

MEMORANDUM FOR RESPONDENT



DEAKIN UNIVERSITY

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

CLAIMANT

v

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

RESPONDENT

**PAUL BEILHARZ • JOANNE BERENGER • MATTHEW COOKSON •
MAYURAN JEYARAJAH • LUCAS KENNY • JAMES KONIDARIS • KELEIGH ROBINSON
ROHAN SINGE**

COACHES: RUSSELL COCKS / CHRISTOPHER KEE



TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
ABBREVIATIONS	V
INDEX OF AUTHORITIES	VII
I. ARBITRAL AWARDS.....	VII
II. CASES	VII
III. JOURNAL ARTICLES.....	IX
IV. TEXTS	X
STATEMENT OF FACTS	1
SUBMISSIONS PART ONE: LAWS APPLICABLE TO THIS ARBITRATION	3
I. MODEL LAW.....	3
II. ARBITRATION RULES	3
III. CONVENTION ON THE INTERNATIONAL SALE OF GOODS.....	3
PART TWO: SUBMISSIONS ON JURISDICTIONAL MATTERS	5
I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THE SUGAR DISPUTE	5
A. <i>This Tribunal has jurisdiction under the agreed arbitral rules</i>	5
1. The Swiss Rules apply to this arbitration in their entirety	6
(a) The Cocoa Arbitration Agreement refers the dispute to arbitration under the guidance of the Geneva Chamber	6
(b) The Swiss Rules apply because CLAIMANT is estopped from objecting to their application.....	7
(c) Parties have not expressly excluded Article 21(5).....	8
2. The Swiss Rules allow for the Sugar Dispute to be heard	9
(a) The Sugar Dispute may be heard under Article 21(5)	10
(b) The Sugar Dispute may be heard as a counterclaim under Article 19(3)	11
B. <i>This Tribunal has Jurisdiction under the phrase ‘with respect to or in connection with’ in the Cocoa Arbitration Agreement.....</i>	11
1. The Cocoa Arbitration Agreement requires a connection between the disputes	12
2. There is a connection between the Cocoa Arbitration Agreement and Sugar Dispute	12
3. There is no need for two arbitrations	14
II. THIS TRIBUNAL SHOULD HAVE FULL CONFIDENCE IN ITS ABILITY TO MAKE AN AWARD	14
A. <i>The principle of res judicata does not preclude this Tribunal from hearing the sugar claim with the cocoa arbitration</i>	14
B. <i>The requirements of the New York Convention have been met.....</i>	15
1. Any award made would be in accordance with the parties’ agreement.	15
2. The relevancy of the public policies of Mediterraneo is questionable.....	16
3. Any unenforceable award may be severed.....	16
PART THREE: SUBMISSIONS ON MERITS OF THE CLAIM.....	17
I. CLAIMANT HAD NO RIGHT TO AVOID THE COCOA CONTRACT.....	17
A. <i>RESPONDENT’s behaviour did not constitute a fundamental breach of contract</i>	18



1.	The has been no detriment that cause a substantial deprivation to CLAIMANT	18
2.	If there was a substantial deprivation, this was not foreseeable to any reasonable person in RESPONDENT's position	19
B.	<i>RESPONDENT has not committed a breach under Article 49(1)(b)</i>	20
1.	CLAIMANT failed to fix an additional delivery period pursuant to Article 47 CISG.....	20
2.	A reasonable period of time had not expired when CLAIMANT made its substitute purchase	22
C.	<i>RESPONDENT's behaviour did not give CLAIMANT 'good grounds' to anticipate a breach</i>	22
II.	IF AVOIDANCE WAS PERMITTED, IT OCCURRED ON 15 NOVEMBER 2002.....	23
A.	<i>CLAIMANT DID NOT DECLARE THE CONTRACT AVOIDED ON 15 AUGUST 2002</i>	23
B.	<i>CLAIMANT DID NOT DECLARE THE CONTRACT AVOIDED ON 25 OCTOBER 2002</i>	24
C.	<i>IF CLAIMANT WAS ENTITLED TO AVOID, AT THE EARLIEST THIS OCCURED ON 15 NOVEMBER 2002</i>	24
III.	DAMAGES	24
A.	<i>CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO Article 74 CISG</i>	24
B.	<i>CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO Article 75 CISG</i>	25
1.	The substitute purchase was made before the contract was avoided	26
2.	The substitute purchase was not made in a reasonable manner as required under the provision.....	26
IV.	RESPONDENT IS ENTITLED TO ARTICLE 79 CISG RELIEF	26
A.	<i>EGCMO BAN WAS AN IMPEDIMENT BEYOND RESPONDENT's CONTROL</i> .	27
1.	Delivery was impossible as the contract contemplated cocoa from Equatoriana	27
(a)	There was an established trade practice between the parties	27
(b)	RESPONDENT's name indicates that it deals primarily with goods from Equatoriana.....	28
(c)	The price stipulated for the cocoa is the price for cocoa from Equatoriana.	28
(d)	Subsequent conduct does not indicate that the contract was for non-specific cocoa.....	28
2.	The embargo caused hardship so as to amount to an impediment	29
(a)	Hardship can amount to an impediment.....	29
(b)	Hardship made performance unreasonable	29
B.	<i>THE BAN COULD NOT HAVE BEEN TAKEN INTO ACCOUNT AT THE TIME OF CONTRACTING</i>	30
C.	<i>RESPONDENT TOOK REASONABLE STEPS TO OVERCOME OR AVOID THE IMPEDIMENT OR ITS CONSEQUENCES</i>	31
1.	If the source was to be Equatoriana, it was reasonable for RESPONDENT to wait for the ban to be lifted	31
2.	Article 79 does not require performance beyond the terms of the contract	31
3.	Even if the contract is not found to contemplate cocoa from Equatoriana, a substitute purchase was not reasonable.....	32
V.	CLAIMANT MUST REDUCE DAMAGES	33



A. CLAIMANT IS NOT ENTITLED TO DAMAGES OF USD 289,353 UNDER
ARTICLE 76..... 33

B. CLAIMANT FAILED TO MITIGATE LOSS PURSUANT TO ARTICLE 77 33

1. Damages should be reduced to nil by CLAIMANT’s failure to mitigate..... 33

2. Damages should be reduced to a third by CLAIMANT’s failure to mitigate.. 34

3. Even if all steps were taken to mitigate, CLAIMANT is still not entitled to the
claimed sum..... 35

PART FOUR: RELIEF REQUESTED..... 35



ABBREVIATIONS

Cl. Answer	CLAIMANT's Answer to Counterclaim
Res. Answer	RESPONDENT's Answer to Notice of Arbitration and Counter-Claim
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods [1980]
CLAIMANT	Mediterraneo Confectionary Associates, Inc
Cl. Ex. No. #	CLAIMANT's Exhibit No. #
Cl. Memo	CLAIMANT's Memorandum
Cocoa Arbitration Agreement	Arbitration agreement found in Cocoa Contract 1045
Cocoa Contract	Cocoa Contract 1045 found in CLAIMANT's Exhibit No. 2
Commentary	Secretariat Commentary of the 1978 Draft CISG
EGCMO	Equatoriana Government Cocoa Marketing Organization
Geneva Chamber	Chamber of Commerce and Industry of Geneva
Geneva Rules	Chamber of Commerce and Industry of Geneva Arbitration Rules
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce Rules of Arbitration [1998]
Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958]
Oceania Rules	Rules of Arbitration of the Oceania Commodity Association
para	Paragraph
p./pp.	Page/Pages
P.O. No. 2	Procedural Order No. 2
RESPONDENT	Equatoriana Commodity Exporters, S.A.
Request	CLAIMANT's Request for Arbitration
RES. Ex. No. #	RESPONDENT's Exhibit No. #
SCC	Swiss Chamber of Commerce
Sugar Contract	Sugar Contract 2212 found in RESPONDENT's Exhibit No. 4
Sugar Dispute	Dispute between the parties in relation to the Sugar Contract.



Swiss Rules	Swiss Rules of International Arbitration [2004]
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law on International Commercial Arbitration Rules
UNIDROIT Principles	International Institute for the Unification of Private Law Principles of International Commercial Contracts



INDEX OF AUTHORITIES

I. ARBITRAL AWARDS

OGH 10 Ob 518/95. 1996 Austria

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

Cited As: OGH 10 Ob 518/95

ICC Award No. 5721. 1990

Cited As: ICC Award 5721

ICC Award 7197. 1992

Cited As: ICC Award 7197

ICC Arbitration Case No. 8574. 1996

<http://www.unilex.info/case.cfm?pid=case&id=521&step=FullText>

Cited As: ICC Award 8574

ICC Award 5901. 1989

Cited As: ICC Award 5901

ICC Award No. 2626. 1978

Cited As: ICC Award 2626

ICC Award No. 7585. 1992

Court of Arbitration of the International Chamber of Commerce

<http://cisgw3.law.pace.edu/cases/927585i1.html>

Cited As: ICC Award 7585

ICC Award No. 7929. 1995

<http://www.kluwarbitration.com>

Cited As: ICC Award 7929

ICC Award No. 9797. 2000

<http://www.kluwarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=24459>

Cited As: ICC Award 9797

II. CASES

Case 56/1995. 1995

Bulgarian Chamber of Commerce & Industry

http://www.cisgw3.law.pace.edu/cisg/text/anno_art_79.html

Cited As: Case 56/1995

China Nanhai Oil Joint Service Cpn v Gee Tai Holdings Co Ltd. 1995



Hong Kong Supreme Court

Cited As: Nanhai Oil Joint Service v Gee Tai Holding

Delchi Carrier S.p.A v. Rotorex Corp., 1995

U.S Circuit Court of Appeals (2d. Cir) United States

<http://www.cisgw3.law.pace.edu/cases/951206u1.html>

Cited As: Delchi Carrier v. Rotorex

G.I.E Acadi v. Societe Thomson-Answare. 1988

Cited As: Acadi v Thomson

Hadley v. Baxendale. 1854

Court of Exchequer Great Britain English Reports

Cited As: Hadley v. Baxendale

Italy No. 53. 2003 Trento Court of Appeal, Italy

Van den berg, Yearbook Commercial Arbitration

Cited As: Italy No. 53

Jurong Engineering Ltd v. Black & Veatch Singapore Pte Ltd. 2003

Singapore High Court: Lai Kew Chai

http://www.onlinedmc.co.uk/jurong_engineering_v_black_&_veatch.htm

Cited As: Jurong v. Black

Mediterranean Enterprises Inc v. Ssangyong Corp. 1983 (9th Cir.)

