MEMORANDUM FOR THE CLAIMANT

CASE NO. 30000-2004

On behalf of: Mediterranean Confectionary Associates, Inc.

Against: Equatoriana Commodity Exporters, S.A.

The Claimant

121 Sweet Street
Capitol City
Mediterraneo

The Respondent

325 Commodities Avenue
Port City
Equatoriana

Faculty of Law
University of Copenhagen

Akila Al-Muhandes
Jennie Dai
Thomas Nikolaj Ingerslev
Bitten Møhring-Andersen
Tobias Søttrup
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Introduction

1. Mediterraneo Confectionary Associates, Inc. (hereinafter the "Claimant") is a corporation seated in Mediterraneo. The Claimant is a producer of various confectionary items and uses large quantities of cocoa in its production. The Claimant sells confectionaries in Mediterraneo and exports to neighbouring countries.

2. Equatoriana Commodity Exporters, S.A. (hereinafter the "Respondent") is a corporation seated in Equatoriana. The Respondent trades various commodities, including cocoa. The Respondent largely trades commodities from Equatoriana, but it also trades commodities produced in other countries.

3. The parties are familiar with each other, as they have done business together on a number of occasions over the years.

PART I: Substantive Issues

1. The Claimant was entitled to receive 400 tons of cocoa beans between March and May 2002

4. During a telephone conversation on 19 November 2001 the parties entered into a contract for the delivery of 400 tons of cocoa beans (hereinafter "cocoa"), which was confirmed by letter of the same date (Cl. Ex. 1). According to contract no. 1045 (hereinafter the "contract"), the Respondent was to deliver the entire amount of cocoa between the months of March and May 2002 (Cl. Ex. 2).

5. On 24 February 2002, the Respondent informed the Claimant that it might not be able to deliver on time due to damage to the cocoa crop caused by a huge storm in Equatoriana (Cl. Ex. 3). As a result of the storm, the Equatoriana Government Cocoa Marketing Organisation (hereinafter the "EGCMO") imposed an embargo on all export of cocoa through at least the month of March 2002 (Cl. Ex. 3). Upon receiving the information, the Claimant immediately replied on 5 March 2002 expressing its concern regarding the Respondent’s inability to fulfill the contract (Cl. Ex. 4). Later, on 10 April 2002, the Claimant contacted the Respondent again and stressed that it expected the Respondent to deliver within the period stated in the contract (Cl. Ex. 5). By letter of 7 May 2002, the Respondent informed the Claimant that it was only able to deliver 100 tons (Cl. Ex. 6).
6. The Claimant submits that a specific delivery period, namely between March and May 2002, was agreed upon in the cocoa contract (Cl. Ex. 2). The Claimant further submits that the agreed delivery time was not subsequently changed. Consequently, the Respondent was in breach of contract when it failed to deliver 400 tons of cocoa by the end of May 2002.

1.1. The Respondent was in breach since it failed to deliver between March and May 2002 as required by the contract

7. By virtue of Art. 33(b) CISG, the Respondent was obligated to deliver the contracted cocoa within the agreed period of time. The contract specified that delivery had to be made between March and May 2002 (Cl. Ex. 2).

8. When interpreting the contract and statements made by the parties regard must be had to the parties’ intentions, cf. Art. 8(1) CISG. Both during the telephone conversation on 19 November 2001 and in the contract, the parties agreed that delivery was to be made between the months of March and May 2002 (Cl. Exs. 1 and 2). Accordingly, the parties intended delivery to be made at the latest by the end of May 2002. The Respondent took the initiative and contacted the Claimant by telephone on 19 November 2001. During this conversation, an agreement was made. It was confirmed by letter of 19 November 2001 from the Respondent accompanied by the contract (Cl. Ex. 1). On this basis, it may reasonably be assumed that the Respondent was well aware of the clearly stipulated intention of the Claimant that delivery was to be made no later than by the end of May 2002. Additionally, in letter of 10 April 2002, the Claimant emphasised that it expected the entire 400 tons of cocoa to be delivered by the end of May 2002 (Cl. Ex. 5) and by letter of 7 May 2002, the Respondent expressed that it looked forward to shipping the remaining 300 tons of cocoa within the very near future (Cl. Ex. 6). Hence, interpretation of the contract and of statements made by both the Respondent and the Claimant establishes that the parties intended delivery to be made between March and May 2002.

1.2. The contractual period for delivery was not modified as a result of the parties’ correspondence

9. The Claimant requests the Tribunal to find that the contractual period for delivery was not modified. The contractual period for delivery remained the months of March to May 2002.

10. According to Art. 29 CISG, the parties may modify the contract by mere agreement. If one of the parties wants to modify the contract, Part II of the CISG applies to the modification (cf. R. Motor v. M. Auto, OLG München, Germany, 8 February 1995). Art. 14(1) CISG requires that
an offer has to be sufficiently definite and indicate the intention of the offeror to be bound in case of acceptance.

11. On 24 February 2002, the Respondent informed the Claimant that the embargo would “at least last throughout the month of March 2002” (Cl. Ex. 3) and in letter of 7 May 2002 the Respondent stated that it “looked forward to deliver the remaining 300 tons of cocoa in a very near future” (Cl. Ex. 6). These statements made by the Respondent in both letters did not qualify as a request for an additional period of time for delivery.

12. The Claimant did also not accept to extend the period of delivery, cf. Art. 18(2) CISG. Quite contrary, by the letter of 5 March 2002 the Claimant emphasised its concerns as to whether the Respondent would be able to fulfil its contractual obligations. On 10 April 2002 the Claimant expressly wrote that it expected to receive the entire 400 tons of cocoa by the end of May 2002 (Cl. Exs. 4 and 5). Hence, the Claimant maintained throughout the correspondence that delivery should be made within the agreed period of time.

13. In letter of 5 March 2002, the Claimant stated (Cl. Ex. 4) that it was “not under immediate pressure to receive the contracted cocoa”. This sentence by itself did not modify the contract, as it was not sufficiently definite and did not indicate any intention to alter the contract, cf. Art. 14(1) CISG. The statement was triggered by the information contained in letter of 24 February 2002, in which the Respondent wrote that the embargo would last throughout the month of March 2002 (Cl. Ex. 3). Based on the information the Claimant had received from the Respondent prior to 5 March 2002 it can reasonably be assumed that when the Claimant wrote the letter of 5 March 2002 it expected the embargo to be lifted before the expiry of the delivery period.

14. The sentence “not under immediate pressure to receive the contracted cocoa” must also be read in the context of the entire letter, in which the Claimant mentioned that if the Respondent did not deliver, the Claimant would have to make a substitute transaction (Cl. Ex. 4). By that statement the Claimant indicated that it maintained its right to hold the Respondent liable for any breach of the contract and at the same time expected timely delivery. Hence, the statement can neither be seen as a new offer pursuant to Art. 14(1) CISG, nor as a waiver of the Claimant’s remedies in case of the Respondent’s breach.

15. The contract explicitly mentioned that the Respondent could deliver the cocoa in one or more instalments (Cl. Ex. 2). By taking delivery of the first 100 tons of cocoa the Claimant did not
indicate that it would accept late delivery of the rest. On the contrary, Art. 53 CISG obliges the buyer to take delivery of the contracted goods. The Claimant was merely fulfilling its contractual obligations by taking delivery of the 100 tons.

2. As the Respondent did not perform timely or within the additional and reasonable period of time fixed by the Claimant, the Claimant was entitled to avoid the contract

16. In letter of 15 August 2002 the Claimant wrote to the Respondent: “It is obvious that if we do not receive notification from you soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere” (Cl. Ex. 7). On 25 October 2002, the Claimant informed the Respondent that it had made a substitute transaction the previous day (Cl. Ex. 8).

17. Art. 47(1) CISG states that the buyer may fix an additional period of time of reasonable length for the performance by the seller (hereinafter "nachfrist"). Furthermore, according to Art. 49(1)(b) CISG, the buyer may declare the contract avoided, if the seller does not deliver the goods within the nachfrist fixed by the buyer in accordance with Art. 47(1) CISG.

18. Nachfrist is a prerogative afforded by the Convention to the aggrieved party. The notion of nachfrist is built on the basis of contract promotion, as it facilitates the possibility of preserving a contract despite a breach. Art. 47(1) CISG (cf. Art. 63 CISG) entitles the aggrieved party to fix an additional period of time in which the breaching party must perform its obligations (Lookofsky, Europe, p. 130). By fixing an additional period of time, the aggrieved party seeks fulfilment of its contractual rights and gains the right to declare the contract avoided in case of non-compliance, cf. Art. 49(1)(b) CISG (Schlechtriem, p. 395). On the other hand, the aggrieved party limits its right to declare the contract avoided until the end of the nachfrist, cf. Art. 47(2) CISG (Schlechtriem, p. 398).

19. The Claimant asserts that its letter of 15 August 2002 fulfilled the requirements of setting a nachfrist, as it demanded performance and fixed an additional period of time for performance of reasonable length (Cl. Ex. 7 and Schlechtriem, pp. 395-397).

2.1. The Claimant’s letter of 15 August 2002 constituted a nachfrist notice in accordance with Art. 47(1) CISG

20. By making the statement contained in letter of 15 August 2002 the Claimant notified the Respondent of its intention of not avoiding the contract despite non-delivery and of its continued desire to receive the remaining 300 tons of cocoa (Cl. Ex. 7). By doing so, the
Claimant provided the Respondent with additional time to deliver. Nevertheless, the Respondent failed to reply or otherwise react to the letter of 15 August 2002.

