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Willem C. Vis International Commercial Arbitration Moot

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

MEMORANDUM FOR CLAIMANT

On Behalf of:	Against:
PHAR LAP ALLEVAMENTO Capital City, Mediterraneo	**BLACK BEAUTY EQUESTRIAN** Oceanside, Equatoriana
CLAIMANT	**RESPONDENT**

TIMOTHY CUMMINGS • MATT HAGLER • QURATULAIN MEHMOOD • ANTHONY NARDI
ALEXANDRA NOLAN • NAZANEEN PAHLEVANI • SYDNEY SHUFELT • STEPHANIE WALD

WASHINGTON, DC, UNITED STATES OF AMERICA

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ABBREVIATIONS

&	And
¶(¶)	Paragraph(s)
%	Percent
§	Section
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Claimant	Phar Lap Allevamento
Cl. Ex. [#]	Claimant's Exhibit [Number]
Co.	Company
Comm.	Commentary
HKIAC	Hong Kong International Arbitration Centre
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
Inc.	Incorporated
No(s).	Number(s)
Not. Arb.	Claimant's Notice of Arbitration
p. at (#)	Page(s)
PO[#]	Procedural Order No [#]
R.	Record
Respondent	Black Beauty Equestrian
Resp. Ex. [#]	Respondent's Exhibit Number
Ans. Not. Arb.	Respondent's Answer to Claimant's Notice of Arbitration
Resp. Not. Challenge Arb.	Respondent's Notice of Challenge of Arbitrator
U.S.	United States
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
v.	Versus
Vol.	Volume

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UNCITRAL Rules	2010 UNCITRAL Arbitration Rules Cited in: ¶ 31
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STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").

CLAIMANT is the oldest and most renowned stud farm in Mediterraneo.

RESPONDENT is a newly established racehorse stable in Equatoriana.

21 March 2017	RESPONDENT contacted CLAIMANT to inquire about the availability of frozen semen from CLAIMANT'S award-winning racehorse, Nijinsky III.
24 March 2017	CLAIMANT deviated from its normal business practices and offered to sell RESPONDENT 100 doses of Nijinsky III's semen in an effort to demonstrate CLAIMANT'S interest in entering into a long-term, mutually beneficial relationship, under the condition that the semen may not be resold to third parties.
28 March 2017	RESPONDENT accepted the majority of CLAIMANT'S terms, but wished to negotiate the price, choice-of-law, and dispute resolution terms. Additionally, RESPONDENT insisted on DDP, which required CLAIMANT assume the risk for delivery.
31 March 2017	CLAIMANT counteroffered, asserting it would only accept DDP at a moderate price increase, as well as transfer of risks associated with DDP delivery, in particular the risks associated with changes in customs regulation and import restrictions. Additionally, CLAIMANT suggested that the PARTIES opt for arbitration in Mediterraneo.
April 2017	Mediterraneo's President announced a 25% tariff on agricultural products from Equatoriana.
10 April 2017	RESPONDENT sent CLAIMANT the first draft of a dispute resolution clause.
11 April 2017	CLAIMANT replied and changed the seat of Arbitration to Danubia, whilst accepting the rest of RESPONDENT'S dispute resolution clause. The PARTIES decided that the law of Mediterraneo would apply, arbitration would take place in Mediterraneo, and a hardship clause would be included to temper the risks associated with DDP.
12 April 2017	Before the contract was finalized, the two main negotiators were injured in a car crash. In the original negotiators' places, the PARTIES introduced Mr. Ferguson for the CLAIMANT and Mr. Antley for the RESPONDENT.
6 May 2017	CLAIMANT and RESPONDENT signed the contract, agreeing on three shipments of frozen semen.
20 May 2017	CLAIMANT delivered the first shipment of 25 doses.
3 October 2017	CLAIMANT delivered the second shipment of 25 doses.
19 December 2017	In a surprising move, Equatoriana's long-time free-trade supporting government imposed a retaliatory 30% tariff on all agricultural goods from Mediterraneo.

20 January 2018	CLAIMANT emailed RESPONDENT and asked for a reasonable price adaptation due to the considerable hardship caused by the newly imposed tariffs.
21 January 2018	Ms. Napravnik (CLAIMANT) and Mr. Shoemaker (Head of RESPONDENT'S breeding program) discussed the tariff situation over the phone. Mr. Shoemaker assured Ms. Napravnik that both PARTIES would be able to find a suitable compromise for price adaptation, given the good relationship between the PARTIES. Mr. Shoemaker insisted that Ms. Napravnik authorize the shipment to continue as scheduled.
23 January 2018	CLAIMANT, relying on RESPONDENT'S promise, delivered the third shipment of 50 doses at a considerable loss.
12 February 2018	CLAIMANT discovered RESPONDENT unilaterally adapted the contract and had sold doses of the semen to third parties. CLAIMANT confronted RESPONDENT'S CEO for resale of Nijinsky III's frozen semen. RESPONDENT'S CEO became angry and indicated there would be no further cooperation with CLAIMANT and refused to adapt the sale price.
31 July 2018	CLAIMANT submitted its Notice of Arbitration and appointed Ms. Wantha Davis as its arbitrator. The HKIAC acknowledged CLAIMANT'S Notice Arbitration.
24 August 2018	RESPONDENT filed its Answer to the Notice of Arbitration.
2 October 2018	CLAIMANT notified the TRIBUNAL that it had received reliable information about another HKIAC arbitration RESPONDENT was a party to regarding the sale of a horse that had also been affected by the unforeseen tariff. In that arbitration, RESPONDENT asked for a price adaptation because of the negative effects of the tariffs. CLAIMANT asked that, if necessary, the third-party be joined to this arbitration.
3 October 2018	RESPONDENT objected to the introduction of evidence from the other arbitration, alleging that CLAIMANT could only have received the information in breach of confidentiality obligations or a hack of RESPONDENT'S computer system.

SUMMARY OF THE ARGUMENT

1. ISSUE 1. The TRIBUNAL has the jurisdiction and the power under the arbitration agreement to adopt the contract, including in particular the question of which law governs the arbitration agreement and its interpretation. The PARTIES agreed to the choice of law provision in Clause 14 of the contract, which establishes that the law of Mediterraneo governs the contract. Further, Mediterraneo law governs the arbitration agreement under when looking to both the HKIAC Rules and the *lex arbitri*. Mediterraneo has adopted the UNDIDROIT Principles, which provide that regard should be given to all circumstances including negotiations. The courts of Mediterraneo have consistently held that where the CISG governs the contract, it may also govern the interpretation of the arbitration clause. The CISG looks to the negotiations to determine the parties' intent. Therefore, looking to the law of Mediterraneo, the arbitration agreement should be interpreted broadly to cover claims for increased remuneration.

2. ISSUE 2. The TRIBUNAL should admit the Partial Interim Award from RESPONDENT's parallel arbitral proceeding as the TRIBUNAL has broad authority over evidentiary procedure. [*2018 HKIAC Art. 22*]. The evidence is relevant and material to CLAIMANT's case, and CLAIMANT's interest in admitting the evidence outweighs RESPONDENT's interest in maintaining confidentiality. Finally, CLAIMANT has proposed multiple solutions that would maintain RESPONDENT's confidentiality, however RESPONDENT objects, attempting to take opposite legal stances in the two arbitrations.

3. ISSUE 3. CLAIMANT is entitled to the payment of US$1.250.000 or any other amount resulting from an adaptation of the price under Clause 12 of the contract. Clause 12 contains explicit language pertaining to hardship, providing that CLAIMANT is not responsible for problems "caused by additional health and safety requirements or *comparable unforeseen events* making the contract more onerous." The tariffs are included under the contract's statement of "unforeseen events" in Clause 12 because no one could have predicted the imposition of the new tariffs. UNIDROIT also recognizes that "there is a hardship where the occurrence of the events fundamentally alters the equilibrium of the contract." [*UNIDROIT Art. 6.2.2*]. A fundamental hardship occurs when either the cost of performance has increased or the value of the performance a party receives has diminished and (a) the events become known to the

"disadvantaged party" after the contract, (b) the parties could not have foreseen the events, (c) the events are outside of the control of the disadvantaged party, and (d) the disadvantaged party did not assume the risk. [*UNIDROIT Art. 6.2.2*]. CLAIMANT did not intend to shift all of the risks of delivery to CLAIMANT.

