TWELFTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

ATENEO DE MANILA UNIVERSITY

BELINDA ATIENZA • FRITZ-ERICH BALDORIA

VANESSA MAR DEL ROSARIO • CLARISSE AEAEA MALLARI

RHYS ALEXEI MURILLO • JEFRIE SAHAGUN

SHERYL MAY TANQUILUT • CARLOS MARTIN TAYAG

SWISS CHAMBERS' ARBITRATION

MOOT CASE NO. 12

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

Equatoriana Commodity Exporters, S.A.

325 Commodities Avenue, Port City,

Equatoriana.

(RESPONDENT)

AGAINST:

Mediterraneo Confectionary Associates, Inc.

121 Sweet Street, Capitol City,

Mediterraneo.

(CLAIMANT)

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

2d	**Second**
3d	**Third**
&	**And**
§	**Section**
Am. Rev. Int'l Arb.	**American Review of International Arbitration**
Am. Univ. Int'l L. Rev.	**American University International Law Review**
Arb. Int.	**Arbitration International**
Art.	**Article**
B.C.C.	**British Company Law Cases**
B.L.R.	**Business Law Review**
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
ed.	Edition/Editor
e.g.	for example (exempli gratia)
EU	European Union
Eur.Ing.	European Engineer

FOB	Free on Board
Harv. L. Rev.	Harvard Law Review
High Tech. L. J.	High Technology Law Journal
Ibid	in the same place (ibidem)
ICC	International Chamber of Commerce
Incoterms	Incoterms 2000, International Commercial Terms of the ICC
Inc.	Incorporated
Int'l Bus. L.J.	International Business Law Journal
J. Bus. L.	Journal of Business Law
K.B.	King's Bench
LG	Landgericht
lex mercatoria	Commercial Law
Ltd.	Limited
Mgmt.	Management
No.	Number
NYC	New York Convention
NYBOT	New York Board of Trade
O.J.L.	Official Journal of the European Union L. series (Legislation)
OLG	Oberlandesgerichtshof

p.	Page
Pace Int'l L. Rev.	Pace International Law Review
para.	Paragraph
paras.	Paragraphs
pp.	Pages
PECL	Principles of European Contract Law
Q.B.	Queen's Bench
S.W. 2d	Southwestern Reporter, Second Series
Sys.	System
Tex. L. Rev.	Texas Law Review
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	United Nations Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 1994
U.S.	United States
USA	United States of America
v.	Versus

INDEX OF AUTHORITIES

BIANCA, C.M.; BONELL, M.J	Commentary on the International Sales Law - The 1980 Vienna Sales Convention (1987) (Cited as: *Bianca*)
BISHOP, R. Doak	A Practical Guide For Drafting International Arbitration Clauses By R. Doak Bishop (Cited as: *Bishop*)
BOGUSLAVSKIJ, M.M.	Vienna Convention for the Contracts for the International Sale of Goods, Commentary (1994) (Cited as: *Boguslavskij*)
von CAEMMERER, E. / SCHLECHTRIEM, Peter	Kommentar zum Einheitlichen UN-Kaufrecht, 2nd ed. (1995) (Cited as: *Caemmerer*)
CARBONNEAU, Thomas	Cases and Materials on the Law and Practice of Arbitration, 2nd Ed., 2000, Juris Pub. (Cited as: *Carbonneau*)

CHENGWEI, **Liu**

Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL (2003)

at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html

(Cited as: *Chengwei*)

COMMISSION ON EUROPEAN CONTRACT LAW (CECL)

Official Comment on the Principles of European Contract Law (1999)

(Cited as: *PECL Commentary*)

DAVID, Rene

Arbitration in International Trade, 1985, Kluwer Law and Taxation Pub., MA USA

(Cited as: *David*)

FLAMBOURAS, Dionysios P.

The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis

at: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html#er

(Cited as: *Flambouras*)

GRAFFI, Leonardo

Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention

(Cited as: *Graffi*)

HONNOLD, **John** — Uniform Law for International Sales under the 1980 United Nations Convention, 2nd ed. (1991)

(Cited as: *Honnold*)

HONNOLD, **John** — Documentary History of the Uniform Law for International Sales (1989)

(Cited as: *2 Honnold*)

KOCH, Robert — The Concept of Fundamental Breach of Contract under the United Nations Conventions on Contracts for the International Sale of Goods

at: http://www.cisg.pace.law.edu/cisg/biblio/koch.html

(Cited as: *Koch*)

LEBOULANGER, Philippe — Multi-Contract Arbitration in Journal of International Arbitration, Vol. 13 No. 4 (1996)

at: http://www.kluwerarbitration.com/arbitration/arb/home/ipn/

default.asp?ipn=8373

(Cited as: Leboulanger 1996)

LEVINGSTON, John — Exclusive Juris Clauses and Arbtration Clauses

www.findlaw.com.au

(Cited as: *Levingston*)

LORENZ, Alexander — Fundamental Breach under the CISG

at: http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html

(Cited as: *Lorenz*)

NAON, Grigera — Horacio A. Grigera Naon, Choice of Law Problem in International Arbitration, 1962, JCB Mohr (Paul Siebeck) Tubingen

(Cited as: *Naon*)

NANDA, Ved P. — Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria (1992)

(Cited as: *Nanda*)

RAMBERG, Jan — International Commercial Transactions (1998)

(Cited as: *Ramberg*)

REDFERN, Allan and HUNTER, Martin — Law and Practice of International Commercial Arbitration (1999)

(Cited as: *Redfern*)

Law and Practice of International Commercial Arbitration (2003)

(Cited as: *2 Redfern*)

ROHNER, **Claude D. SKROKI, Anthony M.** — Controls in a Nutshell (2000)

(Cited as: *Rohner*)

SCHERER, Matthias — New Rules on International Arbitration in Switzerland

(Intl. A.L.R. 2004, 7(4), 199-125)

(Cited as: *Scherer*)

SCHLECHTRIEM, Peter Commentary on the UN Convention on the International Sale of Goods (CISG), Schlechtriem

(Cited as: *Schlechtriem*)

SMIT, Robert H. International Commercial Arbitration: Drafting The Arbitration Clause And Selecting The Arbitration Rules To Govern The Arbitration (2003)

(Cited as: *Smit*)

SUTTON, Jeffrey S. Measuring Damages under the United Nations Convention on the International Sale of Goods

in: Ohio State Law Journal

50 Ohio St. L.J. 737

(Cited as: *Sutton*)

TOOPE, Stephen J. Mixed International Arbitration (1990)

(Cited as: *Toope*)

UNCITRAL Secretariat Commentary on the Draft Convention on Contracts for the International Sale of Goods

UN Doc. A/Conf. 97/5

(Cited as: *Secretariat Commentary*)

Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (1981)

U.N. Doc. A/Conf. 97/19

(Cited as: *Official Records*)

INDEX OF CASES AND ARBITRAL AWARDS

ICC Award, Case No. 8574, 1996
<http://cisgw3.law.pace.edu/cases/968574i1.html>
(Cited as: ICC Award No. 8574)

INDEX OF LEGAL TEXTS

CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
PECL	Principles of European Contract Law (1990)
SWISS Rules	Swiss Rules of International Arbitration (2004)
UCC	United States Uniform Commercial Code (2001)
UNIDROIT Principles	International Institute for the Unification of Private Law (UNIDROIT) Principle of International Commercial Contracts (2004)

STATEMENT OF FACTS

2001

19 November	RESPONDENT telephones CLAIMANT and offers to sell cocoa to it.
	RESPONDENT sends a fax confirming the telephone conversation and sends a copy of Contract 1045 to CLAIMANT.
23 November	CLAIMANT signs the contract.

2002

24 February	CLAIMANT telephones RESPONDENT requiring it to name a shipping date for the cocoa.
	RESPONDENT writes a letter to CLAIMANT informing the latter of a storm that hit Equatoriana and that the Equatoriana Government Cocoa Marketing Organization declared an embargo that barred the release of cocoa for export through at least the month of March.
5 March	CLAIMANT replies to the letter of RESPONDENT saying that the cocoa can come from anywhere and that it will need the cocoa later that year. It makes clear that in the event that the cocoa would not be delivered by then, it would have to look elsewhere and it would hold the latter liable for reimbursement of additional costs.
During the following month	CLAIMANT constantly telephones RESPONDENT inquiring the date for the delivery of cocoa.
10 April	CLAIMANT sends a letter to RESPONDENT saying that it expects it to deliver all of the cocoa by the end of May 2002.
7 May	RESPONDENT sends a telefax to CLAIMANT indicating that 100 tons would be shipped later that month.
28 May	RESPONDENT ships the cocoa and CLAIMANT receives and pays.
June and July	CLAIMANT phones RESPONDENT a number of times inquiring as to the date when the additional 300 tons of cocoa would be delivered.
15 August	CLAIMANT sends a letter to RESPONDENT saying that it would soon need to receive the remaining 300 tons of cocoa and reiterates that it would have to purchase elsewhere and hold the latter liable for extra expense in the event of non-delivery.

29 September	RESPONDENT telephones CLAIMANT that there was no indication yet as to when the export ban would be rescinded.
24 October	CLAIMANT purchases 300 tons of cocoa from Oceania Produce, Ltd
25 October	CLAIMANT notifies RESPONDENT through fax and letter informing the latter of its purchase from Oceania and demands reimbursement of the difference from the original purchase price and cover price.
11 November	CLAIMANT'S counsel sends a letter to RESPONDENT's president for the formal demand for reimbursement.
12 November	The export ban was rescinded.
13 November	RESPONDENT sends a letter to CLAIMANT informing the latter of its refusal to pay.
15 November	CLAIMANT formally avoids the contract.

