TWENTY-SECOND ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA – 27 MARCH TO 2 APRIL 2015

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF ZURICH

ON BEHALF OF:

Mediterraneo Mining SOE
5-6 Mineral Street
Capital City
Mediterraneo

RESPONDENT

AGAINST:

Vulcan Coltan Ltd
21 Magma Street
Oceanside
Equatoriana

CLAIMANT

AND

Global Minerals Ltd
Excavation Place 5
Hansetown
Ruritania

ADDITIONAL PARTY

TILLA CAVENG
ROBIN ERNST
SABINE NEUHAUS
JASCHA TRUBOWITZ
ANDREAS WEHOWSKY
ANNA WILLI

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INDEX OF ABBREVIATIONS

&	and
AG	Aktiengesellschaft
Art/Arts	Article/Articles
ASA	Swiss Arbitration Association
cf	confer
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost, Insurance and Freight (Incoterms)
CIP	Carriage and Insurance Paid to (Incoterms)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co	Company
cons	consideration
COO	Chief Operating Officer
EA	Emergency Arbitrator
ed/eds	editor/editors
edn	edition
e.g.	*exempli gratia* (for example)
et al	*et alii* (and others)
Ex	Exhibit
GoC	Group of Companies
h	hours
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the International Chamber of Commerce 2012
ICCA	International Council for Commercial Arbitration
i.e.	*id est* (that is)
Inc	Incorporation
Incoterms	International Commercial Terms 2010
kg	kilogram
L/C	Letter of Credit
LLC	Limited Liability Company
Ltd	Limited
Ltda	Limitada

MfC	Memorandum for CLAIMANT (Université Panthéon - Assas, Paris II)
Mr/Ms	Mister/Miss
MST	Mediterranean Standard Time
No/Nos	Number/Numbers
Order	Order of the Emergency Arbitrator
p/pp	page/pages
para/paras	paragraph/paragraphs
Party/Parties	CLAIMANT and/or RESPONDENT and/or ADDITIONAL PARTY
PO	Procedural Order
RfA	Request for Arbitration
RfJ	Request for Joinder
RST	Ruritanian Standard Time
sec	section
SOE	State-owned enterprise
t	metric tons
UCP	Uniform Customs and Practice
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollar
v	versus
vol	volume

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Cited as	Rule/Law/Statute/Principle
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
ICC Rules	Arbitration Rules of the International Chamber of Commerce, 2012
Incoterms	International Commercial Terms by the ICC, 2010
UCP	UCP 600: Uniform Customs and Practice for Documentary Credits, 2007
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of international commercial contracts, 2010

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Barron's Law Dictionary	STEVEN H. GIFITS, Barron's Law Dictionary 6th edn, Barron's 2010 in para 86

SUMMARY OF THE CASE

1 The parties to this arbitration are Vulcan Coltan Ltd ("**CLAIMANT**"), Mediterraneo Mining SOE ("**RESPONDENT**") and Global Minerals Ltd ("**ADDITIONAL PARTY**"), together the "**Parties**". CLAIMANT is a recently established broker of rare minerals located in Equatoriana. ADDITIONAL PARTY is based in Ruritania and brokers rare minerals worldwide. ADDITIONAL PARTY owns 100% of the shares of CLAIMANT. RESPONDENT is a state-owned enterprise based in Mediterraneo that operates local mines, including a coltan mine.

2 CLAIMANT and RESPONDENT concluded the Coltan Purchase Contract ("**Contract**") on 28 March 2014. ADDITIONAL PARTY signed the Contract as an endorsee. According to the Contract, RESPONDENT would deliver 30t of coltan to CLAIMANT under CIF Incoterms to the Port of Oceanside, Equatoriana, against a purchase price of US$ 1,350,000. The Parties agreed that the payment of the purchase price would be secured with a letter of credit ("**L/C**"), which ADDITIONAL PARTY eventually established.

3 The Contract is a commodity sales contract because it involves the sale of coltan, a rare mineral with a highly volatile market price. There is a trade usage in commodity trade stipulating that any deviation from a contract constitutes a fundamental breach of contract. The Contract is subject to this trade usage.

4 On 4 July 2014, ADDITIONAL PARTY's bank established the first L/C, which RESPONDENT received on the same date. This L/C deviated from the contractual terms in two ways: On the one hand, the first L/C provided for a delivery of the coltan under CIP Incoterms to CLAIMANT's premises at 21 Magma Street, Oceanside, Equatoriana, instead of CIF Incoterms to the Port of Oceanside, Equatoriana. On the other hand, the first L/C was established in the amount of US$ 4,500,000, relating to 100t of coltan instead of 30t. Although CLAIMANT argued that these deviations were due to an amendment of the Contract, it is now the Parties' understanding that there was no amendment of the Contract.

5 RESPONDENT rejected the first L/C on 4 July 2014 because it deviated from the Contract and fixed an additional period of time for CLAIMANT to provide a conforming L/C by the morning of 7 July 2014. Since CLAIMANT failed to establish the requested L/C within the additional period of time, RESPONDENT avoided the Contract on 7 July 2014.

6 Nevertheless, CLAIMANT provided a second L/C. However, RESPONDENT only received this second L/C on 9 July 2014, which was after the contractual deadline to establish the L/C had expired on 8 July 2014 at 20.00h Mediterranean Standard Time ("**MST**"). Furthermore, the documents required to draw under the second L/C did not conform to the Parties' agreement.

Because CLAIMANT had thereby committed a fundamental breach of contract, RESPONDENT sent a letter of avoidance on 9 July 2014.

7 On 11 July 2014, CLAIMANT filed a Request for Arbitration ("**RfA**") and submitted an application for Emergency Measures with the ICC. On 26 July 2014, the Emergency Arbitrator ("**EA**") ruled that RESPONDENT should not dispose of the coltan owed to CLAIMANT. In the course of the EA proceedings, RESPONDENT challenged the jurisdiction of the EA and put forward that an order of the EA would not be unjustified.

8 On 8 August 2014, RESPONDENT submitted its Answer to RfA and a Request for Joinder ("**RfJ**"). Therein, RESPONDENT claimed damages that it had incurred resulting from the unjustified Order of the EA ("**Order**"). Furthermore, RESPONDENT requested that ADDITIONAL PARTY be joined to the arbitration to secure RESPONDENT's damage claim.

9 According to Procedural Order ("**PO**") No 1, the Tribunal has limited the first part of this arbitration to the following three questions: Firstly, whether or not RESPONDENT rightfully avoided the Contract on 7 or 9 July 2014 (**ISSUE I**). Secondly, whether or not the Tribunal should lift the remaining part of the Order of the EA (**ISSUE II**). Thirdly, whether or not the Tribunal has jurisdiction over ADDITIONAL PARTY (**ISSUE III**).

ISSUE I: RESPONDENT RIGHTFULLY AVOIDED THE CONTRACT

10 According to Art 4 of the Contract the buyer, i.e. CLAIMANT, shall effect payment through an L/C in the amount of US$ 1,350,000, which had to be established within 14 days upon receipt of the Notice of Transport (*Ex C 1, p 7, Art 4*). The Parties understood that ADDITIONAL PARTY would provide the L/C (*PO No 2, p 65, para 17*). Thus, ADDITIONAL PARTY would be responsible for a part of CLAIMANT's payment obligation, i.e. the establishment of the L/C. Hence, any failure of ADDITIONAL PARTY in connection with the establishment of the L/C automatically amounts to a failure to perform on CLAIMANT's part.

11 Since ADDITIONAL PARTY failed to provide a conforming L/C, CLAIMANT failed to perform its obligation set forth in Art 4 of the Contract. Therefore, RESPONDENT rightfully avoided the Contract on 7 July 2014 upon receipt of the first L/C (**1**). Alternatively, RESPONDENT rightfully avoided the Contract on 9 July 2014 upon receipt of the second L/C (**2**).

1. RESPONDENT rightfully avoided the Contract on 7 July 2014 upon receipt of the first L/C

12 RESPONDENT rightfully exercised its right to avoid the Contract on 7 July 2014. Under the CISG, a seller is entitled to avoid a contract based on three alternative grounds: Firstly, when the buyer's failure to perform amounts to a fundamental breach of contract (*Art 64(1)(a) CISG*). Secondly, when the buyer does not perform its obligation within an additional period of time fixed by the seller (*Art 64(1)(b) CISG*). Thirdly, when the buyer commits an anticipatory fundamental breach of contract (*Art 72(1) CISG*).

13 Although one ground for termination would suffice, the prerequisites of all three aforementioned grounds for termination were fulfilled in the instant case: CLAIMANT committed a fundamental breach of contract (**a**). Furthermore, CLAIMANT failed to establish a conforming L/C within the additional period of time fixed by RESPONDENT (**b**). In any event, CLAIMANT committed an anticipatory fundamental breach of contract (**c**).

(a) CLAIMANT committed a fundamental breach of contract

14 The L/C CLAIMANT had to establish had to conform to the terms of the Contract (*Ex C 1, p 7, Art 4*), i.e., it had to provide for *30t* of coltan to be shipped under *CIF* Incoterms to the *Port* of Oceanside, Equatoriana, against a purchase price of US$ 1,350,000 (*Ex C 1, p 7, Arts 3 and 5*). However, the first L/C dated 4 July 2014 deviated from the Contract in two ways: Firstly, it covered a purchase price of US$ 4,500,000, which corresponds to *100t* of coltan. Secondly, it provided for different delivery terms, i.e. *CIP* Incoterms to *21 Magma Street*,

Oceanside, Equatoriana (*Ex C 5, p 11*). RESPONDENT immediately rejected this L/C by leaving a voicemail with CLAIMANT on 4 July 2014 (*PO No 2, p 66, para 21; Answer to RfA, p 36, para 19*).

15 CLAIMANT's attempt to justify the deviations in the first L/C by relying on an alleged amendment of the Contract on 27 June 2014 (*MfC, pp 5-7, paras 31-36*) is inadmissible based on PO No 1. Therein, the Tribunal ordered that this arbitration shall be based on the assumption that the Contract was not amended on 27 June 2014 (*PO No 1, p 60, para 2*).

16 The deviations in the first L/C constitute a fundamental breach of contract under the applicable trade usage (**i**). Moreover, since RESPONDENT did not cause CLAIMANT's failure to establish a conforming L/C, Art 80 CISG did not prevent RESPONDENT from rightfully avoiding the Contract (**ii**).

i. The deviations in the first L/C constitute a fundamental breach of contract under the applicable trade usage

17 When avoiding the Contract on 7 July 2014, RESPONDENT invoked the following trade usage: "in trading commodities such as coltan any deviation from the contract is considered to be a fundamental breach of contract" (*Ex C 7, p 13*). The trade usage, amongst others, refers to the fact that in international trade, both parties must comply strictly with the contractual terms when performing their obligations regarding documents (*cf GRAFFI, p 289; SCHLECHTRIEM/SCHWENZER–SCHROETER, Art 25 para 63; SINGH, p 5*). Therefore, an L/C must conform strictly to the underlying contract with regards to form and substance (*ICC Case No 5885, para 11; ADODO, para 2.04; ELLINGER/NEO, pp 65-66*).

18 CLAIMANT disputes neither the existence nor the applicability of this trade usage in the Memorandum for CLAIMANT or any of its previous submissions. In any event, CLAIMANT is bound by the trade usage because the three prerequisites of Art 9(2) CISG for the applicability of a trade usage were met.

19 Firstly, parties are bound by a trade usage unless they have expressly or impliedly agreed that said usage shall not apply (*Art 9(2) CISG; KRÖLL/MISTELIS/PERALES VISCASILLAS–PERALES VISCASILLAS, Art 9 para 19*). There is no such agreement between the Parties.