4. ISSUE 4. Even if the TRIBUNAL finds that tariffs are not covered by the hardship clause, CLAIMANT is entitled to a price increase under the CISG. Under the CISG, UNIDROIT gap fillers would apply in this case, and under UNIDROIT Art. 6.2.3, a hardship entitles the disadvantaged party to price adaptation. CLAIMANT is entitled to a price adaptation under UNIDROIT Art. 6.2.3 because the unforeseeable tariffs imposed by RESPONDENT'S country severely altered the balance of the contract. Additionally, the PARTIES' formed a binding oral agreement under the CISG to negotiate for price adaptation after CLAIMANT delivered the third shipment of frozen semen. RESPONDENT breached that oral agreement, and under CISG Art. 74, CLAIMANT is entitled to damages in the amount of the expected price adaptation.

ARGUMENT

ISSUE ONE: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, INCLUDING THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

5. Because the contract is governed by the law of Mediterraneo **[A]**, the Tribunal has jurisdiction to adapt the contract **[B]**.

A. The law of Mediterraneo governs the arbitration agreement and its interpretation.

6. The contract is governed by the law of Mediterraneo as established by the choice of law clause in Clause 14 of the contract **[1]**, the 2018 HKIAC Rules **[2]**, and under the *lex arbitri* **[3]**.

1. Mediterraneo law applies per the choice of law clause in Clause 14 of the Contract.

7. From CLAIMANT's initial communication with RESPONDENT, CLAIMANT made clear that if the PARTIES were to enter into an agreement for the sale of Nijinsky III's semen, the law of Mediterraneo *must* apply to the entirety of the agreement. [*Cl. Ex. 2, p. 10; Cl. Ex. 4, p. 12*]. Thus, after long discussions between the PARTIES, the agreement was drafted to state under Clause 14, "This Sales Agreement shall be governed by the law of Mediterraneo." [*Cl. Ex. 5* ¶ *14, p. 14*]. Both PARTIES signed the agreement on 6 May 2017. [*Cl. Ex. 5, p. 14*]. Therefore, it is undisputed that the PARTIES chose the law of Mediterraneo to govern the contract.

8. RESPONDENT disregards the unambiguous language of the contract to argue that that law of Danubia, which is more favorable to its position, applies instead. However, nothing in the text of the agreement suggests that the law of Danubia applies to the arbitration agreement, nor is there anything to suggest that Clause 14 of the agreement *only* applies to the agreement's substantive provision. Absent either language of exclusion or a clause that specifically selects the law of Danubia, it is clear that the PARTIES intended for Clause 14 to apply to the entirety of the agreement. Thus, the arbitration clause, which appears immediately following the choice of law clause, and which does not specifically state that it is governed by any other applicable law, is also subject to interpretation under Mediterranean law. [*Cl. Ex. 5* ¶ *15, p. 14*].

2. Mediterranean law applies to the agreement under the HKIAC.

9. In addition to the unambiguous designation in Clause 14 that Mediterranean law applies to the entire agreement, the arbitration clause provides, "[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted." [*Not. Arb.* ¶ *14, p. 6; R. Ex. 1, p. 33*].

10. RESPONDENT provided the first draft of the arbitration clause based on the HKIAC model clause. [*R. Ex. 1, p. 33*]. The HKIAC recommends that parties to a contract who wish to have any future disputes referred to arbitration under the HKIAC Administered Arbitration Rules insert into the contract an arbitration clause modeled from the following: "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The law of this arbitration clause shall be ... (Hong Kong law). * The seat of arbitration shall be ... (Hong Kong). The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." ** [*HKIAC Mod. C.*].

11. As the HKIAC clarifies, the single asterisk (*) identifies that the clause establishing the law governing the arbitration *should* be included where the law of the substantive contract and the law of the seat are *different*. [*HKIAC Mod. C.*]. From RESPONDENT's own exhibits, we can see that they had access to all of the drafting history of the arbitration clause. [*R. Ex. 1, p. 33; PO2 ¶ 5, p. 55]* Since the PARTIES did not explicitly specify which law governs the contract, it follows from this provision of the HKIAC model clause that it is because the substantive law and the law governing the contract are the same. [*HKIAC Mod. C.*].

12. Furthermore, where the parties expressly chose rules of law to govern the contract as a whole, the arbitration agreement will normally be governed by that law; this is so, whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat. [*Klöckner Pentaplast*]. Contrary to RESPONDENT's argument that Danubian law governs interpretation of the arbitration agreement simply because the seat of the arbitration is in Danubia, the resounding presumption remains that the governing law of the contract governs the arbitration agreement, absent some explicit indication to the contrary. [*Sulamérica Cia Nacional; BCY v. BCZ; Piallo GmbH*]. The tribunal in *BCY v. BCZ*, for example, held that the implied substantive law governing the arbitration agreement is highly likely to be the same as the expressly chosen law of the substantive contract when no express choice of law is written into the arbitration agreement. [*BCY v. BCZ*].

13. Additionally, the presumption is that the arbitration agreement is governed by the law governing the contract, especially where the arbitration agreement forms part of the body of a contract indicating which law governs. [*BCY v. BCZ*]. Clause 15 sets forth only the procedural rules and the seat of arbitration and is immediately preceded by the clause stating Mediterranean law governs the substantive interpretation of the contract. [*Cl. Ex. 5, p. 14*]. The Klöckner court also held that when the governing law statement and the arbitration clause are contained under the same heading, the natural inference is that they are governed by the same law. [*Klöckner Pentaplast*]. Clauses 14 and 15 both appear under the heading "Terms and Conditions," therefore the law of Mediterraneo applies to the entirety of the contract, including the arbitration agreement. [*Cl. Ex. 5, p. 14*].

14. Therefore, having given regard to the substantive law, and looking to the construction of the contract, it is further established that the PARTIES intended for the law of Mediterraneo to govern the arbitration agreement.

3. Mediterraneo law applies per the *lex arbitri*.

15. The PARTIES expressly chose Danubia as the seat of arbitration, making Danubia's arbitration law applicable solely to the procedure of the arbitration and not the substantive interpretation of the arbitration provision. Even if the TRIBUNAL does not find that Mediterraneo law governs the arbitration agreement by reference to Clause 14 of the contract or the HKIAC Rules, or believes there is a gap therein, by applying Danubian arbitration law the TRIBUNAL will find that law of Mediterraneo is still applicable to the arbitration agreement.

16. Art. 28(1) of Danubia's arbitration law, which is a direct adoption of the UNCITRAL Model Law, provides: "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules." The law stipulates that the tribunal must decide the substantive dispute in accordance with the substantive law chosen by the PARTIES, which in this case is Mediterranean law. The Model Law does not allow RESPONDENT to construe the choice of the seat of arbitration as a choice of the seat's substantive law.

B. The law of Mediterraneo provides for a broad interpretation of the agreement.

17. The Tribunal has jurisdiction to adapt the contract because the law of Mediterraneo and the CISG, to which Mediterraneo is a signatory, looks to the negotiations surrounding the creation of the contract to determine the Parties' intent **[1]**. However, even applying the "four corners rule" under Danubian law, the arbitrators still have the power to adapt the contract **[2]**.

1. The UNIDROIT Principles and the CISG look to negotiations to determine the intent of the PARTIES.

18. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts. [*PO1 ¶ 4, p. 53*]. The UNIDROIT Principles provide that a contract shall be interpreted according to the common intent of the parties. [*UNIDROIT*

Art. 4.1]. To establish whether the parties had a common intent, regard should be had to all relevant circumstances, including negotiations. [*UNIDROIT Art. 4.3*]. Accordingly, under Mediterraneo law, the TRIBUNAL is empowered to look to the drafting history of the contract and weigh its importance equally to the text of the contract itself when determining the intent of the parties.

19. Additionally, Mediterraneo law, including the United Nations Convention on Contracts for International Sales of Goods (CISG), governs the contract [*Cl. Ex. 5 ¶14, p. 14*]. The courts of Mediterraneo have consistently held that where the CISG governs the contract, it also governs the interpretation of the arbitration clause contained therein. [*PO1 pg. 53*]. CISG Art. 8(3) looks to the negotiations to determine the PARTIES' intent. Therefore, both the UNIDROIT Principles and the CISG, which are binding under the contract, look to the drafting history, in particular the negotiations between the PARTIES' to determine the PARTIES' intent.