Cited As: Mediterranean v Ssangyong

Methanex New Zealand Ltd. v. Fontaine Navigation S.A., Tokyo Marine Co. Ltd, The Owners and all Others Interested in the Ship Kinugawa (The). 1998

Federal Court of Canada Trial Division

<http://www.uncitral.org/english/clout/MAL-thesaurus/MAL-abstract382-e.htm>

Cited As: Methanex v. Fontaine

OLG Braunschweig 2U 27/1999. 1999 Germany

Cited As: OLG Braunschweig 2U 27/1999

OLG Cologne 22 U4/96.s 1996 Germany

<http://www.uncitral.org/english/clout/abstract/abst12.html>

Cited As: OLG Cologne 22 U4/96

OLG Hamm, 19 U97/91. 1992 Germany

Cited As: OLG Hamm, 1992 U97/91

Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al. 1999

Canada Superior Court of Justice

<http://www.uncitral.org/english/clout/MAL-thesaurus/MAL-full-391-e.pdf>

Cited As: Re Corporacion Transnacional de Inversiones



Woolf v Collis Removal Service. 1948
English Court of Appeal
Cited As: Woolf v. Collis Removal Service

III. JOURNAL ARTICLES

Berger, Klaus Peter,
'Set-Off in International Economic Arbitration' (1999)
15(1) *Arbitration International* 53
<<http://www.kluwerarbitration.com>>.
Cited As: Berger, K.P 1999

Bonell, Michael Joachim,
'A 'Global' Arbitration Decided on the Basis of UNIDROIT Principles: In re Anderson Consulting
Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide
Societe Cooperative' (2001)
17(3) *Arbitration International*
<<http://www.kluwerlawonline.com>>.
Cited As: Bonell, M.J 2001

Chengwei, Liu,
'Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL' (2003)
<<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>>.
Cited As: Chengwei, Liu 2003

Chiu, Julie C,
'Consolidation of Arbitral Proceeding in International Arbitration' (1990)
7(2) *Journal of International Arbitration* 53
Cited As: Chiu, JC 1990

Derains, Yves, 'The ICC Arbitral Process: Choice of the Law Applicable to the Contract and International
Arbitration' (1995)
6(1) *The ICC Court of Arbitration Bulletin* 10
Cited As: Derains, Y 1995

Kee, Christopher,
'Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement
Article 48 of the CISG' (2004)
<http://www.cisg.law.pace.edu/cisg/biblio/kee1.html#*>.
Cited As: Kee, C 2004

Level, Patrice, 'Joinder of Proceedings, Intervention of Third Parties and Additional Claims and
Counter-Claims' (1996)
7(2) *The ICC International Court of Arbitration Bulletin* 36
Cited As: Level, P 1996



Schlechtriem, Peter,
'Effectiveness and Binding Nature of Declarations (Notices, requests and other communications) under Part II and Part III of the CISG' (1995)
Cornell Review on the Conventions on Contracts for the International Sale of Goods 95
<<http://www.cisgw3.law.pace.edu/cisg/biblio/schlect.htm>>.
Cited As: Schlechtriem, P 1995

van den Berg, Albert Jan,
'Court decisions on the New York Convention'
Swiss Arbitration Association Conference, 1996
Cited As: van den Berg, AJ, 1996

Wetter, Gillis,
'The Importance of Having a connection' (1987)
3 *Arbitration International* 329.
Cited As: Wetter, G. 1987

Ziegel, Jacob S.,
'Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods' (1981).
<http://www.cisg.law.pace.edu/cisg/text/ziegel60.html>
Cited As: Ziegel, JS 1981

IV. TEXTS

Bianca, C., Bonell, M. (ed),
Commentary on the International Sales Law: The 1980 Vienna Sales Convention (1987)
Cited As: Bianca, C., Bonell., M 1987

Blessing, Marc,
'The Law Applicable to Arbitration Clause' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (vol 9)
Cited As: Blessing, M

Craig, Laurence W., Park, William., Paulsson, Jan. (ed),
International Chamber of Commerce Arbitration
(3rd ed, 2000)
Cited As: Craig, L.W., Park, W., Paulsson, J., 2000

Enderlein, Fritz., Maskow, Dietrich.,
International Sales Law (1992)
Cited As: Enderlein, F., Maskow, D.

Gaillard, E., Goldman., B. (ed),
Fouchard, Gaillard, Goldman on International Commercial Arbitration (1999)
Cited As: Gaillard, E., Goldman., B 1992



Garner, Bryan A. (ed),
Black's Law Dictionary (8th ed, 2004)
Cited As: Garner, B. 2004

Goldstajn, Alekandar,
'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in Petar. Sarcevic, Volken, Paul (ed), *International Sale of Goods: Dubrovnik Lectures, Oceana*
<http://www.cisg.law.pace.edu/cisg/biblio/goldstajn.html> Chapter 3, 55
Cited As: Goldstajn 1980

Grigera Naon, Horacio,
Recueil Des Cours: Collected Courses of the Hague Academy of International Law (2001)
Cited As: Grigera Naon H 2001

Honnold, John O,
Uniform Law for International Sales under the 1980 United Nations Sales Convention
(3rd ed, 1999)
Cited As: Honnold, J 1999

Redfern, Alan., Hunter, Martin.,
Law and Practice of International Commercial Arbitration
(3rd ed, 1999)
Cited As: Redfern , A., Hunter, M 1999

Redfern, Alan., Hunter, Martin.,
Law and Practice of International Commercial Arbitration: Student Edition (2003)
Cited As: Redfern, A., Hunter, M 2003

Schlechtriem, Peter (ed),
Uniform Sales Law - The UN Convention on Contracts for the International Sale of Goods (1986)
Cited As: Schlechtriem, P. 1986



STATEMENT OF FACTS

2001

- 19 November** RESPONDENT makes verbal offer to sell cocoa to CLAIMANT. CLAIMANT agrees to purchase 400 metric tons of cocoa beans from RESPONDENT. Delivery date to be set in January – February 2002 for delivery in March – May 2002. Price set at market price on 19 November 2002; total price USD 496,299.55. RESPONDENT sends CLAIMANT a letter and signed contract confirming the agreement.
- 23 November** CLAIMANT signs contract. Contract contains arbitration agreement whereby parties agree to be bound by the Rules of Arbitration of Chamber of Commerce & Industry of Geneva. Vindobona, Danubia to be the site of arbitration on the contract.
- 14 February** Storm hits Equatoriana.
- 22 February** EGCMO bans export of cocoa from Equatoriana.
- 24 February** RESPONDENT notifies CLAIMANT ban will continue at least until March, and it will keep CLAIMANT informed when it receives further information.
- 5 March** CLAIMANT replies, stating it is not under immediate pressure to receive the contracted cocoa, but will be later in the year.
- March** CLAIMANT telephones RESPONDENT several times inquiring about delivery date. RESPONDENT unable to give CLAIMANT any further information due to lack of information from EGCMO.
- 20 March** EGCMO extend export ban until further notice.
- 10 April** CLAIMANT reiterates to RESPONDENT that it requires delivery by end of May 2002.
- 7 May** RESPONDENT informs CLAIMANT that 100 tons of cocoa were released to RESPONDENT to export and is to be shipped later in the month. RESPONDENT informs CLAIMANT of the present difficulties in the cocoa market in Equatoriana.
- 18 May** CLAIMANT receives and pays for the 100 tons at contract price.
- June / July** CLAIMANT telephones RESPONDENT several times enquiring about when the remaining 300 tons will be delivered. RESPONDENT was unable to provide any further information.
- 15 August** CLAIMANT enquires as to the state of the export ban and the delivery date.
- 29 September** RESPONDENT phones CLAIMANT and states no further information regarding the export ban has been received.
- October** Rumours circulated that the EGCMO was planning to release additional cocoa.



- 24 October CLAIMANT purchases 300 tons of cocoa from Oceania Produce Ltd. at all time market high of USD 2,205.26.
- 25 October CLAIMANT informs RESPONDENT of cocoa purchase and that a claim for the difference in price will be made.
- 11 November CLAIMANT sends letter to RESPONDENT claiming excess amount.
- 12 November EGCMO rescinds cocoa ban.
- 13 November RESPONDENT writes to CLAIMANT asserting that it had not terminated the contract and that CLAIMANT's cover purchase is a breach.
- 13 November EGCMO releases additional cocoa.
- 15 November CLAIMANT writes to RESPONDENT in an 'abundance of caution' to formally avoid the contract.

2003

- 20 November CLAIMANT purchases 2,500 tons of sugar at USD 154.32 per ton. Total contract price of USD 385,805.00. Contract contains arbitration clause subjecting parties to Rules of Arbitration of the OCA. Site of arbitration to be Port Hope, Oceania.
- 4 December Sugar delivered to carrier '*Oceania*'.
- 8 December Sugar loaded onto vessel in Oceania.
- 15 December Sugar arrives in Mediterraneo.
- 19 December CLAIMANT writes to RESPONDENT claiming sugar has arrived soaked and unfit for human consumption

2004

- 2 July CLAIMANT submits claim for arbitration to SCC.
- 6 July SCC notifies CLAIMANT that Geneva Rules are no longer used for international arbitration, and that Swiss Rules will be applicable.



SUBMISSIONS

PART ONE: LAWS APPLICABLE TO THIS ARBITRATION

I. MODEL LAW

- 1 There is no dispute between the parties as to the applicable law of the arbitration. CLAIMANT has agreed to the application of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") [Cl. Memo, para 82]. Danubia has adopted the Model Law [Request, para 15]. This is an international dispute in accordance with Model Law Art. 1(3) as both parties had their places of business in different states at the time of conclusion of the contract. Consequently, the Model Law governs the present arbitration.

II. ARBITRATION RULES

- 2 Subject to the provisions of the Model Law, Art. 19(1) allows the parties to choose rules of procedure to be followed by the arbitral tribunal in the conduct of proceedings. The Rules of the Chamber of Industry and Commerce of Geneva ("Geneva Rules") were referred to in the Cocoa Contract arbitration clause. The Chamber of Industry and Commerce of Geneva ("Geneva Chamber") has now adopted the Swiss Rules to apply to international arbitration [SCC Letter, July 6 2004]. There is dispute between the parties as to whether the Swiss Rules apply in their entirety or whether the Geneva Rules apply.

III. CONVENTION ON THE INTERNATIONAL SALE OF GOODS

- 3 RESPONDENT agrees with CLAIMANT that the United Nations Convention on Contracts for the International Sale of Goods ("CISG") is the law applicable to the substance of the dispute [Cl. Memo, para 1] because the requirements to enable the CISG to be applied have been fulfilled: both contracts are international contracts for the sale of goods; CLAIMANT and RESPONDENT's places of business are in different states (Mediterraneo and Equatoriana respectively); and there has been no express exclusion of the CISG.



- 4 The contractual formation requirements that the CISG necessitates have been satisfied pursuant to Arts. 14 and 18. Therefore, pursuant to Art. 1(1)(a) the substantive issues between the parties can be governed by the CISG.
- 5 CLAIMANT submissions do not properly contemplate the complexities of determining arbitrability. CLAIMANT has failed to address this Tribunal on the issue of the substantive law applicable to the arbitration agreement. It is within the context of that law that issues of arbitrability must be determined.
- 6 This Tribunal will need to undertake a thorough conflict of laws analysis to determine the applicable law. The learned author Blessing warns that this may involve '*the careful examination of the situations of the parties, the contracts involved and all surrounding circumstances...a purely academic analysis might not lead to the correct solution*' (Blessing, M., 1999, p. 171). Although the arbitration agreement is not automatically subject to the law governing the substance of the dispute, there is a rebuttable presumption that the law governing the substance of the dispute extends to the arbitration agreement (*ICC Award 2626, 1978; Derains, Y., 1995, p. 16; Redfern, A., Hunter, M., 1999, p. 158*). As such, because the CISG is the law governing the substance of the dispute, it may be used to assist this Tribunal in its interpretation of the Cocoa Arbitration Agreement (*ICC Award 5721, 1990; Chiu, J. C., 1990, p. 202*).
- 7 Should this Tribunal choose not to use the CISG to interpret the Cocoa Arbitration Agreement, RESPONDENT submits that this Tribunal should interpret the agreement in accordance with general principles of international law. These general principles include principles of fairness and reasonableness and are also applicable under the CISG. Therefore, both methods of interpretation will provide this Tribunal with the same outcome.



