TWELFTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On behalf of:

Mediterraneo Confectionary Associates, Inc.
121 Sweet Street
Capitol City
Mediterraneo

CLAIMANT

Against:

Equatoriana Commodities Exporters, S.A.
325 Commodities Avenue
Port City
Equatoriana

RESPONDENT

UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

ERIN FARABAUGH · JENNIFER RELLIS ·ELIZABETH SHACKELFORD · GREGORY WALKER

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A. By failing to deliver the full contract quantity of cocoa beans by 31 May 2002, RESPONDENT breached its Art. 35(1) CISG duty of complete delivery thereby enabling CLAIMANT to avoid the unfulfilled portion of the contract. 11

B. RESPONDENT's five-month delay in delivering 75% of the cocoa beans constitutes a fundamental breach as to that portion of the contract. 12

I. RESPONDENT's delay substantially deprived CLAIMANT of its contractual expectation of timely delivery of an essential raw material. 12

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C. RESPONDENT fundamentally breached the contract by delaying shipment of the cocoa beans after CLAIMANT urgently requested RESPONDENT to fix a shipping date. 14

D. CLAIMANT properly avoided the contract because RESPONDENT failed to deliver within the additional period of time provided by CLAIMANT under Art. 49(1)(b) CISG. 16

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b. As a prudent business, CLAIMANT could not wait longer than one month to make a cover purchase or its production would have been impacted. 18

III. Under Art. 47(2) CISG, RESPONDENT's failure to comply with CLAIMANT's request for a shipping date relieved CLAIMANT from waiting any longer. 18

E. CLAIMANT'S 15 August 2002 letter satisfies the requirement of notice of avoidance under Art. 26 CISG. 18

§ 5 CLAIMANT is entitled to damages equal to the difference between the price it paid in its substitute transaction and the contract price for the undelivered 300 tons of cocoa. 20

A. Because the contract was avoided, CLAIMANT is entitled to recover the difference between the cover purchase price and the contract price for the undelivered 300 tons of cocoa under Art. 75 CISG. 20

B. Even if the Tribunal finds that the contract was not properly avoided, CLAIMANT is entitled to the difference between the cover purchase price and the contract price for the undelivered 300 tons of cocoa, because it is the sum equal to CLAIMANT's loss as a consequence of RESPONDENT's breach. 20

§ 6 The Tribunal has no authority to hear what the RESPONDENT claims to be a counter-claim because the parties never consented to this Tribunal hearing claims arising under the Sugar Contract. 21

A. In choosing the Geneva Rules to govern disputes arising out of the Cocoa Contract, the parties' consent to this Tribunal's jurisdiction was limited to disputes arising out of that contract alone. 21

B. The parties' choice of the Oceania Commodity Association to hear claims arising from the Sugar Contract demonstrates that they did not consent to this Tribunal hearing RESPONDENT's claim. 22

C. The Oceania Commodity Association is the only tribunal competent to hear claims arising out of the Sugar Contract because no applicable rule supercedes the parties' consent to arbitration on such claims by that tribunal. 22

   I. The parties did not consent to Article 21(5) of the Swiss Rules, which RESPONDENT relies on to supercede the parties' choice of arbitration in the Sugar Contract. 22

   II. Substantive changes in the Geneva Rules following the parties' consent to those rules do not automatically bind the parties because they cannot be assumed to have consented to those changed provisions. 23

   III. In the Cocoa Contract, the parties consented to the Geneva Rules, and are not bound by provisions in the new Swiss Rules which they would not have agreed to and could not have reasonably anticipated at the time of forming the Cocoa Contract. 24

   IV. The significant disparity between the very broad scope of jurisdiction provided by Article 21(5) of the Swiss Rules and the narrow and explicit jurisdiction provided by the Geneva Rules suggests that the parties would not likely have consented to Article 21(5) at the time of the Cocoa Contract. 26

   V. The parties would not likely have consented to Article 21(5) at the time of forming the Cocoa Contract because, had they intended at that time to provide this Tribunal with such broad jurisdiction, the parties could have chosen the Zurich Rules. 26

   VI. As the goal of the Swiss Rules is to further uniformity, the parties could not reasonably have foreseen a provision such as Article 21(5) that remains uncommon and controversial in international commercial arbitration. 27

§ 7 Because RESPONDENT's claim is beyond the scope of the jurisdiction which the parties consented to grant to this Tribunal, an award on this claim could be refused enforcement. 28

A. An award by this Tribunal on the Sugar Contract claim could be refused enforcement as it is beyond the scope of the parties' submission to arbitration in the Cocoa Contract. 28

B. An award by this Tribunal on the Sugar Contract could also be refused enforcement as it would not be in accordance with the agreement of the parties. 29

§ 8 Even if the Tribunal were to have jurisdiction over RESPONDENT's claim, the Tribunal should nevertheless refuse to hear this claim because it would negatively affect procedural efficiency. 30

A. The facts and the witnesses involved in the claims under the Cocoa Contract and the Sugar Contract are not mutually connected so as to provide any procedural advantage in hearing them together. 30

B. Procedural efficiency is best served by respecting the parties' choice of Oceania Commodity Association for the settlement of disputes arising from the Sugar Contract. 31

I. The parties expressed a clear, corresponding will to exclude the Tribunal's jurisdiction over the Sugar Contract by choosing a Specialized Arbitration Association. 31

II. Specialized arbitrators familiar with the procedures for packaging and shipment of sugar from Oceania producers and shipping lines will advance the procedural efficiency of the arbitration proceedings. 31

C. The disputes arising from the Sugar Contract and the Cocoa Contract are not interrelated in a way that would potentially create inconsistent awards if heard by separate tribunals. 33

I. The dissimilarity of the debts and obligations of the parties undertaken in the Sugar Contract and Cocoa Contract is evidence of the lack of interrelation between the two contracts. 33

II. The fact that the Sugar Contract was entered into two years after the Cocoa Contract further illustrates the lack of interrelation between the two contracts. 33

§ 9 If the Tribunal chooses to extend its jurisdiction to hear RESPONDENT's claim, any award on this claim must be limited to the amount awarded to CLAIMANT on the primary claim. 34

INDEX OF ABBREVIATIONS

Art.	Article
Arts.	Articles
C.E.	Claimant's Exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
ed.	Editor
et seq.	et sequentes (and those that follow)
ICC	International Chamber of Commerce
Id.	Ibid. (same as previous citation)
Inc.	Incorporated
No.	Number
Nos.	Numbers
p.	Page
pp.	Pages
P.O.	Procedural Order
R.E.	Respondent's Exhibit
S.C.	Statement of the Case
S.D.	Statement of the Defense
supra	Above
trans.	Translator
U.S.	United States
USD	United States Dollar
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sales of Goods http://www.unilex.info/
v.	Versus
Vol.	Volume

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STATEMENT OF FACTS

2001

19 November	RESPONDENT offers to sell 400 metric tons of cocoa to CLAIMANT. CLAIMANT accepts RESPONDENT's offer. Total contract price was USD 496,299.55.

2002

24 February	Letter from RESPONDENT informing CLAIMANT of storm and embargo.
5 March	Letter from CLAIMANT stating indifference as to source of cocoa and possibility of cover purchase if RESPONDENT can not perform.
10 April	Letter from CLAIMANT seeking delivery date from RESPONDENT.
7 May	Letter from RESPONDENT acknowledging release of 100 tons of cocoa.
18 May	One hundred tons of cocoa shipped and paid for at contract price.
31 May	Contractual delivery deadline expires. RESPONDENT has not delivered 300 tons of the 400 for which it contracted.
June-July	CLAIMANT calls several times to inquire about late delivery.
15 August	Letter from CLAIMANT stating that if RESPONDENT does not set a shipping date soon it will be required to make a cover purchase due to low stocks.
29 September	RESPONDENT calls CLAIMANT to state that there is no indication regarding when the export ban will be rescinded.
24 October	CLAIMANT makes cover purchase of 300 tons at current market price.
25 October	CLAIMANT notifies RESPONDENT of cover purchase.
11 November	Letter from CLAIMANT demanding reimbursement for cover purchase.
13 November	Letter from RESPONDENT stating CLAIMANT breached contract through its cover purchase.

15 November	Letter from CLAIMANT stating contract was terminated by virtue of RESPONDENT's excessive delay in delivery.

2003

21 November	CLAIMANT and RESPONDENT enter into sugar contract (#2212) for purchase of 2,500 tons of sugar. Total contract price was USD 385,805.

2004

6 July	Correspondence from Swiss Chambers acknowledging CLAIMANT's request for arbitration and receipt of claim under the Cocoa Contract.
10 August	RESPONDENT sends Answer to Notice of Arbitration and files counter-claim under the Sugar Contract.
31 August	CLAIMANT sends Answer to counter-claim.

We hereby respectfully submit this Memorandum on behalf of our client, Mediterraneo Confectionary Associated, Inc., CLAIMANT. As discussed in detail below, CLAIMANT requests the Arbitral Tribunal to hold that:

- RESPONDENT should not be excused from its contractual obligations, because it cannot meet its burden of proof as to each element of Art. 79(1) CISG [§ 3].
- CLAIMANT properly avoided the contract as to the unshipped cocoa [§ 4].
- CLAIMANT is entitled to damages equal to the difference between the price of its substitute transaction and the contract price for the undelivered 300 tons of cocoa [§ 5].
- The Tribunal has no authority to hear what RESPONDENT claims to be a counter-claim because the parties never consented to this Tribunal hearing claims arising under the Sugar Contract [§ 6], and an award on this claim could be refused enforcement [§ 7].
- If the Tribunal were to have jurisdiction over RESPONDENT's claim, the Tribunal should nevertheless refuse to hear this claim because it would negatively affect procedural efficiency [§ 8].
- Even if the Tribunal were to hear RESPONDENT's asserted counter-claim, any award on this claim would be limited to the amount awarded to CLAIMANT on the primary claim [§ 9].

§ 1 The Tribunal has jurisdiction to arbitrate the dispute between CLAIMANT and RESPONDENT arising out of the Cocoa Contract.

