THIRTIETH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF INNSBRUCK

Ref.: PCA CASE NO. 2022-76

ON BEHALF OF:	AGAINST:
Equatoriana Geoscience Ltd. 1907 Calvo Rd Oceanside Equatoriana	Drone Eye plc. 1899 Peace Avenue Capital City Mediterraneo
RESPONDENT	CLAIMANT

LISA PICHLER | SAIBYA SCHROFFENEGGER
MAXIMILIAN PFLUGER | MORITZ MARTIN

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INDEX OF ABBREVIATIONS

Art	Article
ASA	Aviation Safety Act
CISG	UN Convention on Contracts for the International Sale of Goods 1980
CLAIMANT	Drone Eye plc
COO	Chief Operating Officer
DCFR	Draft Common Frame of Reference (DCFR)
dZPO	German Code of Civil Procedure
et seq.	et sequentes
European Convention	European Convention on International Commercial Arbitration 1961
EWCA	England and Wales Court of Appeal
Exh	Exhibit
FL-ZPO	Principality of Lichtenstein's Code of Civil Procedure
HE2020	Hawk Eye 2020 drone
ICC	International Chamber of Commerce
ICCA	Equatorianian International Commercial Contract Act
ICSID	International Court for Settlement of Investment Disputes
KE2010	Kestrel Eye 2010
L.J.	Lord and Lady Justice
Ltd.	Limitted
MfC	Memorandum for CLAIMANT
MoNRaD	Minister of Natural Resources and Development
Mr	Mister
Mrs	Mistress
MüKoBGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKoHGB	Münchener Kommentar zum Handelsgesetzbuch
NJW	Neue Juristische Wochenschrift
No	Number
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
NYC	New York Convention

öZPO	Republic of Austrian's Code of Civil Procedure
p	page
para	paragraph
para, paras	paragraph(s) within this Memorandum
PCA	Permanent Court of Arbitration Rules 2012
plc.	Public limited company
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
pp	per procura
PSA	Purchase and Supply Agreement
RESPONDENT	Equatoriana Geoscience Ltd.
RNoA	Response to the Notice of Arbitration
SOE	State Owned Entities
UAS	Unmanned Aerial Systems
UK	United Kingdom
UN Convention	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration 2006
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016
v	versus

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STATEMENT OF FACTS

1. The parties to these arbitral proceedings are Equatoriana Geoscience Ltd. ("**RESPONDENT**") and Drone Eye plc. ("**CLAIMANT**"). RESPONDENT is a private entity from Equatoriana whose mission it is to explore the country's rural northern provinces for mineral resources with drones as part of the Northern Part Development Program ("**NPDP**"). CLAIMANT is a producer of Unmanned Aerial Systems ("**UAS**") based in Mediterraneo.
2. In March 2020, RESPONDENT launched a public Call for Tender [Exh C1] with clearly defined characteristics and purpose of the drones to be purchased. RESPONDENT conducted fruitful negotiations with CLAIMANT [Exh C1] which led to the conclusion of the Purchase and Supply Agreement ("**PSA**") in December 2020 by representatives of both parties and the former Minister of Natural Resources and Development ("**MoNRaD**"). The parliamentary debate to approve the arbitration agreement in the PSA was scheduled for November 2020 but never took place. CLAIMANT was aware that the proposal had been withdrawn because of illness in Parliament [Exh R4].
3. REPONDENT avoided the PSA and notified CLAIMANT by email of 27 December 2021. The reasons to declare the agreement void were corruption and CLAIMANT's engagement in serious fraudulent misrepresentation of the quality of the Kestrel Eye 2010 ("**KE2010**").
4. The criminal investigations concerning the alleged corruption of Mr Field are conducted by the well-respected public prosecutor Ms Fonseca [PO2 para 44], who anticipates their termination by end of the year 2023 [Exh R2]. Convictions are expected mid-2024. [Exh R2].
5. The Call for Tenders stated that the drones had to be "state of the art" [Exh C1]. In addition, the PSA specified that the drones had to be of the newest model [Exh C2]. So, RESPONDENT had made it sufficiently clear that they wanted the latest technology. CLAIMANT was aware of REPONDENT's expectations. [Exh C1, Exh C2]
6. CLAIMANT misrepresented the KE2010 by providing false information and by failing to disclose the newer Hawk Eye 2020 ("**HE2020**"), which was launched two months after the PSA was concluded [Exh R2].

SUMMARY OF ARGUMENTS

ISSUE ONE: THE TRIBUNAL DOES NOT HAVE JURISDICTION

8. Jurisdiction on this dispute cannot be assumed because the arbitration agreement lacks essential formal requirements preventing its validity. The law of Equatoriana has been chosen by the parties both explicitly and implicitly, hence, the arbitration agreement must be approved by the Parliament of Equatoriana to become formally valid. CLAIMANT knew at all times that this consent was absent and was not given through silence and reliance.

ISSUE TWO*: THE PSA IS GOVERNED BY NATIONAL LAW AND NOT BY THE CISG*

9. The PSA constitutes a valid sales contract concluded between the parties and subject to national law due to the Art 2 (e) CISG exclusion. The KE2010 drone has a permanent transport capability, qualifies as an aircraft, is owned and operated by RESPONDENT, a private entity, thus requires registration. The parties have concluded a valid choice of law clause in Art 20 (d) PSA for Equatorianian law, but the CISG, though part of this legal system, is not applicable.

ISSUE THREE: RESPONDENT CAN RELY ON ART 3.2.5 OF THE INTERNATIONAL COMMERCIAL CONTRACT ACT OF EQUATORIANA

10. The CISG does not provide remedies for fraudulent misrepresentation and CLAIMANT's failure to disclose the impending presentation of the HE2020 is causal to RESPONDENT concluding the PSA. The actions hence meet the requirements to invoke the national Art 3.2.5 ICCA to avoid the contract.

ISSUE FOUR: THE CONCLUSION OF THE ARBITRATION AGREEMENT WAS TAINTED BY CORRUPTION

11. The conclusion of the PSA and the arbitration agreement only came about as a result of a deep-seated corruption scandal as evidenced by accompanying circumstances in the course of contract negotiations. CLAIMANT attempts to downplay though fails to recognize how serious the evidence is. Hence, jurisdiction is prevented by substantial and large-scale corruption.

ISSUE FIVE: STAY AND BIFURCATION WOULD NOT IMPAIR THE PROCEEDINGS

12. If the tribunal assumes jurisdiction, the proceedings must be stayed, to ensure cost and time efficiency by reducing the risk of contradictory adjudication. The proceedings would benefit from consideration of Ms Fonseca's investigative results. If the request to stay is denied, the proceedings must subsidiarily be bifurcated, to observe the findings in the criminal investigation, albeit adjudicating the remaining issues.

ISSUE ONE: The Tribunal lacks jurisdiction.

14. The tribunal shall have no jurisdiction. The parties have made a choice of law in the PSA. It is clear from this that the parties have chosen the law of Equatoriana as the law applicable to the arbitration agreement. In addition, there is an implied choice of Ecuadorian law. Due to the approval of the national parliament required under Ecuadorian law for an arbitration agreement, the formal validity is also linked to this approval. However, an approval for the arbitration agreement contained in Art 20 PSA was never given, which is why it never came into legal existence.

1. The arbitration agreement is governed by the law of Equatoriana

15. The parties' consensus was that "the Agreement is governed by the law of Equatoriana" [Exh C2, Article 20]. This choice of law persisted despite other amendments of the agreement. The wording regarding the choice of law was, however, never changed. [NoA para 16; Exh C9]. The parties have therefore included a general choice of law clause in the PSA. Such a clause usually not only determines the law applicable to the contract itself, but also sets the standard for the associated arbitration agreement [*Born* 2021, p 526]. This extension to the arbitration agreement can either be express or implicit [*Born* 2021, p 554], and is not unusual, as more than 80% of international commercial contracts have a general choice of law clause [*Born* 2021, p 554].

16. The law chosen in the choice of law clause applies to the arbitration clause notwithstanding the doctrine of separability. The independence of the arbitration clause from the main contract, as developed in the doctrine of separability, generally implies that the contract and the arbitration agreement are separate from one another. However, this does not mean that the arbitration agreement and the contract are to be considered completely separate from each other. It cannot be inferred from the doctrine of separability that the law of the arbitration agreement must be assessed independently of the law of the contract [*Plavec* 2020, p 101]. This is a mere possibility but by no means mandatory in all circumstances [*Plavec* 2020, p 101]. The arbitration laws incorporating the doctrine of severability treat the arbitration agreement as separate only in the context of its existence or validity [*Glick/Venkatesan* 2018, p 137]. The relationships that exist between the two, notwithstanding the separation, must still be taken into account. This relation is particularly evident from the fact that the acceptance of the contract implies the acceptance of the clause without further formalities [*Blackaby* 2015, p 162]. Also, in a judgment delivered by Flaux, L.J., (with whom Sir Bernard Rix and McCombe, L.J., concurred) much attention was paid to the wording in the choice of law clause in the contract

[*EWCA,* Kabab-Ji v Kout Food, para 45]. In *Kabab-Ji v Kout Food* it was agreed on, that *"this Agreement shall be governed by English Law"* and the same phrase was used to define in the main contract to include all terms of agreement. The deciding court acknowledge that in such a case the governing law clause should be properly construed as an express choice of law for all provisions of the agreement including the arbitration clause [*EWCA,* Kabab-Ji v Kout Food, para 45,68]. In the case at hand, the parties agreed on an almost identical choice of law clause as in *Kabab-Ji v Kout Food*. Therefore, it seems only logical that in the case at hand the expressly chosen law of the PSA is also transferred to the arbitration agreement. Furthermore, due to the connection between the PSA and the arbitration agreement and the acceptance of the arbitration agreement with the conclusion of the PSA the arbitration agreement at hand is governed by the law of Equatoriana.

17. If the tribunal does not follow this approach, the law applicable to the arbitration agreement must be adjudicated using a three-stage inquiry: First, it has to be determined whether there is an express choice, second, whether there is an implicit choice, and third - in the absence of both an express and implicit choice, the closest and most real connection is decisive [*UK Royal Courts of Justice*, Sulamerica v Enesa, para 25].

18. An express choice of law is given in the case at hand. It derives from Art 20 (d) of the PSA. In consideration of the wording of this contract provision it can be said without doubt that the arbitration agreement is governed by the law of Equatoriana. This is clear from the fact that the choice of law clause is headed "*Dispute Resolution and Applicable Law*", and that "*Any dispute, controversy...*" is a broad statement that does not indicate any exception of the applicable law to the arbitration agreement [Exh C2, Article 20]. The clause was, thus, deliberately drafted in a way to linguistically encompasses the arbitration clause [*Born* 2021, p 554].

