SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31st MARCH TO 7th APRIL 2019

MEMORANDUM FOR RESPONDENT

OF

KOBE UNIVERSITY SCHOOL OF LAW

CDAMS

On Behalf of:	***Against:***
Black Beauty Equestrian	**Phar Lap Allevamento**
2 Seabiscuit Drive,	Rue Frankel 1,
Oceanside, Equatoriana	Capital City, Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSEL

Stefan Kranfeld / Kosit Prasitveroj / Kazuki Akamatsu / Tungalag Tsagaantsooj Sooksun Popun-ngarm / Racquel H. Nacino / Arslan Charyyev / Waka Yamasu / Mai Yagi / Suzuko Tateyama / Takumi Ishizuka / Mikiko Yokoyama / Hiyori Jinno / Takuto Ejiri / Cai Hanrui / Yushi Yamanaka / Taichi Yasuoka / Kaigo Nakamura

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LIST OF ABBREVIATIONS

%	percent
¶	paragraph
ANoA	Answer to the Notice of Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
DDP	Incoterm Delivered Duty Paid
e.g.	for example
Exh.C	Claimant's Exhibit
Exh.R	Respondent's Exhibit
FSSA	Frozen Semen Sales Agreement dated 6 May 2017 between Phar Lap Allevamento (CLAIMANT) and Black d Black Beauty Equestrian (RESPONDENT)
HKIAC	The Hong Kong International Arbitration Centre
HKIAC Rules (2010)	The Hong Kong International Arbitration Centre Rules 2010
HKIAC Rules (2018)	The Hong Kong International Arbitration Centre Rules 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration

Letter by Fasttrack	Letter by Julia Clara Fasttrack
Letter by Langweiler	Letter by Joseph Langweiler
NO.	number/ numbers
NoA	Notice of Arbitration
p.	page/ pages
Parties	CLAIMANT and RESPONDENT
PO1	Procedural Order No.1
PO2	Procedural Order No.2
Record	THE PROBLEM
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
US$	United States Dollar
v.	v*ersus* (against)

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STATEMENT OF FACTS

PHAR LAP ALLEVAMENTO ("CLAIMANT") is a famous award-winning racehorse breeder in Mediterraneo's Capital City. It owns Mediterraneo's oldest stud farm with and 300 horses, which also includes its own herd of mares.

BLACK BEAUTY EQUESTRIAN ("RESPONDENT") is a famous mare breeder in Equatoriana. It bred several champions of international horse dressage and show jumping.

CLAIMANT and RESPONDENT may be collectively referred to as the "**Parties**".

21 March 2017	RESPONDENT sent an inquiry regarding the purchase of 100 doses of frozen semen of CLAIMANT's best racehorse, Nijinsky III ("**Product**").
24 March 2017	CLAIMANT offered the Product in several installments at US$ 99,500 per dose, subject to its general conditions of sale and certain use conditions.
28 March 2017	RESPONDENT responded to the offer, accepting the price and general terms of the CLAIMANT but rejecting the Mediterranean Law as applicable law and EXW delivery terms.
31 March 2017	CLAIMANT accepted DDP Incoterm but asked to be relieved from risks of changing health and security requirements by a hardship clause.
10 April 2017	RESPONDENT offered that the arbitration agreement should be governed by the law of the place of arbitration and not by the law of the contract.
11 April 2017	CLAIMANT partly made a counter-offer by changing the suggested place of arbitration but had not objected to RESPONDENT's offer that the law of the place of arbitration should govern the arbitration agreement.
12 April 2017	Parties' negotiators, responsible for the contract finalization, were both

	involved in a severe car accident on the way to dinner in Danubia. Neither of the Parties' main negotiators was physically capable of resuming the contract negotiation.
6 May 2017	Parties signed the Frozen Semen Sales Agreement (**"FSSA"**).
18 May 2017	RESPONDENT made its first installment payment of US$ 5,000,000 to the CLAIMANT.
20 May 2017	CLAIMANT sent its first shipment of 25 doses of the Product to RESPONDENT.
3 October 2017	CLAIMANT sent its second shipment of 25 doses of the Product to RESPONDENT.
19 December 2017	The Government of Equatoriana announced the imposition of a 30% tariff upon all agricultural goods from Mediterraneo including the Product.
20 January 2018	CLAIMANT informed RESPONDENT of the tariffs put the last shipment that was supposed to be due on 23 January 2018 on hold and requires additional negotiations to find a solution.
21 January 2018	RESPONDENT informed CLAIMANT that CLAIMANT had to bear the costs. It had no authority to agree on an adaptation.
23 January 2018	CLAIMANT sent the third and last shipment of 50 doses of semen and paid the 30% tariffs.
12 February 2018	Parties met to discuss and solve the issue of the tariffs. The negotiation, however, was not successful.
31 July 2018	CLAIMANT submitted its Notice of Arbitration (**"NoA"**) to

RESPONDENT and appointed Ms. Wantha Davis as an arbitrator.

24 August 2018 RESPONDENT filed its Answer to the Notice of Arbitration (**"ANoA"**) and appointed Dr. Francesca Dettorie as its an arbitrator.

11 September 2018 The designation of Prof. Calvin de Souza as presiding arbitrator was notified.

INTRODUCTION

1. CLAIMANT has entered into the FSSA with the RESPONDENT whereby CLAIMANT has agreed to the Product to RESPONDENT. The first two shipments were delivered in accordance with the FSSA. Before the final shipment, however, the Government of Equatoriana imposed 30% tariffs on certain selected products from Mediterraneo, including the Product. Despite such fact, CLAIMANT delivered the remaining shipment to RESPONDENT and the latter paid for the price in accordance to the FSSA.

2. Alleging that Clause 12 of the FSSA and Article 79 of the CISG contains a hardship provision, CLAIMANT is now demanding RESPONDENT to pay the amount of the additional costs of USD 1,250,000 caused by the imposition of the tariff.

3. Regarding the procedural issues, RESPONDENT submits that the Tribunal has no jurisdiction and powers to adapt contract under the Arbitration Agreement (ISSUE 1). CLAIMANT is also not entitled to submit illegally obtained evidence from outside arbitration proceedings (ISSUE 2). On the merits of the case, RESPONDENT submits that CLAIMANT is not entitled to the payment of USD 1,250,000 either pursuant to both Clause 12 of the FSSA or Article 79 of the CISG (ISSUE 3).

