Thirtieth Annual
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Saarland University

Memorandum for Claimant

On behalf of

Claimant	v.	**Respondent**
Drone Eye plc		Equatoriana Geoscience Ltd
1899 Peace Avenue		1907 Calvo Road
Capital City		Oceanside
Mediterraneo		Equatoriana

Anusha Osman Ali • David Bastuck
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Saarbrücken • Germany

Guide for the Reader

Dear reader, Members of the Tribunal,

The Vis Moot Team of Saarland University feels honoured that you spend your precious time to read the Memorandum we have worked on for several weeks. If you read a printed version of our Memorandum, it will simply appear in black and white on paper and nothing has to be added. If, however, you have an electronic version on your computer, tablet, or even smartphone before you, you may see some parts of our Memorandum highlighted, for example, with tiny red or green frames. This is not a bug in formatting but a feature designed to make your reading and studying of our Memorandum more comfortable.

The highlighted parts contain (hyper-)links to information either within the document or even outside the document, if a link to public internet sources is available.

Within the table of contents a click on any heading will take you to the respective heading in our Memorandum. A click on the owl in the header of every page will take you back to the table of contents. This facilitates navigation within the document.

Authorities cited in the argument are linked to the List of Authorities and the List of Cases and Awards, where full information may be obtained. From the List of Authorities you may jump to the paragraphs where the authorities are cited by clicking onto the respective paragraph number.

Enjoy your reading! Thank you!

Vis Moot Team of Saarland University

Contents

List of Abbreviations

%	percent
&	and
AG	Aktiengesellschaft (Stock Company), Germany
Art(s).	Article(s)
BGB	Bürgerliches Gesetzbuch (Civil Code), Germany
BGer	Schweizerisches Bundesgericht (Federal Supreme Court), Switzerland
CEO	Chief Executive Officer
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CISG AC	CISG Advisory Council
Claimant	Drone Eye plc
Contract	Purchase and Supply Agreement, dated 1 December 2020
COO	Chief Operating Officer
Corp.	Corporation
COVID-19	Coronavirus Disease 2019
DAL	Danubian Arbitration Law; *verbatim* adoption of the UNCITRAL Model Law on International Commercial Arbitration (1985) with the 2006 amendments
DC	District Court
Development Program	Northern Part Development Program
ECICA	European Convention on International Commercial Arbitration
ed(s).	editor(s)
et al.	*et alii*
et seq(q).	*et sequens*
EUR	euro
EWHC	England & Wales High Court, United Kingdom

Ex. C	Claimant's Exhibit
Ex. R	Respondent's Exhibit
HC	High Court
i.e.	*id est*
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	*ibidem*
ICC	International Chamber of Commerce
ICCA	International Commercial Contract Act
Inc.	Incorporated
kg	kilogram(s)
LG	Landgericht (Regional Court), Germany
lit.	*littera*
Ltd	Limited
Mfg	Manufacturing
MND	Ministry of Natural Resources and Development
MP	Member of Parliament
Mr./Ms.	Mister/Miss
MüKo BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch (Civil Code), Germany
No.	Number
NoA	Notice of Arbitration
OGH	Oberster Gerichtshof (Supreme Court of Justice), Austria
OLG	Oberlandesgericht (Higher Regional Court), Austria
ONSC	Ontario Superior Court of Justice
p.	page
para(s).	paragraph(s)
Parties	Claimant and Respondent

PCA	Permanent Court of Arbitration
PCA Rules	PCA Arbitration Rules (2012)
plc	Public Limited Company
PM	Prime Minister
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
Respondent	Equatoriana Geoscience Ltd
RNA	Response to the Notice of Arbitration
S.A.	Société Anonyme
s.r.l	Società a responsabilità limitata (limited liability company), Italy
SC	Supreme Court
Sect.	Section
Tribunal	Arbitral Tribunal
UAS	Unmanned Aerial System(s)
UK	United Kingdom of Great Britain and Northern Ireland
UKHL	United Kingdom House of Lords
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994)

US ..... United States of America

v. ..... versus

ZG ..... Zivilgericht (Civil Court), Germany

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1 Statement of Facts

1 **Drone Eye plc** (hereinafter Claimant) is a medium-sized producer of Unmanned Aerial Systems (UAS), commonly referred to as "drones". It is based in Mediterraneo.

2 **Equatoriana Geoscience Ltd.** (hereinafter Respondent) is a private company owned entirely by the Equatorianian Ministry of Natural Resources and Development. In 2016, Respondent was set up after the Equatorianian government announced the Northern Part Development Program (hereinafter Development Program).

3 The Development Program was initiated as a means to curtail the dire living conditions in the northern part of Equatoriana. This region was a stronghold of the socialist party in power at the time. The government intended to remedy these issues, including high unemployment, crime, and mortality rates, with the exploitation and development of the resource-rich forests of Northern Equatoriana [Ex. C5, p. 16]. For this reason, Respondent required the use of drones to explore the northern part with minimal disturbances to the sensitive wildlife in the region [RNA, p. 28, para. 6].

4 In March 2020, Respondent opened a tender process for delivery of four drones. Claimant submitted a successful bid and entered into further negotiations with Respondent for the conclusion of a contract. The negotiations were conducted by COO Mr. David Field on the side of Respondent, and Mr. JC Bluntschli on the side of Claimant.

5 In Spring 2020, Horacia Porter (lawyer of Claimant) researched into the domestic legal requirements for a possible contract with Respondent. She discovered that there is no need to register drones in Equatoriana when they are sold to state-owned companies. She also found that contracts involving public infrastructure required approval of the Minister for Natural Resources and Development. Moreover, contracts containing arbitration clauses require approval by Parliament [Ex. C7, p. 18, para. 5-6].

6 The parliamentary debate, planned for 27 November 2020 to approve the contract between Parties was cancelled on short notice [RNA, p. 29, para. 13]. Nevertheless, Mr. Rodrigo Barbosa, then Minister for Natural Resources and Development, assured Mr. Bluntschli that parliamentary approval would be forthcoming after Christmas break [Ex. C7, p. 18, para. 9].

7 On 1 December 2020, the Purchase and Supply Agreement (hereinafter Contract) was signed at a formal public ceremony by Mr. William Cremer and Ms. Wilhelmina Queen, CEOs of Claimant and Respondent respectively. It was also signed by Mr. Barbosa as the responsible minister and as the chairman of the supervisory board of Respondent. Contract provided for delivery of six Kestrel Eye 2010 drones by Claimant to Respondent between 2022 and 2023 for 44 million EUR. The final terms of Contract were more favorable for both parties than envisioned by the tender. Not only would Respondent receive a higher number of drones at a 20% reduction, Claimant would be able to service the drones for two years longer and for greater remuneration [Ex. R1, p. 32,

para. 5-6].

8 In February 2021, CLAIMANT presented the Hawk Eye 2020 drone at an air show in Mediterraneo, thereby expanding its portfolio of deliverable drones. The Hawk Eye has "fixed wings", compared to the Kestrel Eye 2010, which uses "helicopter technology" [PO 2, p. 45, para. 13].

9 In March 2021, RESPONDENT entered into discussions with CLAIMANT on the effects of the Hawk Eye release on CONTRACT. RESPONDENT accused CLAIMANT of deceptive conduct in the form of misrepresentation, by selling *"old for new"* [Ex. C7, p. 19, para. 13] and failing to disclose the release of the Hawk Eye 2020.

10 In Spring 2021, a leader of the right-wing populist party of Equatoriana raised anti-arbitration sentiments as part of his campaign, arguing that arbitration agreements with foreign private entities lead to a loss of state sovereignty in Equatoriana [*ibid*, para. 15]. This matter was to be taken up in a parliamentary debate planned for June 2021.

11 In May 2021, in a meeting scheduled to discuss the alleged misrepresentation of CLAIMANT, RESPONDENT instead raised a request to amend the arbitration clause of CONTRACT. Subsequently, on 27 May 2021, Ms. Queen sent Mr. Cremer an email containing a copy of the duly amended arbitration clause, which includes sections on the UNCITRAL Expedited Arbitration Rules 2021 and references to the UNCITRAL's Transparency Rules.

12 In June 2021, the parliamentary debate on the use of arbitration by state entities in Equatoriana took place. The main line of argument of the government was that their ministers should only authorize contracts with arbitration clauses which make room for transparency, and expressly referred to the clause in PARTIES' contract as an example [Ex. C7, p. 19, para. 15].

13 On 3 July 2021, the Citizen published a series of articles on massive corruption in the Development Program. This led to a public outcry, the resignation of the socialist PM, and a call for early elections.

14 On 3 December 2021, a new government replaced the socialist government, formed by a coalition of several parties including the liberal party. The new government declared a moratorium on all contracts concluded under the Development Program.

15 On 27 December 2021, RESPONDENT informed CLAIMANT that CONTRACT would be put on hold until further notice. This is because Mr. Field was a key figure in the bribery scandal, and was under arrest and investigation in connection with several contracts he negotiated and concluded under the Development Program.

16 On 3 February 2022, CLAIMANT offered to renegotiate Contract to assimilate the needs of the new government [Ex. C3, p. 13, para. 7]. All work owed under CONTRACT was halted until PARTIES could meet in person to discuss the new developments.

17 On 28 May 2022, the in-person meeting took place. Ms. Queen indicated that RESPONDENT was unwilling to renegotiate and accused CLAIMANT of bribing government officials. She also reiterated the misrepresentation accusations, stating that the Kestrel Eye drones

were not Claimant's newest, state-of-the-art model [Ex. C3, p. 14, para. 8].

18 On 30 May 2022, Respondent declared Contract avoided and negotiations terminated.

19 In light of all this, Claimant submitted a Notice of Arbitration under the dispute resolution clause of Contract [NoA, p. 4-8] on 14 July 2022. Respondent challenges the jurisdiction of Tribunal, arguing that the agreement is void for lack of requisite parliamentary consent, and for corruption. In case Tribunal accepts jurisdiction, Respondent also requests a stay or bifurcation of proceedings, to keep issues of corruption outside the arbitration until criminal investigations are completed in Equatoriana [RNA, p. 30, para. 20-21].

2 Summary of Arguments

20 Tribunal is empowered to decide the present dispute. Tribunal has the authority to decide on its own jurisdiction (**4.1**). Parties have agreed to arbitration instead of litigation in accordance with Art. 7(1) DAL (**4.2**). Moreover, the arbitration agreement meets form requirements under Arts. 7(2) and 7(3) DAL (**4.3**). The lack of parliamentary consent at the time of Contract conclusion does not render the arbitration agreement invalid (**4.4**). Any alleged corruption related to the conclusion of Contract would also leave the arbitration agreement untouched (**4.5**). Finally, the subject matter of this dispute is arbitrable although it may require Tribunal to deal with corruption (**4.6**).

21 Tribunal should neither stay nor bifurcate the present proceedings. Tribunal has no legal duty to stay or bifurcate these proceedings (**5.1**). Rather, Tribunal is authorised under the PCA Rules to decide on a plea of stay or bifurcation, exercising its discretion (**5.2**). The case at hand does not justify a stay or bifurcation, because none of the requisite conditions are met (**5.3**). Any stay or bifurcation would result in unreasonable delays and lead to unfair treatment and a denial of justice. Finally, Art. 15 of Equatoriana's Anti-Corruption Act does not hinder Tribunal in issuing an award on the merits (**5.4**).

22 The CISG is the proper law to apply to the underlying Contract. Parties have chosen Equatorianian law to govern Contract. As part of the unified state law of Equatoriana, the CISG is therefore applicable to the substance of this dispute (**6.1**). There is no express or implied intention of Parties to exclude the application of the Convention under its Art. 6 (**6.2**). Moreover, the CISG is also not excluded under Art. 2(e) because the drones to be delivered are not aircraft within the meaning of the CISG (**6.3**). The Convention is also not excluded from application under Art. 3(2) CISG. Although Contract contains several obligations, the sales element forms the preponderant part of Parties' obligations (**6.4**).

23 The remedy of avoidance for fraudulent misrepresentation pursuant to Art. 3.2.5 ICCA is not available for Respondent. Respondent labeled its defence as "misrepresentation", when it in fact raises an issue of non-conformity entirely covered under the CISG (**7.1**).