19. Even if the tribunal finds that there is no express choice of law, there is at least an implied choice of the law governing the arbitration agreement. This view is supported by various authorities who – even if employing different strands of reasoning - reach the same conclusion and argue that "general choice of law clauses" extend the law chosen for the main contract to the arbitration clause. The Tokyo District Court held that if a specific law was chosen for the underlying contract, the law relevant for determining the validity of the arbitration agreement was the same law as for the underlying contract [*Tokyo District Court*, Hanrei Jiho, p 89]. In the same sense also the German Supreme Court held, that the parties typically intend to subject arbitration clauses to the same law as the main contract [*German Supreme Court*, peanut oil case, p 6]. Therefore, where the substantive contract contains an express choice of law, but the arbitration agreement contains no separate choice of law, the arbitration agreement is governed

by the law expressively chosen to govern the substantive contract [*England and Wales High Court*, Sonatrach v Ferrell, p 9].

20. Considering the aforementioned cases and the three-stage theory of determining the applicable law (para 17), the following conclusion can be drawn as eloquently articulated by Lord Justice Burrows: *"As the parties have impliedly chosen [one] law for the main contract it is natural, rational and realistic to regard that choice for the main contract as encompassing, or carrying across to, the arbitration agreement. That implied choice is simply the correct objective interpretation of the parties' main contract and arbitration agreement."* [*UK Supreme Court*, Enka v Chubb, p 228]. Since in the present case, as explained above (*para* 18), the agreement contains an express choice of law, Lord Burrows' statement must be taken into account and regarded as even more applicable. The express choice of law in conjunction with the implied choice clearly established the law chosen by the parties and therefore the arbitration agreement is governed by the law of Equatoriana.

21. Looking at the facts of the case at hand, an explicit choice of the law applicable to the arbitration agreement was made. Furthermore, if that is denied, an implied choice can be established [Exh C2, Article 20]. The law applicable to the PSA, therefore the whole contract, is the law of Equatoriana [Exh C2, Article 20]. The heading of Art 20 being "applicable law" strongly suggests a choice of law intended to cover the entire agreement, supporting the extension of the proper law of the contract – Equatorianian law – also to the arbitration agreement. Based on the factual situation, it is equally natural, realistic and in regard to the law applicable to the main contract coherent as in *Enka v Chubb* also the arbitration agreement governed by the law applicable to the contract, that is the law of Equatoriana.

1.1. The parties intended to apply the law of Equatoriana to the arbitration agreement

22. Extending the analysis just carried out (*paras* 19 - 21), the actual intention of the parties must be considered even more. This results from Art V (1) (a) NYC, which permits a non-recognition of an arbitral award only if the parties' agreement to arbitrate is invalid "*under the law to which the parties have subjected it or failing any indication, under the law of the country where the award was made*" [*Born*[2] 2016, p 59]. This indicates a strong acceptance of the parties' autonomy to choose the governing law. It also clearly shows the subsidiarity of the seat of arbitration.

23. The applicable law was already determined by the parties through the express choice of law. The following elaborations on the actual intention of the parties, which the implied choice of law is based on also come to the conclusion that the expressively chosen law is applicable. The

intention of the parties mirrors the actual will of both assessing the second stage of the three-stage approach formulated in *Sulamerica v Enesa* (*para* 17), this intention is the basis for the implied choice of law (*para* 19). The starting point of the three-stage inquiry embraces the proper law to the main contract as the baseline to the second stage - the implied choice - to give effect to the actual intention of the parties [*Singapore High Court*, BNA v BNB, para 89]. In *Arsnova v Cruz* the court decided that it had to consider whether the parties had impliedly, if not expressly, chosen an applicable law before considering which system of law had the closest and most real connection [*Queen's Bench Division*, Arsnova v Cruz, p 2].

24. An implied choice of law is presumed to reflect the actual intention of the parties by means of a process of construction that critically gives the words of the arbitration agreement their natural meaning, unless sufficient contrary circumstantial evidence is taken into account to displace that reading [*Chang/Yang* 2020, p 643]. Based on the above-mentioned heading (*para 18*) and the wording of the arbitration agreement itself, one must conclude that the intention of the parties was to subject the arbitration agreement to the law of Equatoriana. This interpretation is reinforced by the amendment to the PSA introduced by agreement of both parties to *"... solve the remaining outstanding issues"* [Exh C2, Article 20]. This proves that neither party perceived the choice of law clause as problematic. Therefore, both parties intended the arbitration agreement to be governed by Equatorianian law, whereas CLAIMANT's argument to give unobstructed effect to the arbitration agreement and rely on the validation principle would result in the tribunal overruling the parties' original intention [MfC, para 7]. This approach would be contrary to the consent of the parties and thus also to a fundamental principle of international arbitration, namely the doctrine of party autonomy [*Moses* 2017, p 2; *Blackaby* 2015, p 174].

1.2. The arbitration agreement is not valid under the applicable national constitution of Equatoriana

25. Under the Equatoriana National Constitution, state and state-owned entities can only submit to arbitration regarding administrative contracts if authorized by parliament [RNoA, para 21]. RESPONDENT is a private entity with the legal form of a Limited (Ltd.) [RNoA, para 3; NoA, para 2]. In addition, RESPONDENT is also managed like a private entity [PO2, para 5]. For a more detailed discussion on the qualification as a private company view (para 48. CLAIMANT was well aware of the fact, that RESPONDENT is a private state-owned entity because otherwise they would not base their arguments on that [NoA, para 2; MfC, para 14]. The PSA is an "*administrative contract*" under Equatorianian qualification because it concerns public infrastructure as recognized by Mrs Porter, an educated jurist and member of CLAIMANT's legal department [Exh C7, para 6] and further indicated by its inclusion in the parliamentary

discussion on Mr Barbosda's initiative as MoNRaD [PO2, para 29]. With the applicability of the law of Equatoriana (*para* 21), the national constitution of Equatoriana must also be taken into consideration, which makes parliament's approval indispensable for the arbitration agreement's validity.

26. CLAIMANT is trying to cover up the fact that they submitted to Equatorianian law in the arbitration agreement [Exh C2, Article 20; Exh C9]. They entered into the arbitration agreement knowing that it would require parliamentary approval, otherwise Mrs Porter would not have informed Mr Bluntschli about this requirement [Exh C7, para 6-8; Exh R4]. CLAIMANT tries to maintain the validity of Art 20 arguing for sovereign immunity. However, this is not a tenable position. Sovereign immunity can only be invoked by a state against another state's national court adjudication and enforcement jurisdiction [*Immunity* 2022, para 1]. RESPONDENT, however, is not a state but a private entity. Therefore, RESPONDENT could not invoke sovereign immunity even if they attempted so. CLAIMANT himself states broadly that RESPONDENT is independent of the executive organs of the state and must therefore be judged separately from them [MfC, para 11]. However, they then try to base their reasoning on a state's sovereign prerogative unavailable to private entities. This is inconclusive and simply wrong. RESPONDENT never put forth suchlike arguments, ergo, how CLAIMANT reached this line of thought is largely inconclusive. RESPONDENT recognizes its status as a state-owned yet private entity [NoA, para 2] and never attempted to nor did it rely on sovereign immunity. Despite the differentiation not being as stringent and clear in many common law countries, RESPONDENT's legal form as a Limited Company (Ltd.) refutes CLAIMANT's preemptive and misplaced arguments in itself [MfC, para 10].

27. Taking this into account, it seems all the more amusing that CLAIMANT invokes the principle of *pacta sunt servanda:* "*having promised to submit disputes to arbitration, a signatory to an arbitration clause must honour its agreement*" [MfC, para 13] and now, due to its own misconduct, i.e. failing to obtain parliamentary approval, does not want to abide by the agreed regulations and to bear the unfavorable consequences in their sphere resulting from this.

28. In summary, the arbitration agreement is invalid because it lacks the required parliamentary approval under the applicable Equatorianian national constitution. The parliamentary approval would have been necessary. Consequently, the invalidity under Art V (1)(a) NYC and the European Convention on Art VI (2) [*Born* 2021, p 766] applies. In examining the validity of an arbitration agreement, the courts shall be mindful of the capacity of each party under the law applicable to them [*Born* 2021, p 766-767; *Barcelona Audiencia Provincial*, Licensing Projects SL v Porelli & C. SpA]. The European Convention can be appreciated as persuasive for this

question, because the New York Convention's notion of "lack of capacity" itself was modeled after Art 2 (1)(b) of the European Convention [*Born* 2021, p 766-767] The same applies under Arts 34 and 36 of the UNCITRAL ML, according to which arbitral awards are not recognized if the award arises from an arbitration agreement made by a party that was "under some incapacity" [*Born* 2021, p 767]. The European Convention states that an arbitration agreement need only be given effect when the parties possessed capacity to do so [*Born* 2021, p 767].

2. The arbitration agreement is formally not valid

29. The signature of the MoNRaD is required for the valid conclusion of the contract [PO2 para 37]. Furthermore, the parliamentary approval is a prerequisite for the valid conclusion of the arbitration agreement.

2.1 Under the Equatorian Constitution SOEs can only submit to foreign seated arbitration if there has been Parliamentary approval

30. The law of Equatoriana is applicable (*para* 21), thus Art 75 of the Equatorianian Constitution is pertinent. Since the approval of the parliament was never given, the arbitration agreement is invalid. The applicability of the Equatorianian law and national constitution to the arbitration clause mean that the requirements contained therein also provide a basis for the formal validity of the arbitration clause [NoA para 16]. Since the parliament must ratify, if the other party is foreign or the seat of arbitration is abroad, the approval is a formal requirement for the arbitration agreement to become valid.

31. Since the parties have not entered into a valid arbitration agreement due to the lack of consent, there is no point in obtaining an award. The award could be set aside under Art 34 (2) (a) (i), as applicable arbitration legislation [*Born*[2] 2016, p 320]. This reason for setting aside the contract is also found in other arbitration statutes, for example U.S. FAA, 9 U.S.C. Art 10 (a) (4) or the Belgian Judicial Code Art 1717 (3) (a) (i), where an arbitration agreement is not valid under the law the parties have subjected it to.

