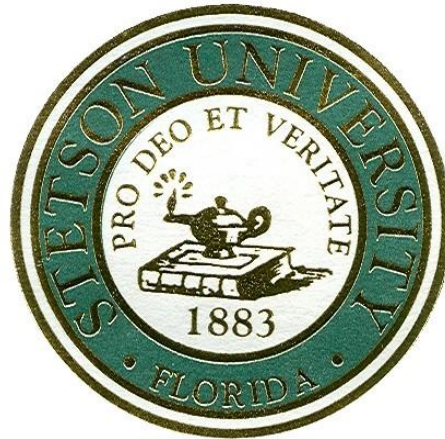


**EIGHTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2010-2011**

MEMORANDUM FOR CLAIMANT

MILAN CHAMBER OF ARBITRATION



On Behalf of:

Mediterraneo Trawler Supply AS
1 Harbour View Street
Capital City, Mediterraneo
CLAIMANT

Against:

Equatoriana Fishing Ltd.
30 Seaview Terrace
Oceanside, Equatoriana
RESPONDENT

STETSON UNIVERSITY COLLEGE OF LAW

CRISTINA CAMBO • KATELYN DESROSIERS • JACOB HANSON
WILLIAM HURTER • CHRISTINA UNKEL



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**TABLE OF ABBREVIATIONS**

§	Section
¶	Paragraph
/S/	Signed
Art./Arts.	Article/Articles
Ch.	Chapter
Cl. Ex./Cl. Exs.	Claimant's Exhibit/Claimant's Exhibits
Co.	Company
EAC	European Arbitration Chamber
Fishing	Equatoriana Fishing Ltd.
Inc.	Incorporated
Ltd.	Limited
MT	Metric Ton
n.	Note
No.	Number
NY	New York
NY Conv.	New York Convention
p./pp.	Page/Pages
Proc. Ord.	Procedural Order
R.	Record
Resp. Ex.	Respondent's Exhibit
Trawler	Mediterraneo Trawler Supply AS



UNCITRAL

United Nations Commission on International Trade Law

U.S.

United States

USD

United States Dollars



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INTRODUCTION

This Tribunal has been constituted because Respondent Equatoriana Fishing Ltd [hereafter “Fishing”] ignored Claimant Mediterraneo Trawler Supply AS’s [hereafter “Trawler”] intent to purchase squid it could resell to the long-line fishing fleet in Mediterraneo. Trawler, an experienced reseller of bait with an excellent reputation, contacted Fishing to purchase Danubian squid it could sell to Trawler’s long-line fishing customers. The parties subsequently entered into a contract for 200 MT of Danubian squid. Fishing, a company that operates its own fishing fleet, was obligated under this contract to deliver a shipment of squid weighing 100-150 grams for Trawler to re-sell as long-liner bait. Instead of fulfilling its obligations, Fishing ignored Trawler’s intent and the requirements of the contract by delivering undersized squid that did not meet industry standards for long-line bait. Fishing’s disregard of Trawler’s intent and the contractual requirements caused Trawler to suffer economic and reputation damages. Trawler now requests this Tribunal find that Fishing breached the contract by delivering non-conforming squid. Additionally, Trawler requests this Tribunal grant damages to Trawler for lost profits, for the costs of mitigation related to preserving and attempting to sell the unusable squid, for disposal of the squid, interest, and arbitration costs.

The reward this Tribunal renders would be enforceable, contrary to Fishing’s assertion. Trawler agreed to Fishing’s dispute settlement provision, and both parties abided by the Chamber of Arbitration of Milan’s Rules to choose arbitrators. The Arbitral Council appointed the presiding arbitrator in accordance with both the Milan Rules and the agreement of the parties. Fishing had ample opportunity to object to the appointment procedure, but instead waited until the Milan Rules’ deadline for objection had passed. This Tribunal should find Fishing waived its right to object, so this claim is without merit and should not be considered by this Tribunal. Similarly, Fishing’s counter-claim for breach of confidentiality is also without merit. Additionally, Trawler had the authority to discuss the proceedings, as Trawler’s legitimate commercial interests permitted disclosure. The parties were not bound to keep the arbitration proceeding confidential. As such, this Tribunal should not allow Fishing to delay these proceedings. Ultimately, Trawler requests this Tribunal hold Fishing liable for its breach of contract and for destroying Trawler’s good reputation in the industry.



STATEMENT OF THE FACTS

1. Trawler has dedicated itself to the business of selling supplies, including bait, to long-line fishers in Mediterraneo for more than twenty years. These customers have come to rely on Trawler for high quality bait. Trawler traditionally has purchased its squid from the Oceanian Islands, but the squid catch was smaller than normal in 2007. Accordingly, the market price for squid increased and Trawler's customers requested it import cheaper squid from Danubia. Fishing's Pacific fleet catches squid of the *illex danubecus* species, which is found specifically in the waters off Danubia.

2. On **April 14, 2008**, Trawler sent an email to Fishing asking for offers specifying species, source, delivery dates, and prices for squid to be used as bait. In this initial email, Trawler stated the squid would be used for long-line bait. In response, Mr. Weeg, Fishing's sales representative, replied to Trawler's correspondence on **April 18, 2008**, stating that he would visit Trawler on **May 17, 2008**, to discuss future business contracts. In addition, he said he would bring a sample of the squid Fishing had supplied to another firm in Mediterraneo, which sold squid exclusively for bait. Mr. Weeg left a sample marked 2007 that fell almost exclusively within a 100–150 gram range, and averaged 130 grams. This size met the industry standard for long-line bait. Trawler showed the sample to its customers, who found it acceptable.

3. On **May 29, 2008**, Trawler placed an order for 200 MT of whole round squid "as per sample inspected." In the email to which the Order Form was attached, Trawler indicated that conforming to sample's size was important to give its customers "the best results." It is well known in the fishing industry that size is critical for squid used as long-line bait, and Trawler stressed this requirement throughout the course of negotiations: Trawler stated it was seeking squid as long-liner bait in its initial email; Trawler stressed the importance to its customers that the squid fall within 100–150 grams to ensure optimal results; and Trawler specifically required in the Order Form that the squid conform to the sample after noting the sample's size was important. The order also specified the squid be fit for human consumption to comply with a Mediterraneo storage regulation.

4. Fishing confirmed the order that same day, **May 29, 2008**, and added "Catch" and dispute settlement provisions into the Sales Confirmation. The "Catch" provision stated "2007/2008 Catch," and the dispute settlement provision stated any dispute arising under the contract would be settled under the rules of the Chamber of Arbitration of Milan by three



arbitrators in Vindobona, Danubia. Trawler immediately responded by sending an email thanking Fishing for promptly acknowledging the order. Additionally, Trawler mentioned it had noticed the inclusion of the arbitration provision on the Sale Confirmation.

5. Fishing delivered the 200 MT of squid in 20-foot containers on **July 1, 2008**. Upon delivery, Trawler randomly selected twenty cartons from two of the twelve containers for examination, all of which were marked 2007. To conduct this examination, the bulk of the containers had to be broken and the cartons removed. Trawler confirmed each carton weighed 10 kg as required, and then Trawler further examined five cartons. In order to inspect the squid for size and quality, it must be defrosted. Once defrosted, however, the squid becomes worthless and can be used only as fishmeal. The defrosted cartons conformed to the expected size and quality as negotiated and as per sample; no further examination was conducted.

6. On **July 29, 2008**, Trawler's customers informed it that the squid did not meet industry norms and, therefore could not be used as long-line bait. Consequently, none of the long-lines would purchase the squid from Trawler because of their apprehension of using an undersized product. Trawler notified Fishing of these complaints the same day. On **August 3, 2008**, Fishing requested Trawler have a certified testing agency inspect the squid. Trawler had TGT Laboratories conduct the inspection, and TGT Laboratories randomly selected .6% of the squid. Test results showed 60% of the squid did not meet the industry standard for long-line bait. Fishing rejected any responsibilities after being given the test results.

7. In the meantime, Trawler not only stored the unsalable bait at its own expense, but also twice attempted to resell the squid for human consumption. However, the local market was already highly saturated, and only ten percent of the 200 MT could be sold outside of Mediterraneo at a deeply discounted rate. In short, every effort was made to encourage Fishing to take back its squid and to mitigate this loss, but the squid eventually had to be destroyed.

8. Pursuant to the parties' Arbitration agreement, on **May 20, 2010**, Trawler submitted a Request for Arbitration to the Chamber of Arbitration in Milan, seeking damages totaling USD 479,450, plus interest and costs. Additionally, Trawler announced the selection of Ms. Arbitrator 1. On **June 24, 2010**, Fishing responded by appointing Professor Arbitrator 2 and submitting a counter-claim for breach of confidentiality.

9. Fishing contends that Trawler breached the confidentiality of these proceedings when Trawler's CEO gave a statement to Commercial Fishing Today, an international commercial



trade publication. Before this interview took place, Commercial Fishing Today had already published an article concerning the dispute between Fishing and Trawler. In an interview, Trawler stated the squid it purchased from Fishing was inappropriate for long-line bait. Trawler also noted that it had commenced legal action against Fishing.

10. On **July 15, 2010**, Ms. Arbitrator 1 and Professor Arbitrator 2 cooperatively appointed Mr. Malcolm Y as the Tribunal's chair. Mr. Malcolm Y filed a statement of independence, disclosing his employment relationship with an attorney advising Trawler. Despite the fact that both parties waived the apparent conflict, the Arbitral Council did not confirm Mr. Malcolm Y's appointment and asked the co-arbitrators to select a different chair; again, the co-arbitrators chose Mr. Malcolm Y. Acting upon its exclusive right to appoint an arbitrator in the event that the parties failed to appoint an eligible substitute, the Council again rejected Mr. Malcolm Y and appointed Mr. Horace Z. The Council reminded the parties that the Tribunal's constitution must take place within thirty days. Neither party objected to the confirmation, and, thus, Mr. Horace Z was confirmed on **September 10, 2010**.

11. On **September 20, 2010**, the Arbitral Tribunal was constituted. However, it was not until two full weeks after Mr. Horace Z's confirmation and four days after the Tribunal's constitution, on **September 24, 2010**, that Fishing objected to the Tribunal's jurisdiction based on the confirmation of Mr. Horace Z.

SUBMISSIONS

For the reasons stated herein, Trawler requests this Honorable Tribunal find that:

- (1) This Tribunal has jurisdiction to hear this claim and render an enforceable award because this Tribunal was properly constituted according to the parties' agreement;
- (2) While it has discretion to hear the breach of confidentiality, it should not do so because there was no obligation to keep the proceedings confidential or any such the obligation was not breached;
- (3) Fishing delivered squid non-conforming to the contract as required under CISG Art. 35 and is, therefore, responsible for damages stemming from that breach; and
- (4) Trawler is not precluded from claiming damages resulting from the breach because it fulfilled its obligations of examination and notice.



