THIRTY-SECOND ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

THE UNIVERSITY OF SYDNEY

MEMORANDUM FOR RESPONDENT

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

COUNSEL

Noam Antonir John Mentzines Alice Shan Peter Taurian

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Abbreviation	Term
/	And
§(§).	Section(s)
¶(¶)	Paragraph(s)
AG	Aktiengesellschaft
ARfA	Answer to the Request for Arbitration, dated 14 August 2024
Art(s).	Article(s)
AŞ	Anonim Şirketi
BV	Besloten Vennootschap
CEO	Chief Executive Officer
cf.	Compare
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
cl.	Clause
CLAIMANT	GreenHydro Plc
Co	Company
COO	Chief Operating Officer
CRCICA	Cairo Regional Centre for International Commercial Arbitration
eAmmonia Option	An option to add production facilities for eAmmonia, pursuant to Art. 2(3) of the PSA
EPC	Engineering, Procurement and Construction
EUR	Euro (€)
Ex. C#	CLAIMANT's Exhibit Number
Ex. R#	RESPONDENT's Exhibit Number
Extension Option	An option to increase the output of the Plant by up to 100 MW, pursuant to Art. 2(2) of the PSA
FAI	Finland Arbitration Institute
GmbH	Gesellschaft mit beschränkter Haftung
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2020)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc	Incorporated
IUSCT	Iran-United States Claims Tribunal
Letter by Langweiler	Letter by Langweiler Objecting to Admittance of Document, dated 14 August 2024
LLC	Limited Liability Company
LP	Limited Partnership
Ltd	Limited
Ltda	Limitada
Mediation Requirement	The requirement that mediation occur before arbitration, pursuant to Art. 30 of the PSA

MfC	Memorandum for CLAIMANT, Mathias Corvinus Collegium Law School, Budapest, dated 12 December 2024
MKAC	Международный коммерческий арбитражный суд при Торгово — промышленной палате Российской Федерации (Tribunal of International Commercial Arbitration — Russian Federation Chamber of Commerce and Industry)
Model Contract	Model Contract for the Purchase of Goods and Services by Equatorianian State Entities
MW	Megawatt
NV	Naamloze Vennootschap
Options	Together, the Extension Option and the eAmmonia Option
p(p).	Page(s)
Parties	CLAIMANT and RESPONDENT
Plant	The green hydrogen power plant, the subject of the PSA
Plc	Public Limited Company
PO1	Procedural Order Number 1, dated 11 October 2024
PO2	Procedural Order Number 2, dated 13 November 2024
PSA	Purchase and Service Agreement, dated 17 July 2023
Pte Ltd	Private Limited
Pty Ltd	Proprietary Limited
RESPONDENT	Equatoriana RenPower Ltd
RfA	Request for Arbitration, dated 31 July 2024
RfQ	Request for Quotation, dated 3 January 2023
SA	Sociedad Anónima / Société Anonyme
SAC	Swiss Arbitration Centre
SAE	Société Anonyme Égyptienne
SAL	Société Anonyme Libanaise
Sàrl	Société à Responsabilité Limitée
SCC	Stockholm Chamber of Commerce
SpA	Società per Azioni
Srl	Società a Responsabilità Limitata
Tribunal	The Arbitral Tribunal
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods (1964)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Vol.	Volume

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TREATIES, CONVENTIONS AND RULES

COMMENTARIES AND ARTICLES

Cited as	*Full Citation*	*Referenced at*
Achilles	Wilhelm-Albrecht Achilles *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* Luchterhand, 2009	¶191
Angyal	Robert S. Angyal 'The Enforceability of Agreements to Mediate' *Australian Construction Law Newsletter*, Vol. 34, 1994, pp. 35–41	¶55
Art. 3 Case Digest	UNCITRAL Secretariat *UNCITRAL Digest of Case Law on Article 3 of the United Nations Convention on Contracts for the International Sale of Goods* United Nations, 2016	¶124
Art. 6 Case Digest	UNCITRAL Secretariat *UNCITRAL Digest of Case Law on Article 6 of the United Nations Convention on Contracts for the International Sale of Goods* United Nations, 2016	¶180
Ashford	Peter Ashford *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* Cambridge University Press, 2013	¶¶66, 72, 91, 101, 102
Balkin	Rosalie Balkin 'International Law and Domestic Law' Sam Blay, Ryszard Piotrowicz, and B. Martin Tsamenyi (eds.) *Public International Law: An Australian Perspective* Oxford University Press, 1997, p. 119	¶185
Berger I	Klaus Peter Berger 'Law and Practice of Escalation Clauses' *Arbitration International*, Vol. 22(1), 2006, pp. 1–18	¶¶28, 50, 55
Berger II	Klaus Peter Berger 'Chapter 13: Evidentiary Privileges'	¶101

	Franco Ferrari and Friedrich Jakob Rosenfeld (eds.) *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* Kluwer Law International, 2022, pp. 301–20	
Bonell	Michael Joachim Bonell 'Art. 6' Cesare Massimo Bianca and Michael Joachim Bonell (eds.) *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* Giuffrè, 1987	¶¶177, 191
Borisova	Bojidara Borisova 'Art. 6 CISG-UP' John Felemegas (ed.) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* Cambridge University Press, 2007, pp. 39–44	¶¶178, 187
Born	Gary B. Born *International Commercial Arbitration* Kluwer Law International, 3rd ed, 2020	¶¶19, 29, 40, 42, 95, 101
Brekoulakis	Stavros Brekoulakis 'Article 10' Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds.) *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* Hart Publishing, 2nd ed, 2018, pp. 182–90	¶¶155, 159, 163
Brown	Chester Brown *A Common Law of International Adjudication* Oxford University Press, 2007	¶92
Bühler/Webster	Michael Bühler and Thomas H. Webster *Handbook of ICC Arbitration: Commentary and Materials* Thomson Reuters, 5th ed, 2021	¶19

Carter	James H. Carter 'Privilege Gets a New Framework' *International Arbitration Law Review*, Vol. 13(5), 2010, pp. 177–9	¶96
CISG-AC Opinion No. 4	CISG Advisory Council *Opinion No. 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)* 24 October 2004	¶¶126, 128
CISG-AC Opinion No. 16	CISG Advisory Council *Opinion No. 16: Exclusion of the CISG under Article 6* 30 May 2014	¶180
Czerwenka	G Beate Czerwenka *Rechtsanwendungsprobleme im Internationalen Kaufrecht: Das Kollisionsrecht bei Grenzuberschreitenden Kaufvertragen & der Anwendungsbereich der Internationalen Kaufrechtsubereinkommen* Duncker & Humblot, 1988	¶176
De Ly	Filip De Ly 'Sources Of International Sales Law: An Eclectic Model' *Journal of Law and Commerce*, Vol. 25(1), 2005, pp. 1–12	¶204
Dennis	Michael J. Dennis 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' *Uniform Law Review*, Vol. 19(1), 2014, pp. 114–51	¶204
Ebenroth	Thomas Carsten Ebenroth 'Internationale Vertragsgestaltung im Spannungsverhältnis zwischen ABGB, IPR-Gesetz und UN-Kaufrecht' *Juristische Blätter*, Vol. 108(21)–(22), 1986, pp. 681–95	¶178
Enderlein/Maskow	Fritz Enderlein and Dietrich Maskow	¶¶144, 191

	International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary Oceana, 1992	
F. Peter Phillips	F. Peter Phillips 'An Introduction to Principled Negotiation, Client Representation in Mediation, and the Arbitration Process' F. Peter Phillips (ed.) *ADR Deskbook for the Business Lawyer: A Cross-Disciplinary Workbook* American Bar Association, 2016	¶72
Ferrari I	Franco Ferrari *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention* Martinus Nijhoff Publishers, 2012	¶¶126, 132, 144, 150, 176, 177, 178, 183, 191
Ferrari II	Franco Ferrari 'Art 1' Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) *Schlechtriem/Schwenzer/Schroeter: Kommentar zum UN-Kaufrecht (CISG): Ubereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf* CH Beck, 7th ed, 2019	¶140
Gillette/Walt	Clayton P. Gillette and Steven D. Walt *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* Cambridge University Press, 2nded, 2016	¶173
Hachem I	Pascal Hachem 'Article 1 CISG: Sphere of application' Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* Oxford University Press, 5th ed, 2022, pp. 26–46	¶140

Hachem II	Pascal Hachem 'Article 3 CISG: Contracts for Goods to Be Manufactured or for Services' Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* Oxford University Press, 5th ed, 2022, pp. 74–86	¶¶126, 144
Hachem III	Pascal Hachem 'Article 6 CISG: Exclusion or Derogation by the Parties (Party Autonomy)' *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) Oxford University Press, 5th ed, 2022, pp. 116–34	¶¶176, 177, 178
Hachem IV	Pascal Hachem 'Article 7 CISG: Interpretation of Convention and Gap-Filling' Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* Oxford University Press, 5th ed, 2022, pp. 135–58	¶¶165, 177
Hachem V	Pascal Hachem 'Article 10 CISG: Place of Business' Ingeborg Schwenzer and Ulrich G. Schroeter (eds.) *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* Oxford University Press, 5th ed, 2022, pp. 218–23	¶¶162, 163
Honka	Hannu Honka 'Harmonization of Contract Law through International Trade: A Nordic Perspective' *Tulane European and Civil Law Forum*, Vol. 11, 1996, pp. 111–84	¶204
Huber	Ulrich Huber	¶191

	'Der Uncitral-Entwurf eines Übereinkommens über Internationale Warenkaufverträge' *Rabel Journal of Comparative and International Private Law*, Vol. 43(3), 1979, pp. 413–526	
Huber/Mullis	Peter Huber and Alastair Mullis *The CISG* Sellier European Law Publishers, 2007	¶126
IBA Guidelines	International Bar Association 'IBA Guidelines for Drafting International Arbitration Clauses' Adopted by IBA Council 7 October 2010	¶28
IBA Privilege Report	IBA Arbitration Committee Task Force on Privilege in International Arbitration Annexure 12, 'Privilege in Commercial Arbitration' *Report on Uniform Guidelines on Privilege in International Arbitration*, February 2024	¶¶95, 102
IBA Rules Commentary	IBA Rules of Evidence Review Task Force 'Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration' Consolidated January 2021	¶118
Jones	Doug Jones 'Dealing with Multi-Tiered Dispute Resolution Process' *Arbitration*, Vol. 75(2), 2009, pp. 188–98	¶28
Khodykin/Mulcahy/ Fletcher	Roman Khodykin, Carol Mulcahy and Nicholas Fletcher *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* Oxford University Press, 2019	¶95
Kohl/Rigolet	Alexandre Rigolet and Benoît Kohl 'Multi-Tiered Resolution Clauses: Use Them All If You Can't Choose One' Dirk de Meulemeester, Maxime Berlingin and Benoît Kohl (eds.)	¶26

	Liber Amicorum CEPANI (1969–2019): 50 Years of Solutions Kluwer Law International, 2019, pp. 427–44	
Korenica/Doli	Fisnik Korenica and Dren Doli 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' *Pace International Law Review*, Vol. 24(1), 2012, pp. 92–118	¶185
Lauterpacht	Hersch Lauterpacht *International Law: Being the Collected Papers of Hersch Lauterpacht* Cambridge University Press, 1970	¶¶92, 185
Magnus	Ulrich Magnus *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)* Sellier European Law Publishers, 2013	¶169
Malanczuk	Peter Malanczuk *Akehurst's Modern Introduction to International Law* Taylor & Francis, 7th ed, 2002	¶185
Meyer	Olaf Meyer 'Constructive Interpretation: Applying the CISG in the 21st Century' André Janssen and Olaf Meyer (eds.) *CISG Methodology* Sellier European Law Publishers, 2009, pp. 319–42	¶165
Meyer-Hauser/Sieber	Bernhard Meyer-Hauser and Phillip Sieber 'Attorney Secrecy v Attorney-Client Privilege in International Commercial Arbitration' *Arbitration*, Vol. 73(2), 2007, pp. 148–88	¶102
Mistelis	Loukas Mistelis 'Article 6'	¶¶173, 180, 184

	Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds.) *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* Hart Publishing, 2nd ed, 2018, pp. 101–11	
Mistelis/Raymond	Loukas Mistelis and Anjanette Raymond 'Article 3' Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds.) *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* Hart Publishing, 2nd ed, 2018, pp. 54–62	¶¶126, 144
Mustill/Boyd	Lord Mustill and Stewart C. Boyd *Commercial Arbitration: 2001 Companion Volume to the Second Edition* Butterworths, 2001	¶70
Neimann	Christopher Neimann *Einheitliche Anwendung des Un-Kaufrechts in Italienischer & Deutscher Rechtsprechung & Lehre* Lang, 2006	¶176
Ng	Nicole S. Ng 'Illegally Obtained Evidence in International Arbitration: Protecting the Integrity of the Arbitral Process' *Singapore Academy of Law Journal*, Vol. 32(2), 2020, pp. 747–70	¶119
O'Malley	Nathan D. O'Malley *Rules of Evidence in International Arbitration: An Annotated Guide* Informa Law, 2nd ed, 2019	¶¶92, 96, 101
Poudret/Besson	Jean-François Poudret and Sébastien Besson *Comparative Law of International Arbitration* Sweet & Maxwell, 2nd ed, 2007	¶19

Redfern/Hunter	Nigel Blackaby, Constantine Partasides and Alan Redfern *Redfern and Hunter on International Arbitration* Oxford University Press, 7th ed, 2023	¶47
Review Subcommittee	IBA Rules of Evidence Review Subcommittee 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' International Bar Association, 2010	¶96
Rosher	Peter Rosher 'The Application and Scope of Attorney-Client Privilege in International Arbitration' *Stockholm International Arbitration Review*, Vol. 2(1), 2007, pp. 1–24	¶101
Rubinstein/Guerrina	Javier H. Rubinstein and Britton B. Guerrina 'The Attorney-Client Privilege and International Arbitration' *Journal of International Arbitration*, Vol. 18(6), 2001, pp. 587–602	¶95
Sambugaro	Giulia Sambugaro 'Exclusion of the 1980 Vienna Convention: Does Recent US Case Law Open the Door to Forum Shopping?' *Internationales Handelsrecht*, Vol. 7(6), 2007, pp. 231–7	¶178
Savola	Mika Savola *Guide to the Finnish Arbitration Rules* Lakimiesliiton Kustannus, 2015	¶61
Schlechtriem/Butler	Peter Schlectriem and Petra Butler *UN Law on International Sales: The UN Convention on the International Sale of Goods* Springer, 2009	¶173
Schwenzer/ Fountoulakis/Dimsey	Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey *International Sales Law: A Guide to the CISG*	¶¶153, 176

	Bloomsbury Publishing, 3rd ed, 2019	
Shelley	Jeremy Shelley 'The Mauritius Convention and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' Rishi Gulati, Thomas John, and Ben Köhler (eds) *The Elgar Companion to UNCITRAL* Elgar, 2023, pp. 161–76	¶85
Spohnheimer	Frank Spohnheimer 'Article 2' Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds) *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* CH Beck, 2nd ed, 2018, pp. 39–53	¶169
Stewart	Hamish Stewart 'A Formal Approach to Contractual Duress' *University of Toronto Law Journal*, Vol. 47(2), 1997, pp. 175–262	¶118
Street	Sir Laurence Street 'Commercial Mediation' *The Arbitrator*, Vol. 16(3), 1997, pp. 187–93	¶55
Strong	Stacey I. Strong 'Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' *Vanderbilt Journal of Transnational Law*, Vol. 31, 1998, 915–96	¶47
Tevendale/Cartwright-Finch	Craig Tevendale and Ula Cartwright-Finch 'Privilege in International Arbitration: Is It Time to Recognize the Consensus?' *Journal of International Arbitration*, Vol. 26(6), 2009, pp. 823–39	¶96