21. On 15 August 2002, both the original period to set a delivery date, between January and February 2002, and the agreed period of delivery, between March and May 2002, had expired. In its letter of 15 August 2002, the Claimant demanded that a delivery date be set, as it required “notification from you soon when you will be shipping the remaining 300 tons” (Cl. Ex. 7). Setting a delivery date logically comes before the actual delivery. Therefore, the request for a delivery date was also a request for delivery. Although the Claimant stated that it needed notification about the delivery date soon, a reasonable person of the same kind would understand this as a request for delivery soon, cf. Art. 8(2) CISG. This is also supported by the fact that the Claimant in the same letter informed the Respondent that its stocks were uncomfortably low. Hence, the letter must be understood as an explicit demand for delivery (Cl. Ex. 7). However, the Respondent neither delivered nor gave any notice.

22. The Claimant asserts that by virtue of its letter of 15 August 2002, the Claimant requested delivery to be made “soon” (Cl. Ex. 7). The meaning of the word “soon” encompasses a certain period of time. In letter of 5 March 2002, the Claimant explicitly notified the Respondent that it would be in need of cocoa later that year, and in letter of 15 August 2002 that its stocks of cocoa were running threateningly low (Cl. Exs. 4 and 7). The word “soon” must be seen in light of these statements, as they help interpret and clarify the intention behind it, cf. Art. 8(1) CISG. Therefore, by use of the word “soon” the Claimant fixed a period in which the Respondent was required to perform. In addition, in Giustina v. Perfect Circle, CA Versailles, France, 29 January 1998, it was decided that the failure of the seller to effect adequate repairs pursuant to its promise justified the buyer’s attempt to avoid the contract even in the absence of a specific time granted by the buyer for such repairs. The literature also supports this, e.g. DiMatteo et al.: “Other courts have permitted buyers to avoid sales contracts on the basis of notices that were not specific with respect to the additional period of time granted to the sellers for performance” (DiMatteo et al., p. 379). And in ICC Case No. 7585, Paris, 1992 the arbitrator held that even though the seller did not dispatch a nachfrist notice pursuant to Art. 63 CISG, the fact that the seller waited several months before declaring the contract avoided was equivalent to the fixing of an additional period of time. The seller could consequently avoid according to Art. 64(1)(b).
2.2. The additional period of time for delivery provided to the Respondent was of reasonable length pursuant to Art. 47(1) CISG

23. Several elements must be included when a period of reasonable length is calculated. These elements encompass the buyer’s interest in delivery, the length of the contractual period for delivery and the nature of the seller’s performance (Enderlein & Maskow, pp. 182-183). After non-delivery for more than 2½ months it was evident that the Claimant due to its diminishing stocks had a great interest in delivery.

24. The Claimant waited until 25 October 2002 before it avoided the contract (Cl. Ex. 8). From the day of the nachfrist notice and until the day of the notification of the substitute transaction the Respondent had the opportunity to perform its contractual obligations. The Claimant submits that the period between 15 August 2002 and 25 October 2002 is a period of reasonable length for the Respondent to deliver. It must be noted that by 15 August 2002 2½ months had already passed after the last day for contractual delivery. In addition, it is not a requirement that the nachfrist grants an additional period of time equal to the agreed period of delivery, in casu 3 months (Enderlein & Maskow, pp. 182-183).

25. The Claimant submits that the Tribunal should take the whole period between the date of the nachfrist notice and the date of avoidance into account. This is supported by OLG Celle, Germany, 24 May 1995. In that case the buyer fixed a nachfrist of 11 days, which the court found was possibly too short under the circumstances. However, the buyer was entitled to avoid the contract 7 weeks after the dispatch of the nachfrist notice because 7 weeks was a sufficiently long time, i.e. a period of reasonable length.

3. The Claimant was entitled to avoid the contract since the non-delivery amounted to a fundamental breach

26. The failure of the Respondent to deliver the entire 400 tons of cocoa before the end of May 2002 constituted a fundamental breach entitling the Claimant to avoid the contract.

27. Art. 49(1)(a) CISG states that the buyer can declare the contract avoided if the seller’s failure to perform amounts to a fundamental breach. Art. 25 CISG defines when a breach is fundamental. The definition encompasses two elements. Firstly, a detriment must substantially deprive the injured party of what it is entitled to expect under the contract. Secondly, the other party must be able to foresee this result (Lorenz, para. III.B.).
3.1. Non-delivery by the Respondent for more than 4 ½ months, substantially deprived the Claimant of what it was entitled to expect under the contract

28. The Claimant submits that non-delivery for more than 4½ months resulted in a substantial detriment. Under Art. 25 CISG, the detriment to the aggrieved party is not to be defined by reference to the damage suffered by the Claimant, but by reference to what interests it had in timely delivery under the contract (Schlechtriem, p. 175).

29. The Claimant never expressly or impliedly indicated that timely delivery was immaterial. Upon entering into the contract, the parties agreed to set a specific period for delivery, namely between “the first and the last day of March to May 2002” (Cl. Ex. 2). When interpreting a contract, regard must be had to the parties’ intentions and in determining a party’s intent subsequent conduct can be taken into consideration, cf. Arts. 8(1) and (3) CISG. The mere fact that the parties fixed an explicit period of time for delivery shows that time was of significance. In support hereof, the Claimant’s behaviour after the conclusion of the contract indicated that the Claimant intended time to be of importance. Immediately after receiving information regarding the embargo, the Claimant notified the Respondent that it would make a substitute transaction in case the Respondent did not deliver within the agreed period of time (Cl. Ex. 4). This information was also repeated in letter of 15 August 2002 (Cl. Ex. 7).

30. Several cases show that non-delivery can amount to a fundamental breach giving buyer the right to avoid according to art 49(1)(a). The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 16 March 1995, has, in a case with facts similar to these, held that a buyer was entitled to avoid. The contractual period for delivery was 3 months as in this case. The Tribunal held that the buyer was entitled to avoid after repeatedly having requested delivery for 5 months after the expiration of the period for delivery. In Foliopack v. Daniplast, Pretura Circodariale di Fidenza, Italy, 24 November 1989 the contractual period for delivery was one week. Two months after the conclusion of the contract the seller had only delivered one third of the goods. The court held that the delay amounted to a fundamental breach of the contract according to Art. 49(1)(a).

31. The Claimant is a producer of confectionary items which are sold throughout Mediterraneo and exported to its neighbouring countries (Cl. Statement of Case, para. 1). Like any other prudent business company, the Claimant must insure that it at all times has a sufficient amount of raw material for its production. Therefore, the Claimant must be able to rely on its business partners respecting specifically agreed delivery periods.
32. To produce confectionaries, the Claimant used large quantities of cocoa, in fact, its annual requirement of cocoa amounted to 1,500 tons (Cl. Statement of Case, para. 3, and Procedural Order No. 2, q. 24). If the Claimant were to wait until the Respondent could deliver, the Claimant would risk its stocks of cocoa running dry. By then it might not be able to fulfil the contracts with the buyers of confectionary items. As a result hereof, the Claimant could risk considerable damages.

33. By 24 October 2002, the embargo had lasted for 8 months. The Respondent had not only failed to deliver it also failed to notify the Claimant of the status on delivery. The only time the Respondent contacted the Claimant was on 29 September 2002, where it did not clarify when delivery of the remaining 300 tons would be made (Procedural Order No. 2, q. 22). Consequently, by October 2002, the Claimant could no longer sustain its confidence in the Respondent’s future performance. This uncertainty as to when delivery would be made served in itself as a detriment to the Claimant (Koch, pp. 247-251). In OLG Hamburg, Germany, 28 February 1997, it was held that a fundamental breach was committed where the seller, after not having been able to deliver the goods within the agreed period of time, asked for more time due to ongoing negotiations with his supplier either for delivery of the goods or indemnification. Such a declaration, the court held, constituted a fundamental breach since it remained uncertain for the buyer if and when the seller would fulfil his obligation to deliver.

3.2. It was possible for the Respondent to foresee that non-delivery for more than 4½ months was a substantial detriment to the Claimant

34. Art. 25 CISG furthermore requires that the Respondent should be able to foresee that non-delivery of the remaining 300 tons of cocoa would result in a substantial detriment to the Claimant.

35. When determining whether non-delivery for 4½ months was foreseeable for the Respondent, regard must be had to the contract and the circumstances under which it was concluded. As argued above in para. 29 the Claimant considered time to be of importance and the Respondent cannot have been unaware of this intention.

36. The subsequent statements made by the Claimant contribute to the interpretation of the parties’ intentions at the time of contracting, cf. Art. 8(3) CISG. In its letter of 5 March 2002, the Claimant stated: “although we are not under immediate pressure to receive the contracted cocoa, we will be later this year” (Cl. Ex. 4). In the same letter the Claimant also mentioned
that by that time, i.e. later that year, it would be forced to make a substitute transaction. Moreover, during several telephone calls and also by letter of 10 April 2002, the Claimant further expressed its growing concern regarding the Respondent’s failure to deliver on time (Cl. Statement of Case, para. 7 and Cl. Ex. 5). Also, it was emphasised that the Claimant expected delivery to be made within the agreed time. Accordingly, all the subsequent statements made by the Claimant revealed that non-delivery later in the year was vital to it.

37. Further, the Claimant and the Respondent had traded commodities on several occasions during the years. Therefore, it can reasonably be assumed that the Respondent was familiar with the fact that the Claimant sold confectionary items in which cocoa was a main ingredient (Cl. Statement of Case, para. 3, and Re. Statement of Case, para. 5). The Respondent could only have known that it was of great importance for the Claimant to receive the cocoa and further that non-delivery for more than 4½ months could lead to severe losses for the Claimant, as it would disable it from fulfilling contracts with its customers. The Claimant would thereby be jeopardising not only concrete contracts, but also its reputation and good relationship with its buyers. Thus, the Respondent could not have been unaware of the possibility that late delivery would cause a substantial detriment to the Claimant.