20 Secondly, parties are bound by any usage of which they knew or ought to have known (*Art 9(2) CISG*). In this sense, the Austrian Supreme Court held that a party is bound by the usage of a specific branch of trade if said party does business within this branch for a considerable period of time (*Wood Case, p 7*). CLAIMANT knew, or at the very least ought to have known, of the instant trade usage because the coltan trade is CLAIMANT's business (*RfA, p 2,*

para 1). Additionally, CLAIMANT employs personnel who are experienced in trading commodities such as coltan. These personnel were formerly employed by ADDITIONAL PARTY (*PO No 2, p 63, para 7*), which has been operating globally as a broker of coltan for more than ten years (*cf RfA, pp 2-3, paras 1 and 5*).

21 Thirdly, parties are bound by a trade usage if this usage is widely known and regularly observed in the respective international trade (*Art 9(2) CISG; BAINBRIDGE, p 655*). The aforementioned trade usage (*cf para 17*) is widely known and observed in documentary sales contracts (*BIJL, sec 5; SCHLECHTRIEM/SCHWENZER–SCHROETER, Art 25 para 63; SCHÜTZE, para 16*). Because a CIF contract is qualified as a documentary sales contract (*SCHWENZER, sec VI.E.2*) and the Contract concluded between the Parties is a CIF contract (*Ex C 1, p 7, Art 5*), the Contract is subject to the trade usage. Consequently, CLAIMANT was bound by the trade usage because all three prerequisites of Art 9(2) CISG were met.

22 CLAIMANT invokes that RESPONDENT did not suffer any substantial detriment in the sense of Art 25 CISG (*MfC, pp 9-10, paras 49-52*). However, this is irrelevant to the question of whether or not the first L/C constituted a fundamental breach of contract. Whenever a trade usage applies to a contract, the trade usage prevails over any contradicting provision within the CISG (*Bermatex v Valentin Rius, para 10; Timber Case, p 8; LANDO, p 122; PAMBOUKIS, p 856; SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 9 para 14*). The applicable trade usage contradicts Art 25 CISG because it renders *any* deviation from a contract a fundamental breach (*Ex C 7, p 13*), whereas under Art 25 CISG a fundamental breach occurs only if the aggrieved party has suffered substantial detriment. Consequently, the trade usage replaces the prerequisite of substantial detriment (*cf BIJL, p 27; GRAFFI, p 117; MULLIS, p 349*). Therefore, under the applicable trade usage RESPONDENT was entitled to avoid the Contract irrespective of whether or not RESPONDENT suffered any detriment.

23 Furthermore, CLAIMANT argues that RESPONDENT could have shipped only 30t instead of 100t of coltan under the first L/C (*MfC, pp 9-10, paras 50-52*). However, CLAIMANT's argument fails to serve its purpose. In order to obtain payment under the first L/C, RESPONDENT would have had to transport the coltan under CIP Incoterms to 21 Magma Street, Oceanside, Equatoriana (*Ex C 5, p 11*), instead of under CIF Incoterms to the Port of Oceanside, Equatoriana (*Ex C 1, p 7, Art 5*), i.e. to a different destination. Unlike under CIF Incoterms, according to which the seller only has to cover the costs and freight to the named *port* of destination (*RAMBERG, p 199*), CIP Incoterms require the seller to bear the costs of carriage to the respective *place* of destination (*GRAF VON BERNSTORFF, para 444; RAMBERG, p 123*). This means that

RESPONDENT would have had to bear the additional transportation costs of US$ 800-1,000 resulting from the transport to CLAIMANT's premises in Equatoriana when shipping under CIP Incoterms in accordance with the first L/C (*cf PO No 2, p 68, para 36*). Because the establishment of a conforming L/C by the buyer is a condition precedent for the seller's performance (*BRIDGE, para 6.33; KING, para 3-02; MURRAY/HOLLOWAY/TIMSON-HUNT/DIXON, para 11-020*), RESPONDENT was not obliged to and could not reasonably be expected to transport the coltan under the first L/C. Consequently, irrespective of the possibility of partial shipment under the first L/C, the deviations in the first L/C constituted a fundamental breach of contract according to the applicable trade usage.

ii. Since RESPONDENT did not cause CLAIMANT's failure to establish a conforming L/C Art 80 CISG did not prevent RESPONDENT from rightfully avoiding the Contract

24 CLAIMANT argues that RESPONDENT was legally prevented from avoiding the Contract based on the deviations regarding the amount of coltan and the delivery terms in the first L/C because it was RESPONDENT that allegedly caused those deviations (*cf MfC, p 5, para 30*). CLAIMANT invokes Art 80 CISG, according to which 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. Contrary to CLAIMANT's allegations, Art 80 CISG does not apply because RESPONDENT did not cause the two deviations in the first L/C.

25 Firstly, RESPONDENT did not cause that the first L/C covered a 100t shipment of coltan instead of 30t. Under Art 8(2) CISG RESPONDENT's conduct leading up to the issuance of the first L/C must be interpreted according to the understanding that a reasonable third person in the shoes of CLAIMANT would have had. RESPONDENT always made it clear that RESPONDENT was only ready to deliver 30t of coltan under the Contract. In the Notice of Transport, RESPONDENT emphasised via underlining that exactly 30t of coltan were ready to be transported (*Ex C 2, p 8*). In the accompanying e-mail, RESPONDENT further stated that it would supply 30t of coltan earlier than anticipated (*Ex C 3, p 9*). Even though the accompanying e-mail mentioned a coltan surplus that RESPONDENT wanted to dispose of (*Ex C 3, p 9*), a reasonable third person would have understood that RESPONDENT wanted to deliver only 30t of coltan under the Contract. However, RESPONDENT's reference to the coltan surplus could only be understood as an offer to engage in new contract negotiations regarding a further delivery of coltan. CLAIMANT's argument that it understood this e-mail as an offer from RESPONDENT to deliver a higher amount of coltan (*MfC, p 6, para 34*) is therefore without merit. Since RESPONDENT did not cause the deviation regarding the amount of coltan referred to in the first

L/C, RESPONDENT was entitled to rely on CLAIMANT's failure to establish a conforming L/C when it avoided the Contract on 7 July 2014.

26 Secondly, it is undisputed that an employee of RESPONDENT ticked the wrong delivery terms box in the Notice of Transport, i.e. CIP instead of CIF (*PO No 2, pp 65-66, para 20; Ex C 2, p 8*). However, this mistake did not cause CLAIMANT's failure to establish a conforming L/C, as alleged by CLAIMANT (*cf MfC, p 7, paras 37-40*). The Notice of Transport indicated that the coltan would be shipped to Oceanside, Equatoriana (*Ex C 2, p 8*), which is the name of the local port (*PO No 2, p 68, para 35*). This was agreed on in the Contract (*Ex C 1, p 7, Art 5*). Following the Notice of Transport CLAIMANT sent a fax to RESPONDENT wherein CLAIMANT stated that the coltan shall be delivered under CIP Incoterms to 21 Magma Street, Oceanside, Equatoriana (*Ex C 4, p 10*), i.e. the premises of CLAIMANT. However, RESPONDENT never agreed to change the destination since such change would have led to additional costs for RESPONDENT (*cf para 23*). Ms Masrov, the assistant to RESPONDENT's General Sales Manager, even communicated to Mr Rüthli, a sales manager of CLAIMANT, that the content of the fax was "clearly unacceptable" to RESPONDENT (*Ex R 2, p 42, para 4*). CLAIMANT nevertheless issued the first L/C providing for a delivery under CIP Incoterms to 21 Magma Street, Oceanside, Equatoriana. Therefore, RESPONDENT did not cause the deviating destination and thus the deviation in the first L/C.

27 **Conclusion of (a):** RESPONDENT rightfully avoided the Contract on 7 July 2014 based on Art 64(1)(a) CISG because CLAIMANT committed a fundamental breach of contract. Under the applicable trade usage, the deviations in the first L/C constituted a fundamental breach of contract. Moreover, Art 80 CISG did not prevent RESPONDENT from rightfully avoiding the Contract on 7 July 2014 because RESPONDENT did not cause CLAIMANT's failure to perform.

(b) CLAIMANT failed to establish a conforming L/C within the additional period of time fixed by RESPONDENT

28 On 4 July 2014, RESPONDENT left CLAIMANT a voicemail, in which RESPONDENT fixed an additional period of time until the morning of 7 July 2014 for CLAIMANT to establish a conforming L/C (*PO No 2, p 66, para 23*). As ADDITIONAL PARTY did not establish a conforming L/C by 7 July 2014, CLAIMANT failed to perform within the additional period of time. Consequently, RESPONDENT was entitled to avoid the Contract on 7 July 2014 based on Art 64(1)(b) CISG.

29 The seller may fix an additional period of time once the deadline for the buyer's performance has expired (*Art 63(1) CISG; Beer Case*, *cons II.1.b*). CLAIMANT argues that the deadline to

establish an L/C did not expire on 4 July 2014 and that RESPONDENT attempted to shorten the period to establish an L/C by fixing an "additional" period of time lasting until 7 July 2014 (*MfC, p 8, paras 43 and 45*). However, CLAIMANT's allegations are without merit: when the parties have agreed on a period of time instead of a fixed date for performance, a party performing within this period of time thereby chooses the ultimate date for performance. Said party is thus no longer entitled to perform after that date (*ENDERLEIN/MASKOW, Art 37 para 1; HERBER/CZERWENKA, Art 37 para 3*). Hence, when the first L/C was established on 4 July 2014, CLAIMANT determined the ultimate date for its performance. Therefore, CLAIMANT would not have been entitled to establish a second L/C had RESPONDENT not granted CLAIMANT an additional period of time to perform. Considering these facts, RESPONDENT was entitled to grant CLAIMANT an additional period of time.

30 Moreover, the additional period of time that RESPONDENT fixed was of reasonable length, as required by Art 63(1) CISG. The length of the period is deemed reasonable when, in consideration of all circumstances of the specific case, it is technically possible for the buyer to perform its obligation within that additional period of time (*Cathode Ray Tubes Case, p 9; Wooden Poles Case, cons I.b*). The additional period of time RESPONDENT fixed lasted three days: it was fixed on Friday 4 July 2014 at approximately 10.00h Ruritanian Standard Time ("**RST**") (*Answer to RfA, p 36, para 18*) and ran until the morning of Monday 7 July 2014 (*PO No 2, p 66, para 23*). CLAIMANT itself has shown that it is technically possible to establish, i.e. issue and deliver, an L/C within two days: after receiving RESPONDENT's first letter of avoidance on 7 July 2014, CLAIMANT instructed RST Trade Bank Ltd to issue a second L/C (*RfA, p 5, paras 13-14*), which the bank issued on 8 July 2014 (*Ex C 9, p 15*) and which RESPONDENT received on 9 July 2014 00.05h MST (*Ex R 4, p 44*). Since the trade finance section of RST Trade Bank Ltd worked on Friday 4 July 2014 and in the morning of Saturday 5 July 2014 (*PO No 2, p 66, para 23*), it was technically possible for CLAIMANT to establish a new conforming L/C by the morning of 7 July 2014. Consequently, the additional period of time RESPONDENT fixed was of reasonable length in the sense of Art 63(1) CISG.

31 CLAIMANT failed to establish a conforming L/C within the additional period of time as the second L/C was only established on 8 July 2014 (*Ex C 8, p 14*). When the buyer fails to establish an L/C, the buyer fails to comply with formalities that enable payment (*Art 54 CISG; KRÖLL/MISTELIS/PERALES VISCASILLAS–BUTLER/HARINDRANATH, Art 54 para 1*). In such a case, the CISG provides the seller with the same remedies as are available when the buyer fails to pay the purchase price, including avoidance according to Art 64(1)(b) CISG (*SCHLECHTRI-*

EM/SCHWENZER–MOHS, Art 54 para 6). Hence, RESPONDENT rightfully avoided the Contract on 7 July 2014 based on Art 64(1)(b) CISG.