UNCITRAL Yearbook 1975	United Nations Commission on International Trade Law 'Report of the Working Group on the International Sale of Goods on the Work of Its Sixth Session (New York, 27 January 1975–7 February 1975) (A/CN.9/100)' *UNCITRAL Yearbook*, 1975, pp. 49–118	¶163
UNCITRAL Yearbook 1976	United Nations Commission on International Trade Law 'Report of the Working Group on the International Sale of Goods on the Work of Its Seventh Session (Geneva, 5–16 January 1976) (A/CN.9/116)' *UNCITRAL Yearbook*, 1976, pp. 87–142	¶132
von Schlabrendorff/ Sheppard	Fabian G. von Schlabrendorff and Audley W. Sheppard 'Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution' Gerald Aksen (ed.) *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* ICC Publishing, 2005, pp. 743–74	¶96
Waddams	S.M. Waddams 'Unconscionable Contracts: Competing Perspectives' *Saskatchewan Law Review*, Vol. 62(1), 1999, pp. 1–18	¶118
Wigmore	John Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* Little, Brown & Co, 3rd ed, 1940	¶97

ARBITRAL AWARDS

Cited as	***Full Citation***	***Referenced at***
AAPL	*Asian Agricultural Products Ltd v. Republic of Sri Lanka* Final Award of 27 June 1990 ICSID Case No. ARB/87/3	¶92
Alstom	*Alstom Brasil Energia e Transporte Ltda v. Mitsui Sumitomo Seguros SA* Final Award of 10 July 2015 ICC Case No. 20686/RD	¶19
China Petrochemical	*China Petrochemical International Co Ltd v. Cypress Oilfield Holdings Ltd* Final Award of 7 March 2014 SCC Case No. V 047/2012	¶124
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EDF	*EDF (Services) Ltd v. Republic of Romania* Award of 8 October 2009 ICSID Case No. ARB/05/13	¶117
Glamis Gold	*Glamis Gold Ltd v. United States of America* Decision on Requests for Production of Documents and Challenges to Assertions of Privilege dated 21 April 2006 Ad Hoc Arbitral Tribunal (UNCITRAL)	¶107
Global Telecom	*Global Telecom Holding SAE v. Canada* Procedural Order No. 5 of 13 December 2018 ICSID Case No. ARB/16/16	¶¶96, 101
GSPC	*Gujarat State Petroleum Corporation Ltd v. Republic of Yemen* Final Award of 10 July 2015 ICC Case No. 19299/MCP	¶118
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	XII Yearbook of Commercial Arbitration, 1987, pp. 97–110	
ICC Case No. 6752	*Grantor of Exclusive Distributorship v. (Former) Exclusive Distributors* Final Award of 1991 ICC Case No. 6752 *XVIII Yearbook of Commercial Arbitration*, 1993, pp. 54–7	¶19
ICC Case No. 6850	*Manufacturer Y SA v. Distributor X GmbH* Final Award of 1992 ICC Case No. 6850 *XXIII Yearbook of Commercial Arbitration*, 1998, pp. 37–41	¶19
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Vito Gallo	*Vito Gallo v. Government of Canada* Procedural Order No. 4 of 21 December 2009 PCA Case No. 2008-03	¶110
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YPF	*YPF SA v. AES Uruguaiana Empreendimentos SA* Partial Award of 8 May 2013 ICC Case No. 16232/JRF/CA	¶176

CASES

Cited as	***Full Citation***	***Referenced at***
Australia		
Aiton	*Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236 Supreme Court of New South Wales	¶¶26, 28, 30
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Case No. 2016CV34496

22 March 2019

Colorado District Court

STATEMENT OF FACTS

1. On **3 January 2023**, Equatoriana RenPower Ltd (**RESPONDENT**), an Equatorianian government-owned company, initiated a procurement process involving a reverse auction for the design and construction of a green hydrogen plant. GreenHydro Plc (**CLAIMANT**), a Mediterranean company, submitted a bid in response to RESPONDENT's Request for Quotation (**RfQ**).
2. By **May 2023**, CLAIMANT was one of two final bidders. CLAIMANT's bid was competitive due to its relationship with its long-time business partner, **Volta Transformer**, and its subsidiary, **Volta Electrolyser**, through which CLAIMANT held a ready-for-use transformer and could produce the requisite electrolyser stacks, respectively. CLAIMANT was also competitive on price, at first offering to undertake the project at cost, as its primary commercial incentive lay in the future work that the project may generate, given the forecasted exponential growth in the green hydrogen market.
3. On **12 July 2023**, CLAIMANT represented that it would greatly exceed the minimum local content requirement, on the basis that it would sub-contract with **P2G**, an Equatorianian entity. This later proved to be untrue. Subsequently, on **13 July 2023**, CLAIMANT offered a 5% price reduction in return for terms requiring CLAIMANT and RESPONDENT (the **Parties**) to use their best endeavours to realise the project and purporting to exclude the right to terminate for convenience.
4. On **17 July 2023**, the Parties entered into the Purchase and Service Agreement (**PSA**). For EUR 285,000,000, CLAIMANT was to deliver a 100MW green hydrogen plant (**Plant**) on a turnkey basis, as well as maintenance and training services for one year. Further, RESPONDENT had two options under the PSA exercisable at its discretion: one to extend the Plant's capacity by up to 100MW (**Extension Option**); and the other to construct an eAmmonia module (**eAmmonia Option**).
5. On **29 February 2024**, RESPONDENT terminated the PSA by reason of CLAIMANT's late and incomplete submission of the Final Plans for the eAmmonia Option. CLAIMANT was contractually obliged to provide these plans, and provided no satisfactory explanation for its failure to do so.
6. In **May 2024**, Equatoriana's prosecution office investigated **Mr. August Wilhelm Deiman** (COO of Volta Transformer; formerly, CLAIMANT's Head of Contracting) for fraud and collusion. As part of that investigation, the police confiscated various documents. To the best of RESPONDENT's knowledge, neither CLAIMANT nor Mr. Deiman resisted this seizure of documents.
7. On **25 May 2024**, following lengthy settlement discussions, RESPONDENT made a confidential, without prejudice offer to reinstate the project and grant CLAIMANT a first demand guarantee of 10% of the contract price in exchange for a further, negotiable price reduction.
8. On **31 July 2024**, CLAIMANT filed its Request for Arbitration (**RfA**), having failed to make any substantive effort to engage with the terms of RESPONDENT's offer and having failed to submit the dispute to mediation, as required by Art. 30 of the PSA.

STATEMENT OF RESPONDENT'S ARGUMENT

9. RESPONDENT is a public entity committed to delivering renewable energy solutions to the people of Equatoriana. It is a key player in Equatoriana's strategy to achieve net zero by 2040. CLAIMANT came to RESPONDENT with a promise to deliver a green hydrogen plant using its groundbreaking PEM-electrolysis technology. CLAIMANT did not make good on this promise. Seeing the project as a strategy for securing future work elsewhere, CLAIMANT concealed the reality of its dealings with P2G and Volta Transformer, reneged on its most basic contractual obligation to deliver the Final Plans, and frustrated the possibility of any amicable settlement of the Parties' dispute. This bad faith conduct has continued into this arbitration, with CLAIMANT's repeated and inappropriate insinuations of impropriety on the part of RESPONDENT and the Equatorianian government. The Tribunal should not permit CLAIMANT to continue in this manner.
10. **Issue A**: The Tribunal should find that it has no jurisdiction, and, in any event, that CLAIMANT's claim is inadmissible. The law of Equatoriana, which applies to the multi-tier dispute resolution mechanism contained in Art. 30 of the PSA, provides that failure to comply with an obligation to mediate prior to arbitration vitiates the Tribunal's jurisdiction. Even if Danubian law were applicable, Art. 30 still requires mediation as a condition precedent to arbitration. CLAIMANT cannot excuse its failure to commence mediation, including on the basis that it was 'futile'.
11. **Issue B**: The Tribunal should exclude Exhibit C7 and include Exhibit R3. Exhibit C7 is a confidential, without prejudice offer made by RESPONDENT to CLAIMANT in anticipation of mediation, and is therefore protected by Art. 15.2 of the FAI Mediation Rules. It is also protected by without prejudice privilege as it was a genuine attempt to settle the Parties' dispute. There is no basis to compel its inclusion. Separately, Exhibit R3, an internal email between CLAIMANT's employees: is relevant to RESPONDENT's case; is not covered by legal advice privilege, which has, in any event, been waived; and was not obtained illegally.
12. **Issue C**: The United Nations Convention on Contracts for the International Sale of Goods (1980) (**CISG**) does not apply to the PSA because: it is not a contract of sale of goods, as CLAIMANT's preponderant obligations consist in the supply of labour and other services; it is a domestic contract between Parties whose places of business were both in Equatoriana; and it is a sale by auction, such that it falls under and is excluded by Art. 2(b) of the CISG.
13. **Issue D**: The Parties, by their words and conduct, evinced a clear, mutual intention to exclude the CISG. Such an implied exclusion is permitted under Art. 6 of the CISG and, here, was manifested through: the language of the governing law provision in Art. 29 of the PSA; the inclusion of other terms inconsistent with the CISG; and the use of an updated template for the PSA, which, in contrast to its predecessor, provided only for the application of the law of Equatoriana.

ISSUE A: THE TRIBUNAL HAS NO JURISDICTION AND, IN ANY EVENT, CLAIMANT'S CLAIM IS INADMISSIBLE

14. Article 30 of the PSA requires that CLAIMANT must "*first*" submit any dispute to mediation before it can be "*finally settled by arbitration*". CLAIMANT has failed to comply with this requirement (the **Mediation Requirement**). Thus, the Tribunal has no jurisdiction to hear this dispute. In any event, CLAIMANT's claim is inadmissible. RESPONDENT presents *four* arguments in this regard.

15. *First*, the arbitration agreement, contained in Art. 30 of the PSA, is governed by Equatorianian law. Under Equatorianian law, CLAIMANT's failure to comply with the Mediation Requirement vitiates the Tribunal's jurisdiction (**I**). *Secondly*, even if the governing law of the arbitration agreement is Danubian law, the Mediation Requirement is still a mandatory condition precedent to arbitration (**II**). *Thirdly*, failure to comply with this condition precedent goes to the jurisdiction of the Tribunal, rather than the admissibility of CLAIMANT's claim (**III**). *Fourthly*, in any event, should the Tribunal treat this issue as a matter of admissibility, CLAIMANT's failure to comply with the Mediation Requirement renders its claim inadmissible (**IV**).

I. Article 30 of the PSA is governed by Equatorianian law, under which mediation is a condition precedent for the jurisdiction of the Tribunal

16. Article 30 of the PSA is to be interpreted in accordance with its governing law [*Enka*, ¶27]. Here, the Parties chose the law of Equatoriana as the governing law of the arbitration agreement (**A**). Consistent with the treatment of multi-tier dispute resolution clauses in Equatoriana, the Mediation Requirement constitutes a condition precedent to the jurisdiction of the Tribunal (**B**).

A. The Parties impliedly chose Equatorianian law as the governing law of Art. 30 of the PSA

17. CLAIMANT has assumed, without justification, that Danubian law governs Art. 30 of the PSA [*MfC*, ¶1]. This is incorrect. Rather, the governing law of the arbitration agreement is the law that governs the PSA (Equatoriana) and not the law of the seat (Danubia).

18. Where the substantive contract (here, the PSA) contains an express choice of law, but the arbitration agreement (here, Art. 30) does not, it is presumed that the law chosen for the substantive contract extends to the arbitration agreement [*Enka*, ¶170; *Sonatrach Petroleum*, ¶32; *RusChemAlliance*, ¶22; *Kabab-Ji*, p. 5; *Sulamérica*, ¶11; *Mittal*, ¶62; *BCY*, ¶65]. That law will then apply to the entire dispute resolution clause [*Enka*, ¶168]. This is because it is reasonable to assume that parties intend for their contract to be governed by a single system of law, as applying different systems of law to different parts of a contract creates inconsistency and uncertainty [*Enka*, ¶53].

19. The Parties expressly chose Equatorianian law as the governing law of the PSA [*PSA*, Art. 29]. Therefore, the Parties are presumed to have also chosen Equatorianian law to govern the arbitration agreement [*Enka*, ¶170; *Born*, §4.04[A][2][d]; *Poudret/Besson*, ¶178; *Bühler/Webster*, ¶6-6].

This presumption has been adopted by courts in civil law jurisdictions [see, e.g., *Owerri*, p. 706 (Netherlands); *Case No. II ZR 41/62* (Germany); *Judgment of 28 August 2007* (Japan)], and common law jurisdictions [see, e.g., *BAZ*, ¶7 (Singapore); *China Railway*, ¶¶27–8 (Hong Kong); *Recyclers of Australia*, ¶10 (Australia); *Aastha*, ¶31 (India)], and by international tribunals [see, e.g., *Alstom*, ¶¶156–8; *ICC Case No. 6850*, p. 38; *ICC Case No. 6752*, pp. 55–6; *ICC Case No. 11869*, pp. 52–3].

20. Further, the Parties' choice of Danubia as the seat of the arbitration, without more, is insufficient to rebut the presumption that the governing law of the PSA extends to the arbitration agreement [*Enka*, ¶170; *RusChemAlliance*, ¶22]. CLAIMANT has made a bare assertion about the relevance of Danubian law, without providing any explanation as to why Danubian law should govern the arbitration agreement. Thus, the Tribunal should give no weight to CLAIMANT's contention that "*under Danubian Arbitration Law … mediation is not required as a precondition to arbitration*" [*MfC*, ¶1].

B. Mediation is a condition precedent to the Tribunal's jurisdiction under Equatorianian law

21. Properly construed in light of the position under Equatorianian law, compliance with the pre-arbitral tier of a multi-tier dispute resolution clause is *first*, a condition precedent, and *secondly*, an issue which affects the Tribunal's jurisdiction, not the claim's admissibility [*Ex. R1*, ¶9].

22. Whilst CLAIMANT asserts, generally, that the "*failure of a party to comply with a contractual term requiring mediation before submitting a dispute to arbitration does not affect the jurisdiction of the tribunal*", it offers no authority or explanation as to why this is the case under Equatorianian law [*MfC*, ¶35]. By contrast, the evidence of Ms. Johanna Ritter (RESPONDENT's Head of Contracting) that "*[i]n Equatoriana, there is consistent case law that in case of a multi-tier clause providing first for mediation and then for arbitration under the rule of an institution, the conduct of mediation is a condition precedent for the jurisdiction of the arbitral tribunal*" is directly on point, and should inform the Tribunal's interpretation of Art. 30 of the PSA [*Ex. R1*, ¶9]. CLAIMANT has failed to raise any objection to this evidence despite having full opportunity to do so.

23. Article 30 of the PSA falls within the Equatorianian jurisprudence. Hence, as the Mediation Requirement has not been satisfied, the Tribunal does not have jurisdiction to hear this dispute.

II. In any event, Art. 30 of the PSA, properly construed, stipulates that mediation is a condition precedent to arbitration

24. Even if the arbitration agreement is governed by Danubian, not Equatorianian, law, the Mediation Requirement should still be construed as a condition precedent to arbitration. RESPONDENT agrees with CLAIMANT's position that the Tribunal should construe Art. 30 of the PSA in accordance with the UNIDROIT Principles [*MfC*, ¶5]. The interpretation of Art. 30 therefore requires consideration of the Parties' knowledge of each other's intent [*UNIDROIT Principles*, Art. 4.1(1)],

or, where this cannot be ascertained, the understanding that a reasonable person in their respective positions would have had [*UNIDROIT Principles*, Art. 4.1(2)].