PART TWO: SUBMISSIONS ON JURISDICTIONAL MATTERS

- 8 In accordance with Model Law Art. 16(1) and Swiss Rule Art. 21(1) this Tribunal has the competence to rule on its own jurisdiction. RESPONDENT has asked this Tribunal to consider the Sugar Dispute [Res. Answer, paras 13-19]. RESPONDENT submits that hearing the Sugar Dispute is within the jurisdiction of this Tribunal.
- 9 As this Tribunal is aware, the primary purpose for which the parties chose arbitration as a dispute resolution method is for its speed and efficiency (Redfern, A., Hunter, M., 1999 p. 3). It was also because the parties have a continuing commercial relationship, which they wish to maintain. RESPONDENT asks this Tribunal to keep these purposes in mind as it decides whether it has jurisdiction to hear the Sugar Dispute. In hearing these two disputes together, these purposes will be achieved.

I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THE SUGAR DISPUTE

- 10 In accordance with general principles, the arbitration agreement forms the basis of this Tribunal's jurisdiction (*Gaillard, E., Goldman., B., 1999, p. 199; Redfern, A., Hunter, M., 1999, p. 6-7*). RESPONDENT asserts that this Tribunal has jurisdiction from the Cocoa Arbitration Agreement to hear the Sugar Dispute. This arises from: **(A)** the agreed arbitral rules; and **(B)** the phrase '*with respect to or in connection with*' in the Cocoa Arbitration Agreement. These two paths are not mutually exclusive; rather they are interrelated and provide this Tribunal two means of arriving at the same conclusion. They are interrelated in that finding the phrase '*with respect to or in connection with*' refers to the Sugar Dispute will open further alternatives within the arbitral rules. As such, although RESPONDENT submits that this Tribunal can find jurisdiction independently via each path, there is some overlap in submissions in relation to the hearing of counterclaims via each path.

A. THIS TRIBUNAL HAS JURISDICTION UNDER THE AGREED ARBITRAL RULES

- 11 RESPONDENT submits that the applicable procedural rules provide this Tribunal jurisdiction to hear the Sugar Dispute. This is because: **(1)** the Swiss Rules apply to this arbitration in their entirety; and **(2)** the Swiss Rules allow for the Sugar Dispute to be heard.



1. *The Swiss Rules apply to this arbitration in their entirety*

12 RESPONDENT submits that the Swiss Rules apply in their entirety. CLAIMANT does not object to the application of the Swiss Rules in principle [Cl. Answer, para 5; Cl. Memo, para 84], however objects to the application of Art. 21(5) of the Swiss Rules. The Swiss Rules apply in their entirety because: (a) the Cocoa Arbitration Agreement refers disputes to arbitration under the guidance of the Geneva Chamber; (b) CLAIMANT is estopped from objecting to their application; and (c) the parties have not expressly excluded Art. 21(5).

(a) *The Cocoa Arbitration Agreement refers the dispute to arbitration under the guidance of the Geneva Chamber*

13 RESPONDENT submits that the arbitration clause in the Cocoa Contract provided for institutional arbitration under the guidance of the Geneva Chamber. According to the learned authors Redfern and Hunter, an institutional arbitration is one which is administered by a permanent arbitral institution under its own rules of arbitration (*Redfern, A., Hunter, M., 1999, p. 44*).

14 The Cocoa Arbitration Agreement specifically states '*Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland*' [Cl. Ex. No. 2]. Had the parties intended to subject their dispute to a set of rules not attached to an institution, it is most likely they would have referred to them by their name, which is '*Chamber of Commerce and Industry of Geneva Arbitration Rules*'. Further, the parties used the arbitration clause drafted by the Geneva Chamber, so there is an implicit reference to the institution. This demonstrates that the parties intended the dispute to be resolved by the Geneva Chamber, not simply its rules.

15 CLAIMANT's assent to the authority of the Geneva Chamber is further demonstrated by its conduct: CLAIMANT stated in its request for arbitration 'The Geneva Chamber of Commerce and Industry has jurisdiction over this arbitration' [Request para 18]; CLAIMANT submitted its dispute to the Geneva Chamber [Letter 2 July 2004]; and CLAIMANT paid a registration fee to the Geneva Chamber.

16 These aforementioned factors demonstrate that by referring to '*Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland*', the parties were submitting any future disputes



to institutional arbitration administered by the Geneva Chamber. This accords with Art. 2(d) of the Model Law, which allows parties to authorise an institution to decide on certain issues, such as rules.

- 17 The Singaporean case of *Jurong v. Black* held that an arbitration is subject to the rules at the time of submission to arbitration, not at the conclusion of the contract (*Jurong v. Black, 2003*). This principle applies regardless of whether those rules were in existence at the time of contracting (*Jurong v. Black, 2003*). RESPONDENT submits this principle has international application and is not peculiar to international arbitration in Singapore. As such, RESPONDENT submits that this arbitration is governed by the Swiss Rules in their entirety, as the Swiss Rules were the rules which the Geneva Chamber was applying at the time the dispute was submitted to arbitration.
- 18 CLAIMANT may argue that any ambiguities in interpreting the Cocoa Contract arbitration clause should be resolved in accordance with the interpretative method of *contra proferentem*. However, RESPONDENT argues that *contra proferentem* does not apply in the current situation because the parties used a standard model arbitration clause which was provided in the Geneva Rules. Therefore any dispute as to whether the words '*Rules of Arbitration of the Chamber of Commerce and Industry of Geneva*' were intended to mean the rules by themselves, or rules as part of an institution, should not automatically be interpreted in favour of CLAIMANT.

(b) The Swiss Rules apply because CLAIMANT is estopped from objecting to their application

- 19 CLAIMANT has been applying and abiding by the Swiss Rule requirements since 6 July 2004 when it was notified of their implementation and provided with a copy of the Swiss Rules. CLAIMANT's conduct evinced an acceptance of the application of the Swiss Rules. This conduct includes: the form requirements for a claim being met under the Swiss Rules; CLAIMANT paid the required fees for commencing arbitration under the Swiss Rules, which is notably 500 Swiss Francs more than under the Geneva Rules; CLAIMANT specifically refers to and applies Art. 7 of the Swiss Rules in the letter of 21 July 2004; CLAIMANT appointed an arbitrator under the Swiss Rules which is different to the procedure for appointing arbitrators under the Geneva Rules; and CLAIMANT did not object to the Swiss Rules until six weeks after notification of their existence.



20 This conduct indicates an acceptance of the Swiss Rules. As such, RESPONDENT submits that CLAIMANT is estopped from objecting to the application of the Swiss Rules or has waived its right to do so under Art. 4 of the Model Law. This article is a form of estoppel which prevents a party from denying conduct which the other party has relied upon. The Canadian case of *Methanex v. Fontaine* involved the application of estoppel under the Model Law. This case involved a party being estopped from invoking an arbitration clause because it had given previous indication through conduct and written communication that it consented to litigation (*Methanex v. Fontaine, 1998*). RESPONDENT relied on CLAIMANT's conduct by paying the required fee of 4,500 Swiss Francs for the bringing of a counterclaim [SCC, Letter dated 13 August 2004]. Had CLAIMANT objected to the Swiss Rules, or specifically Art. 21(5) after it first received notification of their existence, RESPONDENT may not have brought the counterclaim. The learned authors Redfern and Hunter, in a discussion on timely objections to jurisdiction, state '*[o]bjections to jurisdiction should be raised and dealt with by the arbitral tribunal at an early stage as a preliminary issue...It is undesirable that a party who feels that the case is beginning to go against him should be able to raise objections to jurisdictions at a late stage of the proceedings'* (Redfern, A., Hunter, M., 2003, p. 272). As such, RESPONDENT submits that this Tribunal should apply the same reasoning as in *Methanex v. Fontaine* and find that CLAIMANT is estopped from objecting to the Swiss Rules.

(c) Parties have not expressly excluded Article 21(5)

21 CLAIMANT has argued that in the event this Tribunal finds that the Swiss Rules apply, then Art. 21(5) should not apply [Cl. Memo, para 86-98]. RESPONDENT disputes this because: (i) the implementation of Art. 21(5) was foreseeable; and (ii) excluding the application of Art. 21(5) would be a deviation from the purpose of the Swiss Rules.

(i) The implementation of Article 21(5) was foreseeable

22 CLAIMANT may argue that Art. 21(5) is a surprising or peculiar provision as the UNCITRAL Arbitration Rules do not contain a provision such as Art. 21(5) and the Swiss Rules were based on these rules. It may be argued that such a provision was not foreseeable. The purpose of the creation of the Swiss Rules was a unification and harmonisation of the arbitration rules of the six Chambers of Commerce in Switzerland [SCC Letter 16 July 2004]. Fifty percent of the chambers



of Commerce in Switzerland contain a provision such as Art. 21(5) (Basel, Zurich and Ticino). As such, although the UNCITRAL Arbitration Rules do not contain a similar provision, it was reasonably foreseeable that a provision such as Art. 21(5) would be included in rules which were intended to be a unification of the six chambers' international arbitration rules.

(ii) Excluding the application of Article 21(5) would be a deviation from the purpose of the Swiss Rules

- 23 CLAIMANT argues that 'the parties can opt in or out of particular provisions to the extent that neither the nature of the system, nor any core ideas are impaired', and as such Art. 21(5) may be excluded [Cl. Memo, para 94]. RESPONDENT submits that if this Tribunal decides that the Swiss Rules apply, but excludes the application of Art. 21(5), this will be a substantial deviation from the purpose of the Swiss Rules and thus impair the nature of the Rules. Whilst Art. 21(5) is not described as a mandatory provision, attention must be paid to the purpose of the creation of the Swiss Rules. This purpose is expressed in the introduction to the Swiss Rules which is to 'promote institutional arbitration in Switzerland and to harmonize the existing rules of arbitration'. Therefore, RESPONDENT asks this Tribunal to give effect to the Swiss Rules as a replacement for the other Swiss Chambers' international arbitration rules, rather than as an alternative.
- 24 RESPONDENT submits that the fact there was no such provision as Art. 21(5) in the UNCITRAL Arbitration Rules is indicative of the importance of this article to the Swiss Rules. The Introduction to the Swiss Rules states that the differences between the two sets of rules have '*deliberately been kept to a minimum*'. This demonstrates that the drafters of the Swiss Rules made a conscious decision to include Art. 21(5). They were not merely adopting every provision which was in a previous set of rules. Therefore, not applying Art. 21(5) would in effect be disregarding what is an obviously important provision in the Swiss Rules and would thereby frustrate its objectives.