Therefore, any recourse to domestic remedies in non-unified domestic law is excluded by application of the CISG. Moreover, in the present case, there is no evidence of fraudulent representation, necessary to rely on a remedy outside the Convention (**7.2**).

3 Submissions

24 In light of the issues raised in PO 1 [III(1)] Claimant makes the following submissions:

1. Tribunal has jurisdiction to hear and decide the case.
2. Tribunal should neither stay nor bifurcate the proceedings.
3. The CISG applies to Parties' contract.
4. The avoidance of Contract for fraudulent misrepresentation is not available for Respondent.

4 Tribunal has jurisdiction to hear and decide the case

25 Tribunal has the power to decide on its own jurisdiction (**4.1**). Parties have agreed to submit this dispute to arbitration in accordance with Art. 7(1) DAL (**4.2**). Moreover, the arbitration agreement meets all form requirements pursuant to Arts. 7(2) and 7(3) DAL (**4.3**). The absence of parliamentary consent at the time of Contract conclusion does not render the arbitration agreement invalid (**4.4**). In addition, any alleged corruption related to the conclusion of Contract would leave the arbitration agreement untouched (**4.5**). Finally, this dispute is arbitrable though it may require Tribunal to deal with corruption (**4.6**).

4.1 Tribunal has the power to decide on its own jurisdiction

26 Tribunal's authority to determine its jurisdiction follows from Art. 16(1) DAL and Art. 23(1) PCA Rules, giving Tribunal the first word on its jurisdiction [*Smit*, p. 19]; [*Cook*, p. 17]. This authority is subject to the last word of state courts, either through the application of Art. 16(3) DAL or within set aside or recognition and enforcement proceedings in Danubia [Art. 34(2)(a)(i) DAL; Art. 36(1)(a)(i) DAL], or recognition and enforcement proceedings outside Danubia [Art. V(1)(a) NYC]. DAL is applicable because the seat of arbitration is in Danubia, and the PCA rules apply because parties agreed on these rules [Art. 20 Contract].

4.2 Parties intended to submit any disputes to arbitration in accordance with Art. 7(1) DAL

27 Parties have agreed to submit to arbitration any disputes arising out of Contract in accordance with Art. 7(1) DAL. The "agreement to arbitrate" is *"the willingness of the parties to the dispute that want to settle their dispute through arbitration"* [*Ranjbar/ Dehshiri*, p. 96]. This entails giving up the citizen's basic right to seek redress in domestic courts [*Redfern/Hunter*, para. 1.21], and may be evidenced through parties' statements and conduct [*Nevisandeh*, p. 315]. It is uncontested that both during pre- and post-contractual negotiations Parties agreed to arbitration over litigation, which is reflected in the signed Contract containing the arbitration clause [Ex. C2, p. 12, Art. 20].

4.3 Parties's agreement meets the form requirements for arbitration agreements under Art. 7(2) and (3) DAL

28 The original arbitration agreement in Art. 20 Contract satisfies the writing requirement under Art. 7(2) DAL, because Contract was signed by both Parties. The original arbitration agreement was amended following a request of Respondent during negotiations in May 2021 [Ex. C9, p. 22]. This amendment was never signed. However, the unsigned

amendment is deemed to be formally valid by virtue of the alleviation in Art. 7(3) DAL. Art. 7(3) DAL provides that *"an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means"*. The decisive point is that the "content" of the arbitration agreement, as distinguished from the parties' expressions of "consent" has been recorded [*Born*, p. 740-741]. In the present case, there is evidence that PARTIES had an oral exchange on the content of the amendment, and that the resulting text has been recorded in an email dated 27 May 2021 [Ex. C9, p. 22, para. 1].

29 In light of this, it is evident that PARTIES agreed to this arbitration and the agreement meets the form requirements of the arbitration law.

4.4 Lack of parliamentary consent does not render PARTIES' agreement invalid

30 Lack of parliamentary consent raised by RESPONDENT does not render PARTIES' arbitration agreement invalid. Parliamentary consent was not required for the inclusion of the arbitration clause (**4.4.1**). Alternatively, the particular circumstances of this case bar RESPONDENT from invoking the lack of consent (**4.4.2**).

4.4.1 Parliamentary consent was not required

31 RESPONDENT's contention that Equatorianian law requires parliamentary approval for PARTIES' arbitration clause is unfounded. According to Art. 75 of the Equatorianian Constitution, "administrative contracts" concluded by state-owned entities can only submit to foreign-seated arbitration subject to parliamentary approval [RNA, p. 30, para. 21]; [PO 2, p. 47, para. 29]. However, parliamentary consent is not required in this case because CONTRACT is not an administrative contract but a commercial contract. According to the present case law, administrative contracts are defined to cover *only* agreements involving the actual construction of infrastructure [PO 2, p. 47, para. 29]. The scope of CONTRACT is limited to the exploration of natural resources, including the collection of geological data in the northern part of Equatoriana [Ex. C2, p. 10], with no focus on any actual construction in the region. This clearly excludes CONTRACT from the ambit of administrative contracts.

32 By attempting to classify CONTRACT as an administrative contract, RESPONDENT seeks a false interpretation of the Equatorianian constitution. As a general principle of constitutional interpretation, *"change to the constitution through interpretation undermines the Constitution, the rule of law, and the principle of democracy"* [*Goldsworthy*, p. 42]; [*Sandalow*, p. 1033]. If TRIBUNAL interprets the constitutional provision to mean that it extends to contracts for mere surveillance of resources, it faces the risk of rendering an interpretation beyond the scope of the Constitution.

33 Additionally, the pertinent facts of this case show that RESPONDENT, within the confines

posed by its special purpose, is operated like a "commercial company" [PO 2, p. 44, para. 5]. In line with its functioning as a commercial company, RESPONDENT started to generate revenues by selling the data and information which it collected from surveillance missions to other private companies engaged in the exploration or the construction of infrastructure [PO. 2, p. 44, para. 7]. These are a strong indication that RESPONDENT is operating like a private company with strong commercial objectives and has no need to fulfil the regulatory requirements set out by the Equatorianian Constitution for state-owned entities.

34 Therefore, in order to uphold the true spirit of the Equatorianian constitution and ensure a proper interpretation of its Art. 75, TRIBUNAL should find that there was no parliamentary consent required because CONTRACT is commercial and not administrative in nature.

4.4.2 Alternatively, RESPONDENT is barred from invoking the lack of consent

35 Even if parliamentary consent was required for CONTRACT, RESPONDENT is barred from invoking the lack of consent for several reasons.

36 First, RESPONDENT acts in bad faith by invoking its national law to avoid an arbitration agreement that it willingly entered into. There is a general consensus in the international arbitration community on the applicability of the principle that a state party cannot invoke its own internal law to avoid its contractual obligation to arbitrate [*Born*, p. 772]; [*Gaillard/Savage*, p. 322]; [*Paulsson/Petrochilos*, p. 90] and [*Steingruber*, para. 3.26]. Such efforts are irreconcilable with the state's fundamental obligations of good faith and principles of estoppel, applicable as general principles of law. Such a defence, when raised, would have no effect on the validity of the state's agreement to arbitrate [*Born*, p. 777]; [*Cairns*, p. 4]; [*Cheng/Entchev*, p. 955]; [*Paulsson/Petrochilos*, p. 90].

37 The widespread nature of this principle is further demonstrated by international provisions such as Art. II(1) of the European Convention on International Commercial Arbitration (ECICA). Art. II(1) ECICA expresses a general principle of international arbitration law according to which public entities may not rely on their own internal law to frustrate the validity of an international arbitration agreement [*Kröll*, p. 10-11]; [*Paulsson/Petrochilos*, p. 95]; [*Lisa Beisteiner* in: *Zeiler/Siwy*, p. 59]; [*Marzolini*, p. 33]. Art. II(1) ECICA has also been added to the arbitration law of CLAIMANT's state, Mediterraneo [PO 2, p. 48, para. 33]. RESPONDENT may argue that Equatoriana has neither adopted a comparable provision nor is it a contracting State to the ECICA. However, the tribunal in *Benteler v. Belgium* acknowledged that the provision envisaged in Art. II(1) is a general principle that forms the "common law of arbitration" [Tribunal – *Benteler v. Belgium*]. Therefore, even where the ECICA is not directly applicable, in practice its Art. II(1) may be invoked in support of the general principle enshrined in this provision [*Kröll*, p. 6].

38 *Benteler v Belgium* is merely one of several sources which support this principle in line

with the ECICA. Another international authority may be found in Art. 177(2) of the Swiss Private International Law Act 1987. According to Art. 177(2), a state, or an enterprise held by, or an organisation controlled by a state, which is a party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate. Art. 177(2) is based on the principle of good faith, which prohibits one party from adopting an inconsistent behaviour to the detriment of the other [*Marzolini*, p. 34].

39 The Swiss Law and the ECICA enforce a general trend which is supported by several arbitral awards. The tribunals have held a common line of reasoning in the following cases, that: *"there is a general principle, which today is universally recognised in relations between states as well as in international relations between private entities, whereby a state would be prohibited from reneging on an arbitration agreement entered into by itself or, previously, by a public entity"* [ICC – *Framatome v AEOI*] ;[ICC – *Ministry of Defence v Contractor*]; [ICC – *ICC Award No. 3481*]; [ICC – *Elf Aquitaine v. NIOC*]; [ICC – *ICC Award No. 5103*]; [CA Paris – *Gatoil v. NIOC*].

40 The principle of non-reliance on internal law to invalidate an arbitration agreement has general applicability [*Gaillard/Savage*, p. 329]. However, Respondent has argued that Claimant was aware of the missing Parliamentary authorisation. Even in this case, Respondent still cannot rely on the missing consent. Although Claimant acknowledges that it was aware of the missing authorisation of the Equatorianian Parliament for the arbitration clause, it exercised caution and good faith, and inquired about the missing approval immediately after cancellation of the parliamentary vote. In return, Claimant received assurances which led to the reasonable belief that the Parliamentary consent has, in fact, been acquired.

41 These assurances came from Mr. Rodrigo Barbosa. His dual role as an employee of Respondent and the Minister of Natural Resources justifies Claimant's belief in the truth of his statements. He positively assured Claimant that the Parliamentary approval was just a formality, with additional assurances that the approval would be forthcoming after the Christmas break [Ex. C7, p. 18, para. 9]. The minister, while making such assurances, acted on Respondent's behalf as chairman of its supervisory board, in addition to his role as a state representative. According to Respondent's statutes, Mr. Barbosa is required to sign contracts involving a financial liability which is higher than 25 million EUR [PO 2, p. 44, para. 5 and p. 48, para. 37]. The financial liability of Contract is evidently higher than 25 million [NoA, p. 5, para. 7; Ex. R1, p. 32, para. 6]. Therefore, as Contract would never have been valid without his signature, any assurances made by Mr. Barbosa affecting the validity of Contract and its arbitration agreement would be attributable to Respondent. It was not unreasonable in the presence of such reliable assurances for Claimant to believe that Parliamentary consent will be acquired. Any of Claimant's remaining doubts about the missing authorisation were removed when Respondent made advance payments towards the acquisition of the drones

[PO 2, p. 47, para. 30]. It was only after the termination of CONTRACT on 30 May 2022, that CLAIMANT discovered the assurances had not been backed by positive measures to acquire consent by RESPONDENT and its chairman, Mr. Barbosa.

42 Mr. Barbosa's failure to obtain the consent that he promised CLAIMANT becomes even more evident in light of his dual role. Being a minister, Mr. Barbosa had easier access, means and power to obtain the parliamentary vote on this important issue. In fact, it was indeed Mr. Barbosa who used his power to put the discussion on the arbitration clause onto the agenda of the Parliament for 27 November 2020 [PO 2, p. 47, para. 29], and, likewise, he used the same power to withdraw the voting proposal from the agenda [RNA, p. 29, para. 13]. Having the power to add and withdraw matters in this way, Mr. Barbosa could have easily re-used this authority to put the matter to vote again and fulfill his duties to conclude a valid contract for RESPONDENT. His act of signing the arbitration clause without getting the approvals even endangered the contract that RESPONDENT gave him authority to validate. His negligence in acquiring all formalities which he knew to be indispensable for the conclusion of CONTRACT is therefore also attributable to RESPONDENT. In line with the ruling in *Framatome*, the party challenging the tribunal's jurisdiction cannot invoke and take advantage of irregularities and *"violations of regulations [...] which had been committed, by omission or action, by its own organs or representatives"* [ICC – *Framatome v AEOI*]. Therefore, RESPONDENT cannot now rely on missing parliamentary consent, as the irregularity was caused by its own chairman.

