TWENTY SECOND ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MARCH 27 – APRIL 2, 2015

MEMORANDUM

for

RESPONDENT

MAASTRICHT UNIVERSITY

On behalf of	Against
RESPONDENT	**CLAIMANT**
Mediterraneo Mining SOE	Vulcan Coltan Ltd Global Minerals Group

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arguendo	Lat. for the sake of argument
Art.	Article
Arb. Request	Request for Arbitration (11 July 2014)
ADR	Alternative dispute resolution
BGH	Bundesgerichtshof
CC.	Answer to Request for Arbitration/ Request for Joinder / Counterclaim
CC. Reply	Answer to Counterclaim and Joinder
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CIF	Cost, Insurance and Freight
CIP	Carriage, Insurance Paid to…
ed.	Edition
et seq./et seqq.	and the following
E.M. App.	Emergency Measure Application
ICC	International Chamber of Commerce
Inter alia	Among other things
LoC	Letter of Credit
MüKo BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch (Germany)
MST	Mediterranean Standard Time
No.	Number
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
OLG	Brandenburgischen Oberlandesgericht,
Op.	Opinion

p.	Page
¶	Paragraph/ paragraphs
Per se	In itself
PO.	Procedural Order No 1
PO. 2	Procedural Order No 2
RST	Ruritarian Standard Time
UCP 600	Uniform Customs and Practice for Documentary Credits 600
UNIDROIT	Principles of International Commercial Contracts
UNCITRAL 2006	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
USD	U.S. Dollars
v.	versus

STATEMENT OF FACTS

MEDITERRANEO MINING SOE ('RESPONDENT') is a state owned company based in Mediterraneo operating all mines in the country, including coltan. VULCAN COLTAN LTD. ('CLAIMANT'), a 100% subsidiary of GLOBAL MINERALS GROUP OF COMPANIES, is attempting to establish itself in the competitive market of Equitoriana.

23 March 2014	Mr. Storm approaches Mr. Winters in order to enquire about a delivery of 100 metric tons of coltan for Mr. Summers. The main clauses and quantity of coltan were agreed upon during that meeting [PO. ¶2, 7& 12]
28 March 2014	The parties signed the Contract for delivery of 30 metric tons of coltan. The payment was to be performed through documentary credit and the coltan was to be delivered to the port 'Oceanside' using the CIF delivery terms. The Contract included terms for an arbitration agreement and provisional measures. Global minerals signed the contract under "Endorsed by" [Ex. C1;CC. ¶5; PO. 2 ¶7].
25 June 2014	Notice of Transport of 30 metric tons of coltan containing the term of transport CIP was issued by RESPONDENT [Ex. C2]. RESPONDENT sent an e-mail to CLAIMANT informing them that earlier delivery could be expected [Ex. C3].
27 June 2014	Mr. Storm attempts to renegotiate the contract, claiming to accept an extension offer by RESPONDENT,15:05 RST (20:05 MST) [Ex. C4].
4th July 2014	CLAIMANT opened a $4,500,000 LoC for 100 metric tons of coltan [Ex. C5]. The delivery was to be performed through CIP to the CLAIMANTS' premises. RESPONDENT received the LoC at 10:00 RST (15:00 MST)
5th July 2014	Respondent informs VULCAN COLTAN that the LoC rejected. Mr. Storm emails RESPONDENT insisting on 100 metric tons and changing the terms of delivery

	agreed in the contract [Ex. C6]
7th July 2014	RESPONDENT declared the contract avoided [Ex. C7] due to the deviations from the Contract.
8th July 2014	After working hours, CLAIMANT sends a fax with a copy of a second LoC at 22:42 MST to RESPONDENT (17:42 RST) [Ex. C10 & Ex. C8]
9th July 2014	Courier delivered the LoC at 00:05 MST (19:05 RST). [Ex. C9]

DANUBIAN LAW ALLOWS FOR GLOBAL MINERALS TO BE JOINED TO ARBITRATION

I. THE APPLICABLE LAW IS THE LAW OF DANUBIA

1. RESPONDENT requests the court to recognize GLOBAL MINERALS GROUP as an additional party to the Arbitration Agreement and join them to the arbitral proceedings. The applicable procedural law is the law of Danubia [EX. C1]. Danubia has implemented the UNCITRAL Model Law on International Arbitration with 2006 amendment (Model Law) [PO. 1, ¶5 (3)]. Danubia has also implemented the UNIDROIT Principles Of International Commercial Contracts 2010 (PICC) as its substantive contract law [PO.2 ¶43].
2. We will show that GLOBAL MINERALS can be bound as a party to the proceedings. This joinder request is based on two approaches: that GLOBAL MINERALS gave consent (either expressly or implicitly) to be bound (A), and that GLOBAL MINERALS should be bound as it is the same corporate personality as CLAIMANT (B).