ARBITRATION

2004

5 July	CLAIMANT sends letter with Notice of Arbitration to the Chamber of Commerce and Industry of Geneva.
6 July	Chamber of Commerce and Industry of Geneva acknowledges Notice of Arbitration, requesting CLAIMANT to pay registration fees.
12 July	CLAIMANT sends letter to Chamber of Commerce and Industry of Geneva regarding payment of registration fee, including a copy of the payment order.
16 July	Chamber of Commerce and Industry of Geneva acknowledges CLAIMANT'S payment of the registration fee and requests RESPONDENT to file its answer to the Notice of Arbitration within thirty (30) days. Claimant was advised of the new Swiss Rules enforced on January 1, 2004 that shall be applied to the present proceedings since the Notice of Arbitration was submitted after January 1, 2004
21 July	CLAIMANT expresses that it's desire to have three (3) arbitrators instead of a sole arbitrator.

10 August	RESPONDENT submits its Answer and Counter-claim and attached a copy of the payment order for counter-claim fees.
13 August	Chamber of Commerce and Industry of Geneva acknowledges RESPONDENT'S Counter-claim and payment for counter-claim fees, requesting the parties to appoint an arbitrator each by 31 August 2004.
	Chamber of Commerce and Industry of Geneva notes that the counter-claim is of a different contract and refers to the Arbitral Tribunal the issue of jurisdiction over such counter-claim.
31 August	CLAIMANT submits an Answer to RESPONDENT'S Counter-claim and appoints Dr. Claimant Arbitrator
	RESPONDENT appoints Mr. Respondent Arbitrator.
3 September	Chamber of Commerce and Industry of Geneva sent letters designating Dr. Claimant Arbitrator and Mr. Respondent Arbitrator as arbitrators.
6 September	Dr. Claimant Arbitrator and Mr. Respondent Arbitrator submits their consent to the appointment.
13 September	Chamber of Commerce and Industry of Geneva confirms Dr. Claimant Arbitrator and Mr. Respondent Arbitrator as co-arbitrators and requests them to designate a president arbitrator.
16 September	Dr. Claimant Arbitrator and Mr. Respondent Arbitrator appoint Professor Presiding Arbitrator.
	Chamber of Commerce and Industry of Geneva sent a letter designating Professor Presiding Arbitrator.
21 September	Professor Presiding Arbitrator submits his consent to his appointment.
22 September	Chamber of Commerce and Industry of Geneva confirms Professor Presiding Arbitrator as Chairman of the arbitral tribunal and directs the arbitral tribunal to request the parties to pay the deposit on arbitration costs.
1 October	Procedural Order No. 1, stating the rules of procedure for arbitration.
30 October	Procedural Order No. 2, responding to the clarificatory requests of the parties.

SUBMISSIONS

In view of the above facts and in response to Procedural Order No. 1, we respectfully make the following submissions on behalf of our client, Equatoriana Commodity Exporters, S.A. (RESPONDENT):

In regard to cocoa contract 1045

- That the contract was for the sale of cocoa from Equatoriana;
- That Equatoriana Commodity Exporters, S.A. was impeded through no fault of its own from delivering during the period February to November 2002 more than 100 tons of the 400 tons contracted;
- That Mediterraneo Confectionary Associates, Inc. did not fix a period for delivery pursuant to Article 47 CISG for Equatoriana Commodity Exporters, S.A. to deliver the 300 tons of cocoa not yet delivered;
- That Mediterraneo Confectionary Associates, Inc. was not authorized under Article 49 CISG to avoid the contract;
- That, if the Tribunal were to find that Mediterraneo has the right to damages from Equatoriana Commodity Exporters, S.A., the damages should be measured by the difference between the contract price and the market price on 15 November 2002 and not by the larger difference between the contract price and the price paid by Mediterraneo Confectionary Associates, Inc. in the substitute transaction;

In regard to sugar contract 2212

- That the Tribunal has jurisdiction to consider the counter-claim;

- That any damage that may have occurred to the sugar happened after the risk of loss had passed to Mediterraneo Confectionary Associates, Inc.;
- That Mediterraneo Confectionary Associates, Inc. is obligated to pay the full contract price of USD 385,805 for the sugar.

REQUEST FOR RELIEF

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

In regard to cocoa contract 1045

- Dismiss the claim for damages in totality brought by Mediterraneo Confectionary Associates, Inc.;
- Alternatively and only if it finds that Mediterraneo has a claim for damages, find that the damages are limited to USD 172,026.3

In regard to sugar contract 2212

- Order Mediterraneo Confectionary Associates, Inc. to pay the full contract price of USD 385,805;
- Order Mediterraneo Confectionary Associates, Inc. to pay interest on the price of USD 385,805 from 18 December 2003 to the date of payment.

In regard to the arbitration

- Order Mediterraneo Confectionary Associates, Inc. to pay all costs of the arbitration, including the costs for legal representation and assistance incurred by Equatoriana Commodity Exporters, S.A. in this arbitration, in accord with Article 38 of the Swiss Rules.

(Signed)_____

Counsel for RESPONDENT

27 January 2005

I. THE NEW SWISS RULES ARE APPLICABLE TO THIS ARBITRATION

1.The new Swiss Rules are applicable to this arbitration because :**[a]** the same is properly within its provision. Moreover, CLAIMANT, despite being notified of its effectivity, **[b]** failed to except to its application and instead **[c]** assented to the same, thereby modifying the original agreement.

A. THIS ARBITRATION IS PROPERLY WITHIN ARTICLE 1 OF THE NEW SWISS RULES.

2. The plain wording of the provisions of the new Swiss Rules of International Arbitration [Swiss Rules] are enough to convince this Tribunal that they are the proper procedural rules applicable to this arbitration.

3. First, under Art. 1(1), it is provided that "[t]hese Rules shall govern international arbitrations, where an **agreement** to arbitrate refers to these Rules, or to the arbitration rules of the Chambers of Commerce and Industry of … Geneva …" (emphasis supplied).

4. The arbitration clause of Cocoa Contract 1045 is an agreement that refers to such rules. It states [CLAIMANT's Exhibit No. 2] that the Arbitration Rules [Geneva Rules but "Swiss Rules" in Memorandum for CLAIMANT] of the Chamber of Commerce and Industry of Geneva [Chamber] shall govern "any dispute with respect to or in connection with" said contract. When the Request for Arbitration was filed, the arbitration rules of the Chamber is the Swiss Rules.

5. Second, Art. 1(3) of the new Swiss Rules provides that the Rules "shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after" 1 January 2004, the date on which the Rules came into effect. CLAIMANT filed its Request for Arbitration with the Chamber of Commerce and Industry of Geneva on 2 July 2004 [Request for Arbitration], way beyond the effectivity date of the Rules, therefore within the ambit of said provisions.

6. It is clear that from the plain text of Art. 1(1) and (2) that this arbitration is governed by the Swiss Rules.

B. CLAIMANT WAS DULY INFORMED THAT NEW SWISS RULES WERE IN FORCE AS OF THE DATE OF ITS SUBMISSION OF THE REQUEST FOR ARBITRATION BUT FAILED TO EXCEPT TO ITS APPLICATION.

7. It is generally recognized that the procedural law in effect at the time a dispute is submitted for resolution shall govern the resolution of the dispute [Scherer]. However, even without applying this principle, it will be seen from the conduct of CLAIMANT, there it acquiesced to arbitration under the Swiss Rules.

8. **The Chamber** informed CLAIMANT that the new Swiss Rules had been adopted in lieu of the Geneva Rules [Letter from Swiss Chambers, 6 July 2004]. In response, CLAIMANT neither protested nor insisted that the Geneva Rules should govern this arbitration. In fact, CLAIMANT expressly acceded to the change of rules by paying the arbitration fees [Letter from Fasttrack, 12 July 2004], the schedule of which is based on the Swiss Rules. By these acts, CLAIMANT agreed to the applicability of the Swiss Rules.

9. CLAIMANT should not be allowed to belatedly declare that the proper procedural rules are the Geneva Rules. Its acquiescence to arbitrate under the Swiss Rules was based on **informed consent** that was intelligently made as CLAIMANT was even furnished a copy of the new Swiss Rules [Letter from Chambers, 6 July 2004]. CLAIMANT, in other words, had actual knowledge of each and every provision of the Swiss Rules. CLAIMANT may likewise be charged with constructive knowledge of the Swiss Rules since its enactment was widely publicized [Procedural Order No. 2, para. 5].

10. The unqualified assent of CLAIMANT to the Swiss Rules is further demonstrated by its failure to invoke the "unless the parties have agreed otherwise" exception found in Art. 1(3) of the Swiss Rules. Pursuant to the provision, parties are not absolutely bound to arbitrate under the new Swiss Rules. CLAIMANT should have availed of said exception and insisted on the application of the Geneva Rules as agreed upon in Cocoa Contract 1045. The fact that CLAIMANT failed to do so demonstrates a conscious choice by both parties to arbitrate under the Swiss Rules.

