TWENTY-SECOND ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27TH MARCH – 2ND APRIL, 2015

VIENNA

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF SYDNEY

ON BEHALF OF:	**AND:**	**AGAINST:**
VULCAN COLTAN LTD 21 MAGMA STREET OCEANSIDE EQUATORIANA	GLOBAL MINERALS EXCAVATION PLACE 5 HANSETOWN RURITANIA	MEDITERRANEO MINING SOE 5-6 MINERAL STREET CAPITAL CITY MEDITERRANEO
CLAIMANT	**GLOBAL MINERALS**	**RESPONDENT**

NICOLA BEVITT • WILLIAM HANNA • SARAH IENNA • PHOEBE WINCH

INDEX OF ABBREVIATIONS

Abbreviation	Term
¶/¶¶	Paragraph(s)
§/§§	Section(s)
ARA	RESPONDENT's Answer to Request for Arbitration, dated 8 August 2014
Art(s).	Article(s)
ASA	Swiss Arbitration Association
BGH	Bundesgerichtshof (German Federal Supreme Court)
CLAIMANT	Vulcan Coltan Limited; Buyer
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost, Insurance and Freight
CIP	Carriage and Insurance Paid To
Cl. Ex.	CLAIMANT's Exhibit
Co.	Company
Corp.	Corporation
e.g.	*exempli gratia*; for example
EA	Emergency Arbitrator
EAO	Emergency Arbitrator Order, dated 26 July 2014
FIDIC	*Fédération Internationale Des Ingénieurs-Conseils* (International Federation of Consulting Engineers)
GM	Global Minerals Limited
First L/C	Letter of Credit, dated 4 July 2014
infra	see below
i.e.	*id est*; that is
ICC	International Chamber of Commerce

Abbreviation	Term
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
LG	Landgericht (District Court, Germany)
Ltd	Limited
MST	Mediterraneo Standard Time
N/T	Notice of Transport
No(s).	Number(s)
OLG	Oberlandesgericht (Regional Appellate Court, Germany)
Parties	CLAIMANT and RESPONDENT
p. / pp.	page(s)
PO No. 1	Procedural Order Number 1, dated 3 October 2014
PO No. 2	Procedural Order Number 2, dated 29 October 2014
RA	CLAIMANT's Request for Arbitration, dated 11 July 2014
RC	CLAIMANT's Reply to the Counterclaim, dated 8 September 2014
REA	Request for Emergency Arbitration, dated 11 July 2014
RESPONDENT	Mediterraneo Mining SOE; Seller
Res. Ex.	RESPONDENT's Exhibit
RST	Ruritania Standard Time
Second L/C	Letter of Credit, dated 8 July 2014
supra	see above
UNIDROIT	International Institute for the Unification of Private Law
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
USA	United States of America
US$	United States Dollars

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STATEMENT OF FACTS

1. The present dispute arises between Vulcan Coltan Ltd (**CLAIMANT**) and Mediterraneo Mining (**RESPONDENT**) as a result of RESPONDENT's refusal to deliver goods as agreed in a Contract between CLAIMANT and RESPONDENT (together, the **Parties**).
2. CLAIMANT is a new rare minerals broker registered in Equatoriana. RESPONDENT is a state-owned enterprise that operates all mines in Mediterraneo, including the only coltan mine.
3. On **28 March 2014**, the Parties signed and concluded the Contract. It provided for 30 tons of coltan to be delivered CIF to CLAIMANT at US$45 per kilogram (US$1,350,000). CLAIMANT originally offered to purchase 100 tons. However, negotiations resulted in a final purchase amount of 30 tons.
4. On **25 June**, RESPONDENT sent a N/T with different delivery conditions and an email indicating a surplus of coltan. CLAIMANT responded on **27 June** noting the change of the delivery terms and offering to assist RESPONDENT with its surplus coltan. RESPONDENT did not reply. On **29 June**, Xanadu's Government broke down. As Xanadu is the world's largest coltan producer this put pressure on the coltan market, causing the price to rise.
5. On **Friday 4 July**, GM faxed a L/C to RESPONDENT which reflected the delivery terms in the N/T and covered a purchase of up to 100 tons (US$4,500,000) (**First L/C**). A technological development on this day also led to an increase in the coltan price. By voicemail, RESPONDENT stated that the L/C did not conform and threatened to terminate unless a conforming L/C was established over the weekend, by the morning of **Monday 7 July**.
6. On **7 July**, RESPONDENT attempted to avoid the Contract. GM faxed a L/C on **8 July** at **17:42 RST**, which conformed exactly with RESPONDENT'S requests (**Second L/C**). RESPONDENT also received the L/C from RST Tradebank by courier at **19:05 RST**.
7. On **9 July**, RESPONDENT attempted to avoid the contract a second time. RESPONDENT alleges that its termination was valid on **7 July**, that the Second L/C was too late and was non-conforming as it required different documentation to the First L/C.
8. Consequently, on **11 July**, CLAIMANT submitted a Request for Arbitration and Emergency Arbitration to the ICC for delivery of 100 tons of coltan. The Emergency Arbitrator delivered an order on **26 July** for RESPONDENT not to dispose of 100 tons of coltan.
9. Following additional information in RESPONDENT's ARA on **8 August**, CLAIMANT reduced its claim on **8 September** to delivery of 30 tons of coltan and, as a gesture of goodwill, requested that the EA order be amended accordingly.

SUMMARY OF ARGUMENT

1. The Parties agreed to arbitrate according to the ICC Rules. The effect of their agreement was that provisional measures could be sought either in a specific national court or through an EA under the ICC Rules. CLAIMANT validly chose to go to an EA in accordance with this agreement. Further, CLAIMANT continues to satisfy the standard for an order of provisional relief. Therefore, the amended EA order should remain in place **(Issue I)**.

2. GM cannot be joined as a party to the arbitration. GM is not a party to the Contract and arbitration agreement. It is not bound to arbitrate under the doctrine of Group of Companies or a doctrine of good faith because they do not exist under Danubian law. Further, GM does not satisfy the Group of Companies test and acted in good faith during negotiations. Finally, RESPONDENT failed to assert claims against GM and there is therefore no dispute for arbitration **(Issue II)**.

3. The Contract provides for CLAIMANT to establish a L/C fourteen days after receipt of the N/T, i.e. by 9 July at the latest. On 4 July it performed this by establishing a conforming L/C. Even if the Tribunal finds that this First L/C breached the Contract, any inconsistencies were not fundamental and time for performance had not yet expired. CLAIMANT was entitled to a right to cure before the original deadline and any additional period of time for performance set by RESPONDENT was invalid. Consequently, RESPONDENT's purported avoidance on 7 July was invalid **(Issue III)**.

4. RESPONDENT's purported avoidance on 9 July was also invalid. CLAIMANT established the Second L/C that conformed with the Contract before this time. Any alleged non-conformities in CLAIMANT's performance were not fundamental. Further, RESPONDENT is prevented from avoiding the Contract as it was aware that CLAIMANT had performed prior to sending notice of its attempted avoidance **(Issue IV)**.

SUBMISSIONS ON THE PROCEDURE OF THE CASE

1. RESPONDENT is trying to join GM to this arbitration even though RESPONDENT agreed to a Contract that did not include GM as a party. RESPONDENT now seeks to reverse this bargain and join GM as a party by attempting to rely on the Group of Companies doctrine and a supposed doctrine of good faith. This is all to extract damages from the validly imposed EA order which GM was not involved in. The EA order was necessary to prevent the frustration of an order from the Tribunal in CLAIMANT's favour and to prevent RESPONDENT's opportunistic attempt to exploit higher prices on the coltan market. GM cannot be joined as a party to this arbitration **(I)**. The amended EA order preventing RESPONDENT from disposing of the 30 tons of coltan that is the subject of this dispute should not be lifted **(II)**.

I GLOBAL MINERALS CANNOT BE JOINED AS A PARTY TO THIS ARBITRATION

2. The only reason that RESPONDENT is attempting to force GM to join the arbitration is to ensure payment of any adverse award against CLAIMANT. However, GM's ability to pay is not sufficient to give the Tribunal jurisdiction over GM. The Tribunal does not have jurisdiction over GM because GM is not a party to the Contract **(A)**. RESPONDENT cannot overcome this by relying on the Group of Companies doctrine **(B)** or a doctrine of good faith **(C)**. Even if this is not the case, RESPONDENT has not alleged any claims against GM and thus there is no dispute enlivening the Tribunal's jurisdiction **(D)**.

A GLOBAL MINERALS IS NOT A PARTY TO THE ARBITRATION AGREEMENT

3. The Tribunal must be cautious when deciding whether to exert jurisdiction over a non-party [*Art. 6(3) ICC Rules*]. Only parties to an arbitration agreement can be compelled to arbitrate [*Born (a) pp. 1484-5*]. GM is not a party to the Contract containing the arbitration agreement. Article 1 of the Contract specifies the contracting parties [*Art. 1 Contract*]. Article 1 only names CLAIMANT and RESPONDENT; it does not name GM. Nor is GM named in any other contractual provisions [*PO No. 2 ¶17*]. This was not an accident: GM expressly refused RESPONDENT'S request that GM become a party to the Contract [*RC ¶6; Art. 8(3) CISG; Art. 4.3 UNIDROIT*]. CLAIMANT agreed to a less favourable payment method to ensure the Contract would proceed without GM becoming a party [*Res. Ex. 1 ¶7*]. RESPONDENT admits the L/C payment method satisfied its concerns about contracting solely with CLAIMANT [*Res.*

Ex. 1 ¶7]. The Contract therefore represents the bargain struck by CLAIMANT and RESPONDENT. RESPONDENT should not be permitted to renege on this bargain.

4. RESPONDENT's conduct shows that it was aware that GM was not a contracting party [*Arts. 8(1) & 8(3) CISG; Art. 4.1 UNIDROIT*]. Indeed, RESPONDENT admits the "exact legal status of GM was of limited concern" because payment was to be secured by a L/C [*Res. Ex. 1* ¶7]. RESPONDENT acknowledged that the Contract was only between CLAIMANT and RESPONDENT in its letter of 7 July [*Cl. Ex. 7*]. Both of RESPONDENT's notices of avoidance were sent to CLAIMANT only [*Cl. Ex. 7; Res. Ex. 4*]. If RESPONDENT truly believed that GM was a contracting party it would have notified GM as well, as it was obliged to do so under the CISG [*Bianca/Bonell Art. 26* ¶¶*3.2-3.3.2*]. Given these facts, a reasonable person in RESPONDENT's position would have known GM was not a party to the Contract [*Art. 8(2) CISG; Art. 4.1(2) UNIDROIT*]. RESPONDENT accepted the risk of contracting only with CLAIMANT, and negotiated more favourable terms as a result.