ISSUE 1: THE TRIBUNAL HAS NO POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

4. RESPONDENT submits that this Tribunal lacks jurisdiction and/or powers under the arbitration agreement to adapt the contract and thus, the Tribunal's jurisdiction to decide the case for mainly two reasons. Firstly, the Tribunal should decide that the law governing the arbitration agreement and its interpretation is the law of Danubia (1.1). Secondly, this Tribunal lacks jurisdiction to adapt the price because there is no express conferral of powers to adapt the contract in the arbitration agreement which is required under the law of Danubia (1.2).

1.1 The law governing the arbitration agreement and its interpretation is the law of Danubia, which is the seat of arbitration

(i) The law governing the arbitration agreement may differ from the substantive law of the contract

5. In arbitration, the question of the law governing the arbitration agreement is distinct from the question of the substantive law of the contract. Where there is no express provision with respect to the choice of law governing the arbitration agreement, the law that the parties choose to govern the substantive issues of their contract is not always the preferred law to govern the arbitration agreement.

6. Arbitration is a product of agreement between parties to resolve their disputes by arbitration whereas domestic litigation does not require such an agreement. In this sense, party autonomy with respect to the governing laws of the contract, arbitration agreement and arbitration proceedings are hallmarks of arbitration unlike in domestic litigation.

This allow the parties to decide elements of arbitration by themselves [*Sammartano at p. 323*], such as the governing laws of substantive and issues of dispute resolution procedure. This means that the parties may choose a different law for the arbitration agreement that is not the same as that for the substantive issues.

7. From another perspective, the doctrine of separability indicates the possibility that a law of an arbitration agreement may differ from that of substantive issues [*Born at p. 464*]. If the parties have not agreed on the law to govern the arbitration agreement, the law of the seat of arbitration applies to the issue of the validity of the arbitration agreement [*Redfern and Hunter, p. 162; Bulgarian Foreign Trade Bank case*]. In this way, party autonomy of arbitration and the doctrine of separability reflect that an arbitration clause is separable from the other clauses in a contract.

(ii) The law of the seat of arbitration, which is Danubia, is the law governing the arbitration agreement

(a) The concept that the law of seat of arbitration is the law governing the arbitration agreement is well accepted in international arbitration

8. Where the Parties have agreed on the law applicable to the arbitration agreement neither in writing nor implicitly, the law governing the arbitration agreement should be the law of the seat of arbitration, which is Danubia in this case.

9. It is well-established practice in international arbitration that an arbitration is governed by the law of the seat of arbitration [*Born at pp. 1530-1531*]. Multiple arbitral decisions found that an arbitration agreement is governed by the law of the seat of arbitration

when parties do not expressly provide for the governing law of the arbitration agreement [*FirstLink case;* Sulamerica *case*]. The principle is reflected in Article V (a) of the New York Convention, which applies the law of the seat of arbitration to the arbitration agreement by default where parties do not agree otherwise.

10. Domestic courts commonly address questions of arbitrability in accordance with the law of the seat of arbitration despite that the parties have expressly chosen the law for the substantive issues. They also affirm that Articles II and V of the New York Convention require that the arbitrability of disputes be decided under the law of the seat of arbitration, which demonstrates the interdependence of the law of the seat and the agreement to arbitrate [*Bulbank case*].

11. Where the law of the seat and the law of the arbitration agreement are not the same, enforcement of an arbitration award is not ensured. Therefore, it is reasonable for the parties who are involved in international business to choose the law of seat to be the law governing an arbitration agreement [*FirstLink case*].

(b) The seat of arbitration is not just a venue for hearings

12. The seat of arbitration does not merely mean the place of hearing but is regarded as the legal place of arbitration [*McDonnell case*]. Even if the location of the hearing is changed for convenience, the seat of arbitration as a legal place of arbitration remains the same. This concept is provided in Article 20 (2) of the UNCITRAL Model Law, which is adapted as the arbitration law of Mediterraneo, Equatoriana and Danubia, and most arbitration rules [e.g. Article 18(2) of the ICC Rules 2017; Article 16.2 of the LCIA Rules 2014; Article 18(2) of the SIAC Rules 2016].

13. In the present case, CLAIMANT agreed on Danubia as the seat of arbitration, considering not only neutrality of the place but also its arbitration law demonstrating further the link between the law of the seat and the agreement to arbitrate [PO2 at ¶14].

14. For these reasons, the law of the seat of arbitration should be the law governing the arbitration agreement if there is no express and implied agreement on the latter.

(iii) There is neither an express choice of law in the arbitration agreement nor is there an implied choice of law

15. CLAIMANT applies a three-step test in determining the law governing the arbitration agreement [CLAIMANT MEMORANDUM at ¶16]. The three-step test considers (1) the express choice; (2) the implied choice; (3) and the closest and most real connection [*Sulamérica case; BCY v BCZ case*]. Whereas this approach was taken in several arbitrations, it is not a general rule which specifies how arbitrators should ascertain the law governing an arbitration agreement [*LLA's Committee at p. 13*]. In addition, the Tribunal does not have to follow the approach since it was established at common law and does not apply by virtue of the applicable laws in this case. However, even if the Tribunal were to apply the three-step test, there is neither an express choice nor implied choice by the Parties. The FSSA does not include any express provision as to the law governing the arbitration agreement. Moreover, the Parties' implied choice is ambiguous from the wording of Clauses 14 and 15 of the FSSA (a) and the Parties' negotiations (b).

(a) The text of Clause 14 of the FSSA was limited to substantive issues of the FSSA and not meant to extend to the arbitration agreement

16. A careful reading of the Clauses 14 and 15 shows that the parties never agreed to have the arbitration agreement governed by the law of the contract.

17. While Clause 14 of the FSSA explicitly mentions the law of Mediterraneo, there is no basis to conclude that it is also the choice of law governing the arbitration agreement and its interpretation. The clause reads: *"[t]his Sales Agreement shall be governed by the law of Mediterraneo..."* As such, Mediterraneo law is merely the determining law applicable for the main contract, namely the "Sales" part of the FSSA. It does not refer to the arbitration agreement in Clause 15.