Danubian Law Determines Global Minerals' Consent to the Arbitration Agreement

3. In the first approach, where GLOBAL MINERALS is being joined as a consenting party, there are two forms: express and implied consent. When a party has explicitly stated its intention to be bound by an arbitration agreement, it is to be considered to be express consent. When a party has not explicitly given its consent, but has behaved in a manner befitting a party meaning to be bound, this is implied consent [BORN, p.1150]. In either case, when considering joining parties, the question is not of extending the agreement to third parties, but instead recognizing the joined parties as principal contractual parties [BORN, p.1139][Ex. C1 Art. 20; PO.1 ¶5 (3); PO. 2, ¶43].

When determining the Corporate Personality of Global Minerals, Danubian Law recognises Principles of International Law

4. In the second approach, the distinction between GLOBAL MINERALS and CLAIMANT is assessed, to determine whether they are separate corporate characters for the purposes of litigation. The multinational nature of the parties involved in this case invites the application of Principles of International Law. Applying only principles of national law would impair the Arbitral Tribunal's mandate to resolve the dispute whilst taking into consideration the international nature of the litigation. Therefore, the issue of joining

additional parties, when the party to be joined is engaged in international commerce, must be resolved according to rules specific to situations of this kind. It is for such cases that Principles of International Law work as a gap filler. These principles include the doctrines of Group of Companies, Arbitral Estoppel and Good Faith. [Thompson CSF SA v. AM Arb. Association 64 f.3d 125 130 (2nd circuit); Merril Lynch Inv. Managers v. Optibase Ltd. 337 F.3d 125, 130 (2nd circuit 2003); Interocean Shipping Co. v. National Shipping; Trading Corp. 523 F.2d 527, 539 (2nd Circuit 1975)][BORN pp. 1134-1139,1166,1193; BREKOULAKIS p.150][Adams & Ors v. Cape Industries plc. & Anor (1990) BCC 786 (CA)]. The doctrine of Group of Companies mandates that Global Minerals be joined to the arbitration proceedings.

5. The inclusion of applicable international law principles benefits both parties. CLAIMANTS' counsel has cited a "modern *Lex Mercatoria*" as a source of law, showing a willingness to acknowledge and implement this law in the case [CLAIM. MEMO. ¶6].

Global Minerals Does Not Have to Be Bound by the Contract in Order to Be Bound by the Arbitration Agreement

6. The differentiation of the substantive contract and the arbitration agreement are very important factors when determining to what GLOBAL MINERALS have consented to and where. The principle of separation states that a party does not need to be bound by the substantive contract in order to be bound by the arbitration agreement. The substantive contract does not even have to be valid to allow for arbitration. This rule is enshrined in Article 7(1) Option 1 Model Law but is also a generally observed rule [BORN pp. 310, 411; National Power corp. v. Westinghouse DFT 119 II 380,384].
7. As the Arbitration Agreement is a part of the substantive contract, consent to the contract will also give consent to the Arbitration Agreement as according to the principle above [Ex. C1]. However, it is also possible for GLOBAL MINERALS not to be a party to all aspects of the contract, and just be a party to the Arbitration Agreement, as well as an even more minimalist approach where GLOBAL MINERALS is not even a party to the contract at all but is bound by the Arbitration Agreement.
8. The Model Law determines the validity of the Arbitration Agreement and its scope [SCHUMACHER, p. 54; SCHWAB & WALTHER, p. 383; REDFERN & HUNTER, ¶2:89-2:90]. Pursuant to Article 7 (1)(2) of the Model Law (option 1, as adopted by Danubia), an arbitration agreement comprises of an agreement between the parties to submit to arbitration all or certain disputes arising out of a defined legal relationship between them.

9. CLAIMANT and RESPONDENT chose to include an arbitration clause in the written contract, fulfilling the requirements of PICC and NYC [Ex. C1, Art. 20]. The Article 7(3) of the Model Law concerns the definition of the form of the Arbitration Agreement and not the problem whether the parties have indeed reached a valid agreement to arbitrate. The latter issue is to be dealt with by national legislation [BINDER, p.115; A/61/17, ¶ 153].