C. UPON ASSENT TO THE APPLICATION OF THE SWISS RULES, THE ARBITRATION AGREEMENT OF COCOA CONTRACT 1045 WAS EFFECTIVELY MODIFIED BY THE PARTIES

11. Arbitration is essentially contractual in nature [Carbonneau, p. 202; Naon, p. 15]. In the performance of their respective obligations, parties are expected to act in good faith [David, p. 105; Leboulanger] and to comply with the stipulations of their agreement. Nevertheless, pursuant to the principle of party autonomy, nothing prevents contracting parties from modifying their agreement.

12. The arbitration clause of Cocoa Contract 1045 was binding and subsisting from the moment it was signed on 23 November 2004 by RESPONDENT (CLAIMANT's Exhibit No. 2). CLAIMANT, however, unilaterally modified the terms of this agreement when it initiated arbitration in accordance with the Swiss Rules instead of the Geneva Rules. This would have made no effect as RESPONDENT could have validly insisted on the application of the Geneva Rules as stated in the arbitration clause. However, RESPONDENT gave tacit concurrence [Berger, p. 143] to the modification when it filed its answer on 10 August 2004 and paid its share of the arbitration fees [Letter from Langweiler, 10 August 2004]. From that moment, the original arbitration agreement was novated.

13. CLAIMANT argues that the parties' intention at the time Cocoa Contract 1045 was perfected for the Geneva Rules to govern [Memorandum for CLAIMANT, para. 2]. That may be so, but as stated, the agreement was effectively modified when the parties assented to the application of the Swiss Rules. This is nothing but a modification of their arbitration agreement in Cocoa Contract 1045.

14. Otherwise stated, the novation of an agreement is but an exercise of the parties' right to amend their original agreement, an indispensable facet of the principle of freedom of contract. Party intention should therefore be reckoned at this point. Even CLAIMANT admits that a "separate party agreement" [Memorandum for CLAIMANT, para. 5] would make the new Swiss Rules applicable.

15. In sum, CLAIMANT, after agreeing to the application of the Swiss Rules [Letter from Fasttrack, 12 July 2004] and pleading the same as generally applicable in its Answer to

Counterclaim [Para. 6], is estopped from denying the applicability of the Swiss Rules [Hanotiau; Leboulanger].

II. THE TRIBUNAL HAS JURISDICTION OVER THE CLAIM OF THE RESPONDENT.

A. THE CLAIM OF RESPONDENT SHOULD BE TREATED AS BOTH A SET-OFF AND A COUNTERCLAIM.

16. When RESPONDENT submitted its claim, it invoked the Tribunal's jurisdiction on the basis of Art. 21(5) pertaining to set-off [Answer and Counterclaim, para. 17]. This is because the contract that gave rise to the dispute contains an arbitration clause pertaining to another tribunal.

17. If the Swiss Rules did not include Art. 21(5) which allows set-off claims involving relationships governed by an independent arbitration agreement, RESPONDENT would have had no basis to plead set-off on the particular claim that is within the jurisdiction of another tribunal. It does not mean, however, that the dispute involving the sugar contract could not have been brought within this Tribunal's jurisdiction.

18. Under Art. 3(9) "any counterclaim… shall in principle be raised with Respondent's Answer…" while Art. 4(1) allows consolidation of a separate arbitration. In other words, the claim arising from the sugar contract could have been pleaded under Art. 3(9) or in the alternative, as a related claim under Art 4(1), as an object of consolidation.

19. Since the claim has been brought under Art. 21(5), RESPONDENT would like this Tribunal, in case it is found liable and equally entitled to its own claim, to rule a set-off. Such process will dispense with the need to exchange payment of the respective entitlement of the parties pursuant to any award that will be made or the probability of court action for the enforcement of any award in case any party would refuse to pay.

20. However, it may be asked, what happens to the excess of the claim of RESPONDENT inasmuch as it exceeds that of the CLAIMANT's? Is there a need to arbitrate the same in the tribunal identified in the sugar contract?

21. The answer to this lies in the nature of the claim pleaded by RESPONDENT. The term as it appeared in the Answer and Counterclaim denoted "counterclaim." This is but proper and

precisely because the entire claim of RESPONDENT, as stated, exceeds that of CLAIMANT's. As such, RESPONDENT is seeking the payment of the entire amount due for the purchase by the CLAIMANT of the sugar to the extent that should the Tribunal adjudge the parties to be entitled to their respective claims, CLAIMANT will still be made to pay the difference. Unfortunately, because of the set-off limitation under Art. 21(5), RESPONDENT will not be entitled to this.

22. Consequently, a declaration that this Tribunal has jurisdiction pursuant to the foregoing will not only promote procedural economy but also prevent a denial of justice to both parties consequent to a conflicting ruling if the excess is arbitrated in another tribunal [Leboulanger]. Conversely, if RESPONDENT is only allowed to arbitrate its claim as a set-off, it will still be necessary for it to initiate another arbitration to enforce the remainder of its claim.

B. AS A SET-OFF, THE JURISDICTION OF THE TRIBUNAL IS BASED ON ART. 21(5) OF THE SWISS RULES

23. At the onset, it is emphasized that there was never an expressed or implied modification of the Swiss Rules to the effect that Art. 21(5) will not apply to this arbitration because it is contrary to the wording of the arbitration clause as alleged by CLAIMANT [Memorandum for CLAIMANT, para. 11-12]. This is simply untenable as the Swiss Rules was not in existence at the time the sugar contract was perfected.

24. Art. 21(5) allows for a set-off of claims even if the dispute is the object of another arbitration agreement. The said provision requires no connection to exist between the principal claim and the set-off claim, contrary to the allegations of CLAIMANT [Memorandum for CLAIMANT, para. 14].

25. It has been admitted by RESPONDENT that such is the form of the arbitration clause and the nature of the dispute that arose from the sugar contract [Answer and Counterclaim, para. 17]. Considering that it has been properly pleaded pursuant to Art. 3(9) of the Swiss Rules, it is but proper for Tribunal to rule that it has jurisdiction.

26. Further, it has been written that the reason behind the inclusion of this provision is to forestall any delay that may result from the adjudication of such claim with another tribunal,

making it necessary to suspend the proceeding in the Swiss Tribunal [Leboulanger]. To adjudge, therefore, lack of jurisdiction would compel RESPONDENT to arbitrate its claim with another tribunal resulting to unreasonable delay when the dispute involved is merely factual [Procedural Order No. 2, para. 32] in nature and does not require the expertise of Oceania Commodity Association contrary to CLAIMANT's submissions [Memorandum for CLAIMANT, para. 14].

C. AS A COUNTERCLAIM, THE JURISDICTION OF THE TRIBUNAL IS BASED ON ART. 4(1) OF THE SWISS RULES AND THE PRACTICE OF CONSOLIDATION.

27. Pursuant to Art. 4(1) of the Swiss Rules, the Chambers is authorized to consolidate an independent arbitration request involving the same parties with an existing proceeding. In submitting the claim arising based on the sugar contract, RESPONDENT impliedly invokes the authority of the Chambers to consolidate the disputes into a single arbitration, adjudicating and ruling on their respective claims with finality and in full satisfaction of whatever amount the parties are entitled to.

28. Consolidation is often resorted to primarily for procedural economy and this is generally done where the parties involved are one and the same and that as between their respective claims, there is a common question of fact and law [Hanotiau]. As argued, this will be achieved following a finding of jurisdiction by this Tribunal.

29. In consolidating the proceedings, this Tribunal will not violate party autonomy since the arbitration clause of the sugar contract has not been restrictively worded so as to foreclose the possibility of consolidation [Hanotiau]. Moreover, CLAIMANT should have reasonably expected that its adherence to the Swiss Rules will necessarily give rise to the possibility of disputes involving the same parties being consolidated.

III. THE COCOA AND SUGAR CONTRACTS ARE RELATED UNDER THE PRINCIPLE OF UNIFIED CONTRACTUAL SCHEME

30. Unified contractual Scheme applies to complex situations where numerous contractual documents relate to one organic relationship. [*Berg*, 2000]. CLAIMANT is a producer of various confectionary items. To produce the confectionaries, it uses large quantities of cocoa; thus the cocoa contract was executed [Request for Arbitration, para 1]. The sugar from RESPONDENT was purchased for confectionary purposes also [RESPONDENT's Exhibit No.5]. This shows

CLAIMANT's singular purpose in undertaking the two separate contracts. As a consequence of this single organic relationship, the arbitral clause of one contract can apply to the other [*Doak Bishop*]. The arbitral tribunal, under the Swiss Rules, can decide that the arbitral clause in the cocoa contract is applicable to the subsequent sugar contract [Art. 21(5)].

31. Impairment of contract or agreement on forum selection is allowed in this case for reasons of A.] convenience B.]absence of exclusivity of forum selected C.] Prior knowledge of Swiss Rules and the scope of its jurisdiction D.] Reasonable expectation that similar contract would be covered by Swiss Rules

A. CONVENIENCE AS A FACTOR FOR FORUM SELECTION.

32. A forum is chosen because of its geographical convenience to the parties or because it is a suitably neutral venue or because of the good reputation of the arbitration services to be found there or for some equally valid reason. The choice of the particular forum is merely another general connecting factor which may be of relevance in the circumstances of the particular case [*Redfern*]. However, even if such choice shows the intention of the parties, the choice may be changed even without one parties' consent. The change depends on the arbitration clause or submission agreement, coupled with any institutional rules that may have been incorporated [*Redfern*]. It is a well-established practice of arbitral tribunals to reject a forum selection clause when radical changes have fundamentally altered the circumstances that existed when the clause was negotiated in exceptional cases [*Redfern*].

