THIRTIETH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31 MARCH – 6 APRIL 2023

MEMORANDUM FOR RESPONDENT

Drone Eye plc	v.	**Equatoriana Geoscience Ltd**
1899 Peace Avenue		1907 Calvo Road
Capital City, Mediterraneo		Oceanside, Equatoriana
CLAIMANT		**RESPONDENT**

COUNSEL FOR RESPONDENT

VICTORIA BOYTE | AUSTIN TOMLIN | CASSIDY WILLARD | ZAK WORLEY

RALEIGH ▪ NORTH CAROLINA

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INDEX OF ABBREVIATIONS

Cited as in the memorandum	**Full Description**
AA	Arbitration Agreement
AAA	American Arbitration Association
ASA	Aviation Safety Act of Equatoriana [*Ex. R5, p. 35*]
ASA Bull	ASA Bulletin
Art.	article/articles
ch.	chapter
Claimant	Drone Eye plc
Claimant Memo	Memorandum on behalf of Claimant of the University of Geneva, dated December 8, 2022
Co.	company
cmt.	comment
Corp.	corporation
CRCICA	Cairo Regional Centre for International Commercial Arbitration
Ed.	publishing house
ed.	editor/editors
et al.	*et alia* (and others)
et seq.	*et sequitur* (and the following)
EUR	euro
Ex.	exhibit
fn.	footnote/footnotes
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICCA	International Commercial Contract Act of Equatoriana
ICDR	International Centre for Dispute Resolution (AAA)
ICSID	International Centre for Settlement of Investment Disputes
id.	*idem* (the same)
i.e.	*id est* (that is)
Inc.	incorporated

infra	below
LCIA	London Court of International Arbitration
LLC	limited liability company
Ltd.	private limited company
NAI	Netherlands Arbitration Institute
no.	number/numbers
NoA	Notice of Arbitration, dated 14 July 2022
p.	page/pages
par.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
plc	public limited company
PO1	Procedural Order of the Tribunal, dated 7 October 2022
PO2	Procedural Order of the Tribunal, dated 7 November 2022
PSA	Purchase and Supply Agreement between Claimant and Respondent, dated 1 December 2020
Record	The Willem C. Vis Problem 2022-2023
Respondent	Equatoriana Geoscience Ltd
RNoA	Response to Notice of Arbitration, dated 15 August 2022
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SOE	State-Owned Enterprise
supra	above
Tribunal	The arbitral tribunal in the present dispute
UNCITRAL	United Nations Commission on International Trade Law
UAS	Unmanned Aerial System
v.	versus (against)
vol.	volume/volumes
WTO	World Trade Organization

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Cited as in the memorandum	Full Description
AAA Rules	American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, effective 1 September 2022
Chicago Convention	Convention on International Civil Aviation, effective 7 December 1944
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules, effective 1 January 2015
CISG	United Nations Convention on Contracts for the International Sale of Goods, effective 1 January 1988
ICC Rules	Arbitration Rules of the International Chamber of Commerce, effective 1 January 2021
ICSID Rules	International Center for Settlement of Investment Disputes (ICSID) Arbitration Rules, effective 2022
NY Convention	Convention on the Recognition and Enforcement of Foreign Awards, New York, adopted on 10 June 1958, effective 1959
SIAC Rules	Singapore International Arbitration Centre Arbitration Rules, effective in 2005
The Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, Amended 2005
UCC	Uniform Commercial Code (United States)
ULIS	Uniform Law on the International Sale of Goods, effective in 1964
UNCITRAL AR	UNCITRAL Arbitration Rules, effective 15 August 2010
UNCITRAL Expedited AR	UNCITRAL Expedited Arbitration Rules, effective 19 September 2021
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration, adopted on 11 December 1985, as amended in 2006
UNCITRAL RT	UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration, adopted 16 December 2013
UNCITRAL Public Procurement ML	UNCITRAL Model Law on Public Procurement, adopted on 28 June 2012

UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 4th edition, adopted on 20 May 2016
USC	United States Code

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Frankfurt v. Philippines	*Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICISD case no. ARB/03/25, 23 December 2010 Available at https://www.italaw.com/cases/456 *Cited in par. 59*
Glamis Gold v. USA	*Glamis Gold, Ltd. v. The United States of America*, ICSID, 8 June 2009 Available at https://www.italaw.com/cases/487 *Cited in par. 85, 86*
Vecchi v. Egypt	*Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID case no. ARB/05/15, 1 June 2009 Available at https://www.italaw.com/cases/1022 *Cited in par. 65*
Phoenix v. Czech Republic	*Phoenix Action, Ltd. v. The Czech Republic*, ICSID case no. ARB/06/5, 15 April 2009 Available at https://www.italaw.com/cases/850 *Cited in par. 59*
Tokios Tokelés v. Ukraine	*Tokios Tokelés v. Ukraine*, ICSID case no. ARB/02/18, 26 July 2007 Available at https://www.italaw.com/cases/1099 *Cited in par. 69*

Cited as in the memorandum	**Full Description**
World Duty Free v. Kenya	*World Duty Free Company v Republic of Kenya,* ICSID case no. ARB/00/7, 4 October 2006 Available at https://www.italaw.com/cases/3280 *Cited in par. 59*
Inceysa v. Salvador	*Inceysa Vallisoletana S.L. v. Republic of El Salvador,* ICSID case no. ARB/03/36, 2 August 2006 Available at https://www.italaw.com/cases/documents/564 *Cited in par. 59*
IUSCT	
E-Systems v. Iran	*E-Systems Inc v. The Government of the Islamic Republic of Iran*, IUSCT case no. 388, 4 February 1983 Available at https://jusmundi.com *Cited in par. 65*
LCIA	
ASA Bull 664	Procedural Order of 2014 (LCIA Rules) Available in ASA Bull no. 3/2018, p. 664 *Cited in par. 65*
PCA	
Patel v. Mozambique	Patel Engineering Limited v. Republic of Mozambique, PCA case no. 2020-21, 30 November 2022 Available at https://www.italaw.com/cases/8517 *Cited in par. 76*
Cairn Energy v. India	*Cairn Energy PLC and Cairn UK Holdings Limited v. Government of India*, PCA case no. 2016-7, 21 December 2021 Available at https://www.italaw.com/cases/1022 *Cited in par. 65, 67, 70, 76, 80, 85, 86*
Philip Morris v. Australia	*Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA case no. 2012-12, 8 July 2017 Available at https://www.italaw.com/cases/851 *Cited in par. 65, 85*

Cited as in the memorandum	**Full Description**
Dunkeld v. Belize	*Dunkeld International Investment Ltd. v. The Government of Belize, PCA case no. 2010-13, 17 August 2016* Available at https://www.italaw.com/cases/361 *Cited in par. 86*
Guaracachi v. Bolivia	*Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA case no. 2011-17, 29 May 2014 Available at https://www.italaw.com/cases/518 *Cited in par. 85*
Mesa Power v. Canada	*Mesa Power Group, LLC v. Government of Canada*, PCA case no. 2012-17, 15 June 2007 Available at https://www.italaw.com/cases/1619 *Cited in par. 85*
Russian Chamber of Commerce & Industry	
Trade case	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of the Russian Federation, Russian Federation, case no. 217/2001, 11 June 2022 Available at https://www.uncitral.org/ *Cited in par. 155*
Russian submarine case	Tribunal of International Commercial Arbitration at the Maritime Commission at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, case no. 1/1998, 18 December 1998 Available at https://www.uncitral.org/ *Cited in par. 107, 109*
Russian plane case	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of the Russian Federation, Russian Federation, case no. 255/1996, 2 September 1997 Available at https://iicl.law.pace.edu/ *Cited in par. 106*
SCAI	

Cited as in the memorandum	**Full Description**
ASA Bull 637	Procedural Order no. 15 of 10 July 2015 (Swiss Rules) Available in ASA Bull no. 3/2018, p. 637 *Cited in par. 65*
SCC	
Carpatsky v. Ukrnafta	*Carpatsky Petroleum Corporation v. PJSC Ukrnafta*, SCC case no. V (124/2007), 24 September 2020 Available at https://www.casemine.com *Cited in par. 65*

STATEMENT OF FACTS

1) Drone Eye plc ("**Claimant**") is a medium-sized producer of Unmanned Aerial Systems ("**UAS**"), established in 2000 and based in Mediterraneo [*NoA, p. 4, par. 1; PO2, p. 44, par. 1*].

2) Equatoriana Geoscience Ltd ("**Respondent**") is a state-owned company, based in Equatoriana, set up in 2016 by its sole shareholder, the Government of Equatoriana, in connection with its Northern Part Development Program ("**NPDP**"), officially announced in 2017 [*PO2, p. p. 44, par. 3-4*].

3) Respondent's statutory objective is to organize the exploration and possible development of the expected natural resources in that region, and improve the infrastructure [*NoA, p. 4, par. 3; Ex. C5, p. 16; RNoA, p. 27, par. 3-4*]. Respondent lacked the technological capacity to generate the required data [*RNoA, p. 27-28, par. 4*]. Consequently, in January 2020, the supervisory board of Respondent approved the acquisition of "2 to 6 UAS" and approved the maximum budget for the acquisition [*PO2, p. 44, par. 7*]. On 20 March 2020, Respondent opened a tender process and invited bids for 4 "state-of-the-art" UAS. The Call for Tender prominently featured exclusions based on corruption, and related warranties [*Ex. C1, p. 9*]. Two bidders reached the second stage of the process: Aerial Systems plc and Claimant [*NoA, p. 5, par. 5; RNoA, p. 28, par. 8*].

4) Most of the negotiations were conducted between Claimant's COO, Mr. Bluntschli, and Respondent's COO, Mr. Field [*Ex. C3, p. 13, par. 2-3; RNoA, p. 28, par. 8*]. However, Ms. Bourgeois, Mr. Field's assistant, was present at almost every meeting [*RNoA, p. 28, par. 8*], except, relevantly, the meeting that resulted in a complete overhaul of the contract terms [*RNoA, p. 28, par. 9*]. According to Ms. Bourgeois, prior to the meeting she was absent from, Aerial Systems plc was the frontrunner [*RNoA, p. 28, par. 8; Ex. R1, p. 32, par. 3*]. However, after Mr. Field and Mr. Bluntschli spent the weekend at Mr. Bluntchili's beach house, it was decided that Respondent would purchase 6 (instead of 4) Kestrel Eye UAS from Claimant and pay a much higher price for the maintenance portion of the contract [*NoA, p. 5, par. 5-7; Ex. R1, p. 32, par. 5-6*].

5) On 1 December 2020, a Purchase and Supply Agreement ("**PSA**") was executed, at a formal ceremony in Equatoriana. The PSA provided for the sale of 6 Kestrel Eye UAS described as Claimant's "newest model" and "state-of-the-art", for an aggregate price of EUR 44 million, plus maintenance services for 4 years, totaling approximately EUR 17.44 million. Equipment for the last 2 UAS would be agreed and priced later [*Ex. C2, p. 11, Art. 3-4; PO2, p. 47, par. 27*]. The first 3 fully equipped UAS were to be delivered on 15 January 2022, the fourth fully equipped UAS on 31 December 2022, and the last 2 UAS by the end of 2023 [*Ex. C2, p. 10-11, Art. 2*].

6) The PSA was signed by Mr. Cremer (Claimant's CEO), Ms. Queen (Respondent's CEO), and Mr. Barbosa (Equatoriana's then Minister of Natural Resources and Development) [*NoA, p. 5, par. 5, par. 6; RNoA, p. 28, par. 12; Ex. C2, p. 10-12*]. Mr. Bluntschli (Claimant's COO) did not sign the PSA because, two days prior to the execution of the PSA, he was arrested for tax evasion in connection with unreported income held in offshore accounts [*Ex. C3, p. 13, par. 2*].

7) The PSA provides that the law of Equatoriana governs it [*Ex. C2, p. 12, Art. 20(d)*] and termination rights for Respondent [*Ex. C2, p. 12, Art. 18; PO2, p. 48, par. 38*]. Additionally, the PSA contains an arbitration agreement ("**AA**") which provides that any disputes would be settled by arbitration administered by the Permanent Court of Arbitration ("**PCA**") under the PCA Arbitration Rules 2012 ("**PCA Rules**") or under the UNCITRAL Expedited Arbitration Rules ("**UNCITRAL Expedited AR**") [*Ex. C2, p. 12, Art. 20(a)-(c); Ex. C9, p. 22, par. 1*]. The PSA also includes a merger clause [*Ex. C2, p. 12, Art. 21*].

8) Merely two months after the execution of the PSA, in February 2021, Claimant publicly released a true "state-of-the-art" model of UAS, the Hawk Eye 2020 UAS [*PO2, p. 45, par. 15*]. Because as of the time of the execution of the PSA, the Kestrel Eye 2010 UAS was not Claimant's newest or most "state-of-the-art" model, Respondent immediately informed Claimant that Respondent was entitled to avoid the PSA due to fraudulent misrepresentation of the Kestrel Eye 2010 UAS and fraudulent nondisclosure of the Hawk Eye 2020 UAS [*Ex. C7, p. 19, par. 13*].

