Twenty-Second Annual Willem C. Vis International Commercial Arbitration Moot

Humboldt University of Berlin

Memorandum for Claimant

On Behalf of:	Against:
Vulcan Coltan Ltd.	**Mediterraneo Mining SOE**
21 Magma Street	5-6 Mineral Street
Oceanside, Equatoriana	Capital City, Mediterraneo
– Claimant –	– Respondent –

Counsel for Claimant

Ansgar Dietrichs • Caterina Foti • Alix Lamar

Elisa Méndez • Jeanna Möllers • Nicolas Schlüter • Paul Zschunke

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

AG	Aktiengesellschaft
Art.	Article
Artt.	Articles
Ans. Req. Arb.	Answer to Request for Arbitration
Ans. Req. Joind.	Answer to Request for Joinder
BGB	Bürgerliches Gesetzbuch
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
Corp.	Corporation
CPC	Coltan Purchase Contract
EA Ord.	Order of the Emergency Arbitrator
ed.	editor
eds.	editors
et al.	et alia; and others (Latin)
et seq.	et sequens; and the following one (Latin)
et seqq.	et sequentia; and the following ones (Latin, pl.)
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
HGB	Handelsgesetzbuch
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
ICC	International Chamber of Commerce
Inc.	Incorporated

L/C	Letter of Credit
LLC	Limited Liability Company
Ltd.	Limited
Mr	Mister
MST	Mediterranean Standard Time
Ms	Miss
No.	Number
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs
PLC	Public Liability Company
Proc. Ord.	Procedural Order
Req. Arb.	Request for Arbitration
RST	Ruritanian Standard Time
S.A.	Société Anonyme
Sect.	Section
S.r.l.	Società Responsabilità Limitata
SOE	State Owned Enterprise
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	versus

INDEX OF LEGAL TEXTS

CISG	UN Convention on Contracts for the International Sale of Goods
ICC Rules	Arbitration Rules of the International Chamber of Commerce, effective since 1 January 2012
INCOTERMS 2010	International Commercial Terms, effective since 1 January 2011
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UCP 600	Uniform Customs and Practice for Documentary Credits, effective since 1 July 2007
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010

INDEX OF AUTHORITIES

AMAEFULE

Amaefule, Chumah

The Exceptions to the Principle of Autonomy of Documentary Credits, Ph.D. thesis

University of Birmingham 2012

Cited in para.: 30

AUTHOR IN: ARROYO

Arroyo, Manuel (ed.)

Arbitration in Switzerland: The Practitioner's Guide
The Hague 2013

Cited in paras.: 73, 81

BIJL

Bijl, Maartje

Fundamental Breach in Documentary Sales Contracts
The Doctrine of Strict Compliance with the Underlying Sales Contract

In: European Journal of Commercial Contract Law (2009), 19

Cited in paras.: 23, 60

BRUNNER

Brunner, Christoph

UN-Kaufrecht – CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980

Bern 2004

Cited in para.: 61

AUTHOR IN: BÖCKSTIEGEL

Böckstiegel, Karl-Heinz; Kröll, Stefan; Nacimiento, Patricia (eds.)

Arbitration in Germany: The Model Law in Practice

The Hague 2007

Cited in para.: 73

BONELL

Bonell, Michael

An International Restatement of Contract Law

3rd edition, Ardsley 2009

Cited in para.: 60

BOOG

Boog, Christopher

Interim Measures – Relevance of the Courts at the Place of Arbitration and Other Places

In: Ferrari, Franco (ed.)

Forum Shopping in the International Commercial Arbitration Context

Berlin 2013

Cited in para.: 76

BORN

Born, Gary B.

International Commercial Arbitration

2nd edition, Alphen aan den Rijn 2014

Cited in paras.: 73, 76, 88, 91, 98, 112, 114, 116

BUSSE	Busse, Daniel Die Bindung Dritter an Schiedsvereinbarungen In: German Arbitration Journal (2005), 118 Cited in para.: 110
CARON/CAPLAN	Caron, David; Caplan, Lee The UNCITRAL Arbitration Rules 2nd edition, Oxford 2013 Cited in para.: 88
DAVIES	Davies, Martin Documents That Satisfy the Requirements of CISG Art. 58 In: Belgrade Law Review (2011), 39 Cited in para.: 24
EL-SAGHIR	El-Saghir, Hossam Guide to Article 25, Comparison with principles of European Contract Law (PECL) Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp25.html Cited in para.: 32

AUTHOR IN: ENDERLEIN/MASKOW/STROHBACH	Enderlein, Fritz; Maskow, Dietrich; Strohbach, Heinz Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention Berlin 1991 Cited in para.: 62
FERRARI	Ferrari, Franco Fundamental Breach of Contract under the UN Sales Convention – 25 Years of Article 25 CISG In: Journal of Law an Commerce (Spring 2006), 489 Cited in paras.: 34
FERRARI/KIENINGER/MANKOWSKI	Ferrari, Franco; Kieninger, Eva; Mankowski, Peter; et al. Internationales Vertragsrecht 2nd edition, Munich 2012 Cited in para.: 62
FERRARIO	Ferrario, Pietro The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist? In: Journal of International Arbitration 26(5), 647 Alphen aan den Rijn 2009 Cited in paras.: 106, 114, 116

FOUCHARD/GAILLARD/GOLDMAN | Gaillard, Emmanuel; Savage, John (editors)

Fouchard Gaillard Goldman on International Commercial Arbitration

The Hague 1999

Cited in paras.: 73, 91, 105, 114, 116

GRAFFI | Graffi, Leonardo

Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention

In: Revue de droit des affaires internationales (2003), 338

Cited in para.: 34

GRIERSON/VAN HOOFT | Grierson, Jacob; van Hooft, Annet

Arbitrating under the 2012 ICC Rules

The Hague 2012

Cited in para.: 81

HONNOLD | Honnold, John O.

Uniform Law for International Sales under the 1980 United Nations Convention

3rd edition, The Hague 1999

Cited in para.: 40

HUBER/MULLIS | Huber, Peter; Mullis, Alastair

The CISG: A New Textbook for Students and Practitioners

Munich 2007

Cited in para.: 21

KELLER | Keller, Bertram

Early Delivery and Seller's Right to Cure Lack of Conformity: Art. 37 CISG and UNIDROIT Principles Comparative

Available at: http://www.cisg.law.pace.edu/cisg/biblio/keller.html

Cited in para.: 30

AUTHOR IN: KRÖLL/MISTELIS/VISCASILLAS | Kröll, Stefan; Mistelis, Loukas; Perales Viscasillas, Pilar (eds.)

UN-Convention on the International Sales of Goods (CISG)

Munich et al. 2011

Cited in paras.: 22, 52, 59, 61, 62

LEHMKUHL | Lehmkuhl, Heiko

Das Nacherfüllungsrecht des Käufers im UN-Kaufrecht,

Frankfurt am Main 2002

Cited in para.: 30

LEW/MISTELIS/KRÖLL	Lew, Julian; Mistelis, Loukas; Kröll, Stefan Comparative International Commercial Arbitration, The Hague 2003 Cited in para: 83
MOSES	Moses, Margaret The Principles and Practice of International Commercial Arbitration 2nd edition, Cambridge 2012 Cited in para: 73
AUTHOR IN: MÜKO BGB	Säcker, Franz; Rixecker, Roland (eds.) Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 3 6th edition, Munich 2012 Cited in paras.: 43, 62
AUTHOR IN: MÜKO HGB	Schmidt, Karsten (ed.) Münchener Kommentar zum Handelsgesetzbuch: HGB, Band 5 3rd edition, Munich 2013 Cited in para.: 62

AUTHOR IN: MÜKO VGG

Langheidt, Theo; Wandt, Manfred (eds.)

Münchener Kommentar zum Versicherungsvertrags-gesetz: BGB, Band 1,

1st edition, Munich 2010

Cited in para.: 33

MÜLLER/KEILMANN

Müller, Werner; Keilmann, Annette

Beteiligung am Schiedsverfahren wider Willen?

In: German Arbitration Journal (2007), 113

Cited in para.: 107

AUTHOR IN: NEDDEN/HERZBERG

Nedden, Jan; Herzberg, Axel (eds.)

ICC-SchO/DIS-SchO, Praxiskommentar zu den Schiedsgerichtsordnungen

Cologne 2014

Cited in paras.: 71, 81, 83, 91

NIELSEN

Nielsen, Jens

Import- und Exportsicherung auf dokumentärer Grundlage

Cologne 1988

Cited in para.: 20

AUTHOR IN: SCHIMANSKY/BUNTE/LWOWSKI	Schimansky, Herbert; Bunte, Hermann-Josef; Lwowski, Hans-Jürgen Bankrechtshandbuch, Band 1 Munich 2011 Cited in para.: 20
OSER	Oser, David UNIDROIT Principles of International Commercial Contracts – a Governing Law? Leiden 2008 Cited in para.: 60
PAMBOUKIS	Pamboukis, Chalarambos The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods In: Journal of Law and Commerce (2005), 107 Cited in para.: 49
PARK	Park, William Non-Signatories and International Contracts: An Arbitrator's Dilemma In: Permanent Court of Arbitration (ed.) Multiple Parties in International Arbitration Oxford 2009 Cited in paras.: 112, 116

PILTZ | Piltz, Burghard

Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung

2nd edition, Munich 2008

Cited in para.: 33

REDFERN/HUNTER | Redfern, Alan; Hunter, Martin; et al.

Redfern and Hunter on International Commercial Arbitration

5th edition, London 2009

Cited in paras.: 73, 90, 91, 106

RUBBELIN-DEVICHI | Rubbelin-Devichi, Jacqueline

L'arbitrage et les tiers: III. - Le droit de l'arbitrage

In: Revue de l'Arbitrage (1988), 514

Cited in para.: 107

SANDROCK | Sandrock, Otto

The Extension of Arbitration Agreements to Non-Signatories: An Enigma Still Unresolved

In: Baums, Theodor; Hopt Klaus; Horn, Norbert (eds.)

Corporations, Capital Markets and Business Law, Liber Amicorum Richard M. Buxbaum

London et al. 2000

Cited in paras.: 105, 110, 114

SCHLECHTRIEM/SCHROETER	Peter, Schlechtriem; Ulrich, Schroeter Internationales UN-Kaufrecht, Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Wareneinkauf (CISG) 5th edition, Tübingen 2013 Cited in para.: 16
AUTHOR IN: SCHLECHTRIEM/ SCHWENZER	Schlechtriem, Peter; Schwenzer, Ingeborg (eds.) Commentary on the UN Convention on the International Sale of Goods (CISG) 3rd edition, Munich 2010 Cited in paras.: 38, 43, 60, 61, 62, 75
SECRETARIAT'S GUIDE	Fry, Jason; Greenberg, Simon; Mazza, Francesca The Secretariat's Guide to ICC Arbitration Paris 2012 Cited in paras.: 71, 73, 81, 91
AUTHOR IN: STAUDINGER	Kommentar zum Bürgerlichen Gesetzbuch: BGB Buch 2: Recht der Schuldverhältnisse,Wiener UN-Kaufrecht (CISG), Neubearbeitung 2012 Berlin 2012 Cited in paras.: 33, 40, 43

UNCITRAL DIGEST	United Nations Commission on International Trade Law UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods New York 2012 Cited in paras.: 21, 52
WAHAB	Wahab, Mohamed Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum In: Ferrari, Franco; Kröll, Stefan (eds.) Conflict of Laws in International Arbitration Munich 2011 Cited in para.: 110
WEBSTER/BÜHLER	Bühler, Michael W.; Webster, Thomas H. Handbook of ICC Arbitration: Commentary, Precedents, Materials 2nd edition, London 2008 Cited in paras.: 81, 82

WINSOR | Winsor, Katrina

The Applicability of the CISG to govern Sales of Commodity Type Goods

In: Vindobona Journal of International Commercial Law and Arbitration (2010), 83

Cited in paras.: 28, 29

YOVEL | Yovel, Jonathan

Seller's Right to Avoid the Contract in International Transactions: Comparative analysis of the respective provisions in the CISG (Article 64) and in the PECL

Available at:

http://www.cisg.law.pace.edu/cisg/biblio/yovel64.html

Cited in paras.: 16, 38

ZAHN/EHRLICH/HAAS | Zahn, Johannes; Ehrlich, Dietmar; Haas, Gregor

Zahlung und Zahlungssicherung im Außenhandel

8th edition, Berlin 2010

Cited in para.: 20

INDEX OF CASES

AUSTRIA

AUSTRIAN SUPREME COURT 2005	Oberster Gerichtshof, 7 Ob 175/05v 31 August 2005 CISG-online 1093 Cited in para.: 49

FRANCE

DISTRICT COURT STRASBOURG 2006	Tribunal de Grande Instance de Strasbourg, 04/00925 22 December 2006 CISG-online 1629 Cited in para.: 38
FRENCH COURT OF CASSATION 1992	Cour de Cassation, 1. Ch. civile Tareau v. Martin et al. 16 July 1992 Revue de l'arbitrage (1993), 611 Cited in paras.: 110, 116

GERMANY

APPELLATE COURT FRANKFURT 1991	Oberlandesgericht Frankfurt am Main, 5 U 164/90 17 September 1991 CISG-online 28 Cited in para.: 32

