SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

MARCH 31 – APRIL 07, 2019

In the matter of arbitration under the Hong Kong International Arbitration Rules, 2018

MEMORANDUM FOR RESPONDENT

ILS LAW COLLEGE

Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR RESPONDENT:

RUDHDI WALAWALKAR • ANJALI SINGH • RAINA MITRA

TVISHI PANT • LISA MISHRA

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INDEX OF ABBREVIATIONS

&	And
%	Per cent
§/§§	Section/Sections
Agreement	Frozen Semen Sales Agreement
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CISG-AC	Advisory Council for the Convention on Contracts for the International Sale of Goods
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo	CLAIMANT Memo
DDP	Delivery Duty Paid
Edn.	Edition
Ed./Eds.	Editor/Editors
Et al.	*Et alii* (and others)
Et seq.	*Et sequentes* (and that which follows)
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Administered Arbitration Rules, Hong Kong International Arbitration Centre

IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Ibidem* (Latin for "the same place")
i.e.	*Id est* (Latin for "that is")
Ltd.	Limited
No.	Number
p./pp.	Page/pages
¶/¶¶	Paragraph/Paragraphs
PO	Procedural Order
R. Ex./Exs.	RESPONDENT's Exhibit/Exhibits
UML	UNCITRAL Model Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UPICC	UNIDROIT Principles of International Commercial

	Contracts of 2010
USD	United States Dollars
v.	*Versus* (Latin for "against")

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STATEMENT OF FACTS

1. **THE PARTIES**: Phar Lap Allevamento (CLAIMANT) is a company based in Mediterraneo that operates a stud farm, and provides facilities for breeding and storage of frozen semen of champion stallions for artificial insemination. Black Beauty Equestrian (RESPONDENT) is a company based in Oceanside, Equatoriana, and is famous for its broodmare lines that have resulted in a number of internationally renowned show jumpers and dressage champions.

2. **CONTRACT FORMATION:** On March 21, 2017 RESPONDENT contacted CLAIMANT to purchase 100 doses of frozen semen of Nijinsky III, one of CLAIMANT's most sought after stallions for breeding. On March 31, 2017, CLAIMANT agreed to a delivery on DDP basis. This was done after an increase in price, transfer of certain risks to RESPONDENT, and inclusion of a hardship clause, at the CLAIMANT's request. In the meeting dated April 12, 2017, the Parties considered the inclusion of an adaptation reference in the Agreement to facilitate contractual adaptation by the arbitral tribunal. However, this contemplation did not reflect in the final Agreement, which was finalized on May 6, 2017.

3. **THE TARIFF:** Before the final shipment under the Agreement, in furtherance of their protectionist policies, the Mediterranean government announced a 25% tariff on import of agricultural products from Equatoriana, which imposed a retaliatory tariff of 30% on agricultural imports from Mediterraneo. After communicating the additional cost to RESPONDENT, CLAIMANT undertook the burden.

4. **NEGOTATIONS:** CLAIMANT complied with its delivery obligations of the third shipment along with payment of the tariff. The Parties began negotiations in light of CLAIMANT's requests for a price adjustment, which did not fructify into a compromise. Pursuant to this, CLAIMANT sent its Notice of Arbitration on July 31, 2018.

5. **CHOICE OF LAW GOVERNING THE ARBITRATION AGREEMENT:** During the negotiations following the tariff imposition, a dispute arose as to the law governing the Arbitration Agreement as Clause 15 did not contain an express choice of law. CLAIMANT sought to apply the law of the underlying contract, whereby an express empowerment

would not be required for this Tribunal to adapt the contract to provide for a price increase. RESPONDENT stated that both parties agreed to separate the Arbitration Agreement and thereby apply the law of the seat to the clause. As a consequence, the Arbitration Agreement did not empower the Hon'ble Tribunal to adapt the contract as an express reference in this respect is absent.

6. **OTHER ARBITRATION PROCEEDINGS:** On October 2, 2018, CLAIMANT informed the Tribunal about another arbitration involving a contract between RESPONDENT and a Mediterranean corporation. This other arbitration concerns a request for adaptation of terms following a tariff imposition by the state of Mediterraneo. On October 3, 2018, RESPONDENT informed CLAIMANT that the material is taken out of context and has been disclosed due to breach of confidentiality obligations or an illegal hack. However, CLAIMANT is in the process of obtaining the Partial Interim Award and the submissions from that arbitration in order to submit it as evidence. Initially, an ex-employee of the buyer in the other arbitration promised to procure the documents that CLAIMANT wants. When he failed, CLAIMANT paid 1000 USD to a company that collects intelligence in respect of the equestrian industry. This payment has been extended with full knowledge of the fact that the company has a doubtful reputation and it is unclear from where it obtains its information.

SUMMARY OF ARGUMENTS

7. *Firstly*, this Tribunal must hold that the law governing the arbitration clause is the law of Danubia. An arbitration agreement is separate from the matrix contract for purposes wider than those envisaged under Art. 16(1) of UML. Further, it is clear from the contract and the correspondence that the Parties contemplated Clause 15 of the Agreement to be distinct from the Sales Agreement. The natural inference of this separation is that the choice of law made as regards the 'Sales' part of the contract does not extend to the Arbitration Agreement. Consequently, the law of the seat chosen by both Parties governs the Arbitration Agreement, since it satisfies the closest and most real connection test. Finally, the manner in which Clause 15 has been drafted indicates that the Arbitration Agreement was intended to be narrow, and does not empower the arbitrator to adapt the terms of the contract.

8. *Secondly*, the Partial Interim Award and submissions from the other arbitration must not be admitted in evidence. The documents in question are completely irrelevant and immaterial as both arbitrations involve significantly different contracts that require independent adjudication. RESPONDENT has no obligation to make consistent pleadings in separate, private arbitrations where it is oppositely positioned due to the distinct contracts negotiated. Moreover, the evidence can only be obtained by breach of good faith obligations and by taking advantage of an unlawful act, as the initial disclosure of the material is undoubtedly illegal. Lastly, the documents should be excluded in pursuance of respecting the confidentiality of the other arbitration, which was conducted under a clear duty of non-disclosure.

9. *Lastly*, CLAIMANT is not entitled to an increase in remuneration either under Clause 12 of the Agreement or under CISG. Clause 12 restricts its applicability to particular situations of hardship, and the present tariff imposition is not covered within its scope. The 30% tariff imposition is foreseeable in nature, and does not fundamentally alter the equilibrium of the Agreement. A price fluctuation is a basic assumption in international trade, and CLAIMANT assumed the risk of a tariff by entering into a DDP agreement. CLAIMANT's financial situation cannot create a liability on RESPONDENT to alleviate its burdens. Therefore, this event does not amount to hardship for CLAIMANT. In any case, Clause 12 does not provide for adaptation by the arbitral tribunal as a remedy for

situations of hardship. Further, CLAIMANT cannot rely on Art. 79, CISG as an alternative for the purpose of price adaptation, since providing for a clause to govern situations of changed circumstances amounts to derogation from this Article. In any case, Art. 79 does not regulate situations of hardship, as the term 'impediment' provides exemption in cases of impossibility of performance and not events merely making performance onerous. CISG does not contain a gap regarding the issue of hardship, therefore no supplementation is warranted. Furthermore, adaptation is inconsistent with the remedial scheme of CISG as well as the general principles on which it is based.

ARGUMENTS

PROCEDURAL ARGUMENTS

ISSUE I: THIS TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT, AS THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA.

A. THE ARBITRATION AGREEMENT IS SEPARATE FROM THE CONTAINER CONTRACT.

10. The autonomy of an arbitration agreement is known to be one of the cornerstones of the UML [FOUCHARD & GOLDMAN, P. 212]. Even though the Parties in the present case have chosen the law governing their substantive contract, it does not necessarily follow that this law applies to the arbitration clause, since its autonomy is an obstacle to reaching such a conclusion automatically [BERNARDINI I, P. 201].

11. The doctrine of separability is a principle of arbitration law [ELF AQUITAINE] which states that the existence, validity and effectiveness of the arbitration clause must be assessed independently from the main contract [BREMER VULKAN; PREMIUM NAFTA; HARBOUR ASSURANCE; REDFERN, ¶ 2.101]. This explanation is well established, but the doctrine is not restricted to separating the arbitration clause in cases of invalidity of the main contract. It entails that the arbitration clause is free from being governed by the law chosen for the contract. Though its primary consequence is that the non-existence, invalidity, illegality or termination of the contract need not necessarily negate the agreement to arbitrate within it [RUSSELL, ¶ 2-009]. Differences exist in the application of the doctrine [REDFERN, ¶ 2.111]. For example, the New York Convention requires contracting states to respect the parties' agreement to treat their arbitration clause as separable [ART. II (1), NYC]. This doctrine has been used for various purposes across jurisdictions and in established jurisprudence.