33. The consequence of adopting the New Swiss Rules is its incorporation in every subsequent contract between the parties unless either party will claim exception under Art 1(3). This radical change of applicable rules in the prior contract has certainly caused a fundamental alteration of the surrounding circumstances justifying the change of the chosen forum as a practical necessity.

B. PRIOR KNOWLEDGE OF SWISS RULES AND THE SCOPE OF ITS JURISDICTION

34. CLAIMANT consented to the application of the New Swiss Rules without any reservation. Consequently, there is a presumption that the effects of the adoption of the rules are known to CLAIMANT. Thus, it is estopped from asserting that RESPONDENT's claim for set-off is beyond the jurisdiction of the arbitral tribunal or that the recognition of such claim is an exercise

of exorbitant jurisdiction by the arbitral tribunal. The order for set-off is well within the powers of the arbitral tribunal under Article 21 (5) of the new Swiss Rules.

C. REASONABLE EXPECTATION THAT SIMILAR CONTRACT WOULD BE COVERED BY SWISS RULES

35. CLAIMANT having entered into the sugar contract on a latter date than the cocoa contract creates a reasonable expectation that any disputes arising out of separate contracts between them can be under the jurisdiction of the Swiss Arbitral tribunal pursuant to Article 21 (5). CLAIMANT cannot claim now that the arbitral clause in the first contract is not applicable to the sugar contract having assented to the application of the New Swiss Rules in its totality.

D. THERE IS NO MANDATORY AND RESTRICTIVE OBLIGATION TO ARBITRATE IN A CERTAIN FORUM

36. The two parties in this case are not members of any association that would require arbitration in any particular arbitration institution [Procedural Order No.2]. There exists no provision in the forum selection clause nor in the facts of the case that imposes a contractual obligation to arbitrate exclusively in the stated jurisdiction [*Levingston*]. Oceania Commodity Association was originally chosen as the forum for any disputes arising from the sugar contract. However, as a consequence of the application of the new Swiss Rules as well as both parties' assent, the forum originally chosen has to yield.

IV. IF ART. 21(5) IS NOT APPLICABLE THEN THE COUNTERCLAIM FALLS WITHIN ART. 4(1)

37. Art.4(1) allows the Chamber consolidate two arbitrations regardless of whether and to refer the second dispute to the arbitral tribunal constituted in the first dispute taking into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings [*Scherer*].

38. Counterclaims are admissible as long as they arise "out of the same contract, transaction or occurrence that constitutes the subject matter of the claim" [*Toope*]. The degree of connection which must be shown between the claim under the cocoa contract and the counterclaim under the sugar contract exists. Lord Justice Potter noted that there is a right to equitable set off for cases where " a close relationship existed between the dealings and transactions which gave rise to the respective claims [*Bim Kemi*]." All that was required was that it should fall from the dealings and transactions which gave rise to the subject of the claim.

39. The sugar contract was entered into months after problems had arisen out of the cocoa contract. This is an indication of the continuing business relationship between the parties. On that basis, there is a close and inseparable connection between the claim sought to be set-off and the transactions subject of the claim due to the fact that the basis for the sugar contract was the parties' commitment to achieve mutual benefit despite the claims under the first contract. [*Leboulanger*].

40. The arbitral tribunal will find, after careful evaluation, that the disputes under the related agreements of the cocoa and sugar contracts involve similar issues, facts and parties. The tribunal should order the set-off of said disputes as it would advance the parties' interests. In this case, consolidation will avoid unnecessary delay and duplication, conflicting findings or awards, and prejudice to the parties' rights. The advantages of set -off outweigh any perceived disadvantages pointed out by CLAIMANT.

V. RULES SHOULD ADAPT TO PECULIAR CIRCUMSTANCES SURROUNDING DISPUTE

41. One of the advantages of arbitration is flexibility. Procedures can be adapted to fit the dispute, rather than the dispute being made to fit the available procedures [*2 Redfern*]. Arbitration has developed as a system with few absolutes [*3 Berger*]. The rules are left largely to the agreement of the parties and the discretion of the arbitrators, provided that a relatively relaxed standard is met [*Smit*].

VI. RELATIVE "INFANCY" OF NEW SWISS RULES

The rules of arbitration are subject to periodical amendments to reflect developing practice and expectations of users [*Scherer*]. The rules are not cast in stone. The parties have submitted to the application of the New Swiss Rules and the order for set off will not be beyond the standards set by the rules.

VII. RESPONDENT WAS EXCUSED FROM DELIVERING THE 300 METRIC TONS OF COCOA.

A. THE OBLIGATION OF RESPONDENT AS PER CONTRACT 1045 IS A SPECIFIC OBLIGATION TO DELIVER 400 METRIC TONS OF EQUATORIANA COCOA.

42. The RESPONDENT does not deny the existence its obligation to the CLAIMANT as expressed in Contract 1045. REPSPONDENT maintains however that such obligation partakes a specific nature, as stated in its Answer and Counter-claim [Answer to Notice of Arbitration and Counter-Claim, para 3], based on the implied terms of the Contract **[1]** and as evidenced by the contemporaneous transactions between the parties **[2]**.

1. The Terms of Contract 1045 provide the factual basis for the interpretation of RESPONDENT's obligation.

43. RESPONDENT, through its account executive, offered to sell cocoa to the CLAIMANT [Request for Arbitration, para. 3]. It was finally agreed that RESPONDENT would sell to the former, 400 metric tons of cocoa beans at the prevailing price as of 19 November 2001 [*Ibid*]. The contract called for the delivery of the 400 metric tons of cocoa between the months of March to May 2002 either in one or more installments at the option of the RESPONDENT [Request for Arbitration, para. 3; Claimant's Exhibit No. 2]. It is worthy to note that Contract 1045 contained the usual terms embodied in previous contracts of between CLAIMANT and RESPONDENT [Claimant's Exhibit No. 1; Procedural Order No. 2, para. 16]. RESPONDENT invites the tribunal's attention to these factual milieu which will lay the basis for the its stance that its obligation to deliver the 400 metric tons of cocoa is of a specific nature, contrary to CLAIMANT's view.

2. The contemporaneous transactions of the parties and information obtained therefrom is to be considered in interpreting the provisions of Contract 1045 by virtue of Art. 8 and Art. 9, CISG.

44. Contracting parties seldom – if ever – achieve a wholly autonomous contract. The failure to deal with matters, which later becomes of importance during the implementation thereof, has to be remedied. A broad method of contract interpretation extending beyond the actual intentions of the contracting parties, is resorted to through the use of gap-filling methods based on pre-existing norms such as custom of the trade [*Ramberg*, p. 35]. Otherwise, prejudice to the parties might result due to the strict interpretation of the contract.

45. In interpreting the commercial covenants, the CISG permits a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent. Courts are given wide latitude to interpret the statements and other conduct of a party according to his intent as long as the other party to the contract "***knew or could not have been unaware***" of that intent [Art. 8(1), CISG; *MCC Marble Ceramic v. Ceramica*]. Further, in determining the intent of a party or the understanding of what a reasonable person would have had, due consideration is to be given to the negotiations, ***practices which the parties have established between themselves***, usages and any subsequent conduct of the parties. [Art. 8(3), CISG].

46. Usages to which the parties have agreed to and practices to which they have established between themselves are binding on them [Article 9 (1), CISG]. Furthermore, a ***usage of which the parties knew or ought to have known*** and which in international trade is widely known to, ***and regularly observed*** by parties to contracts of the type involved in the particular trade involved is deemed to have been impliedly made applicable to contract or its formation, unless otherwise stipulated [Art. 9(2), CISG; *Switzerland v. Finland; W.T. GmbH v. P. AG*].

47. The CLAIMANT cannot feign ignorance of RESPONDENT's practices. The RESPONDENT has been in business since 1961 and has earned a good reputation in the business community [Procedural Order No. 2, para 13]. Moreover, it has never supplied anyone with cocoa beans that did not originate in Equatoriana [Answer to Notice of Arbitration and Counter-Claim, para 4; Procedural Order No. 2, para. 14]. This practice is made more manifest by the fact that although RESPONDENT could supply cocoa beans from other sources, it never

has. The sale of cocoa beans represents about 20 percent of its total business [Procedural Order No. 2, para 14].

48. At present, an established business relationship already exists between RESPONDENT and CLAIMANT. This came to pass after several years of conducting business with each other [Claimant's Exhibit No. 8; Procedural Order No. 2, para 16, 19]. CLAIMANT knew that the cocoa delivered in its previous contracts with the RESPONDENT came from Equatoriana, as origin was always known, and the bags in which the cocoa were packed indicated their origin [Procedural Order No. 2, para 19].

49. Although there were no regulations that the cocoa be of Equatoriana origin [Procedural Order No. 2, para 20], it is an established fact that RESPONDENT has been in the business of selling Equatoriana cocoa since 1961 [Procedural Order no. 2, para 13] and has been supplying CLAIMANT with the said cocoa for several years. Morevoer, RESPONDENT engages in business under the name of Equatoriana Commodity Exporters, S.A. and that only a small portion of its business involves the sale of commodities produced in other countries [Answer to Notice and Counter-Claim, para 4]. All of these circumstances taken together, more than bolsters the position that RESPONDENT, in selling ONLY Equatoriana cocoa has already crystallized into itself a practice and usage as regards the manner in which it conducts its business.