5. GM acknowledges that it signed the Contract as an endorsement. However, this does not undermine the intention of all three companies that GM is not a contracting party. A signature on a contract is not sufficient to give the Tribunal jurisdiction; it must conclusively show consent [*Born (a) p. 1411*]. This is not the case here. GM signed the Contract in a way that was deliberately different to the Parties. CLAIMANT signed "for the buyer" and RESPONDENT signed "for the seller", but GM signed "endorsed for GM" [*Contract*]. GM's endorsement showed its approval of the deal about the L/C payment method [*Res. Ex. 1* ¶7]. GM's refusal to become a contracting party could not reasonably be interpreted in any other way in light of the contractual provisions [*Art 8(2) CISG; Art. 4.1(2) UNIDROIT*]. RESPONDENT states that GM's endorsement was one of the factors that led to a 0.5% price reduction [*Res. Ex. 1* ¶7]. This is insufficient to establish GM as a party. If RESPONDENT wanted the endorsement to have legal consequences it could have clarified the term or insisted on a parent company guarantee [*PO No. 2* ¶*12*]. It failed to do so [*PO No. 2* ¶*12*]. RESPONDENT is a sophisticated commercial entity and agreed to the L/C deal rather than insisting that GM become a party. It cannot change its mind now.

B GLOBAL MINERALS IS NOT BOUND TO ARBITRATE UNDER THE GROUP OF COMPANIES DOCTRINE

6. RESPONDENT seeks to rely on the Group of Companies doctrine to force GM to join the arbitration. The Group of Companies doctrine cannot be applied here because it has not been approved under Danubian law, which governs the arbitration agreement **(1)**. Even if it can be applied, GM does not satisfy the test under the doctrine **(2)**.

1. The Group of Companies doctrine does not exist under Danubian law

7. The Tribunal is bound to apply Danubian law when determining whether GM consented to arbitrate because the Parties expressly chose Danubian law to govern the arbitration agreement [*Art. 20 Contract; Redfern/Hunter p. 21; Art. 19 ICC Rules*]. The Group of Companies doctrine does not exist under Danubian law [*PO No. 2 ¶46*]. This means the Tribunal cannot consider the doctrine [*Brekoulakis p. 167; Peterson Farms; BGH 8 May 2014; ICC 4504*].

8. CLAIMANT acknowledges that some tribunals, such as those in *Dow Chemical* and *ICC 5721,* have applied Group of Companies doctrine on the basis of it being part of "international trade usages" [*Dow Chemical ¶136*]. This approach is not applicable here. First, unlike those cases, Danubian law expressly applies to the arbitration agreement [*Art. 20 Contract*]. This means that the Tribunal cannot use the separability of the arbitration agreement to decide that international trade usages govern the issue [*Brekoulakis pp. 166-7; Sandrock p. 949*]. Second, even if the Tribunal adopts this approach, the doctrine is not part of international trade usages because it is highly controversial and not commonly used [*Redfern/Hunter p. 102; Hanotiau (b) p. 95*]. It has been expressly rejected in the USA, the UK and Switzerland [*Thomson-CSF; Peterson Farms*; *Alpha; ICC 4504*] and has been inconsistently applied in jurisdictions such as France and India [*Born (a) p. 1447; Indowind Energy*]. Therefore the Tribunal cannot consider the doctrine even on this basis.

2. Even if the Group of Companies doctrine exists, Global Minerals does not satisfy the test

9. The Group of Companies doctrine has three necessary elements [*Dow Chemical; Born (a) pp. 1446-7; Brekoulakis p. 150*]. None are made out. First, CLAIMANT and GM did not form "one and the same economic reality" **(a)**. Second, GM was not substantially involved in the negotiation and performance of the Contract **(b)**. Third, GM was not intended to be a real party **(c)**.

(a) Global Minerals and CLAIMANT are not one and the same economic reality

10. GM and CLAIMANT are separate and independent companies and were treated as such throughout the transaction. At the time of negotiations, RESPONDENT knew that CLAIMANT and GM were separate entities [*ARA* ¶7]. RESPONDENT would have been familiar with the common practice of creating a subsidiary to undertake a new venture. The commercial reason for CLAIMANT being a separate entity is that it operates in a different country to GM [*ICC* 6000]. CLAIMANT has its own assets, office, books and staff [*PO Nos. 2* ¶¶*7, 9*]. It is not a sham company [*ICC 5894; Brekoulakis p. 154*].

11. This is different to the situation in *Dow Chemical.* In *Dow Chemical,* all the companies were treated as one and the same economic reality, i.e. interchangeable. No emphasis was placed on who would sign the Contract because the Parties believed that when one company signed, all other companies would be bound to the Contract. In addition, the Contract specified that related subsidiaries could perform the contractual obligations. This commonly held belief that the companies were interchangeable was the basis for ignoring the separate legal personality of each company [*ICC 10818*].

12. The Parties and GM have negotiated on the understanding that CLAIMANT was a separate entity and that GM would not be bound simply because CLAIMANT was bound. The bargain struck represents a compromise based on the perceived risk of contracting solely with CLAIMANT [*supra* ¶*3*]. RESPONDENT would not have made such an effort to have GM as a contracting party or secure its payment with a L/C if it believed GM would simply be bound by CLAIMANT's signature. Unlike in *Dow Chemical,* GM and CLAIMANT were not seen as one and the same economic reality. There is no basis for undermining the ordinary practice of establishing a subsidiary so that commercial risk is split amongst the corporate group.

(b) Global Minerals was not substantially involved in the negotiation and performance of the Contract

13. GM would be "substantially involved" if it first undertook the negotiations and then established CLAIMANT as a technical instrument to perform the Contract [*ICC 11160; Brekoulakis pp. 156-8*]. This did not occur. GM's only involvement in the negotiations was to assist CLAIMANT in establishing a positive commercial relationship with RESPONDENT. In fact, during negotiations GM actively rejected options that involved it as a contracting party [*supra* ¶*3*]. RESPONDENT knew that GM was simply assisting its new subsidiary with a new

relationship [*ARA ¶7; RA ¶5*]. In the factually similar case of *ICC 10758*, the parent was present and participated in pre-contractual negotiations. This was not enough to satisfy the test [*Brekoulakis pp. 159-60*]. The same conclusion flows from the current circumstances.

14. GM also had limited involvement in the performance of the Contract. GM provided the L/Cs at CLAIMANT's request, but it was not contractually obliged to do so [*PO No. 2 ¶17; RA ¶10*]. GM acknowledges that it did correspond with RESPONDENT about its objections to the First L/C [*Cl. Ex. 6; Cl. Ex. 10*]. This was not involvement in the performance of the Contract. Instead this was a parent company using its pre-existing relationship with a supplier to obtain a commercial resolution for its subsidiary.

(c) Global Minerals was not intended to be a 'real party' to the Contract

15. Even if elements **(a)** and **(b)** are successful, GM will only be treated as a 'real party' if this was "the common intention of all parties" [*Dow Chemical ¶136; Sponsor AB; ICC 11405*]. Without this, the Tribunal cannot apply the doctrine to bind GM to arbitration [*Born (a) p. 1448*; *Hanotiau (a) p. 545; Ferrario p. 668; Sandrock p. 944; ICC 6000 ¶34*]. In all of the cases applying the Group of Companies doctrine, there was genuine confusion regarding who were the 'real parties'. This meant that the arbitrators used elements **(a)** and **(b)** as indicators of the Parties' common intent. Here, the pre-contractual negotiations and contractual terms directly contemplated whether GM would be a party [*supra ¶¶3-5*]. RESPONDENT took steps to secure itself against the perceived risk of contracting solely with CLAIMANT. There could be no confusion as the resulting Contract shows the common intention that GM would not be bound as a party [*supra ¶3*]. Although GM was aware of the arbitration agreement, it made it clear to RESPONDENT before and after the Contract was concluded that it would not be bound to arbitration [*Korsnas Marma*]. Therefore, RESPONDENT's reliance upon the Group of Companies doctrine cannot succeed because GM was never intended to be a real party.

C GLOBAL MINERALS IS NOT BOUND TO ARBITRATE BY A DOCTRINE OF GOOD FAITH

16. RESPONDENT has argued that GM is bound to arbitrate by a doctrine of good faith. However, there is no recognised doctrine of good faith which would empower the Tribunal to bind GM to this arbitration **(1)**. Even if such a doctrine of good faith were applicable, GM cannot be bound because it has acted in good faith at all times **(2)**.

1. There is no recognised doctrine of good faith which would empower the Tribunal to bind Global Minerals to this arbitration

17. The Tribunal has no capacity to bind GM to arbitrate on the basis of good faith. This is because it is not part of the law that the Tribunal must apply. The Parties have chosen Danubian law to govern the separable arbitration agreement [*supra* ¶7]. Danubian courts have never recognised a doctrine of good faith to bind non-parties to arbitration [*PO No. 2* ¶*47*]. When the Danubian legislators adopted UNIDROIT as the national contract law of Danubia, they deliberately excluded Art 1.7 UNIDROIT, the principle of good faith [*PO No. 2* ¶*43*]. Thus there is no recognised good faith doctrine under Danubian contract law. Although good faith continues to be a part of the CISG, this is part of Danubian trade law and not Danubian contract law. As such, it is not applicable when interpreting the separable arbitration agreement [*Born (a) pp. 739-40, 1334*].

18. Even if the Tribunal rejects the accepted approach and applies *lex mercatoria* over the Parties' express choice of Danubian law [*supra* ¶*8*], there is still no accepted doctrine of good faith capable of binding GM. In fact, the attempted use of a doctrine of good faith to bind a non-party to arbitration was expressly rejected by the UK Supreme Court in *Dallah*. In that case, the Government of Pakistan created a Trust which then solely contracted with Dallah. The High Court of England and Wales stated that because the Government of Pakistan was found not to be a party, "the invocation of general principles of good faith in commercial relations and international arbitration is insufficient to make it a party" [*Dallah EWHC ¶130 approved in Dallah SC ¶66*]. It therefore found that the Government of Pakistan was not bound to arbitrate [*Grierson/Taok p. 411*]. The ability to bind non-parties to arbitrate on the basis of good faith is recognised in only one jurisdiction, Switzerland. Even there, the doctrine relies on the active involvement of the third party in the performance of the Contract [*Y SAL v Z Sarl; BG 5 December 2008; BG 7 April 2014*]. The small number of cases and the vagueness of the term "good faith" do not give the Tribunal cogent reasons to bind GM to this arbitration.

