MEMORANDUM FOR CLAIMANT

On Behalf Of:

Vulcan Coltan Ltd.		**Global Minerals Ltd**
21 Magma Street, Oceanside, Oceanside, Equatoriana	AND	Excavation Place 5 Hansetown, Ruritania
(CLAIMANT)		(ADDITIONAL PARTY)

Against

Mediterranio Mining SOE
5 – 6 Mineral Street, Capital City
Mediterraneo
(RESPONDENT)

Peter F. Murphy ¶Omar Bissoon ¶ Alexandru Caleap ¶ Stephen Dickson
Waleed Hammad ¶Amy Gordon ¶ Peyman Askarinejad

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List of Abbreviations

&	And
%	Percent
Art	Article
Artt	Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CE	Claimant's Exhibit
CEO	Chief Executive Officer
CLAIMANT	Vulcan Coltan Ltd, 21 Magma Street, Oceanside, Equatoriana. Oceanside, Equatoriana (CLAIMANT).
COO	Chief Operating Officer
CIF	Cost, Insurance and Freight (named port of destination)
CIP	Carriage and Insurance Paid to (named place of destination)
GDP	Gross Domestic Product
GSM	General Sales Manager
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce Rules of Arbitration
Inc	Incorporated

LC	Letter of Credit
Ltd	Limited
Memorandum	Memorandum for Claimant submitted by the Robert Gordon University Team participating at the 22nd Willem C. Vis International Commercial Arbitration Moot.
MT	Metric Tonne
NA	Notice of Avoidance
No.	Number
NT	Notice of Transport
Op	Opinion
P/PP	Page/Pages
Para/Paras	Paragraph/Paragraphs
Parties	Vulcan Coltan Ltd and Mediterraneo Mining SOE
PC	Parent Company
PO1	Procedural Order 1
PO2	Procedural Order 2
RESPONDENT	Mediterraneo Mining SOE, 5 – 6 Mineral Street, Capital City, Mediterraneo.
RE	RESPONDENT's Exhibit
RST	Ruritanian Standard Time
SC	Application for Arbitration and Statement of Claim

SD	Statement of Defense
Sec. Comm.	Secretariat Commentary
TB	Trade Bank
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$/USD	United States Dollar
V	Versus
Vol	Volume

Statement of Facts

1. The Parties to this arbitration are Vulcan Coltan Ltd, (hereinafter referred to as "CLAIMANT") and Mediterraneo Mining SOE (hereinafter referred to as "RESPONDENT"). This memorandum is being submitted on behalf of both CLAIMANT and Global Minerals Ltd solely for the purposes of procedural economy and no inferences can be drawn from this fact for the legal matters discussed herein [PO2, para 2]. Unless expressly stated otherwise the submissions made hereinafter are to be treated as made on behalf of CLAIMANT.

2. CLAIMANT is a rare minerals broker based in Equatoriana. It is a 100% subsidiary of Global Minerals Ltd (*hereinafter referred to as "Parent Company" or "PC" or "Global Minerals"*), which is world-wide broker of rare minerals based in Ruritania.

3. CLAIMANT has been created by its PC to focus more on the very difficult and competitive market of Equatoriana. Equatoriana has a highly developed electronics industry accounting for 10% of Equatoriana's GDP for which coltan is required. CLAIMANT is an entirely separate legal entity registered in Equatoriana with its own assets and personnel and it keeps its own books [PO2, para 7].

4. RESPONDENT is a state-owned enterprise based in Mediterraneo. It operates all the mines in Mediterraneo including the country's only coltan mine.

5. During the last ten (10) years, a strong business relationship has developed between PC and RESPONDENT, each considering the other a strategic partner. For the best interest of both companies, and to further enhance their business relationship, both PC and RESPONDENT have agreed to develop their bespoke agreements to reflect the level of trust each of them has had towards the other.

6. On 23 March 2014, CLAIMANT expressed their interest to RESPONDENT to purchase 100 metric tons of coltan under the same mutually beneficial contractual terms and condition, particularly the payment and delivery conditions, as its PC.

7. RESPONDENT was unable to commit to sell to CLAIMANT more than thirty (30) metric tons because of the capacity of the mines and commitments to other clients.

8. On 28 March 2014, CLAIMANT and RESPONDENT (hereinafter referred to as "the Parties") and PC (as a witness) concluded a Contract for the supply of 30 metric tons of coltan. Art 2 of said contract states that the seller will issue a Notice of Transport ("NT") when the agreed coltan quantity becomes available and not later than 31 August 2014.

9. On 25 June 2014 CLAIMANT issued by email a Notice of Transport for 30 metric tons of coltan. Attached to the NT by way of a cover letter RESPONDENT stated that: *"….I am delighted to inform you that we are able to fulfill your wish as expressed during the contract negotiation and supply the 30*

metric tons of coltan earlier than anticipated. One of our major customers went bankrupt and defaulted on its purchase of 150 metric tons of coltan and 100 tons of copper. That has left us with some surplus which we are keen to dispose of as quickly as possible due to our having limited storage capacity. I am looking forward to receiving the Letter of Credit at your earliest convenience to be able to authorize shipment…."[Emphasis added]

10. Based on the background negotiations and previous transactions CLAIMANT reasonably interpreted this to mean that RESPONDENT was now in a position to supply 100 tons of coltan.

11. On 28 June 2014 PC faxed confirmation of the increased order of 100 metric tons of coltan as offered by RESPONDENT. Furthermore the faxed confirmation included for the revised delivery terms offered by RESPONDENTS in the Notice of Transport.

12. On 4 July 2014 a Letter of Credit facilitating payment for the maximum of 100 metric tons of coltan CIP Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana was faxed to RESPONDENT

13. On 5 July 2014 PC emailed RESPONDENT confirming the content of a voicemail message to CLAIMAINT from RESPONDENT whereby RESPONDENT rejected the LC of 4 July 2014.