2. The Swiss Rules allow for the Sugar Dispute to be heard

- 25 The Swiss Rules allow for the Sugar Dispute to be heard: (a) under Art. 21(5); or alternatively (b) as a counterclaim under Art. 19(3).



(a) *The Sugar Dispute may be heard under Article 21(5)*

- 26 Article 21(5) allows for the hearing of a set-off defence when the relationship out of which the defence arises is not within the scope of the arbitration clause or is subject to another arbitration agreement or forum selection clause. RESPONDENT submits that the Sugar Dispute may be heard as a counterclaim under this article.
- 27 CLAIMANT has argued that set-off and counterclaim are different concepts [Cl. Answer, para 5]. RESPONDENT agrees that there is a general legal distinction between these two concepts. However, this Tribunal is being asked to consider the concept of "*Set-off defences*".
- 28 RESPONDENT submits that the definition of set-off defence encompasses both counterclaim and set-off. Although the phrase set-off defence is not defined under the Swiss Rules, RESPONDENT submits the meaning of the phrase is to be determined by the context in which it is used in the Swiss Rules. The phrase is used in Art. 42(2), which is an article relating to the carrying out of an expedited procedure. The current proceedings come under the ambit of this article. In this article the phrase set-off defence is able to be understood as being inclusive of counterclaims. This is based on the phrase '*counterclaim (or any set-off defence)*'. RESPONDENT submits by the use of the parenthesis the framers of the Swiss Rules were intending that counterclaim be read as an example of a type of set-off defence.
- 29 This interpretation is supported by Art. 70 of the New French Code of Civil Procedure which is an equivalent provision to Art. 21(5) that uses the word 'counterclaim' rather than 'set-off defence'. It is noted that in French civil procedure it is common to have a counterclaim heard as a set-off (*Berger, K. P., 1999, p. 55*). Many authors have acknowledged that this Code has adopted large portions of the UNCITRAL Arbitration Rules (*Goldstajn, A., 1986*). For this reason, this Tribunal can gain guidance from the New French Code of Civil Procedure as a reference point of what terms such as these mean in international arbitration.
- 30 This submission is further supported by Black's Law Dictionary where counterclaim is defined as '*a claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a set-off against the plaintiff's claim*' (Garner, B. A., 2004, p.



376). This is an indication of the relationship between counterclaim and set-off. That is, a counterclaim may be heard for the effect of setting off. Thus, where the phrase '*counterclaim (or any set-off defence)*' is used in the Swiss Rules it demonstrates that it contemplates the hearing of a counterclaim as a set-off.

- 31 If this Tribunal does not accept that the Sugar Dispute can be heard as a counterclaim under Art. 21(5), it still may be heard as a set-off under this article.

(b) The Sugar Dispute may be heard as a counterclaim under Article 19(3)

- 32 RESPONDENT acknowledges that the following submissions require a determination by this Tribunal that the phrase '*with respect to or in connection with*' contemplates the Sugar Dispute.

- 33 Article 19(3) of the Swiss Rules allows this Tribunal to hear RESPONDENT's counterclaim. This article states that the formal requirements under Arts. 18(2)(b)-(d) must be met in order to bring a counterclaim. As RESPONDENT has satisfied these requirements, it is entitled to bring a counterclaim under this article.

- 34 In the event that this Tribunal does not accept that the Swiss Rules apply and instead decides this arbitration is governed by the Geneva Rules, the Sugar Dispute may nevertheless be heard. Article 8(1)(b) of the Geneva Rules provides for the bringing of a counterclaim. The requirements under the Geneva Rules mirror those under the Swiss Rules and as such RESPONDENT is entitled to bring a counterclaim under the Geneva Rules.

- 35 RESPONDENT provides further persuasion that this Tribunal has jurisdiction to hear the counterclaim pursuant to Model Law Art. 2(f). This article provides that where there has been a claim, there is a reciprocal right to hear a counterclaim as part of the same proceedings.

B. THIS TRIBUNAL HAS JURISDICTION UNDER THE PHRASE '*WITH RESPECT TO OR IN CONNECTION WITH*' IN THE COCOA ARBITRATION AGREEMENT

- 36 It is submitted that this Tribunal can find jurisdiction to hear the Sugar Dispute from the phrase '*with respect to or in connection with*' in the Cocoa Arbitration Agreement. This is in line with the CISG,



which allows us to use a reasonable person test from Art.8(3) CISG to determine the intentions of the parties at the time of contracting. This is because: (1) the Cocoa Arbitration Agreement requires a connection between the Sugar Dispute and the Cocoa Contract; (2) there is a connection between the Sugar Disputes and the Cocoa Contract; and additionally, (3) this phrase indicates there is no need for two arbitrations.

1. *The Cocoa Arbitration Agreement requires a connection between the disputes*

37 The wording of the Cocoa Arbitration Agreement indicates that it can extend to disputes not directly arising from the Cocoa Contract. The wording specifically states '*any disputes arising with respect to or in connection with this agreement*'. This phrase provides this Tribunal with jurisdiction in two ways. The first is to hear disputes '*with respect to*' the agreement, which RESPONDENT submits means disputes under a different body of law, such as tort law (*Redfern, A., Hunter, M., 1999, p. 161-162*). The second is to hear disputes '*in connection with*' the agreement. It is generally accepted in international commercial arbitration that the words '*in connection with*' covers all disputes other than those entirely unrelated to the transaction covered by the contract in question (*Woolf v. Collis Removal Service, 1948*). This includes disputes which have another sort of relationship with the primary dispute. In this instance there is a commercial relationship between the disputes.

38 According to the learned authors Fouchard, Gaillard and Goldman, arbitration agreements should not be construed narrowly (*Gaillard, E., Goldman, B., 1999, p. 260*). As such, RESPONDENT submits that the words '*with respect to and in connection with*' should be construed to extend to all disputes that have a significant connection with the primary agreement (*ICC Award 7929, 1995; Mediterranean v Ssangyong, 1983; Wetter, G., 1987, p. 309*).

2. *There is a connection between the Cocoa Arbitration Agreement and Sugar Dispute*

39 CLAIMANT has argued that the two contracts are not '*sufficiently economically related to allow adjudication of both by one tribunal*' [Cl. Memo, para 83]. In doing so, it appears that CLAIMANT concedes jurisdiction if this Tribunal finds the disputes are sufficiently economically related. This is therefore a factual investigation for this Tribunal to undertake. If this Tribunal finds the two contracts



are sufficiently economically related, it in turn follows that it has jurisdiction to hear the disputes together.

- 40 RESPONDENT submits that the two contracts are economically related, which is demonstrated in the following ways: the same parties are involved in each contract; both raw products are used in the production of confectionaries – which is CLAIMANT’s primary business; and the two products are interrelated and cannot be used for the purpose of making chocolate confectionary without the other being present. RESPONDENT suggests that this is by no means an exhaustive list.
- 41 Further support that the disputes are *‘in connection with’* each other and thus *‘sufficiently economically related’* is demonstrated by the ongoing commercial relationship between the parties (*ICC Award 7929, 1995*). In accordance with Art. 8(3) of the CISG, this Tribunal may turn to the conduct of the parties when ascertaining their intention. RESPONDENT submits that the previous conduct of the parties demonstrates their intention was to be involved in an ongoing commercial relationship. Such a relationship is sometimes referred to as a *‘unified contractual scheme’* or an *‘economic unit’*. The phrase *‘unified contractual scheme’* in the present context appears to reflect the position frequently encountered in international arbitration, which is *‘complex situations where numerous contractual documents relate to the one organic relationship’* (*Craig, L. W., Park, W., Paulsson, J., 2000, p. 95*). The learned authors Craig, Park and Paulsson concluded that it is generally considered desirable that disputes relating to obligations arising from the relationship as a whole should be submitted to a single judicial authority (*Craig, L. W., Park, W., Paulsson, J., 2000, p. 95*).
- 42 This Tribunal may gain an insight as to how these principles are applied by recourse to the French law of international arbitration. The French case of *G.I.E Acadi v. Societe Thomson - Answare* involved a series of contracts. One contract contained an arbitration clause, and another contained a jurisdiction clause in favour of the Commercial Court of Paris. Neither court found it appropriate to separate the issues in dispute to be heard by different judicial authorities (*Acadi v Thomson, 1988*). RESPONDENT asks this Tribunal to apply the same reasoning of the court in that case and hear both disputes together.



3. *There is no need for two arbitrations*

- 43 CLAIMANT may argue that the purpose for the inclusion of reference to the Oceania Commodity Association Arbitration ("Oceania Arbitration") was for a specialist tribunal, and as such two separate arbitrations are needed. RESPONDENT submits that the reason for this reference to Oceania Arbitration was in the event that the dispute was in relation to the quality of the goods. [P.O. 2, para 6] In this current situation, the dispute is not in relation to the quality of the sugar. There is no disagreement between the parties as to whether the sugar has actually been damaged. Rather, the dispute to be determined is simply when the sugar was damaged and the passing of risk [Cl. Answer, para 7]. In addition, neither party belongs to any association which would require arbitration in any particular arbitration institution [P.O. 2, para 6].
- 44 The ultimate purpose behind the arbitration clauses was to subject any disputes between the parties to arbitration, thereby eliminating the option or need for judicial proceedings. This will be fulfilled if the claims are heard together. Therefore, in the current circumstances there is no need for two arbitrations and this Tribunal should have full confidence in its ability to arbitrate the Sugar Dispute.
- 45 Furthermore, RESPONDENT submits that by subjecting their disputes to arbitration, the parties evinced an intention that they wanted any disputes resolved expediently. Joining disputes has been said to be justified for reasons of savings and coherence (*Level, P., 1996, p. 42*). As such, hearing the two disputes together will be procedurally expedient and reduce the chance of hearing related disputes in a piecemeal and possibly inconsistent manner. This further justifies a finding by this Tribunal that both disputes can be heard together.

II. THIS TRIBUNAL SHOULD HAVE FULL CONFIDENCE IN ITS ABILITY TO MAKE AN AWARD

A. THE PRINCIPLE OF RES JUDICATA DOES NOT PRECLUDE THIS TRIBUNAL FROM HEARING THE SUGAR CLAIM WITH THE COCOA ARBITRATION

- 46 CLAIMANT argues that in hearing the Cocoa Dispute and Sugar Dispute together, it would be unfairly precluded from bringing further claims arising from the sugar contract in latter proceedings due to the principle of res judicata [Cl. Memo, para 104].