(b) The Parties did not impliedly choose the law of Mediterraneo to govern the Arbitration Agreement

18. Through their negotiation regarding the applicable laws, the Parties sought a neutral law to the arbitration agreement. The first draft of the arbitration agreement offered by RESPONDENT includes the express choice of law of Equatoriana, where RESPONDENT's business is located [Exh.R1]. However, CLAIMANT rejected RESPONDENT's offer and made a counter-offer because its Creditors Committee would only agree on arbitration in a neutral country. On this basis, Ms. Napravnik suggested in her email of 11 April 2017 that Danubia be the place of arbitration as a neutral venue whose law is a largely verbatim adoption of the UNCITRAL Model Law. [Exh.R2; PO2 at ¶14]. Regrettably, this provision was accidentally dropped from the final draft of the FSSA.

19. For matters of procedure, the parties thus sought to assure the application of a legal regime independent of the Parties. RESPONDENT's agreement to Mediterraneo law, the home law of CLAIMANT, as the law governing substance was a compromise by the RESPONDENT. RESPONDENT would not also have agreed to have CLAIMANT's home law apply to matters of procedure by application to the arbitration agreement as this would have given the CLAIMANT's home law a central position in matters of both substance and procedure.

(iv) The tribunal cannot rely on the general conflict of laws rule to determine the law of arbitration agreement

20. A verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts is the general conflict of laws rule for contracts in Danubia and Mediterraneo [PO2. at ¶43]. However, the Hague Principles do not address the law governing arbitration agreements [Article 1(3)(b) of the Hague Principles]. The reason is that different views exist on the characterization of questions arising out of arbitration agreements. In some States, these questions are considered procedural and are therefore governed by the *lex fori* or *lex arbitri*. In other States, these questions are characterized as substantive issues to be governed by the law applicable to the arbitration or choice of court agreement itself. The Principles do not take a stance among these different views. Rather, Article 1(3) *b)* excludes these issues from the scope of the Principles [Article 1.25 of the Commentary of the Hague Principles]. Therefore, the tribunal must rely on rules or doctrines outside of the general conflict of laws rule outside of the Hague Principles.

1.2 The contract cannot be adapted because there is no express empowerment of adaption as required by Danubian law

(i) There is no express conferral of powers to adapt the contract in its wording

21. According to Article 28 (3) of Danubian arbitration law, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of such powers is required [PO2. at ¶36]. In addition, Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule" which means that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [ANoA at ¶16].

22. In accordance with this rule, the plain wording of the FSSA does not bestow the power to adapt on the tribunal.

(ii) CLAIMANT is seeking a payment which needs an express authorization

23. In its submission, CLAIMANT asserts that it was generally agreed by Model Law Working Party that an express authorization is only required where a tribunal is requested to rewrite one or more terms of the contract. Moreover, CLAIMANT asserts that its request for adaption reflects increased remuneration only, so the tribunal has the power to adapt the FSSA without authorization expressed by the Parties. This confuses the issue because CLAIMANT is not claiming the originally-agreed contractual remuneration which has been undisputedly paid by RESPONDENT. What CLAIMANT is requesting is a payment of the tariffs that were imposed by Equatoriana. In order to grant this remedy, the tribunal would need to rewrite one or more terms of the contract and thus express authorization would be required.

CONCLUSION OF ISSUE 1

24. RESPONDENT submits that the law of Danubia is the applicable law governing the arbitration agreement. Since an express authorization to adapt the FSSA is required under the law of Danubia and the parties failed to include such conferral of power in their FSSA, the tribunal has no jurisdiction and/or power to adapt the FSSA.

ISSUE 2:EVIDENCE SOUGHT TO BE SUBMITTED BY CLAIMANT, INCLUDING AN ARBITRAL AWARD AND SUBMISSIONS, ARE INADMISSIBLE

2.1 The evidence sought to be submitted by CLAIMANT is irrelevant and immaterial

25. Article 22.2 of HKIAC Rules (2018) provides that "[t]he arbitral tribunal shall determine the admissibility, ***relevance, materiality*** and weight of the evidence, including whether to apply strict rules of evidence" [emphasis added].

26. In this connection, Article 9 (2) (a) of IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**") provides grounds for the Tribunal to exclude evidence that lacks sufficient relevance to the case or materiality to its outcome.

27. Although the Parties do not expressly agree to adopt the IBA Rules, the Tribunal may still be guided by the IBA Rules, as they reflect international norms [*Ashford at p. 29*].

28. In order for the evidence to be admitted, CLAIMANT must show that the evidence that it seeks to introduce is both relevant to this case and material to its outcome. In this regard, the award and submissions from an independent and unrelated arbitration ("**Arbitration 2**") cannot be admitted as evidence in this proceeding since they are neither relevant nor material to the outcome of this case.

(i) The evidence submitted by CLAIMANT is irrelevant

29. Evidence is relevant if it reasonably tends to prove or disprove "*the fact at issue* or *facts closely related to the point at issue"* [*Scheinman at p.15*].

30. RESPONDENT submits that neither the award nor submissions from Arbitration 2 can prove the fact at issue or closely related issues in this case. This is because the award and submissions from the Arbitration 2 contains significant difference from that of this case as developed below.

31. In Arbitration 2, the law of Mediterraneo was applied to the arbitration agreement [PO2. at ¶39]. On this basis, the tribunal affirmed its jurisdiction since the law of Mediterraneo provides for a broad interpretative power of arbitration agreements irrespective of the allegedly narrow wording *"dispute(s) arising out of this contract"* in the underlying arbitration agreement [NoA at ¶16]. However, by contrast, the law applicable to the Arbitration Agreement is the law of Danubia, [Exh.C5], which recognizes that arbitrators may adapt contracts only if they are granted express empowerment to adapt [ANoA at ¶13]. The FSSA does not include such an express conferral of powers [ANoA ¶13]. The award and submissions from the Arbitration 2 thus cannot assist the Tribunal to deciding its jurisdiction in this case and is thus irreverent.

