MEMORANDUM FOR RESPONDENT

Chamber of Commerce and Industry of Geneva
Case no 30000-2004

On Behalf of:
Equatoriana Commodity Exporters, S.A.
325 Commodities Avenue
Port City
Equatoriana

Respondent

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

Claimant

HUMBOLDT-UNIVERSITÄT ZU BERLIN

MARTIN DOBIAS  JACOB HÖRNLE  VIOLA MATTATHIL
JONAS PAPE    MAREIKE SCHMIDT  SÉBASTIEN SEELE  BENJAMIN WERTHMANN
A. The CISG is the only body of law applicable to the merits of the present case. .......... 1

B. Respondent is excused from liability under Art. 79(1) CISG by reason of the storm extensively damaging the cocoa crop in Equatoriana and the subsequent export restriction. ................................................................. 3

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<td>e.g.</td>
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<td>et al.</td>
<td>et alii; and others (Latin)</td>
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<td>et seq.</td>
<td>et sequens; and the following one (Latin)</td>
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<td>et seqq.</td>
<td>et sequentia; and the following ones (Latin pl.)</td>
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<td>etc.</td>
<td>et cetera; and so on (Latin)</td>
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<td>FOB</td>
<td>Free on Board (Incoterms 2000)</td>
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<td>i.e.</td>
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<td>ibid.</td>
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MAY IT PLEASE THE TRIBUNAL

1 On behalf of Equatoriana Commodity Exporters, S.A. (henceforth known as Respondent) we respectfully submit Respondent’s reply to Procedural Order No. 1 issued on 1 October 2004 and to the memorandum presented by Mediterraneo Confectionary Associates, Inc. (henceforth known as Claimant).

SUMMARY OF ARGUMENT

2 The following shall demonstrate in law and fact that:
   − the CISG is the body of law exclusively applicable to the merits of the case [A]

concerning Cocoa Contract 1045:
   − Respondent is exonerated from liability for damages by reason of the storm extensively damaging the cocoa crop in Equatoriana and the subsequent export restriction pursuant to Art. 79(1) CISG [B]
   − Claimant cannot recover damages under Arts. 45(1)(b), 74 et seqq. CISG [C]

concerning Sugar Contract 2212:
   − the Tribunal has jurisdiction over the counter-claim arising out of Sugar Contract 2212 and that Respondent’s recovery should not be limited to a set-off defense [D].

ARGUMENT

A. The CISG is the only body of law applicable to the merits of the present case.

3 Prior to its presentation of argument on the merits of this case and in light of Claimant’s several references to other bodies of law [MEMORANDUM FOR CLAIMANT, PARA. 1.1.1.3, 2.2.3.1, 3.3.2 ET AL.], Respondent would like to draw the Tribunal’s attention to the fact that both Claimant and Respondent have their place of business in States that are party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and that therefore the Convention is the body of law applicable to the merits of the case pursuant to Art. 1(1)(a) CISG. Moreover, whenever a certain aspect falls within the scope of the
Constitution, the Convention’s rules govern exclusively [Supreme Court Switzerland, 15 September 2000; Eörsi, p. 2-6; Magnus, Art. 4 para. 12]. Against this background, it is Respondent’s respectful submission that Claimant’s attempts to base its claim inter alia on the Common Law in general [Memorandum for Claimant, para. 1.3.2, 2.1.5 et al.] and the Uniform Commercial Code in particular [Ibid., para. 1.2.1, 2.2.3 et al.], on the UNIDROIT Principles [Ibid., para. 2.1.3, 3.3.2.2 et al.] and the Principles of European Contract Law [Ibid., para. 2.1.4, 3.3.2.1, 3.4 et al.] have to be disregarded when deciding the present dispute.

In this context Respondent further challenges Claimant’s allegation that the UNIDROIT Principles and the Principles of European Contract Law represent the general principles on which the CISG is based [Memorandum for Claimant, para. 3.3.2] and that they can thus be used to assist in its interpretation. It is commonly accepted by commentators that the CISG – according to Art. 7(1) – needs to be interpreted autonomously in order to promote its international character [U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998 - MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino; District Court, Eastern District of Louisiana, 17 May 1999 - Medical Marketing v. Internazionale Medico Scientific; District Court Laufen, 7 May 1993; Ferrari in Schlechtriem/Schwenzer, Art. 7 para. 9; Bonell in Bianca/Bonell, Art. 7 para. 2.2.2]. This means that the Convention itself has to be the only source for its interpretation.

Recourse to other sources of law is only admissible where a matter is not expressly settled in the Convention. In such a situation first and foremost “the general principles on which it [the Convention] is based” find application and are admissible to fill the gaps in the Convention [Art. 7(2) CISG]. As Respondent will show in the course of its memorandum, all of the substantive legal issues related to the dispute between the parties can be solved by applying the provisions of the CISG. Consequently, recourse to the gap-filling mechanism of Art. 7(2) CISG is unnecessary.

Moreover, taking into account that both sets of rules Claimant refers to were published years after the CISG, they could not have been an inspiration during its creation [Witz in Witz/Salger/Lorenz, Art. 7 para. 24]. Consequently and contrary to Claimant’s assertion [Memorandum for Claimant, para. 3.3.2], these sets of rules could not constitute the general principles on which the CISG “is grounded” and are irrelevant in the case at hand.
B. Respondent is excused from liability under Art. 79(1) CISG by reason of the storm extensively damaging the cocoa crop in Equatoriana and the subsequent export restriction.

Respondent denies Claimant’s charge regarding its liability for damages under the CISG [MEMORANDUM FOR CLAIMANT, PARA. 3.4]. Irrespective of the question whether Claimant has a basis to claim damages at all [INFRA, PARA. 36 ET SEQQ.], a liability of Respondent is excluded by Art. 79(1) CISG. This provision states that “[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”. Respondent submits that it is exonerated from liability since a devastating storm on 14 February 2002 [MR. SMART’S LETTER OF 24 FEBRUARY 2002, CLAIMANT’S EXHIBIT NO. 3] and the export restriction on Equatoriana cocoa beans imposed on 22 February 2002 [ANSWER TO NOTICE OF ARBITRATION, PARA. 9] prevented it from delivering the remaining 300 metric tons of cocoa beans.

It is contended that the export restriction and the storm causing it constituted two impediments beyond Respondent’s control [I] and that the failure to deliver the entire quantity of cocoa beans was “due to” these impediments since the Cocoa Contract 1045 exclusively called for the delivery of Equatoriana cocoa beans [II]. These impediments to Respondent’s performance could neither have been foreseen at the time of the conclusion of the contract [III], nor was it possible for Respondent to avoid or overcome them or their consequences [IV]. Respondent is consequently exonerated from liability for damages under Art. 79(1) CISG. Furthermore, the alleged failure to notify Claimant in accordance with Art. 79(4) CISG would not bar Respondent from relying on Art. 79(1) CISG [V].

I. The export restriction and the storm causing it constitute impediments beyond Respondent’s control.

It is submitted that both the devastating storm and the export restriction are impediments beyond Respondent’s control. Natural phenomena are generally accepted as exemplary impediments beyond a party’s control [DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, 6 JULY 2004 - RAW MATERIALS V. MANFRED FORBERICH; HUBER IN MÜNCHENER KOMMENTAR, ART. 79 CISG PARA. 10; ACHILLES, ART. 79 PARA. 6] as are export restrictions
II. Respondent’s inability to deliver the entire amount of cocoa beans was “due to” the impediments as Cocoa Contract 1045 exclusively called for the delivery of Equatoriana cocoa beans.

10 Respondent submits that its sole obligation under Cocoa Contract 1045 was to deliver Equatoriana cocoa beans and repudiates Claimant’s assertion that a limitation of the country of origin may only be based on an “implied term” which allegedly can exclusively be incorporated under the CISG via Arts. 7 or 9 CISG [MEMORANDUM FOR CLAIMANT, PARA. 1 ET SEQQ.]. The CISG rather envisages the determination of the parties’ contractual duties to be governed by Art. 8 CISG which provides for the interpretation of a contract [SUPREME COURT SWITZERLAND, 22 DECEMBER 2000 - ROLAND SCHMIDT V. TEXTIL-WERKE BLUMENEGG; ICC CASE NO. 7331, 1994; OFFICIAL RECORDS, P. 18; HONNOLD, ART. 8 PARA. 105; FARNSWORTH IN BIANCA/BONELL, ART. 8 PARA. 2.1] as well as by Art. 9 CISG which allows usages and practices to supplement contract terms. Seeing that the determination of the parties’ contractual duties is thus expressly settled in the CISG, resorting to other bodies of law such as the UNIDROIT Principles etc. via Art. 7 CISG in order to establish an “implied term” is unnecessary and thus not admissible [CF. SUPRA, PARA. 4 ET SEQ.].

11 Thus, the limitation of Respondent’s contractual duty rather derives from the interpretation of the contract according to Art. 8(2) CISG [1], as well as from a binding practice established between the parties according to Art. 9(1) CISG [2]. Consequently, Respondent was barred from delivering the remaining 300 metric tons of cocoa beans “due to” the above impediments within the meaning of Art. 79(1) CISG.
1. An interpretation of Cocoa Contract 1045 according to Art. 8(2) CISG shows that Respondent’s obligation was restricted to the delivery of Equatoriana cocoa beans.

Respondent respectfully submits that Cocoa Contract 1045 exclusively called for the delivery of Equatoriana cocoa beans. This understanding follows from a “reasonable” interpretation of the contract in accordance with Art. 8(2) CISG, for which pursuant to Art. 8(3) CISG “all relevant circumstances of the case” need to be taken into account. In the present case a number of circumstances have to be considered when scrutinizing Respondent’s contractual duty according to Art. 8(2) CISG.

First, the contract price helps to indicate that Respondent’s obligation was restricted to the delivery of Equatoriana cocoa beans. As already stated before [ANSWER TO NOTICE OF ARBITRATION, PARA. 8] and not challenged by Claimant, the price upon which the parties agreed refers to the lowest quality of cocoa beans available on the market. A glance at the list containing the cocoa producing countries worldwide shows that most producing countries of the world, including the major producers of cocoa, grow cocoa of superior quality [EXTRACT FROM NYBOT COCOA RULES, RESPONDENT’S EXHIBIT NO. 1; LIFFE COCOA FUTURES CONTRACT, RESPONDENT’S EXHIBIT NO. 2] which is thus traded at significantly higher prices. Cocoa of such a low quality as referred to by the low contract price of Cocoa Contract 1045 is produced only in a limited number of countries. Therefore the price already strongly limits the group of countries from which Respondent could have procured the cocoa beans under the terms of Cocoa Contract 1045.