APPELLATE COURT NÜRNBERG 2004	Oberlandesgericht Nürnberg, 12 U 2881/0430 30 November 2004 German Arbitration Journal (2005), 50 Cited in para.: 76
APPELLATE COURT MUNICH 2004	Oberlandesgericht München, 7 U 2959/04 15 September 2004 CLOUT Case No. 595 Cited in para.: 47
APPELLATE COURT MUNICH 2006	Oberlandesgericht München, 23 U 2421/05 16 October 2006 CISG-online 1394 Cited in para.: 40
APPELLATE COURT STUTTGART 2006	Oberlandesgericht Stuttgart, 5 U 21/06 15 May 2006 CISG-online 1414 Cited in para.: 75
APPELLATE COURT KARLSRUHE 2008	Oberlandesgericht Karlsruhe, 9 U 46/07 14 February 2008 CISG-online 1649 Cited in para.: 40

DISTRICT COURT KASSEL 1995	Landgericht Kassel, 11 O 4261/94 21 September 1995 CISG-online 192 Cited in para.: 40
GERMAN FEDERAL COURT 1977	Bundesgerichtshof, III ZR 177/74 5 Mai 1977 BGHZ 68, 356 Cited in para.: 100

INDIA

BHARAT ALUMINUM V. KAISER ALUMINUM TECHNICAL SERVICES	Supreme Court of India, Civil Appeal No. 7019/2005 Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc. 2012 Cited in para: 76
MARRIOT INTERNATIONAL V. ANSAL HOTELS	Delhi High Court Marriot International Inc. v. Ansal Hotels Ltd. 5 July 2000 XXVI Yearbook of Commercial Arbitration (2001), 788 Cited in para: 76

SN PRASAD V. MONNET FINANCE	Supreme Court of India, Civil Appeal No. 9224/2010 S. N. Prasad v. Monnet Finance Limited, et. al. 22 October 2010 Cited in para.: 100

SWITZERLAND

CIVIL COURT BASEL-STADT 2002	Zivilgericht Basel-Stadt 1 March 2002 CISG-online 729 Cited in para.: 32
SWISS FEDERAL COURT 2000	Schweizerisches Bundesgericht, 4C_105/2000 FCF S.A. v. Adriafil Commerciale S.r.l. 15 September 2000 Available at: http://cisgw3.law.pace.edu/cases/000915s2.html Cited in para.: 34
SWISS FEDERAL COURT 2008	Schweizerisches Bundesgericht, 4A_128/2008 X. Ltd. v. Y., Z. SpA 19 August 2008 26 ASA Bulletin (2008), 777 Cited in para.: 100

UNITED KINGDOM

A v. B	Commercial Court, Queens Bench Division A v. B 28 July 2006 [2007] 1 All ER (Comm) 591 Cited in para.: 76
CAPARO GROUP v. FAGOR ARRASTATE	Commercial Court, Queen's Bench Division Caparo Group Ltd. v. Fagor Arrastate Sociedad Cooperative 7 August 1998 [2000] ADLRJ 254 Cited in para.: 109
CHANNEL TUNNEL GROUP v. BALFOUR BEATTY CONSTRUCTION	House of Lords Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. 21 January 1993 [1993] All ER 664 Cited in para.: 76
DALLAH v. PAKISTAN	England and Wales Court of Appeal Dallah Estate and Tourism Holding v. The Ministry of Religious Affairs, Government of Pakistan 20 July 2009 [2009] EWCA Civ 755 Cited in paras.: 108, 109

ECONET WIRELESS V. VEE NETWORKS	Commercial Court, Queen's Bench Division Econet Wireless Ltd. v. Vee Networks 28 June 2006 [2006] EWHC 1568 (Comm) Cited in para.: 76
FURST V. FISCHER	High Court of England and Wales, Commercial Court Enrico Furst & Co. v. WE Fischer Ltd. 11 November 1960 [1960] 2 Lloyd's List Law Reports (Q.B.) 340 Cited in para.: 30
KROMAN V. STEINBERGER	High Court of England and Wales Kroman & Co. v. Steinberger 1922 [1922] 10 Lloyds List Law Reports (K.B.) 39 Cited in para.: 30
PETERSON FARMS V. C & M FARMING	Commercial Court Peterson Farms Inc. v. C & M Farming 4 February 2004 [2004] EWHC 121 (Comm) Cited in paras.: 107, 108, 109

STELLAR SHIPPING V. HUDSON SHIPPING	Commercial Court Stellar Shipping Co. LLC v. Hudson Shipping Lines 18 November 2010 [2010] EWHC 2985 (Comm) Cited in para.: 102
VTB CAPITAL PLC V. NUTRITEK INTERNATIONAL CORP	England and Wales Court of Appeal, (2012) EWCA Civ 808 VTB Nutritek PLC v. Nutritek International Corp. 20 June 2012 Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html Cited in para.: 116

UNITED STATES OF AMERICA

ASPLUNDH TREE EXPERT CO. V. BATES	United States Court of Appeals (6th Cir. 1995), 71 F.3d 592 Asplundh Tree Expert Co. v. Bates 14 December 1994 Cited in para.: 100
CHATEAU DES CHARMES V. SABATE	United States Court of Appeals, 9th Circuit, 328 F.3d 528 Château des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A. 5 Mai 2003 CLOUT Case No. 576 Cited in para.: 75

GRUNDSTAD V. RITT	United States Court of Appeals, 7th Curcuit, 106 F.3d 201 Oddmund Grundstad v. Joseph Ritt and American Arbitration Association Inc. 4 February 1997 Cited in paras.: 100, 101
MOTOROLA CREDIT CORP V. UZAN	United States Court of Appeals, 2nd Curcuit, 388 F.3d 39 Motorola Credit Corporation v. Uzan 22 October 2004 Cited in para.: 109
PROSHRED HOLDINGS V. CONESTOGA DOCUMENTS	United States District Court for the Northern District of Illinois, Eastern Division, 02C1551 Proshred Holdings Ltd. and Sean O'Dea v. Conestoga Document and Product Destruction Inc., Gregory and Jan F. Cranston 24 May 2002 Cited in para.: 100
SARHANK GROUP V. ORACLE CORP.	United States Court of Appeal, 2nd Circuit, 404 F.3d 657 Sarhank Group v. Oracle Corp. 14 April 2005 Docket No. 02-9383. Cited in paras.: 106, 107, 108

SINGAPORE PTE V. ALBACORE MARITIME	United States District Court, S. D. New York, 794 F. Supp. 2d 449 Singapore Pte. Ltd. v. Albacore Maritime Inc. 14 April 2011 Cited in para.: 109

INDEX OF ARBITRAL AWARDS

AD HOC ARBITRATION

AD HOC GENEVA 1991	Ad Hoc Award Geneva of 1991 Alpha S.A. v. Beta & Co., State Company of Ruritanian Law 10 ASA Bulletin (1992), 202 Cited in para.: 116
PAUSHOK V. MONGOLIA	Order on Interim Measures, Ad Hoc Proceeding, 1976 UNCITRAL Rules Sergei Paushok, et al. v. Government of Mongolia 2 September 2008 Cited in para.: 88

ARBITRAL TRIBUNAL VIENNA

ARBITRAL TRIBUNAL VIENNA 4318	Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, SCH-4318 15 June 1994 CLOUT Case No. 94 Cited in para.: 47

CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION

CIETAC 1995	China International Economic & Trade Arbitration Commission 23 April 1995 CISG-online 1031 Cited in para.: 30

INTERNATIONAL CHAMBER OF COMMERCE

ICC CASE NO. 3879	Interim Award in ICC Case No. 3879 of 1984 Westland Helicopters Ltd. v. Arab Organization for Industrialization, et al. 5 March 1984 XI Yearbook of Commercial Arbitration (1986), 127 Cited in para.: 116
DOW CHEMICAL	Interim Award in ICC Case No. 4131 Dow Chemical (France), The Dow Chemical Company (USA), Dow Chemical AG (Swiss), Dow Chemical Europe (Swiss) v. Isover Saint Gobain 23 September 1982 IX. Yearbook of Commercial Arbitration (1984), 131 Cited in paras.: 103, 112, 114

ICC CASE NO. 4367	ICC Case No. 4367 of 1984 XI. Yearbook of Commercial Arbitration (1986), 134 Cited in para.: 90
ICC CASE NO. 4472	ICC Case No. 4472 of 1984 Journal du Droit International (1984), 946 Cited in para.: 90
ICC CASE NO. 5721	ICC Case No. 5721 of 1990 Journal du Droit International (1990), 1019 Cited in para.: 114
ICC CASE NO. 7604	ICC Case No. 7604 of 1998 Collection of ICC Arbitral Awards 1996-2000, 510 Cited in para.: 114
ICC CASE NO. 7610	ICC Case No. 7610 of 1995 Collection of ICC Arbitral Awards 1996-2000, 510 Cited in para.: 114
ICC CASE NO. 10758	ICC Case No. 10758 of 2000 Journal du Droit International (2001), 1171 Cited in paras.: 105, 109, 114,

ICC CASE NO. 11160	ICC Case No. 11160 of 2002 ICC Court of Arbitration Bulletin (2005), 99 Cited in para.: 114
ICC ORDER NO. 5	ICC Case A v. Z, Order No. 5 2 April 2002 ASA Bulletin (2003), 813 Cited in para.: 73
ICC CASE NO. 11849	ICC Case No. 11849 of 2003 Distributor (US) v. Manufacturer (Italy) XXXI Yearbook of Commercial Arbitration (2006), 148 Cited in para.: 67

SUMMARY OF FACTS

1. Vulcan Coltan Ltd. [Hereinafter "CLAIMANT"], organised under the laws of Equatoriana, is a broker of rare minerals, in particular conflict-free coltan. It is a subsidiary of Global Minerals Ltd. [Hereinafter "Global Minerals"], established particularly for entering the very difficult and competitive Equatorianian market.

2. Mediterraneo Mining SOE [Hereinafter "RESPONDENT"] is a state owned enterprise operating all mines in Mediterraneo. It is the second largest producer of coltan worldwide.

3. On **28 March 2014**, CLAIMANT and RESPONDENT [Together "the Parties"] concluded a coltan purchase contract [Hereinafter "CPC"] for the purchase of 30 metric tons of coltan.

4. On **25 June 2014**, RESPONDENT sent CLAIMANT a notice of transport attesting that the coltan was ready to be transported. This event triggered a 14 day period for CLAIMANT to initiate payment by establishing a letter of credit [Hereinafter "L/C"]. Additionally, RESPONDENT sent CLAIMANT an email suggesting that further quantities of coltan had become available.

5. CLAIMANT decided to purchase these further quantities of coltan and established an L/C in the belief that it was performing its obligations under the amended contract. However, RESPONDENT rejected this L/C as it purportedly deviated from the original terms of the CPC and declared the contract avoided on **7 July 2014**.

6. On **8 July 2014**, CLAIMANT established a new L/C, which reached RESPONDENT the same day.

7. On **9 July 2014**, RESPONDENT declared the CPC avoided another time and entered into negotiations with other customers for the sale of the coltan reserved for CLAIMANT.

8. On **11 July 2014**, CLAIMANT submitted both its request for arbitration and its application for emergency measures pursuant to Art. 29 ICC Rules to the ICC Secretariat.

9. On **26 July 2014**, CLAIMANT received a favourable award from the ICC emergency arbitrator [Hereinafter "Emergency Arbitrator"] precluding RESPONDENT from selling the coltan.

10. On **8 August 2014**, RESPONDENT filed its request for joining Global Minerals to the proceedings.

11. These events are overshadowed by a political crisis in Xanadu, the world's largest producer of coltan, which is predicted to last at least until the end of the oral hearings in Vienna.

SUMMARY OF ARGUMENT

12. CLAIMANT is determined to promote a sustainable economy by exclusively trading conflict free coltan. As a newly founded company struggling to establish in the highly competitive market of Equatoriana, it hoped to have found a loyal and reliable business partner in RESPONDENT, a state-owned monopolist.

13. Despite entertaining a long-standing and amicable business relationship with CLAIMANT's corporate parent, RESPONDENT, at the first glance to attain greater profit, chose to exploit the outbreak of hostilities in Xanadu to walk away from its contractual obligations. It left business mails unanswered and provided negligently drafted documents and ambiguous messages, leaving CLAIMANT oblivious of its plans. When CLAIMANT nevertheless offered payment on the basis of the terms it deemed agreed, RESPONDENT rejected all such offers on the very basis of its own failures and – unsuccessfully – attempted to avoid the CPC. Ignoring all of CLAIMANT's subsequent efforts to uphold both the CPC and the business relationship between the Parties, RESPONDENT then attempted to avoid the CPC another time, relying on bagatelles and technicalities. CLAIMANT thus respectfully asks the Tribunal to safeguard not only CLAIMANT's business, but also the philosophy of geo-economical awareness and responsibility it stands for [**A.**].

14. By entering into negotiations with other customers to sell the coltan promised to CLAIMANT, RESPONDENT left CLAIMANT no choice but to – successfully – apply for emergency measures. In line with its previous conduct, RESPONDENT clutches at the last remaining straw and challenges the jurisdiction of the Emergency Arbitrator on the basis of a clause the Parties had agreed upon for entirely different purposes. For no less obvious reasons, the order should be maintained [**B.**].

15. Finally, RESPONDENT attempts to draw CLAIMANT's parent company, Global Minerals, into the current proceedings. To this end, RESPONDENT knowingly misinterprets the ordinary and legitimate guidance provided by a corporate parent to its newly founded subsidiary. However, in absence of any credible justification for joinder, the Tribunal is respectfully requested to find that it lacks jurisdiction over Global Minerals **[C.]**.