32. Moreover, the tariff threshold in Arbitration 2 is by itself irrelevant to the determination of hardship in this case. CLAIMANT alleges it is contradictory that in Arbitration 2, an additional tariff of 25% was sufficient to justify a request for adaptation while an even less-predictable retaliatory tariff of 30% does not justify an adaptation in the instant case [Record at p.50]. However, the numerical percentage of a tariff by itself is

irrelevant since hardship will depend on the various additional circumstances including the assumption of risks between parties to a contract. In this case, the Parties agreed to apply Incoterms to allocate the risk of tariff to CLAIMANT. On this basis, a difference in tariff percentages between the arbitrations is has no relevance to the resolution of this case.

(ii) The evidence CLAIMANT seeks to admit is immaterial

33. Materiality refers to the impact that a piece of evidence will have on the outcome of a case. [*Redfern and Hunter at p. 393*]. RESPONDENT submits that neither the award nor submissions from Arbitration 2 has any impact on the outcome of a case for the following reasons.

34. Firstly, in contrast to the judicial doctrine of stare decisis, an arbitrator's award or analysis is an award is not binding on a future tribunal, even where the facts and the law of the two cases are essentially the same [*Howan at p.62*]. Instead, a tribunal must exercise independent and impartial judgment in each case [*Howan at p.62*].

35. Secondly, CLAIMANT's evidence cannot assist in determining the truth of a fact at issue that is dispositive to this case [*Tennille at p.12*] because there are significant factual differences between the instant case and Arbitration 2. The parties, commercial transaction, applicable laws and contractual provisions are all different. Trying to derive common factual elements in these circumstances would only complicate these proceedings without assisting this tribunal.

2.2 Introducing the evidence submitted by CLAIMANT would increase costs and time to resolution of this dispute

36. The amendments introduced by HKIAC Rules (2018) improve user friendliness, efficiency, and reflect international best practice [*Paul Teo and Philipp Hanusch*]. There were three key objectives behind the amendments in essence: time and cost saving measures, efficiency in complex arbitrations and relevance to developments in international arbitration [*Kwan, Ng and Tang*]. Article 13.5 of HKIAC Rules (2018) provides, "[t]he arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration." This provision was included for the first time in HKIAC Rules (2018) to serve the important function of assuring efficiency in arbitral proceedings, a longstanding concern of the international arbitration community.

37. This principle is further enshrined in Article 9 (2) (g) of the IBA Rules, according to which the Tribunal shall exclude from evidence that is against the procedural economy, as well as commentary [*O'Malley at p.315*].

38. Should the award or submissions from the Arbitration 2 be admitted, RESPONDENT would be obligated to comment on the evidence and likely adduce evidence in response. This could involve costly disclosure of documents, complicated by confidentiality concerns, and possibly witness testimony. CLAIMANT has also suggested that the respondent from Arbitration 2 may need to be joined to these proceedings by application of Articles 27 and 28 of HKIAC Rules (2018) [Record at p.50]. If this were permitted,

it would add significant costs and time to resolution in these proceeding without no benefit to the outcome of this case for the reasons explained above.

2.3 Illegally-obtained evidence must not be admitted in these proceedings

(i) The admission of illegally-obtained evidence would be unfair

39. Article 13. 5 of HKIAC Rules (2018) obligates tribunals and parties to conduct arbitral proceedings fairly. This principle is also enshrined in Article 9 (2) (g) of the IBA Rules, which empowers tribunals to exclude evidence based on considerations of fairness. By extension, commentators recognize fairness to be part of a broader duty of good faith including the "obligation to act with fairness, reasonableness, and decency in the formation and performance" of arbitration agreements [*Kotuby and Sobota at p.90-91; see also Born at p.1254]*.

40. These principles are also well-established in arbitral practice. In [*Methanex v. United States of America case*], documents obtained by a trespasser on private property were declared inadmissible because it was considered that the party acted with reckless disregard even though the party did not intend to violate the law. The tribunal stated that "the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness".

41. For the foregoing reasons, the tribunal should deny the admissibility of the evidence because it was obtained by hacking RESPONDENT's computer illegally, which is

contrary to the principles of good faith and procedural fairness. Even if CLAIMANT were to claim that it was not directly involved with the illegal hacking, CLAIMANT is aware that the evidence it seeks to introduce was obtained illegally, which meets the "reckless disregard" standard in Methanex v. United States of America and otherwise violates general notions of fairness.

42. Moreover, CLAIMANT seeks to acquire the "Partial Interim Award" against payment of 1000 USD from a company which provides intelligence on the horseracing industry. The company has a "doubtful reputation as to where it gets its information" and has refused to disclose its sources [PO2 at ¶41]. This suggests that CLAIMANT bought the evidence, despite its knowledge of the bad reputation of the company. This behavior demonstrates a separate affront to the principles of good faith and procedural fairness.

(ii) If the illegally obtained-evidence is admitted, the award in this arbitration will be endangered

43. Under Article V (2) (b) of New York Convention, enforcement of an arbitral award may be refused if it would be contrary to the public policy of the country where the award is being enforced.

44. Several jurisdictions justifiably exclude illegally-obtained evidence from court proceedings e.g. Article 16.77, Section 138 (1) of Uniform Evidence Law in Australia. If the tribunal were to admit illegally-attained evidence, the award in this arbitration could be endangered, which would undermine the imperative that "[t]he ultimate purpose of an arbitration tribunal is to render an enforceable award" [*Jan at pp.114-145*].

CONCLUSION OF ISSUE 2

45. In conclusion, the evidence put forward by CLAIMANT is inadmissible because it is irreverent, immaterial, contrary to procedural economy and contrary to procedural fairness, and the Tribunal should exclude it on these bases.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE EITHER UNDER CLAUSE 12 OF THE CONTRACT OR UNDER ARTICLE 79 THE CISG

3.1 CLAIMANT is not entitled to payment of USD 1,250,000 pursuant to Clause 12 of the FSSA

46. CLAIMANT alleged that it was entitled to receive the payment of USD 1,250,000 as a result of hardship pursuant Clause 12 of the FSSA. These allegations are ill founded for two reasons. First, CLAIMANT and RESPONDENT did not intend to include tariff imposition as a hardship event under Clause 12 of the FSSA **(i)**. Second, even if the Tribunal finds that a change in tariff is a matter covered by Clause 12 of the FSSA, the tariff imposed by the Government of Equatoriana did not constitute hardship **(ii)**.