9) Prior to Claimant delivering any UAS to Respondent, The Citizen, a leading investigative journal in Equatoriana, published a series of articles examining corruption within the NPDP [*Ex. C5, p. 16; Ex. R2, p. 33*]. These articles caused a public outcry that led to early elections on 3 December 2021 and a new government installation in Equatoriana [*NoA, p. 5, par. 11; RNoA, p. 29, par. 14*].

10) The new government issued a moratorium for all contracts issued under the NPDP, pending the investigation of corruption within the NPDP, and Claimant received an email to that effect on 27 December 2021 [*NoA, p. 5, par. 12; RNoA, p. 29, par. 15*; *Ex. C6, p. 17*]. After several discussions, on 30 May 2022, Respondent terminated the PSA due to corruption, fraudulent misrepresentation, and fraudulent nondisclosure [*Ex. C8, p. 20-21; RNoA, p. 27, par. 1-2*]. Subsequently, a criminal investigation commenced in Equatoriana of several of Respondent's representatives: Mr. Field, Ms. Queen, and Mr. Barbosa. Mr. Field has already been charged, and he is currently under investigation for his involvement with other contracts, including the PSA at question here [*PO2, p. 49, par. 44; Ex. R2, p. 33, par. 3; RNoA, p. 30-31, par. 23*].

11) On 14 July 2022, Claimant initiated the present arbitral proceedings before the PCA, seeking a declaration that, under the CISG, the PSA was validly concluded, and that Respondent breached it, such that Claimant is entitled to damages [*NoA, p. 6-8, par. 16-26*].

12) On 15 August 2022, Respondent challenged the jurisdiction of this Tribunal due to lack of Parliamentary approval for the AA (relying on Art. 75 of the Constitution of Equatoriana) as well as corruption voiding the PSA in its entirety. Alternatively, Respondent requested stay or bifurcation of these arbitral proceedings pending the outcome of the criminal proceedings and investigation in Equatoriana against Mr. Field [*RNoA, p. 30-31, par. 20-25*]. On the merits, Respondent contested the applicability of the CISG to the PSA in general, relying on the Equatorianian Aviation Safety Act ("**ASA**") and the ICCA [*RNoA, p. 30-31, par. 26-29*].

13) Equatoriana, Mediterraneo, and Danubia are Contracting States of the CISG, and their general national contract law, including the ICCA of Equatoriana, is identical to the UNIDROIT Principles [*PO1, p. 43, par. III.3, first bullet; PO2, p. 49, par. 49*]. All three countries are Contracting Parties to the 1899 and 1907 Hague Conventions founding the PCA, the UN Convention against Corruption ("**UNCC**"), and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**") [*PO1, p. 43, par. III.3, third to fifth bullet*].

14) In all three countries, the national arbitration laws applicable to international commercial arbitrations seated therein are a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (the "**UNCITRAL ML**") [*PO1, p. 43, par. III.3, fifth bullet*]. The conclusion and validity of AAs are also governed by the provisions of the general national contract law in all three countries, without any additional specific requirements [*PO2, p. 49, par. 49*].

SUMMARY OF ARGUMENTS

15) **Issue I:** This Tribunal lacks jurisdiction to hear the dispute because the parties did not enter into a valid AA, given that the Parliament of Equatoriana never formally approved the AA, as required for public work contracts such as the PSA. Additionally, the entire PSA, including the AA, is void because it was procured through corruption.

16) **Issue II:** This Tribunal should grant Respondent's request to stay or, alternatively, bifurcate the present arbitral proceedings until the conclusion of the investigation into Mr. Field. A delay would ensue, but such delay would be reasonable and necessary for Respondent to have a fair opportunity to present its case and for this Tribunal to have all facts necessary to make a decision. Absent stay or bifurcation, any award rendered by this Tribunal risks being unenforceable.

17) **Issue III:** The CISG does not apply to the PSA because the Kestrel Eye UAS is an aircraft, and, as such the application of the CISG is excluded by Art. 2(e) CISG. The Kestrel Eye UAS is an aircraft pursuant to the definition of the term "aircraft" derived from the history of the CISG, as well as pursuant to the ASA of Equatoriana, because it is potentially subject to registration and used to transport goods. Consequently, the PSA is governed by the ICCA of Equatoriana.

18) **Issue IV:** Even if the CISG governs the PSA, Art. 3.2.5 ICCA is applicable because Respondent's legal defenses concern the validity of the PSA, not merely the non-conformity of the Kestrel Eye UAS. Respondent was led to conclude the PSA through Claimant's fraudulent misrepresentation and failure to disclose the existence of the Hawk Eye 2020 UAS. Respondent is therefore entitled, under Art. 3.2.5 ICCA and Art. 18 PSA, to avoid the PSA.

ISSUE I: THIS TRIBUNAL DOES NOT HAVE JURISDICTION

19) Claimant incorrectly asserted that this Tribunal has jurisdiction [*Claimant's Memo, p. 4, par. 3 et seq.*]. However, this Tribunal does not have jurisdiction because there is no valid AA.

20) Arbitral tribunals derive jurisdiction from valid AAs [*Born, p. 1517; Redfern/Hunter, par. 2.59; Poudret/Besson, p. 229, par. 265; Voser, p. 351; Paulsson/Rawding/Reed, p. 26*]. Presently, Art. 20 PSA provides that: "Any dispute, controversy or claim arising out of or in relation to this agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration. If the dispute, controversy, or claim concerns an amount less than EUR 1,000,000, then it shall be submitted to arbitration under the UNCITRAL [Expedited AR]. By contrast, if the dispute, controversy, or claim concerns an amount equal to or larger than EUR 1,000,000, or where the amount concerned is unquantifiable, it shall be settled in accordance with the PCA [Rules]. (a) The number of arbitrators shall be one (UNCITRAL [Expedited AR]) or three (PCA [Rules]), as the case may be; (b) The place of arbitration shall be Vindobona, Danubia; […]; and (d) The agreement is governed by the law of Equatoriana. The UNCITRAL [RT] shall apply to any arbitration between the Parties" [*NoA, p. 6, par. 16; Ex. C9, p. 22*].

21) Because Art. 20(d) PSA provides that Danubia is the seat of arbitration, the AA is governed by Danubia's arbitration law as the *lex arbitri*, a verbatim adoption of the UNCITRAL ML [*PO1, p. 43, par. III.3, fifth bullet*]. Pursuant to Art. 20(d) of the PSA, the entire PSA, including the AA, is governed by the substantive laws of Equatoriana, including the Constitution of Equatoriana, the Anti-Corruption Act of Equatoriana, and the ICCA. Under these laws, the AA included in the PSA is not valid due to lack of Parliamentary approval **(A)** and/or corruption **(B)**.

A. The AA is invalid due to lack of Parliamentary approval

22) Respondent could not have validly submitted to arbitration without approval by Parliament per Equatoriana's Constitution **(1)** and such national legislative restrictions are not contrary to the NY Convention **(2)**. Additionally, in the present case, there was no formal approval given by the Parliament and Respondent's actions do not cure the lack of such approval **(3)**.

1. Because the PSA is an administrative contract, Parliamentary approval was required

23) Art. 75 of the Equatorianian Constitution states that "in contracts relating to public works or other contracts concluded for administrative purposes the State of Equatoriana or its entities may submit to arbitration only with consent of the respective minister", but "[i]f the other party is a foreign entity or the arbitration is seated in a different state *Parliament has to consent* to this submission" [*RNoA, p. 30, par. 21 (emphasis added)*]. Thus, Parliamentary approval is required because the PSA is a contract "relating to public works or […] concluded for administrative purposes" [*RNoA, p. 30, par. 21*]. Claimant is a foreign entity, and the arbitration is seated in a foreign state (Danubia).

24) An administrative contract is generally characterized by the following elements: (i) one party is a legal person of public law (a public authority), (ii) the contract is related to a public utility, and (iii) the contract contains clauses that are uncommon in private law [*Al-Kharafi v. Libya, par. 18-B-2; see also Malicorp v. Egypt*]. Administrative contracts typically "involve the expression of public policy, as their contractual consequences are important for public finances" [*Lin, p. 428*].

25) First, Respondent is a legal person of public law, which is typically defined as having the following characteristics: "(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part, by the State […]; or are subject to management supervision by [its] authorities or bodies; or have [a] supervisory board, more than half of whose members are appointed by the State" [*Directive 2014/24/EU, Art. 2(1)(4)*]. Here, Respondent was one of 3 SOEs established by the State of Equatoriana to administer the NPDP [*RNoA, p. 27, par. 3; Ex. C5, p. 16, par. 3; PO2, p. 44, par. 4*], a program created for the exploitation of natural resources and infrastructure improvement [*NoA, p. 4-5, par. 3*] in the Northern Part of Equatoriana.

26) Since the Northern Part of Equatoriana is the poorest area, its improvement is a matter of public interest [*Ex. C5, p. 16, par. 2-3*]. Respondent is a limited liability company ("Ltd"), with a separate

legal personality. Respondent is heavily funded from public money. It received an initial funding of EUR 25 million and receives an annual grant of EUR 10 million from the government [*PO2, p. 44, par. 7*]. Further, Respondent has a supervisory board of 8 members, all appointed by Equatoriana's government, chaired by the Minister of Natural Resources and Development [*PO2, p. 44, par. 5*]. The board of directors is then selected by the supervisory board [*PO2, p. 44, par. 5*].

27) Second, as part of its overall public mission, Respondent had "to ensure that the geological, geophysical and other scientific data necessary for the development of the area covered by the [NPDP] is generated and available" [*RNoA, p. 27, par. 3*]. Respondent lacked the necessary tools and technology to gather that data and needed to gain access to the equipment from an outside source [*RNoA, p. 27, par. 4*]. The data would then enable Respondent to locate the areas richest in natural resources and plan infrastructure improvements. In this sense, the PSA is a preparatory contract for public works (which typically include natural resource exploitation and infrastructure projects) and is therefore "*relat[ed]* to public works" [*RNoA, p. 30, par. 21 (emphasis added)*]. Although there is no case law specifically on this point in Equatoriana [*PO2, p. 47, par. 29*], the concept of "public works" generally includes the acquisition of goods and services that will be needed in connection with the public work [*Directive 2014/24/EU, art. 2(1)(5)-(6); Lin, p. 79; Langrod, p. 326; Art. 2(j) UNCITRAL Public Procurement ML*].

28) Third, the PSA contains unusual clauses for private law commercial contracts, such as the approval of the Ministry of Natural Resources and Development [*Ex. C2, p. 10, recital 7*], the approval of the Parliament [*Ex. R4, p. 35, par. 1, 5*], the covenants of Claimant regarding compliance with anti-corruption legislation [*Ex. C2, p. 10-11, art. 2(h)*], the termination rights of Respondent, including for corruption [*Ex. C2, p. 12, art. 18*], and the inclusion of the UNCITRAL RT, normally meant for contracts between a foreign investor and a sovereign State, based on an investment treaty [*art. 1 UNCITRAL RT*] which eliminate the confidentiality normally associated with commercial arbitration [*art. 2-3 UNCITRAL RT; art. 6 UNCITRAL RT; Born II, p. 2780; Hanotiau, p. 89*].

29) Claimant's own lawyer, Ms. Porter, admitted that the PSA, as she understood it, was a "contract for public infrastructure," requiring approval by Parliament [*Ex. C7, p. 18, par. 6*]. She informed Claimant's main negotiator, Mr. Bluntschli, that such approval would be required for the AA to be valid [*Ex. C7, p. 18, par. 7*]. Therefore, this Tribunal should find that approval of the Parliament was required for the AA within the PSA, which is a contract within the scope of the definition

contained in Art. 75 of the Equatorianian Constitution, as Respondent has always believed, which is why it asked Mr. Barbosa to put the approval on the Parliament's agenda [*PO2, p. 47, par. 29*].

2. National legislative restrictions are not contrary to the NY Convention

30) Claimant argues that national legislative restrictions, such as Art. 75 of Equatoriana's Constitution, are contrary to Art. II of the NY Convention and, therefore, that Parliamentary approval is not required for the validity of the AA [*Claimant Memo, p. 8-9, par. 18-25*]. However, this national legislative restriction is not contrary to the NY Convention.

31) Respondent recognizes that an AA is presumed valid [*Born, p. 680-681*]. However, the validation principle should not be applied in cases where the parties' consent to the AA is disputed, so as not to create an artificial consent to an agreement which would not otherwise exist [*Enka v. Chubb, par. 277*]. The validation principle presupposes that "an agreement was made [which] may or may not be valid" [*Kabab v. Kout, par. 51*], i.e., that consent existed. Here, Respondent could not have consented to the AA, due to the lack of Parliamentary approval as well as corruption [*see infra par. 41-61*]. As such, the presumptive validity of an AA ends where the AA is "null and void, inoperative or incapable of being performed" [*Art. II(3) NY Convention*].

32) Moreover, both the NY Convention and the UNCITRAL ML (the *lex arbitri*) allow courts or tribunals to disregard an AA where "[t]he parties to the [AA] were, *under the law applicable to them*, under some incapacity, or the [AA] *is not valid under the law to which the parties have subjected it*" [*Art. V(1)(a) NY Convention (emphasis added); see also Art. 34(2)(a)(i) UNCITRAL ML; Art. 36(1(a)(i) UNCITRAL ML*]. Here, the AA is subject to the law of Equatoriana [*Ex. C2, p. 12, Art. 20(d)*], which contains the requirement of Parliamentary approval.