ARGUMENT

A. RESPONDENT did not rightfully avoid the CPC

16. CLAIMANT respectfully requests the Tribunal to find that RESPONDENT did not rightfully avoid the CPC. The avoidance of a contract is only possible by giving notice to the respective party [YOVEL, PARA. 3; SCHLECHTRIEM/SCHROETER, P. 145, PARA. 313]. RESPONDENT relies on two distinct declarations of avoidance dated 7 July [EXHIBIT C 7, P. 13] and 9 July [EXHIBIT R 4, P. 44]. However, RESPONDENT did not rightfully avoid the CPC, neither by its declaration of avoidance dated 7 July [**I.**] nor by its declaration of avoidance dated 9 July [**II.**].

I. RESPONDENT did not rightfully avoid the CPC on 7 July

17. RESPONDENT did not rightfully avoid the CPC by its declaration of avoidance dated 7 July. It argues that CLAIMANT committed a breach of contract by establishing the L/C on 4 July, which purportedly did not comply with the terms of the CPC [ANS. REQ. ARB., P. 38, PARA. 30]. Art. 64 CISG sets out various grounds for avoidance provided to a seller including both a right to avoid the contract in case the buyer commits a fundamental breach, Art. 64(1)(a) CISG, as well as the same right when the buyer fails to perform within an additional period of time fixed by the seller, Art. 64(1)(b) CISG. However, neither the requirements of Art. 64(1)(a) CISG [**1.**] nor those of Art. 64(1)(b) CISG [**2.**] are met. In any case, RESPONDENT was barred from avoiding the CPC pursuant to Art. 63(2) CISG [**3.**].

1. RESPONDENT did not rightfully avoid the CPC pursuant to Art. 64(1)(a) CISG

18. RESPONDENT did not rightfully avoid the CPC pursuant to Art. 64(1)(a) CISG. Art. 64(1)(a) CISG stipulates that "*the seller may declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract*". RESPONDENT argues that the L/C of 4 July did not comply with the CPC as it formally relates to 100 metric tons of coltan while the CPC only refers to a sale of 30 metric tons [EXHIBIT C 7, P. 13; ANS. REQ. ARB., P. 36, PARA. 18]. Moreover, RESPONDENT claims that the L/C is defective since it provides for CIP shipment to CLAIMANT's premises instead of CIF shipment to Oceanside, Equatoriana [IBID.]. However, the relation of the L/C to 100 metric tons of coltan does not constitute a breach of the CPC [**a)**]. Furthermore, RESPONDENT is barred by Art. 80 CISG from avoiding the CPC based on the altered delivery terms [**b)**]. In any case, any breach committed by CLAIMANT was not fundamental [**c)**].

a) The relation of the Letter of Credit to 100 metric tons of coltan does not constitute a breach of the CPC

19. The relation of the L/C to 100 metric tons of coltan does not constitute a breach of contract. RESPONDENT argues that the L/C is not in compliance with the CPC as it opposes the agreement regarding the delivery of only 30 metric tons [STAT. OF DEF., P. 36, PARA. 19]. For the L/C does not explicitly refer to any amount of coltan, RESPONDENT's concerns could only be directed at potential conflicts between the sum secured by the L/C, USD 4,500,000, and Art. 4 CPC, which refers to an amount of USD 1,350,000 [EXHIBIT C 1, P. 7].

20. When establishing the L/C on 4 July, CLAIMANT was under the impression that the CPC had been modified on 27 June so as to provide for the delivery of 100 metric tons of coltan [EXHIBIT C 4, P. 10; REQ. ARB., P. 4 , PARA. 9]. Irrespective of the fact that the Parties subsequently agreed to no longer pursue this line of argument [PROC. ORD. NO. 1, P. 60, PARA. 2], the assumed amendment is precisely what motivated CLAIMANT to establish an L/C securing a sum of USD 4,500,000 instead of USD 1,350,000. However, the amount secured by the L/C does not contradict the CPC as it fulfils the purpose of providing sufficient security for the seller's delivery. In general, where an L/C is designed to provide a maximum sum of money to be drawn, the issuing bank can adjust its payment accordingly, if partial shipment is allowed [ZAHN/EHRLICH/HAAS, PARA. 2/287; NIELSEN/JÄGER IN: SCHIMANSKY/BUNTE/LWOWSKI, §120, PARA. 261]. The L/C is issued "*for any sum of money not to exceed a total of USD 4,500,000"* and allows partial shipment of *"not less than 30 metric tons*" [EXHIBIT C 1, P.7; EXHIBIT C 5, P. 11]. As the L/C enables RESPONDENT to obtain payment of USD 4,500,000, the disbursement in the amount of USD 1,350,000 for the delivery of 30 metric tons of coltan is ensured in any case. Therefore, the inherent purpose of guaranteeing payment under the original contract remains fulfilled, irrespective of the relation of the L/C to 100 metric tons of coltan. In conclusion, the deviation is merely of formal nature and does not constitute a breach of contract.

b) Furthermore, RESPONDENT is barred from avoiding the CPC based on the altered delivery terms by virtue of Art. 80 CISG

21. Furthermore, RESPONDENT is barred from avoiding the CPC based on the altered delivery terms by virtue of Art. 80 CISG. RESPONDENT invokes two purported deviations of the L/C from Art. 5 CPC: The change of the shipping terms from CIF to CIP shipment and the change of the address from Oceanside, Equatoriana to 21 Magma Street, Oceanside, Equatoriana. Pursuant to Art. 80 CISG "*a party may not rely on a failure of the other party to perform, to* *the extent that such failure was caused by the first party's act or omission*". Thereby, Art. 80 CISG does not only deny the responsible party the right to claim damages, but the right to claim any remedies relating to a failure of performance, including rights of avoidance pursuant to Art. 64 CISG [HUBER/MULLIS, P. 265; UNCITRAL DIGEST, ART. 80, PARA. 4].

22. First, the change of the shipping terms from CIF to CIP was caused by RESPONDENT sending a misleading Notice of Transport. Causation, as required by Art. 80 CISG, is defined as a *condicio sine qua non*, a certain act without which the injury would not have occurred [ATAMER IN: KRÖLL/MISTELIS/VISCASILLAS, ART. 80, PARA. 8]. It is correct that Art. 5 CPC had initially provided for delivery by means of CIF shipment as defined by the INCOTERMS 2010. However, the Parties had lengthily discussed the option of CIP shipment during the initial negotiations of the CPC [ANS. REQ. ARB., P. 34, PARA. 8]. Thus, it was to CLAIMANT's great surprise when, on 25 June, it received a Notice of Transport referring to CIP transportation [EXHIBIT C 2, P. 8]. In light of the pre-contractual negotiations, CLAIMANT could only come to the conclusion that RESPONDENT's alteration of the shipping terms was made consciously. Nevertheless, CLAIMANT contacted RESPONDENT and clarified that it would accept this deviation from the CPC [EXHIBIT C 4, P. 10], but received no answer. RESPONDENT cannot rely on the fact that Ms Masrov, an employee of RESPONDENT, told CLAIMANT's sales manager Mr Rüthli during a private phone call that the offered changes were not accepted. In fact, Mr Rüthli was let go only minutes after this conversation and never passed on the information [PROC. ORD. NO. 2, P. 66, PARA. 26]. In any case, when receiving CLAIMANT's e-mail for clarification, RESPONDENT was obliged to formally raise an objection to these changes. The mere frustration over a purportedly unfriendly offer [EXHIBIT R 1, P. 41, PARA. 9] does not release RESPONDENT from this obligation. The lack of action cannot be cured by a private phone call between two befriended employees who informally happened to talk about business matters while on holiday. During this phone call, Ms Masrov did not know for certain whether RESPONDENT would reject the offer nor was she assured of Mr Rüthli passing on the information to CLAIMANT [EXHIBIT R 2, P. 42, PARA. 4 ET SEQ.]. RESPONDENT cannot deny the causation of the Notice of Transport in reliance on such private and casual communication, as it would leave the actual receipt of its objection to coincidence.

23. Furthermore, the according change from CIF to CIP shipment was not only legitimate, but also presumed necessary considering the severe consequences of a non-compliant letter of credit. In accordance with the principle of strict compliance applicable to payment by letter of credit, the seller must hand in clean documents, i.e. documents complying with the requirements set out in the corresponding letter of credit, in order to receive payment [BIJL, P. 19]. In the present case, these documents included – *inter alia* – a correct transport document. If CLAIMANT had left the L/C unchanged, while RESPONDENT would have delivered the coltan by means of CIP transport, RST Trade Bank would have been obliged to reject RESPONDENT's transport document and, thus, deny disbursement. In order to prevent failure of payment, thereby jeopardizing the CPC and the amicable relationship of the Parties, CLAIMANT chose to adapt this change of shipment. RESPONDENT therefore caused the alleged breach of contract by its own actions.

24. Second, the alteration of the shipping address from Oceanside, Equatoriana to *"21 Magma Street, Oceanside, Equatorina"* [EXHIBIT C 5, P. 11] was a mere consequence of the change of the shipping terms. Goods sold on CIF terms (*"Cost, Insurance and Freight"*) have to be delivered to a named port of destination, whereas CIP refers to *"Carriage and Insurance Paid to"* a named place, which is usually a specific address [DAVIES, P. 64]. During the pre-contractual negotiations, RESPONDENT always offered to ship the coltan CIP "to CLAIMANT's premises" [ANS. REQ. ARB., P. 34, PARA. 8]. Thus, when receiving the Notice of Transport referring to CIP shipment, CLAIMANT included the address since it assumed that the coltan would be delivered to its premises. As with the shipping terms themselves, this was deemed necessary in order to guarantee RESPONDENT's access to the money secured by the L/C. As the changes of the delivery terms were caused by RESPONDENT's own conduct, it is barred from relying on these alterations in order to avoid the CPC by virtue of Art. 80 CISG.

c) In any case, any breach committed by CLAIMANT was not fundamental

25. Even if the Tribunal should reject any of the foregoing, CLAIMANT did not commit a fundamental breach of the CPC. Contrary to RESPONDENT's allegation [ANS. REQ. ARB., P. 38, PARA. 31], not any deviation from the CPC amounts to a fundamental breach [**(i)**]. Furthermore, the deviations in the L/C do not constitute a fundamental breach of the CPC pursuant to Art. 25 CISG [**(ii)**].

(i) Not any deviation from the CPC amounts to a fundamental breach

26. RESPONDENT wrongfully assumes that any deviation in the L/C automatically amounts to a fundamental breach [EXHIBIT C 7, P. 13]. By doing so, it relies on a trade usage, according to which "*any deviation from the contract* […] *constitutes a fundamental breach*" [ANS. REQ. ARB., P. 38, PARA. 31]. However, the Parties have not made this usage applicable to the CPC [**(1)**]. Even if the Tribunal should find this usage applicable, it cannot be applied to defects of letters of credit, as the establishing party is entitled to a right to cure [**(2)**].

(1) The Parties have not made the respective trade usage applicable to the CPC

27. The Parties have not made the respective trade usage applicable to the CPC pursuant to Art. 9(2) CISG. Under Art. 9(2) CISG, "[t]*he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract* […] *a usage* […] *which in international trade is widely known to* […] *parties to contracts of the type involved in the particular trade concerned*". CLAIMANT does not challenge the existence of a trade usage according to which, in heavily document based commodity transactions, a strict compliance with the contractual provisions is required [PROC. ORD. NO. 2, P. 65, PARA. 18]. However, this usage does not apply to the CPC.

28. First, the usage does not cover transactions similar to the CPC. Usually, commodities are traded by documents that represent the goods. These documents are traded on highly speculative markets, changing the owner several times until the date of delivery. With these so-called *string transactions*, time is of the essence. Due to the high market fluctuations, these commodity contracts are considered strict and therefore governed by the aforementioned trade usage [WINSOR, PP. 90 ET SEQ.]. However, these transactions have to be distinguished from the case at hand. Both RESPONDENT as a producer and CLAIMANT as an importer are not the typical actors on these speculative markets. Accordingly, the CPC is no string transaction, but rather a direct agreement between a seller and a buyer. Therefore, the usage cannot be applied to the case at hand.

29. Second, the Parties did not intend for the usage to be applied. "*Art. 9(2) aims to ensure that an implied usage or practice is made applicable to the contract if the parties in the transaction intended to observe it*" [WINSOR, P. 98]. It can be deduced from the CPC that the Parties did not intend to observe this usage, which is based on the principle that time is of the essence. Instead, they only allocated a minor role to time. In Art. 2 CPC, the Parties agreed on a flexible time frame to deliver a notice of transport. It was to be issued merely depending on an uncertain condition, namely the availability of coltan [EXHIBIT C 1, P. 7]. In fact, RESPONDENT was granted in total a time of four months. Even RESPONDENT itself acknowledges that this time frame was of "*unusual length*" [ANS. REQ. ARB., P. 34 ET SEQ., PARA. 8]. Correspondingly, Art. 5 CPC provides another 60 days for shipment after the establishment of a letter of credit. Altogether, the CPC provides a period of time for performance of well over half a year. An agreement on such a long and flexible time frame demonstrates that the Parties have neglected the principle that time is of the essence. Therefore, it must be assumed that the Parties chose not to submit their contractual relationship to the usage requiring strict compliance with the contractual provisions. For this reason, the Tribunal should not apply a standard exceeding Art. 25 CISG.