ARGUMENTS

12. This Tribunal is constituted as a result of Fishing’s delivery of non-conforming squid to Trawler. Because of this breach of contract, Trawler is entitled to damages. Part I of this Memorandum discusses how this Tribunal was properly constituted and how Trawler has met all of its obligations under the applicable law and rules. Part II addresses the merits of this dispute; specifically that Fishing delivered non-conforming squid and that Trawler met its duties of examination of the goods and notification of the non-conformity.

PART ONE: ARGUMENTS REGARDING JURISDICTION & CONFIDENTIALITY

13. Trawler and Fishing agreed that any dispute arising out of their sales contract would be subject to arbitration under the Arbitration Rules of the Milan Chamber of Commerce. [*Cl. Ex. 4*]. This agreement covers not only the procedures of the arbitration—such as constitution of this Tribunal—but also, the substantive rights regarding arbitration—such as the confidentiality of the proceedings. This Tribunal was constituted within a strict adherence to the Milan Rules. Furthermore, Trawler complied with all of the Rules’ mandates, including those regarding the confidentiality of the proceedings. Trawler contends that **(I.)** this Tribunal has jurisdiction over these proceedings, and **(II.)** Trawler did not breach an obligation of confidentiality.

I. THIS TRIBUNAL HAS JURISDICTION OVER THESE PROCEEDINGS

14. For this Tribunal to render an enforceable award, it must be constituted in accordance with the agreement of the parties. [*NY Conv. Art. V(1)(d); UNCITRAL Model Law Art. 34(2)(a)(iv); Poznanski at p. 87*]. Further, where the parties agree to be bound by a set of institutional arbitral rules, the institution ultimately controls whether any party-appointed arbitrators will subsequently be confirmed. [*Lew/Mistellis/Kröll at p. 237; Redfern/Hunter at p. 251; Born at p. 1387*]. Additionally, Fishing has waived its right to object to the appointment of Mr. Horace Z [hereinafter, “Mr. Z”] and any challenge to the constitution of the Tribunal. The Milan Rules state that any challenge against an arbitrator must be filed within ten days from the receipt of that arbitrator’s statement of independence. [*2010 Milan Rules Art. 19(2)*]. Allowing Fishing to challenge the constitution of the Tribunal would cause undue delay because the Tribunal has been fully and properly assembled. This Tribunal has jurisdiction over these proceedings because **(A.)** this Tribunal was constituted in accordance with the parties’



agreement; and **(B.)** Fishing waived its right to object to Mr. Z's appointment because it did not comply with the Milan Rules and without undue delay.

A. This Tribunal Was Constituted in Accordance with the Parties' Agreement

15. The parties' contract requires that any dispute relating to the contract shall be settled by arbitration under the Rules of the Milan Chamber of Arbitration. [*Cl. Ex. 4*]. Because the parties freely chose to have this arbitration governed by the Milan Rules, **(1.)** the parties are bound by the rules of the Milan Chamber of Arbitration, including rules governing the constitution of the Tribunal. [*2010 Milan Rules Preamble; Born at p. 1381; Gaillard/Savage at p. 451*]. The Milan Rules state that the arbitrators shall be appointed in accordance with the procedures set forth by the parties in their arbitration agreement. [*2010 Milan Rules Art. 14(1)*]. However, the rules also state that Arbitral Council has the exclusive right to confirm or deny an arbitrator in that position. [*2010 Milan Rules Art. 18(4)*]. Further, in the event that the Council decides not to appoint an arbitrator and the parties fail to appoint an eligible substitute, the Council may then appoint and subsequently confirm an arbitrator of its choosing. [*2010 Milan Rules Art. 20(3)*]. As a result, **(2.)** the Arbitral Council properly appointed Mr. Z under the Milan Rules, and this Tribunal was constituted in accordance with the agreement of the parties.

1. The parties are bound by the rules of the Milan Chamber of Arbitration

16. The parties' arbitration agreement provides the each party is to appoint one arbitrator, with those two then collaborating to appoint the presiding arbitrator. [*Cl. Ex. 4*]. However, the same agreement also states that their arbitration will be held pursuant to the Arbitration Rules of the Milan Chamber of Commerce. [*Cl. Ex. 4*]. As such, the Milan Rules are binding on the parties as they are deemed to have been fully incorporated into their contract through the dispute resolution clause. Further, the Milan Rules grant the Arbitral Council general competence over all matters relating to the administration of the proceedings. [*2010 Milan Rules, Preamble*]. Therefore, the parties are bound by the Arbitral Council's decisions made within the scope of the Rules as they apply to these proceedings. Thus, although the parties agreed that their presiding arbitrator shall be appointed by the two party-appointed arbitrators, the Arbitral Council need not confirm the appointed presiding arbitrator if he does not meet the Milan Chamber's requirements. [*2010 Milan Rules Art. 18(4)*].



2. The Arbitral Council properly appointed Mr. Z under the Milan Rules

17. The Arbitral Council is not required to confirm the party-appointed arbitrators. [*Gaillard/Savage at p. 461; Lew/Mistellis/Kröll at p. 237*]. Additionally, the Milan Rules explicitly state that when a potential arbitrator files a qualified statement of independence, it is within the sole discretion of the Arbitral Council to decide whether that arbitrator shall be confirmed. [*2010 Milan Rules Art. 18(4)*]. Further, where a substitute arbitrator is necessary under the Milan Rules, and the parties fail to appoint an eligible substitute, the Arbitral Council has the exclusive authority to appoint and confirm the replacement arbitrator. [*2010 Milan Rules Art. 20(3)*].

18. Here, the Arbitral Council refused to confirm the appointment of Mr. Malcolm Y [Hereinafter “Mr. Y”] as the presiding arbitrator. [*R. 49, 57*]. The Arbitral Council had the right to deny confirmation because Mr. Y’s statement of independence was qualified based on his employment with a multi-national firm acting as Trawler’s adviser. [*R. 46*]. The Arbitral Council justly declined to confirm Mr. Y and requested the co-arbitrators appoint a replacement arbitrator. [*R. 49*].

19. Upon receiving notice of the Arbitral Council’s decision not to confirm Mr. Y, both parties re-appointed Mr. Y as the presiding arbitrator. [*R. 50–51*]. As such, Mr. Y’s second appointment essentially qualifies him as a replacement arbitrator under the Milan Rules Art. 20(3). However, because Mr. Y’s statement of independence remained qualified, the Arbitral Council retained its authority to deny his confirmation. Thus, it was proper for the Arbitral Council to again refuse to confirm Mr. Y as the presiding arbitrator.

20. Under the 2010 Milan Rules Art. 20(3), if a replacement arbitrator is not confirmed, then the Arbitral Council must appoint a new arbitrator. Because the parties reappointed Mr. Y, and the Arbitral Council again refused to confirm him, the Arbitral Council had to appoint a new arbitrator in accordance with the Rules. [*2010 Milan Rules Art. 20(3)*]. As a result, the Arbitral Council rightly exercised its authority in appointing Mr. Z as the presiding arbitrator on 26 August 2010. [*R. 57*].

21. The Secretariat forwarded Mr. Z’s unqualified statement of independence to both parties on 31 August 2010 and, per the Milan Rules Art. 18(3), invited the parties to submit comments and or challenges to his appointment. [*R. 59*]. Neither party challenged Mr. Z’s appointment nor



submitted any comments. [R. 61]. As a result the Arbitral Council, in accordance with Milan Rules Art. 18(4), confirmed Mr. Z as the presiding arbitrator.

22. Mr. Z's appointment and confirmation as the presiding arbitrator was in accordance with the agreement of the parties because the parties agreed to have the Milan Rules govern their arbitration. When the parties failed to appoint a presiding arbitrator who could submit an unqualified statement of independence, the Arbitral Council necessarily appointed an eligible replacement arbitrator. In the absence of any challenge to Mr. Z's appointment, it was proper for the Arbitral Council to confirm him as the presiding arbitrator.

B. Fishing Waived Its Right to Object to Mr. Z's Appointment

23. Arbitral awards may be set aside under the New York Convention where the tribunal is not constituted in accordance with the agreement of the parties. [*NY Conv. Art. V(1)(d)*]. However, a party loses its right to object to the constitution of the tribunal if such an objection is not made within the procedural requirements of the rules governing the arbitration. [*2010 Milan Rules, Art. 19(2); Born at p. 2605; AAOT Foreign; Health Mgmt. Corp*]. Here, Fishing's objection is based on the Arbitral Council's confirmation of Mr. Z as the presiding arbitrator. [R. 64]. Thus, Fishing's objection is not based on the lack of jurisdiction of this Tribunal; instead, it is simply a challenge to the appointment of Mr. Z. Fishing waived its right to object on these grounds because (1.) Fishing failed to object within the time period set forth in the Milan Rules and (2.) Fishing failed to object without undue delay.

1. Fishing failed to object within the time period set forth in the Milan Rules

24. Under the UNCITRAL Model Law a party loses its right to object to any requirement of an arbitration agreement if it does not object within the time period set forth in the applicable rule. [*UNCITRAL Model Law Art. 4*]. With regards to an objection to the constitution of this Tribunal, the Milan Rules state that a party shall challenge the appointment of an arbitrator within ten days of receiving that arbitrator's statement of independence. [*2010 Milan Rules, Art. 19(2)*]. Further, such procedural challenges are frequently waived if not promptly made. [*Born at p. 2604; JCI Comm; Jerusalem Dist. Ct.*]. Under the Milan Rules, if no challenge is made and the arbitrator has submitted an unqualified statement of independence, the Arbitral Council will confirm that arbitrator. [*2010 Milan Rules Art. 18(4)*]. All parties will be deemed to have waived their right to object to the appointment under the UNCITRAL Model Law Art. 4 if they have not objected within ten days. [*2010 Milan Rules Art. 19(2)*].



25. Here, the parties received notice that Mr. Z had been appointed as the presiding arbitrator on 26 August 2010. [R. 57]. The parties then received Mr. Z's unqualified statement of independence on 31 August 2010. [R. 59]. Neither party filed any comments or challenge on Mr. Z's appointment. [R. 61]. Thus, Mr. Z was subsequently confirmed by the Arbitral Council on 10 September 2010. [R. 61].