Contrary to Claimant’s assertion that the above conclusion required special knowledge of a certain trade usage only available to participants in the “cocoa-commodity-trading industry sector” [MEMORANDUM FOR CLAIMANT, PARA. 1.1.1.1], it is submitted that this correlation between price and origin can be recognized by common sense. Claimant itself points out that it sought “low grade and inexpensive cocoa” when contracting with Respondent [MEMORANDUM FOR CLAIMANT, PARA. 1.3.3] and thereby expressly acknowledges its understanding of a necessary correlation between quality and price. Seeing that, as far as the quality of cocoa is concerned, certain producing countries yield distinct qualities, it can be reasonably inferred that Claimant was aware of the necessary link between quality and origin. As a business procuring 1,500 metric tons of cocoa annually, an amount even exceeding the annual output of several cocoa producing countries [CF. ANNEX A,
INTERNATIONAL COCOA AGREEMENT 2001 FOR A LIST OF 16 PRODUCING COUNTRIES FOR WHICH THIS APPLIES], Claimant can hardly argue it was unaware of this correlation. Therefore Claimant cannot have been oblivious to the origin of the cocoa beans it would receive.

Secondly, Respondent’s company name “Equatoriana Commodity Exporters, S.A.” supports the above-mentioned limitation of Respondent’s contractual duty. The first element of the name – “Equatoriana Commodities” – clearly specifies the type of goods Respondent trades with, namely commodities from Equatoriana such as Equatoriana cocoa beans. The second element of the name, the term “Exporters”, as opposed to the term “traders”, indicates that Respondent sells goods originating from Equatoriana to business partners located in other countries of the world. Consequently, the company name establishes that Respondent exports Equatoriana commodities. As far as cocoa beans are concerned, this conclusion perfectly corresponds to reality as Respondent in the course of its business never sold cocoa beans from outside Equatoriana [PROCEDURAL ORDER NO. 2, PARA. 14]. The reasonableness of this conclusion is supported by several examples: the “Tanzania Coffee Exporter Company”, the “Granite India Export Corporation” and the “Caribbean Banana Exporters Association” are all companies dealing exclusively with products originating from the locality to which their name refers [CF. COMPANY PROFILES]. There was consequently no reason for Claimant to assume that Respondent, contrary to all manifest indications, might sell other cocoa beans than those originating from Equatoriana.

The intent of a reasonable buyer serves as a further indication that Respondent’s contractual duty is limited in the above way. It has to be assumed that any reasonable buyer in Claimant’s position would have understood Cocoa Contract 1045 as being restricted to Equatoriana cocoa beans: Since the contract provided that all costs for the transportation from the delivery point onwards are at the buyer’s charge [CF. COCOA CONTRACT 1045, CLAIMANT’S EXHIBIT NO. 2; PROCEDURAL ORDER NO. 2, PARA. 27], it cannot be assumed that a reasonable buyer would have intended to allow for the delivery of cocoa beans from any part of the world and thereby leave the country of origin at the seller’s choice. As a glance at a map of the world shows, cocoa producing countries are located in a wide “belt” along the equator [CF. ICCO MAP]. Therefore, Respondent could have delivered cocoa beans from a country located many thousand miles away from Mediterraneo if the contract had not been restricted in the above-mentioned way. In this case the costs for transportation of the cocoa beans would have increased dramatically, a result demonstrating that no reasonable buyer would have let the seller choose the country of origin.
In this context Respondent objects to the allegation that Claimant’s conduct subsequent to the conclusion of the contract, i.e. declaring the source “completely irrelevant” [MR. SWEET’S LETTER OF 5 MARCH 2002, CLAIMANT’S EXHIBIT NO. 4], showed that the parties had not intended to contract for Equatoriana cocoa beans [MEMORANDUM FOR CLAIMANT, PARA. 1.2.4]. Respondent respectfully submits that Claimant’s conduct indicates quite a different motivation: Taking the above described circumstances into account, Respondent cannot but assume that Claimant merely tried to take advantage of the then changed circumstances in the cocoa market. At the point in time at which Claimant avowed the insignificance of the origin, the price for cocoa beans had risen surprisingly by about 30 per cent compared to the price at the time of contracting [ICCO MONTHLY AVERAGE COCOA PRICES, RESPONDENT’S EXHIBIT NO. 3]. This high market price made it so attractive for Claimant to receive cocoa beans which had been purchased at the much lower price of November 2001 that it was willing to bear potentially higher transportation costs. Thus it is submitted that Claimant originally intended to contract for Equatoriana cocoa beans but later “adapted” its intent to the altered circumstances.

As a result, a reasonable interpretation of Cocoa Contract 1045 pursuant to Art. 8(2) CISG under due consideration of the relevant circumstances shows that Respondent’s contractual duty was limited to delivery of Equatoriana cocoa beans.

2. As all previous sales of cocoa beans concerned Equatoriana cocoa beans, the parties have established a practice which according to Art. 9(1) CISG is binding upon them.

In addition to the above interpretation of the contract, the restriction of Respondent’s contractual duty to deliver Equatoriana cocoa beans results from a binding practice established between the parties. Seeing that every previous sale of cocoa beans by Respondent to Claimant was a sale of cocoa beans originating from Equatoriana [ANSWER TO NOTICE OF ARBITRATION, PARA. 5], it is Respondent’s submission that the parties established a practice within the meaning of Art. 9(1) CISG. According to this provision “[t]he parties are bound by any […] practices which they have established between themselves.”

Over the years the parties repeatedly concluded contracts similar to Cocoa Contract 1045 in the course of their business relationship [MR. SWEET’S LETTER OF 14 OCTOBER 2002, CLAIMANT’S EXHIBIT NO. 8]. All of these contracts concerned the same goods and were made on exactly the same terms [PROCEDURAL ORDER NO. 2, PARA. 16]. They were also executed in
the same manner, i.e. Claimant always received Equatoriana cocoa beans [PROCEDURAL ORDER NO. 2, PARA. 19] and accepted them without any objections. It should furthermore be noted that Claimant did so consciously as it demonstrably knew about the origin of the cocoa beans. This knowledge is established by the printing of the origin on the cocoa bags, as asserted by Claimant [MEMORANDUM FOR CLAIMANT, PARA. 1.2.1], and also indicated by the fact that in the past Claimant arranged the shipment of the goods [PROCEDURAL ORDER NO. 2, PARA. 19]. Consequently, all previous cocoa contracts between the parties were performed in equal fashion without disapproval by one of the parties.

21 It is contended that the parties thereby established a binding practice between them according to which all cocoa contracts concluded between them called for the delivery of Equatoriana cocoa beans. Claimant objects to the existence of a binding practice by arguing that such a practice requires active participation of both parties rather than mere tolerance by one of them [MEMORANDUM FOR CLAIMANT, PARA. 1.2.2]. Contrary to that assertion, Respondent submits that an established practice is sufficiently proven if it is shown that previous similar transactions between the parties were treated in the same manner and no objections were raised [CF. COMMERCIAL COURT AARGAU, 26 SEPTEMBER 1997; JUNGE IN SCHLECHTRIEM, ART. 9 PARA. 7; MELIS IN HONSELL, ART. 9 PARA. 4].

22 This notion is furthermore supported by a decision also cited by Claimant, albeit with the intent to prove the opposite [MEMORANDUM FOR CLAIMANT, PARA. 1.2.2 CITING SUPREME COURT ITALY, 7 AUGUST 1998 - AMC DI ARIOTTI V. ZIMM & SÖHNE]. Although denying its relevance in that particular case, the court did acknowledge the possibility of establishing a practice by “mere tolerance by the seller” [SUPREME COURT ITALY, 7 AUGUST 1998 - AMC DI ARIOTTI V. ZIMM & SÖHNE]. Consequently, both the case law and commentators mentioned above demonstrate that the parties’ conduct in the present case suffices to establish a practice between them that Equatoriana cocoa beans are to be delivered. Seeing that Art. 9(1) CISG emphasizes that any practice established between the parties is binding upon them by law, Claimant is bound by its previous conduct with the result that it cannot suddenly regard Respondent as being obligated to deliver cocoa beans from outside Equatoriana.

23 As a result of the practice established between the parties and the interpretation of the contract [SUPRA, PARA. 12 ET SEQ.], Respondent’s obligation under Cocoa Contract 1045 was restricted to the delivery of Equatoriana cocoa beans. Taking this sole obligation into consideration, it has to be concluded that Respondent was prevented from delivering the
outstanding 300 metric tons of cocoa beans to Claimant by way of the two above-
mentioned impediments within the meaning of Art. 79(1) CISG [SUPRA, PARA. 9].

III. At the time of the conclusion of the contract Respondent could not have 
foreseen the impediments.

It is further contended that Respondent could not have foreseen these impediments at 
the time of the conclusion of the contract as required by Art. 79(1) CISG. The Secretariat 
Commentary, as already cited by Claimant [MEMORANDUM FOR CLAIMANT, PARA. 2.2.2], states 
that “impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future” [SECRETARIAT COMMENTARY, ART. 65 PARA. 5] and thus are foreseeable to a 
certain degree. It then, as unfortunately not cited by Claimant, goes on to state: “However, [...] it is necessary to determine whether the non-performing party could reasonably have been expected to take [the impediment] into account at the time of the conclusion of the contract” [IBID., ART. 65 PARA. 6]. The Commentary thereby underlines 
that in order not to undermine the purpose of the Art. 79(1) CISG foreseeability must not 
be understood as the question whether the particular impediment could have occurred in 
theory, but rather whether a reasonable businessperson in the situation of the promisor 
at the time of contracting had to anticipate the occurrence of the particular impediment 
[IBID., ART. 65 PARA. 5 ET SEQ.; CF. STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER, ART. 79 PARA. 22; 
TALLON IN BIANCA/BONELL, ART. 79 PARA. 2.6.3.; MAGNUS, ART. 79 CISG PARA. 32].