(2) The trade usage cannot be applied to defects of letters of credit as the establishing party is entitled to a right to cure

30. The strict standard of commodity trade is inapplicable to defective letters of credit as the establisher is entitled to a right to cure. While Artt. 34, 37 CISG only grant the seller a right to cure defective performances in cases of pre-mature delivery, its scope of application is not limited to the rights of the seller. In fact, the scope should be interpreted in light of the Danubian contract law, which is a verbatim adoption of the UNIDROIT Principles [EXHIBIT C 1, P. 7, PROC. ORD. NO. 2, P. 69, PARA. 43]. According to Art. 7.1.4. UNIDROIT Principles, the buyer is also entitled to a right to cure, in particular in cases involving defective letters of credit [FURST V. FISCHER; KROMAN V. STEINBERGER; AMAEFULE, P. 16; KELLER, PARA. (G); LEHMKUHL, P. 75]. The applicability of the buyer's right to cure in commodity trade was affirmed by the arbitral tribunal in the "raw wool case", especially in regard to defective letters of credit [CIETAC 1995]. In the said case the tribunal decided to reject the seller's request for immediate avoidance although the letter of credit in question was considered non-conforming. It further held that the seller was only entitled the right of immediate avoidance if the buyer vehemently refused to cure the defective letter of credit [IBID.]. Applying the rationale of the "raw wool case" to the present case, RESPONDENT is deprived of its right of immediate avoidance as CLAIMANT can cure the purportedly defective L/C. In light of the forgoing, the Tribunal should find that RESPONDENT cannot invoke the strict standard of commodity trade in order to claim that any deviation in the L/C of 4 July automatically leads to a fundamental breach.

(ii) The deviations in the Letter of Credit of 4 July do not amount to a fundamental breach of the CPC pursuant to Art. 25 CISG

31. The deviations in the L/C of 4 July do not amount to a fundamental breach pursuant to Art. 25 CISG. Under Art. 25 CISG, a breach of contract is fundamental if it results "*in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*". RESPONDENT did not suffer any substantial detriment [**(1)**]. Even if the Tribunal should find differently, such detriment was not foreseeable for CLAIMANT [**(2)**].

(1) RESPONDENT did not suffer any substantial detriment

32. RESPONDENT did not suffer any substantial detriment. A substantial detriment can only be presumed if the breach nullifies or essentially depreciates the aggrieved party's expectations of the contract [APPELLATE COURT FRANKFURT 1991; CIVIL COURT BASEL-STADT 2002; EL-SAGHIR, P. 4; WILSON, P. 102].

33. First, the change in the sum secured by the L/C does not qualify as a substantial detriment since it does not have any effect on its functionality. Given that avoidance is considered an *ultima ratio* within the framework of the CISG, a substantial detriment is only acknowledged in cases of fatal disorders [PILTZ, PARA. 5-406; MAGNUS IN: STAUDINGER, ART. 64, PARA. 4; FEDERAL SUPREME COURT OF SWITZERLAND 2009]. The purpose of any letter of credit is to guarantee effective payment [SCHWEPCKE IN: MÜKO VGG, PARA. 312]. Yet, this purpose was not jeopardized by the fact that the L/C was issued for a higher amount of coltan [SUPRA, PARA. 20]. Therefore, this deviation should not be considered a fatal disorder.

34. Second, neither the alteration of the shipping terms nor the change of the shipping address amount to a substantial detriment. In fact, CIF and CIP terms do not differ considerably from one another. The major difference between CIF and CIP shipment is the point in time at which the risk passes to the buyer. Under CIP terms, the passing of risk occurs earlier and is therefore more favourable for RESPONDENT. The only disadvantage RESPONDENT suffers under CIP conditions is the additional cost in the amount of USD 800-1000 [PROC. ORD. NO. 2, P. 68, PARA. 36] for shipment to a specific place instead of a port. Monetary harm can only amount to a fundamental breach if the impairment suppresses the damaged party's interest in performance of the contract [FERRARI, P. 495 ET SEQ.; GRAFFI, P. 339; SWISS FEDERAL COURT 2000]. The marginally increased amount only constitutes less than 0.1% of the total volume of the transaction of USD 1,350,000 and thus can hardly impact RESPONDENT's interest in performance. Therefore, the altered shipping terms cannot be considered detrimental. As RESPONDENT itself had offered CIP shipment to CLAIMANT's premises during pre-contractual negotiations [ANS. REQ. ARB., P. 34, PARA. 8], the change could not come as a surprise. Consequently, its expectations could not have been nullified by the change to CIP conditions.

35. Third, RESPONDENT itself acknowledges that mere formal deviations do not result in a fundamental breach. In a similar dispute between one of RESPONDENT's subsidiaries and Iron Unlimited, another subsidiary of Global Minerals, Iron Unlimited tried to avoid the contract merely due to formal deviations. This was criticised by RESPONDENT in its own statement of facts in the attempt to strengthen its argument against CLAIMANT [ANS. REQ. ARB., P. 35, PARA. 14]. In specific, RESPONDENT brought forward that the *"formal deviation"* regarding the origin of copper could not be used by Iron Unlimited to *"get out of a contract which had turned out to be unfavourable"* [ANS. REQ. ARB., P. 35, PARA. 14]. Without any propositions as to this dispute, CLAIMANT respectfully invites the Tribunal to apply the same evaluation of substantiality regarding formal deviations to the present case and to find that the alterations in the L/C do not amount to a substantial detriment.

(2) Even if the Tribunal should find that RESPONDENT suffered a substantial detriment, it was not foreseeable for CLAIMANT

36. Even if the Tribunal should find that RESPONDENT suffered a substantial detriment, it was not foreseeable to CLAIMANT. From the perspective of a reasonable third person CLAIMANT could not foresee the alleged detriment up until the point where RESPONDENT officially rejected the L/C. As outlined above [SUPRA, PARA. 22], it was RESPONDENT who created the illusion that led CLAIMANT to believe in the amendment of the CPC. For instance, RESPONDENT originally proposed in the pre-contractual negotiations that CLAIMANT would purchase 100 metric tons of coltan with CIP shipment [ANS. REQ. ARB., P. 34, PARA. 8]. Additionally, it was RESPONDENT itself who provided CLAIMANT with a notice of transport opting for CIP shipment. Both circumstances strongly indicated that the contract was amended and therefore led CLAIMANT to believe that the L/C was satisfactory to RESPONDENT. Consequently, no reasonable third party could foresee that these actions would in any way impose a detriment on RESPONDENT.

2. RESPONDENT did not avoid the CPC pursuant to Art. 64(1)(b) CISG

37. RESPONDENT did not avoid the CPC pursuant to Art. 64(1)(b) CISG. Art. 64(1)(b) CISG provides that the "*seller can declare the contract avoided if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed*". Pursuant to Art. 63(1) CISG, any additional period of time granted must be of reasonable length. When rejecting the L/C on Friday 4 July, RESPONDENT requested a new conforming L/C, due Monday morning, 7 July [PROC. ORD. NO. 2, P. 66, PARA. 21]. By doing so, RESPONDENT fixed an additional period of time for CLAIMANT within the meaning of Art. 63(1) CISG. However, this additional period of time was not of reasonable length [**(i)**]. Moreover, CLAIMANT did not refuse to fulfil its obligations under the CPC [**(ii)**].

a) The additional period of time granted by Respondent was not of reasonable length

38. The additional period of time granted by RESPONDENT was unreasonable pursuant to Art. 63(1) CISG. The reasonability of the length of the additional period is assessed according to the nature of the contract and the circumstances of the case [DISTRICT COURT STRASBOURG 2006; MOHS IN: SCHLECHTRIEM/SCHWENZER, ART. 64, PARA. 8; YOVEL, PARA. 9.D].

39. In the case at hand RESPONDENT set the additional period of time on a Friday [ANS. REQ. ARB., P. 36, PARA. 19] and requested the new L/C by Monday morning, 7 July [PROC. ORD. NO. 2, P. 66, PARA. 21]. Considering that by opening a letter of credit the bank itself establishes a guarantee on behalf of the applicant, the bank has to assess the applicant's financial solvency thoroughly before granting payment to the beneficiary. Due to the fact that the L/C of 4 July, amounting to USD 4,500,000 was left open [EXHIBIT C 10, P. 16], the bank had to validate the applicant's solvency for another guarantee of USD 1,350,000 all over again. It was therefore impossible for CLAIMANT to establish a new L/C, although the issuing finance section of RST Trade Bank works on Saturday mornings [PROC. ORD. NO. 2, P. 66, PARA. 23]. Thus, the additional period of time set by RESPONDENT was of unreasonable length.

40. When the additional period of time is of unreasonable length, a reasonable period of time is automatically triggered [APPELLATE COURT KARLSRUHE 2008; MAGNUS IN: STAUDINGER, ART. 63, PARA. 16]. It was found that a reasonable period of time for the establishment of an L/C can amount to seven days [UCCI 2005] or nine days [APPELLATE COURT MUNICH 2006]. Furthermore, it was held that a bank needs at least three days solely to confirm the opening of a letter of credit [DISTRICT COURT KASSEL 1995]. As a matter of fact, the additional period of time should be deemed to run at least until the time when performance has to be rendered according to the contract. This approach is supported by the rationale that Art. 64(1)(b) CISG should prevent the seller from avoiding a contract*" prematurely on the basis of short Nachfrist periods in order to benefit from a sharp increase in market value of the goods"* [HONNOLD, PP. 387 ET SEQ.]. Since RESPONDENT bore the risk for price fluctuation until the time when performance of the CPC originally had to be rendered, the additional period of time has to run at least until this point in time.

b) CLAIMANT showed clear intentions that it would perform its contractual obligations

41. Moreover, CLAIMANT showed clear intentions that it would perform its contractual obligations. Art. 64(1)(b) CISG stipulates that the seller is entitled to avoid the contract if the buyer declares within the additional period of time that he will not perform his obligation.

However, CLAIMANT showed clear intentions that it would perform its obligation by sending an e-mail on 5 July emphasising its interest to perform the CPC [EXHIBIT C 6]. CLAIMANT even declared that it would be *"happy to agree to CIF Oceanside, Equatoriana"*, notwithstanding the fact that this INCOTERM is less favourable for CLAIMANT.

42. In conclusion, RESPONDENT was not entitled to avoid the CPC on 7 July pursuant to Art. 64(1)(b) CISG, since the additional period of time was of unreasonable length and CLAIMANT showed clear intentions that it would perform its contractual obligations.

3. In any case, according to Art. 63(2) CISG, RESPONDENT was barred from avoiding the CPC

43. In any case, according to Art. 63(2) CISG, RESPONDENT was barred from avoiding the CPC. Art. 63(2) CISG hinders the seller's right to invoke any remedies, in particular avoidance for fundamental breach, if the additional period of time has not yet expired [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 63, PARA. 12; MAGNUS IN: STAUDINGER, ART. 63, PARA. 17; HUBER IN: MÜKO BGB, ART. 63, PARA. 13]. By fixing an additional period of time, which extends at least until the time when performance is initially due [SUPRA, PARA. 30], RESPONDENT is barred from avoiding the CPC.

II. RESPONDENT did not rightfully avoid the CPC on 9 July

44. RESPONDENT did not rightfully avoid the CPC on 9 July. In response to RESPONDENT's attempt to avoid the CPC on 7 July, CLAIMANT sent a second L/C as a precautionary measure to ensure performance of the CPC. Yet, RESPONDENT declared avoidance once again, claiming that the second L/C was delivered belatedly and did not comply with the terms of the contract.

45. Irrespective of RESPONDENT's objections, it remains CLAIMANT's main submission that it fulfilled its contractual obligations by establishing the first L/C on 4 July. Even if the Tribunal should find otherwise, the second L/C sufficiently fulfilled CLAIMANT's obligation to ensure payment according to the CPC, since it is in compliance with the contract [**1.**] and was received within the additional period of time [**2.**]. Even if the Tribunal should find that the L/C was received belatedly, RESPONDENT was barred from avoiding the CPC pursuant to Art. 64(2) CISG [**3.**].

1. The second Letter of Credit fulfills CLAIMANT's obligation to pay under the CPC as its content complies with the contract

46. The second L/C fulfills CLAIMANT's obligation to pay under the CPC as its content complies with the contract. By its declaration of avoidance dated 9 July, RESPONDENT invokes the additional requirement of presenting a commercial invoice in the second L/C, which was not listed as a necessary document to draw payment under the first L/C [EXHIBIT C 5, P. 11]. However, RESPONDENT's allegation is without merit, as the content of the first L/C has no legally binding effect on any subsequently established letter of credit [**a)**]. Most importantly, the requirement of a commercial invoice in the second L/C is in compliance with the Parties' agreement in the CPC [**b)**].

a) The first Letter of Credit has no legally binding effect on any subsequently established letter of credit

47. RESPONDENT cannot object to the second L/C in reliance on the content of the first L/C, as it has no legally binding effect on any subsequently established letter of credit. In fact, it was RESPONDENT who neglected the validity of the first L/C through its declaration of avoidance dated 7 July. On the one hand, RESPONDENT considers the first L/C a fundamental breach of the CPC; on the other hand, it tries to use the first L/C as a pretext to reject the second L/C. Such "cherry-picking" is inherently contradictory and therefore prohibited by the Parties' duty to observe established principles of good faith, Art. 7(1) CISG. Among these principles is the prohibition of *venire contra factum proprium* – no one may set himself in contradiction to his own conduct [ARBITRAL TRIBUNAL VIENNA 4318; APPELLATE COURT MUNICH 2004]. Consequently, RESPONDENT's second avoidance cannot be based on this account due to its previous rejection of the first L/C.

b) The requirement of a commercial invoice in the second Letter of Credit complies with the CPC

48. The requirement of a commercial invoice in the second L/C complies with the CPC and does not serve as a reason to avoid the contract. Although Art. 4 CPC contains the relevant provisions regarding the letter of credit, the required documents under the letter of credit are not expressly stipulated in this clause. However, the requirement of a commercial invoice in the letter of credit was incorporated in the CPC by virtue of the Parties' intent [**(i)**]. In any case, the additional requirement of a commercial invoice in the second L/C does not contradict Art. 4 CPC [**(ii)**].