26. Fishing failed to object to this Tribunal's jurisdiction until 24 September 2010. [R. 64]. By waiting twenty-four days from receiving notice of Mr. Z's appointment and fourteen from receiving notice of his subsequent confirmation, Fishing waived its right to object. As a result, Fishing waived its right to claim that this Tribunal was not constituted in accordance with the agreement of the parties because it failed to raise its objections within the time period specified in the Milan Rules. Thus, this Tribunal has jurisdiction over these proceedings, as well as the ability to render an enforceable award.

2. Fishing failed to object without undue delay

27. The UNCITRAL Model Law requires the parties to object to any non-compliance with their agreement without undue delay. [*UNCITRAL Model Law Art. 4*]. Failure to object to such non-compliance in a timely manner constitutes a waiver of a party's right to object. [*UNCITRAL Model Law Art. 4; Born at p. 614*]. Such a waiver is not uncommon with regards to objections to the constitution of arbitral tribunals because most institutional rules set forth specific procedures for challenging a tribunal's composition, thereby putting the parties on notice of the importance of a timely objection. [*Born at p. 2605; Société Philipp Bros; Swiss Judgment*]. Additionally, allowing objections to composition at any time would allow parties to wait until an award had been rendered and then attempt to set it aside based on an erroneous composition.

28. Under the Milan Rules, the tribunal typically assembles no more than thirty days after receiving the parties' memoranda. [*2010 Milan Rules Art. 21(2)*]. This procedural requirement puts the parties on notice that there is a need to promptly raise any objection to the constitution of the tribunal. The required standard for a successful challenge to a tribunal's composition is heightened as the arbitration proceeds. [*Donahey at p. 103*]. Thus, when an objection to the constitution of the tribunal is made with undue delay, it is within a tribunal's discretion to find a party has lost its right to object.

29. Here, Fishing had ten days from the receipt of the unqualified statement of independence in which to object to the composition. [*2010 Milan Rules Art. 19(2)*]. Thus, Fishing was required



to object ten days from 31 August 2010. [R. 59]. Fishing did not object until twenty-four days after the receiving Mr. Z's statement of independence, a full two weeks after his confirmation, and four days after this Tribunal was assembled for the first time. [R. 64]. Fishing has provided no reason for its delay in objecting to the Tribunal's constitution. Additionally, there is no justification for the delay since Fishing's other required communications came within three days of any request, evincing that Fishing knew prompt communication was required. [R. 22–23].

30. Waiting nearly a month before objecting to this Tribunal's constitution thus represents an undue delay in presenting the objection. Further, by waiting until after the Tribunal has been assembled to make the objection, Fishing has a much higher burden of showing that the Tribunal was not constituted in accordance with the agreement of the parties. Fishing's only objection is based on Mr. Z's appointment as the presiding arbitrator by the Arbitral Council. [R. 65]. However, Mr. Z's appointment and subsequent confirmation were both conducted in strict adherence to the parties' agreement and the Milan Rules. [See *supra* ¶¶ 17–22].

31. As a result, Fishing failed to object to the constitution of this Tribunal without undue delay. This, coupled with the fact that the objection clearly came outside the time period proscribed by the Milan Rules, signifies that the Fishing effectively waived its right to object. Therefore, this Tribunal has jurisdiction over these proceedings and the ability to render an enforceable award.

II. TRAWLER DID NOT BREACH AN OBLIGATION OF CONFIDENTIALITY

32. In response to Proc. Ord. 3, this Tribunal has discretion to hear Fishing's counter-claim regarding Trawler's alleged breach of confidentiality. However, it should not do so because Fishing's claim is without merit. Fishing has the burden to prove in the record that the disclosure was improper, the improper disclosure harmed Fishing, and damages from this harm are ascertainable. [CISG *Ad. Co. Op. No. 6*; *Smit at p. 582*; *Hwang/Chung at p. 640*]. Fishing alleges an improper disclosure, is unable to identify how it has been harmed by the disclosure, and recognizes no ascertainable damages can be determined from the unknown harm. As such, this Tribunal should exercise its discretion by declining consideration of Fishing's counterclaim.

33. If this Tribunal determines it should consider the merits of the counter-claim, it should take into account confidentiality's unsettled character in the international arbitration community. Scholars distinguish between the concepts of privacy and confidentiality: privacy refers to not allowing third-parties to witness the proceedings while confidentiality refers to the varying level



of obligations imposed on parties not to disclose documents or information revealed in the proceedings. [*Cook/Garcia at pp. 229–231*]. Because the scope of confidentiality varies greatly, the main source this Tribunal should consider in determining the extent of any confidentiality obligation is the contract. [*Cook/Garcia at p. 231; Ritz at p. 237*]. This Tribunal should give effect to the parties’ arbitration agreement by finding **(A.)** Trawler did not breach the confidentiality requirements of the contract. However, if this Tribunal finds the contract is silent in regards to confidentiality, it should find that **(B.)** Trawler did not breach any confidentiality obligation under the Milan Rules.

A. Trawler Did Not Breach the Confidentiality Requirements of the Contract

34. The parties’ contract did not require Trawler to keep the commencement of arbitration proceedings confidential. When determining the confidentiality agreement of the parties, this Tribunal should first look to any contractual agreement, as it would supersede the institutional rules. [*Lew/Mistelis/Kröll ¶¶ 8, 17, 21; Cook/Garcia at p. 231; Lew Expert Report ¶¶ 9, 10; Crookenden at p. 603; Raymond at p. 482; Born at p. 2255; Brown at pp. 1019, 1025; Redfern § 2.145*]. The sales contract is governed by the CISG, which implies trade norms into the contract under CISG Art. 9(2) unless the parties otherwise agreed. [*Infra ¶ 35*]. Additionally, the Milan Rules instruct this Tribunal to take trade usages into account. [*Milan Rules Art. 3(4)*]. Here, the trade norms of the fishing industry are impliedly incorporated into the contract, as the parties have not agreed otherwise. The effect of this incorporation is that any trade norms regarding confidentiality become part of the contract itself.

35. The trade norms in the fishing industry permit disclosures of the existence of arbitration proceedings. [*UNCLOS: The Convention and the Settlement of Disputes; Procedure, “all hearings before the Tribunal... are to be public.”* The commercial fishing industry is part of the maritime industry, which has norms regarding confidentiality of arbitration proceedings. [*UNCLOS II § (3)(B); Kwiatkowska/Dotinga at p. 46*]. These norms permit disclosure of the parties’ identities and arbitral awards to promote insight into the trade. [*Born at p. 2268 n. 91, discussing the practices of the Society of Maritime Arbitrators, Association of Maritime Arbitrators of Canada, and Japan Shipping Exchange regarding disclosure of arbitrations; e.g. Siteam Merkur, listing the parties and arbitral award*]. Further, such disclosure of the mere existence of proceedings is permitted, as the disclosure does not affect the arbitral process. Arbitrations are likely to become public knowledge in this industry. [*Infra ¶ 45*]. In fact, it is



normal for the existence of arbitral proceedings to be disclosed in this trade. Here, Trawler's disclosure of the proceedings was in accord with industry norms of confidentiality that were incorporated into the parties' contract. Furthermore, a trade magazine had already reported on the dispute. [*Proc. Ord. 3 at ¶ 17*]. Thus, Trawler's disclosure was permitted, and this Tribunal should not find Trawler breached its obligation of confidentiality under the contract.

B. Trawler Did Not Breach Any Confidentiality Obligation Under the Milan Rules

36. Absent an express or implied contractual duty of confidentiality, this Tribunal should turn to the arbitration rules the parties incorporated by reference into their contract. Here, the parties incorporated the Milan Rules into their contract. However, this Tribunal is now faced with two sets of rules: the 2004 Milan Rules in force at the conclusion of the contract, and the 2010 Milan Rules in force at the commencement of the arbitral proceedings. Regardless of which rules apply, Trawler did not breach its obligations. This Tribunal should find that **(1.)** Trawler did not breach confidentiality under the 2004 Milan Rules and **(2.)** if the 2010 Milan Rules apply, there was no breach of confidentiality.

1. Trawler did not breach confidentiality under the 2004 Milan Rules

37. Scholars suggest that absent a contractual agreement, arbitrations do not require confidentiality of the parties unless provided for in the institutional rules. [*Lew Expert Report ¶ 22; Redfern § 2.176*]. The confidentiality provision of 2004 Milan Rule Art. 8(1) imposes no obligation on the parties; it requires the Milan Chamber, the presiding tribunal, and expert witnesses to keep information regarding the proceedings confidential. Because the 2004 Milan Rules do not expressly impose a duty of confidentiality on the parties, Trawler has no obligation to keep the existence of arbitration confidential.

38. Just as there is no expressed duty of confidentiality, this Tribunal should also find that there was no implied obligation of confidentiality. Courts and scholars have rejected the idea of implied confidentiality in arbitral proceedings as outdated and incorrect. [*Esso Australia v. Plowman; Bulbank v. ATI; Rovine/Nappert at p. 104; Cook/Garcia at pp. 229–232*]. However, even those who have found an implied duty of confidentiality exists have stopped short of extending this obligation to information concerning the existence of the arbitration, as “it is too uncertain.” [*Schwarz/Konrad at p. 475*]. Both the UNCITRAL Model Law and the NY Convention further support this notion; as they have remained silent on arbitral confidentiality, despite the opportunities create an implied duty of confidentiality. Likewise, this Tribunal should



neither create an obligation of confidentiality where one does not exist, nor should this Tribunal extend any existing obligation to the mere disclosure of the pleadings.

39. In the absence of an express confidentiality obligation in an institution’s rules, tribunals should look to the governing arbitration law for guidance on whether to impose confidentiality. [*Cook/Garcia at pp. 229–232*]. Thus, the Tribunal should defer to the governing arbitration law. The UNCITRAL Model Law, which is the substantive arbitration law governing the proceeding, [*R. 6 ¶ 25, 27 ¶ 22*], imposes no general obligation of confidentiality on the parties. [*Hunter; Born at p. 2253, quoting the Secretary-General on Possible Features of a Model law on International Commercial Arbitration; Hiber at p. 464*]. Because there is no obligation of confidentiality imposed by the UNCITRAL Model Law, this Tribunal should find that Trawler had no duty to keep the existence of arbitration proceedings confidential.

40. As noted, the Milan Rules did not contain an express confidentiality obligation on the actual parties to keep the existence of arbitration a secret; therefore, Trawler was not expressly bound to keep the existence of arbitration confidential. Further, this Tribunal should not imply confidentiality on Trawler as multiple courts and scholars around the world reject implied confidentiality

41. Because the parties did not specifically mention a duty of confidentiality in the contract, there should be no implication that such a duty exists. This duty is absent both in the 2004 Milan rules, and the governing law. Further, the UNCITRAL Model Law is silent on this supposed requirement as well. As such, Fishing has furnished no evidence to substantiate its claim that Trawler breached an implied duty of confidentiality because one did not exist.