(i) CLAIMANT and RESPONDENT did not intend to include tariff imposition as a hardship event under Clause 12 of the FSSA

47. CLAIMANT alleges that tariff imposition constituted a hardship event under Clause 12 of the FSSA and used such allegation as a basis for claiming the payment of USD 1,250,000 from RESPONDENT. However, RESPONDENT submits that it was not the intention of the Parties that tariff imposition could be raised as grounds for invoking

hardship under Clause 12 of the FSSA. This is because CLAIMANT has agreed to assume the risk of tariff imposition by incorporating the DDP Incoterm into the FSSA **(a)** and tariff imposition is not a matter covered by Clause 12 of the FSSA **(b)**.

(a) CLAIMANT has agreed to assume the risk of tariff imposition by incorporating the DDP Incoterm into the FSSA

48. Contracting parties are free to define their respective spheres of risk in their contracts [*Steel Ropes Case*]. The parties may assume the risk for their contractual performance or, alternatively, exclude certain risks. If one of the parties agrees to assume a certain risk, the consequence is that the party agrees to bear such risk completely. As a result, the risk can no longer be raised as grounds for invoking hardship unless otherwise agreed by the parties [*CISG AC, Comment ¶39; Brunner at p. 147-148]*. To determine whether the parties have assumed the risk of the consequence of changed circumstances, it is necessary to examine the contract entered into by the parties.

49. Risk allocation was one of the biggest concerns between CLAIMANT and RESPONDENT during the negotiation of the FSSA. They had devoted considerable time to negotiate their risk allocation and eventually reached the agreement where they expressly agreed to allocate their risks associated with export-import activities of the Products by incorporating DDP Incoterm into Clause 8 of the FSSA. Equally, CLAIMANT and RESPONDENT specifically agreed to exclude the risk of additional health and safety requirements from the CLAIMANT's performance of contract as evident by Clause 12 on the FSSA, as a result of which CLAIMANT assumed all other risks associated with exporting and importing the Product under the DDP Incoterms,

including tariff imposition, beyond health and safety requirements exclusion.

50. Incoterms are standard sets of trading terms and conditions designed to assist the parties in conducting international trade transactions in determining how costs and risks are allocated between them. Incoterms are the authoritative text for two key points of international trade transactions: (i) the allocation of obligations between the seller and the buyer in connection with their trade activities; and (ii) the point of delivery at which risks transfer from the seller to the buyer. By agreeing on Incoterms and incorporating them into a sales contract, parties can achieve a precise understanding of what each party is obliged to do and where responsibility lies in event of loss, damage or other mishaps.

51. Due to the CLAIMANT's much greater expertise in dealing with export and import of frozen semen than RESPONDENT [Exh.C3], CLAIMANT agreed to accept RESPONDENT's request for Incoterm DDP as evidenced in the CLAIMANT's e-mail of 31 March 2017 [Exh.C4]. As a result, the DDP Incoterm were incorporated into Clause 8 of the FSSA and applied to all activities of selling the Product. According to the ICC Incoterm Rules 2010, Delivered Duty Paid (DDP) means: *"[t]he seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport, ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities."*

52. By incorporating the DDP Incoterm into the FSSA, CLAIMANT had deviated from its ordinary course of business of delivering products on EXW Incoterm according to its standard contract [Exh.C2]. According to the ICC Incoterm Rules 2010, Ex Works (EXW) means: *"[t]he seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable."*

53. The negotiations between the Parties and the fact that CLAIMANT agreed to change its normal practice of delivery clearly illustrate the CLAIMANT's intention to be bound by the terms and conditions of DDP Incoterm, and the new allocation of risks associated with the sale activities as a result of the change of Incoterm from EXW to DDP.

54. DDP Incoterm puts the maximum risk and responsibility on CLAIMANT, as a seller. It is the only Incoterm that requires the seller to take responsibility for import clearance and tariff payment. By agreeing on the DDP Incoterm, CLAIMANT was obliged to clear the Product and pay tariffs for both export and import, and to execute all customs formalities. CLAIMANT also agreed to bear all the costs and risks involved in bringing the Product to the place of destination, i.e. Seabiscuit Drive, Oceanside, Equatoriana.

55. CLAIMANT, who had experience of DDP Incoterm sale agreement [PO2 ¶21], was well aware of such increased risk associated with exporting and importing the Product under the FSSA as a result of changing the Incoterm from EXW to DDP. This is evident by the CLAIMANT's demand for the Product price adjustment to reflect the increased risks to be assumed by CLAIMANT as shown in its letter of 31 March 2017 [Exh.C4],

which reads: *"[g]iven the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose."*

56. Despite that the new price of the Product proposed by CLAIMANT was almost 10% more expensive than the original price, RESPONDENT accepted the increase to cover the higher risk of selling and delivering the Product assumed by CLAIMANT. This is a simple rationale behind all price negotiation: CLAIMANT, as a seller, proposed a higher price that can cover the increased risks assumed by it while RESPONDENT, as a buyer, agreed to pay more as it did not desire to assume the risk.

57. In light of the above, RESPONDENT submits that by agreeing to the DDP Incoterm and adjusting the price on this basis, the Parties have agreed that CLAIMANT will assume the risk of tariff imposition under the FSSA and have shown confirmed their common intention to this agreement. Therefore, the tariff imposition cannot be invoked by CLAIMANT as a hardship.

(b) Tariff imposition is not a matter covered by Clause 12 of the FSSA

58. As developed above, by agreeing to the DDP Incoterm in the FSSA, CLAIMANT has agreed to assume all risks involved in delivering the Product to the place of destination, including paying tariffs and carrying out all customs formalities. This result is not changed by the inclusion of the limit hardship provision in Clause 12 in the FSSA.

59. Clause 12 of the FSSA does not mention tariff imposition or other risks involving the Product delivery as hardship events. The language of Clause 12 includes additional health and safety requirements but does not include customs regulation or import restrictions, reflecting the intention of the Parties to narrow the applicability of the

hardship provision to the additional health and safety requirements alone. This intention of the Parties is also evidenced by negotiations between the Parties to conclude Clause 12.