14. On 7 July 2014 RESPONDENT couriered a letter to CLAIMANT formally avoiding its contract of 28 March 2014. RESPONDENT cited two reasons for avoiding the Contract being I. The Letter of Credit covers payment for

minimum 100 metric tons of coltan as opposed to the Contract which specified 30 metric tons, and II. The delivery terms of the LC are different from the Contract.

15. On or around the same time, certain events unfolded in Xanadu which had a drastic impact on the availability of coltan worldwide. Xanadu being the supplier of 28% of the world market for conflict free coltan. Upon becoming aware of this change in the coltan market, RESPONDENT unmeritoriously sought to immediately avoid the Contract and take advantage of the worsening market condition for financial gain.

16. On 11 July 2014 CLAIMANT filed its Request for Arbitration and the Application of Emergency Measures to the Secretariat of the International Court of Arbitration. Request for Arbitration was granted the same day by the International Court of Arbitration ("ICC").

17. On 26 July 2014 the Parties received the Order of the Emergency Arbitrator ordering RESPONDENT not to dispose of any of the 100 metric tons of coltan required to fulfill the Contract of 28 March 2014 as amended by PC on 27 June 2014. On 8 August 2014 RESPONDENT filed its Answer to the Request for Arbitration.

18. On 3 October 2014 and 29 October 2014 Procedural Order No 1 and 2 were issued respectively. In Procedural Order No 1parties agreed that the Order of the Emergency Arbitrator will be lifted in respect of 100 tons of coltan, but the Order will remain in force for the original contact amount of 30 tons.

SECTION ONE

Respondent has not Avoided the Contract of 28 March 2014 by its Declarations of Avoidance:

DECLARATION OF AVOIDANCE OF 7 JULY 2014 WAS INEFFECTIVE

19. RESPONDENT alleges that it has avoided the Contract of 28 March 2014 with CLAIMANT on the grounds that any deviation from the Contract is considered to be a fundamental breach of contract. RESPONENT notes in particular that, the Letter of Credit relates to 100 metric tons of coltan instead of 30 metric tons, and, the Letter of Credit contains different delivery terms.

20. It is submitted here that CLAIMANT was not in breach of Contract of and furthermore CLAIMAINT believes that the RESPONDENT is looking to profit from an unmeritorious avoidance of contract. There was no deviation from the contract and therefore no fundamental breach.

Sale of Commodities Differs From Sale of Goods

21. Without admitting liability, CLAIMANT acknowledges that the sale and trading of commodities differs from the sale of goods. The commodities market is generally a volatile market susceptible to external influences such as political strife, war and the weather. Commodity prices can fluctuate significantly as a result and that fluctuation can happen during the legacy of the sales transactions as well as before or after the contract of sale.[Winsor]

22. Unlike the sale of goods, commodities are easily and quickly transferable. Even when a sale is avoided (for whatever reason) the seller is normally in a

position to sell on the commodity without delay. The actual effect in terms of losses due to the failure of the original sale depends mainly on the commodity trading price and its movement at the time.

23. If the commodity price is on the rise the seller will gain from a failed transition as the next buyer will have to pay more for the same commodity. However, should the commodity price fall, the seller's losses may be significantly disproportionate to the value of the sales contract. Therefore, it is easy to see how one might profit from unmeritorious avoidance of contract. [Takahashi]

The Letter of Credit Did Not Breach the Terms of the Contract

24. Contrary to RESPONDENT claims the Letter of Credit ("LC") does not relate to 100 tons of coltan instead of the 30 metric tons agreed to the Contract. What the LC does is to simply facilitate payment of delivery of up to a maximum quantity of 100 metric tons of coltan at the agreed rate of US$45/kg. That facility is available whether 10 metric ton or 100 metric tons of coltan is delivered.

25. Furthermore, the 'Packing List' as defined in the LC stipulates a quantity of "not less than 30 metric tons per shipment". On that basis, the minimum that can be shipped (without issue) is 30 metric tons and the maximum that can be shipped (without issue) is 90 metric tons in total. It is therefore incorrect to assert the LC relates only to 100 metric tons of coltan. In fact, the correct assertion would be that the LC relates to shipments in 'lots' of 30 metric tons and up to a maximum quantity of 100 metric tons, if so required.

26. Accordingly, the terms of the LC satisfies the terms of the Contract with regard to the quantities of coltan and payment of such quantities.

The Letter Of Credit Contained the Correct Delivery Terms

27. Contrary to what RESPONDENT has claimed, the LC contains the correct delivery terms. Article 5 of the Contract stipulates the delivery term to be CIF (Cost Insurance and Freight). However the Notice of Transport ("NT") issued by RESPONDENT changed the required delivery to CIP (Carriage and Insurance paid). That change was accepted by CLAIMANT and confirmed through the LC. It is evidenced that it was RESPONDENT who changed the Contract through changes introduced in the NT not CLAIMANT.

28. The NT as defined in the Contract will be issued 'when the agreed coltan quantity becomes available for transport'. It is reasonable to say that with the issuance of the NT that RESPONDENT is intends to conclude the contract and be contractually bound once the LT is issued. In effect that RESPONDENTS offer of CIF as contained in the NT was a definite 'proposal for concluding a contract' received [Art14 CISG, UP 2.1.2.].

29. Further CLAIMANT followed exactly RESPONDENT's instructions [Tetracycline case] in the NT and acted upon such definite offer when it issued the LC. Art 16(b) CISG states that an offer cannot be revoked 'if it was reasonable for the offeree to rely on the offer as being irrevocable and the

offeree has acted in reliance of the offer.' CLAIMANT had good reason to believe that the offer was irrevocable acted upon it.