B. RESPONDENT WAS EXCUSED FROM ITS OBLIGATION BY REASON OF THE EMBARGO PLACED ON THE EXPORT OF COCOA UNDER ART. 79 (1) OF THE CISG.

50. Article 79(1) of the CISG provides for the exemption of a party from liability for his failure to comply with his contractual obligations. Such exemption is granted when certain requirements are met such as when the impediment was beyond the control of the parties **[1]** and such impediment could not have been taken into account at the time of the conclusion of the contract **[2]**.

1. The failure was due to an impediment beyond the control of RESPONDENT.

51. The requirement that the impediment be beyond the control of the breaching is based on the assumption that there is a typical sphere of control within which the seller is in control. In this sense, the obligor "guarantees" his ability to perform and must bear the risk of its own activities [*Chengwei*, Article 20.3.3.1].

52. In this case, the cause of the non-delivery of the cocoa did not arise from RESPONDENT's own activities but was brought about by the prohibition imposed by the Equatoriana Government Cocoa Marketing Organization [Procedural Order No. 2, para 10]. RESPONDENT humbly submits that such a circumstance was not within its sphere of control.

53. The Organization is an official entity that has monopoly over the purchase of cocoa from the producers. There are a few local users of the cocoa beans that purchase from the Organization, but the vast majority of the cocoa is sold to exporters, such as Equatoriana Commodity Exporters. That such an impediment was beyond the control of RESPONDENT is made more manifest by the fact that there existed no legal procedure available to protest the export embargo and that no exemption was granted by the Organization [Procedural Order No. 2, para 12]. RESPONDENT could not have reasonably been expected to fulfill its obligations according to Contract 1045 since the cause of its non-delivery came from the Government, an outside force that is beyond the control of the RESPONDENT.

2. RESPONDENT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome its consequences.

54. The requirements for exemption due to force majeure exist in this case. Aside from the impediment being beyond the control of the RESPONDENT, the impediment and its resulting effects were unforeseeable **[a]** and unavoidable **[b]**. Moreover, purchasing cocoa from other sources outside Equatoriana would place the RESPONDENT in an exceptionally disadvantaged position since it involved substantially higher prices **[c]**.

a. Forseeability can only be taken into account if the fortuitous event was foreseeable at the time the contract was concluded.

55. The impediment must be one that could not have been taken into account at the time the contract was made in order for the seller to be exempted from liability. An event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely. [*Chengwei*, Article 20.3.3.2].

56. Equally it is stated that the test is 'reasonable' foreseeability: *that is to say, whether a normal person, placed in the same situation, could have foreseen it without either undue optimism or undue pessimism.* Thus in a particular area cyclones may be foreseeable at certain times of year, but not a cyclone at a time of year when they do not normally occur - that would not be reasonably foreseeable by the parties [*Chengwei*, Article 20.3.3.2].

57. Applied in this case, the storm, which resulted to non-delivery of the cocoa, was an unforeseeable event. The storm that hit Equatoriana on 14 February 2002 was the first storm in 22 years that had caused such severe damage to the cocoa trees [Procedural Order No. 2, para 8]. Hence, RESPONDENT could not have been foreseen that a storm of such intensity and magnitude could likely hit Equatoriana. [*Raw Materials Inc. v. Manfred Forberich]*. Moreover, the most recent storm that occurred in 1980 did not render extensive destruction to the cocoa trees (Procedural Order No. 2, para 8).

b. The RESPONDENT could not fulfill the obligation since the impediment was unavoidable and reasonably impossible to overcome.

58. The event constituting a force majeure must also be unforeseeable and irresistible. It must be such as to make the discharge of an obligation objectively impossible [*Nanda*, p. 91]. Even an unforeseeable impediment exempts the non-performing party if he can prove that he could neither avoid the impediment, nor by taking reasonable steps, to overcome its consequences [*Flambouras*, p. 271]. Reasonableness qualifies the condition that the impediment must be insurmountable or irresistible [*Chengwei*, Article 20.3.3.3].

59. The list of specific force majeure events included in international contracts has evolved in such a way as to contemplate increasing participation of states or their entities in business activities [*Nanda*, p. 95; *Rohner and Skroki*, p. 335], as in this case were the Organization, a government entity actively participates in the trade of Equatoriana cocoa.

60. The RESPONDENT could not have been expected to take measures to fulfill the obligation because of the impossibility in overcoming the impediment. Even if RESPONDENT sought exemption from the export embargo, such would have been to no avail, as evidenced by the rejection of similar requests for exemption sought by several other exporters [Procedural Order No. 2, para 12]. It is therefore reasonably expected that such request would have met the same consequence. It is thus apparent that the embargo from exporting of cocoa was beyond the control of the RESPONDENT and that there existed reasonable impossibility to overcome the impediment because the Equatoriana Government Cocoa Marketing Organization would not allow release of cocoa.

c. The RESPONDENT could not outsource the cocoa as it stood to suffer losses because the cocoa of the same type from other countries was of a higher price.

61. Substitute delivery would become impossible because circumstances have rendered the fulfillment to be exceptionally burdensome. The CISG requires from the parties the observance of good faith in the performance of their contract [Art. 7 (1), CISG]. The principle of good faith requires that the breaching party be relieved of the obligation to make a delivery if it is physically impossible or exceptionally burdensome Since substitute delivery under Article 46 (2) is a particular case of specific performance, this proposition also applies to the right to seek substitute delivery [*Koch*, p. 340-341]. In other cases, events of force majeure are defined as events that do not necessarily render contract performance impossible, but that hamper the ***normal*** discharge of the contract obligation, or make it ***exorbitant from an industrial or commercial stand-poin****t* [*Nanda*, p. 94-95; *Rohner and Skroki*, p. 336].

62. Equatoriana cocoa sells at a discount to cocoa from most other producing countries. Although Equatoriana cocoa is not regularly traded on either the New York Board of Trade or on Euronext LIFFE in London, as is true of a few other small producers of cocoa, provision is made in their rules governing pricing for such producers. Only a small portion of the futures contracts

result in physical delivery of cocoa. RESPONDENT invites this tribunal's attention to the fact, that when a contract results in physical delivery, cocoa from countries in Group A is delivered at a premium of USD 160 per metric ton. Cocoa from countries in Group B is delivered at a premium of USD 80 per metric ton while cocoa from countries in Group C is delivered at par [Respondent's Exhibit No.1]. Cocoa from Equatoriana would be included in Group C. The occurrence of the same phenomenon in London in the Euronext LIFFE Cocoa futures Contract, Exchange Contract No. 401 can be observed. [Respondent's Exhibit No. 2; Answer to Notice of Arbitration and Counter-Claim, para 7].

63. RESPONDENT's Exhibit No. 3 surreptitiously shows the monthly prices for cocoa in US cents per pound. Multiplying the price by the number of pounds in a metric ton shows that the price per metric ton was USD 1,240.75, the price at which the cocoa was sold in contract 1045. The fact that there was no deviation from the basic price indicates that the contract envisaged cocoa coming from a country in category C in the New York Board of Trade Cocoa Rules or the fifth category in the Euronext LIFFE Cocoa Futures Contract, Exchange Contract No. 401. Those categories included cocoa from Equatoriana and almost no other sources [Answer to Notice of Arbitration and Counter-Claim, para 8].

64. It can thus be seen that to require RESPONDENT to obtain the cocoa from other sources would be unduly burdensome and costly to the RESPONDENT as the basic price of the cocoa contracted can only be obtained in Equatoriana and almost no other sources.

C. RESPONDENT WAS NOT IN FUNDAMENTAL BREACH OF CONTRACT 1045.

65. Art. 25 of the CISG provides that a "breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." Art. 25 CISG does not provide specific guidelines for a distinction between fundamental and non-fundamental breach [*Graffi*, p. 338; *Koch*, p. 185]. Such determination must be made through the use of jurisprudence in relation to the factual antecedents of each case [*Graffi,* p. 345].

66. RESPONDENT maintains that it was not in fundamental breach of its Cocoa Contract 1045 with CLAIMANT as: (1) The breach of contract did not result in a substantial detriment to CLAIMANT; (2) Neither RESPONDENT nor a reasonable man of the same kind and in the same circumstances could have foreseen the detriment to the claimant; and (3) RESPONDENT should have been given the opportunity to complete the delivery of cocoa as provided for in Art. 48(1), CISG.

1. There exists no substantial detriment to CLAIMANT.

67. Before a party's breach can be classified as fundamental, it must be shown that the injured party not only suffered a detriment of substantial character. Substantiality is tied to the aggrieved party's detriment and causes the breach to be fundamental [*Graffi*, p. 340].

68. RESPONDENT respectfully submits that when the contract does not clearly state the importance of an obligation or that time is of the essence in the performance, as in this case, the conduct of the party in breach may be interpreted with more tolerance [*Graffi*, p.340].

a. Timely performance was not of the essence in the contract.

69. RESPONDENT invites this Tribunal's attention to the fact that Contract 1045 does not specifically provide that time was of the essence in the delivery of the cocoa. The contract merely required RESPONDENT to deliver the cocoa between the first and last days of March to May 2002 [Claimant's Exhibit No. 2]. A contract in which the delivery time is not binding, cannot be altered into a transaction where time is of the essence merely because the seller subsequently learns that the buyer needs the goods at a particular time [*Koch*, p. 230].

b. Delay by itself does not constitute fundamental breach.