19. An arbitral award will only be enforceable under the *New York Convention* if the relevant parties consented to arbitrate under an arbitration agreement [*Art. 2(1) New York Convention*]. If the Tribunal were to disregard GM's lack of consent in favour of vague notions of good faith, it would jeopardise the enforceability of the award. The Tribunal is under a positive duty to make every effort to ensure this does not occur [*Art. 41 ICC Rules*]. Binding GM on the basis of

good faith would undermine essential principles of party autonomy and consent, which are enshrined in the NYC and the Model Law [*Redfern/Hunter p. 365*].

2. Global Minerals has not acted in a manner capable of engaging a doctrine of good faith

20. Contrary to RESPONDENT's assertions, GM never created the impression that it would stand behind the Contract [*ARA ¶28*]. Unlike the Swiss cases cited above [*supra ¶18*], GM expressly told RESPONDENT that it did not agree to be bound [*RC ¶6*]. GM's express refusal to be a party to the Contract required the Parties to negotiate different payment terms. The only reason payment was by L/Cs is because GM would not be a party to the Contract. Thus there was no conduct on behalf of GM that induced RESPONDENT to enter into the Contract. GM's refusal to be bound is consistent with its behaviour throughout the negotiations and is not in bad faith.

21. GM's post contractual conduct similarly does not engage a doctrine of good faith. The speculative assertion that GM will deprive RESPONDENT of potential damages by bankrupting CLAIMANT is unsubstantiated [*ICC 9762*]. Unlike in *Dallah SC,* GM has not taken any steps to drain CLAIMANT's funds or otherwise cause harm to RESPONDENT. Instead, it has supplied two conforming L/Cs in order to satisfy RESPONDENT's requests and reassure RESPONDENT that it would be paid under the Contract. In fact, CLAIMANT is the only party seeking to complete the agreed transaction. RESPONDENT has no justification for its assertion that GM acted in bad faith and gave the impression that it consented to arbitration. GM cannot be bound on this basis.

D EVEN IF GLOBAL MINERALS IS BOUND TO ARBITRATE, THE TRIBUNAL HAS NO JURISDICTION BECAUSE THERE IS NO DISPUTE BETWEEN RESPONDENT AND GLOBAL MINERALS

22. The Tribunal does not have jurisdiction without the existence of a dispute to arbitrate [*Art. 7 (Option 1) Model Law; Art. 20 Contract*]. There is no such dispute here. First, GM has no express obligations under the Contract [*PO No. 2 ¶17*]. Second, RESPONDENT has not asserted that GM is liable for the actions of CLAIMANT. GM cannot be liable simply because CLAIMANT might be found liable [*PT Jaya*]. RESPONDENT argues that GM should be joined to ensure RESPONDENT can recover its costs if its claim succeeds [*ARA ¶26*]. However, GM's ability to pay is not sufficient to make it liable. The doctrines asserted by RESPONDENT are also not

sufficient to make GM automatically liable for the liabilities of CLAIMANT. A successful application of the Group of Companies doctrine does not simply substitute GM for CLAIMANT. The doctrine instead enables the binding of the non-signatory as a separate party [*Born (a) p. 1450; Brekoulakis p. 170*]. Thus, RESPONDENT needed to allege a separate claim against GM. It failed to do this. RESPONDENT has failed to articulate any claims directly against GM. This is because no such claims exist. As a result RESPONDENT has failed to meet the formal requirements for joinder under Art. 7 of the ICC Rules by reference to Art. 4.3(c) ICC Rules, which requires a party to state the claims it has against the party it's seeking to join. A successful application of a doctrine of good faith does not automatically put GM in the place of CLAIMANT [*Park p. 19*]. As GM did not even take part in the Emergency Arbitration that is the basis for RESPONDENT's dispute with CLAIMANT, there is no reason for the Tribunal to exercise its discretion and substitute CLAIMANT with GM. Therefore the Tribunal has no jurisdiction over GM.

Conclusion: GM did not consent to be bound by the arbitration agreement. It cannot be forced to join the arbitration under the Group of Companies doctrine or a doctrine of good faith because neither forms part of Danubian law. Even if these doctrines were to be applied, they would not succeed. The Group of Companies doctrine fails on all three of its elements. The good faith doctrine fails because GM acted in good faith at all times. Finally, RESPONDENT failed to assert any claims against GM which means that there is no dispute involving GM capable of arbitration. Therefore, the Tribunal must refuse RESPONDENT's request to compel GM to arbitrate.

II THE EMERGENCY ARBITRATOR ORDER SHOULD STAND

23. The amended EA order stops RESPONDENT from disposing of the 30 tons of coltan that is the subject of this dispute. This amended EA order should stand because the EA had jurisdiction to order provisional measures **(A)** and CLAIMANT continues to satisfy the requirements in Art. 17A Model Law for the grant of provisional measures **(B)**.

A THE EMERGENCY ARBITRATOR HAD JURISDICTION

24. The EA provisions under the 2012 ICC Rules apply because the Parties did not exclude them [*Arts. 29(6)(b), (c) ICC Rules*]. The Parties did not opt out of the EA provisions for the purposes of Art. 29(6)(b) ICC Rules. This is because the Parties chose not to opt out through Art. 20 of the Contract **(1)**. Article 21 of the Contract likewise did not have the effect of opting out of

the EA provisions as it is a choice of forum clause **(2)**. Article 21 is not another pre-arbitral procedure for the purposes of Art. 29(6)(c) ICC Rules **(3)**. Therefore, the EA had jurisdiction to prevent RESPONDENT from acting to frustrate the Tribunal's award by selling CLAIMANT's coltan to exploit higher prices on the spot market.

1. The Parties did not opt out of the Emergency Arbitrator provisions under Art. 20

25. The Parties expressly rejected the possibility of opting out of the EA provisions. The Parties were aware of the new EA provisions in the 2012 ICC Rules when the Contract was executed [*PO No. 2 ¶14*]. Under these rules, if the Parties wish to exclude the EA provisions, they should include the sentence "The Emergency Arbitrator Provisions shall not apply" at the end of the Standard ICC Arbitration Clause, or other express language [*ICC Rules, Arbitration Clauses; Carlevaris/Feris p. 37*]. The Parties chose not to do this. As the Parties knew of the existence of the EA provisions and chose the model clause that did not exclude its operation, they intended for the EA provisions to apply [*Craig/Park/Paulsson p. 89; ICC 9759*].

2. The Parties did not opt out of the Emergency Arbitrator provisions under Art. 21

26. Article 21 of the Contract is a choice of forum clause. Its only purpose is to limit the court in which a Party may seek provisional relief. Article 21 restricts this by providing "exclusive jurisdiction" to the courts of the party against whom the provisional measures are sought. Before the tribunal is constituted, a party would ordinarily be able to seek relief in *any* court that claimed jurisdiction over the subject matter in dispute [*Poudret/Besson p. 524; Born (a) pp. 2448-51; Redfern/Hunter p. 447; Fouchard/Gaillard/Goldman p. 711; Lew/Mistelis/Kröll p. 616*]. Article 21 therefore limits CLAIMANT to seeking provisional relief from the courts of Mediterraneo, regardless of whether the courts of Ruritania, Equatoriana or Danubia also have concurrent jurisdiction. This is the intent of the words "exclusive jurisdiction". It does not exclude an arbitral tribunal's jurisdiction to order provisional relief. Article 21 therefore gives CLAIMANT the choice to seek provisional measures from either RESPONDENT's courts or from an EA. CLAIMANT validly chose emergency arbitration and RESPONDENT is contractually bound to respect this choice.

27. This interpretation is consistent with the Model Law and ICC Rules. This is because parties can obtain provisional measures from national courts without waiving their arbitration agreement [*Arts. 9 & 17J Model Law; Art. 28(2) ICC Rules*]. The courts' jurisdiction to grant provisional measures is concurrent with that of an EA or tribunal [*Born (a) p. 2549; Schütze p.*

145]. This is why national courts and an EA have held that parties may still seek interim orders from a tribunal even if a particular foreign court has the power to order provisional measures [*Warth Line; In re Noble Navigation; Carlevaris/Feris p. 34*]. This is consistent with extensive authority which holds that a provision granting "exclusive jurisdiction" does not override the general agreement to arbitrate. In *Paul Smith Ltd*, a provision granted "exclusive jurisdiction" to English courts. This merely nominated the court that had exclusive supervisory jurisdiction without affecting the arbitral tribunal's substantive powers to settle disputes between the parties according to the ICC Rules. This decision is supported by similar conclusions in the USA, France, Germany, Singapore and other ICC arbitrations [*Bartlett Grain; Techniques de l'Ingenieur v Sofel; BGH 25 January 2007; Intra Asia Airlines; ICC 8179*]. Adopting similar reasoning, Art. 21 did not affect the Parties' intention, for the EA to have jurisdiction according to the ICC Rules.

28. The Parties intended Art. 21 to operate in this way [*Born (a) pp. 1320-2; Lew/Mistelis/Kröll p. 150; Joseph p. 145; Art. 4.1(1) UNIDROIT; ICC 7929*]. Article 21 was drafted in response to a dispute over which national court had jurisdiction to order provisional relief [*PO No. 2 ¶13*]. RESPONDENT was aware that Art. 21 was designed to "ensure that efficient interim relief can be obtained without any discussion about the jurisdiction of the courts" [*PO No. 2 ¶13*]. Therefore, there was no intention that it would affect the tribunal's jurisdiction. RESPONDENT accepted both the clause and this information without question [*PO No. 2 ¶13*]. It has since affirmed this by including this clause in all contracts between itself and GM and its subsidiaries [*ARA ¶10*]. RESPONDENT'S interpretation is simply a response to the unfavourable position it finds itself in now and should not be accepted.

29. CLAIMANT's interpretation of Art. 21 is commercially sensible [*Art. 4.1(2) UNIDROIT*]. First, it is commercially "imprudent" to exclude a tribunal's authority to order provisional relief [*Born (a) pp. 2435-6, 2554; Born (b) p. 114*]. RESPONDENT is a state-owned enterprise [*RA ¶2; ARA ¶3*]. It is perceived to be difficult to extract an order against a state-owned company in that state's courts [*ICC 11681*]. Second, there are valid commercial reasons for maintaining some national court jurisdiction to order provisional measures. This is because GM was not a party to the arbitration agreement and an EA cannot make orders against third parties [*Born (a) p. 2445*]. Therefore, RESPONDENT may have needed to rely on national courts to provide provisional relief [*Art. 29(5) ICC Rules; Bühler/Webster pp. 469-70; Born (a) 2445-6*]. Therefore, it is a reasonable to interpret Art. 21 in a manner that maintains this concurrent jurisdiction.