38. In addition, information received by the seller subsequent to the contract, but before delivery, is relevant when determining whether the substantial detriment was foreseeable (Honnold, p. 209). The letter of 5 March 2002 together with the letter of 10 April 2002 definitely made it known to the Respondent that if it did not deliver later in the year 2002, the Claimant would have to make a substitute transaction. These statements made the Respondent aware of the Claimant’s growing need of cocoa.

39. The Claimant had waited for almost 5 months and there were no prospects that the Respondent would be able to deliver in the near future. The Respondent even admitted that it could not deliver before several weeks after the substitute transaction (Cl. Ex. 10). It was foreseeable to the Respondent that the non-delivery of the remaining 300 tons of cocoa resulted in a substantial detriment to the Claimant. Consequently, the Claimant was entitled to avoid and make a substitute transaction.

4. The Claimant rightfully declared the contract avoided

40. In letter of 25 October 2002, the Claimant notified the Respondent that it had made a substitute transaction in order to cover its low cocoa stocks due to the non-delivery of the remaining 300 tons of cocoa (Cl. Ex. 8). In the same letter, the Claimant stated that it
expected the Respondent to cover the additional costs involved in making the substitute transaction. However, the Respondent did not acknowledge that avoidance was made.

41. Art. 26 CISG provides that in order for a declaration of avoidance to be effective, notice thereof must have been given to the other party.

42. It is the Claimant’s assertion that by letter of 25 October 2002 it had made it evident towards the Respondent that it intended to avoid the contract and indeed did avoid it at the said date. Furthermore, the Respondent gave no evidence that it acted in the assumption that the contract had not been avoided.

4.1. The Claimant’s letter of 25 October 2002 could only reasonably be understood as a declaration of avoidance

43. The letter of 25 October 2002 stated that the 300 tons of cocoa had been purchased as a substitute for the remaining 300 tons that were not yet delivered: “The Respondent showed no intention of delivering to us and we were facing the likelihood of running out of supplies if we waited any longer. Yesterday we contracted to buy 300 tons of cocoa” (Cl. Ex. 8).

44. There is no requirement that a declaration of avoidance should contain explicit wording like “avoidance” or any synonym thereof. It must be decisive that the conduct of the avoiding party has made it clear to the other party that avoidance is made. Scholars agree that conduct as well as unambiguous behaviour can convey a sufficiently clear intention in order to serve as a notice of avoidance (Plate, pp. 72-73, Schlechtriem, pp. 188-189 and Honnold, p. 214). Claiming that the word avoidance should be contained in the text would be a misinterpretation of Art. 26 CISG. In ICC Case no. 9978, March 1999, it was held that a fax in which the buyer asked for restitution of price was a validly expressed declaration of avoidance according to Art. 26 CISG. Further, according to Plate p. 8 “The exact wording of the declaration of avoidance is immaterial…” Also, OLG Hamburg, Germany, 28 February 1997, held that once the seller had refused to deliver the goods, a declaration of avoidance was unnecessary.

45. The Claimant made it clear that it had made a substitute transaction. It had summed up the amount of damages that the Respondent would be expected to pay, and it had given a notice of this to the Respondent. A claim for damages based on the making of a substitute transaction can only reasonably be understood as encompassing a declaration of avoidance. It would not be possible to make a claim for damages based on a substitute transaction had the contract not been avoided. This view finds support in the ruling rendered in Roder v.
Rosedown, Federal Court, Australia, 28 April 1995, where a statement of claim served as a notice of avoidance, as the statement made it sufficiently clear that the avoiding party treated the contract as terminated. The Respondent could not reasonably have been unaware that this was the Claimant’s clear intention. Furthermore, as the Respondent did not inform the Claimant about delivery and as it did not object to the Claimant’s letter of 25 October, the Respondent gave no evidence that it assumed the contract had not been avoided.

4.2. The Claimant’s letter of 15 August 2002 and the previous conduct of the Claimant could only reasonably be understood to indicate that avoidance was imminent

46. It is submitted that the Claimant had made it very obvious to the Respondent that if it did not live up to its contractual obligations soon, the Claimant would be forced to purchase cocoa elsewhere. In the letter of 5 March 2002, it stressed that the Claimant would indeed need the cocoa later that year (Cl. Ex. 4). Further, in letter of 10 April 2002, the Claimant reiterated its expectations of receiving delivery by the end of May 2002 (Cl. Ex. 5). These letters were followed by several telephone calls during the summer, and the Claimant finally wrote in letter of 15 August 2002 that it “will have to purchase the cocoa elsewhere” if it did not receive delivery soon (Cl. Ex. 7).

47. By virtue of Art. 8(2) CISG, statements and conduct made by a party are to be interpreted according to the understanding of a reasonable person of the same kind. By declaring its intention to disregard the contract if delivery was not made soon, it could reasonably be understood that the Claimant no longer would consider itself bound by the contract. The Claimant submits that its behaviour made it obvious to the Respondent that it no longer had any intention of honouring the contract. Instead, it was unambiguously conveyed to the Respondent that the contract would be avoided following failure to perform soon.

48. During the telephone conversation of 29 September 2002, the Claimant reiterated its concerns expressed in letter of 15 August 2002 (Procedural Order No. 2, q. 22). By that the Claimant made it clear to the Respondent that it was interested in delivery, but if the Respondent did not deliver, the Claimant would have to avoid the contract.

4.3. The Claimant was entitled to avoid the contract on 25 October 2002, even if its stocks sufficed until the end of November 2002

49. Despite the Claimant’s notice of the substitute transaction on 25 October 2002, the Respondent waited until 13 November 2002 to contact the Claimant regarding the remaining cocoa. The Respondent informed the Claimant that it would be able to deliver within the next
weeks (Cl. Ex. 10). This indicated that before the substitute transaction, the Respondent was not able to perform its obligation, but it was first able to do so several weeks after 13 November 2002.

50. Indeed, the embargo was not lifted until 12 November 2002, making it difficult for the Respondent to deliver the cocoa before the Claimant's stocks were empty. The Respondent had previously shown that in order to make the full arrangements to get the cocoa shipped, it would need as much as two weeks (11 days, cf. Cl. Ex. 6). By then, the Claimant would have had to cease the production, thereby exposing it to further losses and risk its relationship to its own sub-contractors (Procedural Order No. 2, q. 24). This would have caused the Claimant extensive losses for which it could hold the Respondent liable.

51. It cannot reasonably be expected of the Claimant to wait until the last day it had cocoa before making a substitute transaction. A prudent company would at an early stage make sure that it has sufficient cocoa necessary for an undisrupted continuance of production. For these reasons, the Tribunal is requested to find that the Claimant was entitled to make the substitute transaction on 24 October 2002, even though its supply of cocoa would have lasted until the end of November 2002 (Procedural Order No. 2, q. 24).

4.4. If the Tribunal finds that the contract was not avoided on 25 October 2002 the letter of 15 November 2002 constituted a proper notice of avoidance

52. Should the Tribunal find that the Claimant was not entitled to avoid the contract on 25 October 2002, the Claimant urges the Tribunal to find that the contract was properly and rightfully avoided on 15 November 2002. The letter of 15 November 2002 expressly stated that the Claimant considered “the referenced contract to be terminated”, which at the very least must fulfil the requirements under Art. 26 CISG (Cl. Ex. 11).

5. The Claimant is entitled to damages in the amount of USD 289,353.75

53. In letter of 15 August 2002, the Claimant requested the Respondent to notify it soon when it would be shipping the remaining cocoa (Cl. Ex. 7). If not, the Claimant would have to make a substitute transaction and hold the Respondent responsible for additional costs. Further, the Claimant brought the Respondent’s attention to the price increase, and stated that there were reasons to believe that prices would continue to rise (Cl. Ex. 7). On 25 October 2002, the Claimant informed the Respondent of its substitute transaction and requested the Respondent to reimburse it for the additional costs amounting to USD 289,353.75 (Cl. Ex. 8).
54. The following equation demonstrates the damages suffered by the Claimant:

The price for cocoa was calculated according to the Monthly Average Cocoa Prices (in US cents per pound) (Re. Ex. 3). The price per ton for November 2001 amounted to:

\[
\text{USD } 0.5628 \times 2204.6 = \text{USD 1,240.75 per ton}
\]

The contract called for the delivery of 400 tons of cocoa. The price amounted to:

\[
400 \text{ t} \times \text{USD/t 1,240.75} = \text{USD 496,300.00}
\]

300 tons remained undelivered, rendering it necessary for the Claimant to make a substitute transaction in October 2002. The difference between the contract price and the price of the substitute transaction amounted to:

\[
(\text{USD 1.0003} - 0.5628) \times 2204.6 \times 300 \text{ tons} = \text{USD 289,353.75}
\]

55. The basis for liability is stipulated in Art. 45(1)(b) CISG. The Claimant is entitled to compensation equal to its full loss as provided for in Art. 74 CISG, provided that the damages were foreseeable to the Respondent. In the event of a substitute transaction made by an aggrieved party, the full loss is calculated according to Art. 75 CISG. This provision entitles the aggrieved party to receive full recovery of the difference between the contract price and the price of the substitute transaction. The only requirement is that the substitute transaction is suitable to satisfy the aggrieved party’s expectations (Schlechtriem, p. 574).

5.1. The substitute transaction was foreseeable for the Respondent

56. Under Art. 74 CISG the Claimant is entitled to recovery of the full loss suffered, only limited to what the Respondent could have or ought to have foreseen at the time of contracting. The test formulated by the German Supreme Court to determine what is foreseeable is what a “reasonable, ideally typical obligator would expect to happen under the circumstances” (BGH, Germany, 24 October 1979). The Claimant is a producer of confectionary products and has a floating production and needs the cocoa in this production. The Respondent was well aware of this fact. Thus, it knew at the time of contracting that the Claimant would be forced to make a substitute transaction if it did not fulfil its obligations under the contract.