2.2. CLAIMANT cannot rely on the principle of estoppel

32. CLAIMANT alleges that RESPONDENT is estopped from denying the validity and existence of the arbitration agreement [MfC, para 23]. The doctrine of estoppel serves to preclude a party from enjoying rights and benefits under a contract while at the same time avoiding its burden and obligations [*Moses* 2017, p 40]. The concept underlying the principle of estoppel arises from the common law desire to prevent an unjust departure by a party from an assumption adopted by another as the basis of some act or omission which otherwise would operate to that party's detriment [*Amco v Indonesia*, para 47]. An "estoppel" therefore results from the fact,

that one of the parties acknowledges a fact by words or conduct. The party is thereby prevented (or "estopped") from asserting that the contrary position was true in law or in fact [*Gavin/Charis* 2023, para 6].

33. The principle of estoppel therefore could be characterized as a legal response to inconsistent behavior, but not a basis to create rights out of thin air [*ICSID*, Vestey v Venezuela, para 258]. Since the Equatorian Constitution leaves no scope for entering into arbitration agreements for state owned entities (*"can only submit to foreign seated... if there has been authorization by the parliament")* [RoNA, para 21], the remedy of estoppel cannot be applied [*ICSID,* Vestey v Venezuela, para 257 -259]. Thus, based on this principle, no rights can arise from the arbitration agreement [*ICSID,* Vestey v Venezuela, para 259]. Therefore, CLAIMANT's argument that RESPONDENT is estopped from rejecting the validity of Art 20 is legally baseless and does not warrant further consideration [MfC, para 23].

2.2.1. CLAIMANT is unable to invoke good faith

34. Based on the doctrine of estoppel, CLAIMANT submits that RESPONDENT cannot challenge Art 20 on the principle of good faith [MfC, para 25]. It is correct in principle, that estoppel is based on the principle of good faith [MfC, para 23,25], but CLAIMANT fails to recognize that the interaction of these two principles presumes an action in bad faith of the party whom estoppel is claimed against [*ICSID*, Sia v Egypt, para 482]. Per contra, RESPONDENT did not act in bad faith at any point in time of the contract negotiation or formation.

35. CLAIMANT seems to throw around not only spaghetti [MfC, para 40] but also unfounded arguments of general principles [MfC, para 25-26]. Since it is CLAIMANT who alleges bad faith, the burden of proof lies with them [*Weber/Martinez* 2020, p 115]. Howbeit, they fail to bring forth any forceful evidence that would prove a malicious act by RESPONDENT. Instead, attempting to justify their arguments, CLAIMANT invokes three principles that all are based essentially on the same theoretical construct [MfC, para 25-26]. CLAIMANT knew from the beginning that it needed parliamentary approval for the arbitration agreement to be formally valid [Exh C7, para 7]. Yet they relied solely on their own, specifically Mr Bluntschli's assessment of the lack of parliamentary approval being non-problematic and a mere formality. [PO2, para 29; Exh C7, para 9]. A clear statement by RESPONDENT, to assert these sentiments of indicating the same laissez-faire attitude of non-importance is noticeably absent. After the parliamentary debate was cancelled CLAIMANT did not follow up on the fate of the ratification despite the information even internally being passed on by Mr Bluntschli that the approval was missing. [PO2, para 29]. Hence, it is evident and was clear for both parties as well as members

of parliament that approval was never given [Exh C7, para 12]. Consent to the arbitration agreement through the following discussion on the presentation of the HE2020 can be ruled out, as this refers exclusively to the contractual level of the merits and not to the arbitration agreement [Exh C7, para 13].

36. CLAIMANT contends that by amending the arbitration agreement the parties implicitly reiterated to arbitrate, yet the formal deficiency persists either way. [Exh C7, para 13] It cannot be assumed that RESPONDENT's behavior, either before or following the amendment, could justify CLAIMANT's reliance on the arbitration agreement against its own objective knowledge. Furthermore, major changes to the arbitration agreement would require a separate approval by parliament [PO2, para 36]. Considering that the amendments introduced to the arbitration agreement are far from insignificant, a second approval by the parliament would have been necessary. Thus, CLAIMANT can neither rely on good faith to validate the arbitration agreement nor is silent, subsequent approval of the Art 20 arbitration agreement through failure to act or voice disapproval [MfC, para 30], as clear opposite to the express ratification following parliamentary debate, possible.

37. Withal, CLAIMANT 's illustration as if RESPONDENT were solely responsible to ensure the conclusion of a valid arbitration agreement is untenable. It is evident from CLAIMANT's submissions that they knew all along that parliamentary approval was missing. Therefore, to rely on a formal deficiency being remedied by independently is certainly not up to the standard of professional diligence, especially not for a contract with such a large financial volume.

38. CLAIMANT also knew that an express approval must be based on a formal vote and the MoNRaD himself lacks the authority to replace such an approval [PO2, para 34]. The mere fact that approval was once given retroactively in another case is not sufficient for CLAIMANT to expect on such retroactive ramification [PO2, para 34]. The exceptional circumstances in this other particular case were due to power outage just before the intended signature and thus after the parliament had deliberated and assumingly reached a consensus in that entirely non-controversial matter [PO2, para 30]. Parliament cannot approve the arbitration agreement through inaction and reliance, as CLAIMANT alleges [MfC, para 29]. Regarding CLAIMANT's literature source, it must be highlighted that it addresses the UAE civil transaction code [*Badr* 2019, p 207] and obviously not applicable in the case at hand. However, if the argumentation of CLAIMANT is pursued, it can be asserted, that the objecting parties' knowledge of material facts, including the arbitration agreement, must be taken into account when assessing the will and intention of the parties [*Badr* 2019, p 208]. Since CLAIMANT

knew that it needed parliamentary approval through a formal vote, this must be included in the assessment.

39. The argument of the government of Equatoriana violating its proper laws does not carry weight, because it is not the perogative of parliament to vote and approve on a private company's arbitration clause on its own initiative, without a request from the parties [MfC, para 30] in their quest to comply with Art 75 of the constitution.

3. Conclusion of Issue one

40. The Tribunal has no jurisdiction. The parties have clearly declared the law of Equatoriana to be applicable to the arbitration agreement. Therefore, the consent of the National Parliament of Equatoriana to the arbitration agreement is mandated, yet absent in the present case on cannot be remedied or obtained on the basis of legal constructs such as good faith or consent by silence. Since the approval of parliament is a formal prerequisite for the valid conclusion of the arbitration agreement, one must deny the jurisdiction due to formal defects.

ISSUE TWO: The PSA is governed by national law and not by the CISG

41. This chapter deals with two distinct issues. On the one hand, it will be discussed that even though a valid contract of sale has been concluded between the parties, the drones to be delivered fall under the exception of Art 2 (e) CISG, as they constitute "aircrafts". Therefore, Equatorianian contract law is applicable. This follows first from the Equatorianian ASA, that qualifies the KE2010 drone as an aircraft that must be registered, and second from the permanent transport capability of the drones ordered. On the other hand, CLAIMANT and RESPONDENT have clearly expressed their intention that Equatorianian law shall apply by concluding the choice of law clause in Art 20 (d) of the PSA [Exh C2], the CISG has not been chosen per se.

1. The PSA is governed by the ICCA as the national law of Equatoriana

42. CLAIMANT and RESPONDENT concluded a valid sales contract by the PSA. However, this contract of sale does not fall under the CISG but is subject to national law. The sale of the KE2010 drone constitutes the sale of aircraft, which is exempted by Art 2 (e) CISG [*Ferrari* in Schlechtriem/Schwenzer[7] 2019, Art 2 para 38 et seq.; *Siehr* in Honsell[2] 2010, Art 2 para 19].

1.1. Aircrafts are excluded under Art 2 (e) CISG because they must be registered under various national laws

43. Art 2 (e) CISG excludes, inter alia, contracts for the sale of aircraft from its scope of application. The reason why aircrafts are mentioned in Art 2 (e) CISG is because they are governed in many

legal systems by special regulations and because domestic law often imposes registration obligations on them [*Mankowski* in MüKoHGB[5] 2021, Art 2 para 27 et seq.; *Ferrari* in Schlechtriem/Schwenzer[7] 2019, Art 2 (e) para 38; *Lorenz* in Witz[2] 2015, paras 9 et seq.].

44. Such an exception was created because countries regulate the registration of ships and aircraft differently and this makes it difficult to find a uniform concept. [*Brunner* 2004, Art 2 para 14; *Mankowski* in MüKoHGB[5] 2021, Art 2 para 27 et seq.].

1.2. The KE2010 drone is an aircraft in the sense of the Aviation Safety Act of Equatoriana and must be registered under national law

45. According to Art 10 of the Aviation Safety Act (ASA) of Equatoriana [Exh R5], aircrafts of private entities must be registered, and further, ownership does not pass until the drone is registered.

46. CLAIMANT is of the opinion that the KE2010 drone is not an aircraft within the meaning of the ASA and therefore does not need to be registered. As CLAIMANT opines, the KE2010 drone does not appear to be intended for the carriage of persons or property within the meaning of Art 10 ASA [MfC, para 55]. But Art 1 ASA states that aircraft are vehicles designed to "move" persons or objects in the air without mechanical connection to the ground, so it does not refer to transporting or carriage. This means that the ASA covers all changes of position of objects or people. Therefore, the relocation of medicines by RESPONDENT to remote areas of Equatoria and the movement of the surveillance technique would be covered by Art 1 ASA.

1.2.1. Commercial practice transport is not an offence under Art 1 of the Aviation Safety Act

47. CLAIMANT thinks that commercial practical transport is a prerequisite to qualify aircrafts under Art 1 ASA [MfC, para 56]. However, commercial transport is never mentioned in the ASA. Therefore, CLAIMANT tries in vain to exclude the KE2010 drone from the scope of Art 1 ASA with this argument.

1.2.2. RESPONDENT is a private entity in the sense of Art 10 of the Aviation Safety Act

48. In addition, CLAIMANT thinks that the KE2010 drone is not owned and operated by a private entity in the meaning of Art 10 ASA [MfC, para 54]. This opinion does not consider that RESPONDENT is founded in the form of a private company [NoA, para 2]. The fact that it is entirely owned by the MoNRaD of Equatoriana, does not stand in the way. State-owned companies, also corporations with public rights, should be regarded as private companies if they are economically active [*German Supreme Court*, Sports broadcasting case; *German Supreme Court*, Lottery case; *Austrian Supreme Court*, Antitrust case]. Although the owner of RESPONDENT is a public institution, it acts on a private law basis by contract, and does not

carry out its entrepreneurial activities on a public law basis such as by virtue of an administrative act [*German Federal Fiscal Court*, Marketplace redevelopment case]. In addition, the legal form as Limited (Ltd.) means that it is formed as a private corporation. It can therefore be said that contrary to CLAIMANT's opinion, RESPONDENT is a private entity within the meaning of Art 10 ASA. Furthermore, CLAIMANT's statements that the company was established by the Equatorianian government and that it is supposed to consist of government officials acting in their public capacity are therefore irrelevant [MfC, para 54]. Since these members do not act under public law but under private law towards CLAIMANT in the course of the purchase of the drone.