1. Both parties agree that the Tribunal has jurisdiction to arbitrate CLAIMANT's substantive claim arising out of Cocoa Contract No. 1045 (*P.O. No. 1 at 2, 3*).

§ 2 The CISG governs the Cocoa Contract concluded between CLAIMANT and RESPONDENT.

2. CLAIMANT, Mediterraneo Confectionary Associates, Inc., and RESPONDENT, Equatoriana Commodity Exporters, S.A., concluded a contract for the sale of 400 metric tons of cocoa beans on 19 November 2001. As CLAIMANT and RESPONDENT have their places of business in different states, Mediterraneo and Equatoriana respectively (*S.C. at 1, 2; S.D. at 1, 2*), both of which are Contracting States under the CISG (*S.C. at 17*), Art. 1(1)(a) CISG provides

that the CISG governs the parties' contract.

§ 3 RESPONDENT should not be excused from its contractual obligations, because it cannot meet its burden of proof as to each element of Art. 79(1) CISG.

3. Under Art. 79(1) CISG, RESPONDENT, the party seeking exemption from liability (*S.D. at 9*), bears the burden of proof in regard to each of the elements required by Art. 79(1) (*Honnold, Art. 79 at 423.4; UNCITRAL, Art. 79 at 20*). Specifically, "a party is not liable for a failure to perform any of his obligations if he proves" that: the party's non-performance was "due to an impediment"; the impediment was "beyond his control"; the impediment is one that the party "could not have reasonably taken into account at the time of the conclusion of the contract"; *and* the party could not reasonably have "avoided" *or* "overcome" the impediment "or its consequences" (*Art. 79(1)*).

4. RESPONDENT failed to meet its burden, because, as will be shown below, it cannot prove that the embargo in Equatoriana was not reasonably foreseeable when it knew that the Equatoriana Government Cocoa Marketing Organization (EGCMO) possessed the governmental authority to place an embargo on cocoa in response to flooding in Equatoriana. Likewise, because RESPONDENT failed to take reasonable measures such as requesting an exemption or purchasing outside cocoa available on the market, it cannot prove that it could not have overcome the embargo. For these reasons, RESPONDENT fails to meet its burden of proof under Art. 79 CISG and should not be granted exemption from liability for its failure to timely deliver 300 tons of cocoa pursuant to the contract between CLAIMANT and RESPONDENT.

A. RESPONDENT could reasonably be expected to have taken the impediment of the embargo into account at the time of the conclusion of the contract.

I. Given RESPONDENT's extensive experience in the trade of cocoa produced in Equatoriana, RESPONDENT was aware of the impact that rainy seasons and natural disasters can have on the harvest and supply of cocoa.

5. Under Art. 79(1), RESPONDENT must *prove* that it could not reasonably be expected to have taken the impediment of the embargo into account at the time of the conclusion of the contract. Because nearly all impediments to performance are foreseeable to some degree, this element is considered the most difficult to prove for parties claiming Art. 79 exemption (*Secretariat Commentary, Art. 65, at 5; Bernstein/Lookofsky at 107-08*). As an established commodities exporter in cocoa and, consequently, well aware of the adverse impact that weather

can have on the supply of seasonal, agricultural goods, RESPONDENT could reasonably be expected to foresee that inclement weather in the region could result in an impediment to its performance.

6. RESPONDENT has been in business as a trader in commodities since 1961 (*P.O. No. 2 at 13*) and has provided CLAIMANT with cocoa on previous occasions (*S.D. at 5*). RESPONDENT's business involves primarily the exportation of commodities produced in Equatoriana, including cocoa and sugar, although a portion of its revenue comes from the sale of commodities produced in other countries (*S.D. at 4*). As an experienced exporter of at least two seasonal goods, namely cocoa and sugar (*S.D. at 2*), RESPONDENT must be aware of the impact that natural disasters can have on the harvest and supply of seasonal goods.

7. Moreover, given RESPONDENT's experience in Equatoriana, RESPONDENT would undoubtedly be aware of weather patterns in the region. Cocoa trees grow in tropical regions in which precipitation is often concentrated in several annual rainy seasons (*Chocology at 20*). Consequently, cocoa bean harvests "tend[] to be concentrated in two periods" – with the main harvest commencing after the rainy season in October and a second, smaller harvest taking place "at the beginning of the next rainy season in March" (*Id.*). Therefore, it was certainly foreseeable to RESPONDENT, at the time of the conclusion of the contract, that rainy seasons tend to include storms and substantial amounts of rainfall in concentrated periods of time, either of which can potentially produce extensive flooding.

II. RESPONDENT knew of the history of flooding in Equatoriana.

8. RESPONDENT is undoubtedly aware of past natural disasters in the region. When a storm struck Equatoriana twenty-two years ago, causing damage to its cocoa trees, (*P.O. No. 2 at 8*), RESPONDENT was already an established commodities exporter in the region (*Id. at 13*), thereby indicating that RESPONDENT was aware of the possibility of flooding in Equatoriana. Whether an embargo is imposed or not, flooding that substantially damages or entirely decimates a crop in the region can prove to be just as much of an impediment to RESPONDENT's performance. In other words, an embargo prompted by extensive flooding is just one of several possible impediments arising from circumstances in which performance would otherwise be impracticable or impossible. Therefore, RESPONDENT could reasonably foresee the occurrence of flooding in Equatoriana as well as its potential to destroy and impede RESPONDENT's

performance, whether through an embargo or otherwise.

III. RESPONDENT must have been aware of EGCMO's power and authority to place an embargo on the export of cocoa.

9. RESPONDENT could reasonably be expected to foresee that the Equatoriana Government Cocoa Marketing Organization (EGCMO) would exercise its authority to regulate cocoa trading in the wake of a flood. EGCMO is an official government entity that holds a monopoly on the purchase of cocoa from national producers (*P.O. No. 2 at 11*). RESPONDENT must be aware of EGCMO's status and authority, because for every cocoa export contract entered into, RESPONDENT must place an order from EGCMO for an equivalent amount (*Id.*). EGCMO then ships the cocoa from its warehouse directly to the buyer (*Id.*). In this way, RESPONDENT, an established commodities exporter who regularly deals with EGCMO, should reasonably be aware that government embargos on agricultural exports are foreseeable consequences of natural disasters, and that EGCMO possessed the governmental authority to place an embargo on cocoa in response to flooding in Equatoriana. Therefore, RESPONDENT could reasonably be expected to have taken the embargo into account at the time of the conclusion of the contract.

B. RESPONDENT could reasonably be expected to have overcome the consequences of the embargo placed on cocoa exports.

10. Under Art. 79(1) CISG, a party seeking to avoid liability for delayed performance or failure to perform must *prove* that it could not reasonably be expected to have "avoided" or "overcome" the "consequences" of the impediment. When an impediment arises, the obligor, here RESPONDENT, must take reasonable steps to effect performance or find an agreeable substitute if possible (*Stoll in Caemmerer/Schlechtriem, Art. 79 at 25; Šarčević/Volken at 18*). RESPONDENT cannot prove that it made reasonable efforts to overcome the impediment or its consequences, because it 1) failed to ask EGCMO for an exemption and 2) failed to purchase outside cocoa available on the market when neither the contract nor CLAIMANT required shipment of cocoa from Equatoriana.

I. RESPONDENT could have requested an exemption from the embargo.

11. Although RESPONDENT may have lacked legal avenues to circumvent the embargo placed on cocoa exports, it could have requested an exemption from the embargo (*P.O. No. 2 at*

12). RESPONDENT did not do so (*Id.*). The fact that several other exporters were denied such exemptions does not mitigate against RESPONDENT's failure to make such a request. RESPONDENT's good reputation and established business in the cocoa trade in Equatoriana (*Id. at 13*), coupled with its contractual obligations to CLAIMANT and extensive business dealings and contacts with EGCMO, could have distinguished it from other exporters asking for exemptions. Thus, it was reasonable for RESPONDENT to petition EGCMO in a timely manner because it was contractually obligated to secure 300 more tons of cocoa and had substantial connections and a solid reputation with EGCMO. RESPONDENT failed to ask for an exemption and, consequently, failed to make a reasonable effort to avoid or overcome the impediment.

II. RESPONDENT could have overcome the embargo by shipping cocoa from another source.

a. The written contract between CLAIMANT and RESPONDENT did not require delivery of cocoa produced in Equatoriana.

12. Art. 35 CISG provides that the seller "must deliver goods which are of the quantity, quality and description required by the contract." Nowhere in the contract between CLAIMANT and RESPONDENT do the parties stipulate that the cocoa be of Equatorianan origin. Rather, such a requirement is conspicuously absent. Because the cocoa contract does not mandate that RESPONDENT provide CLAIMANT with cocoa produced in Equatoriana and, as discussed below, CLAIMANT clearly made known its indifference to the source of the cocoa, RESPONDENT was not restricted to shipping cocoa from Equatoriana and could have overcome the impediment of the embargo by supplying cocoa from other sources.

b. CLAIMANT clearly informed RESPONDENT that the source of the cocoa was not important.

13. Under Art. 8(1) CISG, which governs the interpretation of contracts, statements made by a party should be interpreted according to that party's intent "where the other party knew or could not have been unaware what that intent was" (*Art. 8(1)*). Art. 8(3) provides that established practices *as well as* subsequent conduct of the parties are all relevant to determining parties' intent. In its letter dated 5 March 2002, CLAIMANT stated clearly that "[t]he contract did not provide specifically for Equatoriana cocoa and the source is completely irrelevant to us" (*C.E. No. 4*). RESPONDENT concedes that the contract did not explicitly call for delivery of

Equatorianan cocoa (*S.D. at 4*) and admits that CLAIMANT's letter evidences its lack of concern for the source of cocoa (*Id. at 5*). Thus, nearly three months before delivery was required, RESPONDENT knew and could not have been unaware of CLAIMANT's intent with regard to the source of the cocoa.