70. CLAIMANT equates the failure of RESPONDENT to complete the delivery under Contract 1045 to a situation where the seller failed to deliver any goods at all [Memorandum for Claimant, para. 49]. With respect to late delivery of the goods, both the case law and the legal authors hold that delay does not *per se* constitute a fundamental breach [*Graffi*, p.341]. RESPONDENT's breach of the first delivery term should not lead to immediate avoidance of the contract and CLAIMANT should have granted him an additional period of time within which the latter could perform its contractual obligation [*Ibid*, p. 341].

71. Mere non- or late delivery does not constitute a fundamental breach under Article 25 of the CISG provided that delivery is *objectively possible* and the seller was willing to deliver. [*Koch*, p. 246; *Düsseldorf, 6 U 228/92; Bundesgerichtshof, VIII ZR 18/94*] The willingness of RESPONDENT to complete delivery of the remaining 300 metric tons of cocoa is readily discernible from its letter to the CLAIMANT dated 13 November 2002. [Claimant's Exhibit No. 10; Request for Arbitration, para. 11] At that time, delivery by RESPONDENT was objectively possible. [*Koch, p. 246]*

72. Fundamental breach occurs if the seller declares seriously and definitely that he will not deliver substitute goods. It does not occur if he merely declares that he cannot deliver at the moment [*Koch*, p. 247; *Oberlandesgericht Düsseldorf, 6 U 119/93*]. RESPONDENT did not unconditionally state that it will not deliver the cocoa it contracted to sell. On the contrary, RESPONDENT informed CLAIMANT that the former would be able to deliver the remaining 300 metric tons of cocoa "in the very near future" [Claimant's Exhibit No. 3; Claimant's Exhibit No. 6].

c. The detriment, if any, caused upon CLAIMANT was not substantial.

73. "Detriment" cannot be confined to an actual material loss or damage [*Lorenz*], and any determination of fundamental breach by reference to monetary loss would seem to be arbitrary since it is unclear when the loss amounts to a substantial deprivation [*Koch*, p. 267].

74. The major emphasis is laid upon the contractual expectation of the injured party. This adds an objective criterion to the definition since it is the contract that determines the party's obligations and it is also the contract that determines the importance of these duties [*Lorenz*]. Furthermore, detriment must "substantially" deprive the injured part of what he is entitled to expect under the contract [*Lorenz; Graffi*, p. 338].

75. Indeed, CLAIMANT was entitled to expect delivery of 400 metric tons of cocoa within the period of March to May of 2002 under Contract 1045 [Claimant's Exhibit No. 2]. However, it is argued, that CLAIMANT itself negated such contractual expectation in a letter dated 5 March 2002, where CLAIMANT equivocally stated that "[a]lthough we are not under immediate

pressure to receive the contracted cocoa, we will be later this year," without reference to a specific time period within which the delivery is essential [Claimant's Exhibit No. 4].

76. It is also worthy to note that CLAIMANT did not inform RESPONDENT at anytime, from the lapse of the period of March to May 2002, until such time that it purchased the cocoa from Oceania Produce Ltd., that it had suffered any supply problems or any extra expenses [Claimant's Exhibit No. 10]. Any detriment therefore caused by the late delivery of RESPONDENT did not substantially deprive the CLAIMANT of its alleged expectations.

77. CLAIMANT would want to impress upon this tribunal that it had a special interest in the timely delivery of the cocoa, as the period of delivery was included in the contract terms [Memorandum for Claimant, para. 54]. What in fact was included in Contract 1045 was a period to deliver between March to May 2002 or a period of 3 months, [Claimant's Exhibit No. 2] which by itself does not clearly express the CLAIMANT's special interest in the delivery of the cocoa. Such conclusion is bolstered by the fact that the 400 metric tons of cocoa ordered by the CLAIMANT would equal slightly over its average requirements [Procedural Order No. 2, para. 24].

78. A contract in which the delivery time is not binding cannot be turned into a transaction where time is of the essence merely because the seller subsequently learns that the buyer needs the goods at a particular time [*Koch*, p. 230].

2. Neither RESPONDENT nor a reasonable man of the same kind and in the same circumstances could have foreseen the detriment to the claimant.

79. The foreseeability element is a filter, which enables the party in breach to prevent contract avoidance. RESPONDENT submits that the foreseeability test serves only to exempt the party in breach, and cannot in itself qualify the breach as fundamental. Foreseeability therefore, is only a conditional element, which if proven will operate ONLY to prevent the contract from being avoided [*Graffi*, p. 340].

80. CLAIMANT cannot therefore use the foreseeability test to raise the argument that the breach was fundamental. Further, it is submitted and as will be discussed hereunder, that foreseeability

of the detriment can only be measured at the time of the conclusion of the contract **[a]** and that the detriment caused upon the CLAIMANT is not foreseeable **[b]**.

a. The foreseeability of the detriment should be measured at the time of the conclusion of the contract.

81. The importance of an obligation must be determined only in light of the circumstances known at the conclusion of the contract [*Graffi*, p. 341]. It is therefore the time of the conclusion of the contract which is the relevant point at which foreseeability should be measured. Foreseeability of detrimental results after the conclusion of contract can only be taken into consideration in exceptional cases and only up to the time when the preparations for performance of the contract started [*Lorenz; Bianca/Bonnel*, at Article 25, 2.2.2.2.5]. Contract 1045 was concluded when Mr. Smart of the RESPONDENT sent a letter to Mr. Sweet of CLAIMANT confirming the conversation and attaching a copy thereof [Claimant's Exhibit No. 1; Claimant's Exhibit No. 2]. It was therefore at that time that the foreseeability of any detriment be measured.

82. To hold otherwise would in effect allow a party to make substantial a certain interest that was not mentioned at the time of the conclusion of the contract, and change a "non-fundamental" breach into a "fundamental" breach simply by providing the other party with further information [*Lorenz*]. As already discussed, CLAIMANT cannot make substantial his alleged "special interest" which was neither mentioned during the formation, nor reflected in the provisions of Contract 1045.

83. Furthermore, this view is in harmony with Article 74, CISG, which primarily deals with monetary damages for breach of contract and limits the recovery of damages to cases where the breach is foreseeable "at the time of the conclusion of the contract." It would be anomalous if a buyer were allowed to avoid the contract because of the seller's breach while the grounds justifying avoidance are too remote for the recovery of damage [*Koch*, p. 231].

b. The occurrence of detriment was not foreseeable.

84. The personal qualities of the party in breach are not essential for the foreseeability test, since the test must be conducted on objective grounds [*Graffi*, p. 340]. Where the parties, for instance, expressly or implicitly agreed that strict compliance with the contract terms is essential and any

deviation from those terms is to be regarded as fundamental, substantial detriment is foreseeable to a reasonable person of the same kind and in the same circumstances [*Koch*, p. 230].

85. It cannot be overstressed that the parties in this case did not expressly nor implicitly agree that strict compliance with the contract terms is essential and any deviation will be considered as a fundamental breach. When the particular importance of the violated duty has neither been established in the contract itself nor discussed during the contract negotiations, the defense of lack of foreseeability becomes available [*Koch*, p. 230].

86. An allegation of prior transactions with the CLAIMANT is not sufficient to charge RESPONDENT with the knowledge of former's manufacturing processes or it's inventory requirements. A reading of Contract 1045, which is said to reflect the "usual terms" [Procedural Order No. 2; Claimant's Exhibit No. 1] of their previous contracts does not show any other information other than the amount of cocoa, the agreed selling price and the delivery period. To reiterate, the importance of an obligation and the defense of lack of foreseeability must be determined only in light of the circumstances known at the conclusion of the contract.

3. RESPONDENT should have been given the opportunity to complete the delivery of cocoa.

87. Many authors favor the consideration of an offer to cure in determining whether or not a fundamental breach has occurred. A breach is not fundamental as long as the requirements of article 48(1) are met, namely, that repair is possible within a reasonable time and without causing the aggrieved party unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer [*Koch*, p. 225].

a. Fundamental Principles of Good Faith in the observation of Contracts imposed a duty upon CLAIMANT to notify RESPONDENT of its decision to source the cocoa elsewhere.

88. Good faith in the observation of contracts precludes a party from automatically invoking his right of avoidance or substitute delivery after a minor deviation in performance by the other [*Koch*, p. 337]. It behooved the CLAIMANT to at least give notice to RESPONDENT that it had decided to purchase the cocoa elsewhere. CLAIMANT only gave notice to RESPONDENT of its purchase from Oceania Produce Ltd. thru a letter dated 25 October 2002, a day after its

purchase [Claimant's Exhibit No. 8; Request for Arbitration, para. 10].

89. Further, it was only on 15 November 2002, approximately 17 days after CLAIMANT purchased the cocoa from Oceania Produce Ltd, that it categorically stated that it considered Contract 1045 to have been terminated [Claimant's Exhibit No. 11]. This it did only after receipt of, and in response to a letter from RESPONDENT informing CLAIMANT that it was in a position to complete the delivery of the remaining 300 metric tons of cocoa.

90. Clearly, the acts of CLAIMANT show absence of good faith in its dealings with RESPONDENT.

b. RESPONDENT's "right to cure" should have been recognized by the CLAIMANT.

91. CLAIMANT should have given RESPONDENT a chance to cure the latter's default. Whether cure is appropriate under the circumstances depends on whether it is reasonable, given the nature of the contract, to permit the non-performing party to make another attempt at performance. This right to cure is not precluded merely because the failure to perform amounts to a fundamental non-performance [UNIDROIT, Art. 7.1.4 (2); *PICC*]. Even if the aggrieved party has rightfully terminated the contract pursuant to the UNIDROIT principles, an effective notice of cure suspends the effects of termination [*PICC*] .

