

Twelfth Annual Willem C. Vis  
International Commercial Arbitration Moot  
Vienna, 2005



UNIVERSITY OF RIJEKA  
FACULTY OF LAW

MEMORANDUM FOR RESPONDENT

Mediterraneo Confectionary  
Associates, Inc.

v.

Equatoriana Commodity  
Exporters, S.A.

BRANIMIR ČOLIĆ ♦ JELENA KEVIĆ ♦ VEDRAN LJUBANOVIĆ

IVANA MANOVELO ♦ MAŠA MAROCHINI ♦ IVA SUNKO



**Twelfth Annual  
Willem C. Vis  
International Arbitration Moot  
Case No. Moot 12**

**MEMORANDUM FOR RESPONDENT**

**On behalf of**

**Claimant**

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

**Against**

**Respondent**

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

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## LIST OF ABBREVIATIONS

<b>AAA</b>	American Arbitration Association
<b>Art(s).</b>	Article(s)
<b>BGH</b>	Bundesgerichtshof (German Federal Supreme Court)
<b>CCIG</b>	Chamber of Commerce and Industry of Geneva
<b>CISG</b>	United Nations Convention on Contracts for the International Sales of Goods
<b>Cl.'s Memorandum</b>	Memorandum for Claimant, Michigan State University College of Law
<b>Co.</b>	Corporation
<b>e.g.</b>	exempli gratia (for example)
<b>EGCMO</b>	Equatoriana Government Cocoa Marketing Organization
<b>Equatoriana C.E.</b>	Equatoriana Commodity Exporters, S.A.
<b>et al.</b>	and others
<b>f.</b>	footnote
<b>Geneva Rules</b>	Rules of Arbitration of the Chamber of Commerce and Industry of Geneva
<b>ICC</b>	International Chamber of Commerce
<b>ICCO</b>	International Cocoa Organization
<b>i.e.</b>	id est
<b>Inc.</b>	Incorporated
<b>infra</b>	below
<b>Int.</b>	International
<b>inter alia</b>	among other things
<b>LG</b>	Landgericht (German Regional Court)
<b>Ltd.</b>	Limited
<b>Mediterraneo C.A.</b>	Mediterraneo Confectionary Associates, Inc.
<b>Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration, 1985
<b>No(s).</b>	Number(s)
<b>NYBOT</b>	New York Board of Trade
<b>NY Convention</b>	New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

<b>OCA</b>	Oceania Commodity Association
<b>OGH</b>	Oberster Gerichtshof (Supreme Court)
<b>OLG</b>	Oberlandesgericht (German or Austrian Regional Court of Appeal)
<b>p(p).</b>	page(s)
<b>para(s).</b>	paragraph(s)
<b>PECL</b>	Principles of European Contract Law
<b>PO</b>	Procedural Order No. 2
<b>q(s).</b>	question(s)
<b>S.A.</b>	Société anonyme
<b>supra</b>	above
<b>Swiss Rules</b>	Swiss Rules of International Arbitration
<b>t</b>	metric ton(s)
<b>TORRO</b>	The Tornado and Storm Research Organization
<b>ULIS</b>	Uniform Law on the International Sale of Goods
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	United Nations International Institute for the Unification of Private Law
<b>USD</b>	United States Dollar
<b>v.</b>	versus
<b>WIPO</b>	World Intellectual Property Organization
<b>YCA</b>	Yearbook of Commercial Arbitration

## AUTHORITIES CITED

### **Atlantic Oceanographic and Meteorological Laboratory**

Hurricane Research Division

<http://www.aoml.noaa.gov/hrd/tcfaq/G4.html>; 20 January 2005

(cited as: Hurricane Research Division)

**BABIAK, Andrew**

Defining "Fundamental Breach" Under the United Nations Convention on Contract for the International Sales of Goods, Temple International and Comparative Law Journal 113, 1992

(cited as: Babiak)

**BERGER, Klaus Peter**

Set-off in International Economic Arbitration  
Arbitration International Vol. 15 No. 1 (1999)

(cited as: Berger)

### **Arbitration Interactive**

A Case Study for Students and Practitioners, Peter Lang, Germany, 2002.

(cited as: Berger I)

**BERNSTEIN, Herbert,  
LOOKOFSKY, Joseph**

Understanding the CISG in Europe, Kluwer Law International, The Hague, 1997

(cited as: Bernstein/Lookofsky)

**BIANCA, Cesare  
Massimo,  
BONELL, Michael  
Joachim**

Commentary on International Sales Law the 1980 Vienna Sales Convention, Giuffrè, Milan, 1987

(cited as: Bianca/Bonell)

**BISHOP, R. Doak**

Drafting the ICC Arbitral Clause, King & Spalding, Houston,  
[www.kslaw.com/library/pdf/bishop5.pdf](http://www.kslaw.com/library/pdf/bishop5.pdf);

10 December 2004

(cited as: Bishop)

### **Practical guide for drafting international arbitration clauses,**

King & Spalding, Houston,

<http://www.kslaw.com/library/pdf/bishop9.pdf>;

15 January 2005

(cited as: Bishop I)

- Enforcement of foreign arbitral awards**  
King & Spalding, Houston,  
[www.kslaw.com/library/pdf/bishop6.pdf](http://www.kslaw.com/library/pdf/bishop6.pdf);  
19 November 2004  
(cited as: Bishop II)
- BLACK's LAW  
DICTIONARY** Second Pocket Edition, West Group, St. Paul, Minn., 2001, editor  
in chief Bryan A. Garner  
(cited as: Black's Law Dictionary)
- By Henry Campbell Black, M. A. , Revised Fourth Edition, 1968.  
(cited as: Black's Law Dictionary I)
- BLESSING, Marc** Introduction to Arbitration – Swiss and International Perspectives,  
1999, Swiss Commercial Law Series edited by Nedim Peter Vogt,  
Vol. 10  
(cited as: Blessing I)
- The Conduct of Arbitral Proceedings under the Rules of  
Arbitration Institutions;** The WIPO Arbitration Rules in a  
Comparative Perspective, Paper presented at Conference on Rules  
for Institutional Arbitration and Mediation, Geneva, Switzerland,  
January 20, 1995,  
[www.arbiter.wipo.int/events/conferences/](http://www.arbiter.wipo.int/events/conferences/); 5 November 2004  
(cited as: Blessing)
- BOND, Stephen, R.** How to Draft an Arbitration Clause,  
[http://www.kluwerarbitration.com/arbitration/arb/  
home/ipn/default.asp?ipn=11369](http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=11369); 19 January 2004  
(cited as: Bond)
- BORN, Gary B.** International Commercial Arbitration – Commentary and Materials,  
Kluwer Law International, The Hague, 2001  
(cited as: Born)
- CHENGWEI, Liu**
1. Remedies for Non-performance: Perspectives from CISG,  
UNIDROIT Principles & PECL, September 2003  
[www.cisg.law.pace.edu/cisg/biblio/chengwei-25.html](http://www.cisg.law.pace.edu/cisg/biblio/chengwei-25.html);  
14 November 2004  
(cited as: Chengwei-25)
  2. Remedies for Non-performance: Perspectives from CISG,  
UNIDROIT Principles & PECL, September 2003  
[www.cisg.law.pace.edu/cisg/biblio/chengwei-47.html](http://www.cisg.law.pace.edu/cisg/biblio/chengwei-47.html);  
07 January 2005  
(cited as: Chengwei-47)

3. Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL, September 2003  
<http://www.cisg.law.pace.edu/cisg/biblio/chengwei-75.html>;  
25 November 2004  
(cited as: Chengwei-75)

4. Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL, September 2003  
<http://www.cisg.law.pace.edu/cisg/biblio/chengwei-79.html>;  
25 November 2004  
(cited as: Chengwei-79)

**ENDERLEIN, Fritz  
MASKOW, Dietrich**

International Sales Law under United Nations Convention on Contracts for the International Sale of Goods, Oceana Publications, New York-London-Rome, 1992  
(cited as: Enderlein/Maskow)

**FLAMBOURAS,  
Dionysios P.**

The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis  
<http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>  
15 October 2004  
(cited as: Flambouras)

**FOUCHARD, Philippe  
GAILLARD, Emmanuel  
GOLDMAN, Berthold**

International Commercial Arbitration, Kluwer Law International, The Hague-Boston-London, 1999  
(cited as: Fouchard et al.)

**HERRMANN,  
GEROLD**

The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions in Essays on International Commercial Arbitration, edited by Petar Šarčević, Graham&Trotman/Martinus Nijhoff, London, 1989  
(cited as: Herrmann)

**HOLTZMANN,  
Howard M.  
NEUHAUS, Joseph E.**

A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer and Taxation Publishers, Deventer – Boston, 1994  
(cited as: Hotzmann/Neuhaus)

**GRAFFI, LEONARDO**

Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention  
<http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>  
28 October 2004  
(cited as: Graffi)

**Guide to CISG Article 47**

<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-47.html>

(cited as: Guide to CISG Art. 47)

**Guide to CISG Article 79**

<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html>

(cited as: Guide to CISG Art. 79)

**HONNOLD, John**

Uniform Law for International Sales under the 1980 UN Convention, Kluwer Law and Taxation Publishers, Deventer-Boston, 1991

(cited as: Honnold)

**The International Cocoa Organization**, “What are the effects of intensive commercial production of cocoa on the environment?”

<http://www.icco.org/questions/environ.htm>;

15 October 2004

(cited as: ICCO)

**KAROLLUS, Martin**

Der Anwendungsbereich des UN-Kaufrechts im Überblick, JuS 1993

(cited as: Karollus)

**KARRER, Pierre A.**

Arbitration under the Swiss Rules of Arbitration in Switzerland and Elsewhere, 12th Croatian Arbitration Days, Zagreb, December 2 - 3, 2004

(cited as: Karrer)

**KOCH, Robert,**

The Concept of Fundamental Breach of Contract under the UN Convention on Contracts for the International Sale of Goods (CISG), Pace ed., Review of the Convention on Contracts for the International Sale of Goods 1998, Kluwer Law International (1999)

[www.cisg.law.pace.edu/cisg/biblio/koch.html](http://www.cisg.law.pace.edu/cisg/biblio/koch.html);

20 October 2004

(cited as: Koch)

**KOSKINEN, Jussi**

CISG, Specific Performance and Finnish Law

<http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html>;

04.11.2004

(cited as: Koskinen)

**LAMM, Carolyn B.**

**SPOORENBERG, Frank**

The Enforcement of Foreign Arbitral Awards under the New Convention, Recent Developments

[http://www.sccinstitute.com/\\_upload/shared\\_files/artikelarkiv/lamm\\_spoorenberg.pdf](http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/lamm_spoorenberg.pdf); 20 January 2005

(cited as: Lamm/Spoorenberg)

**LEW, Julian D.M.,**

**MISTELIS, Loukas A.,**

**KRÖLL, Stefan M.**

Comparative International Commercial Arbitration, Kluwer Law International, The Hague-London-New York, 2003

(cited as: Lew/Mistelis/Kröll)

**MAGNUS, Ulrich**

**STAUDINGER von,**

**Julius**

Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Art. 7 n. 13 th ed. 1995

(cited as: Magnus)

- MATRAY, Lambert** “Embargo and Prohibition of Performance “ in: *Acts of State and Arbitration*, (Böckstiegel, K.-H., ed.), Carl Heymanns Verlag KG, Köln/Berlin/Bonn/München, German Institution of Arbitration (cited as: Matray)
- MERRIAM – WEBSTER’S DICTIONARY OF LAW** Editor Linda Picard Wood, Massachusetts, 1996 (cited as: Merriam – Webster's Dictionary of Law)
- Queensland Government**  
Department of Primary Industries and Fisheries  
Growing cocoa  
<http://www.dpi.qld.gov.au/horticulture/6222.html>; 20.01.2005.  
(cited as: Growing cocoa)
- RUBINO-SAMMARTANO, Mauro** International Arbitration Law, Kluwer Law and Taxation Publishers, Deventer – Boston, 1990 (cited as: Rubino-Sammartano)
- SCHERER, Matthias** New Rules on International Arbitration in Switzerland, International Arbitration Law Review, Vol. 4, No. 4, 2004 (cited as: Scherer)
- SCHLECHTRIEM, Peter** Commentary on the UN Convention on the International Sale of Goods (CISG), Clarendon Press, Oxford, 1998 (cited as: Schlechtriem)
- STORME, Matthias E.** Law of obligations - Leading Principles and Belgian Law in a European (Comparative) Perspective  
<http://www.storme.be/verbt2001deciIAC.doc>;  
21 October 2004  
(cited as: STORME)
- The Tornado and Storm Research Organization, TORRO**  
Windstorm Division  
<http://torro.org.uk/research/windstorms.htm>;  
15 October 2004  
(cited as: TORRO)
- TSCHANZ, Pierre Yves** The Chamber of Commerce and Industry of Geneva`s Arbitration Rules and their Expedited Procedure  
Published in: Journal of International Arbitration, Vol. 10 No. 4 (1993) pp. 51-58  
<http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=8727>;  
(cited as: Tschanz)
- UNCITRAL Digest of case law on the United Nations CISG**  
<http://cisg3law.pace.edu/cisg/text/anno-art-47.html>;  
10 October 2004  
(cited as: UNCITRAL Digest Art. 47)

**UNCITRAL Digest of case law on the United Nations CISG**

<http://daccessdds.un.org/doc/UNDOC/GEN/V04/549/42/PDF/V0454942.pdf?OpenElement>;

06 January 2005

(cited as: UNCITRAL Digest Art. 18)

**VÁRADY, Tibor**  
**BARCELÓ, John Jay**  
von **MEHREN, Arthur**  
**T.**

International Commercial Arbitration A Transnational Perspective,  
American Casebook Series, West Group, St. Paul, Minn., 1999

(cited as: Várady)

**ZIEGEL, JACOB**

The Remedial Provision in the Vienna Sales Convention: Some  
Common Law Perspectives, in International Sales 16, ch. 9, 1984

(cited as: Ziegel)

## LIST OF ARBITRAL AWARDS

Court of Arbitration of the International Chamber of Commerce, No. 8324 of 1995  
<http://cisgw3.law.pace.edu/cases/958324i1.html>

(cited as: ICC Case No. 8324)

ICC Case No. 4462 of 1985, YCA Vol. XVI (1991), pp. 54-78

(cited as: ICC Case No. 4462)

ICC Case No. 9978, March 1999

<http://www.cisg-online.ch/cisg/urteile/708.htm>

(cited as: ICC Case No. 9978)

Bulgarska turgosko-promishlena palata [BTTP] (Bulgarian Chamber of Commerce and Industry),  
56/1995, 24 April 1996

<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&cx=1>

(cited as: BTTP, 24 April 1996)

Himpurna California Energy Ltd. V. PT. (Persero) Perusahaan Listrik Negara

Final Award of 4 May 1999,

YCA, Vol. XXV (2000), pp. 13-108

(cited as: Himpurna California Energy Ltd. V. PT. (Persero) Perusahaan Listrik Negara)

## LIST OF JUDICIAL DECISIONS

### Austria

OGH Austria, Case No. 6 Ob 311/99z of 9 March 2000  
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000309a3.html>; 20 January 2005  
(cited as: OGH, 9 March 2000)

### Canada

Quinette Coal Limited v. Nippon Steel Corp. et al., British Columbia Court of Appeal, 24 October 1990, <http://interarb.com/clout/clout016.htm>; 19 November 2004  
(cited as: Quinette Coal Limited v. Nippon Steel Corp. et al.)