20. During negotiations with RESPONDENT, CLAIMANT specifically expressed that it was important for CLAIMANT to have a mechanism in place which would ensure an adaptation of the contract in the unlikely event that the PARTIES could not agree on amendments to the contract. [*Cl. Ex. 8, p. 17*]. RESPONDENT's own "prime" negotiator, Mr. Antley, proposed that it should be the task of the arbitrators to adapt the contract if the PARTIES are unable to reach a solution. [*Cl. Ex. 8, p. 17*]. CLAIMANT agreed with this proposal, so CLAIMANT requested that it be expressed in the hardship clause or the arbitration clause to avoid any doubt. [*Cl. Ex. 8, p. 17*]. Mr. Antley promised he would provide CLAIMANT with a proposal the next morning including the express reference to the arbitrators adapting the contract. *[Cl. Ex. 8, p. 18].*

21. However, after the unfortunate car accident, he was never able to perform on his promise on behalf of RESPONDENT to CLAIMANT. [*Cl. Ex. 8, p. 18*]. Although the successors in finalizing the contract ultimately failed to include such an express reference to the adaption of the contract, it is undisputed that during negotiations it was the PARTIES' common intent to give the power to adapt the contract to the arbitrators.

2. Even applying Danubian law, the TRIBUNAL still has the power to adapt the contract.

22. Although interpretation of the contract and the arbitration provision are both governed by the law of Mediterraneo, if the TRIBUNAL concludes that Danubian law applies to the arbitration provision, the arbitrators still have the power to adapt the contract. Danubian law adheres to the "four corners rule" for the interpretation of contracts [*Ans. Not. Arb. ¶ 16, p. 32*]. This means that the interpretation of the arbitration agreement is limited to its wording and external evidence may not be relied upon. [*Ans. Not. Arb. ¶ 16, p. 32*].

23. The text of the arbitration provides that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre. [*Cl. Ex. 5 ¶ 15, p. 14*]. The question of contract adaptation in this case is a dispute arising out of the validity of the price provision, interpretation of, or performance under the contract. As such, that question is clearly within the scope of the arbitration agreement and is therefore within the jurisdiction of the TRIBUNAL to decide.

Conclusion on Issue 1

24. Accordingly, the law of Mediterraneo applies to the arbitration agreement as established by Clause 14 of the contract, the HKIAC rules, and the *lex arbitri*. Moreover, the arbitration agreement should be interpreted broadly to cover claims for increased remuneration.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S NEARLY IDENTICAL HKIAC ARBITRAL PROCEEDING.

25. As the TRIBUNAL has the power to determine evidentiary procedure **[A]**, and CLAIMANT's interest in admitting the Partial Interim Award outweighs RESPONDENT's interest in secrecy **[B]**, the TRIBUNAL should admit the Award and protect RESPONDENT's privacy through consolidation or joinder **[C]**.

A. The Partial Interim Award from RESPONDENT's parallel arbitral proceeding is admissible in this arbitration.

26. The TRIBUNAL has the power to admit and review evidence under the 2018 HKIAC Rules **(1)**, under Danubian law **(2)**, and according to the general principles of commercial arbitration **(3)**.

1. The TRIBUNAL has the authority to take and review evidence under the 2018 HKIAC Administered Arbitration Rules.

27. Art. 22 of the HKIAC Rules grants broad authority to the tribunal to determine the evidentiary standards of the arbitration. [*2018 HKIAC Rules Art. 22*]. Art. 22.2 provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." [*2018 HKIAC Rules Art. 22.2*]. Further, the tribunal may require a party to produce documents that the tribunal deems relevant to the case and material to its outcome. [*Born, p. 2309; 2018 HKIAC Art. 22.3*].

28. As such, the TRIBUNAL is empowered to admit and review the Partial Interim Award from RESPONDENT's nearly identical arbitral proceeding.

2. The TRIBUNAL also has the power to admit and review the Partial Interim Award under the law of Danubia.

29. The Danubian arbitration law also allows parties to agree on evidentiary procedure. [*UNCITRAL ML Art. 19*]. Where parties have not agreed on evidentiary procedures, the Model Law empowers the tribunal to conduct the arbitration in a manner that it considers appropriate. [*UNCITRAL ML Art. 19*].

30. Accordingly, the TRIBUNAL can, under Danubian law, admit and review the Partial Interim Award from RESPONDENT's parallel arbitral proceeding on a nearly identical issue.

3. The mainstream codifications of commercial arbitration procedure affirm the TRIBUNAL's authority to determine evidentiary procedures.

31. The principles underlying commercial arbitration require that tribunals have broad authority over evidentiary issues. Both the UNCITRAL Rules and IBA Rules on the Taking of Evidence provide for the tribunal to determine admissibility, relevance, and materiality, while retaining significant discretion in the assessment and weighing of the evidence. [*Lew et al., p. 561; UNCITRAL Rules Art. 27; IBA Rule Art. 9*]. Because the primary reason for liberal admissibility rules is a concern for due process, tribunals should err substantially on the side of permitting the admission of evidence on a party's application. [*Born, p. 2310; Waincymer, p. 793*]. Tribunals should be hesitant to deny the admission of evidence on technical or formal grounds, as doing so could preclude arguments necessary for a party to succeed in its claim. [*Castello, p. 239; Waincymer, p. 793*]. The various evidentiary rules adopted by international arbitral institutions

give tribunals the sole power to determine what evidence will be admissible in the arbitration. [*Waincymer, p. 793; UNCITRAL Rules Art. 27(4); 2018 HKIAC Rules Art. 23.10; Swiss Rules Art. 24.2; SCC Rules Art. 26(1); IBA Rules Art. 9.1; Prague Rules Art. 3*].

32. Even the IBA Rules, which serve as a codification of the international consensus on the rules governing the taking of evidence, reflect the absolute ability of the tribunal to determine the admissibility of evidence. Following the IBA Rules, tribunals should admit evidence after weighing the competing interests of the parties and determining that the evidence is relevant and material to the matter in dispute. [*Marghitola, p. 52*]. Material evidence is evidence that is necessary to determine whether a factual allegation is true, or to allow complete consideration of the legal issue presented. [*Marghitola, p. 52*].

B. CLAIMANT's interest in demonstrating RESPONDENT's inconsistency outweighs RESPONDENT's interest in secrecy.

33. The TRIBUNAL should determine that CLAIMANT's interest in demonstrating RESPONDENT's inconsistency outweighs RESPONDENT's interest in secrecy because the documents are relevant and material to determining the outcome of the dispute **[1]**; any breach of RESPONDENT's confidentiality was not CLAIMANT's wrongdoing **[2]**; and the allegedly illegal means by which the evidence was obtained do not taint or negate the evidence **[3]**.

1. The Partial Interim Award is relevant and material to determining the outcome of the dispute.

34. The primary responsibility of an arbitral tribunal is to make factual determinations, apply those determinations to the mutually agreed upon law, and to resolve disputes in a fair and efficient manner. [*UNCITRAL Rules on Transparency Art. 1 (4)(b); Redfern/Hunter, p. 377*]. When deciding issues of admissibility, tribunals should focus on establishing the facts necessary to resolve the issue between the parties to the arbitration, rather than imposing arbitrary limitations with technical rules of evidence. [*Redfern/Hunter, p. 377*].

35. While confidentiality in commercial arbitration can be essential, disclosure is justified when necessary to protect legal interests. [*Born, p. 2780; 2018 HKIAC Rules Art. 45*]. One such interest is the policy of eliminating inconsistency in arbitration, which is critical in disputes where different tribunals are applying the same legal provisions to similar facts. [*Tung/Lin, p. 83-84*]. Here, the Partial Interim Award is material for CLAIMANT's case to show that RESPONDENT has

acknowledged the hardship imposed by the tariff. The TRIBUNAL should not allow RESPONDENT to hide behind confidentiality rules to further its position by taking diametrically opposing views on the same issue in two separate arbitrations. [*Born, p. 2789; Tung/Lin, p. 83*].