II. GLOBAL MINERALS EXPRESSED CONSENT TO ARBITRATE

10. GLOBAL MINERALS rejects any obligation to the Arbitral proceedings, as GLOBAL MINERALS is not a contracting party and is therefore not obligated to arbitrate. This rejection is unfounded, as GLOBAL MINERALS did give consent by signing the contract as an endorser and thus became a contracting party.

11. Under the contract law of Danubia, the PICC, the freedom of contract principle is enshrined in Art. 1.1. This principle allows a party to choose whether or not to enter into a particular contract. However, after consenting to a contract, a party is not free to 'just' revoke their consent. The PICC allows a contractual obligation to be formed (concluded) by way of acceptance of an offer or by conduct. [Art. 2.1.1 PICC]. Whilst the exact moments of offer and acceptance may be harder to define in complex arrangements, it is easier to determine from conduct when a set of terms have been (at least) notionally agreed upon by the parties [PICC p.36].

12. GLOBAL MINERALS actively participated in the negotiation process, determining the content of the Contract [Arb. Request ¶6]. Once the content was agreed upon, GLOBAL MINERALS signed the contract as an endorser, thereby expressly consenting to the contract [Ex. C1]. This behaviour fulfils the requirements of a contracting party under the substantive law of the contract. GLOBAL MINERALS consented to the arbitration agreement by endorsing the contract.

13. Under the law of Danubia, there is no legal provision defining the term "endorsement", leaving the exact legal status open to interpretation [PO.2 ¶45]. This means the understanding of the term "endorsement" must be interpreted under the Danubian provisions on contract law.

14. The *Contra Proferentem* rule, suggested by CLAIMANT, can be applied.[CLAIM. MEMO ¶5; Art 4.6 PICC]. The principle states that a contract should be interpreted against the party that drafted the provision.

15. Contrary to CLAIMANT's statement, the use of term "endorsement" was not supplied by RESPONDENT but by Mr. Storm and had never been used before in the past contracts

[PO.2 ¶ 12; CLAIM. MEMO ¶5]. When interpreting the term "endorsement", it should be done so in RESPONDENT's favour.

16. Therefore, the "endorsement" can be interpreted as expressing consent for GLOBAL MINERALS to be part of any future arbitration.

III. GLOBAL MINERALS' CONDUCT IMPLIES CONSENT TO BE BOUND TO THE ARBITRATION AGREEMENT

17. The consent of Global Minerals can also be implied from their conduct. The behaviour of GLOBAL MINERALS confirms their intention to be bound, refuting their present claims that they didn't wish to be bound. This conduct shows an implied consent to the Arbitration Agreement.

18. In order for a party to be bound by implied consent there must be an intention to be bound, supported by a substantial involvement entailing the active participation in both the negotiation and performance of the contract [STEINGRUBER, §5.14; PARK, ¶ 1.13, ITT v Amerishare; ICC 4504] [ICC 6519 ¶ 1065; ICC 9771; ICC 11160; ICC 7155, ICC 9517; ICC 4131]. These criteria should be examined by using the substantive Danubian contract law [Arts. 4.1, 4.2 & 4.3 PICC].

19. The conduct of GLOBAL MINERALS suggests an intention counter to its statement that it did not wish to be bound by the contract [CC. Reply ¶5; PO.2 ¶7]. On 23rd March 2014, the negotiations of the future Contract were initiated not only between CLAIMANT and RESPONDENT, but in the presence of and by the request of GLOBAL MINERALS as well [Arb. Request ¶6; Ex. R1 ¶2]. CLAIMANT's parent company participated further in these negotiations by rejecting the first offer and requesting a better price for the higher quantity [CC. ¶8; Ex. R1 ¶6].

20. Applying the standard of reasonableness from Articles 4.1 and 4.2 of the PICC, it becomes clear that this active participation in negotiation of the contract suggests common intention of the parties to by bound by the agreement at issue. The conduct of GLOBAL MINERALS during the negotiations was sufficient to express their agreement to arbitrate.

21. In addition, CLAIMANT itself refers to past relationship and practices between its parent company and RESPONDENT in order to justify its expectations towards the concluded Contract [Arb. Request ¶¶9 & 19]. As a result, CLAIMANT suggests an active role and presence of GLOBAL MINERALS in the contractual relationship. This reference falls under one of the circumstances from Article 4.3 of the PICC, namely the practices established by the parties.