25. On its proper construction, Art. 30 requires the commencement of mediation as a precondition to arbitration. This is for *two* reasons. *First*, the words of Art. 30 clearly stipulate mediation as a precondition to arbitration (**A**). *Secondly*, this construction is supported by the conduct of the Parties during their pre-contractual negotiations (**B**).

A. The words of Art. 30 of the PSA clearly stipulate mediation as a precondition to arbitration

26. For a pre-arbitral stage within a multi-tier dispute resolution process to operate as a condition precedent to arbitration, the parties must employ clear language to that effect [*CZQ*, ¶¶14, 17; *Lufthansa*, ¶54; *Aiton*, ¶¶42–4; *Kohl/Rigolet*, pp. 432–3]. Here, contrary to CLAIMANT's assertion that the condition precedent is "*missing from the PSA*" [*MfC*, ¶7], the express language of Art. 30 of the PSA clearly stipulates that mediation is a precondition to arbitration. This is for *four* reasons.

27. *First*, Art. 30 plainly establishes a chronological order for dispute resolution: any disputes "*shall first be submitted to mediation*" (emphasis added), and then "*shall be finally settled by arbitration*" (emphasis added). On any reading, the use of the words "*first*" and "*finally*" dictates a sequential order. CLAIMANT has not referred to these operative words at any point in its submissions.

28. *Secondly*, the obligation to mediate in Art. 30 is written in the mandatory language of "*shall*" rather than permissive language such as "*may*". CLAIMANT contends that "*mediation is understood to be mandatory only if explicitly agreed upon by the Parties, which is missing from the PSA*" [*MfC*, ¶7]. However, it is a well-accepted principle that the enforceability of pre-arbitral dispute resolution methods generally depends on whether the language connotes a "*clear and determinative pre-condition to arbitration*" [*Jones*, p. 196; *Aiton*, ¶45; *Hooper Bailie*, p. 209]. The use of the word "*shall*" instead of "*may*" indicates an intention that mediation was to be made mandatory [*IBA Guidelines*, ¶95; *Berger I*, p. 5; *HIM Portland*, pp. 42–4]. When read in combination with the chronological order created by the words, "*first*" and *"finally*", the natural interpretation is that this order must be complied with. Therefore, CLAIMANT's contention that mediation is only mandatory if it is explicitly agreed upon by the Parties is immaterial [*MfC*, ¶7]. The Parties have so agreed.

29. *Thirdly*, although CLAIMANT asserts that legal literature recognises "*the enforceability of such clauses as rare … where essential terms (e.g., timeframes for initiation or completion) are undefined*" [*MfC*, ¶17], this fails to recognise the specificity and certainty of the Mediation Requirement. Indeed, in the very excerpt of Professor Born's text cited by CLAIMANT [*Born*, §5.08[A][1][b]], it is noted that "*[a]greements to negotiate or mediate in a particular manner (e.g., pursuant to specified meditation rules) … introduce elements of specificity and certainty, which often cannot be regarded as purely aspirational and which provide a measure of certainty*" (emphasis added). Article 30 of the PSA provides for the place of the mediation

(Danubia), the language of the mediation (English) and importantly, the institutional rules (FAI Mediation Rules) which contain comprehensive rules for the procedure of the mediation.

30. Whilst Art. 30 does not stipulate a time limit for mediation, Art. 4.3 of the FAI Mediation Rules allows the FAI to declare that the mediation is terminated if a party objects, or fails to respond to a Request for Mediation within 15 days. Further, Art. 10.1(b) allows for the termination of mediation upon a party's request. These provisions eliminate any uncertainty in the mediation procedure by setting out guidelines as to when mediation can be terminated, and hence, when the dispute can be escalated to arbitration under Art. 30 of the PSA. Therefore, Art. 30 is sufficiently certain to be enforced as a precondition to arbitration [*HIM Portland*, pp. 42–4; *Aiton*, ¶69].
31. *Fourthly*, the chronological order between the two dispute resolution tiers is strengthened by the Parties' adoption of an *amended* version of the FAI Model Mediation Clause [*Ex. R1*, ¶8; *PSA*, Art. 30; *FAI Mediation Rules*, p. 1], which explicitly removed the clause which allows for the concurrent running of mediation and arbitration. The original FAI Model Mediation Clause stipulates that "*[t]he commencement of proceedings under the Mediation Rules shall not prevent any party from commencing arbitration in accordance with the clause below*" [*FAI Mediation Rules*, p. 1]. The Parties adopted the entire FAI Model Mediation Clause except for this provision. This drafting choice strengthens the Parties' intention that mediation precede arbitration, and that they cannot run concurrently.
32. CLAIMANT has asked the Tribunal to disregard this deliberate omission [*MfC*, §1.2.3]. None of its reasons have any merit. CLAIMANT argues that "*[t]he Model Clause is structured with one mandatory clause and three optional clauses*" to characterise the omission as a non-event [*MfC*, ¶14]. There is no such structure. The FAI Model Mediation Clause simply provides placeholders for parties to populate based on their particular circumstances (language, location and number of arbitrators). The omitted clause is not a placeholder but a substantive part of the FAI Model Mediation Clause.
33. CLAIMANT also argues that the Parties omitted the clause because it "*merely reiterates the substance of Article 11.1 of the FAI Mediation Rules without introducing any substantive modifications*" and Mr. Deiman "*[a]s an economist … is averse to unnecessary repetition*" [*MfC*, ¶15–16]. This is an exceedingly implausible explanation for such a significant deviation from the FAI Model Mediation Clause. In the context of a government project with a value of EUR 285,000,000, the suggestion that Mr. Deiman's economics background would have motivated such a deviation, merely to save four lines of text, cannot seriously be contended for. The more plausible explanation is that the Parties removed the clause to avoid all doubt that mediation was to precede arbitration.
34. Therefore, Art. 30 of the PSA is more than a mere agreement on FAI Mediation. Properly construed, it is clear that the requirement that "*[a]ny dispute … shall first be submitted to mediation*" was intended to act as a bar to arbitral proceedings [cf. *MfC*, ¶10–11].

B. The Parties' pre-contractual discussions further demonstrate an intention for mediation to serve as a precondition to arbitration

35. Mr. Deiman (CLAIMANT's previous Head of Contracting) explicitly assured Ms. Ritter (RESPONDENT's Head of Contracting) that arbitration was to be the last resort only after the Parties had first attempted to mediate their dispute. In his email to Ms. Ritter on 12 July 2023, Mr. Deiman wrote, "*the FAI Model-Mediation Clause suggested by us clearly provides that the Parties must first try to mediate their dispute before resorting to arbitration. Thus, arbitration is only the last resort as you wished.*" (emphasis added) [*Ex. R2*]. There are *three* key aspects to this communication.

36. *First*, Mr. Deiman's use of the mandatory language of "*must*" clearly evinces CLAIMANT's intention that mediation be a mandatory precondition to arbitration. *Secondly*, the need for the Parties to "*first try to mediate … before resorting to arbitration*" emphasises the chronological relationship between the two. *Thirdly*, describing arbitration as "*only the last resort*" makes clear that a party must not proceed to arbitration unless other steps, namely mediation, have been attempted. Each of these features was unsurprisingly reflected in Art. 30 of the PSA itself (see paragraphs 27 to 28 above).

37. Further, any failure to commence mediation does not demonstrate that the Parties did not intend for mediation to be a mandatory precondition to arbitration [cf. *MfC*, ¶7]. It was CLAIMANT who initiated these proceedings without first pursuing mediation, in breach of Art. 30. It cannot rely on its own breach of Art. 30 to now argue that it never intended for mediation to be a precondition to arbitration, when that was its plainly expressed intention at the time of contract formation.

38. In any event, CLAIMANT cannot now insist that mediation is a precondition to arbitration. This is because Mr. Deiman made clear that an attempt to mediate must precede any arbitration (see paragraph 35 above). RESPONDENT relied on this representation when it accepted CLAIMANT's proposed dispute resolution clause [*Ex. R1*, ¶8; *PO2*, ¶13]. If mediation is not a precondition to arbitration, RESPONDENT has relied upon CLAIMANT's representation to its detriment, as it has been deprived of the opportunity to settle the dispute via mediation before participating in costly arbitral proceedings. Thus, CLAIMANT cannot act inconsistently with the understanding it caused RESPONDENT to have [*UNIDROIT Principles*, Art. 1.8; *ICC Case No. 14108*, ¶¶115–17].

39. For the reasons stated above, mediation must be regarded as a precondition to arbitration.

III. The Tribunal has no jurisdiction to hear this dispute

40. CLAIMANT contends that failure to comply with a pre-arbitral step of a multi-tier dispute resolution clause is always an issue of admissibility, rather than jurisdiction [*MfC*, ¶¶32–6]. This contention fails to engage with the divide in authority on this issue [see, e.g., *Lufthansa*, ¶63; *X v. Y*, §2.4.4.2; *Geico*, pp. 329–30; *Burke*, p. 4]. In any event, whether compliance with a pre-arbitral step is an issue of admissibility or jurisdiction depends on the construction of the specific clause in dispute [*C v.*

D, ¶¶7, 47; *Born*, §5.08[A][4]]. If parties clearly indicate that non-compliance should affect their consent to arbitration, then such non-compliance is properly a matter of jurisdiction [*C v. D*, ¶8].

41. As explained in paragraphs 24 to 39 above, the Parties clearly intended as much. During their pre-contractual discussions, the Parties agreed that arbitration was to be "*only the last resort*" [*Ex. R2*]. That is, the Parties did not see arbitration as simply the next step in the dispute resolution process, but as a significant escalation of a dispute, which could only be done as the last resort. Hence, the Parties viewed non-compliance with the Mediation Requirement as a matter directly affecting their consent to arbitration, and not merely a procedural step. As the Mediation Requirement has not been satisfied, the Parties have not consented to arbitration. Thus, the Tribunal has no jurisdiction.
42. Further, resort to concepts of 'admissibility' and 'jurisdiction' can distract from the true inquiry, which is whether the parties have consented to arbitration [*C v. D*, ¶151; *CBI Constructors*, ¶30; *Model Law*, Art. 34(2)(a)(iii)]. Here, as the Parties only consented to arbitration on the condition that disputes first be submitted to mediation, this dispute falls outside the ambit of the Parties' submission to arbitration [*BG Group*, pp. 46–7, 51, 62; *C v. D*, ¶7; *Born*, §5.08[C][1]].
43. For the reasons stated above, the Tribunal has no jurisdiction to hear this dispute.

IV. In any event, CLAIMANT's claim is inadmissible

44. Even if the Tribunal were to find that CLAIMANT's breach of the Mediation Requirement is a matter of admissibility rather than jurisdiction, this does not assist CLAIMANT because its claim is inadmissible. CLAIMANT raises *three* factors which it asserts should weigh upon the Tribunal's exercise of its discretion in allowing arbitration without mediation [*MfC*, ¶20]. None of these warrant the Tribunal's exercise of its procedural discretion to hear this dispute.
45. *First*, determining that CLAIMANT's claim is inadmissible would not compel CLAIMANT to initiate or participate in mediation proceedings to which it has not consented (**A**). *Secondly*, mediation had, and continues to have, reasonable prospects of success (**B**). *Thirdly*, and as a result, RESPONDENT's objection to arbitration without mediation should not be viewed as a 'dilatory tactic' (**C**).

A. Terminating these proceedings would not compel CLAIMANT to initiate or participate in mediation proceedings to which it has not consented

46. RESPONDENT agrees with CLAIMANT that consent is a fundamental principle of mediation [*MfC*, ¶22]. However, determining that CLAIMANT's claim is inadmissible would not amount to an infringement upon CLAIMANT's consent for *two* reasons.
47. *First*, as mediation is a precondition to arbitration (see paragraphs 24 to 39 above), CLAIMANT has already consented to the requirement to submit its dispute to mediation before it can submit it to arbitration. As a result, CLAIMANT cannot credibly argue that requiring it to comply with its contractual obligations contravenes its consent. By contrast, if the Tribunal were to exercise its

procedural discretion to find that CLAIMANT's claim is admissible, this would contravene RESPONDENT's consent to arbitration "*only as a last resort*" [*Ex. R2*] and be tantamount to an inappropriate rewriting of Art. 30 of the PSA [*Redfern/Hunter*, ¶9.64; *Strong*, p. 922].

48. *Secondly*, if these proceedings were terminated, CLAIMANT would not be compelled to initiate or participate in mediation proceedings if it did not wish to do so [cf. *MfC*, ¶22]. Article 30 of the PSA does not compel the Parties to submit their disputes to mediation. It is only if CLAIMANT wishes to have its dispute finally settled by arbitration that it must first submit it to mediation.
49. Thus, finding the claim inadmissible would not force CLAIMANT to do anything that it did not already consent to.

B. Mediation had, and continues to have, reasonable prospects of success

50. None of CLAIMANT's contentions regarding the futility of mediation demonstrate that mediation had, or continues to have, no "*reasonable prospects of success*" [*Lancashire Schools*, ¶44; *Churchill*, ¶10; *Higgins*, ¶8; *Collagen*, ¶28; *Berger I*, pp. 13–14]. This is for *three* reasons.
51. *First*, RESPONDENT's conduct did not display an unwillingness to pursue an amicable resolution or participate in mediation [cf. *MfC*, ¶¶23–27]. To support its claim, CLAIMANT places significant weight on RESPONDENT's without prejudice offer (Exhibit C7), which is inadmissible, as explained below in Issue B, and hence cannot be relied upon by CLAIMANT.
52. In any event, without prejudice to RESPONDENT's claim of privilege over Exhibit C7, its offer does not indicate that mediation had no reasonable prospects of success. That RESPONDENT provided CLAIMANT with an offer to recommence the project in itself shows that RESPONDENT was willing to negotiate with CLAIMANT. Indeed, RESPONDENT's offer contained an inherent indication that it was open to negotiate given the use of the language "*a serious price reduction of 15% or at least a two-digit number*" (emphasis added) — a concession to its initial position that a 15% reduction was the lowest it could accept [*Ex. C7*]. RESPONDENT's transparency regarding its commercial position is precisely what would be expected of serious discussions to settle a dispute.
53. Contrary to CLAIMANT's submission [*MfC*, ¶24], there is nothing unusual about these dealings. RESPONDENT is a commercial party that is entitled to pursue its own interests [*Burger King*, ¶185; *Paciocco*, ¶289; *Faulkner*, ¶212]. Further, RESPONDENT is a government-owned entity, whose actions are directed towards implementing public policies, with accountability to the Equatorianian people [*RfA*, ¶2]. In contrast to CLAIMANT's suggestion, RESPONDENT need not subordinate its own interests to those of CLAIMANT to achieve an "*equal*" resolution [cf. *MfC*, ¶24]. Nor did it adopt "*a dominant position, prioritizing its political interests over its contractual obligations*" [cf. *MfC*, ¶24]; at the time, RESPONDENT had no contractual relationship with CLAIMANT, as the PSA had been terminated.
54. *Secondly*, that RESPONDENT did not commence mediation does not reflect any unwillingness to

mediate [cf. *MfC*, ¶26]. It was CLAIMANT who commenced arbitration in breach of the Mediation Requirement. While CLAIMANT "*threatened to initiate arbitration proceedings*" [*PO2*, ¶24], RESPONDENT was not obliged to pre-emptively commence mediation proceedings in anticipation of CLAIMANT breaching its contractual obligations, by failing to first submit the dispute to mediation.

55. *Thirdly*, even if RESPONDENT had adopted an unreasonable bargaining position (which is denied), the apparent non-interest of one party to engage in negotiations does not evidence the futility of mediation [*Berger I*, p. 15; *Angyal*, p. 35; *AWA*, p. 11]. Indeed, the involvement of a skilled third party to facilitate consensus is precisely the purpose of mediation [*Street*, p. 187]. Moreover, once a Request for Mediation has been submitted to the FAI, both Parties "*shall act in good faith and make their sincere efforts to reach an amicable settlement in the matter*" [*FAI Mediation Rules*, Art. 8.5].