(i) The requirement of a commercial invoice was incorporated in the CPC by virtue of the Parties' intent

49. Although the CPC does not explicitly stipulate the document list, the requirement of a commercial invoice in the letter of credit was incorporated into the CPC by virtue of the Parties' intent. Pursuant to Art. 8(3) CISG the parties' intent should be interpreted in accordance with the practices and usages established between themselves. Although the CPC is the first contract concluded between the Parties, it is based on a model contract used for all contracts concluded between RESPONDENT and the Global Minerals Group [PROC. ORD. NO. 2, P. 64, PARA. 10]. It is CLAIMANT's submission that by implementing the model contract, the Parties have not only adopted its wording, but also the practices associated with it. The parties are bound by the practices established between themselves if they feature a certain extent of frequency and duration [AUSTRIAN SUPREME COURT 2005; PAMBOUKIS, P. 116]. In most of the contracts conducted during the ten years of business relationship with Global Minerals [REQ. ARB., P. 3, PARA. 5], a letter of credit was listed as an obligatory document [PROC. ORD. NO. 2, P. 65, PARA. 16]. Therefore, requiring the presentation of a commercial invoice upon drawing payment is an established practice between RESPONDENT and Global Minerals. When concluding the CPC, both Parties agreed that CLAIMANT, as a subsidiary, should benefit from the same conditions as given to Global Minerals except for the open account payment mode [EXHIBIT R 1, P. 40, PARA. 3; P. 41 PARA. 7]. Following from this, it was the Parties' intent to transfer the remaining conditions – including the established practices – to the CPC. Therefore, the requirement of presenting the commercial invoice is incorporated into the contract.

(ii) In any case, the requirement of a commercial invoice in the second Letter of Credit complies with the provisions of Art. 4 CPC

50. The requirement of a commercial invoice in the second L/C complies with the provisions of Art. 4 CPC. As the clause does not specify the required documents under the letter of credit, the requirement of a commercial invoice has to be assessed based on the general provisions of Art. 4 CPC. These provisions stipulate that the letter of credit has to be "*acceptable in content to the Seller*" and "*consistent with the terms of this Contract*". The aim of these conditions is to ensure that the letter of credit fulfils its purpose as a payment method. The purpose of a letter of credit is to guarantee payment after the seller has fulfilled his obligations. Corresponding with this purpose, the letter of credit requires the presentation of documents proving that the seller has fulfilled his contractual obligations, therefore being "*consistent* *with the terms of this Contract*". In addition, the requirement of being *"acceptable* […] *to the Seller"* is met if the presentation does not impose any additional effort on the seller. The requirement of a commercial invoice does not contradict either of the two conditions.

51. First, the requirement of a commercial invoice was consistent with the terms of the CPC. In Art. 4 CPC, the Parties have subjected the letter of credit to the UCP 600. Art. 18(c) UCP 600 stipulates that "[t]*he description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.*" This illustrates that the content of the invoice only serves as proof of RESPONDENT's performance as set out in the L/C. Therefore, the requirement of a commercial invoice served the purpose of the L/C to allow payment after ensuring that RESPONDENT fulfilled its contractual obligations and was consistent with the terms of the CPC.

52. Second, the requirement of a commercial invoice was also acceptable to RESPONDENT, as RESPONDENT was obliged to issue a commercial invoice. While this requirement is not expressly stated in the CPC, it is part of the agreement on "CIF" shipment pursuant to the INCOTERMS 2010 in Art. 5 CPC. In accordance with Sect. A.1 Rules of Interpretation of the INCOTERMS, the seller is obliged to provide a commercial invoice to the buyer [UNCITRAL DIGEST, ART. 29, PARA. 4; VISCASILLAS IN: KRÖLL/MISTELIS/VISCASILLAS, ART. 30, PARA. 44]. Thus, the presentation of a commercial invoice to the bank would not have caused RESPONDENT any additional effort and therefore has to be considered acceptable.

2. The second Letter of Credit was received within the additional period of time

53. The second L/C was received within the additional period of time set by RESPONDENT. It was dispatched via special courier on 8 July [EXHIBIT C 8, P. 14; EXHIBIT C 9, P. 15]. On the same day, Global Minerals sent RESPONDENT a copy of the second L/C via fax [EXHIBIT C 10, P. 16]. RESPONDENT alleges that both versions were received belatedly [ANS. REQ. ARB., P. 38, PARA. 34]. This allegation is without merit. In fact, the additional period of time lasted at least until 9 July [**a)**]. Even if the additional period of time ended on 8 July, the L/C dispatched via courier was received on time as RST is the relevant time zone [**b)**]. In any case, the copy sent via fax was received on 8 July [**c)**].

a) The additional period of time lasted at least until 9 July

54. The L/C was received on time as the additional period of time lasted at least until 9 July, which is the time originally set out in the CPC [SUPRA, PARA. 40]. In Art. 4 CPC, the Parties agreed that "*a Letter of Credit* [...] *shall be established by the Buyer not later than fourteen days after the Buyer received the notice of transport*" [EXHIBIT C 1, P. 7]. CLAIMANT received the Notice of Transport on 25 June. By claiming that the L/C was due on 8 July, RESPONDENT considers 25 June the day initiating the period of time. However, this interpretation contradicts Art. 4 CPC, which states that the period of time should beginn "*after*" receipt of the Notice of Transport. It is CLAIMANT's submission that, in accordance with Art. 4 CPC, the period of time was initiated on 26 June at 00:00 hours.

55. This can be derived from the fact that in Art. 4 CPC, the Parties have subjected the payment by means of a letter of credit to UCP 600. As the establishment of a letter of credit is an essential part of the payment process, the applicable method of calculation can be deduced by analogy from Art. 3 UCP 600 which stipulates that "*the word 'after' excludes the date mentioned when used to determine a period of shipment*". The reference in Art. 3 UCP 600 to shipment does not hinder its application by analogy as it embodies a self-contained, cohesive system to calculate deadlines within a transaction involving payment via letter of credit.

56. This interpretation is further affirmed by the wording of Art. 4 CPC. If 25 June was considered the first day, the period would begin at 00:00 hours of that day – before receipt of the Notice of Transport. This would contradict the word "*after*" in Art. 4 CPC. CLAIMANT received the Notice of Transport on 25 June at 08:45 MST [PROC. ORD. NO. 2, P. 66, PARA. 24]. As the second L/C was received on 9 July at 00:05 MST, it arrived thirteen days, fifteen hours and twenty minutes after CLAIMANT had received the Notice of Transport. Therefore, RESPONDENT's allegation that the L/C arrived belatedly is without merit.

57. Finally, RESPONDENT might argue that its calculation method is supported by Art. 20(1) CISG. The provision reads: "A *period of time for acceptance fixed by the offeror in* […] *a letter begins to run* […] *from the date shown on the letter*". As this article is located in Part II of the CISG, titled "Formation of Contract", the article cannot directly be applied to calculate a period of time fixed within the CPC. While some articles of the CISG can be applied beyond their explicit scope, this has to be declined for Art. 20(1) CISG. The restrictive application can be derived from the fundamental difference between a period of time for acceptance as addressed in Art. 20(1) CISG, and a period of time for performance as relevant in the case at hand. If the provision of Art. 20(1) CISG was applied for calculating such periods for performance, this would give the sender total control over the start of the period of time. He could easily change the date shown on the letter, thereby *de facto* fixing any starting date of his choice. This would result in a significant reduction of the time left for performance. The sender could therefore even make performance impossible for the recipient, effectively rendering the period of time *ad absurdum*. Thus, Art. 20(1) CISG cannot be applied for calculating the period of time fixed in the CPC.

b) Even if the additional period of time ends on 8 July, the second Letter of Credit dispatched via courier was received on time as RST is the relevant time zone

58. The second L/C of 8 July dispatched via courier was received on time as RST is the relevant time zone. In the present case, there are two different time zones possibly applicable to determine the end of the additional period of time, either MST or RST [PROC. ORD. NO. 2, P. 66, PARA. 23], which is five hours behind MST. RESPONDENT alleges that the L/C dispatched via courier was received on 9 July at 00:05 MST and thus belatedly [ANS. REQ. ARB., P. 38, PARA. 34]. However, in the present case, the relevant time zone is not MST, but RST. While according to MST the additional period of time was exceeded by five minutes, CLAIMANT delivered 4:55 hours before the end of the time period according to RST.

59. The determination of the time zone applicable to contractual deadlines is not addressed by the CISG [FERRARI IN: KRÖLL/MISTELIS/VISCASILLAS, ART. 20, PARA. 14]. Where the CISG remains silent, the gap must be filled with the domestic contract law of Danubia as part of the applicable substantial law chosen by the Parties. The Danubian domestic law is a verbatim adoption of the UNDIROIT Principles [PROC. ORD. NO. 2, P. 69, PARA. 43] of which Art. 1.12(3) is the relevant provision to determine the applicable time zone.

60. Pursuant to Art. 1.12(3) UNIDROIT "the relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise". The UNIDROIT Principles are generally supplemented by illustrations, which form an integral part of the Principles [BONELL, P. 62; OSER, P. 6]. It can be inferred from Illustration No. 5 of Art. 1.12 UNIDROIT Principles that in cases where a neutral third party is involved to proceed payment, e.g. a bank, the relevant time zone is where payment is due. Art. 57(1)(b) CISG provides that payment against presentation of documents is due at the place where the handing over of the documents takes place. In particular, in transactions involving letters of credit payment is effected by the tender of conforming documents at the place of business of the buyer's bank [BIJL, P. 19; MOHS IN: SCHLECHTRIEM/SCHWENZER, ART. 57, PARA. 10]. Therefore, the relevant time zone in this case is RST. It can be concluded that the L/C dispatched via courier was received by RESPONDENT on 8 July at 19:05 RST and not at 00:05 MST on 9 July [EXHIBIT R 1, P. 41; EXHIBIT C 9, P. 15]. Therefore, CLAIMANT fulfilled its obligation within the additional period of time granted.

c) Even if MST is the relevant time zone, the copy of the second Letter of Credit sent via fax was received on time

61. Even if MST is the relevant time zone, the copy of the second L/C sent via fax at 22:42 MST was received on time. RESPONDENT argues that CLAIMANT performed belatedly since the fax arrived outside its business hours and was only discovered on 9 July [ANS. REQ. ARB., P. 38, PARA. 34]. However, business hours are irrelevant when determining the timely arrival of a communication in international sales [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 24, PARA. 32]. One of the fundamental objectives of the CISG is to provide a uniform legal protection to different international commercial players in different jurisdictions. If business hours were to be considered relevant, every commercial party to an international sales contract would determine the timely arrival of a communication solely by relying on its national business hours, which can differ considerably from one another [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 24, PARA. 32]. This approach would pass the risk relating to the receipt of a communication from the addressee to the declaring party as it can never be certain of the business hours of its recipient [BRUNNER, ART. 24, PARA. 3; FERRARI IN: KRÖLL/MISTELIS/VISCASILLAS, ART. 24, PARA. 13].

62. For this reason, the ordinary provisions of the CISG have to be taken into account to determine whether CLAIMANT'S fax arrived on time. Pursuant to Art. 24 CISG, declarations reach the addressee as soon as they enter the addressee's sphere of influence [GRUBER IN: MÜKO BGB, ART. 24, PARA. 15; KRÖLL IN: KRÖLL/MISTELIS/VISCASILLAS, ART. 24, PARA. 13]. Although Art. 24 CISG expressly refers to declarations governed by Part II of the CISG, concerning offer and acceptance, the provision also applies to equivalent declarations such as the receipt of a letter of credit [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 24, PARA. 3]. A communication enters the addressee's sphere of influence as soon as it is physically accessible and the addressee could gain knowledge of it under ordinary circumstances [MANKOWSKI IN: FERRARI/KIENINGER/MANKOWSKI, ART. 24 CISG, PARA. 17]. In case of electronic transmission via telefax it reaches the addressee when the addressee's telefax machine prints the declaration [ENDERLEIN/MASKOW/STROHBACH, ART. 24, PARA. 4; FERRARI IN: MÜKO HGB, ART. 24, PARA. 13]. Consequently, the fax sent on 8 July at 22:42 MST was received on time.

63. As opposed to this, RESPONDENT claims that the fax did not reach Mr Winter, RESPONDENT's sales manager responsible for this communication. While Mr Winter would normally have been absent at that late hour, he did not leave the office before midnight during the entire week [EXHIBIT R 1, P. 41, PARA. 10]. Consequently, when the fax was transmitted at 22:42 MST, he was still at the office and therefore able to gain knowledge of the fax. Therefore RESPONDENT cannot rely on his hypothetical absence to deny receipt of the fax. In conclusion, the L/C of 8 July sent via fax was received on time.

64. The fact that the fax is a copy of the original L/C does not undermine its functionality. Although the original L/C must be presented to the bank in order to draw payment, upon its arrival, the fax was supposed to serve as a mere confirmation of the establishment of the L/C. Since it was agreed that the L/C was to be opened irrevocably [EXHIBIT C 8, P. 14], it could not be cancelled or amended without RESPONDENT's consent. Thus, the fax was equally suited to assure RESPONDENT that payment had been secured. It could therefore confidently prepare the shipment of the coltan. Up until shipment, RESPONDENT was not in immediate need of the original L/C as it could only draw payment after dispatch of delivery. At that time RESPONDENT would have been in the possession of the original L/C as it was received only 1:23 hours after the fax.