- 47 In *ICC Award 5901*, the issue was whether certain claims that had been raised as a set-off affirmative defence in earlier proceedings could be re-introduced in a latter proceeding (*ICC Award 5901, 1989*). The Tribunal held that under both civil law and common law legal systems, it is undisputed that *res judicata* effects are limited '*to those items which where actually decided by the prior Tribunal*'. The Tribunal found a party '*is not barred from litigating those causes of action which have not been addressed and very clearly determined by the first award*' (*Grigera Naon, H., 2001, p. 168*). As such, any claims which CLAIMANT has in relation to the Sugar Dispute may be brought in future proceedings as they will not have been '*addressed and very clearly determined*' by this Tribunal.
- 48 Should this Tribunal find that it does have jurisdiction to hear both disputes, there is no barrier to CLAIMANT also making a claim under the sugar contract, if it has any claims in relation to damages or loss of profit. Both parties have the option of consenting to having CLAIMANT's claims under the sugar contract being heard at the same time as RESPONDENT's claim. This illustrates that this Tribunal should not be reluctant to make an award which encompasses both disputes as CLAIMANT would not necessarily be unfairly prejudiced.

B. THE REQUIREMENTS OF THE NEW YORK CONVENTION HAVE BEEN MET

- 49 CLAIMANT has argued that in hearing the Sugar Claim, this Tribunal would risk making an unenforceable award because it would not be in accordance with the parties' agreement under Art. V(1)(d) and thus outside this Tribunal's jurisdiction under Art. V(1)(c) [Cl. Memo, para 118]. CLAIMANT has also argued that any award made may contravene the public policy of Mediterraneo and thus would be unenforceable under Art. V(2)(b) [Cl. Memo, para 122]. RESPONDENT refutes these arguments on the following grounds: (1) any award made would be in accordance with the parties' agreement and thus within this Tribunal's jurisdiction; (2) the relevance of the public policies of Mediterraneo is questionable; and (3) any unenforceable aspect of the award may be severed.

1. *Any award made would be in accordance with the parties' agreement.*

- 50 In hearing the Sugar Dispute, this Tribunal would be acting in accordance with the parties' agreement under Art. V(1)(d). As previously established, this Tribunal has jurisdiction under the



Cocoa Arbitration Agreement and it would be dealing with a dispute that was submitted for arbitration. As such, any award made by this Tribunal would not be outside the scope of the Cocoa Arbitration Agreement under Art. V(1)(c). Furthermore, courts worldwide have generally been reluctant to refuse to enforce an award under Art. V(1)(c) (*van den Berg, A. J., 1996, p. 86*).

2. *The relevancy of the public policies of Mediterraneo is questionable*

51 This Tribunal need not be deterred from hearing the Sugar Dispute due to reasons of public policy. The public policy of Mediterraneo is irrelevant as CLAIMANT would presumably be seeking to enforce an award in Equatoriana, not Mediterraneo. Public policies of neither country are known. Merely speculating about any public policy does not assist this Tribunal. To substantiate this argument, CLAIMANT needs to show what the public policy of Mediterraneo (or more importantly Equatoriana) is. As this has not been done, this Tribunal should not make a decision on this point unless both parties are invited to make further submissions. Even if the public policies of Mediterraneo or Equatoriana were known by this Tribunal, the risk of an award not being enforced due to contravention of public policy is low. This is because courts are reluctant to make such a finding (*Redfern, A., Hunter, M., 1999, p. 471*). In a discussion of the public policy ground as a bar for enforcing an award, the Canadian case of *Re Corporation v STET International* held '*the public policy ground for resisting enforcement should only apply where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud are examples*' (*Re Corporacion Transnacional de Inversiones, 1999*). In addition, renowned arbitrator Mr Justice Kaplan in the Hong Kong Supreme Court case of *China Nanhai Oil v Gee Tai Holdings* stated that '*even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless ... The residual discretion enables the enforcing court to achieve a just result in all the circumstances*' (*Nanhai Oil Joint Service v Gee Tai Holding, 1995*).

3. *Any unenforceable award may be severed*

52 CLAIMANT may threaten this Tribunal that if it does not have jurisdiction to hear the Sugar Dispute, it risks the enforceability of the entire award. This Tribunal should not be deterred by such a threat. Even if the country of enforcement did find that this Tribunal did not have jurisdiction to hear the Sugar Dispute, this would not affect any award made in relation to the Cocoa Arbitration Agreement. (*Nanhai Oil Joint Service v Gee Tai Holding, 1995; Redfern, A., Hunter, M., 1999, p. 471*). In the Court of Appeal in Trento (*Italy No. 53, 2003*), the court considered an award rendered in Syria based on an arbitration agreement providing for arbitration in respect of '*non- technical*'



disputes. It was forced to sever parts of the award that the Tribunal in that case had dealt with which were '*technical matters*'. As such, a court can provide partial enforcement of the award with respect to the Cocoa Contract.

PART THREE: SUBMISSIONS ON MERITS OF THE CLAIM

- 53 Before hearing the merits of this dispute, RESPONDENT asks the Tribunal to bear in mind that the underlying purpose of the CISG is to keep contracts on foot for as long as possible (*Kee, C., 2004, para 2*). In the present case CLAIMANT is requesting the most severe outcome under the CISG – avoidance of the contract. RESPONDENT asserts that to avoid the contract prematurely, without justification, defeats the fundamental purpose of the CISG in maintaining the contractual obligations of the parties.
- 54 RESPONDENT submits that the burden of proof in this dispute lies solely with CLAIMANT. Therefore, **(I)** CLAIMANT must justify their entitlement to avoid pursuant to Arts. 49 or 73(2) CISG (Cl. Memo para 29-47), and **(II)** establish that a valid avoidance of the contract was declared (Art. 26 CISG); [Cl. Memo, para 48] in order for the Tribunal to find in their favour. Although RESPONDENT will refute CLAIMANT's allegations, there is no positive obligation on RESPONDENT to disprove CLAIMANT's submissions.

I. CLAIMANT HAD NO RIGHT TO AVOID THE COCOA CONTRACT

- 55 RESPONDENT submits CLAIMANT did not have grounds to avoid the contract and obtain damages for three alternative reasons: **(A)** RESPONDENT's behaviour did not constitute a fundamental breach of contract (Arts. 49(1)(a), 25 CISG); [Cl. Memo, para 30]; **(B)** RESPONDENT has not committed a breach under Art. 49(1)(b); and **(C)** CLAIMANT did not have good grounds to anticipate a fundamental breach [Art. 73(2)]. As a consequence, RESPONDENT denies liability for CLAIMANT's purchase of substitute cocoa.



A. RESPONDENT'S BEHAVIOUR DID NOT CONSTITUTE A FUNDAMENTAL BREACH OF CONTRACT

56 Article 49(1)(a) CISG grants an aggrieved party the right of avoidance in the event of a fundamental breach. According to Art. 25 CISG, a fundamental breach will be established if RESPONDENT foresaw that non-delivery would result in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract.

57 RESPONDENT submits: (1) there has been no detriment that has caused a substantial deprivation to CLAIMANT, and alternatively, (2) if there was a substantial deprivation, this was not foreseeable to any reasonable person in RESPONDENT's position. For these reasons, RESPONDENT refutes any allegation that they committed a fundamental breach [Cl. Memo, para 31]

1. *The has been no detriment that cause a substantial deprivation to CLAIMANT*

58 CLAIMANT seeks to establish a fundamental breach on the basis of mere non-delivery of the outstanding cocoa [Cl. Memo, paras 32-36] RESPONDENT submits that the only possible breach is that of a delay in performance, rather than non-delivery, as RESPONDENT always intended to fulfil its contractual obligations. The learned author Schlechtriem is of the view that delay in performance of itself is not a fundamental breach entitling automatic avoidance (*Schlechtriem, P., 1986, p. 417*) If this Tribunal finds that late performance amounts to a minor breach, RESPONDENT submits that the breach did not result in such detriment as to substantially deprive CLAIMANT.

59 Article 25 requires the expectations of the aggrieved party to be foiled before a fundamental breach will be constituted. Hence a substantial deprivation will only arise where a party's interest in the performance of the contract is dispelled (*Chengwei, L., 2003, Chapter 8; Schlechtriem, P., 1986, p. 48*). RESPONDENT asserts that CLAIMANT's disinterest in the completion of the contract would have only occurred where CLAIMANT did not receive the cocoa by the time they were required for production. CLAIMANT would only have experienced such production difficulties amounting to substantial deprivation, at the end of November [P.O No. 2, para 24]. As a consequence, RESPONDENT submits that CLAIMANT has not suffered a substantial deprivation, as RESPONDENT was willing and able to make delivery of the remaining 300 tons of cocoa several weeks prior to the cessation of CLAIMANT's production [P.O No. 2, para 24].



2. If there was a substantial deprivation, this was not foreseeable to any reasonable person in RESPONDENT's position

- 60 Should this Tribunal find that there has been a breach resulting in a substantial deprivation, RESPONDENT submits this was not foreseeable. Article 25 stipulates that for a breach to develop fundamentally, the result of it must be foreseeable to reasonable person in the same circumstances. RESPONDENT emphasises that in these circumstances, a reasonable person is a merchant involved in the international trade of goods, and not legal counsel. Hence, in order for a substantial detriment to be foreseeable, a reasonable person in RESPONDENT's position must recognize the consequences of the breach to the aggrieved party (*Chengwei, L., 2003, chapter 8; Schlechtriem, P., 1986, p. 178*).
- 61 In determining what was foreseeable by a reasonable person in RESPONDENT's position, consideration must be given to: the parties' intentions at the conclusion of the contract, the subsequent conduct of the parties (Art. 8(3) CISG), past trade usages between the parties (Art. 9(1) CISG), and the application of the NYBOT Rules.
- 62 RESPONDENT asserts that at the time of contracting the parties did not stipulate that 'delivery time' was an essential term of the contract [Cl. Ex. No. 2]. CLAIMANT left the fixing of the delivery date to RESPONDENT, indicating that time was not imperative to the performance of the contract.
- 63 Further, CLAIMANT by failing to set an express deadline for delivery of the cocoa, has impliedly suggested that the cocoa purchased from RESPONDENT would be stockpiled rather than used for an impending job. The fact that the purchase was not made to satisfy a pressing need, but rather for storage purposes, is further evidenced by RESPONDENT's initiation of the transaction. Purchase of cocoa for stockpiling purposes indicated to RESPONDENT that there was no urgent need to receive the goods on a particular date, and that any subsequent delay in its delivery would not affect CLAIMANT's production capabilities.
- 64 Although CLAIMANT may argue that they reasonably expected to have goods delivered within the contracted period, such an expectation has been altered by CLAIMANT's subsequent conduct and NYBOT Rule 9.01. CLAIMANT, as a reasonable merchant in the trade of cocoa could not have been unaware of the application of NYBOT Rule 9.01 which restricts delivery to certain months of



the year. The subsequent conduct of CLAIMANT can be used to clarify their intentions at the time of contracting, where the parties' intentions are not expressly clear (Art. 8(3) CISG).