5.2. The Claimant was entitled to make the substitute transaction before the actual avoidance

57. In its letter of 25 October 2002, the Claimant summed up its claim against the Respondent (Cl. Ex. 8). The Claimant submits that its claim is covered by Art. 75 CISG.
Despite the fact that the wording of Art. 75 CISG indicates that a declaration of avoidance must be given before the making of a substitute transactions, case law has shown that this requirement is not absolute. In a decision rendered by OLG Hamburg, Germany, 28 February 1997, the court held that, “termination does not constitute a prerequisite for the application of Art. 75 CISG when termination is in any case possible and it is undoubtedly clear before the substitute transaction that the other party will not perform its obligation”. According to the cited ruling, in order for the Claimant to be able to make a substitute transaction prior to avoidance, it must fulfil two requirements, namely a) termination was possible and b) the Respondent clearly would not have performed its obligations before the substitute transaction.

Regarding the first condition, the Claimant made the substitute transaction on 24 October 2002 (Cl. Ex. 9). By 24 October 2002, the Claimant’s expectation to the Respondent’s ability to perform the contract was substantially deprived to the extent that the breach committed by the Respondent was fundamental, cf. Art. 25 CISG. Hence, on 24 October 2002, it was possible for the Claimant to avoid the contract pursuant to Art. 49(1)(a) CISG.

As regards the second condition, the fact that the embargo was still in force at the time when the Claimant conducted the cover purchase made it impossible for the Respondent to deliver at that time. Further, the Respondent had exceeded the delivery period stipulated in the contract by approximately 5 months. From May and until the substitute transaction was made the, Respondent only contacted the Claimant twice. On 7 May 2002 was the last time the Respondent contacted the Claimant stating that it was “looking forward to shipping you the remaining 300 tons in the very near future”. More than 4½ months after that information the Respondent stated that: “there was no indication as yet as to when the export ban would be rescinded” (Cl. Ex. 6 and Procedural Order No. 2, q. 22). The Claimant, on the other hand, had made numerous telephone calls and sent several letters to the Respondent requesting delivery. Letters in which the Claimant stressed its growing need for the cocoa (Cl. Statement of Case, para. 8-11). On 24 October 2002, the Claimant was put in such a position as to reasonably assume that the Respondent would not deliver and the Claimant was entitled to act accordingly.

The fact that the Claimant declared the contract avoided a day after it had made the substitute transaction should not bar the Claimant from seeking recovery (Cl. Ex. 7). The substitute transaction was made on 24 October 2002 (Cl. Ex. 8). Had the Claimant avoided the contract on 23 October 2002, it would not have materially changed neither the Claimant’s right to
avoid nor the amount of damages claimed. Regardless of whether the declaration of avoidance was given prior to or subsequent to the substitute transaction, the Respondent's breach of contract was fundamental and the amount of damages was the same (further clarified below under section 5.3.). In the case of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 16 March 1995, it was held that the buyer was entitled to recover the difference between the contract price and the cover purchase price, even though the cover purchase was conducted before the actual avoidance.

62. In its letter of 13 November 2002, the Respondent stated that the Claimant should have known about the rumours regarding the EGCMO planning to release additional cocoa (Cl. Ex. 10). The Claimant rejects that rumours in Equatoriana should bar the Claimant from avoiding the contract and making the substitute transaction. A small purchaser, such as the Claimant, would not necessarily have heard of the rumours (Procedural Order No. 2, q. 29). Even if it is rendered that the Claimant was aware of the rumours, it should not reasonably be expected to rely on such rumours, especially seen in the light of the passive silence of the Respondent and the sequences of events during the previous 8 months. At the end of the day, proper and reasonable business decisions are not based on speculations and rumours, but rather on properly communicated facts.

5.2.1. The substitute transaction was made within reasonable time and in a reasonable manner

63. In order for a substitute transaction to be recoverable it must be made within reasonable time and in a reasonable manner, cf. Art. 75 CISG. Reasonable time is not relevant in the case at hand as the Claimant made the substitute transaction prior to the declaration of avoidance contained in letter of 25 October 2002 (Cl. Ex. 8). The time span between the substitute transaction made on 24 October 2002 and the declaration of avoidance made by letter of 25 October 2002 was, nevertheless, reasonable since the Respondent was immediately notified of the cover purchase.

64. When the Claimant made the substitute transaction on 24 October 2002, it purchased the remaining 300 tons of cocoa at a price of USD 2,205.26 per ton (at 100.03 cents per pound) (Re. Statement of Case, para. 12). This price was the current market price according to the Monthly Average Cocoa Prices for October 2002. In addition, it was doubtful that the Claimant could have purchased the cocoa at a lower price (Re. Ex. 3 and Procedural Order No. 2, q. 25). The substitute transaction made by the Claimant consisted of cocoa of the same
grade as cocoa from Equatoriana (Procedural Order No. 2, q. 26). Therefore, the substitute transaction was performed in a reasonable manner. This is supported by the decision rendered in ICC Case No. 8128, Basel, 1995, in which it was held, “...that a transaction is reasonable if...the goods bought in replacement are of the same kind and quality as the undelivered ones”.

5.3. The Claimant acted in accordance with the obligation to mitigate its losses pursuant to Art. 77 CISG

65. The Claimant made the substitute transaction on 24 October 2002 due to its threateningly low stocks of cocoa (Cl. Ex. 7). If the Claimant’s stocks were to run dry of cocoa, it would be unable to produce and deliver the contracted confectionaries. Ultimately, the Claimant would have been in breach of contract towards its costumers and possibly also liable towards them. This would have led to even greater damages for which the Claimant could hold the Respondent liable. Therefore, in order to prevent this from happening, the Claimant was forced to make a substitute transaction and thus mitigate its losses pursuant to Art. 77 CISG.

66. As the price of cocoa was constantly rising subsequent to the conclusion of the contract, the Claimant had no reason to believe, nor could it reasonably have foreseen, that the price would fall after the substitute transaction. Further, the Claimant knew nothing of the rumours that the embargo would end (Procedural Order No. 2, q. 29). It acted out of carefulness, when performing the substitute transaction on 24 October 2002. As mentioned in its letter of 15 August 2002, the Claimant feared that prices would rise, so when making the substitute transaction on 24 October 2002 it relied on taking the measures necessary to mitigate losses (Cl. Ex. 7). Since the price of cocoa in the Monthly Average Cocoa Prices is fixed on a monthly basis, determining the damages on 24 or on 25 October 2002 will have no relevance (Procedural Order No. 2, q. 25 and Re. Ex. 3).

67. The Claimant rightfully avoided the cocoa contract on 25 October 2002, and therefore its recovery should be calculated on that day. Hence, the Claimant should be entitled to receive USD 289,353.75 from the Respondent, being the difference between the contract price and the price of the substitute transaction.

5.4. The Claimant submits in the alternative that its recovery should be calculated as of 15 November 2002

68. Should the Tribunal find that the contract was not avoided until 15 November 2002 and the substitute transaction was not made in a reasonable manner, the Claimant urges the Tribunal
to calculate damages in accordance with Art. 76 CISG pursuant to which provision the Claimant is entitled to damages amounting to the current price of the goods at the time when the contract was avoided.

69. The following equation demonstrates the recoverable price to be granted to the Claimant:

The difference between the contract price and a substitute transaction made on 15 November 2002 is to be calculated according to the Monthly Average Cocoa Prices (Re. Ex. 3). As 300 tons of cocoa remained undelivered, the Claimant’s damages would amount to:

\[
(USD \ 0.8229 - 0.5628) \times 2204.6 \times 300 = USD \ 172,024.99
\]

6. There was no impediment under Art. 79 CISG since any category C cocoa could have fulfilled the contract

70. On 19 November 2001, the parties entered into a contract for the sale of 400 tons of cocoa (Cl. Exs. 1 and 2). The parties agreed to the delivery of cocoa of standard grade and count to be delivered from one of the delivery points of the country (Cl. Ex. 2). In February 2002, a storm raged in Equatoriana and as a consequence the EGCMO imposed an embargo for the release of cocoa for export. The Respondent did not try to get an exemption from the embargo or petition against it (Procedural Order No. 2, q. 12). The Respondent informed the Claimant that it did not know when it would be able to deliver the agreed cocoa (Cl Ex. 3). In reply, the Claimant expressed that the source of the cocoa was irrelevant (Cl. Ex. 4).

71. Art. 79 CISG sets the requirements as to when a party can be exempted from liability for failure to perform its contractual obligations. In accordance with this article, the Respondent must prove that there was an impediment to perform the contract.

72. The Claimant’s assertion is that there was not an impediment, since any category C cocoa could have fulfilled the contract. It was only cocoa from Equatoriana, which was affected by the storm and the embargo. As category C cocoa was available in other countries, the Respondent could easily have delivered.

6.1. The contract called for any category C cocoa

73. In interpreting statements regard must be had to a party’s subjective intent, where the other party was aware of that intent (Marble Ceramic Center v. Ceramica Nuova, U.S Circuit Court of Appeals, 29 June 1998). Accordingly, in determining whether the contract called for
Equatoriana cocoa specifically or whether any category C cocoa could have fulfilled the contract regard must be had to the intent of the parties, cf. Art. 8(1) CISG.

