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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Vienna, Austria
27 March - 2 April 2015

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:	
14 Capital Boulevard, Oceanside, Equatoriana **RESPONDENT**	
AGAINST:	
Excavation Place 5, Hansetown Ruritania **GLOBAL**	75 Court Street, Capital City, Mediterraneo **CLAIMANT**

Counsel
Cameron Green • Ben Keime •Michael Lorigas
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LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
AA	Arbitration Agreement
AP/ GLOBAL	Global Minerals Ltd, parent company of CLAIMANT
AEM	CLAIMANT's Application for Emergency Measures dated 11 July 2014
Art./Artt.	Article/Articles
CE	CLAIMANT's Exhibit
CIF	Cost, Insurance and Freight
CIP	Carriage & Insurance Paid to
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CLAIMANT	Vulcan Coltan Ltd, a subsidiary of GLOBAL
Contract	Contract dated 28 March 2014 between CLAIMANT and RESPONDENT and endorsed by GLOBAL
COO	Chief Operating Officer
EA	Emergency Arbitrator, Ms Chin Hu, appointed on 12 July 2014
EAP	Emergency Arbitrator Provisions
CRA	CLAIMANT's Request for Arbitration dated 11 July 2014
CRC	CLAIMANT and GLOBAL's Reply to Counterclaim, Answer to Request for Joinder dated 8 September 2014
EWHC	High Court of England and Wales
L/C	Letter of Credit
L/C 1	L/C in the amount of USD 4,500,000
L/C 2	L/C in the amount of USD 1,350,000
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce, 2012
Id.	Ibidem (in the same place)

Ltd	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments
MT	Metric ton
n.	note
No.	Number
NoT	Notice of Transport sent by RESPONDENT to CLAIMANT on 25 June 2014
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
OEA	Order of Emergency Arbitrator dated 26 July 2014
p./pp.	Page/ pages
PAR	Pre-Arbitral Referee
¶¶./¶¶.	¶¶graph/ ¶¶graphs
PAR Rules	ICC's Pre-Arbitral Referee Rules
Parties	CLAIMANT, RESPONDENT and GLOBAL
PO1	Procedural Order No. 1 dated 3 October 2014
PO2	Procedural Order No. 2 dated 29 October 2014
RAC	RESPONDENT's Answer to Request for Arbitration, Counterclaims and Request for Joinder dated 8 August 2014
RE	RESPONDENT's exhibit
RESPONDENT	Mediterraneo Mining SOE, state-owned enterprise based in Mediterraneo
SGHC	Singapore High Court
SOE	State-owned enterprise
Tribunal	Panel consisting of Mr Henry Haddock (President), Dr. Arbitrator One, Ms. Dos
UCP	Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Brochure No. 600
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010
USD	United States Dollar
v./vs.	Versus; against

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STATEMENT OF FACTS

I. FACTUAL HISTORY

A. Parties involved

1. Vulcan Coltan Ltd ("CLAIMANT") brokers coltan, a rare mineral used in many electronic devices. CLAIMANT is a 100% subsidiary of the Additional Party, Global Mineral, Ltd. ("AP"). CLAIMANT was specifically established to operate in the very competitive and highly volatile market of Equatoriana [*CRA* ¶*1*].

2. AP is a worldwide broker of rare minerals, including coltan, and is based in Ruritania. AP and others members belonging to the Global Minerals Group of Companies have been regular customers of Mediterraneo Mining SOE ("RESPONDENT") [*RAC* ¶*4*].

3. RESPONDENT is a state-owned enterprise based in Mediterraneo. RESPONDENT extracts coltan, copper and gold [*RAC* ¶*3*].

B. The Coltan Purchase Agreement

4. On **23 March 2014**, AP and CLAIMANT approached RESPONDENT to inquire about a purchase for 100 MT of coltan. AP, CLAIMANT and RESPONDENT could not agree on terms for the 100 MT for various reasons [*RE1* ¶¶*6-7*].

5. However, on **28 March 2014**, AP, CLAIMANT and RESPONDENT executed a Coltan Purchase Agreement ("Contract") for 30 MT of coltan at USD 1.5 million with delivery CIF (INCOTERMS 2010) at Oceanside, Equatoriana [*CE1*]. AP endorsed the Contract to guarantee CLAIMANT's obligation to pay [*RAC* ¶*7*].

6. Under Art. 2 of the Contract, RESPONDENT had until 31 August 2014 to issue a Notice of Transport ("NoT"). Fourteen days after receipt of the NoT, CLAIMANT was to establish a L/C ("L/C") from a Ruritanian Bank, subject to the UCP 600.

C. Events Leading to the Declaration of Avoidance

7. On **25 June 2014**, RESPONDENT emailed the NoT AP and CLAIMANT. RESPONDENT was able to facilitate delivery earlier than anticipated because another customer defaulted on a contract for coltan and copper [*CE3*].

8. On **27 June 2014** AP and CLAIMANT expressed an interest in purchasing 100 MT of coltan for USD 4.5 million [*CE4*]. By the time RESPONDENT received their offer, critical changes altered the coltan market. As such, RESPONDENT felt no need to formally reject CLAIMANT and AP's offer [*RE1* ¶*9*].

9. On **4 July 2014** CLAIMANT and AP attempted to unilaterally amend the Contract. L/C 1 changed the terms to 100 MT of coltan for USD 4.5 million with CIP delivery [*CE5*]. On **5 July 2014** RESPONDENT informed CLAIMANT that L/C 1 was non-conforming and requested a L/C consistent with the Contract [*PO2* ¶*21*].

10. In response, AP emailed RESPONDENT to state that it would only correct the delivery terms and still expected to take delivery of 100 MT of coltan [*CE6*]. Accordingly, RESPONDENT declared the Contract avoided on **7 July 2014** [*CE7*]. However, on **8 July 2014** CLAIMANT and AP established L/C 2 [*CE8*]. Notwithstanding the previous avoidance, RESPONDENT emailed CLAIMANT on **9 July 2014** to be clear the Contract was avoided [*RE4*].

II. PROCEDURAL HISTORY

11. On **11 July 2014** CLAIMANT filed a Request for Arbitration and Request for Emergency Arbitrator Proceedings. On **12 July 2014**, the Emergency Arbitrator ("EA") was appointed pursuant to the ICC Rules.

12. On **26 July 2014** the EA issued an order that forced RESPONDENT to maintain a supply of at least 100 MT of coltan until the Tribunal reached a decision on the merits of the case. Despite RESPONDENT's contention against the jurisdiction of the proceedings, the EA believed this was necessary to prevent the CLAIMANT from suffering damage to its reputation.

13. Following the EA's Order ("OEA"), RESPONDENT filed a Request for Joinder to include AP in the proceedings. Additionally, RESPONDENT filed an Answer and made a counter-claim against CLAIMANT and AP.

14. In response, AP filed a Reply to the Request for Joinder contesting the Tribunal's jurisdiction over it. Following the submissions, the International Court of Arbitration stated there was *prima facie* evidence to include AP in the proceedings.

15. On **2 October 2014** the parties signed the Terms of Reference and agreed to limit the first phase of arbitration to the following issues [*PO1*]:

    a. Should the Tribunal lift the **26 July 2014** OEA? **(Issue 1)**
    b. Does the Tribunal have jurisdiction over AP by virtue of the Group of Companies or Good Faith doctrines? **(Issue 2)**
    c. Did RESPONDENT rightfully avoid the Contract by either the **7 July 2014** or **9 July 2014** declarations of avoidance? **(Issue 3).**

III. PRAYER FOR RELIEF

16. Consistent with PO1, Respondent respectfully requests that this Tribunal enter an award declaring that:

(i) the Emergency Arbitrator's order should be lifted

(ii) the Tribunal has jurisdiction over Global

(iii) the contract has been rightfully avoided through both the 7 July and 9 July declarations of avoidance.

INTRODUCTION

17. RESPONDENT has a well-established reputation in the coltan market. This reputation has allowed RESPONDENT to become the second largest producer of coltan in the world. Now CLAIMANT and AP seek to tarnish that reputation through these proceedings. CLAIMANT, AP and the other members of the Global Group of Companies have consistently sought to outwit their business partners without any regard for the consequences those business partners will suffer. CLAIMANT and AP have no respect for the contracts they enter in to.

18. The present Contract gave exclusive jurisdiction to national courts for granting interim measures. Nonetheless, CLAIMANT instituted the ICC's Emergency Arbitrator Provisions. The EA has no jurisdiction to provide interim relief, and even if she did, CLAIMANT failed to establish the necessary prerequisites for granting interim relief **(Issue 1).**

19. CLAIMANT's erroneous OEA has caused RESPONDENT extensive damages and it must pay reparations. However, the likelihood of enforcing any favorable award against CLAIMANT is dependent upon the joinder of AP to these proceedings. Notwithstanding RESPONDENT's contention that AP is a signatory to the Contract, CLAIMANT and AP have consistently acted as one and the same throughout all phases of the Contract. Therefore, the Tribunal has binding jurisdiction over AP **(Issue 2)**.

20. With CLAIMANT and AP together in one proceeding, the Tribunal will be exposed to all of the facts. Those facts will show that CLAIMANT and AP attempted to rob RESPONDENT of what it was entitled to expect under this Contract. Despite RESPONDENT's valid avoidance of the Contract via the 7 July declaration, CLAIMANT and AP were relentless in their attempts to capitalize on the volatile coltan market. Accordingly, RESPONDENT did what any reasonable coltan trader would do and sent a second declaration of avoidance on 9 July. CLAIMANT and AP are no longer entitled to any of the rights under the Contract because it was validly avoided by both declarations **(Issue 3)**.

21. Neither RESPONDENT nor any other businessman in international trade should be subjected to these bad practices. Therefore, RESPONDENT respectfully requests that this Tribunal enter an award that lifts the OEA, grants jurisdiction over AP, and declares that RESPONDENT validly avoided the Contract.