In the present case the storm of 14 February 2002 was the first within the last 22 years 
which affected the Equatoriana cocoa crops at all. Furthermore, it was the first storm in 
the country’s reported history which caused extensive damage to the cocoa crops 
[PROCEDURAL ORDER NO. 2, PARA. 8] and therefore resulted in a governmental reaction as 
the one experienced in 2002. Therefore a storm of such degree causing such 
consequences could not have been foreseen at the time of the conclusion of Cocoa 
Contract 1045. Moreover, it has to be considered that the question whether an 
impediment could have been foreseen does not only relate to the occurrence of the 
impediment per se; it also requires that the promisor could have foreseen that the 
impediment could occur during the time designated for the performance of the contract 
[TALLON IN BIANCA/BONELL, ART. 79 PARA. 2.6.3.]. The occurrence of such a storm within the six 
months designated for the performance of Cocoa Contract 1045 was even less foreseeable.
The same considerations apply to the export restriction. Export restrictions are generally accepted as being unforeseeable [District Court s'-Hertogenbosch, 2 October 1998; Bulgarian Chamber of Commerce and Industry, 24 April 1996]. In the present case this general notion gains further weight by two circumstances: First, there is no information about the occurrence of any comparable state interventions within the entire history of Equatoriana. Second, the export restriction was the result of the storm of 14 February 2002, an event which was unforeseeable in itself. How can the result of an unforeseeable event be expected to be foreseen?

It has thus to be concluded that Respondent could not reasonably be expected to have taken the impediments into account at the time of the conclusion of the contract. Therefore these impediments were unforeseeable within the meaning of Art. 79(1) CISG.

IV. The impediments and their consequences could have neither been avoided nor overcome.

Respondent submits that the further requirements of Art. 79(1) CISG are also given as neither the impediments to Respondent’s performance [1] nor their consequences [2] were avoidable or surmountable within the meaning of Art. 79(1) CISG.

1. To avoid or overcome the impediments was beyond Respondent’s power.

As far as the storm is concerned, it cannot be reasonably doubted that it was impossible for Respondent to avoid or overcome it. The same applies to the export restriction. First, Respondent could not have avoided the export restriction as the enactment was directed against all exporters of Equatoriana cocoa beans located in Equatoriana. Second, there existed no possibility for Respondent to overcome the export restriction as it was ordered by the Equatoriana Government Cocoa Marketing Organization [Mr. Smart’s Letter of 24 February 2002, Claimant’s Exhibit No. 3] which is an official entity with the result that Respondent was under the duty to obey the export ban [Procedural Order No. 2, Para. 11].

Contrary to Claimant’s allegation [Memorandum for Claimant, Para. 2.2.3] there was no legal procedure available for Respondent to overcome the export embargo. All petitions against the embargo and queries for an exemption from it by participants in the Equatoriana cocoa market were rejected by the Equatoriana Government Cocoa Marketing Organization [Procedural Order No. 2, Para. 12]. As the organization can
reasonably be expected to treat all exporters of Equatoriana cocoa equally, it is beyond reason to assume that a further query by Respondent could have been successful. Therefore it was beyond Respondent’s power to avoid or overcome the impediments.

2. To overcome the impediments’ consequences was equally impossible for Respondent.

Respondent further submits that it could not have overcome the impediments’ consequences. Contrary to that, Claimant suggests that Respondent should have provided Equatoriana cocoa beans which had already been exported [MEMORANDUM FOR CLAIMANT, PARA. 2.2.1] – a notion Respondent objects to. All cocoa beans which are exported from Equatoriana are directly delivered from the warehouses of the Equatoriana Government Cocoa Marketing Organization to the ultimate purchasers [PROCEDURAL ORDER NO. 2, PARA. 11]. The term “ultimate purchaser” illustrates that these purchasers themselves process the cocoa beans and – like Claimant – do not acquire them for resale [PROCEDURAL ORDER NO. 2, PARA. 24]. Therefore it has to be assumed that none of the Equatoriana cocoa beans exported prior to the imposition of the export restriction were available for Respondent to source.

Moreover, Claimant alleges that Respondent was compelled to deliver cocoa beans from outside Equatoriana as a “commercially reasonable substitute” [MEMORANDUM FOR CLAIMANT, PARA. 2.2.3]. The concept of providing such a substitute is a purely academic one which did not find its way into the CISG. Seeing that Respondent’s duty under Cocoa Contract 1045 was limited to the delivery of Equatoriana cocoa beans [SUPRA, PARA. 10 ET SEQQ.], Respondent repudiates Claimant’s assertion to this effect. First, the very purpose of Art. 79(1) CISG is to exonerate a party from liability if he is prevented from performing his contractual obligations. If the parties contract for a certain good originating from a single country where an export restriction is imposed after the conclusion of the contract, the situation is a textbook definition of an excuse under Art. 79(1) CISG [CF. TALLON IN BIANCA/BONELL, ART. 79 PARA. 2.6.5.; STOLL IN SCHLECHTRIEM, ART. 79 PARA. 30]. Compelling the party in breach to provide a commercially reasonable substitute even in such a situation would not leave any space for the application of Art. 79(1) CISG. Seeing that the parties in the present case contracted only for cocoa beans originating from Equatoriana where an export restriction was imposed, this case corresponds to the given exemplar where a commercially reasonable substitute cannot be demanded.
Second, acknowledging the duty to offer a commercially reasonable substitute in case a party fails to perform would harshly contravene the principle of party autonomy which is the basis of any contractual relationship between individuals. The parties’ broad freedom to agree upon the subject matter of a contract is one of the most fundamental characteristics within the law of contracts. In the given case the parties agreed upon the delivery of Equatoriana cocoa beans. Therefore the obligation to furnish a commercially reasonable substitute would render this intentional restriction of the contract invalid and thereby inadequately undermine the parties’ freedom of contract – it would “lead to a far-reaching and, above all, undefined modification of [...] [the] obligation to perform” [ENDERLEIN/MASKOW, ART. 79 PARA. 13.6]. For these reasons Respondent was not compelled to provide a commercially reasonable substitute.

V. Respondent’s alleged failure to notify Claimant in accordance with Art. 79(4) CISG does not bar Respondent from relying on Art. 79(1) CISG.

According to Art. 79(4) CISG “the party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform.” It is contended that Respondent accurately complied with this duty by repeatedly giving sufficient and exact notice of the impediments and their effects [MR. SMART’S LETTER OF 24 FEBRUARY 2002, CLAIMANT’S EXHIBIT NO. 3; MR. SMART’S LETTER OF 13 NOVEMBER 2002, CLAIMANT’S EXHIBIT NO. 10]. However, even a failure to live up to this duty does not prevent a party from relying on exoneration within the meaning of Art. 79(1) CISG [MAGNUS IN HONSELL, ART. 79 PARA. 23; STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER, ART. 79 PARA. 50].

Seeing that the requirements of Art. 79(1) CISG have been fulfilled, Respondent in conclusion respectfully requests the Tribunal to find that Respondent is exonerated from liability by reason of the storm and the export restriction.

C. Claimant is not entitled to damages under the CISG.

Claimant bases its claim for damages stemming from the cover purchase it conducted on 24 October 2002 upon Arts. 45(1)(b), 75 and 76 CISG. Yet as the following will show, Claimant is neither entitled to calculate its loss under Art. 75 CISG [I], nor can it establish its loss on the basis of Art. 76 CISG [II]. Moreover, should Claimant seek to rely on Art. 74 CISG, its claim would not be successful either [III]. Furthermore, any potential damages to be
awarded to Claimant would have to be reduced to USD 34,405 according to Art. 77 CISG [IV]. Finally, it is contended that interest is not an issue at this stage of the proceedings [V].

I. Claimant may not recover the additional expenses incurred through the purchase on 24 October 2002 under Art. 75 CISG.

Contrary to Claimant’s submission [MEMORANDUM FOR CLAIMANT, PARA. 3.4] the calculation of damages in the present case cannot be based on Art. 75 CISG as Claimant failed to avoid Cocoa Contract 1045 prior to its purchase on 24 October 2002.

1. Avoidance of the contract is a mandatory prerequisite for the application of Art. 75 CISG.

It is clear from the wording of Art. 75 CISG that this provision may only be applied “[i]f the contract is avoided”. This indispensable requirement of avoidance has been acknowledged in various decisions [COURT OF APPEAL MILAN, 11 DECEMBER 1998 - BELLONI CASTELLO V. EGO; COURT OF APPEAL BAMBERG, 13 JANUARY 1999; DISTRICT COURT BRAUNSCHWEIG, 30 JULY 2001; DISTRICT COURT HAMBURG, 26 NOVEMBER 2003; COURT OF APPEAL BARCELONA, 2 FEBRUARY 2004; COURT OF APPEAL DÜSSELDORF, 22 JULY 2004] as well as by commentators [STOLL IN SCHLECHTRIEM, ART. 75 PARA. 5; KNAPP IN BIANCA/BONELL, ART. 75 PARA. 2.1; ACHILLES, ART. 75 PARA. 2]. The rationale behind this requirement is to prevent the aggrieved party from benefiting from the contract twice: Without the requirement of avoidance a party could claim damages for a substitute transaction and then go on to demand performance of the contract [HUBER IN MÜNCHENER KOMMENTAR, ART. 74 CISG PARA. 9; STOLL IN SCHLECHTRIEM, ART. 75 PARA. 5]. There can thus be no doubt that avoidance of contract must precede a cover transaction for the loss to be calculated under Art. 75 CISG.

2. Claimant did not declare avoidance until after the cover purchase.

For a contract to be nullified Art. 26 CISG mandates that the aggrieved party give notice to this effect. This declaration is necessary in order to protect the opposite party from unnecessarily continuing to seek performance and to clarify their legal position in regard to the contract in question [STOLL/GRUBER IN SCHLECHTRIEM, ART. 75 PARA. 5; KAROLLUS IN HONSELL, ART. 26 PARA. 3]. Claimant failed to declare avoidance before its purchase of 300 metric tons of cocoa beans from Oceania Produce Ltd. on 24 October 2002. It was not until three weeks later that Claimant stated that it considered the contract terminated.
[MR. FASTTRACK'S LETTER OF 15 NOVEMBER 2002, CLAIMANT'S EXHIBIT NO. 11]. This only assertion of avoidance was declared too late in order to enable the calculation of damages under Art. 75 CISG.