12. In this case, the Arbitration Agreement is separate from the Agreement even if it is physically included in it [LEW I, ¶ 6-9]. The rationale is that an arbitration clause, which involves substantive and procedural aspects, possesses a special character different from the main contract, which is only substantive in nature [BERGER I, P. 319]. Another reason for this is that parties provide consent to two separate agreements, the matrix agreement

and the arbitration agreement arising [PENGELLEY, P. 451; FEEHILY, P. 358; LESOTHO]. RESPONDENT submits that the doctrine of separability applicable to the Agreement is wider than Art. 16(1) **(1)** and the language of Clause 15 is demonstrative of the intention to separate **(2)**.

1. **The doctrine of separability applicable to this Agreement is not restricted to Art. 16(1).**

13. Art. 16(1) of Danubian Arbitration law, which contains the principle of Kompetenz-Kompetenz expressly empowers the arbitrators to consider challenges to their jurisdiction [ART. 16(1) UML]. This includes challenges to the existence and validity of the arbitration agreement [U.N. DOC. A/CN.9/264; HOLTZMANN & NEUHAUS, P. 488]. RESPONDENT submits that the scope of Art. 16(1) is restrictive in the context of the Agreement **(a)**, the consequence of separability is the application of a different national law to the arbitration agreement and, **(b)** in any case, Art. 16(1) may also be interpreted broadly **(c)**.

a. The scope of Art. 16 (1) of UML is restrictive in the context of this Agreement.

14. Art. 16(1) contains the two principles of Kompetenz-Kompetenz as well as separability of the arbitration clause [EXPLANATORY NOTE, ¶ 24]. UML links the two by providing, first, that the tribunal may render a decision on its own competence, and second, that the nullity of the contract does not automatically invalidate the arbitration clause [SCHWEBEL, P. 18]. Art. 16(1) merely deems the arbitration clause to be separable from the underlying contract for Kompetenz-Kompetenz purposes [BORN I, P. 376].

15. CLAIMANT contends that separability is inapplicable as the validity of the Agreement has not been challenged. RESPONDENT submits, however, that separability under Art. 16(1) has a specific scope and purpose. Art. 16 of Danubian law is merely an acknowledgement of the doctrine of separability [ANSWER TO NOTICE OF ARBITRATION, P. 31, ¶ 14].

16. Art. 16(1) provides that since an arbitration agreement is separable from the rest of the contract, an assertion that the latter is invalid does not prevent the arbitrators from ruling on the validity of the former [SVERNLÖV & CARROLL, P. 38; HOBÉR, P. 264]. Consequently, its strict application in this case is misplaced. It merely uses separability to

give this Tribunal its requisite jurisdiction, but does not encompass the doctrine as a whole. Once separability is accepted, a tribunal will not be compelled to deny its own jurisdiction on the ground that the main agreement is invalid [CHRISTOPHER BROWN].

b. Application of a different national law to the Arbitration Agreement is a consequence of separability.

17. Separability has multiple effects, one of which is identified under Art.16(1). Another of its effects is that the law of the arbitration agreement may differ from the law applicable to the substantive contract [PETERSON FARMS; MUSTILL & BOYD, PP. 62-63]. This means that distinct laws may apply to each agreement [BORN I, P. 464; LANDOLT, P. 516].

c. In any case, Art. 16(1) may also be interpreted broadly.

18. Even if this Tribunal relies strictly on Art. 16(1) to interpret Clause 15, this should be done broadly. The Explanatory Note to UML explains separability simply as a doctrine whereby the arbitration agreement is treated independently from other terms of the contract [EXPLANATORY NOTE; U.N. DOC. A/CN.9/264]. While interpreting this provision, the Cour de Cassation, stated that except in exceptional circumstances, an arbitration agreement, whether in a separate document or in the main contract, is always completely autonomous [GOSSET; HECHT; GRAVEL & PETERSON, P. 521]. An arbitration agreement within a contract is separate irrespective of the nature or validity of the contract [JINGZHOU, ¶ 185]. This approach favours separability and confirms the UML principle that arbitration clauses shall be treated as independent and completely separable agreements [WEIXIA, PP. 173-174].

2. The language of the Agreement demonstrates intention to separate Clause 15.

19. Parties are free to agree that their arbitration agreement is separable from the matrix contract, and this intention must be fulfilled [HARBOUR ASSURANCE; RENT-A-CENTER WEST; BOSTON TELECOMM.]. Such intent would become operative where the parties were aware of its separable nature at the time of concluding the contract [BERKE MOORE]. English decisions have emphasized that separability is a product of contractual interpretation, based on parties' intentions [BORN I, P. 380; PETERSON FARMS; HARBOUR ASSURANCE]. Even in Sulamerica, it was observed that the presumption that the

arbitration agreement would be governed by the law of the main contract may be defeated where there exists intention to the contrary [SULAMERICA]. In the present case, the Parties intended to separate Clause 15 from the Sales Agreement; the natural inference is that they intended to apply another law to the clause.

20. By virtue of the wording of the contract, parties can limit or expand the application of the law of the substantive contract. Contrary to CLAIMANT's contention, the Parties have, while drafting, chosen not to extend the law of the contract to the Arbitration Agreement [CL. MEMO, ¶ 23]. The Frozen Semen Sales Agreement starts with the words 'This Agreement', thereby referring to the entire contract. On the other hand, Clause 14 uses the words 'Sales Agreement' for laying down the law governing the substantive contract, implying that its application is restricted only to the 'Sales' part of it [ANSWER TO NOTICE OF ARBITRATION, ¶ 16; ARSANOVIA LTD.]. Contrary to CLAIMANT's assertion that Clause 14 was not restrictive, the language employed suggests otherwise [CL. MEMO, ¶ 21]. Furthermore, since the choice of law clause precedes Clause 15, it can be deduced that the substantive law does not extend to the arbitration clause. The distinction between 'Agreement' and 'Sales Agreement' is also made in the correspondence, wherein specific terminology is used while referring to the substantive law [CL. EX. 5; R. EXS. 1, 2]. Irrespective of the title, this distinction drawn in the contract and the negotiations must be recognized [CL. MEMO, ¶ 22].

21. Even if CLAIMANT contends that separability as envisaged under Art. 16(1) must be applied, this only buttresses RESPONDENT's argument that intention to separate existed at the time of conclusion of the contract. Clause 15 lays down that 'Any dispute arising out of this contract, including *existence, validity*...' must be resolved by this Tribunal. Thus, this arbitration clause was always intended to be separated, since a dispute regarding existence of the contract was contemplated by the Parties. It is impossible for such a dispute to be resolved without separating the Arbitration Agreement. Upon observing Clause 15, it cannot be said that a separate arbitration agreement was not in contemplation [CL. MEMO ¶ 24]. In the interests of consistency this intention must be realised, as alternatively, different national laws would be applied to Clause 15 for the purposes of different disputes.

B. THE ARBITRATION AGREEMENT HAS THE CLOSEST AND MOST REAL CONNECTION WITH THE LAW OF DANUBIA.

22. RESPONDENT submits that the Parties have not made any express of choice of law **(1)** or any implied choice of law **(2)** in favour of Mediterranean law. On an application of the closest and most real connection test, Danubian law must govern Clause 15 **(3)**.

1. There is no express choice of law identified by the Parties.

23. The Parties' intention as to the applicable law is only express when it is recorded in writing; [LEW II, ¶. 17-13]. Such a choice has evidently not been made in the instant case. Consequently, the law applicable to Clause 15 is to be determined according to established common law principles. These require the forum to effectuate the parties' express choice of law, failing which their implied choice must be identified [DICEY I, ¶ 16R-001]. Since a clear choice has not been made, the four corners rule permits an evaluation based on surrounding circumstances [PO 1 ¶ 16; CL. MEMO ¶ 28].

2. The Parties have not made an implied choice to apply the Mediterranean law to the Arbitration Agreement.

24. RESPONDENT submits that due to the four corners rule, pre-contracual negotiations should not be relied upon **(a)**. In any case, the negotiations do not evince an intention to apply Mediterranean law to Clause 15 **(b)**.

a. Pre-contractual negotiations should not be relied upon due to four corners rule.

25. CLAIMANT contends that since there is no express choice of law as regards Clause 15, the Parties have implicitly chosen to apply the law of the underlying contract to it [CL. MEMO, ¶ 25]. However, such intention has to be convincingly established. CLAIMANT relies on pre-contractual negotiations to draw an inference regarding an intention to apply Mediterranean law to Clause 15 [CL. MEMO, ¶ 36]. Preliminarily, RESPONDENT submits that Danubian law allows for interpretation under the four corners rule, and hence, pre-contractual negotiations should not be considered [ANSWER TO NOTICE OF ARBITRATION ¶ 16]. In fact, selection of the seat in a separable arbitration clause is sufficient indication of the choice of law governing the clause [HAMLYN].

b. Even if pre-contractual negotiations are considered, there exists no intention to apply Mediterranean law to Clause 15.