1.2.3. Registration under national law and simultaneous application of the CISG is not possible

49. CLAIMANT contradicts itself in its memorandum by stating that even if the KE2010 drone must be registered, the CISG should still apply [MfC, para 58]. But registration is precisely a prerequisite for the drone to be an aircraft and consequently exempt from the application of the CISG. In another argument CLAIMANT also claims that only aircrafts must be registered. Nevertheless, they also claim that the KE2010 drone is not an aircraft [MfC, para 55]. If CLAIMANT now assumes that registration under Equatorianian law is necessary, then it also assumes that the KE2010 drone is an aircraft. And as already mentioned, aircrafts are excluded from Art 2 (e) CISG and therefore the scope of application of the CISG is also excluded.

1.3. The KE2010 has permanent transport function

50. Moreover, the KE2010 drone is an aircraft because it has permanent transport function [*Brunner* 2004, Art 2 para 14]. The prevailing opinion says that an aircraft should have the purpose of being able to transport goods or people [*Brunner* 2004, Art 2 para 14]. The permanent transport ability can be derived from the General Product Information of the KE2010 drones [Exh C4]. It states that the KE2010 has a maximum take-off weight of 1,100 kg and a payload capacity of 245 kg. With this take-off weight, medicine and food can be moved to remote areas of Equatoriana, which RESPONDENT intends to do [Exh R5]. Based on this fact, one cannot assume that the KE2010 does not represent an aircraft.

1.4. RESPONDENT himself can decide how he ultimately uses the KE2010 drone

51. CLAIMANT replies that this is not done by many of its customers but transporting goods with the KE2010 drones is basically possible [MfC, para 56]. CLAIMANT also counters that for transporting medicine, a cheaper drone could have been purchased, [MfC, para 56] but it is up

to RESPONDENT how it ultimately uses its purchased goods, even if this may not correspond with general use.

52. Finally, in one of his speeches, Mr Rodrigo Barbosa, MoNRaD, already talked about a drone that can carry out surveillance flights and is able to transport medicine to remote areas, for example. That is why RESPONDENT increased its order by two KE2010 drones [Exh R2]. In addition, the email from Mr Bluntschli of 29 November 2020 led RESPONDENT to believe that the KE2010 drones were suitable for its surveillance mission as well as the transport of cargo, which in the end was also the reason for the higher number of drones ordered. In fact, this email literally mentions that the KE2010 is also suitable for other purposes, in particular, to bring high value and sensitive other loads, such as medicine, to the remote areas of the northern provinces [Exh R4].

1.5. Qualifying the KE2010 drone as an aircraft in the sense of Art 2 (e) CISG is not frustrating the purpose of the CISG

53. CLAIMANT considers in its memorandum [MfC, para 61] that the sale of unmanned aerial systems is a USD 20-30 billion market and that it is expected to grow by USD 430 billion by 2030. On this basis, CLAIMANT speculates that this market will grow even further. If sellers of UAS participating in international trade can assume that they will reduce transaction costs because their contracts are subject to the uniform set of rules of the CISG. But with this argument one cannot widen the sphere of application of the CISG if that is inconsistent with its rules. As already explained in detail above, CLAIMANT can be countered that there are concrete rules in Art 2, in Art 2 (e) CISG, as to when the CISG applies and when it does not. And financial or economic reasons are not mentioned here.

2. The PSA is governed by the ICCA of Equatoriana, and Art 20 PSA is a choice of law clause

54. Claimant argues that classifying the KE2010 as an "aircraft" within the meaning of Art 2 (e) CISG would defeat the objective and purpose of the CISG. The parties would be subject to a variety of national sale laws, which would increase international transaction costs. The application of different national laws to the sale of UAS would lead to significant legal obstacles and uncertainties in international transactions. However, the fact is that the KE2010 drone is an aircraft and the purpose of the CISG is not frustrated by this very fact, as aircraft are excluded by Art 2 (e) CISG and are not covered by the CISG. In principle, because Equatorianian law is applicable, the CISG could apply as part of the Equatorianian law. Moreover, CLAIMANT and RESPONDENT would have had the opportunity to agree on the CISG per se as the rules of their contract in the PSA, which they did not. Furthermore, CLAIMANT and RESPONDENT

could have agreed that Art 2 (e) CISG does not apply to the KE2010 drone. However, this did not happen as well. Instead, CLAIMANT and RESPONDENT entered a usual choice of law clause, as already explained in the procedural part (*para*s 15-21). By including this choice of law clause in Art 20 (d) of the PSA [Exh C2], the parties clearly expressed their intention that Equatorian law should apply. As the CISG as a special rule for international sales contracts does not apply, as stated above, the Equatorianian ICCA applies.

3. Conclusion of issue two

55. CLAIMANT and RESPONDENT concluded a valid sales contract with the PSA. But this contract of sale is not subject to the CISG because the KE2010 drone is an aircraft that is excluded from the scope of the CISG under Art 2 (e) CISG. The KE2010 drone needs registration under the ASA of Equatoriana, which is the main characteristic of an aircraft in the sense of the CISG, also because, contrary to CLAIMANT's opinion, RESPONDENT is a private entity in the sense of Art 10 ASA. CLAIMANT falsely states that commercial practical transport is necessary under the ASA. Furthermore, according to the General Product Information [Exh C4] the KE2010 drone has a permanent transport capability, that qualifies the KE2010 as an aircraft under Art 2 (e) CISG. Furthermore, a supposed reduction of transaction costs contrary to CLAIMANT's view, is not enough to expand the sphere of application of the CISG without respecting exemptions like Art 2 (e) CISG. CLAIMANT and RESPONDENT have concluded a valid choice of law clause in Art 20 (d) PSA [Exh C2] on the application of Equatorianian law, but the CISG as a part of this legal system is not applicable.

ISSUE THREE: RESPONDENT can rely on Art 3.2.5 of the ICCA of Equatoriana in any case

56. RESPONDENT can rely on national law, namely the International Commercial Contract Act (ICCA) of Equatoriana, because not the CISG but the ICCA is the law applicable to the PSA (*paras 41-55*). Even if the CISG were applicable to the PSA, RESPONDENT could still rely on Art 3.2.5 ICCA in order to avoid the contract: first, the CISG does not cover the issue of fraudulent misinformation and second, CLAIMANT acted in fraud under Art 3.2.5 ICCA, both by the fraudulent representation of the KE2010 drones and by fraudulent non-disclosure of the HE2020 drone.

1. Even if the CISG were applicable, RESPONDENT could rely on Art 3.2.5 ICCA

57. Even if the CISG were applicable to the contract, the question of validity would not be answered by it. The CISG explicitly excludes validity issues (Art 4 (a) CISG), especially those

resulting from fraudulent activities [*Djordjević* in Kröll[2] 2018, Art 4 para 23]. The question of whether the breach of disclosure or other duties regarding contract conclusion warrants the avoidance of the contract is thus governed by national law [*Ferrari* in Schlechtriem/Schwenzer[7] 2019, Art 4 CISG para 25a; *Schlechtriem* in Internationales UN-Kaufrecht[4] 2007, para 42a]. Fraudulent behavior is also not governed by Art 35 CISG, namely the problem of the non-conformity of the goods, since the issue at hand goes beyond the mere non-conformity of the quality of the goods (*Kröll* in Kröll[2] 2018, Art 35 para 212).

58. Moreover, Art 40 CISG does not contain a disclosure obligation as argued by CLAIMANT [MfC para 81]. According to the established doctrine, it is not possible to derive a general duty of disclosure from this norm [*Schwenzer* in Schlechtriem/Schwenzer[7] 2019, Art 40 para 7]. Art 40 CISG is not applicable in this case because not only did CLAIMANT know about the lack of conformity of the goods and omitted to inform RESPONDENT about it, but they also misrepresented the goods and did not disclose information independently from the conformity of the goods. CLAIMANT's conduct goes far beyond the sphere of application of Art 40 CISG.

59. Therefore, the CISG cannot be applied to solve the problem of fraudulent misinformation committed by CLAIMANT and RESPONDENT can rely on Art 3.2.5 ICCA.

2. CLAIMANT fraudulently misrepresented and failed to disclose under Art 3.2.5 ICCA

60. Under Art 3.2.5 ICCA – like under the very similar Art II.-7:205 (1) DCFR - a party is acting in fraud when he *first* misrepresents facts or violates disclosure obligations, *second* has fraudulent intention with the goal to gain an advantage and *third* the fraudulent conduct is causal for the contract conclusion [*Brödermann* 2018, Art 3.2.5 para 1].

61. CLAIMANT fraudulently misrepresented the up-to-date status of the KE2010 drones and failed to disclose the existence of the HE2020 drones, so two requirements of Art 3.2.5 ICCA are met. Therefore, RESPONDENT concluded a contract without receiving what they could reasonably expect under the PSA, namely, to receive the newest and best drones on the market for the purpose of the NPDP and is entitled to rely on Art 3.2.5 ICCA.

2.1. CLAIMANT was acting in fraud

62. CLAIMANT *first* fraudulently misrepresented the KE2010 drones by presenting them as their newest state-of-the-art model (*paras* 63-65) and *second* fraudulently did not disclose the existence of the newer HE2020 drone (*paras* 66-69).

2.1.1. CLAIMANT misrepresented the KE2010 drone

63. RESPONDENT made clear which specification the drones must have in the Call for Tender, namely "state-of-the-art UAS" to collect geological and geophysical data necessary for the

exploration of natural resources in a sparsely populated region in Equatoriana [Exh C1]. This requirement is also mentioned in the preamble of the PSA [Exh C2] and in Art 2 (a) PSA the obligation of CLAIMANT is specified as "newest model" [Exh C2], which emphasizes the importance of "state-of-the-art".