### China

Shangai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd, Court of Final Appeal of the Hong Kong Special Administrative Region, 2 April 2004,  
<http://www.smlawpub.com.hk/cases/2004/0406a.htm>; 23 January 2005  
(cited as: Shangai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd)

### France

Raffineries de pétrole d'Homs et de Baniyas v Chambre de Commerce Internationale, CA Paris, May 15, 1985, cited in: Fouchard et al., p. 182, f. 610  
(cited as: Raffineries de pétrole d'Homs et de Baniyas v Chambre de Commerce Internationale)

Abess Bros. and Sons, CA Paris, Apr. 26, 1985, cited in: Fouchard et al., p. 182, f. 609  
(cited as: Abess Bros. and Sons)

### Germany

OLG München, Case No. 10 O 5432/01 of 1 July 2002  
<http://cisgw3.law.pace.edu/cases/020701g1.html>; 16 January 2005  
(cited as: OLG München, 1 July 2002)

BGH Germany, Case No. VIII ZR 51/95 of 3 April 1996  
<http://cisgw3.law.pace.edu/cases/960403g1.html>; 18 December 2004  
(cited as: BGH, 3 April 1996(D))

LG Frankfurt, Case No. 3/11 O 3/91 of 16 September 1991  
<http://cisgw3.law.pace.edu/cases/910916g1.html>; 18 December 2004  
(cited as: LG Frankfurt, 16 September 1991)

OLG Stuttgart, Case No. 5 U 216/99 of 12 March 2001  
<http://cisgw3.law.pace.edu/cases/010312g1.html>; 15 January 2005  
(cited as: OLG Stuttgart, 12 March 2001)

OLG Hamburg, Case No. 1 U 167/95 of 28 February 1997  
<http://www.unilex.info/case.cfm?pid=1&do=case&id=291&step>; 12 January 2005  
(cited as: OLG Hamburg, 28 February 1997)

OLG Düsseldorf, Case No. 6 U 87/96 of 24 April 1997  
<http://cisgw3.law.pace.edu/cases/970424g1.html>; 12 January 2005  
(cited as: OLG Düsseldorf, 24 April 1997)

Court of Appeal, Hamburg, 30 July 1998, YCA, Vol. XXV (2000), pp. 714-716  
(cited as: Court of Appeal, Hamburg, 30 July 1998)

## **Hungary**

Metropolitan Court of Budapest (Fovárosi Biróság), 12.G.41.471/1991/21, 24 March 1992  
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&x=1>; 17 January 2005  
<http://cisgw3.law.pace.edu/cases/920324h1.html>; 17 January 2005  
(cited as: Metropolitan Court of Budapest, 24 March 1992)

## **Solomon Islands**

Chan Wing Ltd v. Wing Sun Company Ltd., High Court of Solomon Islands, 8 September 1999,  
<http://www.paclii.org/sb/cases/SBHC/1999/89.html>; 11 January 2005  
(cited as: Chan Wing Ltd v. Wing Sun Company Ltd.)

## **Switzerland**

BGer Switzerland, Case No. 4C105/2000 of 15 September 2002  
<http://cisgw3.law.pace.edu/cases/000915s2.html>; 11 January 2005  
(cited as: BGer, 15 September 2002)

BGer Switzerland, Case No. 4C.179/1998/odi of 28 October 1998  
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981028s1.html>; 22 January 2005  
(cited as: BGer, 28 October 1998)

Handelsgericht Aargau, 26 September 1997  
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&x=1>; 20 January 2005  
(cited as: Handelsgericht Aargau, 26 September 1997)

Handelsgericht des Kantons Zürich; HG 940513, 10 July 1996  
<http://www.uncitral.org/english/clout/abstract/abstr14.htm>; 12 January 2005  
(cited as: Handelsgericht des Kantons Zürich, 10 July 1996)

Imuna v Octapharma, Federal Tribunal, 8 January 2001, cited in Scherer, p. 125, f. 11  
(cited as: Imuna v. Octapharma)

## **United Kingdom**

Ranko Group v Antartctic Maritime SA, June 12 1998, cited in Scherer, p. 125, f. 13  
(cited as: Ranko Group v Antartctic Maritime SA)

Taylor Woodrow Civil Engineering v Hutchison IDH Development Ltd [1998] C.I.L.L. 1434, cited in Scherer, p. 125, f. 13  
(cited as: Taylor Woodrow Civil Engineering v Hutchison IDH Development Ltd)

Pall Wilson & Co A/S v Partenreederei Hannah Blumenthal, [1983] 1 AC 854, cited in Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd, para. 42

## **USA**

Nissho-Iwai Co., ltd. v. Occidental Crude Sales, Inc., United States Court of Appeals, Fifth Circuit, No. 86-2809., July 1, 1988  
(cited as: U.S. Court of Appeals, July 1, 1988)

Louis Dreyfus Corp. v. Continental Grain Co., 395 So.2d 442, 450 (La.Ct.App.1981).  
cited in: Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG  
<http://cisgw3.law.pace.edu/cases/040706u1.html>; 5 January 2005  
(cited as: Louis Dreyfus Corp. v. Continental Grain Co.)

Wollan v. McKay, 24 Idaho, 691, 135, cited in Black's Law Dictionary, p. 420  
(cited as: Wollan v. McKay)

Howard Elec. And Mechanical Co. v Frank Briscoe Co., YCA Vol. XIII (1988), p. 614  
(cited as: Howard Elec. And Mechanical Co. v Frank Briscoe Co.)

Parson and Whittemore Overseas Co. Inc. v Rakta, YCA Vol. I (1976), p. 205  
(cited as: Parson and Whittemore Overseas, Inc. v Rakta)

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., cited in Várady, p. 751  
(cited as: Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.)

Himpurna California Energy Ltd. V. PT. (Persero) Perusahaan Listrik Negara  
(cited in Matray, p. 36)  
(cited as: Himpurna California Energy Ltd. V. PT. (Persero) Perusahaan Listrik Negara)

## LIST OF LEGAL SOURCES

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
- International Arbitration Rules of the American Arbitration Association, 2001
- Maritime Arbitration Rules
- NYBOT Cocoa Rules
- Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, 1992
- Rules of Arbitration of the International Chamber of Commerce, 1998
- Swiss Rules of International Arbitration, 2004
- UNCITRAL Model Law on International Commercial Arbitration, 1985
- United Nations Convention on Contracts for the International Sale of Goods, 1980
- WIPO Arbitration Rules

## STATEMENT OF FACTS

- **19 November 2001** – Mr. Smart, account executive for Equatoriana C.E. offered to sell cocoa to Mr. Sweet, commodity buyer for Mediterraneo C.A.. It was agreed that Equatoriana C.E. would sell 400 t of cocoa beans to Mediterraneo C.A.. During the period January-February 2002 Equatoriana C.E. was to fix a delivery date that would be between the months of March to May 2002. Mr. Smart sent a fax with a written contract enclosed.
- **14 February 2002** – Storm had hit the cocoa producing area in Equatoriana
- **24 February 2002** – Mr. Smart informed Mr. Sweet that the Equatoriana Government Cocoa Marketing Organization had announced that no cocoa would be released for export. Due to the export ban, Equatoriana C.E. was unable to deliver contracted cocoa until the ban was rescinded.
- **5 March 2002** – Mr. Sweet pointed out that Mediterraneo C. A. was not under immediate pressure to receive the contracted cocoa.
- **10 April 2002** – Mr. Sweet sent a letter to Mr. Smart stating that Mediterraneo C.A. expected Equatoriana C.E. to deliver all of the cocoa, but that they would be happy to receive whatever Equatoriana C.E. is able to send.
- **7 May 2002** – Mr. Smart informed Mr. Sweet about the EGMCO release of small amount of cocoa and that Equatoriana C.E. would be able to deliver 100 t of cocoa to Mediterraneo C.A. during May. Equatoriana C.E. apologized for the delay and emphasized difficulties in the market of cocoa in Equatoriana.
- **18 May 2002** – Equatoriana C.E. shipped 100 t of cocoa, which Mediterraneo C.A. received and paid.

There was no written correspondence until 15 August 2002, which led Equatoriana C.E. into believing that delivery of cocoa is not urgent to Mediterraneo C.A.

- **15 August 2002** – Mr. Sweet sent a letter to Mr. Smart emphasizing their need for cocoa
- **28 September 2002** – Mr. Smart made a telephone call to Mr. Sweet in which he said that there was no indication yet as when the export ban will be rescinded. Mr. Sweet reiterated the concerns expressed in letter of 15 August 2002.
- **24 October 2002** - Mediterraneo C.A. purchased 300 t of cocoa beans from Oceania Produce Ltd. without providing notice to Equatoriana C.E. and before avoidance of the contract.
- **25 October 2002** – Mr. Sweet notified Equatoriana C.E. of the purchase.

- **11 November 2002** – Mr. Fasttrack, counsel for Mediterraneo C.A. sent a letter to Mr. Tender, President of Equatoriana C.E. demanding extra expenses.
- **13 November 2002** – Mr. Smart in his letter asserted that the contract had not been terminated and that Equatoriana C.E. would not pay the sum claimed by Mediterraneo C.A.. He pointed out Equatoriana's C.E. possibility of shipping the necessary 300 t of cocoa to Mediterraneo C.A. since on 12 November 2002 the EGMCO rescinded the export ban.
- **15 November 2002** – Mr. Fasttrack sent a letter to Equatoriana C.E. stating that Mediterraneo C.A. considers the cocoa contract to be terminated.
- **20 November 2003** – Equatoriana C.E. sold 2,500 t of sugar to Mediterraneo C.A.
- **2 July 2004** – Mediterraneo C.A. commences arbitration before the Chamber of Commerce and Industry of Geneva
- **6 July 2004** – The Chamber of Commerce and Industry of Geneva informed Mediterraneo C.A. that it has adopted the new Swiss Rules of International Arbitration and that these Rules apply to all arbitral proceedings in which the Notice of Arbitration was submitted after 1 January 2004.

## **1. THE TRIBUNAL HAS JURISDICTION TO CONSIDER THE COUNTERCLAIM ARISING FROM SUGAR CONTRACT 2212**

1. RESPONDENT holds that this honourable Tribunal has jurisdiction to consider its counterclaim arising from sugar contract, concluded on 20 November 2003 (hereinafter: sugar contract 2212) (Respondent's Exhibit No. 4), for the following reasons. First, the Swiss Rules of International Arbitration (hereinafter: Swiss Rules), including Art. 21(5) are applicable to the present dispute [1.1.]. Second, Art. 21(5) Swiss Rules provides legal grounds for the Tribunal to hear RESPONDENT's counterclaim [1.2.]. Third, RESPONDENT's counterclaim is not contrary to the agreement of the parties [1.3.]. Fourth, hearing the counterclaim would not deprive the parties of their right to be heard [1.4.]. Finally, Tribunal's award concerning sugar contract 2212 would not be successfully challenged and would be enforceable [1.5.].

### **1.1. The Swiss Rules, including Art. 21(5), are applicable to the present dispute**

2. Cocoa contract, concluded on 19 November 2001 (hereinafter: cocoa contract 1045) (Claimant's Exhibit No. 2), contains the arbitration clause calling for the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva (hereinafter: Geneva Rules) (Claimant's Exhibit No. 2). However, after receiving the Request for Arbitration, the Chamber of Commerce and Industry of Geneva (hereinafter: CCIG) notified the parties that the new Swiss Rules, which entered into force on 1 January 2004, replaced the Geneva Rules and as such applied to the present proceedings (Letter from Swiss Chambers of 6 July 2004 and 16 July 2004). In its Answer to Counter-Claim, CLAIMANT stated that it "*does not object to the general application of the Swiss Rules ... it does object to the application of Article 21(5).*" (para. 4; see also Memorandum for Claimant, Michigan State University College of Law (hereinafter: Cl.'s Memorandum), paras. 76-77) In reply to CLAIMANT's statement, RESPONDENT proves that the Swiss Rules apply to the present dispute [1.1.1.], and second, derogation from Art. 21(5) is inadmissible under the Swiss Rules [1.1.2.].