92. The UNIDROIT further provides that the non-performing party may not cure if the aggrieved party can demonstrate a legitimate interest in refusing cure [UNIDROIT, Art. 7.1.4 (1)(c); *PICC*]. The facts clearly show that CLAIMANT has no legitimate interest to refuse the cure as it would be in its best interest if the cocoa it originally contracted for was delivered to it without incurring additional costs. Under the UNIDROIT Principles, therefore, curability is a relevant factor in determining whether or not non-performance is fundamental [*Koch*, page 233].

93. Fundamental breach is determined not in the light of an offer to cure by the seller, but by looking at whether cure is possible at all. There is no fundamental breach when the breach is curable [*Koch*, p.228].

4. Conclusion

94. In light of the foregoing discussions, RESPONDENT submits that it was not in Fundamental Breach of its contract with CLAIMANT.

VIII. CLAIMANT WAS NOT JUSTIFIED IN AVOIDING THE CONTRACT.

A. CLAIMANT HAS NO VALID GROUNDS FOR THE AVOIDANCE OF CONTRACT 1045.

95. Avoidance of a contract is of paramount importance, for according to Art. 81 CISG it releases both parties from their obligations under the contract. Above all things, it releases the seller from the obligation to deliver goods and the buyer from the obligation to take delivery of the goods and pay the price for the goods [*Russian Federation 196/1997*]. If the injured party does not declare the contract avoided, it remains valid [*Boguslavskij,* 76]. A buyer may only avoid a contract based on two grounds: failure to perform by the seller amounting to a fundamental breach of contract, and in case of non-delivery, if the seller does not deliver the goods within an additional period of time fixed by a *Nachfrist* notice under Art. 47 of the CISG [Art. 49(1), CISG]. Unfortunately for CLAIMANT, both grounds do not exist in this case. As has been proven above, there was no failure to perform on the part of RESPONDENT which amounts to a fundamental breach, and, as will subsequently be discussed, CLAIMANT failed to fix an additional period of time pursuant to Art. 47 of the CISG within which RESPONDENT could have delivered the remaining 300 tons of cocoa.

B. THE MANNER BY WHICH CLAIMANT CLAIMS TO HAVE AVOIDED THE CONTRACT IS INEFFECTIVE.

1. CLAIMANT's conduct did not constitute a valid avoidance of contract.

96. CLAIMANT asserts that its conduct and letter constituted a rightful avoidance of the contract [CLAIMANT's Memorandum, para. 60]. This defense is unavailing, since the wording of an advance notice must be unequivocal [*Honnold*, 215]. A contract is avoided only "when a contracting party is notified by the other party in a direct and unambiguous way" [*Boguslavskij,* 136]. CLAIMANT's letter only contained the following words: "Although we are not under immediate pressure to receive the contracted cocoa, we will be later this year. Naturally, we would have to look elsewhere for the cocoa if Equatoriana Commodity Exporters, S.A. has not lived up to its agreement. If that were to happen, we would look to you for reimbursement of any

additional costs that we might incur" [CLAIMANT's Exhibit No. 4]. Even in its subsequent correspondence with RESPONDENT, CLAIMANT still failed to give notice of avoidance. CLAIMANT's letter dated 15 August 2002 merely stated that "if [CLAIMANT] do[es] not receive notification from [RESPONDENT] soon when [RESPONDENT] will be shipping the remaining 300 tons, [CLAIMANT] will have to purchase elsewhere" [CLAIMANT's Exhibit No. 7]. At most, these letters would only amount to a "threat of avoidance" [*Enderlein*, 243] and not an actual, valid declaration of avoidance.

2. There was no valid notice of avoidance.

97. A declaration of avoidance of the contract is effective only if made by notice to the other party [Art. 26, CISG]. A party which decides to avoid the contract must notify the other party of that decision. Without such notification, the contract cannot be declared avoided [*Russian Federation 196/1997*]. As can be clearly shown by CLAIMANT's own exhibits, no declaration of avoidance was made by CLAIMANT prior to 15 November 2002. This observation was merely relayed by RESPONDENT to CLAIMANT in its letter dated 13 November 2002 [Claimant's Exhibit No. 10]. In fact, CLAIMANT even highlighted this failure to give notice of avoidance in its letter dated 15 November 2002 which it used to try to cover up its inaction, which is now fatal to its claim [Claimant's Exhibit No. 11]. Such letter was worded thus: "Furthermore, in his letter Mr. Smart suggests that the cocoa contract had not been terminated. The contract was terminated automatically by the failure of Equatoriana Commodity Exporters, S.A. to deliver the cocoa for such a long period later than it was contractually obligated to do so.
98. However, in an abundance of caution I wish now to state clearly that the Mediterraneo Confectionary Associates, Inc. considers the referenced contract to be terminated." It is obvious, that such statements amount to a desperate attempt by CLAIMANT to establish a valid avoidance of Contract 1045, which, unfortunately fatal to its claim, it miserably failed to do.

99. Notice is not required only in the case where "the other Party has declared that he will not perform his obligations" [Art. 72, CISG; *ICC Award No. 8574*]. Automatic or *ipso facto* avoidance was deleted from the remedial system in [the CISG] because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided [*ICC Award No. 8574*]. Under Article 60 of [the CISG] the contract is still in force unless the Buyer has

affirmatively declared it avoided. [*ICC Award No. 8574*; *2 Honnold*, 58-59]. None of RESPONDENT's communications with CLAIMANT were made to the effect that RESPONDENT will not perform its obligations. In fact, RESPONDENT's letter dated 13 November 2002 even contained the following words: "Since our Contract 1045 had never been terminated by you, we would have been able to ship to you the necessary 300 tons within the next several weeks" [CLAIMANT's Exhibit No. 10]. This unequivocally shows that RESPONDENT had no intention whatsoever to renege on its obligations. On this basis, RESPONDENT did not make any declaration that it will not perform its obligations, as it had no reason to do so.

3. There was no *Nachfrist* notice.

a. CLAIMANT failed to fix an additional period of time pursuant to Art. 47 of the CISG.

100. In order that CLAIMANT may declare a contract avoided in case of non-delivery, he should set an additional period of time of reasonable length for performance of the seller of his obligations [Art. 47(1), CISG]. If the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Art. 47 of the CISG, the buyer may declare the contract avoided [Art. 49(1)(b), CISG]. However, such right to avoid shall not come into existence unless the buyer fulfills such prior notice requirement. This requirement set by Art. 47 has clearly not been fulfilled by CLAIMANT.

101. No additional period of time was fixed by Mediterraneo Confectionary Associates, Inc., as called for by Article 47. The last communication from them prior to their purchase of replacement cocoa on 24 October 2002 and the purported avoidance of the contract on 11 November 2002 was the letter from Mr. Sweet of 15 August 2002. In that letter all that he said was that if they (CLAIMANT) do not receive notification from RESPONDENT soon when RESPONDENT will be shipping the remaining 300 tons, they (CLAIMANT) will have to purchase elsewhere" [CLAIMANT's Exhibit No. 7]. It is unfortunate that Mediterraneo Confectionary Associates, Inc. did not at least contact Equatoriana Commodity Exporters, S.A. immediately before they purchased the cocoa elsewhere. As stated in the letter of Mr. Smart of 13 November 2002, [CLAIMANT's Exhibit No. 10] there had been rumors for some time that the Equatoriana Government Cocoa Marketing Organization was planning to release additional

cocoa, which it did on 13 November. It would then have been possible for Equatoriana Commodity Exporters, S.A. to deliver the remaining 300 tons.

102. None of the letters of CLAIMANT satisfy the requirement of Art. 47, otherwise known as a *Nachfrist* notice. The aggrieved party must set an additional period, i.e. inform the non-performing party accordingly with an appropriate notice to make his intention clear, once he makes a decision to invoke the *Nachfrist* procedure so as to give the non-performing party a second chance [*Chengwei*, 4.3.1].

103. The three conventions which recognize the *Nachfrist* notice (Art. 47, CISG; Art. 7.1.5, UPICC; Art. 8:106, PECL) all require that two conditions must be met for the notice to be effective. First, the period must be *fixed*. Second, the period so fixed must be *reasonable* [*Chengwei*, 4.3.2].

104. An effective *Nachfrist* notice should make clear that the additional period sets a fixed limit on the date for performance [*Chengwei*, 4.3.2.1]. It must be clear from the communication that it is an additional period of time for performance, i.e. fulfillment after expiration of that period is rejected [*Chengwei*, 4.3.2.1]. A general demand by the entitled party that the other party perform or that he perform "promptly" or the like is not a "fixing" of a period of time [Comment 7 on Draft Art. 43 and 59, Secretariat Commentary]. If the notice is not for a fixed period of time it may give the defaulting party the impression that it is free to postpone performance indefinitely. It will not suffice to ask for performance 'as soon as possible' [*PECL Commentary*, Art. 8:106].

105. It is obvious that CLAIMANT failed to fix the period required by Art. 47. Its claim is clearly rejected by the authorities. In CLAIMANT's letter dated 15 August 2002, the wording of the notice was as follows: "It is obvious that, if we do not receive notification from you **soon** when you will be shipping the remaining 300 tons, we will have to purchase elsewhere" [CLAIMANT's Exhibit No. 7]. By such wording, CLAIMANT failed to refer to a period which may be fixed **according to the calendar**, which meets the specificity requirement of the notice [Official Records, 49].