30. RESPONDENT cannot rely on the argument that Art. 21 can be construed *contra proferentem* [*Art. 4.6 UNIDROIT*]. This is an argument that can only be used as a "last resort" where ordinary principles of construction fail [*Liebscher/Fremuth-Wolf* ¶¶*2.11-2.12*]. There is sufficient evidence of the Parties' intention in this case. Second, *contra proferentem* cannot be used to construe arbitration agreements. Rather, the Tribunal should follow the authority of nearly every jurisdiction and favour the construction that prioritises a tribunal's jurisdiction over the dispute [*e.g. Hudson v ConAgra Poultry; OGH 26 August 2008; Onex Corp.; Tjong Very Sumito; Klöckner Pentaplast; see further, Born (a) pp. 1334-8*]. Authorities that adopt a restricted interpretation are much older and do not reflect the current approach towards arbitration agreements [*Born (a) p. 1338*]. Based on the recent authorities, the Parties intended an EA to have jurisdiction under their arbitration agreement.

3. Article 21 is not another pre-arbitral procedure

31. The Parties have not agreed to another pre-arbitral procedure in Art. 21 of the Contract [*Art. 29(6)(c) ICC Rules*]. As established above [*supra* ¶*27*], courts automatically have jurisdiction to order provisional relief. Therefore, the Parties have not agreed to a new procedure for provisional measures, but have instead modified the limits of an existing one. This does not satisfy Art. 29(6)(c) ICC Rules so as to exclude an EA. To do so, the Parties would need to agree to an alternate method of provisional relief that otherwise would not exist between them. This may include a dispute resolution board in FIDIC contracts or the ICC pre-arbitral referee procedure [*Fry/Greenberg/Mazza p. 309; Voser p. 814; Bühler/Webster pp. 472-4*]. In choosing to merely limit a pre-existing method of obtaining provisional relief, the Parties have not agreed to "another pre-arbitral procedure" [*Art. 29(6)(c) ICC Rules*].

B CLAIMANT SATISFIES THE REQUIREMENTS FOR A GRANT OF PROVISIONAL MEASURES

32. CLAIMANT satisfied and continues to satisfy the elements needed for a grant of provisional measures under Art. 17A(1) Model Law. First, CLAIMANT would likely suffer harm not adequately reparable by an award of damages **(1)**. Second, this harm substantially outweighs any harm likely to be suffered by RESPONDENT if it is subject to an order for provisional measures **(2)**. Third, CLAIMANT has a reasonable possibility of success on the merits **(3)**.

1. CLAIMANT would likely suffer harm not adequately reparable by an award of damages

33. Without the EA order, CLAIMANT would likely suffer harm not adequately reparable by damages [*Art. 17A(1)(a) Model Law*]. The EA order prevents RESPONDENT from selling the 30 tons of coltan that it agreed to sell CLAIMANT. If RESPONDENT were permitted to sell this coltan, CLAIMANT would be unable to honour its existing contractual commitments with third parties and may be liable for breach of these contracts [*RA ¶21*]. In addition, this would cause damage to CLAIMANT's commercial reputation and to its ability to enter new contracts. Moreover, CLAIMANT would suffer a special prejudice because of its status as a new company [*PO No. 2 ¶9*]. A damaged commercial reputation and a loss of business opportunities amount to loss not adequately reparable by damages [*Binder p. 247; Caron/Caplan p. 521*].

34. CLAIMANT satisfies the relevant threshold, which is only whether the harm is "likely" to occur [*Art. 17A(1) Model Law*]. It is not necessary that the harm be imminent [*Born (a) p. 2472; ARA ¶37*]. RESPONDENT wants to take advantage of the higher prices of coltan on the spot market [*ARA ¶38*]. It has not contested that it has been in negotiations with other customers to sell CLAIMANT's coltan [*REA ¶21*, *PO No. 2 ¶33*]. RESPONDENT has already indicated that it does not have sufficient reserves of coltan to take on additional obligations [*ARA ¶38*]. It is unlikely that CLAIMANT would be able to buy coltan from an alternate source as Xanadu's stability is likely to deteriorate further. Xanadu has a history of civil war [*Res. Ex. 3*] and its government recently broken down [*PO No. 2 ¶30*]. As the world's largest producer of coltan [*EAO ¶3*], any further deterioration in Xanadu is certain to lead to insufficient conflict free coltan to honour all contractual obligations in the market [*PO No. 2 ¶30*]. It is known that even larger competitors would have serious problems sourcing conflict free coltan [*PO No. 2 ¶34*].

2. This harm substantially outweighs the likely harm to RESPONDENT

35. Any harm suffered by RESPONDENT is adequately reparable by an award of damages [*Art. 17A(1)(a) Model Law*]. The amended EA order does not prevent RESPONDENT from entering into additional contracts. As a result of CLAIMANT's goodwill, the EA order was reduced to conserving 30 tons of coltan [*RC ¶¶4, 10; PO No. 1 ¶2*]. RESPONDENT's complaint that it could not conclude additional contracts was only in relation to the unamended order not to dispose of 100 tons of coltan [*ARA ¶38*]. RESPONDENT is capable of storing at least 250 tons [*Cl. Ex. 3*]. An order not to dispose of 30 tons is not as large a proportion of RESPONDENT's storage capacity as 100 tons. There is no suggestion that RESPONDENT is unable to accept new

contracts under this amended EA order. RESPONDENT's continued objection to the amended EA order is simply part of its opportunistic attempt to exploit higher coltan prices and avoid its pre-existing contractual obligations. Any loss of profit could be adequately compensated by damages.

36. Even if RESPONDENT suffers lost business opportunities, this is substantially outweighed by the potential harm to CLAIMANT. RESPONDENT is seeking to make opportunistic profits by reneging on its pre-existing contractual commitments with CLAIMANT and making new ones on the spot market. RESPONDENT is still able to engage in its normal business of selling coltan, whereas CLAIMANT is at risk of dishonouring its contracts. Further, CLAIMANT is more likely to be affected by reputational damage than an established company like RESPONDENT. CLAIMANT is a new company operating in the competitive Equatoriana market [*RA ¶1*] whereas RESPONDENT is an established state-owned enterprise and the second largest producer of conflict free coltan in the world [*EAO ¶3*]. Therefore any harm that could be suffered would be substantially outweighed by the harm to CLAIMANT.

3. CLAIMANT has a reasonable possibility of success

37. It is only necessary for CLAIMANT to prove that there is a reasonable possibility of success on the merits of its claim [*Art. 17A(2) Model Law*]. This is a very low standard. It is only in "rare cases where a CLAIMANT has failed to advance *any* plausible basis for its claims" (emphasis added) that they will fail to satisfy this test [*Born (a) p. 2478-81*]. For the reasons set out at below, CLAIMANT has met this burden.

Conclusion: The EA order should stand. The Parties always intended that efficient provisional relief could be accessed through a particular court or tribunal. CLAIMANT also satisfied and continues to satisfy the requirements for the grant of provisional measures.

SUBMISSIONS ON THE MERITS OF THE CASE

38. The only thing CLAIMANT seeks in this arbitration is what it was entitled to receive under the Contract. CLAIMANT has consistently and diligently performed its contractual obligations, giving RESPONDENT no valid cause for complaint. On 4 July CLAIMANT established the First L/C, which adequately secured CLAIMANT's payment obligations. Following RESPONDENT's objections to the First L/C, CLAIMANT provided the Second L/C. This was provided within the original contractual deadline and complied exactly with RESPONDENT's requests. Yet, even with two conforming L/Cs, RESPONDENT tried to avoid the Contract once again. RESPONDENT's claims are motivated by a desire to escape its contractual obligations in order to take advantage of higher coltan prices. CLAIMANT is entitled to the delivery of 30 tons of coltan because the Contract is still valid. RESPONDENT could not avoid on 7 July because the First L/C satisfied the contractual requirements. Alternatively, if there was a breach, this did not entitle RESPONDENT to avoid the Contract **(III)**. RESPONDENT's purported avoidance on 9 July was also invalid. CLAIMANT established a second, conforming L/C before this time. Even if there were non-conformities in CLAIMANT's performance, these were not fundamental. RESPONDENT was also aware that CLAIMANT had satisfied its payment obligation before it purported to avoid on 9 July **(IV)**.

39. The CISG governs the merits of the dispute under either Art. 1(a) or Art. 1(b). First, the Parties have their places of business in two different states which are each contracting States [*Art. 1(a) CISG*; *RA ¶1-2; PO No. 1 ¶5(3)*]. Second, the rules of private international law lead to the application of Danubian law which incorporates the CISG [*Art. 1(b) CISG; Art. 20 Contract*].

40. To the extent there are gaps in the application of the CISG, reference to the UNIDROIT Principles is permissible so long as they represent general principles underlying the CISG [*Art. 7(2) CISG*; *Liu ¶¶107-8*; *Schlechtriem/Schwenzer Art. 7 ¶36; Huber/Müllis p. 36; Bonell (c) p. 35*]. The UNIDROIT Principles are also applicable as they are part of Danubian contract law [*RA ¶18; PO No. 1 ¶5(3)*]. On that basis, the UNIDROIT Principles may be used to fill any internal gaps in the CISG even if they do not reflect its general principles [*Art. 7(2) CISG; PO No. 2 ¶43*].

III RESPONDENT'S NOTICE OF AVOIDANCE ON 7 JULY WAS INVALID

41. CLAIMANT's contractual obligation was to establish a L/C before 9 July **(A)**. CLAIMANT performed this obligation within the required time **(B)**. Any alleged non-conformity in this First L/C was due to RESPONDENT's erroneous instructions. RESPONDENT cannot rely on its own mistake to avoid the Contract. Any breach was not fundamental as strict compliance with contractual terms was not required and the time for performance had not yet expired **(C)**. Additionally, CLAIMANT had a right to cure before the original date of performance **(D)**. Finally, RESPONDENT could not validly set an additional period of time for performance **(E)**.

A CLAIMANT WAS REQUIRED TO ESTABLISH A LETTER OF CREDIT BEFORE 9 JULY

42. The deadline for CLAIMANT's performance expired on 9 July **(1)**. CLAIMANT was only required to establish a L/C before that time **(2)**.

1. The relevant deadline was 9 July

43. CLAIMANT's obligation under the Contract was to establish a L/C within 14 days of receipt of the N/T [*Art. 4 Contract*]. Danubian contract law does not expressly provide rules for the calculation of time periods [*PO No. 2* ¶*44*; *supra* ¶*40*]. In light of this, the Tribunal should find that the 14 day period began to run from 25 June 03:45 RST when CLAIMANT received the N/T [*PO No. 2* ¶*24*]. This expired at the same time 14 days later, on 9 July 03:45 RST. This is what CLAIMANT has consistently maintained [*PO No. 2* ¶*39*]. The period of time should be calculated in this way because it is a commercially sensible approach. The term "not later than fourteen days" contemplates that the party will have 14 full days to perform [*Art. 4 Contract*]. If the period of time is calculated from the beginning of the day on which it was received, this would disregard the specific time of receipt. Therefore the Parties would not have 14 *full* periods of 24 hours to perform.