26. If the Hon'ble Tribunal holds that intention is to be inferred from negotiations, the parties' objective understanding of the contractual language must be inquired into [SIRIUS INTERNATIONAL; SAMUEL, P. 493; DONOVAN]. Although it is open to parties to select a law to govern the entire agreement, having due regard to surrounding circumstances, RESPONDENT submits that such a choice was not made here [CL. MEMO, ¶ 23]. Firstly, as has been previously submitted, the Parties intended to separate Clause 15. Further, upon an objective interpretation of the correspondence it is clear that the law of the seat was extended to the arbitration clause. While interpreting the negotiations, CLAIMANT relies upon its personal understanding of the exhibits [CL. MEMO, ¶ 29], but the test of objective interpretation disregards any undisclosed intention of parties [THE DIANA PROSPERITY].

27. The draft of the dispute resolution clause sent by RESPONDENT was largely based on the HKIAC Model Clause and included a choice of law to govern the clause [HKIAC MODEL CLAUSE]. Further, CLAIMANT was requested to relay objections to the draft. In response, CLAIMANT changed the seat of arbitration from Equatoriana to Danubia [R. EX. 2]. However, no amendment was made as regards the extension of the law of the seat to the arbitration clause. This interpretation is premised on the plain language used by the drafters and evinces objective intent to apply the law of seat to the arbitration clause [DONOVAN].

28. Interpretation of the Agreement as well as pre-contractual negotiations should be done bearing in mind the background knowledge which a reasonable person could gather about the same [INVESTOR'S COMPENSATION SCHEME]. Similarly, it is clear in this case that the law of the seat applies to the entire Arbitration Agreement, and not merely its procedural part.

29. CLAIMANT contends that since RESPONDENT agreed to delete the choice of law for the arbitration agreement, it assented to having Clause 14 govern it [CL. MEMO, ¶¶ 24, 29]. The statement following the reproduction of the clause "*in its relevant part*" was as follows – "*This offer in naturally on the condition that the law applicable to the Sales Agreement remains the*

law of Mediterraneo" [R. EX. 2]. RESPONDENT's acceptance of this clause was on an objective understanding that the term 'Sales Agreement' was separate from the term 'Agreement'. Hence, there is no assent to having Mediterranean law govern the entire Agreement.

3. The law of the seat has the closest connection to this Arbitration Agreement.

30. Under common law, where the law of the arbitration clause is not expressly or impliedly chosen, the law with the closest and most real connection is applied to it [SULAMERICA; HABAS SINAI]. The law of the seat is closely connected with the arbitration agreement because the seat is the place of performance of the arbitration agreement and not, as CLAIMANT asserts, an exception for saving an arbitration agreement [CL. MEMO, ¶ 26].

31. The law of the separable arbitration agreement is rarely different from the law of the seat [C V D; DICEY II, P. 829]. In this case, Danubian law has the closest and most real connection, as an arbitration clause will, as a norm, have such a connection with the place of arbitration as opposed to the place of the law of the contract [C V. D; ARSANOVIA]. RESPONDENT submits that in choosing the seat, the Parties were guided by considerations of neutrality **(a)**, and this choice was intended to govern the entire arbitration clause **(b)**.

a. The Parties were guided by considerations of neutrality while choosing the seat of arbitration.

32. The natural inference when commercial relationships break down and parties enter dispute resolution is that they desire neutrality. The law of the contract takes a backseat and primacy is given to the neutral law selected to govern the proceedings [FIRSTLINK]. While selecting Danubia, the Parties were guided by considerations of neutrality. This is reflected in practice, where the purpose of choosing a neutral seat is to insulate the dispute resolution process from the national law of either party. That is the case even if the main contract is not governed by a neutral law [AMICORUM & PRYLES, P.145]. Thus, it is more likely that the Parties intended the dispute resolution clause to be governed by the law of the neutral seat.

b. In absence of a choice of law clause for the Arbitration Agreement, the law of the seat must apply to the entire clause.

33. The construction of an arbitration clause starts from the assumption that parties intend that all disputes will be decided according to procedure chosen by them [PREMIUM NAFTA; TAMIL NADU ELECTRICITY BOARD]. RESPONDENT submits that an arbitration agreement has procedural as well as substantive aspects and the consequence of choosing a seat is that its law will govern all aspects [SULAMERICA]. Objectively, choosing Danubian law entails that it would govern Clause 15 in its entirety [HAMLYN]. As a "*sound general rule*", it is not necessary that the close connection test becomes relevant only at the third stage of the analysis; the choice of seat by itself constitutes evidence of the parties' intention [COMPAGNIE D'ARMEMENT].

C. THE VALIDATION PRINCIPLE IS NOT APPLICABLE.

34. According to the validation principle, the conventional choice of law inquiry should be eschewed in favour of applying a law that would validate rather than invalidate the arbitration agreement [NAZZINI P. 701; BORN III, P. 56]. As a matter of construction, an arbitration agreement may be valid under one law and invalid under another. But the wider principle is one of law and not of construction of the clause.

35. Parties draft arbitration agreements without regard to which law would render it valid [BORN I, P. 543]. This principle has generally been used with the objective of ensuring that the arbitration agreement remains valid. In this case, the impact of either choice is that it will be interpreted liberally in Mediterraneo and restrictively in Danubia. The Parties were guided merely by considerations of neutrality and neither choice invalidates the Arbitration Agreement.

36. CLAIMANT's assertion that Mediterranean law will validate the Arbitration Clause is untenable as parties cannot make an agreement valid or invalid by fiat [CL. MEMO ¶¶ 27, 30]. Such questions depend on the consequences that a legal system attaches to the contract, and the choice of law inquiry must only identify this specific law [AMICORUM & PRYLES, P. 148].

37. The validation principle must apply where the law which invalidates the arbitration agreement was chosen when the contract was made. In Sulamerica, the invalidity of the arbitration agreement was treated as a factor relevant to the construction exercise [SULAMERICA]. CLAIMANT relies on the principle as a reason for adopting Mediterranean law over Danubian law, although it never contemplated invalidity while drafting, because the Arbitration Agreement was valid under both jurisdictions.

D. THE ARBITRATION AGREEMENT DOES NOT EMPOWER THIS TRIBUNAL TO ADAPT THE CONTRACT.

38. Under Danubian law, Clause 15 does not provide this Tribunal with the power to adapt the contract. Due to the four corners rule, the clause must be interpreted only from the contract and not from any extraneous evidence [ANSWER TO NOTICE OF ARBITRATION, ¶ 16]. RESPONDENT submits that the contract does not provide express empowerment as required under Danubian law **(1)**. Even if pre-contractual negotiations are taken into consideration, Clause 15 is not wide enough for adaptation **(2)**.

1. The Agreement does not provide an express empowerment to adapt.

39. Arbitration clauses are constructed in different contexts. Thus, there is no general inference that the phrase 'arising out of' is sufficient empowerment for this Tribunal to act in the place of parties and determine future obligations [BRUNER & O'CONNOR; TEXACO]. In fact, parties provide broader clauses in order to demonstrate clear intention [ICC CASE NO. 7544]. Without an express empowerment to adapt in the substantive or procedural agreements, the prevailing view is that the arbitrator cannot adapt [HORN & KROLL, P. 457], as the sanctity of the contract must be preserved [BERNADINI II, P. 421; BERGER III, P. 74]. Additionally, this Tribunal is not empowered to provide a decision in equity, as that does not fall within the scope provided to it [ART. 28 (3), UML]. The discussions of the Working Group referred to by CLAIMANT are irrelevant to this issue as Danubian law, as it stands, requires an express empowerment for adaptation [CL. MEMO, ¶ 40].

2. Even if pre-contractual negotiations are considered, the Arbitration Agreement must be interpreted narrowly.

40. The phrase 'arising out of' has been given various degrees of scope and does not have a singular meaning. Its interpretation is malleable based on the context in which it is used [THE ANTONIS P. LEMON; E.B. AABY]. CLAIMANT submits that the Arbitration Clause must be read broadly to include adaptation of the contract [NOTICE OF ARBITRATION, ¶ 16]. Tribunals indulge in liberal interpretation on the assumption that rational businesspersons could not have intended to restrict the arbitration agreement [FIONA TRUST]. Despite CLAIMANT'S assertion, such interpretation is not universally applicable [CL. MEMO, ¶ 37]. A narrow meaning must be ascribed where the constructional process required it, as was the case over the course of these pre-contractual negotiations [HANCOCK PROSPECTING].