ARGUMENTS

ISSUE 1: THE EMERGENCY ARBITRATOR'S ORDER SHOULD BE LIFTED

23. The ICC Rules are applicable to these proceedings pursuant to Art. 20 of the Contract [*CE1*]. Emergency Arbitrator Provisions ("EAP") are available under Art. 29 of the ICC Rules. However, parties may choose to opt-out of these proceedings. That was accomplished through Art. 21 of the Contract, which provides national courts with exclusive jurisdiction over the granting of interim measures [*CE1*]. Therefore, the EAP are not applicable to this dispute **(I)**. Even if the EAP applied, CLAIMANT failed to demonstrate the necessary conditions for interim relief **(II)**.

I. THE EMERGENCY ARBITRATION PROVISIONS DO NOT APPLY TO THIS DISPUTE

24. Art 29(6) of the ICC Rules excludes the application of the EAP and the jurisdiction of the EA. Arts. 29(6)(2) and (3) set forth the procedure for how parties may expressly or impliedly exclude jurisdiction [*Fry/Greenberg/Mazza p. 309*]. Art. 21 of the Contract constitutes a valid opt-out clause. As such, the President of the ICC Court ("President") should have dismissed CLAIMANT's Request for Emergency Measures ("REM") **(A)**. Nonetheless, Art. 21 was both an implied **(B)** and express **(C)** opt-out clause. Therefore, the EA had no jurisdiction to grant interim measures **(D)**.

A. The President should have denied CLAIMANT's REM

25. The President should not have appointed the EA because Art. 21 excluded the EAP. The President of the ICC Court assesses EAP applications and approves them if he believes "on the balance of probabilities that the condition was met" [*Webster/Bühler p. 452-453*]. That is, the President must determine that none of the subsections of the opt-out provisions apply

26. Here, the President received a copy of the Contract, including Art. 21, with CLAIMANT's REM [*Record p. 18*]. The President had the responsibility to look past CLAIMANT's self-serving application when he reviewed the arbitration and opt-out clauses. A review of Art. 21 would have shown that CLAIMANT's request for emergency arbitration should be denied. Although the President only had access to the plain language of Art. 21, that should have been enough to determine that the EAP did not apply. Nevertheless, the President's decision to appoint an EA is a preliminary, administrative decision and does not bind this Tribunal.

B. Art. 21 is an implied opt-out from the EAP

27. Art 29(6)(3) states that EAP do not apply when "the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures." The text of Art 21 constitutes the implied opt-out [*Fry/Greenberg/Mazza p. 309*]. "Agreeing to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures amounts to an implied opt-out and therefore excludes the application of the [EAP]" [*Fry/Greenberg/Mazza p. 309*]. Notably, it is not necessary for the other pre-arbitral procedures to be exclusive, as it is here, to preclude the EAP. The other pre-arbitral procedure merely has to take priority over the EAP. [*Webster/Bühler p. 452*].

28. The implied opt-out as defined by Art. 29(6)(3) does away with CLAIMANT's erroneous argument that an express opt-out is required [*Cl. Mem.* ¶*9*]. As such, CLAIMANT's REM should have been denied by the President and the EA should have found that she did not have jurisdiction. The tribunal should find that Art. 21 is a valid implied opt-out of the EAP Art. 29(6)(3).

C. Art. 21 is an express opt-out from the EAP

29. Under Art. 29 (6)(2), the EAP do not apply when "the parties have agreed to opt out of the [EAP]." There is no magic language that must be used to expressly opt-out. "Any . . . clear language would suffice, whether specified in the arbitration itself or elsewhere." [*Fry/Greenberg/Mazza p. 309*]. Here, Art. 21 constitutes an express opt-out clause from the EAP.

30. Art. 21 provides "exclusive jurisdiction to grant [interim] measures" to domestic courts. Exclusive means "limiting or limited to possession, control, or use by a single individual or group." [*Merriam-Webster*]. Art. 21 is an express opt-out of the EAP because it gives jurisdiction to domestic courts to the exclusion of all other forums. Use of the world 'exclusive' clearly indicates that EAP are not applicable to any disputes between CLAIMANT and RESPONDENT. Contrary to CLAIMANT's suggestion [*Cl. Mem.* ¶*9*], "exclusive jurisdiction" clearly reflects that EAP shall not apply. The use of the word exclusive allowed the drafters to provide only one forum for interim measures while avoiding the need to list all pre-arbitral procedures that would not apply.

31. The Tribunal should interpret Art. 21 in accordance with the "understanding a reasonable person would have" [*CISG 8(2)*]. A reasonable would interpret the plain meaning of Art. 21 as granting exclusive jurisdiction over preliminary measures to domestic courts. Thus, the EAP and all other pre-arbitral procedures were expressly excluded.

32. Additionally, CISG 8(1) states that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." CLAIMANT introduced extrinsic evidence that the intent of Art. 21 was "to regulate

jurisdiction for interim relief in future contracts to ensure that efficient interim relief can be obtained without any discussion about the jurisdiction of the court." [*Record p 64-65*]. This statement does not help CLAIMANT's argument. The clause that Art. 21 is based upon was introduced in 2010. [*PO2 ¶13*). It is not possible for CLAIMANT or RESPONDENT to have intended that the Art. 21 clause permit the EAP when the EAP would not exist for another two years. Furthermore, CLAIMANT has provided no evidence that the intent of Art. 21 was changed by the introduction of the EAP or that the change of intent was communicated to RESPONDENT.

Furthermore, Art. 4.5 of the UNIDROIT Principles of International Commercial Contracts states that "[c]ontract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of the effect." CLAIMANT's interpretation deprives the all of the effect of the term 'exclusive jurisdiction.' RESPONDENT's interpretation is the only interpretation that gives effect to all terms in Art. 21.

33. The Tribunal should find that Art. 21, interpreted in the light of the CISG and the UNIDROIT Principles, is an express opt-out of the EAP.

D. The EA had no jurisdiction

34. The President's decision does not establish the EA's jurisdiction [*Webster/Bühler p. 461*]. The EA herself must make a more substantial inquiry into the issue of her jurisdiction before she decides on the matter [*Id.*]. Art. 6(2) of the Emergency Arbitrator Rules ("EAR") states that "the emergency arbitrator shall determine whether the Application is admissible pursuant to Art. 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures." This rule requires the EA to hear both parties and to make a prima facie determination of jurisdiction. [*Id.*].

35. In this case, the EA held that she had jurisdiction because "Art. 21's purpose is not to exclude any form of interim relief by the Arbitral Tribunal or via any other *intra-arbitration mechanism*" [*Record p. 30*]. This finding demonstrates why the EA incorrectly determined that she had jurisdiction.

36. The EAP is a pre-arbitral mechanism, it is not an intra-arbitral mechanism. Intra-arbitration refers what happens from the time the arbitral tribunal is constituted until it issues the final award. The EA's order was correct in holding that this tribunal has power to issue interim orders; however, she failed to distinguish that the EAP is a pre-arbitral procedure. It is true that the arbitration agreement allows for intra-arbitral interim measures, but the EAP is a *pre-arbitral* procedure. The EAP ends before the intra-arbitration phase begins and therefore jurisdiction over intra-arbitration matters does not extend to an EA. As such, the EA took the wrong view when she held that she had jurisdiction as evidenced by Art. 21 and Art. 29(6)(2) and (3).

37. By finding for her own jurisdiction, the EA overstepped her bounds and prevented RESPONDENT from having its defense heard by competent judicial authorities. Erroneous jurisdictional findings that go against the plain language of the arbitration agreement and the opt-out clause can create friction between arbitral bodies and judicial authorities. Such would be the case if RESPONDENT had obtained a stay of the EA's order in the courts of it place of business based on the EA's interpretation of Art. 21.

II. CLAIMANT FAILED TO SATISFY THE REQUIREMENTS FOR GRANTING INTERIM MEASURES.

38. Even if the EA had jurisdiction, CLAIMANT did not demonstrate that it would suffer "[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted" [*Model Law Art. 17(A)*]. In her order, the EA referred to the degree of harm required for interim measures as "irreparable harm" [*OEA ¶13*]. Conversely, CLAIMANT suggests that the standard is "substantial harm" [*Cl. Mem. ¶24*]. RESPONDENT submits that the correct standard for "irreparable harm" is "harm that no other form of alternative relief . . . could adequately repair" is the correct standard. [*Fry/Greenberg/Mazza p. 309*].

39. Regardless of the terminology used, CLAIMANT failed to demonstrate that an award of damages would not adequately repair its harm and that its harm substantially outweighed the harm to RESPONDENT.

40. CLAIMANT speculates that it would suffer substantial harm by way of a loss of reputation and bankruptcy [*Cl. Mem. ¶21*]. CLAIMANT asserts that it had contracts with buyers for the 30 tons of coltan and that it would suffer a loss of reputation if it could not provide the coltan to these buyers [*Cl. Mem. ¶23*]. This assertion rests on the false premise that CLAIMANT's only alternative source of coltan was in Xanadu. CLAIMANT never attempted to negotiate a new and fair price for RESPONDENT's coltan. CLAIMANT could have purchased the coltan at fair market price from RESPONDENT and then sold it to its buyers. This may have been a loss for CLAIMANT, but it would have preserved, if not improved, its reputation within the industry. Alternatively, CLAIMANT could have negotiated a new price with its buyers. None of these options would have irreparably harmed CLAIMANT's reputation because changed circumstances are common in a volatile market like coltan.

41. CLAIMANT also asserts that it would have faced bankruptcy. CLAIMANT should not be viewed as a singular entity whose fate is solely dependent on a single transaction. AP specifically created

CLAIMANT as a special investment vehicle to mitigate losses should fail the second attempt at the Equatoriana market fail [*RAC ¶5*]. Whether CLAIMANT would face bankruptcy largely depends on whether AP would have continued to support its wholly owned subsidiary, not on the success or failure of a single transaction. Furthermore, the risk of bankruptcy can be cured by monetary damages. CLAIMANT has not gone into bankruptcy, at this point monetary damages would alleviate the risk of bankruptcy to CLAIMANT.