44. This approach is consistent with the calculation of time in Art. 20 CISG. The CISG does not expressly provide for the calculation of time for performance of a party's contractual obligations. This creates an internal gap [*Art. 4 CISG; Ferrari pp. 162-3; Kotrusz* ¶*1.2.2*]. Where a gap exists an analogy may be drawn with other parts of the CISG [*Art. 7(2) CISG; Keller* ¶*g; Shoe Leather Case*]. When an offer is made via instantaneous communications, such as fax, Art. 20 provides that the period of acceptance runs from the moment the offer reaches the offeree [*Schlechtriem/Schwenzer Art. 20* ¶*3*] In this case, the N/T was initially faxed to CLAIMANT,

therefore this method will apply [*PO No. 2* ¶*24*]. This method is also consistent with the general principle of good faith under the CISG, as it ensures that parties are given the full period of time to perform [*Agricultural Products Case; Magnus* ¶*5(b)(3); Povrzenic* §*3(B)*]. By analogy with Art. 20, the Tribunal should apply this method to the calculation of time for performance of a party's obligations.

2. CLAIMANT was merely obliged to *establish* a Letter of Credit

45. CLAIMANT's obligation is merely to *establish* a L/C. This is distinct from RESPONDENT's *receipt* of the L/C. The distinction is made clear by the different wording of Arts. 4 and 5 of the Contract. The first sentence of Art. 4 states that "*A Letter of Credit in the amount of US$1,350,000* ***shall be established by the Buyer***" (emphasis added). In contrast, Art. 5: Shipment states "*CIF (INCOTERMS 2010), Oceanside, Equatoriana, not later than 60 days* ***after receipt of Letter of Credit***" (emphasis added).

46. This distinction was clearly intended by the Parties [*Art. 8(2) CISG*]. Such a separation of obligations is common where the parties agree upon payment by way of L/C [*Baatz p. 116; Mugasha p. 85*]. This is because CLAIMANT's obligations are performed once it has provided RST Tradebank with the necessary information and instructed it to send the L/C to RESPONDENT [*De Rooy p. 75*]. It is then RST Tradebank's duty to open the credit in accordance with its instructions [*Oelofse p. 123; Mugasha p. 99*]. RESPONDENT is not required to ship any goods until it has physical receipt of the L/C. This means that neither party is responsible for the risks associated with postage of the L/C. After RESPONDENT has shipped the goods, it is then entitled to immediate payment under the L/C upon presentation of complying documentation [*Art. 15 UCP 600; Mugasha p. 123*]. This interpretation is also consistent with the statements made during negotiations and subsequent conduct of the parties [*Art. 8(3) CISG*]. In the negotiations, the Parties agreed that RST Tradebank was responsible for sending the L/C directly to RESPONDENT [*PO No. 2* ¶*25*]. Then, for each L/C, CLAIMANT asked GM to instruct RST Tradebank which then sent the L/C directly to RESPONDENT [*Cl. Ex. 5; Cl. Ex. 8; RA* ¶¶*10, 14-15*]. It is clear the Parties only ever intended that CLAIMANT be required to *establish* the L/C.

B CLAIMANT ESTABLISHED A CONFORMING LETTER OF CREDIT BEFORE 9 JULY

47. CLAIMANT performed its obligations within the relevant time by establishing a conforming L/C on 4 July [*Cl. Ex. 5*]. Article 4 of the Contract sets out five requirements for the L/C. It

must be: (i) irrevocable; (ii) acceptable in content to the Seller; (iii) consistent with the terms of the Contract; (iv) issued by a first class Ruritanian Bank in favour of RESPONDENT; and (v) valid until 15 December. There is no disagreement that the First L/C complied with requirements (i), (iv) and (v) [*PO No. 2 ¶17; Cl. Ex. 5*].

48. The First L/C satisfies (ii) and (iii). Contrary to RESPONDENT's position, providing a maximum security of up to US$4,500,000 did not breach the Contract. This amount secures payment for at least 30 metric tons of coltan. RESPONDENT's N/T and accompanying email of 25 June indicated that it had excess coltan and created uncertainty as to the amount of coltan to be shipped [*Cl. Ex. 3*]. CLAIMANT was willing to receive a larger amount and established a L/C to facilitate this by specifying the maximum amount that RST Tradebank then committed to pay [*Mugasha p. 27*]. As the L/C is irrevocable, it constitutes a definite undertaking by RST Tradebank to honour a complying presentation up to the value of US$4,500,000 [*Art. 2 UCP 600; Trans Trust SPRL v Danubian Trading; Oelofse p. 35*]. This permits RESPONDENT to draw down an amount equal to the value of any quantity of coltan delivered [*Borcky*]. This is consistent with the N/T which provides for partial shipment of the coltan [*Cl. Ex. 2*]. Providing a maximum amount of security allows RESPONDENT to draw down the L/C in tranches as each shipment is made.

49. The shipping term CIP was only included because of RESPONDENT's request. RESPONDENT sent the N/T indicating transportation on a CIP basis and CLAIMANT opened the First L/C to reflect this information. CLAIMANT was unaware that RESPONDENT made a mistake by indicating CIP, as RESPONDENT remained silent even after CLAIMANT confirmed CIP delivery by fax [*PO No. 2 ¶20; Cl. Ex. 4*]. CLAIMANT cooperated with RESPONDENT's request solely for RESPONDENT's benefit. If CLAIMANT did not establish a L/C consistent with the N/T, RESPONDENT's document would be in conflict with the L/C upon presentation to RST Tradebank [*Art. 14(d) UCP 600*]. As a consequence, RESPONDENT would not receive payment [*Art. 16(a) UCP 600; Hot-Rolled Plates Case*]. This is because RST Tradebank must reject the documents if the Seller has not strictly complied with the terms in the L/C [*Ellinger p. 22; Mugasha p. 127*]. It has no authority to pay against documents "which are almost the same, or which will do just as well" [*Equitable Trust Co. v Dawson Partners Ltd*].

50. The change does not disadvantage RESPONDENT, rather CLAIMANT has taken on more risk by complying with RESPONDENT's request. According to the INCOTERMS, the "critical point"

for the passing of risk is the place of delivery [*Jolivet p. 48*]. Under CIP, the relevant place of delivery is brought forward so that the risk passes to CLAIMANT at an earlier point in time [*Lookofsky p. 162*]. For example, if RESPONDENT needs to transport the coltan from its mines to the port of shipment, the place of delivery at which risk will pass is immediately when the coltan is handed over to the first carrier. In contrast, under CIF the risk does not pass from RESPONDENT to CLAIMANT until the goods are loaded on the ship [*Rules A4 & A5 INCOTERMS*]. Moreover, RESPONDENT indicated shipment in two 20ft containers [*Cl. Ex. 2*]. As CIP is the "containerised transport equivalent of CIF" and would accommodate shipment in containers, CLAIMANT believed this change was logical [*Lookofsky p.163*]. This is because transporting containerised goods on a CIF basis exceeds the scope of this maritime term [*Jolivet p. 49*].

51. The first time RESPONDENT objected to the inclusion of CIP was on 7 July [*Cl. Ex. 7*]. This was immediately after the coltan market price had increased as a result of the news of the games console launch and the political crisis in Xanadu [*PO No. 2 ¶31*]. It appears that RESPONDENT was willing to perform the Contract until it became advantageous for it to avoid its obligations and seek a better price elsewhere.

C ALTERNATIVELY, ANY BREACH IN THE FIRST LETTER OF CREDIT DID NOT ENTITLE RESPONDENT TO AVOID

52. Even if the Tribunal finds that the First L/C was non-conforming, RESPONDENT could not avoid the Contract due to CLAIMANT's alleged breach for two reasons. RESPONDENT's erroneous instructions caused the inconsistencies in CLAIMANT's First L/C **(1)**. Any breach was not fundamental as the Contract does not require strict compliance and time for performance had not expired **(2)**.

1. RESPONDENT's omission caused the alleged non-conformity

53. RESPONDENT has no right to avoid because its omission caused CLAIMANT's non-performance [*Art. 80 CISG; Propane Gas Case*]. The reference in Art. 80 CISG to "non-performance" includes "non-conforming performance" [*Liu ¶135*]. Article 80 will apply where RESPONDENT's behaviour contributed to the non-performance by making it "impossible or almost impossible" to open a conforming L/C [*Fashion Products Case; Schlechtriem/Schwenzer Art. 80 ¶11*]. RESPONDENT caused this for two reasons.

54. First, RESPONDENT made the initial error by specifying CIP in its N/T [*Cl. Ex. 2; PO No. 2 ¶20*]. It failed to rectify this error after it had been notified of the terms on which the First L/C would be established. As a result, the L/C was established in accordance with the terms specified in the fax. If RESPONDENT wanted to obtain payment and perform the Contract as originally intended, it would have informed CLAIMANT immediately of the error. Instead, RESPONDENT admitted that it received the fax and knew of CLAIMANT's misunderstanding, yet chose to remain silent [*Res. Ex. 1 ¶9*]. In this way, RESPONDENT constructed what it now claims to be CLAIMANT's breach in order to evade the contract. As the Arbitrator stated in the *Fashion Products Case*, a Seller cannot take advantage of a Buyer's non-performance caused by its own delayed provision of information "necessary for performance" [*Fashion Products Case p.166-7 ¶71*]. This would be contrary to good faith and Art. 80 of the CISG [*Fashion Products Case*]. Therefore, the Tribunal should not permit RESPONDENT to rely upon a breach of its own creation.

55. Second, RESPONDENT was required to inform CLAIMANT of this error because it was obviously wrong. This is in the interests of commerciality and efficiency, as it can prevent obviously defective performance or facilitate the cure of already defective performance. This principle was applied in the *Wuhan Jute-Bag Case*. In that case, the Buyer provided two non-conforming L/Cs. The Tribunal found that the Seller was under an obligation to inform the Buyer of any obvious inconsistencies immediately [*Wuhan Jute-Bag Case*]. RESPONDENT is under a similar obligation in the present circumstances. RESPONDENT failed to inform CLAIMANT that a L/C established on the terms indicated in its fax would be obviously unacceptable in content [*Res. Ex. 1 ¶9*]. RESPONDENT has breached this obligation. As such, it was almost impossible for CLAIMANT to know that the terms would not be acceptable to RESPONDENT, causing CLAIMANT to open a non-conforming L/C.