30. "Favor contractus is often said to be an underlying principle of the CISG according to Article 7(2) of the Convention" [Keller]. If Keller's assertion is true, the parties to the contract should at all times seek to uphold the contract in a cooperative and favorable manner and 'sometimes even an adaptation of the Contract.' It is submitted to the TRIBUNAL that CLAIMANT was upholding the principle of *favor contractus* when it issued its LC on 7 July 2014 and behaved in a cooperative manner to the 'adaptation' introduced by RESPONDENT to secure the Contract.

Uncertainty in designation of CIF/CIP in Incoterms

31. In several earlier arbitration awards it was held that the scope of an 'Incoterms rule' has in practice been exceeded. For instance, the traditional, so-called 'maritime' terms have been used for multimodal transport [ICC case no. 9773; Jolivet, p. 49] or for transporting containerized goods, which is in fact contrary to ICC's recommendations.

32. What often happens is a change to the obligations governed by the Incoterms rule, reflecting the parties' wish to make this rule more precise. For instance, parties could agree that a 'given vessel' shall be used or that the chosen vessel shall 'take a given shipping route' [Jolivet, p. 44; ICC case no. 5910].

33. Insurance cover can accordingly be extended, e.g. by setting the amount insured higher than the minimum cover provided in the Incoterms rules

[Jolivet, p. 48; ICC case no. 11715]. Such changes can in fact alter the legal arrangement established by the chosen term and cause the sale to become subject to an Incoterms rule not initially contemplated by the parties [Jolivet, p. 49; ICC case no. 12596]. Such changes will likely result in major cost changes; whereas, the same 'Incoterms' rule remains unchanged.

34. A typical problem, which accounts for a large part of the difficulties in applying the Incoterms rules, concerns the interpretation of the 'C group' Incoterms rules. As Jolivet notes, a typical issue is *"Where these rules have been specified, if the parties have placed upon the seller an obligation relating to the performance of the contract of transport in the country of destination, were they wanting to modify only the transfer of costs or also the transfer of risks?"* [Jolivet, p. 49; ICC case no. 6209].

35. Another example provided by the same author is the opportunity given to the seller, whose delivery obligations are performed at the departure point, i.e. in the country of exportation, to inspect the goods at their destination to ascertain their conformity [Jolivet, p. 49-50; ICC cases nos. 8191 and 11715].

36. The above are only examples of multiple situations in which the parties have sought to alter the content of a term. Such changes are referred to as variants and they have been regarded variously by ICC in the different versions of the Incoterms rules [Jolivet, p. 49].

Usage and Practices

37. It is further submitted that CLAIMANT was right to accept the changed delivery terms described in the Notice of Transport. CLAIMANT parent

company, Global Minerals Ltd., provided the LC on behalf of CLAIMANT. Global Minerals had sales agreements with RESPONDENT as far backs as 2000 and was accustomed to CIP delivery terms.

38. It is submitted here that CLAIMANT parent company, with authority, agreed the CIP delivery terms without hesitation as it was normal practices to use CIP. The CIP term of delivery is in force for many decades whereas CIF has only been introduced in Incoterms 2010. In reality the use of CIF or CIP depends on company to company practices and not on the actual meaning. This reality is reflected for in ART 9(1) CISG. Art 9(1) CIGS confirms parties are bound by usage and practices which they have established between themselves.

39. Accordingly, it would be wrong in law to hold CLAIMANT liable for breach of contract while there were binding agreements between the parties on the terms of shipment. The CLAIMANT acted in good faith and conformity with RESPONDENT's offer for CIP and issued the LC in a timely manner and in full compliance with the duration stated in the Contract and the shipment terms mentioned in the Notice of Transport.

40. However, the Respondent, via letter of 7 July 2014, has wrongfully sought to avoid the contract due to his misinterpretation of the quantities included in the LC and due to his deviation from the contract requirements related to shipment terms. CLAIMANT contends that both arguments stated in the said letter, are attributable to the RESPONDENT and do not constitute a

fundamental breach by CLAIMANT. RESPONDENT has no entitlement to avoid the contract.

Fundamental Breach of Contract

41. ART 25 CISG defines what is considered fundamental breach. Fundamental breach is considered as such a detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract.

42. A fundamental breach is a breach that has a paramount importance in the economy of the contract. Since the avoidance of the contract is a drastic measure it should be used only in regard to fundamental breaches of the contract, not for trivial ones. [Huber and Mullis]

43. The second major requirement for a breach to be regarded as substantial detriment is that the detriment caused by the breach must have some degree of seriousness so that it substantially deprives the victim of breach of what he is entitled to expect under the contract

There was no Detriment and Substantial Deprivation

44. "The 'detriment' described in ART (25) CISG must be viewed in the light of the circumstances of each case e.g. the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party". [Secretariat]

45. Under the contract RESPONDENT was entitled to expect CIF, however, and as demonstrated above, RESPONDENT through its own actions agreed to accept different delivery terms which were subsequently agreed by CLAIMANT. Therefore there was no breach. Even if it was accepted by the

Tribunal that the contract term was breached it is submitted here that there would be no substantial effect caused by such breach. The nature of the contractual obligation to make delivery and to make delivery by sea to Oceanside, Equatoriana has not changed. Art 60 GISG defines the buyer's obligations to take delivery. CLAIMANT has not obstructed delivery or the taking over of the goods.

46. Further, RESPONDENT has not evidenced any monetary loss as a result of the claimed breach. The change from CIF to CIP has only a minor effect on the overall contract value. It is conceivable that RESPONDENT insurance premium may have increased slightly for coverage of increased modes of transport. CIF requires insurance to cover the many modes of shipping considered with CIF as opposed to just sea shipping covered by CIP. In fact the only known additional cost to RESPONDENT would be the shared costs between CLAIMANT and RESPONDENT for unloading at port of import and loading on truck at port of import. It is hard to consider that such detriment would substantially deprive RESPONDENT of what he was entitled to expect under the Contract.