36. As discussed by Henriques, tribunals stress that parties should conduct their actions in good faith during arbitration. [*Henriques, p. 516*]. The concept of good faith implies a duty to employ honest, loyal, and fair behavior that is absent of malice or intention to deceive. [*Henriques, p. 516*]. Tribunals should compel parties to honor their obligations to arbitrate in good faith when dealing with procedural disputes. [*Born, p. 2142; Rowley/Wisner, p. 327*]. In fact, some tribunals have found that denying a party its right to defend its position constitutes a breach of the obligation to arbitrate in good faith. For example, in *Stati v. Republic of Kazakhstan*, the tribunal found that by waiting to revive an issue until after it had become moot, thereby denying the other party the opportunity to respond, Kazakhstan had acted in bad faith. [*Stati v. Republic of Kazakhstan, p. 240*]. Similarly, in this case, RESPONDENT attempts to deny CLAIMANT the opportunity to admit the Partial Interim Award, even though RESPONDENT has been authorized to speak about the parallel arbitration in some capacity. [*R. at p. 51*]. RESPONDENT cannot claim it is acting in good faith by opposing the admission of the evidence when its goal is to prevent CLAIMANT from exposing RESPONDENT's inconsistency, while also deceiving the TRIBUNAL by arguing contrary points.

37. In the present arbitration, RESPONDENT has brazenly ignored the principle of *venire contra factum proprium*, which has been widely applied by arbitral tribunals. [*EGI-VSR v. Coderch Mitjans; Stati v. Republic of Kazakhstan*]. Ultimately, this principle, which estops parties from taking inconsistent positions, bars parties from making arguments inconsistent with their prior representations. [*Henriques, p. 516; Berger, p. 205; EGI-VSR v. Coderch Mitjans*].

38. On appeal in three separate but factually similar arbitrations between the same parties a tribunal constituted under the LCIA Rules determined "[i]t would have been more efficient for these arbitrations to be consolidated. The possibility of inconsistent arguments and evidence not available to all parties and to all arbitral decision makers would thus have been eliminated." [*LCIA Case No. 132445, ¶ 3.1*]. Here, both TRIBUNALS are dealing with similar factual scenarios, the imposition of agricultural tariffs, and similar questions of law, does the imposition of tariffs

constitute a hardship for purposes of contract adaptation. [*Cl. Ex. 6, p. 15*]. Therefore, the TRIBUNAL should admit the Partial Interim Award to preclude RESPONDENT from arguing that the TRIBUNAL does not have jurisdiction to rule on contract adaptation.

2. Any breach of confidentiality was not CLAIMANT's wrongdoing.

39. Generally, an action for the breach of confidentiality may only be brought by a person to whom the duty is owed. [*DOJ Report* ¶ *7.94*].

40. RESPONDENT argues that the Partial Interim Award should not be admitted into the arbitration as it was acquired through either a contractual or a statutory breach. However, RESPONDENT also acknowledges that neither breach was the fault of CLAIMANT, admitting that "the only source . . . could either be two former employees of RESPONDENT, . . . or a hack of RESPONDENT's computer system which occurred three weeks ago and where the hackers managed to retrieve a considerable amount of data." [*R. at p. 50*]. CLAIMANT owes RESPONDENT no duty to maintain confidentiality in either scenario.

41. Regardless of whether the disclosure would violate the confidentiality provision of the HKIAC Rules, Art. 45.3(a) specifically allows a party to disclose an arbitral award in order "to protect or pursue a legal right or interest of the party in legal proceedings before another authority." [*2018 HKIAC Rules Art. 45.3(a)*].

42. Here, the other party in RESPONDENT's parallel arbitral proceeding could disclose the contents of the arbitral award to CLAIMANT, in order to pursue their third-party legal interests against RESPONDENT.

3. The means by which the Partial Interim Award was obtained do not discount the relevance of the Award as evidence.

43. The allegedly illegal means by which the Partial Interim Award was obtained do not lessen the relevance of the evidence to CLAIMANT's case. The tribunal in the *Methanex* arbitration struggled with the same issue of admissibility. [*Methanex*]. The tribunal initially asserted that the standard of good faith in arbitration rendered evidence obtained by illegal means inadmissible [*Methanex*]. However, in its analysis the tribunal included an element of materiality, implicitly acknowledging that the manner in which the evidence is obtained would not always justify excluding the evidence. [*Boykin/Havalic; Methanex*]. When the tribunal in the *Yukos* arbitration

revisited this issue, that tribunal found the materiality of the evidence outweighed the unlawful actions that resulted in the public disclosure of the evidence. [*Yukos; Boykin/Havalic*]. Finally, an arbitrator in the *ConocoPhillips* arbitration dissented to critique the majority and noted that "the revelations of the WikiLeaks cables submitted to the Tribunal . . . [changed] the ground[s] or causes for reconsideration radically in dimension and importance," in a similar manner to the revelation of RESPONDENT's other arbitration. [*ConocoPhillips; Boykin/Havalic*].

44. Other international tribunals have found that evidence obtained by illegal methods, for example WikiLeaks documents, are admissible on the basis that disclosure was no fault of the admitter, and the evidence was relevant to the case, and material to one party's argument. [*El Masri v. Macedonia; Persia Int'l Bank; Prosecutor v. Taylor*]. The European Court of Justice similarly held that "the prevailing principle of EU law is the unfettered evaluation of evidence, in the present case, since the applicant was not involved in the disclosure of the cables, the possible unlawful nature of the disclosures cannot be held against it." [*Persia Int'l Bank*]. In this case, as in *Methanex*, the source of the evidence is irrelevant, as the materiality of the documents outweighs any interest RESPONDENT has in keeping them secret, and the TRIBUNAL is not required to deny evidence produced by illegal means when the party admitting the documents played no role in the illegal activity.

C. If the TRIBUNAL determines that it should not admit the Partial Interim Award into evidence, then the TRIBUNAL should consolidate the proceedings, or, alternatively, join the third party from RESPONDENT's parallel arbitration to the current arbitration.

45. Even taking RESPONDENT's allegation that the award could only have been obtained by illegal means as true, CLAIMANT has proposed several means by which the confidentiality of the award could be preserved in the context of this arbitration, including through consolidation of the two cases **[1]** and by joinder of the third party to this case **[2]**. Both solutions would cap the number of people with access to the information, the disclosure of which is aligned more closely with the prevailing wave of transparency in arbitration.

1. The TRIBUNAL should consolidate the proceedings to balance RESPONDENT's interest in secrecy with CLAIMANT's right to present all necessary evidence.

46. CLAIMANT has suggested to consolidate the two proceedings in order to preserve RESPONDENT's confidentiality. The TRIBUNAL has the authority, under HKIAC Art. 28, to

consolidate two proceedings when a common question of law arises in both arbitrations, the rights stem from the same series of transactions, and the arbitration agreements are compatible. [*2018 HKIAC Art. 28.1*]. In this instance, there are common issues of law and fact, in whether unforeseen agricultural tariffs constitute hardship for the purposes of contract adaptation. [*Cl. Ex. 6, p. 15; Not. Arb. ¶ 18, p. 7*]. Thus, consolidation of the claims would provide for efficient proceedings, promote consistent results, and preserve confidentiality. [*Laughlin, p. 845*]. The possibility of consolidation is a unique feature of the HKIAC Rules as competing arbitral rules, such as the UNCITRAL, ICC, and AAA International Rules, do not permit consolidation of arbitrations. [*Born, p. 673*].

47. Joinder and consolidation are unique features of the HKIAC Rules, of which RESPONDENT could not have been unaware when negotiating the contract. RESPONDENT cannot, therefore, now argue that it disputes the ability of the TRIBUNAL to determine that such procedures are necessary for efficiency and to protect the confidentiality of the information RESPONDENT is reluctant to disclose. If RESPONDENT did not want to be compelled to consolidate arbitral proceedings, then RESPONDENT should have suggested another set of arbitration rules that did not include such a provision, instead of suggesting the HKIAC Rules during the contract negotiation. [*Cl. Ex. 4, p. 12*].