56. If there were non-conformities, RESPONDENT caused them. Therefore, by operation of Art. 80 CISG, RESPONDENT is prevented from raising any claims resulting from this non-performance [*Art. 80 CISG; Schlechtriem/Schwenzer Art. 80 ¶¶1, 8; Propane Gas Case*].

2. In addition, any breach was not fundamental

57. A Seller can only avoid a contract in accordance with Art. 64(1)(a) CISG if the Buyer has committed a fundamental breach [*Methyl Tertiary-Butyl Ether Case; Huber/Müllis p. 325*]. Any non-conformities in the First L/C were not fundamental under Art. 25 CISG. A breach can

only be fundamental if it substantially deprives the injured party of what it was entitled to expect under the contract [*Wooden Poles Case*]. A party will only be "substantially deprived" if the breach goes "to the root" of the contract and removes the other party's interest in performing the contract [*Ziegel p. 9.14*]. This standard "presupposes a considerable distortion of the contractual relationship" to the extent that it becomes unacceptable to further bind the aggrieved party [*Wooden Poles Case*]. This should be assessed in light of the circumstances of each case i.e. the monetary value of the contract and the monetary harm caused by the breach [*Secretariat Commentary, Draft Art. 23 ¶3*]. This threshold is not met for two reasons.

58. First, RESPONDENT did not suffer any monetary harm. If RESPONDENT were interested in performing the Contract its only concern would be to ensure receipt of payment. The First L/C entirely secured CLAIMANT's payment obligations. Once established, there was no risk that payment would not occur. Further, the time for performance had not yet expired. As of 4 July it was still possible for RESPONDENT to obtain payment before the original contractual deadline. Prior to the contractual deadline, any lack of conformity can only exist in the form of an anticipatory breach of contract [*Schlechtriem/Schwenzer Art. 37 ¶3*]. CLAIMANT did not clearly indicate that it would commit a fundamental breach in the future [*Art. 72 CISG; Schlechtrim/Schwenzer Art. 72 ¶3; Huber/Müllis p. 345*]. Rather the email on 5 July communicated CLAIMANT's willingness to address RESPONDENT's objections [*Cl. Ex. 6*]. This does not amount to an anticipatory breach. Therefore the alleged non-conformities did not deprive RESPONDENT of payment.

59. Second, the alleged non-conformities do not go "to the root" of the Contract [*Ziegel p. 9.14*]. RESPONDENT has tried to argue that any deviation is a fundamental breach as coltan is a commodity [*Cl. Ex. 7*]. However, there are two types of commodity contracts. The first is where "commodities are sold directly from the seller to the buyer" and the second is where "string trading takes place" [*Zeller p. 632*]. In the commodities trade, strict compliance is generally only required in string trading [*Winsor p. 103; PO No. 2 ¶18*]. This is not the case for this Contract. In string trading, where multiple transactions take place between intermediate buyers, it is the documents that are being sold rather than the goods [*Winsor p. 91; Zeller p. 628; Müllis p. 328*]. The coltan is being sold directly from the Seller to the Buyer and CLAIMANT intended on receiving the physical delivery of the goods. Any contracts for the on-sale of coltan were made after the conclusion of the Contract [*PO No. 2 ¶34*]. Further, the inclusion of an INCOTERM in the Contract reinforces the Parties' intent that this was not a string contract.

The settled position is that INCOTERMS are used in contracts for sales contemplating the "physical delivery, not the transfer of ownership, of the goods sold" [*Jolivet p. 47*]. Therefore the Contract did not contemplate a string of intermediate buyers. Finally, in string trading, a Seller's documents must strictly comply with contractual provisions because the documents themselves are being sold [*Winsor p. 91*]. Whereas here, it is the conformity of the Buyer's documents that is in contention. Therefore, any special rules that apply to string contracts for commodities are not applicable in the present case. Any minor deviation will not automatically be a fundamental breach.

60. Even if the breach causes substantial deprivation to RESPONDENT, it is not fundamental. This is because CLAIMANT did not foresee this, and a reasonable person in the same circumstances would not have foreseen such a result [*Art. 25 CISG; Schlechtriem/Schwenzer Art. 25* ¶*26*]. CLAIMANT's knowledge of RESPONDENT's expectations is relevant only for assessing the importance of the obligation that has been breached [*Schlechtriem/Schwenzer Art. 25* ¶*27*]. RESPONDENT is only entitled to rely on compliance with CIF and the secured amount as a "substantial" expectation under the Contract if CLAIMANT knew, or a reasonable person would have known, that by entering into the contract, such a particular expectation would be created [*Schlechtriem/Schwenzer Art. 25* ¶*27*]. This is not the case. RESPONDENT created doubt as to the precise transport term and amount of security required following contract formation [*supra* ¶*48*]. RESPONDENT remained silent after CLAIMANT confirmed RESPONDENT's changes [*Cl. Ex. 2; Cl. Ex. 4*]. From this, CLAIMANT could not reasonably be expected to know, nor would a reasonable person objectively conclude, that adherence to both terms was a substantial contractual expectation. As the breach was not fundamental, avoidance was not available under Art. 64.

D CLAIMANT WAS ABLE TO CURE ANY DEFECTIVE PERFORMANCE BEFORE THE CONTRACTUAL DEADLINE

61. RESPONDENT's attempted avoidance on 7 July was premature because time for performance had not yet expired. The relevant deadline for CLAIMANT's performance was 9 July [*supra* ¶*43*]. Until this date, CLAIMANT was permitted to rectify any non-conformities in the First L/C in accordance with the CISG **(1)**, or alternatively under the UNIDROIT Principles **(2)**.

1. CLAIMANT has a right to cure under the CISG

62. Articles 34 and 37 CISG give a Seller the right to cure any non-conforming goods or documents before the original deadline unless this would cause unreasonable inconvenience or expense to the other party [*Crude Metal Case*]. The CISG does not expressly address a Buyer's right to cure, even though a Buyer's rights fall within the scope of the CISG [*Art. 4 CISG*]. This creates an internal gap, which may be filled by analogy to the Seller's rights [*Art. 7(2) CISG; Enderlein/Maskow Art. 7 ¶91; Bianca/Bonell Art. 7 ¶2.3.2.1; Povrzenic §5.4(A); Keller ¶g; Huber/Müllis p. 34; supra ¶40*].

63. The general principles of good faith, reasonableness, prohibiting contradictory behaviour and preventing premature unilateral termination underpin the CISG [*Schlechtriem/Schwenzer Art. 7 ¶¶34-5; Bianca/Bonell Art. 7 ¶2.3.2.2; Enderlein/Maskow Art. 7 ¶9.1; Ferrari pp. 174-175; Keller ¶d; Bonell (c) p. 35*]. A Seller's right to cure before the date for performance reflects these principles. This keeps the contract alive and minimises economic waste [*Kröll/Mistelis/Perales Viscasillas Art. 37 ¶4*]. Extending an analogous right to CLAIMANT would achieve the same result, without causing any unreasonable detriment to RESPONDENT. It is in RESPONDENT's interest to obtain payment, even if this involves allowing CLAIMANT to cure documents. As such there is no good reason to treat the Buyer and Seller any differently. It would be unjust not to extend this right to CLAIMANT [*Bianca/Bonell Art. 7 ¶2.3.2.1*].

64. Further, it is commercial practice to allow a Buyer to cure a defect in a non-conforming L/C if it can be done before the L/C is required [*Carr p. 494*]. Therefore, it is reasonable to allow CLAIMANT the right to cure before the original contractual deadline and it also provides a second opportunity to redress defects, keeping the contract alive. RESPONDENT promised to wait for performance up until that deadline. It would be condoning contradictory behaviour to allow RESPONDENT to insist on final performance before the originally agreed deadline. This conflicts with the general principles of the CISG [*Schlechtriem/Schwenzer Art. 7 ¶32*].

65. A Buyer's right to cure is also supported by Art. 7.1.4 UNIDROIT, which extends this right to *any* non-performing party. Article 7.1.4 UNIDROIT is based on the same underlying rationales as Arts. 34 and 37 CISG, including the preservation of contracts [*Art. 7.1.4 Comment 1 UNIDROIT; Keller ¶d; Bonell (b) p. 126*]. Therefore, as Keller argues, "where the buyer breaches the contract before the date of performance (e.g. opening a wrong letter of credit)

the occurring gap may be filled by analogy to Art. 37 CISG in light of Art. 7.1.4 UNIDROIT Principles" [*Keller* ¶*g*].

66. Applying these principles, CLAIMANT was entitled to remedy any deficiency in the First L/C up to 9 July if it would not cause RESPONDENT unreasonable inconvenience or expense [*Arts. 34 & 37 CISG; Crude Metal Case*]. Mere inconvenience or expense is insufficient [*Schlechtriem/Schwenzer Art. 37 ¶13*]. Rather, it must exceed "in an intolerable way the normal prejudice brought about to the buyer" [*Bianca/Bonnell Art. 37 ¶2.5; Kröll/Mistelis/Perales Viscasillas Art. 37 ¶13*]. This must be assessed on a case-by-case basis [*Liu ¶438*]. Although, it is "hardly conceivable" that the cure of defective documents would cause unreasonable inconvenience or expense [*Schlechtriem/Schwenzer Art. 34 ¶13*].

67. RESPONDENT was not required to assume risks associated with performance as its obligation to ship did not commence until receipt of the L/C [*Art. 5 Contract; Schlechtriem/Schwenzer Art. 64 ¶9*]. CLAIMANT was entitled to establish a further L/C up until 9 July [*Art. 4 Contract*]. Providing a conforming L/C before this date would not cause RESPONDENT any further inconvenience than if CLAIMANT had initially established this L/C on the last day it was entitled to under the Contract. Any inconveniences suffered by RESPONDENT during this time can be compensated by damages [*Arts. 34 & 37 CISG*].

68. CLAIMANT had a right to remedy any non-conformity in the L/C before 9 July, and gave notice that it was prepared to cure. Therefore, RESPONDENT could not avoid the Contract whilst the right to cure could be exercised, nor could RESPONDENT argue that such avoidance precluded CLAIMANT's right to cure [*Schlechtriem/Schwenzer Art. 37 ¶15; Keller ¶n*]. If a party was able to avoid a contract before the date for cure had passed, the right to cure would be worthless. Further, avoiding a contract to prevent the other party from exercising the right to cure is contrary to good faith and the preservation of contracts [*Agricultural Products Case; Magnus §§5(b)(3), 5(b)(9); Povrzenic §3(B)*].