43 In any case, it was never CLAIMANT's duty to acquire consent, but RESPONDENT's. According to Art. 6.1.14 of the UNIDROIT Principles, *"where the law of a state requires a public permission affecting the validity of the contract or its performance, if only one party has its place of business in that State, [...] that party shall take the measures necessary to obtain the permission"*. RESPONDENT, having its place of business in the state of Equatoriana where the consent was required, was under a duty to obtain the necessary authorisations from its Parliament for the arbitration clause. This is especially because RESPONDENT is in the best position to have full knowledge about the relevant procedures as a state-owned entity. As established earlier, RESPONDENT failed to discharge its burden and no further steps were taken to pass the parliamentary procedure which was withdrawn on 27 Nov 2020 [PO 2, p. 47, para. 30]. After the debate was cancelled, RESPONDENT could have taken retroactive measures to obtain consent, which it did not. After failing to acquire consent, RESPONDENT cannot now rely on its absence.

44 RESPONDENT is likewise precluded from invoking lacking parliamentary consent for the amendment to the arbitration clause. The original arbitration clause was amended by PARTIES in May 2021. According to the minority view held in RESPONDENT's state, major changes to an arbitration clause concluded with a state entity also require the approval of Parliament [PO 2, p. 48, para. 36]. Following the controversies relating to arbitration involving state entities in Equatoriana, a broad Parliamentary debate was

organised to discuss the inclusion of arbitration clauses into state contracts. During this debate, the amended arbitration clause between PARTIES was expressly commended by the parliamentary members due to its inclusion of transparency provisions [Ex. C7, para. 13, p. 19]. Despite these positive sentiments of the Equatorianian Parliament pertaining to the arbitration clause, RESPONDENT did not use the opportunity to put the clause to a parliamentary vote.

45 RESPONDENT's subsequent reliance on the lack of parliamentary consent after discussing, signing and amending the arbitration clause in CONTRACT is equivalent to inconsistent party behaviour. According to Art. 1.8 of the UNIDROIT Principles, *"a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment"*. The arbitration clause remained a part of the agreement for 1.5 years, indicating that RESPONDENT considered the arbitration agreement to be valid and in force. RESPONDENT has conveniently changed its position now that it seeks to terminate CONTRACT. This is evidence of inconsistent behaviour. TRIBUNAL should disregard RESPONDENT's reliance on its internal law as RESPONDENT otherwise would be contradicting its earlier behaviour.

46 It is crystal clear that the international legal community has thrown their weight behind the principle prohibiting reliance on internal law. In light of such compelling consensus, RESPONDENT cannot justifiably avoid its international obligations under the arbitration agreement. Any insistence upon the repudiation of its consent in favour of its internal rules will adversely affect the business confidence of foreign private parties and prevent them from conducting business activities in RESPONDENT's state. A foreign party selected as a contractor by a state entity, which relies in good faith on the valid conclusion of an arbitration agreement, deserves the protection granted by the general principle enshrined in Art. II(1) ECICA [*Kröll*, p. 13]. CLAIMANT, as a foreign contractor, concluded the arbitration agreement with RESPONDENT in good faith and deserves the protection afforded by Art. II(1) ECICA and other similar provisions. Additionally, RESPONDENT having proper knowledge about its state laws and the requirement of consent acted in bad faith by its failure to take the relevant steps to acquire such approvals and acting to the detriment of a foreign entity, CLAIMANT. TRIBUNAL should decide that RESPONDENT is barred from invoking its national law to renounce an arbitration clause that it willingly signed.

4.5 The alleged corruption would not render PARTIES' arbitration agreement invalid

47 While there is no corruption involved in the acquisition of the transaction, the allegations of corruption made by RESPONDENT would not render PARTIES arbitration agreement invalid. This is because in the event of any corruption, no money was paid to obtain an arbitration agreement (**4.5.1**). Moreover, PARTIES' arbitration agreement is a separate

contract not affected by corruption in the main contract due to the principle of separability (**4.5.2**).

4.5.1 In the event of corruption, no money was paid to obtain an arbitration agreement

48 RESPONDENT has failed to present any traces and evidence of corruption. RESPONDENT itself confirms that *"there is no proof yet as to the payment of any bribes in relation to this contract"* [Ex. C8, p. 20, para. 2]. However, even if any illicit payments were made during negotiations, they were made to acquire the main contract. No money would have been paid to obtain an arbitration agreement. Furthermore, the second bidder to RESPONDENT's tender, based in Equatoriana, also insisted on the inclusion of an arbitration clause into the contract due to the bad reputation of state courts in Equatoriana [PO 2, p. 47, para. 29]. In the circumstance that choosing arbitration was a common means of settling disputes in such contracts, it becomes absurd to assume that bribes can be paid for the inclusion of an arbitration clause into such contracts.

4.5.2 PARTIES' arbitration agreement is a separate contract and not tainted by corruption

49 PARTIES arbitration agreement is a completely separate contract and not affected by corruption in the main contract based on the principle of separability. According to Art. 16(1) DAL *"the arbitration agreement shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause"*. In light of the principle of separability, the invalidity of the main contract, hence, does not automatically extend to the agreement to arbitrate, as repeatedly held by courts in accordance with provisions equivalent to Art. 16 DAL (UNCITRAL Model Law) [SC India – *Reddy & Bros v Maharashtra*]; [SC Victoria – *Subway Systems v Ireland*]; [ONSC – *D.G. Jewelry v. Cyberdiam Canada*] [ONSC – *NetSys Technology*]; [SC India – *Magma Leasing v. Madhavilata*]; [HC Nairobi – *Blue v. Jaribu Credit*]; [*Born*, p. 953]. RESPONDENT's allegations of fraudulent inducement are only made towards the underlying contract as per the following words: *"the conclusion of the Agreement was tainted by corruption resulting in its invalidity. The Agreement and thus also the arbitration clause contained therein, would not have been concluded but for the bribes paid"* [RNA, p. 30, para. 20]. The extension of such an allegation of corruption and bribery to the arbitration clause is inconsistent with the core principles of separability. According to case law and scholarly opinion, it is settled that the fraudulent inducement of the parties' underlying contract as distinguished from the parties' arbitration clause does not compromise the substantive validity of an arbitration clause included in the contract. As a consequence, only fraud or fraudulent inducement directed at the agreement to arbitrate itself will, as a substantive matter, impeach that agreement [*Born*, p. 912]; [*Karim A. Youssef* in: *Mistelis*, p. 55].

50 In *Prima Paint v. Flood & Conklin Mfg* and *Fiona Trust v. Privalov*, the courts held that the alleged fraudulent misrepresentations concerned only the procurement of the commercial terms of parties' underlying commercial transaction and, therefore, did not impeach the agreement to arbitrate. The arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement [US Supreme Court – *Prima Paint v. Flood & Conklin*]; [UKHL – *Fiona Trust v. Privalov*]. RESPONDENT has not raised any concrete facts concerning any fraudulent activity involved in the acquisition of the arbitration agreement. As a result, it cannot be concluded that the arbitration clauses were instrumental to the overall allegations of deceptive conduct. In effect, an allegation of bribery or corruption in the procurement or performance of the contract should not in itself deprive the arbitral tribunal of jurisdiction [*Karim A. Youssef* in: *Mistelis*, p. 55] and [*Redfern/Hunter*, para. 2.153].

51 Due to the principle of separability, it is unconscionable to extend any allegation of corruption affecting the underlying contract to the arbitration clause for its invalidation. Thus, in the absence of any challenge specifically to the arbitration agreement itself relating to fraudulent inducement, its provisions are enforceable even if the main contract were invalid.

4.6 The dispute is arbitrable although it may require TRIBUNAL to decide on corruption

52 The dispute is arbitrable although it requires that TRIBUNAL renders a decision on corruption. It is a widely accepted view that an arbitral tribunal has jurisdiction to decide upon cases of corruption [*Fox*, p. 487]; [*Pendse/Joshi*, p. 25]; [*Pitkowitz*, para. 5]; [*Born*, p. 1078]; [*Malik/Kamat*, p. 11]. It is generally held that the arbitral tribunal is entitled to hear the arguments and receive evidence, and to determine for itself the question of illegality [UKHL – *Fiona Trust v. Privalov*]; [*Redfern/Hunter*, para. 2.153]. It has been held in [EWCACiv – *London Steamship v. Spain*] that "the arbitrator has the power to draw civil consequences of the rule of the criminal law on the business dispute, and it is the arbitrator's duty to determine illegality, fraud, and collusion and draw the consequences therefrom". If an allegation of corruption is made in plain language in the course of the arbitration proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proven [*Born*, p. 978]; [*Redfern/Hunter*, para. 2.158]. Conversely, a failure to address the existence of such illegality may threaten the enforceability of an award [*Redfern/Hunter*, para. 2.158]. RESPONDENT has raised allegations of corruption towards the underlying contract [RNA, p. 30, para. 20]. TRIBUNAL, therefore, is under a duty to consider the allegations and deliver its findings for a possibility to render an enforceable award. Thus, disputes involving corrupt activity are considered to be arbitrable.

53 It is further established that there should be no insuperable barriers to raising issues of bribery in the context of international commercial arbitration, particularly if the contract contains a clause prohibiting acts of bribery by the parties and if the relevant countries are signatories to one of the new international conventions against bribery and corruption [*Fox*, p. 500]. International anti-corruption conventions ratified by a country are absolute proof that bribery is not consistent with that country's public policy [*Fox*, p. 500]. Both caveats are evident in the present case: PARTIES have their seats in contracting States to the United Nations Convention Against Corruption (UNCAC) [PO 1, p. 42, para. 3] and according to CONTRACT, PARTIES have undertaken to comply with the obligations arising from the anti-corruption legislation [Ex. C2, p. 11]. This includes corruption into the scope of the present case. A possible future finding of fraud by TRIBUNAL shall not be contrary to the public policy of RESPONDENT's state.

54 In a nutshell, TRIBUNAL is empowered with an unfettered right to decide the outcome of the dispute. All form requirements have been adhered to and there are no impediments imposed by the national law provisions affecting the validity of the arbitration agreement. Finally, it is settled that the arbitration agreement is not affected by any corruption allegations and TRIBUNAL has the duty and the power to decide on any corruption allegations affecting CONTRACT.

5 The proceedings should not be stayed nor bifurcated by TRIBUNAL

55 TRIBUNAL has no legal duty to stay or bifurcate these proceedings (**5.1**). Instead, TRIBUNAL may exercise its discretion under the applicable rules, the PCA Rules, to decide on a stay or bifurcation (**5.2**). The case at hand does not justify a stay or bifurcation because none of the requisite conditions are met (**5.3**). TRIBUNAL is also not hindered by Art. 15 of Equatoriana's Anti-Corruption Act from issuing an award (**5.4**).

5.1 TRIBUNAL is under no legal duty to stay or bifurcate proceedings

56 CLAIMANT wishes to establish, as a first point, that TRIBUNAL is not required to stay proceedings. *"[T]here is no duty on the part of the arbitrators to stay the arbitral proceedings. The stay is neither mandatory nor automatic"* [*Besson*, p. 104]; [BGer – *B. Fund Ltd v A. Group Ltd*]. This remains true even where the domestic law in parties' places of business mandates a stay of civil proceedings pending criminal investigations. In Equatoriana, which is RESPONDENT's domicile, the law obliges civil courts to stay proceedings *"if their outcome depends on ongoing criminal investigations, as the judgment of the criminal court on a matter is binding on a civil court"* [PO 2, p. 49, para. 46]. However, this provision should not affect TRIBUNAL's decision on a stay at all.