14. CLAIMANT reiterated its position several weeks before the end of the shipping period, writing on 10 April 2002 that it "would be happy to receive whatever you would be able to send us" (*C.E. 5*). Finally, on 15 August 2002, over two months after delivery was due, CLAIMANT again informed RESPONDENT that "our contract was for cocoa, not for Equatoriana cocoa" (*C.E. 7*). CLAIMANT's correspondence clearly and unequivocally informed RESPONDENT that it was unconcerned with the source of the cocoa for which it contracted. Therefore, RESPONDENT cannot show that it neither knew nor could have been unaware of such intent.

15. RESPONDENT's argument that a requirement of Equatoriana cocoa should be impliedly read into the contract is twofold. First, RESPONDENT claims that the parties' contract specifically anticipated cocoa from Equatoriana by virtue of its name, Equatoriana Commodities Exporters. This argument is without merit. RESPONDENT's name may just as likely indicate its business location as the origin of the commodities in which it deals. Furthermore, RESPONDENT does not exclusively export commodities produced in Equatoriana (*S.D. at 2, 4; P.O. No. 2 at 14*). Finally, even if RESPONDENT's name *suggests* that its products stem from Equatoriana, this does not prove, under Art. 8(1), that CLAIMANT *knew* that it was contracting for cocoa only produced in that country. If RESPONDENT intended to contract to sell only Equatoriana cocoa, that intent should have been manifested in the written contract or in correspondence responding to CLAIMANT's clear statement of indifference as to the source of the cocoa. RESPONDENT never refuted CLAIMANT's statements that the contract did not call for Equatoriana cocoa until after the fact, and it cannot now rely on its name to supply the requisite intent.

16. Second, RESPONDENT argues that the contract anticipated the sale of cocoa from Equatoriana because RESPONDENT had always filled CLAIMANT's orders with cocoa from that country (*S.D. at 5*). In doing so, RESPONDENT appears to invoke Art. 9(1), whereby "the parties are bound by any usages to which they have agreed and by any practices which they have established between themselves." However, this argument fails for two reasons. First, the

practice of shipping Equatoriana cocoa that RESPONDENT claims to be a course of dealing is premised on a specific circumstance that, unlike the previous occasions, is not present in this case – namely a ready supply of cocoa in Equatoriana. In this sense, it cannot fairly be said that the parties have established a course of dealing requiring shipment of Equatoriana cocoa when such goods were unavailable. Thus, RESPONDENT's course of dealing argument is wholly unpersuasive, because it relies on the availability of Equatoriana cocoa, the absence of which distinguishes this case from the parties' prior transactions. Second, the intentions of one party – in this case, RESPONDENT asserting that the source of cocoa was not irrelevant at the time of contracting (*S.D. at 5*) – which are not expressly agreed upon by the parties fails to establish a practice in the sense of Art. 9 unless, under Art. 8, CLAIMANT realized that RESPONDENT was only willing to enter a contract for the export of Equatoriana cocoa (*CLOUT No. 176*). In other words, just because RESPONDENT intended to ship CLAIMANT cocoa from Equatoriana does not mean the parties expressly contracted for cocoa from that specific source. In order to establish a "practice" within the meaning of Art. 9 and in the absence of both parties' express agreement, RESPONDENT must prove that CLAIMANT knew or could not have been unaware of its intent.

c. RESPONDENT could have secured cocoa available on the open market.

17. When faced with an impediment to contractual performance, the obliging party, here RESPONDENT, is required to make reasonable efforts to effect performance or locate an agreeable substitute (*Stoll in Caemmerer/Schlechtriem, Art. 79 at 25; Šarčević/Volken at 18*). RESPONDENT could reasonably be expected to purchase cocoa available on the market to "overcome" the impediment because (a) there was sufficient cocoa available on the market to fulfill its contractual obligations (*R.E. No. 3; P.O. No. 2 at 25*) and (b) the increased market price of cocoa does not excuse RESPONDENT failure to make such a purchase.

18. Art. 79 provides exemption from liability for non-performance only where the goods are no longer available on the open market (*Schlechtriem, Art. 79 at 613; CLOUT No. 277*). In this case, cocoa was available for purchase on the market (*R.E. No. 3; P.O. No. 2 at 26*). Furthermore, there was an adequate supply of cocoa beans of similar grade available on the open market (*P.O. No. 2 at 25*), as evidenced by CLAIMANT's cover purchase on 24 October 2002

(*Id. at 25-26; C.E. No. 8*).

19. Moreover, as an established commodities exporter who trades regularly in sugar and cocoa, it is reasonable to assume that RESPONDENT is aware of and has access to such goods on the international market. First, RESPONDENT's Answer to Notice of Arbitration and Counter-Claim reveals that it is well-informed with regard to pricing of cocoa futures on the New York and London markets (*S.D. at 6 et. seq.*). Secondly, RESPONDENT's business is not limited solely to the export of commodities produced in Equatoriana (*S.C. at 2; S.D. at 2*). It involves "occasional" trading of commodities produced in other countries (*Id.*), including the capability of supplying buyers such as CLAIMANT with cocoa beans from other sources (*P.O. No. 2 at 14*). Because of RESPONDENT's extensive experience in commodities trading, coupled with an adequate supply of cocoa on the open market, RESPONDENT could reasonably have overcome the embargo by purchasing cocoa on the open market.

d. The increase in the market price of cocoa does not excuse RESPONDENT's failure to procure non-Equatorianan cocoa available on the market.

20. Although increased prices in the cost of goods may impede a seller's ability to make a profit on a particular contract, market fluctuations are generally considered foreseeable, and price increases or changed economic circumstances do not relieve the seller of liability (*Schlechtriem, Art. 79 at 30, 39; Honnold, Art. 79 at 432.2; Bernstein/Lookofsky at 108*). In this case, RESPONDENT, as seller, assumed the risk of market fluctuations and bore the risk of increasing market prices (*CLOUT No. 277; 14.01.1993 UNILEX Italy; 02.05.1995 UNILEX Belgium; 04.07.1997 UNILEX Germany*). Consequently, the fact that cocoa prices increased on the market cannot excuse RESPONDENT from failing to take reasonable steps to fulfill its contractual obligations to CLAIMANT by way of purchase on the market.

21. When CLAIMANT and RESPONDENT entered into the cocoa contract, they agreed to the then average price of cocoa on the market (*R.E. No. 3*). Although the price of cocoa had increased by the time CLAIMANT made its cover purchase for the undelivered 300 tons (*Id.*), the 79% market price increase in this case is considerably less than the tripling of market prices that was deemed inadequate to trigger Art. 79 exemption in a prior case (*CLOUT No. 277*). In light of previous case law denying exemptions based on market fluctuations (*Id.; CLOUT No. 54; 14.01.1993 UNILEX Italy; 04.07.1997 UNILEX Germany*), "it was incumbent upon

[RESPONDENT] to bear the risk of increasing market prices. . ." (*CLOUT No. 277*).

22. Moreover, this was not the first time average monthly cocoa prices had topped the $1/pound mark. From November 1983 to February 1986, the price of cocoa was consistently above this threshold (*R.E. No. 3*). Even earlier, the market sustained cocoa prices in excess of $1/pound for over four straight years, peaking at 197.84 cents/pound in July 1977 (*Id.*). In short, the historical trends of the cocoa market reveal that the steady climb from November 2001 to October 2002 was neither unprecedented nor so extreme as to render RESPONDENT's purchase on the market unreasonable, much less impossible. RESPONDENT, in business since 1961 (*P.O. No. 2 at 13*), was aware of this market history.

23. In light of the above, RESPONDENT could reasonably be expected to purchase cocoa at the end of May 2002, the time at which it knew that it would not be able to ship within the contractual period of delivery, thereby insulating itself from any liability for breach of contract and saving further loss. The fact that RESPONDENT failed to do so because of increased prices does not justify exemption under Art. 79. By virtue of RESPONDENT's assumption of the risk of market fluctuations, and the fact that performance was not impossible, either because of extreme price increases or lack of goods available on the market, it was reasonable for RESPONDENT to purchase substitute cocoa available on the market to overcome the ongoing embargo in Equatoriana.

§ 4 CLAIMANT properly avoided the contract as to the unshipped cocoa.

A. By failing to deliver the full contract quantity of cocoa beans by 31 May 2002, RESPONDENT breached its Art. 35(1) CISG duty of complete delivery thereby enabling CLAIMANT to avoid the unfulfilled portion of the contract.

24. RESPONDENT did not deliver 300 of the required 400 metric tons of cocoa beans within the contractual two-month time period, thus breaching the terms of the contract and its Art. 35(1) CISG duty to deliver the quantity of goods contracted for (*Art. 35(1); C.E. No. 2*). Furthermore, this failure to perform an objectively measurable contractual duty was not excused under Art. 79 CISG (*See § 3 supra*). CLAIMANT had the option of immediately declaring the contract avoided as to the missing cocoa under Art. 51(1) CISG if delay amounted to a fundamental breach as to that portion of the contract (*Huber in Schlechtriem, Art. 51 at 4*). Alternatively, CLAIMANT can avoid the contract after fixing an additional period of time for delivery of the

missing cocoa (*Art. 51(1); Huber in Schlechtriem, Art. 51 at 4; 24.05.1995 UNILEX Germany*).

B. RESPONDENT's five-month delay in delivering 75% of the cocoa beans constitutes a fundamental breach as to that portion of the contract.

25. Delayed delivery can amount to a fundamental breach, particularly when time of performance is essential as determined by the contract or outside circumstances (*Huber in Schlechtriem, Art.49 at 5; CLOUT Case No. 90*). A court found that a seller's two-month delivery delay after the conclusion of the contract was a fundamental breach (*CLOUT Case No. 90*). RESPONDENT's failure to complete delivery five-months after the contract deadline is more striking. Furthermore, RESPONDENT's breach satisfies all three elements of fundamental breach under Art. 25 CISG: (1) a breach of a contractual obligation; (2) that substantially deprives one party of its contractual expectation; (3) and such deprivation is foreseeable to the breaching party (*Art. 25; Schlechtriem, Art. 25 at 7, 9, 11*).

I. RESPONDENT's delay substantially deprived CLAIMANT of its contractual expectation of timely delivery of an essential raw material.