22. It was GLOBAL MINERALS, and not CLAIMANT who suggested and issued the LoC required in the Contract [Arb. Request ¶10; PO. 2 ¶25]. When RESPONDENT informed CLAIMANT about the lack of conformity of the LoC, it was GLOBAL MINERALS who intervened to clarify the situation, and not its subsidiary, who was allegedly the only party to the Contract with RESPONDENT [Arb. Request ¶12]. The second LoC was also issued by GLOBAL MINERALS [Arb. Request ¶15]. The attempts to amend the Contract by fax, from 27th June 2014, as well as the email sent in order to justify this amendment and the fax from 8th July 2014 were all accordingly written by Mr. Storm from GLOBAL MINERALS, who tried to extend the order on behalf of his subsidiary company [Ex. C4, C6 & C10].

23. In this correspondence, Mr. Storm used plural personal pronouns such as "We" and "Us", confirming the active parties perception of the participation of GLOBAL MINERALS in the contractual relationship between CLAIMANT and RESPONDENT [Ex. C4, C6 & C10]. RESPONDENT has reasonably interpreted this as an agreement to arbitrate.

24. GLOBAL MINERALS intention was to keep CLAIMANTS business, *"wherever possible"*, totally separate from the parent company [CC. Reply ¶ 5]. Nevertheless, this intention was absent when GLOBAL MINERALS started to behave as a party of the Contract and the Arbitration Agreement, by not only initiating the negotiations, but also actively participating in performing contractual obligations and communicating directly with RESPONDENT to resolve problems [Ex. C4 & C7]. The silent and passive conduct of CLAIMANT was compensated for by the parent company, who, by performing actions which would have normally been performed by the subsidiary, had substantially become involved in the contractual relation and left for RESPONDENT a reasonable impression that GLOBAL MINERALS became a party of the Contract and the Arbitration Agreement by giving an implied consent through its own conduct.

25. Therefore, GLOBAL MINERALS conduct was sufficient to show agreement to both the Contract and the Arbitration Agreement included therein. After applying the standard of reasonableness set out in the PICC, it becomes clear that the common intention of the entities at issue, as well as GLOBAL MINERALS conduct during negotiations and the one subsequent to the conclusion of the agreement, have both established an implied consent of RESPONDENTS parent company to the arbitration agreement.

Joinder is Enforceable under the New York Convention

26. Whilst a joinder of additional parties may be viable under Danubian law, such an award must be enforceable in the applicable jurisdiction for it to have effect. Ruritania as the base of GLOBAL MINERALS is the focus of the enforceability question.

27. All of the relevant jurisdictions have adopted the New York Convention, and will recognise and enforce foreign arbitral awards [PO. 2 ¶42]. The convention provides that the state will recognise and enforce a valid award [Art. 1&3, NYC]. As a contracting state, Ruritania would recognise and enforce a joinder of GLOBAL MINERALS to the arbitral proceedings [BGH III ZG].

Global Minerals should be bound to the Arbitration Agreement under the Group of Companies Doctrine

28. The Group of Companies Doctrine is an established principle of international commercial litigation and arbitration [BORN ¶1170].

29. The tribunal should make use of the Group of Companies doctrine to bind non-signatory third parties of the same corporate group based on the intention and conduct of the parties. The application of this doctrine is necessary to meet the purpose of the Arbitration Agreement which was agreed upon by VULCAN COLTAN, MEDITERRANEO MINING and GLOBAL MINERALS.

30. Established as a transnational principle in the *Dow Chemicals* case, the Group of Companies doctrine pierces the corporate veil of a controlling parent company [Dow Chemical]. GLOBAL MINERALS has previously stripped a subsidiarity of assets to avoid damages from litigation (IRON UNLIMITED [CC. 5]) and must therefore be bound to the Arbitration Agreement, to ensure its liability for the breach of obligations of the subsidiary (CLAIMANT).

31. In *Dow Chemical,* the arbitration tribunal found the fact that a group of companies belongs to a single economic reality to be a permissible ground on which to bind a non-signatory [Dow Chemical, Part D]. This reasoning has been acknowledged in "many awards and been discussed in scholarly articles" [ICC 10758 ¶17]. The judgment is built on similar case law which drew conclusions from the existence of a single economic reality and the needs of international commerce [ICC 1434, id at 978]. This was then confirmed in France by the Parisian court of appeal as "admitted law" [Societe Sponsor AB].

32. Switzerland has accepted the validity of the doctrine when the facts of a case permit it [ICC 5721]. Without being accepted in national law, the Swiss courts have allowed the doctrine to be applied as an extension of the applicable law. In cases where the effect of the contract shifts from the subsidiary to the parent, the doctrine should be applied and the corporate veil should be pierced [Swiss Federal Tribunal 29 January 1996].