56. Therefore, CLAIMANT's unilateral judgement that mediation would have been futile is misplaced, being entirely premature and failing to consider the inherent purpose of mediation. The Tribunal should not base its decision regarding admissibility on the perceived prospects of a mediation that was not properly pursued.

C. RESPONDENT's objection to arbitration without mediation is not a 'dilatory tactic'

57. CLAIMANT contends that the Tribunal should view RESPONDENT's request for mediation as a delay effort solely on the basis that "*mediation through dismissal would be futile*" [*MfC*, ¶30]. As explained at paragraphs 50 to 56 above, mediation would not be futile. Instead, RESPONDENT's objection is based upon its desire for CLAIMANT to comply with the Mediation Requirement.

58. In this regard, CLAIMANT's suggestion that it could simply terminate mediation "*at the earliest opportunity*" [*MfC*, ¶30] under Art. 10.1 of the FAI Mediation Rules is not a sound justification for proceeding with this arbitration. Indeed, any such attempt by CLAIMANT to undermine a genuine mediation would contravene its obligation under Art. 8.5 of the FAI Mediation Rules to "*act in good faith and make their sincere efforts to reach an amicable settlement*".

59. For the reasons stated above, the Tribunal should decide that CLAIMANT's claim is inadmissible.

CONCLUSION

60. CLAIMANT has failed to comply with the requirement in Art. 30 of the PSA that it must "*first*" submit any dispute to mediation. This vitiates the Tribunal's jurisdiction, such that it cannot hear this dispute. Even if the Tribunal were to treat non-compliance with the Mediation Requirement as an issue of admissibility, CLAIMANT's breach would render its claim inadmissible. Therefore, the Tribunal cannot proceed with this arbitration.

ISSUE B: THE TRIBUNAL SHOULD EXCLUDE EXHIBIT C7 AND SHOULD NOT EXCLUDE EXHIBIT R3

61. As CLAIMANT has identified, Art. 34.1 of the FAI Arbitration Rules provides that the "*arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence*" [*MfC*, ¶37]. RESPONDENT agrees with CLAIMANT that the Tribunal should have recourse to the IBA Rules on the Taking of Evidence in International Arbitration (2020) (**IBA Rules**) as general guidance [*MfC*, ¶37], and further notes that the IBA Rules are often applied in arbitral proceedings conducted under the FAI Arbitration Rules [*Savola*, pp. 293, 454]. RESPONDENT disagrees, however, with CLAIMANT's application of these principles to the evidentiary issues in this arbitration.

62. RESPONDENT requests that the Tribunal make two evidentiary rulings. *First*, Exhibit C7 should be excluded as it was a privileged communication obtained during confidential settlement negotiations (**I**). *Secondly*, Exhibit R3 should not be excluded as there is no basis for CLAIMANT's contentions concerning its relevance, privilege, and the way in which it was obtained (**II**).

I. Exhibit C7 should be excluded

63. Exhibit C7 is a confidential and privileged offer sent from RESPONDENT to CLAIMANT, by which RESPONDENT sought to resolve the Parties' dispute. Despite this, CLAIMANT now seeks to use Exhibit C7 as evidence for some ulterior motive on RESPONDENT's part. In doing so, it has plainly breached fundamental principles concerning the protection of privileged settlement negotiations.

64. The Tribunal should exclude Exhibit C7 for *three* reasons. *First*, it is protected by Art. 15.2 of the FAI Mediation Rules as a communication made in the context of an FAI Mediation (**A**). *Secondly*, the letter is protected by without prejudice privilege (**B**). *Thirdly*, there are no other grounds for excluding Exhibit C7, including on the basis of good faith (**C**).

A. Exhibit C7 was a confidential communication obtained in the context of FAI Mediation

65. Article 15.2 of the FAI Mediation Rules provides that the Parties "*shall not invoke or produce as evidence any information (including, but not limited to, any statements made regarding the possibility to settle the dispute) obtained in the context of FAI Mediation in any subsequent legal proceedings*". Exhibit C7 was provided to CLAIMANT as a preliminary step at resolving the Parties' dispute, for which FAI Mediation was the agreed next step pursuant to Art. 30 of the PSA. Accordingly, Exhibit C7 was created "*in the context of FAI Mediation*", and so cannot be adduced by CLAIMANT as evidence in these proceedings.

66. At the outset, RESPONDENT notes that CLAIMANT did not address Art. 15.2 of the FAI Mediation Rules. Instead, CLAIMANT initially discussed the lack of a non-disclosure agreement [*MfC*, §2.1.1]. Though that is undisputed, such an agreement would not, in any event, have been sufficient to justify the exclusion of evidence [*Ashford*, ¶9-62; *Nassé*, p. 1065]. CLAIMANT then purported to address the entirety of Art. 15 of the FAI Mediation Rules [*MfC*, §2.1.2]. However, CLAIMANT in

fact confined its submissions to Art. 15.1, such as when it asserted that "*the scope of Article 15 applies exclusively to statements or information made or obtained during the mediation process*" (emphasis added) [*MfC*, ¶43]. The emphasised phrase is a direct quote from Art. 15.1, and does not appear in Art. 15.2.

67. RESPONDENT does not dispute the inapplicability of Art. 15.1. Instead, RESPONDENT objects to admitting Exhibit C7 on the basis of Art. 15.2, which protects Exhibit C7 for *four* reasons.

68. *First*, Art. 15.2 extends to pre-mediation communications. This is clear when comparing Art. 15.2 with Art. 15.1. Article 15.1 protects communications exchanged "*during the mediation*", which starts on the date on which the Request for Mediation is received, as per Art. 3, and runs until terminated under Art. 10. Were Art. 15.2 similarly confined, it would be redundant. Instead, Art. 15.2, which requires that communications be "*in the context of FAI Mediation*", must be capable of extending to communications before or after mediation, such as preliminary negotiations.

69. In this case, FAI Mediation was evidently in the Parties' contemplation in connection with Exhibit C7. As CLAIMANT acknowledges, Exhibit C7 was sent in the course of negotiations following RESPONDENT's termination of the PSA, which CLAIMANT "*strongly contested*" [*RfA*, ¶¶20–1]. Such negotiations are the natural prelude to a formal dispute resolution process [*CZQ*, ¶30], for which Art. 30 of the PSA mandated mediation, then arbitration. Indeed, CLAIMANT itself admitted that, upon receipt of Exhibit C7, it turned its mind to the possibility of commencing mediation, deciding, ultimately, not to do so [*RfA*, ¶25; *Ex. C5*, ¶16]. As mediation was anticipated to occur, and should, in fact, have occurred, Exhibit C7 was sent "*in the context of FAI Mediation*".

70. *Secondly*, it is irrelevant that no FAI Mediation in fact occurred. The FAI Mediation Rules apply as a matter of contract upon the signing of the agreement into which they are incorporated [*FAI Mediation Rules*, Art. 1.1; *Cargill*, ¶¶77, 84; *Mustill/Boyd*, p. 52]. They have full force and effect regardless of whether a mediation takes place. Had CLAIMANT complied with the Mediation Requirement, Exhibit C7 would have clearly formed part of the "*context of*" that mediation, being the very document that precipitated CLAIMANT's decision to commence formal proceedings [*Ex. C5*, ¶16]. It should still be seen as such, despite CLAIMANT's failure to mediate.

71. *Thirdly*, Art. 15.2, unlike Art. 15.1, explicitly singles out "*statements made regarding the possibility to settle the dispute*" as attracting its confidentiality protections. Exhibit C7 is plainly such a statement (see paragraphs 52 to 53 above and 78 to 81 below).

72. *Fourthly*, CLAIMANT has argued that "*it is unnecessary and unwarranted to extend the rules of Article 15 to the Parties' pre-contractual negotiations*" [*MfC*, ¶47]. However, Exhibit C7 was not "*pre-contractual*". Rather, it formed part of negotiations to resolve a dispute arising from the PSA. In any event, there is nothing remarkable about extending the scope of Art. 15.2 to negotiations. Negotiation and mediation are kindred forms of ADR [*Ashford*, ¶9-40]. Indeed, the sole authority on which

CLAIMANT relied at §2.1.2.2 of its submissions recognises that mediation and negotiation share similar principles and goals: "*[m]ediation is negotiation with adult supervision*" [*F. Peter Phillips*, p. 6].

73. Therefore, Exhibit C7 is protected by Art. 15.2 of the FAI Mediation Rules.

B. Exhibit C7 is subject to without prejudice privilege

74. The Tribunal should exclude Exhibit C7 because it was communicated on a without prejudice basis and is thus privileged. Article 9.2(b) of the IBA Rules provides that the Tribunal shall exclude documents subject to "*privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*". In assessing privilege, the Tribunal may consider "*the need to protect the confidentiality of a Document created … in connection with and for the purpose of settlement negotiations*" [*IBA Rules*, Art. 9.4(b)].
75. CLAIMANT expressly accepts the applicability of these privilege rules [*MfC*, ¶51].
76. Exhibit C7 is plainly a communication sent "*in connection with and for the purpose of settlement negotiations*" [*IBA Rules*, Art. 9.4(b)]. The Parties had, by the time Exhibit C7 was sent on 25 May 2024, already been negotiating for over two months, with a view to resolving their dispute [*PO2*, ¶23]. Exhibit C7 contained an offer that, if accepted, would have resolved this dispute. It is the quintessential document to which this privilege attaches [*Daintrey*, pp. 119–20; *Ofulue*, ¶¶2, 87].
77. Despite this, CLAIMANT has advanced *four* arguments as to why Exhibit C7 is not privileged [*MfC*, §§2.1.3.1–2.1.3.4], none of which are persuasive.
78. *First*, CLAIMANT argues at §2.1.3.1 of its submissions that there were no settlement negotiations. This is incorrect. CLAIMANT itself acknowledged that Exhibit C7 emerged from such discussions, describing it as "*the without-prejudice offer made by Respondent in the negotiations*" (emphasis added) [*RfA*, ¶21]. Further, paragraph 23 of PO2, on which CLAIMANT relies [*MfC*, ¶51], far from demonstrating the absence of settlement negotiations, describes at length the "*extent of the Parties' negotiations*". That context clearly justifies the application of without prejudice privilege [*Oceanbulk*, ¶25].
79. *Secondly*, contrary to CLAIMANT's argument at §2.1.3.2 of its submissions, Exhibit C7 was a genuine attempt at resolving the Parties' dispute. RESPONDENT accepts that merely labelling a document "*Without-Prejudice*" is insufficient [*MfC*, ¶50], and that an offer must be a "*genuine*" attempt at settling a dispute in order to attract this privilege [*MfC*, ¶52; *Rush & Tompkins*, pp. 1299, 1301]. However, CLAIMANT's only basis for impugning the genuineness of RESPONDENT's offer is its contention that "*RESPONDENT demanded a price reduction but did not compromise on anything*" [*MfC*, ¶53]. That is incorrect. In exchange for a price reduction, RESPONDENT offered to continue the PSA despite CLAIMANT's breach and to provide a "*first demand guarantee*" of 10% of the new price [*Ex. C7*].
80. CLAIMANT makes much of the fact that RESPONDENT sought a price reduction, going so far as to say that a "*letter labelled [without prejudice] which offers to pay a lower sum than the amount claimed, is not privileged, as the will to settle the dispute is missing*" [*MfC*, ¶52]. If accepted, CLAIMANT's submission

would lead to the absurd result that without prejudice privilege only applies where the offeror capitulates to the other side's demands. Obviously, commercial parties engaging in negotiations may offer "*to pay a lower sum than the amount claimed*" [*MfC*, ¶52]. The case cited by CLAIMANT has no application, as it concerned an attempt "*to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability*" [*Bradford & Bingley*, ¶73]. RESPONDENT had not "*admitted liability*" to pay the contract price; that disputed liability is the very subject of this arbitration.

81. CLAIMANT cannot now assert that a further price reduction was "*thoroughly unacceptable*" [*MfC*, ¶55]. As CLAIMANT itself explains, both Parties knew full well that CLAIMANT undertook the project at a loss [*RfA*, ¶13; *MfC*, ¶55]. But this was not charity on CLAIMANT's part. It was a recognition that the project was "*extremely important*" to CLAIMANT as a "*reference project*", for which the primary commercial value lay in the opportunity to secure future customers, given the "*exponential market growth predicted from 2026 onwards*" [*RfA*, ¶9]. Thus, viewed holistically [*Poben Consultants*, ¶30], it was reasonable for RESPONDENT to negotiate a further price reduction. CLAIMANT, however, rejected RESPONDENT's offer outright, demanding that RESPONDENT abandon its own legitimate interests before commencing arbitration [*PO2*, ¶24].

82. *Thirdly*, CLAIMANT's argument at §2.1.3.3 of its submissions that Exhibit C7 was not a settlement offer and "*was made solely to outline RESPONDENT's position*" is untenable [*MfC*, ¶55]. As explained at paragraphs 79 to 81 above, Exhibit C7 was a genuine offer of compromise. It did not merely set out a position, but stated: "*we would like to make the following offer without prejudice*" [*Ex. C7*].

83. *Fourthly*, CLAIMANT submits at §2.1.3.4 of its submissions that Exhibit C7 "*does not address the merits of the dispute but merely demonstrates that mediation would have been pointless*", and should thus be admitted. This is a notable departure from CLAIMANT's original case, where it relied on Exhibit C7 to argue that RESPONDENT invalidly terminated the PSA [*RfA*, ¶¶21–2]. In any event, CLAIMANT's point that without prejudice privilege does not attach to 'mere' procedural issues is entirely novel and has no basis in the authorities it cites, or any other authority. Put simply, Exhibit C7 was sent without prejudice: it thus cannot be used to prejudice RESPONDENT. To suggest otherwise on the basis of an irrelevant taxonomical distinction between 'merits' and 'procedure' would be to erode the strong public policy considerations underpinning the privilege [*Unilever*, pp. 2448–9].

84. For these reasons, Exhibit C7 is protected by without prejudice privilege.

C. There are no other grounds for excluding Exhibit C7, including on the basis of good faith

85. For completeness, RESPONDENT notes that CLAIMANT seems to have abandoned its objection that "*[i]t would be contrary to good faith*" to allow RESPONDENT to exclude Exhibit C7 on the basis that Equatoriana is a signatory to the "*Mauritius Convention on Transparency*" [*Letter by Langweiler*, pp. 34–5]. In any event, it is telling that CLAIMANT referred to this treaty by its unofficial,

abbreviated name. As is clear from the treaty's full name (and Art. 1 of the treaty), the 'United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration' does not apply to a contractual dispute in an international commercial arbitration [*Shelley*, p. 163].

86. For the reasons stated above, Exhibit C7 should be excluded.

II. Exhibit R3 should not be excluded

87. The Tribunal should not exclude Exhibit R3. Exhibit R3 is an internal email of CLAIMANT's employees, in which Ms. Heidi Smith (CLAIMANT's Head of Legal) regarded it as "*not unlikely*" that the deal with P2G would fall through. Despite this, Mr. Deiman obscured the true status of P2G's potential involvement just two days later [*Ex. R2*]. This disparity between CLAIMANT's actions and its knowledge cuts to the heart of its reliance on the contractual concessions that it extracted from RESPONDENT after misleading it in this way.

88. Exhibit R3 should not be excluded because it is relevant to the material issues in the arbitration (**A**), is not covered by legal advice privilege (**B**), and was not obtained illegally (**C**).