#### **1.1.1. The Swiss Rules apply to the present dispute**

3. RESPONDENT proves that both parties agreed to the Swiss Rules in general and consequently to Art. 21(5). At the outset, RESPONDENT submits that the parties modified the initial arbitration agreement contained in cocoa contract 1045 when giving their consent to the new Swiss Rules. As stated above, CLAIMANT itself declared that it does not object to the general application of the Swiss Rules (Answer to Counter-Claim, para. 4). CLAIMANT's conduct confirmed its statement. When acknowledging the receipt of the Notice of Arbitration, the CCIG explicitly notified both parties that the Swiss Rules applied and enclosed the copy thereof (Letter from Swiss Chambers of 6 July 2004 and 16 July 2004). CLAIMANT, in its subsequent letter of 12 July 2004, affirmed the receipt of Chamber's letter and raised no objection

whatsoever to the Swiss Rules. All the more, it executed the payment of the arbitration fee in accordance with Appendix B, Section 1.1 Swiss Rules. In further correspondence with the Chambers, CLAIMANT stated: "[...] *we would prefer to follow the procedure in Art. 8 [...]*" as opposed to that in Art. 7 Swiss Rules, which concerned the appointment of the sole arbitrator (Letter from Mr. Fastrack of 21 July 2004). Eventually, CLAIMANT appointed one of the arbitrators, pursuant to Art. 8 Swiss Rules (Letter from Mr. Fastrack of 31 August 2004). According to case law, a legally binding arbitration agreement can be inferred from the conduct of the parties (*Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd; Pall Wilson & Co A/S v Partenreederei Hannab Blumenthal*), in particular, the appointment of the arbitrators (Court of Appeal, Hamburg, 30 July 1998). Based on the above-described CLAIMANT's conduct, the conclusion follows that CLAIMANT unconditionally accepted the application of the Swiss Rules.

4. In addition, Art. 1(1) Swiss Rules expressly states that the Rules will apply even if the arbitration agreement refers to the arbitration rules of other Chambers, including the CCIG. The only exception is provided in Art. 1(3) Swiss Rules, which allows the parties to make a specific agreement to follow the proceedings in accordance with the old rules. Therefore, the default rule applies in the case at hand since the parties did not make a specific agreement for the application of the Geneva Rules. This is also confirmed in the commentary of the Swiss Rules: "*In light of case law of the Swiss Supreme Court (the Federal Tribunal), an opting out of the Swiss Rules in favour of the old Rules requires a specific agreement.*" (Scherer, pp. 121-122; see *Imuna v Octapharma*) If CLAIMANT found any provision of the Swiss Rules unacceptable, it should have immediately suggested RESPONDENT to opt back to the Geneva Rules and not object to their application two months later (Answer to Counter-Claim, 31 August 2004).

5. Furthermore, RESPONDENT submits that the Swiss Rules, as a new procedural law, set aside the old one - the Geneva Rules, in accordance with the principle *lex posterior derogat legi priori*. The principle that the version of rules in effect at the time of the commencement of the arbitration prevails over the former ones is broadly accepted by legal scholarship and practice. In support to this, Berger emphasizes: "*Institutional arbitrations are conducted under the rules which are in force at the date the arbitration commences.*" (Berger I, p. 58; similarly AAA Rules, Art. 1.1; WIPO Arbitration Rules, Art. 2) This principle is also embodied in the model arbitration clause of the Swiss Rules. Moreover, "*[t]he principle that the rules governing the proceedings are those in force at the time the arbitration is initiated has also been applied by English courts.*" (Scherer, p. 122; *Taylor Woodrow Civil Engineering v Hutchison IDH Development Ltd, Ranko Group v Antarctic Maritime SA*) The situation in the case at hand would have been different if the initial arbitration clause or the Geneva Rules contained a provision stating that the rules in force at the time of the conclusion of the contract would govern future proceedings regardless of the changes in arbitration rules. (see Bishop, p. 2) That this is not a merely theoretical possibility is proven by the fact that there are such arbitration clauses. For instance, several arbitration clauses contained

in contracts from 1987 referred to the ICC Rules "...then in force, i.e. at the time of the signature of the contract containing the arbitration clause." (Bond, p. 68) Therefore, CLAIMANT, as a prudent businessman, might have negotiated such clause in cocoa contract 1045. Nevertheless, it did not use this possibility.

6. To conclude, since CLAIMANT accepted the Swiss Rules in general it agreed to the application of Art. 21(5) Swiss Rules as well.

### 1.1.2. Derogation from Art. 21 (5) is inadmissible under the Swiss Rules

7. RESPONDENT submits that this honourable Tribunal should not permit derogation from Art. 21(5) because that possibility is neither allowed by the Swiss Rules and other similar rules nor in legal scholarship.

8. Unlike some other arbitration rules, the Swiss Rules do not contain a specific provision, which would allow the parties to exclude the application of any of their articles. For instance, Art. 1.1 AAA Rules explicitly provides: "*The arbitration shall take place in accordance with these rules...subject to whatever modifications the parties may adopt in writing.*" Similarly, Section 1. Maritime Arbitration Rules lays down: "[...] *the parties may mutually alter or modify these Rules.*" Contrary to that, some other rules such as the International Arbitration Rules of Zürich Chamber of Commerce and the ICC Rules do not envisage such possibility. Commenting on those rules, Blessing pointed out that both institutions have been very reluctant to allow exclusion of a particular provision even in those cases where common accord of the parties exists. The ratio behind such approach was that "[...] *the nature of an ICC procedure should not be changed.*" (Blessing, para. 38.3; see also Bishop I, p. 17) Accordingly, derogation from Art. 21(5) should not be allowed, in particular because RESPONDENT disagrees.

9. Furthermore, CLAIMANT bases its requests for exclusion of Art. 21(5) on the allegation that it is "[...] *structurally and fundamentally different and ... untenable or surprising.*" (Cl.'s Memorandum, para. 66) However, the solution in the Swiss Rules is neither "*untenable*" nor "*unjustified*" as CLAIMANT wrongfully argues. On the contrary, Art. 21(5) is "[...] *an eminently practical provision*" (Karrer, p. 6) as it "[...] *increases the effectiveness of arbitration [...]*" (Scherer, p. 124). Moreover, this provision reflects the needs of the contemporary international arbitration and should therefore prevail over the old perspectives regarding the set-off defences. CLAIMANT further argues that Art. 21(5) was "*surprising*" and "*entirely unexpected*" (Cl.'s Memorandum, paras. 66-67). This contention is unfounded for several reasons. Namely, "[...] *the adoption of the new Swiss Rules was well publicized in interest circles and known by lawyers who engage in international commercial arbitration.*" (PO, q. 5) Consequently, it is hard to believe that CLAIMANT's counsel, Mr. Fasttrack, a lawyer engaged in international commercial arbitration, was unaware of the fact that the Swiss Rules would replace *inter alia* the Geneva Rules. All the more, since, as early as in 1999 (i.e. 2 years before cocoa contract 1045 was concluded), eminent scholars discussed the unification of arbitration rules of Swiss Chambers. (Blessing I, pp. 292-293)

In addition, Swiss Chambers, other than CCIG, involved in the process of unification of arbitration rules, contained a provision similar to Art. 21(5): Zurich - Art. 27, Basel - Art. 29, Berne - Art. 9, Ticino - Art. 12 (Blessing I, p. 192). Thus, inclusion of this provision in the Swiss Rules was at least expected, if not logical, outcome.

10. Furthermore, even if a derogation of a particular provision is allowed under the Swiss Rules, CLAIMANT cannot rely on that as it waived its right to object. Had CLAIMANT not agreed with any of the Swiss Rules provisions, it should have had objected immediately after realizing they were applicable, and most certainly before acting in accordance with them. It is irrelevant whether CLAIMANT, or its counsel, was actually familiar with each and every Swiss Rules provision, as the widely accepted rule *ignorantia iuris nocet, not excusat* (i.e. being ignorant of law harms) applies here. However, CLAIMANT objected to Art. 21(5) almost two months after receiving the Swiss Rules. Such objection is contrary to the *bona fides* principle. This principle, governing the conduct in arbitration, reflects the idea that "[...] a party which does not promptly object ... will be deemed to have waived its right to objection." (Blessing I, p. 119) In other words, the rule "speak up or shut up" applies. (Blessing I, p. 119)

11. CLAIMANT might argue that the application of Art. 21(5) Swiss Rules should be excluded because the main reason for choosing the Geneva Rules lies in the fact that they, unlike rules of other Chambers in Switzerland, did not allow defences from another contracts. RESPONDENT maintains that this is a completely fabricated argument because it has no ground in the facts of the case. It can as well be true that the parties chose these Rules since they permit, to place the seat of arbitration outside the borders of Switzerland (Art. 3 Geneva Rules), unlike other arbitration rules in Switzerland. In fact, the parties did use this possibility choosing Danubia, Vindobona as a seat of arbitration.

12. The arguments set forth above suffice to prove that the Swiss Rules apply as a whole and that CLAIMANT has no justifiable grounds to object to the application of Art. 21(5).

**1.2. Art. 21(5) Swiss Rules provides legal grounds for this honourable Tribunal to hear RESPONDENT's counterclaim**

13. RESPONDENT's counterclaim is admissible under Art. 21(5) Swiss Rules because the notion of set-off defence and counterclaim are interchangeable [1.2.1.], and Art. 21(5) Swiss Rules is in accordance with the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: the Model Law) [1.2.2.].

**1.2.1. The notions of counterclaim and set-off defence are interchangeable**

14. RESPONDENT maintains that CLAIMANT's attempt to make a distinction between counterclaim and set-off defence is practically impossible (Cl's Memorandum, paras. 82-85). As Berger nicely puts, the

"[...] counterclaim and set-off are closely intertwined" and "[...]'only a hair's-breadth away' from each other" (Berger, pp. 57-58). This is also the reason why arbitration rules rarely contain provisions on this matter (Blessing I, p. 192). The same applies to the Swiss Rules, which are silent about the notion of counterclaim and set-off defence. Commenting on the Art. 21(5) Swiss Rules, Karrer stated: "It is not clear whether this provision also applies to counterclaims." However, his following words: "The idea is that if a party attacks another before a particular forum it should not be surprised if the other fights back on the spot", suggest that counterclaims are likely to be covered by the provision in question. (Karrer, p. 6 (*emphasises added*)) The expression "fight back", used by Karrer, implies an offensive tactic, which is commonly considered a feature of counterclaim. Thus, Art. 21(5) should be construed to cover counterclaims.

15. The confusion surrounding the notions of counterclaims and set-off is perhaps best illustrated in law dictionaries. Thus, in Merriam - Webster's Dictionary of Law, set-off is defined as a "counterclaim made by a defendant against a plaintiff for reduction or discharge of a debt by reason of an independent debt owed by the plaintiff to the defendant." (p. 453) On the contrary, Black's Law Dictionary defines a counterclaim as "a species of set-off" (Black's Law Dictionary I, p. 420; *Wollan v. McKay*), and as "[...] a setoff against the plaintiff's claim." (Black's Law Dictionary, p. 153) The said ambiguity between the two notions occurs in practice as well; Berger states that "[s]et-off in international economic arbitration is therefore sometimes regarded as a counterclaim in disguise." (Berger, p. 57) Therefore, CLAIMANT's contention, that crucial distinction between the two is mirrored in a fact that set-off is "purely a defensive claim" (Cl.'s Memorandum, para. 83) as opposed to counterclaim, is unfounded. This is further supported by the ruling in *Chan Wing Ltd v. Wing Sun Company Ltd.* where the Court cited an Australian author Cairns, who stated: "To say that set-off is a shield and not a sword is not to say that it can never be used offensively. But for it to be used offensively the set-off must also be pleaded as a counterclaim." Hence, set-off can be used not only defensively, as a shield, but also offensively, as a sword. As such, it is no different than counterclaim. Consequently, there are no firm, generally accepted criteria based on which the clear distinction between set-off and counterclaim could be drawn.

16. Danubia, as a seat of arbitration, has adopted the Model Law (Request for Arbitration, para. 15), which therefore applies as *lex arbitri* in the case at hand. Though the text of the Model Law itself does not provide any guidance to the issue at question, the drafters explained that the word set-off is not included next to the word counterclaim in Art. 2(f), regarding definitions and rules of interpretations, assuming as self-evident "[...] that provisions dealing with counterclaims would apply (*mutatis mutandis*) to a claim relied on by the respondent for the purpose of a set-off." (Holtzmann/Neuhaus, p. 658)

17. Based on foregoing conclusions, it is evident that set-off defence and counterclaim are essentially equivalent concepts, which leads to the conclusion that Art. 21(5) Swiss Rules applies to both. Accordingly, RESPONDENT's counterclaim is admissible and as such gives the Tribunal authority to decide on the

whole amount of contract price of USD 385,805 for the delivered sugar. CLAIMANT argues to the contrary, asserting that RESPONDENT's recovery should be limited to a set-off against any damages that CLAIMANT might be awarded under cocoa contract 1045. (Cl.'s Memorandum, paras. 82-85) RESPONDENT rejects this argument on the grounds of procedural economy and efficiency, as underlying principles in arbitration (Berger, p. 69). Undoubtedly, it is in both parties' best interest to save their time and money by resolving the whole sugar dispute before this honourable Tribunal, where the procedure regarding cocoa dispute has already been initiated and where RESPONDENT already paid the fee for its counterclaim. If this honourable Tribunal decides to hear the counterclaim, the parties would not have to pay double arbitration and lawyer fees by initiating another proceedings before the Oceania Commodity Association (hereinafter: OCA). Even in case this Tribunal decides to limit its award only to a part of the sugar dispute leaving the rest unsettled, resolving the remaining part before the OCA would still be a time consuming process which would cause considerable expenses. In any case, this honourable Tribunal would have to hear evidence in respect to the entire sugar dispute. Would it be commercially reasonable then to decide only on a part of it?

18. To conclude, RESPONDENT's counterclaim is included in Art. 21(5) Swiss Rules and therefore, the Tribunal has jurisdiction to decide on it.

### 1.2.2. Art. 21(5) Swiss Rules is in accordance with the Model Law

19. CLAIMANT wrongfully maintains that it would be contrary to the Model Law should this honourable Tribunal exercise its jurisdiction over RESPONDENT's counterclaim (Cl.'s Memorandum, paras. 62-65). That is because the Model Law does not have the priority over the Swiss Rules in respect to this issue.