33. The English courts themselves have recognised the Group of Companies criteria as a parallel to the Alter Ego doctrine. [MORSE, Palmers company law 2004 vol. 1 ¶2] However, the English courts have recognized the Group of Companies criteria from *Dow Chemicals* . However they have shown reluctance to adopt the doctrine fully, not being inclined to apply *Lex Mercatoria* as an extension of national law. [Roussel-Uclaf v. Searle; Peterson farms]

34. The Group of Companies doctrine is an established legal principle that can bind third parties to arbitration on the basis that they are the same corporate personality. I has been adopted and practiced as a principle of international law.

Group of Companies is Applicable Under Danubian Law

35. The national jurisdiction of Danubia has not yet defined its position on the Group of Companies doctrine [PO. 2 ¶35]. Contrary to CLAIMANTS memorandum, the applicability of the doctrine does not depend on the incorporation of *Lex Mercatoria*, nor its "*controversial*" nature (CLAIMANT MEMO ¶20). Rather, it is a combination of determining the form and national public policy after determining the applicable law.

36. In a landmark decision, the German Bundesgerichtshof overturned a ruling on the dismissal of the Group of Companies doctrine [BGH III ZG]. The overturned court, the Higher Regional Court of Braunschweig, had dismissed a case requesting the application of the doctrine on the grounds of German public policy. A similar conclusion can be found in the English case Peterson farms. However, in Germany, the BGH determined the doctrines applicability by addressing the applicable law to the arbitration agreement (i), whether its form requirements were met (ii) and if this interpretation violates German Public Policy (iii). It found that it was appropriate to apply the doctrine, though only on a case by case basis.

(I)The Applicable Law

37. To determine the applicable law, two possibilities must be examined. First, we will argue that the law chosen in the Arbitration Agreement must be used. If one has not been

expressly or implicitly chosen, then the applicable law is the law of the seat of arbitration. Secondly, the legal relationship between the third party and one of the signatory parties is examined. This serves to ensure no third party may be brought into extremely unfavourable conditions by the signatories.

38. Danubian law is explicitly stated as the choice of law for the Contract and the Arbitration Agreement [Arb. Request, ¶5(3)]. As the seat of arbitration, Danubian law would also be used under the criteria of the BGH. Danubian Law should be applied to the Arbitration Agreement.

(II)The Form Requirement is Fulfilled

39. To determine the form requirements of an arbitration agreement for signatory parties of the New York Convention, Article II(1) of the convention must be inspected. In the BGH case, the law in which the tribunals' award on a joinder would need to be enforced was New Delhi, India. India recognizes the doctrine [Rakesh S. Kathotia & Anr. v Milton Global Ltd. & Ors]. Therefore, the form requirement was met.

40. Danubia, as well as Mediterraneo, Ruritania and Equatoriana, are signatories to the NYC. [PO.2 ¶42]. The jurisdiction in which the joinder would be enforced is Ruritania, as the location of the headquarters of GLOBAL MINERALS. [Arb. Request ¶1] In Ruritanian law, the Group of Companies doctrine has been recognised by the national courts. Therefore, the enforceability of a joinder of GLOBAL MINERALS in Ruritania would be successful.

(III)Policy

41. The BGH ruling stated that an arbitral tribunal shouldn't be dissuaded from applying the Group of Companies doctrine based on its incompatibility with national law. The German Supreme Court's ruling reflects an arbitration friendly stance whereby the doctrine did not necessarily have to be adopted in the German national law provided it did not violate public policy. It was concluded that when it is merely inapplicable with German law, the doctrine may still be used if it is accepted in the jurisdiction of enforceability.

42. Similar to Germany, Danubian law maintains a strong belief in the principle of party autonomy within its national jurisdiction [PO.2 ¶46]. Danubian contract law allows the adoption of transnational principles. The doctrine's applicability must be analysed on a case by case basis to ensure its compliance with national public policy.

The Arbitral Award Would Be Enforceable in Ruritania

43. The jurisdiction in which the arbitral award would be enforced is that of the domicile of GLOBAL MINERALS. This would be Ruritania [Arb. Request ¶1]. Ruritania public policy is already fully accepting of the Group of Companies doctrine as set out in the Dow Chemical's judgment [CC. Reply ¶7]. Therefore, any enforcement of the tribunals' joinder would be accepted and enforced by Ruritanian law.