48. When making this determination the TRIBUNAL should heed the prevailing wave of transparency in arbitration [*R. at p. 50*]. The UNCITRAL Transparency Rules reflect the overall shift in arbitration from complete confidentiality toward recognizing the benefits of transparency. [*Poorooye/Feehily, p. 309*]. These include holding arbitrators and parties accountable for their awards and creating consistency in the interpretation of legal provisions and issues. [*Tung/Lin, p. 82; Zlantaska, p. 33*]. Further, with respect to the transparency of awards, arbitral institutions have "shift[ed] to a presumption in favor of redacted awards in the absence of party objection" [*Rogers, p. 1320, Proposed ICSID Rule 44*]. In the present case, a redacted version of the Partial Interim Award would be sufficient to see the legal arguments that are put forward by RESPONDENT.

2. Alternatively, the TRIBUNAL should join the third party from the parallel proceeding to the current arbitration.

49. Joinder in international arbitration has the benefit of increased efficiency and reduces the risk of inconsistent results in two or more separate arbitrations. [*Born, p. 2567*]. The HKIAC Rules allow for a tribunal, at its own discretion, to join a party to the arbitration, where the third party is bound by an arbitration agreement under the HKIAC Rules. [*2018 HKIAC Rules Art. 27.1; Smith, p. 187*]. Pursuant to HKIAC Art. 27.1, a tribunal can compel the third party to join without the consent of either party to the existing arbitration. [*2018 HKIAC Rules Art. 27.1*].

50. These rules were adopted by the HKIAC during the 2013 rules change and were "carefully balanced by both the HKIAC and tribunals to ensure they render enforceable awards grounded in demonstrably fair and just outcomes." [*Connor/Talib, p. 192*]. Specifically, in a case where a party is invoking its right to intervene and join the arbitration based on information obtained in a breach of confidentiality, "this is an issue for consideration not by HKIAC but, rather, a matter for the tribunal." [*Connor/Talib, p. 193*].

51. RESPONDENT claims that interests of confidentiality require the TRIBUNAL to not admit the documents obtained from RESPONDENT's parallel arbitration. However, joinder would preserve confidentiality, and the HKIAC Rules provide for continued confidentiality in the case of joinder of two separate arbitrations. [2018 *HKIAC Rule, art. 45.3(d)*]. While RESPONDENT claims it is worried about the dissemination of confidential information, RESPONDENT rejects all of CLAIMANT's alternative means of preserving confidentiality, in order to exploit the confidentiality provisions.

Conclusion on Issue 2

52. The TRIBUNAL should admit the Partial Interim Award into evidence, as is within its power under the HKIAC Rules. Specifically, as CLAIMANT's interest in presenting a complete case outweighs RESPONDENT's interest in secrecy, and CLAIMANT has proposed alternative methods of protecting RESPONDENT's confidentiality.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1.250.000 UNDER CLAUSE 12 OF THE CONTRACT.

53. This TRIBUNAL has the authority to recognize CLAIMANT's entitlement to the payment of US$1.250.000 and adapt the price of the contract under a plain language reading of clause 12 **[A]**, or when comparing clause 12 to the UNIDROIT Principles **[B]**.

A. Under the plain meaning of Clause 12, CLAIMANT included the imposition of tariffs as an unforeseen hardship for which CLAIMANT is not responsible.

54. Clause 12 provides that the: "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [*Cl. Ex. 5 ¶ 12, p. 14*]. Under Clause 12, CLAIMANT is not responsible for the tariffs, which significantly increased the costs of the goods.

55. Mediterraneo and Equatoriana have adopted the UNIDROIT Principles of International Commercial Contracts. Regardless which country's domestic law governs, UNIDROIT Principles are applicable. Should the TRIBUNAL find that the CISG governs the contract, UNIDROIT Principles are also applicable because international commercial law recognizes the UNIDROIT Principles as acceptable supplemental and gap-filling measures under the CISG.

56. This TRIBUNAL must consider the nature and scope of the contract. UNIDROIT Art. 4.3 uses an inclusive approach for the relevant background as CISG Art. 8(3) in declaring that regard shall be given to "all relevant circumstances of the case." UNIDROIT looks to include the circumstances surrounding the completion and implementation of the contract. [*Rosengren, p. 11–12*]. In considering the full scope of the contract, CLAIMANT made it clear to RESPONDENT that CLAIMANT would be unable to take on the full costs associated with shipping charges beyond the standard shipping cost associated with DDP, which did not include extra tariffs. [*Cl. Ex. 4, p. 12*]. From previous experience, CLAIMANT had faced untenable increased costs which nearly led to its insolvency due to a bout of foot and mouth disease. [*PO2 ¶ 21, p. 58*]. Because the issue was widely publicized, and because RESPONDENT indicated they were aware of the foot and mouth disease issues in Danubia, RESPONDENT had constructive notice of notice of the possible border measures associated with imports and transportation. [*Cl. Ex. 1, p. 9*]. With

constructive notice and the hardship clause, RESPONDENT should have expected the possibility that the cost of the goods would change. Knowing the possibility of these risks, RESPONDENT accepted that risk by signing the contract.

1. The tariffs are included in the contract's *force majeure* clause.

57. *Force majeure* clauses are generally considered to be standard or boilerplate language but are broadly interpreted. [*Brunner, p. 383*]. Many tribunals recognize *force majeure* clauses to include events that are unforeseeable by parties and out of the control of either party. [*Fontaine/de Ly, p. 403*]. When a *force majeure* clause includes a list of potential events, tribunals will consider the list to be non-exhaustive. [*Brunner, p. 387; Nissho-Iwai v. Occidental*]. Moreover, the tribunal is obligated to consider the *force majeure* clause in the light of the entirety of the contract. [*Brunner, p. 384*]. The words within a *force majeure* clause are to be construed as having their natural and broader meaning, and they are not limited to events of the same kind with those previously enumerated in the list. [*Chitty, para. 14-127*]. This TRIBUNAL should consider standard elements of *force majeure*: unforeseeability, unavoidability, uncontrollability. [*Fontaine/de Ly, p. 437, 474–75, 482*]. The TRIBUNAL should consider the totality of the circumstances in determining which party is responsible for the increased costs due to the tariffs. Because CLAIMANT was clear that it would not take on unforeseen events, CLAIMANT is not responsible for the higher costs associated with the tariffs.

i. The tariffs constitute an unforeseeable event.

58. The tariffs were an unforeseeable event. As is such, the TRIBUNAL should require RESPONDENT to pay the unanticipated costs.

59. Tribunals have considered various unforeseen issues including export prohibitions [*Decision of 24.04.1996*], toll increases refused [*Autopista Concesionada v. Venezuela*], and currency fluctuations. The tribunals in each of the named cases did not recognize the problems as unforeseeable because in each a party in the case was aware of the potential changes. In the export prohibitions case [*Decision of 24.04.1996*], both parties were aware of the issues before the conclusion of the contract. In Venezuela, civil unrest was common. As for the last type, tribunals have generally held buyers responsible for currency fluctuations. Tribunals have

required contractual payments even after currency changes [*Aktiengeselshaft v. Inter Trading; Humpurna Award*].

60. In the case at hand, neither PARTY, not even market experts, predicted the implementation of the tariffs. [*Cl. Ex. 6, p. 15*]. CLAIMANT had dealt previously with issues of duty imports and health measures affecting the transportation of its previous products. However, Mediterraneo's tariff imposition was extraordinary for its breadth of goods covered, the speed of implementation, and the number of countries covered. [*PO2 ¶ 23, p. 58*]. Although agricultural goods had been subjected to tariffs, horse semen was never included under such a listing before. Neither PARTY predicted that horse semen would be subjected to such a large tariff. [Cl. *Ex. 8, p. 17*].

ii. The tariffs were unavoidable.

61. A tribunal will enforce a contract in full if either party could have avoided the issue; however, the tariffs in the case at bar were entirely unavoidable by either PARTY. To account for the unavoidability of these tariffs, the PARTIES agreed CLAIMANT would not be responsible for the tariffs because the tariffs fall under the concept of additional health and safety measures. The tariffs deal with importation and protection of the goods entering the country. [*cf. Kiyoichi Fujikawa v. Sunrise Soda*].

62. In this case, neither PARTY could have avoided the costs. The cost of the tariffs was not fully realized in the price of the good for RESPONDENT. Because tariffs fall under the hardship clause, RESPONDENTS must bear the increased cost of the goods.

iii. The tariffs were beyond the control of either CLAIMANT or RESPONDENT.