33) Claimant argues that a party may not invoke its national law to avoid a valid AA [C*laimant Memo p. 8, par. 21*] and relied on Art. 177(2) Swiss PILA, which provides: "If a party to the arbitration Contract is a state or an entity controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration Contract". However, Danubia, the *lex arbitri*, has not adopted a similar provision.

34) Consequently, whether Respondent can validly submit to arbitration is a matter of capacity, governed by the law of Equatoriana as Respondent's personal law [*Art. V(1)(a) NY Convention; Art. 36(1)(a)(i) and Art. 34(2)(a)(i) UNCITRAL ML; see also Born, p. 669; Trésor Public v. Galakis*]. In the absence of the Parliamentary approval required by the Constitution of Equatoriana, Respondent did not have capacity to enter into arbitration. For the same reason, the present dispute

is not arbitrable, in the sense of subjective arbitrability or "arbitrability *ratione personae*" [*Eleni, p. 1, par. 2; see also Fouchard/Gaillard/Goldman, p. 312; Born, p. 243; Hanotiau, p. 151; Matthew/Mook; Crivellaro, p. 115*].

35) Claimant also tries to rely on the *Gatoil* case [*Claimant Memo, p. 9, par. 24; Gatoil case*]. In that case, the claimant invoked a provision of the Iranian Constitution which provided that disputes submitted to arbitration were to be approved by the Council of Ministers. The English High Court held that the party that invokes the need for approval has the burden to obtain said approval, and that, until the approval was sought out and refused, the claimant could not rely on the domestic restriction.

36) Claimant further tries to rely on *Paris Court of Appeal case* as analogous to this dispute, yet, unlike the present case, the *Paris Court of Appeal case* involved parties from the same country, Egypt, not a private and public entity from different countries [*Claimant Memo, p. 9, par. 23; Paris Court of Appeal case*]. The tribunal in *Paris Court of Appeal case* found that approval by the Egyptian ministry to be "irrelevant to the assessment of the effectiveness of the arbitration clause" [*Claimant Memo, p. 9, par. 23*]. However, this does not mean a tribunal will equate the same degree of relevancy or not of ministerial or Parliamentary approval when the disputing parties are from differing countries with differing laws.

37) Respondent acknowledges that, pursuant to the ICCA of Equatoriana (a verbatim adoption of the UNIDROIT Principles), the "principle of good faith and fair dealing may require the party whose place of business is located in the State requiring a public permission to inform the other party of the existence of that requirement" [*UNIDROIT Commentary, Art. 6.1.14, p. 205*]. It is undisputed that Respondent had informed Ms. Porter and Mr. Bluntschli about the need for an approval from Parliament [*Ex. C7, p. 18, par. 6-7*]. Respondent also acknowledges that it had the obligation to "take the measures necessary to obtain the permission" [*Art. 6.1.14 ICCA (UNIDROIT Principles)*] and submits that, contrary to the facts of *Gatoil*, it did take the necessary measures.

38) Respondent, through Mr. Barbosa, scheduled the proposed AA for Parliament to discuss. Parliament was set to discuss the proposal on 27 November 2020, several days before the parties were to sign the PSA [*RNoA, p. 20, par. 13; Ex. C7, p. 18, par. 7*]. However, more than twenty members of Parliament missed the session due to contracting COVID, and so the proposal was withdrawn for that date [*RNoA, p. 20, par. 13*]. Because Claimant was aware of the existence of the requirement, as well as of the cancellation of the Parliamentary vote [*Ex. R4, p. 35, par. 1*],

both parties understood that the validity of the AA remained conditioned upon the approval of Parliament, even if the signing of the PSA proceeded as planned for 1 December 2020.

39) Respondent reasonably did not resubmit the AA to Parliament between December 2020 and July 2021, because of an ongoing Parliamentary debate regarding the AA included in another contract concluded with the NPDP [*NoA, p. 6-7, par. 16*]. Respondent reasonably waited for the outcome of that debate and, in the meantime, took measures to increase the chances of the AA being approved by including a reference to the UNCITRAL RT [*Ex. C7, p. 19, par. 14-15; Ex. C9, p. 22, par. 1*]. In this sense, the May 2021 amendment to the AA should not be construed as a confirmation of the validity of the AA or as any form of assurances given by Respondent that Parliament would approve the AA. Respondent was merely complying with its obligations of best efforts set forth in Art. 6.1.14 ICCA.

40) Starting in July 2021, The Citizen began publishing articles about the potential corruption involved with the NPDP [*RNoA p. 29, par. 14*]. After this, it would have been impossible for the AA to receive approval from Parliament. If permission has neither been granted nor refused within a reasonable time, "either party is entitled to terminate the contract" [*Art. 6.1.16 ICCA (UNIDROIT Principles)*]. Here, this Tribunal should apply Art. 6.1.16 ICCA allow for termination. Moreover, even if retroactive approval was or still is in theory possible, based on a singular and extraordinary precedent [*PO2, p. 47, par. 30; PO2 p. 48, par. 34*], that should not change the conclusion that the AA is ineffective, because, as of the termination of the entire PSA (30 May 2022), more than a "reasonable time" had passed since its execution on 1 December 2020.

3. There was no formal approval of the AA by the Parliament and Respondent's actions do not cure the lack of such approval

41) It is undisputed between the parties that approval by the Parliament had to be "an express approval based on a formal vote" [*PO2, p. 48, par. 34*]. For this reason, theories of "implied consent" or "ratification" should not be applied in the present case. As such, the fact that Respondent is solely owned by the State of Equatoriana, and that members of Parliament were aware of the signing of the PSA and failed to object [*Ex. C7, p. 18-19, par. 12*] is irrelevant.

42) In particular, Claimant cannot rely on the fact that Mr. Barbosa, the Minister for Natural Resources and Development, signed the PSA. Mr. Barbosa did not sign the PSA pursuant to the first sentence of Art. 75 of the Equatorianian Constitution ("[I]n contracts relating to public works or other contracts concluded for administrative purposes the State of Equatoriana or its entities may submit

to arbitration only with consent of the respective minister"), but rather as chair of the supervisory board of Respondent, "composed of eight members appointed by different ministries" [*PO2, p. 44, par. 5*]. Further, Mr. Barbosa is not a member of Parliament [*PO2, p. 48, par. 36*].

43) Claimant also cannot rely on the last recital of the PSA ("Whereas the required approval of the agreement by the Minister of Natural Resources and Development is evidenced by his signature") [*Ex. C2, p. 10, preamble*] or on the lack of a specific mention in the PSA of the second approval required, that of Parliament, because Claimant knew of the two separate authorizations. Claimant's own lawyer, Ms. Porter, testified that "my understanding was that the Agreement […] required an approval by the Minister in charge, which was in this case the Minister for Natural Resources and Development. *In addition*, approval by Parliament is required if such contracts contain an arbitration clause" [*Ex. C7, p. 18, par. 6 (emphasis added)*]. Claimant's COO, Mr. Bluntschli, also knew Parliamentary approval would be required [*Ex. R4, p. 35, par. 1*]. Because two of Claimant's representatives had the relevant information, it does not matter that Mr. Cremer, Claimant's CEO, might not have known of the required approval from Parliament. The language in the last recital of the PSA was not misleading and Respondent cannot be responsible for the arrest of Mr. Bluntschli hours before he was supposed to accompany Mr. Cremer to Equatoriana for the last drafting meeting and signature of the PSA [*PO2, p. 48-49, par. 39*].

44) Lastly, Claimant also contended that Respondent confirmed the validity of the AA via the advance payment of EUR 10 million made by Respondent under the PSA [*PO2, p. 47, par. 30; Ex. C2, p. 11, Art. 4(2)*], and a later amendment to the AA [*Ex. C9, p. 22*], as showing an intent to be bound by the PSA in general and the AA in particular [*Claimant Memo, p. 10, par. 27*]. However, even if these subsequent events reflect an intent to be bound, the existence of such intent to be bound by Respondent does not cure the lack of formal approval by Parliament.

45) This Tribunal is urged to find that neither Mr. Barbosa's signature, nor Respondent's subsequent actions alleviated the need for a formal approval by Parliament for the AA to be valid.

B. Alleged corruption undermines the jurisdiction of this Tribunal

46) Under a "more likely than not" standard of proof, this Tribunal should find that Respondent has met its burden of proof with respect to its allegations of corruption **(1)**. Because the PSA and the AA were procured through corruption, the AA is invalid **(2)**.

1. This Tribunal should not decide issues of corruption

47) Claimant wrongly contended that Respondent must meet a clear and convincing evidence standard before this Tribunal may dismiss for lack of jurisdiction, and that Respondent has not offered enough evidence [*Claimant Memo, p. 13, par. 39 (citing Himpurna v. PT)*]. In determining the appropriate standard of proof, this Tribunal should consider the intrinsically difficult nature of demonstrating a bribe and should adopt "the civil law standard of 'the balance of probabilities' or 'more likely than not'" [*Partasides, p. 58, par. 56*]. Corruption "is by essence difficult to establish" and "can be shown through circumstantial evidence" [*Metal-Tech v. Uzbekistan, par. 243*] as well as through reasonable inferences from the known or assumed facts [*Partasides, p. 61, par. 77*].

48) Corruption is difficult to prove because "a party making allegations of corruption, as a rule, cannot present any written proof" due to the fact that such agreements are typically made verbally, so as not to leave potential traces, and because a "party […] cannot call on witnesses, because as soon as a witness testifies in international arbitration that he paid a bribe, he can be immediately charged with a criminal offense" [*Khvalei, p. 63*]. Lastly, "arbitrators do not have the tools that are available to state courts and police for the investigation of facts" [*id.*]. For example, if arbitrators request documents and information from third parties, such as banks, the third parties are not bound by the AA. For example, Art. 27 PCA Rules provides that this Tribunal "may require *the parties* to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine" (emphasis added). However, this provision will not help if neither party has access to documents that would be of actual use. Further, this Tribunal does not have the power to subpoena witnesses or other third parties themselves [*Art. 27(2)-(4) PCA Rules*]. Instead, this power usually lies with the state courts, which have the power to order the production of evidence for use in a proceeding in a foreign or international tribunal [*e.g., 28 USC Section 1782(a); Born p. 1922-1939; Zvesper; Mintz; Rothman/Kolb; Rashid v. Sadaf*].

49) Public prosecutors, such as Ms. Fonseca in Equatoriana, have broad investigative powers. Ms. Fonseca has already charged Mr. Field with two corruption charges and continues to investigate him [*RNoA, p. 30-31, par. 23*]. She "announced that her team would also investigate other contracts concluded by Mr. Field on behalf of [Respondent] also with foreign companies" and specifically mentioned the PSA [*Ex. R2, p. 33, par. 3*].

50) It is likely that Ms. Fonseca's investigation will result in charges against Mr. Field regarding the PSA. The negotiations between Respondent and Claimant were primarily conducted by Mr. Field

with support from his assistant, Ms. Bourgeois [*RNoA, p. 28, par. 8*]. Ms. Bourgeois recalled that Air Systems, an Equatorianian company, provided a better financial offer [*Ex. R1, p. 32, par. 3*]. Despite this, Mr. Field accepted Claimant's offer, after agreeing to significant changes, during the only meeting unattended by Ms. Bourgeois [*Ex. R1, p. 32, par. 4; RNoA, p. 28, par. 8*]. This meeting was held at Mr. Bluntschli's beach house, a location that had previously never been used for negotiations between the parties [*Ex. R1, p. 32, par. 4*].

51) Before the beach house negotiations, Claimant's proposal consisted of 4 Kestrel Eye (for a total price of EUR 40 million), and maintenance services for 2 years (for a total of EUR 4 million, consisting of: (a) basic maintenance at EUR 290,000 per aircraft (2.9% of the price per aircraft) and (b) additional maintenance at EUR 210,000 per aircraft (2.1% of the price per aircraft)) [*PO2, p. 47, par. 27*]. The total value of the PSA was EUR 44 million, which fit perfectly within Respondent's approved budget of EUR 55 million (EUR 45 million for the acquisition of the aircrafts and EUR 10 million for maintenance) [*PO2, p. 44, par. 7*]. The maintenance portion represented 10% of the total value of the PSA. The fee for maintenance, with its 2 components, amounted to 5% of the price paid for an aircraft. That was consistent with industry practice, which is that maintenance amounts to 3-5% of the price paid for an aircraft [*Ex. R1, p. 32, par. 6*].

52) After the beach house negotiations, the parties agreed to 6 Kestrel Eye (for a total price of EUR 44 million), and maintenance services for 4 years (for a total of EUR 17.44 million, consisting of: (a) basic maintenance at EUR 480,000 per aircraft (6.5% of the average price per aircraft) and (b) additional maintenance at EUR 246,666 per aircraft (3.3% of the average price per aircraft)) [*PO2, p. 47, par. 27; Ex. R1, p. 32, par. 6*].