Foreseeability

47. ART 25 CISG states that fundamental breach is applicable 'unless the party in breach did not foresee and reasonable person of the same kind in the same circumstances would not have foreseen such a result.

48. Had CLAIMANT intentionally derogated from the terms of the Contract and in particular Article 5, it would be right for RESPONDENT to allege fundamental breach and seek to avoid the contract. But as it has been

demonstrated above, it was RESPONDENT who changed the Contract Terms through a willingness to accept different terms of delivery. It is therefore not reasonable to suggest that CLAIMANT could have foreseen that agreement to the introduced change which was reflective of customary usages would result in avoidance of contract by RESPONDENT.

49. The opposite is true for RESPONDENT. It is not reasonable to suggest that RESPONDENT was surprised by CLAIMANTS actions. In light of the practices established between the Parties, the CIP delivery term cannot be regarded as too harsh or surprising for the RESPONDENT. [Turku]

CLAIMANT's option to Cure

50. The framing of the text of Art. 49 was 'based on the conclusion that ... avoidance should not be available for trivial departures that may readily be redressed by damages (Art. 74)'. [Honed, at para. 304.]

Respondent has lost its right to avoid the contract

51. Furthermore, under Art 64(2) CISG the seller loses his right to avoid the contract where the buyer has paid the price of the goods. In our case CLAIMANT has facilitated payment of the full price through the irrevocable LC.

52. Further, Art 80 CISG states that a party cannot rely on a fault of the other party if that fault was caused by the first party's acts or omissions. It is submitted to this tribunal that RESPONDENT is looking to profit from its own act of changing the delivery terms. Should RESPONDENT be successful in its claim for avoidance it will profit greatly from the increasing price of coltan due to the events in Xanadu.

Matters of Time

53. RESPONDENT had 12 days to remedy the NT prior to issuance of the LC by CLAIMANT. RESPONDENT then took a further 3 days to issue its 'Letter of Avoidance' from issue of LC. CLAIMANT contends that the resulting avoidance of contract is in contrast to RESPONDENT prior actions when it had time enough to correct what it now calls fundamental breach.

DECLARATION OF AVOIDANCE OF 9 JULY 2014 WAS UNMERITORIOUS

54. On 9 July 2014, the RESPONDENT rejected the second LC which was sent by the CLAIMANT, based on the following reasons: Firstly, there was no longer a contract to be performed and secondly LC was, anyway, sent belatedly.

55. The claim that "by the time of receipt" of the second LC "the RESPONDENT had validly avoided the contract" [RESPONDENT's Answer, page 38, paragraph 33] is without merit.

56. In the voicemail message left on 4 July 2014 the RESPONDENT sets a new time limit for the CLAIMANT's to provide a new LC "at the latest by Monday morning, our time" [Procedural Order No 2, paragraph 21], despite that the contract entitled the CLAIMANT to pay in 14 days after the NT [CLAIMANT's Exhibit C 1, page 7, article 4]. Following this time limit, on 7 July the RESPONDENT avoided the contract of sale [CLAIMANT's EXHIBIT C 7].

57. Based on the avoidance of contract from 7 July 2014 the RESPONDENT considers that any subsequent performance is invalid: "we are not accepting

the second LC as performance since there is no longer any contract to be performed" [RESPONDENT' Exhibit R 4].

58. Article 63 of the CISG regulates the procedure that needs to be followed in respect of the additional term of performance, which is known in the law doctrine as the Nachfrist procedure: *"The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligation"*

59. The seller's right to fix an additional time for performance is available in the event that a breach by delay had occurred prior the issuing of the notice for additional time. In other words, the procedure cannot be invoked without an initial failure of performance. In this regard, the word "additional" implies that at least one period of time has already elapsed [Kimbel].

60. Therefore, the new term the RESPONDENT gave, i.e. "at the latest by Monday morning, our time" is unlawful.

61. Furthermore, since the term for performance, i.e. 14 days from the NT, established under the contract did not expire on the date of 9 July 2014 our contract was still in existence.

The claim that "the second LC was sent belatedly" is unjustified

62. In article 4 of the contract the Parties had mutually agreed in regard to the modality of payment and the time in which the performance should take place. A Letter of Credit shall be established not later than fourteen days after the buyer received the Notice of Transport in regard to the shipment.

63. The word "after" read in its ordinary sense means later than, following, subsequent to, succeeding and, thus, excludes the day when the NT was received from being counted in. Therefore, a literal interpretation of the clause yields to the conclusion that the first day when the 14 days term starts to run is 26 June 2014 and it ends on 9 July 2014.

64. It is a common principle of the interpretation of contracts that the words should be given the ordinary meaning. Also, international instruments like the Uniform Customs and Practice for Documentary Credits, shows the evident meaning of the word "after" that is to exclude the date of reference when calculating time limits, which is exactly the same as our case. [Article 3 of the UCP 600]

65. Hence, since the wording of the clause is clear, there is no need to resort to any of the laws of the parties on calculating time limits.

66. The parties inserted this term in the contract which means that it was their common intention to give the word "*after*" the meaning that it excludes the day when the NT is received. By the same token, it is the meaning that a reasonable person of the same kind as the parties would have given to the word "*after*" in the present circumstances.

67. Any particular understanding of the word "*after*" that the RESPONENT might attempt to advance – i.e. that according to his laws the day of the occurrence of the triggering event should be counted in – should be read in the view of article 8 (1) of the CISG. More exactly it should prove that it was the common intention of the parties to give that particular meaning to the

word "after" or that the CLAIMANT was aware about it, which is not the case here.

68. In this perspective, the courts held that *"a party who asserts that article 8(1) applies – i.e. that the other party knew or could not been unaware of the former party's intent – must prove that assertion*" [Switzerland, St. Gallen], otherwise the subjective intent of that party is irrelevant [Switzerland, Genève].