57 CLAIMANT acknowledges that TRIBUNAL generally has a duty to secure the enforceability of its award [*Horvath*, p. 135]. CLAIMANT also acknowledges, that the duty to stay civil proceedings in Equatoriana may be considered part of the public policy of Equatoriana, so that an award might not be enforceable in Equatoriana where a stay or bifurcation was refused pending criminal investigations. This is based on the fact that Equatorianian courts *"have the reputation of deciding in favor of the state and its entities in case of doubt"* [PO 2, p. 46, para. 18]. However, the attitude of Equatorianian courts deviates from the position of the arbitration community, that a tribunal should not be affected by a duty to stay in domestic law [*Racine*, p. 210-211]; [*Racine- Note to Judgement of 25 October 2005*, p. 108]; [*Wittmer et. al*, para. 6]; [ICC – *ICC Award No. 11961*]. In the present case, TRIBUNAL should not make its decision to stay proceedings based solely on a duty to stay in Equatoriana.

58 Firstly, TRIBUNAL cannot be expected to know the possible laws in every state which may render their award unenforceable. *"A duty to render an enforceable award is in practice close to impossible to police [...] an arbitral tribunal cannot conceivably ensure universal enforceability. Nor can it anticipate all potential places in which enforcement may occur in practice"* [*Wittmer et. al*, para. 6]. The main duty of TRIBUNAL is to ensure that its award will not be set aside in Danubia, where these proceedings are seated. Only set aside proceedings can lead to the annulment of an award. Danubian courts would, however, not set aside TRIBUNAL's award based on a duty to stay. There is no information in the facts that Danubian Law contains a similar provision to the provision in the law of Equatoriana, requiring state courts in civil proceedings to stay their proceedings. Even if there were such a rule, Danubian courts would follow the general position of the arbitration community and would not consider the duty to stay as part of public policy. TRIBUNAL is therefore under no duty to let its decision on a stay or bifurcation be guided by the pressures of the Equatorianian law.

59 Secondly, TRIBUNAL is not a civil court, as required by the Equatorianian provision [PO 2, p. 49, para. 46]. TRIBUNAL is also not bound by the Equatorianian provision because a domestic procedural law cannot apply to an arbitrator ruling in international matters. The arbitral tribunal is autonomous, with an arbitral procedure governed by its own rules [CA Paris – *Congo v. SA Commisimpex*]. PARTIES' choice of Equatorianian law to govern CONTRACT [Ex. C2, p. 12] pertains only to substantive law. Hence, TRIBUNAL is under no obligation to stay or bifurcate proceedings in the present case.

5.2 The PCA Rules give TRIBUNAL the power to decide on a stay or bifurcation exercising its discretion

60 TRIBUNAL has the power to decide on a stay or bifurcation. Art. 17(1) PCA Rules provides that the tribunal, in exercising its discretion, shall conduct the proceedings to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the

dispute. This provision has formed the basis for the tribunal's determination of a request for stay and bifurcation in PCA case law [PCA – *Patel Engineering v. Mozambique*]; [PCA – *Cairn Energy v. India*]. TRIBUNAL is therefore free to exercise its authority and decide on the matter, in accordance with the PCA Rules agreed upon by PARTIES.

5.3 The conditions necessary for a stay or bifurcation of proceedings are not met

61 It is wholly unnecessary to delay the delivery of justice in this case. RESPONDENT requests a stay when it would even go against its own interests (**5.3.1**). Otherwise, the conditions for rendering a decision on a stay or bifurcation are the same in the instant case (**5.3.2**). In line with these standards, a bifurcation would lead to the unfair treatment of CLAIMANT (**5.3.3**) and to an unreasonable delay (**5.3.4**). Moreover, the outcome of criminal investigations in Equatoriana against Mr. Field is immaterial to the present arbitration (**5.3.5**).

5.3.1 A stay would go even against the interests of RESPONDENT

62 RESPONDENT asks for a remedy that does not serve its own interests in this arbitration. A stay would hinder TRIBUNAL even to decide on the remedy of avoidance for misrepresentation. In essence, RESPONDENT's lawyer, Mrs. Fasttrack, may have indeed acted too 'fast' in requesting a stay of proceedings. This is because RESPONDENT requests an avoidance of contract for both *misrepresentation* and *corruption*. If corruption is separated from all other issues in this arbitration, and TRIBUNAL eventually finds that RESPONDENT may avoid the contract for misrepresentation, then there would be no need to render any decision on corruption. A stay would have been completely in vain. RESPONDENT has all the means to plead its case and win its desired remedy based on the defenses already raised, without delving into any issues of corruption. Consequently, RESPONDENT only delays its own justice by insisting on a stay.

5.3.2 The standard for deciding on a stay or bifurcation request is the same

63 Even if TRIBUNAL considers that a stay would not be detrimental to RESPONDENT, a delay of proceedings would still be unnecessary. In exercising its discretion to grant a stay or bifurcation in the instant case, TRIBUNAL must consider which standard to apply. The core issue to be decided is whether TRIBUNAL should wait for the finalisation of criminal investigations in Equatoriana against Mr. Field before concluding this arbitration. This is true whether the decision concerns a stay or bifurcation. Therefore, there should be a single standard to assess RESPONDENT's request.

64 Nevertheless, the PCA case law definition of "bifurcation" may be misleading, and lead to the false impression that the standard for bifurcation is distinct from that for a stay in the case at hand. The vast array of PCA arbitrations that deal with the issue of bifurcation are concerned with whether the tribunal should render a decision on juris-

diction, and decide on the merits in a separate award [PCA – *Patel Engineering v. Mozambique*]; [PCA – *Renco Group v. Peru*]; [PCA – *Nordstream 2 v. EU, Parties = Nordstream 2 AG v. The European Union, Sign = PCA Case No. 2020-07, Url = https://pcacases.com/web/sendAttach/23424*]; [PCA – *Glencore v. Bolivia*]. Those scenarios cannot be likened to the one at hand. What Respondent requests is not a division between jurisdiction and merits, but simply a separation of the question of whether Contract can be avoided for corruption [PO 2, p. 49-50, para. 52]. In fact, Procedural Order No. 1 requests that Parties present arguments on whether a stay or bifurcation should be granted only *"if the Tribunal's jurisdiction can be established"* [PO 1, p. 42, III(1)(b)]. Therefore, Tribunal's assessment must assume that jurisdiction is a given. Applying the standard laid down in the aforementioned PCA cases would therefore be improper, as they were crafted for a specific scenario disparate from the present one. Consequently, the only question which Tribunal must answer is whether it must wait to determine the issue of corruption.

65 For that, the decision in *Cairn* will be relevant [PCA – *Cairn Energy v. India*]. In that case, the tribunal had to decide whether to stay proceedings pending a decision in a parallel arbitral proceeding on the lawfulness of a tax demand of the respondent, which was similarly to be decided within that arbitration. There, the tribunal laid down a four-step test for determining whether a tribunal must await a decision of a parallel legal proceeding. Namely, it must be assessed (i) whether the stay causes material prejudice to one of the parties, thus violating their right to equal treatment; (ii) whether the stay amounts to depriving a party of the right to present its case; (iii) whether the stay delays the proceedings unreasonably; and (iv) whether the outcome of the other pending proceeding is material to the outcome of the arbitration. These conditions were later affirmed in *Patel* [PCA – *Patel Engineering v. Mozambique*]). None of these conditions can justify bifurcation of the issues in the present arbitration. The subsequent arguments, made against a bifurcation of proceedings, may also be used to preclude a stay of proceedings.

5.3.3 A bifurcation of proceedings would lead to the unfair treatment of Claimant

66 To decide on a bifurcation request, Tribunal must weigh the scales of damage that would be caused between Claimant and Respondent. The principle of equal treatment of parties is enshrined in Art. 17(1) of the PCA Rules and Art. 18 DAL [*Daly et al*, para. 5.03]. The fine balance that must be struck by tribunals is that parties should have an equal opportunity to present their case, without putting either side at a disadvantage [PCA – *Cairn Energy v. India*]; [*Scherer et. al*, p. 13]; [*Bantekas*, p. 995]. *In casu*, this balance has been distorted because Claimant bears a disproportionate amount of risk, and is severely disadvantaged in comparison to Respondent.

67 Respondent, through a bifurcation, seeks some form of certainty on the existence of

corruption within CONTRACT, in order to obtain a final award in this case which it would consider to be more precise. However, a decision against a bifurcation would not be detrimental for RESPONDENT. If a declaratory relief is granted against RESPONDENT, it will be found that CONTRACT is valid and RESPONDENT is liable to pay damages to CLAIMANT. Even if an award is eventually made ordering RESPONDENT to disburse the damages, CLAIMANT will have to seek recognition and enforcement of the award in Equatoriana, where RESPONDENT has its domicile and assets. In the unlikely event that the authorities in Equatoriana discover the existence of corruption within CONTRACT, the recognition and enforcement of the award will simply be denied on grounds of public policy, provided for under Art. V(2)(b) of the New York Convention.

68 On the other hand, CLAIMANT's continued solvency rests on an immediate resolution of the dispute. CLAIMANT's request for damages would be delayed by a bifurcation postponing the determination of CONTRACT's validity. These damages would, in principle, cover losses for the decreased price at which it must now sell its drones [PO 2, p. 46, para. 24], and for loss of the financial benefits which came with the maintenance of the drones, among others. As a medium-sized producer [NoA, p. 4, para. 1], CLAIMANT needs these remunerations to fuel its liquidity, especially because it had already offered the drones to RESPONDENT for a price considerably below the market price. However, these damages are in jeopardy because RESPONDENT is at risk of becoming insolvent. Not only have all contracts tied to the Development Program been halted [Ex. C6, p. 17], but the government of Equatoriana has been taken over by a coalition including the Liberal Party. It is uncertain whether this new government will have any use for RESPONDENT, and therefore CLAIMANT needs to settle its dispute with RESPONDENT before it becomes a victim of the latter's insolvency.

69 Additionally, CLAIMANT's business reputation suffers with each day that no award is rendered on this dispute. CLAIMANT would only be able to resell the drones promised to RESPONDENT *"with difficulties and with considerable price reductions"*, because *"there had been considerable coverage of the dispute with Respondent in the relevant industry journal"* [PO 2, p. 46, para. 24]. Therefore, CLAIMANT requires an immediate decision, which frees its business from the severe allegations of corruption and misrepresentation. A delay of a year (and possibly more) would only give room for a rapid decline of CLAIMANT's competitive and financial status pending the decision of the criminal investigation in Equatoriana.

70 Accordingly, CLAIMANT requests that TRIBUNAL grant it the right to present its case sooner rather than later, to ensure the fair and equal treatment of PARTIES in the instant case.

5.3.4 A bifurcation of proceedings would lead to an unreasonable delay

71 Any delay caused by a bifurcation of this arbitration would be without merit. Art. 17(1) PCA Rules requires TRIBUNAL to conduct an efficient proceeding. It is a tribunal's mandate to deny any procedural requests which are *" predominantly designed to delay proceedings or otherwise do not contribute to the conducting of fair and effective proceedings"* [*Welser/Mimnagh*, p. 139]. CLAIMANT will now furnish several reasons why a delay in this case is wholly unreasonable.

72 First, there is no need to delay proceedings in the absence of any evidence of corruption. RESPONDENT has only been able to speak of a mere "likelihood" of corruption [Ex. C8, p. 20], and has not produced a shred of evidence that provides a strong indication of corruption within CONTRACT. In fact, any peculiarity within CONTRACT can be explained based on the facts furnished by PARTIES.

73 The only aspect of CONTRACT which may raise questions is the price of the maintenance obligations, which according to Ms. Bourgeois, assistant to the COO of RESPONDENT, *"had a value of EUR 11,520,000"* and *" was completely overpriced"* [Ex. R1, p. 32, para. 6]. However, Ms. Bourgeois, having little insight into CLAIMANT's business and finances, has unfortunately made an uninformed statement. CLAIMANT typically sells the Kestrel Eye drone for 10 million EUR [Ex. R4, p. 35]. Due to the insolvency of a different customer, CLAIMANT had three Kestrel Eye drones ready to sell by the time it began negotiations with RESPONDENT. By the time RESPONDENT entered into negotiations with CLAIMANT, it only had a budget of 45 million EUR to spend on the drones [PO 2, p. 44, para. 7]. This would only be enough to buy four of CLAIMANT's Kestrel Eye, however, due to the three additional drones in stock, CLAIMANT was able to offer 6 drones at a reduced price, bringing the total price to 44 million EUR, with an additional 1 million EUR remaining on the budget. The additional two drones are also not an unusual result of negotiations. Not only was the budget approval of the drone described as being for *"2 to 6 UAS"* [PO 2, p. 44, para. 7], RESPONDENT needed the additional drones for its more challenging surveillance missions [*ibid*, para. 8].