Global Minerals Fulfils the Criteria of Group of Companies

44. Three conditions for this doctrine have been developed to determine whether a tribunal has jurisdiction over a third-party under the Group of Company Doctrine applying *Lex Mercatoria*: a) the existence of tight group structure; b) the active role of the non-signatory company; and c) the common intention of the parties to arbitrate [BREKOULAKIS, p. 162; Dow Chemicals].

(a)Tight organizational structure

45. Emphasis here is on the ability of the parent company to hold a significant degree of control over the subsidiary regardless of the percentage of ownership [ICC 8910; ICC 7155]. Where the interest of the group takes priority over the interest of each subsidiary company a *single economic reality* can be found [ICC 5103; HANOTIAU, p. 74]. The single economic reality is often key to Tribunals establishing the doctrine application, as stated in Dow Chemicals: '*Une réalité économiqe unique, dont les tribunaux doivent tenir compte*" [Case 6000 of 1988]. Substantial loans within a group of companies may further evidence to the application of the doctrine [ICC 5103 of 1988].

46. Contrary to CLAIMANTS memorandum, Global Minerals and Vulcan Coltan form a Group of Companies, as both parties in the CLAIMANT position have stated [CLAIM. MEMO ¶39]. The continuous "advice" sought from GLOBAL MINERALS by CLAIMANT in combination with the direct negotiations between GLOBAL MINERALS and RESPONDENT evidence the actual interests represented. The financial existence of CLAIMANT rests on credit alone [PO2]. Any and all real business must be conducted by relying on the guarantee of the parent company.

(b)Role in Claimants Activities

47. The working role of the non-signatory company, in the process of the contract containing the arbitration clause, must be determined to be active. It has been held that evidence of such an active role can be found in looking at the exchange of money as well

as the "know-how" of the parties required to contract [ICC 7604; ICC 7610 of 1998]. The correspondence of a non-signatory in the negotiations may also sufficiently fulfil these criteria [ICC 5103 of 1998].

48. There is a necessity to establish a particular interest of the parent company in the realisation of the contract [BREKOULAKIS p.163]. Present in all the cases is an element of the involved active non-signatory. The active involvement is in most cases required in an alternative form to the other conditions of the doctrine [PARK p.17]. The working role must be based on a foundation that the arbitration clause was concluded whilst the group existed. A case where the tribunal found the non-signatory to be in a commanding role, and the other merely a "*technical instrument*" is an example. This may similarly be inferred from a "*series of conduct*" including the signature, negotiations, payments, and meeting location [ICC 11160 of 2002]. Furthermore, when numerous contracts are made between subsidiaries of each group, the framework agreement can extend to the parent companies [ICC 5894 of 1989].

49. CLAIMANT has sought continuous advice from GLOBAL MINERALS. Also, GLOBAL MINERALS not only began proceedings [Ex. R1], but also led in them. This is evident in the reply of the COO of GLOBAL MINERALS who writes to RESPONDENT that "VULCAN COLTAN did have the opportunity… however *we* did not take that option" [Ex. C6, *emphasis added*]. GLOBAL MINERALS have also maintained all contact with RESPONDENT. Also, it orchestrating key business decisions, such as the attempted extension of the order of tons of coltan [Ex. C4]. CLAIMANTS parent company has actively participated in those negotiations by rejecting the first offer and requesting a better price for the higher quality [CC. ¶ 8; Ex. R1 ¶ 6].

50. In addition, the CLAIMANT itself refers to the past relationship and practices between its parent company and RESPONDENT in order to justify its expectations towards the concluded Contract [Arb. Request ¶¶9, 19]. At no point in the discussion did it strike CLAIMANT to clarify their supposedly representative function.

(c) Common intention

51. The common intention of the parties to arbitrate must be evident from the group structure and active involvement of the non-signatory. Consent has been deemed to play a pivotal factor in the application of the group of companies' doctrine [BREKOULAKIS, p. 162; Dow Chemical; ICC 5721]. The genuine belief of the co-contractor is determined by the conduct and behaviour of a] signatory and b] members of the group. Factor a] is

dependent on where the co-contractors saw the non-signatory company as their true partner in that performance [ICC 6000]. Factor b] focuses on whether the behaviour of a genuine party *confused and misled* the co-contractor by diluting the difference between the signatory and non-signatory heavily enough [Societe KIS France].