A. Exhibit R3 is relevant to the material issues in the arbitration

89. RESPONDENT accepts that the Tribunal must assess the relevance of evidence, and that it should refuse to admit irrelevant evidence [*MfC*, ¶60]. However, RESPONDENT rejects CLAIMANT's characterisation of Exhibit R3 as irrelevant to the issues in dispute [cf. *MfC*, §2.2.1].

90. CLAIMANT's contention is predicated on a misstatement of RESPONDENT's case. As RESPONDENT has explained, it only agreed to the contractual exclusion of termination rights based on the "*wrong assumption that Claimant's delivery would most likely contain close to 50% of materials and services produced in Equatoriana*", which was the "*impression Claimant had created during the entire negotiation process*" [*ARfA*, ¶6]. However, Exhibit R3 demonstrates that CLAIMANT knew this to be false, as it was already aware that the P2G negotiations were "*not unlikely*" to fail [*Ex. R3*; *ARfA*, ¶7]. Exhibit R3 therefore assists RESPONDENT in arguing that the exclusion of its right to terminate, on which the merits of this arbitration turn, was bargained for by CLAIMANT pursuant to a misrepresentation.

91. CLAIMANT cannot dictate what is relevant to RESPONDENT's case [*Ashford*, ¶3-40]. It asserted that its "*awareness during negotiations [is] irrelevant, as the mandatory requirement in the tender was 25%, which was duly complied with*" [*MfC*, ¶62]. But whether CLAIMANT in fact complied with the minimum local content requirement is beside the point. What is relevant is that CLAIMANT induced RESPONDENT to make additional concessions based on its representations, and Exhibit R3 is central to that issue.

92. In any event, this preliminary phase is the inappropriate juncture to decide relevance [*Watkins-Johnson*, ¶64; *International Military Services*, ¶4.4.2; *O'Malley*, ¶9.17]. Relevance can only be decided once the issues in dispute have been fully ventilated [*Island of Palmas*, pp. 840–1; *AAPL*, ¶56; *Brown*, p. 91; *Lauterpacht*, pp. 41–2]. The Tribunal has before it only a high-level impression of the Parties'

substantive cases, and has directed the Parties not to address the merits at this time [*PO1*, ¶III(1)].

93. Thus, it would be inappropriate for the Tribunal to rule that Exhibit R3 is irrelevant at this preliminary stage [*Century Indemnity*, p. 557; *O'Malley*, ¶9.14], and doing so would risk violating the basic principle that "*each party shall be given a full opportunity of presenting his case*" [*Model Law*, Art. 18].

B. Exhibit R3 is not protected by legal advice privilege

94. Exhibit R3 is not protected by legal advice privilege for *three* reasons. *First*, there are no applicable legal advice privilege protections (**1**). *Secondly*, in any event, any legal advice privilege was waived by inadvertent disclosure (**2**). *Thirdly*, any such privilege was impliedly waived (**3**).

1. The law applicable with respect to Exhibit R3 does not provide for legal advice privilege

95. Where parties are subject to different legal rules, a choice of law analysis is necessary to decide which system of law governs legal advice privilege [*IBA Rules*, Arts. 9.2(b), 9.4; *Khodykin/Mulcahy/Fletcher*, ¶¶12.103, 12.112]. CLAIMANT has sought to dispense with this analysis by assuming that, "*[e]ven if procedural conflict of laws issues would be raised by* RESPONDENT *in this context, the generally recognised* most favoured nation rule *of legal privileges would render the Equatorian [sic] privilege applicable*" [*MfC*, ¶64]. In doing so, CLAIMANT overlooks the fact that the 'most favoured nation' rule, far from being decisive, is simply one of many means of determining the law applicable to issues of privilege [*IBA Privilege Report*, p. 5; *Born*, §§16.02[E][8][e]–[f]; *Rubinstein/Guerrina*, p. 590].

96. Here, the 'most favoured nation' rule has no application. This is because the rule was designed to prevent a tribunal from applying different privilege rules to two parties [*O'Malley*, ¶9.61; *Tevendale/Cartwright-Finch*, p. 831; *Review Subcommittee*, p. 25]. Thus, the 'most favoured nation' rule does not replace a choice of law analysis, but only operates as a backstop to avoid the application of two sets of rules that produce unfairness [*Carter*, p. 178; *von Schlabrendorff/Sheppard*, p. 773; *Global Telecom*, Annex A, pp. 11–12; see also *IBA Rules*, Art. 9.4(e)].

97. If both CLAIMANT and RESPONDENT were asserting legal advice privilege, it would be prudent to grant both Parties the protections afforded under Equatorianian law. However, CLAIMANT is the only party claiming legal advice privilege. RESPONDENT, by contrast, appeals to an entirely different type of privilege as regards Exhibit C7, which has a distinct rationale [*Baker*, p. 66; *Wigmore*, ¶2290]. As such, there is no inequality for the 'most favoured nation' rule to remedy.

98. Instead, applying a proper choice of law analysis, the Tribunal should find that no legal advice privilege attaches to Exhibit R3. There are *four* relevant approaches; each supports this conclusion.

99. *First*, the Tribunal must have regard to "*the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen*" [*IBA Rules*, Art. 9.4(c)]. The sender and recipients of Exhibit R3, as employees of a Mediterranean company exchanging an internal email, would have expected the rules of Mediterraneo to govern that email [*Nelson*, ¶¶18–19]. Any suggestion that

they expected Equatorianian or Danubian law to apply is untenable, as the PSA, which designates Equatorianian law as the governing law and Danubia as the arbitral seat, had yet to be agreed.

100. Where the law of Mediterraneo is applicable with respect to Exhibit R3, it cannot be protected by legal advice privilege, as Mediterraneo does not recognise any such privilege [*Ex. R4*].

101. *Secondly*, the 'closest connection' test, which has widespread acceptance in private international law [*Berger II*, §13.03[B][2]; *O'Malley*, ¶9.43; *Ashford*, ¶9-53; *Rosher*, p. 17], also points to the application of Mediterranean law. Relevant factors demonstrating the requisite connection include: the place where the lawyer is admitted; the party's primary place of business; the place at which the document was created and stored; and the place to which it was sent [*O'Malley*, ¶9.44; *Born*, §§16.02[E][8][e]; *Global Telecom*, pp. 13–14; *Niko Resources*, ¶22]. Mediterraneo is the answer in each case [*Ex. R3*], which, again, means that no privilege rules apply.

102. *Thirdly*, there is substantial variation between states as to whether communications from in-house counsel, as opposed to 'independent' lawyers, should be protected by legal advice privilege [*IBA Privilege Report*, Annex 2, pp. 4–5; *Akzo*, ¶42; *Ashford*, ¶¶9-29–9-30]. Accordingly, even a 'survey' of various international rules on privilege would yield the same result: namely, that no privilege rules are applicable to the present case [*Meyer-Hauser/Sieber*, p. 170].

103. *Fourthly*, even if the Tribunal were to apply the law of Equatoriana, which resembles that of the United States [*Ex. R4*], Exhibit R3 would still not be privileged. This is because Ms. Smith is a foreign lawyer from the perspective of Equatoriana. Despite CLAIMANT's assertion that Ms. Smith is a "*member of the Bar*" [*MfC*, ¶65], she is only a member of the Mediterranean, not Equatorianian, bar [*Ex. R3*]. In such a case, whether privilege should extend to cover foreign lawyers turns on whether the parties to the communication expected that it would be privileged [*Malletier*, pp. 46–7; *Wultz*, pp. 494–5]. For the reasons provided at paragraphs 99 to 101 above, the Mediterranean parties involved in Exhibit R3 could not possibly have had that expectation, given the lack of any privilege protections in Mediterraneo.

2. In any event, any privilege attaching to Exhibit R3 was waived by inadvertent disclosure

104. Article 9.4(d) of the IBA Rules provides that the Tribunal must take into account "*any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise*". Moreover, under the privilege rules of Equatoriana, which are equivalent to those of United States [*Ex. R4*], it is the party asserting legal advice privilege who must establish not only that the communication is privileged, but also that such privilege has not been waived [*United Shoe*, pp. 358–9; *US v. Jones*, p. 1072; *International Harvester*, p. 1150; *McCafferty's*, pp. 166–7; *Johnson*, pp. 642–3; *Mir*, p. 467; *Ambac*, pp. 34–5].

105. CLAIMANT has made no attempt to do so [*MfC*, §2.2.2]. In any event, RESPONDENT submits that

CLAIMANT has inadvertently waived any privilege attaching to Exhibit R3 for *three* reasons.

106. *First*, CLAIMANT itself has raised the possibility that one of its employees leaked Exhibit R3 to RESPONDENT [*Ex. C8*; *MfC*, ¶70]. In such cases, even if due to an "*unfortunate lapse*", this reveals that CLAIMANT "*was careless with the confidentiality of its privileged communications*", and therefore constitutes a waiver of privilege [*Sealed Case*, p. 980].

107. *Secondly*, CLAIMANT's failure to assert privilege over documents obtained by Equatorianian police constitutes a waiver of privilege. If a party wishes to maintain privilege over documents, it "*must take some affirmative action*" [*Horowitz*, p. 82; *von Bulow*, p. 101]. Indeed, a proponent of privileged documents must show "*not only that it intended these documents to be confidential, but that it took all possible precautions to maintain their confidentiality*" [*United Mine Workers*, p. 6; *Sealed Case*, p. 980]. Where a privileged document is inadvertently disclosed, whether privilege is waived turns on, among other factors, the reasonableness of the precautions taken, the promptness of measures taken to rectify the disclosure, and the overriding interests of justice [*Gray*, p. 1484; *Glamis Gold*, ¶51].

108. There is no evidence that CLAIMANT or Mr. Deiman made any effort to restrain the police's use of Mr. Deiman's documents. Neither claimed to have asserted any privilege over the confiscated documents, despite knowing full well that such documents would have contained confidential information [*Letter by Langweiler*, p. 34; *Ex. C8*]. CLAIMANT has thereby failed to establish the steps that it took to prevent disclosure [*de la Jara*, p. 750; *Ocean Transportation*, pp. 674–5; *Williams*, pp. 49–50; *Peterson*, p. 427]. It is only now, months after the investigation, that CLAIMANT seeks to assert privilege [*Flowcrete*, ¶45; *Baliva*, p. 1032; *Eigenheim Bank*, pp. 991–2].

109. Moreover, Mr. Deiman was, at the time, no longer an employee of CLAIMANT, but the COO of Volta Transformer [*Ex. C8*, ¶1]. Given this, it is unclear why CLAIMANT still allowed Mr. Deiman access to his old work emails. CLAIMANT thereby "*put [Mr. Deiman] in a position*" to disclose its documents, and "*gave him the information to disclose*" [*Jonathan Corp*, p. 700]. Further, Exhibit R3 was not itself designated as privileged or confidential, and there is no evidence of any attempt to store or label it as such [*Pelullo*, pp. 1077–8; *McCafferty's*, p. 168].

110. *Thirdly*, privilege cannot be selectively waived for one party and not another [*Pacific Pictures*, pp. 1127–8]. Thus, by waiving privilege through inadvertent disclosure to the police, CLAIMANT cannot reassert such privilege. As RESPONDENT has had access to Exhibit R3 throughout the arbitration, and has used it to support its case, RESPONDENT stands to suffer prejudice were it now robbed of the opportunity to rely on that document: "*the 'bell cannot be un-rung*'" [*Vito Gallo*, ¶44].

3. Further, any privilege attaching to Exhibit R3 has been impliedly waived

111. Additionally, CLAIMANT has impliedly waived any privilege attaching to Exhibit R3 by its "*affirmative use of the Document*" in these proceedings [*IBA Rules*, Art. 9.4(d)]. This is for *two* reasons.

112. *First*, CLAIMANT has expressly relied on Exhibit R3 to support its case. In its submissions on the value of the eAmmonia Option, CLAIMANT argues that, "*this would have been a price of EUR 100 M, 80% of which would have been for the delivery of goods*", for which it cites, inter alia, Exhibit R3 [*MfC*, ¶101]. This is inconsistent with an intention to maintain privilege over Exhibit R3 and constitutes an implied waiver of such privilege [*Clair*, p. 43; *GS Enterprises*, p. 1368].

113. *Secondly*, CLAIMANT has made various positive assertions, placing the information in Exhibit R3 directly in issue and thereby impliedly waiving privilege [*Hearn*, p. 581; *Smith*, pp. 724–5]. It asserted that it was "*very transparent*" [*RfA*, ¶13] and "*very frank*" [*Ex. C5*, ¶10] during the negotiations that led to the exclusion of the right to terminate. It further claimed that it fostered "*ongoing and forward-looking cooperation between … two partners who trust each other*" [*RfA*, ¶13], and that it was "*trying [its] best to overfulfill the local content quota*" [*Ex. C5*, ¶10]. Mr. Poul Cavendish (CLAIMANT's CEO) specifically alluded to a process of "*extensive scrutiny of [P2G's] facilities and personnel*" [*Ex. C5*, ¶12]. These statements, to the effect that it was acting lawfully, bona fide, reasonably, and pursuant to "*scrutiny*" it had engaged in, put in issue any legal advice that CLAIMANT may have received in this regard, whether or not it purports to have relied on such advice [*Bilzerian*, p. 1292; *Cox*, pp. 1418–19; *State Farm*, p. 1177].

114. For these reasons, no legal advice privilege protections apply to Exhibit R3, and in any event, any legal advice privilege was waived by inadvertent disclosure or through implied waiver.

C. Exhibit R3 was not obtained illegally by RESPONDENT

115. CLAIMANT submits that illegally obtained documents may be excluded on the basis that they contravene good faith, justice and fairness [*MfC*, ¶66; *IBA Rules*, Art. 9.3]. RESPONDENT does not challenge this principle. However, RESPONDENT challenges CLAIMANT's application of this principle to the present case. In particular, CLAIMANT has stated that "*Ex. R3 was either obtained by the public prosecution office or leaked by an employee of CLAIMANT*", and asserts that, "*[i]n either case, it was acquired through illicit means*" [*MfC*, ¶66]. However, CLAIMANT has not proven either of its allegations.

116. *First*, in regard to the public prosecution office, CLAIMANT relies on circumstantial facts to allege a conspiratorial relationship between RESPONDENT and the public prosecution office. Although RESPONDENT's CEO made accusations that led to an investigation against Mr. Deiman [*PO2*, ¶27], that is the extent of the connection borne out by the evidence and does not establish the impropriety alleged by CLAIMANT. CLAIMANT's contention that the "*criminal investigations against Mr. Deiman were initiated by RESPONDENT*" is inaccurate [*MfC*, ¶69]. The investigation was initiated by the prosecution office, which does not act at RESPONDENT's behest [*PO2*, ¶3; cf. *Libananco Holdings*, ¶79]. CLAIMANT's contention that "*[t]he criminal investigation was not justified*" is also inaccurate [*MfC*, ¶69]. The fact that Mr. Deiman was acquitted [*PO2*, ¶27] says nothing about the

legitimacy of the prosecution office's investigation. Moreover, CLAIMANT speculates that "*RESPONDENT, due to [its] close ties with the prosecution office … managed to acquire the document*" [*MfC*, ¶69]. Even assuming RESPONDENT had such ties, that would not sustain an inference that prosecutors were apt to share sensitive investigation materials with RESPONDENT.

117. In essence, CLAIMANT relies on a series of insinuations that Equatoriana unlawfully "*exploit[ed]*" its law enforcement through the public prosecution office [*MfC*, ¶69]. These serious accusations are inappropriate, given the lack of cogent evidence and any representative for the state to address them in this arbitration [*EDF*, ¶221; *ICC Case No. 4145*, p. 102; *Rehman*, ¶¶140–1]. Moreover, CLAIMANT cannot impugn the prosecution office's conduct as a matter of Equatorianian law under the 'act of state' doctrine, which provides that an external court (or tribunal [*Reliance*, ¶113]) cannot challenge the validity of acts done by a state in the exercise of its powers; relevantly, the executive powers of the police according to Equatorianian law [*Kirkpatrick*, pp. 405–6; *Yukos Capital*, ¶110]. Thus, CLAIMANT cannot establish any unlawfulness as regards Equatoriana's prosecution office.