41. While drafting Clause 15, Mr. Antley suggested adoption of a narrow clause, thereby making amendments to the HKIAC Model Clause, such as omission of the phrases *"or relating to"* and "*non-contractual obligations*" [R. EX. 1; HKIAC MODEL CLAUSE]. In response to this email, Ms. Napravnik reproduced this portion exactly as proposed, without objections, thereby assenting to its language and the intention behind the changes [R. EX. 2]. Contrary to CLAIMANT's suggestion, after deliberate omission of the phrase "*relating to*", a clause referring only to disputes 'arising out of' the contract restricts arbitration to matters concerning interpretation and performance [CL. MEMO, ¶ 35; KINOSHITA]. RESPONDENT submits that this intention of narrow interpretation must be fulfilled. The object of achieving consistency in interpreting the phrase is not as important as assessing it in the relevant circumstances [WALTER RAU].

42. CLAIMANT asserts that adaptation does not fall within the term "*non-contractual obligations"* [CL. MEMO, ¶ 35]. However, removal of the phrase "*non-contractual obligations"* is an obvious indicator that only contractual obligations were to be adjudicated by the Tribunal. The relief sought is a revision of the previously agreed upon price, by dividing the responsibility of the tariff increase. Not only was the price determined based on the obligations undertaken during contract formation, adaptation of the price based on a supposed 'hardship' was never in contemplation even within Clause 12.

CONCLUSION TO ISSUE I:

43. RESPONDENT humbly requests this Tribunal to hold that the separable Arbitration Agreement in Clause 15 is governed by the law of the seat. Consequently, the relief of adaptation sought by CLAIMANT should be denied, as it has been excluded from the scope of the Arbitration Agreement by the choice of the seat, as well as the language of the clause.

ISSUE II: THE PARTIAL INTERIM AWARD AND THE SUBMISSIONS FROM THE OTHER ARBITRATION SHOULD NOT BE ADMITTED IN EVIDENCE.

44. RESPONDENT is currently involved in a separate arbitration where it is seeking a relief of adaptation of contract owing to a tariff imposition. The contents of the confidential arbitration have been disclosed illegally and some information relating to the arbitration has been brought to this Tribunal's attention. CLAIMANT is attempting to procure that confidential information in order to demonstrate inconsistency in RESPONDENT's pleadings. RESPONDENT submits that the evidence is irrelevant and immaterial to this arbitration **(A)**. Furthermore, it has been improperly obtained **(B)** and is confidential in nature **(C)**.

A. THE EVIDENCE IS NOT RELEVANT OR MATERIAL TO THIS ARBITRATION.

45. This Hon'ble Tribunal may have wide discretion in determining admissibility of evidence, but this discretion must be exercised subject to, *inter alia*, relevance and materiality [CL. MEMO, ¶ 45]. Often, evidence is excluded because the parties' burden of proof is not significantly affected [O'MALLEY, ¶ 3.67]. RESPONDENT submits that this evidence is neither relevant nor material as the contracts in both arbitrations are substantially different **(1)**, and in any case, RESPONDENT is entitled to make contradictory submissions **(2)**. Lastly, this Tribunal has no obligation to be consistent with other arbitral awards **(3)**.

1. The evidence is irrelevant as the contracts involved in both arbitrations are substantially different.

46. Evidence would be deemed relevant if it tends to make the existence of any fact that is of consequence more or less probable [PILKOV, P. 148]. In this case, CLAIMANT intends to

present this evidence to draw attention to an alleged contradiction with pleadings made before a different tribunal.

47. RESPONDENT contends that the submissions made in both arbitrations cannot be contradictory as relief is being requested under separate contracts. The deductions from the Partial Interim Award evince that the other contract is different in multiple ways [PO 2, ¶ 39]. The other contract contains a verbatim adoption of the Model HKIAC Clause, which, *prima facie* empowers the arbitrator to adapt [*ID.*]. It also contains the ICC Hardship Clause, which is broader than Clause 12 of the present Agreement [*ID.*]. The existence of separate rights and obligations in both situations entitles RESPONDENT to operate differently. CLAIMANT's analysis on relevance of the evidence ignores that foreseeability and hardship are issues concerning separate events and distinct agreements [CL. MEMO, ¶ 59].

48. RESPONDENT is guaranteed a full opportunity of presenting its case in both arbitrations [ART. 18, UML]. Whether the changed circumstances warrant adaptation, or tariff amounts to hardship, demands specific inquiry into the parties' intentions and their agreements. Even if this Tribunal admits the evidence, it shall still have to make an independent finding of fact in respect of this Agreement [WAINCYMER, P. 824]. Therefore, no fact of consequence is made more or less probable by the admission of this evidence [PILKOV, P. 148].

2. Respondent is entitled to lead contradictory evidence in different arbitrations.

49. Even if the stances adopted were starkly contradictory, nothing precludes RESPONDENT from doing so. CLAIMANT argues that a party cannot assume contradictory positions with respect to the same matter in different suits. Firstly, the matters involved cannot be deemed to be the same, as both disputes concern tariffs involving varying degrees of foreseeability [LETTER BY LANGWEILER]. Secondly, even if this Tribunal is convinced that both disputes involve the same matter, such rules of equity have a narrow scope of application. The fact that cases may be run differently against different parties is not a reason to lift confidentiality of an arbitration, despite the similarity in the disputes [EASTERN SAGA].

50. The only instance where a party is estopped from contradicting a previous stance is where parties to both the proceedings are the same [RESTATEMENT, § 63; KLEIN; SAFFRON]. The rationale behind the principle, known as collateral estoppel, is that a party should not unfairly change positions before the same adversary when suitable [SCARANO; FAY]. CLAIMANT submits that the New York Convention prohibits contradictory behavior [CL. MEMO, ¶ 60]. However, this only estops a party from being contradictory in respect of representations made to the opposite party in the particular arbitration [BMW CASE]. Clearly, no such obligations have been breached as no representations made to CLAIMANT have been deviated from.

51. The most liberal version of this rule, judicial estoppel, does not require the same parties to be involved in both proceedings [SCHREIBER]. A pre-requisite to applying it is that the prior forum accepted the position urged by the party [SIMON; IN RE COASTAL PLAINS]. This deters parties from taking stances that they know to be bad in law. RESPONDENT's submissions before this Tribunal are certainly not in bad faith as there has been no prior, binding resolution of the issue [KRYSTAL CADILLAC]. Since RESPONDENT is only putting forth claims based on this Agreement, no variant of estoppel prohibits it.

3. This Tribunal has no obligation to be consistent with other arbitral awards.

52. The object of the above principles is to ensure that a court does not deviate from law previously established by the same court [REPUBLIC OF ECUADOR]. However, this logic is irrelevant here, as arbitral tribunals do not have the public responsibility of setting precedent, but only of resolving disputes submitted by specific private parties [RIVERBOAT CASINO]. The possibility of inconsistency is acceptable where it is attributable to the exercise of party autonomy [SANDERS, P. 114]. Thus, no interest of justice is affected by retaining the confidentiality of the other arbitration [CL. MEMO, ¶ 52].

B. THE EVIDENCE MUST BE EXCLUDED AS IT HAS BEEN OBTAINED IMPROPERLY.

53. Even though no applicable law strictly prohibits the admission of this evidence, there are other internationally recognized norms that CLAIMANT violates in its procurement. [CL. MEMO, ¶ 46]. RESPONDENT submits that the evidence must be excluded on account of

CLAIMANT's bad faith in obtaining it **(1)**, under Art. 9(2)(g) of the IBA Rules, **(2)** and to avoid potential risks at the enforcement stage of the proceedings **(3)**.

1. Claimant has acted in bad faith in obtaining this evidence.

54. On October 3, 2017, CLAIMANT was informed that the documents it sought were disclosed either due to breach of a confidentiality agreement or an illegal hack [LETTER BY FASTTRACK]. Despite having knowledge of this, CLAIMANT is trying to gain access to this material. Mr. Velazquez, an ex-employee of the buyer in the other arbitration, was unable to procure the material, demonstrating its inaccessibility [PO 2, ¶ 41]. Yet, CLAIMANT has arranged to obtain it from a company against a price of 1000 USD, although the means employed by this company are unknown [*ID.*].

55. RESPONDENT submits that this conduct amounts to bad faith, and any evidence procured using these means must be excluded. It is immaterial whether CLAIMANT violated the law; any willful conduct that is iniquitous or in bad faith constitutes unclean hands [PRECISION INSTRUMENT; N.Y. FOOTBALL GIANTS; DOBBS, P. 68]. The doctrine of unclean hands posits that a party that acts inequitably loses the right to an equitable relief [BLACK'S LAW, P. 268; NIKO RESOURCES; HESHAM TALAAT]. CLAIMANT is deliberately taking advantage of an illegal act by actively seeking out confidential material [OBEROI, P. 75]. This is a breach of good faith obligations that arbitrating parties owe to each other at all times [EDF; METHANEX; BORN II, PP. 1003-1004]. Any relief that it seeks in respect of the documents procured must be denied.