52. Mr. Storm (GLOBAL MINERALS) approached Mr. Winter bringing his former-assistant, Mr. Summer (CLAIMANT) [Arb. Request ¶6]. The previous function of Mr. Summer as Mr. Storms assistant had evidently not changed [PO.2 ¶7]. In CLAIMANTS request for arbitration, it is stated "CLAIMANT asked for delivery of 100 metric tons" [Arb. Request ¶9]. Therefore, even CLAIMANT saw emails sent off by GLOBAL MINERALS to be the work of "CLAIMANT" [Ex. C4]. Emails from RESPONDENT sent to CLAIMANT, merely copying in on the email GLOBAL MINERALS were RESPONDENT *by* GLOBAL MINERALS [Ex. C3 & C4]. The conduct of GLOBAL MINERALS and the lack of conduct by CLAIMANT lead to a diluted impression of CLAIMANT functioning as an autonomous body. This was of no concern to RESPONDENT, since it merely confirmed the participation of GLOBAL MINERALS within the contract as agreed upon.

53. The conditions of the Group of Company have been met. GLOBAL MINERALS clearly form a tight organisational structure (i). GLOBAL MINERALS has been highly active in the process of fulfilling the contract (ii). And finally, it was the common intention of the parties to be bound by the arbitration. The tribunal should therefore join GLOBAL MINERALS to the arbitral proceedings on the basis of the Group of Companies Doctrine.

INTERIM MEASURES OF THE EMERGENCY ARBITRATOR DO NOT FULFIL THE CRITERIA OF THE ICC & THE MODEL LAW

54. The law applicable to the arbitral tribunal's power to grant interim relief is by default the procedural law governing the arbitration (*lex arbitri*) [BORN 2014, P. 2457; SCHWARTZ, P.58; ICC 8879; ICC 8786]. This could only be modified by express agreement by the parties [BORN 2014, P.2458; ICC 7210, ICC 7589].

55. The *lex arbitri* is Danubian Law. The parties have expressly agreed that their dispute shall be settled under the rules of the 2012 ICC Rules [Ex. C1 Art.20]. Issues regarding jurisdiction to provide provisional measures must be determined according to the ICC rules. In addition, the parties decided that their agreement will be governed by the national law of Danubia [Ex. C1 Art.20].

I. THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO ISSUE PROVISIONAL MEASURES

56. Under the ICC Rules, and more precisely under its article 28(1), an arbitral tribunal may order emergency measures at the request of a party of the agreement to arbitrate, unless the parties agreed otherwise. Article 28(2) of the ICC Rules establishes a two-avenue system: arbitration tribunal and national courts. This allows the parties to ask a national court for interim measures without waiving the Arbitration Agreement or denying the jurisdiction of the Arbitration Tribunal and its competence for emergency measures. Article 29(7) provides that the Emergency Arbitrator Provisions shall not prevent any party from seeking emergency measures from other competent judicial authority prior to making application for such measures at the Arbitration Tribunal or, in appropriate circumstances, even thereafter. Despite the parallel system of two competent authorities, the ICC Rules provides three exceptional situations in which the Emergency Arbitration Provisions shall not apply. Two of those situations are relevant for the case at issue, namely: when the parties have agreed to opt out of the Emergency Arbitrator Provisions (Article 29(6)(b)), or if the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or other similar measures (Article 29(6)(c)).

57. In the present case, the parties have agreed, pursuant to Article 21 of the Contract in conjunction with Article 20 of the Contract, to opt out of the Emergency Arbitrator Provisions and have, moreover, consented to another pre-arbitral procedure that provides

for granting provisional measures. Contrary to CLAIMANTS belief [CLAIM. MEMO.¶48], the Arbitration Agreement did not allow the parties to choose between national courts and the Emergency Arbitrator. Pursuant to Article 21 of the Contract, when a party seeks provisional measures, it is the Court at the place of the business of the party against which provisional measures are sought that has *exclusive* jurisdiction [Ex. C1, *emphasis added*].

1. The Parties have Opted out of the Emergency Arbitrator Provisions

58. The intention of the parties was to identify one court that would have exclusive jurisdiction. Hence, by stating that the courts of Mediterraneo or Equatoriana will have an exclusive jurisdiction to grant interim measures, the parties have mutually opted out of the Emergency Arbitrator Provisions. The term "exclusive" must be interpreted in a light of Danubian contract law.

59. Article 4.1 of the PICC requires establishment of the common intention of the parties in the process of interpretation of the contract. The same provision states that if this common intention cannot be established, the contract must be interpreted according to the meaning that the reasonable third persons of the same kind as the parties would give to this contract if they were in the same circumstances.