32 **Conclusion of (b):** RESPONDENT rightfully avoided the Contract on 7 July 2014 upon receipt of the first L/C because CLAIMANT failed to establish a conforming L/C within the additional period of time rightfully fixed by RESPONDENT in accordance with Art 64(1)(b) CISG.

(c) In any event, CLAIMANT committed an anticipatory fundamental breach of contract

33 Contrary to CLAIMANT's argument (*cf MfC, p 6, para 22*), RESPONDENT rightfully avoided the Contract on 7 July 2014 because CLAIMANT committed an anticipatory fundamental breach of contract in the sense of Art 72(1) CISG. RESPONDENT submits this argument in the event that the Tribunal finds that RESPONDENT did not rightfully avoid the Contract on 7 July 2014 for fundamental breach and that the ultimate date of CLAIMANT's performance was not set on 4 July 2014.

34 An anticipatory fundamental breach of contract occurs if it is clear to a party that the other party will fundamentally breach the contract prior to the date for performance (*Art 72(1) CISG*). The standard of "clear" is met when the other party fails to provide adequate assurance of its performance upon request by the first party (*AZEREDO DA SILVEIRA, sec III.2.a; Commentary Draft Convention, Art 63 [now Art 72] para 2; HONSELL–BRUNNER/HURNI, Art 71 para 32;*). Whether adequate assurance was provided is determined according to Art 71(3) CISG (*SCHLECHTRIEM/SCHWENZER–FOUNTOULAKIS, Art 72 para 28*). Under said provision assurance is adequate when the respective party indicates that it will fulfil its obligation as agreed (*SCHLECHTRIEM/SCHWENZER–FOUNTOULAKIS, Art 71 para 49*). The only communication by CLAIMANT that could constitute adequate assurance of CLAIMANT's performance was ADDITIONAL PARTY's e-mail of 5 July 2014 to RESPONDENT (*Ex C 6, p 12*). Said e-mail did not constitute adequate assurance of CLAIMANT's performance since it merely stated that the delivery terms would be changed (*Ex C 6, p 12*) but did not indicate that CLAIMANT would fulfil its obligation to establish the L/C as agreed. Therefore, it was clear to RESPONDENT that CLAIMANT would commit a fundamental breach of contract.

35 A party intending to avoid a contract for an anticipatory fundamental breach must give reasonable notice to the other party of its intent and fix the other party a period of time to provide adequate assurance of its performance (*Art 72(2) CISG; SCHLECHTRIEM/SCHWENZER–FOUNTOULAKIS, Art 72 paras 15-16*). Such notice has to be reasonable in the sense that the other party can be expected to provide adequate assurance of its performance within said pe-

riod of time (*BIANCA/BONELL–BENNETT, Art 72 para 3.3; WITZ/SALGER/LORENZ, Art 72 para 14*). Upon receipt of the first L/C that deviated from the Contract (*cf para 14*), RESPONDENT left CLAIMANT a voicemail on 4 July 2014 informing CLAIMANT that RESPONDENT would terminate the Contract unless a conforming L/C was established by the morning of 7 July 2014 (*PO No 2, p 66, para 21*). RESPONDENT could reasonably expect CLAIMANT or ADDITIONAL PARTY to provide adequate assurance of its performance by the morning of 7 July 2014 (*cf para 30*). However, CLAIMANT failed to provide adequate assurance of its performance. Consequently, since the period of time set by RESPONDENT was reasonable, RESPONDENT was entitled to avoid the Contract on 7 July 2014 based on Art 72(1) CISG.

36 **Conclusion of (c):** RESPONDENT rightfully avoided the Contract on 7 July 2014 upon receipt of the first L/C because CLAIMANT committed an anticipatory fundamental breach of contract in the sense of Art 72(1) CISG.

2. Alternatively, RESPONDENT rightfully avoided the Contract on 9 July 2014 upon receipt of the second L/C

37 In any event, should the Tribunal find that the ultimate date for CLAIMANT's performance was not on 4 July 2014 (*cf para 29*) and that the Contract was not terminated on 7 July 2014, RESPONDENT rightfully avoided the Contract on 9 July 2014 for fundamental breach based on Art 64(1)(a) CISG. CLAIMANT committed a fundamental breach of contract in two ways: Firstly, by failing to establish the second L/C in time (**a**). Secondly, by establishing a second L/C that did not conform to the Parties' agreement (**b**).

(a) CLAIMANT committed a fundamental breach of contract by failing to establish the second L/C in time

38 Contrary to CLAIMANT's argument (*MfC, p 11, para 56*), CLAIMANT failed to establish the second L/C in time. The contractual deadline to establish the L/C expired on 8 July 2014 at 20.00h MST (**i**) and RESPONDENT did not receive the original L/C or an authorised written advice of the L/C's issuance before the contractual deadline expired (**ii**). Since time was of the essence the belated establishment of the second L/C constituted a fundamental breach of contract (**iii**).

i. The contractual deadline to establish the L/C expired on 8 July 2014 at 20.00h MST

39 Contrary to CLAIMANT's allegation (*cf MfC, pp 11-12, paras 58-63*), the deadline to establish an L/C already expired on 8 July 2014. CLAIMANT argues that the Equatorianean method of calculating deadlines applies, according to which deadlines start running the day *after* the

triggering event (*PO No 2, p 69, para 44*). CLAIMANT bases its assertion on Art 21(1) ICC Rules (*MfC, pp 11-12, paras 60-61*), which provides that the Tribunal shall apply the appropriate rules of law if the parties have *not* agreed upon the applicable rules of law (*WEBSTER/BÜHLER, para 21-4*). However, since the Parties expressly chose Danubian law and thus the CISG to govern their Contract (*Ex C 1, p 7, Art 20; RfA, p 5, para 18*), the Tribunal is bound by the Parties' choice of law.

40 CLAIMANT correctly states that Danubian domestic law does not provide a rule to determine when the 14-days period started running and when it ended (*cf MfC, p 11, para 59; PO No 2, p 69, para 44*). However, the application of Art 20(1) CISG to the 14-days period (*Ex C 1, p 7, Art 4*) leads to 8 July 2014 as being the last day of said period. The aforementioned article provides that a period of time for acceptance starts running from the moment the offer reaches the offeree. Art 20(1) CISG is also applicable to the calculation of other fixed periods of time such as payment deadlines (*KRÜGER/WESTERMANN–GRUBER, Art 20 para 14; VON STAUDINGER/MAGNUS, Art 20 para 14; WITZ/SALGER/LORENZ, Art 20 para 3*). Therefore, it also applies to the 14-days period in Art 4 of the Contract relating to the payment of the purchase price through an L/C. Since CLAIMANT received the Notice of Transport on 25 June 2014 (*Ex C 2, p 8*) the 14-days period to establish an L/C started running on 25 June 2014 and expired on 8 July 2014. In the following it will be shown that this deadline expired at 20.00h MST on 8 July 2014.

41 RESPONDENT's business hours are relevant to determine the exact point in time at which the contractual deadline to establish an L/C expired. Art 24 CISG regulates the point in time at which "declarations regarding the contract performance or price" become effective (*SCHLECHTRIEM/SCHWENZER–SCHROETER, Art 24 para 3*). Said article governs the effectiveness of the L/C for two reasons: Firstly, the original L/C or a written authorised advice of its establishment are declarations regarding the payment of the purchase price. Secondly, either document has to reach the beneficiary in order for the L/C to be established in time (*ELLINGER/NEO, p 9; ADODO, para 2.50*). Pursuant to Art 24 CISG, a declaration made outside a party's business hours becomes effective on the next day at the opening of the party's business even though the declaration was delivered to the addressee on the day before (*cf FERRARI/KIENINGER/MANKOWSKI–MANKOWSKI, Art 24 para 27; HERBER/CZERWENKA, Art 24 para 6; NEUMAYER/MING, Art 24 sec 6*). RESPONDENT's business hours last from 08.00h MST to 20.00h MST (*Answer to RfA, p 37, para 23*) and were known to CLAIMANT and ADDITIONAL PARTY (*PO No 2, p 66, para 23*). If the L/C is delivered outside RESPONDENT's business

hours, it only becomes effective on the next day. Therefore, CLAIMANT would have had to deliver the L/C by 20.00h MST on 8 July 2014 in order to meet the contractual deadline to establish the L/C. Consequently, CLAIMANT's allegation that CLAIMANT was not obliged to establish the L/C within RESPONDENT's business hours (*MfC, p 12, para 64*) is incorrect.

42 In any event, should RESPONDENT's business hours not be considered decisive, MST is nevertheless the relevant time zone for determining the exact time of expiration of the deadline. The CISG is silent on the matter of which time zone prevails. However, Art 1.12(3) of the Contract Law of Danubia, which is a verbatim adoption of Art 1.12(3) UNIDROIT Principles (*PO No 2, p 69, para 43; Ex C 1, p 7, Art 20*), provides for a solution. Said article stipulates that in general, if a party has set a time limit for performance, the time zone at this party's place of business is the decisive one. If the circumstances of the obligation at stake point towards another time zone, that time zone prevails (*Art 1.12(3) UNIDROIT Principles; BONELL, pp 101-102; VOGENAUER/KLEINHEISTERKAMP–KLEINHEISTERKAMP, Art 1.12 para 8*). Since it is unknown which Party set the 14-days period for establishing the L/C (*PO No 2, p 64, para 12*), the circumstances of the respective obligation have to be considered in order to determine the applicable time zone. CLAIMANT's obligation to establish an L/C is only performed once RESPONDENT receives the original L/C or a written authorised advice of its issuance (*cf para 41*). Therefore, the circumstances of the obligation to establish an L/C point to MST, which is the applicable time zone in Mediterraneo (*PO No 2, p 66, para 23*), where RESPONDENT is located (*RfA, p 2, para 2*). Consequently, MST is the relevant time zone, which means that the 14-days period would have expired at 23.59h MST on 8 July 2014.

ii. RESPONDENT did not receive the original L/C or an authorised written advice of the L/C's issuance before the contractual deadline expired

43 CLAIMANT failed to meet the contractual deadline to establish an L/C, which expired at 20.00h MST on 8 July 2014 (*cf paras 39-42*). By referring to Art 18(3) CISG CLAIMANT implies that it is the time of sending of the L/C which determines whether or not the L/C was established in time (*MfC, p 13, paras 71-72*). However, as will be shown in the following, it is the time of receipt that is decisive.

44 The L/C that CLAIMANT had to establish is subject to the UCP (*Ex C 1, p 7, Art 4*). According to Art 7 UCP in connection with Art 2 UCP, a bank is irrevocably bound to pay the beneficiary upon presentation of conforming documents as of the time it issues the credit. Said article has to be interpreted in the way that an L/C is established at the moment the beneficiary *receives* the original L/C or an authorised written advice of the L/C's establishment

(*cf para 41*). The Tribunal should consider this interpretation because it reflects international practice: many jurisdictions have adopted this interpretation, e.g. England and Wales (*ELLINGER/NEO, p 10*), France (*STOUFFLET, para 354*), Germany (*ZAHN/EBERDING/HAAS, para 2/151*), Switzerland (*BERNHARDT, p 88*) and the United States of America (*ELLINGER/NEO, p 9*). RESPONDENT only *received* the original L/C on 9 July 2014 at 00.05h MST (*Ex R 4, p 44; Ex C 9, p 15*), which was after the deadline expired on 8 July 2014 at 20.00h MST or alternatively at 23.59h MST (*cf paras 39-42*).