20. Citing Blessing, CLAIMANT mistakenly argues: "[t]he UNCITRAL Model Law '... rank[s]... first in priority and, therefore, override[s] any provisions in the institutional Arbitrational Rules, or any other agreement made between the Parties.'" (Cl.'s Memorandum, para. 62) CLAIMANT obviously misunderstood Blessing's words as the scholar referred to "the mandatory provisions of law applicable to the arbitration from which the parties cannot derogate (i.e. in particular some mandatory provisions of the Arbitration Act prevailing at the place of arbitration)." (Blessing, para. 38.1 (emphasises added)) In the present case, "the Arbitration Act" is the Model Law. Therefore, CLAIMANT's conclusion that the Model Law as a whole overrides the Swiss Rules is erroneous. That is for the reason that "[...] only the mandatory provisions of the procedural law of the place of the arbitration need to be taken into account." (Rubino-Sammartano, pp. 146-147; see also Born, p. 435; Holtzmann/Neuhaus, p. 565; Lew/Mistelis/Kröll, p. 29) Only a few provisions in the Model Law are indeed of a mandatory nature, namely, Art(s). 7(2), 18, 24(2)(3), 30(2) and 31(1)(3)(4). (Holtzmann/Neuhaus, p. 198) However, none of these provisions even remotely

concern the admissibility of set-off and counterclaim defence from another contract. Consequently, no mandatory provision of the Model Law overrides Art. 21(5).

21. Moreover, the Model Law does not even contain the non-mandatory provision, which would be incompatible with Art. 21(5) Swiss Rules. This renders the CLAIMANT's contention that *"the Model Law clearly conflicts with Article 21(5) of the Swiss Rules regarding the Tribunal's jurisdiction over counter-claims and set-off defences"* (Cl.'s Memorandum, para. 64) utterly incorrect. In Herrmann's supportive opinion, *"of course, the Model Law prevails only in respect of matters regulated by it, whether expressly or impliedly, without a relevant provision in point there is nothing that could prevail."* (Herrmann, p. 21) That being the case, how can one conclude that the Model Law *"clearly conflicts"* with Art. 21(5) Swiss Rules?

22. Even if there would be a mandatory rule in the Model Law contrary to Art. 21(5), there is an authority stating that arbitration rules always take priority over other sources of procedural law, including those of mandatory character (Fouchard et al., pp. 181-182; *see also* Craig, cited in Rubino-Sammartano, p. 353). Thus, the Paris Court of Appeals decided that *"the provisions of the Rules of the ICC Court of Arbitration, which constitute the law between the parties, must be applied to the exclusion of all other rules."* (*Raffineries de pétrole d'Homs et de Banias v Chambre de Commerce Internationale*; *see also* *Abess Bros. and Sons*) In accordance with this standpoint, the Tribunal would not be bound by the Model Law, as *lex arbitri*.

23. To conclude, Art. 21(5) Swiss Rules is compatible with the Model Law.

### 1.3. RESPONDENT's counterclaim is not contrary to the agreement of the parties

24. Claim and counterclaim derive from two contracts, cocoa contract 1045 and sugar contract 2212, containing different arbitration clauses, one calling for the CCIG and the other calling for the OCA. CLAIMANT maintains that hearing RESPONDENT's counterclaim would frustrate parties' initial agreement and their intention to separate cocoa and sugar disputes (Cl.'s Memorandum, para. 72-78). However, CLAIMANT's contentions are unjustified, based on the following reasons.

25. First, RESPONDENT proved that both parties agreed to the application of the Swiss Rules, including Art. 21(5), which modified their earlier agreement referring to the Geneva Rules (*supra*, para. 3-6). Since Art. 21(5) Swiss Rules allows the parties to raise counterclaims governed by different arbitration clauses contained in different contracts, RESPONDENT's counterclaim arising from sugar contract 2212 is perfectly valid and in accordance with the parties' latter agreement. For the same reason, the CLAIMANT's argument that this honourable Tribunal should dismiss the counterclaim based on the fact that cocoa and sugar contracts *"represent wholly separate and distinct business transactions"* is irrelevant (Cl.'s Memorandum, para 79)

26. Second, both sugar and cocoa contracts “[...] are absolutely standardized except for the price.” (PO, q. 17) Since the parties negotiated only the price and not the arbitration clauses, it is clear that they did not consider arbitration clauses as essential elements of the contracts. At the moment of the conclusion of each of the contracts, parties' attention was not focused on the choice of the arbitration institution; hence, it seems that whether the possible disputes would be settled before the OCA or the CCIG was irrelevant. Apparently, parties' intention regarding the selection of the arbitration clauses did not exist at all, or at least was not essential as CLAIMANT' wrongfully alleges. (Cl.'s Memorandum, para. 73) Even if the parties' initial intention to separate cocoa and sugar disputes did, in fact, exist, this honourable Tribunal should consider Berger's words “[...] the parties' interest to have claim and cross-claim decided simultaneously and through one single instance outweighs the interest to preserve different competence for the cross-claim.” (Berger, p. 73)

27. In addition, RESPONDENT' finds CLAIMANT's argument that arbitration clause contained in sugar contract 2212 should be complied with because the OCA is a more suitable arbitral institution for settling the sugar dispute totally groundless (Cl.'s Memorandum, para. 67). This is due to the fact that the CCIG is no less competent to hear sugar disputes than the OCA.

28. As the name itself suggests, the OCA deals with all sorts of commodities, not merely sugar. On the contrary, for instance The Sugar Association of London deals with disputes arising from a raw sugar contract only, such as sugar contract 2212. Moreover, the parties are not members of any commodity association (PO, q. 6) that would oblige them to settle disputes in specialized arbitration institutions. This indicates that the parties never selected the arbitration institutions, but rather accepted whichever was referred to in a standard contract.

29. Furthermore, the present dispute does not require any specialized expertise. This is due to the fact that, if the sugar was wet on arrival, as CLAIMANT' argues (Respondent's Exhibit No. 5), it will only be important to determine when it became wet. In determining this issue, the witnesses will need to be heard and written documents, such as bill of lading, examined. This Tribunal is as competent as the OCA to perform this task. Namely, pursuant to Art. 16(2) Swiss Rules the Tribunal "*may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate [...]*". It may even meet "*at any place it deems appropriate for the inspection of goods, other property or documents*" (16(3) Swiss Rules). Moreover, pursuant to Art. 25(5) Swiss Rules evidence of witnesses may be presented in the form of written statements or reports signed by them. Accordingly, any witness could be easily heard without further increase of the arbitration costs.

30. Therefore, deciding on RESPONDENT's counterclaim would not frustrate the parties' agreement.

#### 1.4. Hearing the counterclaim would not deprive the parties of their right to be heard

31. CLAIMANT holds that hearing the counterclaim would prejudice its ability to present its case since it believes that it will not have an opportunity to confront Oceania Sugar Producers to the present arbitration (Cl.'s Memorandum, paras. 68-72). What comes as a surprise is the fact that CLAIMANT is not sure if Oceania Sugar Producers should participate in the proceedings as a third party or as a witness, which is evident from its wording: *"Unless Oceania Sugar Producers agrees to become a party to the present arbitral proceedings, CLAIMANT would be unable to call Oceania Sugar Producers as a witness..."* (Cl.'s Memorandum, para. 71). Thus, its argument about them being unwilling to participate in proceedings before this Tribunal is at least confusing. Above all, RESPONDENT finds no reason why would they agree to become a party before the OCA and not before this honourable Tribunal since CLAIMANT provides no evidence to substantiate this argument.

32. To clarify, there is no legal barrier for Oceania Sugar Producers to participate in the procedure, nor as a third party (Art. 4(3) Swiss Rules), nor as a witness (Art. 25(2) Swiss Rules). As to the third party, CLAIMANT should have made a request to the Tribunal for participation of Oceania Sugar Producers in the instant proceedings. There is also no obstacle for Oceania Sugar Producers to become witness in the proceedings since pursuant to Art. 25(2) *"any person may be a witness"*. CLAIMANT only has to communicate the names and addresses of the witnesses to the Tribunal. Thus, the Swiss Rules provide legal grounds for participation of Oceania Sugar Producers. However, Oceania Sugar Producers will only participate in sugar dispute if it is in their best interest regardless of the institution conducting the proceedings. Therefore, CLAIMANT's ability to present its case will not be affected more before this Tribunal than before the OCA.

33. In addition, CLAIMANT argues that, since the parties are currently involved in the Expedited Procedure, hearing the counterclaim would severely affect its ability to present its case (Cl.'s Memorandum, para. 70). However, Scherer emphasises that *"[...] the general principles of due process and right to be heard also apply in the expedited procedure."* (Scherer, p. 124) Thus, although the Expedited Procedure provides with one single hearing it does not indicate that the hearings will be held in only one day. According to Tschanz, *"[i]t can be a hearing lasting several consecutive days. A single hearing does not rule out a prehearing conference;"* (Tschanz, p. 2). Moreover, pursuant to Art. 2(3) Swiss Rules, if circumstances so justify, the Chambers may extend any time limits that they have set. Evidently, the Tribunal will have enough time to consider both, claim and counterclaim, and consequently CLAIMANT's right to be heard will not be violated.

34. Furthermore, the honourable Tribunal should allow RESPONDENT to present its case by hearing the counterclaim because otherwise its business would be severely affected. The same argument was made by CLAIMANT when justifying the cover purchase of cocoa: *"[...] its inventory level were reaching a dangerously*

*low level... and it could not wait any longer in hopes of decrease in price [...]*" (Cl.'s Memorandum, para. 53, *see also* Letter from Mediterraneo of 15 August 2004). To clarify, CLAIMANT purchased cocoa at a much higher price because it believed that its producing process was jeopardized. As a result, it initiated present proceedings seeking damages for the cover purchase of cocoa made in attempt to protect its business. For the exact same reason, i.e. to protect its business liquidity, RESPONDENT brought its counterclaim seeking the whole amount of the sugar dispute. Namely, RESPONDENT as a trading company needs constant cash flow to buy and trade commodities. However, by not hearing the counterclaim, RESPONDENT's cash flow could be put at risk since it might be obligated to pay to CLAIMANT alleged damages from cocoa contract 1045 (while CLAIMANT actually owes it even a higher amount from sugar dispute), and only later before the OCA recover a full amount from sugar contract 2212.

35. In that light the Tribunal should consider RESPONDENT's counterclaim to ensure equal treatment of the parties and prevent the unjustified outcome.

**1.5. Tribunal's award concerning sugar contract 2212 would not be successfully challenged and would be enforceable**

36. CLAIMANT wrongfully asserts that the award concerning sugar contract 2212 could be set aside in Danubia or that its enforcement could be refused (Cl.'s Memorandum, paras. 74-75). In support of its arguments, CLAIMANT invoked Art. 34(2) Model Law, as grounds for setting aside the award, and Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the NY Convention), as grounds for refusal of recognition and enforcement of awards. The latter is applicable as Danubia, Equatoriana and Mediterraneo are party to it (Request for Arbitration, para. 16). The grounds provided in Art. 34(2) are virtually identical to those in Art. V NY Convention. However, none of these grounds applies in the present case.

37. CLAIMANT maintains that if the Tribunal hears the counterclaim the present procedure would be contrary to the parties' agreement and as such constitutes grounds for refusal of recognition and enforcement of the award (Art. V(d) NY Convention). However, RESPONDENT already proved (*supra*, paras. 2-9) that the parties' agreement in cocoa contract 1045 was modified when the parties agreed to the Swiss Rules. Thus, application of Art. 21(5) Swiss Rules, which provides the Tribunal with the jurisdiction to hear RESPONDENT's counterclaim, is in accordance with the agreement of the parties. Likewise, it would be equally impossible to prove that the award concerning sugar dispute contains decisions on matters beyond the scope of the arbitration agreement pursuant to Art. V(c) NY Convention and 34(2)(a)(iii) Model Law. Even if the facts of the case supported CLAIMANT's allegations, it would be difficult, if not impossible to set aside or resist enforcement of the award since it is a widely established presumption "*that an arbitral body*

*has acted within its powers"* (*Howard Elec. And Mechanical Co. v Frank Briscoe Co.*; Várady, p. 747, *Parson and Whittemore Overseas, Inc. v Raketa*). Similarly in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* the court held that "*any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration.*" Accordingly, "... *the courts invariably rejected the defence that the arbitrator exceeded his authority.*" (YCA 1996, p. 490; Bishop II, p. 19; similarly Lamm/Spoorenberg, p. 3; *Quinette Coal Limited v. Nippon Steel Corp. et al.*; Court of Appeal, Hamburg, 30 July 1998)

38. Therefore, the award regarding sugar dispute would neither be set aside nor its enforcement refused.

39. To conclude based on the arguments set forth above, RESPONDENT submits that this honourable Tribunal has jurisdiction to hear RESPONDENT's counterclaim.

## **2. RESPONDENT WAS EXCUSED FROM DELIVERING THE 300 T BY REASON OF EMBARGO PLACED ON THE EXPORT OF COCOA BY THE EGCMO FROM MID FEBRUARY TO EARLY NOVEMBER 2002**

40. RESPONDENT respectfully requests this honourable Tribunal to find that in present case the true impediment was the embargo [2.1]. Furthermore, RESPONDENT proves that cocoa contract 1045 required delivery of Equatoriana cocoa [2.2]. Finally, RESPONDENT demonstrates that it was excused from delivering due to impediment, under Art. 79 CISG, because requirements set forth in the mentioned article were fulfilled [2.3].

### **2.1. The true impediment in present case was the export embargo ordered by the EGCMO**

41. CLAIMANT wrongfully concluded that the true impediment in the case at hand was the storm (Cl.'s Memorandum, para. 19). The storm did not prevent RESPONDENT to deliver 300 t of cocoa, the embargo did. RESPONDENT had sufficient amount of cocoa on stocks to supply CLAIMANT, which is obvious from the correspondence between the parties, in which RESPONDENT repeatedly stated that it was prepared to deliver additional cocoa as soon as the export ban would be rescinded (Claimant's Exhibit No. 3 & 10; PO, q. 22). As a matter of fact, RESPONDENT delivered 100 t of cocoa instantly after the EGCMO released it for export (Claimant's Exhibit No. 6). Therefore, there is no doubt that the essential reason preventing delivery of 300 t of cocoa was the export embargo ordered by the EGCMO.

### **2.2. Cocoa contract 1045 was for Equatoriana cocoa**

42. In reply to CLAIMANT's allegations, (Cl.'s Memorandum, para. 20) RESPONDENT proves that cocoa contract 1045 required delivery of Equatoriana cocoa and that it was never modified regarding the origin of cocoa.