118. *Secondly*, in regard to any leak by CLAIMANT's employees, CLAIMANT overstates the significance of such leak. While CLAIMANT's employees were under non-disclosure agreements [*PO2*, ¶28], RESPONDENT rejects the claim that "*[b]reaching the NDA is considered illicit, particularly when the information is confidential*" [*MfC*, ¶70]. It is incorrect to describe the breach of a private contract as illegal or "*illicit*" in the sense of Art. 9.3 of the IBA Rules [*IBA Rules Commentary*, p. 30; *Stewart*, p. 186; *Waddams* p. 9; *Dalmia*, ¶27]. Moreover, RESPONDENT was not involved in any such breach [cf. *Methanex*, ¶59], which occurred under a contract separate to the PSA [*GSPC*, ¶85].

119. In any event, in light of Art. 9 of the IBA Rules, which presumes the admissibility of documents *unless* a relevant exception applies [*IBA Rules*, Art. 9], and the limited powers of an arbitral tribunal to compel the production of evidence, it is appropriate for the Tribunal to adopt an inclusionary approach to the gathering of evidence, to enable it to form the clearest picture of the facts [*Ng*, pp. 751–2]. Thus, even if the Tribunal were to find that there was any impropriety or illegality in RESPONDENT's acquisition of Exhibit R3, which is denied, it should still not exclude Exhibit R3.

120. For these reasons, Exhibit R3 should not be excluded.

CONCLUSION

121. Exhibit C7 should be excluded, as it is protected by Art. 15.2 of the FAI Mediation Rules and is subject to without prejudice privilege. There is no basis to compel its inclusion. Separately, Exhibit R3 should be included as it is relevant to the issues in dispute, is not subject to legal advice privilege, and was not illegally obtained.

ISSUE C: THE CISG DOES NOT APPLY TO THE PSA

122. Contrary to CLAIMANT's contentions, the PSA is not a contract that falls within the CISG's sphere of application under Arts. 1–3. *First*, the PSA is not a contract of sale of goods, as CLAIMANT's preponderant obligation is the supply of services (**I**). *Secondly*, the PSA lacks the internationality required under Art. 1(1) of the CISG, as it is a contract between parties whose places of business are both in Equatoriana (**II**). *Thirdly*, the exception under Art. 2(b) applies to exclude the CISG, as the reverse auction procedure used to conclude the PSA is an 'auction' (**III**). Thus, if the Tribunal finds in favour of any one of these reasons, the CISG cannot apply to the PSA.

I. The PSA is not a contract of sale of goods

123. It is undisputed that the PSA is a mixed contract [*MfC*, ¶95], as it involves both the 'sale of goods', being the delivery of equipment and materials, and the 'supply of labour or other services', such as planning, engineering, construction, maintenance and training [*Ex. C5*, ¶11].

124. Contrary to CLAIMANT's submission [*MfC*, ¶¶77–8], it is incorrect to characterise the entire Plant as a good; rather, its constituent components are goods, whereas the Plant is the product of labour and other services being applied to those goods. The cases relied upon by CLAIMANT [*MfC*, ¶77–8] concerned the deconstruction, movement, and reconstruction of a spinning plant [*Spinning Plant Case*, ¶1] and oil rigs [*China Petrochemical*, ¶19] — these are materially different from the construction of an entire power plant facility which cannot be moved once affixed to the land. In any event, the decisive element in both cases was not whether these were 'goods', but whether the exceptions set out in Art. 3 of the CISG applied [*Spinning Plant Case*, ¶16; *China Petrochemical*, ¶319]. Similarly, the inquiry here is whether the exceptions in Art. 3 are made out [*Art. 3 Case Digest*, ¶1].

125. RESPONDENT accepts that it did not supply a substantial part of the materials necessary for the manufacture of the Plant. Therefore, CLAIMANT's invocation of Art. 3(1) of the CISG is misplaced [cf. *MfC*, §3.5]. Instead, RESPONDENT's contention is that, pursuant to Art. 3(2), the CISG does not apply to the PSA because "*the preponderant part of the obligations of the party who furnishes the goods [i.e. CLAIMANT] consists in the supply of labour or other services*".

126. In assessing the 'preponderant part' of CLAIMANT's obligations, the Parties' intentions — i.e., their subjective evaluations of the relative importance of each obligation — always prevail [*Hachem II*, ¶19; *Mistelis/Raymond*, ¶18; *Ferrari I*, p. 121; *Huber/Mullis*, p. 47; *CISG-AC Opinion No. 4*, ¶3.4; *Orintix*, p. 4; *Potato Chips Plant Case*, ¶44]. A comparative assessment of the relative economic value of the goods and services to be provided under the PSA may assist, but is not determinative of, this inquiry [*Spinning Plant Case*, ¶72; *Hachem II*, ¶18; *CISG-AC Opinion No. 4*, ¶3.3].

127. Here, the Parties' intentions at the time of contracting demonstrate that the sale of goods was only ancillary to the main service obligation, which was to construct the Plant (**A**). Further, the

economic value of the services component of the PSA exceeds that of the sale of goods (**B**).

A. The Parties' intentions point towards a services contract

128. The Parties placed greater weight on the services component of the PSA, rather than the goods to be delivered. In assessing the Parties' intentions, relevant factors include the denomination and content of the contract, the structure of the price, and the weight given by the Parties to the obligations [*CISG-AC Opinion No. 4*, ¶3.4]. Here, CLAIMANT submits that the "*denomination and the entire content of the PSA point to the preponderance of the obligations for the delivery of the goods*" [*MfC*, §3.6.4]. However, this relies on a superficial reading of the PSA in *two* respects.

129. *First*, although the PSA is a mixed contract, CLAIMANT relies on the sequential order of the words "*Purchase and Service Agreement*" to argue that the PSA is "*primarily a contract for the purchase of the plant, and only secondarily for the ancillary service*" [*MfC*, ¶97]. In doing so, CLAIMANT manufactures a connection between the word "*purchase*" and goods; of course, one can purchase services, as well as goods. Further, the deliberate change in wording from the "*Model Purchase and Sales Agreement of Equatoriana*" (emphasis added) evinces precisely the opposite intention [*PSA*, Art. 31]. The substitution of "*Sales*" for "*Services*" can only mean that services were of particular significance.

130. *Secondly*, CLAIMANT cites the four obligations set out in Art. 2 of the PSA, arguing that only the fourth obligation (Art. 2(4)) mentions "*anything about maintenance and training*" and is therefore the only service obligation, whereas the first three obligations (Arts. 2(1)–(3)) concern the "*delivery of goods*" [*MfC*, ¶97]. This overlooks the services inherent in the construction of the Plant and in the delivery of the Extension Option and the eAmmonia Option (together, the **Options**). Indeed, with respect to the Plant, Mr. Cavendish fully detailed the extent of these services in the table in his witness statement [*Ex. C5*, ¶11], on which CLAIMANT has relied [*MfC*, ¶98]. Additionally, as discussed in paragraphs 145 to 148 below, services obligations are also present in both Options.

131. To the contrary, the Parties regarded the supply of services as CLAIMANT's preponderant obligation for *four* reasons.

132. *First*, it is common ground that the PSA is a turnkey contract. Not only was it described as such in Art. 1 of the RfQ, but CLAIMANT and its CEO, Mr. Cavendish, repeatedly described the PSA as a turnkey contract [*RfA*, ¶4; *Ex. C5*, ¶¶9, 11; *Ex. R3*; see also *PO2*, ¶21]. This is not a mere label. Rather, it captures the very essence of this project, being an undertaking where "*the production and not the delivery of the goods is of primary importance*" [*Waste Separation Machines Case*, p. 4; *Inter Rao*, ¶229]. RESPONDENT did not contract for mere goods, but for their assembly into a complex, functional power plant [*Potato Chips Plant Case*, ¶46]. This was clear from the outset as RESPONDENT sought a single contractor to provide all services for the "*engineering, planning, construction, and delivery of a plant (turnkey)*" [*RfQ*, Art. 1]. Indeed, this is the reason why the drafters of the CISG contemplated

that turnkey contracts should fall directly within the Art. 3(2) exception [*Inter Rao*, ¶¶235–9; *Waste Separation Machines Case*, p. 4; *Ferrari I*, p. 117; *UNCITRAL Yearbook 1976*, p. 98].

133. *Secondly*, and reinforcing the above, a substantial part of CLAIMANT's obligations lay in assembling the "*[v]ery different components of the plant … to form a whole new unit*" [*Waste Separation Machines Case*, p. 4]. This includes the electrolyser stacks, transformer, compressor, core system and others [*Ex. C5*, ¶11]. Thus, it is inevitable that the "*assembly, adaptation, instruction and similar works constitute a considerable part of the contractual performance*" [*Waste Separation Machines Case*, p. 4], all of which go far beyond the typical obligations of a seller of goods [*Inter Rao*, ¶229]. Furthermore, given the complexity of this project, the Plant was simply not a facility "*that can just be placed somewhere, but [a facility] that need[ed] looking-after during the initial phase*" [*Waste Separation Machines Case*, p. 4; *Jazbinsek*]. This is reflected in CLAIMANT's obligations to perform an on-site 'test run' of the Plant [*PSA*, Art. 3], to carry out a subsequent 'Performance and Acceptance Test' [*PSA*, Art. 18], and to provide training and maintenance services following the Plant's construction [*PSA*, Art. 2(4)].

134. *Thirdly*, the relative weight of CLAIMANT's service obligations is strengthened by how the contractual milestones are defined by CLAIMANT's performance of services. These milestones are linked to the submission of the plans, building activities, test run, and performance test [*PSA*, Art. 3]. By contrast, there is no relationship to the delivery or installation of goods.

135. *Fourthly*, in light of the local content requirement, a large part of CLAIMANT's works comprised of subcontracting work to other Equatorianian entities [*RfA*, ¶12]. Further, CLAIMANT itself did not possess the expertise to build the eAmmonia Option [*Ex. C3*], but rather had to outsource the bulk of the work to subcontractors. This act of subcontracting is itself a service, not a good.

136. Overall, the Parties intended for the preponderant part of the PSA to be the provision of services.

B. The economic value of the services is the preponderant part of the PSA

137. That the preponderant part of the PSA consists in the supply of services is also supported by its economic value vis-à-vis the value of goods. RESPONDENT accepts that the value of the goods in the construction of the Plant alone exceeds the value of the services to be provided by CLAIMANT [*MfC*, ¶99]. However, this analysis ignores both the Extension Option (valued at EUR 60,000,000) and the eAmmonia Option (valued at EUR 100,000,000) [*Ex. C5*, ¶9], which are core parts of the PSA and key benefits for which RESPONDENT bargained [*PSA*, Art. 2].

138. The Tribunal should include the value of both Options in making this economic assessment as they form a part of the PSA (**1**). Hence, the preponderant part of the contract price, inclusive of the Options, is that of services (**2**).

1. The Options should be included in assessing the economic value of services in the PSA

139. The Options should be considered holistically within the PSA, and not as standalone agreements.

This is because the Options are exercisable at RESPONDENT's sole discretion with no further need for negotiation or contracting [*PO2*, ¶18], which is undisputed [*MfC*, ¶101].

140. Contracts with "*pre-emptive options*" should be regarded as one contract under the CISG [*Hachem I*, ¶11; *Ferrari II*, ¶18]. These contracts, which include fixed obligations (e.g., minimum delivery amount) and provisional obligations (e.g., increased delivery amount at the buyer's discretion), "*are in accordance with commercial practices, particularly in international matters*" [*Romay*, ¶22]. The provisional part of the PSA (i.e., the Options) does not detract from the PSA being a 'sales contract' under the CISG if "*there is agreement on the object of the delivery, the sales volumes and the unit prices*" [*Romay*, ¶18].

141. Here, the Parties have agreed on the timeframe, quantity, price payable, and all other specifications for both Options "*in line with the schedule*" in Annexes 2 and 3 of the PSA [*PSA*, Art. 1; *PO2*, ¶18; cf. *Helen Kaminski*, p. 3; *Viva Vino*, p. 1]. Even if RESPONDENT chooses to exercise the Options in part, the price is still determinable according to a "*proportional reduction of the price*" [*PO2*, ¶18; *Romay*, ¶72]. Moreover, RESPONDENT's discretion to do so was not open-ended, as the deadline was set at 31 December 2026 [*PSA*, Art. 1]. Therefore, there is no uncertainty as regards the Options.

142. Further, the Parties always intended for the Options to be exercised. The eAmmonia Option was structured as such only because of "*financial and fiscal reasons*", being a lack of funding from the Equatorianian government at the time [*ARfA*, ¶5]. CLAIMANT committed to preparing plans for the eAmmonia module on the basis that "*Respondent had informed Claimant that the exercise of the eAmmonia-option was very likely*" [*PO2*, ¶21]. Indeed, it was CLAIMANT's failure to provide the Final Plans for the eAmmonia module that precipitated this very dispute [*Ex. C6*]. As for the Extension Option, in June 2023 (prior to the signing of the PSA on 17 July 2023), CLAIMANT had already negotiated with Volta Transformer to provide electrolyser stacks and packaging [*RfA*, ¶11]. Therefore, both Parties were prepared to implement the Options.

143. As the Options were an inseparable part of the PSA, their economic value should be included in assessing the 'preponderant part' of CLAIMANT's obligations.

2. The value of the services under the PSA, including the Options, is the preponderant part of CLAIMANT's obligations

144. Taken holistically, the value of the PSA is EUR 445,000,000: EUR 285,000,000 for the Plant; EUR 60,000,000 for the Extension Option; and EUR 100,000,000 for the eAmmonia Option. As will be explained below, the value of CLAIMANT's services obligations amount to EUR 224,500,000. This exceeds 50% of the overall price (EUR 222,500,000), rendering it the preponderant part of CLAIMANT's obligations [*Hachem II*, ¶20; *Mistelis/Raymond*, ¶18; *Ferrari I*, p. 119; *Enderlein/Maskow*, p. 37; *Officine Maraldi*, p. 7]. While the Options do not include a detailed breakdown of goods and services, reasonable inferences can be drawn based on the available evidence.

145. *First*, the Extension Option involves the provision of up to ten electrolyser stacks of 10 MW each [*RfA*, ¶5; *PSA*, Art. 2(2)]. Contrary to CLAIMANT's assertion that the Extension Option "*would have included almost no service part, because the necessary services would have been already performed*" [*MfC*, ¶101], the provision of new electrolyser stacks would involve various new services, including packaging, engineering, and installation, all of which necessitate additional project management [*Ex. C5*, ¶11]. At a minimum, the cost of packaging for the electrolyser stacks alone would be EUR 20,000,000 as per CLAIMANT's estimation [*Ex. C5*, ¶11]. Thus, it may be reasonably inferred that the value of the services under the Extension Option is *at least* EUR 20,000,000, and likely to be more.

146. *Secondly*, the eAmmonia Option likely involves the provision of services, rather than goods. This is because it involves the "*addition of a part [to the Plant] for the production of eAmmonia*" [*RfA*, ¶4], i.e., by converting green hydrogen (already produced by the Plant) into ammonia. Absent any contrary indication, the eAmmonia Option seems to operate as a traditional turnkey contract, whereby CLAIMANT's obligations lie in engineering, procurement and construction (**EPC**) work, such as building the foundations for the module, project management, engineering and other construction services (see paragraphs 132 to 135 above). Thus, the value of the services provided under the eAmmonia Option may be reasonably inferred to be close to its full value of EUR 100,000,000.