45 In addition, the fax with an enclosed copy of the L/C that RESPONDENT received on 8 July 2014 at 22.42h MST was neither the original nor an authorised written advice. Thus, contrary to CLAIMANT's view (*MfC, pp 12-15, paras 66-77*), the fax with an enclosed copy of the L/C was insufficient to meet the contractual deadline for CLAIMANT's performance. According to Art 4(a) UCP, an L/C is a separate transaction from the contract on which it is based and banks are not bound by such a contract. This means *vice versa* that a party to the underlying contract is not part of the transaction between the bank and the beneficiary and cannot take legally binding action for said bank. Thus, an authorised written advice would usually be made by an advising bank (*CARR, p 440; ELLINGER/NEO, p 177; MALEK/QUEST, p 137*). However, where the parties did not mandate an advising bank, as in the case at hand (*PO No 2, p 66, para 25*), the issuing bank would have to send such authorised written advice (*cf CARR, p 440; ELLINGER/NEO, p 177; MALEK/QUEST, p 137*). Therefore, ADDITIONAL PARTY could not effectively notify RESPONDENT of the issuance of the L/C. It follows that the fax that ADDITIONAL PARTY sent to RESPONDENT on 8 July 2014 does not qualify as an authorised written advice. Thus, the fax did not constitute fulfilment of CLAIMANT's obligation to establish an L/C within the contractual deadline.

46 In any event, even if the fax dated 8 July 2014 could possibly constitute sufficient performance, CLAIMANT still did not meet the deadline to establish the L/C. RESPONDENT received said fax at 22.42h MST (*Ex C 10, p 16*). Contrary to CLAIMANT's submission (*MfC, p 12, para 64*), the fax thus arrived after the contractual deadline had expired on 8 July 2014 at 20.00h MST. Therefore, CLAIMANT committed a fundamental breach of contract that entitled RESPONDENT to avoid the Contract on 9 July 2014.

iii. Since time was of the essence the belated establishment of the second L/C constituted a fundamental breach of contract

47 Since time is of the essence in the coltan trade, adhering to deadlines is crucial. Under the applicable trade usage (*cf para 17*), any deviation from the Contract, e.g. a belated establish-

ment of the L/C, constitutes a fundamental breach of contract. Thus, CLAIMANT's argument that RESPONDENT was not substantially deprived of its "essential expectations" under the Contract by the belated establishment of the L/C (*MfC, pp 14-16, paras 77-85*) is irrelevant.

48 Nevertheless, CLAIMANT argues that time was not of the essence since the importance of timely performance was not expressly laid out in the Contract (*MfC, pp 15-16, paras 82-83*). However, in commodity trade time is always of the essence (*PO No 2, p 65, para 18; BRIDGE, para 6.08*) because commodities are subject to substantial price volatility (*HUBER/MULLIS, pp 223-224; LEISINGER, p 126; MULLIS, p 329; SCHWENZER, sec VI.E.4*). This is true irrespective of whether or not this is expressly laid out in the contract (*SCHLECHTRIEM/SCHWENZER–MOHS, Art 64 para 8*). This rationale also applies to coltan, as coltan also has a volatile price (*RfA, p 3, para 4*). Consequently, because time was of the essence for the performance of the Contract, CLAIMANT's belated establishment of the L/C (*cf paras 43-46*) constituted a fundamental breach of contract by CLAIMANT.

49 Moreover, CLAIMANT alleges that RESPONDENT violated the principle that a contract shall be maintained (*MfC, p 17, paras 91-92*). However, applying this principle to commodity sales is unsuitable since it would hinder the effective processing of resale transactions that are typical in commodity trade (*SPAGNOLO, p 170*). Therefore, the aforementioned principle does not apply to the Contract. Lastly, contrary to CLAIMANT's allegation (*cf MfC, p 17, paras 94-96*), there is no indication that RESPONDENT acted in bad faith when it avoided the Contract on 9 July 2014. RESPONDENT merely exercised its right to avoid a contract under the CISG.

50 **Conclusion of (a):** RESPONDENT rightfully avoided the Contract on 9 July 2014 upon receipt of the second L/C because CLAIMANT committed a fundamental breach of contract by failing to establish the second L/C before the contractual deadline expired on 8 July 2014 at 20.00h MST. Since time was of the essence, the belated establishment of the second L/C constituted a fundamental breach of contract.

(b) CLAIMANT committed a fundamental breach of contract by establishing a second L/C that did not conform to the Parties' agreement

51 RESPONDENT was further entitled to avoid the Contract on 9 July 2014 because the second L/C did not conform to the Parties' agreement. Unlike the first L/C, the second L/C required RESPONDENT to present a commercial invoice to draw under the credit (*Ex C 8, p 14*). Requiring this additional document constitutes a fundamental breach of contract in light of the applicable trade usage (*cf para 17*).

52 Art 4 of the Contract does not specify which documents are required to draw under the credit but states that the L/C shall be acceptable in content to RESPONDENT (*Ex C 1, p 7, Art 4*). The first L/C listed three specific documents that have to be presented to RST Trade Bank Ltd when drawing under the L/C: the Transport Document, the Packing List, and the Examination Certificate (*Ex C 5, p 11*). Upon receipt of the first L/C, RESPONDENT objected to parts of the L/C's content (*cf para 14*). However, RESPONDENT did not object to the required documents and thereby expressed that the L/C was acceptable with regards to these three documents. In doing so, the Parties reached an agreement that no further document, e.g. a commercial invoice, would be required under any L/C to be established under the Contract. Contrary to CLAIMANT's allegation (*cf MfC, p 14, para 74*), CLAIMANT was bound by the Parties' agreement and the first L/C.

53 Lastly, CLAIMANT alleges that requiring a commercial invoice to draw under the credit is mandatory according to Art 18 UCP (*MfC, p 14, para 73*). However, said article merely specifies the content of a commercial invoice (*SUTTON, pp 132-135*) but does not state that such commercial invoice must be included in every L/C.

54 **Conclusion of (b):** RESPONDENT rightfully avoided the Contract on 9 July 2014 upon receipt of the second L/C because the second L/C did not conform to the Parties' agreement. Thus, it constituted a fundamental breach of contract in light of the applicable trade usage.

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55 **CONCLUSION OF ISSUE I:** RESPONDENT rightfully avoided the Contract on 7 July 2014 upon receipt of the first L/C for three reasons: Firstly, under the applicable trade usage the deviations in the first L/C constituted a fundamental breach of contract. Secondly, CLAIMANT failed to establish a conforming L/C within the additional period of time fixed by RESPONDENT. Thirdly, in any event, CLAIMANT committed an anticipatory fundamental breach of contract. In the alternative, should the Tribunal find that the Contract was not terminated on 7 July 2014, RESPONDENT rightfully avoided the Contract on 9 July 2014 upon receipt of the second L/C. CLAIMANT committed a fundamental breach of contract in two ways: Firstly, because the second L/C was not established before the contractual deadline for establishing an L/C expired. Secondly, because the second L/C did not conform to the Parties' agreement.

ISSUE II: THE TRIBUNAL SHOULD LIFT THE REMAINING PART OF THE EMERGENCY ARBITRATOR'S ORDER

56 On 26 July 2014 the EA ordered RESPONDENT to refrain from disposing of 100t of coltan (*Order, p 31, ruling No 2*). Subsequent to CLAIMANT's withdrawal of its original claim for 100t of coltan, the Order was restricted to refer to 30t of coltan (*PO No 1, p 60, para 2*). CLAIMANT explained the withdrawal with the assessment of the chances for success of the claim by Mr Fasttrack, CLAIMANT's and ADDITIONAL PARTY's representative, who "[…] considered the chance for success […] very low" (*PO No 2, p 63, para 5*). While Mr Fasttrack was right in that regard, the chances for success of the claim for 30t of coltan are equally low.

57 The Tribunal has the power to annul the Order according to Art 29(3) ICC Rules and should exercise its power, primarily because the EA had no jurisdiction to order provisional measures due to Art 21 of the Contract (**1**). Furthermore, the Order was not justified at the time the EA imposed the provisional measures on 26 July 2014 (**2**). In any event, the Order is still not justified today (**3**).

1. The Emergency Arbitrator had no jurisdiction to order provisional measures due to Art 21 of the Contract

58 Pursuant to Art 29(6)(b) ICC Rules the EA Provisions (*Appendix v ICC Rules*) do not apply if the parties have agreed to opt out of the EA Provisions by using any clear wording (*cf CARLEVARIS/FERIS, p 34; FRY/GREENBERG/MAZZA, para 3-1101; VOSER/BOOG, p 83*). According to its wording and purpose, Art 21 of the Contract is such an opt-out of the EA Provisions. CLAIMANT alleges that the EA had jurisdiction to impose provisional measures for two reasons: Firstly, the Parties did not incorporate the opt-out wording proposed by the ICC into their Contract (*MfC, p 20, para 110*). Secondly, Art 21 does not constitute an opt-out of the EA Provisions (*MfC, pp 20-21, paras 107, 109, and 111-112*). However, CLAIMANT's allegations are incorrect.

59 Whether or not Art 21 of the Contract constitutes an opt-out of the EA Provisions has to be determined according to the applicable rules of contractual interpretation. As the Contract is governed by the CISG (*RfA, p 5, para 18; Answer to RfA, p 38, paras 29-30*), the applicable rules of interpretation are those set forth in Art 8 CISG. Art 8 CISG applies to contract interpretation irrespective of whether or not a specific contractual provision, such as an arbitration or forum selection clause, belongs to the subject-matter of the CISG (*SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 8 para 5*).

60 As there is no mutual intent between the Parties regarding an opt-out of the EA Provisions in the sense of Art 8(1) CISG (*Answer to RfA, p 35, para 10; Application for Emergency Measures, p 17, para 17*), the understanding of a reasonable third person prevails when interpreting Art 21 of the Contract (*Art 8(2) CISG*). According to the understanding of a reasonable third person, Art 21 is an opt-out of the EA Provisions, as will be established in the following.

61 Firstly, a reasonable third person would interpret the wording of Art 21 of the Contract as constituting an exclusive forum selection clause and thus as an opt-out of the EA Provisions. For an exclusive forum selection clause to be valid, it has to specify in its wording the forum which is given *exclusive* jurisdiction (*BORN, Forum Selection, pp 17-18; GEISINGER/VOSER–VON SEGESSER/BOOG, p 125; cf PARK, Forum Selection, p 111 and 115*). In addition, the clause must address the question of exclusivity in connection with provisional measures to extend to the latter (*BORN, Forum Selection, pp 22 and 35*). Art 21 states: "The courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures" (*Ex C 1, p 7, Art 21*). Art 21 therefore fulfils both requirements.

62 The title of Art 21 of the Contract reads "Provisional measures" (*Ex C 1, p 7, Art 21*). No other provision in the Contract explicitly relates to provisional measures or implicitly addresses such measures. Consequently, a reasonable third person would understand that provisional measures are conclusively dealt with in Art 21. Furthermore, by only mentioning "courts", Art 21 specifies the forum that has *exclusive* jurisdiction to issue provisional measures. Thus, only the *courts* at the place of business of that party against which a provisional measure is sought are competent to order provisional measures. RESPONDENT is the party against which the measure is sought. As RESPONDENT is located in Mediterraneo, a provisional measure has to be sought at the court at RESPONDENT's place of business in Mediterraneo. Because Art 21 leaves no room for the EA's jurisdiction, a reasonable third person would understand that state courts at the place of business of that party against which provisional measures are sought have exclusive jurisdiction to order provisional measures.