43. Although it is correct that the written contract did not contain exact words referring to Equatoriana cocoa (Claimant's Exhibit No. 2), there is no doubt that both Mr. Sweet and Mr. Smart contracted in respect

to cocoa from Equatoriana. RESPONDENT believes that, when defining what was contracted between the parties, due consideration should be given to the parties' intent pursuant to Art. 8 CISG. Pursuant to Art. 8(1) CISG the contract should be interpreted according to RESPONDENT's intent where CLAIMANT knew or could not have been unaware what that intent was and in the light of relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

44. As to the negotiation, CLAIMANT agreed to "[...] purchase 400 metric tons of cocoa beans on the usual terms [...]" (Claimant's Exhibit No. 1). The wording "on the usual terms" referred to the NYBOT standard form of contract, which was used in cocoa contract 1045, and to all previous cocoa contracts (PO, q. 16). NYBOT standard form of contract is specifically requiring delivery of cocoa of "[...] the Growth of any country or clime, including new or yet unknown growths, [...]" (NYBOT Cocoa Rules). The term "Growth" is defined in the NYBOT Cocoa Rules as "[...] the common commercial name of a variety of cocoa to indicate the country in which it was produced or the district in such country or the port from which it was shipped." (p. 3) RESPONDENT tailored this contract form to the needs of this transaction by erasing the above-cited part of the clause providing for cocoa of whatever Growth, i.e. origin. The remaining part of the clause referring to cocoa of standard Grade and Count, in fact determined the number of cocoa beans per kilogram and percentage of defective/slatey beans. Erasing "Growth part" of the clause was clearly not accidental, and reveals the parties' intent not to contract for the cocoa of any origin, yet only in regard to the cocoa of specific origin – of Equatoriana origin. This is especially evident in the light of the previous practice between the parties.

45. As to the practice established between the parties, the facts of the case state that "[t]he two companies have done business together on a number of occasions over the years" (Request for Arbitration, para 3). It is also the fact of the case that CLAIMANT was aware that RESPONDENT throughout these years always delivered the cocoa of Equatoriana origin. Moreover, the origin was always known to it since the buyer was responsible for arranging the carriage of the goods and the bags in which the cocoa was packed indicated clearly their origin (PO, q. 19). This was sufficient to undoubtedly establish the practice of delivering cocoa of Equatoriana origin (*see* Handelsgericht Aargau, 26 September 1997). Taking into account the long-established practice between the parties, RESPONDENT's intention to deliver cocoa of Equatoriana origin, reflected in erasing the "Growth part", was more than obvious. In the comparable case, the court held that the quality, quantity and price of the goods were impliedly fixed by the established practices between the parties where seller repeatedly delivered the same type of goods and buyer paid after delivery. (*see* ICC Case No. 8324; Metropolitan Court of Budapest, 24 March 1992) Applying this rule to the case at hand, without doubt parties fixed the country of origin of the cocoa to be Equatoriana.

46. As to the subsequent conduct of the parties, RESPONDENT constantly insisted on the fact that cocoa contract 1045 was calling for delivery of Equatoriana cocoa, and not even once declined from this conviction (Claimant's Exhibit No. 3 & 10, PO, q. 22).

47. Finally, RESPONDENT states that the usages are of no importance in the case at hand. Given that Equatoriana is not a member of the NYBOT, while the Rule 9.03. NYBOT Cocoa Rules provides that no contract shall be recognized unless parties are both members, cocoa contract 1045 is not subject to those Rules. Moreover, cocoa produced in Equatoriana is not regularly traded on the NYBOT (Answer to Notice of Arbitration and Counter-Claim, para 6.). Therefore, no usages codified under the NYBOT apply to RESPONDENT. Finally, there is no indication in the facts of the case as to the existence or content of any other usages that would be relevant for resolving this dispute.

48. In view of the above-mentioned circumstances, there is no doubt that RESPONDENT's intention was to deliver cocoa of Equatoriana origin and that CLAIMANT knew or could not have been unaware of its intent.

49. Since CLAIMANT insists that the parties' subjective intention do not coincide (Claimant's Exhibit No. 4 & 7, Cl.'s Memorandum, para. 20), RESPONDENT demonstrates, in accordance with Art. 8(2) CISG, that a reasonable person of the same kind as CLAIMANT, in the same circumstances, would have understood cocoa contract 1045 as requiring delivery of Equatoriana cocoa. If an experienced trader (PO, q. 13), for a number of years, enters into a contract for purchase of a certain commodity and always receives that commodity of the same origin, any reasonable person would understand that any subsequent contract for the same commodity would be in regard to the same origin, unless explicitly provided otherwise. *"Except for the case in which a party expressly excludes their application for the future, courses of dealing are automatically applicable [...] to supplement the terms of the contractual agreement [...]"* (Bonell in Bianca/Bonell, p. 106). Not only that such provision to the contrary was not made part of cocoa contract 1045, but was intentionally erased from the standard form contract.

50. Furthermore, pursuant to Art. 9(1) CISG parties are bound by any practices which they have established between themselves. As proved above, practice between the parties regarding origin of cocoa has been firmly established years ahead of cocoa contract 1045 (*see supra*, para. 47). RESPONDENT maintains that this particular practice supplemented the terms of the contract (*see Enderlein/Maskow*, p. 68). Therefore, the parties by their conduct established a binding practice between themselves regarding the cocoa origin. Denying those practices, CLAIMANT acts contrary to the principle of good faith since *"[...] the binding effect of such practices is an expression of the principle of good faith [...]"* (Junge in Schlechtriem, p. 78).

51. Although, in its written submission, CLAIMANT did not argue that cocoa contract was modified in regard to cocoa origin, RESPONDENT, nevertheless, presents its arguments on the issue. RESPONDENT sustains that CLAIMANT, in its letters of 5 March 2002 and 15 August 2002, obviously

tried to misinterpret cocoa contract 1045 by stating that it called for delivery of cocoa of any origin. Even if those letters could be considered as an offer to modify cocoa contract 1045, the contract was never modified because RESPONDENT did not accept this offer.

52. RESPONDENT never agreed to the alleged offer; it persistently made CLAIMANT aware that the contract was for Equatoriana cocoa (*see supra*, para. 48). Not even if it remained silent, would have made it bound by the offer. Pursuant to Art. 18(1) CISG “[...] *silence or inactivity does not in itself amount to acceptance.*” Whether or not the statement or conduct indicates assent is subject to interpretation in accordance with the rules of Art. 8(1) and (2) (UNCITRAL Digest Art. 18, para. 3). “*The indication of assent may be in an oral or written statement or by conduct [...]*” (UNCITRAL Digest Art. 18, para. 6). RESPONDENT did not give any consent, either explicit or implicit. On the contrary, its subsequent conduct represents rejection of the alleged offer. First, delivery of 100 t of Equatoriana cocoa, and, second, correspondence between the parties where RESPONDENT insisted on delivery of 300 t of Equatoriana cocoa as soon as the export ban would be rescinded. Therefore, RESPONDENT had shown its unmistakable intention to be bound by original contract and not to accept an alleged offer to modify the contract (*see* Handelsgericht des Kantons Zürich, 10 July 1996).

53. To conclude, cocoa contract 1045 was for Equatoriana cocoa and it was never modified in that respect.

### **2.3. RESPONDENT was excused under Art. 79 CISG from delivery 300 t of cocoa**

54. RESPONDENT proves that all condition of Art. 79 CISG were fulfilled: first, RESPONDENT's delay in performance was due to an impediment beyond its control [2.3.1.]; second, at the time of the contract RESPONDENT could not have reasonably been expected to have taken the impediment into account [2.3.2.]; third, subsequent to the contract RESPONDENT could not have reasonably been expected “*to have overcome the obstacle or its consequences*” [2.3.3.]; and, fourth, RESPONDENT fulfilled its obligation to notify CLAIMANT of the alleged impediment pursuant to Art. 79(4) CISG [2.3.4.].

#### **2.3.1. RESPONDENT's delay in performance was due to an impediment beyond its control**

55. Although CLAIMANT acknowledges that impediment was beyond RESPONDENT's control, RESPONDENT reaffirms its position as follows.

56. In order for the impediment to be beyond the control, it has to be “[...] *extraneous to the activity of the defaulting party [...]*” (Tallon in Bianca/Bonell, p. 579; U.S. Court of Appeals, July 1, 1988). This requirement is certainly met since the export ban was act of Equatoriana Government and thus clearly outside the control of RESPONDENT (*see* ICC Case No. 4462).

57. It is widely accepted in the jurisprudence that beyond the control of a debtor are regularly not only natural catastrophes, but also governmental interference in international commercial relations such as an

export ban (see Bianca/Bonell, p. 583; Stoll in Schlechtriem, p. 610; Matray, p. 94). There are also numerous supportive awards. It is a constant practice of ICC arbitrators to grant *force majeure* defenses in cases involving embargoes (see, ICC Case No. 9978; ICC Case cited in Matray, p. 94). Besides, in the final award of 1999, an *ad hoc* Tribunal, relied on the Böckstiegel's opinion that "[...] normally acts of public authority by the state have to be accepted as an excusing case of *force majeure* [...]" (*Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*). Additionally, in an arbitration proceeding involving an export ban for coal, the tribunal found that a prohibition on export implemented by the seller's State constituted an impediment beyond the control of the seller (see BTTP, 24 April 1996). Based on the above, it is certain that Equatoriana embargo, temporary preventing RESPONDENT's performance, was beyond its control.

**2.3.2. At the time of the contract RESPONDENT could not have reasonably been expected to have taken the impediment into account**

58. According to Stoll, when determining the foreseeability in a case of *force majeure*, the judge or arbitrator should neither refer to an excessively concerned "*pessimist who foresees all sorts of disasters*" nor to a "*resolute optimist who never anticipates the least misfortune*". (Stoll in Schlechtriem p. 608) Applying this standard to the case at hand, it may be concluded that RESPONDENT could not have had reasonably been expected to have taken either the storm or the consequential embargo into account when it entered into cocoa contract 1045 with CLAIMANT.

59. It is true that Equatoriana is located in a tropical rainforest zone (ICCO). This could suggest that, due to the tropical climate, storms occur regularly (TORRO); nevertheless, this is actually not the case. "*Cocoa is not generally grown in areas prone to cyclones so its vulnerability to strong wind is not well known.*" (Growing Cocoa) Therefore, it would be reasonable to conclude that Equatoriana is located in the part of tropical belt where there are no strong winds and to expect storm of this magnitude would be equal as expecting Tsunami.

60. This is supported by the fact that the storm on 14 February 2002 was the first storm in 22 years that had caused damage to cocoa trees (PO, q. 8). Furthermore, the last storm in 1980 did not cause extensive damage to cocoa trees (PO, q. 8). Therefore, for at least a quarter of a century Equatoriana saw no storm of the magnitude comparable to that in 2002. On the other hand, there are parts of the tropics, where 33 hurricanes occurred in only four years of 1995 to 1999 (Hurricane Research Division). The scholarship provides an illustration pertinent to this case: in a particular area cyclones may be foreseeable at certain times of year, but not a cyclone at a time of year when they do not normally occur - that would not be reasonably foreseeable by the parties (Chengwei-79). RESPONDENT showed neither undue optimism nor undue pessimism, when on 19 November 2001 it did not foresee the February storm and resultant embargo. Case law stated that "*unexpected weather conditions*" have been the basis of a successful *force majeure* defence (*Louis Dreyfus Corp. v. Continental Grain Co.*). Consequently, RESPONDENT could not have reasonably taken into account the storm of this magnitude at the time of the contract.

61. The EGCMO ordered embargo on export, as a reaction to damage the storm on 14 February 2002 caused to cocoa trees in Equatoriana. Therefore, there exists a direct causal link between the storm and embargo, and between the embargo and RESPONDENT's delay in performance. As proven above, RESPONDENT could not have reasonably taken into account the storm of this magnitude; expecting embargo as a consequence of unexpected storm would be equally unreasonable.

62. It is said that the case law supports the following notion of foreseeability: an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely (Chengwei-79). Given that parties to this dispute did not negotiate any clause to that effect, they did not consider this course of events as at all likely when entering the contract.

63. To conclude, RESPONDENT could not have had reasonably been expected to have taken the embargo, being the consequence of the storm, into account when it entered into cocoa contract 1045 with CLAIMANT.

### **2.3.3. RESPONDENT could not have reasonably be expected to have avoid or overcome the impediment or its consequences**

64. RESPONDENT proves that it could not have reasonably been expected to have avoided or overcome the impediment or its consequences, based on the fact that cocoa contract 1045 obliged RESPONDENT to deliver cocoa from Equatoriana (*see supra*, paras 42-53).

65. To "avoid" means taking all the necessary steps to prevent the occurrence of the impediment (Tallon in Bianca/Bonell, p. 581). It was impossible for RESPONDENT to prevent the EGCMO to issue an export ban. CLAIMANT states that RESPONDENT could have reasonably avoided the impediment by including a *force majeure* clause in cocoa contract 1045 (Cl.'s Memorandum, para 25). However, including such clause in the contract would not have prevented the EGCMO to order export embargo. Any other RESPONDENT's action would have been equally unsuccessful.

66. To "overcome" means to take the necessary steps to preclude the consequences of the impediment (Tallon in Bianca/Bonell, p. 581). RESPONDENT could not have reasonably been expected to overcome the consequences of the export embargo. It was nothing that RESPONDENT could have done in order to overcome the effects of embargo. The EGCMO is an official entity (PO, q. 11), which had announced that no cocoa would be released for export (Claimant's Exhibit No. 3). As "[t]here was no legal procedure available for RESPONDENT to protest the export embargo", the only way RESPONDENT could have been able to overcome the impediment, would have been if the EGCMO were to grant it an exemption (PO, q. 12). However, several other exporters did ask for exemption, and were all rejected (PO, q. 12). RESPONDENT thus did not see it as likely that it would be exempt and hence made no request to that effect. Chengwei

points out that a party must invoke “[...] *the remedies against hindering decisions by State insofar as they have a chance of succeeding*” (Chengwei-79). Therefore, RESPONDENT was not obliged to ask for exemption because that would not make any difference. In particular, given that without any request it obtained a license for export of 100 t of cocoa in May 2002. Therefore, the export of cocoa was in no way dependent on possible request made by RESPONDENT and its request even if made would be rejected. Therefore, it is obvious that the only possibility for RESPONDENT was to wait for the EGCMO to issue another license for export or complete removal of export ban.