147. CLAIMANT submits that "*80% of [the eAmmonia Option] would have been for the delivery of goods*" [*MfC*, ¶101]. This is incorrect. The 80% figure to which CLAIMANT refers is simply its sub-contractor's share of responsibility for the "*works and services*" of the eAmmonia Option [*RfA*, ¶12; see also, *ARfA*, ¶5; *Ex. R1*, ¶4; *Ex. R3*]. This says nothing about the division between goods and services. Indeed, this is reinforced by the fact that, each reference to this 80% figure in the record relates to the local content requirement, being the work done by an Equatorianian sub-contractor.

148. Accordingly, taking the services components of the Plant and the Options together, the value of the services to be provided by CLAIMANT exceeds 50% of the total value of the PSA.

149. For these reasons, the PSA is not a contract of sale of goods, and the CISG does not apply to it.

II. The PSA is a domestic contract as both Parties' places of business are in Equatoriana

150. Per Art. 1(1) of the CISG, the defining criterion for a contract's 'international character' is that the parties' relevant places of business, at the time of contractual formation, are in different states [*Bullet-Proof Vest Case*; *Ferrari I*, p. 72]. It is undisputed that RESPONDENT has its place of business in Equatoriana [*MfC*, ¶81]. For the reasons explained below, CLAIMANT also has a place of business in Equatoriana, thus rendering the CISG inapplicable [cf. *MfC*, ¶80].

151. Whilst Mediterraneo is a place of business for CLAIMANT, its operations within Equatoriana also constitute a place of business (**A**). Thus, as an entity with multiple places of business, CLAIMANT's *relevant* place of business under Art. 10(a) of the CISG is that with the "*closest relationship to the contract*

and its performance", which, here, is Equatoriana (**B**).

A. Equatoriana is a place of business for CLAIMANT

152. CLAIMANT is an entity with multiple places of business: namely, Mediterraneo and Equatoriana.

153. While CLAIMANT is incorporated in Mediterraneo and its Mediterranean address appears on the face of the PSA [*MfC*, ¶81], this is not determinative [*CISG*, Art. 1(3)]. Rather, the Parties' places of business are to be ascertained from the PSA itself, the Parties' dealings, and any other information disclosed between them [*CISG*, Art. 1(2); *Schwenzer/Fountoulakis/Dimsey*, p. 24].

154. Here, CLAIMANT carried out a substantial amount of its obligations under the PSA through Volta Transformer, which CLAIMANT acknowledges as "*its long-time Equatorianian business partner*" [*RfA,* ¶8]. These dealings, coupled with the performance of the PSA in Equatoriana, clearly indicate that, for the purposes of the PSA, Equatoriana was a place of business for CLAIMANT.

155. While Volta Transformer had not yet been acquired by CLAIMANT at the time of concluding the PSA [*MfC*, ¶¶82–3; *PO2*, ¶8], this does not preclude Equatoriana from being a place of business for CLAIMANT. Indeed, although CLAIMANT and Volta Transformer were not, at the time, in a parent-subsidiary relationship, the latter can still qualify as a place of business of the former where there are "*such close business and operational links*" between the two that "*they can reasonably be taken as belonging to a single group entity*" [*Brekoulakis*, ¶21]. Here, this test is satisfied for *two* reasons.

156. *First*, at the time of concluding the PSA on 17 July 2023 [*RfA*, ¶14], a significant portion of Volta Transformer's production capacity was dedicated to CLAIMANT's projects [*PO2*, ¶5; *Ex. C8*, ¶2]. RESPONDENT accepts that, before CLAIMANT's acquisition of Volta Transformer, no agreements "*guaranteed Claimant any control or operational influence on Volta Transformer*" (emphasis added) [*PO2*, ¶8; *MfC*, ¶83]. However, in reality, CLAIMANT's status as Volta Transformer's largest business partner already gave CLAIMANT substantial influence over it. As Mr. Deiman (CLAIMANT's negotiator and subsequent COO of Volta Transformer) accepts, Volta Transformer's contract with CLAIMANT "*was the most important individual contract of Volta Transformer*" [*Ex. C8*, ¶2]. From June 2023 onwards, Volta Transformer shifted a substantial portion of its resources to prioritise CLAIMANT's project [*PO2*, ¶5]. These close business and operational links meant that Volta Transformer was effectively a proxy for CLAIMANT's performance of the PSA.

157. *Secondly*, CLAIMANT also had close business and operational links with Volta Transformer's subsidiary, Volta Electrolyser, which was tasked with carrying out the "*non-transformer-related tasks*" [*RfA*, ¶11]. This included production and packaging of electrolyser stacks "*at the site in Greenfield in Equatoriana*" [*RfA*, ¶11], which notably constituted "*60% of the annual production capacity of Volta Electrolyser for the next year*" [*PO2*, ¶6]. Further, Volta Electrolyser could only produce, and thereby generate revenue from, electrolyser stacks under a licence granted by CLAIMANT [*RfA*, ¶11].

158. Thus, given CLAIMANT's significant dealings and influence over Volta Transformer and Volta Electrolyser (both operating in Equatoriana), Equatoriana is a place of business for CLAIMANT.

B. Equatoriana is CLAIMANT's place of business with the closest connection to the PSA

159. As Equatoriana is also a place of business for CLAIMANT, it is necessary to have regard to Art. 10(a) of the CISG. Under Art. 10(a), the relevant place of business is "*that which has the closest relationship to the contract and its performance*". This designation depends on the "*circumstances known to or contemplated by the parties at the time before or at the conclusion*" of the PSA [*CISG*, Art. 10(a)]. Although not raised by CLAIMANT, it is necessary to consider Art. 10(a) because, contrary to its contention, CLAIMANT has multiple places of business which requires analysis beyond Art. 1 [*Brekoulakis*, ¶2].

160. Here, the place of business with the closest connection to both the PSA and its performance is Equatoriana. This is for *three* reasons.

161. *First*, in relation to the PSA itself, the contract was formed in Equatoriana, where both the reverse auction [*PO2*, ¶9] and the signing ceremony occurred [*PO2*, ¶35(b); *PSA*, signature block]. It is also material that the governing law of the PSA is the law of Equatoriana [*PSA*, Art. 29].

162. *Secondly*, in relation to the PSA's performance, the centrality of Equatoriana is indisputable. The construction of the Plant and the implementation of the Options was to occur in Equatoriana [*RfA*, ¶¶11, 34(3); *RfQ*, Art. 1; *PSA*, Art. 1]. Moreover, to satisfy the local content requirement, a significant portion of the parts making up the Plant was required to "*originate from Equatoriana or be sold by entities in Equatoriana*" [*RfQ*, ¶9; *Ex. R2*]. Indeed, the transformer, core system, electrolyser stacks and electrical equipment were all to be manufactured by Volta Transformer and Volta Electrolyser in Equatoriana [*Ex. C5*, ¶11; *Hachem V*, ¶5]. Similarly, services under the PSA were to be performed in Equatoriana by CLAIMANT, Volta Transformer, and Volta Electrolyser. This included packaging, project management, site works, training, maintenance, construction of the buildings and foundations for the facility, and other remaining EPC services [*Ex. C5*, ¶11].

163. *Thirdly*, in the event of any ambiguity, preference should be given to the place of performance [*Brekoulakis*, ¶30]. Although not raised by CLAIMANT, it may be argued that the place of business closest to the contract is the 'principal place of business' most influential on the contractual relationship [*Hachem V*, ¶6]. However, this formulation was rejected during the drafting of Art. 10 [*UNCITRAL Yearbook 1975*, p. 52]. Here, CLAIMANT's Mediterranean office bears no relation to the PSA's performance; at most, it was merely a contact point and administrative centre [*VLM*, p. 787; *PO2*, ¶1]. Instead, Art. 10(a) favours the place of performance, as it singles out "*performance*" amidst other factors, such as negotiation, conclusion and termination [*Brekoulakis*, ¶30].

164. For these reasons, the PSA is a domestic contract between parties with places of business in the same state, and the CISG is inapplicable.

III. The 'auction' exception under Art. 2(b) of the CISG applies to the PSA

165. The CISG is also inapplicable as the reverse auction by which the PSA was procured is an auction under Art. 2(b) of the CISG. Contrary to the strict interpretation of an 'auction' as contended for by CLAIMANT [*MfC*, ¶87], the Tribunal should take a flexible approach to adapt to the evolving nature of international commerce [*Meyer*, p. 321; *Hachem IV*, ¶22]. Indeed, courts have increasingly embraced internet auctions as part of the 'auction' exception [see, e.g., *Sale of Horse via Internet Auction Case*; *Online Auction of Photography Case*; *Online Auction of Car Case*], despite the fact that the drafters of the CISG could not have anticipated this [*Meyer*, p. 336].

166. Here, in light of the commercial realities in which reverse auctions are employed, they can be seen to have the characteristics of an auction within the meaning of Art. 2(b) for *four* reasons.

167. *First*, the reverse auction has the same competitive nature as a traditional auction, in which participants must outbid one another. In this reverse auction, the "*calculated price*" is the determinative factor [*PO2*, ¶9]. This calculated price was derived from a mathematical "*formular weighing inter alia the technologies used, the efficiency of the plant and other factors*" [*PO2*, ¶9]. That these qualitative factors were reduced to a quantitative assessment gives it the fundamental numerical criterion that makes it an 'auction'.

168. *Secondly*, although the reverse auction did not lead to a 'knockdown' of one winning bidder, it was integral to the award of the PSA. CLAIMANT argues that there is a "*lack of direct causality between the reverse auction and the conclusion of the contract*" [*MfC*, ¶88] because it "*did not guarantee a right to contract, only a right to negotiate*" [*MfC*, ¶86]. However, the reverse auction was an inseparable part of the procurement process, as the final contracting party is selected out of the two final bidders emerging from the reverse auction [*RfQ*, Art. 1(c)(4); *Ex. C5*, ¶9]. Indeed, it is not uncommon for contractual terms to be negotiated after a 'knockdown'. Thus, RESPONDENT's negotiations with the two final bidders do not detract from the reverse auction's character as an 'auction'.

169. *Thirdly*, the reverse auction procedure was regulated by special national laws. Equatoriana has its own Public Procurement Law governing the bidding process and the award of the contract [*RfQ*, ¶8; *PO2*, ¶32]. This conforms with one of the key rationales of excluding 'auctions' under Art. 2(b), which is that sales by auction are "*undisputedly considered to be covered by special national provisions and usages*" [*Spohnheimer*, ¶27; *Magnus*, ¶32]. It would be an overreach for the CISG to apply to reverse auctions used in public procurement processes, as states may opt out of the CISG if it interferes with these processes, which are of national importance and regulated by domestic laws.

170. *Fourthly*, there is no indication that, at the time of the reverse auction, RESPONDENT had any positive knowledge of the bidders' places of business, and, by extension, whether they were in another CISG Contracting State. CLAIMANT argues that the rationale behind Art. 2(b) is that "*the*

parties do not attach any importance to the fact that they might have their places of business … in different countries" [*MfC*, ¶87]. It further submits that this rationale "*does not apply to situations when a contract is awarded to the highest bidder in a public procurement bid*" [*MfC*, ¶87] without further elaboration. Taking this point at its highest, which is that RESPONDENT might have known that the winning bidder had their place of business in another CISG Contracting State, there is no evidence supporting this.

171. For these reasons, the reverse auction is an 'auction' under Art. 2(b) of the CISG, and therefore the CISG does not apply to the PSA.

CONCLUSION

172. The CISG does not apply to the PSA because: it is not a contract of sale of goods as the preponderant part of CLAIMANT's obligations is the provision of services; it is a domestic contract, as both Parties have their places of business in Equatoriana; and it was a sale by auction, such that Art. 2(b) of the CISG applies to exclude the application of the CISG to the PSA.

ISSUE D: THE PARTIES EXCLUDED THE OPERATION OF THE CISG

173. The Parties have excluded the operation of the CISG pursuant to Art. 6, which empowers parties to tailor the contractual framework governing their relationship in accordance with their mutual intention [*Mistelis*, p. 101; *Schlechtriem/Butler*, p. 3; *Gillette/Walt*, p. 73].

174. Contrary to CLAIMANT's suggestion at §4.2 of its submissions, an implied exclusion of the CISG is possible under Art. 6 (**I**). Here, the Parties, through their words and conduct, have evinced a mutual intention to impliedly exclude the CISG (**II**). For completeness, RESPONDENT does not contend that the CISG has been expressly excluded [cf. *MfC*, §4.1.1].

I. An implied exclusion of the CISG is possible

175. CLAIMANT asserts that, in principle, an implied exclusion of the CISG is not possible [*MfC*, ¶111]. However, this assertion is incorrect for *three* reasons.

176. *First*, CLAIMANT's interpretation of Art. 6 reflects a minority view [*Hachem III*, ¶4; *Ferrari I*, pp. 160–1; *Schwenzer/Fountoulakis/Dimsey*, p. 41]. Rather, the prevailing view is that the CISG may be impliedly excluded where the parties clearly manifest an intention to do so. This view has been upheld in both civil law jurisdictions [see, e.g., *Citroen Type C 5 Case* (Austria); *Electronic Electricity Meters Case* (Switzerland); *Potato Chips Plant Case* (Germany); *Cybernetix* (France); *Officine Maraldi* (Italy); *Bullet-Proof Vest Case* (Greece); *Neimann*, p. 79; *Czerwenka*, p. 170] and common law jurisdictions [see, e.g., *Olivaylle* (Australia); *Asante* (USA); *Houweling Nurseries* (Canada); *Pamesa Ceramica* (Israel)], and has been embraced by numerous tribunals [see, e.g., *Park Plus*; *Inter Rao*; *Diammonium Phosphate Case*; *Niederreiter*; *YPF*].

177. *Secondly*, contrary to CLAIMANT's argument, the CISG's *travaux préparatoires* does not include the Convention's predecessor, being the Uniform Law on the International Sale of Goods (**ULIS**) [cf. *MfC*, ¶112]. In fact, the *travaux préparatoires*, which comprise "*conference proceedings and documents*" from the drafting process of the CISG [*Hachem IV*, ¶22], support the possibility for implied exclusion, as they show that proposals to mandate express exclusion were consistently rejected by the CISG's drafters [*Hachem III*, ¶2; *Ferrari I*, p. 160; *Bonell*, p. 52].

178. *Thirdly*, CLAIMANT's comparison of Art. 6 to the respective term within the ULIS is misguided [cf. *MfC*, ¶112]. The removal of an express reference to implied exclusion within Art. 6 was not intended to substantively alter the provision [*Hachem III*, ¶2]. Rather, the omission sought to discourage courts and tribunals from too readily making findings of implied exclusion, emphasising the need for a clear intention to exclude [*Ferrari I*, p. 161; *Sambugaro*, p. 234; *Ebenroth*, p. 684]. Indeed, just as the power under Art. 6 to "*exclude the application of [the CISG]*" is silent on implied exclusion, it equally does not require that exclusion only be through express words [*Borisova*, p. 41].

179. Thus, an implied exclusion of the CISG is not only possible but contemplated by Art. 6.

II. The Parties impliedly excluded the operation of the CISG

180. In accordance with Art. 8 of the CISG, the words and conduct of the Parties demonstrate a "*clear*" and "*real*" intention to exclude the CISG [cf. *MfC*, ¶114; *CISG-AC Opinion No. 16*, ¶3.6; *Citroen Type C5 Case*, ¶71; *Mistelis*, pp. 105–6; *Art. 6 Case Digest*, ¶9]. This is for *three* reasons.