42. Also, the EA's assertion that "the only loss which may result for RESPONDENT from the order requested is that it can presently not enter into additional better remunerated contracts" fails to account the costs of operating a successful mining operation. [*Record p. 31*]. It does not account for the constant overhead and expenses that are paid for by the regular sale of coltan. RESPONDENT cannot maintain its operations if it does not sell coltan. Additionally, the requirement to store large quantities for an extended time only adds to RESPONDENT's cost.

43. Thus, CLAIMANT failed to show it would suffer irreparable harm or that the harm it may have suffered would substantially outweigh the harm to RESPONDENT. The Tribunal should lift the EA's order.

CONCLUSION ON ISSUE 1

44. The EA had no jurisdiction to grant interim measures. Art. 21 was a valid opt-out clause in accordance with both the express and implied provisions of the ICC Rules. Moreover, CLAIMANT failed to demonstrate that it would suffer irreparable harm and that its harm substantially outweighed the harm to RESPONDENT. There, the Tribunal should lift the OEA.

ISSUE 2: THE TRIBUNAL HAS JURISDICTION OVER GLOBAL

45. Despite AP's attempts to confuse the Tribunal, AP should be joined in these proceedings. AP manifested its intent to arbitrate when it signed the Contract, which includes the arbitration agreement under Art. 20 [*CE1*]. As a signatory, there should be no need for the Tribunal to analyze doctrines that extend arbitration clauses to non-signatories. After all, the term "non-signatory" refers to a party that has not put ink to paper [*Park ¶ 1.26*]. Nonetheless, even assuming AP is not a signatory to the arbitration agreement, the Tribunal may base its jurisdiction under both the Group of Companies Doctrine **(I)** and the Doctrine of Good Faith **(II)**.

I. THE TRIBUNAL HAS JURISDICTION OVER AP VIA THE GROUP OF COMPANIES DOCTRINE

46. The Group of Companies doctrine ["GoC") was specifically tailored for arbitration [*Born p. 1445*] to adapt to the complexities of international business transactions. Despite the criticisms GoC has faced, consent is one of the main elements of the doctrine [*Ferrio p. 651*]. As such, the non-recognition of GoC's legal existence by the parties' chosen law should not have a dispositive impact on the doctrine's application [*Complex Arbitrations p. 50*]. Thus, contrary to AP's position [*Cl. Mem. II[B)*], GoC is applicable to this dispute **(A)** and all of the doctrine's requirements have been fulfilled **(B)** to give the Tribunal jurisdiction over AP.

A. GoC is applicable to these proceedings

47. Pursuant to Art. 20 of the Contract, the ICC Rules and Danubian law govern these proceedings [*CE1*]. AP's argument that GoC does not apply [*Cl. Mem. ¶40*] is meritless. GoC is applicable under the ICC Rules **(1)** and Danubian law **(2)**. Therefore, the Tribunal may apply the doctrine to find it has jurisdiction over AP.

1. The Tribunal may apply GoC under the ICC Rules

48. The ICC Rules govern the procedural aspects of these proceedings [*CE1*]. The Tribunal has the competence to decide on its own jurisdiction [*ICC Art. 6*]. AP states that the ICC Rules do not permit joinder under GoC because there is no valid arbitration agreement [*Cl. Mem. ¶40*]. However, the Tribunal shall take account of the relevant trade usages [*ICC Art. 21[2)*]. Thus, the Tribunal may apply GoC as a trade usage.

49. International trade usages have long been recognized for their importance in determining the scope of an arbitration agreement [*Lew p. 123; Asken p. 472*]. GoC as an international trade usage recognizes the importance of the economic reality of a transaction [*Vidal ¶26; Sponsor A.B. v. Lestrade*]. Indeed, the economic unity of a group has become one of the most important factors in determining the scope of an arbitration agreement [*Train ¶42; ICC 4131; ICC 5103; ICC 6000*]. Therefore, GoC is applicable to this dispute as a trade usage under ICC Art. 21(2).

2. GoC is applicable under the laws of Danubia

50. AP provides no support for its claim that GoC is "clearly not recognized" by Danubian law [*Cl. Mem. ¶41*]. Mere comments by authors [*PO2 ¶46*] are insufficient to deprive this Tribunal of their *competence-competence*. The Tribunal will find that the essential elements of GoC are consistent with Danubia's arbitration **(a)** and contract **(b)**.

a. Goc is in line with Danubian arbitration law

51. Danubian arbitration law adopted the Model law with Option I under Art. 7 [*PO2 ¶41*]. Although Option I follows the structure of the 1985 text, the amendments eliminated the signature requirement for arbitration agreements [*Explanatory Note ¶19*]. This is because UNCITRAL recognized the need "to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement" [*A/RES/61/33*]. Notwithstanding AP's signature right below the arbitration agreement, GoC is consistent with these goals.

52. AP has misinterpreted the application of GoC under Option I of the Model law [*Cl. Mem. ¶42*]. The Working Groups discussed GoC, like other theories of third party rights under an arbitration agreement, minimally because it would be difficult to harmonize with *every* legal system [*Binder p. 78*]. Accordingly, the absence of an explicit reference to GoC does not imply it should be rejected. As a general principle, because there is nothing in the text of the Model law or travaux préparatoires that prohibits GoC, the doctrine should be allowed.

b. GoC is in line with Danubian Contract law

53. Danubian contract law consists of the CISG and UNIDROIT Principles. The Danubian Supreme Court emphasizes that arbitration is based on consent [*Cl. Mem. ¶41; PO2 ¶46*]. Consent is interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" [*CISG 8[2); ICC 9651*]. Consent is determined by looking to the party's statements and conduct during the negotiations, as well as that party's subsequent conduct [*CISG 8[3)*]. GoC is line with both of these principles..

54. Consent is an essential element under GoC [*Voser p.374*]. GoC determines consent by looking to the party's involvement in the negotiations and its subsequent conduct during the performance or termination of the contract [*Hanotiau p. 344; ICC 4131*]. This is in line with Danubian law because both seek to establish the resisting party's consent.

55. Therefore, GoC is consistent with Danubian law and the Tribunal may apply the doctrine to this dispute.

B. The requirements of GoC have been met

56. AP incorrectly submits that the facts of this case proscribe the application of GoC [*Cl. Mem. ¶44*]. GoC extends the scope of an arbitration agreement to the parent company in order to prevent that company from circumventing a valid arbitration agreement [*Lamm/Aqua p.* 725]. The doctrine is most notable for its application in *Dow Chemical Company v. Isover Saint Gobain* ["*Dow Chemical*"] [*ICC 4131*].

57. In *Dow Chemical*, Isover Saint Gobain ["Isover") entered into several contracts containing an ICC arbitration clause with various members of the Dow Chemical Company ("Dow") [*Id.*]. When complications arose, the non-signatory Dow instituted arbitral proceedings against Isover [*Id.*]. In response, Isover contested the tribunal's jurisdiction to hear Dow's claims because of Dow's status as a non-signatory [*Id.*].

58. The tribunal issued an award establishing its jurisdiction [*Id.*]. Looking to the realty of a group of companies being a single economic unit, the tribunal based its jurisdiction on the mutual intent of the parties [*Id.*]. This was implicated by the non-signatory's involvement in the negotiation, performance and termination of the contract [*Id.*]. Thus, the non-signatory effectively controlled its subsidiaries and the tribunal had jurisdiction to hear its claims [*Id.*]. The award was subsequently upheld by the Paris Cour d'appel [*Isover-Saint-Gobain v. Dow Chem. France*].

59. Similarly, CLAIMANT and AP form one and the same economic reality **(1)**. AP effectively controlled CLAIMANT through its dominant participation in the negotiations, performance and termination of the contract **(2)**. Accordingly, the Tribunal will find that extending the arbitration clause to AP reflects the mutual intent of all the parties **(3)**. Thus, the Tribunal has jurisdiction over AP by virtue of GoC.

1. AP and Claimant form one economic reality

60. AP and CLAIMANT exaggerate the separate and independent nature of the entities [*Cl. Mem. ¶48*]. And while a company in a group of companies may have separate rights and liabilities [*Id.*], the independent personalities between members of a group of companies are dependent on the exertion of control and economic interrelationships [*Blumberg pp. 245-46*]. Here, there is no distinction to be found between CLAIMANT and AP.

61. To be clear, RESPONDENT does not submit that the presence of a single economic unit is sufficient to bind AP [*Cl. Mem. ¶51*]. However, the economic unity between CLAIMANT and AP's relationship allows consent to take a special dimension [*Hanotiau p. 344*]. This is because the indivisible nature of the parties' obligations is a sign of their intent [*Derains ¶6; ICC 9517*].

62. Both CLAIMANT and AP are brokers of coltan. AP has used CLAIMANT as a second chance to take advantage of the Equatoriana market [*RAC ¶5*]. Despite intending to keep their business separate [*Cl. Mem. ¶49*], CLAIMANT could not function without AP. CLAIMANT's only source of financing is a line of credit guaranteed by AP [*PO2 ¶9*]. Further, AP did not merely guarantee payment, it actually performed CLAIMANT's obligation [*CE5; CE8*].

63. Moreover, AP has demonstrated its financial interest by placing Mr. Storm in charge of CLAIMANT [*RAC* ¶*7*]. Indeed, it was AP's involvement through Mr. Storm that allowed CLAIMANT to receive a 0.5% price reduction [*RE1* ¶*7*]. Not only was AP the focal point of this contractual relationship, it also participated in the negotiations with several of CLAIMANT's contracts with other suppliers and customers [*PO2* ¶*7*].

64. Therefore, the fact that CLAIMANT is wholly owned by AP and the two entities run the same business operation, supports the disregard of any separate legal personality [*DHN Food Distributors Ltd. v. London Borough of Towers*]. It is essential for the legal and economic structures to match [*Blumberg p. 201*]. As such, it cannot be denied that CLAIMANT and AP for one and the same economic unit [*ICC 4131; ICC 1434; ICC 3493*

2. AP was involved in every phase of the contract

65. CLAIMANT's oversimplification of AP's involvement and the absence of substantial facts from the record are telling [*Cl. Mem.* ¶¶*54-54*]. AP played an equally preponderant role in the [i) negotiation, [ii) performance and [iii) termination of the Contract. Even outside the context of GoC, such significant interventions by a parent company are sufficient to bind that non-signatory to arbitrate [*Blessing* ¶ *35; Vidal* ¶ *17; ICC 6519; ICC 11160*].