63. Tribunals recognize events as hardships when such events are beyond the control of a party. Observing the totality of the circumstances, this TRIBUNAL should recognize that the *force majeure* clause encompasses the hardships associated with the delivery of the goods. Tribunals read the *force majeure* clause in its entire context. [*General Dynamics v. Libya*]. Accordingly, this TRIBUNAL should take notice of CLAIMANT'S 31 March 2017 email discussing the issues CLAIMANT encountered with previous DDP. [*Cl. Ex. 4, p. 12*].

64. CLAIMANT has fulfilled its obligations and RESPONDENT has accepted the goods. This TRIBUNAL should adapt the price of the contract and hold RESPONDENT responsible for the

increased costs associated with the tariffs because RESPONDENT accepted responsibility for price increases under Clause 12 of the contract.

2. Under Art. 8 of the CISG, the drafting history demonstrates that CLAIMANT and RESPONDENT agreed that RESPONDENT would be responsible for hardships outside of the agreed upon DDP terms.

i. Under CISG Art. 8(1), RESPONDENT is responsible for hardships outside of the agreed upon DDP terms.

65. According to CISG Art. 8(1), a contract shall first be interpreted according to the parties' subjective intent where the other party could not have been unaware of what this intent was. [*CISG Art. 8.1*]. Due regard must be given not only to the text of the contract but also to surrounding circumstances. [*CISG Art. 8(3)*]. First, during the negotiations of the contract, the PARTIES manifested their common will for CLAIMANT to be bound by an obligation of best efforts as indicated by clause 12 of the contact. [*Cl. Ex. 5 ¶ 12, p. 14*]. Second, CLAIMANT's obligation of best efforts was confirmed by the PARTIES' subsequent conduct. The contract is not tainted by any fault of CLAIMANT because CLAIMANT has fulfilled all of its duties by shipping and sending the goods.

66. If a *force majeure* clause lacks specific definitions, tribunals will consider its definition according to general standards. [*Brunner, p. 387*]. In this case, the TRIBUNAL must accept the interpretation of the PARTIES' intent as long as the other party knew or could not have been unaware of the intention of the other parties' intention. To that end, the TRIBUNAL must interpret the statement of a party "subjectively" by examining the scope of the entire contract. [*Schwenzer et al., p. 60*].

67. CLAIMANT was clear about its intent that RESPONDENT should take on the hardship associated with trade and potential tariffs. [*Cl. Ex. 4, p. 12*]. CISG Art. 8.1 and 8.2 preclude parties from trying to enforce hidden or "sham" intent. [*Schlechtriem/Butler, p. 57*]. Had CLAIMANT not been forthcoming with its intent for delivery, the TRIBUNAL would be unable to enforce CLAIMANT's request. Although CLAIMANT offered DDP for RESPONDENT, the DDP was incomplete. Ms. Napravnik in the 31 March 2017 email stated, "we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions." [*Cl. Ex. 4, p. 12*]. CLAIMANT brought to

RESPONDENT's attention the hardships associated with the changes in customs. CLAIMANT agreed to a DDP because of CLAIMANT'S expertise in the delivery of frozen semen, but CLAIMANT was unwilling to assume the full risk associated with deliveries under DDP. Ms. Napravnik informed RESPONDENT's that Phar Lap had experience with delivery delays due to unforeseen circumstances. [*Cl. Ex. 4, p. 12*]. In a previous sale to a client Danubia, CLAIMANT had experienced the hardship associated with sudden and unforeseen changes to deliveries across borders. [*PO2 ¶ 15, p. 57*]. The hardships led extreme cost increases for CLAIMANT and the forfeiture of potential loans. [*PO2 ¶ 21, p. 58*]. After the preliminary discussions, both parties agreed to the hardship possibility in Clause 12, which included the possibility of tariffs.

ii. Under the Principles of UNIDROIT, RESPONDENT is also responsible for hardships outside of the agreed upon DDP terms.

68. Under UNDROIT Art. 4.1, tribunals interpret contracts according to the behavior of the parties. Specifically, the behavior of the party to the contract is interpreted under a principle of intent. If the intent is difficult to discern, a tribunal will consider the circumstances of a reasonable person to the persons of the parties. [*UNIDROIT Art. 4.1*]. The principle of good faith is universally applied. [*Devaud, p. 17*]. Accordingly, a tribunal will ensure that both parties have applied good faith in fulfilling its obligations. In the case at bar, CLAIMANT has shown its good faith in fulfilling all of its duties for the contract.

69. Under UNIDROIT Art. 4.3, this TRIBUNAL should interpret the terms and expressions in light of the contract in its entirety. Accordingly, following UNIDROIT Art. 4.4, contract terms shall be interpreted to give effect to all terms. The *contra proferentem* rule, which falls under UNIDROIT Art. 4.6, decides that when a contract term supplied by one party is unclear, the interpretation against that party is preferred. RESPONDENT requested to narrow the focus of the *force majeure* clause. [*Ans. Not. Arb. ¶ 4, p. 30*]. Accordingly, if this TRIBUNAL finds the language of the clause ambiguous, that ambiguity should be read against RESPONDENT. However, this rule is the last resort for contract interpretation. UNIDROIT is clear in its application of the interpretation of hardship, Art. 6.2 and force majeure clauses Art. 7.1.7. [*Rosengren, p. 12*].

70. When the interpretation of the contract is dependent on specific legal terms, the parties may look beyond the standard interpretation and try to find the meaning of the terms under the applicable law. When specific terms are not part of the lexicon of the applicable law, the

tribunal may seek guidance on any related concepts or how a national court applying the applicable law would go about dealing with such terms. Parties should consider UNIDROIT and other international laws in support of their proposed interpretation even if they are not directly applicable to the contract. [*Rosengren, 15*]. In doing so, this TRIBUNAL will find that the intent and language is clear, and that CLAIMANT is not responsible for the cost of the tariffs.

71. When looking beyond the scope of the contract, the TRIBUNAL must note the hardships previously encountered by CLAIMANT. CLAIMANT had previous issues with deliveries of its goods. [*PO2 ¶ 21, p. 58*]. To counter these issues, CLAIMANT indicated to RESPONDENT that it was not able to fully take on delivery changes. [*Cl. Ex. 4, p. 12*].

B. Clauses 12's language parallels that of UNIDROIT Art. 6.2.1. and, therefore, CLAIMANT is not responsible for the increased costs associated with the tariffs.

1. The contract became more onerous for CLAIMANT.

72. The government of Equatoriana imposed a thirty percent tariff on all agricultural goods imported from Mediterraneo. Before the imposition of the tariffs, CLAIMANT only had a profit margin of less than five percent because it anticipated a long-term relationship with RESPONDENT. In the hope of securing a favorable relationship, CLAIMANT was willing to lower its potential profit margin. [*Cl. Ex. 8, p. 18*]. CLAIMANT even agreed to take on some of the risks associated with shipping the horse semen because of its experience. With the tariffs in place, the contract became much more onerous for CLAIMANT. Prior to the tariffs, CLAIMANT stood to make about USD$300.000 in profit. [*PO2 ¶ 29, p. 59*]. After the tariffs, CLAIMANTS owed USD$1.250.000, making the tariffs prohibitively expensive for CLAIMANT.

2. CLAIMANT performed its contractual duties regardless of the onerous impediment after Equatoriana imposed the tariffs.

73. Under UNIDROIT Art. 6.2.1, comment 1, a party for which the contract becomes a loss of expected profits, or even meaningless, must still perform its contractual duties "as long as it is possible and regardless of the burden it may impose." [*UNIDROIT Art. 6.2.1, cmt. 1*]. CLAIMANT is under no fault and complied with the contract terms and fulfilled its duties when it delivered the final shipment of semen doses to RESPONDENT on 23 January 2018 [*Not. Arb. ¶ 13, p. 6*]. Both parties agreed to 23 January 2018 as the date for the final delivery of the remaining fifty doses, including under the contract renegotiated by Ms. Napravnik and Mr.