3. Even if the Tribunal should find that the second Letter of Credit was received belatedly, RESPONDENT was barred from avoiding the CPC

65. Even if the second L/C was not received within the additional period of time, RESPONDENT could still not avoid the CPC. Considerations of good faith prevent RESPONDENT from avoiding the CPC merely based on a five minute delay of the second L/C [**a)**]. In any case, RESPONDENT lost its right to avoid the CPC pursuant to Art. 64(2) CISG [**b)**].

a) Considerations of good faith prevent RESPONDENT from avoiding the CPC merely due to a five minute delay of the second Letter of Credit

66. The mere fact that the courier arrived on 9 July at 00:05 MST prevents RESPONDENT from avoiding the CPC due to considerations of good faith according to Art. 7(1) CISG. When RST Trade Bank sent the second L/C on 8 July, it did not spare any expenses to engage a *"fast and reliable"* special courier [EXHIBIT C 9, P. 15]. The L/C was picked up by the courier as early as 09:00 RST and delivered only 5 minutes after midnight MST. When using cross-border mail exchange such minimal inconsistency in time should not be taken into account. From a practical point of view, there is no faster option accessible to reach a recipient located in a country across the ocean with a time difference of five hours [PROC. ORD. NO. 2, PARA. 37]. Thus, the Tribunal should take the long distance travelled by the courier into consideration. In light of these circumstances and the fact that every actor involved dutifully tried to contend

RESPONDENT to the best possible, the marginal delay of the courier should not lead to an avoidance of the CPC.

b) In any case, pursuant to Art. 64(2) CISG, RESPONDENT lost its right to avoid the CPC

67. In pursuance to Art. 64(2) CISG, RESPONDENT lost its right to avoid the CPC. According to Art. 64(2) CISG, in cases of late performance by the buyer, the seller loses the right to declare the contract avoided if he does so after becoming aware that performance has been rendered. This also applies when the buyer performs after the additional period of time set by the seller [ICC CASE NO. 11849].

68. Notwithstanding the receipt of a conforming L/C, RESPONDENT declared avoidance of the CPC on 9 July, alleging belated performance by CLAIMANT. Therefore, RESPONDENT was well aware that CLAIMANT had already fulfilled its contractual obligation of paying the price when rejecting the second L/C [EXHIBIT R 4, P. 44]. Thus, RESPONDENT had lost its right to avoid the CPC pursuant to Art. 64(2) CISG.

III. Conclusion

69. In conclusion, the Tribunal is respectfully requested to find that RESPONDENT did not rightfully avoid the CPC, neither by its declaration of 7 July nor by its declaration of 9 July.

B. The Arbitral Tribunal should not lift the remaining part of the order rendered by the Emergency Arbitrator

70. CLAIMANT respectfully requests the Tribunal to uphold the remaining part of the order rendered by the Emergency Arbitrator against RESPONDENT. Pursuant to Art. 29(3) ICC Rules, the Tribunal is empowered to terminate an emergency order. Contrary to RESPONDENT's allegations [ANS. REQ. ARB., P. 35, PARA. 10], there is no reason for the Tribunal to exercise this power since the order was rendered rightfully. Pursuant to Art. 6(2) Appendix V ICC Rules, an emergency arbitrator may order emergency measures if he or she has the jurisdiction to do so and the application for emergency measures is admissible. Both requirements are met as the Emergency Arbitrator had jurisdiction to render the order [**I.**] and CLAIMANT's application was admissible [**II.**].

I. The Emergency Arbitrator had jurisdiction to render the order

71. Contrary to RESPONDENT's allegation [ANS. REQ. ARB., P. 39, PARA. 36], the Emergency Arbitrator had jurisdiction to render the order. In principle, the jurisdiction of an emergency arbitrator is established on the basis of an agreement to ICC arbitration as stipulated in Art. 20 CPC: *"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce"* [EXHIBIT C 1, P. 7; EA ORDER, P. 30, PARA. 9]. As the agreement was concluded after 1 January 2012 it is subject to the Emergency Arbitrator Provisions. However, an opt-out of these provisions is provided by Art. 29(6)(b) ICC Rules [SECRETARIAT'S GUIDE, P. 295, PARA. 3-1055; BASSIRI/HALLER IN: NEDDEN/HERZBERG, P. 475, PARA. 5]. RESPONDENT understands Art. 21 CPC to be an opt-out clause in terms of this provision [ANS. REQ. ARB., P. 39, PARA. 36]. Art. 21 CPC states that*"*[t]*he courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures."* In particular, RESPONDENT argues that this clause limits *"all types of interim relief to that available from the courts"* [ANS. REQ. ARB., P. 35, PARA. 10; ANS. REQ. ARB., P. 39, PARA. 36], thereby excluding interim relief from an emergency arbitrator.

72. However, Art. 21 CPC does not exclude Emergency Arbitrator Provisions. The wording of Art. 21 CPC does not suffice to opt out of the Emergency Arbitrator Provisions [**1.**]. Even if the Tribunal should find that the wording of Art. 21 CPC does suffice to opt out of the Emergency Arbitrator Provisions, the Parties did not intend to do so [**2.**].

1. The wording of Art. 21 CPC does not suffice to opt out of the Emergency Arbitrator Provisions

73. The wording of Art. 21 CPC does not suffice to opt out of the Emergency Arbitrator Provisions as provided by Art. 29(6)(b) ICC Rules. In principle, an arbitral tribunal possesses jurisdiction to order provisional measures, as the authority to order such measures is an inherent aspect of any adjudicatory body [BORN, PP. 2453 ET SEQQ.; MOSES, P. 107; FOUCHARD/GAILLARD/ GOLDMANN, PARA. 1306]. This particular jurisdiction is concurrent with the equivalent jurisdiction of national courts [REDFERN/HUNTER, PARA. 7.14]. This common principle is reflected by Art. 28 ICC Rules and Artt. 17 and 17(J) Danubian arbitration law [Hereinafter "Danubian Arbitration Law"], which is a verbatim adoption of the UNCITRAL Model Law [PROC. ORD. NO. 2, P. 69, PARA. 43]. Where parties nevertheless agree to deny the arbitral tribunal this fundamental right, such agreement has to meet a high standard of clarity by using express wording [ICC ORDER NO. 5; BORN, P. 2455; KREINDLER/SCHÄFER IN: BÖCKSTIEGEL/KRÖLL/NACIMIENTO, P. 262, PARA. 6; MAGLIANA IN: ARROYO, P. 809]. A mere specification of a particular national court to grant interim relief *"should not be considered as an exclusion of the concurrent power on the part of the arbitral* *tribunal"* [BORN, P. 2455]. Given that the Emergency Arbitrator Provisions are part of interim relief within the framework of arbitration, the same strict standard should be applied to the exclusion of the Emergency Arbitrator Provisions [SECRETARIAT'S GUIDE, P. 309, PARA. 3-1101].

74. Art. 21 CPC merely stipulates which national court possesses exclusive jurisdiction to render provisional measures, while not mentioning arbitration at all. Therefore, the wording of Art. 21 CPC does not expressly exclude any provisional measures within the framework of arbitration. Hence, the clause does not suffice to opt out of the Emergency Arbitrator Provisions.

2. Even if the Tribunal should find that the wording of Art. 21 CPC does suffice to opt out of the Emergency Arbitrator Provisions, the Parties did not intent to do so

75. Even if the Tribunal should find that the wording of Art. 21 CPC does suffice to opt out of the Emergency Arbitrator Provisions, the Parties did not intend to do so. Given that the CPC is governed by the CISG, any forum selection or arbitration clause within it is to be interpreted pursuant to Art. 8 CISG [CHÂTEAU DES CHARMES V. SABATE; APPELATE COURT STUTTGART 2006; SCHMIDT-KESSEL IN: SCHLECHTRIEM/SCHWENZER, ART. 8, PARA. 5]. In light of Art. 8(3) CISG, Art. 21 CPC should be construed as a regulation as to which national court in question has jurisdiction to render interim measures, but not to address interim measures available within the framework of arbitration.

76. First, this can be derived from the context in which Global Minerals had introduced the clause in 2010. The introduction of Art. 21 CPC was the result of a controversy regarding the question which national court had jurisdiction to grant interim measures. This controversy resulted in a failure of one of Global Minerals' subsidiaries to obtain interim relief and its subsequent insolvency [ANS. REQ. ARB., P. 35, PARA. 10; PROC. ORD. NO. 2, P. 64, PARA. 13]. Thereupon, it had always been the common understanding of both Parties that the purpose of the clause was *"to ensure that efficient interim relief can be obtained without any discussion about the jurisdiction of the courts"* [PROC. ORD. NO. 2, P. 64, PARA. 13]. Provisional measures from national courts may suffer severe cross-border enforcement difficulties [BORN, P. 2554]. Thus, only the courts at the place of business of the party against which such measures are sought can grant efficient interim relief. However, whether these courts have jurisdiction to order provisional measures is highly questionable [BOOG, P. 218]. In fact, these courts' jurisdiction to this regard has often been denied on the ground that *"an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause"* [A V. B,

PARA. 111; APPELATE COURT NÜRNBERG 2004; BHARAT ALUMINUM V. KAISER ALUMINUM TECHNICAL SERVICES; MARRIOT INTERNATIONAL V. ANSAL HOTELS]. Even in cases where the courts at the place of business had jurisdiction, these courts took a critical attitude towards granting provisional measures in aid of "foreign" arbitration proceedings and thus denied such measures [CHANNEL TUNNEL GROUP LTD. V. BALFOUR BEATTY CONSTRUCTION; ECONET WIRELESS LTD. V. VEE NETWORKS]. Therefore, it is generally recommended to expressly allow for provisional measures to be ordered by the courts outside the seat of arbitration in the contract [BÜHRING-UHLE/KIRCHHOFF, P. 50].

77. Given the principle of concurrent jurisdiction of national courts and arbitral authorities, there is no conflict between these for granting provisional measures. The intention behind Art. 21 CPC was only to prevent another conflict regarding the jurisdiction of a specific national court. For this purpose, Emergency Arbitrator Provisions were of no relevance.

78. Second, the Parties cannot have intended the exclusion of provisional measures within the framework of arbitration, as this would have resulted in an unfair advantage for RESPONDENT. Choosing the courts at the place of business of the respective party was motivated by considerations of efficiency [PROC. ORD. NO. 2, P. 64, PARA. 13]. Yet, if Art. 21 CPC excluded provisional measures within the framework of arbitration, the party against which provisional measures are sought would have a potential *"home-advantage"*. Especially RESPONDENT as a state-owned company [ANS. REQ. ARB., P. 34, PARA. 3; REQ. ARB., P. 2, PARA. 2] would have exceedingly profited from such a clause. When Global Minerals drafted the clause in 2010 [ANS. REQ. ARB., P. 35, PARA. 10], it could not possibly have intended to introduce such an imbalanced clause to its own detriment. Furthermore, this would contradict the Parties' intention when choosing arbitration as the most neutral way to settle their disputes.

79. Last, this interpretation is supported by the structure of the CPC. The Parties chose to address interim measures in a contract clause separate from the arbitration agreement. Moreover, Art. 20 CPC is entitled "*Arbitration*", whereas Art. 21 CPC is entitled "*Provisional measures*" [EXHIBIT C 1, P. 7]. This emphasises that the stipulations in Art. 21 CPC were meant to leave the intent to arbitrate, as laid out in Art. 20 CPC, untouched.

80. Therefore, CLAIMANT respectfully requests the Tribunal to acknowledge that Art. 21 CPC was not intended to exclude interim relief available from the Emergency Arbitrator Provisions.

II. CLAIMANT's application for emergency measures was admissible

81. Contrary to RESPONDENT's allegations [ANS. REQ. ARB., P. 39, PARA. 37], CLAIMANT's application for emergency measures was admissible. Pursuant to Art. 29(1) ICC Rules, an application for emergency measures is admissible if the provisional measures sought cannot await the constitution of the arbitral tribunal [SECRETARIAT'S GUIDE, P. 299, PARA. 3-1061; WEBSTER/BÜHLER, PARA. 29-82]. Furthermore, the requirements for the granting of provisional measures by the arbitral tribunal as determined by Art. 17A Danubian Arbitration Law must be met [BASSIRI/HALLER IN: NEDDEN/HERZBERG, P. 481, PARA. 34; BOOG IN: ARROYO, P. 819; GRIERSON/VAN HOOFT, P. 69]. As already stated by the Emergency Arbitrator [EA ORDER, P. 30, PARAS. 10,11], all requirements were met. First, the provisional measures sought by CLAIMANT could not await the constitution of the Arbitral Tribunal [**1.**]. Second, CLAIMANT was likely to suffer harm not adequately reparable by an award of damages [**2.**]. Third, such harm substantially outweighed the harm that was likely to result to RESPONDENT [**3.**]. Fourth, CLAIMANT had a reasonable possibility to succeed on the merits of its claim [**4.**].

1. The provisional measures sought by CLAIMANT could not await the constitution of the Arbitral Tribunal

82. The provisional measures sought by CLAIMANT could not await the constitution of the Arbitral Tribunal. In order to determine the urgency of provisional measures, the time necessary for the constitution of an ICC tribunal and for the granting of provisional measures must be taken into account [WEBSTER/BÜHLER, PARA. 29-83]. In the case at hand, RESPONDENT was already negotiating with other customers when CLAIMANT sought provisional measures to prevent RESPONDENT from selling the contracted amount of coltan [ANS. REQ. ARB., P. 39, PARA. 38; PROC. ORD. NO. 2, P. 68, PARA. 33]. In particular, one of these customers was looking for delivery at the beginning of August, which was just one week after CLAIMANT's application [EA ORDER, P. 30, PARA. 10]. Considering that this Tribunal was not constituted until 18 September [ICC MEMO., P. 56], it was impossible to receive interim relief from the Tribunal itself before RESPONDENT would have sold the coltan. Consequently, the need for provisional measures by the Emergency Arbitrator was urgent.