60. In accepting the RESPONDENT's offer to include the DDP Incoterm in the FSSA [Exh.C3], CLAIMANT, in its email of 31 March 2017 [Exh.C4], made a reservation that it would not assume the risk of change in delivery terms, in particular the changes in customs regulation or import restrictions, *as:"[f]urthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions."*

61. RESPONDENT then elaborated on the phrase 'changes in customs regulation or import restrictions' in the next sentence of the email as 'unforeseeable additional health and safety requirements' and concluded that a hardship clause should be included into the FSSA to deal with such event, as:*"[a]s we both know from past experiences unforeseeable additional health and safety requirements may take highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At minimum, a hardship clause should be included into the FSSA to address such subsequent changes."*

62. If the Parties intended that the scope of hardship provisions cover all risks associated with the export-import of the Product, they would simply have opted for the phrase 'changes in customs regulation or import restrictions' which is broad enough to cover all risks associated with export and import activities. Instead and in response to the

specific concern of the CLAIMANT, the Parties agreed to limit the hardship provision in Clause 12 to additional health and safety requirements.

63. The intention of the Parties to narrow the scope of the risk of changing in customs regulation or import restrictions to additional health and safety requirements also corresponds with the fact that the Parties agreed to use DDP Incoterm in the FSSA. If the hardship provisions in Clause 12 of the FSSA were meant to apply to all risks associated with the changes in customs regulation or import restrictions, this would render the allocation of risks between the Parties under the DDP rules meaningless.

64. The intention of the Parties to narrow the scope of risk of changes in customs regulation or import restrictions also corresponds with the Parties' decision not to adopt the ICC-Hardship Clause into the FSSA as they considered that the scope was too broad for the purposes of this FSSA and the objectives pursued [PO2 ¶12]. As a result, the Parties agreed to a hardship provision limited to specific risks as in Clause 12 of the FSSA.

65. Since other risks associated with changes in customs regulation or import restrictions have been carved out by the Parties, the term 'or comparable unforeseen events making the FSSA more onerous' does not cover tariff imposition and other customs regulation or import restriction matters.

(ii) Tariff imposition by the Government of Equatoriana did not constitute hardship

66. Clause 12 of the FSSA requires that events constituting hardship must be '*unforeseen events making the FSSA more onerous*'. Accordingly, even if the Tribunal were to find that tariff imposition is a matter covered by hardship provisions in Clause 12 of the

FSSA, the tariff imposed by the Government of Equatoriana in this case did not constitute hardship in accordance with Clause 12 of the FSSA because it was foreseeable for CLAIMANT when concluding the FSSA with RESPONDENT **(a)** and it did not render the CLAIMANT's performance of FSSA more onerous **(b)**.

(a) Tariff imposition was not unforeseeable for CLAIMANT when concluding the FSSA with RESPONDENT

67. Tariff imposition cannot be understood as an unforeseen event under Clause 12 of the FSSA. CLAIMANT has been engaged in sales, including exports, of frozen semen before entering into the FSSA with RESPONDENT. Accordingly, there can be no doubt as to CLAIMANT's expertise and knowledge of export procedures and tariff payment requirements as well as risks with regard to export-import activities.

68. Moreover, CLAIMANT has first-hand experience with a change in customs regulation and import restriction. In 2014, there was a change in customs regulation and import restriction that affected CLAIMANT's sale of three mares DDP Danubia to farms in Danubia under the imposition of new health and safety requirements by the Danubian Government [PO2 ¶21]. CLAIMANT must have foreseen that a change in customs requirements could take place at any time during the term of the FSSA, especially in this case where the ban on artificial insemination for racehorses had just been temporarily lifted by the Government of Equatoriana.

69. Lastly, by agreeing to the DDP Incoterm in the FSSA, CLAIMANT acknowledged and agreed to assume risks involved in delivering the Product to the place of destination, including paying any tariff for both export and import of the Product. CLAIMANT, who

entered into the FSSA with DDP Incoterm, cannot claim unawareness of the risks of tariff change.

70. Therefore, based on the previous experience of CLAIMANT of exporting frozen semen with the change in customs requirements and recalling the DDP nature of delivery where the risks associated with customs clearance and tariff payment were assumed exclusively by CLAIMANT, its argument that the imposition of tariff was unforeseeable has no grounds and should be dismissed.

(b) Tariff imposition did not render the CLAIMANT's performance of the FSSA more onerous

71. To successfully invoke the hardship, Clause 12 of the FSSA requires that CLAIMANT provide evidence to demonstrate how tariff imposition affected the its ability to perform its contractual obligation and rendered the performance of the FSSA more onerous. To that end, CLAIMANT alleged that the imposition of 30% tariff has increased the cost of the Product and thus constituted hardship under Clause 12 of the FSSA.

72. However, in international commercial arbitration cases, cost increases of 30%, 44% and 25-50% have been considered insufficient to qualify as hardship [*Brunner at p.427*]. Specifically, in the international market, it is expected a party assumes the risk of higher price fluctuations than is usual on domestic markets and therefore only a cost increase of 150-200% can constitute hardship [*Schwenzer at p.710-711*].

73. In the event that CLAIMANT claims for a lower threshold of hardship for whatever reason, the threshold of hardship in Clause 12 of the FSSA cannot be lower than 40% of the cost increase, which was the basis for CLAIMANT to offer the inclusion of

hardship into the FSSA [Ehx.C4].

74. In light of the above, tariff imposition by the Government of Equatoriana was not unforeseeable for CLAIMANT when concluding the FSSA with RESPONDENT and it did not render the CLAIMANT's performance of contract more onerous. Hence, the tariff imposition did not constitute a hardship in accordance with Clause 12 of the FSSA.

3.2 CLAIMANT is not entitled to payment of USD 1,250,000 under Article 79 of the CISG

75. RESPONDENT submits that Article 79 of the CISG could not be used as the basis for CLAIMANT to claim for the payment of USD 1,250,000 because tariff imposition does not meet the requirements of Article 79 of the CISG **(i)**. Moreover, Article 79 of the CISG cannot be interpreted to cover hardship and contract adaptation matters **(ii)**.

(i) Tariff imposition does not meet the requirements of Article 79 of the CISG

76. Article 79(1) of the CISG provides that: *"[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to* ***an impediment*** *beyond his control and that he* ***could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the FSSA*** *or to have avoided or overcome it or its consequences"* [emphasis added].