63 Secondly, a reasonable third person would also interpret Art 21 of the Contract as excluding the EA Provisions because of its purpose. CLAIMANT correctly states that in 2010 a subsidiary of ADDITIONAL PARTY, Precious Minerals, had unsuccessfully applied for interim relief at a court (*MfC, p 20, para 107; cf PO No 2, pp 64-65, para 13*). Precious Minerals was not granted interim relief due to a controversy regarding which court had jurisdiction to issue provi-

sional measures (*PO No 2, pp 64-65, para 13*). To prevent any controversies in the future, ADDITIONAL PARTY suggested including Art 21 of the Contract into all contracts entered into by companies belonging to the Global Minerals Group, thereby specifying the competent state court for interim relief (*MfC, p 20, para 107; Answer to RfA, p 35, para 10*). The context in which this clause was proposed indicates that the Parties thought about exclusive jurisdiction of a state court. Consequently, the purpose of Art 21 was to grant the Parties efficient interim relief amongst others, by avoiding any controversies over the question of which state court has jurisdiction (*PO No 2, pp 64-65, para 13; Answer to RfA, p 35, para 10*).

64 The application of the EA Provisions would contradict the above-mentioned purpose because the EA Provisions provide the Parties with an additional alternative forum for provisional measures being the forum of the EA. This would again create controversies about the competent forum to order provisional measures, and could possibly lead to contradictory measures. The present dispute about the competent forum to order provisional measures is precisely the kind of controversy Art 21 was meant to prevent in the first place. The Parties included Art 21 into the Contract in order to have certainty as to which forum should order provisional measures (*cf paras 61-63*). By granting the state courts *exclusive* jurisdiction to order provisional measures, the Parties made clear that the jurisdiction of state courts would exclude the EA's jurisdiction to order provisional measures. Thus, a reasonable third person would understand the purpose of Art 21 as excluding the EA Provisions.

65 Furthermore, the Parties wanted to have *efficient* interim relief (*MfC, p 20, para 108; PO No 2, pp 64-65, para 13; Answer to RfA, p 35, para 10*). For provisional measures to be efficient, they need to be enforceable (*BOOG, p 474; BORN, p 2515; CARLEVARIS/FERIS, p 37*). Whereas provisional measures of an emergency arbitrator need the assistance of a state court to be enforceable, a state court ordering provisional measures has coercive power to enforce its decisions (*GRIERSON/VAN HOOFT, p 65; JAKOB, para 61; VOSER/BOOG, p 87; YESILIRMAK, paras 3-18 and 3-24*). If CLAIMANT wanted to enforce the Order against RESPONDENT in Mediterraneo, CLAIMANT would need the assistance of state courts in Mediterraneo. However, with provisional measures ordered by a state court in Mediterraneo, there would be no need for further judicial assistance to enforce such provisional measures. Hence, as the enforcement of the EA's Order might be difficult and would be time consuming, applying the EA Provisions is inefficient.

66 Additionally, the application of the EA Provisions would allow a party in need of interim relief to apply to both the emergency arbitrator as well as a state court. However, having two

proceedings for interim relief, with possibly contradictory outcomes, would also be inefficient. To avoid such situations, the Parties chose to assign state courts the exclusive competence to order provisional measures, thus picking the option which is overall more efficient. In light of the efficiency of state court ordered provisional measures and the Parties' conforming intent to have efficient interim relief, a reasonable third person would understand the EA Provisions to be excluded by Art 21.

67 **Conclusion of 1:** The EA had no jurisdiction to impose provisional measures because Art 21 of the Contract is an opt-out of the EA Provisions. Based on the wording and purpose of Art 21, a reasonable third person would understand Art 21 as conferring exclusive jurisdiction to state courts and thus denying the EA jurisdiction to order provisional measures.

2. The Order was not justified at the time the Emergency Arbitrator imposed the provisional measures on 26 July 2014

68 The Order was not justified when issued on 26 July 2014 because none of the substantive requirements were met. The ICC Rules do not specify further substantive requirements for ordering provisional measures other than the prerequisite of "urgency" pursuant to Art 29(1) ICC Rules (*ARROYO–BOOG, Art 29 ICC Rules para 31*; *CARLEVARIS/FERIS, p 35; GRIERSON/VAN HOOFT, p 160; VOSER/BOOG, p 85*). Furthermore, there is no universal practice regarding which prerequisites an emergency arbitrator should consider before ordering provisional measures (*ARROYO–BOOG, Art 29 ICC Rules para 32; ARROYO–MAGLIANA, Art 28 ICC Rules para 4; EHLE, p 96; LEW/MISTELIS/KRÖLL, para 23-58*). However, parties may agree on the prerequisites for provisional measures which they wish to apply to their disputes (*DRAHOZAL, p 180 and 185; cf GRIERSON/VAN HOOFT, p 70; VOSER/BOOG, p 85*).

69 During the EA proceedings, CLAIMANT and RESPONDENT only ever referred to two requirements: the requirement of a good arguable case as well as the requirement of irreparable harm (*PO No 2, p 67, para 32; Order, p 30, para 7; Application for Emergency Measures, p 17, paras 18-19; Answer to RfA, p 39, para 37*). In doing so, the Parties implicitly agreed on a standard applying to provisional measures. Likewise, the EA focused on those two prerequisites and stated that these requirements were two internationally accepted principles forming the basis of Art 17A Danubian Arbitration Law (*Order, p 30, para 11; cf GRIERSON/VAN HOOFT, p 70*). As a verbatim adoption of the UNCITRAL ML (*PO No 2, p 69, para 41*), Art 17A Danubian Arbitration Law names the two above-mentioned requirements for ordering provisional measures.

70 As the two requirements apply cumulatively, it is sufficient for one requirement to be refuted to render the Order unjustified. When CLAIMANT applied for provisional measures on 11 July 2014 *(Application for Emergency Measures, pp 17-18*), neither of the two requirements was met: CLAIMANT did not face irreparable harm (**a**) and CLAIMANT had no reasonable chance to succeed on the merits of its claim (**b**).

(a) CLAIMANT did not face irreparable harm

71 As a first requirement, the party requesting interim relief has to face irreparable harm if the measure is not ordered (*Art 17A(1)(a) Danubian Arbitration Law*). The prerequisite of irreparable harm stipulated in Art 17A(1)(a) Danubian Arbitration Law implies the requirement of urgency in Art 29(1) ICC Rules (*ARROYO–BOOG, Art 29 ICC Rules para 30; cf ICC Case No 10596, cons 19*). "Urgency" requires that the requesting party cannot await the constitution of the arbitral tribunal to be granted provisional measures (*BORN, p 2475*). Therefore, urgency need not be addressed separately in the following.

72 CLAIMANT argues that it would not have been able to deliver coltan to its customers had CLAIMANT not received the coltan from RESPONDENT (*MfC, p 21, para 116*). However, CLAIMANT's argument that it faced irreparable harm (*MfC, pp 21-23, paras 114, 116-117, and 121*) is incorrect because conflict free coltan was still available on the market when the Order was issued on 26 July 2014 (*cf Order, p 29, para 5 and p 31, para 13; PO No 2, p 68, para 34*).

73 About one month before the Order was issued, i.e. at end of June 2014, one main party withdrew from the government in Xanadu, which is a major producer of conflict-free coltan. This marked the beginning of Xanadu's uncertain political situation (*Order, p 29, para 5*). However, at the time of this withdrawal the situation in Xanadu had not yet deteriorated so far as to interrupt the production of conflict free coltan. Coltan was still qualified as conflict free and available in sufficient quantities (*PO No 2, p 67, para 29; Ex R 3, p 43*). Even the rising tensions on 7 July 2014, during which people got killed (*PO No 2, pp 66-67, para 28*), did not interrupt Xanadu's production of conflict free coltan. Conflict free coltan thus remained available up until the Order was issued on 26 July 2014. Accordingly, the purchase of conflict free coltan on the market was continuously possible. Hence, CLAIMANT did not depend on RESPONDENT's delivery of 30t of coltan and could have substituted the coltan by purchasing it on the market.

74 When the Parties concluded the Contract on 28 March 2014 they agreed on a price of US$ 45 per kg of coltan (*Ex C 1, p 7, Art 3*). When the Order was issued on 26 July 2014, the market

price for coltan was no more than US$ 51 per kg (*PO No 2, p 67, para 30*). Therefore, CLAIMANT would have been able to buy 30t of coltan for no more than US$1,530,000, i.e. US$ 180,000 more than the contractually agreed price. As CLAIMANT has a line of credit of US$ 5 million (*PO No 2, p 64, para 9*), it could have afforded those additional costs. Hence, contrary to CLAIMANT's allegation (*MfC, p 22, para 117*), CLAIMANT would have been in a position to substitute the coltan expected from RESPONDENT also in practical terms, and thereby fulfil its contractual obligations towards its customers. Thus, CLAIMANT did not face irreparable harm when the Order was issued on 26 July 2014. As a consequence, the Order was not justified on the basis of the first requirement.

(b) CLAIMANT had no reasonable chance to succeed on the merits of its claim

75 As a second requirement, the party requesting interim relief must have a reasonable chance to succeed on the merits of its claim (*Art 17A(1)(b) Danubian Arbitration Law*). Contrary to CLAIMANT's arguments (*MfC, p 22, para 119*), CLAIMANT did not merit protection because it had failed to perform its contractual obligation to establish a conforming L/C within the contractual deadline. As a consequence, RESPONDENT rightfully avoided the Contract (*cf for detailed arguments **ISSUE I***). RESPONDENT had sent two letters of avoidance to CLAIMANT, both of which it submitted to the Tribunal (*Ex C 7, p 13; Ex R 4, p 44*). Even if one of the avoidances was not justified, the other one would have terminated the Contract. Thus, in any event, the Contract was avoided and CLAIMANT had no reasonable chance to compel RESPONDENT to deliver the coltan. Consequently, CLAIMANT had no reasonable chance to succeed on the merits of its claim.

76 **Conclusion of 2:** The Order was not justified at the time the EA imposed the provisional measures on 26 July 2014 because CLAIMANT did no face irreparable harm and had no reasonable chance to succeed on the merits of its claim.

3. In any event, the Order is still not justified today

77 CLAIMANT still has no reasonable chance to succeed on the merits of its claim (*cf **ISSUE I**; and para 75*). Additionally, the Order is still not justified today because CLAIMANT still does not face irreparable harm. Xanadu's production of conflict free coltan is still ensured and thus coltan remains available on the market in sufficient quantity (*cf para 73*). The circumstances in Xanadu indicate that the current situation will persist at least until after the hearings at the end of March 2015 (*PO No 2, p 67, para 30*). Therefore, CLAIMANT still has the option of purchasing 30t of coltan on the market without facing irreparable harm.

78 Furthermore, since the Order was issued on 26 July 2014, new facts have arisen which render the Order futile. According to the Procedural Timetable dated 9 October 2014, the ICC Court set the time limit for the Tribunal to render the final award for 31 July 2015 *(ICC Communications with the Parties, p 62, Time Limit for Rendering the Final Award*). The Tribunal is expected to submit a draft award within three months after the last hearing on 2 April 2015, i.e. at the latest on 2 July 2015 (*ICC Communications with the Parties, p 62, Time Limit for Rendering the Final Award*). However, CLAIMANT's contractual obligations towards its customers require it to deliver the coltan in May 2015 (*PO No 2, p 68, para 34*). Therefore, even in case of a favourable decision by the Tribunal, CLAIMANT would fail to fulfil its contractual obligations unless it procures 30t of coltan on the market before the issuance of the award. Thus, upholding the Order, which merely stops RESPONDENT from disposing of the coltan otherwise but does not transfer any quantities to CLAIMANT, is of no use to CLAIMANT and would have no effect on CLAIMANT's alleged irreparable harm.