In its memorandum Claimant brings forward a four-pronged argument as to why it considers the contract avoided prior to its substitute purchase [MEMORANDUM FOR CLAIMANT, PARA. 3.1 ET SEQ.]. In the following Respondent will show why none of these arguments serves to conclude that Claimant indeed avoided Cocoa Contract 1045 before concluding the cover purchase.

In its first argument Claimant qualifies its letter of 15 August 2002 [MR. SWEET'S LETTER OF 15 AUGUST 2002, CLAIMANT'S EXHIBIT NO. 7] as an explicit notice of avoidance conditional to continued non-delivery [MEMORANDUM FOR CLAIMANT, PARA. 3.1.2]. In this letter Claimant stated that it would “have to purchase elsewhere” if it did not “receive notification from [Respondent] soon” concerning the time of shipment of the remaining cocoa beans. Respondent respectfully submits two reasons why this statement cannot be understood as a declaration of conditional avoidance of the contract.

Firstly, the buyer's declaration of avoidance under Art. 26 CISG needs to satisfy a “high standard of clarity” [LESER IN SCHLECHTRIEM, ART. 26 PARA. 10; CF. SUPREME COURT AUSTRIA, 6 FEBRUARY 1996] by unequivocally revealing “the buyer's obvious will not to be bound any longer under the sales contract” [DISTRICT COURT FRANKFURT, 16 SEPTEMBER 1991; HUBER IN SCHLECHTRIEM, ART. 49 PARA. 29]. Claimant's letter, however, remains silent concerning the fate of Cocoa Contract 1045. Therefore, Respondent was reasonable in understanding the threat of purchasing the outstanding amount elsewhere rather as a threat to conduct an auxiliary purchase than as a threat to avoid the contract.

Furthermore, Respondent submits that the CISG, through Art. 26, requires a declaration of avoidance to be immediately effective. Consequently, commentators regard it as inadmissible to link a declaration of avoidance to a certain condition [LESER IN SCHLECHTRIEM, ART. 26 PARA. 6; KAROLLUS IN HONSELL, ART. 26 PARA. 16]. Seeing that Claimant's letter of 15 August 2002 threatens to purchase the outstanding amount of cocoa beans elsewhere under the condition of continued non-delivery, the conditionality of this warning deprives the statement of the immediate effect required by Art. 26 CISG. Thus, Claimant's letter cannot be used to establish the avoidance of Cocoa Contract 1045.
As a second argument Claimant regards Art. 26 CISG and thus the requirement of declaration of avoidance waived by means of tacit agreement between the parties [MEMORANDUM FOR CLAIMANT, PARA. 3.1.2.1]. This assumption by Claimant appears unsustainable: There is nothing to indicate that Claimant’s letter of 15 August 2002 should be understood as an offer to waive the Art. 26 CISG requirement. Beyond this questionable offer Claimant asserts Respondent’s acceptance through silence. According to Art. 18(1) sentence 2 CISG “[s]ilence or inactivity does not in itself amount to acceptance”. Beyond this clear requirement of explicit consent, it is hardly imaginable why Respondent would have consented to such a waiver. In conclusion, Respondent submits that Art. 26 CISG was not waived.

Thirdly, Claimant maintains that Cocoa Contract 1045 was annulled automatically as performance was impossible [MEMORANDUM FOR CLAIMANT, PARA. 3.3] and thereby echoes Mr. Fasttrack’s letter of 15 November 2002 alleging that Cocoa Contract 1045 had been “terminated automatically by the failure of [Respondent] to deliver the cocoa for such a long period” [MR. FASTTRACK’S LETTER OF 15 NOVEMBER 2002, CLAIMANT’S EXHIBIT NO. 11]. Contrary to these suppositions, the CISG does not contain an ipso facto avoidance mechanism. This is made clear by the wording of Art. 26 CISG (“A declaration of avoidance of the contract is effective only if made by notice to the other party”), has been acknowledged by numerous decisions [SUPREME COURT AUSTRIA, 6 FEBRUARY 1996; COURT OF APPEAL BAMBERG, 13 JANUARY 1999; ICC CASE NO. 9887, AUGUST 1999] and is unanimously accepted by commentators [SECRETARIAT COMMENTARY, ART. 24 PARA. 2; LESER/HORNUNG IN SCHLECHTRIEM/SCHWENZER, ART. 26 PARA. 2; WILL IN BIANCA/BONELL, ART. 47 PARA. 1.2]. Moreover, Claimant’s assumption that performance was impossible is inconsistent with its position that the above-mentioned impediments [SUPRA, PARA. 9] could have been overcome, thus enabling performance of the contract [MEMORANDUM FOR CLAIMANT, PARA. 2.2.3].

Finally, Claimant asserts that “circumstances, where the aggrieved party may have no option but to treat the contract as avoided” were present in this case [MEMORANDUM FOR CLAIMANT, PARA. 3.3.1]. Claimant argues that “where [the contract] could not be considered anything other than avoided” [IBID.] it would be “manifestly unjust to require a party to formally avoid a contract” [IBID.]. Respondent objects to this understanding for two reasons: First, this alleged legal concept has no basis whatsoever within the provisions of the CISG. While Claimant asserts that such a mechanism is envisaged “implicitly” [IBID.] by the CISG, Art. 26 CISG, on the contrary, expressly mandates explicit notice of
avoidance. As pointed out above [SUPRA, PARA. 39] notification is of central importance to the avoidance of contracts under the CISG. Allowing such “circumstances” to result in an automatic avoidance would decisively undermine this important aspect. Second, even if such a mechanism existed, it has to be kept in mind that in the present case performance was merely deferred to a later time [INFRA, PARA. 49 ET SEQ.] and that Respondent remained willing to fulfill its obligations under Cocoa Contract 1045. Why should the parties in these circumstances have had no option but to consider the contract avoided? In summary, Claimant can thus not be deemed to have avoided Cocoa Contract 1045 in any fashion.

3. Claimant was not entitled to avoid Cocoa Contract 1045.

Beyond failing to declare avoidance Claimant has not shown a basis for a valid avoidance of Cocoa Contract 1045. Art. 49(1) CISG requires either a fundamental breach of contract or the unsuccessful expiry of an additional period of time for performance of the contract. Respondent submits that there was neither a fundamental breach of Cocoa Contract 1045 as required by Art. 49(1)(a) CISG [a] nor was an additional period of time for delivery fixed by Claimant in accordance with Art. 49(1)(b) CISG [b].

a) There was no fundamental breach of contract in accordance with Arts. 25, 49(1)(a) CISG on Respondent’s part.

Respondent denies the allegation that it was in breach of Cocoa Contract 1045 [MEMORANDUM FOR CLAIMANT, PARA. 3.4] since the parties agreed to extend the contractual time frame for delivery [aa]. Yet even if Respondent was to be held in breach of contract, the alleged breach would not amount to a fundamental breach under Art. 25 CISG [bb].

aa) Respondent performed all of its obligations under Cocoa Contract 1045 with the consequence that there was no breach of contract on its part.

Respondent submits that its duty to deliver was deferred by way of a modification of Cocoa Contract 1045 according to Art. 29(1) CISG with the consequence that Respondent never breached the contract. In its letter of 5 March 2002, Claimant informed Respondent that, though it attached importance to eventually receiving the 400 metric tons of cocoa, delivery until 31 May 2002 was not of the essence [Mr. Sweet’s LETTER OF 5 MARCH 2002, CLAIMANT’S EXHIBIT NO. 4]. Rather, Claimant explicitly stated that it would only need to receive the cocoa “later this year” [IBID.].
According to Art. 29(1) CISG a deferral of delivery constituting a “valid and binding alteration of the sales contract” [DISTRICT COURT HAMBURG, 26 SEPTEMBER 1990] is achieved “by the mere agreement of the parties” [ART. 29(1) CISG; CF. COURT OF APPEAL GENT, 15 MAY 2002; DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, 6 JULY 2004 – RAW MATERIALS V. MANFRED FORBERICH; SCHLECHTRIEM IN SCHLECHTRIEM, ART. 29 PARA. 3]. It is contended that in the present case such an agreement was reached between the parties.

A reasonable person in Respondent’s position [CF. ART. 8(2) CISG] had to interpret Claimant’s above-referenced letter of 5 March 2002 [MR. SWEET’S LETTER OF 5 MARCH 2002, CLAIMANT’S EXHIBIT NO. 4] as an offer to modify Cocoa Contract 1045 within the meaning of Art. 29(1) CISG. This notion is supported by the circumstances under which Claimant made this statement. Taking into account the extraordinary price rally in the cocoa market in early 2002 [MONTHLY AVERAGE COCOA PRICES, RESPONDENT’S EXHIBIT NO. 3], Claimant had a vested interest in performance of the contract at the low November 2001 price. Therefore, Respondent reasonably interpreted this letter as an offer for deferral and can be reasonably expected to have accepted this offer in the subsequent telephone conversations [REQUEST FOR ARBITRATION, PARA. 7].

Consequently, there was a binding alteration of Cocoa Contract 1045 pursuant to Art. 29(1) CISG extending the contractual period for delivery of 400 metric tons of cocoa beans until “later this year”, i.e. until the end of 2002. As a result, Respondent was not in breach of contract by not having delivered the full amount of cocoa until 15 November 2002 when Claimant purported to avoid the contract, let alone at any earlier stage.

bb) The purported breach Claimant bases its claim upon would not be fundamental in the sense of Art. 25 CISG.

Assuming for a brief moment but not conceding that Claimant was in breach of Cocoa Contract 1045, the alleged late delivery does not merit classification as fundamental breach under Art. 25 CISG. According to this provision a breach is to be considered fundamental “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract”, which has been acknowledged in the case of final non-delivery [COURT OF APPEAL CELLE, 24 MAY 1995; COURT OF FIRST INSTANCE PARMA, 24 NOVEMBER 1989 – FOLIOPACK V. DANIPLAST; HUBER IN SCHLECHTRIEM, ART. 49 PARA. 6]. Late performance as such, however, does not constitute a fundamental breach [ICC CASE NO. 7585, 1992; COURT OF APPEAL DÜSSELDORF, 24 APRIL 1997; COURT OF APPEAL
MILAN, 20 MARCH 1998 - ITALDECOR v. YIU'S INDUSTRIES; SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER, ART. 25 PARA. 18], and the parties concur that in the present case the alleged breach of contract could only have consisted in a late delivery [MEMORANDUM FOR CLAIMANT, PARA. 3.2].