74. In the contract, the parties agreed that the cocoa should be of “standard grade and count” (Cl. Ex. 2). This was the only reference to the cocoa in the contract. The description did not state that the cocoa should be from Equatoriana. On the contrary, it was merely a generic description of the quality of the cocoa. Since the origin was not included in the description of the cocoa, it could not logically be understood as cocoa from Equatoriana only. Hence, it can reasonably be derived that the parties intended that any cocoa of “standard grade and count” could have fulfilled the contract.

75. When interpreting the contract regard must be had to Art. 9(2) CISG. In accordance with this provision parties impliedly agreed to any international trade usage widely known. The New York Board of Trade (hereinafter "NYBOT") and Euronext LIFFE (hereinafter "LIFFE") govern international trade of, i.a. cocoa. Therefore, the reference to “standard grade and count” must be seen in connection with the rules of NYBOT and LIFFE. Under the NYBOT and LIFFE rules, cocoa is divided into categories according to their standard. Each cocoa producing country is placed in one of these categories (Re. Exs. 1 and 2). Thus, it is the standard of the cocoa and not the country of origin that is decisive as to which category each country are divided into. Consequently, a reference to “standard grade and count” must be understood as any cocoa from a specific category and not necessarily from Equatoriana (Re. Exs. 2 and 3).

76. The contract price (USD 1,240.75 per ton) was the average market price for category C cocoa as listed in the table from the International Cocoa Organisation (Re. Ex. 3). Hence, based on the contract price alone, any category C cocoa could have fulfilled the contract.

77. The only reference in the contract to Equatoriana was in the Respondent’s name: “Equatoriana Commodities Exporters S.A.”. The Claimant is aware of the fact that the Respondent’s business on occasion involved the sale of commodities produced in other countries (Re. Statement of Case, para. 2). Thus, the name “Equatoriana Commodities Exporters S.A.” does not in itself indicate any limitation as to the geographical scope of the Respondent’s business. Rather, it merely illustrates that the entity is seated in Equatoriana.

78. The delivery point is not in itself a decisive factor as to the source of the cocoa. The contract specified that delivery was to be made “at one of the customary delivery points for the
country” (Cl. Ex. 2). The contract was the Respondent’s standard form, adapted from the standard form found in the NYBOT Cocoa Rules 9.03 (Procedural Order No. 2 q. 15). Accordingly, when resolving how “the country” should be understood, regard must be had to these rules. The NYBOT form refers to three specific delivery points in the New York region. When formulating the contract, the Respondent deviated from these specific delivery points and instead it used a neutral term as “delivery points for the country”.

79. Regard must be had to the contra preferentem principle under which the contract is interpreted against the drafter if doubts are raised as to the understanding of the contract. This principle supplements Art. 8 CISG and is an internationally recognised principle for contract interpretation (Lookofsky, USA, pp. 41 and 148). If the Respondent wanted Equatoriana to be the only delivery point, it would have been more sensible to write the name in the clause. However, it chose not to do so and that can reasonably be understood as an intention to keep its options open. A reasonable person of the same kind as the Claimant would not interpret “the country” as designating Equatoriana to be the sole delivery point, cf. Art. 8 (2) CISG.

80. Even if “the country” is interpreted as encompassing Equatoriana, it still did not mean that the cocoa had to be from Equatoriana. The NYBOT Cocoa Rules 9.03 form refers to three delivery points within the New York region. Nevertheless, cocoa delivered under the NYBOT Rules is cocoa from all over the world. Thus, even if the cocoa should be delivered in Equatoriana, this is no indication as to the origin of the cocoa.

6.2. The correspondence between the parties and their conduct did not indicate that the cocoa had to be from Equatoriana

81. When interpreting the contract, regard must be had to the parties’ intentions, cf. Art. 8(1) CISG. In determining a party’s intent, any subsequent conduct after the conclusion of the contract is to be taken into consideration, cf. Art. 8(3) CISG and C. v. W., Bezirgericht St. Gallen, Switzerland, 3 July 1997.

82. In its letter of 5 March 2002, the Claimant expressed that the “contract did not provide specifically for Equatoriana cocoa” and that the “source was completely irrelevant” (Cl. Ex. 4). In its letter of 15 August 2002, the Claimant repeated: “Our contract was for cocoa, not for Equatoriana cocoa” (Cl. Ex. 7). These subsequent statements support that the Claimant’s intention at all times was that any category C cocoa was contractual. The fact that the Respondent did not object to any of these statements can logically be taken as an indication that the Respondent was originally of the same understanding.
6.3. The parties had not established a practice between them requiring that the cocoa should be from Equatoriana

The parties are bound by any practice established between them, cf. Art. 9(1) CISG. When considering if a practice has been established, regard must be had to the length of the relationship, the circumstances under which they have done business, the number of times the parties have contracted, and the time laps between the different contracts.

In *AG Duisburg, Germany, 13 April 2000*, it was held that in order to establish a practice within the meaning of Art. 9(1) CISG it must be required that a regular conduct is observed between the parties. Similar *Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997*. A lengthy business relationship must be established in order to found a practice between the parties (Schlechtriem, p. 78). Further, “practices are established by a course of conduct that creates an expectation that this conduct will be continued” (Honnold, p. 126). It must be determined whether the Claimant had given the Respondent the expectation that only Equatoriana cocoa was contractual. The parties had done business together on occasions (Cl. Statement of Case, para. 3). On these occasions the Respondent chose to deliver category C cocoa from Equatoriana out of several other possible sources. Since the Respondent delivered contractual cocoa on these occasions, the Claimant was obligated to take delivery pursuant to Art. 53 CISG. By doing so, the Claimant did not give rise to the perception that only Equatoriana cocoa would be contractual. The Claimant submits that the continuity of a practice had never been established, as the business relationship between the parties did not qualify as a lengthy relationship.

6.4. There were no surrounding circumstances implying that the cocoa should be from Equatoriana

The Claimant had purchased cocoa from other suppliers. It was also the Respondent who contacted the Claimant regarding the 400 tons of cocoa. This strongly indicates that the source of the cocoa was of no relevance to the Claimant (Cl. Ex. 4). Further, when buying cocoa of inferior quality as category C cocoa, the origin is not of similar importance as when purchasing for instance champagne.

The Respondent wrote the terms of the contract. If it had been crucial to the Respondent that the cocoa should be from Equatoriana, it could have made it an explicit condition in the contract (Cl. Ex. 2). However, it chose not to do so and according to the contra proferentem principle this uncertainty should be interpreted against the Respondent.
6.5. Since category C cocoa was available, the Respondent could have delivered

87. Category C cocoa was available in other countries (Re. Ex. 1 and Procedural Order No. 2, q. 25). Therefore, the Respondent could just have provided the Claimant with cocoa from these countries. Exemption from liability for failure to deliver shall be confined to situations where the impediment prevents performance (Honnold §432.1). Art. 79 CISG does not cover frustration impediments since it does not obstruct performance (Bund p.387). Further, the conditions that must be fulfilled in trying to overcome the impediments are strict cf. OLG Hamburg, Germany, 4 July 1997, where it was held that even though heavy rainfalls had severely reduced the tomato harvest in France, the harvest was not destroyed altogether, and as such the impediment was surmountable. See also Bulgarian Chamber of Commerce and Industry, No. 11/1996, 12 February 1998. Thus, it was not impossible for the Respondent to deliver and therefore it is not exempt from liability under Art. 79 CISG.

7. The Respondent is not relieved from liability under Art. 79 CISG

88. The risk for not being able to meet contractual obligations lies with the promisor. If an obstacle for delivery occurs, the seller is still liable. The possibility of exception under Art. 79 CISG does not change the allocation of the contractual risk (Vine Wax, BGH, Germany, 24 March 1999). Therefore, it is only if the requirements under Art. 79(1) CISG are met that a party can be exempt from liability. It is a strict and close to objective standard for excusing the promisor (Schlechtriem, p. 603). Also Šarčević & Volken, p. 32: “generally speaking, the decisions show that both national courts and arbitral tribunal adopt a rather restrictive attitude towards permitting any exemptions under Article 79”, with reference to i.a.: Nuova Fucinati v. Fondmetall, Tribunale Civile de Monza, Italy, 14 January 1993, and ICC Case No. 6281, 1989.

89. An exemption under Art. 79 CISG is only granted if the promisor proves: “that the failure was due to an unpredictable and inevitable impediment, which lies outside his sphere of control, or due to an overwhelming obstacle, which is not the case in situations within his sphere of control” (FCF v. Adriafil, Bundesgericht, Switzerland, 15 September 2000).

90. The Claimant submits that the Respondent shall not be exempt from liability under Art. 79 CISG. The Respondent could reasonably have been expected to take weather conditions such as storms into account at the time of contracting and in addition, it did not do everything it could to overcome the impediment.
7.1. Weather conditions were something the Respondent could reasonably have been expected to take into account

91. It is a well-known fact that the weather has a great impact on the harvest of agricultural products. It might destroy the crops under a drought or due to heavy rain. Even if heavy storms are not frequent, they are still a commonly known weather condition (Procedural Order No. 2, q. 8). Since the Respondent has been dealing with cocoa for over 40 years, it cannot claim to be unaware of these factors. By entering into a contract for the sale of cocoa, the Respondent accepted the risk of not being able to meet its contractual obligations due to a failure of the crop because of e.g. a storm. Since the consequences of the storm were part of the Respondent’s contractual risk, it cannot qualify as an exemption under Art. 79 CISG. This is supported in the award rendered by Schiedsgericht der Handelskammer Hamburg, Germany, Arbitral Award, 21 March 1996, where the court held that if an impediment is within the promisor’s sphere of risk it cannot rely on Art. 79 CISG.