66. First, AP's involvement in the negotiations went beyond mere introductions [*Cl. Mem.* ¶*54*]. The Contract was dependent upon on AP's guarantee of the payment obligation [*RAC* ¶*7*]. Additionally, RESPONDENT only passed on the use of an advising bank for the L/C because of AP [*PO2* ¶*25*]. AP's involvement was also necessary to secure the same delivery options for CLAIMANT. Further, AP rejected the initial offer for 100 MT because it wanted a better deal [*RE1* ¶*8*].

67. Second, AP exercised de facto control over the performance of the Contract. AP always initiated communications with RESPONDENT [*CE4; CE6; CE10*]. AP established both L/Cs [*CE5; CE8*]. In reality, only AP, and not CLAIMANT, took part in performance.

68. Third, AP's conduct led to the termination of the contract. It was AP who attempted to unilaterally amend the Contract [*CE4*]. The overwhelming presence of AP cannot be ignored. Thus, AP was the pivot of the contractual relationship and should be joined in these proceedings [*ICC 5721; Tribunal Supremo Case*].

3. Joinder reflects the mutual intent of all parties

69. Extending the arbitration agreement to AP is consistent with the mutual intent of all the parties. It is the parties true intentions, rather than their declared intentions, that define consent [*Gaillard/Savage* ¶*477*]. Mutual intent focuses on the parties' goal to accomplish their agreement [*Born p.* 1415].

RESPONDENT's goal was to receive payment and this was accomplished by having AP guarantee performance. There can be no doubt that AP intended to ensure that both it and CLAIMANT received a delivery of coltan.

70. Despite not being a "party" under the Contract [*Cl. Mem.* ¶*57*], AP at all times relevant acted as if it were a party. In fact, AP already revealed its true intent to RESPONDENT: "*We* are determined to enforce *our* rights in arbitration" [*CE10*]. That statement alone makes it clear that, at the least, AP intended to arbitrate any disputes. To exclude AP from these proceedings would "narrowly restrict the parties apparent intention to arbitrate their differences" [*Cosima-Poseidon Schiffart GmbH v. Atlantic and Great Lakes Steamship Corp.*]. As joinder is consistent with the mutual intent of all parties, the Tribunal may base is jurisdiction over AP by virtue of GoC

II. GOOD FAITH CONSIDERATIONS PREVENT ADDITIONAL PARTY FROM DENYING JOINDER

71. Contrary to AP's submission [*RAC ¶ 7*], good faith considerations prevent AP from invoking the absence of a valid arbitration agreement. AP consistently gave the impression throughout the conclusion and performance of the Contract that it was a party to the Contract. It follows logically that AP intended to arbitrate any disputes arising out of or in connection to the agreement in accordance with Art. 20 of the Contract. As such, the doctrine of good faith establishes the Tribunal's jurisdiction over AP **(A)**. Nevertheless, joinder is in line with the principle of party autonomy **(B)**.

A. The Tribunal Has Jurisdiction over AP via the doctrine of Good Faith

72. It is difficult to find an international arbitration award that does not, at the least, mention the principle of good faith. [*Cremades p. 761*]. Notwithstanding the principle of party autonomy [*Cl. Mem.* ¶ *61*], the doctrine of good faith is equally applicable to this dispute **(1)**. Accordingly, the prohibition against inconsistent behavior **(2)** and the necessity for the administration of justice **(3)** require the Tribunal's jurisdiction over AP.

1. Good Faith Considerations are applicable to this dispute

73. No matter what argument AP may raise, it is impossible to escape the application of good faith to this dispute. Pursuant to Art. 20 of the Contract, this arbitration is to be governed by the laws of Danubia [*CE1*]. However, other laws play a role in determining the scope of an arbitration agreement [*Hanotiau p. 9*]. Here, regardless of the underlying law, the doctrine of good faith is applicable to this dispute..

74. Good faith is one of the most universally applied principles in interpreting international arbitration agreements [*Gaillard/Savage ¶ 256*]. This is the result of the belief that good faith is enshrined in the provisions of the New York Convention [*Berg ¶ 185; Born p. 1475*]. Further, the principle is recognized in most civil law [*French Civil Code, Art. 1156; German BGB, Art. 133*] and common law [*UCC Sec. 1-304*] jurisdictions. Therefore, good faith is applicable based on international law practices.

75. Accordingly, any suggestion that good faith is too general for international arbitration [*Cl. Mem. ¶ 61*] is inapposite, especially in light of the doctrines codification into the UNIDROIT Principles [*Gaillard p. 167*]. UNIDROIT is applicable here as *lex contractus* [*PO1 ¶ 5[3]*] and as *lex arbitri* [*PO2 ¶ 43*]. Although the Danubian legislature did not adopt the general provision on good faith [*UNIDROIT Art. 1.7*], this was simply due to legislative tradition and did not take into account substantive considerations [*PO2 ¶ 43*]. Nonetheless, good faith is dispersed throughout the UNIDROIT Principles, such as in Art. 5.1.2 on implied obligations. Thus, good faith is recognized under Danubian law.

76. On the other hand, courts and tribunals often apply the laws governing the corporation to be joined [*Craig/Park/Paulsson ¶ 5.02; NYC Art. V[1)[a); ICC 13954; Fletcher v. Atex, Inc.*]. This stems from the party's obligation to abide by the laws of its place of incorporation [*Redfern/Hunter ¶ 2.32*]. Here, Ruritanian law governs AP, and it has verbatim adopted Art. 1.7 of the UNIDROIT Principles [*RAC ¶ 8*]. The lack of case law applying good faith to the scope of arbitration agreements in Ruritania is irrelevant to the Tribunal's authority to apply the doctrine to this case.

77. In any event, good faith is applicable under the ICC Rules, which are incorporated through the arbitration agreement [*CE1*]. Under Art. 21[2), the Tribunal shall take into account any relevant trade usages. Good faith is arguably a trade usage of all international business transactions [*DiMatteo p. 146*]. As such, the Tribunal may apply the doctrine of good faith pursuant to Art. 21[2) of the ICC Rules.

78. Therefore, regardless of the underlying applicable laws or rules (Danubian, Ruritanian, international, or ICC Rules), the Tribunal may apply the doctrine of good faith to these proceedings.

2. The Prohibition Against Inconsistent Conduct Justifies Joinder of AP

79. Good faith considerations preclude a party from portraying one position and then adopting a subsequent position on the same issue without regard to its truth or accuracy [*Max Planck ¶¶ 1-2*]. There are three requirements for this proposition to prevail: [1) inconsistent behavior; [2) reasonable

reliance; and [3) detriment [*UNIDROIT Art. 1.8*]. Here, AP has demonstrated inconsistent behavior that RESPONDENT reasonably relied on to its detriment.

80. The prohibition against inconsistent conduct does not require intent to deceive or defraud [*Cheng p. 144*]. Rather, in the context an arbitration agreement, the notion is that good faith bars a party from asserting the inapplicability of an arbitration clause when it has previously claimed the benefits [*Park ¶¶ 1-48-1.51*]. Justice and equity prevent an individual from leading another to rely on such statements or conduct and then go back on that position [*Cooke p. 2; ICC 9474*].

81. AP asserts that it never intended be party to the Contract, or the arbitration clause therein, and this is allegedly evidenced by its rejection to RESPONDENT's proposal that it become a party to the Contract [*Cl. Mem. ¶ 34*]. Yet AP later expressed its true understanding that it was a party to the contract by declaring its right to 100 MT of coltan [*CE6*] and its willingness to enforce that right in arbitration [*CE10*].

82. Consequently, RESPONDENT reasonably relied on AP's communication [*CE6*] as a sign that CLAIMANT and AP had no intention to settle the dispute amicably. Therefore, RESPONDENT avoided the Contract [*RAC ¶ 20*]. RESPONDENT has since suffered damages through its inability to sell the coltan supply [*OEA*]. This detriment was a direct result of RESPONDENT's reasonable reliance on AP's portrayal as a party to the contract.

83. As such, reparation must be had in accordance with the Contract through arbitration. AP cannot claim its right to arbitration and then later deny its applicability [*InterGen NV v. Grina; Conveyor Band Case*] after leading RESPONDENT to believe that it would settle any disputes in arbitration. Thus, the Tribunal has jurisdiction over AP via the prohibition against inconsistent behavior.

3. Joinder is necessary for the proper administration of justice

84. Joinder should be ordered when it fosters the administration of justice [*Platte p. 67*]. Justice can be properly administered when the Tribunal is "presented with *all* legal and economic aspects of the dispute" [*Vidal ¶ 49; Jaguar Case*]. Indeed, the tribunal should exhaust all aspects of the dispute in order to avoid new proceedings based on the same facts and same relationships [*Kurkela/Turunen p. 39*]. This ensures procedural efficiency and avoids the issue of inconsistent awards [*Lew/Mistelis/Kroll ¶ 16-92*]. Presently, justice requires extending the arbitration clause to AP.

85. Any potential dispute between RESPONDENT and AP brought to a national court would rely on the exact same facts and relationships, mainly AP's guaranteed payment of CLAIMANT's main obligation under the Contract. It would make little sense to subject the Contract to arbitration under Danubian law in Danubia, but leave issues arising out of the guarantee to "some unspecified court in some

unspecified jurisdiction according to some unspecified governing law" [*Stellar Shipping Lines* ¶¶ *53-56*].

86. The court in *Stellar Shipping* reasoned that the parent company, subsidiary and charterer "enter[ed] into a tri-partite relationship enshrined in a single contractual document" [*Stellar Shipping Lines* ¶ *54*]. As such, the parties could reasonably be expected to resolve all disputes arising out of that relationship in a like manner [*Stellar Shipping Lines* ¶ *54*]. Any other result would lead to inefficient proceedings and the potential for inconsistent awards [*ICC 3879; J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.; X S.A. and A v. Y A.G.*].