Respondent, however, objects to Claimant’s assertion that the alleged delay in performance amounted to a fundamental breach as “time [was] of the essence” [MEMORANDUM FOR CLAIMANT, PARA. 3.2]. Seeing that cases in which a timely performance is actually crucial are the only scenarios in which a delay in performance may amount to a fundamental breach [SCHLECHTRIEM IN SCHLECHTRIEM, ART. 25 PARA. 18; SALGER IN WITZ/SALGER/LORENZ, ART. 25 PARA. 9], Claimant would have had to furnish proof that such a case was given [CF. MÜLLER-CHEN IN SCHLECHTRIEM/SCHWENZER, ART. 49 PARA. 13].

Contrary to that, Respondent submits that in regard to Cocoa Contract 1045 time was not a central aspect of performance. This is vividly illustrated by the circumstances of the case: Firstly, the contract itself already provided for a two-months-period for delivery [COCOA CONTRACT 1045, CLAIMANT’S EXHIBIT NO. 2]. Secondly, Claimant departed from this date afterwards and required delivery “later this year” [MR. SWEET’S LETTER OF 5 MARCH 2002, CLAIMANT’S EXHIBIT NO. 4]. Thirdly, even three months after the expiry of the original delivery date Claimant was still interested in a delivery [MR. SWEET’S LETTER OF 15 AUGUST 2002, CLAIMANT’S EXHIBIT NO. 7]. Finally, Claimant’s supply of cocoa beans was sufficient to ensure an ongoing production until the end of November [PROCEDURAL ORDER NO. 2, PARA. 24]. Thus Respondent cannot be held to have been in fundamental breach of Cocoa Contract 1045 with the result that Claimant had no right for avoidance based on Art. 49(1)(a) CISG.

b) Claimant did not fix an additional period of time for delivery in the meaning of Arts. 47(1), 49(1)(b) CISG.

As an alternate ground for avoidance of contract Art. 49(1)(b) names the expiry of an additional period of time for delivery under Art. 47(1) CISG. According to this provision the buyer must “fix an additional period of time of reasonable length”. Claimant submits [MEMORANDUM FOR CLAIMANT, PARA. 3.1] that it fixed such an additional period by requesting delivery “soon” [MR. SWEET’S LETTER OF 15 AUGUST 2002, CLAIMANT’S EXHIBIT NO. 7]. Respondent rejects this assumption, seeing that the extension in time must be precise [COURT OF APPEAL DÜSSELDORF, 24 APRIL 1997; MÜLLER-CHEN IN SCHLECHTRIEM/SCHWENZER, ART. 47 PARA. 4; SALGER IN WITZ/SALGER/LORENZ, ART. 47 PARA. 4]. The buyer must either fix an exact date by which delivery must have occurred or name a period of time, e.g. ‘two
weeks’, ‘one month’ [HUBER IN SCHLECHTRIEM, ART. 47 PARA. 6; SCHNYDER/STRAUB IN HONSELL, ART. 47 PARA. 20; HONNOLD, PARA. 289]. This preciseness is important – *inter alia* – in order to determine whether the additional period is of reasonable length [COURT OF APPEAL DÜSSELDORF, 24 APRIL 1997; COURT OF APPEAL NAUMBURG, 27 APRIL 1999]. The term “soon”, however, does not meet these requirements [WILL IN BIANCA/BONELL, ART. 47 PARA. 2.1.3.1.; MÜLLER-CHEN IN SCHLECHTRIEM/SCHWENZER, ART. 47 PARA. 4; SCHNYDER/STRAUB IN HONSELL, ART. 47 PARA. 20] with the consequence that Claimant’s letter cannot serve as a basis for an avoidance of contract under Art. 49(1)(b) CISG.

Seeing that Claimant neither effectively declared avoidance nor had a right to do so, the requirements of Art. 75 CISG are not met. Consequently, it cannot claim damages under this provision.

II. Claimant cannot recover USD 289,353 under Art. 76 CISG either.

Claimant further alleges to have a claim for damages under Art. 76 CISG [MEMORANDUM FOR CLAIMANT, PARA. 3.4.1]. In response to this assertion it is contended that Art. 76 CISG does not apply to the present case [1]. However, even if the provision were applicable, Claimant could not rely on it due to its failure to avoid Cocoa Contract 1045 [2]. Assuming but not conceding that there was an avoidance of the contract on 15 November 2002, recoverable damages would only amount to USD 172,026 [3].

1. Art. 76 CISG is not applicable in the present case because it requires that no substitute transaction has taken place.

Pursuant to the wording of Art. 76 CISG a party can only calculate damages according to this provision “if he has not made a purchase or resale”, i.e. if he has in fact not entered into a substitute transaction. This view is supported by case law [ICC CASE NO. 8574, SEPTEMBER 1996; ICC CASE NO. 8502, NOVEMBER 1996] as well as by commentators [HERBER/CZERWENKA, ART. 76 PARA. 2; SCHLECHTRIEM, GEMEINSAME BESTIMMUNGEN, P. 164; SCHLECHTRIEM, UNIFORM SALES LAW, P. 97; KAROLLUS, P. 221 ET SEQ.; STOLL IN SCHLECHTRIEM, ART. 76 PARA. 5]. Claimant, however, did go ahead and procured 300 metric tons of cocoa beans from an alternate seller on 24 October 2002.

By referring to this transaction as “collateral contract” [MEMORANDUM FOR CLAIMANT, PARA. 3.4.1] Claimant alleges to merely have bought these cocoa beans in addition to
those outstanding under Cocoa Contract 1045. This allegation, however, is unreasonable for two reasons: First, Claimant itself at an earlier stage labeled this transaction as “cover contract” [MR. FASTTRACK’S LETTER OF 11 NOVEMBER 2002, CLAIMANT’S EXHIBIT NO. 9]. Second, this assertion contradicts Claimant’s attempt to recover damages for a “substitute transaction” under Art. 75 CISG. Consequently, Claimant “made a purchase or resale” which impedes the applicability of Art. 76 CISG.

2. Should the Tribunal consider Art. 76 CISG applicable in spite of a substitute transaction, Claimant could not rely on this provision for lack of avoidance.

By commencing with the words “[i]f the contract is avoided” Art. 76 CISG clarifies that damages for loss based on the market price are only awarded in case of an effective avoidance of the contract [STOLL IN SCHLECHTRIEM, ART. 76 PARA. 6; KNAPP IN BIANCA/BONELL, ART. 74 PARA. 1.4]. This understanding has been expressed by various decisions [SUPREME COURT AUSTRIA, 6 FEBRUARY 1996; ICC CASE NO. 8574, SEPTEMBER 1996; RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY, 24 JANUARY 2000]. Seeing that Claimant has not validly avoided the contract [SUPRA, PARA. 39 ET SEQ.], Art. 76 CISG therefore cannot serve as basis for Claimant to recover the loss it suffered in conducting the cover purchase.

3. Assuming but not conceding that Claimant avoided the contract on 15 November 2002, damages recoverable under Art. 76 CISG are limited to USD 172,026.

If it is assumed for the sake of argument that Art. 76 CISG is applicable despite Claimant’s cover purchase and that Claimant effectively avoided Cocoa Contract 1045 on 15 November 2002 [MR. FASTTRACK’S LETTER OF 15 NOVEMBER 2002, CLAIMANT’S EXHIBIT No. 11], Art. 76 CISG only allows for the recovery of USD 172,026. This is a consequence of the calculation mechanism of Art. 76 CISG which states that “the party claiming damages may [...] recover the difference between the price fixed by the contract and the current price at the time of the avoidance“. Based on the market price on 15 November 2002, the day of Claimant’s alleged avoidance [MEMORANDUM FOR CLAIMANT, PARA. 3.4.1], the difference between these two prices equals USD 172,026 [FOR CALCULATION DETAILS SEE ANSWER TO NOTICE OF ARBITRATION, PARA. 12]. Consequently, this amount is the maximum Claimant could possibly be granted under the above assumptions.
III. Art. 74 CISG does not allow Claimant to recover its loss either.

Claimant may possibly endeavor to recover its loss under Art. 74 CISG. For three reasons, however, Respondent submits that such an attempt would be futile: Firstly, this provision cannot be applied as a legal basis for the recovery of loss suffered in the accomplishment of a substitute transaction [1]. Secondly, even under the assumption that Art. 74 CISG is applicable, its key prerequisite – a breach of contract – is not given [2]. Thirdly, in case Art. 74 CISG were applicable and there had been a breach of contract, the loss Claimant incurred would still not be recoverable because it was not foreseeable within the meaning of Art. 74 CISG [3].

1. Art. 74 CISG does not allow for the recovery of losses arising out of the execution of substitute transactions.

In seeking to be compensated for the excess price paid in the cover purchase, Claimant strives to be placed in the economic position it would have been in if it had received 400 metric tons of cocoa beans from Respondent by 31 May 2002 – it claims the so-called “non-performance loss”. However, it is generally accepted that within the CISG this loss can only be recovered if the contract has been avoided prior to the substitute transaction [Local District Court Nordhorn, 14 June 1994; Supreme Court Austria, 6 February 1996; Supreme Court Austria, 9 March 2000; Supreme Court Austria, 28 April 2000; Huber in Münchener Kommentar, Art. 74 CISG para. 9 et seqq.; Magnus, Art. 45 para. 22; Schlechtriem, Internationales UN-Kaufrecht, para. 309; Stoll/Gruber in Schlechtriem/Schwenzer, Art. 74 para. 5] with the result that Arts. 75, 76 CISG - which explicitly require avoidance of the contract - are exclusively applicable for recovery of the “non-performance loss”.