69. Given that the second LC was actually sent [CLAIMANT'S Exhibit C 9] and received by the RESPONDENT on time [RESPONDENT'S Exhibit R 1, page 41, paragraph 10], the Tribunal should observe that that RESPONDENT had no reasons to avoid the contract on the date of 9 July 2014.

70. In conclusion, based on the above presented reasons, the plea of the RESPONDENT should be rejected and the CLAIMANT should be granted with an award that entitles him to the delivery of 30 metric tons of coltan.

SECTION TWO.

The Arbitral Tribunal should dismiss the request of the respondent to lift the order made By the Emergency Arbitrator against the RESPONDENT on 26 July 2014

71. With regards to the measures granted by the Emergency Arbitrator, it is the Claimant's submission that such measures should be upheld, thus preventing the Respondent from disposing of the remaining 30 metric tons of coltan. In support of this the Claimant respectfully submits the following:

- That the jurisdiction of the Emergency Arbitrator is not impeded by what is contained within article 21 of the sales agreement when read in regards to article 29(6)(c) of the ICC rules.
- That the substantive conditions for an order of this nature to be granted were and still remain present.

The question of jurisdiction

72. Considering firstly the relevant section of article 29 in the ICC rules, it is stated that;

73. *"The Emergency Arbitrator Provisions shall not apply if.....the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures."*

74. When read with article 21 of the sales agreement it is possible to conclude that this article provides precisely the type of procedure article 29 is referring to. The article reads;

75. *"The courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures."*

76. The Claimant submits that this article exists merely to give guidance as to court jurisdiction should the matter be dealt with in that manner rather than being a method to interfere with any arbitration procedure. It is clear from article 5 of appendix 5 within the ICC rules that an emergency arbitrator is given the widest scope possible when granting orders;

77. "The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

78. Relating specifically to the "Urgency of the application," the Claimant submits that article 29(1) be applied in favor of the application. [Born at 2456]

79. "A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V."

80. As a tribunal has not been formed at this time and given the substantial amount of time this formation and any eventual decision will take, the Claimant submits that their order falls within the level of "Urgency" this article was created to provide for. [Procedural Order No. 2, para 13 - 14]

81. Even in the event that Article 21 of the Sales Agreement is meant to be interpreted as a pre-arbitral agreement, to apply it as such would be to incorrectly apply the discretionary doctrine of *Forum Non Conveniens* demonstrated in Piper Aircraft Co. v. Reyno 454 US 235 (1981).

82. In applying this doctrine, the choice of forum made by the Parties must be considered as well as the effect any change of forum may have upon each party's case. It was made clear in Koster v. Lumbermens Mut. Cas. Co [1978]

A.C. 795, 822D that the choice of venue made by the Parties should be given the highest possible consideration. Given that this arbitration is only taking place through contract, mutual agreement has therefore already been established to avoid court as a primary forum.

83. With regard to the effect a change of forum may have on the parties cases, Lord Diplock stated in MacShannon v Rockware Glass Ltd (See Lord Diplock in The Abidin Daver [1984] AC 398 – change of forum discussed in relation to "Specific advantage" one forum would provide over another) that a change of forum should be grated where the case; "*may be tried more suitably for the interests of all the Parties and the ends of justice*". Given that the purpose of an arbitration is to allow the case of each party to be heard before a third party with specialist knowledge, it cannot be considered either in the interest of justice or the parties to commute such a specialist ruling to a court where the level of knowledge would in no way be as relevantly specialised

Substantive conditions

84. In relation to the conditions under which the order was granted the Claimant submits that claim made was of considerable merit. It is further submitted that irreparable harm to the Claimant's business and reputation would follow any revocation of the order, harm which greatly outweigh any hardship the Respondent may currently face.

85. The Claimant submits that there was every reason to believe that the 100 tons (and currently 30 tons) agreement would be upheld by the Respondent given their intimate knowledge of the Respondent's previous business dealings

despite their silence on the matter. The Claimant was therefore entitled to enter into further business agreements based upon this assumption.

86. The Claimant further submits that due to the scarce quantities of coltan currently known to exist, the current crisis in Xanadu could prevent the Claimant from continuing business. The Respondent's attempt to lift the order cannot be justified as it would allow materials within a validly formed contract rightfully the property of the Claimant to be resold at a significantly increased price [Procedural Order No. 2 para 30]. The Respondent's motive being purely financial, their goal should not be achieved at the expense of the Claimant.

87. Finally it is submitted by the Claimant that irreparable harm would result in the lifting of this order. The remaining 30 tons of coltan which the Respondent seeks to deprive the Claimant of would prevent the Claimant from fulfilling their great many pressing contractual obligations regarding its sale. The losses resulting from such would not only be financially crippling but would also have a seriously detrimental effect on the Claimant's reputation, preventing them from attempting to act successfully within the marketplace in future. The aforementioned issues in Xanadu and the current scarcity of coltan make this harm the very definition of irreparable. If the damage to the Claimant's reputation does not prevent them from continuing to trade, the fact that the Respondent is one of the few, if not the only source, of the requisite amount of coltan most likely will. Any monetary compensation that may be granted by the Tribunal to the Claimant cannot remedy the detriment which the CLAIMANT'S reputation will suffer

in the event that the Respondent is allowed to sell the remaining 30 tons of coltan. The CLAIMANT emphasises here that such a decision may lead it to close down its business as no future clients will dare to approach a new company that has defaulted on its very first business transactions. [Procedural Order No. 2, para 34].

It is for these reasons that the Claimant respectfully submits the order granted by the Emergency Arbitrator be upheld.

SECTION THREE

The Arbitral Tribunal does not have Jurisdiction over the Additional Party, i.e. Global Minerals

GLOBAL MINERALS CANNOT BE SEEN AS A PARTY TO THE CONTRACT ON APPLICATION OF THE GROUP OF COMPANIES DOCTRINE

88. The two parties to the contract are expressly named in the contract [Art. 1 of Exhibit C 1]. The contracting parties are named as Mediterraneo (Seller) and Vulcan (Buyer). In constructing this contract, the Tribunal must give effect to the express written terms of the agreement, which is usually strong evidence of the intention of the parties [Stone, para 6.5.4]. The parol evidence rule states *"If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given…so as to add to or subtract from, or in any manner to vary or qualify the written contract"* [Chitty, 12-096].