87. Similarly, CLAIMANT, AP and RESPONDENT have entered into a tri-partite relationship. The structure of the guarantee as an endorsement of the underlying contract creates a single contractual relationship that requires AP's presence in these proceedings. Here, AP must be joined to protect RESPONDENT's interests in justice by promoting procedural efficiency and avoiding inconsistent awards.

B. Joinder is in line with the principle of party autonomy

88. Even if the Tribunal did not rely solely on good faith considerations, joinder would still be line in with the principal of party autonomy. Despite CLAIMANT's allegation that there is insufficient evidence under party autonomy [*Cl. Mem.* ¶ *61*], there are ample facts to prove that AP consented to arbitration. This is true based on AP's express consent as a signatory **(1)**. In any event, AP has given implied consent **(2)**.

1. AP is a signatory to the Contract and Arbitration Agreement

89. Pursuant to privity of contracts, a contract only binds parties who sign it [*Blessing p.* 1]. Contrary to AP's position [*Cl. Mem.* ¶ *36*], an endorsement is sufficient to bind a party to a contract and the arbitration clause therein [*Stellar Shipping Lines; X. v. Y. SRL, Z. SpA*]. Accordingly, AP's endorsement constitutes a signature that grants the Tribunal jurisdiction over it.

90. Further, subject to *contra proferentem*, any ambiguity in a term is interpreted against the drafter [*Steingruber* ¶ *7.34*]. Application of *contra proferentem* is particularly justified when the term was not subject to further negotiations [*UNIDROIT Art. 4.6*]. AP suggested the term endorsement without any negotiation or discussion as to its meaning [*PO2* ¶ *12*]. Therefore, the term endorsement should be interpreted against AP as a proper signature to the Contract [*Automobile Case; Sidoon Environmental, SARL v. Societe des Terrains et Developpment Urbain, SAL; ICC 3779*].

91. And although it is true that an arbitration agreement is separable from the contract [*Cl. Mem.* ¶ *38*], AP misconstrues the application of the separability doctrine to this dispute. Separability seeks to

maintain the validity of an arbitration agreement when the underlying contract is deemed to be invalid. [*Waincymer p. 130*]. Accordingly, "[t]he jurisdictional effect of separability both saves arbitral jurisdiction and expands the scope of arbitral jurisdiction" [*Landolt p. 514*]. Thus, the doctrine supports RESPONDENT's position that the Tribunal's jurisdiction binds AP.

92. Moreover, parties who conclude a contract with an arbitration agreement are presumed to have consented to arbitrate [*Craig/Park/Paulsson ¶ 5.01; Gaillard/Savage ¶ 478; ICC 2321*]. This presumption is particularly true when the resisting party had knowledge of the arbitration clause [*Poudret/Besson p. 229*]. Here, the arbitration clause has been a standard term in contracts between AP and RESPONDENT since 2010 [*PO2 ¶ 10*]. Moreover, the arbitration clause is the second clause above AP's signature on the Contract [*CE1*]. Thus, AP can be presumed to have consented to the arbitration clause as a signatory to the Contract.

2. In any event, AP has given implied consent

93. Even if AP were not a signatory, AP's consistent involvement from day one implies that AP has consented to arbitration. Danubian contract law, applicable here through Art. 20 [*CE1*], consists of the CISG and the UNIDROIT Principles. Under the CISG, consent is the main requirement for the formation of any contract [*CISG Part II*]. While consent is determined via the common intentions of the parties [*Gaillard/Savage ¶ 471*], the Tribunal should look to the parties' true intentions, rather than their declared intentions [*Gaillard/Savage ¶ 477*].

94. The Tribunal may determine a party's true intentions by interpreting that party's statements and conduct "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" [*CISG 8[2); ICC 9651*]. A reasonable person's understanding depends on all the facts and circumstances including the negotiations, any practices the parties have established and subsequent conduct [*Schlechtrieum p. 39; CISG Art. 8[3)*]. The Tribunal will find that the reasonable person in RESPONDENT's position would have interpreted AP's involvement as consenting to become a party to the Contract.

95. CLAIMANT is misguided in alleging that involvement in negotiations or performance is insufficient for implied consent [*Cl. Mem. ¶ 60*]. Significant interventions by a parent company in the conclusion and performance of a Contract are consistently held to be sufficient to bind a non-signatory [*Blessing ¶ 35; Vidal ¶ 17; ICC 6519; ICC 11160*]. AP effectively controlled the negotiations before the Contract was ever concluded. A reasonable person would understand that exertion of control to be indicative of consent.

96. Additionally, AP's guarantee of the payment obligation provides insight into its true intention to become a party [*Conveyor Band Case; Scaforn Int'l BV & Orion BVBA v. Exma CPI SA; ICC 9517*]. It is reasonable to expect that a person who guaranteed the obligations of another assumed all that appertains thereto [*Kucera p. 100*]. By guaranteeing payment of the underlying contract, the reasonable person would expect AP to be bound by the obligation to arbitrate disputes regarding the Contract.

97. AP's argument regarding its denial of the proposal to be a party under Art. 1 of the Contract is irrelevant for two reasons [*Cl. Mem. ¶ 35*]. First, the arbitration clause does not require disputes between the "parties." Rather, "[a]ll disputes arising out of or in connection with the present contract" are to be arbitrated [*CE1*]. Second, had AP not intended to be a party, it would have drafted against it through either an integration or indemnification clause [*Blessing ¶ 55*]. Neither is present here. A reasonable person would understand that to mean AP intended to arbitrate any disputes.

98. Furthermore, AP's subsequent conduct shows what the endorsement meant at the time the Contract was concluded [*Alpha Prime Development Corp. v. Holland Loader; Fabrics Case; Textiles Case*]. AP has always initiated communications with RESPONDENT, established both L/C and asserted it would "enforce [its] rights" to 100 MT of coltan in arbitration. A reasonable person would find that these actions demonstrate AP's true intention to become a party to the Contract.

99. Due to AP's significant interventions in the negotiations, conclusion, and performance of the contract, AP has manifested its intent to arbitrate in these proceedings. Therefore, the Tribunal has jurisdiction over AP.

CONCLUSION ON ISSUE 2

100. Notwithstanding RESPONDENT's contention that AP is a signatory to the Contract, the Tribunal has jurisdiction over AP. AP and CLAIMANT demonstrated they form one economic reality because of AP de facto control over the negotiations, performance and termination of the Contract. Therefore, the Tribunal may base its jurisdiction by virtue of GoC. Moreover, good faith considerations prevent AP from invoking the absence of a valid arbitration agreement.

ISSUE 3: RESPONDENT RIGHTFULLY AVOIDED THE CONTRACT

101. CLAIMANT and RESPONDENT are both based in different contracting states to the CISG and the Contract involves an international sale of goods. Therefore, this dispute is governed by the CISG

[*CISG Art. 1(a)*]. Accordingly, RESPONDENT is no longer bound by the terms of the Contract because it was rightfully avoided through both declarations of avoidance. First, RESPONDENT's 7 July communication was a proper declaration of avoidance **(I)**. Second, the 9 July communication was also a valid declaration of avoidance in and of itself **(II)**.

I. THE 7 JULY DECLARATION VALIDLY AVOIDED THE CONTRACT

102. Under Art. 72 CISG, a seller may avoid the contract if prior to the date of performance it is clear that the buyer will commit a fundamental breach of contract. An anticipatory breach requires a degree of certainty that breach will be committed, and the nature and magnitude of that breach to determine whether or not it was fundamental. [*Schlectriem/Schwenzer, p. 721*]. As such, RESPONDENT rightfully avoided the Contract because L/C 1 was a clear indication of a future fundamental breach **(A,B)**. Additionally, **e**ven if it was not a clear indication of future fundamental breach, RESPONDENT was still entitled to avoid the contract **(C)** and properly did so **(D)**.

A. L/C 1 amounted to a fundamental breach

103. In order to avoid a contract under anticipatory breach, the suspected breach must be fundamental as determined by Art. 25 CISG [*CISG Art. 72(1)*]. A breach is fundamental when it results in such detriment to substantially to deprive the other party of what it was entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. [*CISG Art. 25*]. A fundamental breach must be determined on an individual basis [*Beer Case*]. To determine whether a breach is fundamental, the Tribunal should consider the nature of the contractual obligation, the gravity of the circumstances of breach, and the unwillingness to perform. [*Koch*, p. 214].

104. CLAIMANT committed an anticipatory breach because the nonconformities of L/C 1 frustrated the nature of the Contract. The gravity of these consequences substantially deprived RESPONDENT of what it was entitled to expect under the contract **(1)** [*Cl. Mem. ¶65*]. Furthermore, CLAIMANT, and a reasonable person in a similar circumstance as Claimaint, could have reasonably foreseen such a result **(2)** [*Cl. Mem. ¶65*].

1. Respondent was substantially deprived of what it was entitled to expect under the Contract.

105. Any obligation under a contract may give rise to a relevant expectation, "irrespective of their nature as primary obligations, or mere modalities of performance." [*Beer Case*]. As the Buyer, CLAIMANT's most important obligation was to pay the price for the coltan in congruence with the terms of the

contract. [*CISG Art. 53*]. CLAIMANT's obligation to pay the price includes complying with such formalities required for as are necessary under the Contract to enable payment to be made. [Art. 54 CISG]. Therefore, RESPONDENT had an expectation that CLAIMANT open a L/C in the amount USD 1.35 million. [*CE1*].

106. Failure to open such a L/C or opening a defective L/C constitutes a fundamental breach. [*Osuna-González p. 302; Koch p. 219*]. The term substantially deprived "does not refer to the extent of the damage, but instead to the importance of the interests which the contract and its individual obligations actually create for the promise." [*El-Saghir* and S*chlechtriem* p. 58]. RESPONDENT required a L/C because it wanted to ensure that payment would be made. Accordingly, a proper L/C was essential to the conclusion of the Contract.