2. The evidence should be excluded under Art. 9(2)(g) of the IBA Rules.

56. CLAIMANT denies the applicability of the IBA Rules in absence of the Parties' explicit agreement to include the same [CL. MEMO, ¶ 52]. While it is not contended that the principles therein are binding, they are valuable to this Tribunal as they reflect principles of common law, civil law, and international arbitration [IBA COMMENTARY, P. 3].

57. The IBA Rules stipulate that the Tribunal shall exclude evidence based on considerations of fairness and equality [ART. 9(2)(G), IBA RULES]. This clause is described as a catch-all provision available in order to enable a fair hearing [IBA COMMENTARY, P. 26].

58. RESPONDENT has not alleged that CLAIMANT has breached any confidentiality agreement or hacked the computer system. However, it is not necessary to show that CLAIMANT's

conduct was unlawful, per se [SUSSMAN, P. 11]. Ethically borderline acts, which are not strictly in breach of codified rules, are also unacceptable [HORVATH, P. 297; CHINA MACHINE]. In a case where privileged documents were obtained in a manner that was technically lawful, the tribunal protected the party whose rights had been infringed in the process [LIBANANCO]. In Methanex, although it was clear that the party did not intend to violate the law, the effect of the conduct was considered while excluding the evidence [METHANEX]. Tribunals consciously choose not to disadvantage a party that is injured by an illegal act [CARATUBE].

59. The rule developed in the case of Methanex and EDF is an appropriate interpretation of Art. 9(2)(g), and must be applied here [O'MALLEY, ¶ 9.118]. As CLAIMANT contends, a balance of mutual interests must be achieved [CL. MEMO, ¶ 48]. It is submitted that in view of Art. 9(2)(g) the interests of the RESPONDENT must be considered, as they are victims of an illegal act, and the evidence sought to be submitted is of minimal utility.

3. Reliance upon illegally obtained evidence risks enforceability of the award.

60. This Tribunal is obligated to make an effort to produce an award devoid of elements that would render it unenforceable [ART. 13.10, HKIAC 2018; KUITKOWSKI, P. 88]. The rules applicable to this Tribunal provide discretion to apply strict rules of evidence. Contrary to CLAIMANT's submission, tribunals regularly exclude immaterial evidence, or evidence where procurement was questionable [CL. MEMO, ¶ 58; ALI SHIPPING; EDF; ART. 22.2, HKIAC 2018; ART. 19(2), UML]. On the other hand, relying on this evidence gives rise to a potential risk at the enforcement stage [§ 68(2)(G), ENGLISH ARBITRATION ACT; GEE QC, ¶ 343].

61. If an award is rendered in favour of CLAIMANT, the courts of Equatoriana would have to enforce an award that is based on evidence obtained upon commission of an illegal act against its citizen, possibly in its own jurisdiction. Although CLAIMANT may not have committed the offence, its usage only furthers and takes advantage of an illegality [LIBANANCO]. Further, awards can be set aside where an arbitrating party has breached the duty to act in good faith, even where no codified rules are violated [CHINA MACHINE].

62. Past tribunals have acknowledged good faith principles, international public policy and the duty to honour local laws [DUMBERRY, P. 251; INCEYSA]. Unlawfully obtained

evidence must be presumptively inadmissible, unless it is the only evidence available and is absolutely necessary to satisfy the burden of proof [BOYKIN & HAVALIC, P. 35]. Clearly, the submissions and the Partial Interim Award are not crucial to satisfying CLAIMANT's burden of proof. The questions in this dispute are limited to issues pertaining to this Agreement alone [CONNECTICUT LIGHT]. RESPONDENT submits that in view of the immateriality of the documents in question, it is prudent to avoid reliance on the same.

C. THE CONTENTS OF THE OTHER ARBITRATION ARE CONFIDENTIAL.

63. RESPONDENT submits that this Tribunal must maintain the confidentiality of the other arbitration. Even in Caratube, which CLAIMANT relies upon, the tribunal admitted illegally obtained evidence but made an exception for confidential material [CL. MEMO, ¶ 55; CARATUBE]. RESPONDENT submits that it has a legitimate expectation of confidentiality in respect of the documents, **(1)** and that principles of transparency are inapplicable here **(2)**.

1. Respondent has a legitimate expectation of confidentiality in respect of the Partial Interim Award and the submissions.

64. Under the IBA Rules, this Tribunal shall exclude evidence protected by any legal impediment [ART. 9(2)(B), IBA RULES]. This must be examined by considering the parties' expectations at the time the legal impediment arose [ART. 9(3)(C), IBA RULES]. While participating in the other arbitration, RESPONDENT expected that the contents therein would not be used in any other context, as is a right even under the IBA Rules [ART. 3.13, IBA RULES]. The other arbitration is administered by the HKIAC Rules, 2013, which contains a duty of non-disclosure [ART. 42, HKIAC 2013]. This confidentiality extends to all submissions, evidence, as well as the awards [BORN II, P. 2251; ASSOCIATED ELECTRIC].

65. One of the exceptions under Art. 42 is that a party to the proceedings may disclose documents necessary to assert a legal right [ART. 42, HKIAC 2013]. The authorities cited by CLAIMANT refer to such an exception alone, and not to situations where a third party is permitted to use confidential documents [CL. MEMO, ¶ 54; SHEARSON CASE].

66. Clearly, RESPONDENT's expectation was that material produced or disclosed would be used only for the purposes of that arbitration [SMEUREANU, P. 1218]. In order to keep this information private, RESPONDENT also entered into a confidentiality agreement with its ex-employees. Even in the absence of a strict duty on CLAIMANT, RESPONDENT's legitimate expectation must not be unfairly withdrawn [SCHMIDT; MARVIN].

67. A balance ought to be struck between protecting the confidentiality of this material and the necessity to scrutinize it [TEVENDALE & FINCH, P. 829]. Where testimony from an arbitration was sought to be submitted to show contradictions, the tribunal chose to retain confidentiality, due to the limited value of the evidence [BECCARA]. CLAIMANT asserts that all evidence must be admitted in order to grant a full opportunity of being heard [CL. MEMO, ¶ 58]. However, RESPONDENT requests that this Tribunal exercise its discretion to ensure that its rights are protected [REISMAN & FREEDMAN, P. 738].

2. Principles of transparency are inapplicable to this dispute.

68. CLAIMANT's application of principles of transparency to commercial arbitration is misplaced. The distinction between investment and commercial arbitration is that the former connotes a public interest due to the involvement of a state, while the latter purely caters to private entities [TUCK, P. 912]. Private parties arbitrate assuming that their confidentiality would be upheld as it is an essential benefit of the process. [BOND, PP. 273–282].

69. Moreover, no consistency may necessarily be achieved, as transparency has not prevented tribunals from arriving at opposite conclusions even in investment disputes concerning the same facts [CME; LAUDER]. In absence of a public interest, there is no need to compel consistency or scrutiny. Thus, transparency norms are irrelevant to this dispute.

CONCLUSION TO ISSUE II:

70. The Partial Interim Award and the submissions do not affect the present proceedings in any manner. There exists no reason for this evidence to be admitted, as it has been procured by the exercise of bad faith, especially in light of confidentiality of the other arbitration. Thus, RESPONDENT submits that the evidence must be completely excluded.

SUBSTANTIVE ARGUMENTS

ISSUE III: CLAIMANT IS NOT ENTITLED TO A PRICE INCREASE BY ADAPTATION OF CONTRACT.

71. RESPONDENT submits that CLAIMANT is not entitled to payment of USD 1,250,000 under Clause 12 **(A)** or under CISG **(B)**.

A. CLAIMANT IS NOT ENTITLED TO A PRICE INCREASE UNDER CLAUSE 12.

72. CLAIMANT contends that the retaliatory tariff imposed by Equatoriana constitutes hardship under Clause 12 of the Agreement, thereby entitling it to a price increase by adaptation of the Agreement. However, RESPONDENT submits that the present tariff imposition is not hardship under the law of the Agreement **(1).** Further, the language of Clause 12 limits the application thereof in a manner that excludes tariff imposition from its scope **(2).** In any case, the Agreement cannot be adapted to increase the price payable to CLAIMANT **(3).**

1. The present tariff imposition does not constitute hardship.

73. Under Mediterranean law, hardship arises firstly, where the event fundamentally alters the contractual equilibrium; secondly, if it occurs or becomes known after conclusion of the contract and could not have been accounted for at the time of conclusion; and thirdly, where the risk of the event was not assumed [ART. 6.2.2, UPICC]. CLAIMANT submits that the present tariff has resulted in hardship under Clause 12 of the Agreement [CL. MEMO, ¶¶ 84-85, ¶¶ 88-103]. However, it is submitted that the contractual equilibrium has not been fundamentally altered **(a)**. Furthermore, it is not an unforeseen event, and could have been accounted for by CLAIMANT **(b)**. Lastly, the risk of additional costs was assumed by CLAIMANT **(c)**.

a. The tariff imposition does not fundamentally alter the contractual equilibrium.