2. If the 2010 Milan Rules Apply, Then There Was No Breach of Confidentiality

42. If the parties are bound to the confidentiality obligations imposed by 2010 Milan Rules, this Tribunal should still find that Trawler did not breach its obligations. 2010 Milan Rules Art. 8(1) requires that parties “keep the proceedings and arbitral award confidential, except in the case where it has to be used to protect one’s rights.” Trawler did not breach because **(a.)** mere disclosure of arbitration keeps the proceedings confidential, and in any event, **(b.)** Trawler disclosed the arbitration to protect its rights.



a. Mere disclosure of arbitration keeps the proceedings confidential

43. Trawler's disclosure of the existence of arbitration kept the proceedings confidential. Confidentiality is crucial where imposed, so as to ensure that the proceedings remain uninfluenced by outside bias. [*Cook/Garcia at p. 229; Born at pp. 2284–2285*]. However, it is unrealistic to assume that every part of the arbitration can or will remain confidential, as many aspects, especially the existence of the proceeding, are likely to become public knowledge. [*Hiber/Pavic at p. 464; Hwang/Chung at p. 612; Paulsson at p. 313; Brown at p. 1002*]. Thus, revealing the mere existence of arbitration is unavoidable and will not harm the procedural conduct of the arbitration. [*Paulsson at pp. 303–304*]. Here, the existence of the dispute was already public record, as Commercial Fishing Today had already on the dispute between Trawler and Fishing. [*Proc. Ord. 3 ¶ 17*]. No prejudicial effect had been reported by either party after the publication of this original report. [*Id.*] Because this report already publicized the dispute, Trawler's disclosure that arbitration had commenced was unlikely to have any influence on the procedural conduct. [*Bulbank v. ATI, finding the public disclosure did not breach because would not affect the arbitration's actual proceedings*]. Therefore, Trawler's disclosure of the existence of arbitration will not harm the arbitral process and will still render the proceeding confidential.

44. Additionally, if confidentiality has not been expressly provided for in the parties' contract, the discretion to allocate the extent of confidentiality is left to the Tribunal. [*Smit at p. 300*]. Different aspects of the arbitration have been assigned varying degrees of confidentiality. [*Born at p. 2283*]. The aspects warranting the highest degree of confidentiality are those aspects affecting the arbitral process, such as the proceedings and deliberations. In contrast, those that do not affect the arbitral process itself, such as disclosure of an arbitral award, warrant the least degree of confidentiality. [*Id. at pp. 2283–2285*]. Fishing has provided no indication that the mere disclosure of the proceedings affects the arbitral process. Thus, this disclosure warrants the least degree of confidentiality. [*Id. at pp. 2283–2284*]. As such, this Tribunal has the discretion to find that the disclosure of the existence of the arbitration warrants the least degree of confidentiality and keeps the proceedings themselves confidential. Thus, Trawler did not destroy confidentiality.

b. Trawler disclosed the arbitration to protect its rights

45. If this Tribunal determines that Trawler has breached confidentiality, this breach was warranted in order for Trawler to preserve its legitimate interests. As noted, the duty of



confidentiality is not absolute; it is subject to a number of exceptions. [*Supra* ¶ 44; *Hiber/Pavic at p. 464*; *Hwang/Chung at p. 612*; *Paulsson at p. 313*; *Dolling-Baker v. Merrett*; *Smit at p. 577*]. The 2010 Milan Rule 8(1) states that the parties “shall keep the proceedings and arbitral award confidential, except in the case where it must be used to protect one’s rights.” A claimant’s ability to protect its interests supersedes its obligation of confidentiality of the proceedings. [*Smit at pp. 577–578*; *Born at p. 2285*]. Because Trawler is entitled disclose what is reasonably necessary to preserve its rights, this disclosure is protected by the exception specifically provided by the 2010 Milan Rules.

46. Trawler’s disclosure to Commercial Fishing Today was necessary to preserve its legitimate interests of goodwill and reputation. This court has within its discretion the ability to find that the preservation of a party’s reputation constitutes a reasonable legitimate interest, as the list of exceptions to the duty of confidentiality is not exhaustive. [*Born at p. 2284*]. Due to the nature of the goods, Trawler’s reputation within the industry is of paramount importance. It is imperative that the long-liners can rely on their bait suppliers because of the time and costs associated with returning to port to purchase replacement bait in the event the bait supplied is unusable. This reliance is evidenced by the fact that once Trawler’s customers learned the squid it was selling did not meet industry standards, it was unable to sell the remainder of the squid, even at a highly discounted price. [*R. 6 ¶ 19*; *Cl. Ex. 10*]. In addition to being unable to sell the remaining squid, at least three of Trawlers main long-line customers began using other suppliers. [*Cl. Ex. 10 ¶ 18*]. Therefore, it was necessary for Trawler to say it had commenced arbitral proceedings, to demonstrate its commitment to its customers, and to show that this is not its usual practice. [*Proc. Ord 3 ¶ 13*]. Fishing’s breach put Trawler in a position where it had to salvage its legitimate interest by disclosure to maintain its excellent reputation. Thus, Trawler is protected from Fishing’s counter-claim for damages because the disclosure did not breach the confidentiality obligation found in 2010 Milan Rules Art. 8(1).



PART TWO: ARGUMENTS REGARDING THE SUBSTANTIVE ISSUES

47. Trawler contracted with Fishing for long-line bait, fully performed its obligations, and likewise expected Fishing to perform its obligations under the contract. Fishing, however, ignored both Trawler's intent to purchase squid to be resold for long-line bait, along with its obligations to deliver goods that conformed to the contract. As a result, Trawler suffered economic and reputation damages. [*Cl. Ex. 10 ¶¶ 12–18*].

48. The CISG is the substantive contract law that governs the transaction between Trawler and Fishing. The parties contracted for the sale of goods, [*Cl. Exs. 3–4*], and all parties places of business are in contracting states to the CISG. [*R. 6 ¶ 24*]. Because there is no choice of law provision, CISG Art. 1(1)(a) dictates that the CISG is the controlling law. Trawler requests that this Tribunal grant damages because (I.) Trawler received goods that did not conform to the contract as required by CISG Art. 35, and (II.) Trawler's right to damages is not precluded because it fulfilled its examination and notice obligations as required by CISG Arts. 38 and 39.

I. THE GOODS DID NOT CONFORM TO THE CONTRACT UNDER CISG ART. 35

49. Trawler contracted with Fishing to purchase squid that could be resold as long-line bait; Fishing did not deliver squid that conformed to this contractual requirement. CISG Arts. 30 and 35 require a seller to deliver goods as required by the contract, and Fishing's failure to do so constitutes breach according to CISG Art. 36(1). Therefore, Trawler requests that this Tribunal grant damages because (A.) the squid did not conform to the contract as required by CISG Art. 35(1), and (B.) the squid did not conform to the requirements of CISG Art. 35(2).

A. The Squid Did Not Conform to the Contract as Required by CISG Art. 35(1)

50. Fishing failed to deliver goods that conformed to the requirements of the contract. CISG Art. 35(1) requires that the seller "deliver goods which are of the quantity, quality and description required by the contract." While the proper quantity of squid was delivered, the squid was not of the quality or description required by the contract. In finding that Fishing breached the contract by delivering non-conforming goods, this Tribunal should determine that (1.) the contract required Fishing to deliver squid fit for long-line bait, and that (2.) the squid did not meet the quality or description requirements of the contract in violation of CISG Art. 35(1).

1. The contract required Fishing to deliver squid fit for long-line bait

51. Trawler entered into a contract with Fishing to purchase squid it could resell as long-line bait. Fishing breached by failing to deliver squid that conformed to the contract. In making this



determination, it is necessary for this Tribunal to first identify the contract and then to interpret it, as the contract is the “overriding source for the standard of conformity.” [*Sect. Comm. to Art. 35 ¶ 4*]. This Tribunal should find that **(a.)** the terms of the Sale Confirmation are the explicit terms of the contract according to CISG Art. 19 and that **(b.)** a reasonable interpretation of the terms required Fishing to deliver squid fit for long-line bait.

a. The terms of the Sale Confirmation are the explicit terms of the contract according to CISG Art. 19

52. After negotiations, Trawler offered to purchase squid fit for long-line bait on 29 May 2008. [*Cl. Ex. 3; R. 5 ¶ 15*]. Because there is no requirement as to the form of the contract, [*CISG Art. 11*], all of the parties dealings must be considered. After sending an invitation for offers of long-line bait, [*R. 5 ¶ 11; Cl. Ex. 1*], and receiving a sample of squid fit for long-line bait, [*R. at 5, ¶ 12; Cl. Ex. 10 ¶ 8*], Trawler sent another e-mail to Fishing with an attached order form for 200 MT of squid “as per sample” at a price of USD 1,600 per MT. [*R. 5 ¶ 15; Cl. Ex. 2–3*]. In the e-mail Trawler reiterated that the squid was to be resold to its customers, referencing the long-line fishers in the initial email. [*Cl. Ex. 1–2*]. Because the goods, quantity, and price were definite, and the email and attachment indicated Trawler’s intent to be bound, the email constituted an offer. [*CISG Art. 14(1)*].

53. Fishing responded to Trawler’s offer on 29 May 2008 by sending a Sales Confirmation that purported to accept Trawler’s offer. Fishing promptly responded on 29 May 2008, the same day, with a Sales Confirmation that stated, “we are pleased to confirm the following order.” [*Cl. Ex. 4*] The acceptance contained two additional provisions: one regarding “Catch” and another regarding dispute settlement. [*Cl. Ex. 4*]. The CISG adopts the “mirror-image rule” in Art. 19(1), stating that an offer which purports to be an acceptance but contains additional terms is a rejection of the offer and a counter-offer. [*CISG Art. 19(1); Lookofsky at p. 70; Valiotti at § II(C)*]. Additional terms can relate to quality of the goods or the settlement of disputes. [*CISG Art. 19(3)*]. Here, the inclusion of the dispute settlement provision at the very least constitutes an additional term, [*CISG Art. 19(3)*], and, thus, the Sale Confirmation constituted a purported acceptance and triggered the application of CISG Art. 19(1).