181. *First*, the Parties designated Equatorianian law, without any reference to the CISG, to govern the PSA (**A**). *Secondly*, the terms of the PSA are inconsistent with the applicability of the CISG (**B**). *Thirdly*, the Parties based the PSA on the updated Model Contract for the Purchase of Goods and Services by Equatorianian State Entities (the **Model Contract**), which was aimed at "*strengthening the role of Equatorianian law*" [*PO2*, ¶10] (**C**).

A. Choosing the law of Equatoriana to govern the PSA amounts to an exclusion of the CISG

182. Article 29 of the PSA provides that "*[t]he Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles*". Whilst this does not contain express words, such as "*the applicability of the [CISG] shall be excluded*" [*Venter*, ¶28], the exclusion of the CISG is a necessary inference to draw for *three* reasons.

183. *First*, several judgments and commentaries have found that a choice of law clause specifying the law of a Contracting State functions as an implicit exclusion of the CISG [*American Biophysics*, pp. 63–4; *Zykronix*, ¶8; *MKAC Case No. 155/2004*; *Ferrari I*, pp. 164–5; cf. *MfC*, ¶106]. Were the Tribunal to accept CLAIMANT's contention that exclusion requires the Parties to directly "*choose [the] internal law of the State*" [*MfC*, ¶107], it would result in the Parties' present choice of law having no practical meaning [*Mistelis*, p. 106; *Leather and Textile Wear Case*, ¶2; *Musgrave*, ¶13].

184. *Secondly*, CLAIMANT suggests that, in the case of ambiguity, the "*interpretation against the drafter must be applied*" [*MfC*, §4.3.4]. However, CLAIMANT incorrectly asserts that "*RESPONDENT was the original drafter of the PSA, as it was based on its [Model Contract]*" [*MfC*, ¶124]. In doing so, it wrongly conflates RESPONDENT, a "*separate legal entity of private law*" [*PO2*, ¶3], with the government of Equatoriana — who was solely responsible for the drafting of the updated Model Contract's terms [*Ex. R1*, ¶7; *PO2*, ¶10]. RESPONDENT merely used the Model Contract as the starting point for negotiations and was open to alterations to its terms [*Ex. R1*, ¶7]. Where CLAIMANT did not propose alterations to a term, it was simply because it did not wish to do so. Thus, the rule that a term must be interpreted against its drafter has no application here.

185. *Thirdly*, in dualist states such as Equatoriana [*PO2*, ¶34], treaties, such as the CISG, are governed solely by international law and are not part of their legal systems prior to formal incorporation through domestic legislation [*VCLT*, Art. 2(1); *Lauterpacht*, pp. 216–7; *Malanczuk*, p. 45; *Korenica/Doli*, p. 94; *Balkin*, p. 119]. As such, the legislation responsible for incorporating the CISG into national law would, in itself, constitute a "*conflict of laws principle*". By designating the CISG as applicable, the domestic legislation prioritises it over domestic contract law, resolving a "*conflict of laws*" which would otherwise occur where a transaction involved an international sales contract.

186. Therefore, the Parties' designation of the law of Equatoriana as the governing law of the PSA demonstrates an intention to exclude the CISG from applying to the PSA.

B. The inclusion of certain terms in the PSA is inconsistent with the application of the CISG

187. The Parties have negotiated and included certain terms in the PSA which are inconsistent with the CISG. In doing so, the Parties "*have managed to achieve the exclusion of the Convention and also to determine the applicable law*" [*Borisova*, p. 42], evincing a mutual intention, or, at the very least, CLAIMANT's knowledge and acceptance of RESPONDENT's intention, for the PSA to be governed solely by Equatoriana's domestic contract law. This is for *four* reasons.

188. *First*, the Parties included a term in Art. 28(2) of the PSA to exclude the right to "*terminate the [PSA] for convenience*". This right derives solely from Equatorianian contract law — namely, Art. 7.3.8 of the Equatorianian Civil Code, which provides that "*governmental entities may always terminate contracts which have been concluded in the pursuance of a particular strategy*" [*PO1*, ¶III(4); *PO2*, ¶33]. If the Parties had intended for the CISG to govern the PSA, such a term would have been entirely superfluous, as no such termination right exists under the CISG and thus there would be no need for the Parties to bargain for a term excluding this termination right. And yet, the Parties did just that: CLAIMANT pushed for the inclusion of Art. 28(2), going so far as to accept a further EUR 15,000,000 price reduction for a project that it was already undertaking at cost [*Ex. C5*, ¶10; *RfA*, ¶13].

189. *Secondly*, this is reinforced by Art. 28(1) of the PSA, which expressly allows the Parties to terminate

in cases of "*serious and fundamental non-performance*". Had the Parties intended for the CISG to govern the PSA, this provision would be redundant, as the CISG allows a party to terminate a contract where the other party's "*failure … to perform [an obligation] amounts to a fundamental breach of contract*" (emphasis added) [*CISG*, Arts. 49(1)(a), 64(1)(a)]. The decision to include an equivalent ground for termination in the PSA reflects a mutual understanding that the CISG was not to apply, which in turn necessitated the inclusion of terms addressing matters otherwise covered by the CISG.

190. *Thirdly*, the Public Procurement Law governed all aspects of "*the bidding process and the award of the PSA*" [*RfQ*, Art. 8; *PO2*, ¶37], and the PSA was to be interpreted "*in light of the Request for Quotation*" [*PSA*, Art. 31]. A potential further inconsistency arises here as the Public Procurement Law has certain provisions covering matters of contractual formation which may otherwise be governed by the CISG (such as Arts. 14 and 15 of the CISG) [*Inter Rao*, ¶250].

191. *Fourthly*, the use of standard form contracts is, more generally, capable of excluding the application of the CISG where the form has been "*profoundly influenced by the rules and the concepts of a specific legal system … and their use tends at the same time to exclude the application of the CISG as a whole*" [*Ferrari I*, p. 172; *Bonell*, pp. 56–7; *Huber*, p. 426]. Here, the Model Contract is clearly "*influenced*" by Equatorianian law, given its inclusion of terms unique to the Equatorianian legal system (see paragraphs 188 and 190 above) and its reformulation to "*strengthen the role of Equatorianian law*" [*Ex. R1*, ¶7; *PO2*, ¶10]. Further, rather than regulating specific elements of the Parties' relationship [cf. *Enderlein/Maskow*, p. 49; *Achilles*, p. 26], its terms are comprehensive, appearing to encompass all the Parties' foundational rights and liabilities.

192. Consequently, by including such terms in the PSA, the Parties evinced an intention to exclude the CISG from applying to the PSA.

C. The Parties' use of the updated Model Contract indicates their intention for domestic law to govern the PSA

193. As part of the Equatorianian National Party's (**ENP**) desire to "*strengthen the role of Equatorianian Law and Equatoriana as a place of dispute resolution*", the Model Contract was amended by the Ministry of Justice, resulting in a rewriting of the governing law provision [*PO2*, ¶10; *Ex. R1*, ¶7]. Whereas the earlier provision provided that "*[t]he Agreement is governed by the CISG. For all issues not regulated by the CISG, the law of Equatoriana shall apply*" [*PO2*, ¶10], it now states that "*[t]he Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles*" [*PSA*, Art. 29].

194. The implications of this drastic rewording are clear. For all contracts based on the Model Contract, the CISG was no longer intended to apply. Indeed, CLAIMANT knew, or a reasonable person in CLAIMANT's position would have known, that, in adopting the Model Contract, RESPONDENT intended to exclude the CISG's application [*CISG*, Arts. 8(1)–(2)]. This is for *five* reasons.

195. *First*, contrary to CLAIMANT's submission, CLAIMANT should be taken to have read and considered the terms of the PSA [cf. *MfC*, ¶¶116, 122]. CLAIMANT is a sophisticated commercial party involved in a transaction worth, at minimum, EUR 285,000,000. CLAIMANT cannot credibly assert that the mere similarity in the nomenclature used to designate the two Model Contracts [*MfC*, ¶116], or the "*slight changes in wording*" [*MfC*, ¶122], absolved it of the responsibility to review its terms in detail. Furthermore, CLAIMANT argues that a "*reasonable business person in the same type of business*" would not appreciate the change in wording to the Model Contract as "*CLAIMANT's business is not concerned with the intricacies of PIL*" [*MfC*, ¶122]. This is plainly incorrect. As CLAIMANT has itself explained [*RfA*, ¶8; *Ex. C5*, ¶8; *PO2*, ¶2], its business obviously involves entering into international sales contracts, which necessarily entails consideration of a contract's governing law. Indeed, CLAIMANT expressly identified "*choice of law*" as an area of interest for future discussion [*Ex. R1,* ¶11], which demonstrates CLAIMANT's proactive engagement with this subject.

196. *Secondly*, given CLAIMANT's familiarity with the earlier iteration of the Model Contract, having utilised it in two prior dealings with Equatorianian government entities [*Ex. R1*, ¶11; *PO2*, ¶2], a reasonable person in its position would have noted and inquired into any changes. Given the centrality of the CISG to the previous Model Contract, coupled with Mr. Cavendish's understanding that the CISG was the "*gold standard*" [*Ex. R1*, ¶11], the omission of such a crucial phrase as "*[t]he Agreement is governed by the CISG*" [*PO2*, ¶10] would have been immediately apparent.

197. *Thirdly*, the previous iteration of the Model Contract explicitly provided that any agreement would be "*governed by the CISG [and for] all issues not regulated by the CISG, the law of Equatoriana shall apply*" [*PO2*, ¶20]. This formula conceived of the "*CISG*" and the "*law of Equatoriana*" as mutually exclusive legal regimes. Thus, the "*law of Equatoriana*", when used in the Model Contract, can only be understood to refer to domestic law, exclusive of the CISG. As CLAIMANT was aware of the change of wording to the choice of law clause, CLAIMANT, or a reasonable person in its position, must have appreciated that the CISG was no longer intended to apply.

198. *Fourthly*, contrary to CLAIMANT's submission, RESPONDENT did not "*hide its intent to exclude the CISG*" [cf. *MfC*, ¶117]. The reason for the alteration to the Model Contract was not concealed. Rather, it emerged as part of a widely publicised political campaign by the ENP, during which it issued an official press release on the amended Model Contract [*Ex. R1*, ¶7]. This announcement "*explicitly mentioned that changes were made to the forum selection clause and the choice of law clause to strengthen the role of Equatorianian law*" (emphasis added) [*PO2*, ¶10]. Given CLAIMANT's ongoing dealings with Equatorianian state-owned entities using the Model Contract [*PO2*, ¶2], a reasonable person in its position would have understood the alteration not to be merely a superficial change.

199. Further, Ms. Ritter was transparent in negotiating the PSA, in that she was willing to address any

"*changes … requested by [CLAIMANT]*", including any confusion regarding the "*templates used*" [*Ex. R1*, ¶7; cf. *MfC*, ¶117]. RESPONDENT was under no obligation to guide CLAIMANT to the proper interpretation of Art. 29, particularly where CLAIMANT had expressed no difficulty with the clause's meaning. RESPONDENT's choice not to proactively raise this issue was based on legitimate political considerations and a desire to avoid jeopardising the project [*Ex. R1*, ¶7].

200. *Fifthly*, CLAIMANT cannot avoid this interpretation by pleading that all material employees, being Messrs. Cavendish, Deiman and Law, and Ms. Smith, were ignorant of RESPONDENT's clear intention to exclude the CISG [cf. *MfC*, ¶¶117, 120–1, 123].

201. As regards Mr. Cavendish, his awareness or otherwise of the change to the choice of law clause is irrelevant. He openly disclaimed his involvement in the negotiations regarding the applicable law when he "*agreed that the issue should be left to the lawyers for discussion*" [*Ex. R1*, ¶11]. In any event, Mr. Cavendish was made aware of the need to examine the choice of law clause in the PSA — a point which he raised in negotiations with Ms. Ritter [*Ex. R1*, ¶11; *PO2*, ¶11].

202. As regards Mr. Deiman, he was CLAIMANT's key negotiator not only for the PSA but also for both previous transactions with Equatorianian government entities [*PO2*, ¶2]. Thus, he should have reasonably discerned the omission of a phrase that materially altered the governing law framework. CLAIMANT's assertion that "*Mr. Deiman thought that the applicable law is the CISG*" has no basis in the witness statement of Ms. Ritter upon which it relies [cf. *MfC*, ¶117; *Ex. R1*, ¶7].

203. As regards Mr. Law, CLAIMANT's previous Head of Legal [*PO2*, ¶2], he in fact noticed the change to the Model Contract, bringing the "*issue of the applicable law*" to the attention of Mr. Cavendish [*Ex. R1*, ¶11; *PO2*, ¶11; cf. *MfC*, ¶121]. As CLAIMANT has argued, "*the knowledge of persons acting on behalf of the contracting parties is imputable to the parties*" [*MfC*, ¶118]. On this basis, Mr. Law's knowledge should be imputed to CLAIMANT, and it was not deprived of that knowledge by terminating Mr. Law's employment.

204. As regards Ms. Smith, CLAIMANT's chief legal advisor throughout the negotiations, she directly interpreted the governing law clause in the Model Contract to refer solely to "*the non-harmonised law of Equatoriana*" [*PO2*, ¶11]. Given that the CISG provides a uniform set of rules designed to apply across all Contracting States [*Honka*, p. 112; *De Ly*, p. 11; *Dennis*, p. 114], and is therefore not a part of "*the non-harmonised law of Equatoriana*", Ms. Smith's conclusion provides evidence of CLAIMANT's clear understanding of RESPONDENT's intention [*CISG*, Arts. 8(1), 8(3)].

205. CLAIMANT attempts to dismiss Ms. Smith's interpretation by contending that the "*Tribunal should not consider*" her admission, due to her "*lack of awareness about the applicability of the CISG*" [*MfC*, ¶120]. However, this is at odds with Ms. Smith's recognition that the CISG was a "*potentially applicable regime*" [*PO2*, ¶11]. Notwithstanding this acknowledgement, the conclusion she came to was that

Art. 29 of the PSA referred exclusively to Equatoriana's "*non-harmonised law*". Moreover, there is no basis for CLAIMANT's assumption that Ms. Smith's interpretation emerged from her "*lack of familiarity with the rules of PIL, and not from the comparison of the new and old [Model Contracts]*" [cf. *MfC*, ¶120]. The Tribunal should not allow CLAIMANT to reach a favourable answer through speculation.

206. Therefore, RESPONDENT intended to exclude the CISG, and CLAIMANT, or a reasonable person in its position, was aware of this intention and contracted with RESPONDENT on that basis.

CONCLUSION

207. The CISG was impliedly excluded by the Parties. Article 6 of the CISG contemplates the possibility for an implied exclusion and, here, the Parties' conduct demonstrates a clear mutual intention that the CISG would not govern the PSA.

REQUEST FOR RELIEF

208. For the reasons stated above, RESPONDENT requests that the Tribunal declare that it does not have jurisdiction, and, further or in the alternative, that CLAIMANT's claim is inadmissible.

209. Alternatively, RESPONDENT requests that the Tribunal:

(1) order that Exhibit C7 be excluded from evidence;

(2) decline to exclude Exhibit R3 from evidence;

(3) declare that the PSA is not governed by the CISG, and, further or in the alternative, that the Parties have excluded the application of the CISG to the PSA;

(4) order any other relief as it deems fit; and

(5) order that CLAIMANT bear the costs of the arbitration.

210. RESPONDENT reserves its submissions on the balance of any issues to be decided by the Tribunal.

CERTIFICATE OF VERIFICATION

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

Respectfully submitted,

Sydney, 30 January 2025

Noam Antonir

John Mentzines

Alice Shan

Peter Taurian

APPENDIX 3

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: University of Sydney

COUNTRY: Australia

ACADEMIC INTEGRITY	YES	UNSURE	NO
We 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.	X		

USE OF AI			
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):			X

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