67. In theory, one could argue that RESPONDENT had a possibility to break the export ban, and deliver 300 t of cocoa. However, the promisor should not be expected to risk serious consequences by performing his obligation at all costs. (Chengwei-79) Infringement of the State’s embargo would undoubtedly cause serious consequences for RESPONDENT.

68. Perhaps the situation would have been different if cocoa contract 1045 was for cocoa of any origin, the consequences of export embargo could have been more easily overcome by delivering substitute cocoa. RESPONDENT sustains that since cocoa contract 1045 *“consists of specific goods, a requirement of re-delivery of substitute goods seems to be irrelevant as the nature of the goods makes such re-delivery impossible, de facto.”* (Koskinen)

69. In addition, RESPONDENT proves that the EGCMO cannot be considered as a third person in the sense of Art. 79(2) CISG since it acted only as a supplier to RESPONDENT. It is suggested that the seller’s suppliers should not be considered third persons for the purposes of Art. 79(2) CISG, since such persons simply create the preconditions or assist in the preparation for the performance of the promisor’s obligation without, however, performing all or part of the actual contract as Art. 79(2) CISG requires (Chengwei-79; Flambouras; Guide to CISG Article 79; Tallon in Bianca/Bonell, p. 585).

#### **2.3.4. RESPONDENT fulfilled its obligation to notify CLAIMANT of the alleged impediment pursuant to Art. 79(4) CISG**

70. RESPONDENT gave proper notice of the export ban two after it was ordered, i.e. in the letter of 24 February 2002. RESPONDENT there informed CLAIMANT of the export ban, stating that “[...] *the EGCMO has announced that no cocoa will be released for export thought at least the month of March.*” (Claimant’s Exhibit No. 3) Thus, it complied with the requirement of reasonable time set under Art. 79(4) CISG. Regarding the notice on extension of the export ban that occurred on 20 March 2002, RESPONDENT sustains that it impliedly provided such notice. CLAIMANT was clearly aware of the situation, as, subsequent to the aforementioned letter, there was written correspondence between the parties and several telephone calls in which RESPONDENT made it clear that it was not in a position to deliver cocoa due to the export ban (Claimant’s Exhibits No. 6; Request for Arbitration, para. 9; PO, q. 22). Any reasonable person would have

understood that the export ban was extended. Therefore, CLAIMANT was properly notified of the impediment and its effect on RESPONDENT's ability to perform.

71. To conclude, since cocoa contract 1045 was for delivery of Equatoriana cocoa, and since all requirements of Article 79 CISG have been fulfilled, RESPONDENT respectfully requests this honourable Tribunal to find that it was exempt from liability to pay any damages due to the EGCMO embargo.

### **3. CLAIMANT IS NOT ENTITLED TO DAMAGES AS A RESULT OF RESPONDENT'S ALLEGED BREACH**

72. If this honourable Tribunal finds that RESPONDENT was not excused from liability under Art. 79 CISG, RESPONDENT maintains that CLAIMANT did not have the right to avoid cocoa contract 1045 under any of the CISG provisions. Art. 49 CISG envisages two situations in which the aggrieved party has the right to declare the contract avoided. First, when the non-performance of any of the seller's obligations amounts to fundamental breach, and, second, in the case of non-delivery by the seller within the additional period of time fixed by the buyer according to Art. 47 CISG. However, in the case at hand none of the requirements were met, hence, CLAIMANT is not entitled to damages. In support to that RESPONDENT proves the following: first, RESPONDENT's alleged breach did not amount to fundamental one under Art. 25 CISG [3.1.], second, CLAIMANT failed to fix an additional period of time pursuant to Art. 47 CISG. [3.2.], and, alternatively, CLAIMANT failed to give the notice of avoidance as required by Art. 26 CISG [3.3.].

#### **3.1. RESPONDENT's delay in delivery of 300 t of cocoa does not constitute fundamental breach under Art. 25 CISG**

73. In response to CLAIMANT's unfounded allegations (Cl.'s Memorandum, paras. 34-41), RESPONDENT proves that the delay in delivery of 300 t of cocoa did not amount to fundamental breach of contract as none of the conditions under Art. 25 CISG were fulfilled. First, CLAIMANT was not substantially deprived of what it was entitled to expect under cocoa contract 1045 [3.1.1.], and, second, RESPONDENT did not and could not have foreseen the detriment [3.1.2.].

##### **3.1.1. CLAIMANT was not substantially deprived of what it was entitled to expect under the contract**

74. To qualify as fundamental under Art. 25 CISG, the breach must "[...] result in such detriment to the other party as substantially to deprive him of he is entitled to expect under the contract." RESPONDENT proves that, in the present case, CLAIMANT did not suffer such detriment based on the following: first, time was not of

essence in regard to cocoa contract 1045 [3.1.1.1.], and second, CLAIMANT did not declare to RESPONDENT, prior to 25 October 2002, that it lost interest in performance in cocoa contract 1045 [3.1.1.2.].

### 3.1.1.1. Time was not of the essence in regard to cocoa contract 1045

75. CLAIMANT wrongfully alleges that time was of essence in its attempt to prove that RESPONDENT committed fundamental breach. CLAIMANT is clearly in the wrong when stating: “[...] *delivery dates were set and CLAIMANT gave notice to RESPONDENT demanding a notification as to when it would be able to deliver the cocoa.*” (Cl.’s Memorandum, para. 35), whereby CLAIMANT relied on the contract terms and its letter of 15 August 2002, respectively. As to the delivery dates fixed under the contract, CLAIMANT itself denied them the attribute of essentiality, by not objecting to delay in delivery and by asking RESPONDENT to deliver several months after the expiry of the contract dates. Obviously, the parties modified the original contractual term determining the delivery dates, which Art. 29 CISG allows to be done by mere agreement of the parties. However, they did not set any other date for delivery. Besides, RESPONDENT never fixed an additional period of time (*see infra*, paras. 89-100), which “[...] *indicate[s] that delay in delivery has not yet decisively impaired his interest in receiving the delivery and that there has therefore not yet been a fundamental breach of contract.*” (Huber in Schlechtriem, p. 417)

76. This is especially true in the light of the totality of CLAIMANT’s statements and conduct, which are relevant for the interpretation of the parties’ intention pursuant to Art. 8(1) and (3) CISG. Namely, Art. 8(1) CISG provides that “... *statement made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*” Art. 8(3) CISG supplements this by laying down that “[*in*] *determining the intent of the party [...] due consideration is to be given to all relevant circumstances of the case including [...] subsequent conduct of the parties.*” Applying this interpretative criterion to the circumstances of this case, RESPONDENT submits that it was completely unaware of the extent of the pressure for the cocoa on the part of CLAIMANT due to CLAIMANT’s failure to communicate any specific and precise information thereof. This submission is based on the following facts of the case.

77. On 5 March 2002, when RESPONDENT informed CLAIMANT about the export ban, CLAIMANT stated that it would be under pressure to receive the contracted cocoa no sooner than “*later this year*” (Claimant’s Exhibit No. 4). Even though in its next letter of 10 April 2002 CLAIMANT said that it expects the delivery of entire amount of cocoa within the contract dates, i.e. by the end of May (Claimant’s Exhibit No. 5), its further conduct contradicts this, at first glance, unambiguous statement. Namely, before the end of May 2002 RESPONDENT has had an opportunity to deliver 100 t of cocoa; however, CLAIMANT did not object to delay in delivery of the remaining amount. Conversely, it inquired over

telephone as to delivery of the remaining part of the goods during June and July. Therefore, the only impression RESPONDENT could have got is that CLAIMANT's words should not be taken literally. On 15 August 2002, CLAIMANT wrote the letter stating that it will have to purchase elsewhere if it did not receive "soon" the notification on when the shipment of the remaining cocoa would be arranged (Claimant's Exhibit No. 7), which exact words CLAIMANT repeated on 29 September 2002 over the telephone (PO, q. 22). This evidenced that the above-mentioned RESPONDENT's impression of CLAIMANT was accurate: on 15 August CLAIMANT for the first time demanded delivery to be made soon, and, six weeks later it again demanded delivery to be made soon. On 24 October 2002, four weeks subsequent to the telephone call, CLAIMANT purchased cocoa from another supplier. In a view of such vague, imprecise and contradictory statements, how was RESPONDENT to know or assess the level of pressure CLAIMANT was experiencing? In other words, was RESPONDENT to understand the expression "soon" as four, six, or ten weeks?

78. That delay of delivery on the part of RESPONDENT is a clear case of simple breach is confirmed in scholarly writings and case law. Thus, Schlechtriem states that: "[...] *mere failure to observe delivery date, with delivery as such is still possible, is not generally to be regarded as fundamental breach. It is fundamental only if precise observance of the delivery date is of special importance to the buyer (so that he would rather have no delivery whatsoever than late delivery) and if the seller ought to have been aware of this upon the conclusion of the contract.*" (Huber in Schlechtriem, p. 417) Similarly, the Hamburg Court of Appeal ruled that delayed delivery did not constitute fundamental breach where "[...] *at the time of the formation of the contract, it was obvious to the seller that a buyer had not a special interest in a punctual delivery.*" (OLG Hamburg, 28 February 1997) Besides, the Düsseldorf Court of Appeals held that a fundamental breach occurs where the seller declares seriously and definitely that he will not deliver goods, yet does not occur where he only declares that he cannot deliver at the moment (Chengwei-25). Applying this to the case at hand, it is evident that the delivery, though temporary impeded, was still possible when CLAIMANT turned to another supplier (Claimant's Exhibit No. 10), and RESPONDENT constantly emphasized its will in keeping the contract in force (Claimant's Exhibit's No. 4, 5 & 7). As proved above, at the time cocoa contract 1045 was concluded in 2001 there was no CLAIMANT's special interest in punctual performance as CLAIMANT's statements and conduct always led to the same conclusion, that it would rather choose delivery at a later time over no delivery at all.

79. The same comprehension RESPONDENT had, CLAIMANT's conduct and statements would cause to any reasonable person in the same circumstances. This standard, determined by Art. 8(2) CISG, applies where Art. 8(1) does not. Hypothetically speaking, if time was indeed of essence to CLAIMANT, it would have been reasonable for it to notify RESPONDENT of the exact date by which the delivery needed to be performed. Having failed to communicate precisely about its need for cocoa, CLAIMANT brought

the detriment upon itself. As submitted in the literature, “[i]f the detriment was due to its [aggrieved party’s] own conduct it might be inappropriate to say that non-performance was fundamental.” (Chengwei-25; see also OLG Stuttgart, 12 March 2001).

**3.1.1.2. Prior to 25 October 2002, CLAIMANT did not declare to RESPONDENT that it lost interest in performance in cocoa contract 1045**

80. According to legal scholarship: “Detriment basically means that the purpose the aggrieved party pursued with the contract was foiled, and, therefore, led to his losing interest in the performance of the contract.” (Honnold, p.113; see also, Herber in Schlechtriem, p.48; Graffi, p.340; Koch, p.245; Chengwei-25). In the other words, this means that there is no fundamental breach of contract, if the injured party still has further interest in the performance and when the buyer’s intended use of goods does not become impossible (Graffi, p.340). In the case at hand, CLAIMANT never indicated that it lost the interest in performance of the contract, neither in its letters nor in telephone conversation (Claimant’s Exhibit’s No. 7 & 8; PO, q. 22). On the contrary, entire CLAIMANT’s communication to RESPONDENT clearly indicated its continuing interest in delivery, both before the contract dates for delivery have expired and afterwards (Claimant Exhibit’s No. 3, 4 & 7). Why otherwise would it constantly inquire as to the shipment and delivery dates? On 10 April 2002, CLAIMANT stated: “[...]we [CLAIMANT] expect you [RESPONDENT] to deliver the entire 400 metric tons you agreed to deliver”, and added: “I [Mr. Sweet] look forward to receiving from you [RESPONDENT] specific indication as to when and how much you will be delivering.” (Claimant’s Exhibit No. 5)

81. Additionally, CLAIMANT inquired as to the time of delivery on numerous occasions in June and July, which clearly indicates that its interest in RESPONDENT’s performance existed at the time. What’s more, in its letter of 15 August 2002 CLAIMANT wrote to RESPONDENT: “[...]you [RESPONDENT] continue to owe us [CLAIMANT] 300 tons” of cocoa and inquired as to the time when it would be shipped (Claimant’s Exhibit No. 7). In the telephone conversation of 29 September 2002, CLAIMANT restated exactly the same (PO, q. 22), i.e., it inquired as to the time of shipment, meaning that it was indeed interested in RESPONDENT’s performance. As of that date until CLAIMANT’s letter of 25 October 2002, when it notified RESPONDENT of purchasing cocoa from Oceania Produce Ltd. (Claimant’s Exhibit No. 8), there was no communication between the parties. Hence, RESPONDENT could not have been aware neither of the possibility that CLAIMANT might have lost interest in performance nor of the date on which that might have happened.

82. To sum up, CLAIMANT was not substantially deprived of what it was entitled to expect under cocoa contract 1045.

**3.1.2. Respondent did not and could not have foreseen the detriment and the reasonable person of the same kind in the same circumstances could not have foreseen the detriment**

83. Even if this honourable Tribunal finds that CLAIMANT suffered substantial detriment due to RESPONDENT's delay in delivery, RESPONDENT is still not in fundamental breach of cocoa contract 1045 since Art. 25 CISG *in fine* provides that a breach shall not be considered fundamental if the party in breach proves that it "*did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen*" the detriment and its substantiality.

84. The wording of Art. 25 CISG does not expressly specify the point in the time when standard of foreseeability is to be applied. In the view of learned scholars, the time of the conclusion of the contract is relevant. (Schlechtriem in Schlechtriem, p.180; Ziegel, paras. 9-19; Karollus, p.91; Magnus, p.19) RESPONDENT submits that, under the circumstances of the case at hand, it is irrelevant whether the alleged detriment was unforeseeable at that time. Namely, three months before the initial contract dates for delivery expired, CLAIMANT informed RESPONDENT that it needed delivery only "*later this year*" (Claimant's Exhibit No. 4). As a result it is now estopped from invoking foreseeability in time of the conclusion of the contract, as it made RESPONDENT aware of the fact that it would not suffer any detriment if the cocoa were not delivered in the contract period. As the perception RESPONDENT had at the time the contract was concluded entirely changed, that time ceased to be relevant for the purpose of establishing the foreseeability element of the fundamental breach.