Allowing a party who failed to comply with the strict avoidance exigencies of Arts. 75, 76 CISG to recover the “non-performance loss” under Art. 74 CISG would mean unjustifiably circumventing the crucial requirements of Arts. 75, 76 CISG [Huber in Münchener Kommentar, Art. 74 CISG para. 9]. Thereby these provisions would be deprived of their purpose and the CISG’s principles would be undermined [ibid.]. Consequently, Art. 74 CISG cannot be applied to award Claimant damages for the “non-performance loss”, i.e. the excess price paid in the cover purchase.
2. Assuming but not conceding that Art. 74 CISG is applicable, its preconditions are not met because there was no breach of contract.

It is undisputed that a breach of contract is the essential prerequisite in order to claim damages under Art. 74 CISG [COURT OF APPEAL BARCELONA, 20 JUNE 1997; ICC CASE NO. 7531, 1994; STOLL IN SCHLECHTRIEM, ART. 74 PARA. 7; SCHÖNLE IN HONSELL, ART. 74 PARA. 18; HUBER IN MÜNCHENER KOMMENTAR, ART. 74 CISG PARA. 3]. Seeing that in the present case there was no breach of contract [SUPRA, PARA. 49 ET SEQQ.], the requirements of Art. 74 CISG are not fulfilled and Claimant may thus not recover any damages under this provision.

3. Even if there had been a breach of contract, under Art. 74 CISG Claimant could not be reimbursed for the loss it incurred as this loss was not foreseeable when the contract was concluded.

It is contended that even under the assumption that Respondent had in fact breached Cocoa Contract 1045, Claimant could not be compensated for the incurred loss by reason of the contemplation rule embodied in Art. 74 CISG. This provision limits recoverable damages to “the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.” In order to establish this prerequisite of foreseeability, the aggrieved party must prove that not only the occurrence of the loss but also its type and its extent were foreseeable [JUNG, PP. 239, 256; KNAPP IN BIANCA/BONELL, ART. 74 PARA. 2.8 ET SEQ.; STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER, ART. 74 PARA. 39, 51].

While it is not required that the exact amount of loss could have been foreseen, the promisor must have been able to essentially foresee the loss in its extent [SUPREME COURT AUSTRIA, 14 JANUARY 2002; KNAPP IN BIANCA/BONELL, ART. 74 PARA. 2.9; MAGNUS, ART. 74 PARA. 34; SAIDOV, PARA. II.2.E]. Pursuant to this requirement damages cannot be granted if the loss is so high that the promisor did not have to anticipate it [COURT OF APPEAL COLOGNE, 21 MAY 1996]. Respondent submits that at least the extent of Claimant’s loss in the amount of USD 289,353 was unforeseeable as it resulted from an unpredictable development of the cocoa market price in the year 2002. When the parties concluded the contract in November 2001, low market prices had been a feature of most of the past decade [ICCO ANNUAL REPORT FOR 2001/2002, P. 11]. Furthermore, the International
Cocoa Organization expected that the 2001/2002 crop would be higher than the crop in the previous year [ICCO ANNUAL REPORT FOR 2000/2001, P. 12]. Therefore, Respondent could expect a decreasing or at least steady market price.

However, at the time Claimant conducted the cover purchase on 24 October 2002, the market price had increased to 178 per cent of the price agreed on in Cocoa Contract 1045 – the market price thereby reached a 16-year-high [ICCO ANNUAL REPORT FOR 2001/2002, P. 11; MONTHLY AVERAGE COCOA PRICES, RESPONDENT’S EXHIBIT NO. 3]. When concluding Cocoa Contract 1045, Respondent could not foresee such an enormous price increase, particularly because “[a]nnual price increases of such magnitude had been recorded on only two previous occasions”, both of them in the 1970s [ICCO ANNUAL REPORT FOR 2001/2002, P. 13]. Thus the extent of Claimant’s loss was unforeseeable.

To sum up, Claimant could not have recovered its loss under Art. 74 CISG, as this provision cannot be applied, its prerequisites are not fulfilled and the loss suffered was not foreseeable.

IV. If Claimant were to be awarded damages at all, their amount would have to be reduced to USD 34,405 pursuant to Art. 77 CISG.

As a subsidiary and partial defense to be considered only if the Tribunal should find that Claimant has a right to damages at all, it is contended that the amount of damages should be reduced to USD 34,405 according to Art. 77 CISG. This follows from the fact that Claimant was under the duty to mitigate its loss [1]. Thus it should have purchased at the lower November price and not more than the amount of cocoa it needed to ensure its production [2]. Seeing that Claimant thereby would have only incurred a loss of USD 34,405, according to Art. 77 CISG this is the utmost sum it may be awarded [3].

1. Claimant was obligated to mitigate its loss.

Since Art. 77 CISG states that the “party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss”, Claimant had a duty of mitigation. The principle embodied in Art. 77 CISG is universally recognized [ICC CASE NO. 8817, DECEMBER 1997; DERAINS, P. 376] and has repeatedly been confirmed [COURT OF APPEAL CELLE, 2 SEPTEMBER 1998; SUPREME COURT SPAIN, 28 JANUARY 2000; RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY, 10 FEBRUARY 2000; RUSSIAN FEDERATION
2. **In order to mitigate its loss, Claimant should have purchased at the lower November price and not more than 60 metric tons of cocoa beans.**

At the time Claimant conducted its cover purchase at the end of October 2002, it knew or at least ought to have known of two factors: First of all, there had been world-wide reports that the Equatoriana Government Cocoa Marketing Organization was planning to release additional cocoa [Mr. Smart’s Letter of 13 November 2002, Claimant’s Exhibit No. 10; Procedural Order No. 2, Para. 29] which were confirmed when the Organization in fact rescinded the export restriction on 12 November 2002 [Procedural Order No. 2, Para. 10]. Moreover, it was the crisis in Ivory Coast – the world’s largest cocoa producer [ICCO Annual Report for 2002/2003, p. 13] – which essentially caused the price rally in 2002 [Ibid.]. Seeing that this crisis started to cool down on 18 October 2002 [Ibid.; International Committee of the Red Cross, Operational Update], it was predictable that cocoa prices would start decreasing in the very near future.

Claimant should have known of the above factors for two reasons: First, Claimant was relying on a delivery of Equatoriana cocoa beans, which were essential to sustain its production [Mr. Sweet’s Letter of 5 March 2002, Claimant’s Exhibit No. 4; Procedural Order No. 2, Para. 24]. Considering the importance of the delivery, Claimant should have kept informed about the Equatoriana cocoa export situation. Second, Claimant itself demonstrated its knowledge about the development of the cocoa market price by expressly referring to the price fluctuations in its earlier correspondence [Mr. Sweet’s Letter of 15 August 2002, Claimant’s Exhibit No. 7; Mr. Sweet’s Letter of 25 October 2002, Claimant’s Exhibit No. 8].

Based on this knowledge Claimant should have waited just a few days longer before purchasing additional cocoa beans. It should have further merely purchased the amount necessary to bridge the time gap between the depletion of its stock and the rescission of the export restriction. Seeing that Respondent could have delivered the outstanding amount of cocoa beans at the beginning of December [Mr. Smart’s Letter of 13 November 2002, Claimant’s Exhibit No. 10] and Claimant’s stock would not have been depleted until
the end of November [PROCEDURAL ORDER NO. 2, PARA. 24], about a half a month’s supply would have given Claimant ample resources to ensure the continuation of its production:

Based on Claimant’s yearly requirements of 1,500 metric tons of cocoa beans [IBID.], its monthly consumption averages 125 metric tons. Consequently, approximately 60 metric tons of cocoa beans would have fully sufficed to provide the half a month’s supply necessary to ensure an ongoing production. One week after Claimant’s actual cover transaction on 24 October 2002, Claimant could have purchased these 60 metric tons of cocoa beans at the November market price of USD 108,850 (USD 1,814.17 x 60) [MONTHLY AVERAGE COCOA PRICES, RESPONDENT’S EXHIBIT NO. 3].

Claimant argues that it did not know about the reports concerning the imminent rescission of the export restriction [MEMORANDUM FOR CLAIMANT, PARA. 2.2.4, 2.2.4.1]. Assuming that this was indeed the case and Claimant did not have any knowledge about the development of the cocoa market price either, the question arises why Claimant did not contact Respondent one last time before concluding the cover contract. It is acknowledged that contacting the other party can be a reasonable measure to mitigate loss [DISTRICT COURT DARMSTADT, 9 MAY 2000; SAIDOV, PARA. II.4.B.] which the party relying on a breach of contract is required to take according to Art. 77 CISG. In the present case, one single telephone call from Claimant to Respondent prior to the cover purchase would have provided Claimant with knowledge of the situation explained above [SUPRA, PARA. 73] and should thus have prompted it to undertake the respective measures of mitigation.

3. Claimant may be awarded at most USD 34,405 because it could have mitigated its loss by USD 254,948 by taking reasonable measures according to Art. 77 CISG.

As explained above [SUPRA, PARA. 76], Claimant would have had to spend USD 108,850 in a reasonable cover purchase of 60 metric tons of cocoa beans at the market price of November 2002. The price fixed in Cocoa Contract 1045 for the same amount is USD 74,445 (USD 1,240.75 x 60) [CF. COCOA CONTRACT 1045, CLAIMANT’S EXHIBIT NO. 2]. The difference between these two prices, which constitutes potentially recoverable damages, equals USD 34,405. This amount is USD 254,948 less than the amount of USD 289,353 Claimant strives to be granted. If Claimant had undertaken all reasonable measures listed above, it consequently would have mitigated its loss by USD 254,948.
Pursuant to Art. 77 CISG “the party in breach may claim a reduction in the damages in the amount by which the loss would have been mitigated” if the other party fails to take reasonable measures of mitigation. Thus, according to Art. 77 CISG, Respondent requests that damages be reduced in the amount of USD 254,948. If Claimant is to be awarded any damages at all, it should therefore only be granted USD 34,405.

V. Interest is not an issue at this stage of the proceedings.

In addition to damages, Claimant is asking the Tribunal to order Respondent “to pay interest at the prevailing market rate [...] from 24 October 2002 until the date of payment” [MEMORANDUM FOR CLAIMANT, PARA. 3.4]. Regarding this request Respondent refers to Procedural Order No. 1 and will refrain from discussing the question whether Claimant may demand pre-award or post-award interest at this stage of the proceedings [PROCEDURAL ORDER NO. 1, PARA. 7].