74. At the outset, it is important for this Tribunal to take cognizance of the rule of *pacta sunt servanda*, or adherence to the contract, which implies that deviation from contractual obligations is an exceptional remedy [VOGENAUER, P. 716]. The '*fundamental*' nature of the degree of alteration required for hardship implies a high threshold, which is in line

with the aforementioned rule [URIBE, P. 248; VOGENAUER, P. 718]. It has been recognized that an increase in price rarely causes fundamental alteration of contractual equilibrium [BRUNNER, P. 427-428; ICC CASE NO. 6281]. The mere fact that performance of the contract entails a higher economic burden for a party cannot create an assumption of hardship [ART. 6.2.1, UPICC; ICC CASE NO. 8486].

75. CLAIMANT invokes the hardship exemption in light of an increase in its total expenses [CL. MEMO, ¶ 84]. However it cannot evade responsibility merely because it has eventually suffered some losses. [ART. 6.2.1, UPICC, COMMENT 1] Price increases of 30%, 44% and even 50% do not amount to a fundamental alteration [NUOVA FUCINATI; SHIPPING EXCHANGE AWARD; ICC CASE NO. 2508]. In this case, the tariff constitutes 30% of the third shipment, amounting to a mere 15% of the total contract price. This is a miniscule increase, falling far below the threshold. A disadvantage for one party cannot allow it to alter contractual terms [GRUPO SANTA]. This stands true irrespective of the resultant effect on CLAIMANT [UAB]. Thus, the price increase is not a fundamental alteration.

b. The tariff imposition was foreseeable.

76. CLAIMANT contends that the present tariff was unforeseeable, in light of Equatoriana's history of amicable dispute settlement and free trade [CL. MEMO, ¶¶ 91-97]. Admittedly, price fluctuations are extremely foreseeable aspects of international trade, and losses are a "*normal risk of commercial activities*" [CL. MEMO, ¶¶ 91, 96; ARTICLE 79 DIGEST, ¶ 15]. Thus, parties engaged in trans-border trade should not claim exemption from something as foreseeable as an import regulation. As an experienced professional, CLAIMANT must be viewed as capable of protecting itself from foreseeable changes in circumstances [FOUCHARD & GOLDMAN, P. 25].

77. CLAIMANT alleges that the tariff imposed by Mediterraneo was unexpected, and consequently the present tariff, which is a retaliation thereto, was unforeseeable [CL. MEMO, ¶ 94]. However, the President of Mediterraneo had clear intentions to create a protectionist regime specifically for agricultural goods, [CL. EX. 6] and his advisor was a front liner in support of this policy [PO 2, ¶ 23]. This renders an agricultural tariff imposition by Mediterraneo extremely likely. Due to the need for trade balances, the most common response to countries exhibiting a protectionist or hostile trade policy has

always been to retaliate [COMPREHENSIVE TARIFF LIST; WOLFF; POST]. In this atmosphere, retaliatory impositions by countries engaged in trade with Mediterraneo are foreseeable.

78. Further, international practice recognizes that animal semen is to be taxed as an agricultural good, and its trade is regulated by the governments' agricultural department [USA PROGRAM HANDBOOK; UK IMPORT NOTES; ICELAND & GEORGIA TARIFF SCHEDULE; IRELAND VAT RATES; CHILE IMPORT REGULATIONS; UKRAINE IMPORT REGULATIONS]. CLAIMANT cannot claim unforeseeability merely because it failed to acknowledge the possibility of duty when accepting DDP.

79. In fact, since "*almost everything that ever happens is in some sense foreseeable*," only an event that is "*so outside the bounds of probability that reasonable parties would not provide for it*" may lead to hardship [CHENGWEI, ¶ 21.3.3.2]. Since retaliatory impositions by Equatoriana have occurred in the past [CL. EX. 6], a reoccurrence should remain in contemplation. CLAIMANT cannot assume that it was "*insulated from a repetition of history*" [HIMPURNA].

c. The risk of tariff imposition was assumed.

80. Under Mediterranean law, a party bears the cost of performing its own obligations [ART. 6.1.11, UPICC]. However, CLAIMANT contends that the present tariff was not within its sphere of control [CL. MEMO, ¶¶ 88-90] and was not a risk assumed by it while entering into the Agreement, and is, therefore, not within the scope of DDP [CL. MEMO, ¶ 76].

81. While Equatorianian governmental policies are not in CLAIMANT's control, changes in such policies are not outside its sphere of risk. In face of onerosity, parties to trans-border contracts cannot claim unawareness of macro-economic adversities [HIMPURNA]. Parties are required to undertake risks in the general manner determined under the contract, unless special risk allocations are defined [ICC CASE NO. 8486]. If CLAIMANT wished to exclude tariffs from the risks it was to undertake, this was to be specified in the clause providing for DDP [RAMBERG, P. 70; O'CONNOR, P. 21]. These obligations were not excluded from CLAIMANT's responsibilities in the final Agreement. By affirming DDP, CLAIMANT accepted that it would, at its own expense, carry out all formalities necessary for import [O'CONNOR, P. 20]. If CLAIMANT cannot guarantee duty payment, its risks under DDP delivery would be negligible. As a fixed-price contract, the Agreement is intended to cover risks such as the present one [DIMATTEO, P. 301]. The

fact that risks were accounted for before the final determination of the price is indicative of the same [PO 2, ¶ 8].

82. CLAIMANT contends that its financial instability should weigh in favour of a price increase [CL. MEMO, ¶ 111]. However, CLAIMANT was alone required to ensure its financial ability to perform, an aspect which solely belongs to its own sphere of responsibility [CHINESE GOODS CASE; SCHLECHTRIEM & SCHWENZER, P. 1067]. CLAIMANT is not freed from this responsibility even where subsequent events render performance onerous [BRUNNER, P. 170; CHINESE GOODS CASE].

83. CLAIMANT's primary aim in this Agreement was to repair its finances [PO 2, ¶ 15], and it was dependent on making profits in order to repay its loans [PO 2, ¶ 29]. However, CLAIMANT's financial instability was not communicated to RESPONDENT at any point before the tariff imposition [PO 2, ¶ 22]. CLAIMANT must not be permitted to translate its self-imposed tribulation into a burden to be shouldered by RESPONDENT.

84. It is further being contended that the tariff payment was unavoidable [CL. MEMO, ¶¶ 99-101]. However, this does not detract from the fact that payment of the present tariff has been assumed as a risk, and this contractual obligation must be fulfilled.

2. The language of Clause 12 does not contemplate the present tariff.

85. In the event that this Tribunal considers the tariff imposition to be a hardship, it is submitted that Clause 12 may be attracted only where the hardship is caused either by additional health and safety requirements or comparable unforeseen events [CL. EX. 5]. However, the present event does not qualify as either.

86. The Parties agreed that the ICC Hardship Clause was too broad for this Agreement [R. EX. 4]. They then referred to the risks mentioned in Ms. Napravnik's email of March 31, 2017 before deciding the final wording [PO 2, ¶ 12]. This email referred not only to additional health and safety requirements, but also custom regulations and import restrictions [CL. EX. 4]. However, the Parties chose to mention only the former in Clause 12.

87. Thus, after noting a communication referencing two situations, Clause 12 was drafted to specify only one. The inescapable conclusion is that the omission was intended. The maxim *expressio unius est exclusio alterius*, as used in contractual interpretation, supports this conclusion [QUADRANT CASE; IN RE ORE CARGO]. Where a contract expressly mentions

a part of a certain subject matter, other parts that are not expressly mentioned must be inferred to have been deliberately omitted [LEWISON, ¶ 6.06; QUADRANT CASE]. The Parties have expressed conditions by which they intend to be bound, and it is undesirable to widen the scope by implication from the language of the Agreement [ASPDIN; IN RE ORE CARGO]. Since they discussed multiple risks and specifically excluded import restrictions, the term "*comparable unforeseen events*" must not be interpreted to encompass the present tariff imposition. The Parties were not unaware of the risk, and their omission to formulate a precise exemption does not create a gap that requires filling [ICC CASE NO. 1512].

88. The juxtaposition of 'additional health and safety requirements' and 'comparable unforeseen events' requires the latter to be construed restrictively in context of the former [THE TROPWIND]. As per the rule of *ejusdem generis,* this term is restricted to the genus of the specific related preceding term, that is, 'health and safety requirements' [THE THAMES].