2. CLAIMANT has a right to cure under the UNIDROIT Principles

69. If reference to general principles of the CISG cannot be used to fill this gap, CLAIMANT has a right to cure in accordance with Art. 7.1.4 UNIDROIT. This applies to *any* non-performing party, including the Buyer and provides a right to cure where a party has not expressed a clear refusal to perform [*African Holding Co.; Keller*]. CLAIMANT did not refuse to perform, rather in

the email of 5 July, there was a clear indication that CLAIMANT wanted to continue the Contract and was willing to amend the delivery terms [*Cl. Ex. 6*]. Therefore, the right to cure was available if the following requirements were met: (i) the notice to cure was provided [*Art 7.1.4(1)(a) UNIDROIT*]; (ii) the cure was appropriate [*Art. 7.1.4(1)(b) UNIDROIT*]; (iii) RESPONDENT had no legitimate interest in refusing the cure [*Art. 7.1.4(1)(c) UNIDROIT*]; and (iv) the cure was effected promptly [*Art. 7.1.4(1)(d) UNIDROIT*]. CLAIMANT met all of these requirements.

70. First, Mr. Storm's email of 5 July provided notice to cure [*Art 7.1.4(1)(a) UNIDROIT; Cl. Ex. 6*]. The requirements for the contents of this notice are affected by the extent to which information is available to the non-performing party [*Art. 7.1.4 Comment 2 UNIDROIT; Liu ¶433*]. RESPONDENT did not provide information about the exact deficiencies in the First L/C until 7 July [*Cl. Ex. 7*]. Therefore, on 5 July CLAIMANT provided as much notice as possible through Mr. Storm's email which communicated CLAIMANT's willingness to rectify the apparent cause of RESPONDENT's objections, i.e. the transport term. This was given without delay the morning after CLAIMANT became aware of RESPONDENT's objections [*RA ¶12; Art. 7.1.4 Comment 2 UNIDROIT; Liu ¶432; Bonell (a) p. 348*].

71. Second, providing a new L/C was an appropriate cure. This involves consideration of the chances of success, whether the cure can be carried out without delay and the reasonableness of the cure [*Art. 7.1.4 Comment 3 UNIDROIT; Vogenauer/Kleinheisterkamp Art.7.1.4 ¶12; Liu ¶437; Keller ¶h; Bonell (a) p. 348*]. These requirements were met as CLAIMANT established a new L/C less than three business days after being made aware of the alleged defective performance [*Cl. Ex. 7; Cl. Ex. 8; Cl. Ex. 10*]. Further, time was not of the essence in this Contract [*infra ¶93; Vogenauer/Kleinheisterkamp Art. 7.1.4 ¶11*]. As such, it was reasonable for CLAIMANT to provide a new L/C within the original contractual deadline. In addition, the cure was appropriate as RESPONDENT demanded a new L/C [*PO No. 2 ¶21*].

72. Third, RESPONDENT had no legitimate interest in refusing the cure. The meaning of "legitimate" is determined subjectively, depending on the surrounding circumstances [*Vogenauer/Kleinheisterkamp Art. 7.1.4 ¶16; Keller ¶¶h, k*]. If the cure is appropriate and notice to cure has been given, there is a presumption that the cure should be permitted [*Liu ¶441*]. RESPONDENT's only interest in refusing the cure was its desire to escape the Contract to take

advantage of the rise in the price of coltan. This is *not* a legitimate interest in preventing cure [*Art. 7.1.4 Comment 4 UNIDROIT; Liu* ¶*441*].

73. Fourth, the cure was effected promptly [*Vogenauer/Kleinheisterkamp Art. 7.1.4* ¶*20*]. CLAIMANT established a new L/C within three business days of receiving RESPONDENT's initial objections and within 48 hours of receiving its *precise* objections. Therefore CLAIMANT did not "lock [RESPONDENT] into an extended waiting period" [*Art. 7.1.4 Comment 5 UNIDROIT; Liu* ¶*439*].

74. As CLAIMANT satisfied all requirements, it was entitled to cure as at 9 July. Any purported avoidance before this time is precluded by Art. 7.1.4(3) UNIDROIT. This provision suspends rights inconsistent with cure during the period for cure [*Art. 7.1.4 Comment 7 UNIDROIT; Liu* ¶*450; Bonell (b) p. 126*].

E RESPONDENT COULD NOT VALIDLY SET AN ADDITIONAL PERIOD FOR PERFORMANCE

75. RESPONDENT left a voicemail on 4 July demanding that a new L/C be provided by the morning of 7 July [*PO No. 2* ¶*21*]. By doing so RESPONDENT was purporting to set an additional period of time in accordance with Art. 63 in order to unilaterally shorten the contractually agreed period for performance [*Schlechtriem/Schwenzer Art. 63* ¶¶*1, 5; Art. 64(1)(b) CISG*]. Article 63 is intended to encourage the performance of contracts rather than create an opportunity for early avoidance [*Huber/Müllis p. 329*]. Instead, this was a shallow attempt to contrive a premature right to avoid. A party is only entitled to set an additional period after the date for performance has passed i.e. performance is already late [*Beer Case; Bianca/Bonell Art. 63* ¶*1.4; Secretariat Commentary, Draft Art. 59* ¶¶*3, 6*].

76. Article 63 has been applied this way numerous times. In the *Auto Case*, the Buyer had not fully paid for various shipments of cars as required by the contract. The OLG München determined that the Seller was only permitted to set an additional period of time in respect of shipments where full payment was already due and could not set an additional time for future shipments of cars. This is because the Buyer "had not definitely and seriously rejected the payment of the price" for those future shipments. Similarly, in the *Beer Case*, before certain invoices fell due, the Seller attempted to set an additional period of time for payment. Even though this additional period of time expired after the original due date, the OLG Brandenburg still found that the Seller was obliged to wait until the original time for performance had passed before

setting any additional period. Applying this principle consistently, RESPONDENT is not entitled to require performance before 9 July.

77. Even if RESPONDENT could set an additional period before the contractual deadline had passed, or if the time for performance expired on 4 July when CLAIMANT established the First L/C, the additional period purportedly set by RESPONDENT would not be valid. As Schlechtriem and Schwenzer argue "no additional period of time at all starts to run if the seller gives a sham notice without truly intending to grant the buyer a second chance for performance" [*Schlechtriem/Schwenzer Art. 63 ¶9; Wooden Poles Case*]. Not only was the period of time unreasonable, RESPONDENT's conduct shows it never truly intended to give CLAIMANT a second chance for performance.

78. The question of whether a period of time is reasonable is to be determined by the objective circumstances of the case. This includes consideration of: (i) the impediments to CLAIMANT [*Schlechtriem/Schwenzer Art. 63 ¶8; Wooden Poles Case*]; (ii) the commercial reality that parties may not be able to perform if given insufficient time [*Antique Jaguar Sports Car Case*]; and (iii) the seller's motive for demanding performance in a brief period of time [*Wooden Poles Case*]. RESPONDENT left a voicemail on a Friday afternoon requiring a new L/C by Monday morning MST (07:00 RST) at the latest [*PO No. 2 ¶21*]. This would require performance in a period of little more than 48 hours, which fell almost entirely over a weekend. During this time RESPONDENT did not provide the information needed for CLAIMANT to determine the precise objections to the L/C. Even though RST Tradebank was open briefly for four hours on Saturday morning, CLAIMANT could not establish a new L/C until RESPONDENT had provided specific objections to the First L/C. By the time RESPONDENT did so, the additional time period had already expired.

79. Further, RESPONDENT did not have a legitimate motive to demand performance in such a short period of time. By including a contractual term requiring CLAIMANT to establish a L/C within 14 days after receipt of the N/T, RESPONDENT indicated that it was prepared to wait until 9 July [*Art. 4 Contract*]. However, the additional period it purported to set expired two days before this deadline [*supra ¶75*]. This illustrates how the additional time period set by RESPONDENT was a sham that was solely intended to give it the opportunity to seek a higher price on the coltan spot market [*Schlechtriem/Schwenzer Art. 63 ¶9*]. The LG Kassel in the *Wooden Poles Case* declared such conduct to be an abuse of power.

80. Such behaviour is also contrary to the general principles of the CISG which aim to preserve contracts and require parties to act in good faith in international trade [*Agricultural Products Case; Art. 7(1) CISG; Schlechtriem/Schwenzer Art. 7* ¶¶*34-5*]. As such, RESPONDENT is not entitled to rely on CLAIMANT's failure to perform within an additional period of time that was nothing but a sham [*Perales Viscasillas p. 91*].

Conclusion: RESPONDENT's attempted avoidance on 7 July was ineffective because the First L/C satisfied CLAIMANT's contractual obligations. Alternatively, the alleged breach did not provide a basis for avoidance nor could RESPONDENT construct a right to avoid by setting an additional period of time for performance.

IV RESPONDENT'S PURPORTED AVOIDANCE ON 9 JULY WAS INVALID

81. RESPONDENT could not avoid the Contract on 9 July. This is because CLAIMANT provided a conforming L/C after RESPONDENT purported to avoid on 7 July **(A)**. Any discrepancies in the Second L/C were not fundamental. Further, in the event that the L/C was delayed, this did not entitle RESPONDENT to avoid the Contract **(B)**. Finally, RESPONDENT could not avoid the Contract after it became aware that CLAIMANT had paid the price **(C)**.

A THE SECOND LETTER OF CREDIT CONFORMED WITH THE CONTRACT

82. CLAIMANT complied with its contractual obligations by establishing the Second L/C on 8 July. Article 4 of the Contract stipulates five requirements for the L/C [*supra* ¶*47*]. There is no disagreement that the L/C complied with requirements (i), (iv) and (v). The only dispute is whether the inclusion of a Commercial Invoice meets requirements (ii) and (iii). It does so because this document is required by the inclusion of the INCOTERMS in the Contract (iii) therefore it cannot be unacceptable to RESPONDENT (ii).

83. The requirement of a Commercial Invoice is consistent with the Contract (iii). The contractual terms did not stipulate the documents to be presented under in the L/C [*PO No. 2* ¶*16*]. However, the CISG "incorporates" INCOTERMS through Art. 9(2) because they are well known in international trade, even if their use is not global [*BP Oil Case*]. Rule A1 of all INCOTERMS requires a Seller to present a Commercial Invoice. RESPONDENT ought to have known that presentation of a Commercial Invoice is part of its obligations under both CIP and CIF [*Rule A1 INCOTERMS*]. Further, the Commercial Invoice is one of the two documents that are "essential to every shipment sale" [*Baatz p.114*]. RESPONDENT cannot

seriously maintain that requiring the presentation of an essential document amounts to a fundamental breach [*Magellan International Corp.*]. As the Parties have expressly referred to CIF in the Contract, RESPONDENT would still have to provide the Commercial Invoice even if it was not specified in the L/C [*Art. 5 Contract; INCOTERMS*]. The presentation of this document is compulsory under both CIP and CIF, so RESPONDENT cannot argue that its inclusion was unacceptable (ii).