107. Due to prior dealings with AP, where it had caused a subsidiary to default on payments, RESPONDENT made it clear that AP must guarantee CLAIMANT's payment obligation with a L/C being the best option [*RE1¶¶4-7*]. L/C advanced international trade by providing adequate security for payment [*Ellinger/Neo p. 1*]. Thus, opening of a conforming documentary credit to enable payment falls under a buyer's obligation to pay the contracted price. [*Downs Investments Case*].

108. In *Downs Investments Case*, the tribunal found that the buyer committed a fundamental breach of contract when it failed to open the irrevocable L/C agreed upon in the contract. Unable to receive payment, the seller was substantially deprived of its payment expectations and was therefore entitled to avoid the contract. Similarly here, CLAIMANT has committed a fundamental breach when it failed to open a conforming L/C because that deprived RESPONDENT of its payment expectation.

109. Once a L/C is opened, the seller must present the bank with transport documents that comply with the terms of the L/C in order to be paid [*Art. 14 UCP*]. However, the bank is only permitted to provide payment upon the presentation of documents that strictly comply with the L/C, even if they are not compliant with the terms of the contract itself. [*UCP Arts. 2,4*]. By instructing its bank to issue a non-conforming L/C, CLAIMANT left respondent with only two options. First, RESPONDENT could provide complying documents and effectively accept the modified CIP terms and 100 MT. Second, RESPONDENT could do what any reasonable businessman its position would do and avoid the Contract. Here, avoidance was the best option.

110. Regardless if the amount exceeds the contracted price, the only way the L/C could be opened partially would require RESPONDENT to present the bank with documents that comply to non-conforming L/C terms. Therefore, even if RESPONDENT wanted to open a partial L/C, CLAIMANT still left Respondent with the same problematic options.. [*UCP Art. 4; Cl. Mem. ¶ 76*].

111. Further, the establishment of a L/C "must not serve as to lure to get the goods out of the seller." [*Osuna-González, p. 323*]. The entire purpose of requiring a L/C was to reduce RESPONDENT's risk in contracting with CLAIMANT and to ensure the payment of USD 1.35 million, not to be forced to comply with unilateral modifications. Additionally, by failing to provide a conforming L/C, CLAIMANT not only substantially deprived the RESPONDENT of receiving payment at all, but also substantially deprived it in regard to the market value payment price **(a)** and the delivery terms **(b)** it was entitled to expect.

a. RESPONDENT was entitled to expect market value for the amount of coltan purchased

112. Claimant is bound by any agreed upon practices and usages it has established with Respondent [CISG Art. 9(1)]. Claimant agreed to Respondent's contracted price, which was based off of the current market value at the conclusion of the contract. Therefore, Claimant was bound to use the market value as a determination of price. As such, Respondent was entitled to expect receive payment in the amount of the market value price for any fixed quantity of coltan sold.

113. Additionally, a buyer has fundamentally breached its payment obligations where payment is paid only partially [*Beer Case*]. In the *Beer Case*, the buyer substantially deprived the seller of its payment expectation when the invoices were only partially paid. This led to a considerable loss of profit on the part of the seller and the OLG Brandenburg court found that seller was entitled to avoid the contract.

114. Similarly, RESPONDENT was substantially deprived of its payment expectation when CLAIMANT attempted to only pay the partial market price. When CLAIMANT opened the L/C 1, the market value of coltan had been fluctuating by up to USD5/kg due to Xanadu's political breakdown and the disclosure of a new game console release [*PO2 ¶6*]. By opening a nonconforming L/C that demanded 100 MT at USD45/kg, RESPONDENT was being forced to accept a modified quantity that did not reflect the agreed upon practice of using market price.

115. Specifically, CLAIMANT was demanding 230% more coltan than the contracted quantity at a price below market value. In other words, CLAIMANT unilaterally modified the contract for a discount price of USD 3.15 million for an additional 70 MT. That additional amount alone is valued at USD 3.85 million [*PO2 ¶30*]. Much like the buyer in the *Beer Case*, CLAIMANT's partial payment would have caused RESPONDENT to suffer a considerable loss of profit. Therefore, even if RESPONDENT were to accept the L/C 1, RESPONDENT was still substantially deprived because, in light of the

market value, the amount reflected in L/C 1 was less than what the RESPONDENT would have reasonably expected for the sale of 100 MT.

b. RESPONDENT was entitled to expect CIF delivery terms

116. RESPONDENT is entitled to expect that the L/C be "consistent with terms of the contract." [*CE1*]. This expectation encompasses all the terms explicitly stated in the contract including the agreed upon CIF shipping terms. [*CE1*]. Although both CIF and CIP require the seller to provide some form of insurance there is a fundamental difference between the two terms.

117. Under CIF Incoterms the seller only has to cover insurance only by the sea and the risk of the seller passes to the buyer once the goods reach the destination port. On the other hand, CIP Incoterms require the seller to cover insurance for goods up to the contracted destination. This would force RESPONDENT to pay a higher insurance premium because of the liability for risks.

118. Even if CLAIMANT acted under the belief that the typo on the NoT was a modification, RESPONDENT's conduct is to be interpreted according to its intent [*CISG Art. 8(1)*]. In determining RESPONDENT's intent, due consideration must be given to any practices which the parties have established between themselves [*CISG Art. 8(3)*]. The only reason RESPONDENT agreed to CIF terms was because the state owned shipping company had an office in Ruritania that could provide lining services to that port [*RE1 ¶7*]. The use of CIF Incoterms, as opposed to any "f" clauses, was an established practice between the parties that was also relevant for price calculation [*RE1 ¶5; Cl. Mem. ¶70*].

119. Furthermore, a party's conduct is to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had under the same circumstances [*CISG Art. 8(2)*]. A reasonable person would not intentionally modify the contract in such a way that would shift additional costs onto it. Therefore, CLAIMANT's argument regarding shipping terms [*Cl. Mem. ¶ ¶72, 88*], is not dispositive. Thus, RESPONDENT was still entitled to expect a L/C with CIF shipping terms

2. CLAIMANT could have reasonably foreseen such substantial deprivation

120. The foreseeability of a substantial detriment caused by the breach depends on all relevant circumstances of the case [*Koch p. 228*]. As an active member in the coltan market, CLAIMANT and any reasonable person in the market would have known of the current state of the market. The public announcement of the political divide in Xanadu and the leaked anticipated release of a new game console critically change the market value for coltan [*PO2 ¶30*]. Therefore, a reasonable coltan

trade would have foreseen the drastic price fluctuations and anticipated the negative effect it would have on RESPONDENT with respect to opening a non-conforming L/C [*Cl. Mem. ¶ 81*].

121. Moreover, Claimant had access to insider information about the government breakdown in Xanadu [*RE1 ¶9*]. As such, CLAIMANT knew that a substantial increase in the price of coltan was imminent, and attempted to purchase far more than had been agreed to exploit this knowledge. A reasonable person would have foreseen that this would substantially deprive RESPONDENT of entering into other contracts with more attractive prices and ultimately lead to a considerable loss in profit for RESPONDENT [*Cl. Mem. ¶ 81*].

122. Furthermore, opening a non-conforming L/C created an additional delay in payment. Such a delay is fundamental and CLAIMANT could have reasonably foreseen such detriment in light of the circumstances because time is of essence in this contract [*PO2 ¶18*]. Additionally, based off prior negotiations with RESPONDENT, CLAIMANT knew the importance of complying with the L/C. This was the most important condition in entering into agreement in the first place [*CISG Art. 8(1), Cl. Mem. ¶86*]. The focus of negotiations revolved around payment, and it was implicitly established that RESPONDENT intended to have strict compliance with the L/C was essential and any deviation from the agreed upon L/C is to be regarded as fundamental [*CISG Art. 8(3)*].

123. In determining fundamental breach, consideration should also be given to whether the breach gives the aggrieved party reason to believe that he may not rely on the other party's future performance. Even where the contractual breach is minor, and the consequences of the breach do not substantially deprive the aggrieved party of his expectations under the contract, a party can nonetheless treat the breach as fundamental if it was intentional. [*Karollus,* note 105]. Therefore, CLAIMANT's breach is fundamental regardless of the detriment because it was an intentional error with foreseeable consequences.

124. It is irrelevant that the L/C was timely. Opening a non-conforming L/C forced RESPONDENT to decide between two unfavorable options that lead to substantial detriment. RESPONDENT would be forced to either accept the L/C along with CLAIMANT's unilateral amendments, or reject the L/C and create an additional delay in payment. Such a delay is fundamental and CLAIMANT should have reasonably foreseen such detriment in light of the circumstances because time is of essence in this contract [*PO2 ¶21*].

B. There was a high degree of certainty for fundamental breach

125. It is sufficient that the future breach is clear whatever the clarity results from so long as it is fundamental in character. [*Bennett p. 525*]. While a high degree of certainty is required for anticipatory

breach, *absolute* certainty is not required. [*Schlectriem/Schwenzer, p. 721; Germany 30 September 1992 District Court Berlin*]. A clear indication of future breach may follow from the parties conduct in preparing to perform the contract. [*Schlechtriem, p. 95*]. A buyer's failure to open a L/C may satisfy those conditions of certainty [*Downs Investments Case*].

126. In *Downs Investments Case*, the buyer's failure to establish a L/C was a failure by the buyer to meet its "obligation to pay the price" and was a clear indication of a future fundamental breach. Similarly, by sending a non-conforming L/C, CLAIMANT failed to meet its obligation to pay the price and clearly indicated a future fundamental breach of contract. Therefore, RESPONDENT was entitled to avoid the Contract.

C. In any event, CLAIMANT failed to provide adequate assurance

127. The party intending to declare the contract avoided must give reasonable notice, if time allows, to the other party in order to permit him to provide adequate assurance of his performance [*CISG Art. 72(2)*]. However, such notice is not required if the breaching party has declared that it will not perform its obligations. Although RESPONDENT gave reasonable notice **(1)**, CLAIMANT failed to provide adequate assurance by declaring it will not perform its obligations by virtue of its 5 July email to RESPONDENT **(2)**.