64. CLAIMANT knew that the KE2010 drone was obviously neither "state-of-the-art" nor its "newest model", as required under the PSA and the Call for Tender. Mr Bluntschli even reinforced the impression that the KE2010 was CLAIMANT's newest model and top model in his email of 29 November 2020, where he presented the KE2010 as *"...top model for your purpose. Its advanced technology guarantees its suitability for state-of-the-art data collection and aerial surveillance"* [Exh R4]. It is not true that the merger clause in the PSA excludes all "*extrinsic evidence*" of the alleged misrepresentation, as argued by CLAIMANT [MfC para 67 et seq.]: adding a merger clause into a contact, the parties protect the integrity of the writing in the contract, and consequently the parties cannot rely on prior statements or agreements, because the contract becomes the only binding document [*Brödermann* 2018, Art 2.1.17 para 1]. Nevertheless, prior statements can be used to interpret the contract and are useful to ascertain in more detail an obligation contained in the contract. Further a merger clause cannot hinder to bring forward arguments based on grounds for avoidance [*Brödermann* 2018, Art 2.1.17 para 1 et seq.]. Especially a merger clause cannot be used to legalize fraudulent behavior. By interpreting the statement of Mr Bluntschli of 29 November 2020, only two days before the conclusion of the PSA, it becomes clear how important the specification "state-of-the-art" und "newest-model" are. CLAIMANT misrepresented the KE2010 drones by asserting that they correspond to those specifications, which is not true.

65. CLAIMANT´s presentation of the KE2010 as its "newest model" and "state of the art" constitutes a serious misrepresentation in the sense of Art 3.2.5 ICCA. The KE2010 was originally developed in 2010 and then sold from 2012 onwards with only some minor subsequent amendments and updates [Exh C8]. The last update took place in December 2018, two years before the conclusion of the PSA [PO2 para 13]. Moreover, the KE2010 will not be CLAIMANT's newest model on the date of delivery, which is scheduled for 15 January 2022 [Exh C2 Art 2 (d) (i)].

2.1.2. CLAIMANT failed to disclose the existence of the newer HE2020 drone

66. Parties do have the duty to inform themselves about relevant information when they exercise their freedom to contract, but legal systems recognize that a failure to disclose the true state of affairs to the other party may result in fraud [*du Plessis* in Vogenauer[2] 2015, Art 3.2.5 para 14].

The non-disclosure of facts is to be considered as fraudulent under Art 3.2.5 of the ICCA in the case of circumstances in which according to *"reasonable commercial standards of fair dealing*" a party is obligated to disclose information relevant for the contract conclusion. This "*reasonable commercial standards of fair dealing*" in Art 3.2.5 ICCA can be regarded as a manifestation of the general duty laid down in Art 1.7 ICCA, which determines that every party must act in accordance with "*good faith and fair dealing in international trade*", which include disclosure obligations in certain circumstances [*du Plessis* in Vogenauer^2 2015, Art 3.2.5 para 15 et seq.]. The obligation to act in good faith and fair dealing extends to all phases of the contract, already from the start of the negotiations, so it also applies in the pre-contractual phase, as in the case by hand [*Vogenauer* in Vogenauer^2 2015, Art 1.7 para 8]. Good faith and fair dealing are both fundamental ideas of the ICCA. Even in the absence of specific provisions in the ICCA, the parties must act according to those principles, because of the mandatory nature of the provision [*Off Cmt* 1 to Art 1.7 2016 p 18]. The obligation to act according to those principles in international trade means that they should be interpreted in the light of the specific circumstances in international trade and that domestic standards can only be taken into account, when it is proven that they are generally accepted in various legal systems [*Off Cmt* 1 to Art 1.7 2016 p 19 et seq.]. Finally, can be said, that in certain circumstances, parties are obligated to disclose relevant information, because this obligation of behavior is part of the principle of good faith, which the parties in an international sales-contract are obliged to observe under Art 3.2.5 ICCA.

67. In European private law, the Draft Common Frame of Reference (DCFR) is a non-binding document, which reflects what is generally recognized in European private law [*Jansen/Zimmermann* in NJW 2009, 3401]. It contains the same provision of fraud as in Art 3.2.5 ICCA in Art II.7:205 (1) DCFR. The provision is taken over completely verbatim in para 1 and contains in para 3 a detailed provision about disclosure-obligation under the principles of good faith and fair dealing. A party is always obligated to disclose relevant information in connection with good faith and fair dealing; *(a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) whether the other party could reasonably acquire the information by other means; and (d) the apparent importance of the information to the other party*. In the case at hand, CLAIMANT had a special expertise of the technology of the drones, and therefore was obligated to disclose all relevant information for the contract conclusion, such as the presentation of the HE2020. It would not have been a problem of costs to inform RESPONDENT about future developments of Drone Eye plc., and it was obvious impossible for RESPONDENT to acquire the information about the better

technology of the HE2020, which was not yet presented on the market. Last, RESPONDENT has continuously emphasized the importance of the drones being state of the art and operating with the newest available technology. CLAIMANT was cognizant of this request's significance.

68. CLAIMANT was aware that within a few months after the conclusion of the PSA, its company would launch a new drone, the HE2020. This new drone is able to carry a much greater payload, has a broader range, and enjoys a more versatile scope of application [Exh R3]. Nevertheless, CLAIMANT never informed RESPONDENT before the conclusion of the PSA about the planned launch of the HE2020 in February 2021, only two months after the signing of the PSA. It is true, that RESPONDENT never specifically asked about the further launch of a newer drone, but CLAIMANT was obligated to inform RESPONDENT about the existence of the HE2020 drone under the principle of good faith in international trade.

69. Moreover, the Equatorianian Supreme Court ruled in 2010 in a comparable case in domestic setting that an experienced private party is obligated to disclose all information potentially relevant for the other party. According to the tribunal this disclosure obligation also extends to planned improvements to the product, which are relevant for the contract conclusion [RNoA para 18]. Even if in this case before the Supreme Court the applicable law was the national Contract Act and not the ICCA, it must be expected that fraudulent non-disclosure must be interpreted in the same way when the ICCA is applicable. The Contract Act is equivalent to Art 3.2.5 ICCA and the consistency of a legal system must be preserved. As a result, there is no difference between a national or international contract concluded under the law of Equatoriana. In the case at hand, CLAIMANT did not disclose the presentation of the new HE2020 drone and the newer and better technology. This information was relevant for the contract conclusion, therefore it can be said that CLAIMANT was acting in fraud by non-disclosing this information.

2.2. CLAIMANT had the intention to gain an advantage

70. Conduct is fraudulent if *"it is intended to lead the other party into error and thereby gain an advantage to the detriment of the other party"* [*Off Cmt* 1 to Art 3.2.5 2016 p 105]. CLAIMANT´s intention was to present the KE2010 as their newest model and state-of-the-art drone, which meets the requirements under Art 2 PSA and under the Call for Tender, and optimally fulfills the purpose of the NPDP. Thus, this presentation was designed to convince RESPONDENT to buy the KE2010 and to accept the offer as it is.

71. With the conclusion of the PSA, CLAIMANT gained a significant advantage. During negotiations CLAIMANT already had three drones in stock due to the insolvency of another

costumer in the past [NoA para 5]. As a result of the fraudulent misrepresentation and non-disclosure, CLAIMANT was able to resell these drones to RESPONDENT. Consequently, CLAIMANT could avoid loss of profit of the already produced drones and resell them before the presentation of its new HE2020 drone, which makes the KE2010 drone less attractive. This explains why CLAIMANT made a second offer, which was 20% lower than the first one, to convince RESPONDENT to accept the offer of the KE2010 drones before the presentation of its new drones in February 2021, two months after the signing of the PSA.

72. The misrepresentation committed by CLAIMANT was deliberate because they obviously wanted to resell the drones they had already produced and make a profit with additional services. Even if the intention was not a deliberate misrepresentation it was a reckless representation concerning certain circumstances concerning the specification of the drones in the PSA and the Call for Tender. Both, deliberate misrepresentation as well as reckless representation, present the state of mind of a fraudulent intention under Art 3.2.5 ICCA [*Brödermann* 2018, Art 3.2.5 para 1]. In common law countries, where the rules on misrepresentation have been developed, it is well established that reckless representation can be regarded as fraudulent since the Case *Derry v Peek* [*du Plessis* in Vogenauer^2 2015, Art 3.2.5 para 7; *House of Lords, Derry v Peek*]. A representation is also fraudulent when a party does not know if the statement is true or does not matter whether it is true. A similar approach exists in civil law systems, where reckless representation can be compared to the concept of *dolus eventualis* to describe the practice of giving groundless representation without indicating the party´s uncertainty as to whether they are correct [*du Plessis* in Vogenauer^2 2015, Art 3.2.5 para 7].

2.3 The fraudulent conduct of CLAIMANT was causal to the contract conclusion

73. The conduct of the fraudulent party must be the causal link to the conclusion of the contract. Avoidance, in case of fraud under Art 3.2.5 ICCA, is only possible if the other party would not have concluded the contract in case the other party was not acting in fraud (*dolus causam dans*). If the party would have concluded the contract, but under different conditions, avoidance of the contract according to Art 3.2.5 is not possible (*dolus eventualis*) [*du Plessis* in Vogenauer^2 2015, Art 3.2.5 para 24]. Therefore, the decisive point, according to the principle of *dolus causam dans,* is whether the contract would not have been concluded under different conditions without fraudulent conduct of the other party. According to *conditio-sine-qua-non*, the conduct was causal to the conclusion of the contract, if in the case of an omission in breach of duty, the required action cannot be added.

74. RESPONDENT would not have concluded the PSA, neither with other conditions, if they had known that CLAIMANT would bring a new drone onto the market only two months after the conclusion of the contract. Eventually they would have bought the HE2020, this would not represent a contract with different condition, but an entirely different contract. First, the KE2010 drones are not "state-of-the-art" and RESPONDENT would have never entered into negotiations with CLAIMANT about the KE2010 if it had known that the new HE2020 drones will be available soon. Second, the KE2010 lost market value after the presentation of the HE2020. This means that RESPONDENT would have never accepted such a high price and cannot resell the drone at a high price. Third, the HE2020 are more appropriate for the purpose of the NPDP described in the Call for Tender [Exh C1]. The longer endurance and the satellite communication system would be more suitable for the mission in the remote parts of Northern Equatoriana and the greater payload would make it possible to conduct more than one investigation with one flight, which would make it more profitable than the KE2010 drone [PO2 para 17].
75. Another problem concerning CLAIMANT's fraudulent conduct is that the KE2010 will only be produced until 2024 [PO2 para 13], but they never informed RESPONDENT about that fact. The last two drones should be delivered in 2023 under the PSA [Exh C2 Art 2 (d) (ii-iii)] and CLAIMANT is obligated under Art 2 (f) PSA to provide a maintenance service for four years following the delivery of the respective drone [Exh C2 Art 2 (f)], which would end at the earliest in 2027. This means that CLAIMANT cannot guarantee those maintenance services under the PSA and will not be any more specialized to this type of "helicopter technology", due to the new and different "aerodynamic lift technology" of the HE2020 [PO2 para 13].
76. The party seeking avoidance must prove the facts under 3.25.5 ICCA [*du Plessis* in Vogenauer[2] 2015, Art 3.2.5 para 25]. REPONDENT gave sufficient facts about the fraudulent conduct of CLAIMANT to prove the causality between the fraud and the contract conclusion.