B ANY ALLEGED DEFICIENCIES IN PERFORMANCE WERE NOT FUNDAMENTAL

84. Any alleged non-conformities in the Second L/C did not provide a basis for RESPONDENT's purported avoidance on 9 July. Neither the inclusion of the Commercial Invoice **(1)** nor any delay in delivery of the L/C **(2)** amounted to a fundamental breach.

1. Any non-conformity in the content of the Second Letter of Credit was not a fundamental breach

85. Even if requiring presentation of a Commercial Invoice amounted to a breach of contract, this was not fundamental and RESPONDENT was not entitled to avoid the Contract [*Art. 64 CISG*]. This is because the requirements of Art. 25 are not met. Inclusion of the Commercial Invoice would not substantially deprive RESPONDENT of the benefit it is to receive [*Art. 25 CISG; Foamed Board Machinery Case*]. RESPONDENT always prepared a Commercial Invoice and would easily be able to present the Commercial Invoice to RST Tradebank to receive payment [*PO No. 2 ¶16*]. As a Commercial Invoice is a requirement in transactions involving INCOTERMS [*supra ¶83*], a reasonable person could not have foreseen that the stipulation of this document would result in any detriment to RESPONDENT. As the breach is not fundamental, RESPONDENT is not entitled to avoid the Contract [*Art. 64 CISG*].

86. If RESPONDENT was unable to provide a Commercial Invoice, it should have asked CLAIMANT to amend the L/C [*Art. 10 UCP 600; Sempione v Provident Bank of Maryland*]. RESPONDENT ought to have asked for an amendment rather than attempt to hastily avoid the Contract. This is consistent with the principles of the CISG which aim to minimise economic wastage and uphold contracts where possible [*Kröll/Mistelis/Perales Viscasillas Art. 7 ¶58; Bianca/Bonell Art. 7 ¶2.3.2.2; Schlechtriem/Schwenzer Art. 7 ¶35*]. Requesting an amendment would ensure both Parties still receive what they expected under the Contract. Further, RESPONDENT need not expressly communicate acceptance of the amendment as it can take place merely upon presentation of documents consistent with the amendment [*Art. 10 UCP 600; Mugasha p. 29*].

In contrast, cancelling the Second L/C would require the agreement of RESPONDENT, CLAIMANT and RST Tradebank [*Art. 10 UCP 600; Mugasha p. 123*]. Then a new L/C would need to be issued, creating further delay.

87. The *Australian Raw Wool Case* recognised that a party is *obliged* to request amendment of a non-conforming L/C prior to the exercise of a right to avoid. In that case, the L/C was opened three days late. The Tribunal held that the Seller had no right to avoid the contract, unless it had first requested an amendment to the L/C and the Buyer had refused to cooperate. RESPONDENT is under a similar obligation to request amendment of the L/C before attempting to avoid the Contract. RESPONDENT failed to do so. Instead, RESPONDENT's purported avoidance demonstrates that it is attempting to use a mere technicality to escape a contract it no longer views as advantageous. This is contrary to the general principle of good faith and one of the principal aims of the CISG; to keep the contract alive [*Agricultural Products Case; Magnus §5(1)(9); Schlechtriem/Schwenzer Art. 7 ¶35*].

2. Any delay in performance was not a fundamental breach

88. RESPONDENT alleges that the relevant deadline was 8 July and the relevant time zone was MST. According to this view, the Second L/C was late as it was received at 0:05 MST on 9 July. CLAIMANT maintains that the relevant deadline is 9 July [*supra ¶43*].

89. Even if the relevant deadline was 8 July and the applicable time zone was MST, CLAIMANT still performed its contractual obligations on time. CLAIMANT established a L/C at the moment when the bank dispatched the advice of the issuance of credit [*De Rooy p. 82*]. This occurred on 8 July at 14:00 MST when the courier picked up the L/C from RST Tradebank to send to RESPONDENT [*Cl. Ex. 9*]. This was within the RESPONDENT's alleged deadline.

90. Alternatively, if the Tribunal considers that there was a delay in establishing the L/C, avoidance will only be available in exceptional circumstances [*Wooden Poles Case; Foamed Board Machinery Case*]. If the L/C was late by one day, this was only a minor deviation from the Contract. It is not an exceptional circumstance allowing RESPONDENT to avoid. Nor did it substantially deprive RESPONDENT of the benefit it expected to receive in accordance with Art. 25 [*supra ¶57; Arts. 25 & 64(1)(a) CISG; Foamed Board Machinery Case*]. This is for two reasons.

91. First, RESPONDENT received the contractual benefit, i.e. payment, *less than a day* after the deadline. This is because establishing a L/C constitutes payment of the price [*Magellan*

International Corp.; infra ¶*95*]. This negligible delay did not deprive RESPONDENT of the benefit of payment. As Lookofsky has observed, even if the buyer pays one or two days late, "it is far from certain that the seller has thereby suffered a substantial deprivation under Art. 25" [*Lookofsky p. 157*]. Further, even delays greater than one day, i.e. 3 or 17 days, did not amount to a fundamental breach in cases concerning commodity contracts [*Australian Raw Wool Case; Lanthanide Compound Case respectively*]. When considered in this context, it is clear that a delay of less than a day is so minor that it cannot meet the strict threshold of substantial deprivation.

92. Second, RESPONDENT did not suffer any monetary harm between the time of receiving L/C and the contractual deadline. This is because its obligation to ship was contingent upon receipt of the L/C [*Secretariat Commentary, Draft Art. 23* ¶*3; supra* ¶*45-6*]. As the Parties agreed on payment by L/C, RESPONDENT may not immediately avoid the Contract if the buyer fails to open the L/C by the fixed time [*Schlechtriem/Schwenzer Art. 64* ¶*9*]. This is because the L/C secures RESPONDENT's performance and before the Seller starts shipping, "he has no exposure that would require immediate coverage" [*Schlechtriem/Schwenzer Art. 64* ¶*9*]. Until RESPONDENT received the L/C it did not assume any risk because the coltan never left its possession. Thus, substantial deprivation cannot be established on this basis.

93. Even if there was substantial deprivation, CLAIMANT could not foresee, nor could a reasonable person of the same kind in the same circumstances have foreseen that a delay of less than a day would create such a result [*Art. 25 CISG; Schlechtriem/Schwenzer Art. 25* ¶*26*]. Time is not automatically of the essence in this transaction as it does not involve string trading [*supra* ¶*59*]. Nor have the Parties explicitly made time of the essence [*PO No. 2* ¶*18*]. Whether the Parties otherwise intended payment time to be of the essence is determined by considering all relevant circumstances including any subsequent conduct [*Schlechtriem/Schwenzer Art. 64* ¶*8*; *Art. 8(3) CISG*]. RESPONDENT requested an unusually long period of time for issuance of the N/T. To a reasonable person, this would demonstrate that time is *not* of the essence. Due to such generous time periods for performance, it would be unreasonable for RESPONDENT to then insist on strict time constraints. Therefore, CLAIMANT could not be expected to know that a delay of less than one day would amount to a fundamental breach.

94. This is similar to the principle espoused in *Verja*. In that case, the deadline for performance had been moved earlier for the Seller's benefit. The Buyer took delivery a few days late. The Cour d'appel de Grenoble held that in such circumstances the Buyer could not be expected to

appreciate that this delay would constitute a fundamental breach. Similarly, CLAIMANT could not foresee that such a short delay would amount to a fundamental breach. Since time is not of the essence, mere late payment will not automatically constitute a fundamental breach of the Contract [*Schlechtriem/Schwenzer Art. 64 ¶7; Foamed Board Machinery Case*].

C IF PERFORMANCE WAS LATE, RESPONDENT RECEIVED NOTICE OF THE LETTER OF CREDIT BEFORE AVOIDANCE

95. Even if there was a delay in establishing the L/C, under Art. 64(2)(a), RESPONDENT lost the right to avoid the Contract immediately upon receiving notice that CLAIMANT had paid the price [*Schlechtriem/Schwenzer Art. 64 ¶26*]. The term "payment of the price" includes establishing a L/C [*Art. 54 CISG; Secretariat Commentary, Draft Art. 60 ¶7; Foamed Board Machinery Case; Propane Gas Case; Fashion Products Case*]. Further, as the US District Court of Illinois has observed, issuance of a L/C satisfies a buyer's obligation to pay the price [*Magellan International Corp.*]. RESPONDENT became aware that the price had been paid upon receipt of the Second L/C [*Schlechtriem/Schwenzer Art. 64 ¶26*]. This occurred at 19:05 RST when Mr. Winter signed to receive the L/C [*Cl. Ex. 8; Cl. Ex. 9; ARA ¶24; Res. Ex. 1 ¶10*]. RESPONDENT's purported avoidance on 9 July was after this time and is therefore ineffective [*Art. 64(2)(a)*].

96. A similar situation arose in the *Mono Ethylene Glycol Case.* In that case, the Seller attempted to avoid the Contract after receiving the relevant L/Cs one day late. This was ineffective as it occurred after the Seller became aware that payment had been made. In this case, the letter of avoidance on 9 July referred to the Second L/C, so it is clear that Mr. Winter was aware of it before he purported to avoid the Contract for the second time [*Res. Ex 4*]. To allow RESPONDENT to avoid in these circumstances based on a mere technicality would be wasteful, inefficient and contrary to the overarching principles of the CISG [*Schlechtriem/Schwenzer Art. 7 ¶35*].

Conclusion: RESPONDENT could not avoid on 9 July because the Second L/C conformed with the Contract. Alternatively, the defects in performance that RESPONDENT objected to were not fundamental. Further, RESPONDENT knew that CLAIMANT had performed its payment obligations before it purported to avoid on 9 July.

REQUEST FOR RELIEF

Counsel for CLAIMANT respectfully requests the Tribunal to:

1) Reject RESPONDENT's counterclaim and uphold EA's order;
2) Declare that it has no jurisdiction over GM;
3) Order RESPONDENT to deliver to CLAIMANT, immediately after the issuance of an award, 30 metric tons of coltan as required by the provisions of the Contract concluded between CLAIMANT and RESPONDENT on 28 March 2014;
4) Order RESPONDENT to reimburse CLAIMANT for all damages it incurred due to the belated delivery of the coltan; and
5) Order RESPONDENT to bear CLAIMANT's costs arising out of this arbitration.

Pursuant to Rule 80 of the Willem C. Vis International Commercial Arbitration Moot Rules 2014, the persons who have signed below confirm that only such persons wrote this Memorandum.

Sydney
11 December 2014
Counsel for CLAIMANT

Nicola Bevitt	William Hanna	Sarah Ienna	Phoebe Winch