1. RESPONDENT gave reasonable notice

128. There is no strict requirement for the type of notice provided. [*High tensile steel bar case*]. Notice is reasonable so long as the addressee has a chance to provide assurance of performance [*Schlectriem/Schwenzer p. 722*]. In *High tensile steel bar case*, a seller's fax informing the buyer of potential future termination if the buyer does not conform to the contract was considered reasonable notice. Much like a fax, RESPONDENT's voicemail provided CLAIMANT with notice almost instantly.

129. To prevent a hasty declaration of avoidance, RESPONDENT immediately called CLAIMANT upon receipt of L/C 1 [*PO2 ¶21*]. RESPONDENT left a voicemail informing CLAIMANT of the discrepancies in the L/C, asked CLAIMANT to provide adequate assurance of performance, and requested a conforming L/C. Additionally, given the casual means of communication and frequent the phone calls between CLAIMANT and RESPONDENT, telephonic communications was an established practice by which the parties were bound. [Art. 9[1) CISG.]

130. Due to the sophisticated means of instant communication made available to, and used by both parties, CLAIMANT had a chance to provide assurance of performance almost immediately. Therefore, leaving a voicemail that informed CLAIMANT of potential future termination constitutes reasonable notice.

2. CLAIMANT Failed To Provide Adequate Assurance

131. The absence of an assurance of performance in response to a notice constitutes a clear indication that a breach is going to occur [*Düsseldorf case*]. Failure to provide adequate assurance is sufficient to permit avoidance because it becomes clear that CLAIMANT will commit a fundamental breach [*Schlectriem/Schwenzer, p. 720, Honnold/Fletcher p. 565*]. Additionally, mere retraction of a declaration of repudiation is no adequate source of future performance [*Schlectriem/Schwenzer p. 724*].

132. Rather than returning RESPONDENT's phone call, AP merely emailed RESPONDENT to inform it that only the delivery terms would be changed [*CE6 ¶2*]. While the incorrect delivery terms were a fundamental discrepancy of L/C 1, it was not the only non-conformity.

133. Additionally, CLAIMANT failed to provide any assurance with regard to the non-conforming quantity. Further, CLAIMANT merely retracted that it would demand CIP delivery terms. Therefore, only promising to change the delivery terms does not amount to adequate assurance because RESPONDENT's voicemail requested overall assurance of performance, meaning a correct L/C in its entirety.

134. Failure to provide adequate assurance not only amounts to a fundamental breach itself, but also makes it clear that the CLAIMANT will commit a fundamental breach [*Düsseldorf case*]. *Düsseldorf case* held that a buyer's failure to provide adequate assurance is a clear indication that he will not pay the purchase price and is a clear indication of a future fundamental breach. The seller was therefore entitled to avoid the contract on these grounds. Here, RESPONDENT is entitled to avoid the contract on the grounds that CLAIMANT failed to provide adequate assurance of opening a conforming L/C in its 5 July email.

135. Furthermore, a blatant refusal to cure the defect within a reasonable time constitutes a fundamental breach [Karollus n. 378]. Not only did CLAIMANT fail to provide adequate assurance of future performance, it also clearly repudiated the terms of the contract by alleging it was entitled to 100 MT of coltan [*CE6 ¶2; Cl. Mem. ¶87*]. This operates alongside the case where a German buyer clearly demonstrated an unwillingness to perform [*Landgericht* Berlin, 30 September 1992, 99 O 123/92]. The buyer indicated a future fundamental breach by refusing to honor an Italian seller's request for a security of payment, and thus, the Italian seller was entitled to avoid the contract. Such a declaration of an unwillingness to perform allows RESPONDENT to declare the Contract avoided without further notice. [Art. 72(3) CISG; *Schlectriem/Schwenzer p. 720*]. In this case, the 5 July email entitled RESPONDENT to avoid the contract on the grounds that CLAIMANT expressly repudiated the contract when it still demanded 100 MT.

D. Respondent effectively avoided the Contract

136. Avoidance was the only option because it was clear that CLAIMANT had no intention of complying with the contract. The declaration of avoidance is a unilateral right vested in the non-breaching party if the conditions provided under the Convention are satisfied. CLAIMANT's fundamental breach of contract and blatant unwillingness to preform met such conditions. RESPONDENT properly avoided the contract under the provisions of Art. 72 CISG and properly communicated the termination of the contract to CLAIMANT through its written 7 July declaration of avoidance [*ICC Case No. 7197*]. The wording of the notice was unequivocal and it sufficiently avoided the contract. Pursuant to Art. 27 CISG, the declaration of avoidance was effective after dispatch.

II. THE 9 JULY DECLARATION VALIDLY AVOIDED THE CONTRACT

137. Notwithstanding the 7 July notice of avoidance, the 9 July letter was also a proper notice of avoidance–if there had been a contract to be avoided at that point. RESPONDENT was forced to send this second notice of avoidance due to CLAIMANT and AP's behavior leading up to the termination of the Contract **(A)**. Thus, RESPONDENT was entitled to avoid the Contract **(B)** and effectively did so **(C)**. Accordingly, the Tribunal will find that the 9 July notice of avoidance properly avoided the contract, regardless of its determination as to the propriety of the 7 July notice of avoidance.

A. RESPONDENT was forced to send the 9 July notice of avoidance

138. Despite validly avoiding the Contract by virtue of the 7 July notice of avoidance, RESPONDENT was compelled to send a second notice of avoidance because of CLAIMANT and AP's lack of good faith in the dealings **(1)** and the need for RESPONDENT to protect its interests **(2)**.

1. RESPONDENT reasonably believed that CLAIMANT would not act in good faith

139. RESPONDENT was justified in its belief that CLAIMANT would not respect the 7 July avoidance. CLAIMANT already attempted to unilaterally amend the contract, and sent a L/C to enforce its conditions. Although RESPONDENT resisted these actions, CLAIMANT reiterated its alleged claim to 100 MT, and RESPONDENT avoided the contract.

140. Despite the foregoing, CLAIMANT sent L/C 2 for 30 tons of coltan. This time CLAIMANT unilaterally amended the L/C by requiring unstipulated documents. CLAIMANT consistently demonstrated behavior indicating that it would not accept anything less than its modified terms. In dealing with such a partner, RESPONDENT was left with no other choice than to send a second notice of avoidance. Any reasonable businessman would have done the same. Therefore, RESPONDENT was

justified in eliminating both the contract and its relationship with CLAIMANT. [*Compromex No. M/115/97*]

2. RESPONDENT needed to protect its interests.

141. The RESPONDENT was motivated to protect its interests as against CLAIMANT and additional party. Any reasonable businessmna in RESPONDENT's position would have undertaken the same actions to protect its interests [*Chinchilla Furs Case*].This is especially true when it involves the commodities market.

142. The commodities market is a fast moving, highly volatile market, dependent upon timely payments, and as such allows for and necessitates a quick trigger on the avoidance of a contract [*The New Prosper Case*]. As the facts have demonstrated, events can cause the price of a commodity to change drastically in a short period of time. Allowing a party to deliver a L/C that was not only late, but only received due to the dramatic events of the past days, is both poor policy and inconsistent with the strict nature of the commodities market [*Zeller p. 631*].

143. Additionally, if CLAIMANT were to prevail in its claim, a message would be sent that taking unfair advantage of information unavailable to other parties is acceptable behavior in business. CLAIMANT contends that RESPONDENT is exhibiting opportunistic behavior, but fails to acknowledge its own improper conduct.

144. CLAIMANT was aware that the price of coltan would rise considerably, and attempted to unfairly exploit that knowledge. While a business is expected to take advantage of market conditions, it is contrary to good faith when it results in detriment to another party. Such conduct runs counter to an integral principle applied to every transaction under the CISG [*Good Faith-The Scarlet Pimpernel of the CISG*].

B. RESPONDENT was entitled to avoid the Contract

145. Contrary to CLAIMANT's submission [*Cl. Mem. ¶100*], RESPONDENT was entitled to avoid the Contract by virtue of the 9 July declaration. As has been reiterated since the signing of the Contract, *any* deviation from a contract in the commodities trade constitutes a fundamental breach [*CE7; RAC ¶31; RE4; PO2 ¶18*]. Accordingly, L/C 2 was late **(1)** and CLAIMANT's failure to timely establish the L/C was a fundamental breach **(2)**. In any event, the commercial invoice requirement constitutes a fundamental breach **(3)**. Therefore, the Tribunal will find that RESPONDENT rightfully avoided the Contract.

1. L/C 2 was late

146. CLAIMANT's position on the timeliness of L/C 2 is incorrect as to the date performance was due and the applicable time zone [*Cl. Mem.* ¶*98*]. First, CLAIMANT was required to establish a L/C by 8 July **(a)**. Second, MST is the applicable time zone **(b)**. Therefore, CLAIMANT failed to timely establish a L/C.

a. 8 July 2014 was the final day to establish the L/C

147. CLAIMANT is misguided as to both when the L/C was to be established and how to calculate that date [*Cl. Mem. B.1.1*]. Under Art. 4 of the Contract, CLAIMANT was required to establish a L/C "not later than fourteen days after [CLAIMANT]" received the NoT [*CE1*]. CLAIMANT received the NoT on 27 June, making 8 July the final date for performance. Although CLAIMANT is correct that the CISG has not expressly settled this issue under Art. 20 [*Cl. Mem.* ¶*102*], a proper analysis of the CISG's gap-filling procedures leads to the rules of private international law ("PIL") [*CISG 7(2)*]. Thus, the Tribunal will find that date of performance must be determined under Mediterraneo's rules, which makes 8 July the proper date of performance [*PO2* ¶*44*]

148. Under Art. 7(2), matters not expressly settled by the CISG are to be interpreted in accordance with the general principals on which it is based. CLAIMANT offers no support for its position that PECL Art. 1:304(3) is a general principle upon which the CISG is based [*Cl. Mem.* ¶*102*]. Nonetheless, RESPONDENT submits that the calculation of deadlines after the formation of the contract is an external gap. Therefore, the Tribunal should proceed to a conflict of laws analysis under private international law [*CISG 7(2)*].