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79 **CONCLUSION OF ISSUE II:** The Tribunal should lift the remaining part of the EA's Order because the EA had no jurisdiction to impose provisional measures based on Art 21 of the Contract. Furthermore, the Tribunal should lift the remaining part of the EA's Order because the Order was already not justified at the time the EA imposed provisional measures on 26 July 2014. In any event, the Order is still not justified today.

ISSUE III: THE TRIBUNAL HAS JURISDICTION OVER ADDITIONAL PARTY

80 The Tribunal has jurisdiction over ADDITIONAL PARTY for three reasons: Firstly, RESPONDENT and ADDITIONAL PARTY concluded an arbitration agreement (**1**). Secondly and alternatively, the arbitration agreement in Art 20 of the Contract can be extended to ADDITIONAL PARTY based on the Group of Companies (**"GoC"**) doctrine (**2**). Thirdly, in any event, the principle of good faith prohibits ADDITIONAL PARTY from objecting to the Tribunal's jurisdiction (**3**).

1. RESPONDENT and ADDITIONAL PARTY concluded an arbitration agreement

81 Both RESPONDENT and ADDITIONAL PARTY are parties to the arbitration agreement contained in Art 20 of the Contract. As ADDITIONAL PARTY correctly points out, express consent of all parties to enter into an arbitration agreement leads to the conclusion of an arbitration agreement (*MfC, p 25, para 135*). However, ADDITIONAL PARTY fails to consider that an arbitration agreement may also be concluded by inferred consent. Inferred consent is established when a reasonable third person in the shoes of one party would interpret the other party's behaviour as consent to the arbitration agreement (*cf Investors v West Bromwich, p 912; BERGER/KELLERHALS, paras 414-415; HUBER, p 236; PARK, Non-Signatories, para 1.46 SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 8 para 20; STEINGRUBER, para 7.30*). As the Contract is governed by the CISG (*cf para 59*), the formation of an arbitration agreement therein is determined by Art 8 CISG (*cf Hibor v Trelleborg, para 1.6; Tissue Machine Case, para 22; SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 8 para 5*). In the case at hand, there is consent of both Parties to enter into an arbitration agreement because: Firstly, RESPONDENT consented to the arbitration agreement with ADDITIONAL PARTY (**a**). Secondly, ADDITIONAL PARTY's behaviour can reasonably be interpreted as consent to the arbitration agreement with RESPONDENT (**b**).

(a) RESPONDENT consented to the arbitration agreement with ADDITIONAL PARTY

82 RESPONDENT always intended for ADDITIONAL PARTY to be a party to the whole Contract, including the arbitration agreement. Mr Winter, the General Sales Manager of RESPONDENT, insisted already at the beginning of the contract negotiations on the inclusion of ADDITIONAL PARTY into the Contract (*cf Answer to RfA, p 34, para 7*) and he furthermore also understood ADDITIONAL PARTY to be a contracting party (*Ex R 1, p 41, para 7*). Accordingly, RESPONDENT signed the Contract on the last page along with ADDITIONAL PARTY and thereby unambiguously expressed its intent to conclude an arbitration agreement with ADDITIONAL PARTY (*cf Ex C 1, p 7*).

83 ADDITIONAL PARTY argues that RESPONDENT never understood the former to be a party to the Contract (*MfC, pp 28-29, para 154)*, submitting that the letters of avoidance were only sent to CLAIMANT. ADDITIONAL PARTY bases this argument on Art 8 CISG, under which the parties' behaviour before, at, and after the conclusion of a contract is relevant for a reasonable third person in order to determine the parties' intention at the time of the conclusion of the contract (*Art 8(3) CISG, HONSELL–MELIS, Art 8 para 14; SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 8 paras 52-54*). However, ADDITIONAL PARTY's argument is based on an incorrect interpretation of the facts. RESPONDENT sent the letters of avoidance exclusively to CLAIMANT because only CLAIMANT was directly affected by the avoidance. ADDITIONAL PARTY was neither the buyer nor the recipient of the coltan under the Contract (*cf Ex C 1, p 7*). Thus, ADDITIONAL PARTY did not need to be directly informed about the termination of the Contract. Furthermore, RESPONDENT could reasonably assume that ADDITIONAL PARTY would be informed because ADDITIONAL PARTY had always been informed about prior communication between CLAIMANT and RESPONDENT (*cf Ex C 6, p 12*). This assumption was confirmed after RESPONDENT had left a voicemail with CLAIMANT on 4 July 2014 regarding the first L/C, since ADDITIONAL PARTY replied to this voicemail (*cf Ex C 6, p 12*). Thus, RESPONDENT's behaviour after the conclusion of the Contract does not interfere with the understanding a reasonable third person would have had, namely that RESPONDENT expressly consented to the arbitration agreement with ADDITIONAL PARTY.

(b) ADDITIONAL PARTY's behavior can reasonably be interpreted as consent to the arbitration agreement with RESPONDENT

84 A reasonable third person in the shoes of RESPONDENT would have understood ADDITIONAL PARTY's behaviour as showing consent to the arbitration agreement with RESPONDENT: Firstly, ADDITIONAL PARTY's endorsement of the Contract can reasonably be interpreted as showing consent to the arbitration agreement (**i**). Secondly, ADDITIONAL PARTY's fax of 8 July 2014 can reasonably be interpreted as showing consent to the arbitration agreement (**ii**). Thirdly, ADDITIONAL PARTY exhibited no behaviour that could reasonably be interpreted as a refusal to become a party to the arbitration agreement (**iii**).

i. ADDITIONAL PARTY's endorsement of the Contract can reasonably be interpreted as showing consent to the arbitration agreement

85 ADDITIONAL PARTY is bound by the arbitration agreement because a reasonable third person in the shoes of RESPONDENT would have understood ADDITIONAL PARTY's endorsement of the Contract as consent to the Contract as such and therefore also to the arbitration agreement.

86 Firstly, according to the general definition an "endorsement" (or "indorsement") is a signature placed on an instrument by which the endorsee becomes a party to the instrument and liable for its payment (*cf Ouachita Industries v Anderson, p 813; Barron's Law Dictionary, Indorsement*). In another case where a party endorsed a contract by signing it, the judge held that an endorsement can only have a meaningful effect if it involves the endorsee's agreement to arbitration. The judge argued that "one would expect rational businessmen to agree on a common method of dispute resolution […] in the interests of efficiency, expediency and costs" as otherwise a dispute would be decided by "some unspecified court in some unspecified jurisdiction according to some unspecified governing law" (*Stellar Shipping v Hudson Shipping Lines, paras 53 and 56; cf with the same reasoning Fiona Trust v Privalov, para 13*). As RESPONDENT and ADDITIONAL PARTY had agreed on arbitration in previous contracts (*PO No 2, p 64, para 10),* a reasonable third person in the shoes of RESPONDENT would understand that ADDITIONAL PARTY wanted to settle possible disputes by an arbitral tribunal in Danubia under Danubian law (*cf Ex C 1, p 7, Art 20*). Hence, by endorsing the Contract ADDITIONAL PARTY became a party to the Contract and, as such, a party to the arbitration agreement.

87 Secondly, ADDITIONAL PARTY endorsed the Contract with its signature on the last page of the Contract (*Ex C 1, p 7*). The signatory to a contract has to indicate which provisions its signature shall cover, if the signatory wants its obligation to be limited to specific provisions (*General Electric v Deutz Case, paras 35-36 and 51; cf HANOTIAU, Complex Arbitrations, footnote 225*). ADDITIONAL PARTY's signature on the last page of the Contract has no restrictions with regard to provisions which should be covered. Above ADDITIONAL PARTY's signature it states generally "Endorsed for Global Minerals" (*Ex C 1, p 7*). Thus, by signing the Contract as a whole, ADDITIONAL PARTY became a party to the arbitration agreement in Art 20 of the Contract.

88 Thirdly, the endorsement was not limited to merely covering the duty to establish an L/C (*cf MfC, p 25, para 132*) but formed a stronger commitment encompassing consent to the Contract and the arbitration agreement. If the term "endorse" merely meant providing financial security by establishing an L/C ADDITIONAL PARTY would have "endorsed" previous contracts in favour of CLAIMANT or its other subsidiaries too. However, ADDITIONAL PARTY has never previously formally endorsed contracts between other suppliers and CLAIMANT for which it provided financial security (*PO No 2, p 64, para 12; Answer to RfJ, p 50, para 5*). Furthermore, ADDITIONAL PARTY had never endorsed contracts between its subsidiaries and

RESPONDENT (*cf PO No 2, p 64, para 12*), even though RESPONDENT had insisted on financial securities before (*cf Ex R 1, p 40, para 5*). Hence, this first endorsement of 28 March 2014 must be reasonably interpreted as a stronger commitment of ADDITIONAL PARTY to the Contract. This interpretation is further supported by the fact that ADDITIONAL PARTY endorsed the Contract in order to obtain a price reduction of more than US$ 6,500 for CLAIMANT (*cf Ex R 1, p 41, para 7*). Consequently, the endorsement could reasonably be understood as ADDITIONAL PARTY's consent to the Contract and the arbitration agreement.

89 Fourthly, ADDITIONAL PARTY's argument based on the Pyramids Case (*MfC, p 25, para 134*) has no merit because that case is not comparable to the case at hand. The Pyramids Case addressed a different question, i.e. whether or not a state could rely on its immunity to avoid an arbitration agreement and not whether or not a parent company consented to a contract (*Pyramids Case, pp 113-114, cons 34-40; cf BLESSING, State Arbitrations, pp 462-463*).

90 Lastly, RESPONDENT's understanding that ADDITIONAL PARTY is a party to the arbitration agreement prevails. ADDITIONAL PARTY claims that the endorsement unambiguously meant that ADDITIONAL PARTY did not become a party to the arbitration agreement (*MfC, p 25, para 133*), putting forward that the wording was not discussed or used before and that the term "endorsed" has no particular meaning in any of the jurisdictions involved (*MfC, p 25, para 133*). However, these facts do not support ADDITIONAL PARTY's alleged interpretation but would rather indicate that the meaning of the term "endorsed" was ambiguous. As a consequence, RESPONDENT's understanding of the word "endorsed" shall prevail on the basis of the *contra proferentem* rule. According to the *contra proferentem* rule, an ambiguous contractual provision has to be interpreted against the party that drafted the provision *(Mastrobuono v Shearson Lehman Hutton, p 62; FOUCHARD/GAILLARD/GOLDMAN, para 479; GIRSBERGER/VOSER, para 222*). This rule applies because the Contract and its interpretation are governed by the CISG (*cf para 59*), which recognises the *contra proferentem* rule (*Automobile Case, para 37; HUBER, p 237; SCHLECHTRIEM/SCHWENZER–SCHMIDT-KESSEL, Art 8 para 49*). Under the *contra proferentem* rule the term "endorse" has to be understood against ADDITIONAL PARTY as ADDITIONAL PARTY introduced said expression (*PO No 2, p 64, para 12*). Thus, RESPONDENT's understanding that ADDITIONAL PARTY is a party to the arbitration agreement (*Ex R 1, p 41, para 7*) prevails.