- 65 RESPONDENT submits that a reasonable merchant in the position of RESPONDENT could not have foreseen the importance attached to timely delivery [Cl. Memo, para 32]. The letter sent by CLAIMANT dated 5 March 2002 [Cl. Ex. No. 4] communicated a clear statement of its unhurried need for the cocoa. CLAIMANT used the phrase '*later this year*' to describe its need for the cocoa [Cl. Ex. No. 4]. RESPONDENT maintains that the ambivalent nature of the phrase alone suggests that CLAIMANT did not consider late delivery to amount to a 'substantial deprivation.' If such were the case, CLAIMANT ought to have provided explicit details in its correspondence, as to when 'an immediate pressure' to receive the cocoa would have arisen. RESPONDENT asserts that the relaxed approach adopted by CLAIMANT gave a strong indication that time was not 'of the essence' and therefore punctual delivery was not of central importance to CLAIMANT.
- 66 Further, the requirement of NYBOT Rule 9.01, stipulates that delivery of cocoa can only occur during the months of March, May, July, September and December. A reasonable merchant in RESPONDENT's position would interpret CLAIMANT's request for delivery with regard to this provision.
- 67 As a result of CLAIMANT's relaxed approach to establishing a specific delivery time and the requirement of NYBOT Rule 9.01, RESPONDENT asserts that delay in performance of the goods did not cause CLAIMANT detriment that was foreseeable by a reasonable person in RESPONDENT's position. Therefore, if CLAIMANT wishes to avoid the contract, it must resort to Art. 49(1)(b) CISG.

B. RESPONDENT HAS NOT COMMITTED A BREACH UNDER ARTICLE 49(1)(b)

1. CLAIMANT failed to fix an additional delivery period pursuant to Article 47 CISG

- 68 Article 49(1)(b) CISG gives the buyer the right to avoid the contract in the case of non-delivery, if the seller has not delivered the goods within an additional period of time fixed by the buyer pursuant to Article 47 CISG. The purpose of Art. 47 is to make time of the essence where it had not previously been of such significance and, to confer upon the buyer a right to avoid for non-



compliance without establishing a fundamental breach (*Schlechtriem, P., 1986, p. 395*). Therefore, in order to effectively avoid the contract, CLAIMANT must establish that an extended period of time was provided for pursuant to Art. 49(1)(b).

- 69 RESPONDENT acknowledges that delivery did not occur during the contractually agreed period. However, RESPONDENT submits that CLAIMANT failed to make 'time of the essence' by establishing an extra period of time for delivery, a breach of which would have permitted avoidance under Art. 49(1)(b).
- 70 RESPONDENT refutes CLAIMANT's submission that an extended delivery period had been set pursuant to Art. 47 CISG [Cl. Memo 45]. This provision requires a buyer to fix an additional period of time of reasonable length, and to make such an extension of time known to the seller in order to secure a remedy in the event of a breach (*Bianca, C., Bonell, M., 1987, p. 345*). RESPONDENT asserts that the deadline must be unequivocal and expressed so clearly to the extent that the seller is made aware of his last chance to perform (*Ziegel, J. S., 1981, p. 9; Bianca, C., Bonell, M., 1987, p. 345*). Further, a demand for performance, without fixing a specific date for performance, is insufficient to warrant avoidance of the contract (*Schlechtriem, P., 1986, p. 395*). As a consequence, demands not specifying a fixed date do not open up the route for CLAIMANT to avoid the contract under Art. 49(1)(b) (*Schlechtriem, P., 1986, p. 396*).
- 71 RESPONDENT submits that at no time in all its correspondence did CLAIMANT stipulate a specific date for performance. In its letter dated 15 August 2002 [Cl. Ex. No. 7] CLAIMANT made a threat to make a substitute purchase in the event of non-delivery, but failed to provide a specific deadline to which RESPONDENT must have adhered. CLAIMANT merely indicated a need for the cocoa 'soon' [Cl. Ex. No. 7]. RESPONDENT contends that the provision of a non-specific term, does not amount to an unequivocal and clear extension of the delivery date. Further, the ambiguity of the term 'soon' defeats the fundamental purpose of the CISG in ensuring that the certainty of the parties obligations are maintained (*Schlechtriem, P., 1986, p. 187*). Consequently, RESPONDENT submits that CLAIMANT was not entitled to declare avoidance pursuant to the operation of Art. 49(1)(b) as no such deadline had been fixed.



2. A reasonable period of time had not expired when CLAIMANT made its substitute purchase

- 72 Should this Tribunal find CLAIMANT did set a reasonable extended delivery period, RESPONDENT asserts that CLAIMANT still cannot avoid the contract, as CLAIMANT's substitute purchase was made prior to the expiry of the extended delivery period. In its letter dated 5 March 2002 [Cl. Ex. No. 4] CLAIMANT potentially extended the delivery period to 'later that year,' providing no specific time for delivery. Since avoidance is the most severe remedy under the CISG, the need for a specific time is paramount to the termination of contractual relationships. RESPONDENT submits that the only definitive time this could have been was at the end of December 2002. RESPONDENT requests this Tribunal to bear in mind that such a conclusion is conducive to the underlying purpose of the CISG in keeping contracts on foot for as long as possible (*Kee, C., 2004, para 2*). As CLAIMANT made its substitute purchase prior to the expiry of this date [Cl. Ex. No. 8], no effective avoidance may be declared as under general principles 'a party may not refuse performance that he has invited' (*Schlechtriem, P., 1986, p. 395*)

C. RESPONDENT'S BEHAVIOUR DID NOT GIVE CLAIMANT 'GOOD GROUNDS' TO ANTICIPATE A BREACH

- 73 CLAIMANT may submit that RESPONDENT's behaviour constituted 'good grounds' to anticipate a breach permitting avoidance of the contract pursuant to Art. 73(2) CISG. In order for the breach to be anticipatory, the date for performance must be fixed. In the present case, the delivery date set by the parties has expired and therefore, CLAIMANT cannot seek to rely on an anticipatory breach. Consequently, the only way in which CLAIMANT may anticipate a breach is if the contract has been modified to extend the delivery date to 'later in the year' [Cl. Ex. No. 4]. RESPONDENT refutes any allegation that they consented to a modification of the contract pursuant to Art. 29 CISG.
- 74 However, should this Tribunal find that the contract was modified to extend the delivery date to 'later in the year' [Cl. Ex. No. 4], CLAIMANT still cannot establish an anticipatory breach under Art. 73(2). This provision requires that CLAIMANT have 'good grounds' to believe that a fundamental breach would occur. The learned author Schlechtriem interprets such a provision to necessitate a high degree of probability - an obvious risk that is evident to persons generally (*Schlechtriem, P., 1986, p. 536*).



75 RESPONDENT submits that in light of the ambiguity as to when the ban would be lifted [Cl. Ex. No. 3], and NYBOT Rule 9.01, the climate itself was not one where clear intentions or outcomes could be ascertained to a level of high probability. Therefore, CLAIMANT could not have had good grounds to believe that a fundamental breach was to occur, and should not be entitled to avoid the contract for any anticipatory breach.

II. IF AVOIDANCE WAS PERMITTED, IT OCCURRED ON 15 NOVEMBER 2002

76 Alternatively, should this Tribunal find that CLAIMANT was entitled to avoid the contract, CLAIMANT must also satisfy the requirements of Art. 26 CISG, which requires a declaration of avoidance to be made to the party in breach.

77 CLAIMANT has purported to declare an avoidance of the contract on two separate occasions: **(A)** 15 August 2002 [Cl. Memo, para 49] and **(B)** 25 October 2002 [Cl. Memo, para 50]. However, should this Tribunal find that a declaration of avoidance did occur, RESPONDENT submits this could only have occurred on **(C)** 15 November 2002.

78 Article 26 obliges CLAIMANT to prove that a declaration of avoidance made on one of the above dates was unequivocal and entirely clear. RESPONDENT submits that a declaration avoiding the contract must fulfil the requirements of clarity, unconditionality and irrevocability (*Schlechtriem, P., 1986, p. 197*). The purpose of such a stringent test is to promote the concept of certainty into contractual relationships (Schlechtriem 1986, p187)

A. CLAIMANT DID NOT DECLARE THE CONTRACT AVOIDED ON 15 AUGUST 2002

79 CLAIMANT's letter dated 15 August 2002 [Cl. Ex. No. 7] does not constitute an effective declaration of avoidance pursuant to the operation of Art. 26. The letter fails to express a clear indication of CLAIMANT's wish to cease performance of the contract. By threatening 'to purchase elsewhere' if delivery was not made 'soon', CLAIMANT is still giving the RESPONDENT an opportunity to deliver. Conditional declarations of avoidance are not acceptable in fulfilling the requirements of 'clarity, unconditionality and irrevocability' (*Schlechtriem, P., 1986, p. 187*), and therefore cannot constitute a lawful declaration of avoidance within the meaning of Art. 26.



B. CLAIMANT DID NOT DECLARE THE CONTRACT AVOIDED ON 25 OCTOBER 2002

80 Further, RESPONDENT asserts that the letter dated 25 October 2002 [Cl. Ex. No. 8] does not constitute an effective declaration of avoidance according to Art. 26. The letter is similar to 15 August 2002, as it fails to provide express words showing an intention to cease the contractual obligations of the parties. CLAIMANT's assertion that its legal counsel will provide a follow up letter, invites an ambiguous interpretation of the parties' obligations at that time [Cl. Memo, para 51]. Furthermore, CLAIMANT's request for damages does not detract from their ability to perform their obligations of the contract. As CLAIMANT contracted for the lowest market price, any reasonable merchant in the circumstances would wish to keep the contract on foot. Consequently, CLAIMANT has failed to remove any doubt in RESPONDENT's mind that it no longer wished to be bound by the contract.

C. IF CLAIMANT WAS ENTITLED TO AVOID, AT THE EARLIEST THIS OCCURED ON 15 NOVEMBER 2002

81 Should the Tribunal find that CLAIMANT was entitled to avoid the contract, the only date at which Art. 26 CISG has been satisfied is on 15 November 2002. RESPONDENT disputes the claim that a declaration of avoidance occurred prior to this date [Cl. Memo, para 49-50]. In any event, RESPONDENT asserts that the letter dated 15 November 2002 has revoked any prior notification of avoidance (*Schlechtriem, P., 1995, p. 5*). Therefore any claim to damages should be calculated from this date.

III. DAMAGES

82 RESPONDENT contests damages of USD 289,353 sought by CLAIMANT [Cl. Memo, para 64]. RESPONDENT submits: (A) CLAIMANT is not entitled to damages pursuant to Art. 74 CISG; and (B) CLAIMANT is not entitled to damages pursuant to Art. 75 CISG.

A. CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO ARTICLE 74 CISG

83 Article 74 CISG permits a recovery of damages equal to the loss suffered by the aggrieved party as a consequence of the breach. Whilst the provision does not mandate an avoidance of the contract, its application is restricted to those losses that are foreseeable to the breaching party at the



conclusion of the contract (*Enderlein, F., Maskow, D., 1992, p. 298*). The party in breach must foresee the extent of the damage, and calculate its risk (*Enderlein, F., Maskow, D., 1992, p. 300*) on the balance of probabilities (*Bianca, C., Bonell, M., 1987, p. 541*).