85. If this honourable Tribunal finds that foreseeability of detriment may occur after the conclusion of the contract, RESPONDENT, as well as any reasonable person under the circumstances, could not have foreseen any detriment that CLAIMANT might have suffered at that time either.

86. In its written submission, CLAIMANT states that "*RESPONDENT had sufficient opportunities to foresee the result of its non-performance to CLAIMANT*" (Cl.'s Memorandum, para. 36), but failed to show which those opportunities were. It wrongfully invokes as evident its letter of 5 March 2002 stating that CLAIMANT there "*[...] emphasized that it expected the entire contract fulfilled by the end of May.*" Besides the fact that this citation was erroneous, it is also ungrounded in a view of the above-presented arguments (*see supra*, paras. 75-79).

87. The "*multitude of communications through telephone calls and letters*", to use the CLAIMANT's exact words (Cl.'s Memorandum, para. 37), were not sufficiently precise to make RESPONDENT foresee the detriment or its substantiality. Namely, in its letter of 15 August 2002, CLAIMANT only stated, what it also reiterated in a telephone conversation on 29 September 2002: "*Our [CLAIMANT's] stocks are lower than we are comfortable with.*" (Claimant's Exhibit No. 7; PO, q. 22) Taking into account the fact that CLAIMANT itself stated that it

would not feel pressure for cocoa supplies until “*later this year*”, its statement red together with the imprecise wording “*soon*”, rather than “*promptly*” as CLAIMANT wishes us to believe (Cl.’s Memorandum, para. 36), could not cause RESPONDENT’s ability to foresee the detriment that CLAIMANT might have suffered. In terms of foreseeability, the lack of any specific indication as to the time when the detriment might happen is just as the same as if such warning was not given at all. As proven above, CLAIMANT never actually informed RESPONDENT of amount of cocoa on its stock, or of exact time it would run out of cocoa. (*see supra*, paras. 75-79) In jurisprudence, the comparable situation was described as follows: “*It is possible that the nonbreaching party may not have provided material information or simply withheld such information which was crucial to properly completing performance.*” (Babiak, p. 121)

88. Based on the above, RESPONDENT was not able to foresee and any reasonable person of the same kind in the same circumstances could not have foreseen that CLAIMANT might be substantially deprived as a consequence of delay in delivery beyond 25 October 2002.

### 3.2. CLAIMANT failed to fix an additional period of time under Art. 47 CISG

89. Since RESPONDENT did not commit fundamental breach, the only way CLAIMANT could have rightfully avoided the contract was by providing RESPONDENT, in accordance with Art. 47 CISG, with additional period of time for delivery, also referred to as *Nachfrist*. RESPONDENT submits that CLAIMANT failed to act accordingly as it did not properly fix an additional period of time as required under Art. 47 [3.2.1.], and, alternatively, the additional period of time was not of reasonable length [3.2.2.].

#### 3.2.1. CLAIMANT never fixed an additional period of time pursuant to Art. 47 CISG

90. RESPONDENT maintains that none of the CLAIMANT’s communications fixed an additional period of time in accordance with Art. 47 CISG. Assuming that CLAIMANT might attempt to allege that its letter of 15 August 2002, or the subsequent call made on 29 September 2002 served as a notice under Art. 47 CISG, RESPONDENT proves the opposite.

91. In the mentioned letter CLAIMANT wrote: “[*If we [CLAIMANT] do not receive notification from you [RESPONDENT] soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere.*” (Claimant’s Exhibit No. 7) This wording, in particular the expression “*soon*” did not constitute proper fixing of additional period of time because, as commonly emphasized in the CISG commentaries, this period must be fixed either by specifying the date by which performance must be made or by specifying a time period (Guide to CISG Art. 47). Strong invitations expressing something like “*hope to receive the goods soon*” and vague terms like “*promptly*”, “*immediately*”, etc. would not be proper fixing and therefore would not trigger the notice – avoidance remedy (Will in Bianca/Bonell, p. 345). In other words, this time period will have to be fixed or

fixable according to the calendar (Chengwei-47). Fixing the exact date(s) on the basis of the expression “soon” is simply not possible; therefore, this CLAIMANT’s letter cannot qualify as a proper notice under Art. 47 CISG. The situation would have been entirely different if CLAIMANT wrote that RESPONDENT must notify it of shipping dates, for instance, until 15 November 2002, or within three months from the date of the letter.

92. Furthermore, the telephone conversation the parties had on 29 September 2002, when CLAIMANT reiterated the concerns expressed in its letter of 15 August 2002 (PO, q. 22), does not qualify as a proper notice either. That comes as consequence, not only of the vague wording, but also of the fact that telephone call by the buyer to demand prompt delivery does not amount to fixing of time pursuant to Art. 47 CISG (UNCITRAL Digest Art. 47). This is confirmed in the similar CISG case decided by OLG Düsseldorf. The court held that the buyer’s telephone call, a reminder demanding prompt delivery, did not fix a specific time allowing for performance, and as such, did not fulfil the requirements of Art. 47(1) of the CISG (OLG Düsseldorf, 24 April 1997).

93. In its written submission, CLAIMANT itself admits that it “*did not set a specific time for performance after the original delivery dates*”, but “*waited for a reasonable time.*” (Cl.’s Memorandum, para. 39) In the attempt to justify its conduct, CLAIMANT stated that its tolerance in waiting for delivery “*was equivalent to grant of Nachfrist*” (Cl.’s Memorandum, para. 40). This allegation is entirely erroneous and contrary to the ratio of the cited provision. Namely, one of the purposes of the provision of Art. 47 CISG is to remove “[...] *uncertainty about whether and when the seller will deliver. If the buyer does not fix a time limit, his right to claim performance and the seller right to deliver would remain open – ended indefinitely.*” (Will in Bianca/Bonell, p. 344). In the case at hand, by not fixing an additional period of time for delivery CLAIMANT placed both itself and RESPONDENT into such situation. Consequently, CLAIMANT should not be allowed to invoke its negligent behaviour to its own benefit as that would contradict one of the main principles embodied in the CISG – the principle of good faith, and, its special feature, the prohibition of *venire contra factum proprium* (see Herber in Schlechtriem, p. 67).

94. The case law supports the RESPONDENT’s contention that CLAIMANT must have had fixed an additional period of time in order to be entitled to avoidance of cocoa contract 1045. Thus, the OLG München held that the buyer was not entitled to declare the contract avoided with respect to the shoes not yet delivered without fixing an additional period of time. It stated that the fixing of an additional period of time is an indispensable requirement for the buyer’s exercise of remedies for breach of contract by the seller, unless the seller has declared that he will not deliver under any circumstances (OLG München, 1 July 2002). There was no such statement of the seller in the cited case, or in the case at hand.

95. To conclude, CLAIMANT failed to fix an additional period of time for delivery of 300 t of cocoa, which was required for the proper avoidance of cocoa contract 1045.

### 3.2.2. The additional period of time was not of reasonable length

96. If this honourable Tribunal finds that CLAIMANT's letter of 15 August 2002 constitutes a proper notice fixing an additional period of time for performance, RESPONDENT proves that fixed period of time was not of reasonable length. *"The question of what exactly should be considered reasonable length of time, depends on the particular circumstances on each case."* (Chengwei-47) Although the determination of whether the period of time fixed is reasonable is ultimately to be decided by this honourable Tribunal, RESPONDENT would like to present the factors, which according to legal scholarship, should be taken into account. (Huber in Schlechtriem, p. 396; Chengwei-47; Enderlein/Mascow, p. 193)

97. First decisive factor for establishing the reasonableness of the additional period of time is the delivery period originally set for performance. The general rule is that long delivery dates require longer additional period. In the case at hand, the contract was concluded on 19 November 2001, the shipment dates were to be fixed by 31 February 2002, and the cocoa had to be delivered by 31 May 2002 (Claimant's Exhibit No. 2). Hence, the delivery period embraced six months calculating from the date of the conclusion of the contract, and three months from the day the shipment dates were to be notified. Comparing these periods to the somewhat more than two months that CLAIMANT allegedly granted to RESPONDENT, the conclusion is inevitable that the additional period of time fixed by CLAIMANT was of unreasonable length.

98. Second criterion, relevant here, is the nature of the impediment to delivery, well illustrated by the following metaphor: *"A party which has been prevented from performance by bad weather should be granted a longer respite than a party which merely forgot its duties."* (Chengwei-47) In the present case, RESPONDENT was absolutely hindered from performance due to the embargo placed by the EGCMO, an objective and unforeseeable reason, to which it did not contribute at all. CLAIMANT was aware of that, when, in the letter at issue here, it wrote: *"We can understand the problems you [RESPONDENT] may be facing [...]".* (Claimant's Exhibit No. 7) Hence, it should have granted to RESPONDENT a longer period of time than merely two months. In fact, RESPONDENT would have been able to deliver the cocoa probably within three and half months, i.e. by the end of November, as the embargo was rescinded on 12 November 2002 and shipment would take several weeks (Claimant's Exhibit No. 10; PO, q. 10).

99. By taking into consideration all the relevant circumstances of this case, the period of two months allegedly set by CLAIMANT was not of reasonable length as required under Art. 47.

100. To conclude, there was no fundamental breach on the part of RESPONDENT under Art. 25 CISG; hence, CLAIMANT did not have the right to avoid cocoa contract 1045 pursuant to Art. 49(1)(a) CISG. Furthermore, CLAIMANT did not fix an additional period of time for performance to RESPONDENT as required under Art. 47 CISG; therefore, CLAIMANT was not entitled under Art. 49(1)(b) to avoid cocoa contract 1045.

### **3.3. Claimants letters of 15 August 2002 and 25 October 2002 did not constitute a valid declaration of avoidance**

101. If this honourable Tribunal finds that CLAIMANT had the right to declare the contract avoided, RESPONDENT proves that CLAIMANT'S letters of 15 August and 25 October 2002 did not represent a valid notice of avoidance as required under Art. 26 CISG [3.3.1.] and [3.3.2.]. Furthermore, notice of avoidance was not implied through the totality of the communications [3.3.3.].

#### **3.3.1. CLAIMANT's letter of 15 August 2002 did not represent a notice of avoidance as required under Art. 26 CISG**

102. As provided in Art. 26 CISG, and supported by legal scholarship, (Huber in Schlechtriem, p. 425) a declaration of avoidance must be made clear to the other party. CLAIMANT's letter of 15 August 2002 failed to meet this requirement.

103. RESPONDENT agrees with CLAIMANT who, citing Honnold, argued that the notice *"must be an effective means of informing the seller that the buyer will not accept or keep the goods"* (Cl.'s Memorandum, para. 42). However, it firmly disagrees with CLAIMANT as to whether the letter at issue was indeed of such character. Claimant's Memorandum contains several overstatements, one of which being: *"The letter of 15 August 2002 made clear that CLAIMANT refused to wait any longer for RESPONDENT to perform."* (Cl.'s Memorandum, para. 43) Even after reading the said letter for the fifth time, RESPONDENT was unable to find therein this or any other similar sentence. What CLAIMANT actually wrote was quite the opposite. The wording of the letter expressing its expectation to receive notification from RESPONDENT about shipping of 300 t of cocoa and saying that RESPONDENT *"[...]continue to owe us 300 tons"* indicated CLAIMANT's genuine interest in RESPONDENT's performance. (Claimant's Exhibit No.7). The CLAIMANT's statement cited above is even less convincing in the light of the fact that CLAIMANT actually repeated the same words on 29 September 2002 in a telephone conversation with RESPONDENT (PO, q. 22).

104. Based on the above arguments, it is reasonable to conclude that on 15 August 2002 CLAIMANT was interested in delivery of remaining 300 t, and not in avoiding the contract. Therefore, CLAIMANT's letter of 15 August 2002 did not represent a notice of avoidance.

### 3.3.2. CLAIMANT's letter of 25 October 2002 did not represent a notice of avoidance as required under Art. 26 CISG

105. Contrary to CLAIMANT's allegations (Cl.'s Memorandum, para. 45), the letter sent to RESPONDENT on 25 October 2002 was not effective in avoiding cocoa contract 1045. It is unclear whether a notice of avoidance must always be express or whether it may also be implied. However, "[...] a notice under Art. 26 must satisfy a high standard of clarity and precision." (Leser in Schlechtriem, p. 189)

106. Apparently, CLAIMANT's letter of 25 October 2002 was not explicit avoidance of the contract as did not precisely said that it "avoids the contract" or that it "will not accept the goods" which some scholars require for a valid express declaration of avoidance (Honnold, p. 263).

107. Furthermore, not even impliedly did CLAIMANT declare the contract avoided. The required standard in relation to implied avoidance is well captured in the following citation: *Even if an implied declaration of avoidance were possible, the recipient of this declaration must be in a position to undoubtedly realize the buyer's obvious will not to be bound any longer under the sale contract.* (LG Frankfurt, 16 September 1991; Leser in Schlechtriem, p. 169) It is true that CLAIMANT contracted with another supplier to buy the cocoa, but this did not automatically mean that CLAIMANT is not interested any longer in performance of cocoa contract 1045. CLAIMANT, being a producer of various confectionary items, uses large quantities of cocoa (Request for Arbitration, para. 1), what CLAIMANT knew as they have done business on number of occasions during the years (Request for Arbitration, para. 3). Consequently, it was not unreasonable to believe that CLAIMANT would both, use the cocoa it bought in October 2002, and still be interested in delivery of the 300 t under cocoa contract 1045. The fact that the said letter indicated the possibility that in future a demand would be made as to the payment of the amount paid beyond the contract price does not alter this contention. Namely, no demand was yet raised and perhaps it might have never been raised at all. This interpretation was even more plausible given that CLAIMANT, in the closing sentence of the same letter, wrote to RESPONDENT that "[...] this situation [...] does not detract from our desire to continue the business relationship [...]" (Claimant's Exhibit No. 8) The content of the letter, as such, could not have resulted in RESPONDENT's definite awareness that it was not bound by cocoa contract 1045. Quite the contrary, RESPONDENT was convinced that eventually cocoa contract 1045 would be performed fully to the satisfaction of both parties. All the more, avoidance is an *ultima ratio* remedy, i.e. "should only be allowed as a last resort" for resolving a dispute between parties (Koch, p. 245; similarly BGH 3 April 1996 (D); BGer Switzerland, 28 October 1998).