D. The Tribunal has jurisdiction over the dispute arising out of Sugar Contract 2212 and Respondent’s recovery should not be limited to a set-off defense.

Concerning Sugar Contract 2212, Respondent brings forward the following two submissions: First, the Tribunal has jurisdiction to decide upon the question whether Respondent has a right to demand the purchase price set by Sugar Contract 2212 [I]. Second, recovery should not be limited to a set-off defense but rather be granted in the full amount [II].

I. The Tribunal has jurisdiction to consider the dispute arising out of Sugar Contract 2212.

Respondent contends that, contrasting Claimant’s assertion to the contrary [MEMORANDUM FOR CLAIMANT, PARA. 4 ET SEQ.], the Tribunal has jurisdiction over the above-mentioned dispute, even though the arbitration clause in Sugar Contract 2212 refers possible disputes to arbitration under the auspices of the Oceania Commodity Association. The Tribunal is granted jurisdiction firstly pursuant to Art. 21(5) Swiss Rules [1] and secondly according to the internationally accepted principle providing that “the judge of the action is the judge of the exception” [2].
1. **Art. 21(5) Swiss Rules grants the Tribunal jurisdiction.**

It is contended that Art. 21(5) Swiss Rules is applicable to the present arbitration and allows the arbitral Tribunal to decide upon the merits of the dispute arising out of Sugar Contract 2212. This provision states that “[t]he 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 object of another arbitration agreement or forum-selection clause.” Even though Respondent challenges the notion that the scope of application of Art. 21(5) Swiss Rules is restricted to set-off defenses [INFRA, PARA. 95 ET SEQ.], this provision in any case enables a Tribunal to consider the merits of a dispute not falling under the arbitration clause of Cocoa Contract 1045.

The applicability of Art. 21(5) Swiss Rules results from the applicability of the Swiss Rules as a whole. These rules are applicable for three main aspects: Firstly, the arbitration clause of Cocoa Contract 1045 refers to the Swiss Rules [a]. Secondly, both parties’ conduct demonstrates that they consented to the application of the Swiss Rules [b]. Thirdly, it will be shown that the scope of Art. 21(5) Swiss Rules also covers Respondent’s claim [c].

a) **The arbitration clause of Cocoa Contract 1045 refers to the Swiss Rules.**

The arbitration clause of Cocoa Contract 1045 states that “the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland” [COCOA CONTRACT 1045, CLAIMANT’S EXHIBIT NO. 2] shall be applicable. Contrary to Claimant’s allegation [MEMORANDUM FOR CLAIMANT, PARA. 5.5], it is Respondent’s submission that the parties thereby agreed upon the version of rules applied by this institution at the time of the commencement of proceedings as opposed to the version in force when the contract was concluded.

This understanding is derived from the widely accepted principle that whenever the parties did not agree to a specific version of arbitration rules provided by an arbitral institution, their agreement is considered to refer to the institution’s rules as in effect at the time the request for arbitration is submitted [HIGH COURT SINGAPORE, 26 NOVEMBER 2003 - JURONG ENGINEERING V. BLACK & VEATCH SINGAPORE; HIGH COURT ENGLAND AND WALES, 20 JANUARY 1997 – CHINA AGRIBUSINESS DEVELOPMENT V. BALLI TRADING; SUPREME COURT GERMANY, 5 DECEMBER 1985; LACHMANN, PARA. 300]. The rationale behind this principle is to allow the parties to benefit from the fact that the rules agreed upon “will have undergone periodic revisions” and will have been continuously updated [REDFERN/HUNTER, PARA. 1-100; CRAIG/PARK/Paulsson, P. 143].
As the Chamber of Commerce and Industry of Geneva informed Claimant by way of its letter dated 6 July 2004, it currently applies the Swiss Rules of International Arbitration (Swiss Rules) to international arbitrations. These new Swiss Rules have been in force since 1 January 2004 and “govern international arbitrations, where an agreement to arbitrate refers to the arbitration rules of the Chambers of Commerce and Industry of [...] Geneva” [ART. 1(1) SWISS RULES] and “in which the Notice of Arbitration is submitted on or after that date [1 January 2004]” [ART. 1(3) SWISS RULES]. As in the case at hand it is common ground that these prerequisites are fulfilled, the procedural provisions governing this arbitration are the Swiss Rules. Their application gives the parties the benefit of an up-to-date set of rules which reflects the pooled resources and expertise of the six separate Swiss Chambers of Commerce.

It may be noted that the above-mentioned principle also corresponds to the practice of the International Chamber of Commerce whose arbitration rules are also periodically updated. In cases very similar to the one in question, i.e. in disputes in which the parties did not agree to a specific version of rules and the new version contained a clause nearly equivalent to the one in Art. 1(1) Swiss Rules, it has frequently been decided that the newest version of the rules should be applied [HIGH COURT ENGLAND AND WALES, 14 MAY 1976 – OFFSHORE INTERNATIONAL v. BANCO CENTRAL; COURT OF APPEALS NEW YORK, 19 DECEMBER 1977 – MOBIL OIL INDONESIA v. ASAMERA OIL; ICC CASE NO. 5622, 1988; SUPREME COURT SWITZERLAND, 14 JUNE 1990 – KOMPLEX v. VOEST-ALPINE STAHL; CRAIG/PARK/PAULSSON, P. 145].

Contrary to the above argumentation Claimant contends that the arbitration clause could not refer to the Swiss Rules as arbitrating under the Swiss Rules would mean transferring the case to an “entirely different” arbitral body [MEMORANDUM FOR CLAIMANT, PARA. 5.3]. This submission lacks any foundation since the Chamber of Commerce and Industry of Geneva still is the arbitral institution administering the present arbitration. The relevant correspondence substantiates this conclusion since both parties exclusively communicated with this institution [E.G. MR. FASTTRACK’S LETTER OF 12 JULY 2004; MR. LANGWEILER’S LETTER OF 10 AUGUST 2004; LETTER OF CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA, 6 JULY 2004]. Furthermore, Claimant itself points out that it submitted the Request for Arbitration to the Chamber of Commerce and Industry of Geneva and made the registration fee payable to the same institution’s account [MEMORANDUM FOR CLAIMANT, PARA. 5.7].

Consequently, the rules governing this arbitration are the Swiss Rules whose applicability is already derived from the arbitration clause of Cocoa Contract 1045.
b) Claimant’s conduct demonstrates its consent to the Swiss Rules.

Respondent further submits that the parties also consented to the applicability of the Swiss Rules after the commencement of the arbitration. Respondent’s approval of the Swiss Rules is self-evident. As far as Claimant’s consent is concerned, Claimant asserts that it has not accepted the entire Swiss Rules at any point in time and that no acceptance could be implied from its actions [MEMORANDUM FOR CLAIMANT, PARA. 5.7]. Respondent objects to this submission and rather contends that Claimant’s conduct represented consent to the application of the Swiss Rules for two reasons.

Firstly, Claimant evinced its acceptance of the Swiss Rules including Art. 21(5) by not objecting to them after the Chamber of Commerce and Industry of Geneva notified it of the Swiss Rules’ application to the arbitral proceedings. If Claimant did not wish the Swiss Rules to be applicable, it should have objected at this point in time. Instead it even paid a registration fee (which in fact exceeded the fee under the Chamber’s former rules by CHF 500) and thereby demonstrated its approval of the Swiss Rules as the Chamber of Commerce and Industry of Geneva had informed Claimant that the Chamber would only proceed with the arbitration once this fee was paid [LETTER OF CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA, 6 JULY 2004]. Secondly, Claimant’s correspondence with the Chamber of Commerce and Industry of Geneva, in which Claimant itself explicitly referred to provisions of the Swiss Rules [MR. FASTTRACK’S LETTER OF 21 JULY 2004] illustrates this perception. What can this reference stand for other than Claimant’s consent?

The aforementioned facts show that Claimant consented to the entire Swiss Rules and thereby to Art. 21(5). Its later objection to the application of Art. 21(5) Swiss Rules accompanied by an express reiteration of its general consent to the Swiss Rules [ANSWER TO COUNTER-CLAIM, PARA. 4], cannot retroactively remove its acceptance of this particular provision. According to Art. 4 UNCITRAL Model Law – which applies to these proceedings as lex arbitri [CF. REQUEST FOR ARBITRATION, PARA. 15] – “[a] party who knows that [...] any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay [...], shall be deemed to have waived his right to object.” Seeing that Claimant deems the application of the Swiss Rules not to be in accordance with the arbitration clause of Cocoa Contract 1045 and yet failed to object to it in due time, Claimant has waived this right pursuant to Art. 4 UNCITRAL Model Law. Therefore, any later objection either to the Swiss Rules in their entirety or to particular provisions therein is not admissible.
Claimant further asserts that the parties could not have agreed to adopt the Swiss Rules as at the time this dispute was submitted to arbitration the Swiss Rules required the seat of the arbitration to be in Switzerland [MEMORANDUM FOR CLAIMANT, PARA. 5.4], whereas the arbitration clause of this dispute states that the arbitration shall take place in Vindobona, Danubia. Respondent challenges this submission: The Chamber of Commerce and Industry of Geneva suggested on 6 July 2004 to arbitrate under the Swiss Rules [LETTER OF CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA, 6 JULY 2004] and specified in its subsequent correspondence that the seat of arbitration can be Vindobona, Danubia, since the Swiss Chambers had already decided to amend the respective provision [LETTER OF CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA, 16 JULY 2004].

c) Respondent's claim falls within the scope of Art. 21(5) Swiss Rules.

Claimant argues that Art. 21(5) Swiss Rules does not apply to Respondent’s claim as Respondent labeled it as “counter-claim” while Art. 21(5) Swiss Rules solely mentions set-offs [MEMORANDUM FOR CLAIMANT, PARA. 4]. In contrast to Claimant’s allegation Respondent’s reference to a “counter-claim” does not bar it from relying on Art. 21(5) Swiss Rules in order to establish the Tribunal’s jurisdiction over the dispute concerning Sugar Contract 2212.