54. This Tribunal has the discretion to interpret CISG Art. 19(1) in accordance with the “knock-out rule,” by which additional material terms not specifically accepted would be knocked out of the contract. [*Di Matteo at pp. 348–352; Magnus at pp. 193–195; Van Altstine at p. 213;*



Lautenschlager at pp. 285–286; e.g. Martinswerk adopting the knock-out rule]. Applying the knock-out rule here would require this Tribunal to find that the Catch provision is not a term of the contract, while the dispute settlement provisions was incorporated by Trawler’s specific acceptance. [Resp. Ex. 2]. Such an interpretation of CISG Art. 19(1) would conform to the current international trend and promote uniformity in the application of the CISG, as required by CISG Art. 7(1). [*Magnus at p. 193, explaining the “knock-out rule’s” adoption under UNIDROIT, the American Uniform Commercial Code (UCC), and the Principles of European Contract Law; See also Knitware Case and Powdered Milk Case, adopting the knock-out rule*]. Thus, this Tribunal has the discretion to find that the Catch provision is not part of the contract. Without the term Fishing has no basis to argue that the contract was for unsized squid. Therefore, in interpreting the CISG to adhere to the knock-out rule, this Tribunal should find that the contract required squid that could be resold for long-line bait.

55. If, however, the traditional “last shot doctrine” is applied, this Tribunal would reach the same conclusion: the contract required delivery of squid to be resold as long-line bait. [*Powdered Milk Case, maintaining that the knock-out rule and last shot doctrine would yield the same result*]. While the “knock-out rule” would exclude the Catch provision, the “last shot doctrine” would permit it to become a term of the contract. The principles of good faith and contra proferentem would then require this Tribunal to interpret the provision against Fishing. [*See infra ¶¶ 60–61 for analysis on this point*]. Regardless of whether this tribunal finds the “knock-out rule” applies, the addition of the “Catch” provision should not be construed to negate weeks of negotiation between the parties; the numerous emails and communications; and Trawler’s reiterated intent that it needed squid weighing 100–150 grams. Therefore, regardless if the Catch provision is included, the only reasonable interpretation is that the contract was for squid to be resold as long-line bait.

b. A reasonable interpretation of the terms required Fishing to deliver squid fit for long-line bait

56. Having identified the contract, this Tribunal must interpret it to determine whether the goods were delivered in accordance with its provisions. [*Bianca/Bonell: Bianca § 2.1 at p. 271; Enderlien/Maskow at p. 140; Schelctriem/Schwenger: Schwenger at p. 413; Honnold at pp. 253–254; Eörsi at pp. 2–15; see e.g. RJ & AM Smallmon, stating, “In applying Article 35, regard must also be had to Article 8.”*]. CISG Art. 8(1) governs interpretation of contracts, and requires



this Tribunal to first look at the intent of one party “where the other party knew or could not have been unaware” of the intent. Thus, in this subjective test of interpretation, the parties’ intent is paramount. [*Huber at p. 235; Lookofsky at p. 55; Enderlien/Maskow at p. 62; Bianca/Bonell: Farnsworth § 2.3 at pp. 97–98*]. To determine the intent, this tribunal must consider “all relevant circumstances of the case,” including negotiations, party practices, usages, and subsequent conduct of the parties. [*CISG Art. 8(3)*]. Trawler manifested its intent throughout the contract formation: Trawler’s initial email to Fishing stated it was “interested in purchasing squid for resale to the long-liner fishing fleet . . . to be used as bait,” [*Cl. Ex. 1*]; Fishing sent a representative with a sample of squid fit for the purpose of being resold as long-line bait, [*R. 5 ¶¶ 13–14*]; Trawler sent a second email to Fishing noting that the sample was satisfactory, particularly in regard to the size range “since that is the range that gives our customers the best results,” [*Cl. Ex. 2*]. For the same reasons, Fishing knew or could not have been unaware that Trawler was in the market for squid that could be sold as long-line bait. [*Cl. Exs. 1–2*] A reasonable person in Fishing’s position would reach the same conclusion. [*CISG Art. 8(2)*]. As such, in looking to the contract for “*illex danubecus*” “[a]s per sample,” this Tribunal should find that Trawler intended to purchase squid to resell as long-line bait.

57. Inclusion of the provision “fit for human consumption” did not change Trawler’s intent to purchase squid for resell as long-line bait. Trawler included the term “fit for human consumption” in order to comply with a regulation for storage. Since other products in its coolers were to be sold for human consumption [*R. 5 ¶ 15*], Trawler included this provision to ensure Fishing was made aware of this requirement. [*See New Zealand Mussels, requiring a party to make the other party aware of regulations with which goods must comply; Henschel at § g*]. Fishing has stated it was unaware of Trawler’s motives for including the requirement in the order form, [*R. 26 ¶ 18*], and should be estopped from now inconsistently arguing to this Tribunal that the provision’s inclusion created any ambiguity as to Trawler’s intent to purchase squid fit for resell as long-line bait. [*See UNIDROIT Principles 1.8 prohibiting inconsistent behavior; Food Products Case*].

58. Fishing cannot substantiate its position that Trawler knew or could not have been unaware of Fishing’s intention to sell squid not usable as long-line bait. Fishing contends that its intention was to sell unsized squid—which would include squid not capable of use as long-line bait—and that the “Catch” provision and marking on the sample carton made Trawler aware of



this intent. [R. 26 ¶¶ 14–15]. For Fishing’s intent to be clear from these actions, Fishing would have to demonstrate either a previous practice between the parties, [CISG Art. 8(3)], or a trade usage regarding unsized squid. [CISG Art. 9(3)]. Here, there are no prior practices between the parties that could have resulted in such knowledge of Fishing’s intent. [Proc. Ord. 3 ¶ 14]. Further, Fishing’s own statements fail to assert that either inserting a “Catch” provision or marking a carton with a year is a trade usage which indicates the squid are unsized.

59. Fishing’s position is further weakened because thirteen percent of the squid tested from the 2008 catch fell within the range Trawler needed, [Cl. Ex. 7], which indicates that it was possible for some squid from the 2008 catch to be fit for long-line bait. Trawler was aware that squid harvested by the time of the conclusion of the contract were unlikely to all be fit for long-line bait, [Proc. Ord. 3 ¶ 27], but could reasonably have believed Fishing was only going to deliver squid from 2008 if it met the same size qualities as the sample. If Fishing had simply communicated in good faith to Trawler that it was offering unsized squid, Trawler would have been able to make an informed decision regarding the transaction. Instead, Fishing argues that Trawler was expected to ascertain Fishing’s intent from an ambiguous provision that was inserted into a purported acceptance to purchase squid fit for long-line bait. According to Fishing’s logic, Trawler would have had to speculate as to what Fishing intended. Because the contract must be interpreted in good faith, [E.g. *Chinese Goods Case*, noting a contract must be interpreted according to the principles of good faith; see also *Felemegas* § 6; *Magnus* § 10], this Tribunal should find that Trawler was without knowledge of Fishing’s intent.

60. If the inclusion of the “Catch” provision created an ambiguity in the meaning of the contract, the term should be interpreted against Fishing. Although not explicitly mentioned in the CISG, the underlying principle of *contra proferentem* should be considered in interpreting the contract. [CISG Art. 7(2); *Honnold* at p. 117, likening the requirements of CISG Art. 8(2) to the doctrine of *contra proferentem*; *Lookofsky* at p. 47 n. 3; *Huber* at p. 236]. This doctrine instructs that it is preferable to construe ambiguous terms against the drafting party. [UNIDROIT *Principles* 4.6; *Lex Mercatoria* No. IV.4.4]. Following this doctrine, the ambiguous “Catch” provision must be interpreted against Fishing, which would lead to the conclusion the parties contracted for squid fit as long-line bait.

61. Similarly, CISG Art. 80 prohibits Fishing from arguing that this Tribunal should find the contract required unsized squid because Trawler failed to object to the Catch provision. CISG



Art. 80 states that a party cannot rely on the other party's failure to perform "to the extent that such failure was caused by the first party's act or omission." [See *Schäfer at introduction, citing Magnus*]. Accordingly, any conduct can trigger the Article's application to prevent bad faith or contradictory behavior. [*Id.*] Had Fishing expressly communicated that it planned to deliver squid that did not conform to Trawler's expressed needs instead of adding an unclear term into the Sale Confirmation, Trawler would not have concluded the contract. By not clearly communicating this crucial information, Fishing contradicted its prior behavior of holding out a sample of squid that would meet Trawler's needs and violated the principles of CISG Art. 80. Additionally, this behavior contravenes the underlying principles of cooperation and transparency in dealings promoted by CISG Art. 7(2). [*UNCITRAL Digest at ¶ 9; Machinery Case, finding the general principle of good faith requires the parties to cooperate with each other and to exchange information relevant to the performance of their respective obligations*]. Therefore, if this Tribunal accepts that the Catch provision is a term of the contract, Fishing cannot claim that Trawler's failure to object to the term excuses Fishing from providing squid unusable for Trawler's expressed purpose.

62. Trawler expressed its intent to purchase squid to resell as long-line bait at each phase of the contract formation; if Fishing never intended to meet this need, it was necessary for Fishing to communicate its intent to Trawler. Therefore, based on the negotiations and conduct of the parties, a reasonable and good faith interpretation requires this Tribunal to find that the parties contracted for squid Trawler could resell as long-line bait.

**2. The squid did not meet the quality or description requirements
of the contract in violation of Art. 35(1)**

63. Fishing failed to perform its obligations because it did not deliver squid that conformed to the requirements of contract. CISG Art. 35(1) obligates the seller to "deliver goods which are of the quantity, quality and description required by the contract." As discussed *supra* in ¶¶ 56–62, the agreement between the parties required Fishing to deliver squid that was fit for long-line bait. Long-line bait squid should weigh between 100–150 grams. Although a little deviance outside this range is permitted, Fishing was aware this size of squid was the industry standard. [*R. 5 ¶ 14; Cl. Exs. 2, 10 ¶ 5; Proc. Ord. 3 ¶ 26*]. Despite the parties' agreement and knowledge, Fishing delivered squid that was not suitable as long-line bait, as evidenced by TGT's examination and the fact that long-line fishers returned the squid as unusable. [*R. 6 ¶ 18; Cl.*



Exs. 13, 15–16]. Fishing failed to meet its obligations under the contract, and Trawler is entitled to recover damages.