149. The applicable laws under the present PIL analysis are those of Mediterraneo, Danubia, Equatoriana, and Ruritania. Generally, a tribunal will choose the laws of the country that has the closest connection to the transaction [*Dicey/Morris/Collins p. 1582*]. In determining the closest connection, the Tribunal should take account of which country the characteristic performer of the contract has a territorial connection with [*Clarkson/Hills p. 186*]. Both factors point to the rules of Mediterraneo. The Contract is for the sale of coltan that is mined and extracted exclusively by RESPONDENT in Mediterraneo. Mediterraneo has the closest connection to the Contract and the Mediterraneo standard should be applied to fill the gap.

150. Pursuant to Mediterraneo rules, the day of the occurrence of the triggering event is counted in [*PO2* ¶*44*]. Here, the receipt of the NoT was the triggering event. CLAIMANT received the NoT on 27 June. CLAIMANT had 14 days starting on 27 June to establish a L/C. L/C 2 did not reach RESPONDENT until 9 July, the 15th day. Therefore, the L/C was late.

b. MST is the applicable Time Zone

151. MST time zone applies to Mediterraneo and RST time zone applies to Ruritania and Equatoriana [*RAC ¶ 34*]. Although it is correct that determining the applicable time zone requires gap-filling [*Cl. Mem. ¶105*], CLAIMANT has misinterpreted the law in concluding RST time zone applies [*Cl. Mem. ¶108*]. RESPONDENT accepts CLAIMANT's position that the time zone should be determined under Art. 1.12 of the UNIDROIT Principles [*Cl. Mem. ¶106*]. However, a proper interpretation of that law leads to MST time zone.

152. Art. 1.12(3) states that the relevant time zone is determined by the place of business of the party setting the time. RESPONDENT clearly set the time when it sent the NoT to CLAIMANT [*CE2*]. As RESPONDENT is located in Mediterraneo, MST time zone applies.

153. Even if the Tribunal were to follow CLAIMANT's use of the illustration under Art. 1.12 [*Cl. Mem. ¶107*], CLAIMANT has once again misapplied the law in concluding that RST time zone applies because Ruritania is the place where payment is due [*Cl. Mem. ¶108*]. Presently, the place of payment is Mediterraneo. Under a documentary L/C, payment is made when a credit is made to the beneficiary's account [*Ellinger/Neo p. 9*]. Thus, payment would ultimately be made to an account in Mediterraneo.

154. Further, contrary to CLAIMANT's assertion [*Cl. Mem. ¶113*], when a communication consists of an obligation under the contract "it can be deemed to have been performed *only* if the information has reached the promisee" [*Schlechtriem/Schwenzer p. 308*]. Moreover, it is well settled that a L/C is not established until it reaches the hands of the beneficiary [*Ellinger/Neo p. 9*]. Therefore, as RESPONDENT would not have had access to the fax until the next morning, it was late under MST time zone.

155. Despite CLAIMANT doing its "best" [*Cl. Mem. ¶111*], the fax was still late under MST time. CLAIMANT was well aware that RESPONDENT's business hours were between 8:00 and 20:00h MST [*RAC ¶23; PO2 ¶23*]. The fax was not received until 22:42h MST [*RE4*]. CLAIMANT's argument that this is irrelevant because the Contract did not stipulate that the L/C had to be sent during business hours exceeds the bounds of common sense [*Cl. Mem. ¶112*]. The L/C is useless if it is just sitting in a fax machine.

2. Failure to timely establish a L/C is a fundamental breach

156. CLAIMANT ignores the fundamental nature of the commodities trade in declaring that a late L/C does not constitute a fundamental breach [*Cl. Mem. ¶115*]. "The buyer's obligation to pay the prices includes taking such steps and complying with such formalities" under the contract that enable payment to be made [*CISG Art. 54*]. A seller may declare the contract avoided when the buyer's

failure to perform any of its obligations amounts to a fundamental breach [*CISG Art. 64(1)(a)*]. A breach is fundamental when the seller is substantially deprived of what it is entitled to expect *under the contract* **(a)**, unless the buyer and a reasonable person could not have foreseen such a result **(b)** [*CISG Art. 25*].

a. A late L/C constitutes a fundamental breach in the commodities trade

157. Under the CISG, parties are bound by any international usage that is respected in their particular trade [*CISG Art. 9*]. The violation of a trade usage may amount to a fundamental breach [*Kroll/Mistellis/Viscasillas p. 339*]. While under some circumstances time may not be of the essence in opening a L/C [*Cl. Mem. ¶117*], it is a common usage in the commodities trade that time is always of the essence [*Winsor p. 97*]. When time for performance is essential to a contract, a delay can amount to a fundamental breach [*Magnus p. 602*]. The Tribunal will find that under the present circumstances the delayed L/C was a fundamental breach.

158. CLAIMANT is correct that the detriment is specified by the contract [*Cl. Mem.* ¶122]. However, the significance in the delay should be assessed by the aggrieved party's interest in punctuality [*Ferrari/Flechtner/Brand p.* 367]. The coltan market is highly volatile with price fluctuations that are susceptible to political crises like the one in Xanadu. As the second largest producer of coltan with a well-established reputation, RESPONDENT has no problem selling coltan–when it is able to. Accordingly, RESPONDENT always expects to be paid on time in order to maximize its profits. After all, that is why parties enter into international trade.

159. As such, RESPONDENT would have never entered into this Contract if it knew that CLAIMANT was going to establish the L/C late [*FCF S.A. v. Adriafil Commerciale S.r.l*]. Therefore, RESPONDENT was substantially deprived of what it was entitled to expect because punctuality was essential and the lateness frustrated RESPONDENT's economic goals [*Kroll/Mustellis/Viscasillas p. 337; Downs Investment Case*].

b. CLAIMANT and a reasonable person would have foreseen such a result

160. Notwithstanding CLAIMANT's contention that the Contract did not expressly specify time was of the essence [*Cl. Mem. ¶124*], the reasonable person under this analysis is one who is familiar with the trade [*Kroll/Mustellis/Viscasillas p. 341*]. As such, CLAIMANT carries the burden of proof to demonstrate that it, or the reasonable person in the commodities trade, would not have been aware that any delay would result in a fundamental breach [*Honnold/Fletcher p. 189*]. CLAIMANT has failed to show that a reasonable person under these circumstacnes would not have considered delayed payment to be a substantial detriment to RESPONDENT.

161. Once again, CLAIMANT fails to account for the usages of the commodities trade. The fact that it is new to this business should be no excuse. Further, by including CIF as a term in the Contract, CLAIMANT was on notice that deadlines were to be strictly followed [*Iron Molybdenum Case*]. Thus, the fundamentality was foreseeable because CLAIMANT has not met its burden to prove that a reasonable person in the commodities trade would have been aware that a delay in payment constitutes a fundamental breach.

3. In any event, the commercial invoice requirement constitutes a fundamental breach

162. CLAIMANT CLAIMANT is correct that a commercial invoice is required via Incoterms, international usage, established practices and by general cooperation [*Cl. Mem.* ¶¶*129-136*]. However, under these limited circumstances, the commercial invoice amount to a fundamental breach. The UCP 600 is applicable through Art. 4 of the Contract [*CE1*]. According to the UCP, the commercial invoice "must be made out in the name of the applicant" under the L/C [*UCP Art. 18(a)(ii)*]. AP is the applicant under both L/C 1 and L/C 2. Therefore, only AP would have the right to the goods upon delivery.

163. This would substantially deprive RESPONDENT of what is was entitled to expect by making it susceptible to a damages claim from CLAIMANT. RESPONDENT has a duty to deliver the goods free from any third-party right or claim [*CISG Art. 41*]. This one of the most fundamental expectations of a buyer in a sale for goods [*Kroll/Mistellis/Viscasillas p. 642*]. Under Art. 41, the mere assertion of a third-party claim constitutes a fundamental breach [*Lookofsky p.* 87]. Accordingly, the commercial invoice requirement would force RESPONDENT to deliver the goods subject to a right or claim by AP. RESPONDENT cannot be expected to expose itself to that kind of liability.

164. Further, CLAIMANT's obligation in taking delivery includes taking all steps reasonably expected of him to enable RESPONDENT to make delivery [*CISG Art. 60(a)*]. This creates another issue because the address for the applicant on the commercial invoice must be in the same country as the address listed on the L/C [*UCP Art. 14(j)*]. Therefore, RESPONDENT must list an address in Ruritania for delivery in order to meet the strict document compliance for a L/C. Inducing RESPONDENT to make mistakes on documents prevent payment from being made through a L/C constitutes a fundamental breach [*Dulces Luisi v. Seoul International*].

165. CLAIMANT has breached both of its obligations under Art. 53 because the commercial invoice requirement forces RESPONDENT to make an error that will prevent it from complying with its payment and delivery obligations. In the commodities trade, handing over clean documents is of the

essence of the Contract [*Winsor p. 101*]. Therefore, under these particular circumstances, the commercial invoice requirement constitutes a fundamental breach.

C. The 9 July declaration was an effective notice

166. Avoidance was carried out by notice to the CLAIMANT, as required by CISG Art. 26. This notice was clear and unambiguous as to its intent and effect. CLAIMANT knew that the contract was being avoided both from the explicit language of the notice and the fact that the Contract had already been avoided previously. Given both the circumstances and the notice itself, there was no other reasonable interpretation of the notice other than avoidance.

CONCLUSION ON ISSUE 3

167. RESPONDENT rightfully avoided the Contract through both the 7 July and 9 July declarations of avoidance. RESPONDENT was entitled to avoid the Contract by virtue of the 7 July declaration because CLAIMANT clearly indicated it would commit a future fundamental breach. In any event, RESPONDENT validly avoided through the 9 July declaration because the late delivery and commercial invoice requirement each amounted to a fundamental breach. Therefore, RESPONDENT validly avoided the Contract.