This assertion follows from the fact that a set-off defense is necessarily included in any counter-claim because a set-off, in its essence, is merely a limited counter-claim, with the main difference being its dependence on the fate of the main claim [BERGER, P. 60]. Therefore, no clear-cut terminology exists differentiating between counter-claims and set-offs; quite the contrary, within legal literature as well as jurisprudence set-offs are often referred to as “counter-claims” or “counter-claims for the purpose of a set-off” [CF. DISTRICT COURT MUNICH, 6 APRIL 2000; CRAIG/PARK/PAULSSON, P. 647; HANOTIAU, P. 286]. A set-off has even vividly been described as a “counterclaim in disguise” [BERGER p. 58]. Consequently, Respondent respectfully submits that it would be overly formalistic to inadequately restrict the interpretation of this broad term. Therefore Respondent’s choice of words cannot be deemed to bar it from taking recourse to Art. 21(5) Swiss Rules.

As a subsidiary defense only to be considered in case the Tribunal should find that Respondent’s counter-claim was not a claim for the purpose of a set-off, Respondent hereby declares its claim for a set-off pursuant to Art. 20 Swiss Rules on the grounds described in its Answer to Notice of Arbitration [ANSWER TO NOTICE OF ARBITRATION, PARA. 13 ET SEQQ.].
2. The Tribunal’s jurisdiction is further established by the internationally accepted principle that “the judge of the action is the judge of the exception”.

Respondent submits that the Tribunal’s jurisdiction is further established by an internationally acknowledged principle providing that an arbitral Tribunal has jurisdiction to consider the merits of a cross-claim even though it is subject to a different arbitration agreement [KARRER, P. 177]: The arbitral Tribunal is authorized to decide on all defenses raised against the main claim – “le juge de l’action est le juge de l’exception” [SUPREME COURT SWITZERLAND, 5 MAY 1959 – FRIZZI V. KALMÁR; REINER, PP. 114, 199; POUDRET, P. 364]. The rationale behind this principle is to avoid overly formalistic solutions and to preserve the procedural economy of the arbitration [ICC CASE NO. 5971, 1995; BERGER, P. 73]. This general principle is also expressly acknowledged by Claimant [MEMORANDUM FOR CLAIMANT, PARA. 4.3.1].

Nevertheless Claimant argues that the case at hand should be treated differently for two reasons which will both be refuted in the following. First, Claimant asserts that the principle may not be applied in cases of fast track procedures [MEMORANDUM FOR CLAIMANT, PARA. 4.3.2]. The reason for this alleged exception is to prevent the parties from losing the benefits of such an expedited procedure. In the given case the expedited procedure will be applied even if the counter-claim is admitted: Under the Swiss Rules all cases where the amount in dispute representing the aggregate of the claim and the counter-claim does not exceed CHF 1,000,000 are eligible for expedited procedure [CF. ART. 42(2) SWISS RULES]. Seeing that the amount in dispute adds up to CHF 845,288 (calculated and converted as of the dates of submission of claim and counter-claim), it would not exceed this sum with the consequence that the expedited procedure would still apply and the parties would still be able to reap its benefits.

Further, Claimant considers cases in which the cross-claim is subject to highly specialized arbitration rules to constitute a second exception [MEMORANDUM FOR CLAIMANT, PARA. 4.3.2]. Alleging that the parties in Sugar Contract 2212 chose the Oceania Commodity Association for its expertise in commodity arbitration [IBID.], Claimant regards this exception to be given. However, this notion cannot convince when taking into account that Sugar Contract 2212 was on a standard form [PROCEDURAL ORDER NO. 2, PARA. 30] which means that the parties did not deliberately choose a particular arbitration clause when concluding this contract. Furthermore, the expertise of the Oceania Commodity
Association cannot have been the decisive reason for referring arbitration to it because Cocoa Contract 1045 shows that when dealing with commodities the parties repeatedly chose to arbitrate under institutions which are not specialized in this field.

101 As a result, Respondent requests the Tribunal to find that it has jurisdiction to consider the dispute arising out of Sugar Contract 2212 based both on Art. 21(5) Swiss Rules and on the internationally acknowledged principle “le juge de l’action est le juge de l’exception”.

II. Recovery should be granted in the full amount of the counter-claim and not be limited to a set-off.

102 Seeing that the Tribunal has jurisdiction to consider the dispute arising out of Sugar Contract 2212 on the merits, it is Respondent’s submission that recovery should not a priori be restricted to a set-off defense but rather be granted in the full amount of the counter-claim. This contention results essentially from three considerations: First, limiting recovery to a set-off defense would merely create a formalistic obstacle in the parties’ way to a final resolution of the dispute arising out of Sugar Contract 2212 [1]. Secondly, the risk of conflicting awards would become imminent if the Tribunal limited recovery to a set-off defense [2]. Thirdly, important practical considerations militate against a restrictive approach with regard to the counter-claim [3].

1. Limiting Respondent’s recovery to a set-off would create a purely formalistic obstacle to the resolution of the dispute arising out of Sugar Contract 2212.

103 Respondent respectfully submits that limiting the Tribunal’s jurisdiction to a partial decision on a set-off defense would merely delay the final resolution of the dispute arising out of Sugar Contract 2212. This results from the fact that the purchase price claimed by Respondent under Sugar Contract 2212 exceeds the amount of damages Claimant seeks to recover with regard to Cocoa Contract 1045. Consequently, if the Tribunal treated Respondent’s counter-claim only as a set-off defense, it would decide only partially about the amount at issue under Sugar Contract 2212. Thus second arbitral proceedings would become necessary in order to reach a decision on the remainder of the purchase price. In accordance with the arbitration clause contained in Sugar Contract 2212 these
proceedings would then be conducted under the auspices of the Oceania Commodity Association and therefore decided by another Tribunal.

104 It is contended that these proceedings would merely be an intolerable delay on the parties’ way to a final resolution of the dispute. Their only task would be to affirm a decision which has already been adequately adjudicated by the Tribunal. This assessment is derived from the fact that previous decisions are not irrelevant to the solution of subsequent disputes arising between the same parties [REDFERN/HUNTER, PARA. 8-74]. Arbitral awards can particularly be relied upon by one of the parties in order to found a plea of “issue estoppel” [PRIVY COUNCIL, 29 JANUARY 2003 – ASSOCIATED ELECTRIC V. EUROPEAN REINSURANCE COMPANY; REDFERN/HUNTER, PARA. 8-74]. Under such a plea an issue which has previously been adjudicated in arbitration is excluded from being examined for a second time [CF. BORN, PP. 682 ET SEQ.; REDFERN/HUNTER, PARA. 8-74]. Such a plea is of particular significance in the present case, as the only issue arguable under Sugar Contract 2212 is the condition of the sugar at the time of loading which is a purely factual matter. As the relevant issues of law – the time of the passing of risk from the seller to the buyer – are regulated unambiguously through the clause FOB (Incoterms 2000), it is the factual matter which solely determines the outcome of the case.

105 Therefore a plea of issue estoppel – which can reasonably be expected to be raised by either party – would bind the arbitral Tribunal in the second proceedings to adhere to the decision reached with regard to the condition of the sugar in the present proceedings [CF. HIGH COURT ENGLAND AND WALES, 26 FEBRUARY 2004 - THE LINCOLN NATIONAL LIFE INSURANCE V. SUN LIFE ASSURANCE]. Consequently, the arbitral Tribunal presiding over the later proceedings would necessarily render a decision corresponding to the one already reached regarding the set-off in the present arbitration.

2. Limiting recovery to a set-off would create the risk of conflicting awards.

106 Should the Tribunal decide to limit recovery to a set-off instead of deciding on the counter-claim in its entirety, a different problem could arise if the Tribunal in Oceania did not follow the plea of issue estoppel, namely the problem of conflicting awards [CF. REDFERN/HUNTER, PARA. 1-49]. This danger recently materialized in the case of CME v. Czech Republic [PARTIAL AWARD, 13 SEPTEMBER 2001 - CME V. CZECH REPUBLIC]. In this case a single dispute produced two utterly conflicting arbitral awards [BROWER/BROWER/SHARPE, PP. 428], a situation which has been described as “absolutely ludicrous, and highly
regrettable for the fact that it makes the law look so stupid. [...] It makes one appreciate how uncertain the arbitral process is. You have to conclude that arbitration is too hazardous — you must go to a national court [where] ... you can get mistakes corrected by an appeal” [CARVER CITED BY BROWER/BROWER/SHARPE, PP. 428]. This comment shows that there is a need to avoid conflicting awards in the same case, as such conflicting decisions threaten the very integrity of the international commercial arbitration system [CF. SOLTYSINSKI/OLECHOWSKI, PP. 230, 232].

3. Important practical considerations militate against the restriction of the recovery to a set-off.

107 In addition to the aforementioned arguments, practical reasons support the notion that recovery should be granted in the full amount of Respondent’s counter-claim. The consequence of Respondent having to further pursue its claim before another Tribunal would in many aspects be detrimental to both parties.

108 First of all, an additional arbitration would require a significant amount of time. Pre-arbitral actions, such as the selection of the arbitrators, and the arbitral proceedings themselves would delay the final decision for at least several months. This effect can easily be deduced from the present case in which at the time of the hearings nine months will have elapsed since Claimant’s request for arbitration. Thereby second proceedings would harshly contradict the concept of procedural economy. The same disadvantageous effect would eventuate concerning the costs of the arbitration which would increase significantly since another registration fee as well as compensation of three further arbitrators would have to be paid [CF. SUGAR CONTRACT 2212, RESPONDENT’S EXHIBIT NO. 4]. Moreover, Respondent would have to bear the risk of Claimant becoming insolvent before the second award – concerning Sugar Contract 2212 – would be rendered.

109 The foregoing arguments underline the absurdity of conducting second arbitral proceedings especially when considering that the Swiss Rules seek to promote the efficiency of proceedings in particular by way of Art. 21(5) Swiss Rules [PETER, P. 9; SCHERER, P. 123]. Therefore Respondent’s counter-claim should be considered and decided upon in full by the arbitral Tribunal.
REQUEST FOR RELIEF

In the light of the above submissions, Respondent respectfully requests the Tribunal to

- find that Respondent is excused from liability for damages pursuant to Art. 79(1) CISG
- find that Claimant cannot recover damages under Arts. 45(1)(b), 74 et seqq. CISG
- find that it has jurisdiction over the counter-claim arising out of Sugar Contract 2212
- find that Respondent’s recovery is not restricted to a set-off defense.

27 January 2005