26. CLAIMANT requires 1,500 metric tons of cocoa beans annually to manufacture its confectionaries (*S.C. at 1; P.O. No. 2 at 24*). To ensure a seamless production schedule, CLAIMANT must contract in advance to ensure a steady supply of this necessary raw material. On 19 November 2001, CLAIMANT and RESPONDENT concluded a contract for 400 metric tons of cocoa beans for delivery by 31 May 2002 (*C.E. No. 2*). As this contract was for one quarter of CLAIMANT's annual supply of cocoa beans (*P.O. No. 2 at 24*), CLAIMANT had a substantial interest in acquiring the goods according to the contractual terms. In failing to meet the deadline, RESPONDENT substantially deprived CLAIMANT of its expectation of timely delivery. Therefore, this failure constitutes a fundamental breach according to the contract terms and the expectations of the injured party (*Bianca/Bonell, Art. 25 at 2.1.2.2; Huber in Schlechtriem, Art. 25 at 9*).

27. RESPONDENT's failure to honor the contract time frame was more than mere delay. In good faith, CLAIMANT accommodated RESPONDENT's delay for five months, only making a cover purchase when it was weeks away from a production stoppage (*P.O. No. 2 at 24*). By the end of November 2002, CLAIMANT would have had to cease production of certain products unless it received additional cocoa beans (*Id.*). As CLAIMANT's confectionaries are sold both in Mediterraneo and in neighboring countries (*S.C. at 1*), production delays would have adversely

impacted long-standing and extensive customer relationships. Therefore, RESPONDENT's five-month delayed delivery of one-quarter of CLAIMANT'S annual cocoa bean inventory substantially deprived CLAIMANT of its contractual expectation and amounted to a fundamental breach because it threatened to seriously disrupt CLAIMANT's own production.

II. RESPONDENT foresaw that a five-month delivery delay would substantially deprive CLAIMANT of its contractual expectation.

28. A breach is fundamental unless the breaching party did not foresee that its breach would substantially deprive the aggrieved party of its expectation (*Art. 25 CISG*). Because determination of the time at which foreseeability is measured is unsettled, this Tribunal is permitted to examine all the circumstances to reach a balanced result (*Bianca/Bonell, Art. 25 at 2.2.2.2.5; Flechtner at 75-76; Honnold at 183*).

a. RESPONDENT was clearly aware when the contract was formed that delay would substantially deprive CLAIMANT of its contractual expectation because of the contract terms and CLAIMANT's intended use.

29. CLAIMANT had a contractually-based interest in timely delivery as the parties agreed to a delivery deadline of 31 May 2002 (*C.E. No. 2*). Therefore, since there was a fixed date for delivery, RESPONDENT cannot argue that it "did not foresee any detriment" to CLAIMANT (*Schlechtriem, Art. 25 at 12*). As the cocoa beans were vital to CLAIMANT's production process, CLAIMANT attached great importance to full and timely delivery to ensure a smooth and cost-effective manufacturing. Because of the parties' previous business dealings for cocoa beans and sugar (*S.C. at 3*), RESPONDENT must have been aware of this. Therefore, CLAIMANT's loss from the delay was foreseeable at the time the contract was made and RESPONDENT's failure to deliver for five months after the contract time period constitutes a fundamental breach.

b. CLAIMANT's loss of its contractual expectation was even more foreseeable after RESPONDENT's breach because CLAIMANT's subsequent communications reinforced its need to restock dwindling cocoa supplies in a rising cocoa market.

30. The foreseeability of the consequences of RESPONDENT's breach was even more pronounced in light of CLAIMANT's communications with RESPONDENT after the contract was formed. A court found that a delivery delay constituted a fundamental breach where the

seller knew that timely delivery was essential to the buyer from communications after the seller breached the delivery deadline (28.02.1997 *UNILEX Germany; CLOUT Case No. 277*). In this case, CLAIMANT clearly communicated to RESPONDENT that delayed delivery would substantially deprive it of its contractual expectation both before and after the breach. When the "serious consequences of the breach become evident subsequent to the making of the contract," the Tribunal must take them into consideration (*Bianca/Bonell, Art. 25 at 2.2.2.2.5*).

31. While CLAIMANT endeavored to keep the contract in force, its communications showed a continual reliance on complete delivery and emphasized the consequences it would suffer as a result of RESPONDENT's breach. CLAIMANT warned RESPONDENT as early as 5 March 2002 that although it was not "under immediate pressure" it would need the cocoa later in the year (*C.E. No. 4*). On 15 August 2002, CLAIMANT informed RESPONDENT that its inventory of cocoa beans was "lower than [it was] comfortable with" and that it would be forced to make a cover purchase "soon" unless RESPONDENT sent shipment notification (*C.E. No. 7*). As CLAIMANT's letter referenced both a low inventory and an intention to restock if RESPONDENT did not perform, RESPONDENT could not have been unaware of the severe consequences of its continued delay.

32. In addition to CLAIMANT's phone calls and written communications to RESPONDENT, the rising price of cocoa beans increased the foreseeability of CLAIMANT's substantial deprivation of its contractual expectation. Cocoa bean prices rose steadily after the parties concluded their contract in November 2001 (*R.E. No. 3*). In March 2002, CLAIMANT warned that it would hold RESONDENT liable for "additional costs" of non-performance (*R.E. No. 3; C.E. No. 4*). Again, in August 2002, when the price of cocoa beans was even higher, CLAIMANT stated that RESPONDENT's extra costs would be "considerable" if it did not perform and CLAIMANT made a cover purchase (*R.E. No. 3; C.E. No. 7*). These additional circumstances make the serious consequences of CLAIMANT's contractual loss more foreseeable after the contract was concluded and should be considered by this Tribunal (*Bianca/Bonell, Art. 25 at 2.2.2.2.5*).

C. RESPONDENT fundamentally breached the contract by delaying shipment of the cocoa beans after CLAIMANT urgently requested RESPONDENT to fix a shipping date.

33. RESPONDENT's refusal to remedy its five-month delay by shipping non-Equatoriana

cocoa, coupled with inaction in response to CLAIMANT's request for performance, amounts to a declaration that it would not deliver the missing cocoa. In this context, CLAIMANT reasonably understood RESPONDENT's statement on 29 September 2002 that the export ban was still in force with "no indication" as to when it would be rescinded as a final refusal to perform (*P.O. No. 2 at 22*). CLAIMANT reasonably understood RESPONDENT's failure to fix a shipping date in these circumstances as a "serious and definite refusal to deliver upon the contractually-agreed terms" (*Huber in Schlechtriem, Art. 49 at 6*). This "repudiatory conduct" by RESPONDENT after the date for performance constitutes a fundamental breach and permits CLAIMANT to avoid the contract (*Lubbe at 452-453*).

34. Both before and after the delivery deadline, CLAIMANT clearly expressed its need for timely delivery of the 300 tons of cocoa beans. The tenor of CLAIMANT's requests became more pressing as RESPONDENT's delivery delay increased, culminating in a letter to RESPONDENT on 15 August 2002 warning that CLAIMANT would be forced to make a cover purchase to avoid a production impact unless RESPONDENT set a shipment date for the delinquent 300 tons (*C.E. No. 7*).

35. Under Art. 8 CISG, which governs the interpretation of the parties' conduct, RESPONDENT should have understood that CLAIMANT intended to make a cover purchase to avoid production impact. Art. 8(1) states that conduct is to be interpreted according to the parties' intent "where the other party knew or could not have been unaware what that intent was." RESPONDENT could not have been unaware of CLAIMANT's intent as CLAIMANT frequently communicated its concern regarding its dwindling cocoa stocks to RESPONDENT during the course of the parties' dealing (*C.E. Nos. 4, 7, 8*). Even assuming, *arguendo,* that Art. 8(1) is not applicable, RESPONDENT was undoubtedly aware of CLAIMANT's intent under Art. 8(2) CISG, which requires that statements be interpreted according to the understanding that "a reasonable person of the same kind as the other party would have had in the same circumstances." A reasonable person in RESPONDENT's position would have understood from the 15 August 2002 letter that CLAIMANT would make a cover purchase to avoid manufacturing delays unless RESPONDENT provided a shipping date.

36. This conclusion is not undercut by RESPONDENT's 13 November 2002 letter, nearly six months after the delivery deadline, alleging that CLAIMANT was aware of the rumors that

EGCMO planned to release additional cocoa that would enable RESPONDENT to perform (*C.E. No. 10*). However, these "widely circulated" rumors were not heard by a small purchaser such as the CLAIMANT (*P.O. No. 2 at 29*). Additionally, RESPONDENT cannot refute that a reasonable person in CLAIMANT position would have believed that RESPONDENT's failure to fix a delivery date after the 15 August 2002 letter or 29 September 2002 phone call was a refusal to perform (*Art. 8(2) CISG*).

37. The reasonableness of CLAIMANT's understanding that by September 2002 RESPONDENT had repudiated its obligation to deliver the remaining cocoa is further supported by the fact that six and a half months after the date fixed for performance, RESPONDENT could do no more than claim it *would* have been able to ship the cocoa by the end of November (*C.E. No. 10*). By this time, CLAIMANT's stock of cocoa would have been exhausted, forcing it to halt production of some products (*P.O. 2 at 24*). It is unreasonable to bind CLAIMANT to a contract that would have substantially hindered its manufacturing activities on the *mere possibility* of shipment by RESPONDENT after such a long delay. In the face of such definite refusal, CLAIMANT had no recourse but to avoid the contract and purchase replacement cocoa as RESPONDENT's delivery delay had caused a foreseeable and substantial deprival of its contractual expectations.

D. CLAIMANT properly avoided the contract because RESPONDENT failed to deliver within the additional period of time provided by CLAIMANT under Art. 49(1)(b) CISG.

38. RESPONDENT's failure to deliver three-fourths of the cocoa beans within the two-month contract time-frame entitled CLAIMANT to fix an additional time period of a reasonable length for the seller's performance (*Art. 49(1)(b); Art. 47(1)*). This *Nachfrist* procedure allows a buyer awaiting performance to make delivery within the indicated additional period "of the essence" (*Honnold, Art. 49 at 305*). This device recognizes that the obligation to deliver is so fundamental that its breach should give rise to additional tools to compel performance (*Bianca/Bonell, Art. 49 at 2.1.3*).