Shoemaker. [*Cl. Ex. 8, p. 18*]. Mr. Shoemaker urged Ms. Napravnik to send the delivery by the originally agreed-upon date because receiving the doses during breeding season was crucial, and the start of the breeding season was drawing near. [*Cl. Ex. 8, p. 18*]. With misgivings, CLAIMANT shipped the final dosages. CLAIMANT made clear to RESPONDENT that CLAIMANT intended to renegotiate the final price with RESPONDENT. [*Cl. Ex. 6, p. 18*]. Accordingly, CLAIMANT complied with the law under Art. 6.2.1 even though doing so was much more onerous because of the imposition of the new thirty percent tariffs. RESPONDENT cannot argue that CLAIMANT did not fulfill its duties. Accordingly, RESPONDENT is responsible for the costs.

74. Moreover, CLAIMANT not only performed its contractual duties when the contract became more onerous but when the contract also became meaningless. CLAIMANT completed its duties out of respect for the binding nature of international contracts and in an attempt to salvage the relationship with RESPONDENT for their stated long-term goals of mutual benefit. [*Cl. Ex. 4, p. 12*]. CLAIMANT also fulfilled its duties with the understanding that clause 12 would apply for any unreasonable increased costs and that both PARTIES would willingly enter into negotiations to account for the price differences. [*Cl. Ex. 8, p. 18*].

3. The principles of UNIDROIT Art. 6.2.1 recognize standard hardship clauses, which are subject to adaptation.

75. Under UNIDROIT, when the performance of a contract becomes more onerous for one party to perform, that party is obligated to perform the contract unless the situation is subject to hardship. [*UNIDROIT Art. 6.2.1*]. UNIDROIT recognizes that a hardship exists when an event or events fundamentally alter the equilibrium of the contract. [*UNIDROIT Art. 6.2.2*]. A fundamental hardship occurs when either the cost of performance has increased or the value of the performance a party receives has diminished and (a) the events become known to the "disadvantaged party" after the contract, (b) the parties could not have foreseen the events, (c) the events are outside of the control of the disadvantaged party, and (d) the disadvantaged party did not assume the risk. [*UNIDROIT Art. 6.2.2*].

76. In a situation where equilibrium is not in balance, a tribunal will look to a *force majeure* clause. A *force majeure* clause only applies if the party could not reasonably avoid the impediment. [*Brunner, p. 320*]. In the current situation, CLAIMANT could not avoid the tariffs associated with the shipment of horse semen. The tariffs were entirely beyond the control of either PARTY.

CLAIMANT is still obligated to overcome the effects of an impediment, even if overcoming the impediment involves additional costs or a substantial loss. [*Brunner*, *p. 322*]. However, CLAIMANT specifically provided for the possibility of tariffs in its *force majeure* clause 12. The burden of the tariffs, because of the clause, is on RESPONDENT.

77. This TRIBUNAL should recognize the negotiation between Ms. Napravnik and Mr. Shoemaker as a legitimate alteration to the contract. In a Dutch whey protein case, one of the parties worked with the other to renegotiate the price. One of the parties' representatives was not authorized to make changes to the contract. The tribunal, in that case held that the party was still responsible for the sale and could have reasonably believed that that person had authority to make changes. [*Court of Rotterdam*]. Similarly, although Mr. Shoemaker did not have the power to alter the price, he assured Ms. Napravnik that the two parties would reach a deal. [*Cl. Ex. 8, p. 18*].

78. A judge or an arbitrator could overlook the lack of capacity of one of the parties or the absence of power of a party representative if it was established that the other party entered into the contract in circumstances in which it could legitimately have been unaware of the lack of capacity or absence of power. However, Ms. Napravnik's reliance on Mr. Shoemaker's ability to negotiate the price was reasonable. Arbitrators, generally, interpret questions of the authority of representatives liberally, because international trade usages demand that one overlook formal flaws in corporate actions. Arbitrators will determine authority through the conduct and communications of a person acting as a representative of authority, especially if such acts induce the confidence of the co-contractor. [*Rosengren, p. 17*].

Conclusion on Issue 3

79. CLAIMANT is not responsible for the increased costs due to the tariffs. CLAIMANT and RESPONDENT agreed RESPONDENT would be responsible for such costs in its *force majeure* clause. In fulfilling its duties, CLAIMANT expected both PARTIES would enter into negotiations to account for the price difference. Accordingly, this TRIBUNAL should adjust the contract price of the goods.

ISSUE FOUR: EVEN IF THE TRIBUNAL FINDS NO PRICE ADAPTATION UNDER THE HARDSHIP CLAUSE, CLAIMANT IS ENTITLED TO PRICE ADAPTATION UNDER CISG ART. 74 OR 79(1).

80. CLAIMANT is entitled to a price adaptation under CISG Art. 79, as the inclusion of a hardship clause does not constitute a derogation **[A]** and the UNIDROIT gap filling provisions reach the same conclusion **[B]**. Regardless, the TRIBUNAL should order RESPONDENT to pay CLAIMANT USD 1,250,000 for breach of the PARTIES' oral agreement **[C]**.

A. Inclusion of a hardship clause does not constitute derogation from CISG Art. 79.

81. CISG Art. 8(1) states that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." [*CISG Art. 8(1)*]. The plain language of CISG Art. 8(1) only requires looking into the subjective intent of a party if the counter-party was aware of that subjective intent. [*MCC-Marble*].

82. The PARTIES' inclusion of a hardship clause in the contract cannot constitute an implied derogation of CISG Art. 79, because RESPONDENT did not make CLAIMANT aware of any such intent at the formation of contract. [*Ishida, p. 370*; *Cl. Ex. 5, p.13-14*].

B. UNIDROIT Art. 6.2.2, serves as a gap-filler for Article 79(1) because it is the contract law of both Mediterraneo and Equatoriana.

83. CISG Art. 79(1) does not expressly specify what constitutes an unforeseeable impediment or how to address such an impediment after performance occurs. In dealing with such internal gaps in the CISG, Art. 7(2) states, "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence principles, in conformity with the law applicable by virtue of the rules of international law." [*CISG Art. 7(2)*].

84. UNIDROIT functions as a gap-filler for the CISG in this case because the CISG facilitated the development of the UNIDROIT Principles of International Commercial Contracts, which thus represent the "general principles" upon which the CISG is based, and both Mediterraneo and Equatoriana adopted UNIDROIT as their domestic contract law. [*Lando, p. 4; PO1, p. 52*].

85. When there are no general principles that can be invoked to fill in the gaps in the CISG, the domestic law of the contracting PARTIES closest in relation to the disputed issue may be applied. [*CISG Art. 7(2); Person of Greece*].

86. Therefore, even if the TRIBUNAL somehow finds UNIDROIT does not represent the general principles on which the CISG is based, UNIDROIT applies here because it is the domestic law of both PARTIES' states.

1. The retaliatory tariffs suddenly imposed by RESPONDENT's country created a hardship for CLAIMANT under UNIDROIT Article 6.2.2.

87. Under CISG Art. 79(1), an "impediment" is "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness." [*Chinese Goods Case; CISG Art. 79(1)*]. Paralleling the qualities of an "impediment" under the CISG, UNIDROIT Art. 6.2.2 defines "hardship" as "the occurrence of events [that] fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, in addition to the four hardship factors previously laid out." [*UNIDROIT Art. 6.2.2*]. The term "hardship" under UNIDROIT fills in for "impediments" under the CISG because under UNIDROIT's factors, hardship is an exceptional event according to factor (b) and it is an unmanageable risk under factor (c). UNIDROIT provides additional factors to define hardship because UNIDROIT Art. 6.2.2 fills in the gap for the broader concept of impediments covered under the CISG.

88. RESPONDENT's country's sudden imposition of tariffs on frozen semen created hardship for CLAIMANT in performing delivery of the third shipment because it fundamentally altered the equilibrium of the contract by reducing CLAIMANT's five percent profit on the transaction to a twenty-five percent loss, and because the imposition of tariffs meets all the criteria for hardship under UNIDROIT Art. 6.2.2: (a) the tariffs were suddenly imposed on 19 December 2017, seven months after the conclusion of the contract, (b) CLAIMANT could not have reasonably predicted the longtime free-trade supporting government of Equatoriana to suddenly impose thirty percent tariffs on frozen semen, (c) CLAIMANT has no control over RESPONDENT's country imposing tariffs, and (d) CLAIMANT agreed to delivery DDP under the condition that it

would not assume the risk for "unforeseen events making the contract more onerous." [*Cl. Ex. 5, p. 14; Cl. Ex. 6, p. 15*].