77. RESPONDENT submits that tariff imposition does not meet the requirement of Article 79 of the CISG because it is not an impediment under Article 79 of the CISG **(a)**; CLAIMANT has agreed to assume the risk of tariff impositions **(b)**; and CLAIMANT could reasonably be expected to have taken the tariff imposition into account at the time of conclusion of the FSSA **(c)**.

(a) Tariff imposition is not an impediment under Article 79 of the CISG

78. Article 79 of the CISG uses the expression 'impediment' to mean an event that can exempt a contracting party from performing contractual obligations. Several decisions have suggested that an impediment under Article 79 requires satisfaction of something in the nature of an 'impossibility' standard [*Tomato Concentrate Case (Germany); Vital Berry Marketing NV v. Dira-Frost NV (Belgium); Iron Molybdenum Case (Germany); Nuova Fucinati S.p.A. v. Fondmetall International A.B. (Italy)*]. On basis of this interpretation, a party cannot be excused from performing the contract as long as such performance had not been made virtually impossible.

79. Whilst the tariff imposition has increased performance costs on CLAIMANT by 30%, it did not render the delivery of the Product impossible. CLAIMANT had the Product ready to deliver to RESPONDENT at the time the tariff was imposed, and performance was always physically possible even the cost of performance increased. Hence, tariff imposition is not an impediment under Article 79 of the CISG.

80. As for the cost increase, courts and arbitral tribunals do not grant relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract [*Brunne at p.428-432*]. Moreover, courts and arbitral tribunals interpreting Article 79 of the CISG have been very reluctant to allow hardship in case of fluctuations of prices [*ICC Award No. 6281; Nuova Fucinati S.p.A. v. Fondmetall International A.B. (Italy)*]. Decisions dealing with hardship under Article 79 have concluded that even a price increase or decrease of more than 100% would not suffice [*Steel Ropes Case (Bulgaria); Vital Berry Marketing NV v. Dira-Frost NV*

*(Belgium),*Société Romay AG v. SARL Behr France].

81. For these reasons, tariff imposition and CLAIMANT's alleged 30% cost increase as a result of the tariff imposition cannot be considered as an impediment under Article 79 of the CISG.

(b) CLAIMANT has agreed to assume the risk of tariff imposition

82. Since CLAIMANT has agreed to assume the risk of tariff imposition by incorporating the DDP Incoterm into the FSSA, there can be no exemption under Article 79 of the CISG [*Chinese Goods Case (Germany); Vine Wax Case (Germany);Malaysia Diary Industry v. Dairex Holland (Netherlands); Vital Berry Marketing NV v. Dira-Frost NV (Belgium); Steel Ropes Case (Bulgaria);ICC Case No. 6281; Iron Molybdenum Case (Germany); Tomato Concentrate Case (Germany); ICC Case No. 8128; Flagstone Tiles Case (Germany)*]. Para 48-57 are repeated here.

(c) CLAIMANT could reasonably be expected to have taken the tariff imposition into account at the time of conclusion of the FSSA

83. Article 79(1) of the CISG requires that a party invoking an exemption under Article 79 prove that the claimed impediment could not reasonably have been taken into account at the time of the conclusion of the contract.

84. Considering the previous experience of CLAIMANT exporting frozen semen with the change in customs requirements as well as the DDP Incoterm in the FSSA by which the risks associated with customs clearance and tariff payment are entirely taken by CLAIMANT, it could reasonably have taken the tariff imposition into account at the time it concluded the FSSA with RESPONDENT. Para. 67-70 are repeated here.

(ii) Article 79 of the CISG cannot be interpreted to cover hardship and contract adaptation matters

85. CLAIMANT argues that Article 79 of the CISG can be interpreted to allow for hardship and price adaptation claims along the lines of the hardship provisions in Article 6.2.3 of the UNIDROIT Principles [NoA at P.8 ¶20]. RESPONDENT submits that the CLAIMANT's request must be denied entirely because hardship is not a matter covered by Article 79 of the CISG **(a)** and Article 6.2.3 of the UNIDROIT Principles cannot be used for interpreting Article 79 of the CISG **(b)**.

(a) Hardship is not a matter covered by Article 79 of the CISG

86. RESPONDENT submits that Article 79 of the CISG does not regulate hardship and does not provide for a legal remedy to adapt the contract by increasing the price of the Product under the FSSA for 3 reasons.

87. Firstly, Article 79 of the CISG was not intended by drafters to cover hardship. During the drafting process, a proposal was made by the Norwegian delegation to include a CISG provision on hardship. However, this proposal was rejected [*Norwegian Proposal*].

88. Secondly, there is a clear basis for distinguishing between hardship provision and Article 79 of the CISG. As observed in para. 78 above, a party could be excused from performing its obligations under Article 79 only if such performance was impossible due to an impediment. On the other hand, hardship occurs where the performance of a contract is possible, but a change in circumstances has rendered performance of such contract so much more burdensome. Hence, Article 79 of the CISG and the hardship

provision hardship do not invoke the same operative facts.

89. Thirdly, Article 79 of the CISG and the provision for hardship lead to different outcomes. According to Article 79 of the CISG, a party is not liable for damages for failure to perform its obligation if an impediment prevents performance; however, other remedies are not affected. A party is merely excused from liability for damages pursuant to Article 79(5) of the CISG: *"[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention."* In contrast, the effect of hardship, as exemplified by Article 6.2.3 of the UNIDROIT Principles, is that the underlying contract can be renegotiated, adapted or terminated. These legal consequences affect the entire contract and not just a specific remedy.

90. A clear distinction between hardship and Article 79 of the CISG is demonstrated by the possibility of adaptation of the contract. While the hardship provisions commonly allow a court or tribunal to adapt a contract, the adaptation of contract is not allowed under the CISG regime. Accordingly, the CLAIMANT's attempt to request the Tribunal to adapt the FSSA to receive the payment of USD 1,250,000 lacks a legal basis under Article 79 of the CISG.

91. Since Article 79 of the CISG and hardship provisions are triggered by different operative facts and do not provide the same functional solutions to changed circumstances, RESPONDENT submits that Article 79 of the CISG does not cover hardship matters.