53) The total value of the PSA increased to EUR 61.44 million, significantly over Respondent's approved budget, notably in respect of the maintenance component: EUR 17.44 million over 4 years as compared to the approved EUR 10 million over 3 years [*PO2, p. 44, par. 7*]. Moreover, the maintenance portion now represented over 28% of the total value of the PSA, and was "completely overpriced" [*Ex. R1, p. 32, par. 6*]. The fee for maintenance, with its two components, now amounted to almost 10% of the average price paid for an aircraft, double the *maximum* of 5% seen in the industry [*Ex. R1, p. 32, par. 6*]. It was equally strange that "even some of the standard maintenance obligations now had to be bought separately" and that the prices for some services, previously agreed, were suddenly increased [*Ex. R1, p. 32, par. 6; PO2, p. 47, par. 27*].

54) Such unusual changes "had happened before only in relation to one further contract also negotiated by Mr. Field. This other contract is one of the two contracts underlying the bribery charges brought against Mr. Field" [*RNoA, p. 28, par. 11*]. Consequently, the changes to the PSA to which Mr. Field agreed are indicative of bribery rather than poor negotiating skills.

55) Claimant contended that the audit of its own accounts with Equatoriana indicated no unauthorized payments, and, therefore, there is no support for Mr. Field's corruption [*Claimant's Memo, p. 14, par. 41*]. However, Claimant fails to account for the fact that payments could have been made to accounts other than Equatorianian accounts and from accounts other than Claimant's corporate accounts. Here, both main negotiators of the PSA have been arrested and convicted of crimes of dishonesty. Mr. Bluntschli was arrested for tax evasion [*PO2, p. 48-49, par. 39*]. Mr. Field was arrested for corruption and already charged with corruption in connection. The authorities were able to identify two offshore (i.e., not in Mediterraneo) accounts of Mr. Bluntschli containing more than USD 8 million which were not disclosed in his tax declaration [*PO2, p. 49, par. 40*]. Similarly, the authorities attributed at least two offshore (i.e., not in Equatoriana) accounts to Mr. Field, each containing more than EUR 3 million [*Ex. R2, p. 33, par. 1; RNoA, p. 29, par. 16*]. The money in those accounts can be traced directly to Mr. Field [*Ex. C5, p. 16; Ex. R2, p. 33*]. Payments between these offshore accounts of Mr. Bluntschli and Mr. Field would not have been captured by Claimant's audit, because it only concerned payments from Claimant's business accounts into accounts in Equatoriana [*Ex. C3, p. 13, par. 7*]. These circumstances indicate a high probability that Mr. Field and Mr. Bluntschli used these offshore accounts to transfer bribes.

56) That explains why, according to Mr. Cremer, "Mr. Bluntschli – while he may admit in private that he did not pay – is not willing to testify in person" [*Ex. C3, p. 13, par. 11*]. Mr. Bluntschli's refusal to testify in person is another strong indicator that Mr. Bluntschli bribed Mr. Field. Otherwise, he would testify because he would have no reason to fear any adverse consequences.

57) Consequently, this Tribunal should follow the "more likely than not" standard and find that Respondent met its burden of proof with respect to its allegations of corruption.

2. Corruption invalidates the PSA and the AA

58) Claimant contended that any corruption regarding Mr. Field has no impact on the AA and the parties' capacity to submit to arbitration, because Mr. Field did not have the power to conclude the AA, nor did he sign the PSA [*Claimant's Memo, p. 14, par. 43*].

59) Respondent acknowledges that the presumption of separability of the AA from the main contract is well-established [*Born, p. 376; see also art. 23(1) PCA Rules; art. 16 UNCITRAL ML; Fouchard/Gaillard/Goldman, p. 222; Lew/Mistelis/Kröll, par. 6-3; Moses, p. 18; Redfern/Hunter, par. 2.02; Fiona Trust v. Privalov*]. However, corruption is a type of fraud, and "fraud vitiates everything" [*Lenaerts; Pédamon; Ommeslaghe; US v. Throckmorton; Avitel v. HSBC; Sorchaga v. Ride Auto; see supra par. 157-162].* Consequently, arbitral tribunals have often declined jurisdiction or declared claims inadmissible due to a party's alleged involvement in economic crimes, including corruption [*ICC Case 1110: Metal-Tech v. Uzbekistan; World Duty Free v. Kenya; Inceysa v. Salvador; Frankfurt v. Philippines; Phoenix v. Czech Republic*].

60) Respondent also acknowledges that the modern trend is, however, for arbitral tribunals to decide themselves issues of corruption [*Redfern/Hunter, par. 2.151-2.153; Born, p. 953 et seq.*], except where the challenge is to the AA itself [*Buckeye v. Cardegna; see also Prima Paint v. Conklin; Rush v. Oppenheimer*]. Here, corruption was directed at the AA itself. The AA was amended, in May 2021, after a private in-person meeting between Mr. Field and Claimant's CEO, Mr. Cremer [*Ex. C9, p. 22, par. 1*]. Any payments made by Claimant to Mr. Field at that time would not have been captured by the internal audit performed by Claimant which only covered the period until February 2021 [*Ex. C3, p. 13, par. 7*].

61) For these reasons, the principle of separability does not apply to preserve the validity of the AA.

62) **Conclusion on Issue I**. This Tribunal lacks the jurisdiction to hear the present dispute because the AA is invalid for lack of Parliamentary approval, and, further, corruption undermines the ability of the parties to have properly concluded the AA.

ISSUE II: THIS TRIBUNAL SHOULD STAY, OR ALTERNATIVELY, BIFURCATE THE PROCEEDINGS

63) Respondent requested this Tribunal to stay, or alternatively, bifurcate the present arbitration proceedings [*RNoA, p. 30-31, par. 23-24*].

64) This Tribunal has wide discretion to grant or deny such requests **(A)** and should exercise it in the sense of granting the stay **(B)** or the bifurcation **(C)**.

A. This Tribunal has wide discretion to grant or deny requests to stay or bifurcate

65) Art. 17(1) PCA Rules grants this Tribunal the implied power to decide on a stay or bifurcation request by providing for wide discretion in conducting the arbitration "so as to avoid unnecessary

delay and expense" [*see also Art. 19(2) UNCITRAL ML*]. Other tribunals have interpreted similar rules as granting the power to decide on a stay or bifurcation request [*Cairn Energy v. India; Philip Morris v. Australia*] or simply invoked an inherent power to decide such requests [*Railway v. Jordan; Cairn Energy v. India; Berkowitz v. Costa Rica; ASA Bull 637; ASA Bull 664*]. It is generally accepted that arbitral tribunals have the power to decide whether a stay or bifurcation of the proceeding is appropriate [*Fouchard/Gaillard/Goldman, p. 960, par. 1660; Air Intergulf v. SECA; Carpatsky v. Ukrnafta; Cape Lambert v. MCC; Vecchi v. Egypt; Penn Engineering v. Pirito; E-Systems v. Iran; ICC case 16394*].

B. The proceedings should be stayed

66) Respondent's request for a stay is based on the existence of criminal proceedings for corruption in Equatoriana against Mr. Field, and on the likelihood that the ongoing criminal investigation of Mr. Field will result in him being found guilty of corruption connected to the PSA. Therefore, after the oral hearing scheduled for April 2023, Respondent urges this Tribunal to stay both the jurisdictional challenge and the merits of the case, as both matters depend on the question of the invalidity of the PSA due to Mr. Field's corruption.

67) A PCA tribunal held that a stay should be granted when "compelling reasons" have been offered, unless an unreasonable delay will result from the stay [*Cairn Energy v. India*]; that approach is followed by other arbitral institutions [*Groselj, p. 576, par. 1-2; see also S.D. Meyers v. Canada; ASA Bull 248; ASA Bull 501; ASA Bull 642*]. Arbitral tribunals are more inclined to grant a request for stay when both parties suffer an equal amount of material prejudice or none [*Cairn Energy v. India; Berkowitz v. Costa Rica*], and, where a stay is premised on the outcome of criminal proceedings, if the outcomes of those proceedings will be material to the arbitration [*Cairn Energy v. India; ASA Bull 642*].

68) Respondent agrees that it has the burden of proof to support its request for a stay, which it has met **(1)**. A stay should therefore be granted because the outcome of the criminal proceedings and investigation in Equatoriana are material to the outcome of this arbitration **(2)** and because a stay will cause neither unreasonable delay **(3)** nor material prejudice to Claimant **(4)**.

1. Respondent has met its burden of proof

69) The PCA Rules provide that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense" [*Art. 27 PCA Rules*]. This Tribunal has wide discretion in determining

whether the burden of proof was met [*PCA Statement, p. 6, par. 24*]. The standard of proof required for Respondent's request for a stay should be lower than the standard required for Respondent's challenge to jurisdiction, both of which are based on the same facts of corruption. For stay requests in connection with allegations of corruption, other tribunals have applied the balance of probabilities standard and have allowed a cumulation of suspicious circumstantial evidence, without requesting direct evidence [*Methanex v. United States; BSG Resources v. Guinea; Tokios Tokelés v. Ukraine; Libananco v. Turkey; Churchill v. Indonesia; Metal Tech v. Uzbekistan*]. When analyzing circumstantial evidence, Tribunals often rely on facts that don't necessarily prove corruption, but those facts, when stacked together, may represent evidence of corruption [*Methanex v. United States; BSG Resources v. Guinea*]. The evidence of corruption submitted by Respondent in connection with its jurisdictional challenge [*see supra par. 50-55*], at the very least, satisfies the standard required for granting the stay.

2. The outcome of the investigation and criminal proceedings in Equatoriana is material to this arbitration

70) When analyzing a stay request in relation to parallel proceedings, arbitral tribunals have held that the outcome of other criminal proceedings must be material to the arbitration [*Cairn Energy v. India; Groselj, p. 571; ASA Bull 637; ASA Bull 655*].

71) Respondent's request for a stay is based on two reasons: the criminal proceedings that have already commenced against Mr. Field in Equatoriana for corruption in connection with two domestic contracts concluded by him as COO of Respondent (1), and the ongoing criminal investigation against him in connection with other contracts, including specifically the PSA (2) [*Ex. R2, p. 33, par. 3*].

72) The current criminal proceedings, even if unrelated to the PSA, are material to this arbitration, despite the lack of a direct connection with the PSA. Mr. Field has denied guilt with respect to his current charges and any future charges [*Record, p. 40, par. 3*]. The outcome of those proceedings will either show that his statements have been lies or that he speaks the truth, which is relevant for the purpose of assessing the credibility of his statements, including as a potential future witness in this arbitration. If Mr. Field is found guilty of the current charges, that will make it more probable that the PSA was procured through corruption.

73) The ongoing criminal investigation against Mr. Field in connection with other contracts, including the PSA, is material to this arbitration, as it is dispositive of the outcome of this arbitration, both with respect to the jurisdictional challenge, and on the merits, as the PSA would be void.

74) Arbitrators have a duty to render enforceable awards [*Innogy v. Spain; Vattenfall v. Germany*]. According to arbitration practice, fraud, corruption, and bribery are a breach of public policy [*Turbines v. Westman; World Duty Free v. Kenya; Hanotiau/Caprasse, p. 794-796*] and, therefore, refusal to enforce awards stemming from agreements tainted by such forms of illicit misconduct is likely. Therefore, arbitrators should always consider the aspect of the enforceability of an award when deciding on both procedural and substantive matters. If this Tribunal were to make a ruling in this case (on either the challenge to jurisdiction or on the merits) without waiting for the results of the criminal proceedings, and that ruling differs from the outcome thereof, it would be difficult to enforce the ruling in Equatoriana, the most likely jurisdiction where Claimant would seek enforcement of an award favorable to it. That is because violation of public policy is a ground for refusal to enforce under the NY Convention [*art. V(2)(b) NY Convention; see also art. 36(1)(b)(ii) UNCITRAL ML*]. Similarly, in Danubia, the seat of arbitration, either party could request the award be set aside, as the prohibition of corruption is likely also part of public policy in Danubia, a country also party, like Equatoriana and Mediterraneo, to the UNCC [*PO1, p. 43, par. III.3, fourth bullet*].

75) Moreover, if Equatorianian courts provide a contradictory ruling after this proceeding, then not granting the stay might place Respondent in the position of not being able to voluntarily comply with a disfavorable award. That is because complying with a potential award of this Tribunal to fulfill the PSA, if the PSA is then found to have been procured through corruption, 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" [*RNoA, p. 27, par. 2*]. To avoid these potential negative outcomes, it is preferable to stay the proceedings until the ongoing investigation into Mr. Field is completed.

3. If a stay is granted, there would not be an unreasonable delay

76) Tribunals have required a lack of unreasonable delay to grant a stay [*Cairn Energy v. India; Patel v. Mozambique*]. That is in line with Art. 17(1) PCA Rules, which provides: "The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

77) Respondent admits that a stay will cause delay, but it will not be unnecessary or unreasonable. Ms. Fonseca has already stated that her investigation will be finalized by the end of 2023 at the latest "and charges would then be brought" [*Ex. R2, p. 33, par. 7*]. Claimant argued that Ms. Fonseca could possibly wait to bring charges until the statute of limitations runs out, potentially giving her more time after 2023 to decide whether to file charges or not [*Claimant Memo, p. 16, par. 55*]. Given that Ms. Fonseca already brought charges against Mr. Field, there is no reason to believe that she will wait until close to the expiration of the statute of limitations to bring additional charges against Mr. Field in connection with the PSA specifically [*Ex. R1, p. 33, par. 2*]. Once Ms. Fonseca has brought charges, the next step will be first instance proceedings, which are anticipated to last approximately 7 months, ultimately resulting in a decision no later than July 2024 [*RNoA, p. 31, par. 24*].