3. Adaptation by this Tribunal is not a remedy provided under Clause 12.

89. RESPONDENT has not made any representations in furtherance of adaptation of the Agreement **(a)**. Furthermore, Clause 12 does not provide for adaptation **(b)**.

a. Respondent did not assent to adaptation during negotiations.

90. CLAIMANT asserts that adaptation was assured as a remedy by Mr. Shoemaker during negotiations, thus binding RESPONDENT to this assurance [CL. MEMO, ¶¶ 74-75; ¶¶ 107-110]. However, RESPONDENT has never conducted itself in a manner, or made any representations, that would convey any intention to adapt the contract. Contrary to CLAIMANT's contention, RESPONDENT's acceptance of shipment delivery does not amount to an assent to the request of price adaptation [CL. MEMO, ¶ 83].

91. In a conversation after the tariff imposition, CLAIMANT was explicitly informed that Mr. Shoemaker was not involved in the negotiations of the Agreement, and had no authority to make any legally binding promises [R. EX. 4; CL. EX. 8]. Considering the paucity of time, Mr. Shoemaker merely urged CLAIMANT to fulfill its contractual obligations, stating that although he did not believe the Agreement allowed for adaptation, a solution could

be found if it did [R. Ex. 4]. Even though members of RESPONDENT's legal department were unavailable, Mr. Shoemaker discussed with his wife, a lawyer, a strict template of what had to be conveyed to CLAIMANT without making any binding commitments [PO 2, ¶ 34].

b. The Sales Agreement does not provide for adaptation.

92. Under Clause 12, where certain events lead to hardship, CLAIMANT is exempt from responsibility for the same [CL. EX. 5]. CLAIMANT states that both Parties intended to provide for hardship situations via Clause 12 [CL. MEMO, ¶¶ 65-73] and that it is entitled to an adaptation of the Agreement. [CL. MEMO, ¶¶ 74-76]. While it is undisputed that the clause provides for hardship, it is submitted that the remedy of adaptation cannot be derived therefrom, as the clause only stipulates an exemption from responsibility.

93. The remedy of adaptation, while allowed under Art. 6.2.3 of Mediterranean law, cannot be made to operate where it is absent, to supersede the remedy expressly provided for in the Agreement. In accordance with Mediterranean law, the Parties have excluded the adaptation remedy by expressly agreeing on terms inconsistent with it, regardless of whether these have been individually negotiated [ART. 1.5, UPICC, COMMENT 2]. Tribunals have noted that while parties can include a term for price increase by adaptation to changing conditions, the lack of such an express clause means that contractual obligations cannot be set aside [ICC CASE NO. 2708].

94. As a general rule, one should be reluctant to allow adaptation when there is no gap in the contract, and when the intent regarding remedies has been expressed. This is particularly true in international contracts, where it is *"much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely"* [ICC CASE NO. 1512]. The effect of Clause 12 is clear, and adherence is required even if it is argued that adaptation would serve a better commercial purpose [LEWISON, ¶ 1.07]. The principle of good faith concerns the conduct of parties in contractual performance, and cannot be invoked to create a right of adaptation [CHURCHILL FALLS]. Notions of equity and fairness cannot be used to distort unambiguous provisions in this manner [IN RE NEW YORK SKYLINE].

95. Art. 6.2.1 of Mediterranean law reflects a general presumption for international contracts, requiring the supremacy of the principle of *pacta sunt servanda* over a duty to adapt a contract to changed circumstances [ICC CASE NO. 1512; BERGER II, P. 292]. In the

AMINOIL arbitration, it was held that *"tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal . . . could not, by way of modifying or completing a contract, prescribe how a provision [for the determination of the economic equilibrium] must be applied. For that, the consent of both parties would be necessary."* [KUWAIT AMINOIL]. The Parties were free to provide for adaptation, and the absence of such a provision in this Agreement means that obligations cannot be set aside [ICC CASE 2708]. The guise of interpretation must not be used to extend the terminology of Clause 12 [CORNELL].

96. In fact, it is improper to alter or ignore the language of the Agreement merely to *"avoid hardships or to meet special circumstances against which the parties have not protected themselves"* [MORRIS JAMES]. This stands true irrespective of whether parties had specifically contemplated each term in its totality, or whether the language results in exclusion of certain remedies [DAIMLER].

97. Since Clause 12 does not allow adaptation, CLAIMANT also places reliance on the ICC Hardship Clause for allowing adaptation of the Agreement [CL. MEMO, ¶¶ 77-80]. However, inclusion of the ICC Hardship Clause was explicitly rejected, as it was too broad [R. EX. 4; PO 2, ¶ 12]. The final clause in the Agreement is much narrower.

c. Respondent has not acted in bad faith by disallowing adaptation.

98. CLAIMANT asserts that adaptation should be allowed *a fortiori*, as RESPONDENT has allegedly breached the Agreement by resale of the frozen semen [NOTICE OF ARBITRATION, ¶ 20]. However, it must be noted that CLAIMANT has not made any consequent claim for breach or damages. The right to adaptation cannot be created in the manner attempted by CLAIMANT, with no basis to derive such right from the Agreement.

99. In any case, RESPONDENT has not conducted itself in bad faith or breached the Agreement. While the initial contemplation in CLAIMANT's email dated March 24, 2017 contained reference to both a resale prohibition and information requirement, only the latter fructified into the Agreement, and there remained no prohibition regarding resale of the frozen semen [CL. EX. 2]. As aforementioned, where a contract expressly mentions a part of certain subject matter, other parts not expressly mentioned have been deliberately omitted, and one cannot extend the Agreement to other conditions by implication [LEWISON, ¶ 6.06; QUADRANT CASE; ASPDIN; IN RE ORE CARGO; IN RE

LINN ENERGY]. One cannot simply import discussions from initial negotiations and assume them to be part of the final product.

100. CLAIMANT contends that it authorized delivery and paid the tariff in furtherance of good faith [CL. MEMO, ¶ 85]. However, delivery was the primary obligation that CLAIMANT was required to perform, and cannot create any corresponding duty on RESPONDENT to adapt the contract. Furthermore, although the Agreement did not contemplate adaptation, RESPONDENT agreed to arrange a meeting with CLAIMANT to hear out concerns regarding the tariff [CL. EX. 8]. This is demonstrative of RESPONDENT's good faith, and subsequent rejection of CLAIMANT's attempts to derogate from contractual requirements does not take away from it. Good faith entails doing all that one is reasonably able to do to fulfill one's obligations and assist the other party in the same, but does not mean sacrificing one's own interests [CHURCHILL FALLS].

B. CLAIMANT IS NOT ENTITLED TO A PRICE INCREASE UNDER CISG.

101. CLAIMANT is not entitled to a price increase under CISG, as the inclusion of Clause 12 amounts to derogation from Art. 79 **(1)**. In any case, the present tariff imposition is not an 'impediment' under Art. 79 **(2)**. Further, CISG does not allow the remedy of adaptation **(3)**.

1. The inclusion of Clause 12 amounts to derogation from Art. 79, CISG.

102. Art. 79 provides exemption from performance of obligations in face of impediments. Art. 6, CISG enables parties to explicitly or implicitly derogate from and vary the effect of provisions of the Convention [ART. 6, CISG; SCHLECHTRIEM & SCHWENZER, P. 103]. Using INCOTERMS to regulate passing of risk, fixing standards for fundamental breach, and altering prerequisites of recoverable damages, are all forms of derogation [SCHLECHTRIEM & SCHWENZER, P. 116].

103. Clause 12 of the Agreement regulates changed circumstances, specifying the circumstances allowing invocation of the clause, as well as their effect. Where there is conflict between special contract clauses and provisions of CISG governing the same situations, the contract will preclude application of the Convention [ICC CASE NO. 9978;

CORN CASE]. Thus, the inclusion of Clause 12 amounts to derogation and its application will override Art. 79.

2. Art. 79 does not cover situations of hardship.

104. CLAIMANT attempts to rely on CISG to claim relief by adaptation in light of hardship. Under Art. 79, a party is not liable for a failure to perform obligations where, firstly, the failure was due to an impediment beyond its control; secondly, it could not have taken the impediment into account at the time of the conclusion of the contract; and thirdly could not have avoided or overcome the impediment or its consequences.

105. However, Art. 79 does not regulate hardship **(a)**. Further, the threshold of an impediment under Art. 79 has not been fulfilled **(b)**. CISG does not contain any gap concerning changed circumstances, and it does not require external supplementation **(c)**. In any case, UPICC cannot be used to fill any alleged gap **(d)**.

a. The tariff imposition is not an impediment as defined in Art. 79.