106. As has been discussed above, the period which CLAIMANT purportedly gave RESPONDENT was not fixed. Thus, a discussion of whether the period was reasonable or not, need not be made.

IX. EVEN IF THE TRIBUNAL FINDS THAT CLAIMANT HAS A RIGHT TO CLAIM DAMAGES, THE AMOUNT CLAIMED BY CLAIMANT IS INCORRECT.

107. CLAIMANT wishes to ask the Tribunal to award in its favor, damages amounting to USD 289,353 [*Request for Arbitration*, para. 20]. However, such amount is clearly erroneous, since it exceeds the sum equal to the loss that it suffered. Moreover, in the event that damages are indeed awarded by the Tribunal, it should be limited to the difference between the contract price and the current market price at the time the contract was avoided. Finally, RESPONDENT holds that due to CLAIMANT's failure to mitigate the losses which it supposedly suffered, a right to a reduction in damages exists in favor of RESPONDENT.

A. THE AMOUNT CLAIMED BY CLAIMANT EXCEEDS THE SUM EQUAL TO THE LOSS THAT IT SUFFERED.

108. Damages that CLAIMANT may demand from RESPONDENT may not exceed the loss which RESPONDENT foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which RESPONDENT then knew or ought to have known, as a possible consequence of the breach of contract [Art. 74, CISG]. Since the loss which CLAIMANT now claims from RESPONDENT is the difference between the contract price (USD 372,225) and the price of the cover purchase (USD 661,578) which was made when the market price was at almost a historic high of 100.03 cents per pound [RESPONDENT's Exhibit No. 3; *Answer to Notice of Arbitration and Counterclaim*, p. 12], the loss which CLAIMANT suffered, through its own doing, is not the loss which RESPONDENT foresaw or ought to have foreseen at the time of the conclusion of the contract. It can reasonably be concluded, that at the time of the conclusion of the contract, RESPONDENT would only have been able to foresee a loss which amounts to the difference between the contract price and the current market price at the time of the avoidance of the contract (USD 544,251), or, at the very least, the difference between the contract price and the cover price, if the cover transaction performed by CLAIMANT was valid: that is, if the cover purchase was made in a reasonable manner and within reasonable time [Art. 75, CISG].

B. THE AMOUNT OF DAMAGES WHICH CLAIMANT MAY ASK THE TRIBUNAL TO ORDER RESPONDENT TO PAY IS LIMITED TO THE DIFFERENCE BETWEEN THE CURRENT MARKET PRICE AND THE CONTRACT PRICE, NOT THE DIFFERENCE BETWEEN THE COVER PRICE AND THE CONTRACT PRICE.

109. As a subsidiary and partial defense to be considered only if the Tribunal should find that Mediterraneo Confectionary Associates, Inc. has a claim for damages, Equatoriana Commodity Exporters, S.A. contests the calculation of damages presented by Mediterraneo Confectionary Associates, Inc. in its claim. The price of cocoa, like that of many other commodities, is often very volatile. Therefore, it matters from which date damages are measured [*Answer to Notice of Arbitration and Counter-claim*, para. 12].

110. Art. 75 of the CISG measures damages on the basis of a substitute transaction. An aggrieved buyer concludes a substitute transaction when it buys goods to replace those promised in the avoided contract [*Delchi Carrier, SpA v. Rotorex Corp.*]. Damages under Art. 75 are established by the action of the injured buyer in obtaining cover or buying the goods elsewhere [*Sutton,* 745]. The injured party is obligated to obtain cover or seek resale in a "reasonable manner and within a reasonable time after avoidance" [*Commentary,* Art. 71]. In the event that the substitute is not carried out in a reasonable manner, the injured party must resort to Article 76, or measurement of damages by current market price [*Commentary*, Art.71].

111. As stated by the CISG, if the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under Art. 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance [Art. 76, CISG].

112. As will be elaborated upon below, CLAIMANT may only be entitled to damages based on Art. 76, and not Art. 75, for failure to comply with the requirements for a valid substitute transaction.

1. The subsequent transaction was not made in a reasonable manner and within a reasonable time, and was therefore, not a valid cover purchase.

113. As noted in the claim, Mediterraneo Confectionary Associates, Inc. purchased 300 tons of cocoa on 24 October 2002 at a time when the market price was at almost a historic high of 100.03 cents per pound, [RESPONDENT's Exhibit No. 3] or USD 2205.26 per metric ton for a

total contract price of USD 661,578. Also, as noted in the claim, on 15 November 2002 Mr. Fasttrack, counsel for Equatoriana Commodity Exporters, S.A. purported to avoid the contract. This was clearly not within a reasonable time after the circumstance giving right to avoidance had occurred and therefore inconsequential [Article 49 (2) CISG; *ICC Award No. 8574*]. No substitute transactions undertaken prior to a reasonable time after that date can be taken into account for purposes of establishing a duty of indemnification based on substitute transactions [*ICC Award No. 8574*]. On that date the price for cocoa had gone down to 82.29 cents per pound, or USD 1814.17 per metric ton. If the 300 tons of cocoa had been purchased on the date Mediterraneo Confectionary Associates, Inc. purported to avoid the contract, it would have paid USD 544,251. The amount it paid would have been USD 172,026 more than the contract price in cocoa contract 1045 instead of USD 289,353 as claimed.

114. Under Art. 75 of the CISG, the seller is only obliged to bear the cost of a substitute transaction if that transaction takes place after the avoidance of contract. Only avoidance of contract makes it clear that the contract will not be performed [*OLG Bamberg*, 13 January 1999]. In fact, it was even held in a case that the reasonable time requirement means that a reasonable time must elapse after avoidance before the substitute transaction may be concluded [*ICC Award No. 8574*]. Thus, the actual avoidance of the contract and the conclusion of a substitute transaction cannot occur concurrently. From CLAIMANT's version of the facts, it would seem that its avoidance of Contract 1045 and its entering into a substitute transaction occurred at the same time. Evidently, these acts of CLAIMANT run counter to the principles set forth by the CISG and jurisprudence on the matter.

115. It should be noted that buyer's avoidance of contract was only declared on 15 November 2002 [CLAIMANT's Exhibit No. 11]. Therefore, a valid substitute transaction may have occurred only after such date. When the contract is avoided, the parties lose the right to perform and regain their freedom of disposition. Up until then, it is their duty to remain loyal to the contract. A breach of contract by one party does not entitle the other to free herself of the contract by entering a substitute transaction, as long she has not declared the contract avoided by notice to the breaching party [Art. 26 CISG; *OLG Bamberg*, 13 January 1999].

2. The amount of damages must be the difference between the contract price and the current market price at the time of the avoidance.

116. As admitted by CLAIMANT, the normal measure of damages is taken to be the difference between the contract price and market price [Claimant's Memorandum, par. 68]. Instead of gauging damages by the price differential of a substitute transaction, Art. 76 authorizes damages on the basis of the market price at the time of avoidance [*Sutton,* 746]. Art. 76 CISG provides for an abstract calculation of loss if the contract was avoided and there is a current price for the goods. The calculation is based on the difference between the price fixed by the contract and the current price at the time of the avoidance [*OLG Celle,* 2 September 1998]. The measurement of damages rule authorized under Art. 76 may be used when resale or repurchase is not reasonable under Art. 75.

117. The principle enunciated by the CISG as regards recovery of damages based on market price is supported by numerous other instruments. Art. 76's counterpart in the UCC, as regards recovery by the buyer, is §2-713 which states that subject to §2-723 with respect to proof of market price, the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in §2-715, but less expenses saved in consequence of the seller's breach [*§2-713*, UCC].

C. RESPONDENT HAS A RIGHT TO A REDUCTION IN DAMAGES.

118. RESPONDENT is entitled to a mitigation of damages whether the Tribunal decides to award such damages based on Art. 75 or Art. 76. A party who relies on a breach of contract must take measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in damages in the amount by which the loss should have been mitigated [Art. 77, CISG].

119. If there is a significant difference between the contract price and the price in the substitute transaction the damages recoverable under Article 75 may be reduced pursuant to Article 77 because of the aggrieved party's failure to mitigate damages [*ICC Award No. 8128*]. Certainly,

the amount of USD 172,206, which is the difference between the damages asked for by CLAIMANT and the damages based on the market price, is too large to be overlooked. This is considering that the transaction between CLAIMANT and RESPONDENT was in the amount of USD 496,299.55. Thus, RESPONDENT may only seek a reduction due to CLAIMANT's failure to enter into a substitute transaction which could have resulted in a smaller difference between the cover price and the contract price, if there be any.

120. Another basis for mitigation is CLAIMANT's act of entering into a substitute transaction with Oceania Produce Ltd. instead of asking RESPONDENT to deliver. It should be remembered that before entering into the substitute transaction, CLAIMANT did not make any unequivocal statement to demand delivery from RESPONDENT. In a case, the Court stated that the buyer's act of ordering the production of the goods elsewhere instead of requesting delivery from the seller constitutes a violation of the buyer's obligation to mitigate damages under Art. 77 of the CISG [*LG Darmstadt*, 9 May 2000].

121. In conclusion, RESPONDENT's right to mitigation of the damages was firmly established by CLAIMANT's own conduct. Hence, a reduction of any award granted by the Tribunal to CLAIMANT in this case must be enforced.