92. It is a fact that storms have occurred in Equatoriana before the storm in February 2002. The last storm that caused damage to cocoa trees raged in 1980 (Procedural Order No. 2, q. 8). As the Respondent has been in business since 1961, it has experienced the storm in 1980 causing damage to the crop. Therefore, it was not an unrealistic possibility for the Respondent that another storm could occur. Although damages in 1980 were not as severe as the ones suffered from the storm in February 2002 (Procedural Order No. 2, q. 8) it still caused damage to the crop. Thus, it was not unpredictable that a storm could cause losses.

93. The fact that the impediment lies with the Respondent’s suppliers cannot surmount to exemption, as the sphere of risk is extended to cover also the supplier, cf. the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 16 March 1995, and Schiedsgericht der Handelskammer Hamburg, Germany, Arbitral Award, 21 March 1996. In these cases it was held that problems that were within the supplier's sphere of risk did not constitute an exemption under Art. 79 CISG.

94. Despite the risks associated with the production of cocoa, the Respondent chose to enter into this business and thereby accepted that delivery problems might occur. If the Respondent could not bear the risk, or did not want to, it should have contractually limited it or excluded it (Schlechtriem in the commentary to the case of Vine Wax, BGH, Germany, 24 March 1999, section 1.d, above para. 86). Any exclusion would be to the detriment of the buyer and thus make the contract less valuable. Consequently, it had commercial value not to make any
exclusion of risks. The Respondent must take the consequence of presenting the contract as it did without any hardship clause. It is not unusual to exclude certain risks by incorporating a hardship or force majeure clause in the contract. Something, which has also been recommended when entering into international commercial transactions (Bund, p. 10, Bianca & Bonell, p. 576 and similarly Lookofsky USA, p. 128).

7.1.1. The embargo was a foreseeable consequence of the storm

95. The Claimant urges the Tribunal to find that the Respondent could reasonably have foreseen the embargo, since the embargo was a natural consequence of the storm.

96. An embargo is not an unprecedented act from a government when a country suffers a calamity. Impediments such as embargoes have occurred in the past, and can be expected to occur in the future (Secretariat Commentary, para. 5, and Lookofsky, Europe, p. 151). Thus, embargoes can be foreseen in certain situations and are not necessarily eligible as exemptions under Art. 79 CISG. The Respondent described the damage to the crop in a letter to the Claimant in February 2002 (Cl. Ex. 3). In the letter it was mentioned that the storm had “caused extensive damages to the crop that was ready for harvesting”. Accordingly, at the time when the embargo was imposed, it was unclear what the losses and consequences of the storm would be. When a country experiences such damage to an export product, it is not unforeseeable that a government takes steps in order to get the state of affairs under control. Rather, it is a logical consequence that the Respondent could reasonably have taken into account.

97. Further, when determining whether the embargo was foreseeable, regard should also be had to the way in which the business was organised in Equatoriana. The government enforced a strict control over the cocoa market by keeping a monopoly. Decisions regarding this market were made by the EGCMO, including the embargo (Cl. Ex. 3). Thus, the Respondent should have been aware of the risks of an embargo considering the strict government control. This view is backed in the Norwegian Supreme Court’s decision in Bjergværksdommen, NRt 1922.31H, where an outbreak of war and a following government order made an international delivery impossible. This did not constitute an insurmountable obstacle for the seller, but was based on the structure of the seller's company and the government rule. Something which was within their sphere of risk and the seller was as such liable for damages (this decision was rendered prior to the existence of the CISG under the Norwegian National Sales of Goods Act of 1906 which holds a provision similar to Art. 79 CISG).
98. The Claimant recognises that a state intervention such as an embargo can qualify as an impediment under certain circumstances. However, in a situation like the present where the impediment is a conjunction of a number of events, namely the storm and the embargo, it is sufficient that just one of the events was foreseeable (Schlechtriem, p. 617). It is reasonable to assume that if there had been no storm, there had been no embargo, thus there is a conjunction of events. The storm is a *conditio sine qua non* for the embargo and, as argued under paras. 91-93, the storm was foreseeable. Thus, the Respondent cannot claim that the embargo in itself was unforeseeable as the embargo was imposed due to a foreseeable event.

### 7.2. The Respondent failed to do everything it could to overcome the embargo

99. To be exempted from liability under Art. 79 CISG, the Respondent must prove that the impediment was not within its sphere of control. Although a state intervention, i.e. an embargo, is generally outside a party’s control, it is a condition for relief that the promisor took the steps required by the contract or by good faith in order to avoid or overcome the effects of the state’s intervention (Schlechtriem, p. 611). The promisor must make an effort to show its desire to perform. The Claimant urges the Tribunal to find that though it was not certain that the Respondent could get an exemption from the embargo, an effort in this respect must be required. As the Respondent did not in good faith try to overcome the impediment, it should accordingly not be exempted from liability.

### PART II: Procedural Issues

#### 8. The Swiss Rules in general and the UNCITRAL Model Law apply

100. The arbitration clause in the cocoa contract designated the Arbitration Rules of the Chamber of Commerce and Industry of Geneva (hereinafter the "Geneva Rules") to govern the arbitral proceedings (Cl. Ex. 2). The Claimant does not challenge the application of the Swiss Rules of International Arbitration (hereinafter the "Swiss Rules") in general as the replacement of the Geneva Rules, but infra para. 102 et seq., the Claimant disputes the application of Art. 21(5) Swiss Rules.

101. The parties chose Vindobona, Danubia, as the seat of the arbitration (Cl. Ex. 2). Danubia has adopted the Model Law on International Commercial Arbitration as adopted by UNCITRAL (hereinafter "Model Law") without amendments (Cl. Statement of Case, para. 15). The cocoa contract is a commercial transaction between two parties in different countries and, consequently, the Model Law applies, cf. Model Law Arts. 1(1) and 1(3). As the lex arbitri,
the Model Law supplements the institutional arbitration rules chosen by the parties (Redfern & Hunter, p. 98). The Model Law contains no mandatory provisions relevant to this case.

9. **Art. 21 (5) Swiss Rules is not applicable under the current arbitration**

102. The cocoa contract contained an arbitration clause which stated that any disputes should be decided in accordance with the Geneva Rules (Cl. Ex. 2). These rules were replaced by the Swiss Rules in the field of international arbitration in January 2004 (Letter of 6 July 2004 from Swiss Chambers’ Arbitration (hereinafter "SCA") to the Claimant). The Swiss Rules contain the new provision Art. 21(5), which provides for jurisdiction to hear set-off defences.

103. In November 2003, the Claimant bought 2,500 metric tons of sugar from the Respondent (Re. Ex. 4). The contract (hereinafter "sugar contract") contained an arbitration clause which stipulated that any dispute should be decided in accordance with the Rules of Arbitration of the Oceania Commodity Association (hereinafter the "Oceania Rules").

104. A dispute between the Claimant and the Respondent concerning the sugar contract has arisen. The Respondent claims that it is entitled to receive payment for the sugar delivered to the Claimant. The Claimant, however, refuses to pay on the grounds that the sugar delivered did not meet the requirements of the contract as it was unfit for human consumption (Cl. Answer to Counter-Claim, para. 7). The Respondent now wants to bring its claim for payment according to the sugar contract in this current arbitration before the Arbitral Tribunal (Re. Letter of 10 August 2004 to the Chamber of Commerce and Industry of Geneva).

105. The Claimant asserts that Art. 21(5) Swiss Rules does not apply in this arbitration because the rule did not exist when the parties contracted, and the Claimant could not have foreseen the adoption of the rule. Furthermore, the rule is an unusual rule and does not reflect a recognised principle in international arbitration. The Claimant therefore objected to the application of Art. 21(5) Swiss Rules as soon as it became aware that the Respondent would use it to include its claim for payment under the sugar contract. The Claimant’s objection to the application of Art. 21(5) Swiss Rules will, however, not bar the Respondent from having its claim adjudicated by another tribunal.

9.1. **Art. 21(5) Swiss Rules did not exist at the time of contracting and the adoption of the rule could not have been foreseen**

106. The Claimant agrees that the Swiss Rules in general apply to the present arbitration. It is a widely accepted principle that the applicable procedural rules in arbitration are the rules in
force at the commencement of the arbitration, regardless of whether these differ from those in force when the arbitration agreement was made. This principle is, inter alia, expressed in Art. 6(1) of the Arbitration Rules of the International Chamber of Commerce (hereinafter the "ICC Rules") and it is also found in case law, cf. China Agribusiness v. Balli Trading, QBD, United Kingdom, 20 January 1997. However, the Claimant argues that there are exemptions to the principle when amendments to the procedural rules substantially change what the parties agreed on and the amendments were not foreseeable. The reasoning behind the Claimant’s assertion is that the parties chose the arbitral rules when they formed the contract. Therefore, their expectations to the arbitration are established already at the time of contracting. Party autonomy is a basic pillar in international arbitration and thus, the parties should not be forced to accept substantial and unexpected amendments that would hollow this principle.

107. An arbitral tribunal can only settle disputes that the parties have agreed should be subject to its jurisdiction (Redfern & Hunter, p. 295). Accordingly, the arbitration clause in the cocoa contract sets the limits of the jurisdiction of the Tribunal (Cl. Ex. 2).

108. The cocoa contract was concluded more than 2 years before the new Swiss Rules entered into force. None of the parties could reasonably have been aware of the revision of the Geneva Rules at the time of the conclusion of the contract. Furthermore, it cannot be assumed that any of the parties could foresee that an amendment would include a provision with the characteristics and consequences of Art. 21(5) Swiss Rules. Thus, applying Art. 21(5) Swiss Rules would oppose the original intention of the parties.

9.1.1. Art. 21(5) Swiss Rules does not reflect a recognised principle of international commercial arbitration and is therefore an unusual rule

109. When the parties formed the cocoa contract in November 2001 they agreed on the Geneva Rules (Cl. Ex. 2). The Geneva Rules do not have any special provision regarding a tribunal’s jurisdiction to hear counterclaims or set-off defences outside the scope of the arbitration agreement. Since the arbitration clause in the sugar contract called for the Oceania Rules, the Geneva Rules could not grant jurisdiction to any claims regarding the sugar contract.