74 In terms of drone maintenance, RESPONDENT's budget was 10 million EUR [PO 2, p. 44, para. 7]. With an extra 1 million EUR to spare, PARTIES, therefore, agreed that CLAIMANT should receive an increase in its turnover for maintenance of the drones of a little over 1 million EUR, which would still enable RESPONDENT to remain within its overall budget. Therefore, there is no evidence of corruption that can be seen within the confines of PARTIES' contractual obligations.

75 RESPONDENT may argue that the arrest of Mr. Bluntschli (negotiator of CONTRACT on the side of CLAIMANT) for tax evasion may be indicative of his involvement in corruption within CONTRACT. However, to argue that the value of money undisclosed in Mr. Bluntschli's tax declaration [PO 2, p. 49, para. 40] had anything to do with bribes collected in connection with CONTRACT would be far-fetched and based on mere specula-

tion. It is excluded that Mr. Bluntschli's tax evasion had anything to do with CONTRACT because he was arrested before CONTRACT was concluded, for tax evasion which could only be for a previous year.

76 Moreover, CLAIMANT has done its due diligence to avoid corruption in CONTRACT. It has reviewed all payments made from its accounts to Equatoriana during the pre- and post-contractual phase and found nothing suspicious [Ex. C3, p. 13, para. 7]. It agreed to the inclusion of UNCITRAL Transparency Rules within CONTRACT [Ex. C7, p. 19, para. 14], which it regularly includes in other contracts with state entities [Ex. C7, p. 19, para. 14]. In addition, CLAIMANT has adopted an anti-corruption policy and ethical rules [PO 2, p. 44, para. 3]. It even offered to re-negotiate CONTRACT [E. C3, p. 13, para. 7], which would avoid any involvement of Mr. Field and satisfy RESPONDENT's concerns.

77 The ongoing criminal investigation in Equatoriana has also not pointed towards any corruption in CONTRACT. The investigations headed by Ms. Fonseca have already led to the finding that Mr. Field has received two payments adding up to 2 million EUR, which were directly associated with the award of contracts by Equatoriana Geoscience to two companies owned by Mr. Field's cousin [Ex. R2, p. 33]. Although Ms. Fonseca has expressly stated that she is investigating the agreement between CLAIMANT and RESPONDENT, she has not found any evidence of corruption therein to date. The universal principle of *"innocent until proven guilty"* is both a human right and a fair means of trial [*Weigend*, p. 285]. Mr. Field's impropriety during other negotiations cannot be hastily assumed in the present CONTRACT. In any case, it is not Mr. Field's signature that finalised CONTRACT, but Ms. Queen's [Ex. C2, p. 12]. Ms. Queen has been cleared of any corruption charges [PO 2, p. 49, para. 44].

78 Second, a delay of these proceedings would be unreasonable because TRIBUNAL has all the means necessary to decide on the corruption issue itself, without having to wait for the result of criminal investigations in Equatoriana. TRIBUNAL has the power to hear witness and expert testimonies at any location it considers appropriate [Arts. 20(2) and 26(3) DAL; Arts. 17(3) and 28(2) PCA Rules]. According to the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which are intended to represent international best practices, Art. 3(10) permits the tribunal to *"(i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain documents from any person or organisation"*. These provisions grant a tribunal a chance to hear witnesses in a place other than the seat, particularly in places where crucial witnesses reside [*Ortolani* in: *Bantekas et al*, Art. 20, para. 2, p. 589]; [ICJ – *Honduras v. Nicaragua*]. This means that TRIBUNAL may extend its investigation to Equatoriana and Mediterraneo if it sees fit, and make efforts to obtain evidence pertaining to relevant witnesses in these countries.

79 Moreover, TRIBUNAL has access to international assistance by virtue of the UN Convention Against Corruption (UNCAC). Equatoriana, Danubia and Mediterraneo are all

state parties to the UNCAC [PO 1 III(3), p. 43]. Art. 43 of the Convention provides that *"[s]tates Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption"*. All three states also have arbitration laws which are a verbatim adoption of the UNCITRAL Model Law [*ibid.*]. Art. 27 of the Model law gives the tribunal the power to seek court assistance in taking evidence. This provision entails that the domestic courts at the seat of arbitration may assist the tribunal in compelling the production of evidence through a UNCAC cooperation [*Baizeau/Hayes*, p. 255]. TRIBUNAL may call on the Danubian state to aid its investigation of the corruption allegations. Therefore, TRIBUNAL has a vast set of means and methods to obtain any evidence necessary to decide on the issue of corruption. TRIBUNAL should deny RESPONDENT's effort to cause an unreasonable delay and deny a bifurcation of proceedings.

5.3.5 The outcome of criminal investigations against Mr. Field is not material to the outcome of this arbitration

80 TRIBUNAL should not grant a bifurcation because the outcome of the criminal investigation against Mr. Field is immaterial to the outcome of this arbitration. In this regard, *Cairn* sets an important distinction between parallel investigations which would be of mere persuasive authority to a tribunal, and investigations which are materially relevant to the outcome of the arbitral proceedings [PCA – *Cairn Energy v. India*].

81 To begin, a decision that is not directly binding on an arbitral tribunal lacks material relevance. More specifically, it has been held that parallel criminal proceedings do not take precedence over civil proceedings in the context of international arbitration proceedings [SCAI – *SCAI Case 300273-2013*]; [*Groselj*, p. 561]. An arbitral tribunal is not bound by any domestic decision unless otherwise directed by the mandatory provisions of the arbitration law at its seat, or the rules chosen by the parties [*Onyema*, p. 487-488]. Therefore, in the absence of any provision in DAL which binds TRIBUNAL to the decision in Equatoriana, any decision made in the courts of Equatoriana on corruption within CONTRACT would not be binding on TRIBUNAL.

82 Moreover, the outcome of Mr. Field's investigation is immaterial because it deals with different parties and different subject matter. The principle of *res judicata*, which prevents a decided matter from being adjudicated for a second time, requires that the parties to, and the subject matter of the parallel proceedings be the same [*Steakley/Howell*, p. 355]. In the present case, the investigation against Mr. Field assesses his personal grievances towards the state of Equatoriana, while this case is concerned with a commercial matter between two entities. The parties and subject matter of the two proceedings are anything but identical. This means there may be different standards for making a finding of corruption, and different effects of such corruption. Therefore, TRIBUNAL should make its own impression on the set of facts and decide on the issue of corruption on its own

accord.

83 The special circumstances of this case reveal that the results of the criminal investigation in Equatoriana would not be reliable. Ms. Fonseca, the investigator of Mr. Field, has a seemingly never-ending conflict of interest within her investigation. The CEO of a second bidder for RESPONDENT's drone acquisition contract is Ms. Fonseca's brother-in-law [Ex. R2, p 33]. Furthermore, Ms. Bourgeois, who offered testimony on behalf of RESPONDENT, is Ms. Fonseca's son's fiancée [PO 2, p. 49, para. 43]. Ms. Bourgeois is also the former personal assistant of Mr. Field. Upon his arrest, she was promoted to become the head of the internal investigation at RESPONDENT. After that, she assumed office under the public prosecutor, her future mother-in-law, Ms. Fonseca. It is doubtful whether one can fully believe the word of the person prosecuting the man who lost her brother-in-law a huge deal and whose arrest guaranteed her son's fiancée a promotion.

84 In light of these facts, it is apparent that relying on the domestic investigation in Equatoriana would be putting trust in a non-binding and seemingly unreliable decision. TRIBUNAL should find that the decision of the Equatorianian investigation is immaterial to the present case, and deny a stay or bifurcation of these proceedings.

5.4 TRIBUNAL's award is not precluded by Art. 15 of Equatoriana's Anti-Corruption Act

85 RESPONDENT argues that by complying with an order by TRIBUNAL to fulfil a contract obtained by bribery, the former would be in breach of Art. 15 of Equatoriana's Anti-Corruption Act, according to which it is *"prohibited to either directly or indirectly perform a contract for the conclusion of which undue benefits were granted or promised"* [RNA, p. 27, para. 2].

86 Any award issued by TRIBUNAL in this dispute would not demand performance of CONTRACT because CLAIMANT merely requests a declaratory relief. In the unlikely event that corruption affecting CONTRACT is discovered in Equatoriana, the Anti-Corruption Act does not hinder TRIBUNAL from rendering an award in the present case. The provision forbids the *direct* or *indirect* performance of contracts obtained with bribery. What CLAIMANT seeks to obtain through this arbitration is not the performance of the contract, but damages. Therefore, an award of damages would only violate the Anti-Corruption Act if it amounts to an indirect performance of CONTRACT, which it does not. A claim for damages completely excludes any remedy for the performance of the contract, because the party making the claim obtains compensation for loss of performance. *"It is [...] inconsistent with a claim for performance if the seller has already claimed the performance interest as damages [...], because in that case, the seller has expressed his desire not to receive specific performance from the buyer but to be compensated in money"* [*Huber/Mullis*, p. 323]. Therefore, TRIBUNAL's award is not precluded by Art. 15 of Equatoriana's Anti-Corruption Act.

87 In sum, justice delayed is justice denied. A stay or bifurcation would not be in the interest of CLAIMANT, or the requesting party, RESPONDENT. These remedies would lead to the unfair treatment of CLAIMANT, cause a delay without merit, and involve the reliance on unrelated and unreliable parallel proceedings. Consequently, TRIBUNAL should uphold the principles of efficiency and fairness in the arbitral process by denying RESPONDENT's requests.

6 The CISG applies to CONTRACT and all remedies thereunder

88 The CISG is the proper law to apply to CONTRACT. As part of the unified state law of Equatoriana, the CISG is applicable to the substance of this dispute (**6.1**). There is no express or implied intention of PARTIES to exclude the application of the CISG under its Art. 6 (**6.2**). The CISG is also not excluded under Art. 2(e) because the drones to be delivered are not aircraft within the meaning of the CISG (**6.3**). The Convention is also not excluded from application under Art. 3(2) CISG. Although CONTRACT contains several obligations, the sales element forms the preponderant part of CLAIMANT's obligations (**6.4**).

6.1 The CISG applies to CONTRACT in general as part of the law of Equatoriana

89 Mr. Langweiler's analysis on why the CISG applies in principle to CONTRACT is not entirely correct. He argues that the CISG applies because parties to the Agreement have their places of business in Contracting States [NoA, p. 7, para. 20], thereby referring to Art. 1(1)(a) CISG. However, Art. 1(1) CISG does not apply in arbitral proceedings. It can only be applied by state courts in contracting states [*Köhler/Rüßmann*, p. 446-447]; [*Huber/Mullis*, p. 66-68]; [*Hachem* in: *Schlechtriem/Schwenzer*, Intro, para. 13; Art. 1, para. 31]. Arbitral tribunals have to decide on the applicable law according to the conflict of laws rules which bind them. These are found either in the arbitration law (in our case DAL) or in arbitration rules agreed upon (in our case PCA Rules).

90 Art. 35(1) PCA Rules and Art. 28(1) DAL provide that TRIBUNAL must decide on the basis of the rules of law *"designated by the parties as applicable to the substance of the dispute"*. In the present case, PARTIES agreed in Art. 20(d) of CONTRACT on the law of Equatoriana to govern the substance of CONTRACT. Since Equatoriana is a contracting State of the CISG, the agreement on Equatorianian law includes the CISG as part of this law [BGer – *Facade Panels for Mountain Lodge Case*].