I. CLAIMANT's tolerance of RESPONDENT's delay is equivalent to granting an additional period of time for performance under Art. 47 CISG.

39. Decisions applying the *Nachfrist* provisions of the CISG establish that CLAIMANT fixed

an additional period of time for performance by tolerating RESPONDENT's five-month delivery delay (*UNCITRAL Art. 47 at 6; CLOUT Case No. 246; CLOUT Case No. 225*). For example, in a case involving a contract to deliver springs used in the buyer's manufacturing process, a court held that tolerating late delivery of three installments was equivalent to granting an additional period of time under Art. 47 and therefore avoidance was proper after the third late installment (*CLOUT Case No. 246*). Similarly, although RESPONDENT had made only one timely delivery of one-fourth of the contract amount, CLAIMANT attempted in good faith to keep the cocoa contract viable until low cocoa bean stocks forced it to give notice of avoidance on 15 August 2002 and to make a cover purchase on 25 October 2002 (*C.E. Nos. 7, 8; P.O. No. 2 at 24*). This Tribunal should find that by tolerating the RESPONDENT's delay in delivery, CLAIMANT fixed an additional period of time under Art. 47(1).

II. Giving RESPONDENT one more month to perform after the parties' last communication was a reasonable period of time.

40. In light of RESPONDENT's five-month delay and CLAIMANT's desperate need for cocoa beans to avoid a production stoppage, waiting one month from its last contact with RESPONDENT before making a cover purchase was a reasonable period of time under Art. 47 CISG. The reasonableness of a time period is determined by the original length of the contractual delivery period, the buyer's interest in delivery, and the extent and the consequences of the delay (*Schlechtriem, Art. 47 at 9; Enderlein/Maskow, Art. 47 at 2*). When considered against these factors, CLAIMANT's cover purchase one month after its last phone call with RESPONDENT was reasonable.

a. As the parties typically communicated in monthly intervals while the contract was in force, one month was a reasonable period of time to await performance.

41. That both parties had a practice of waiting one month between communications during the contract demonstrates that one month was a reasonable period for CLAIMANT to wait between the last phone call with RESPONDENT on 29 September 2002 and its cover purchase on 25 October 2002. The initial contract called for delivery within a two-month window at the seller's option (*C.E. No. 2*). When RESPONDENT breached its obligation, CLAIMANT tolerated RESPONDENT's delayed performance for two and a half months while continuing to inquire about complete delivery through phone and written contact (*S.C. at 9*). When

CLAIMANT's cocoa bean stocks were running low, it requested on 15 August 2002 that RESPONDENT set a shipment date or it would be forced to make a costly cover purchase (*C.E. No. 7*). RESPONDENT did not set a delivery date, instead calling CLAIMANT one month later to state that there was no indication when the export ban would be lifted (*P.O. No. 2 at 22*). Given this pattern of monthly communications, CLAIMANT's decision to wait one more month before avoiding the contract and making a cover purchase was reasonable.

b. As a prudent business, CLAIMANT could not wait longer than one month to make a cover purchase or its production would have been impacted.

42. Furthermore, in determining the reasonableness of the Art. 47 time period, "the extent and consequences of the delay" must be taken into consideration (*Enderlein/Maskow, Art. 47 at 2*). CLAIMANT endeavored to grant RESPONDENT wide latitude to perform, only making a cover purchase when it was weeks away from having to limit its own production due to a lack of cocoa beans (*P.O. No. 2 at 24*). Waiting more than a month after the 29 September 2002 phone call would have impacted CLAIMANT's manufacturing ability and exacerbated the consequences of the delay. It is unreasonable and reckless for a prudent business operation to completely exhaust supplies before restocking. Therefore, one month is a reasonable period under Art. 47 CISG as CLAIMANT needed the 300 tons of cocoa beans "without further delay" (*Honnold, Art. 47 at 289*).

III. Under Art. 47(2) CISG, RESPONDENT's failure to comply with CLAIMANT's request for a shipping date relieved CLAIMANT from waiting any longer.

43. A buyer can immediately avoid the contract if the seller declares that it will not deliver within the Art. 47(1) period (*Art. 47(2); Huber in Schlechtriem, Art. 49 at 22; Enderlein/Maskow, Art. 47 at 6*). RESPONDENT's refusal to fix a delivery date in response to CLAIMANT's 15 August 2002 request amounted to a declaration that it would not deliver within a reasonable time (*See 33-37 supra*). Therefore, CLAIMANT did not need to await further performance and could immediately avoid the contract.

E. CLAIMANT'S 15 August 2002 letter satisfies the requirement of notice of avoidance under Art. 26 CISG.

44. CLAIMANT's 15 August 2002 letter served the dual function of fixing an additional time period and providing notice of avoidance of the contract by informing RESPONDENT of

CLAIMANT's intent to make a cover purchase unless RESPONDENT set a shipping date (*See Huber in Schlechtriem, Art. 49 at 31 explaining that a "buyer can combine an additional period of time for performance with a conditional declaration that the contract will be avoided if the seller does not perform within that period."*). This type of notice satisfies Art. 26 CISG, which requires no particular form of notice for effective avoidance (*Id. at 29*). Instead, what language is necessary must be decided in reference to the Art. 7(1) principle of good faith (*Id.*). So long as the buyer makes it clear that he is no longer willing to perform the contract because of the seller's breach, the notice is adequate (*Id.*).

45. Notice can be implied through the conduct of the parties, particularly when a clear breach has been established (*Id.*). In one case, the ICC found that the buyer properly avoided the contract when it informed the seller that it would make a substitute purchase unless it received a "firm undertaking" that the seller would ameliorate its delinquent delivery (*ICC Case No. 8128*). The ICC held that under Art. 8(2), a reasonable person would understand that the buyer was declaring the contract avoided unless the seller informed the buyer of delivery (*Id.*). Analogously, by 15 August 2002, RESPONDENT was clearly in breach of its contractual obligation of timely delivery and the parties had been in frequent contact regarding the breach. Additionally, CLAIMANT had often referenced its intent to make a cover purchase because of RESPONDENT's delivery failure (*C.E. Nos. 4, 7, 8*). Viewed against the context of the parties' dealing, CLAIMANT's 15 August 2002 letter should have been understood as avoiding the contract unless RESPONDENT announced a shipment date for the missing 300 tons.

46. Art. 7(1) CISG mandates that the Convention should be interpreted to promote the "observance of good faith in international trade" (*Art. 7(1)*). Citing this provision, one court has held that an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation because to insist otherwise would be contrary to the principle of good faith (*CLOUT Case No. 277*). Analogously, RESPONDENT's conduct throughout the contract, particularly its inaction in response to CLAIMANT's 15 August 2002 letter, indicated a definite refusal to perform. CLAIMANT's 25 October 2002 letter to RESPONDENT announcing its cover purchase opened with the statement "I am sure that this letter will not be a surprise to you" (*C.E. No. 8*). After five months of repeated calls and letters regarding the delivery delay, RESPONDENT was well aware that CLAIMANT's cocoa stock was dwindling and that it

required delivery of the remaining 300 tons immediately. In order to effectuate the CISG's Art. 7(1) good faith principle, this Tribunal must find that the 15 August 2002 letter triggered avoidance of the contract as to the remaining 300 tons of cocoa beans.

§ 5 CLAIMANT is entitled to damages equal to the difference between the price it paid in its substitute transaction and the contract price for the undelivered 300 tons of cocoa.

47. Because CLAIMANT failed to deliver the remaining 300 tons of cocoa and is not exempt under Art. 79 (*see § 3 supra*), CLAIMANT is entitled under Art. 45 to claim damages as provided in Arts. 74 and 75 (*Art. 45(1)(b)*).

A. Because the contract was avoided, CLAIMANT is entitled to recover the difference between the cover purchase price and the contract price for the undelivered 300 tons of cocoa under Art. 75 CISG.

48. Art. 75 provides that an aggrieved party may recover damages measured by the difference between the contract price and a cover purchase price if the original contract has been avoided and the cover purchase was made in reasonable manner and within a reasonable amount of time after avoidance. Because CLAIMANT avoided the contract (*see § 4 supra*) and made its cover purchase simultaneously, there can be no doubt that CLAIMANT bought replacement goods within a reasonable amount of time following avoidance. And since CLAIMANT purchased at the prevailing market price at the time, there can be no doubt that the manner of its substitute purchase was also reasonable (*17.11.2000 UNILEX Australia*). Having avoided the contract and secured substitute goods within a reasonable time and manner, CLAIMANT is entitled to damages totaling the difference between its cover purchase price and the contract price for the undelivered 300 tons of cocoa.

B. Even if the Tribunal finds that the contract was not properly avoided, CLAIMANT is entitled to the difference between the cover purchase price and the contract price for the undelivered 300 tons of cocoa, because it is the sum equal to CLAIMANT's loss as a consequence of RESPONDENT's breach.

49. Under Art. 74, damages for breach of contract by one party consist of a sum equal to the foreseeable loss suffered by the other party as a consequence of the breach. Art. 74 insures the right of the promisee to be "fully compensated for all disadvantages he suffers as a result of the promisor's breach of contract" (*Schlechtriem, Art. 74 at 1*), to be placed in as good a position as if the breaching party had performed (*CLOUT No. 138*). Because RESPONDENT's breach

necessitated CLAIMANT's purchase on the open market, CLAIMANT suffered a loss equal to the difference between the substitute transaction price and the contract price for the undelivered cocoa. RESPONDENT should have foreseen the possibility of flooding in Equatoriana as well as the fact that EGCMO had the power and authority to impose an embargo under such circumstances. Moreover, RESPONDENT should have likewise foreseen that CLAIMANT would purchase from other cocoa suppliers in the event of RESPONDENT's non-performance, because RESPONDENT knows that CLAIMANT operates a confectionary business which relies on a regular stream of raw materials for production. Damages totaling the difference between the cover purchase price and the contract price for the undelivered 300 tons of cocoa will place CLAIMANT in as good a position as if RESPONDENT had performed.