89. By application of the parol evidence rule, the written agreement of the parties should not be disregarded or interpreted in a way that is contrary or

inconsistent with the most obvious meaning conveyed by the words of the agreement [Stone, para. 6.5.4], especially when the instrument is meant to represent the formal and conclusive expression of the agreement [Chitty, para 12-107]. [Stone and Chitty, it should be noted, are two of the pre-eminent doctrinal authorities on common law contract law.]

90. The words of the contract between Mediterraneo and Vulcan are unambiguous in this regard. They have no special or technical meaning [Chitty para 12-052; 12-121] beyond what is ordinarily given in contractual arrangements and what is understood by parties seasoned in commercial undertakings. Nowhere in the document is Global named as a party to the contact.

91. Therefore, the words taken as they stand from the document itself [Chitty para 12-043] excludes Global Minerals as a party to this contract. As Lord Hope commented in Melanesian Mission Trust Board v Australian Mutual Provident Society "*If the meaning of the words is clear and unambiguous, why should the court not assume that it was what the parties meant?" Chitty further cements this point in para.12-051 stating that "The starting point in construing a contract is that the words are given their ordinary and natural meaning*."

92. Beyond the obvious meaning of the words in the contract, if the intention of the parties [UNIDROIT Art 4.1; Fouchard, Gaillard, Goldman para 477] is examined by considering the "*factual matrix*" and the "*available background*" [Chitty para 12-043] of the transactions leading up to the formation of the contract, it becomes clear that there was no intention by Global to create legal relations with Mediterraneo. In fact Mr. Summer made it expressly clear that

Global would not become a party to the contract [Para 7 of the Respondent's Counterclaims and para 6 of Claimant's Reply to Counterclaim - Answer to Request for Rejoinder]. It was never the intention of Global to enter into a contract with Respondent.

93. It is therefore established that Global Minerals is not a party to the contact, either expressly or impliedly, and they never intended to be. By application of the principle of privity of contracts they therefore have no rights nor obligations under the contract, including any right or obligation related to arbitration [Chitty para 18-021; Stone 5.2] Global Minerals is closely related to one of the two named parties by virtue of being the parent company of Vulcan, but close relationship of a third party to the parties of a contract does not imply any rights or obligations under the contract [Tweddle v Atkinson].

94. It may be argued that Global Minerals "*endorsed*" the contract between Vulcan& Mediterraneo. What is the meaning of this and does it have any legal implications? The meaning of "endorsed" as used in the contract is not defined in the contract, nor established by previous dealings between the parties [Procedural Order No. 2 para 12]. A review of the relevant authorities in law in case law or civil law does not provide guidance as to the application of this term in contractual agreements similar to the context of the case under review i.e. where a party endorses a contract without being named as a party in the contract.

Tribunal to dismiss the "Endorsement" by Global Minerals as lacking legal force

95. Chitty para 12-121 states that where words are to be understood in a "*special sense*", extrinsic evidence is admissible to prove that special sense. Where the

parties used a "*private dictionary*" in determining the meaning of such words, the evidence is admissible to show what the special meaning is attributed to the word used. However, as pointed out previously, no definition of the word endorsed was given anywhere by the parties. Further, there is no implicit or trade usage definition of endorsement "*in light of custom*" since there is no indication that it is being used by other commercial entities in the territories of Danubia, Mediterraneo, Ruritania, or Equatoriana or between the parties themselves [Chitty, para. 12 - 058 - 059; UNIDROIT 4.3 (e)]. Because of this vacuum of precedent and contextual meaning, the word "*endorsed*" is rendered a "*meaningless phrase*" which can be ignored as per Nicolene v Simmonds. Consequently, the Tribunal is left with no reasonable option but to dismiss this endorsement as lacking legal force and therefore without any effect. Global cannot be held to be a party to the contract because the word is so vague that it is incurable [Chitty, para. 12-125] and therefore Global have to be rendered a non-signatory to the contract.

Express and implied consent are absent

96. "*Like consummated romance, arbitration rests on consent*" [Park, p 1]. Park further states "*The legal framework for normal commercial arbitration (whether statute, treaty, or institutional rules) continues to require some assent to arbitrate, whether expressed, implied, or incorporated by reference to other documents or transactions*" [Park, p 8]. According to Strong, "the existence of a binding arbitration agreement is a necessary precondition to arbitration…" [Strong, p 141]. UNCTAD asserts the requirement of consent as indispensable "*arbitration must be founded on the agreement of the parties. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between*

them, it also means that the authority of the arbitral tribunal is limited to that which the parties have agreed" [p 6].

97. Furthermore, whereas the merits of the dispute are to be subject to arbitration, it is in the greater interest of justice to have the interim measures subject to the decision of the Arbitral Tribunal because the latter will be in a better position to rule on the matter after having familiarized itself with the whole dispute. It is respectfully submitted that any ordinary court who may have only jurisdiction to rule on the interim measures will not be well-position as the court (in the instant case this Arbitral Tribunal) who will try the merits of the case. For this reason, and based on the aforementioned mentioned doctrine *forum non-conveniens*, the Tribunal is the more convenient forum to order any interim measures or/and to review the order of the emergency arbitrator.