108. To conclude, CLAIMANT's letter of 25 October 2002 addressed to RESPONDENT did not constitute a declaration of avoidance under Art. 26 of CISG. Therefore, CLAIMANT did not have the right, pursuant to Art. 49 CISG in connection with 51(1) CISG, to avoid cocoa contract 1045. If any

communication between CLAIMANT and RESPONDENT could be amount to a proper notice of avoidance under Art. 26 CISG, it could only be the letter of 15 November 2002 (Claimant's Exhibit No. 11).

### 3.3.3. Notice of avoidance was not implied through the totality of the communications

109. RESPONDENT holds CLAIMANT's allegations that "[n]otice of avoidance was implied through the totality of the communications" (Cl.'s Memorandum, paras. 46-48), utterly unfounded. In the case at hand, RESPONDENT tends to agree with CLAIMANT that "[t]he letters between March 2002 and August 2002 were adequate in warning RESPONDENT of the potential consequences [...]" (Cl.'s Memorandum, para. 47). Nonetheless, it cannot amount to the notice of avoidance, as it does not comply with the provision of Art. 26. CISG. Knowing that, CLAIMANT invokes two court rulings, which supposedly support these allegations. Unfortunately for CLAIMANT, those rulings are inappropriate for the case at hand.

110. The first concerns the Swiss Supreme Court decision (BGer, 15 September 2002), which CLAIMANT interpreted so as to declare that party's inactivity could represent a tacit will to renounce performance of the contract (Cl.'s Memorandum, para. 47). However, CLAIMANT failed to mention that in the cited case "*common inactivity of both parties*" motivated the Court to reach such a conclusion. Even if this reasoning would pertain to the situation at dispute here, it would still not render the contract terminated, since RESPONDENT never show either express or tacit will to renounce performance. On the contrary, it was continuously interested in shipping the 300 t of cocoa to CLAIMANT, and able to do so after the embargo was rescinded on 12 November 2002 (*see supra*, paras. 80-82; Claimant's Exhibit No. 10).

111. Another case improperly invoked deal with the contract where the time was of essence. As proved above, cocoa contract 1045, as later modified, was not the contract of that kind (*see supra*, paras. 75-79).

112. For that reasons mentioned above, the totality of communication between the parties to this dispute could not have substituted the notice of avoidance.

## 4. CLAIMANT IS NOT ENTITLED TO DAMAGES

113. As proved above (*see supra*, paras. 54-69), RESPONDENT was exempt from liability in accordance with Art. 79 CISG, hence, CLAIMANT is not entitled to any damages.

114. Alternatively, if this honourable Tribunal finds that RESPONDENT was not exempt from liability to pay damages, RESPONDENT submits as follows: first, CLAIMANT is not entitled to invoke Art. 74 CISG [4.1.]; second, CLAIMANT is not entitled to damages pursuant to Art. 75 CISG [4.2.]; and, third, CLAIMANT failed to mitigate the loss as required under Art. 77 CISG [4.3.]. As another alternative,

RESPONDENT proves that CLAIMANT is entitled to damages in the amount not exceeding USD 172,026 in accordance with Art. 76 CISG [4.4.].

#### 4.1. CLAIMANT is not entitled to invoke Art. 74 CISG

115. Art. 74 CISG is a basic and general rule for damages and Arts. 75 and 76 CISG implement Art. 74 CISG, by providing the means of calculation of damages in certain defined cases when the contract has been avoided. *If the contract has been avoided it [Art. 74 CISG] applies as a subsidiary rule concerning damages in addition to those which can be calculated under Art(s). 75 and 76.* (Knapp in Bianca/Bonell, p. 539) As the contract was avoided on 15 November 2002 (Claimant's Exhibit No. 11), or, alternatively, previous to that date, CISG commands the application of it Arts. 75 and 76 which contain specific rules on the calculation of damages. Art. 74 can only be used in calculating damages, which exceed the amount calculated under Arts. 75 and 76 CISG. Since there has are no damages that cannot be calculated under Arts. 75 and 76, CLAIMANT has no right to invoke Art. 74 CISG.

#### 4.2. Claimant is not entitled to damages in the amount of USD 289, 353 according to Art. 75 CISG

116. Art. 75 CISG sets forth the means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased. Further conditions provided by Art. 75 CISG are that the replacement purchase must be made *“in a reasonable manner and within reasonable time after avoidance”*. RESPONDENT submits that CLAIMANT did not make valid substitute transaction by purchasing replacement goods from Oceania Produce Ltd. on 24 October 2002, since none of the conditions set under Art. 75 CISG were fulfilled. First, avoidance did not preceded to substitute transaction [4.2.1.], and second, the transaction was not made in a reasonable manner [4.2.2.].

##### 4.2.1. CLAIMANT's purchase was not made in a reasonable time after avoidance of the contract

117. CLAIMANT failed to comply with the requirement that the substitute transaction must be made within reasonable time after avoidance. The rationale for this rule contained in Art. 75 CISG is that *“[a]s a rule it is only avoidance of the contract which makes it clear that the contract will not be performed [...] Until then they must comply with the contract.”* (Stoll in Schlechtriem, p. 575) Its significance can also be seen when comparing Art. 85 ULIS with Art. 75 CISG, since Art. 75 CISG can be traced back to Art. 85 ULIS. The difference between these two articles is that Art. 85 ULIS merely requires a substitute transaction to have been carried out *“in a reasonable manner”* while the Art. 75 CISG adds by way of clarification that the substitute transaction must also

have taken place “*within a reasonable time after avoidance*”. This condition is added, “*so as to avoid the non-performing party being prejudiced by hasty or malicious conduct*” (Chengwei-75).

**118.** As proved above, (*see supra*, paras. 102-104) CLAIMANT's letter of 15 August 2002 did not represent a valid notice of avoidance. There has been no correspondence between the parties from 15 August until 25 October 2002, except the telephone call made on 29 September 2002 in which CLAIMANT reiterated its concerns stated in the letter of 15 August 2002. Clearly, CLAIMANT did not avoid the contract previous to purchasing cocoa on 24 October 2002 from Oceania Produce Ltd.

**119.** The supportive ruling can be found in a court decision of Austrian Supreme Court where the court found that “*as the buyer never declared the contract avoided, the buyer could not claim possible damages on the basis of Art. 75.*” (OGH, 9 March 2000)

**120.** Given that the substitute transaction was not made after avoidance, let alone within reasonable time after thereafter, CLAIMANT is not entitled to claim damages according to Art. 75 CISG.

#### **4.2.2. CLAIMANT's purchase of cocoa on 24 October 2002 was not made in a reasonable manner**

**121.** The term “*reasonable manner*” is to be interpreted as the duty of the buyer to buy the goods “*at the lowest price reasonably possible*” (Knapp in Bianca/Bonell, p. 550; Stoll in Schlehriem, p. 576; Chengwei-75). At the time CLAIMANT purchased 300 t of cocoa from Oceania Produce Ltd. it was at than current market price. Transaction at current market price may sometimes be considered reasonable, but the problem arises in view of the fact that CLAIMANT's transaction was made in October 2002 when the market price of cocoa was at almost a historic high of USD 2205.26 per metric ton (Respondent's Exhibit No. 3). In comparison to the contract price per metric ton, which was USD 1,240.75, the price in October was almost 80% higher. The transaction at such a high cost might have been avoided if only CLAIMANT spoke to RESPONDENT immediately before the transaction with Oceania Produce Ltd. was concluded on 24 October 2002. Therefore, although CLAIMANT made purchase at the then current market price, by failing to take any reasonable measures aimed at mitigating unnecessary losses (*see infra*, paras. 122-129), the condition of buying in a reasonable manner was not fulfilled.

#### **4.3. CLAIMANT failed to mitigate the loss as required under Art. 77**

**122.** Art. 77 CISG reads: “*A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.*”

**123.** Contrary to CLAIMANT's allegations (Cl.'s Memorandum, para. 59), it failed entirely with the said obligation by not undertaking reasonable measures prior to concluding the purchase contract with Oceania Produce Ltd. Under the circumstances, these reasonable measures would include both fixing an additional period of time by which delivery must have been made as well as sending the notice of substitute transaction before it took a place.

**124.** By failing to fix an additional period of time CLAIMANT created a situation of uncertainty in which RESPONDENT was completely unaware of the actual situation of CLAIMANT's inventory of cocoa (*see supra*, paras. 80-82). If CLAIMANT had fixed an additional period of time, RESPONDENT would have been able to correctly assess the situation and act accordingly. Whatever the case may be, the complete insight into the CLAIMANT's inventory situation would erase uncertainty and allow RESPONDENT to minimize, if not entirely avoid, the losses.

**125.** It should be noted that CLAIMANT is inexperienced in trade of cocoa, as “[a]ll that it purchases is used in its confectionary business” and “[i]t never purchases cocoa for resale.” (PO, q. 24) Therefore, it was unreasonable for CLAIMANT to involve into transaction with Oceania Produce Ltd. not having previously consulted RESPONDENT, at least as to its prediction on the changes in prices. If it had done so, it would probably not find out much about the prices flow, but would have had learned of the rumors that the EGCMO was planning to release additional cocoa. Being a small purchaser, CLAIMANT need not have necessarily heard these rumors, on the other hand, RESPONDENT knew of the rumors as they were circulating in interested circles in Equatoriana and in the cocoa industry worldwide. (PO, q. 29) As from here, there are two possible scenarios of the further events.

**126.** Under the first scenario, it can be assumed that the extent of the rumors indicated that they were probably accurate, which was in fact confirmed when on 12 November 2002 the Equatoriana embargo was definitely rescinded. It would then have been possible for RESPONDENT to deliver the remaining 300 t, and CLAIMANT would receive the cocoa still in good time. Namely, it requires 125 t of cocoa per month, and on 24 October it had approximately the same amount in the inventory (PO, q. 24). This means that it could have waited for RESPONDENT to ship the remaining cocoa, without having to cease producing certain of its products. Even if CLAIMANT would need to buy some cocoa prior to RESPONDENT's delivery of remaining 300 t, as the shipment would last longer than the end of November, CLAIMANT could still have been able to avoid such an enormous cost if it contacted CLAIMANT in advance. It would have known that the delivery is imminent and just a matter of a “*several weeks*” needed for shipment (Claimant's Exhibit No. 10), and would have bought not more than 100 t covering its instant needs. By doing so, it would have had saved at least two thirds of the amount paid for the transaction with the other supplier. The damages then could not exceed USD 96,451.

127. Another scenario also proves that even if rumors did not prove trustworthy, if CLAIMANT waited for few more days before making the purchase in order to see whether the rumours were justifiable or not, it would have had been better off. Irrespective of the fact that the embargo was not rescinded before 12 November 2002, postponing the purchase until 1 November would result in buying at considerably lower price. Thus, CLAIMANT would have had mitigated at least the part of damages it now seeks, to be precise, USD 117,327, being the difference between the price for 300 t of cocoa in October and November 2002. The damages would hence not be as high as USD 289,353 but USD 172,026.

128. Whatever the case may be, it is obvious that CLAIMANT itself caused the incurrence of exceptionally high costs, for which RESPONDENT should not be liable. Therefore, RESPONDENT claims the reduction in the damages in the amount by which the loss should have been mitigate, i.e. USD 129,902, or alternatively, USD 117,327, so that the damages may not exceed USD 96,451, or alternatively, USD 172,026.

129. To conclude, CLAIMANT failed to take any reasonable measure whatsoever to fulfil its obligation of mitigating the loss, hence should not be awarded damages in the amount beyond the mentioned ones.

**4.4. Alternatively, CLAIMANT is entitled to damages in the amount of USD 172,026 according to Art. 76 CISG**

130. Because CLAIMANT did not make a substitute transaction as required under Art. 75 CISG, it may only claim damages pursuant to Art. 76. The formula set forth in Art. 76 CISG provides that, if the contract is avoided and there is a current price for goods, the party claiming damages may recover the difference between the price fixed by the contract and the current market price at the time of avoidance. To be able to invoke Art. 76 CISG, CLAIMANT has to satisfy two additional conditions, namely, it has to avoid the contract for breach made by other party, and second, the current market price for goods at the time of avoidance must be higher then the contract price (Knapp in Bianca/Bonell, p. 554).

131. As proven above, CLAIMANT's letter of 15 November 2002 is the only communication that may be considered a valid notice of avoidance. (*see supra*, paras. 105-108) Since the current market in November 2002, when the avoidance took place, was USD 1814.17 per t (Respondent's Exhibit No. 3) and the contract price was USD 1240.75 per t, the current price was obviously higher then the contracted one. As to the 300 t, the difference between the contract price and the then current market price is USD 172,026.

132. Therefore, if this honourable Tribunal finds that CLAIMANT is entitled to damages, the proper amount of damages would under no circumstances surpass USD 172.026.

## **5. REQUEST FOR RELIEF**

We respectfully submit the following request on behalf of our client Equatoriana Commodity Exporters, S.A..

Equatoriana Commodity Exporters, S.A. requests this honourable Tribunal to find:

In regard to cocoa contract 1045:

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

In regard to sugar contract 2212:

- That the Tribunal has jurisdiction to consider the counterclaim;
- That Mediterraneo Confectionary Associates, Inc. is obliged to pay the full contract price of USD 385,805 for the sugar;
- Order Mediterraneo Confectionary Associates, Inc. to pay all costs of arbitration, including the costs for legal representation and assistance incurred by Equatoriana Commodity Exporters, S.A. in this arbitration, in accord with Art. 38 Swiss Rules

**Counsel for RESPONDENT:**

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Maša Marochini

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Iva Sunko

Rijeka, 27 January 2005