78) Claimant argued against a stay as delaying the proceedings but offered no evidence that it is pressed for time [*Claimant Memo, p. 17, par. 61*]. In fact, Claimant opted for the PCA Rules whereas it could have opted for the UNCITRAL Expedited AR [*NoA, p. 6, par. 16*]. No evidence was presented that Claimant needs an award to meet any financial needs. It is Claimant who is keeping Respondent's EUR 10 million advance payment [*PO2, p. 47, par. 30*].

79) The delay caused by a stay of these proceedings is outweighed by the benefit a stay provides to this Tribunal's ability to decide on this case with the benefit of all relevant evidence.

4. If a stay is granted, neither party will suffer material prejudice

80) Claimant argued that a stay would cause material prejudice to Claimant because it would increase the reputational harm already suffered by Mr. Field [*Claimant Memo, p. 18, par. 66-67 (citing Cairn Energy v. India; Berkowitz v. Costa Rica)*]. However, Mr. Field is not a party to this arbitration. Moreover, reputational harm is not generally a concern in an arbitral setting because of the confidential nature of arbitration. However, Claimant argued that the adoption of the UNCITRAL RT, which provides for increased transparency, supports the notion that Mr. Field's reputation will continue to be degraded until this arbitration concludes [*Claimant Memo, p. 18, par. 67*]. To this date, neither party to this arbitration requested the application of the transparency provisions of the UNCITRAL RT in these proceedings, so the court of public opinion should be of no concern to Claimant at this time.

81) Claimant also argued that a stay would impact Claimant's right to have a fair opportunity to present its case [*Claimant Memo, p. 15, par. 49 (citing Art. 17(1) PCA Rules)*]. Claimant's main concern

is the recollection capabilities of witnesses. However, if a stay is granted, both parties will have to wait the same amount of time to examine witnesses.

82) Consequently, if a stay is granted, neither party will suffer material prejudice.

C. Alternatively, the proceedings should be bifurcated

83) Alternatively, this Tribunal is requested to bifurcate the jurisdictional challenge from the merits of the case and then, further bifurcate the jurisdictional challenge by only addressing, in the first phase, whether the AA is invalid for lack of Parliamentary approval, and not also whether the AA is invalid because the PSA in general and the AA specifically were procured through corruption. Further, at the very least, on the merits of the case, this Tribunal should first decide what law governs the PSA and Respondent's avoidance thereof, then decide whether the PSA is void for fraudulent misrepresentation and fraudulent failure to disclose, leaving the question of whether the PSA is void for corruption to be bifurcated.

84) Bifurcation of "preliminary" issues, such as a jurisdictional challenge, is commonly granted. Most arbitration rules grant express authority to order the bifurcated hearing of preliminary objections to jurisdiction and admissibility [*Calamita/Sardinha, p. 2; Art. 23(3) PCA Rules; Art. 43(4) ICSID Rules; Art. 23(3) UNCITRAL AR*], others contain implied authority [*Art. 3(1), Art. 3(2) UNCITRAL Expedited AR*].

85) Bifurcation requires that the issues to be bifurcated are not inextricably intertwined with other issues [*Rule 42(4)(c) ICSID Rules; United Utilities v. Estonia; Philip Morris v. Australia; Tulip v. Turkey; Glamis Gold v. USA; Mesa Power v. Canada; Cairn Energy v. India*]. The proposed issues to be bifurcated are connected, but they are not inextricably intertwined. Importantly, each of the issues to be bifurcated is potentially dispositive of the outcome of this case, a highly relevant factor used by PCA tribunals and other arbitral tribunals [*Rule 42(4)(b) ICSID Rules; Rule 33(b) AAA; Philip Morris v. Australia; Cairn Energy v. India; Glamis Gold v. USA; Mezzanine v. Hungary; Emmis v. Hungary; United Utilities v. Estonia; Tulip v. Turkey; Mesa Power v. Canada; Guaracachi v. Bolivia; Apotex v. USA*].

86) One other highly relevant factor is whether bifurcation would materially reduce the time and cost of the proceeding [*Rule 42(4)(b) ICSID Rules; Art. 17(1) PCA Rules; Dunkeld v. Belize; Burimi v. Albania; Phillip Morris v. Austrailia; Tulip v. Turkey; Glamis Gold v. USA; Cairn Energy v. India; Apotex v. US*]. Bifurcation of the merits of this case will expedite the proceedings because it will allow this Tribunal to conclude that the PSA is void for fraudulent misrepresentation and failure

to disclose, in which case the entire arbitral proceedings can be disposed of. Moreover, if this Tribunal finds that Respondent has not met its burden of proof with respect to corruption, Respondent will need to bring forward more evidence "within such a period of time as the tribunal shall determine" [*Art. 27(3) PCA Rules*]. Respondent cannot provide this evidence (i.e., a court sentence finding Mr. Field guilty of corruption in connection with the NPDP or the PSA specifically) until the criminal proceedings in Equatoriana, which are outside of its control, conclude. Bifurcation will allow Respondent to bring forward additional evidence. Arbitration practice supports bifurcation for the purpose of enabling the parties to bring forward additional evidence [*Art. 27(3) PCA Rules; Rule 36(3) ICSID Rules; Art. 19(2) LCIA Rules; Rule 35(a) AAA Rules; Art. 12(1) SIAC Rules; Art. 41(2), Art. 43(1) CIETAC Rules; Art. 25(4) ICC Rules*].

87) **Conclusion on Issue II**. Consequently, this Tribunal should grant Respondent's request for a stay, or alternatively, grant Respondent's request for bifurcation of these proceedings.

ISSUE III: THE PSA IS GOVERNED BY THE EQUATORIANIAN ICCA

88) Art. 20(d) of the PSA provides that the PSA is governed by the law of Equatoriana [*Ex. C2, p. 12*]. It is undisputed that both parties to the PSA have their primary places of business in different Contracting States to the CISG, Equatoriana and Mediterraneo [*PO1, p. 43, par. III.3, first bullet*]. As such, the CISG would apply to the PSA, unless its application is excluded either by the CISG itself or by the parties [*Art. 1-6 CISG*].

89) Claimant argued that the application of the CISG was not excluded by the choice-of-law clause in favor of the law of Equatoriana [*Claimant Memo, p. 19, par. 71*]. Respondent agrees that, under Art. 6 CISG, when a choice of law clause designates the law of a CISG Contracting State without further specification, such clause does not lead to an exclusion of the CISG [*CISG Op. 16, rule 4(b)(i); Schwenzer/Jaeger, par. 30.02; Kröll/Mistelis/Viscasillas, p. 13, par. 41; Schlechtriem/Schwenzer, p. 109, par. 15; Coke case (1); Coke case (2); Machines case; Crude metal case; Industrial products case; Tyre crushing plant case; Yugoslav mushroom case; Tantalum case; Electronic components case; Ajax case; MRI systems case*] and there is no need to resort to the rules of private international law [*CISG Digest, p. 4, par. 2; Brunner/Gottlieb, p. 11; Huber/Mullis, p. 51-52; Schlechtriem/Butler, p. 13; Textiles case*].

90) Claimant also argued that the application of the CISG was not excluded under Art. 3(2) of the CISG, because the preponderant part of the PSA consists in the sale of goods, not services [*Claimant Memo, p. 19, par. 72*]. Respondent agrees that, in general, if the economic value of the

goods from a mixed contract exceeds 50% of the entire economic value of the contract, the CISG applies [*Brunner/Gottlieb, p. 28, par. 8; CLOUT case 882; LG mainz case; Hotel case*]. However, the objective respective value of the goods and services component is not conclusively determinative of the application of the CISG. The intent of the parties and the subjective importance of the obligations are also relevant to determine if the CISG governs or not [*CISG Op. 4, par. 3.4; Schlechtriem/Schwenzer, p. 70, par. 18; Ferrari, Art. 3, par. 15; Magnus/ Staudinger, Art. 3, par. 22; CLOUT case 196; CLOUT case 882*].

91) Here, the sale of the goods would not have been possible without the maintenance services which were essential for the conclusion of the PSA. The service portion of the PSA is what made the contract possible. After reviewing bids, Respondent negotiated only with Claimant and Air Systems [*Ex. R1, p. 32, par. 3*]. However, after Mr. Field spent a weekend at Mr. Bluntschli's beach house, Respondent ceased negotiations with Air Systems, even if Air Systems had presented a better offer from a financial perspective [*Ex. R1, p. 32, par. 4-5*]. As discussed in more detail above, after that weekend, the terms of the agreement between Respondent and Claimant had changed considerably, notably regarding the maintenance portion, likely because of bribery [*see supra par. 47-57*].

92) Moreover, the supply of maintenance services is essential for the agreement, as the Kestrel Eye UAS was developed in 2010 and constantly updated by Claimant. Only Claimant could provide the required maintenance [*PO2, p. 45, par. 13*], essential in extending the life of the Kestrel Eye [*PO2, p. 47-48, par. 26*]. Given the crucial importance of the maintenance component in the conclusion of the PSA, this Tribunal should not apply the CISG to it.

93) Even if this Tribunal will decide that the application of the CISG was not excluded under Art. 3(2) CISG, its application was excluded under Art. 2(e) CISG, which states that the CISG does not apply to "sales of ships, vessels, hovercraft, or aircraft" [*Art. 2(e) CISG*]. While the CISG does not contain a definition of the term aircraft, in interpreting the meaning of "aircraft" under the CISG, courts and arbitral tribunals have generally looked to the history behind the inclusion of Art. 2(e) CISG [*Schlechtriem/Schwenzer, p. 57-58, par. 27-30*]. Additionally, "when confronted with an apparent gap in the CISG's express provisions, courts should first look to the general principles upon which the CISG is based to determine whether they answer the question, and, if they do not, they should then select the domestic laws applicable under private choice of law rules and answer the question with a domestic legal rule" [*Smythe, p. 5, para. 1; Art. 7 CISG*].

94) Thus, when determining the meaning of the term aircraft as used in Art. 2(e) CISG, this Tribunal should look to the general principles upon which the CISG is based, specifically the history behind the inclusion of Art. 2(e) CISG, and then to the applicable domestic laws. Here, the relevant domestic law is the ASA of Equatoriana, as most closely connected with the PSA.

95) The Kestrel Eye UAS is an aircraft pursuant to the definition of aircraft derived from the history of the CISG and other international instruments **(A),** as well as pursuant to the definition contained in the Aviation Safety Act ("**ASA**") of Equatoriana **(B)**.

A. The Kestrel Eye is an aircraft pursuant to the definition of aircraft derived from the history of the CISG and other international instruments

96) Claimant argued that the CISG is applicable because the 6 Kestrel Eye UAS are not aircrafts under Art. 2(e) CISG because they do not require registration in Equatoriana and will not be used by Respondent to transport goods [*Claimant Memo, p. 20, par. 111*]. However, absence of registration is not a dispositive factor under the CISG **(1)** and the UAS can be used to transport goods **(2)**.

1. The Kestrel Eye is an aircraft under the CISG even if no registration is required

97) Art. 2(e) CISG was derived from Art. 5(1)(b) ULIS [*Schlechtriem/Schwenzer, p. 57-58, par. 27-30*]. Art. 5(1)(b) ULIS provided that ULIS does "not apply to sales [...] of any ship, vessel or aircraft, which is or will be subject to registration." As such, contracts for the sale of registered aircraft were excluded from ULIS while contracts for the sale of unregistered aircraft were governed by ULIS. However, when the CISG was adopted, the registration distinction was abandoned, and all sales of aircraft were excluded [*Schlechtriem/Schwenzer, p. 57-58, par. 27-30*].

98) According to the UN's official records of the CISG drafting meetings, the CISG excluded *all* sales of aircraft because, in most legal systems, at least some aircraft were subject to special registration requirements and the rules specifying which aircraft had to be registered differed widely [*Vienna 1980 Official Records, p. 16, par. 9*]. That continues to be the case. As an example, sales of aircraft require registration (as the default rule) in Equatoriana under the ASA [*Ex, R5, p. 36, Art. 10*] as well as in at least two other countries [*PO2, p. 46, par. 19*].

99) In order to preserve uniformity in the application of the CISG and its international character [*Schlechtriem/Schwenzer, p. 58, par. 29-32; Bianca/Bonnell, Art. 2, par. 2.6; Lookofsky, p. 17, par. 2.5*], this Tribunal should not take into consideration whether the Kestrel Eye UAS would be subject to registration in Equatoriana or not.

100) In arguing for the application of the CISG, Claimant emphasized that no registration is required in Equatoriana because the ASA of Equatoriana only requires registration of "aircrafts owned or operated by a private entity in the territory of Equatoriana" and Respondent is a SOE [*Claimant Memo, p. 21, par. 118*]. If registration or lack thereof is deemed to be a relevant factor by this Tribunal, Respondent submits that this Tribunal should not place great weight on the fact that parties seemingly agreed that the UAVs would not be subject to registration in Equatoriana [*Ex. C7, p. 18, par. 5*], because the decision ultimately belongs to the aircraft registry [*Ex. R5, p. 36, Art. 10*]. The relevant language from the ASA provides that registration is required if the operator is a "private entity" [*Ex. R5, p. 36, Art. 10*]. Respondent is a SOE operated like a commercial company [*PO2, p. 44, par. 5*]. It is unclear how the aircraft registry will interpret the phrase "private entity" as applied to Respondent, especially given that, so far, only the police and the armed forces have employed similar aircraft in Equatoriana, and the police and the armed forces were clearly not "private entities" [*PO2, p. 46, par. 19*].