6.2 The application of the CISG has not been excluded by Contract according to Art. 6 CISG

91 Respondent may contend that the choice of the *"law of Equatoriana"* to govern Contract refers to the domestic contract law of Equatoriana and not the international sales law. However, this argument would be fallacious. Parties have never excluded the CISG from application, be it expressly or implicitly. The CISG Advisory Council has clarified that the most widely accepted indication of intent to exclude the CISG may be drawn from an express exclusion [*CISG-AC*: Opinion No. 16, para. 14] [*Johnson*, p. 259]; [ICC – *ICC Award No. 7565*]. At no point of negotiations has Respondent objected to the application of the CISG, and there is no indication in Contract itself.

92 There is also no implied exclusion of the CISG. An implicit intent to exclude the CISG must be shown by interpreting statements and conduct of parties according to the understanding of a reasonable person under Art. 8(2) CISG, and taking into account all relevant circumstances of the case [Art. 8(3) CISG] [*Smythe*, p. 8]; [OGH Austria – *Chinchilla furs case*]. Parties' reference to "aircraft" in Contract, which are excluded from the Convention according to Art. 2(e) CISG, cannot be understood as an implied exclusion of the CISG because the terms "UAS", "drones" and "aircraft" were used interchangeably [Ex. C2, p. 11, Art. 3-4]. This means Parties had no intention to attribute any legal meaning to those terms. Also, Parties' choice of the law of Equatoriana cannot be interpreted as an implicit exclusion of the CISG, although the drafting party is a state-owned company. Respondent and the Minister, Mr. Barbosa, cannot be unaware that the CISG is a part of their national law. This is why they should have expressly excluded the CISG from application if they wanted to do so. The result of this is that the choice of the law of a Contracting State is not an implied choice *against* the CISG, but rather *for* it [*CISG-AC*: Opinion No. 16, para. 4.2]; [*Manner and Schmitt* in: *Brunner/Gottlieb*, p. 78]; [*Ferrari*, p. 25]. Therefore, the CISG is not excluded from application, and Tribunal should apply it in the resolution of this dispute.

6.3 The drones to be delivered are not aircraft in the meaning of Art. 2(e) CISG

93 *"Drones should not be considered aircraft at all"* [*Hachem* in: *Schlechtriem/Schwenzer*, Art. 2, para. 33]. Pursuant to Art. 2(e) CISG, the Convention does not apply to sales of aircraft. The deciding question in this respect is whether the Kestrel Eye drones promised to Respondent under Art. 6 Contract qualify as aircraft. Though the CISG does not expressly regulate this matter, the documented intention of the drafters, as well as the conditions for applying Art. 2(e), lead to the conclusion that drones are not aircraft under the CISG. The obligation to register the drones under domestic law does not make them aircraft (**6.3.1**). The intended use of the drones determines whether they may be

classified as aircraft. RESPONDENT never intended to use the drones as aircraft within the meaning of the CISG (**6.3.2**).

6.3.1 The duty to register the drones does not make them aircraft under the CISG

94 Art. 1(a) and Art. 10 of the Equatorianian Aviation Safety Act provide that drones that have a length over 90cm and a payload over 50kg are considered aircraft and must be registered. The Kestrel Eye drones meet the size specifications of the Equatorianian law [Ex. C4, p. 15]. However, RESPONDENT erroneously argues that the requirement to register the drones as air vehicles under Equatorianian Law renders them aircraft in the sense of Art. 2(e) CISG [RNA, p. 31, para. 26].

95 To begin, the law of a member state of the CISG cannot be used to interpret the text of the Convention itself. In its attempt to interpret Art. 2(e) according to the standard of Equatorianian law, RESPONDENT subjects a unique, widespread international sales law to the standard of a single domestic law. In fact, one of the main principles of the CISG is that it has an "internal mechanism" for its interpretation in Art. 7(1) [*Kröll/Mistelis/Perales Viscasillas* in: *Kröll et al*, Introduction, para. 18]. It requires that when issues of its interpretation arise, *"regard is to be had to its international character and to the need to promote uniformity in its application [...]"*. Art. 7(1) CISG therefore forecloses blindly transferring domestic legal ideas into the CISG [*Piltz*, p. 96, para. 2-185]. Consequently, RESPONDENT'S notion that Equatorianian Law's Aviation Safety Act determines whether the drones are aircraft under Art. 2(e) CISG is misguided. For a definition of "aircraft", one must therefore turn away from Equatorianian law, and towards the uniform law itself.

96 The CISG does not define aircraft based on a need for registration. Although the underlying rationale of Art. 2(e) is to avoid interference with national duties to register these goods, the provision applies regardless of whether the vehicle actually has to be registered or not [*Spohnheimer* in: *Kröll et al*, Art. 2, para. 41]. This rationale is supported by the historical evolution of the uniform international sales law. While the CISG's predecessor - the ULIS - did make its applicability to the sale of aircraft dependent on whether they are or will be subject to registration [Art. 5(1)(b) ULIS], this requirement has been deleted in the drafting process of the CISG. One reason is that, if the application of the CISG were made subject to the need for registration, it would be less clear which domestic law is to apply [*Hachem* in: *Schlechtriem/Schwenzer*, Art. 2, para. 28], and the legal regulations would depend on a fact independent of the buyer and possibly unknown to him [*Ferrari* in: *Schlechtriem/Schwenzer/Schroeter*, Art. 2, para. 38], [*UNCITRAL Yearbook VI*, p. 74, Art. 2, para. 13], [*UNCITRAL Yearbook VII*, p. 98, Art. 2, para. 9]. Therefore, a requirement for registration bears no importance in determining whether a good is excluded as an aircraft under the CISG. During the drafting process of the CISG, there were countries that even advocated to abolish Art. 2(e) entirely [*UNCITRAL Yearbook*

VIII, Finland, p. 115, para. 3; Norway, p. 120, para. 6; Philipines, p. 127, para. 4].

97 Even if the classification of drones as "aircraft" pursuant to Art. 2(e) CISG depended on the duty to register the vehicle, there is no need to register the drones sold by CLAIMANT to RESPONDENT. Art. 10 of the Aviation Safety Act of Equatoriana states that *"Any aircraft owned or operated by a private entity in the territory of Equatoriana shall be registered at the aircraft registry"*. Any aircraft that is owned or operated by a non-private entity does not need to be registered. Given that RESPONDENT is a state-owned entity, the drones sold under CONTRACT do not need to be registered.

98 In conclusion, the registration requirement is not relevant.

6.3.2 RESPONDENT intended to use the drones for surveillance purposes

99 Pivotal in determining whether the drones are aircraft is the intended use of the goods. If the drones were intended to transport humans or goods, they might perhaps be classified as aircraft pursuant to Art. 2(e) CISG [*Hachem* in: *Schlechtriem/Schwenzer*, Art. 2, para. 31, 33]; [*Ferrari* in: *Schlechtriem/Schwenzer/Schroeter*, Art. 2, para. 42]; [*Spohnheimer* in: *Kröll et al*, Art. 2, para. 46]; [*Saenger* in: *Bamberger et al*, Art. 2, para. 11]; [*Huber* in: *MüKo BGB*, Art. 2, para. 22]. However, the drones were never intended to be used in that way.

100 The Kestrel Eye Drone is not capable of carrying humans [PO 2, p. 45, para. 9]. Although the Minister of Natural Resources and Development, Mr. Rodrigo Barbosa, stated in his speech during the signing ceremony on 2 December 2020 that the drones should also be capable of transporting urgently needed spare parts or medicine [Ex. R. 2, p. 33; PO2, p. 46, para. 22], this does not allow the conclusion that the drones were intended to transport goods. The Kestrel Eye 2010 has only been used in cases of emergency, when no other transport was available on short notice, for any other purpose than carrying surveillance equipment [PO 2, pp. 44,45, para. 9]. This is mainly due to the fact that the technology of the Kestrel Eye drone is not designed for transport purposes: The shape and location of the payload bays in the Kestrel Eye 2010 are clearly engineered for the use for surveillance purposes [PO 2, p. 45, para. 9]. Furthermore, the drones' excellent "flight stability" makes them significantly more expensive than UAVs for cargo delivery, which have lower stability requirements and much larger payload bays. Thus, the use of the Kestrel Eye 2010 with its small payload bays for standard delivery of cargo over shorter distances is much too expensive and commercially unviable [PO 2, p. 45, para. 9]. The statement of Mr. Barbosa pointing towards the use of the drones for transportation of goods is based on incorrect information given to him by Mr. Field, RESPONDENT's main negotiator. In order to explain the deviation in numbers from the tender documents to the minister, Mr. Field relied on the theoretical, but unlikely use of the Kestrel Eye drones for transportation purposes [PO 2, p. 46, para. 22].

101 When taking a closer look at the drones purchased under CONTRACT, it becomes even

more apparent that the intended use of the drones is not the delivery of cargo, but surveillance. Pursuant to Art. 2(a) CONTRACT, four out of the six drones bought were to be supplied already equipped with geological surveillance features, while the equipment of the further two drones still had to be agreed upon [Ex. C2, p. 10]. This alone already indicates RESPONDENT's intention to use the drones for data collection. A more detailed consideration of the product specifications further supports this assessment. The Kestrel Eye 2010 features "small" [PO 2, p. 45, para. 9] payload bays, out of which one is merely optional [Ex. C4, p. 15]. The first three (already-produced) drones do not have the optional payload bay [NoA, p. 5, para. 5; Ex. R4, p. 35]; [PO 2, p. 44, para. 8], meaning there is "hardly any" weight and volume capacity left when fully equipped and fuelled [PO 2, p. 45, para. 10]. Therefore, the first three drones would not be appropriate for transporting goods.

102 The fourth drone to be delivered fully equipped by 31 December 2022 [Art. 2(d)(i) CONTRACT, p. 11] would have the optional bay, which increases the payload amount by 25 percent [PO 2, p. 45, para. 10]. However, this drone would have been needed and used exclusively for additional surveillance missions. 40 percent of RESPONDENT's planned missions would require a UAV with the optional payload bay to employ additional surveillance equipment [PO 2, p. 44, para. 8]. This is due to the fact that the entire weight and volume capacity was meant to be used by RESPONDENT for those missions, where the more complicated tests are to be performed [PO 2, p. 45, para. 10]. Given that the first three drones were unsuitable for more complicated missions, the fourth drone would be used continuously in order to carry out these missions, without which RESPONDENT could not have fully collected all its required data. There would be no room to use this drone for transportation. Hence, in total, the first four drones would not have been used for transportation purposes at all.

103 Even the fifth drone is required for surveillance. Although its equipment is yet to be determined, it is certain that it will have the additional payload bay [PO2, p. 46, para. 23], which is required for 40 percent of RESPONDENT's surveillance missions [PO 2, p. 45, para. 10]. Out of the six drones ordered by RESPONDENT, one would certainly not be enough for these missions. To ensure the efficiency of data collection, even the fifth drone would be needed exclusively for surveillance, and not transport.

104 For the sixth and last drone, the use is left open in CONTRACT. It is certain that this drone would also have the optional payload bay in the front [PO 2, p. 46, para. 23]. Even though it may not be necessary, nothing is to say that this last drone will not also be used to support surveillance missions. This is especially because the Kestrel Eye has been specifically engineered for data collection. It may even be a waste to use it merely to carry goods. In conclusion, it is probable that all six of the drones were intended to be used for surveillance purposes. In any case, even if the last drone were to be used for a separate purpose, it has been proven that the majority of the drones sold to RESPONDENT are for

surveillance and nothing else.

105 Conclusively, the Kestrel Eye drones cannot be considered aircraft at all. The intended use is the only relevant criterion deciding their classification. RESPONDENT intended to use the drones only for surveillance. TRIBUNAL should bestow the drones with their proper classification - they are goods under the CISG and the Convention applies.

6.4 The CISG applies to CONTRACT as a mixed contract with sales and maintenance obligations

106 Art. 3(2) CISG states that *"This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services"*. Under Art. 3(2) CISG, the convention therefore applies to mixed contracts, provided that the preponderant obligation is a sales obligation [*CISG-AC*: Opinion No. 4, para. 1.1]; [*UNCITRAL Yearbook III*, p. 79]. CONTRACT is such a mixed contract in the sense of Art. 3(2) CISG. As already suggested by its title, *"Purchase and Supply Agreement"*, CONTRACT provides for the sale of drones and for their maintenance over a period of time. RESPONDENT may seek to exclude the CISG by arguing that the maintenance obligation is preponderant in CONTRACT. The relevant test for preponderance does not support such an argument.