89. Dramatic changes in economic conditions and political tensions, which change the equilibrium of the PARTIES' contract, which the PARTIES could not have reasonably taken into account, constitute hardship. [*Brunner, p. 111*]. To further the concept of hardship and the fundamental alteration of the equilibrium of a contract under UNIDROIT, in the aftermath of World War I and the severe inflation suffered by the German economy, Professor Oertmann developed the theory of *Wegfall der Geschäftsgrundlage*, or "disappearance of the foundations of the contract." Unprecedented tariffs that turn a once profitable contract to a loss would similarly constitute a disappearance of the foundation of the contract to which the PARTIES agreed. [*Perillo, p. 113-114*].

90. In the present case, CLAIMANT experienced a "disappearance of the foundation of the contract" when the unprecedented tariffs imposed by RESPONDENT's country led to the third shipment of frozen semen under the contract generating a twenty-five percent loss for the CLAIMANT instead of the five percent profit that CLAIMANT contracted for. [*Cl. Ex. 6, p. 15*]. Additionally, it would be unreasonable to require a party to perform a contract at a loss, particularly at such a high loss.

2. Because CLAIMANT satisfies the requirements for hardship under UNIDROIT Article 6.2.2, CLAIMANT is entitled to negotiation for price adaptation under UNIDROIT Article 6.2.3.

91. Under UNIDROIT Art. 6.2.3(1), "In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based." [*UNIDROIT Art. 6.2.3(1)*].

92. CLAIMANT suffered hardship as defined by UNIDROIT Art. 6.2.2, and timely requested renegotiation for price adaptation from RESPONDENT, before performing delivery of the third shipment of frozen semen. [*Cl. Ex. 7, p. 16*]. CLAIMANT detrimentally relied on RESPONDENT's promise to renegotiate when RESPONDENT refused renegotiation after accepting delivery of the third shipment. [*Cl. Ex. 8 ¶ 10, p. 18*].

93. RESPONDENT refused to conduct further business with CLAIMANT, and under UNIDROIT Art. 6.2.3(3), "Upon failure to reach agreement within a reasonable time either party may resort to the court." [*UNIDROIT Art. 6.2.3(3)*]. Various courts have applied UNIDROIT Art. 6.2.3(3) and held that in cases of hardship, the injured party is entitled to negotiations for price adaptation. [*Dupiré Invicta Industrie; Georgia Power; Aeronaves de Mexico*].

3. Even if the hardship clause did not include price adaptation for tariffs, CLAIMANT is entitled to price adaptation under UNIDROIT Article 6.2.3.

94. The secretariat commentary for the interpretation of UNIDROIT Art. 6.2.3 states that renegotiation on account of hardship is not precluded, even if the parties' contract contains a hardship clause which does not expressly contemplate the events that gave rise to the hardship. Courts and arbitral tribunals have found that in cases of hardship, the disadvantaged party is entitled to price adaptation. An arbitral tribunal in France found that because the seller performed delivery in good faith and suffered hardship not contemplated in the contract, the seller was entitled to a price adaptation in its favor, under CISG Article 79(1). [*Christian Flippe*]. Additionally, in the *Gaz de Bourdeaux* case, the French *Conseil d'Etat* held that when the price adjustment clause in a contract was insufficient to address the spike in coal prices after World War I, the disadvantaged party was entitled to a price adjustment based on hardship. [*Fucci, p. 4*].

95. In the present case, CLAIMANT performed delivery of the third shipment in good faith, relying on RESPONDENT's promise to renegotiate, and is therefore entitled to renegotiation for price adaptation under UNIDROIT Art. 6.2.3, even if the TRIBUNAL finds that the hardship clause did not contemplate tariffs. [*Cl. Ex. 8 ¶ 9, p. 18*].

96. Also, similarly to the *Gaz de Bourdeaux* case, even if the TRIBUNAL finds the hardship clause in the contract did not provide price adaptation for tariffs, the CLAIMANT is still entitled to a price adaptation because of the unforeseeable spike in delivery costs for the CLAIMANT, which created a hardship and fundamental imbalance in the contract similar to that in *Gaz de Bourdeaux*. [*Gaz de Bourdeaux*].

4. The TRIBUNAL should order RESPONDENT to pay CLAIMANT an additional USD 1,250,000, which is twenty-five percent of the price of the third shipment, to restore the equilibrium of the contract under UNIDROIT Article 6.2.3.

97. A court or Tribunal may adapt a contract to restore its equilibrium. [*UNIDROIT Art. 6.2.3(4)(b)*].

98. In a 2011 ICC case, hardship did not excuse non-performance, but called for price adaptation to restore the equilibrium of the contract. [*Buyer v. Seller*]. Because there was a hardship clause in the sales contract that stated the parties must share the risk under conditions that constitute hardship, and the equilibrium of the contract was fundamentally altered because the commodity's price fluctuated and diminished the value of the performance seller received, the ICC held that price adaptation was a reasonable and fair solution to restore the equilibrium of the contract. [*Buyer v. Seller*].

C. Even if the TRIBUNAL finds no price adaptation under UNIDROIT through CISG Art. 79(1), the TRIBUNAL should order RESPONDENT to pay Claimant USD 1,250,000 in damages for breaching the PARTIES' oral agreement.

99. Under CISG Art. 74, "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract." [*CISG Art. 74*]. The PARTIES formed a binding agreement when CLAIMANT'S agent, Ms. Napravnik, called RESPONDENT's agent, Mr. Shoemaker, to address the tariffs, the PARTIES agreed RESPONDENT would negotiate price adaptation with CLAIMANT after CLAIMANT delivered the third shipment of frozen semen. [*Cl. Ex. 8 ¶ 9, p. 18*]. RESPONDENT assured CLAIMANT that it valued their business relationship and would find a solution with CLAIMANT for adapting the price, in exchange for CLAIMANT'S timely delivery of the shipment. [*Cl. Ex. 8, p. 18*]. An agreement between two parties need not be formalized in writing to be binding under the CISG. [*CISG Art. 11].*

100. After CLAIMANT timely delivered the third shipment, CLAIMANT approached RESPONDENT to negotiate the price adaptation the PARTIES agreed to. At this time, RESPONDENT breached the contract for price adaptation when RESPONDENT'S CEO acted hostile towards CLAIMANT and refused to negotiate the price. [*Cl. Ex. 8 ¶ 10, p. 18*].

101. CISG Art. 74 requires that the aggrieved party to foresee the loss it seeks to recover damages for at the time it makes the agreement with the other party. [*CISG Art. 74*]. Here, CLAIMANT knew that it would suffer a thirty percent loss of profits if RESPONDENT breached the agreement to negotiate for price adaptation. Therefore, the TRIBUNAL should order RESPONDENT to pay CLAIMANT USD 1,250,000, which is twenty-five percent of the price of the third shipment, because CLAIMANT satisfies the foreseeability requirement of CISG Art. 74.

Conclusion on Issue 4

102. Here, the tariffs imposed by RESPONDENT's country fundamentally altered the equilibrium of the contract because they reduced the five percent profit CLAIMANT contracted for to a twenty-five percent loss on the transaction with RESPONDENT, and RESPONDENT breached the PARTIES' oral agreement to negotiate price adaptation after CLAIMANT delivered the third shipment of frozen semen. Therefore, the TRIBUNAL should order RESPONDENT to pay to CLAIMANT USD 1,250,000, which is twenty-five percent of the price of the third shipment, either to restore the equilibrium of the contract or to award CLAIMANT damages for RESPONDENT'S breach of contract.

Prayer for Relief

In light of the above, CLAIMANT respectfully requests the TRIBUNAL find that:

1) The TRIBUNAL has the jurisdiction and power to adapt the contract;

2) The Partial Interim Award is admissible in this proceeding;

3) CLAIMANT is entitled to a payment of US$1.250.000 under both;

    a) Clause 12 of the contract, and

    b) Art. 79(1) of the CISG.

Claimant reserves the right to amend its prayer for relief as may be required.

Certificate and Choice of Forum

To be attached to each Memorandum

I Nazaneen Pahlevani, on behalf of the Team for (name of School) hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☑ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☑ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) American University Washington College of Law

Name Nazaneen Pahlevani

Signature Nazaneen Pahlevani