§ 6 The Tribunal has no authority to hear what the RESPONDENT claims to be a counter-claim because the parties never consented to this Tribunal hearing claims arising under the Sugar Contract.

50. "In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come" (*Redfern/Hunter at 260*).

A. In choosing the Geneva Rules to govern disputes arising out of the Cocoa Contract, the parties' consent to this Tribunal's jurisdiction was limited to disputes arising out of that contract alone.

51. In the Cocoa Contract of 23 November 2001, CLAIMANT and RESPONDENT consented to arbitration of any disputes arising out of that contract "in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland" (Geneva Rules) (*C.E. No. 2*). The only provision of the Geneva Rules granting jurisdiction is Article 1.1, which states, "These Rules apply whenever the parties have agreed to submit their disputes to CCIG arbitration." According to this provision, jurisdiction provided by the Geneva Rules is only that to which the parties explicitly consent. Therefore, CLAIMANT and RESPONDENT only granted the Tribunal jurisdiction over disputes strictly concerning the Cocoa Contract. Furthermore, because of the "voluntary nature of arbitration," the Tribunal "must not exceed its *jurisdiction*" (emphasis in original) as provided for in the agreement of the parties from which the dispute originates (*Redfern/Hunter at 260*).

52. RESPONDENT, however, asks the Tribunal to extend its jurisdiction to a claim based on

the Sugar Contract of 21 November 2003. In order to protect the parties' autonomy to be governed only in the manner to which they consented, the Tribunal "must determine what the parties intended and give effect to their intention" (*Lew/Mistelis/Kroll at 412*). As the arbitration agreement in the Cocoa Contract did not provide jurisdiction to that extent, if the Tribunal exceeds the mandate entrusted to it in this regard, the jurisdiction exercised would be outside the scope of what the parties bargained for and voluntarily chose in the Cocoa Contract.

B. The parties' choice of the Oceania Commodity Association to hear claims arising from the Sugar Contract demonstrates that they did not consent to this Tribunal hearing RESPONDENT's claim.

53. In addition to choosing particular arbitration rules in the Cocoa Contract which authorize very limited jurisdiction, CLAIMANT and RESPONDENT explicitly provided that a separate set of arbitration rules apply to the Sugar Contract, out of which RESPONDENT's asserted counter-claim arises. The existence of a separate arbitration provision in a separate agreement between the parties, pointing to a different arbitration location and rules, is "fairly strong evidence" that the parties intended that disputes under the two agreements to be arbitrated separately (*Born at 325*). The Sugar Contract specifies, "Any disputes arising with respect to or in connection with this agreement shall be finally decided . . . in Port Hope, Oceania in accordance with the Rules of Arbitration of the Oceania Commodity Association" (*R.E. No. 4*). The parties chose to arbitrate Sugar Contract disputes before the Oceania Commodity Association because of its particularly relevant expertise and experience as a specialist in commodity arbitrations, and because the sugar was being supplied by an Oceania company. At the time of concluding this contract, the parties clearly had the opportunity to opt for the Geneva Rules again. By rejecting this option, the parties revealed their intention for disputes arising from the two separate contracts be brought separately

C. The Oceania Commodity Association is the only tribunal competent to hear claims arising out of the Sugar Contract because no applicable rule supercedes the parties' consent to arbitration on such claims by that tribunal.

I. The parties did not consent to Article 21(5) of the Swiss Rules, which RESPONDENT relies on to supercede the parties' choice of arbitration in the Sugar Contract.

54. In the Cocoa Contract of 2001, CLAIMANT and RESPONDENT consented to arbitration

of disputes arising out of that contract "in accordance with" the Geneva Rules (*C.E. No. 2*). On January 1, 2004, the Swiss Rules of International Arbitration ("Swiss Rules") came into force. Article 1 of the Swiss Rules states: "These Rules shall govern international arbitrations, where an agreement to arbitrate refers to these Rules, or to the arbitration rules of the Chambers of Commerce and industry of . . . Geneva . . ." (*Swiss Rules Art. 1*). Despite the assertion in the Swiss Rules that they are wholly applicable to any agreements referencing the Geneva Rules, where parties have actually consented only to arbitration in accordance with the Geneva Rules, the parties' original intentions must be respected. Thus, if a provision in force at the time of arbitration is not consistent with what the parties consented to at the time of concluding the arbitration agreement, CLAIMANT and RESPONDENT cannot be assumed to have consented to that provision (*Uzelac at 88*).

55. While the new Swiss Rules are generally comparable to the Geneva Rules chosen by the parties to govern disputes arising out of the Cocoa Contract, jurisdiction provided to the Tribunal under Article 21(5) of the Swiss Rules greatly exceeds the authority provided to the Tribunal under the original Geneva Rules referenced in the Cocoa Contract. Article 21(5) provides the Tribunal with "jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause." Binding the parties to this provision, which dramatically exceeds the grant of authority to which the parties consented, would violate the will of the parties as expressed in their agreement, and should, therefore, not be considered to be within the parties' consent unless they "expressed [their] agreement" with the changes (*Rechtbank van Koophandel, Brussels 6 May 1993*).

II. Substantive changes in the Geneva Rules following the parties' consent to those rules do not automatically bind the parties because they cannot be assumed to have consented to those changed provisions.

56. When CLAIMANT and RESPONDENT agreed to subject disputes under the Cocoa Contract to arbitration in accordance with the Geneva Rules, the parties did not agree to be bound by any broad changes instituted by the Chamber of Commerce and Industry of Geneva and are, therefore, not bound where such changes adversely affect their rights and expectations under the arbitration agreement. According to the U.S, Second Circuit Court of Appeals, when parties

subject their disputes to certain institutional arbitration rules, they are "deemed to have incorporated those rules into their agreement" (*Born at 330*). By this reasoning, the Geneva Rules became a part of the parties' agreement at the time the contract was made, and later changes to those rules must thus be scrutinized for conformity with the parties' intent before they can be applied to the parties' disputes.

57. Arbitration is strictly a function of party consent. Parties are within the jurisdiction of an arbitration institution "not because the parties were subjected thereto as they would be to a law, but because they had *agreed* thereon" (*Habscheid/Habscheid at III(1)*). While it would be appropriate for changes in the rules or institution of a court to be binding on parties subject to the authority of that court, an analogy here would "not correspond to a modern understanding of arbitration" (*Uzelac at 87-88*). Party autonomy must be respected even in the case of a change in applicable rules. Therefore, the question is whether or not CLAIMANT and RESPONDENT would have agreed to arbitration in accordance with the provisions of the Swiss Rules now applicable (*see Uzelac at 88*).

III. In the Cocoa Contract, the parties consented to the Geneva Rules, and are not bound by provisions in the new Swiss Rules which they would not have agreed to and could not have reasonably anticipated at the time of forming the Cocoa Contract.

58. Although little authority exists as to what happens when a set of arbitration rules are replaced by another set through regional consolidation of rules, the experience of arbitral institution succession in recent European history is instructive as to the approach the Tribunal should take in addressing the new Swiss Rules. After the Arbitration Court at the Foreign Trade Chamber in Berlin was dissolved in 1990 following German Reunification, its members transferred all its powers to the Association for Promotion of Arbitration. However, the Federal Court of Justice in Karlsruhe held that arbitration clauses referring to the old institution were invalidated by dissolution of the institution to which they granted authority (*Uzelac at 80-81*). According to the Karlsruhe court, "The legal status granted by means of the arbitration agreement . . . is not transferable to another organization without agreement of the contracting parties" (*Id. at 82*). A Brussels court came to the same conclusion based on the determination that there was not sufficient continuity between the two arbitration courts (*Rechtbank van Koophandel, Brussels 6 May 1993*).

59. Although this result has been attacked by some, the focus of this criticism is that it does not sufficiently respect the will of the parties; it would be more in line with the parties' choice to have their disputes determined through arbitration before the new institution, which had "compelling uniformities and symmetries" with the old institution, rather than before ordinary courts (*Levin at II(D)*). Thus, following either the reasoning of the Karlsruhe court or that of its critics, the will and intent of the parties must be the key in determining how to apply an arbitration agreement following such changes. The issue was not whether or not to look to the parties' will when dealing with institutional change, but how best to fulfill it. Applying this principle to the case at hand, the Tribunal must consider what the parties intended by incorporating the Geneva Rules into their contract and how that intent might be frustrated by certain provisions of the new Swiss Rules.

60. The treatment of arbitration clauses in the former Yugoslavia following the collapse of the Yugoslav federation in the early 1990s confirms this approach. Many arbitral clauses in contracts between parties in the former Yugoslavia referred to the Foreign Trade Arbitration Court (FTAC) in Belgrade, which operated under the auspices of the Yugoslav Chamber of Economy. However, open hostilities during the early 1990s made compliance with such agreements by parties outside of Serbia unattractive, if not impossible (*Uzelac at 83*). According to the Zagreb High Commercial Court in Croatia, arbitration clauses referring to the FTAC no longer had legal effect because the Yugoslav Chamber of Economy existed only in a changed form, and even if it had not changed, it was now a foreign arbitration institution (*Id. at 84*). Given this major change in the circumstances of the FTAC, no basis existed for assuming that parties would have accepted arbitration clauses incorporating the foreign arbitration institution.

61. Following the reasoning applied above, the Tribunal should focus on the issue of whether or not the parties would have agreed to arbitrate under the changed rules at the time of the agreement, and only if they would have consented to the changes should the parties be so bound. By utilizing this standard, the Tribunal will properly stay within the bounds of its mandate, and party autonomy will be protected even in light of unforeseen circumstances.

IV. The significant disparity between the very broad scope of jurisdiction provided by Article 21(5) of the Swiss Rules and the narrow and explicit jurisdiction provided by the Geneva Rules suggests that the parties would not likely have consented to Article 21(5) at the time of the Cocoa Contract.