3. As consequence: RESPONDENT can avoid the PSA under Art 3.2.5 ICCA

77. RESPONDENT can avoid the PSA under Art 3.2.5 ICCA because the requirements are met as shown above. CLAIMANT was acting with fraudulent intent, which was causal for the contract conclusion. The avoidance takes effects retroactively according to Art 3.2.14 ICCA, which means the contract is deemed to have never existed [*Brödermann* 2018, Art 3.2.14 para 1; *Off Cmt* 1 to Art 3.2.14 2016 p 117].
78. An ad hoc tribunal in Rome ruled on 4 December 1996 that a party may avoid the contract when it has been induced to conclude it by the other party's deception, including by words or conduct,

or by fraudulently concealing from the party circumstances which, according to ordinary standards of fair dealing, it ought to have disclosed to it (*ad hoc-arbitration Rome*, *bank note case*). Same in the case by hand, the conclusion of the PSA was casual to the fraudulent conduct of CLAIMANT´s intention, therefore RESPONDENT is entitled to avoid the contract under Art 3.2.5 ICCA.

3.1. RESPONDENT gave timely notice under Art 3.2.11 – 3.2.12 ICCA

79. The right of avoidance is exercised by notice to the other party (Art 3.2.11 ICCA) and becomes effective when it reaches the other party (Art 1.10 (2) ICCA) [*Off Cmt* 1 to Art 3.2.12 2016 p 115]. The notice must be exercised within reasonable time [*du Plessis* in Vogenauer[2] 2015, Art 3.2.5 para 26]. Art 3.2.12 (1) ICCA determines that this period commences after the party knew or could not have been unaware of the relevant facts [*du Plessis* in Vogenauer[2] 2015, Art 3.2.5 para 26]. How long the period will last depend on the individual circumstances, which are determined on the type of international transaction, the jurisdiction and the distance involved [*Brödermann* 2018, Art 3.2.12 para 1]. Also, subjective factors influence the period which should at least be long enough to take legal advice [*Huber* in Vogenauer[2] 2015, Art 3.2.12 para 6].

80. RESPONDENT had no technological expertise about such specific drones and needed time to comprehend the impact of the presentation of the HE2020 with his new technology in February 2021 on the contract concluded with CLAIMANT. RESPONDENT gave notice by letter of 30 May 2022, where it stated that they "*no longer considers itself bound by the PSA*" and terminated all negations concerning the performance of the PSA [Exh C8]. The reasons given by RESPONDENT are corruption and misrepresentation under Art 3.2.5 ICCA. The avoidance took place more than a year after the knowledge of the relevant facts. Nevertheless, the avoidance is valid.

81. In a similar case governed by the ICCA, the Equatoriana Supreme Court ruled that the avoidance of a government entity after more than a year of unsuccessful negotiations with the private party is valid. Also, in this case the reason was fraudulent non-disclosure under the ICCA [RNoA para 19]. More, RESPONDENT declared a moratorium of the performing of the PSA on 27th December 2021, six months before the final avoidance [Ech C6]. Thus means that avoidance was predictable.

4. Avoidance under the CISG

82. If the tribunal does not consider that CLAIMANT acted fraudulently under Art 3.2.5 ICCA and that the CISG would be the applicable law on the contract, RESPONDENT can avoid the contract under the CISG.

83. The principle of good faith permeates also the CISG [*Perales Viscasillas* in Kröll[2] 2018, Art 7 para 25]. According to Art 7 (1) CISG, the Convention needs to be interpreted conforming to the principle of good faith in international trade [*Perales Viscasillas* in Kröll[2] 2018, Art 7 para 21]. It is considered as a substantive principle which applies to the formation and the performance of the contract [*Perales Viscasillas* in Kröll[2] 2018, Art 7 para 24]. Therefore, it can be said, the CISG does cover the issue of bad faith during negotiation in case this conduct produces damages during the performance of the contract [*Perales Viscasillas* in Kröll[2] 2018, Art 7 para 36]. CLAIMANT was acting in bad faith during the negotiations as shown above and gained an exceedingly great advantage as shown above.

84. The Court of Appeal of the State of Rio Grande do Sul explains the importance of good faith as a principle based on the expectation of duly performed contractual duties. Together with a model of conduct, which is accepted by the parties, it imposes a code of behavior between the parties. They are thus expected to consider the interest of the other contracting party and to act accordingly [*Court of Appeal of the State of Rio Grande do Sul, Discharge machine case*].

85. CLAIMANT did not inform RESPONDENT about important circumstances which would have been important to know in the interest of RESPONDENT, namely the possibility to acquire drones, that would be more suitable for RESPONDENT´s request. Under Art 35 CISG, the seller is obligated to deliver quality and description required by the contract. Through the interpretation of Art 35 CISG under the principle of good faith in Art 7 CISG, it becomes obvious that CLAIMANT violated the obligation of delivery of the quality requested under the contract. Therefore, it can be said that CLAIMANT violated Art 35 CISG

86. Avoidance is only possible in the case of a fundamental breach, which is regulated in Art 25 CISG [*Huber* in MüKoBGB[8] 2019, Art 49 para 2]. The breach of contract is to be regarded as fundamental when it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. In the case at hand, the breach committed by CLAIMANT was fundamental, because RESPONDENT expected state-of-the-art drones with the newest technology. Therefore, RESPONDENT can avoid the contract under Art 49 CISG.

5. Conclusion of Issue three

87. RESPONDENT can rely on Art 3.2.5 ICCA. The CISG is not the law applicable to the PSA and does not govern the issue of fraud. CLAIMANT was acting in fraud by misrepresenting the KE2010 and by failing to disclose the existence of the HE2020 drone under Art 3.2.5 ICCA. Those conducts were causal to the contract conclusion. Consequently, the avoidance of the PSA by RESPONDENT was legally conform.

ISSUE FOUR The conclusion of the PSA and the arbitration agreement was tainted by corruption

88. CLAIMANT misinterpreted the red flags and circumstantial evidence when essentially applying the right and accepted approach in assessing indicators of corruption [MfC, para 38]. The joint consideration of all relevant circumstances is central to a truthful and reliable analysis whether the transaction and incorporated arbitration agreement were tainted by corruption. Therefore, contrary to CLAIMANT's statements, the *Metal-Tech case* is persuasive. Even if the assessment of corruption must always be made on a case-by-case basis, CLAIMANT's argument of a specific case's exclusion as interpretive guideline without legal or factual discrepancy but only CLAIMANT's displeasure with its rationale should carry no weight. Rather, it can be derived from the *Metal-Tech case* that the tribunal cannot have jurisdiction on the basis of corruption, but rather that its jurisdiction must be assessed on the basis of the cumulation of circumstances [*ICSID Metal-Tech v Uzbekistan*, para 228].

89. The *Metal-Tech case* deals with corruption during the establishment of the investment, the case however offers no conclusion to what happens when the capital investment has already been made [*ICSID Metal-Tech v Uzbekistan*, para 193; MfC, para 41]. The same situation is reflected in the present case, where corruption was already prevalent in the preparatory acts for the conclusion of the contract. The influence of corruption during the establishment of the contract was decisive for the conclusion of the contract. This also follows from the fact that CLAIMANT's corruption broke off the negotiations with the second bidder, although Mrs Bourgeois had the impression that the negotiations with the second other bidder would have a higher chance of success [Exh R1, para 3]. Especially regarding the price, the second bidder had a better offer than CLAIMANT, which only reinforces suspicions of corruption after CLAIMANT "supposedly" adjusted its prices to undercut the second bidder [Exh R1, para 8]. It can therefore be concluded with a high degree of probability that the conclusion of the PSA in particular was affected by corruption and would not have been concluded at all without it. With CLAIMANT'S cynical sentence: "*Thus, RESPONDENT's attempt to invalidate Art 20 on*

the basis of corruption is like throwing undercooked pasta on the wall and hope that it sticks" [MfC, para 40], CLAIMANT overlooks the fact that corruption affected the entire contract and thus also tainted the arbitration agreement.

90. The separability doctrine allows for the survival of the arbitration agreement if the underlying contract itself is impugned [*Singapore High Court*, BCY v BCZ; *Abraham* in Kaplan/ Moser 2018, p 82], it must not, however, serve to give it effect at all costs [*Singapore Court of Appeal*, BNA v BNB]. Farther, the court's conclusion, that the arbitration agreement is not "separate and distinct […] in and of itself" at the time of contract formation [*Abraham* in Kaplan/Moser 2018, p 82; *Singapore High Court*, BCY v BCZ] and the evaluation of its conclusion shall be subjected to the same scrutiny und the same legal standard as the underlying contract, as would be the parties' expectation [*EWCA*, Sulamerica v Enesa, para 26]. Since the arbitration agreement was included as a clause in the main contract and concluded at the same time, either both or neither would have been affected by the corruption. Albeit, to determine whether the issue of corruption is subject to adjudication through this tribunal, considering that the doctrine of separability can equally be interpreted to reflect "the parties' presumed intention that their agreed procedure for resolving disputed should remain effective in circumstances that would render the substantive contract ineffective" [*EWCA*, Sulamerica v Enesa, para 26], RESPONDENT will subsequently distinguish the consequences of corruption for the underlying contract pursuant to Art 34 UN Convention and the unclean hands doctrine for the arbitration agreement.

91. The doctrine of "unclean hands" provides that a court will not provide assistance if CLAIMANT's action is based on unlawful acts [*Camilla/Tarek* 2022, para 1]. It therefore is often defined as a bar to claims brought by parties engaged in illegal activities and recognizes that a party seeking legal protection must be clean-handed [*Le Moullec*, p 17]. Furthermore, it is a generally established principle, that when an investment is made by means of bribery and/or corruption, therefore with unclean hands, jurisdiction should be declined and not entertain the claim presented [*Stockholm Chamber of Commerce,* Littop v Ukraine, para 468]. Depending on the circumstances of the case, the doctrine of unclean hands may dismiss a claim if the host state was supposedly "equally capable" in connection with the investment because it participated in the corruption [*Kreindler* 2010, p 320]. Even if this is not the case, in the case at hand CLAIMANT in particular came into the contract with unclean hands because they misrepresented the drones by presenting facts false as well as that omitting the disclosure of the newer drone which would have been actually state of the art and also more suitable for the fulfillment of the contract (*paras* 62-72).