107 The prevailing test for establishing preponderance is the economic value test [*CISG-AC*: Opinion No. 4, para. 3.3]; [*Hachem* in: *Schlechtriem/Schwenzer*, Art. 3, para. 7a]; [CAM-Milan – *(para. 20)Prada S.p.A. v. Caporicci USA Corp*]; [LG München – *(p. 3)Pizzeria restaurant equipment case*]; [OLG München – *(para. 17)Window Production Plant Case*]; [LG Mainz – *(para. 19)Cylinder Case*]. It compares the value of the sales obligation with the value of the maintenance obligation. The value can either be established by the prices given in the contract or by market prices [*Huber* in: *MüKo BGB*, Art. 3 para. 13]. The market prices and contract prices lead to a clear preponderance of the sales obligation. The overall price for the sales obligation in CONTRACT is 44 million EUR compared to a total of 17.4 million EUR maintenance costs estimated by Ms. Bourgeois [PO 2, p. 47, para. 27]. Market prices draw an even clearer picture. Six drones would cost 60 million EUR compared to maintenance costs of 12 million EUR for four years [PO 2, p. 47, para. 27]. Thus, in both alternatives, the sales element is clearly preponderant.

108 RESPONDENT may argue that the profits, and not the turnover of the various obligations make the maintenance obligation preponderant. A comparison of profits derived from the sales obligation and the maintenance obligation is, however, legally inadequate and factually not available in the present case. It is legally inadequate because a seller may have very good and economically viable reasons to sell goods below production or acquisition costs. He might, for instance, need the space the goods take on his premises for new products. The sale entails a loss. It would be totally inappropriate to have the sales transaction fall outside the CISG because of the slightest profit in a maintenance

obligation. Therefore, comparing profits to establish the preponderant part of obligations is legally inappropriate and should not be followed by TRIBUNAL. The comparison is in the case at hand also factually not available, because the figures given in PO 2, para. 25 and 27 allow for the calculation of profit in the sales part but not in the maintenance part. In conclusion, the sales part of CONTRACT is preponderant. The application of the CISG is not excluded by its Art. 3(2).

109 In sum, the CISG forms part of the proper law of Equatoriana, and is to be applied to this dispute. The application of the CISG is not excluded by the will of the parties under Art. 6 CISG. The subject-matter exclusions of Art. 2(e) CISG do not apply to the goods being sold in CONTRACT. Art. 3(2) CISG provides no ground to exclude the application of CISG through the preponderance test. The CISG applies.

7 The avoidance for misrepresentation under Art. 3.2.5 ICCA is not available for RESPONDENT

110 RESPONDENT's reliance on the remedy of avoidance for misrepresentation pursuant to Art. 3.2.5 of the Equatorianian ICCA is merely the result of an incorrect legal analysis. Art. 3.2.5, which is a verbatim adoption of the UNIDROIT Principles, provides that a party may avoid a contract concluded as a result of fraudulent misrepresentation. However, RESPONDENT's first error occurred when it labeled its defence as "misrepresentation", when it in fact raises an issue of non-conformity entirely covered under the CISG (**7.1**). In situations related to the qualities of goods sold, the CISG only permits reliance on a law outside the Convention where there is evidence of fraud. In the present case, RESPONDENT cannot rely on Art. 3.2.5 ICCA because CLAIMANT never acted fraudulently (**7.2**).

7.1 Despite labelling its defence "misrepresentation" in the meaning of Art. 3.2.5 ICCA, RESPONDENT raises a non-conformity issue

111 Putting a label on something can never change the facts. The fact is that RESPONDENT has raised a defence, the substance of which is fully captured under the CISG's provisions. RESPONDENT wishes to apply the domestic law of Equatoriana to raise a claim of misrepresentation against CLAIMANT. CLAIMANT acknowledges that ordinarily, the use of the word "misrepresentation", points towards an issue of contractual validity, which is a matter not governed by the CISG according to its Art. 4. However, where an issue falls under the list of excluded validity matters in Art. 4, it does not automatically mean that the issue is excluded from the Convention. On the contrary, if the issue relates to a matter *"expressly provided in this Convention"* [Art. 4 CISG], the CISG precludes the application of domestic law and leaves the issue within the CISG's ambit [*Hachem* in: *Schlechtriem/Schwenzer*, Art. 4, para. 36]. The facts of the current case show that the

issue raised relates to a non-conformity.

112 A closer look at CONTRACT makes it clear that RESPONDENT's claim for misrepresentation is actually a *"breach-of-contract claim in masquerade"* [*Schroeter*, p. 559]. As explained by Ms. Queen, RESPONDENT's allegations relate to the *"quality of the Kestrel Eye 2010 drone"* [Ex. C8, p. 20], where it argues that they are not "state-of-the-art". The wording used by RESPONDENT draws a very close parallel to the non-conformity provision of Art. 35(1) CISG, which states that *"the seller must deliver goods which are of the [...] quality and description required by the contract [...]"*. RESPONDENT itself speaks of an issue of quality. RESPONDENT has always expressed its claims as an issue of quality. Whenever it alleged a misrepresentation, it was always related to some quality of the drones. In particular, RESPONDENT alleged that the Kestrel Eye 2010 was not CLAIMANT's "latest model" or "top model" due to it being originally developed in 2010 [Ex. C8, p. 20]. This was based on the agreement between parties in CONTRACT that CLAIMANT must deliver its *"newest model of Kestrel Eye 2010 [...] with state-of-the-art geological surveillance"* [Ex. C2, p. 10, Art. 2(a)]. Issues of quality under Art. 35 include anything which relates to the intrinsic qualities and features of the good [*Saidov*, p. 534]. Since statements about the novelty or state-of-the-art nature of the goods are evidently issues of quality, there is no reason why any other law except the CISG should govern the issue.

113 TRIBUNAL should not consider the misleading label used by RESPONDENT, but the substance that the latter advocates for. In such a case of possibly competing remedies, the substance rather than the characterisation of the domestic competing rule determines whether it is displaced by the Convention [*Honnold/Flechtner*, p. 458]; [*Schwenzer/Hachem*, p. 471]. This becomes even more apparent when one considers that various jurisdictions may label issues that are different in substance with the same term, as a result of the legislative history and circumstances leading to that classification [*Schroeter*, p. 559]. For example, the notion of "case law" in some jurisdictions has binding force as judicial precedent, while not in others [*Pejovic*, p. 831]. "Damages", in some jurisdictions, are a remedy that requires fault, while in others they may be awarded without fault [*ibid*]. In the same vein, even if the case before TRIBUNAL fits the characterisation for "misrepresentation" in Equatorianian Law, this does not mean that it is not covered by the CISG. TRIBUNAL should therefore find that, by addressing the quality of the drones, RESPONDENT argues a non-conformity in the sense of the CISG.

114 Since RESPONDENT's defence is CISG-based non-conformity, the ICCA is excluded from application. Art. 34 ULIS – the predecessor of Art. 35 CISG – expressly provided for the exclusion of all of the buyer's remedies for lack of conformity under domestic law. Although a provision similar to Art. 34 ULIS was not included under the CISG, it may not be inferred that the buyer could have unrestricted recourse to domestic remedies [*Schwenzer* in: *Schlechtriem/Schwenzer*, Art. 35, para. 47]; [*Kroell* in: *Kröll et al*, Art. 35, para. 208]. Rather, questions as to the conformity of the goods are regulated exclusively

by Arts. 35 et seq. CISG, excluding all remedies under national law which are based on the same factual and legal considerations [*Schroeter*, pp. 563 et seq.]; [*Kroell* in: *Kröll et al*, Art. 35, para. 211]; [*Schwenzer* in: *Schlechtriem/Schwenzer*, Art. 35, paras. 48-50].

115 In *Perkins v. Haul-All*, the Illinois District Court held that this is even true for fraudulent misrepresentation [DC Illinois – *Perkins v. Haul-All*]. Claimant acknowledges that the general view in the CISG community does not preempt reliance on domestic remedies in cases of fraud [*Kroell* in: *Kröll et al*, Art. 35, para. 212]. Since Respondent is alleging fraud under Art. 3.2.5 ICCA, it would in principle be entitled to rely on this provision. However, as will be demonstrated, Claimant did in no way act fraudulently.

7.2 Claimant did not act fraudulently

116 Claimant never acted fraudulently in the portrayal of its Kestrel Eye drones. Under Art. 3.2.5 ICCA, a fraudulent misrepresentation may be either an active representation or a fraudulent non-disclosure which gives one party an advantage to the detriment of the other [*UNDROIT Commentary*, Art. 3.2.5, p. 105]. Claimant neither positively misrepresented the attributes of the drones (**7.2.1**), nor did it do so by failing to disclose the release of the Hawk Eye 2020 to Respondent, because it had no such obligation (**7.2.2**). Even if there were a duty to disclose, Claimant did not breach such duty intentionally (**7.2.3**).

7.2.1 Claimant has not acted fraudulently by way of positive representation

117 Respondent fallaciously quotes statements from Mr. Bluntschli's email of 29 November 2020 [Ex. R4, p. 35] as evidence of fraudulent representation [RNA, p. 29, para. 17]. To exclude a positive misrepresentation, the statements made by one party to the other have to be "substantially correct" [EWHC – *Avon Insurance plc v. Swire Fraser Ltd*][para. 16 f.] and unambiguous [King's Bench – *Curtis v. Chemical Cleaning*][per Denning L.J.]; [*Chen-Wishart*, Ch. 5]. Respondent argues that the terms "state-of-the-art" and "top model" are fraudulent representations [Ex. C8, p. 20]. This argument is simply made out of context, as it must be read with the statement that the Kestrel Eye constitutes Claimant's *"present top model for* Respondent's *purposes"* and that the drone's *"advanced technology guarantees its suitability for state-of-the-art data collection and aerial surveillance"* [Ex. R4, p. 35]. This assessment is true, and Mr. Bluntschli's unambiguous statements were correct.

118 Firstly, at the time Parties negotiated the sale of the Kestrel Eye drones, the more advanced Hawk Eye 2020 drone was not yet on the market as it was still in the test flight phase [PO 2, p. 45, para. 14; Ex. C3, p. 14, para. 9]. Hence, Mr. Bluntschli's statement that the Kestrel Eye 2010 is Claimant's *present* top model, was correct. Secondly, Mr. Bluntschli explicitly described the drones as Claimant's *"latest model of the Kestrel Eye 2010 family"*, which – in light of the subsequent updates and amendments which followed up until 2018 [Ex. C8,p. 20; PO 2, p. 45, para. 13] – cannot be refuted. Thirdly, there

is no evidence supporting an argument that the Kestrel Eye's technology is not advanced or suitable for *"state-of-the-art data collection and aerial surveillance"*. This becomes especially apparent when considering that the latest update to the Kestrel Eye 2010 primarily concerned its *"excellent"* flight stability [PO 2, p. 45, para. 13; p. 45, para. 12], which is vital for RESPONDENT's surveillance purposes. CLAIMANT never positively misrepresented its drones.

7.2.2 CLAIMANT was under no duty to disclose the development of the Hawk Eye 2020 to RESPONDENT

119 Every party is the master of its own interests, and bears the burden of gathering information which might serve its interests. It cannot rely on the opposing party to disclose all information which might be in its interest. That would, in a reciprocal contract, go against the distribution of risk between the parties. Parties that exercise their freedom of contract are expected to inform themselves [*Du Plessis* in: *Vogenauer*, Art. 3.2.5, para. 14]. Therefore, there is no such general obligation to disclose any circumstances that might be relevant for the decision for or against a contract with the other party. Thus, in line with both the civil and common law view, a duty to disclose must be established to arrive at a fraudulent non-disclosure [*Armbrüster* in: *MüKo BGB*, Sect. 123, para. 32]; [Court of Appeals, 2nd Circuit – *Aaron Ferer v. Chase Manhattan*].