98. It is inescapable then that consent is a fundamental requirement for engaging in the process of arbitration. Without consent, the legitimacy of the arbitration process becomes questionable and compromised. As Bermann pointed out "*If a court compels a party to arbitrate despite its not having consented to arbitration, the legitimacy of both the arbitration and any resulting award is compromised. This follows from the fundamental principle that commercial arbitration is consent-based, and that a party cannot be bound by an agreement to arbitrate or by the resulting award unless it consented to be so bound*"

Since the "Endorsement" lacks legal force and Global Minerals is not named as a party, there is no consent by the latter to arbitrate

99. Global Minerals are not a party to the contract, and did not implicitly or expressly consent to an arbitration agreement at any time. Therefore, based

on the principle of consent, Global Mineral cannot be legitimately compelled to arbitrate and the Tribunal has no jurisdiction because of the absence of this fundamental requirement for arbitration.

100. Alternatively, it may be argued that a collateral contract was formed due to performance of Global Minerals for certain obligations of Vulcan such as…(name it payment, opening of a letter of credit…etc)In the event that it is contended, notionally, there is a collateral contract between Mediterraneo and Global Minerals (which we deny), established as follows: Global Minerals in exchange for a guarantee that Mediterraneo will supply its subsidiary with coltan provides a guarantee of payment for the product supplied by Mediterraneo to Vulcan if Vulcan fails to pay. The basic features of a contract are present, with the consideration provided by Mediterraneo being the guarantee that it will supply coltan to Vulcan, which is a "practical benefit" [Williams v Roffey Bros] and something of economic value [Thomas v Thomas] to Global.

101. On the other hand the consideration provided by Global Minerals is a guarantee to pay. Mediterraneo receives a guarantee of payment and Global receives a practical benefit of economic value thereby establishing a collateral contract outside of the main contract between Mediterraneo and Vulcan [Shanklin Pier v Detel Product; City of Westminster Properties v Mudd].

But there is no agreement to arbitrate under the collateral contract

102. If there is a collateral contract (which we deny), this is a separate and distinct contract from the main contract. A separate contract, even where it may be collateral, is not governed by or influenced by the terms of the main contract [City of Westminster Properties v Mudd]. It will be a stretching the

arbitration clause and the Tribunal's jurisdiction to their elastic limit to contend that the reach of the terms in the main contract extends to the collateral contract. In this regard, the following from Russell on Arbitration 23rd Ed. is instructive "A tribunal has no power to order consolidation of proceedings or concurrent hearings without the agreement of the parties. Problems can arise where a contract provides for any disputes arising under it to be determined in the same arbitration as disputes arising under another contract, but the other contract contains no corresponding provision. In these circumstances neither the courts nor the tribunal can insist upon a tripartite arbitration" [para 3-048].

103. Further UNCITRAL Article 7(2), the adopted law of Danubia, is very explicit that "The arbitration agreement shall be in writing". For emphasis, it should be noted that the implication of this law is that agreement to arbitrate cannot be implied from conduct, enforced due to insistence of other parties in the contract, or requested for convenience. The basis of agreement to arbitrate is consent which must be in writing or in the absence of a written agreement the availability of specific material facts that leave no doubt as to the consent of a party to submit to arbitration which is not available in the instant case. Since there are no written terms in the collateral contract, by extension there is no written arbitration clause and the ordinary course for determining a legal dispute before competent courts apply. The fundamental requirement of a written arbitration clause, and by extension consent, is missing in the collateral contract. For these reasons a tripartite arbitration under these circumstances will be nothing short of a travesty.

104. According to Fouchard, Gaillard & Goldman (On International Arbitration), *"a party guaranteeing an obligation arising out of a contract containing an arbitration clause will not be bound by that clause unless it can be established from other circumstances that the parties' true intentions in drawing up the guarantee were that the guarantor - often the parent company - would be party to the arbitration agreement" [para 498].*

105. Assuming that by "endorsing" the agreement, Global Minerals thereby guaranteed the agreement for the Respondent's comfort, this does not in any way imply that Global Minerals then automatically becomes a party to the contract or a party to any arbitration agreement [Fouchard, Gaillard, Goldman, para 500]. Considered in light of the parties intention, it becomes even more stark that Global Minerals had no "true intention" of becoming a party to the contract or becoming involved in any arbitration agreement, refusing even to become a party to the contract. It is doubtful that Mediterraneo intended for Global Minerals to be part of any arbitration, since they did not request this explicitly and it was not a point of discussion at any time during the negotiations.

106. Further the tribunal's position in ICC Case No. 5721 (1990) is explicit that the key consideration in deciding whether to "*lift the corporate veil*" of legal independence is the existence of the parties' consent [Fouchard, Gaillard, Goldman, para 501]. At no point during the negotiations, at the formation of the contract, or after the contract was there any consent by Global Minerals to be part of the arbitration clause. The absence of consent and in light of the observations of authorities quoted, the Tribunal does not have any

jurisdiction over Global Minerals by way of piercing the veil of corporate autonomy.

Guarantor is not a party to a contract or a party to the arbitration agreement

107. In the prominent and influential international case of Dallah Real Estate & Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan, it was firmly established that a guarantor does not become a party to a contract or the arbitration agreement by the act of guaranteeing a contract or being the beneficiary of a counter-guarantee.

108. Despite "*organic control*" by the government over the trust, analogous to that exercised by Global Minerals over Vulcan, the United Kingdom Supreme Court dismissed the appeal on the basis that the Government of Pakistan was not a party to the contact, never intended to be a party to the contract and not falling under the jurisdiction of the arbitration clause. Similarly, Global is not a party to the contract, never intended to be a party to the contract, and therefore does not fall within the jurisdiction of the arbitration clause. For this reason as well, the Tribunal cannot request Global Minerals to be a party to the arbitration proceedings.

There is no commercial justification for global Minerals to be a party to the contract

109. A reasonable commercial person will ask "*what benefit is there for Global Minerals to become a party to the contract and is this benefit greater than allowing Vulcan Coltan to pursue contracts on their own*?" Adopting the "*commercial common sense*" test as applied by the United Kingdom Supreme Court in Rainy Sky SA v Kookmin Bank, reveals that the greater benefit for Global Minerals, as the parent company, is to see the establishment of Vulcan as a

respected, trusted and reputable firm in its own right in the tough Equatoriana market. Had Global Minerals entered the contract as a party, it would have stymied the growth of Coltan by casting a long shadow of dependence.