92. The allegations of corruption in the case at hand and the *Metal-Tech case* are largely the same, as corruption as well as fraudulent and material misrepresentation by CLAIMANT to gain approval and self-enrichment through exorbitant service fees are present in both [*ICSID Metal-Tech v Uzbekistan*, para 110]

1. A sufficient number of "red flags" and circumstantial evidence can be identified

93. Corruption und Bribery, by their nature, occur in obscure and hidden circumstances and leave no or scant traces behind, because bribe givers and bribe takers all use schemes to disguise their transactions [*Menaker/Greenwald* 2015, p 15]. Arbitral tribunals fall short of the extensive powers of domestic courts and criminal investigative authorities to compel a natural or legal person to produce witness testimony or evidence [*Menaker/Greenwald* 2015, p 15]. Irrespective thereof, the tribunal must apply proper rules of evidence to create an assessment of the overall situation [*Martin* 2003, p 20]. As such tribunals must generally determine whether the party alleging corruption has offered circumstantial evidence to prove its corruption allegations [*Menaker/Greenwald* 2015, p 15].

94. In the case at hand, "red flags" and circumstantial evidence should form the basis of assessment. Regarding indications of cover-up intentions for acts of corruption within contracts, the ICC defines red flags as "*circumstances that may indicate a party's propensity to make an illegal payment to officials and employees if public and private sectors*", or more broadly as "*any fact that suggests commercial, financial, legal and ethical irregularities*" [*ICC Guidelines* 2010, para 5].

95. RESPONDENT agrees that the presence of only four red flags in this case does not change the fact that red flags are evident and merit consideration [MfC, para 39]. The existence of at least one red flag of corruption is already sufficient for the court to start a more in-depth investigation [*Valle/Carvalho* 2022*,* page 852]. And at least two uncontested red flags would already be sufficient to make inferences about corruption [*Valle/Carvalho* 2022*,* page 852].

96. With regard to the red flags put forward by CLAIMANT, the following can be stated [MfC, para 39,40]: **First,** CLAIMANT's allegations that the corruption charges against Mr Field are not directly related to the PSA, while true in principle, must be considered as circumstantial evidence [MfC, para 40]. All three NPDP-related contracts were negotiated by Mr Field and appear to have been concluded under influence of corruption and awarded only to persons within his close societal circle [Exh C5, Exh R2]. Mr Field is also implicated in the *panama paper scandal* [Exh C5 R2], where offshore accounts with assets of more than EUR 3 million were discovered, which in fact are obviously disproportionate to his compensation as COO for

RESPONDENT [Exh R2]. Also, Ms Fonseca was able to prove that at least two payments were made to these offshore accounts in connection with the award of contracts by Equatoriana Geosciences Ltd. to two companies owned by Mr Field's cousin [Exh R 2]. In addition, Mr Bluntschli owns two offshore accounts containing over USD 8 million. From one of these accounts, transfers were made to three other offshore accounts [PO2, para 40]. The owners and the origin of the money in these accounts are not known because Mr Bluntschli refuses to disclose this information [PO2, para 40]. Even if RESPONDENT cannot confirm with complete certainty that these accounts belong to Mr Field, it however seems very likely that he owns at least one of these unknown accounts. This assumption stems from Mr Field's questionable involvement with these offshore accounts.

97. **Second**, CLAIMANT tries to absolve itself of responsibility by claiming that the previous corruption allegations against it were raised and addressed prior to introducing anti-corruption policies [MfC para 40]. However, it seems that CLAIMANT does not particularly care about enforcing these internal anti-corruption rules, because then they would have initiated investigations against Mr Bluntschli after they became aware of specific allegations of corruption. It is therefore incomprehensible why CLAIMANT is yet to take any action to this respect in the event of renewed allegations of corruption against an employee and is merely relying on a private and unofficial assurance of an individual with a personal stake in the issue [Exh C3, para 11].

98. **Third**, CLAIMANT argues that the maintenance agreement was not overpriced. Mr Bourgeois himself was already of the opinion [Exh R1 para 6], and the disproportion can be easily demonstrated by use of simple mathematics: The maintenance costs represent between 3 to 5per cent of the purchase price of a UAS and the supervisory board approved EUR 10 million for the maintenance and other services [PO2, para 7]. The basic service fee of EUR 480,000 per drone resulting in a total of EUR 11,520,000 alone exceeds the budget for the service part [PO2, para 27]. However, the additional service costs at the customary fixed price are assumed to be EUR 1,480,000 which are mentioned in Annex C seemingly perceived as the full-service fee must be calculated into the final sum resulting in a surplus of EUR 3,000,000 beyond the authorized maintenance budget [PO2 para 27; MfC, para 40]. Originally the flat fee for the annual maintenance for the drones was EUR 500,000 per UAS, but under the concluded PSA the annual maintenance fee was EUR 480,000 per UAS excluding those maintenance services mentioned in Annex B of the PSA and all additional services and spare parts (which were expected to be necessary in 80% of the cases) had to be booked separately at the prices in Annex C of the PSA [P02, para 27]. Few of the prices in Annex C of the PSA have also been increased

[P02, para 27]. Although it should not appear so at first glance, it is nevertheless clear that the service agreement is overpriced.

99. In view of these red flags, it is obvious that based on circumstantial evidence, the PSA and thus also the arbitration agreement are affected by corruption. The legal consequence of the United Nations Convention Against Corruption, adopted in both residence countries of the parties, is to annul or rescind a contract in Art 34. Since the legality at the beginning of the conclusion of the contract is relevant for the question of the jurisdiction and not the legality during the fulfillment of the contract, it can be concluded that CLAIMANT did not act according to the doctrine of clean hands due to its corrupt behavior in the contract, as well as the false representation and the omitted disclosure of the drones at pre-contractual state of the contract [ICSID *Hamester v Ghana,* para 127].

2. CLAIMANT must disprove the corruption allegations

100. Art 27 of the PCA Rules states that the burden of proving the facts relied on to support its claim or defense lies with the party who puts them forth / employs them. Thus, it is unreasonable for either CLAIMANT or RESPONDENT to bear the full burden of proof to all facts. CLAIMANT must therefore provide substantiating evidence that Mr Bluntschli did not act corruptly. This should be easy for CLAIMANT given its position that there is no internal corruption problem. Especially since Mr Bluntschli had conducted the majority and essential part of the negotiations with RESPONDENT and was arrested for private tax evasion on 29 November 2020, therefore only two days before the signing of the PSA. [Exh C3, para 2; PO2 para 39]. However, the fact that Mr Bluntschli is not willing to testify that he did not grant any benefit to governmental employees rather reinforces the suspicion that he has done something illegal [Exh C3 para 11].

101. The corruption allegations are further supported by the facts at hand. The first round of negotiations was interrupted by a romantic getaway in Mr Buntschli's beach house [Exh R 1 para 4]. Only Mr Field and Mr Bluntschli have attended this weekend getaway [Exh R 1 para 4]. Subsequently, negotiations with the other bidder were completed and the conclusion of the PSA was almost certain [Exh R1 para 5]. This only strongly suggests that illegal transactions were concluded there.

102. The highlighted special circumstances, require CLAIMANT to provide counter-evidence and should also make a proportionate contribution to uncovering corruption. The International Chamber of Commerce in arbitrating a case involving corruption has previously held, that if the other party fails to provide evidence to the contrary, the tribunal may conclude that the facts alleged are true [*ICC Case No. 6497,* page 73]. Because of the near impossibility to "prove"

corruption for RESPONDENT on its own, an appropriate way is to shift the burden of proof to CLAIMANT, so they can establish that the legal and good faith requirements were in fact duly met [*Mills* 2002*,* page 9]. Considering, for example, the fact that the service agreement for the drone is overpaid, CLAIMANT, the party handling the payment, only has to show that the price paid by it and the price charged to the project do not differ by a material amount [*Mills* 2002*,* page 9]. CLAIMANT argues that the service agreement is not overpriced but fails to justify this in a comprehensible way [MfC*,* para 40]. If CLAIMANT's intentions when engaging in the PSA were honest, they should have no difficulty demonstrating the lawfulness its activities [*Valle/Carvalho* 2022*,* page 851], but has not been the case so far.

3. The issue of corruption is non-arbitrable

103. Even if the tribunal affirms the PSA and abstains from declaring it null and void, the predominance of red flags prevents its jurisdiction. As the arbitration agreement is in the PSA as Art 20, the allegations of corruption necessarily extend to it (*para* 90) despite the doctrine of separability averting the automatic extension of the fate of the underlying contract [source] it was concluded by the same persons and under identical circumstances thus a disparity in legal evaluation would not be justifiable.

104. The tribunal should look to the non-arbitrability doctrine instead, which provides that certain types of disputes may not be arbitrated, notwithstanding an otherwise valid arbitration agreement [*Born*[2] 2016*,* page 87]. Corruption is a criminal matter and be extension considered non-arbitrable by virtually all states / countries [*Born*[2] 2016*,* page 87]. Therefore, in this case, if the tribunal establishes it jurisdiction contrary to RESPONDENT's reasoning, it should decide to either stay the proceedings until the corruption allegations have been resolved by the national courts in Equatoriana or subsidiarily bifurcate (*para* 106) to address solely the issues not tainted by corruption (*para* 117).

4. Conclusion of Issue four

105. The tribunal has no jurisdiction in this case due to corruption and CLAIMANTS violation of the unclean hand's doctrine. From the circumstances under which the contract was concluded, i.e. the misrepresentation up to the overpricing for the maintenance agreement, it cannot be excluded that the contract was concluded exclusively through illegal acts. Therefore, no assistance should be given to CLAIMANT because CLAIMANT's action relates to its own illegal acts and violates fundamental principles of law.

ISSUE FIVE: The procedural motions of stay and subsidiary bifurcation of corruption issue should be granted.