2. CLAIMANT was likely to suffer harm not adequately reparable by an award of damages

83. CLAIMANT was likely to suffer *"harm not adequately reparable by an award of damages"* as required under Art. 17A(1)(a) Danubian Arbitration Law. It is generally accepted that reputational damage can constitute harm not adequately reparable by an award of damages [BASSIRI/HALLER IN: NEDDEN/HERZBERG, P. 446, PARA. 30; LEW/MISTELIS/KRÖLL, P. 603, PARA. 23-85]. Contrary to RESPONDENT's allegations [ANS. REQ. ARB., P. 39, PARA. 37], such irreparable reputational damage was imminent.

84. CLAIMANT is a newly formed company that had just entered the difficult and highly competitive Equatorianian market [PROC. ORD. NO. 2, P. 68, PARA. 34]. As part of the attempt to establish its business, CLAIMANT had already entered into several contracts for the resale of the coltan it had bought from RESPONDENT [EA ORDER, P. 29, PARA. 1]. Should CLAIMANT however be unable to deliver the coltan, it would be forced to breach the contracts concluded with its new customers. In light of the fierce market conditions, such severe failure would ruin the newly established business relations and deter any other potential customers from contracting with CLAIMANT. This would have caused an irreparable reputational damage and could have resulted in CLAIMANT's insolvency.

85. Such results would have likely occurred, had the Emergency Arbitrator not rendered the order. RESPONDENT was already in negotiations to sell the coltan originally intended for CLAIMANT. Thus, there was a high risk that CLAIMANT would not obtain the coltan from RESPONDENT, if the latter was not prevented from selling it [Ans. Req. Arb. , P. 39, PARA. 38; PROC. ORD. NO. 2, P. 68, PARA. 33]. CLAIMANT would most likely be unable to obtain coltan from any other supplier due to the fact that CLAIMANT only deals with conflict free coltan, which is a very scarce mineral [REQ. ARB., P. 3, PARA. 4; EA ORDER, P. 29, PARA. 3], mainly produced in Xanadu [EA ORDER, P. 29, PARA. 5]. However, due to intense political tensions in this country which are predicted to last at least until after the hearings in Vienna [PROC. ORD. NO. 2, P. 66, PARA. 30], there is a high risk that there will not be enough conflict free coltan on the market to meet the demand [EA ORDER, P. 29, PARA. 5; PROC. ORD. NO. 2, P. 67, PARA. 29]. Considering CLAIMANT's weak position as a young company on the difficult coltan market, it is therefore very likely that CLAIMANT will not be able to obtain sufficient conflict free coltan to fulfil its contractual obligations [PROC. ORD. NO. 2, P. 68, PARA. 34]. Consequently, CLAIMANT was likely to suffer irreparable reputational damage if the provisional measures had not been ordered.

3. CLAIMANT's potential harm substantially outweighed the harm that was likely to result to RESPONDENT

86. CLAIMANT's potential harm substantially outweighed the harm that was likely to result to RESPONDENT, as required under Art. 17A(a) Danubian Arbitration Law. RESPONDENT claims an expected amount of damages of USD 1,000,000 resulting from the emergency order [ANS. REQ. ARB., P. 39, PARA. 4]. However, a damage of USD 1,000,000 is a bearable loss to RESPONDENT. It is a state-owned company, which operates all the mines in Mediterraneo, including the only coltan mine [REQ. ARB., P. 2, PARA. 2]. Furthermore, it is the second biggest producer of conflict-free coltan worldwide [EA ORDER, P. 29, PARA. 3], usually dealing with much greater amounts of minerals than the amount in dispute [EXHIBIT C 3, P. 9].

87. More importantly, the mere financial damage incurred by RESPONDENT is easily reparable by an award of damages. In contrast, CLAIMANT's impending reputational damage is not reparable and could result in its insolvency. Consequently, the harm likely to result to CLAIMANT substantially outweighed the harm that was likely to result to RESPONDENT.

4. CLAIMANT had a reasonable possibility to succeed on the merits of its claim

88. CLAIMANT had a reasonable possibility to succeed on the merits of its claim, as required under Art. 17A(1)(b) Danubian Arbitration Law. This inquiry into the merits of the parties' claims and defences is solely on a prima facie basis [BORN, P. 2479, CARON/CAPLAN, P. 523]. Essentially, it has to be established that *"the claims made are not, on their face, frivolous"* [PAUSHOK V. MONGOLIA]. It is uncontested between the Parties that the contract for the delivery of 30 tons of coltan was validly concluded on 28 March. CLAIMANT had established two letters of credit to fulfil its contractual obligations. As both letters of credit were not evidently in contradiction with the CPC, RESPONDENT could not rightfully avoid the contract. Thus the claims made by CLAIMANT were not frivolous and therefore it had at least a reasonable possibility to succeed on the merits of its claim.

III. Conclusion

89. Finding that the Emergency Arbitrator had jurisdiction to render the order and that CLAIMANT's application to the Emergency Arbitrator was admissible, the Tribunal should not exercise its power under Art. 29(3) ICC Rules and uphold the emergency order.

C. The Tribunal lacks jurisdiction over Global Minerals

90. CLAIMANT respectfully requests the Tribunal to find that it has no jurisdiction over Global Minerals as an additional party. In accordance with the universally accepted principle of *competence-competence* [ICC CASE NO. 4367; ICC CASE NO. 4472], an arbitral tribunal may rule on questions regarding its own jurisdiction [REDFERN/HUNTER, PARA. 5.42]. This principle is adopted by both Art. 6(3) ICC Rules, which stipulates that *"any question of* *jurisdiction* [...] *shall be decided directly by the arbitral Tribunal"*, and by Art. 16(1) Danubian Arbitration Law, providing that a tribunal *"may rule on its own jurisdiction"*. Pursuant to Art. 7(1) in connection with Art. 6(3) ICC Rules, this *competence-competence* encompasses questions regarding jurisdictions over additional parties.

91. Jurisdiction of any arbitral tribunal is based on a valid arbitration agreement [FOUCHARD/GAILLARD/GOLDMAN, PARA. 44; REDFERN/HUNTER, PARA. 1.58]. Thus, the tribunal's jurisdiction will only extend to those parties bound by the arbitration agreement [BORN, P. 1405; SCHMIDT-AHRENS/NEDDEN IN: NEDDEN/HERZBERG, ART. 7, PARA. 43; SECRETARIAT'S GUIDE, PARA. 3-292]. While existence and validity of the arbitration agreement in Art. 20 CPC are undisputed between the Parties, the Tribunal cannot derive any jurisdiction over Global Minerals from this clause. Contrary to RESPONDENT's allegations [ANS. REQ. ARB., P. 37 PARA. 27], Global Minerals never agreed to be bound by the arbitration agreement [**I.**]. Likewise, the Tribunal should find that Global Minerals is not bound by the group of companies doctrine [**II.**] or by considerations of good faith [**III.**].

I. Global Minerals never agreed to be bound by the arbitration agreement

92. Global Minerals never agreed to be bound by the arbitration agreement. As the arbitration agreement is contained in Art. 20 CPC, consent to arbitration could only be inferred from an agreement to the underlying contract. RESPONDENT alleges that Global Minerals has become either *"a party to the contract or at least a quasi-party responsible for payment"*. In contrast, it is CLAIMANT's submission that Global Minerals is not a party to the CPC [**1.**]. Furthermore, Global Minerals is not bound by the arbitration agreement as a guarantor [**2.**].

1. Global Minerals is not a party to the CPC

93. Global Minerals is not a party to the CPC. First, this can be derived from the wording of the CPC itself. Art. 1 CPC explicitly names the contracting parties as Mediterraneo Mining SOE and Vulcan Coltan Ltd., thereby limiting the legal obligations arising from the CPC to CLAIMANT and RESPONDENT. This is further supported by the fact that the Parties did not impose any direct obligations on Global Minerals [PROC. ORD. NO. 2, P. 65, PARA. 17]. This conscious choice of the Parties should be acknowledged, so as to find that Global Minerals was never meant to become a party to the CPC.

94. Second, this can be deduced from the pre-contractual negotiations. Prior to conclusion of the CPC, Mr Storm had always insisted that Global Minerals would not become a party to any of CLAIMANT's contracts [PROC. ORD. NO. 2, P. 63, PARA. 7]. Moreover, during the contractual negotiations, the Parties had discussed multiple modes of payment. While CLAIMANT preferred an open account payment, RESPONDENT made clear that such would only be offered to Global Minerals as a contracting party [EXHIBIT R 1, P. 41, PARA. 7]. Thus, the fact that the Parties finally opted for payment via letter of credit is tantamount to the fact that Global Minerals has never become party to the CPC.

95. Third, this is further emphasised by RESPONDENT's subsequent conduct. Pursuant to Art. 26 CISG, *"a declaration of avoidance of the contract is effective only if made by notice to the other party"*. In contrast, both of RESPONDENT's declarations of avoidance [EXHIBIT C 7, P. 13; EXHIBIT R 4, P. 44] were only addressed to CLAIMANT and unambiguously referred to the contract *"between Vulcan Coltan and Mediterraneo Mining SOE"* [EXHIBIT C 7, P. 13; EXHIBIT R 4, P. 44]. Global Minerals has never been informed about the avoidance of the contract it supposedly was party to.

96. RESPONDENT's assertion is solely based on the fact that Global Minerals *"endorsed"* the contract with its signature. It thereby attempts to impose severe legal obligations on Global Minerals from a term that was not introduced by the Parties as a legal term [PROC. ORD. NO. 2, P. 64] and has no legal consequences in any jurisdiction involved [PROC. ORD. NO. 2, P. 69, PARA. 45]. Rather, the ordinary meaning of an endorsement is merely to declare one's public approval or support. The endorsement was therefore product of Global Minerals' satisfaction and approval of the contract and illustrated its willingness to assist in the establishment of the L/C. In conclusion, Global Minerals has never become party to the CPC and is not bound by the arbitration agreement.

2. Global Minerals is not bound by the arbitration agreement as a guarantor

97. RESPONDENT might argue that Global Minerals functions as a guarantor responsible for payment under the CPC. However, Global Minerals has never become a guarantor [**a)**]. Even if the Tribunal should find differently, Global Minerals is not bound by the arbitration agreement [**b)**].

a) Global Minerals has not become a guarantor

98. Global Minerals' endorsement cannot be construed as a guarantee, as this would fundamentally contradict the intent of all parties involved. Generally, a guarantee to a contract is limited in its scope and secures specific obligations as opposed to the entire underlying contract. As such, a guarantee agreement to a contract constitutes a separate and self-sufficient arrangement [BORN, P. 1458]. Yet, neither are there provisions regulating the outlines of such guarantee, nor did negotiations between the Parties ever establish any underlying framework [PROC. ORD. NO. 2, P. 64, PARA. 12]. In fact, the mere term *"endorsed for"* does not regulate any of the essential terms of a guarantee. Therefore, it cannot amount to a self-sufficient agreement.

99. Moreover, an interpretation of Global Minerals' endorsement as a guarantee would disregard the express considerations of the Parties prior to conclusion of the CPC. During the negotiations, it was held that providing sufficient security for payment was crucial [EXHIBIT R 1, P. 40, PARA. 5]. Therefore, the Parties had discussed a parent guarantee to be provided by Global Minerals and payment by means of a letter of credit. The Parties rejected the parent guarantee by Global Minerals and opted for payment via letter of credit in conjunction with the endorsement provided by Global Minerals [PROC. ORD. NO. 2, P. 64, PARA. 12]. Payment by letter of credit alone had previously always sufficed as security for RESPONDENT's purposes [EXHIBIT R 1, P. 40, PARA. 5] and made any form of additional security superfluous. Pursuant to Artt. 4, 5 CPC, the L/C had to be established irrevocably and before shipment. Therefore, payment was guaranteed as long as RESPONDENT itself complied with its obligations under the CPC. It appears far-fetched and devoid of all commercial reason to assume that Global Minerals had nevertheless agreed to provide both forms of security.

b) Even if Global Minerals had become a guarantor, it would not be bound by the arbitration agreement

100. Even if Global Minerals had become a guarantor, it would not be bound by the arbitration agreement. As a guarantee constitutes an agreement separate from the underlying contract [SUPRA, PARA. 98], consent to provide a guarantee cannot by itself be interpreted as consent to the arbitration agreement governing the underlying contract [GERMAN FEDERAL COURT 1977; FRENCH COURT OF CASSATION 1992; SWISS FEDERAL COURT 2008; GRUNDSTAD V. RITT; ASPLUNDH TREE EXPERT CO. V. BATES; SN PRASAD V. MONNET FINANCE]. This principle can only be departed from *"when* [the guarantor] *expressly agrees to the obligation to arbitrate"* [PROSHRED HOLDINGS V. CONESTOGA DOCUMENTS]. Such consent has never been given by Global Minerals.