101) The mere possibility of registration being required was one of the reasons that the drafters of the CISG, contrary to the drafters of ULIS, excluded all sales of aircraft. Ms. Porter, Claimant's representative, conceded in her witness statement that Claimant's "drones are in many features comparable to *aircrafts* as they use the same airspace, and their operation poses threats to third parties, they are generally subject to the rules of the Aviation Safety regulations in the different jurisdictions" [*Ex. C7, p. 18, par. 2 (emphasis added)*].

102) It should also be relevant that, even if no registration is or would ultimately be required in Equatoriana, it might be required in a different jurisdiction. So far, Claimant exported its Kestrel Eye UAS in four jurisdictions. In two of them, there was no requirement to register the Kestrel Eye UAS. In the other two, there was a requirement to register the Kestrel Eye UAS, but that requirement did not apply because the buyer was the police force of that State [*PO2, p. 46, par. 20*]. It would defeat the objective set forth in 7(1) CISG to promote uniformity in the application of the CISG if the CISG were applied only to some sales of the same goods (Kestrel Eye UAS) by the same seller (Claimant), depending on who the buyer is and what country the buyer is from.

103) Moreover, under the ASA of Equatoriana, all aircraft, including the Kestrel Eye, must "have clearly visible product numbers on the tail" of the UAS [*Ex. R1, p. 32, par. 7*]. While the purpose of this requirement is "to identify the [UAS] in case of alleged violations of privacy or alleged interferences with other forms of aerial traffic" [*PO2, p. 46, par. 21*], it is very similar to the

purpose of a registration requirement. The Convention on International Civil Aviation requires that all aircraft engaged in international air navigation bears its "registration marks" which is a numeric or alphanumeric code [*Chicago Convention*]. Thus, a registration mark functions the same as a product number because both identify the aircraft while it is engaged in air navigation. This represents another reason to exclude the application of the CISG from all sales of aircraft.

104) Similarly, the existence of a registration requirement with the relevant aircraft registry is often linked with an additional restriction. That is the case, for example, in Equatoriana, where the ASA provides that "transfer of ownership… is only perfected upon registration" [*Ex. R5, p. 36, Art. 10*]. Historically, Art. 2 CISG has excluded the sale of certain goods that were subject to special requirements for the transfer of property [*Mankowski, par. 17*]. Accordingly, Art. 4(b) CISG provides that the CISG "is not concerned with […] the effect which the contract may have on the property in the goods sold". Because a registration requirement, if applicable, would also condition the transfer of the property of the UAS, this Tribunal should find that the CISG does not apply to the sale of the Kestrel Eye UAS.

105) Accordingly, the mere possibility of registration being required in Equatoriana or elsewhere, with accompanying property transfer restrictions, should be a highly relevant factor in this Tribunal's determination that the CISG does not apply to the PSA.

2. The Kestrel Eye is an aircraft because it can be used to transport goods

106) Scholars note that "aircraft" means "civil and military aircrafts that are intended to transport humans or goods and are intended for a continual movement" [*Kröll/Mistelis/Viscasillas, p. 52, par. 46*] and that Art. 2(e) CISG "does not encompass [...] air and watercraft which do not serve as transportation" [*Brunner/Gottlieb, p. 21, par. 14*]. Accordingly, when considering whether an object is an "aircraft," this Tribunal should focus on whether it can be used to transport goods [*Schlechtriem/Schwenzer, p. 57-58, par. 29- 30; Report of Committee, par. 29-31*]. If so, the CISG will not apply [*Russian plane case*].

107) In the *Russian submarine case*, a contract between a buyer and seller stated that the buyer intended to use the submarine being sold for scrap metal or as a museum. When determining whether the CISG applied, the tribunal looked to whether the submarine could still float as a submarine, determined that it could, and held that it was therefore a vessel under Art. 2(e) CISG, such that the CISG did not apply to the contract [*id.*].

108) Consequently, whether the Kestrel Eye UAS is an aircraft under Art. 2(e) CISG hinges on whether the Kestrel Eye UAS could be used to transport goods. The Kestrel Eye UAS can objectively transport goods **(a)** and was intended to transport goods **(b)**.

a. The Kestrel Eye can objectively transport goods

109) Similar to the *Russian submarine case*, when determining whether the CISG applies to the PSA, this Tribunal should primarily focus on whether the Kestrel Eye UAS *can* transport goods, not whether it was intended to. It is undisputed that the Kestrel Eye UAS can transport goods [*PO2, p. 44-45, par. 9*]. Not only is the Kestrel Eye UAS capable of transporting goods, but it has previously been used to carry medicine and small pieces of equipment to remote areas [*id.*].

110) Claimant argued that the Kestrel Eye UAS was engineered for surveillance purposes and that it would be impossible to transport any cargo unless the surveillance equipment were removed [*Claimant Memo, p. 23, par. 128*]. However, the Kestrel Eye UAS can transport cargo without removing the surveillance equipment, even in options without the Front Payload Bay.

111) Each Kestrel Eye UAS has one standard Central Payload Bay in the middle of the fuselage [*Ex. C4, p. 15*]. An additional, optional, Front Payload Bay in the front of the nose fuselage can be ordered and installed [*id.*]. A Kestrel Eye UAS which only has the Central Payload Bay can transport items weighing up to 245 kg [*id.*]. The addition of a Front Payload Bay raises the weight and volume capacity of the UAS by 25% [*PO2, p. 45, par. 10*]. Therefore, a Kestrel Eye UAS which has both the Central Payload Bay, and the optional Front Payload Bay can transport items weighing up to 306.25 kg.

112) In a Kestrel Eye UAS which only has the Central Payload Bay, “there is *hardly* any weight and volume capacity left” after the surveillance equipment is installed and the UAS is fully fueled [*PO2, p. 45, par. 10 (emphasis added)*]. However, this does not mean that there is *no* weight and volume capacity left. Thus, it is likely that a few bottles of medication or a package of wound dressings could still fit in the option without the Front Payload Bay.

113) If a Kestrel Eye UAS has the optional Front Payload Bay, an additional 61.25 kg can be loaded. An average at-home COVID test weighs 3.21 ounces [*Amazon*]. Consequently, the Kestrel Eye UAS with the Front Payload Bay could transport roughly 670 COVID tests. Additionally, the Kestrel Eye UAS with the Front Payload Bay could transport spare parts such as an engine for another damaged Kestrel Eye, which weighs 58 kg [*Ex. C4, p. 15*].

114) The record does not clearly indicate if Respondent ordered the optional Front Payload Bay for any of the 6 Kestrel Eye UAS purchased under the PSA, it only reflects that the first three Kestrel Eye UAS that were to be delivered did not already have the optional Front Payload Bay [*PO2, p. 44, par. 8*]. That does not mean that Respondent was not going to order the optional Front Payload Bay for all 6 Kestrel Eye UAS or for some of them. The PSA provides that the equipment for the last two Kestrel Eye UAS was to be subsequently agreed and separately priced [*Ex. C2, p. 11, Art. 2(d)(ii)-(iii)*]. That would have very likely included the optional Front Payload Bay because 40% of the missions that Respondent planned to carry using the Kestrel Eye were "expected to require a [UAS] with the optional payload", which corresponds to approximately 2.4 UAS that would have to have the optional Front Payload Bay [*PO2, p. 44, par. 8*].

115) Accordingly, the Kestrel Eye UAS ability to transport goods should be a highly relevant factor in this Tribunal's determination that the CISG does not apply to the PSA.

b. The Kestrel Eye was subjectively intended to transport goods

116) Claimant argued that this Tribunal should only take into consideration the primary intended use (subjective approach) of the Kestrel Eye UAS by Respondent, which was surveillance and not transportation [*Claimant Memo, p. 24, par. 131*]. While Respondent maintains that the PSA is not governed by the CISG, this Tribunal may look to the CISG for purposes of determining if the CISG applies [*Tupolev aircraft case*]. The ICCA contains similar rules [*Art. 4.1 and Art. 4.2 ICCA (UNIDROIT Principles)*]. The subjective approach embodied in Art. 8(1) CISG is only rarely applicable, given the high standard required for its application: "where the other party knew or could not have been unaware of what that intent was" [*Art. 8(1) CISG; CISG Digest, p. 54, par. 7; Raw Material case; MCC-Marble v. D'Agostino*]. As such, courts and tribunals generally apply Art. 8(2) CISG, which provides for an objective interpretation, according to the understanding of an abstract reasonable person [*Manganese case; Carriage case; MCC-Marble v. D'Agostino; CISG Digest, p. 55, par. 10*].

117) Additionally, Art. 8(3) CISG provides "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties". The ICCA contains a similar provision [*Art. 4.3 ICCA (UNIDROIT Principles)*]. Therefore, this Tribunal has wide discretion to consider "all relevant circumstances", even when analyzing the subjective intent of the parties.

The "relevant circumstances" present here indicate that the Kestrel Eye UAS were intended (at least secondarily) to be used to transport goods.

118) First, the preamble to the PSA provides that "the scope of the agreement to be awarded was changed to reflect new developments and a *possible additional use* of the *aircraft*" [*Ex. C2, p. 10, recital 5 (emphasis added)*]. Not only does the preamble refer to the Kestrel Eye UAS as "aircraft" but it clearly contemplates an additional use. While a preamble does not create binding obligations, it is a relevant consideration that suggests the intent of the parties [*Fontaine/De Ly, p. 17, par. 2*]. The preamble implies that surveillance was not the only intended use of the UAS by Respondent. Instead, Respondent also intended for other *additional* uses of the UAS.

119) Second, Mr. Bluntschli, Claimant's COO, mentioned "other purposes" in an email to Mr. Field, Respondent's COO, on 29 November 2020 [*Ex. R4, p. 35, par. 4*] and the Minister of Natural Resources and Development stated in a speech on 2 December 2020 that the UAS "should also be able to transport urgently needed spare parts or medicine to remote areas" [*Ex. R2, p. 33, par. 5*]. Elaborating on the additional uses, Ms. Queen, Respondent's CEO, added "that in light of this logic […] [Respondent] decided to increase the number of drones to be ordered by two" [*id.*]. According to The Citizen, the order of drones was subsequently enlarged because "the load which the Kestrel Eye 2010 drone could carry" for other purposes than surveillance [*id.*].

120) Claimant argued that statements made by the representatives of both parties have no binding value because of the merger clause in Art. 21 PSA [*Claimant's Memo, p. 24, par. 130*]. Respondent agrees. However, merger clauses do not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation, they only act to prevent additional or different terms being included into a contract. Art. 2.1.17 ICCA, a verbatim adoption of Art. 2.1.17 of the UNIDROIT Principles, provides: "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements *may be used to interpret the writing*" [*Art. 2.1.17 UNIDROIT Principles (emphasis added); see also CISG Op. 3, par. 4.6; Kröll/Mistelis/Viscasillas, p. 156-157, par. 30; Schlechtriem/Schwenzer, p. 160, par. 36; UCC §2-202*].

121) Therefore, the email between Mr. Bluntschli, and Mr. Field on 29 November 2020 that mentioned "other purposes" [*Ex. R4, p. 35, par. 4*] may not be used to contradict the PSA but may be used to interpret the PSA. Moreover, the statements by the Minister of Natural Resources and

Development and by Ms. Queen are not barred by the merger clause because they occurred after the PSA was signed on 1 December 2020. A merger clause only limits "prior statements or agreements" and does not have any effect on subsequent statements [*Art. 2.1.17 UNIDROIT Principles (emphasis added); see also CISG Op. 3, par. 4.6; Kröll/Mistelis/Viscasillas, p. 156-157, par. 30; Schlechtriem/Schwenzer, p. 160, par. 36; UCC §2-202*]. Consequently, this Tribunal should give "due consideration" to all these statements [*Art. 8(3) CISG; see also Art. 4(3) ICCA*].

122) Additionally, Ms. Porter, Claimant's in-house lawyer, admitted that the Kestrel Eye UAS are "comparable to aircraft" for purposes of concluding what laws are applicable to them [*Ex. C7, p. 18, par. 2*]. This statement by Ms. Porter shows how Claimant's legal department subjectively characterized the Kestrel Eye UAS. The conclusion was not that the sale of Kestrel Eye UAS is governed by the CISG, but rather that they are "subject to the rules of the Aviation Safety regulations in the different jurisdictions," such as the ASA of Equatoriana [*Ex. C7, p. 18, par. 2*].

123) Accordingly, Respondent's intended and announced additional purpose to transport goods should be a highly relevant factor in this Tribunal's determination that the CISG does not apply.

B. The Kestrel Eye UAS is an aircraft according to the Aviation Safety Act of Equatoriana

124) Because the PSA is most closely connected with the law of Equatoriana, this Tribunal should place great weight on the definition of aircraft under the domestic law of Equatoriana, more specifically, the ASA of Equatoriana.