64. This Tribunal need not try to determine the exact amount of squid permitted to fall outside the optimal range because the facts indicate the variance here was too high. Of the five vessels that purchased squid from Trawler, two immediately returned to port to return the squid, costing them substantial sea-time. [*Cl. Ex. 10 ¶¶ 11–12*]. Two others remained at sea with sufficient other bait and returned with a normal catch, but the final vessel which remained at sea without sufficient other bait noted a poor result because the squid was undersized. [*Cl. Ex. 10 ¶ 12*]. These facts—that long-line fishers were forced to return to port at their own expense to return the squid and that the squid, when used, yielded poor results—demonstrate that no matter what amount of squid is permitted to be undersized, the amount of undersized squid supplied by Fishing was in excess of the permissible range. As such, this Tribunal need not determine how much of the squid was permitted to fall outside the optimal range, as it is evident that an unreasonably large amount of squid was undersized. [*See Granulated Plastics Case, finding that the court only must determine whether non-conformity existed and not the extent of non-conformity, as the seller guarantees conformity of the goods in a way that the seller is liable for any damages the buyer suffers as a result of non-conformity.*]

65. Fishing failed to deliver goods in accord with CISG Art. 35(1), and this Tribunal should hold it responsible for the breach. Trawler and Fishing contracted for squid to be resold as long-line bait, and Fishing failed to deliver squid suited to this purpose. As such, Fishing breached the contract, and this Tribunal should award damages to Trawler.

B. The Squid Did Not Conform to the Requirements of CISG Art. 35(2)

66. Fishing failed to deliver squid that conformed to the requirements of CISG Art. 35(2), and is liable for damages to Trawler based on this breach. Of the requirements of CISG Art. 35(2), scholars note that it is paramount that goods conform to any sample held out by the seller in accord with CISG Art. 35(2)(c). As such, CISG Art. 35(2)(c) takes precedence over the other provisions of CISG Art. 35(2). [*Bianca/Bonell: Bianca § 2.6.1 at p. 275; Schlectriem/Schwenzer: Schwenzer at p. 424; Enderlien/Maskow at pp. 145–146*]. Here, **(1.)** the squid did not conform to the sample under CISG Art. 35(2)(c); additionally, **(2.)** the squid was not fit for its ordinary purpose under CISG Art. 35(2)(a), and **(3.)** the squid was not fit for its particular purpose under



CISG Art. 35(2)(b). (4.) Fishing is not excused from liability under CISG Art. 35(3) because Trawler was unaware of the lack of conformity at the conclusion of the contract.

1. The squid did not conform to the sample under CISG Art. 35(2)(c)

67. While Fishing held out a sample of squid to Trawler that was fit for long-line bait, the product Fishing delivered did not reflect the qualities of the sample and could not be used by long-liners. [R. 5 ¶¶ 14–15, 6 ¶ 18; Cl. Exs. 2, 5–8]. CISG Art. 35(2)(c) requires that goods “possess the qualities of goods which the seller has held out to the buyer as a sample or model.” [CISG Art. 35(2)(c); *Compressors Case*; *Heliotropin Case*]. The purpose of holding out a sample is to provide a “concrete way for the seller to specify his offer.” [*Bianca/Bonell: Bianca* § 2.6.1 at p. 275; *Schlectriem/Schwenzer: Schwenzer* at p. 423; *Enderlien/Maskow* at p. 145–146; *Sect. Comm. to Art. 35* ¶ 11]. By holding out the sample, the seller warrants that the goods will possess the same qualities. [*Id.*] Fishing’s sample of squid fell almost exclusively within 100–150 grams, and averaged 130 grams. [R. 5 ¶ 14]. In contrast, TGT’s report indicated eighty-seven percent of the 2008 catch and sixty percent of the squid examined was below 100 grams. [Cl. Exs. 2, 8, 10 ¶ 5; R. 5 ¶ 14]. Therefore, the squid did not conform to the size quality of the sample.

68. Fishing cannot in good faith argue that it did not hold out the size of the sample as a quality to which it intended to be bound. The only situation in which goods are not required to conform to the sample is when the seller explicitly indicates the goods delivered will not possess the qualities held out. [*Bianca/Bonell: Bianca* § 2.6.2 at p. 275; *Enderlien/Maskow* at pp. 145–146; *Sect. Comm. to Art. 35* ¶ 11; *Doors Case*]. Fishing never indicated the sample’s size was not a quality being held out. Further, Mr. Weeg never mentioned that the sample was unsized and the carton’s marking was equally insufficient to indicate that the sample was unsized. [R. 25 ¶ 10; *Proc. Ord.* 3 ¶ 25; see *supra* ¶ 58 for a discussion as to why the marking was insufficient to indicate that the sample was unsized]. Additionally, a minor change in wording of a contract provision from, “As per sample inspected” to “As per sample already received,” [Cl. Exs. 3–4], is not a good-faith notification that the goods will not conform to the sample. Because there was no indication the sample size was not being held out, Fishing was bound to deliver goods that conformed to the size quality.

69. Although Fishing held out a sample of squid from the 2007 Catch, [*Proc. Ord.* 3 ¶ 32], the 2008 Catch squid was also required to conform to the sample. While the parties do not have



to contractually agree on a sample to make it compulsory, [*Schlectriem/Schwenzer: Schwenzer at p. 423; see also Marble Slabs Case, holding that goods do not conform with a contract unless they possess the qualities of the goods held out to the buyer as a sample*], here, the parties did so. The Sale Confirmation stated that Fishing was obligated to deliver goods “[a]s per sample already received.” [*Cl. Ex. 4*]. Therefore, even though a portion of the squid was to come from a different catch, it was contractually required to conform to the qualities of the original sample. Because the majority of the squid did not reflect the sample qualities, Fishing breached its obligations under CISG Art. 35(2)(c).

2. The squid was not fit for its ordinary purpose under CISG Art. 35(2)(a)

70. Fishing failed to deliver goods fit for their ordinary purpose, namely squid that could be used as long-line bait. Goods must be “fit for the purposes which *goods of the same description* would ordinarily be used.” [*CISG Art. 35(2)(a), emphasis added*]. The description of the goods is to be determined according to CISG Art. 8, [*Honnold at p. 255–256; see also Bianca/Bonell: Bianca at § 2.5.1 at p. 273 noting that the purpose must be that of the goods described by the contract*], which required delivery of squid fit for long-line bait. [*Supra ¶¶ 56-62*]. As noted, the industry standard for squid for long-line fishing bait falls between 100–150 grams, and the testing results indicate that the 2008 squid did not conform to this industry standard. [*Supra ¶¶ 63, 67*]. Because the squid did not conform to the industry norm, the long-line fishers refused to purchase it. [*R. 6 ¶ 19*]. Further, CISG Art. 35(2)(a) requires foremost that goods must be able to be resold. Fishing violated CISG Art. 35(2)(a) because in supplying squid that did not conform to the industry standard, it could not be resold. [*Schlectriem/Schwenzer: Schwenzer at p. 416; Honnold at p. 255, requiring merchantability; Gillette/Ferrari at III(C), pp. 11–12, also requiring merchantability so as to avoid the “moving target” that average quality standard creates for both buyers and sellers*]. Further, the squid was non-conforming because it “yield[ed] abnormally deficient results.” [*Bianca/Bonell: Bianca § 2.5.1 at p. 273; Cl. Ex. 10 ¶ 12*]. Because the squid did not conform to goods of the same description, could not be resold, and yielded abnormally deficient results, this Tribunal should find that the squid was not fit for its ordinary purpose in violation of CISG Art. 35(2)(a).

3. The squid was not fit for its particular purpose under CISG Art. 35(2)(b)

71. Fishing did not deliver squid fit for Trawler’s particular purpose as long-line bait. Goods must be fit for “any particular purpose expressly or impliedly made known” to the seller,



provided that the buyer reasonably relied on the seller's skill and judgment. [*CISG Art. 35(2)(b)*]. This particular purpose can overlap with the ordinary purpose of the goods, as it does in this case. [*Lookofsky at p. 92*]. Here, Trawler made known that the squid needed to be fit for long-line bait, and Trawler reasonably relied on Fishing's skill and judgment.

72. Trawler made the particular purpose of the squid known to Fishing. Being made aware requires less than showing a contractual agreement. [*Enderlien/Maskow at p. 144; Schlectriem/Schwenzer: Schwenger at p. 421*]. Therefore, this Tribunal can find that Fishing was aware that squid was to be used as long-line bait because a reasonable seller could have recognized the purpose. [*Schlectriem/Schwenzer: Schwenger at p. 422; Gaillard/Savage at p. 88*]. Here, Trawler contacted Fishing to buy squid to be resold as long-line bait, Fishing delivered a sample of squid fit for that purpose, and Trawler told Fishing that the sample's size was particularly important; these fact show actual knowledge on the part of Fishing. [*R. 5 ¶¶ 11, 14–15; Cl. Exs. 1–2*].

73. The buyer must not only make known its particular purpose for the goods, but must reasonably rely on the seller's skill and judgment. [*CISG Art. 35(2)(b)*]. Although the circumstances must be ascertained case by case, of particular importance to showing reliance is the expertise of the seller. [*Bianca/Bonell: Bianca § 2.5.3 at p. 275; Schlectriem/Schwenzer: Schwenger at p. 422*]. The circumstances in this situation show that Fishing had actual knowledge of Trawler's particular purpose. First, Fishing was an experienced firm in the fish trade that knew of the importance of size of bait in regard to long-line fishing. [*Proc. Ord. 3 ¶ 26*], whereas Trawler had never purchased Danubian squid, which is the squid required by the contract. [*R. 5 ¶ 10; Cl. Ex. 4*]. Second, after contacting Fishing in its initial email about purchasing squid for long-line bait, Trawler received a sample that Fishing had supplied to one of Trawler's competitors that was fit for long-line bait. [*R. 5 ¶¶ 13–15*]. Third, after inspecting the sample, Trawler again emailed Fishing to express its satisfaction with the sample primarily because it was of the desired size for Trawler's customers. [*Cl. Ex. 2*]. Thus, in failing to deliver squid fit for Trawler's express purpose, Trawler violated the standard set forth in *CISG Art. 35(2)(b)*. Based on all of the facts and circumstances, this Tribunal should find that Fishing was an expert that induced Trawler's reasonable reliance on Fishing's skill and judgment. [*Proc. Ord. 3 ¶ 26; R. 5 ¶¶ 10, 13–15; Cl. Ex. 4*].



74. Trawler made Fishing aware of the squid's particular purpose as long-line bait, and Trawler reasonably relied on Fishing's skill and judgment. As such, this Tribunal must find Fishing failed to perform its obligations under CISG Art. 35(2)(b).