- 84 In the present dispute CLAIMANT seeks damages equal to the loss resulting from RESPONDENT's delay in delivering [Cl. Memo, para 57]. RESPONDENT asserts that loss resulting from late delivery was unforeseeable. Moreover the extent of damages claimed was not foreseeable by RESPONDENT at the time of contract conclusion. [Cl. Memo, para 61]. The extent of loss will be foreseeable if it can be reasonably expected to have been contemplated by both parties at the time they of contracting (*Delchi Carrier v. Rotorex, 1995; Hadley v. Baxendale, 1854; OLG Cologne 22 U4/96, 1996*).
- 85 Any reasonable person in the position of RESPONDENT could not have foreseen the gravity of damages compensable as a result of the substitute purchase made by CLAIMANT. RESPONDENT contends that at the time of contracting it was not probable that the price of cocoa would rise to an all time high [Re. Ex. No. 3]. The parties entered into the contract in November 2001, at this time the price of cocoa was 56.28 US cents per pound, with not much variation. Although CLAIMANT may argue that due to the volatility of the market RESPONDENT should have foreseen the loss, RESPONDENT submits that the purchase of cocoa at a 'record high' was certainly not within their foresight, given that prices were relatively low and consistent at the time of contracting [Re. Ex. No. 3].
- 86 Hence, given these state of affairs, at the time of contracting it was not probable that the price of cocoa might double to a record high by October 2002 [Re. Ex. No. 3]. RESPONDENT submits that the loss was unforeseeable.

B. CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO ARTICLE 75 CISG

- 87 Pursuant to Art. 75, CLAIMANT may obtain damages to recover the difference between the contract price and the price in the substitute transaction, if the substitute purchase is made in a reasonable manner and within a reasonable time after the contract is avoided.



88 RESPONDENT submits that Art. 75 cannot be invoked to obtain damages as: (1) the substitute purchase was made before the contract was avoided and, (2) the substitute purchase was not made in a reasonable manner as required under the provision.

1. The substitute purchase was made before the contract was avoided

89 CLAIMANT has made a substitute transaction on 24 October 2002. Therefore, to rely upon this provision, it must show that it has avoided the contract prior to this date.

90 The only avoidance that CLAIMANT may rely upon to invoke Art. 75, is the letter dated 15 August 2002 [Cl. Ex. No. 7]. As previously submitted, CLAIMANT's attempt to avoid on this date fails to satisfy the preconditions of Art. 26, which governs declarations of avoidances, or alternatively was revoked by its subsequent avoidance on 15 November 2002 (see above para 79).

2. The substitute purchase was not made in a reasonable manner as required under the provision

91 RESPONDENT further disputes CLAIMANT's argument that a reasonable substitute purchase was made, thereby contesting USD 289,353 amount sought [Cl. Memo, para 75]. In purchasing cocoa from another supplier, CLAIMANT failed to take reasonable measures to avoid consequential losses. Cocoa purchased at an inflated price renders the substitute transaction unreasonable in the circumstances. CLAIMANT had no immediate need to purchase cocoa on 24 October 2002, as CLAIMANT's manufacturing would only have ceased at the end of November [P.O. No. 2, para 24]. Had CLAIMANT delayed its purchase of substitute cocoa until it was required for production, the price would have decreased significantly to 82.29 US cents per pound [Re. Ex. No. 3], rendering the transaction a reasonable purchase.

92 Therefore, RESPONDENT submits that CLAIMANT cannot seek to rely on Art. 75 to claim damages of USD 289,353, as the substitute purchase was made prior to CLAIMANT's avoidance of the contract and was not conducted in a reasonable manner.

IV. RESPONDENT IS ENTITLED TO ARTICLE 79 CISG RELIEF

93 RESPONDENT submits that if this Tribunal finds that CLAIMANT does have a right to avoid, then RESPONDENT seeks to rely on the exemption from liability under Art. 79 CISG.



94 Under Art. 79, a party is not liable for a failure to perform if it proves that the failure was due to an impediment, that was beyond its control and which it could not have reasonably been expected to take into account at the time of contracting, or have overcome or avoided it or its consequences. RESPONDENT submits: **(A)** the EGCMO ban was an impediment beyond its control; **(B)** which could not have reasonably been taken into account at the time of contracting; and **(C)** RESPONDENT took reasonable measures to overcome or avoid it and its consequences.

A. EGCMO BAN WAS AN IMPEDIMENT BEYOND RESPONDENT'S CONTROL

95 RESPONDENT submits that the embargo placed on it by the EGMCO was an impediment that made delivery impossible. Impossibility of performance has been found as sufficient to constitute an impediment (*Honnold, J. O., 1999, p. 478; Schlechtriem, P., 1986, p. 608*). The issue here is whether the contract contemplated cocoa from Equatoriana or cocoa from any source. RESPONDENT submits: **(1)** delivery was impossible as the contract purely contemplated cocoa from Equatoriana; or alternatively, **(2)** it caused hardship so as to amount to an impediment.

1. Delivery was impossible as the contract contemplated cocoa from Equatoriana

96 RESPONDENT submits the cocoa contract contemplated cocoa from Equatoriana as: **(a)** there was an established practice between the parties; **(b)** RESPONDENT's name indicates that it deals primarily with goods from Equatoriana; **(c)** the price stipulated for the cocoa was the price for cocoa from Equatoriana; and **(d)** subsequent conduct does not indicate that the contract was for non-specific cocoa.

(a) There was an established trade practice between the parties

97 RESPONDENT submits that under Art. 9(1) CISG, the parties are bound to any trade practices they have established between each other. Both CLAIMANT and RESPONDENT have been trading for a number of years [Request, para 3]. RESPONDENT has never supplied anyone, including CLAIMANT, with cocoa that did not originate in Equatoriana [P.O. No. 2, para 14]. Further, CLAIMANT always knew that in previous dealings it had always been supplied with cocoa from Equatoriana [P.O. No. 2, para 19]. This clearly indicates that at the time of contracting the parties intended and expected the cocoa to have an origin in Equatoriana.



98 Further, RESPONDENT submits that it was reasonable to assume that the second instalment of 300 tons was to originate in Equatoriana. Article 8(2) CISG permits a reasonable person test to be adopted in the determination of the parties' intention. Given the first instalment of 100 tons originated in Equatoriana, a reasonable merchant in the circumstances would assume that the remaining 300 tons would be sourced and delivered from Equatoriana, to accord with the initial instalment.

(b) RESPONDENT's name indicates that it deals primarily with goods from Equatoriana

99 RESPONDENT submits that as evidenced by its name, 'Equatoriana Commodity Exporters S.A,' the RESPONDENT's business is essentially the exportation of commodities from Equatoriana [Cl. Answer, para 4], which CLAIMANT was aware of. Only a minor part of RESPONDENT's trade is with commodities that are produced in places other than Equatoriana, with this portion representing less than a quarter of their business [P.O No. 2, para 14]. RESPONDENT asserts that it would be misleading to suggest that CLAIMANT had any other impression.

(c) The price stipulated for the cocoa is the price for cocoa from Equatoriana

100 Under the NYBOT rules, cocoa is classified in three distinct groups: A, B and C [Res. Ex. No. 1]. Cocoa from Equatoriana is part of only a handful of countries in group C, which is allocated a price 'at par' with the market price. Cocoa contract 1045 was a standard form NYBOT contract [P.O. No. 2, para 15]. RESPONDENT submits that as the price of the cocoa in contract 1045 was 'at par,' it contemplated cocoa from Equatoriana.

101 RESPONDENT submits, that these factors taken cumulatively strongly indicate that the cocoa contract 1045 contemplated cocoa from Equatoriana.

(d) Subsequent conduct does not indicate that the contract was for non-specific cocoa

102 Subsequent conduct is classified as a relevant factor under Art. 8(3) in determining the intentions of the parties. However, RESPONDENT submits that the mere purpose of the provision is to provide evidence of the parties' previous intentions (*Bianca, C., Bonell, M., 1987, p. 98*). RESPONDENT submits that subsequent conduct may not provide accurate evidence of intention at the time of contracting as this conduct only occurred after the dispute arose.



2. *The embargo caused hardship so as to amount to an impediment*

103 Should the CLAIMANT succeed in its submission that any cocoa would suffice to fulfil the contract, it is nonetheless submitted by RESPONDENT that the embargo should be characterised as an impediment, as performance of the contract would have amounted to economic hardship. (*Enderlein, F., Maskow, D., 1992, p. 325; Schlechtriem, P., 1986, p. 618*).

(a) Hardship can amount to an impediment

104 Various learned authors have suggested that hardship can amount to an impediment (*Enderlein, F., Maskow, D., 1992, p. 325; Schlechtriem, P., 1986, p. 618*). Although the learned author Schlechtriem submits that a 'limit of sacrifice' must be reached before hardship can be claimed, RESPONDENT submits the better view is that of Enderlein and Maskow, who argue that this view should not be preferred over the 'reasonableness test' adopted in Art. 79. However, this is only when it upsets the equilibrium of the contract and makes performance unreasonable (*Enderlein, F., Maskow, D., 1992, p. 234*). This view is in line with the plain wording of Art. 79, which adopts the standard of reasonableness, while Art. 7(2) requires that the parties have regard to the principles of good faith in the interpretation of the CISG. RESPONDENT submits that under Art. 79, the impediment caused hardship to a standard of reasonableness, which does not require its business to be put on the way to ruin, as required under the interpretation of the learned author Schlechtriem (*Enderlein, F., Maskow, D., 1992, p. 324*).

(b) Hardship made performance unreasonable

105 RESPONDENT asserts that the cost of purchasing cocoa from overseas at the time of the subsequent purchase was almost double that at the time of contracting [Res. Ex. No. 3]. Given that they had never purchased from overseas in previous dealings [P.O No. 2, para 14], RESPONDENT submits that any purchase from overseas would have been unreasonable due to hardship, and that therefore the embargo amounted to an impediment under Art. 79.

106 RESPONDENT submits that that it was not reasonable to make an external purchase in February, as the embargo may have been lifted before the end of the delivery period in May. Even after May, the ban may have been lifted 'soon' [Cl. Ex. No. 7]. Given that CLAIMANT was aware of the embargo following the letter dated 24 February 2002 [Cl. Ex. No. 3], it was reasonable for them to wait for a period of time to determine at what point the ban would be lifted. By the time it became apparent that the ban was not to be lifted until November, the prices were too high to justify an



overseas purchase, and RESPONDENT therefore submits that performance of the contract was unreasonable.

107 Additionally, in insisting on unchanged performance, in these changed circumstances, it is submitted that CLAIMANT is particularly unreasonable, as it has been suggested by some authors that actions such as these contravene good faith (*Enderlein, F., Maskow, D., 1992, p. 325*).

108 Further, this Tribunal may also obtain guidance from an examination of the UNIDROIT Principles, as these principles may be used to interpret or supplement international uniform law instruments (*ICC Award 9797, 2000; Bonell, M. J., 2001*)(*Preamble UNIDROIT Principles*). Under principle 6.2.3, a party suffering hardship has a right to renegotiate terms. RESPONDENT submits that in contravention of this, CLAIMANT insisted on strict performance. At no time did CLAIMANT communicate intentions to re-negotiate the contract or the delivery period.

109 RESPONDENT maintains that the embargo caused severe economic hardship, which CLAIMANT did not assist RESPONDENT in overcoming, despite prevailing international standards. These changed circumstances disrupted the equilibrium of the contract and made it unreasonable for RESPONDENT to deliver. Therefore, the embargo caused hardship amounting to an impediment under Art. 79.