125) Art. 1 ASA provides that "any vehicle with or without an engine, heavier or lighter than air that is used or intended to be used for moving persons or objects in the air without any mechanical connection to the ground. Unmanned Aerial Vehicles are treated accordingly as aircrafts if their overall length exceeds 90 cm or if their payload is higher than 50 kg" [*Ex. R5, p. 36, Art. 1*].

126) Here, the Kestrel Eye UAS is an Unmanned Aerial Vehicle with an overall length of 630 cm and a payload capacity of 245 kg [*Ex. C4, p. 15*] that at the very least was intended to be used for moving surveillance equipment in the air [*PO2, p. 45, par. 9*]. Accordingly, the Kestrel Eye UAS is an "aircraft" according to the ASA of Equatoriana.

127) **Conclusion on Issue III**. The CISG does not govern the PSA, because the UAS are "aircrafts", both under the CISG and under the national law of Equatoriana.

ISSUE IV: RESPONDENT CAN RELY ON ART. 3.2.5 OF THE EQUATORIANIAN ICCA TO AVOID THE PSA

128) Respondent previously demonstrated that the PSA is governed by the Equatorianian ICCA in its entirety, and not by the CISG [*see supra, par. 88-127*]. However, the following arguments will be presented pursuant to this Tribunal's instruction to assume that the CISG governs the PSA.

129) In its letter of 30 May 2022, Respondent informed Claimant that it "no longer considers itself bound by the [PSA]" because the PSA was procured by corruption (and, as such, void from the beginning), fraudulent misrepresentation and failure to disclose the existence of the Hawk Eye 2020 UAS [*Ex. C8, p. 20-21*]. Art. 3.2.5 of the Equatorianian ICCA provides: "A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed." [*Art. 3.2.5 UNIDROIT Principles*].

130) Here, Art. 3.2.5 ICCA is applicable, even if the CISG otherwise governs the PSA, because Respondent's legal defenses concern the validity of the PSA, and not merely the non-conformity of the Kestrel Eye 2010 UAS **(A)**. Moreover, Respondent was led to conclude the PSA through fraudulent misrepresentation **(B)** and fraudulent failure to disclose **(C)**. Therefore, Respondent is entitled, under Art. 3.2.5 ICCA and Art. 18 PSA, to avoid the PSA **(D)**.

A. Respondent's legal defenses involve the validity of the PSA

131) The CISG expressly excludes issues of validity from its scope [*Art. 4 CISG*], as did Art. 8 ULIS [*Schlechtriem/Schwenzer, p. 74, par. 1; Ferrari, Art. 4, par. 1; Magnus/Staudinger, Art. 4, par. 6*]. The rationale for the exclusion is that such matters are better suited for resolution at the state level [*Schlechtriem/Schwenzer, p. 75, par. 3; Ferrari, Art. 4, par. 1; CISG Digest, p. 25, par. 9*].

132) Claimant alleged that Art. 3.2.5 ICCA is inapplicable due to the CISG's coverage of issues of nonconformity [*Claimant Memo, p. 28-29, par. 142-143*]. However, nonconformity under the CISG is a failure to deliver goods in the quality, quantity, and description stipulated in the contract [*Art. 35(1) CISG*]; a failure to deliver goods fit for ordinary purpose or any particular purpose [*Art. 35(2)(a) -(b) CISG*]; delivering goods different from a sample or a model [*Art. 35(2)(c) CISG*] or improperly packaged [*Art. 35(1) CISG and Art. 35(2)(d) CISG*]. Under the CISG, non-conformity of goods can lead to damages [*Art. 45(1)(b) CISG and Art. 74 CISG*] and/or, if the non-conformity

amounts to a fundamental breach in the sense of Art. 25 CISG, avoidance of the contract [*Art. 45(1)(a) CISG; Art. 49(1)(a) CISG*]. However, neither the provisions of Art. 35 CISG nor the provisions of Art. 25 CISG account for situations where there is a "fraudulent" intent to misrepresent [*Schlechtriem/Schwenzer, p. 89, par. 37*]. Further, the CISG does not expressly deal with the existence and extent of any duty to disclose [*Schlechtriem/Schwenzer, p. 260-261, par. 73-74, p. 677, par. 8; Magnus/Staudinger, Art. 40, par. 10*].

133) The leading treatise on the CISG distinguishes between "fraudulent misrepresentation" (which is not governed) and "negligent misrepresentation" (which would be governed by the CISG). It notes: "*The CISG does not govern* the situation where contracts have been concluded with one party showing tortious conduct, e.g. by committing fraud or exerting duress on the other party including *the notion of fraudulent misrepresentation*. […] The applicable domestic law decides upon the fate of the contract and the rights and remedies available to the aggrieved party based on these concepts. These claims may concur with remedies provided by the CISG for breach of contract if the applicable domestic law so decides. This [is] […] to be distinguished from cases of negligent misrepresentation. Domestic claims based on [negligent misrepresentation] cannot concur with the remedies of the CISG for breach of contract." [*Schlechtriem/Schwenzer, p. 89, par. 37*].

134) The same treatise notes, with respect to breach of a duty to disclose under domestic law, that "[p]re-contractual duties which are designed to prevent mistakes and, thereby, protect the freedom of will of the parties […] address an issue not governed by the Convention and may therefore be applied concurrently with the CISG, irrespective of the legal consequences arising from their violation [under domestic law] (e.g. invalidity of the contract, right to rescind the contract or to withdraw a declaration)" [*Schlechtriem/Schwenzer, p. 260, par. 73; but see, Magnus/Staudinger, § 312c, para 93; Schlechtriem/Schwenzer, p. 211, par. 18*] if the failure to disclose is the result of fraudulent conduct [*Schlechtriem/Schwenzer, p. 261, par. 74, fn. 321; but see, Benedick, para. 950; Schroeter, § 6, p. 113, par. 134*]. For example, the pre-contractual disclosure obligations under certain EU directives have been applied concurrently with the CISG [*Schlechtriem/Schwenzer, p. 260, par. 73; Schroeter, § 6, p. 113, par. 130*]. Similarly, here, the Equatorianian Supreme Court has held that, in a similar setting to that of the PSA, disclosure obligations of the seller exist, covering all information potentially relevant for the government entity, including any "planned improvements to the product" [*RNoA, p. 29-30, par. 18*]. Because Equatoriana is a common law

country, this decision is binding in Equatoriana [*PO1, p. 43, par. III*], and should be at the very least be considered highly persuasive by this Tribunal.

135) The decisive distinction between fraudulent and negligent misrepresentation or non-disclosure "lies in the nature and purpose of the defrauding party's representations or non-disclosure" [*UNIDROIT Commentary, Art. 3.2.5, p. 107, par. 2*]. The misrepresentation or non-disclosure "is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party" [*id.*]. In such a case of fraudulent conduct, no additional requirements or limitations apply before the contract can be avoided (such as notice under Art. 49 CISG and Art. 26 CISG or qualifying the breach as a fundamental breach under Art. 25 CISG or complying with the requirements of Art. 3.2.2 ICCA (UNIDROIT Principles)) [*id.*]. In the present case, Claimant's conduct amounts to both fraudulent misrepresentation and non-disclosure.

B. Claimant fraudulently misrepresented the Kestrel Eye 2010 UAS

136) Claimant fraudulently misrepresented the Kestrel Eye 2010 UAS to induce Respondent to enter the contract, and thereby gained an advantage to the detriment of Respondent. Respondent made an advance payment of EUR 10 million two weeks after the execution of the PSA, which occurred on 1 December 2020 [*Ex. C2, p. 11, Art. 4(2); Ex. C6, p. 17, par. 3*]. As of today, more than two years later, Claimant still has Respondent's advance payment, while Respondent has nothing.

137) Art. 2(a) of the PSA provides that Claimant undertakes to supply to Respondent "6 of its *newest model* of Kestrel Eye 2010 UAS, out of which 4 are equipped with *state-of-the-art* geological surveillance feature further specified in Annex A to this Agreement" [*Ex. C2, p. 10, Art. 2(a) (emphasis added)*]. However, the Kestrel Eye 2010 UAS was not Claimant's "newest model" UAS **(1)** or "state-of-the-art" **(2)** at the time of the negotiations between the parties or at the time of the conclusion of the PSA.

1. The Kestrel Eye 2010 UAS was not Claimant's newest model

138) Claimant argued that Art. 2(a) PSA does not call for Claimant's "newest model" but rather only for Claimant's "newest model of Kestrel Eye 2010 UAS", which Respondent received [*Claimant Memo, p. 30, par. 144*]. However, as more reasonably interpreted, the PSA called for Respondent to receive whatever would be Claimant's "newest model" of UAS at the time of each scheduled delivery, ranging from 15 January 2022 to 31 December 2023 [*Ex. C2, p. 10-11, Art. 2(c)-(d)*]. Respondent could not have drafted the contract differently, by removing the reference to the

"Kestrel Eye 2010 UAS" and simply state "newest model", because the Kestrel Eye was the only model presented to Respondent that Claimant assured would fit the contract description [*NoA, p. 5, par. 5-9; Ex. C7, p. 18, par. 4; Ex. C8, p. 20, par. 4; RNoA, p. 29, par. 17; Ex. R4, p. 35*].

139) Claimant's representative, Mr. Bluntschli, fraudulently reinforced Respondent's impression that the Kestrel Eye 2010 UAS was Claimant's newest model in its email of 29 November 2020, sent two days before the execution of the PSA. In that email, Mr. Bluntschli stated: "The version of the Kestrel Eye 2010 UAS purchased under the Agreement constitutes *our present top model* for your purposes" [*Ex. R4, p. 35, par. 4 (emphasis added)*]. As discussed before, the existence of the merger clause included as Art. 21 PSA does not prevent this Tribunal from considering the email sent by Mr. Bluntschli for purposes of interpreting the PSA and determining whether there was fraudulent intent to deceive by Claimant [*see supra, par. 120-121*].

2. The Kestrel Eye 2010 UAS was not state-of-the-art

140) The Call for Tender referenced "state-of-the-art unmanned aircraft systems" [*Ex. C1, p. 9, par. 3*]. Claimant, at the onset of negotiations, understood that Respondent did not have the technological infrastructure, or know how, to create its own UAS systems and was seeking the most "state-of-the-art" UAS systems for the NPDP of Equatoriana [*RNoA, p. 27-28, par. 4-7; Ex. C5, p. 16, par. 1*]. Respondent, due to its lack of knowledge as an SOE in a lesser developed country, relied on Claimant for delivery of UAS systems that would be "state-of-the-art". In this sense, the references to "state-of-the-art" should not be seen as mere "puffery" in advertising or negotiations, but rather an essential requirement of Respondent [*UNIDROIT Commentary, Art. 3.2.5, p. 107, par. 2*]

141) Claimant argued that Art. 2(a) PSA does not call for the Kestrel Eye 2010 UAS to be "state-of-the-art" but only for the equipment of the UAS to be state-of-the-art [*Claimant Memo, p. 30, par. 146*]. However, clauses in a contract must be read together [*Art. 4.4 UNIDROIT Principles; Whitaker v. Monroe Staffing; Oil Tubing case; Residential Condo case; Tribe land case; Ford Motor case*]. The preamble to the PSA clarifies that the UAS itself had to be state-of-the-art: "Whereas [Respondent] has initiated a tender process for the acquisition of *state-of-the-art aircrafts* in the form of Unmanned Aerial Systems (UAS)" [*Ex. C2, p. 10, recital 3 (emphasis added)*]. Moreover, Art. 2(f) PSA provided for maintenance for 4 years "following the delivery of the respective state-of-the-art UAS" [*Ex. C2, p. 11, Art. 2(f)*].

142) While the parties did not expressly define "state-of-the-art," the common meaning is "very modern and using the most recent ideas and methods" [*State-of-the-Art, Cambridge Dictionary*]. It is

undisputed now that "[n]o further updates of the Kestrel Eye 2010 family are planned and the last update concerning primarily the flight stability software took place in December 2018" [*PO2, p. 45, par. 13*]. That hardly represents "state-of-the-art". The Kestrel Eye will likely be discontinued in 2024 [*PO2, p. 45, par. 13*]. As such, as of the last delivery date stated in the PSA (31 December 2023), Claimant was fraudulent planning to "sell old for new" to Respondent.

C. Claimant fraudulently failed to disclose relevant information

143) First, Claimant failed to disclose its knowledge regarding the Hawk Eye 2020 UAS **(1)**. Second, Claimant failed to disclose prior and previous instances of corruption **(2)**. Had Respondent known this information, it would not have entered into the PSA.

1. Claimant fraudulently failed to disclose the Hawk Eye 2020 UAS

144) Claimant publicly released its Hawk Eye 2020 UAS two months after the signing of the PSA [*PO2, p. 45, par. 15*], without ever mentioning it to Respondent.

145) Art. 3.2.5 ICCA mandates to disclose "circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed" and provides for avoidance for failure to disclose if such failure led the other party to conclude the contract. In interpreting the extent of the duty to disclose, this Tribunal should give great weight to the decision of the Equatorianian Supreme Court, pursuant to which there is an obligation to disclose "planned improvements to the product", such as the existence of the Hawk Eye 2020 UAS [*RNoA. p. 30, par. 18*]. The Hawk Eye is a major improvement over the Kestrel Eye. The Hawk Eye has a wider range of reach, is able to carry a heavier payload, enjoys a more versatile scope of application, has a higher maximum flight ceiling, can stay in the air longer, and has a longer period of time before maintenance is required [*NoA, p. 5, par. 10; Ex. C4, p. 15; Ex. R3, p. 34; RNoA, p. 29, par. 17*]. Respondent would have benefitted more from the use of the Hawk Eye over the Kestrel Eye [*PO2, p. 45, par. 17*]. It is undisputed that there is a "likelihood that the courts in Equatoriana would come to [the] conclusion [that Claimant would have been required to disclose the forthcoming presentation of the Hawk Eye 2020 UAS due to the precedent decision]" [*PO2, p. 46, par. 18*].