120 There was no duty to disclose the Hawk Eye release. If a party is seeking to ascertain information that it deems relevant for the decision for or against a contract, it always has the option to ask its potential co-contractor. Only if a direct question posed is not answered by the other party, a duty to disclose may be established [*Du Plessis* in: *Vogenauer*, Art. 3.2.5, para. 19]. RESPONDENT always had the possibility to inquire information, if it wanted to know about the development of new drones in CLAIMANT's portfolio. The information on CLAIMANT's new development was never hidden but was information that was readily available to the public [PO2, p. 45, para. 15]. Still, RESPONDENT never specifically asked CLAIMANT whether the latter was developing a new UAV. It cannot now rely on a duty to disclose information that would have been revealed by a simple search on the internet, or a short inquiry. Hence, no duty to disclose can be imposed.

121 Moreover, the characterisation of CONTRACT as a sales contract excludes a duty to disclose. The inference of a duty to disclose depends on the type of contract the parties aim to conclude. In so-called *uberrimae fidei* contracts, limited to insurance contracts and fiduciary duties [UKHL – *Bell v. Lever Bros*], one party (the insurer) typically relies on the other party's (the insured's) disclosure [King's Bench – *Carter v. Boehm*][Lord Mansfield]; [*Tarr/ Van Akkeren*]. In contrast, sales contracts in business-to-business transactions are governed by the *caveat emptor* doctrine. In such contracts, although there might be an information asymmetry between buyer and seller, it is the buyer's obligation to assure the product is of good quality [UKHL – *Bell v. Lever Bros*]. A form of

caveat emptor is inferred into Art. 35(3) CISG; *"what you see is what you get"* [*Lookofsky*, p.95]. Since PARTIES concluded a sales contract, it shall be governed by the *caveat emptor* doctrine, which speaks against imposing a duty to disclose on CLAIMANT.

122 The principle of fair dealing also does not impose a duty to disclose on CLAIMANT. A duty of disclosure might result from the *"reasonable commercial standards of fair dealing"* mentioned in Art. 3.2.5 ICCA. This "test" for imposing a duty to disclose can be regarded as a manifestation of the general duty laid down in Art. 1.7 ICCA, that each party must act in accordance with good faith and fair dealing in international trade [*Du Plessis* in: *Vogenauer*, Art. 3.2.5, para. 16]; [*UNDROIT Commentary*, Art. 1.7, para. 1]. While there is no general rule, certain circumstances demand a thorough consideration of whether good faith and fair dealing require that a party discloses particular information. Regard is especially to be had to (a) whether the party had special expertise, (b) the cost to the party of acquiring the relevant information, (c) the ease with which the other party could have acquired the information for itself, (d) the nature of the information and (e) the apparent importance of the information to the other party [*Du Plessis* in: *Vogenauer*, Art. 3.2.5, para. 21], [*Brödermann*, Art. 3.2.5, para. 1].

123 CLAIMANT did not have a duty to disclose merely because of its special expertise on the production of drones (lit.(a)). As the developer of both the Kestrel Eye 2010 and the Hawk Eye 2020, CLAIMANT naturally has special expertise and knowledge when it comes to its drones. However, this does not lead to the conclusion that a duty to disclose is imposed. The duty to disclose as an expert requires only the disclosure of information necessary to achieve the goals of the buyer [*Baird*, p. 297-298]. The seller is only obliged to disclose whether the goods in question would achieve this goal. In this instance, RESPONDENT's aim was the collection of data using drone surveillance. The Kestrel Eye drones offered by CLAIMANT had, and even surpassed the requirements for the technology, flight stability, endurance, communication links, and payload which RESPONDENT needed to accomplish its goal under the Development Program [Ex. C1, p. 9; Ex. C4, p. 15]. For example, RESPONDENT requested a payload in its tender of 180 kg, and received 245kg with the option to install an additional loading bay. It requested an endurance of 10 hours and received 13 hours [*ibid*]. RESPONDENT had all the needed information to achieve its purpose. In any case, RESPONDENT appears to have access to its own expertise on drones. RESPONDENT was able to create a tender document with specifications for the drones which only an expert can provide, for example, the requirements for "operating altitude" or "dispatch liability" [Ex. C1, p. 9]. Hence, although CLAIMANT has special expertise, the particularities of this case are not in favour of a duty to disclose any information on the Hawk Eye.

124 CLAIMANT did not have a duty to disclose because RESPONDENT would have borne no cost in acquiring information on the Hawk Eye (lit.(b) and (c)). The second requirement of fair dealing is that there must be no extravagant costs to the party acquiring information

[*Baird*, p. 297-298]. As already explained, it was generally known in the market that Claimant was developing a new UAV, and the information was readily available [PO 2, p. 45, para. 15]. Therefore, even in this case, Claimant did not have to disclose the Hawk Eye.

125 Additionally, there was no duty of disclosure because the nature of the information on the Hawk Eye permits non-disclosure (lit.(d) and (e)). First, the perspective of Respondent is essential. The nature of the information withheld might impose a duty to disclose if the information is objectively essential for the buyer [*Baird*, p. 297-298]. In this case, obtaining information on an upcoming drone model was not essential for Respondent. If it were, Respondent would not have limited the requirements for "state-of-the-art" and "top model" to such vague criteria. Even the term "newest technology" does not have any specific meaning in Respondent's business practise [PO 2, p. 45, para. 11] and cannot serve as a requirement of utmost importance. Furthermore, the "state-of-the-art" criterion also does not bear any significant importance to Respondent. Otherwise, Respondent would not have opted for the Kestrel Eye 2010, when drones similar to the Hawk Eye 2020 were already available on the market at the time of Contract negotiations [PO 2, p. 45, para. 14]. As already established, Respondent had the expertise required to understand the specifications of these drones. Hence, lacking significance for Respondent, the information about the Hawk Eye 2020 is not of such nature that it imposes a duty to disclose.

126 Second, the perspective of Claimant must also be considered (lit.(d) and (e)). A duty to disclose might be imposed if the seller was under the impression that the information was essential to the buyer [*Baird*, p. 297-298]. Claimant did not believe that disclosure of the development of the Hawk Eye 2020 was of any relevance to Respondent. At the time of the negotiation of Contract, there were similar drones to Hawk Eye 2020 on the market [PO2, p. 45, para. 14]. Claimant was justified in assuming that Respondent would have purchased its drones elsewhere if it wanted similar ones to the Hawk Eye. In addition, the Hawk Eye drones developed by Claimant have a different communication link (satellite) from what Respondent requested in its tender (radio) [Ex. C1, p. 9; Ex. R3, p. 34]. While the tender offer was only stating minimum requirements, no reasonable seller would think about disclosing the development of a drone that is still in testing [PO2, p. 45, para. 14], when its finished and proven model fulfills all the requirements set in the tender. Hence, taking the reasonable standards of fair dealing into consideration, Claimant had no duty of disclosure because it was not apparent that the development of the Hawk Eye 2020 was important information for Respondent.

127 Third, the sensitive nature of the information on the Hawk Eye speaks against imposing a duty to disclose. At the time of Contract negotiation, Claimant had not obtained any patents protecting its newest drone and Tribunal should take into account that any duty to disclose would compromise Claimant's patents. This is because only shortly before

the airshow in February 2021, Claimant applied for three different patents relating to the technology which were granted only in July 2022 [PO 2, p. 15, para. 45].

128 Patents are granted on a country-by-country basis. A national patent grant is only valid and enforceable within the granting, territorial nation [*Campbell*, p. 617]. For an inventor to obtain protection beyond its national borders, the international protection is necessary. In this case, if information on the Hawk Eye had been disclosed, it would not be disclosed in Claimant's home country, Mediterraneo, but in Equatoriana, where Contract was concluded. Since the patents had not yet been obtained, and considering that Equatoriana is a common law country [PO 1, p. 43, III(3)], Claimant would have had to rely only on the common law protection rather than on a formal patent protection.

129 The common law imposes no obligation upon the inventor to disclose his invention to others. The inventor is free to keep his secret entirely to himself [*Dunlavey*, p. 458]. However, once the information becomes available to the public, at common law the public is free to make, use and sell anything of which it has knowledge [*Dunlavey*, p. 458]. The Hawk Eye has been the outcome of three years of development and extensive testing [NoA, p. 5, para. 10]. Jeopardising secrecy by disclosing the information to Respondent would not be reasonable. If indeed, fair dealing is to be upheld, Claimant cannot be found to have a duty to give up the prize of its labour and efforts for free.

130 In light of all these circumstances, there was evidently no duty to disclose, and hence, no fraudulent non-disclosure committed by Claimant.

7.2.3 Alternatively, if Tribunal decides there was a duty to disclose, Claimant did not breach such duty intentionally

131 Even if Tribunal were to find that Claimant had a duty to disclose, Claimant did not breach that duty intentionally. Fraudulent intent is necessary for a non-disclosure to be a ground for avoidance [ICC – *ICC Case No. 9474*], [SC NY – *Sun Insurance v. Hercules Securities*], [Supreme Court of Canada – *BG Checo v. British Columbia*], [UKHL – *Hedley Byrne v. Heller & P*]. Claimant had no fraudulent intent, because it made the innocent assumption that no such duty existed. This assessment is supported by the facts of the case.

132 Claimant's innocent assumption stems from the fact that it knew that Respondent would not be able to afford the Hawk Eye drones. A single Hawk Eye drone would cost at least 16 million EUR [Ex. C3, p. 14, para. 9]. Respondent, looking to acquire at least four drones [Ex. C1, p. 9] with a budget of only 45 million EUR [PO2, p. 44, para. 7] would not have been able to buy more than two Hawk Eye drones without exceeding its budget. Taking into consideration that Respondent needed at least five Kestrel Eye drones in order to collect the relevant data [*ibid*], two Hawk Eye drones would not have sufficed. Claimant, being aware of Respondent's financial situation, did not deem it necessary to inform Respondent about the development of the Hawk Eye. Therefore,

contrary to Respondent's assumption, there was no intention to "cheat" Respondent by "selling old for new" [Ex. C. 7, p. 18, para. 13].

133 Moreover, Claimant did not have any fraudulent intention to withhold information on the Hawk Eye because it had met all the requirements of the tender offer with the Kestrel Eye 2010. Between the Kestrel the and Hawk Eye, only the Kestrel Eye drone has the radio communication link specifically asked for in the tender [Ex. C. 1, p. 9; Ex. C. 4, p. 15]. As elaborated earlier, the Kestrel eye meets, and even surpasses other requirements in the tender. It is a valuable part of Claimant's portfolio and Claimant even intends to produce it at least until 2024 [PO 2, p. 45, para. 13]. Claimant had no intention of cheating Respondent by selling "old for new". Furthermore, Claimant had no reason to intentionally withhold the Hawk Eye from Respondent if it thought this newer drone would serve the latter's interests best. Hence, there is no indication of fraudulent intent on the part of Claimant at all, and any duty to disclose would not have been breached intentionally.

134 At best, Claimant might have negligently concluded that there existed no duty to disclose. Even so, negligence does not suffice for fraudulent misrepresentation [*Du Plessis* in: *Vogenauer*, Art. 3.2.5, para. 8]. In the absence of fraud, the result would be that the claim would fall within the ambit of the CISG and any reliance on domestic remedies would be excluded. Therefore, even if Tribunal were to find that there existed a duty to disclose, Respondent still cannot rely on Art. 3.2.5 ICCA.

135 In conclusion, the issue raised by Respondent is one of non-conformity pursuant to Art. 35 CISG, which generally preempts all domestic remedies. While an exception exists for cases involving fraud, Claimant did not behave fraudulently. Claimant neither misrepresented the drones in a fraudulent way, nor did Claimant intentionally omit disclosure of relevant facts, because there was no duty to disclose. Any other perception would impose contractual duties reaching further than even the Hawk Eye could go.

8 Prayer for Relief

In light of the submissions made above, Claimant respectfully requests Tribunal to:

1. Accept jurisdiction to hear and decide the case.
2. Not stay nor bifurcate the proceedings.
3. Hold that the CISG applies to Parties' contract.
4. Find that the remedy of avoidance for fraudulent misrepresentation is not available for Respondent.

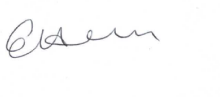
Certificate of Authentication

We hereby confirm that this Memorandum was written only by the persons whose names are listed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Saarbrücken, 8 December 2022

Anusha Osman Ali

David Bastuck



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