110. Art. 21 Swiss Rules resembles Art. 21 in the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter "UNCITRAL Arbitration Rules"). However, the UNCITRAL Arbitration Rules do not contain a provision similar to Art. 21(5) Swiss Rules. As regards set-off and counterclaims, Art. 19(3) UNCITRAL Arbitration Rules states that tribunals only have jurisdiction to adjudicate counterclaims arising out of the same
contract (see also Weigand, p. 346). Thus, a tribunal under the UNCITRAL Arbitration Rules could not hear the Respondent’s counterclaim.

111. Under the ICC Rules there are the same requirements, i.e. a tribunal only has jurisdiction to hear a counterclaim if the counterclaim is covered by the arbitration clause (Derains & Schwartz, p. 72). A provision similar to Art. 21(5) Swiss Rules is neither found in the arbitration rules of other well-established institutions such as the Rules of the London Court of International Arbitration and the International Arbitration Rules of the American Arbitration Association.

112. The comparison of Art. 21(5) Swiss Rules to the Geneva Rules, the UNCITRAL Arbitration Rules and some institutional arbitration rules illustrates that Art. 21(5) Swiss Rules is an unusual rule in international commercial arbitration.

113. Regard must especially be had to the difference between the Swiss Rules and the UNCITRAL Arbitration Rules. The UNCITRAL Arbitration Rules were drafted “after extensive consultation with arbitral institutions and centres of international commercial arbitration” (Resolution 31/98 Adopted by the general assembly on 15 December 1976). Therefore, the UNCITRAL Arbitration Rules reflect established principles of international commercial arbitration. In addition, in 1999 during an UNCITRAL meeting it was discussed whether a provision similar to Art. 21(5) Swiss Rules should be included in the UNCITRAL Arbitration Rules. The notion was rejected as it was seen as a sound rule that an arbitral body needed a specific arbitration clause in order to have jurisdiction (Sorieul, para. B 7).

114. This unusual rule governs an important issue, namely whether the Tribunal has competence over a certain matter. Art. 21(5) Swiss Rules broadens the jurisdiction of the Tribunal, allowing the Tribunal to hear set-off defences even when the defence is governed by another arbitration agreement. Thus, the new Swiss Rules have materially widened the mandate given to the Tribunal by the parties in the arbitration clause.

115. As Art. 21(5) Swiss Rules constitutes a substantial amendment, as Art. 21(5) Swiss Rules is not a recognised principle in international commercial arbitration, and as the parties did not and could not expect the amendment at the time of contracting, the Claimant urges the Tribunal to reject the application of Art. 21(5) Swiss Rules in this arbitration.
9.2. The Claimant raised its plea to the Tribunal's jurisdiction under Art. 21(5) Swiss Rules in time

116. The Respondent raised its counterclaim in its answer and counterclaim enclosed in the letter of 10 August 2004. In its letter of 31 August 2004, the Claimant challenged the Tribunal’s jurisdiction to hear the counterclaim.

117. The Swiss Rules do not fix a time limit for challenges to jurisdiction to hear a counterclaim. Art. 21(3) Swiss Rules stipulates that a plea to the Tribunal’s jurisdiction to hear a counterclaim should be raised in the reply to the counterclaim. The Claimant complies with this requirement.

118. Even though the SCA informed the Claimant about the new Swiss Rules on 6 July 2004, the Claimant has not accepted the application of the Swiss Rules, including its Art. 21(5). There cannot be a duty to conduct a thorough examination of every single rule upon receipt of the new set of rules. Such a duty would result in unnecessary legal expenses. Furthermore, the Claimant could not anticipate that the Respondent would raise a claim under the sugar contract, as the parties had a separate arbitration clause in the sugar contract. Thus, the Claimant objected to the application of Art. 21(5) Swiss Rules as soon as possible after it became aware of the Respondent having raised a claim based on this rule.

9.3. The Claimant is acting in good faith and is not rejecting the Respondent the right to have its claim adjudicated

119. The Claimant’s objection to the Tribunal’s jurisdiction is raised in good faith and is not a dilatory tactic.

120. The Claimant is of course willing to participate in arbitration under the Oceania Rules in order to solve the sugar dispute. The Claimant has urged the Respondent to initiate arbitration under the Oceania Rules should the Respondent wish to have the dispute resolved in arbitration (Cl. Answer to Counter-Claim, para. 5). Thus, even though the Claimant considers the Respondent’s claim under the sugar contract without legal basis, the Claimant is not denying the Respondent its right to have the dispute solved by another tribunal.

121. There are no signs indicating that the Claimant is experiencing financial difficulties. Consequently, even in the unlikely event that the Respondent’s claim is successful, the Claimant would be able to comply with the award. As Mediterraneo is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
(hereinafter the “New York Convention”), the Respondent would also be able to enforce a successful award in Mediterraneo.

10. The parties’ choice of the rules of the Oceania Commodity Association should be respected

122. Should the Tribunal find that Art. 21(5) Swiss Rules applies in the present arbitration, the Claimant maintains that the Tribunal should reject the Respondent’s counterclaim.

123. Art. 21(5) Swiss Rules governs the Tribunal’s possibility to hear set-off defences even when the said defence is governed by a different arbitration clause. The provision grants the Tribunal the power to determine which set-off defences it considers itself competent to hear and which it will deny. It does not mandate the Tribunal to hear every possible set-off defence raised by the Respondent.

124. The Claimant urges the Tribunal to practice its discretionary power to dismiss the Respondent’s counterclaim. Firstly, because the parties intended Oceania Commodity Association to adjudicate disputes concerning the sugar contract. Secondly, because the Oceania Commodity Association is specialised in commodity arbitration. Thirdly, because the execution of the arbitral proceedings in Oceania involves numerous advantages.

10.1. The procedural economic aspects of Art. 21(5) Swiss Rules should not prevail over the parties’ express agreement to arbitrate under the Oceania Rules

125. The agreement to submit disputes arising out of the sugar contract under the Oceania Rules is valid. The arbitration clause expressly states the choice of institution, the number of arbitrators, the seat of the arbitration and the choice of language (Re. Ex. 4).

126. Whenever the parties traded sugar they used the same arbitration clause, and when they traded cocoa they used another arbitration clause (Procedural Order No. 2, q. 6). The fact that the parties use different arbitration clauses when trading sugar and cocoa indicates that the parties made an intentional choice when they chose Oceania Commodity Association as the arbitral institution and the Oceania Rules to govern disputes concerning the sugar contract.

127. Furthermore, the US Supreme Court has emphasised the importance of the parties' agreement to a specific forum for dispute resolution in *M/S Bremen v. Zapata, US Supreme Court, 12 June 1972*, as: "it would be unrealistic to think that the parties did not conduct their
negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations”.

128. Thus, the parties have a valid arbitration agreement reflecting their intentions. If the Tribunal hears the Respondent’s counterclaim, it would challenge one of the central elements, perhaps the most central element of international commercial arbitration, namely the principle of party autonomy (Redfern & Hunter pp. 295 and 304). The principle is inter alia reflected in the Model Law where the parties can choose the procedural rules (Art. 19), the place of arbitration (Art. 20), the language of the arbitration (Art. 22) etc. and the principle is thus recognised as a general principle. If the Tribunal hears the Respondent’s counterclaim, it ignores the intentional choice of the parties.

129. Admitting the counterclaim may result in a faster determination of the sugar dispute but it will certainly not speed up the process of determining the Claimant’s claim. In the case at hand the claims arise out of contracts that deal with different commodities. Furthermore, the points of delivery are in different countries and the disputes concern entirely different issues. The only connection is that the parties are the same. Therefore, the proceedings would be prolonged if the Tribunal also heard the sugar dispute.

130. Furthermore, the parties have agreed to have the dispute adjudicated under the expedited procedure, cf. Art. 42 Swiss Rules. Under the expedited procedure an award shall be made within six months, cf. Art. 42(1)(c) Swiss Rules. Hearing the counterclaim will disregard the Claimant’s interest in obtaining an enforceable award about the cocoa dispute as quickly as possible. The Claimant has already waited more than two years and is reasonably entitled to have its case heard without further delay.

131. In conclusion, the parties have chosen that any disputes concerning the sugar contract should be adjudicated by a tribunal in accordance with the Oceania Rules. The Claimant urges the Tribunal to respect this choice.

10.2. Oceania Commodity Association is specialised in commodity arbitration, thus it is essential to the Claimant to have the dispute concerning the sugar contract adjudicated in Oceania

132. Oceania Commodity Association is specialised in commodity arbitrations and the Claimant considered this special competence when the parties drafted the contract (Cl. Answer to Counter-Claim, para. 2). Furthermore, it is very common to have specialised arbitration
facilities when trading in commodities. Some commodity exchanges even require the use of the associated arbitration facility, e.g. the New York Board of Trade (Procedural Order No. 2, para. 6). The Claimant urges the Tribunal not to hear the Respondent’s counterclaim and instead let an arbitral panel appointed in accordance with the Oceania Rules settle the dispute.

133. In the sugar dispute, an arbitral panel will have to decide on questions of conformity of the goods. The evaluation of such questions - which are more a matter of fact than of law - requires great familiarity with commodities and especially the quality of sugar. Therefore, it is important for the Claimant to have the sugar dispute solved by specialised arbitrators appointed in accordance with the Oceania Rules. The cocoa contract is also a commodity transaction, yet the issues in dispute are not connected to the quality of the commodity. On the contrary, the Tribunal has to decide on the interpretation of the contract, avoidance, damages, exemption under Art. 79 CISG, etc. These are issues related more to law than to facts.