(b) Article 6.2.3 of the UNIDROIT Principles cannot be used for interpreting Article 79 of the CISG

92. Article 7 of the CISG provides a method to assist with interpretation and gap filling of

the CISG. This provides a means to ensure that the CISG is applied in a uniform way so as to remove legal barriers to international trade [*CAN International v. Guangdong Kelon Electronic Holdings Case (USA)*]. In this regard, Article 7(1) of the CISG requires that provisions of the CISG have to be interpreted by taking into account its international character and the need to promote uniformity in its application. Article 7(2) of the CISG further states that for the matters governed by the CISG, gaps in the CISG have to be filled on the basis of the general principles underlying the CISG.

93. Even if the Tribunal were to find that hardship is a matter covered by Article 79 of the CISG, RESPONDENT rejects the CLAIMANT's assertion that Article 6.2.3 of the UNIDROIT Principles should be applied in this case as a tool to fill the gap of Article 79 of the CISG with regard to hardship. This is because Article 6.2.3 of the UNIDROIT Principles is not a general principle underlying Article 79 of the CISG **(aa)**; and, even if the Tribunal were to find that Article 6.2.3 of the UNIDROIT Principles can be applied to Article 79 of the CISG, the tariff imposition does not meet the requirement of hardship under Article 6.2.2 of the UNIDROIT Principles **(bb).**

(aa) Article 6.2.3 of the UNIDROIT Principles is not a general principle underlying Article 79 of the CISG

94. Article 7(2) of the CISG states that for the matters governed by the CISG gaps have to be filled in by the 'general principles' on which the CISG is based. In specifying such general principles, the Tribunal, in accordance with the basic criteria of Article 7(1), is required to avoid resorting to standards developed outside the CISG and try to find the particular solution autonomously, i.e., within the CISG itself. The principles underlying

the CISG are those principles expressly stated in the CISG such as the principle of good faith in Article 7(1) and the principle of autonomy in Article 6 [*Rosenberg, p. 451*]. The principles underlying the CISG also include the principles which can be extracted from provisions in the CISG which deals with specific issues. If it can be concluded that they express a more general principle, capable of being applied also to cases different from those specifically regulated, then they could also be used for the purposes of Article 7(2), such as the principle of reasonableness and the principle of mitigation [*Honnold, p. 155; Schlechtriem, p.38*].

95. Using the standards outside the CISG, like the UNIDROIT Principles, as general principles to interpret and fill in the gap of the CISG would undermine the autonomy and uniformity of the CISG's interpretation and application. Specifically, the UNIDROIT Principles are generally not considered to be the general principles of the CISG. This proposition is affirmed by the UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts 2013, which provide that the general principle under Article 7.2 of the CISG "*are as such not identical with the UNIDROIT Principles.*"

96. More importantly, even if the Tribunal were to find that the UNIDROIT Principles can be used to interpret and fill in the gap of the CISG, Article 6.2.3 of the UNIDROIT Principles is not a general principle where Article 79 of the CISG can be based upon. As explained in paras. 90-93 above, Article 79 of the CISG and hardship do not result from the same operative facts and do not provide same functional solutions to the issue of changes in circumstances. Hence, if the Tribunal regards hardship as a gap in the

CISG and applies Article 6.2.3 of the UNIDROIT Principles on this basis, this would result in divergent legal consequences of Article 79. Uniformity of the CISG would be jeopardized, and the aim of the Convention, as stated in Article 7(1) of the CISG, would be undermined *[Tallon at p. 594, Schlechtriem at p. 102]*.

(bb) The Tariff Imposition Does Not Meet the Requirement of Hardship under Article 6.2.2 of the UNIDROIT Principles

97. Even if the Tribunal were to find that Article 6.2.3 of the UNIDROIT Principles can be applied to Article 79 of the CISG, the tariff imposition does not meet the requirement of hardship under Article 6.2.2 of the UNIDROIT Principles for two reasons.

98. Firstly, Article 6.2.2 of the UNIDROIT Principles defines hardship as an event "*where the occurrence of events fundamentally alters the equilibrium of the contract…*" When reading Article 6.2.1 and 6.2.2 together, the UNIDROIT Principles establish the standard of hardship as an event which is not merely more onerous for a party to perform but rather the event must cause a fundamental alteration of the equilibrium of the contract.

99. In ascertaining whether an event causes a fundamental alteration of the equilibrium of the contract, the commentary to Article 6.2.2 of the UNIDROIT Principles in its first edition of 1994 suggests that if the performance is capable of precise measurement in monetary terms, an alteration amounting to 50% of more of the cost or the value of the performance is likely to amount to a fundamental alteration. Although the edition of the UNIDROIT Principles in 2016 refrains from recommending any exact figure, it is most likely that an alteration of less than 50% will not be considered as fundamental pursuant

to Article 6.2.2 of the UNIDROIT Principles *[McKendric, p. 719-720]*. On the above basis, CLAIMANT's alleged 30% cost increase as a result of the tariff imposition does not amount to a fundamental alteration of the equilibrium of the contract pursuant Article 6.2.3 of the UNIDROIT Principles.

100. Secondly, like Article 79(2), Article 6.2.2 (b) of the UNIDROIT Principles requires that a party invoking a hardship must prove that the party could not reasonably take into account the hardship event at the time of the conclusion of the contract. In this case, CLAIMANT could reasonably have taken the tariff imposition into account at the time it concluded the FSSA with RESPONDENT. Para. 67-70 are repeated here.

CONCLUSION OF ISSUE 3

101. In light of the above, CLAIMANT is not entitled to receive the payment of USD 1,250,000 pursuant Clause 12 of the FSSA, because CLAIMANT and RESPONDENT did not include tariff imposition as a hardship event under Clause 12 of the FSSA and, even if the Tribunal were to find that a change in tariff is a matter covered by hardship provisions in Clause 12 of the FSSA, the tariff imposition by the government of Equatoriana did not constitute hardship. Moreover, CLAIMANT is not entitled to receive the payment pursuant Article 79 of the CISG because tariff imposition does not meet the requirements of Article 79 of the CISG and Article 79 of the CISG cannot be interpreted to cover hardship and contract adaptation matters.

REQUEST FOR RELIEF

In light of the above, RESPONDENT requests that the Tribunal:

a. dismiss the claim as inadmissible for a lack of jurisdiction and powers;

b. reject the admission of the evidence requested by CLAIMANT;

c. reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT; and

d. order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.