91 Considering the above, a reasonable third person in the shoes of RESPONDENT would understand ADDITIONAL PARTY to be a party to the Contract due to its endorsement of the Contract.

ii. ADDITIONAL PARTY's fax of 8 July 2014 can reasonably be interpreted as showing consent to the arbitration agreement

92 Furthermore, ADDITIONAL PARTY showed that it considered itself bound to the arbitration agreement when it invoked the arbitration agreement by sending the fax of 8 July 2014 (*Ex C 10, p 16*) as a response to RESPONDENT's first letter of avoidance of the Contract. ADDITIONAL PARTY sent the fax in its own name and stated therein "We are determined to enforce our rights in arbitration and ask you to give us assurance" (*Ex C 10, p 16*). Thus, a reasonable third person in the shoes of RESPONDENT would have understood that ADDITIONAL PARTY considered itself to be a party to the arbitration agreement.

iii. ADDITIONAL PARTY exhibited no behavior that could reasonably be interpreted as a refusal to become a party to the arbitration agreement

93 ADDITIONAL PARTY alleges that it refused to be listed as a party to the Contract (*MfC, p 25, para 132*). However, this allegation is imprecise. By refusing to be listed ADDITIONAL PARTY merely refused to be listed as an additional *buyer* (*Answer to RfJ, p 50, para 6*). This showed ADDITIONAL PARTY's intent not to be responsible for both obligations of the buyer, the obligation to pay *and* the obligation to accept the goods as set forth in Art 53 CISG. As CLAIMANT and ADDITIONAL PARTY had always requested that the coltan should be delivered solely to CLAIMANT, ADDITIONAL PARTY was not in a position to accept the goods (*Ex C 4, p 10; RfA, p 3, para 6*). Accordingly, contrary to ADDITIONAL PARTY's allegation (*MfC, p 25, para 132*), it is irrelevant that ADDITIONAL PARTY is not listed in Art 1 of the Contract because Art 1 only defines the buyer and the seller of the purchase (*Ex C 1, p 7*). A reasonable third person would not understand ADDITIONAL PARTY's refusal to be listed as a buyer to the Contract as a refusal to be a contracting party at all.

94 **Conclusion of 1:** RESPONDENT and ADDITIONAL PARTY concluded an arbitration agreement because: Firstly, RESPONDENT consented to the arbitration agreement with ADDITIONAL PARTY. Secondly, ADDITIONAL PARTY's behaviour can reasonably be interpreted as showing consent to the arbitration agreement with RESPONDENT.

2. Alternatively, the arbitration agreement in Art 20 of the Contract can be extended to ADDITIONAL PARTY based on the Group of Companies doctrine

95 Even if ADDITIONAL PARTY were considered to be a non-signatory, the arbitration agreement contained in Art 20 of the Contract can be extended to ADDITIONAL PARTY based on the GoC doctrine. Said doctrine is based on the Dow Chemical Case (*ICC Case No 4131; cf ICC Case No 6519, pp 423-425; REDFERN/HUNTER, para 2.42; JÜRSCHIK, p 36*). The essence of this doc-

trine is that a non-signatory is bound to arbitration if the group structure between the non-signatory and a signatory, as well as the involvement of the non-signatory in the contract, created the impression that the non-signatory had an intent to arbitrate (*cf in detail para 102*). The arbitration agreement contained in Art 20 of the Contract should be extended to ADDITIONAL PARTY because: Firstly, the GoC doctrine is applicable under the relevant laws (**a**). Secondly, both requirements of the GoC doctrine are met (**b**).

(a) The Group of Companies doctrine is applicable under the relevant laws

96 Under Art 41 ICC Rules, an award has to conform to both the law at the place of arbitration and, if it is to be enforced, to the law at the place of enforcement (*ARROYO–SPOORENBERG, Art 41 ICC Rules, para 9; LEW/MISTELLIS/KRÖLL, para 15-56; WEBSTER/BÜHLER, paras 41-6 and 41-9; cf ICC Case No 9787, paras 5-7; MOSES, p 203; POUDRET/BESSON, paras 7.67-7.69*). The relevant laws in the case at hand are those of Danubia and Ruritania respectively. The place of arbitration is Danubia (*Ex C 1, p 7*) and the award would be enforced against ADDITIONAL PARTY at its place of business in Ruritania (*cf RfA, p 2, para 1*). Neither the law of Danubia nor Ruritania hinders the applicability of the GoC doctrine: Firstly, Danubian law as the law at the place of arbitration has not rejected the GoC doctrine (**i**). Secondly, Ruritanian law as the law at the place of enforcement has accepted the GoC doctrine (**ii**).

i. Danubian law as the law at the place of arbitration has not rejected the Group of Companies doctrine

97 Contrary to ADDITIONAL PARTY's allegation (*MfC, p 26, para 139*), Danubian law does not reject the GoC doctrine. Danubian law does not contain a provision addressing the doctrine and Danubian courts have not yet decided on the applicability of the GoC doctrine (*PO No 2, p 69, para 46*). Accordingly, there is *no* ruling rejecting the GoC doctrine in Danubia. The Tribunal would thus render an enforceable award if it based its jurisdiction over ADDITIONAL PARTY on the GoC doctrine.

98 ADDITIONAL PARTY might argue that the Danubian Supreme Court would overturn a possible award. This argument would be founded on the statements of certain authors who suggest that Danubian courts will most likely not follow the GoC doctrine because the Danubian Supreme Court has repeatedly held that arbitration is based on consent (*PO No 2, p 69, para 46; cf MfC, p 26, para 82*). However, applying the GoC doctrine would be in line with the Danubian Supreme Court's previous decisions as the doctrine is merely a tool to interpret the parties' intent at the time of the conclusion of a contract (*ICC Case No 7604-7610, pp 515-516; BLESSING, Introduction to Arbitration, para 497; BORN, p 1450; JÜRSCHIK, p 171;*

STEINGRUBER, para 9.36; YOUSSEF, para 6.7; cf Sponsor v Lestrade, pp 156-157; HANOTIAU, Multiple Parties, para 2.05). Thus, the GoC doctrine does not attempt to circumvent the requirement of consent emphasised by the Danubian Supreme Court. Rather, it allows a tribunal or court to determine whether a party's intent to arbitrate was given at the time of contract conclusion. Consequently, since the application of the GoC doctrine does not contradict the Danubian Supreme Court's previous practice, there is no reason to assume that the Supreme Court would not uphold an award that bases the Tribunal's jurisdiction over ADDITIONAL PARTY on the GoC doctrine.

99 Furthermore, ADDITIONAL PARTY claims that the GoC doctrine is not universally recognised based on some court decisions from England and Poland (*cf MfC, p 26, para 140*). ADDITIONAL PARTY thereby implies that Danubian courts would also disregard the doctrine. However, Danubian courts will apply the doctrine should they rely on international practice as the GoC is internationally recognised. The GoC doctrine is an established doctrine amongst ICC tribunals (*ICC Case No 4504, p 291; ICC Case No 5103, p 370; ICC Case No 6673, pp 433-434; ICC Case No 7604-7610, pp 515-516; ICC Case No 8910, pp 577-579; ICC Case No 10988, p 724; ICC Case No 12605, pp 732-733; ICC Case No 14114, p 912*). Notable authors such as BLESSING (*Law applicable, pp 175-178*), BORN (*p 1448*) FOUCHARD/GAILLARD/GOLDMAN (*paras 500-506*) and GIRSBERGER/VOSER (*para 238*) support the GoC doctrine. Furthermore, several jurisdictions such as Belgium (*WEGEN/WILSKE, p 103*), Brazil (*Trelleborg v Anel, pp 124-125; SEREC/COES, pp 71-72*), Canada (*Xerox v MPI, para 45; WEGEN/WILSKE, p 120*), Egypt (*Egyptian Court of Cassation, Case No 4729, pp 105-106; SALAH, pp 76-79*) and France (*Isover v Dow, p 100; WEGEN/WILSKE, p 202*) have explicitly recognised the GoC doctrine. In fact, contrary to ADDITIONAL PARTY's allegation (*MfC, p 26, para 140)*, even Poland has not rejected the doctrine. The Warsaw Appellate Court did not refer to the GoC doctrine at all in the case cited by CLAIMANT (*Warsaw Appellate Court, Case No VI ACa 462/06, pp 2-10*). Therefore, Danubian courts are likely to recognise and to apply the GoC doctrine.

100 Even if there is a risk that the Tribunal's award were overturned, the Tribunal should not bar RESPONDENT from obtaining an award. Rather, the Tribunal should render an award because RESPONDENT alone bears this risk.

ii. Ruritanian law as the law at the place of enforcement has accepted the Group of Companies doctrine

101 An award of the Tribunal, in which the Tribunal affirms its jurisdiction over ADDITIONAL PARTY based on the GoC doctrine, will be enforceable in Ruritania. The Ruritanian Supreme Court has explicitly recognised the GoC doctrine (*Answer to RfJ, p 50, para 7*) and thus the doctrine is applicable under Ruritanian law.

(b) Both requirements of the Group of Companies doctrine are met

102 There are two requirements which must be met for the GoC doctrine to apply: Firstly, there must be a group structure between the non-signatory and a signatory which is close enough to constitute a single economic entity (*Dow Chemical Case, p 151; ICC Case No 5894, p 27; ICC Case No 6519, pp 423-425; BREKOULAKIS, para 5.15; YOUSSEF, para 6.5; ZUBERBÜHLER, p 25*). Secondly, the non-signatory must appear as an actual party to the contract by virtue of its role in the conclusion, performance, or termination of the contract containing the arbitration clause (*Dow Chemical Case, p 151; ICC Case No 5103, p 370; ICC Case No 10758, pp 542-543; Sponsor v Lestrade, p 156; PARK, Non-Signatories, para 1.72*). The arbitration agreement can be extended to ADDITIONAL PARTY based on the GoC doctrine because both requirements are met. Firstly, there is a sufficiently close group structure between CLAIMANT and ADDITIONAL PARTY (**i**). Secondly, ADDITIONAL PARTY appears as an actual party to the Contract by virtue of its involvement in the Contract (**ii**).

i. There is a sufficiently close group structure between CLAIMANT and ADDITIONAL PARTY

103 A group structure is considered to be sufficiently close if one group member has significant control over the other group member(s) (*ICC Case No 5894, p 27; ICC Case No 8385, pp 484-485; BREKOULAKIS, paras 5.15 and 5.18*). Although ADDITIONAL PARTY has neglected to argue on the first requirement for the application of the GoC doctrine in all its submissions, it is necessary for the application of the GoC doctrine that the structure of the group is close enough to make the group appear to be a single economic entity (*cf para 102*). ADDITIONAL PARTY exercises significant control over CLAIMANT because ADDITIONAL PARTY caused the incorporation of CLAIMANT (*PO No 2, p 63, para 7*) and owns 100% of CLAIMANT's shares (*cf PO No 2, p 63, para 7*). Furthermore, as soon as CLAIMANT was established, ADDITIONAL PARTY assigned former employees of its own to key positions in CLAIMANT's management. One example is Mr Summer, CLAIMANT's COO, who is a former assistant of Mr Storm, ADDITIONAL PARTY's COO (*PO No 2, p 63, para 7*). Moreover, ADDITIONAL PARTY factually

determines CLAIMANT's financial fate as CLAIMANT has no valuable assets other than a credit line of US$ 5,000,000, which is guaranteed by ADDITIONAL PARTY (*PO No 2, p 64, para 9*). Not only was ADDITIONAL PARTY involved in the present contract negotiations (*cf in detail para 107*) but it had also participated in negotiations between CLAIMANT and other suppliers as well as customers (*PO No 2, p 63, para 7*). Consequently, ADDITIONAL PARTY exercises significant control over CLAIMANT in daily business as well as financially.