134. The Claimant’s request to let a tribunal appointed in accordance with the Oceania Rules settle the sugar dispute should not be seen as an indication of mistrust towards the Tribunal. On the contrary, the Claimant has full confidence in the Tribunal’s expertise to settle the disputes concerning the cocoa contract, but the Claimant believes that a tribunal in Oceania would be better to solve the sugar dispute.

10.3. It would be reasonable to have the arbitral proceedings in Oceania, as all the evidence and witnesses are located in Oceania

135. The main dispute under the sugar contract is whether the Respondent or the Claimant bore the risk for the contamination of the sugar (Re. Statement of Case, para. 15 and Cl. Answer to Counter-Claim, para. 7). The sugar was delivered by Oceania Sugar Producers and loaded on a vessel in Port Hope, Oceania (Re. Ex. 4). The fact that the point of delivery was in Port Hope was one of the reasons why the parties chose Port Hope as the seat of arbitration (Cl. Answer to Counter-Claim, para. 2).

136. When solving the sugar dispute, it would involve numerous advantages to execute the arbitral proceedings in Port Hope. Firstly, the place of delivery was Port Hope (Re. Ex. 4) and, consequently, an arbitral tribunal in Port Hope could easily inspect the harbour and other relevant locations. This examination would give great guidance as to whether a contamination of the sugar was possible before the loading of the sugar. Secondly, the employees at Oceania Shipping Lines and other possible witnesses are situated in Oceania and therefore it would be
much easier for the possible witnesses to testify in Oceania. Transportation costs and inconvenience for the witnesses would also be minimised.

11. Should the Tribunal find that Art. 21(5) Swiss Rules is applicable, it only has jurisdiction to hear the Respondent’s claim as a set-off defence

137. The Claimant invites the Tribunal to find that it only has jurisdiction to hear the Respondent’s claim as a set-off defence. Art. 21(5) Swiss Rules only provides for the inclusion of set-off defences in the arbitral hearing and it should not be extended to include counterclaims.

138. Counterclaims and set-off defences have many similarities, but they have to be distinguished sharply from each other (Berger, para. III). Both common law and civil law countries recognise the distinction (Berger, para. II). Inter alia, the European Court of Justice has differentiated between counterclaims and set-off defences in Danværn v. Schuhfabrikken Otterbeck, C-341/93. The European Court of Justice defined a counterclaim as a separate claim by the defendant which seeks judgement ordering the plaintiff to pay him a debt (C-341/93, para. 12), whereas a set-off defence wholly or partially extinguishes the plaintiff’s claim (C-341/93, para. 12).

139. The recovery available in case a set-off defence or a counterclaim is successful also shows the distinction. A successful respondent can recover the full amount of a counterclaim, irrespective of the amount of the Claimant’s claim and irrespective of whether the Claimant’s claim is successful. In contrast, the set-off defence is limited to the amount of the main claim, thus, a party claiming a set-off defence can recover nothing for himself (Berger, para. III).

11.1. The Tribunal does not have jurisdiction to hear counterclaims, as Art. 21(5) Swiss Rules should be interpreted narrowly or at least not beyond its wording

140. Art. 21(5) Swiss Rules states that the Tribunal is granted the possibility to hear set-off defences. The Claimant submits that Art. 21(5) Swiss Rules should be interpreted narrowly and at least not beyond its wording. Thus, the Tribunal should not grant itself the power to hear a counterclaim, as it would materially alter the scope of the Swiss Rules.

141. Art. 3(9), Art. 3(10) and Art. 19(3) Swiss Rules make references to both set-off defences and counterclaims, whereas Art. 21(5) only mentions set-off defences. Thus, the drafters of the Swiss Rules recognised a distinction between set-off defences and counterclaims. Only set-off defences are mentioned in Art. 21(5) Swiss Rules and this indicates that the drafters only
intended Art. 21(5) Swiss Rules to cover set-off defences and not counterclaims. There should therefore be no possibility to hear a counterclaim under Art. 21(5) Swiss Rules.

142. In the introduction to the Swiss Rules it is stated that the Swiss Rules are based on the UNCITRAL Arbitration Rules. It is further stated that “changes and additions have been deliberately kept to a minimum” (Introduction to Swiss Rules b). As stated above (para. 110) a rule similar to Art. 21(5) Swiss Rules cannot be found in the UNCITRAL Arbitration Rules. Furthermore, Art. 21(5) Swiss Rules does not express a generally recognised principle in international commercial arbitration (para. 112) Considering the statements in the introduction to the Swiss Rules and considering the uncommon principle expressed in Art. 21(5) Swiss Rules, the rule should be interpreted narrowly.

143. The commentaries on the Swiss Rules assume that Art. 21(5) Swiss Rules only gives the Tribunal jurisdiction to hear set-off defences and not counterclaims (see Peter, p. 9 “a counterclaim is only admissible if it is governed by the arbitration clause” and Blessing, p. 43).

144. By including set-off defences not covered by the arbitration agreement, the Swiss Rules have gone far in extending the jurisdiction for the Tribunal. Adding counterclaims to the jurisdiction of the Tribunal might have inexpedient implications which were not anticipated by the drafters.

145. Firstly, a losing party might challenge an award or request national courts to refuse recognition and enforcement of an award if the award is based on a wide interpretation of Art. 21(5) Swiss Rules. Art. 34(2)(iii) Model Law and Art. V (1)(c) New York Convention allow the courts to set aside/refuse recognition of part of an award if an award adjudicated a dispute outside the scope of the arbitration agreement. Disputes can only be settled in arbitration if the parties agree thereto (Huleatt-James & Gould, p. 62) and “national systems of law, and the international conventions on arbitration, both emphasise that it is important that an arbitral tribunal should not exceed its jurisdiction” (Redfern II). Therefore, national courts with more restrictive approaches to the scope of jurisdiction of arbitral tribunals might set aside part of an award based on a wide interpretation of Art. 21(5) Swiss Rules.

146. Secondly, a wide interpretation can result in fewer parties choosing to arbitrate under the Swiss Rules. When parties draw up arbitration clauses, many circumstances affect whether they are interested in submitting a dispute to arbitration and if they want institutional or ad
hoc arbitration to adjudicate the dispute, inter alia, special competence, special procedure, arbitrators' fees (Huleatt-James & Gould, pp. 28-29). If counterclaims are included in Art. 21(5) Swiss Rules, a tribunal under the Swiss Rules has the power to hear practically every possible claim between the parties. In this way Art. 21(5) Swiss Rules overrules the agreed dispute resolution chosen by the same parties in other contracts.

12. Even though Art. 21(5) Swiss Rules grants jurisdiction to hear the Respondent’s claim as a set-off defence, the Tribunal should not hear it, as it would result in unnecessary legal expenses

147. The Claimant asserts that hearing the Respondent’s claim as a set-off defence under this arbitration would result in unnecessary expenses and therefore it should be dismissed.

148. The Claimant’s claim is for USD 289,353.75 along with interest as of 24 October 2002 and the Respondent’s claim is for USD 385,805 along with interest as of 18 December 2003. Thus, if both claims are fully successful there should be a net judgement in favour of the Respondent. As the Tribunal does not have jurisdiction to issue a net judgement in favour of the Respondent, the Respondent would have to initiate arbitration under the Oceania Rules in order to receive the remaining amount.

149. Art. 21(5) Swiss Rules was inserted in order to promote efficiency in proceedings (Peter, p. 9) and it is almost always more efficient to conduct two proceedings together, instead of having separate proceedings. However, since the Respondent’s claim is larger than the Claimant’s claim, efficiency in proceedings is not promoted. Both this Tribunal and a tribunal in Oceania will have to decide on the Respondent’s claim regarding the sugar contract. Furthermore, the Oceania Tribunal will have to determine whether the doctrine of res judicata applies and whether it has jurisdiction to decide on the merits of the claim. Art. 21(5) Swiss Rules was intended to simplify proceedings, but in this case the provision actually has the opposite effect.

150. Under arbitration in Oceania the award rendered by this Tribunal would not be binding, as there is no doctrine of stare decisis in arbitration (Redfern & Hunter p. 459). Therefore, the new arbitrators would have to examine the evidence, hear the witnesses and oral arguments in order to decide the dispute again. This result would undoubtedly involve expenses. The superfluous expenses could be avoided if this Tribunal refrained from hearing the Respondent’s claim and instead left it to the Tribunal in Oceania.
151. Should the Oceania Tribunal reach a conclusion different from this Tribunal in the sugar dispute and grant no relief to the Respondent, the Oceania Tribunal would have to consider, whether it could change this Tribunal’s decision. The Oceania Tribunal might then issue an award of USD 289,353.75 in favour of the Claimant if it finds that the Respondent has no claim regarding the sugar contract. Otherwise there would be 2 inconsistent awards. This absurd scenery would unfortunately be the result if the two tribunals' jurisdictions were intertwined.

152. Furthermore, the Respondent has only requested the Tribunal to hear its entire claim and labels its claim as a counterclaim (Re. Statement of Case para. 18 “consider the counterclaim” and para. 19 “pay the full contract price of USD 385,805”). Thereby the Respondent stipulates its intention to obtain a separate judgement and acknowledges that it wants the claim heard as a counterclaim. Such action by the Tribunal would be contrary to Art. 21(5) Swiss Rules.

153. In the light of these irrational nonsensicalities, the Claimant submits that even if the Tribunal were to find that it has jurisdiction to hear the Respondent’s claim as a set-off defence, it should not supervene the jurisdiction of the Oceania Tribunal and thus create a risk for inconsistencies.

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9 December 2004

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