4. Fishing is not excused from liability under CISG Art. 35(3)

75. Fishing delivered goods that did not conform to the requirements of CISG Art. 35(2) and is not entitled to be excused from liability because it did not make Trawler aware of the lack of conformity. A seller is only excused from liability under CISG Art. 35(2) if it made the buyer aware of the lack of conformity at the conclusion of the contract, or if the buyer could not have been unaware of the lack of conformity at that time. [*CISG Art. 35(3)*]. However, the seller has the burden of proof, which has been described as a burden of proving "more than gross negligence." [*Schlectriem/Schwenzer: Schwenzer at p. 426; Enderlien/Maskow at p. 147; Marble Panel Case*]. To meet this burden, the lack of conformity would have to be obvious. [*Schlectriem/Schwenzer: Schwenzer at p. 426; Enderlien/Maskow at p. 148; Bianca/Bonell: Bianca § 2.8.3 at p. 278*]. The only indication the goods would not conform to the requirements of CISG Art. 35(2) is the Catch provision, which, if part of the contract, was ambiguous at best. [*Supra ¶ 60*]. Because it was ambiguous, it was not obvious and does not satisfy Fishing's burden under 35(3).

76. If this Tribunal finds that the goods were non-conforming under CISG Art. 35(1), Fishing cannot exclude liability using CISG Art. 35(3). CISG Art. 35(3) only expressly excludes liability for lack of conformity as to the requirements of CISG Art. 35(2). [*CISG Art. 35(3)*]. Scholars have argued that this exclusion of liability should not be extended to cover lack of conformity under CISG Art. 35(1). [*Schlectriem/Schwenzer: Schwenzer at p. 428; Bianca/Bonell: Bianca § 2.9.2 at p. 282; contra Enderlien/Maskow at pp. 146–147*]. Therefore, if this Tribunal finds a lack of conformity with the requirements of the contract according to CISG Art. 35(1), Fishing cannot rely on CISG Art. 35(3) to exclude liability.

II. FISHING VIOLATED CISG ART. 40, AND TRAWLER FULFILLED ITS OBLIGATIONS UNDER CISG ARTS. 38 AND 39.

77. Fishing will argue that Trawler is barred from claiming damages for non-conformity because it conducted an inadequate or untimely inspection of the goods under CISG Arts. 38 and 39. However, (A.) CISG Art. 40 prohibits Fishing from relying on examination and notice. CISG Art. 40 bars a seller from relying on Arts. 38 and 39 in situations where the seller knew or



could not have been unaware of the goods' non-conformity. Regardless of whether this Tribunal finds CISG Art. 40 applicable, Trawler is not barred from recovering damages for non-conformity because it fully performed its obligations as required by CISG Arts 38 and 39. **(B.)** Trawler conducted a proper examination of the squid ad required by CISG Art. 38, and **(C.)** Trawler gave Fishing sufficient and timely notice as required by CISG Art. 39. As such, Trawler is not precluded from claiming damages stemming from Fishing's delivery of non-conforming squid.

A. CISG Art. 40 Prohibits Fishing From Relying on Examination and Notice

78. CISG Art. 40 provides that the seller forfeits his right to rely on CISG Arts. 38 and 39 "if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." In essence, CISG Art. 40 is a codification of the general principles underlying the CISG, including the principles of good faith and fair dealing. [*See Lookofsky at ¶ 196; Kuoppala at § 2.4.3.3; and 4,000 Ton Rail Press Case*]. Article 40 is colloquially referred to as the "bad actor" provision, and is generally regarded as a "safety valve" that supersedes a buyer's notification requirement where the seller is or could not have been unaware of the non-conformity. [*See Lookofsky at ¶ 196; Garro at p. 253; Morrissey/Graves at pp. 212–213*]. The rationale is that in such situations, the seller has no reasonable basis for requiring the buyer to notify him. [*See Bianca/Bonell: Sono § 2.1 at pp. 314–315*]. In this situation, Fishing knowingly delivered non-conforming, undersized squid, and, therefore, is prohibited by CISG Art. 40 from arguing that Trawler did not conduct a proper examination or give notice because Fishing did not disclose the non-conformity.

79. Fishing was aware that the squid it delivered was non-conforming. Where a seller fails to disclose a non-conformity, the seller loses its right to rely on CISG Arts. 38 and 39. [*CISG Art. 40*]. The standard to establish the seller's knowledge of non-conformity is "a conscious disregard of facts that meet the eyes" and that are relevant to the non-conformity. [*Huber/Mullis at p.165*]. Here, Fishing knew that Trawler needed squid it could resell as long-line bait, [*Supra ¶ 56*], and knew that long-line bait needed to fall within 100–150 grams. [*R. 5 ¶ 14; Proc. Ord. 3 ¶ 26*]. Fishing was aware the squid it was delivering did not fall within this range, as evidenced by its response to TGT's report. [*Cl. Ex. 9*]. As such, Fishing disregarded these facts by delivering undersized squid that could not be used as long-line bait, and cannot in good faith claim it was unaware the squid would not meet Trawler's intended purpose.



80. Fishing delivered squid that it knew would not meet Trawler’s intended purpose; such an act triggers the application of CISG Art. 40. The principles underlying the applicability of CISG Art. 40 are illustrated in the *Wine Case*, in which the court held that a seller who sold wine diluted with nine percent water was prohibited from relying on CISG Arts. 38 and 39 because the seller could not have been unaware of the non-conformity under CISG Art. 40, namely that wine with a diluted content would not be suitable for resale). [*See Wine Case*]. As such, the addition of the water amounted to willful deceit in violation of the principles of good faith and fair dealing. [*Id.*] Similarly, Fishing delivered squid that it knew would not conform to Trawler’s intended purpose for resale as long-line bait. [*Proc. Ord. 3 ¶ 26*]. By delivering non-conforming goods, Fishing breached the contract and acted without regard to the principles embodied in both CISG Arts. 40 and 7, which emphasize good faith and fair dealing in international trade.

81. There is other evidence of Fishing’s violation of the principles of good faith and fair dealing. Trawler repeatedly made its intention to purchase squid for resell to long-line bait known to Fishing prior to the conclusion of the contract: first in the initial email, then in the inspection of Mr. Weeg’s sample, and again in the email attached to Trawler’s Order Form. [*Supra ¶ 56*]. Further, when Trawler notified Fishing the squid did not meet industry standards, Fishing altogether refused to acknowledge its errors and cure the non-conformity. [*Cl. Ex. 9; R. 6 ¶ 23*]. Even though Fishing was aware Trawler was storing the squid at its own expense, Fishing refused to compensate Trawler. [*R. 6 ¶ 23*]. Trawler was clear in communicating its intentions, yet Fishing disregarded its obligations under the contract. Consequently, Fishing should be barred from arguing Trawler’s examination or notice was deficient when Fishing purposefully shipped goods it knew or could not have been unaware were non-conforming.

82. Alternatively, Trawler is not barred from recovery even if this Tribunal finds that Fishing was unaware of the non-conformity, Trawler conducted a proper examination and gave adequate notice; therefore, Trawler is not precluded from claiming damages resulting from the non-conformity.

B. Trawler conducted a proper examination as required by CISG Art. 38

83. Trawler’s examination met the requirements of the CISG. CISG Art. 38 explains that “the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances,” but does not specify a method of performing the examination. [*Bianca/Bonell: Bianca § 2.3 at p. 297; Kuoppala § 3.3.1*]. This tribunal must, therefore,



consider what is reasonable under the circumstances to determine if the examination is proper. [*Sect. Comm. Art. 38 ¶ 3; Bianca/Bonell: Bianca § 2.3 at p. 297; Di Matteo p. 362; Kuoppala § 3.2.4; Schlectriem/Schwenger: Schwenger at p. 451*]. (1.) Trawler's examination was reasonable within the circumstances due to the nature, packaging, and quantity of the squid. Further, (2.) conducting a larger examination would contradict the CISG general principle of minimizing waste. Thus, Trawler conducted an adequate examination within the parameters of CISG Art. 38.

1. Trawler's examination was reasonable within the circumstances due to the nature, packaging, and quantity of the squid

84. This Tribunal should consider all of the relevant circumstances in determining that Trawler's examination was sufficient. In order to determine if the examination was sufficient, this Tribunal should first consider any arrangement for which the parties have agreed, and second look to any common usages within the trade. [*Bianca/Bonell: Bianca § 2.3 at p. 297; Kuoppala § 3.3.1*]. Because there was no agreement or trade usage, this Tribunal should look to all of the relevant circumstances to determine if the buyer's examination was reasonable in the circumstances. [*Sect. Comm. to Art. 38 ¶ 3; Bianca/Bonell: Bianca § 2.3 at p. 297; Di Matteo at p. 362; Kuoppala § 3.2.4; Schlectriem/Schwenger: Schwenger at p. 451*]. Reasonableness depends upon the nature of the goods, their packaging, quantity, and all other relevant circumstances. [*Bianca/Bonell: Bianca § 2.3 at p. 297; Di Matteo at p. 362; Kuoppala § 3.2.4; Schlectriem/Schwenger: Schwenger at p. 451*]. Considering all of these circumstances, the examination was reasonable.

85. Trawler's examination was reasonable in the circumstances due to the nature of the goods. When conducting an examination of frozen goods, an adequate examination requires defrosting the goods. [*Schlectriem/Schwenger: Schwenger at p. 452; Frozen Cheese Case; Frozen Fish Case; Frozen Ribs Case*]. Fishing delivered frozen squid that Trawler subsequently thawed and examined. [*R. 5*]. Thus, Trawler conducted a proper examination in relation to the nature of the goods.

86. Trawler's examination was also reasonable in the circumstances due to the packaging of the squid. When a buyer purchases goods that are in sealed containers and plans to resell them, he is not required to open the container and examine the goods. [*Guiliano § I(D)(1)*]. Further, a distributor need not break the packaging and may rely on a third party to discover the lack of conformity. [*Kuoppala § 3.3.1; Canned Goods Case*]. Trawler buys and sells squid in bulk, and



the squid was delivered in pallets that had to be broken in order to conduct an examination. [R. 4 ¶ 8, 5 ¶ 17]. Thus, it was reasonable due to the packaging for Trawler to open only two of the twelve containers to conduct the examination.

87. Trawler’s examination was reasonable in the circumstances due to the quantity of the goods. When a seller delivers a large number of goods, the buyer need not examine every part of every good; instead, he may restrict the examination to a random, representative sample. [*Di Matteo* at p. 362; *Kuoppala* § 3.3.1; *Schlectriem/Schwenzler: Schwenzler* at p. 452]. This sample need only represent a small fraction of the whole amount. [*Schlectriem/Schwenzler: Schwenzler* at p. 452; *Lambskin Case*]. Because 200 MT of squid was delivered, Trawler was only required to choose a representative, random fraction of the goods to examine, which is exactly what it did. [R. 5 ¶ 17]. The examination, in regards to the quantity of the goods, was, therefore, reasonable in the circumstances.