62. As stated above, changes in the rules selected by the parties to govern disputes can only be applied to the extent that the altered rules conform to the parties' intent and expectations as expressed in the arbitration agreement. The scope of jurisdiction under the Geneva Rules is limited to that explicitly provided by the parties (*see Geneva Rules Art. 1.1*). Furthermore, the Geneva Rules explicitly state that consolidation of disputes for arbitration is provided only where both arbitration proceedings are governed by the Geneva Rules, and even then the arbitrator must consider all circumstances of the two proceedings, including links between the two cases, before determining that consolidation is appropriate (*Geneva Rules Art. 16*). In contrast, Article 21(5) of the Swiss Rules grants the arbitral tribunal "jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause" (*Swiss Rules Art. 21(5)*). Clearly, the scope of jurisdiction permitted under the Swiss Rules is vastly greater than that provided under the Geneva Rules. Suggesting that CLAIMANT would have submitted to such broad jurisdictional power for the Tribunal at the time of the agreement, based on the parties' choice of the Geneva Rules, is plainly false. In fact, the choice of arbitration rules in the Cocoa Contract suggests the opposite, as the Geneva Rules allow particularly limited jurisdiction to arbitrate only where the parties have explicitly granted their consent.

V. The parties would not likely have consented to Article 21(5) at the time of forming the Cocoa Contract because, had they intended at that time to provide this Tribunal with such broad jurisdiction, the parties could have chosen the Zurich Rules.

63. If parties intend to subject a broad range of disputes to the jurisdiction of a particular arbitral tribunal, they can and must manifest that intent in their arbitration agreement (*Mesquite Lake at 163*). When parties actually choose the current Swiss Rules to govern their disputes, this manifests an intent to accept very broad jurisdiction. At the time of forming the Cocoa Contract, the extensive jurisdiction provided now in Article 21(5) was actually available in the Zurich Rules (*Zurich Rules Art. 27*). CLAIMANT and RESPONDENT had ample opportunity at the

time of their agreement to opt for the Zurich Rules instead of the Geneva Rules if they intended to grant jurisdiction to the Tribunal reaching beyond disputes arising from the Cocoa Contract itself. Neither party had any connection to Geneva or Zurich at that time, so some objective factor must have led to their choice of Geneva Rules. As the set-off defense provision of the Zurich Rules is arguably the greatest difference between the Zurich and Geneva Rules, the parties' choice of the Geneva Rules over the Zurich Rules should indicate that the parties intentionally opted for narrow and specific jurisdiction for this Tribunal limited to Cocoa Contract claims. Given the principle of party autonomy, the parties should be able to rely on their consensual and intentional choice of that provision of the Geneva Rules now.

VI. As the goal of the Swiss Rules is to further uniformity, the parties could not reasonably have foreseen a provision such as Article 21(5) that remains uncommon and controversial in international commercial arbitration.

64. The new Swiss Rules have been instituted to "harmonise the existing rules of arbitration" by providing one uniform set of rules for the several Chambers of Commerce and Industry in Switzerland (*Swiss Rules Introduction*). However, Article 21(5) sets forth a controversial infringement on party autonomy. Incorporation of Article 21(5) is not itself controversial because allowing parties to authorize broad jurisdiction for arbitral tribunals is consistent with the principle of party autonomy. Nevertheless, to permit set-off defenses where parties have not explicitly consented to them, and where the arbitration agreement is "without any indication as to a corresponding will of the parties," application of these provisions is generally considered invalid (*Berger at V(b)(iii)*). No such indication exists in the arbitration agreement in the Cocoa Contract.

65. If the parties would not likely have agreed to altered provisions at the time of the arbitration agreement, they could be bound by the changes only if they could reasonably have expected the application of those provisions. CLAIMANT and RESPONDENT had no reason to expect that Article 21(5) would be incorporated into the new Swiss Rules because similar provisions are uncommon in international commercial arbitration. Mandatory arbitration provisions and rules reflecting the public policy of the arbitral location are examples of provisions that may be binding on the parties even without their explicit or implied consent, as their applicability is foreseeable (*Born at 415*). As Danubia, the chosen arbitral location in this

case, has adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law), mandatory provisions of the Model Law can be binding on the parties even where they conflict with the chosen rules. While no mandatory provisions in the Model Law are relevant to this issue, notably the Model Law, like the Geneva Rules, provides jurisdiction only to the extent explicitly provided by the parties, and does not provide for jurisdiction over unrelated set-off defenses (*see Model Law*).

66. It is obvious that both parties, at the time of completing the Sugar Contract, fully intended that it be governed by a separate arbitration procedure, and no reason exists to assume that the parties would have agreed at that time to subject it to the same arbitration as disputes arising from the Cocoa Contract. Furthermore, there is no evidence suggesting that the parties would have accepted such broad jurisdiction at the time of completing the Cocoa Contract. The parties specifically chose two separate sets of rules to govern the two contracts and separate locations in which to arbitrate. Thus, there is no basis for concluding that the parties would have agreed to be bound by the extensive jurisdiction of Article 21(5). Consequently, the Tribunal has no jurisdiction to consider the counter-claim.

§ 7 Because RESPONDENT's claim is beyond the scope of the jurisdiction which the parties consented to grant to this Tribunal, an award on this claim could be refused enforcement.

A. An award by this Tribunal on the Sugar Contract claim could be refused enforcement as it is beyond the scope of the parties' submission to arbitration in the Cocoa Contract.

67. In arbitration agreements, choosing an arbitration location in a state that is party to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is highly desirable as the Convention "provides for a more simple and effective method of obtaining recognition and enforcement of foreign awards" than available in absence of the Convention (*Redfern/Hunter at 455*). Not only is Danubia, the chosen location for arbitration under the Cocoa Contract, a party to the New York Convention, but Equatoriana and Mediterraneo, the states of the RESPONDENT and CLAIMANT respectively, are also parties to the Convention (*S.C. at 16*). Even under these favorable circumstances, however, any arbitration award arising from a dispute on this agreement could be refused enforcement if the arbitration proceedings are not conducted in accordance with the specifications of the New York

Convention.

68. If the Tribunal were to make an award beyond the scope of the parties' submission to arbitration, it would exceed its proper jurisdiction, and "a court of law may refuse enforcement of the arbitral award if it finds that the arbitrator erred regarding jurisdiction" (*Jarvin in Newman/Hill at 84*). While this is a generally accepted principle of international commercial arbitration, the case against enforcement here is even stronger because of the application of the New York Convention. According to Article V(1)(c) of the New York Convention, "Recognition and enforcement of the award may be refused" if the award "contains decisions on matters beyond the scope of the submission to arbitration. . . ." Regardless of ensuing changes to the Geneva Rules, CLAIMANT and RESPONDENT, upon agreeing to the Cocoa Contract, only chose to submit to the scope of arbitration afforded by the Geneva Rules (*see Geneva Rules Art. 1.1*).

B. An award by this Tribunal on the Sugar Contract could also be refused enforcement as it would not be in accordance with the agreement of the parties.

69. The New York Convention also specifies in Article V(1)(d) that "recognition and enforcement" may be denied if "the arbitral procedure was not in accordance with the agreement of the parties. . . ." This provision is a strong endorsement of the importance of abiding by the procedural rules chosen by the parties. The parties in this case agreed that the Geneva Rules would apply to Cocoa Contract disputes (*C.E. No. 2*), and the Geneva Rules indicate that the parties agreed to no further jurisdiction (*see Geneva Rules Art. 1.1*). Moreover, the Sugar Contract, from which RESPONDENT's asserted counter-claim arises, specifies that "[a]ny disputes arising with respect to or in connection with" the Sugar Contract "shall be decided . . . in Port Hope, Oceania in accordance with the Rules of Arbitration of the Oceania Commodity Association" (*R.E. No. 4*). Thus, if the Tribunal were to make an award on a dispute arising from the Sugar Contract, not only would it exceed its jurisdiction under the Cocoa Contract and apply a provision of the Swiss Rules not agreed to by the parties, but it would also flout the choice of procedural rules explicitly agreed to by the parties for disputes on the Sugar Contract. Such an award would be in violation of the parties' explicit agreements in both contracts.

70. Although the New York Convention only "indirectly addresses" the issues of scope of arbitral jurisdiction and party choice of procedural rules, "an arbitral award may be denied

recognition" if conducted in violation of the Convention's provisions (*Born at 414*). Despite this indirect application, the Tribunal must consider enforceability of an award if it is to fulfill its purpose of efficiently resolving the disputes in accordance with the will of the parties. As any award based on RESPONDENT's asserted counter-claim would be beyond the scope of the Tribunal's jurisdiction and not in accordance with the parties' choice of arbitral procedure for either contract, thereby leaving any such award vulnerable to non-enforceability under the New York Convention, the Tribunal should not hear RESPONDENT's Sugar Contract counter-claim.

§ 8 Even if the Tribunal were to have jurisdiction over RESPONDENT's claim, the Tribunal should nevertheless refuse to hear this claim because it would negatively affect procedural efficiency.

A. The facts and the witnesses involved in the claims under the Cocoa Contract and the Sugar Contract are not mutually connected so as to provide any procedural advantage in hearing them together.

71. "In considering the procedural admissibility of set-off, [the tribunal] is often confronted with . . . balancing the parties' rights against the need for arbitral efficiency" (*Berger at IX*). Efficiency is established in situations where the contracts are overwhelmingly similar in substance, as to make it appealing to have an arbitrator who is familiar with the facts of the first contract hear the second as well. The assumption is that the arbitrator already familiar with the facts will be better equipped to act more quickly in making decisions regarding both contracts (*Leboulanger at Part One III(A)(1)*). The Tribunal will not have an advantage in reaching a decision on the sugar contract in this case.

72. In resolving disputes arising under the Sugar Contract it will be necessary to determine the party bearing the risk of loss at the time of contamination. This will require an examination of the conditions under which the sugar was packaged and shipped. The process by which the cocoa was packaged and shipped is not at issue in the main claim and the parties are different. The facts of the Cocoa Contract will not offer any assistance in this determination.