110. Therefore, from the point of view of a reasonable commercial person, Global Minerals would want to wean Vulcan soonest by allowing them to undertake the contract as the sole buyer. In this way Vulcan will mature and build a portfolio of successes, thereby becoming attractive to potential sellers and buyers of its products, and to critical commercial partners such as banks and insurance providers. The establishment of Vulcan as an independent and respected corporate entity would undoubtedly be of greater benefit to Global Minerals than becoming a party to the contract.

THE GOOD FAITH DOCTRINE DOES NOT PROVIDE THE TRIBUNAL WITH JURISDICTION OVER GLOBAL MINERALS

111. The Global Minerals never made a representation leading Respondent to believe it agrees itself to be a party to arbitration proceedings. Arbitration clause is legally independent from the main contract, and generally remains effective even if the contract itself is void, which is a widely recognized principle [Russell, para 2-007].

112. In this case, Global Minerals only provided the required financial securities without, however, becoming party to the underlying contracts.

113. That is exactly what happened during the negotiation with RESPONDENT. Given the long lasting business relationship of Global Minerals with RESPONDENT, Mr Storm introduced his colleague from CLAIMANT, Mr Summer, to Mr Winter, the responsible person at RESPONDENT. The first offer made foresaw no involvement of Global Minerals in the contractual relationship at all. Only when RESPONDENT insisted on financial securities, Global Minerals endorsed the contract, to avoid an expensive outside guarantee. Global Minerals had, however, never intended to become a party to the contract by that endorsement. A proposal by RESPONDENT to list Global Minerals in Article 1 of the contract as an additional buyer was explicitly rejected [Answer to Request for Joinder, page 50, para 6].

114. There are very limited exceptions to the principle that only the parties to the main contract are bound by the arbitration agreement contained therein.

115. In recent decision the Supreme Court of Switzerland [case 4A_450/2013] confirmed that such exceptions may apply in the following situations:

- the assignment of a debt;
- the assumption of a debt; or
- the transfer of a contractual relationship.

116. An exception may be made where a third party participates in the performance of the contract to such an extent that it may be inferred from this participation that the third party intended to be a party to the arbitration agreement. The Supreme Court also admitted that situations in which there is confusion between the activity of a company and that of its parent may

exceptionally justify the refusal to uphold the two companies' independence. Such may be the case if a parent company creates the appearance to be bound by an arbitration agreement that results in the other party's erroneous understanding that it entered into a contract with the parent instead of the subsidiary, or with both the companies.

117. Although the Supreme Court of Switzerland took a pioneering approach in this matter, even under its analysis it is obvious that Global Minerals never intended to become bound by arbitration agreement, and never led the RESPONDENT to believe so.

118. The CISG stipulates that the doctrine of good faith is to be used for interpretation. Specifically, Article 7(1) states: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

119. A narrow interpretation of Art 7(1) suggests it does not impose an obligation of good faith on the conduct of contracting parties, but rather that Art. 7(1) simply requires that Convention provisions be "read" in good faith.

120. P. Koneru in "*The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: an Approach Based on General Principles argues that "good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate*." Nives Povrzenic, for his part, argues that good faith is a principle that cannot be ignored: "*The need to*

promote...the observance of good faith in international trade should be given a broad interpretation in the sense that it is addressed to the parties to each individual contract of sale as well as to the Convention itself."

121. Good faith considerations cannot justify preventing Global Minerals from invoking the absence of an arbitration agreement. Again, with the exception of Ruritania, none of the jurisdictions involved has a developed doctrine of good faith which would justify such a finding. Given that party autonomy is an internationally recognized principle of arbitration the very general reference to the good faith principle in international arbitration is definitively not sufficient to justify the joining of Global Minerals to the arbitration proceedings.

122. Moreover, while Ruritanian contract law contains a general reference to good faith, a verbatim adoption of Article 1.7 UNIDROIT Principles 2014, there have been no reported cases from Ruritania yet which have extended good faith to the scope of the arbitration agreement [Procedural Order 2 para 47] .

123. Unlike in Ruritania, where the Global Minerals is based, there is no statutory provision regulating good faith in any of the other jurisdictions concerned. The courts have on occasions relied on good faith arguments, but a general principle that parties must always act in good faith with a list of resulting duties has not been developed. In particular, there are no decisions which deal with good faith in relation to arbitration agreements and arbitral proceedings.

124. Therefore, considering that the absence of arbitration agreement is expressly mentioned in Art V (1) of the New York Convention 1958, joinder of Global Minerals in this arbitration has the potential of putting the enforcement of a resulting award in this case at risk.

REQUEST FOR RELIEF

For the above mentioned reasons, CLAIMANT respectfully requests the Arbitral Tribunal:

1. To decide that the RESPONDENT has not rightfully avoided the contract of the 28 March 2014 by either declaration of avoidance of 7 July 2014 or declaration of avoidance of 9 July 2014;
2. To keep the remaining part of the order made by the Emergency Arbitrator against RESPONDENT on 26 July 2014 in place, resulting in the delivery of 30 metric tons of coltan to the CLAIMANT.
3. To decide that the Arbitral Tribunal has no jurisdiction over the parent company Global Minerals.
4. To order that all fees arising from this arbitration, including fees of the arbitrators and legal representatives be paid by RESPONDENT

CERTIFICATE

Aberdeen, 11 December 2014,

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate

/s/
Walled Hammad

/s/
Peter F. Murphy

/s/
Stephen Dickson

/s/
Peyman Askarinejad

/s/
Omar Bissoon

/s/
Amy Gordon

/s/
Alexandru Caleap

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