88. The examined squid was representative of the squid delivered. As noted, a buyer of large quantities “may restrict the examination to representative, random tests.” [*Kuoppala* § 3.3.1]. To expedite the examination process of the 200 MT of squid, Trawler selected twenty cartons from the initial two containers delivered. [R. 5 ¶ 17; R. 26 ¶ 20; *Cl. Ex. 10* ¶ 10]. Although the cartons selected held squid from only the 2007 Catch, Trawler expected that the squid from the 2008 Catch would possess the same qualities of the 2007 squid. [*Supra* ¶ 69]. Based on this expectation, Trawler’s examination of the squid should be deemed representative.

89. Additionally, Trawler examined an adequate percentage of the squid. A buyer need only examine a few percent of the entire shipment for the exam to be reasonable. [*Schlectriem/Schwenzler: Schwenzler* at p. 452]. This percentage can be reduced to a few per thousand of goods shipped. [*Blood Infusion Devices Case*]. Trawler weighed twenty cartons to confirm that they weighed the required 10 kg, and it selected five containers for thawing and additional inspection to confirm the squid was of the proper size. [R. 5 ¶ 17]. According to the *Wine case*, in situations where the buyer has no specific grounds for suspicion, the buyer is under no obligation to conduct more than its conventional examination. [*Supra* ¶ 87]. Based on this principle, because nothing in either the parties’ communications or Trawler’s examination suggested any grounds for suspicion of inconsistency, Trawler had no reason to believe the squid would be undersized, and therefore, no reason to continue the inspection. Consequently, Trawler inspected an adequate percentage of the squid.



90. A buyer is only required to discover non-conformities that a proper examination would expose. [*Sect. Comm. to Art. 38 ¶ 3; Di Matteo at p. 362; Honnold at p. 279; Kuoppala § 3.3.1*]. Accordingly, when the buyer is unable to discover the lack of conformity through reasonable examination, he may rely on the presumed conformity and provide the seller with notice only after the non-conformity has been discovered. [*Bianca/Bonell: Sono § 2.4 at p. 308*]. Therefore, an examination may still be proper even if it fails to uncover the non-conformity. Although the examination conducted by Trawler did not reveal the non-conformity, it still conducted a proper examination. Because Trawler conducted an adequate examination, it may rely on the presumed conformity and provide Fishing with notice only after it has discovered the lack of conformity.

2. Conducting a larger examination would contradict the CISG general principle of minimizing waste

91. CISG Art. 7(2) explains that when a matter has not been clearly settled, it is to be settled in conformity with the general principles on which the CISG is based. The general principle of minimizing loss has been recognized by scholars and is indicated in the mitigation principle in CISG Art. 77 and the preservation principles in CISG Arts. 85–88. [*Honnald at p. 107; Morrissey/Graves at p. 57; Bianca/Bonell: Bonell § 2.3.2.1 at p. 79*]. UNIDROIT Principles Arts. 7.1.4 (cure by non-performance) and 7.4.8 (mitigation of harm) further explicate the principle of minimizing economic waste. Consequently, this Tribunal should consider the reasonableness of Trawler’s examination in light of the general principle of minimizing waste.

92. Had Trawler selected a larger sample of squid to examine it would have amplified economic waste, in direct opposition to the CISG principle of minimizing waste. While it was necessary for Trawler to thaw a small portion of the squid in order to conduct a reasonable examination, [*Schlectriem/Schwenzer: Schwenzer at p. 452; Frozen Cheese Case; Frozen Fish Case; Frozen Ribs Case*] the very act of thawing for examination rendered the squid unsalable, [*R. 5–6 ¶ 17*], and unusable for its contractual purposes of long-line bait; it could be used for only fishmeal. [*R. 5–6 ¶ 17*]. Thus, Trawler defrosted the portion necessary to conduct an examination without causing waste.

C. Trawler Gave Fishing Sufficient and Timely Notice as Required by CISG Art. 39

93. According to CISG Art. 39, a buyer loses its right to rely on a lack of conformity when it fails to provide the seller with notice specifying the lack of conformity within a reasonable time after the buyer discovered or ought to have discovered it. **(1.)** Trawler provided Fishing a



sufficiently specific notice, and (2.) Trawler provided Fishing a timely notice. Thus, Trawler is not precluded from receiving damages that stem from the non-conformity.

1. Trawler provided Fishing with a sufficient notice

94. The 29 July 2008 notice sufficiently described the lack of conformity. A notice is sufficient when it specifies the nature of the lack of conformity, [*CISG Art. 39(1)*], so that the seller may adequately understand the lack of conformity in order to remedy the situation and arrange for an examination of goods. [*Sect. Comm. to Art. 39 ¶ 4; Munoz § V(B)(3)(A); Bianca/Bonell: Sono § 2.3 at p. 208*]. The requirements for specifying a lack of conformity should not be overstated; the notice need only provide the seller with the information necessary to take the appropriate measures. [*Schlectriem/Schwenger: Schwenger at p. 462; see also Kuoppala § 4.3.1*]. While Fishing argues that the statement “hardly usable as bait” was insufficient to describe the non-conformity, as noted, the notice need only make the buyer aware so that he may remedy the situation and conduct his own examination. On 29 July 2008, Trawler notified Fishing that the squid was unusable as bait. [*Cl. Ex. 5*]. Consequently, Fishing requested an examination of the squid by a certified testing agency. [*Cl. Ex. 6*]. Thus, the notice sufficiently fulfilled its purpose of specifying the lack of conformity in a manner which provides the seller with an opportunity to remedy the lack of conformity and conduct its own examination of the goods.

2. Trawler provided Fishing with a timely notice

95. The 29 July 2008 notice was timely. A notice is timely when it is provided within a reasonable time after the buyer discovered or ought to have discovered the lack of conformity. [*CISG Art. 39(1)*]. The notice was timely because (a.) Trawler provided notice immediately when it discovered or ought to have discovered the non-conformity. (b.) Alternatively, even if Trawler should have discovered the non-conformity during the initial examination, the notice was timely.

a. Trawler provided Fishing with notice immediately when it discovered or ought to have discovered the non-conformity

96. As a general matter, a reasonable time for providing notice of a non-conformity must be divided into two periods: the period for examining the goods and the period for providing notice. [*CISG Ad. Co. Op. No. 2 Art. 39 ¶ 2; Schlectriem/Schwenger: Schwenger at p. 466*]. Thus, the



relevant period of time to consider whether a notice is timely begins at the close of the period when the buyer discovered or ought to have discovered the non-conformity.

97. Trawler provided Fishing with notice the very day that it discovered or ought to have discovered the non-conformity. [*Cl. Ex. 5; R. 6 ¶ 18*]. While the period of reasonable time for notice depends upon all the circumstances, notice that is received the very day that the buyer discovered or ought to have discovered the defect is reasonable. [*CISG Ad. Co. Op. No. 2 Art. 39 ¶ 3; Software Case; Jasmine Aldehyde Case, finding notice one day after discovery was timely*]. Further, notice given as late as three months after the goods were delivered was timely. [*Frozen Stockfish Case, allowing one month for examination and two months for notice*]. Trawler received notice from its customers on 29 July 2008 that the squid was unusable for long-line bait. [*R. 6 ¶ 18*]. Trawler, sent an e-mail to Fishing the same day indicating the squid was non-conforming. [*Cl. Ex. 5; R. 6 ¶ 18*]. Thus Trawler provided Fishing with a timely notice.

b. Alternatively, even if Trawler should have discovered the non-conformity in the initial examination, the notice was timely

98. As noted, a reasonable time for providing notice of the non-conformity begins at the close of the period when the buyer discovered or ought to have discovered the lack of conformity. [*CISG Ad. Co. Op. No. 2 Art. 39 ¶ 2; Schlectriem/Schwenzer: Schwenzer at p. 466*]. No definite period for providing notice has been established. [*CISG Ad. Co. Op. No. 2 Art. 39 ¶ 3, Schlectriem/Schwenzer: Schwenzer at p 466; Bianca/Bonell: Sono § 2.4 at p. 308*]. However, numerous tribunals have adopted the standard of the “noble month”—which promotes international uniformity as required by CISG Art. 7(1)—by allowing buyers to provide notice of a non-conformity within a month of examination. [*New Zealand Mussels Case; Machine for Producing Hygienic Tissues Case; Blood Infusion Devices Case*]. This Tribunal has within its discretion to promote this standard, which would both provide buyers and sellers with predictability in determining when the notice is due and advance a uniform application of the rule. [*Andersen § VI(2) n. 1*]. Consequently, this Tribunal should consider the “noble month” standard in determining the period for timely notice.

99. Trawler’s notice was timely because it provided Fishing with notice less than one month after the initial examination of the squid. Notice provided within one month is reasonable. [*New Zealand Mussels Case; Machine for Producing Hygienic Tissues Case; Blood Infusion Devices Case*]. The squid was delivered on 1 July 2008. [*R. 5 ¶ 17; Cl. Ex. 10 ¶ 9*]. Trawler conducted



the examination, found that the squid conformed to the contractual size specifications, and began distributing the squid to its customers. [*R. 5 ¶ 17; 6 ¶ 18; Cl. Ex. 10 ¶ 10–11*]. On 29 July 2009—twenty-nine days later—Trawler notified Fishing of the non-conformity. [*Cl. Ex. 5; R. 6 ¶ 18*]. Trawler, therefore, provided a timely notice within the “noble month” range even if this Tribunal finds that the original examination should have revealed the lack of conformity. Thus, Trawler fulfilled its requirements of notice under CISG Art. 39 in addition to fulfilling the requirements of examination under CISG Art. 38.

REQUEST FOR RELIEF

For the foregoing reasons, Trawler respectfully requests this Tribunal find that:

- (1) The Tribunal was properly constituted in accordance with the parties’ agreement and may therefore render an enforceable award;
- (2) Trawler is not liable for any damages to Fishing because the Milan Rules did not impose a confidentiality obligation on Trawler nor did Trawler breach confidentiality;
- (3) Trawler is entitled to damages in the amount of USD 479,450 resulting from Fishing’s failure to deliver squid that conformed to the contractual specifications; and
- (4) Trawler fulfilled its obligations of examination and notice and is therefore not precluded from claiming damages.

20 November 2010: (signed)

/S/ Cristina Cambo /S/ Katelyn Desrosiers /S/ Jacob Hanson

/S/ William Hurter /S/ Christina Unkel