106. If the tribunal does not follow RESPONDENT's arguments and assumes jurisdiction, the proceedings should be stayed until the ongoing investigations against Mr Field are concluded. Since a special chamber has been set up in the criminal court headed by the prominent and well-respected public prosecutor Ms Fonseca, the state of Equatoriana is already investigating the matter with increased consideration [Exh R2, PO2 para 44]. Criminal prosecutors have broader investigative powers than the tribunal (*para* 115). Additionally, staying the arbitral proceedings until the outcome of the criminal case, particularly the inference of Mr Fonseca's investigation, minimizes the risk of rendering contradictory or unenforceable decisions (*para* 112).
107. If the proceedings are not stayed, they should be bifurcated allowing the tribunal to solely decide on the issues not tainted by the corruption allegations. It would be inefficient not to await and consider Ms Fonseca's investigation. Especially in view of what they have already revealed, awaiting their conclusion will be much more cost- and time-efficient proceedings while concurrently establishing a baseline for the issues pertaining to the merits of the case (*para* 117*).*
108. Literature and case law have developed conglomerative criteria to determine whether a procedure should be stayed or, subsidiarily, bifurcated. The application of these criteria can provide an objective way to decide this matter and will be applied in the following. (*paras* 109 & 117)

1. The tribunal should stay the proceedings until the decision of the criminal court

109. When considering the effectiveness and appropriateness of staying the proceedings, one must rely on the following four criteria by *Luka Groselj*, used in *Nigeria Power v Nigeria* [*Groselj* 2018, p 563]. First, whether external circumstances will affect the proceedings. Second, the interests of the parties with regard to the principle of a fair and fast trial. Third, its impact on the proceeding's efficiency. Finally, the avoidance of unreasonably delay. [*United States District Court Columbia*, Enron Nigeria Power v Nigeria, p 2]
110. **First**, Ms Fonseca's investigations have an impact on this case [*Groselj*, 2018, p 563]. CLAIMANT argues that there is not any credible allegation that the PSA is tainted by corruption [MfC para 44]. It is rather the other way round, there is evidence that the PSA is tainted by corruption and therefore can be avoided per Art 34 UN Convention, especially the arbitration agreement (*paras* 88-92). Interim results of the investigations by the prosecution already show that two contracts concluded by Mr Field were affected by corruption [Exh R2 para 1]. Moreover, CLAIMANT suggests, the lack of conclusive evidence of corruption in its

contracts with international companies [PO2 para 45] applies to all allegations and questions on corruption for the PSA. [MfC para 44]. This conclusion is one-dimensional and not justifiable and cannot support the neglect of the upcoming investigative results.

111. CLAIMANT tries to persuade the tribunal that Ms Fonseca is biased because of her relatives' respective vocation [MfC para 46]. The special public prosecutor is not biased nor unprofessional. Ms Fonseca is a well-respected criminal lawyer in Equatoriana. Withal, Ms Fonseca took a clear position against corruption and has never been an active member of any political party. [PO2 para 44]

112. **Second**, a stay would be in the interest of both parties, as it would save on expenditures on possibly void arbitral proceedings at least provisionally [*Tan/Willcocks* 2022, para 9] and investments on time for all involved. The proceedings could still be conducted after the criminal court's judgment. In addition, there is a risk for RESPONDENT to become liable for advance payments due to an incorrect decision and consequently bear CLAIMANT's insolvency risk. RESPONDENT would be disproportionately affected by the continuation of the proceeding because RESPONDENT no longer has a use for the UAS because the NPDP has been terminated. [Exh C6]

113. **Third**, a stay of the proceedings would prevent an incorrect decision and thus increase their efficiency [*Daly/Goriatcheva/Meighen*, 2014, p 66]. A typical risk of different proceedings is to render two opposing decisions, which also result in concerns about the legitimacy and credibility of such decisions [*Tan/Willcocks* 2022, para 9]. The tribunal should resolve this conflict by employing the doctrine of *forum non conveniens* if it does not, the award is unenforceable [*Tan/Willcocks* 2022, para 15]. The Second Circuit Court of Appeals upheld a refusal of an enforcement in *Monegasque v Ukraine* because of the doctrine of *forum non conveniens*. In this case there was a serious issue, which can only be determined on the basis of national law [*Moses* 2017, p 229-230; *Second Circuit Court of Appeals*, Monegasque v Ukraine]. In the case at hand, assuming jurisdiction to adjudicate allegations of corruption contrary to RESPONDENT's position for their non-arbitrability, a national criminal court is still better positioned to render a decision as it lies within their prerogative to analyze the corruption scheme in its entirety.

114. In Austria, Lichtenstein and Germany, the law expressly provides possibilities to stay litigation on the basis of criminal proceedings [Art 191 öZPO, Art 149d dZPO, Art 191 FL-ZPO]. In both countries, disregarding a criminal conviction or acquittal is grounds for appeal. [Art 530 öZPO, Art 513, 546 dZPO, Art 530 FL-ZPO]. The tribunal is not obliged to interrupt the proceedings, but the award may be subsequently set aside on that ground [*Nueber/Auer*, 2018, p 36-37]. Not

only in German-speaking jurisdictions, but also in Equatoriana, it is common practice to interrupt civil proceedings due to criminal proceedings. [PO2, para 46]

115. **Finally**, a stay of proceedings is reasonable, because the public prosecutor has broader investigative powers than the tribunal for these allegations of corruption. The public prosecutor can use undercover agents, confidential information, subpoena witnesses, cooperate with witnesses, arrest suspects, issue search warrants and use physical as well as electronic surveillance. [Prosecutorial Investigations, 2008, Part 2] They cannot only be employed against the suspected offender himself but also to third parties, allowing the creation of a more comprehensive picture of the situation. The tribunal cannot force witnesses to appear by itself but would have to rely on the support of national courts within limits of assistance prescribed by the respective national procedural laws [*Niemoj/Gambarini* 2022, para 11]. In the case of *Windstream Energy v Canada,* the tribunal had requested the Ontario Superior Court of Justice to subpoena the witness [*PCA*, Windstream Energy v Canada, para 42].

116. A national criminal court is better suited to decide allegations of corruption, particularly in protecting and outwardly representing the public interest. To preserve the national interests, the new government has set up a new chamber in the criminal court to decide on all allegations of corruption in connection with the NPDP [Exh R2]. This special chamber is favourable to the principle of a fast proceeding, as Ms Fonseca has assured that the investigation will be completed by the end of 2023 and the criminal proceedings by the mid-2024 at the latest [Exh R2].

2. If a stay is refused, bifurcation preserves procedural and economic advantages

117. Bifurcation of arbitral proceedings is reasonable if several factors as developed by literature, as in *Ugale/Gurdova* and by case law, as in *Philip Morris v Australia* or *Hope Services v Cameroon*. CLAIMANT has already employed these three criteria in its memorandum, and RESPONDENT agrees with their usefulness and applicability. First, whether the allegations are serious and substantial. Second, whether a bifurcation will lead to a reduction in cost and time in the next stage. Third, whether the bifurcated section is so intertwined with the merits as to make bifurcation impractical. [*Ugale/Gurdova* 2022, para 12; *PCA*, Philip Morris v Australia, p 45-49; *ICSID*, Hope Services v Cameroon, para 22]

118. **First**, the allegations are serious and substantial because suspicious payments to Mr Field have already been identified [Exh R2]. Even if one would apply a higher standard, than just not frivolous or vexatious, as has already been done in other cases, such as *Hasanov v Georgia*, this benchmark would also be met because the early investigative stages already generated

incriminating findings.[ICSID, Hasanov v Georgia] Mr Field, his relatives and political friends are heavily implicated in various corruption scandals, as the *Panama Papers* and *The Citizen* articles show [Exh R2, Exh C5]. From the date and information contained in the *Panama Papers* two offshore accounts have been allocated to Mr Field, each worth more than EUR 3,000,000 which is blatantly disproportionate to his annual income of EUR 300,000. Moreover, the prosecution can already identify payments to offshore accounts associated with Mr Field's cousin. [Exh R2]

119. **Second**, the bifurcation would reduce costs and time because the criminal court would have to investigate the corruption allegations regardless (*para* 112). Bifurcation is a common practice in PCA proceedings. [*Daly/Goriatcheva/Meighen* 2014, p 67] Also, in the last few years, arbitration has become a slower and costlier dispute resolution mechanism compared to litigation in the eyes of a few authors [*Born*[2] 2016, p 12]. Thus, it is imported to keep the proceedings as efficient as possible as defined in Art 17 (1) PCA Rules. [*Daly/Goriatcheva/Meighen* 2014, p 66] This means a bifurcation would significantly reduce the overall cost for the parties to resolve this dispute.

120. **Third**, the question of corruption and which action have been affected can be addressed fully separate from the questions pertaining to the merits. While the allegations of corruption are investigated by the specially appointed prosecutor Ms Fonseca, the tribunal can decide on the applicability of the CISG (*paras* 41-55) and the avoidance of the PSA by invoking Art 3.2.5 ICCA for fraud (*paras* 56-87). There is sufficient substance to the claim to adjudicate partially until the court proceedings will be concluded by mid 2024.

3. Conclusion of Issue five

121. If the tribunal discerns its proper competence despite the faulty formal validity of the arbitration agreement, the proceedings should be stayed to take advantage and cognizance of the parallel criminal investigation and impending trial, to save time and money.

122. If the tribunal rejects the request to stay the proceedings, one should subsidiarily bifurcate these proceedings to still appreciate and draw upon the parallel investigations, albeit utilizing the interim to decide the few, residual issues.

REQUEST FOR RELIEF

123. Based on the foregoing arguments RESPONDENT respectfully requests the tribunal to dismiss all requests and submissions by CLAIMANT and

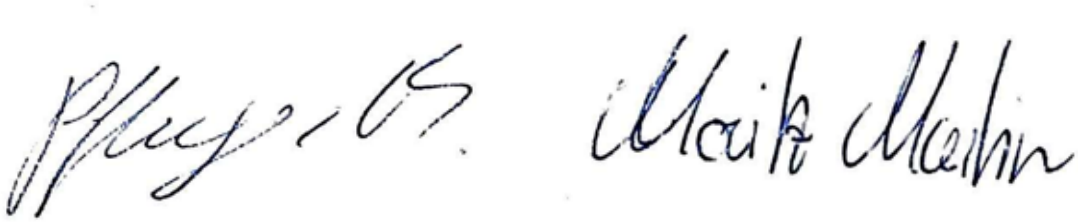
I. find it lacks jurisdiction to hear this case PCA CASE NO. 2022-76 (issue one),
II. subsidiarily, stay or, alternatively, bifurcate the proceedings until after the national courts judgment expected mid 2024, respectively the conclusion of the investigations (issue five),
III. to declare the CISG non-applicable because of the Art 2 (e) exception (issue two) and
IV. affirm RESPONDENT's right to avoid the contract by invoking Art 3.2.5 ICCA (issue three).

RESPONDENT reserves the right to amend its requests as may be necessary.

On behalf of Equatoriana Geoscience Ltd.,

COUNSEL

LISA PICHLER | SAIBYA SCHNROFFENEGGER



MAXIMILIAN PFLUGER | MORITZ MARTIN, LL.B.

Innsbruck, 26 January 2023