B. THE BAN COULD NOT HAVE BEEN TAKEN INTO ACCOUNT AT THE TIME OF CONTRACTING

110 CLAIMANT has not made submissions to this extent, however may assert in oral proceedings that the embargo was a foreseeable event at the time of contracting. RESPONDENT submits that the impediment was not reasonably foreseeable at the conclusion of the contract. An impediment will not be foreseeable unless it exists at the time of contracting (*ICC Award 7197, 1992; Case 56/1995, 1995*). Here it is submitted that export bans and embargoes, specifically the ban on the export of cocoa, are not circumstances that would reasonably have been contemplated by the parties at the time of contracting.



C. RESPONDENT TOOK REASONABLE STEPS TO OVERCOME OR AVOID THE IMPEDIMENT OR ITS CONSEQUENCES

111 In the event the cocoa contract is found to contemplate cocoa from Equatoriana, RESPONDENT took reasonable steps to overcome the impediment and its consequences. CLAIMANT maintains that a substitute purchase should have been made in a bid to overcome the ban [Cl. Memo, para 22]. RESPONDENT submits: (1) as the contract contemplated cocoa from Equatoriana, it was reasonable to wait for the ban to be lifted; (2) making a substitute purchase was not reasonable as Art. 79 does not require performance beyond the terms of the contract; and alternatively (3) even if it does, the substitute performance was not reasonable.

1. If the source was to be Equatoriana, it was reasonable for RESPONDENT to wait for the ban to be lifted

112 It was not reasonable for RESPONDENT to apply for an exemption to the embargo as they realised such action was futile given past attempts by other parties were rejected [P.O No. 2, para 12]. Since the contract contemplated cocoa from Equatoriana, there was no reasonable action that RESPONDENT could have taken but to wait for the ban to be lifted. This is further supported by the fact that, as time was not of the essence [see above paras 62-65], there was no sense of urgency and therefore no need to take any further action.

2. Article 79 does not require performance beyond the terms of the contract

113 RESPONDENT submits that the requirement that a promisee take reasonable steps to 'overcome (an impediment) or its consequences' does not require RESPONDENT to deliver goods not contemplated by the contract. CLAIMANT's assertion to the contrary is excessive given the vague wording of Art. 79 to require a party to go beyond the terms of the contract [Cl. Memo para 22] (*Bianca, C., Bonell, M., 1987, p. 582*), particularly as this position would be contrary to Art. 35(1), which imposes an obligation on the parties to perform a contract in accordance with its terms. RESPONDENT submits that following the general principle of certainty in international commercial contracts (*Schlechtriem, P., 1986, p. 187*), it is dangerous to permit a unilateral change of the terms of an agreement. While CLAIMANT seeks to rely on the Secretariat Commentary which expresses a view to the contrary [Cl. Memo para 22], the learned authors Bianca & Bonell adopt the position that this commentary is merely 'an analysis' of the Article, which is sometimes inconsistent with the wording of the Article (*Bianca, C., Bonell, M., 1987, p. 574*).



114 Therefore, RESPONDENT maintains that it was unreasonable for it to make a substitute purchase, as such a purchase would be contrary to Art. 79.

3. Even if the contract is not found to contemplate cocoa from Equatoriana, a substitute purchase was not reasonable

115 The duty to provide a commercially reasonable substitute is to be judged in light of the overall commercial nature of the dispute. The CLAIMANT has argued that RESPONDENT should have purchased a commercially reasonable substitute of any Group C cocoa under the NYBOT cocoa trade. RESPONDENT submits that the reasonableness of this must be judged in light of what is commercially possible, and when it would be reasonable for such a purchase to have been made.

116 Under the NYBOT Rules cocoa contracts only require delivery in the following months: March, May, July, September and December (NYBOT Rule 9.01).

117 RESPONDENT asserts that it was not reasonable to make such a substitute purchase in March or May, as it was reasonable to wait for the embargo to be lifted during the contracted period of delivery. Although, in July there were mere inquiries as to the date of delivery, the purchase of a viable commercial substitute did not seem necessary or reasonable, as CLAIMANT had made no written contact with RESPONDENT, indicating an urgent need for the cocoa. [Cl. Ex. No. 9]. This is further supported by CLAIMANT's letter dated 5 March 2002 that stated the need for the cocoa 'later in the year' [Cl. Ex. No. 4]. Further the conduct of CLAIMANT in its letter dated 15 August 2002 [Cl. Ex. No. 7], indicated the need for the cocoa 'soon'. RESPONDENT submits that it would be unreasonable in the circumstances to expect the RESPONDENT to make a foreign purchase, in September given the ambiguity associated with this correspondence.

118 Given that CLAIMANT made its substitute purchase on 25 October 2002, the contractual obligations of RESPONDENT ceased, therefore rendering a foreign purchase in December unnecessary. Therefore, RESPONDENT submits that it was not reasonable to make a commercially viable substitute purchase.

119 In the alternative, RESPONDENT submits that if the contract did not contemplate cocoa from Equatoriana, and Art. 79 does permit performance outside the terms of the contract; then as previously mentioned, hardship made performance unreasonable.



V. CLAIMANT MUST REDUCE DAMAGES

A. CLAIMANT IS NOT ENTITLED TO DAMAGES OF USD 289,353 UNDER ARTICLE 76

- 120 The clear wording of Art. 76(1) CISG stipulates that CLAIMANT may obtain damages to recover the difference between the contracted price of cocoa and the prevailing market price at the time of avoidance, if a purchase has not been made pursuant to Art. 75. (*ICC Award 8574, 1996; OLG Hamm, 19 U97/91, 1992; Honnold, J. O., 1999, para 414*). Therefore, RESPONDENT submits that Art. 76 is applicable to the calculation of damages.
- 121 As CLAIMANT's only effective declaration of avoidance occurred on 15 November 2002 [Cl. Ex. No. 11], damages must be reduced to reflect the difference between the contract price and the market value in November of 2002. The monthly average price of cocoa at the time of avoidance was 82.29 US cents per pound, aggregating to USD 661, 578 for the outstanding 300 tons. Calculation of damages pursuant to Art. 76 therefore reduces the amount sought by CLAIMANT to USD 172,026.
- 122 Accordingly, RESPONDENT contests liability of USD 289,353 sought by CLAIMANT, and submits that the correct amount should be reduced to reflect USD 172,026.

B. CLAIMANT FAILED TO MITIGATE LOSS PURSUANT TO ARTICLE 77

- 123 Pursuant to Art. 77 CISG, the loss suffered by the aggrieved party may only be recovered to the extent that the party took reasonable measures to mitigate their loss (*OGH 10 Ob 518/95, 1996; ICC Award 7585, 1992; OLG Braunschweig 2U 27/1999, 1999*). RESPONDENT submits: (1) damages should be reduced to nil by CLAIMANT's failure to mitigate; or alternatively (2) damages should be reduced by one third by CLAIMANT's failure to mitigate; and finally (3) even if all steps were taken to mitigate, CLAIMANT is still not entitled to the claimed sum.

1. Damages should be reduced to nil by CLAIMANT's failure to mitigate

- 124 In purchasing the remaining 300 tons of cocoa prematurely, CLAIMANT failed in their duty to take reasonable steps to mitigate their loss as required by Art. 77. RESPONDENT submits that as



CLAIMANT took no action to mitigate their loss, the avoidable loss should be mitigated to zero (*Enderlein, F., Maskow, D., 1992, p. 309; Schlechtriem, P., 1986, p. 586*).

125 Had CLAIMANT taken reasonable steps to minimise its losses, RESPONDENT submits that CLAIMANT would have suffered no loss. The contracted cocoa was only needed by the end of November [P.O. No. 2, para 24] and it is clear from RESPONDENT's earlier delivery that transport of cocoa takes only 11 days, therefore it was possible that delivery meeting CLAIMANT's need could have been organised as late as mid-November. RESPONDENT submits that CLAIMANT should have waited until this time before they made their cover purchase. This is particularly so in light of the greatly increased costs that would have been incurred by making a cover purchase in October, and the comparatively small losses of waiting a couple of extra weeks.

126 Had CLAIMANT taken these reasonable steps, RESPONDENT submits that as soon as the ban was lifted on 12 November 2002, CLAIMANT would have been informed that performance was again possible and the cocoa would have been delivered according to the contract price. Therefore upon proper mitigation of loss CLAIMANT would have suffered no damages, consequently the damages sought by CLAIMANT should be reduced to nil for their failure to mitigate loss under Art. 7.

2. Damages should be reduced to a third by CLAIMANT's failure to mitigate

127 Alternatively, if this honourable Tribunal does not accept the option of nullified damages, RESPONDENT submits that the loss should be reduced to a third of the amount sought by CLAIMANT.

128 At the time CLAIMANT made its substitute purchase it had 100 tons of cocoa remaining in inventory [P.O. No.2, para 28]. RESPONDENT submits that the purchase of 300 tons on this date was unnecessary and unreasonable in the circumstances, as the market price during this period was at a record high [Res. Ex. No. 3]. RESPONDENT submits that it would have been more reasonable for CLAIMANT to purchase only 100 tons of cocoa on 24 October 2002, and to then have waited to see if those rumours indicating the embargo was to be lifted came to fruition. Therefore, RESPONDENT submits that as CLAIMANT was unreasonable in purchasing 300 tons of cocoa, it should not be entitled to claim damages for the additional expenditure it forfeited. If this Tribunal finds that the correct award of damages is USD 289,353 as requested by CLAIMANT,



RESPONDENT submits that this award should be limited to only one-third, being the sum of USD 96,451.

3. Even if all steps were taken to mitigate, CLAIMANT is still not entitled to the claimed sum

129 However, should this Tribunal accept RESPONDENT's submission that the maximum award compensable to CLAIMANT pursuant to Art. 76 is only USD 172,026, RESPONDENT asserts that this sum should also be limited due to CLAIMANT's unreasonable substitute purchase. Therefore, RESPONDENT submits that any award in favour of CLAIMANT should be restricted to a third of the compensable sum, the restricted value being USD 57,342.

PART FOUR: RELIEF REQUESTED

130 RESPONDENT requests that this Tribunal find that:

- i) This Tribunal has jurisdiction to consider RESPONDENT's claim under sugar contract 2212.
- ii) That any damage to sugar occurred after risk of loss had passed to CLAIMANT;
- iii) CLAIMANT is obligated to pay full contract price of USD 385,805 for the sugar;
- iv) A declaration that CLAIMANT had no right to avoid the Cocoa Contract 1045;
- v) A declaration that RESPONDENT is not liable for any sum by reason of the embargo placed on the export of Equatoriana cocoa;
- vi) As such, CLAIMANT is not entitled to damages;
- vii) Any award made in favour of RESPONDENT is not limited to the amount of the cocoa claim;
- viii) CLAIMANT to pay the costs of arbitration, including costs for legal representation and assistance incurred by RESPONDENT pursuant to Art.38 Swiss Rules; and
- ix) CLAIMANT is liable for interest on any amount payable.