106. Academic opinion professes that a disturbance making performance onerous, such as one caused by hardship or impracticability, cannot be an impediment under Art. 79 [FLAMBOURAS, P. 277; JENKINS, P. 2025; NUOVA FUCINATI]. Several decisions have suggested that an exemption under Art. 79 requires satisfaction of a standard at the level of impossibility [TOMATO CONCENTRATE CASE; IRON MOLYBDENUM CASE; FROZEN RASPBERRIES CASE; NUOVA FUCINATI].

107. The drafting history of Art. 79 is consistent with this conclusion, as it excludes the possibility of any underlying contemplation of hardship in the Convention. The term '*impediment*' was chosen to denote an objective force that literally prevents performance, and this is said to exclude hardship from its purview [RIMKE, P. 221; HONNOLD II, P. 535; NICHOLAS, P. 240].

108. Additionally, scholars interpreting Art. 79 have been reluctant to allow hardship claims in case of price fluctuations [UNCITRAL YEARBOOK V, P. 66; LOOKOFSKY]. This results in an extremely high threshold for an event to fall under the category of '*impediment*'.

109. Art. 79 reflects the traditional view of contracts. In line with *pacta sunt servanda*, the binding force of agreements must be given priority in the face of adversity [JENKINS, P.

2019; PERILLO, P. 112]. The ultimate goal of CISG in creating a higher threshold is for parties to introduce hardship clauses specifically designed to allocate risks relevant to their purpose, instead of a "*one size of economic risk fits all*" approach [SCHLECHTRIEM, P. 618]. Whether from a refusal to extend Art. 79 to hardship, or from the application of an impossibly high threshold, case law on Art. 79 clearly demonstrates that it cannot apply to hardship [KUSTER & ANDERSEN, PP. 19-20].

110. The '*impossibility'* threshold is further demonstrated by the fact that Art. 79 is an exemption that comes into effect when performance cannot be completed, and it sets limits on liability for a consequent breach of contract. However in the present case, CLAIMANT has already completed performance, and is not claiming an exemption from non-performance as contemplated in Art. 79. Thus, Art. 79 is inapplicable to the present situation.

b. The threshold of 'impediment' has not been fulfilled.

111. To qualify as an impediment under Art. 79, it must be determined whether the present tariff is an event that could not have been accounted for at the time of the conclusion of the contract, and could not be overcome or avoided by CLAIMANT.

112. The high threshold of "*impediment"* under Art. 79 requires that parties predict contingencies and negotiate risk allocation, as they are in a much better position to do so than tribunals [SPIVACK, P. 761]. Circumstances of onerosity, or sudden changes in economic circumstances are not contemplated by Art. 79 [CANNED ORANGES CASE; SUNFLOWER SEEDS CASE]. Far from rendering performance impossible, these events are in the normal risk of commercial activities [FROZEN RASPBERRIES CASE]. Consequently, even a price increase to the extent of over 100% would not be covered in the ambit of an impediment. [SCHWENZER, P. 716; SOCIÉTÉ ROMAY]. It has been suggested that 150%-200% margin may be advisable for this purpose [SCHWENZER, P. 717]. As stated above, the present tariff is foreseeable, and should not be deemed a hardship, much less an impediment under Art. 79 [*SUPRA* ¶¶76-79].

c. CISG does not contain any gap concerning the situation of changed circumstances.

113. Under Art. 7(2), CISG, matters governed but not expressly settled by CISG are settled according to general principles on which it is based [ART. 7(2), CISG]. Alternatively, in absence thereof, they are settled in conformity with the law applicable by virtue of rules of private international law. CLAIMANT asserts that hardship is governed but not settled by CISG, creating a gap, which is to be supplemented by the UPICC [CL. MEMO, ¶¶ 104-106].

114. It is submitted that Art. 79 does not contain a gap as to situations of *imprévision* or hardship [RIMKE, P. 219]. This is also elucidated in the legislative history of CISG [POVRZENIC]. Proposals brought during the drafting process of CISG to provide for such situations were expressly rejected as such a provision would *"cut too deeply into the parties' duty to perform their obligations under the contract"* [HONNOLD I, PP. 442-443; RIMKE, P. 212]. The only case that admitted a hardship claim under Art. 79 is the Steel Tubes case, which has also been relied upon by CLAIMANT [CL. MEMO, ¶¶ 81, 107; STEEL TUBES CASE]. However, this judgment and the rationale utilized therein has been severely criticized, and has been described as violative of Art. 7(2), and undermining the utility and purpose of CISG [FLECHTNER, PP. 270-271; DIMATTEO, PP.286-287].

d. UPICC cannot be used to fill such a gap.

115. Contrary to CLAIMANT's contention [CL. MEMO, ¶ 105], UPICC cannot be termed as the general principles on which CISG is based [ICC CASE NO. 9029]. Furthermore, the authorities relied upon by CLAIMANT in support of this contention merely make a reference to UPICC in international contracts, but do not permit gap filling in any manner [CL. MEMO, ¶ 105]. Hardship, as contemplated under the UPICC does not constitute a general principle on which CISG is based [SLATER, P. 249; CARLSEN; FLECHTNER, PP. 273-274], and application of hardship provisions alongside Art. 79 would hamper the uniformity desired by Art. 7(1) [CARLSEN].

116. CLAIMANT further contends that if UPICC does not constitute general principles on which CISG is based, domestic law may be used for gap filling [CL. MEMO, ¶ 106].

However, the use of domestic law to supplement CISG provisions is heavily discouraged in order to maintain uniformity in its application across jurisdictions [LINDSTROM].

117. CLAIMANT concludes that the operation of UPICC casts a duty of adaptation on the Parties [CL. MEMO, ¶¶ 107-109]. As aforementioned, gap filling cannot be used to allow operation of UPICC, and the obligation to perform the Agreement should not be altered. This is reflected in Art. 79(5), which does not create scope for any variation or dilution of obligations. It is thus evidence that Art. 79 does not impose a duty upon the parties to adapt the contract [BONELL & BIANCA, ¶ 3.1; SCHWENZER, P. 713; CARLSEN; NUOVA FUCINATI]. CLAIMANT cannot use the principle of good faith to create a duty where it cannot exist.

3. Adaptation by this Tribunal is not a remedy contemplated under CISG.

118. The remedy of adaptation of contracts is not provided for under Art. 79(5) **(a)** Furthermore, it is inconsistent with the remedial scheme of CISG **(b)**.

a. Art. 79(5) does not provide for adaptation as a remedy.

119. The sole provision in CISG which regulates the issue of changed circumstances is Art. 79, which only releases the non-performing party from liability. The original obligation of contractual performance is maintained, under Art. 79(5). If performance has become radically more onerous for a party, it may at best seek an exemption from liability, on the ground that performance has been rendered impossible [BRUNNER, P. 250].

b. Adaptation is inconsistent with the remedial scheme of CISG.

120. Unlike other domestic and international rules and principles concerned with non-performance, CISG does not explicitly authorize a party facing a dramatic increase in the costs or a dramatic loss of value of performance to request renegotiation, and seek a court-ordered adaptation or termination of the contract. Under Art. 79, a relief may be provided consistent with CISG and the general principles on which it is based [CISG-AC OPINION NO. 7, ¶ 3.2]. Moreover, the remedy of adaptation has been rejected by the drafters of CISG for being inconsistent with its general principles [ISHIDA].

121. Even if one recognises hardship as an impediment, adaptation of the Agreement is not possible under Art. 79 [FLECHTNER, P. 271]. While renegotiation or adaptation of

contractual terms is a remedy for hardship under Mediterranean law [ART. 6.2.3, UPICC], it is not a remedy under Art. 79 or within CISG. It cannot be conceived that there is a gap in CISG to be filled by giving the court or tribunal the power to adapt the contract to the changed circumstances [SCHLECHTRIEM, P. 480].

CONCLUSION TO ISSUE III:

122. RESPONDENT submits that CLAIMANT is not entitled to payment of USD 1,250,000, or any other amount, on price increase by allowing adaptation of the Agreement under Clause 12, or under CISG. The tariff imposition has not amounted to hardship as defined by Clause 12, and the remedy of adaptation is absent from the Agreement. Further, hardship is not provided for under CISG, and adaptation cannot be allowed by application of the Convention.

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully request the Arbitral Tribunal to hold that,

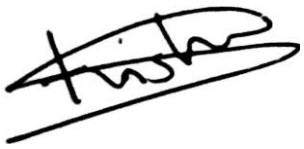
1. This Hon'ble Tribunal is not empowered to adapt the terms of the Frozen Semen Sales Agreement under the Arbitration Agreement.
2. The Partial Interim Award and the submissions from the other arbitration are excluded from evidence.
3. CLAIMANT is not entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price –
    a. Under Clause 12 of the Frozen Semen Sales Agreement, or,
    b. Under the CISG.

Respectfully signed and submitted by Counsel on January 24, 2018.

RUDHDI WALAWALKAR

ANJALI SINGH

RAINA MITRA



TVISHI PANT

LISA MISHRA