73. Additionally, the Cocoa Contract only requires the Tribunal to hear evidence from CLAIMAINT and RESPONDENT; whereas, the relevant facts to the Sugar Contract will predominantly come from third parties. The sugar was supplied and transported for shipping by Oceania Sugar Producers, and was delivered by Oceania Shipping Lines. It will be necessary to hear evidence from these parties to determine where contamination occurred. Clearly, any

familiarity with the facts and witnesses involved in the Cocoa Contract will not aid the Tribunal in making a quick and efficient decision regarding the Sugar Contract. Since procedural efficiency is not advanced, the Tribunal should respect the will of the parties and refuse to hear the Sugar Contract claim.

B. Procedural efficiency is best served by respecting the parties' choice of Oceania Commodity Association for the settlement of disputes arising from the Sugar Contract.

I. The parties expressed a clear, corresponding will to exclude the Tribunal's jurisdiction over the Sugar Contract by choosing a Specialized Arbitration Association.

74. Generally, the use of different arbitration clause for each specific contract is strong evidence that the parties intended to have disputes arising out of their respective contracts settled in a different manner, thus excluding the tribunal's competence over the contract with a separate agreement. The difference in selection suggests that "they rejected the possibility of a consolidation externally imposed on them by a court of law or otherwise since they had in mind having disputes decided, no matter how closely interconnected, by different panels irrespective of any risk of incompatible decision" (*Leboulanger at Part Two II(A)(1)(c)*).

75. Arbitral tribunals have decided that in certain instances set-off claims arising under various agreements cannot be segregated, even in the absence of authority to hear set-offs under the chosen arbitration rules (*Hanotiau at I*). However, they recognize that this is only possible "in the absence of a clear indication that the parties had the real intention to keep them totally separate from each other" (*Id.*). There are exceptional cases that clearly indicate the parties' intention to limit the competence of arbitral tribunals (*Berger at V(b)(ii)*).

76. Exceptional cases such as specialized arbitration associations illustrate the parties' clear, corresponding will to exclude another tribunal's competence over a contract. (*Id.*). The parties chose Oceania Commodity Association to quickly and effectively resolve disputes arising under the Sugar Contract and to eliminate unnecessary burdens on the flow of business. The parties' choice of a specialized commodity organization is thus a clear indication that they contracted to exclude the Tribunal's jurisdiction over the Sugar Contract.

II. Specialized arbitrators familiar with the procedures for packaging and shipment of sugar from Oceania producers and shipping lines will advance the procedural efficiency of the arbitration proceedings.

77. CLAIMANT and RESPONDENT could have chosen the same arbitration provision that was inserted in the Cocoa contract; however, they instead chose an arbitration provision which could address the specialized nature of the contract. The Oceania Commodity Association was chosen because it is specialized in commodity arbitration proceedings. There are specialized organizations, like Oceania, that exist for commodity arbitration and maritime disputes (*Davidson at 131*). London for example has both the Sugar Association Limited and the Refined Sugar Association (*See Sugar Association*). Specialized associations, such as those in London, provide separate arbitration facilities for various soft commodities (*Id.*). The parties here contracted for the sale of refined sugar. The existence of separate arbitration facilities for each of sugar and refined sugar in London stresses the depth of the specialization that can be useful in resolving disputes concerning this soft commodity.

78. Oceania Commodity Association was chosen for both its expertise in commodity arbitration and its location. The sugar at issue was supplied by Oceania Sugar Producers. Further, the sugar was delivered for shipment to a carrier in Port Hope, Oceania. The parties' choice of Oceania Commodity Association provides for the appointment of arbitrators with knowledge and understanding of sugar originating from Oceania as well as commodities being shipped from their ports. This specialized knowledge furthers the procedural efficiency of the arbitration proceedings (*Smid*).

79. When dealing with commodities, "disputes are seen as anomalies in the smooth flow of trade and as such [should] be excised as soon as possible" (*Id.*). The relevance of specialized arbitration associations "from the point of view of speed, is that the persons appointed to judge a dispute will be experts in the field" (*Id.*). Arguably arbitrators with specialized knowledge can independently determine the quality and condition of the goods and reach a more swift decision (*Id.*). For example, it may be necessary for the parties to each bring in their own experts to address the storage and possible contamination of the sugar. Arbitrators already familiar with the packaging and shipment procedures of a particular commodity from a particular area are more adept in determining the validity of the evidence provided by the experts (*Id.*). The procedural efficiency of arbitration is thus better served by respecting the parties' choice of the specialized arbitration association.

C. The disputes arising from the Sugar Contract and the Cocoa Contract are not interrelated in a way that would potentially create inconsistent awards if heard by separate tribunals.

I. The dissimilarity of the debts and obligations of the parties undertaken in the Sugar Contract and Cocoa Contract is evidence of the lack of interrelation between the two contracts.

80. Another instance where the need for arbitral efficiency may be more appealing to the parties than protecting their original choice of arbitral bodies is where consolidation avoids contradictions in the settlement of related disputes and therefore prevents inconsistent awards (*Leboulanger Part One III(A)(2)*). The Cocoa Contract and Sugar Contract are not mutually connected in a way that would cause inconsistent awards. To cause inconsistent awards the contracts must contain a related dispute. "Interrelation is the link which joins two debts undertaken under the same legal relationship and which allows the interplay of a set-off between these debts" (*Leboulanger at Part One I(A)(1)(a)*). The presumption is that the parties have an overriding interest in having the linked claims heard by the same tribunal, regardless of the existence of a separate arbitration agreement, because of their relationship to one another (*Berger at V(b)(ii)*).

81. Further, "[w]henever there is an economic link between contracts, ensuing from the contracts' nature and mutual function, these agreements should not be regarded as autonomous agreements" (*Id. at I(A)*). The existence of an economic link can be established by examining the relationship of the parties' debts and obligations under each contract. The obligations undertaken by the parties under the Sugar Contract do not affect the main claim in any way. The only similarity between these two contracts is that CLAIMANT and RESPONDENT are parties to both. An award on one of the contracts will not hinder the parties' from completing their obligations under the other contract. Additionally, there is no evidence of a common debt between the two contracts. Therefore, consolidation to avoid inconsistent awards is unnecessary.

II. The fact that the Sugar Contract was entered into two years after the Cocoa Contract further illustrates the lack of interrelation between the two contracts.

82. A determination of an interrelation between contracts is fact specific. "The interplay between the obligations, as well as the context in which the parties' business relationship was developed have to be taken into account" (*Leboulanger at Part One I(A)*). The parties entered

into the Sugar Contract on 20 November 2003, approximately two years after the parties entered into the Cocoa Contract (*R.E. No. 4*). The Sugar Contract did not include any provisions regarding the parties' previous agreement for the sale of Cocoa. The parties chose a different set of arbitration rules to govern disputes arising under each contract. If an economic link existed between the two contracts, clearly the parties would have included the same arbitration clause in the Sugar Contract when they entered into it two years later.

§ 9 If the Tribunal chooses to extend its jurisdiction to hear RESPONDENT's claim, any award on this claim must be limited to the amount awarded to CLAIMANT on the primary claim.

83. Even if this Tribunal can hear a claim on the Sugar Contract, it cannot award damages beyond the amount due on the primary Cocoa claim. A counter-claim is inadmissible if it does not arise out of the same contract as the main claim (*Lew/Mistelis/Kroll at 153*). RESPONDENT's counter-claim involves a dispute arising from the Sugar Contract, not the Cocoa Contract. Thus, unless otherwise agreed to by the parties, it is not admissible as a counter-claim.

84. A set-off on the other hand, may be admissible if the parties have granted the arbitral tribunal competence to hear set-offs that did not arise out of the arbitration agreement of the main claim (*Berger at VI*). RESPONDENT argues that Article 21(5) effectively grants the Tribunal competence to hear set-offs (*S.D. at 17*). Clearly, the addition of this article was not intended to create a loop-hole through which RESPONDENT could unilaterally modify the initial choice of the parties in the contract governing the Sugar claim. Allowance of this unilateral change would violate the very goal of arbitration.

85. Should the Tribunal nevertheless decide to exercise jurisdiction over the counter-claim, the maximum amount of relief would be limited to a set-off against the award received by CLAIMANT on the primary claim. RESPONDENT relies upon Article 21(5) to bring its counter-claim under the jurisdiction of the Tribunal. Article 21(5) specifically provides for jurisdiction to hear a set-off defense not a counter-claim. Article 21(5) states: "The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the subject of another arbitration agreement or forum-selection clause." Under the Swiss Rules, a claim arising from a dispute governed by a separate arbitration agreement is clearly limited to being presented

as a set-off in the form of a defense against the main claim.

86. "Set-off is . . . a defense against a claim, not a counter-attack" (*Karrer*). The amount of the Sugar Contract is USD 385,805 (*R.E. No. 4*). The amount at issue in the Cocoa Contract is USD 289,353 (*S.C. at 21*). RESPONDENT asks the Tribunal to require CLAIMANT to pay the full contract price for the sugar. However, the amount of the Sugar Contract exceeds the amount of the Cocoa Contract. "Respondent may, as a defense, set off his claim to the full extinction of his claim against Claimant's claim (to the extent that it would exist except for the set-off)" (*Id.*). If an arbitral tribunal has jurisdiction, a respondent may also "counter-claim for the excess of his claim" (*Id.*). In the case at hand, there is no such jurisdiction. RESPONDENT's claim does not arise out of the same contract as the primary claim, and even if Article 21(5) applies, it specifically limits jurisdiction to claims being raised as a set-off defense. If the Tribunal does decide to hear RESPONDENT'S claim, it is limited to considering it as a set-off defense, and as such cannot render an award in excess of the amount due on the primary Cocoa claim.

REQUEST OF RELIEF

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

- find that RESPONDENT is not excused from its contractual obligations under Art. 79(1);
- find that CLAIMANT properly avoided the contract as to the unshipped cocoa;
- grant CLAIMANT's request for damages equaling the difference between the cover purchase price and the contract price for the unshipped cocoa;
- find that RESPONDENT's counter-claim is beyond the scope of the jurisdiction which the parties consented to give this Tribunal; and
- find that it lacks authority to hear RESPONDENT's counter-claim.

(signed)

Erin Farabaugh   Jennifer Rellis   Elizabeth Shackelford   Gregory Walker

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9 December 2004