101. The endorsement of the CPC by Global Minerals cannot be construed as implied consent to arbitration. In a similar case decided by a United States Court of Appeals, two parties concluded a contract while two others guaranteed the performance by virtue of a signature on the main contract [GRUNDSTAD V. RITT]. The guarantee was titled *"we hereby agree to guarantee all of the provisions of the within Agreement, and especially the performance* […]*"* [IBID., PARA. 6]. The court held that the mere fact that the guarantee agreement and the main contract containing the arbitration clause were concluded on the same document did not suffice in order to prove the guarantor's consent to arbitrate [IBID., PARA. 16]. Further, the court found that *"in the absence of language within the guaranty specifically stating that* [the guarantor] *would be bound by the arbitration clause contained within the Agreement, we are not convinced that, as a matter of law, he agreed to be so bound"* [IBID., PARA. 18]. CLAIMANT respectfully requests the Tribunal to apply the ratio of GRUNDSTAD V. RITT to the present case. Global Minerals has never expressly agreed to be bound, there is no indication that it wished to be bound, and thus it should not be considered bound.

102. Other courts have more readily found a guarantor to have consented to an arbitration agreement in the underlying contract. In STELLAR SHIPPING V. HUDSON SHIPPING, the High Court of England and Wales found that the guarantor consented to the arbitration clause merely by endorsing the main contract. The court considered such interpretation *"to be both the natural and the commercially sensible construction of Stellar's endorsement as guarantor"* [STELLAR SHIPPING V. HUDSON SHIPPING, PARA. 51]. In STELLAR SHIPPING V. HUDSON SHIPPING, the main contract contained an express guarantee clause in addition to the endorsement of the contract. Therefore, the court found that the purpose of the endorsement had gone beyond the mere provision of the guarantee. In the case at hand, no express guarantee agreement was incorporated into the CPC, so that RESPONDENT relies on the endorsement itself to be interpreted as a guarantee. Thus, the *"natural and the commercially sensible construction"* of the endorsement would be, if at all, to construe it as an implied guarantee. Any consent going beyond the provision of this guarantee would exceed the intent of the Parties. Even as a guarantor, Global Minerals is not bound by the arbitration agreement.

II. Global Minerals is not bound by the arbitration agreement by virtue of the group of companies doctrine

103. Contrary to RESPONDENT's allegation [ANS. REQ. ARB., P. 37, PARA. 27], Global Minerals is not bound by the arbitration agreement by virtue of the group of companies doctrine. Pursuant to this doctrine, a company part of a group of companies can be bound by an arbitration agreement concluded by another member of the group on the sole merit that *"a group of companies constitutes one and the same economic reality"* [DOW CHEMICAL]. CLAIMANT requests the Tribunal not to apply the group of companies doctrine [**1.**]. Even if the Tribunal should choose to apply the group of companies doctrine, its requirements are not met [**2.**].

1. The Tribunal should not apply the group of companies doctrine

104. The Tribunal should not apply the group of companies doctrine. The doctrine contradicts general principles of law [**a)**] and is therefore rejected by the governing law [**b)**].

a) The group of companies doctrine contradicts general principles of law

105. The group of companies doctrine contradicts general principles of law. It is generally recognised that only the true intent of the parties can bind additional parties to an arbitration agreement [FOUCHARD/GAILLARD/GOLDMANN, PARA. 5.00]. However, the application of the group of companies doctrine often undermines the intent of the parties [SANDROCK, P. 464]. In such cases, the group of companies doctrine contradicts the principle that arbitration is based solely on consent. As an award pointed out: *"If* [a party] *had intended* [the non-signatory] *to be a party to the contract or its arbitration clause he could have so insisted at that time"* [ICC CASE NO. 10758].

106. Furthermore, the group of companies doctrine disregards the basic principles of separateness and limited liability of legally separate entities. Yet, outsourcing of a business branch onto a subsidiary is not only common practice, but also imparative in international trade [SARHANK GROUP V. ORACLE CORP; WILSKE/SHORE, P. 160; REDFERN/HUNTER, PARA. 3-31]. Moreover, the group of companies doctrine neglects the required written form of an arbitration agreement and its substantive validity [FERRARIO, P. 652].

107. In light of the fact that the group of companies doctrine raises concerns, it comes as no surprise that most jurisdictions reject its application. English courts made clear that the group of companies doctrine *"forms no part of English law"* [PETERSON FARMS V. C & M FARMING]. Similarly, American courts have denied the application of the doctrine [SARHANK GROUP V. ORACLE]. Likewise, the doctrine has no standing under German law [MÜLLER/KEILMANN, P. 118] and even faces harsh criticism in France [RUBBELLIN-DEVICHI, P. 515], the country in which it was originally established. It can therefore be concluded that the group of companies doctrine contradicts general principles of law.

b) The group of companies doctrine is rejected by the governing law in the case at hand

108. The group of companies doctrine is rejected by the governing law in the case at hand. Pursuant to Art. 41 ICC Rules the tribunal must ensure the enforceability of an arbitral award. Moreover, pursuant to Art. 21(1) ICC Rules the tribunal is bound only by the governing law. In cases in which an arbitral award transgresses the jurisdictional principles of the applicable law, the award will likely be annulled pursuant to Art. 34(2)(a)(i) UNCITRAL Model Law or refused enforcement under Art. 36(1)(a)(i) UNCITRAL Model Law and Art. V(1)(d) New

York Convention [PETERSON FARMS V. C & M FARMING; SARHANK GROUP V. ORACLE CORP.; DALLAH V. PAKISTAN]. For this reason, a tribunal should not apply the group of companies doctrine if it is rejected by the governing law.

109. The law governing the applicability of the group of companies doctrine is either the law of the seat of arbitration [ICC CASE NO. 10758; DALLAH V. PAKISTAN], the law governing the underlying contract [MOTOROLA CREDIT V. UZAN; SINGAPORE PTE V. ALBACORE MARITIME] or a conjunction of both [CAPARO GROUP V. FAGOR ARRASTATE; PETERSON FARMS V. C & M FARMING]. In the case at hand, both the arbitration agreement and the CPC are governed by Danubian law [EXHIBIT C 1, P. 7]. Thus, all three approaches lead to Danubian law as the applicable law. This result can also be inferred from the New York Convention, which was ratified by all jurisdictions involved [PROC. ORD. NO. 2, P. 69, PARA. 42]. Art. V(1)(a) New York Convention provides that the law governing the existence and validity of the arbitration agreement is the law which was agreed to govern the arbitration agreement or in absence of such choice the law of the seat of arbitration. This makes Danubian law the governing law.

110. In particular, the Tribunal should not apply international principles or the law of the place of enforcement. The place of enforcement cannot be clearly determined *ex ante*, and international principles provide only vague and non-codified indications as to scope and conditions of the group of companies doctrine. Any application would result in unpredictable and inconsistent decisions, thus causing legal uncertainty [BUSSE, P. 122; SANDROCK, P. 464; WAHAB, P. 180]. Moreover, these approaches violate the New York Convention, which provides for a clear choice of law rule in Art. V(1)(a). Therefore, only Danubian law is the governing law.

111. Although there have been no decisions on the applicability of the group of companies doctrine in Danubia, the Danubian Supreme Court has always emphasised that arbitration is based solely on consent [PROC. ORD. NO. 2, P. 69, PARA. 46]. On this basis, several authors have concluded that "*Danubian courts will most likely not follow the group of companies doctrine*" [IBID.]. In consequence, the governing Danubian law clearly rejects the doctrine.

112. Even if the Tribunal should consider applying Ruritanian law, the group of companies doctrine is nevertheless rejected for this particular case. The High Court of Ruritania *obiter dicta* acknowledged the group of companies doctrine only in one specific case [ANS. REQ. JOIND., P. 50, PARA. 7]. However, an *obiter dictum* is not a binding precedent in a common law country such as Ruritania. Furthermore, the case decided by the High Court of Ruritania was based on the DOW CHEMICAL award, which has to be distinguished from the case at hand.

In DOW CHEMICAL, a parent company requested to join an arbitral proceeding between its subsidiary and a third party. In the case at hand, Global Minerals as the corporate parent has never intended and still does not intend to join the arbitration proceedings. This distinction is crucial, as it is easier to justify allowing a consenting party to join arbitral proceedings than to forcefully join a non-consenting party [BORN, P. 1450; PARK, PARA. 1.77]. Therefore, the group of companies doctrine is not approved by Ruritanian authorities under the circumstances of this particular case. In light of the general reservations to the application of the group of companies doctrine, Ruritanian courts will most likely reject the doctrine.

113. Consequently, the group of companies doctrine is rejected by any law potentially applicable to the case at hand. In the interest of the enforceability of an award rendered within these proceedings, the Tribunal should refrain from applying the group of companies doctrine.

2. Even if the Tribunal should choose to apply the group of companies doctrine, its requirements are not met

114. Even if the Tribunal should choose to apply the group of companies doctrine, its requirements are not met. The mere fact that CLAIMANT is a subsidiary of the Global Minerals Group does not suffice to justify a joinder in application of the group of companies doctrine [ICC CASE NO. 10758; BORN, P. 1447; FERRARIO, P. 651; FOUCHARD/GAILLARD/GOLDMAN, PARA. 5.00]. Rather, a non-consenting party will only be joined to arbitral proceedings as an *ultima ratio* and under exceptional circumstances [ICC CASE NO. 5721; ICC CASE NO. 10758]. The application of the doctrine however requires an involvement during negotiations, conclusion and performance of the contract, thus leading to the reasonable assumption that all parties intended the additional party to become a "*real*" party to the contract and its arbitration agreement [DOW CHEMICAL; ICC CASE NO. 7604, CASE NO. 7610; ICC CASE NO. 11160; FOUCHARD/GAILLARD/GOLDMAN, PARA. 5.00; FERRARIO, P. 648; SANDROCK, P. 464].

115. In the case at hand, there is no need to take recourse to this interpretative aid as the actual intent of the all parties can be sufficiently determined. Neither party intended Global Minerals to become a party to the CPC and it was always clear that Global Minerals would at best provide a letter of credit. Even if the Tribunal should find that Global Minerals guaranteed CLAIMANT's obligations under the CPC, this would still not lead to the reasonable assumption that all parties intended Global Minerals to become a *"real"* party to the CPC. At best, one could conclude that all parties intended Global Minerals to become a *"real"* guarantor. As the intent of all parties is known, the requirements of the group of companies doctrine are not met. Therefore, RESPONDENT cannot rely on it to justify the joinder of Global Minerals.

III. Global Minerals is not bound by the arbitration agreement by considerations of good faith

116. RESPONDENT furthermore alleges that Global Minerals *"always created the impression that it would stand behind the contract"* and should thus be bound by the arbitration agreement [ANS. REQ. ARB., P. 37, PARA. 28]. The opposite is the case. In fact, Global Minerals always insisted that it would not become party to the CPC [PROC. ORD. NO. 2, P. 63, PARA. 7]. More importantly, the imposition of liability on a parent company based on the sole ground of good faith would deeply disregard the independence of separate legal entities and their limited liability [FERRARIO, P. 654]. Only in cases where these principles are fraudulently abused to shield the true party in interest from liability, *"piercing the corporate veil"* can be justified for reasons of good faith [ICC CASE NO. 3879; ICC CASE NO. 8385; FRENCH COURT OF CASSATION 1992; VTB CAPITAL PLC V. NUTRITEK INTERNATIONAL CORP; BORN, PP. 1431 ET SEQ.; FERRARIO, PP. 655 ET SEQQ.; FOUCHARD/GAILLARD/GOLDMAN, PARA. 5.01; PARK, PARA. 1.14]. Such fraudulent behaviour can be inferred from undercapitalization, overlapping of administration and management and overlapping of assets [AD HOC GENEVA 1991].

117. Yet, any allegation that Global Minerals abused CLAIMANT as an undercapitalised entity in order to circumvent liability is untenable [ANS. REQ. ARB., P. 37, PARA. 26]. CLAIMANT operates its own offices, keeps its own books and has its own personnel [PROC. ORD. NO. 2, P. 63, PARA. 7]. It has a line of credit of USD 5 million with a bank in Equatoriania [PROC. ORD. NO. 2, P. 64, PARA. 9] and its overall costs for 2014 are covered by the proceeds from other contracts [PROC. ORD. NO. 2, P. 64, PARA. 9]. Therefore, CLAIMANT'S financial resources are more than sufficient to satisfy RESPONDENT's presumed counterclaim [ANS. REQ. ARB., P. 39, PARAS. 38 ET SEQ.]. In any case, RESPONDENT was invariably aware that CLAIMANT was a newly formed subsidiary [ANS. REQ. ARB., P. 34, PARA. 7]. Therefore, RESPONDENT cannot argue that Global Minerals provided false information regarding CLAIMANT's resources. Thus, there is no evidence for any fraudulent conduct of Global Minerals that could extend the scope of the arbitration agreement on the sole basis of good faith.

IV. Conclusion

118. In conclusion, CLAIMANT respectfully requests the Tribunal to find that it lacks jurisdiction over Global Minerals as an additional party. Global Minerals has never agreed to arbitrate, it cannot be joined by virtue of the group of companies doctrine and should not be drawn into the proceedings under considerations of good faith.

REQUEST FOR RELIEF

119. For the above reasons, Counsel for CLAIMANT respectfully requests the Tribunal to find that

1. RESPONDENT has not rightfully avoided the CPC on 7 July 2014 or on 9 July 2014;
2. the order rendered by the Emergency Arbitrator against RESPONDENT on 26 July 2014 shall not be lifted;
3. it has no jurisdiction over Global Minerals as an additional party.

Ansgar Dietrichs   Caterina Foti   Alix Lamar   Elisa Méndez Bräutigam

Jeanna Möllers   Nicolas Schlüter   Paul Zschunke