104 Furthermore, there is a close group structure if there exist strong financial and organisational links between the companies (*ICC Case No 5894, p 27; BREKOULAKIS, para 5.15*). Such links exist for example if: "the parent finances the subsidiary", "the parent caused the incorporation of the subsidiary", or the parent "pays or guarantees debts of the dominated corporation" (*Bridas I, note 11, para 2 Nos 2 and 6, para 3 No 2; cf TYLER/KOVARSKY/STEWART, para 4.87*). As demonstrated above (*cf para 103*), ADDITIONAL PARTY initiated CLAIMANT's incorporation and has financed CLAIMANT ever since. Also, it was ADDITIONAL PARTY who provided the L/C and thereby tried to pay CLAIMANT's debt under the Contract (*PO No 2, p 63, para 7*). Consequently, there are strong financial and organisational links between CLAIMANT and ADDITIONAL PARTY.

105 In light of the above, CLAIMANT and ADDITIONAL PARTY form a group that is sufficiently close to constitute a single economic entity under the GoC doctrine.

ii. ADDITIONAL PARTY appears as an actual party to the Contract by virtue of its involvement in the Contract

106 ADDITIONAL PARTY claims that it had no actual intent to arbitrate (*MfC, pp 27-28, paras 146-150*). However, under the GoC doctrine, it is decisive whether or not a non-signatory's acts created the impression that the non-signatory was a party to the Contract (*Dow Chemical Case, p 151; ICC Case No 10758, pp 542-543; Sponsor v Lestrade, p 156; PARK, Non-Signatories, para 1.72*). ADDITIONAL PARTY was actively involved in the conclusion and performance of the Contract and thereby appears as an actual party to the Contract.

107 Firstly, by initiating and participating in the negotiations between CLAIMANT and RESPONDENT, ADDITIONAL PARTY was actively involved in the conclusion of the Contract. ADDITIONAL PARTY initiated the negotiations when Mr Storm, ADDITIONAL PARTY's COO, called Mr Winter, RESPONDENT's General Sales Manager, in mid-March 2014 (*Ex R 1, p 40, para 2*). Subsequently, Mr Storm introduced Mr Summer, CLAIMANT's COO, to Mr Winter on 23 March 2014 and continued to participate in the negotiations (*Ex R 1, p 40, para 2*). At one point during the negotiations, Mr Storm even had the authority to turn down an offer by RE-

SPONDENT (*cf Ex R 1, p 41, para 8*). Mr Storm further negotiated a price deduction in favour of CLAIMANT in return for the endorsement of the Contract (*Ex R 1, p 41, para 7; cf para 88*). Considering the above facts, ADDITIONAL PARTY appears as an actual party to the Contract due to its heavy involvement in the negotiations of the Contract.

108 Secondly, by providing the L/Cs, ADDITIONAL PARTY was actively involved in the performance of the Contract (*Ex C 5, p 11; Ex C 8, p 14*). Although the Contract stated that the "buyer" had to provide the L/C (*Ex C 1, p 7, Art 4*), the L/C was provided by ADDITIONAL PARTY (*Ex C 5, p 11; Ex C 8, p 14*). In doing so, ADDITIONAL PARTY performed part of CLAIMANT's payment obligation under the Contract (*cf para 12*) and thus did more than simply providing a financial security. Consequently, ADDITIONAL PARTY's argument that providing a mere financial security is not a sufficient involvement (*cf MfC, p 28, para 150*) is irrelevant.

109 Thirdly, by writing the faxes of 27 June 2014 and 8 July 2014, ADDITIONAL PARTY was actively involved in the performance of the Contract. In the fax of 27 June 2014, ADDITIONAL PARTY wrote in its own name and in the name of CLAIMANT and expressed CLAIMANT's intent to buy more coltan (*Ex C 4, p 10*). Contrary to CLAIMANT's argument (*MfC, pp 28-29, paras 151-155*), this fax constituted an offer to amend the Contract and was thus considerably more involvement than what was necessary for the establishment of an L/C. The second fax dated 8 July 2014 was written solely in the name of ADDITIONAL PARTY (*Ex C 10, p 16; cf para 92*). This second fax not only contained a copy of the second L/C but also clarified that ADDITIONAL PARTY still expected a delivery of 100t of coltan to CLAIMANT (*Ex C 10, p 16*). ADDITIONAL PARTY therein threatened to commence arbitration should RESPONDENT not deliver the coltan (*cf para 92*). As a result both the faxes of 27 June 2014 and 8 July 2014 were not limited to the establishment of the L/C. They show the active involvement of ADDITIONAL PARTY in the performance of the Contract.

110 In light of the above, ADDITIONAL PARTY appeared as an actual party to the Contract by virtue of its involvement in the conclusion and performance of the Contract.

111 **Conclusion of 2:** The arbitration agreement in Art 20 of the Contract can be extended to ADDITIONAL PARTY based on the GoC doctrine. The GoC doctrine is applicable under the relevant laws of Danubia and Ruritania. Furthermore, both requirements of the GoC doctrine are met as there is a close group structure between CLAIMANT and ADDITIONAL PARTY, and ADDITIONAL PARTY appeared as an actual party to the Contract by virtue of its involvement in the negotiations and performance of the Contract.

3. In any event, the principle of good faith prohibits ADDITIONAL PARTY from objecting to the Tribunal's jurisdiction

112 In any event, ADDITIONAL PARTY is bound to the arbitration agreement contained in Art 20 of the Contract based on the principle of good faith. The principle of good faith is a general principle of the CISG (*Art 7 CISG; HUBER/MULLIS, p 8; SCHLECHTRIEM/BUTLER, pp 49-50*) and internationally recognised (*cf CREMADES, p 765; HONSELL–MELIS, Art 7 para 9; THOMAS, p 964*). The CISG is further part of Danubian law, i.e. the law governing the Contract (*RfA, p 5, para 18; PO No 1, p 61, para 5(3); cf para 39*). Thus ADDITIONAL PARTY's allegation that Danubian law does not recognise any general principle of good faith (*cf MfC, p 29, paras 159-161*) is inaccurate.

113 The principle of good faith is extensive and encompasses further principles, e.g. the principles of arbitral estoppel and *venire contra factum proprium* (*BORN, p 1477; GREENBERG/KEE/WEERAMANTRY, para 4.75; HUGHES, para 2*). The internationally recognised rule that these two principles share (*STEINGRUBER, paras 9.53-9.54; THOMAS, p 958*) is that a party may not object to a tribunal's jurisdiction where such an objection would be inconsistent with the previous actions of said party. Additionally, the rule requires that the objection is unjust to the other party because that party relied on the existence of an arbitration agreement (*BOWDEN, p 127; CREMADES, p 769; STEINGRUBER, para 9.54; cf ICC Case No 11405, in HANOTIAU, Complex Arbitrations, para 161*). Both of these requirements are met in the case at hand.

114 Firstly, ADDITIONAL PARTY's objection to the jurisdiction of the Tribunal is inconsistent with its previous actions. ADDITIONAL PARTY played a major role in the conclusion of the Contract, although ADDITIONAL PARTY now denies this role (*cf MfC, p 27, para 84*). ADDITIONAL PARTY negotiated on behalf of CLAIMANT (*cf Ex R 1, p 41, para 9; also para 107*) and eventually even endorsed the whole Contract (*cf Ex C 1, p 7; also para 85*). In doing so, ADDITIONAL PARTY created an incentive for RESPONDENT to sign the Contract (*cf Answer to RfA, pp 37-38, para 28*). Furthermore, ADDITIONAL PARTY's behaviour led to the impression that ADDITIONAL PARTY would stand behind the Contract. Moreover, by endorsing the Contract ADDITIONAL PARTY gave the impression that it agreed to arbitration because the Contract includes an arbitration agreement (*Ex C 1, p 7, Art 20*). Thus, to now object to the Tribunal's jurisdiction is inconsistent with ADDITIONAL PARTY's previous actions.

115 Secondly, ADDITIONAL PARTY's objection to the Tribunal's jurisdiction is unjust to RESPONDENT because RESPONDENT had good reasons to rely on ADDITIONAL PARTY's inclusion into the Contract (*cf para 114*). RESPONDENT even granted CLAIMANT favourable terms in return for

ADDITIONAL PARTY's inclusion by reducing transportation costs for the C- instead of F- Incoterms (*cf Ex R 1, p 40, para 5*) as well as giving a price reduction of more than US$ 6,500 (*cf para 88*). Additionally, it would be unjust to RESPONDENT if the Tribunal denied its jurisdiction over ADDITIONAL PARTY because CLAIMANT would most likely be unable to satisfy RESPONDENT's claim for damages as well as the costs of the arbitration proceedings. CLAIMANT's assets are limited (*Ex R 1, p 40, para 2; cf para 103*) and a further line of credit in favour of CLAIMANT is guaranteed only by ADDITIONAL PARTY (*PO No 2, p 64, para 9; cf para 103*). In light of previous experience, there is a substantial risk that ADDITIONAL PARTY will withdraw its guarantee of the line of credit if RESPONDENT succeeds on the damage claim against CLAIMANT. ADDITIONAL PARTY has left RESPONDENT with unpaid debts once before (*PO No 2, pp 64-65, para 13; Ex R 1, p 40, para 4*). Before 2010, RESPONDENT and ADDITIONAL PARTY had concluded a supply contract which, upon request of ADDITIONAL PARTY, was transferred to Precious Minerals, another subsidiary of ADDITIONAL PARTY (*PO No 2, pp 64-65, para 13; Ex R 1, p 40, para 4*). Just two months after this transfer, Precious Minerals faced difficulties in paying the purchase price. Subsequently, ADDITIONAL PARTY let its subsidiary go insolvent, which resulted in a financial loss for RESPONDENT (*Ex R 1, p 40, para 4*). Should ADDITIONAL PARTY follow its business practice and withdraw its guarantee to the line of credit, CLAIMANT will be unable to satisfy RESPONDENT's claims. Thus, ADDITIONAL PARTY's objection to the Tribunal's jurisdiction is unjust to RESPONDENT.

116 As the two requirements of the principles of *venire contra factum proprium* and arbitral estoppel are met, there is no need to go into the detail of ADDITIONAL PARTY's remarks on the theory of piercing the corporate veil or fraud (*MfC, pp 31-32, paras 165-168 and 170-174*).

117 **Conclusion of 3:** The principle of good faith prohibits ADDITIONAL PARTY from objecting to the Tribunal's jurisdiction. ADDITIONAL PARTY's objection to the jurisdiction of the Tribunal is inconsistent with previous actions and unjust to RESPONDENT.

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118 **CONCLUSION OF ISSUE III:** The Tribunal has jurisdiction over ADDITIONAL PARTY. RESPONDENT and ADDITIONAL PARTY concluded an arbitration agreement. Alternatively, the arbitration agreement between CLAIMANT and RESPONDENT can be extended to ADDITIONAL PARTY as a non-signatory based on the GoC doctrine. In any event, the principle of good faith prohibits ADDITIONAL PARTY from objecting to the Tribunal's jurisdiction. Therefore, the Tribunal is requested to affirm its jurisdiction over ADDITIONAL PARTY.

REQUESTS FOR RELIEF

In light of the submissions above, counsel for RESPONDENT respectfully requests the Tribunal to find that:

(1) RESPONDENT rightfully avoided the Contract;

(2) The remaining part of the Order imposed by the Emergency Arbitrator against RESPONDENT on 26 July 2014 should be lifted;

(3) The Tribunal has jurisdiction over ADDITIONAL PARTY.

Respectfully submitted on 22 January 2015 by

/s/ TILLA CAVENG	/s/ ROBIN ERNST	/s/ SABINE NEUHAUS
/s/ JASCHA TRUBOWITZ	/s/ ANDREAS WEHOWSKY	/s/ ANNA WILLI

We hereby confirm that only the persons, whose names are listed above, have written this memorandum.