146) Had Claimant disclosed to Respondent the existence of the Hawk Eye prior to the execution of the PSA, Respondent would have renegotiated or not entered a multi-million contract for the purchase of the Kestrel Eye [*Ex. C3, p. 14, par. 8-10; Ex. C7, p. 19, par. 13; Ex. C8, p. 20-21; RNoA, p. 29, par. 17; Ex. R4, p. 35, par. 2*]. Respondent would have been able to utilize the improved features

of the Hawk Eye to examine a wider range of the Northern Part of Equatoriana, and the improvements in technology would have provided Respondent with more accurate images of where exploitable resources would be in the region.

147) Claimant's fraudulent intent is supported by the fact that Claimant had previously contracted to sell 3 Kestrel Eye 2010 UAS but was unable to do so because the party who had originally contracted to buy them went insolvent [*PO2, p. 46, par. 25; Ex. R4, p. 35, par. 2; Ex. C3, p. 14, par. 7-9*]. While Claimant contends that the insolvency of the previous buyer led to a beneficial bargain for Respondent [*Claimant Memo, p. 32, par. 150*], the facts rather indicate that Claimant was trying to get rid of the UAS in its inventory in order to produce the new Hawk Eye that will likely result in the end of production for the Kestrel Eye in 2024 [*PO2, p. 45, par. 13*].

148) Claimant argued that there was no duty to disclose the Hawk Eye 2020 UAS, as that represented a trade secret [*Claimant Memo, p. 33, par. 152*]. A trade secret refers to valuable know-how and business information that is undisclosed and intended to remain confidential [*Art. 39(2) of the TRIPS Agreement*]. Here, the information surrounding the release of a new UAS was not confidential because Claimant, in a 2017 press release, announced that it would be enlarging its UAS portfolio by releasing a UAS with newly acquired technology and "it was generally known in the market that Claimant was developing a new [UAS]" [*PO2, p. 45, par. 15*]. While the specifications of the Hawk Eye 2020 UAS are likely a trade secret, the timeframe of its expected release is not. If it had been, then Claimant would have filed patents for the new UAS before its release, which it did not [*PO2, p. 45, par. 15*]. Moreover, Claimant did not have to provide to Respondent specific details about the design and manufacture of the Hawk Eye 2020 UAS. Claimant merely needed to disclose that a newer "state-of-the-art" UAS would likely be released soon. This would have enabled Respondent to make an informed decision about whether to sign the PSA with Respondent or enter a contract with the second bidder, Air Systems, which had initially presented a "better offer" [*NoA, p. 5, par. 5; RNoA, p. 28, par. 8; Ex. R1, p. 32, par. 3-5*].

149) *C3, p. 14, par. 9*]. While the Hawk Eye may have been more expensive than the Kestrel Eye, this does not mean that Respondent could not have afforded the newer UAS [*Ex.* Respondent had an approved budget of EUR 45 million to purchase "2 to 6 UAS" [*PO2, p. 44, par. 7*]. The Hawk Eye costs approximately EUR 20 million [*Ex. C3, p. 14, par. 9*]. Respondent therefore had sufficient funds to purchase two Hawk Eye UAS in December 2020, or a combination of Kestrel Eye and

Hawk Eye UAS, or purchase more aircraft at a later time, as Respondent had started generated its own revenues from the sale of data [*PO2, p. 44, par. 7*].

2. Claimant fraudulently failed to disclose other relevant information

150) Claimant also fraudulently failed to disclose other material information, which further supports that Claimant had an overall intent to deceive Respondent and ensure that Respondent signed the PSA. For example, pursuant to the Call for Tender, each bidder was required to disclose any previous convictions of corruption within its company that occurred within the last five years [*Ex. C1, p. 9, par. 4*]. Claimant had had two previous instances of corruption within its company [*PO2, p. 44, par. 3*], although the record does not provide any information regarding the date thereof. If this warranty was breached, Respondent is entitled to terminate the PSA [*Ex. C1, p. 9, par. 5*].

151) Further, Mr. Bluntschli, Claimant's COO, was engaged in illegal activity (tax evasion) and was subsequently arrested for that [*PO2, p. 48-49, par. 39*]. Moreover, if, as Respondent fully expects, Mr. Field, Respondent's COO, will be found guilty of corruption, in the form of taking a bribe in connection with the PSA [*see supra par. 47-56*], that means that Mr. Bluntschli is also guilty of corruption, in the form of giving a bribe. That is perhaps the reason why "Mr. Bluntschli […] is not willing to testify […] in person [that he did not pay any government officials]" [*Ex. C3, p. 14, par. 11*]. His request for a remuneration for his testimony casts additional doubt [*id.*].

D. Respondent's avoidance on 30 May 2022 was effective

152) Because there was fraudulent misrepresentation and/or failure to disclose, Art. 3.2.5 ICCA entitled Respondent to avoid the PSA, which Respondent did, via letter sent to Claimant on 30 May 2022 [*Ex. C8, p. 20-21*]. Claimant argued that Respondent's avoidance was ineffective because it did not comply with the requirements of Art. 18 PSA and because it was not timely. However, Respondent's avoidance was effective under Art. 3.2.5 ICCA and Art. 18 PSA **(1)** and timely **(2)**.

1. Art. 18 PSA supports Respondent's avoidance

153) Claimant heavily relied on Art. 18 PSA, titled "Termination for Cause" to argue that Art. 3.2.5 ICCA does not apply to Respondent's legal defenses of fraudulent misrepresentation or failure to disclose but rather the CISG or, alternatively, that even if Art. 3.2.5 ICCA applies, avoidance was possible only in the case of a fundamental breach of contract, as defined in Art. 25 CISG, and there was no such fundamental breach in the present case [*Claimant Memo, p. 33-34, par. 153-156*].

154) Art. 18 PSA provides that Respondent "is entitled to avoid the agreement in case [Claimant] commits a fundamental breach of contract" [*Ex. C2, p. 12, Art. 18(1)*] and then proceeds to enumerate certain situations which automatically represent such fundamental breaches, including any breaches "which deprive [Respondent] of what it is entitled to expect under the Agreement" [*Ex. C2, p. 12, Art. 18(2)(c)*]. By the combined effect of these two provisions, Art. 18 PSA comes very close to replicating Art. 25 CISG which, read in conjunction with Art. 49(1)(a) CISG, essentially provides that avoidance is available only when the seller commits a fundamental breach, defined as one which "results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract" [*Art. 25 CISG*].

155) However, Art. 18 PSA does not bring back the application of the CISG or otherwise supersede the application of Art. 3.2.5 ICCA. First, there was clear intent to derogate from, and expand, the definition of fundamental breach contained in Art. 25 CISG, by including additional, automatic, instances of fundamental breach: "[i]nappropriate payments to any employee of [Claimant]" and "[d]elay in delivery of more than 200 days" [*Ex. C2, p. 12, Art. 18(2)(a)-(b)*]. Second, this provision was specifically negotiated by the parties and Respondent agreed to Claimant's request to limit the instances that represent automatic fundamental breaches entitling Respondent to avoidance. The previous language, which had been proposed by Respondent, provided that "[n]on-compliance with [any] obligations listed in Art. 2 [PSA] constitutes a fundamental non-performance of the contract" [*PO2, p. 48, par. 38*]. Ms. Porter, Claimant's in-house attorney, changed this language to only provide for three instances which represent automatic fundamental breaches. As such, any ambiguity regarding the effect of Art. 18 PSA should be interpreted against Claimant, as the drafter, and in favor of Respondent, the party meant to be protected by Art. 18 PSA, pursuant to the contra proferentem rule of interpretation [*Art. 4.6 ICCA (UNIDROIT Principles); Trade case; Kim/Kim/Shim, p. 125, par. 6; Huber/Mullis p. 15, par. 2*].

156) Art. 18 PSA also does not displace the application of Art. 3.2.5 ICCA, in the sense of conditioning the avoidance remedy provided by Art. 3.2.5 ICCA by the existence of a fundamental breach, or eliminating avoidance for fraud, because the legal remedies for fraud trump contractual provisions [*see supra par. 153-154*]. Moreover, the fraudulent misrepresentation and failure to disclose, which have already been demonstrated by Respondent would fit the situation set forth in Art. 18(2)(c) PSA, in the sense that Respondent was deprived of what it was entitled to expect under the PSA, namely the newest and most state-of-the-art drone. Lastly, the existence of corruption

alone would entitle Respondent to avoidance under Art. 18(2)(a) PSA, which also represents another reason why the present proceedings should be stayed until the criminal investigation against Mr. Field in Equatoriana is completed.

2. Respondent's avoidance was timely

157) Claimant argued that Respondent's avoidance was untimely [*Claimant Memo, p. 34, par. 157*]. However, Respondent timely avoided the contract when it was clear that Claimant was going to deprive Respondent of what it was entitled to expect under the contract and that no amicable solution could be found. The Equatorianian Supreme Court interprets Art. 3.2.5 ICCA in the sense that avoidance is timely even if made more than 1 year from discovery of the misrepresentation [*Ex. C7, p. 19, par. 17*]. While the CISG does not provide for a specific time limit to declare the contract avoid, international statutes such as the UN Limitation Convention set a time limit of four years while many common law countries set a time limit of six years [*Magnus, p. 429, par. 1*].

158) The Hawk Eye was presented to the public in February 2021 [*PO2, p. 45, par. 15*]. Respondent immediately informed Claimant that this entitled Respondent to terminate the PSA [*Ex. C9, p. 19, par. 13*]. The parties had numerous discussions in this respect from March 2021 to May 2021 [*Ex. C9, p. 19, par. 14- C3, p. 13, par. 5*]. Mr. Field did not raise the issue after May 2021, very likely as a result of further corruption in connection with the negotiations of the amendment to the AA [*see supra par. 58-61*].

159) Claimant argued that the fact that Mr. Field vehemently brough up the misrepresentation issue indicates that he was not corrupt [*Claimant Memo, p. 34, par. 158*]. However, it was more likely that Mr. Field did so in order to avoid raising suspicion and/or in order to extract an even larger payment from Claimant.

160) Respondent did not pursue the matter further in 2021, due to the unprecedented events that quickly ensued after May 2021. In July 2021, The Citizen, a leading investigative journal in Equatoriana, considered to be a credible source [*PO2, p. 49, par. 42*] started publishing article denouncing corruption within the NPDP [*Ex. C5, p. 16; Ex. R2, p. 33*]. These articles led to early elections on 3 December 2021 and a new government installation in Equatoriana [*NoA, p. 5, par. 11; RNoA, p. 29, par. 14*]. Shortly thereafter, a moratorium was issued for all contracts issued under the NPDP, during the investigation of the corruption scheme, and Claimant promptly received an email to that effect on 27 December 2021 [*NoA, p. 5, par. 12; RNoA, p. 29, par. 15; Ex. C6, p. 17*].

161) The parties had numerous communications to find an amicable solution, spanning from 27 December 2021 to 28 May 2022 [*Ex. C3, p. 13-14, par. 5*]. Because such efforts were unsuccessful due to fundamental divergences between the parties, Respondent had no other choice than to send a formal notice of avoidance on 30 May 2022 [*Ex. C8, p. 20-21*].

162) Consequently, Respondent's avoidance was timely. Respondent did not and could not declare avoidance until after it learned that Claimant had released a new UAS that was more advanced than the Kestrel Eye UAS (in February 2021), that there was a high likelihood of corruption of Mr. Field, who was arrested on 28 February 2022 [PO2, p. 49, par. 43], with an additional investigation against him being launched on or around 22 May 2022, specifically in connection with the PSA [Ex. R2, p. 33, par. 3].

163) **Conclusion on Issue IV.** Because Art. 4 CISG excludes matters of validity. Art. 3.2.5 ICCA applies. Claimant fraudulently misrepresented the Kestrel Eye UAS and failed to disclose the Hawk Eye UAS and other material facts, in order to induce Respondent to enter into the PSA. Respondent was therefore entitled to avoid the PSA.

REQUEST FOR RELIEF

164) With respect to the issues identified by this Tribunal for purposes of the first procedural phase, Respondent respectfully requests this Tribunal to:

(1) Declare that this Tribunal lacks jurisdiction over the dispute between the parties;

(2) Declare that the proceeding should be stayed or, alternatively, bifurcated;

(3) Declare that the PSA is governed by the Equatorianian ICCA; and

(4) Declare that Respondent can rely on Art. 3.2.5 ICCA to avoid the PSA.

SUBMITTED ON BEHALF OF EQUATORIANA GEOSCIENCE LTD.

Cassidy Willard	*Victoria Boyte*	*Zak Worley*	*Austin Tomlin*
Cassidy Willard	Victoria Boyte	Zak Worley	Austin Tomlin