60. It is clear that the common intention of the parties cannot be established, as CLAIMANT does not agree with RESPONDENT that the use of term "exclusive" in the Article 21 of the Contract served a purpose of opting out of the Emergency Arbitrator Provisions. Applying the standard of reasonableness of Article 4.1 of the PICC, it must be concluded that the term at issue means that no one else, no other national court nor any tribunal body has jurisdiction to grant provisional measures apart from the courts of Mediterraneo or Equatoriana. This conclusion is supported by the fact that the Article 21 of the Contract has been introduced in order to avoid any controversy between the parties regarding "which court has jurisdiction to issue such measures" and to "ensure that efficient interim relief can be obtained without any discussion about the jurisdiction of the courts" [PO.2 ¶13].

61. In addition, Article 4.5 of the PICC states that the contract terms must be interpreted so as to be given effect to all terms, rather than deprive some of them of effect. Even under assumption, according to which CLAIMANT might argue that the term "exclusive" is ambiguous and does not necessarily mean that the Emergency Arbitrator Provisions were excluded, this term must be interpreted in a way in which it serves some certain purpose, rather than having no importance in the Contract at all. By stating that the word

"exclusive" did not mean that the courts of Mediterraneo and Equatoriana were the only ones having a jurisdiction to grant such measures, the term at issue, as well as the whole Article 21 of the Contract are being deprived of their purpose and effect. In other words, if the parties' intention was indeed to not exclude the jurisdiction of the Arbitral Tribunal, the term "exclusive" could have been omitted and the same effect would have been reached as it is undeniable that a court does not truly have an exclusive jurisdiction if some other authorities are allowed to grant the same measures. The term at issue has a purpose of giving the monopoly of jurisdiction to the courts of Mediterraneo or Equatoriana and has excluded the jurisdiction of the Arbitral Tribunal to grant provisional measures. Therefore, Article 21 was introduced in order to opt out of the Emergency Arbitrator Provisions.

2. The Parties Have Chosen a Different Pre-Arbitral Procedure for Provisional Measures

62. Article 21 of the Contract should be interpreted as an agreement of the parties to choose a different pre-arbitral procedure than the one provided by the ICC Rules. This article falls under the exception of Article 29(6)(c) of the ICC Rules by choosing exclusive competence of the courts of Mediterraneo or Equatoriana (depending on which party seeks for those measures) as another pre-arbitral procedure, instead of Emergency Arbitration. In this case, provisional measures were sought against RESPONDENT. Therefore, only the courts of Mediterraneo had jurisdiction to grant the measures sought by CLAIMANT. By giving this exclusive jurisdiction to the courts of Mediterraneo, the parties have agreed on a different pre-arbitral procedure for granting provisional measures, instead of the automatic jurisdiction of the Arbitral Tribunal.

63. In conclusion, the Emergency Arbitrator Provisions should not apply in this case as the Arbitral Tribunal did not have jurisdiction to issue provisional measures.

II. THE SUBSTANTIVE REQUIREMENTS FOR ISSUING AN INTERIM MEASURE WERE NOT MET

64. Even if the Tribunal considers that it has jurisdiction to issue an interim award, RESPONDENT submits that the substantive requirements necessary for issuing an interim measure were not met. In its Request for Arbitration, CLAIMANT requested that an Emergency Arbitrator order RESPONDENT to refrain from disposing of the 30 metric tons of coltan [Arb. Request ¶21].

65. The conditions for the Arbitral Tribunal to order a party to maintain the *status quo* are found in Article 17 A(1) of Model Law. According to Article 17 A (1), the party requesting an interim measure must prove that a) the harm was not adequately reparable by an award of damages; b) the harm was likely to occur if the measure is not ordered; c) and did not substantially outweigh the harm to the other party caused by granting the measure. Also, it has to be shown that there is a reasonable possibility that the requesting party will succeed on the merits of her claim (Article 17 A(1b)).

66. The conditions from Article 17 A (1)(a) and (b) are cumulative. The burden of proof for all these conditions lies with CLAIMANT (Article 17 A(1): the party requesting the interim measure ... shall satisfy the arbitral tribunal that...). Because the conditions from Article 17 A (1) are cumulative, it is sufficient to prove that one element was not met. Out of the conditions mentioned above, we will argue that the harm would have been adequately reparable by way of pecuniary damages.

67. In the case at hand, it is not necessary to issue an interim award because the harm could have been remedied by monetary damages. CLAIMANT argues that the harm it is suffering consists in: a) damage to its reputation [CLAIM. MEMO. ¶54]; b) damage caused to its relationships with third parties who rely on contracts regarding to delivery of coltan.

68. The interests of both parties at stake need to be balanced. The likelihood of harm which cannot be adequately repaired by damages to the requesting party must "*substantially outweigh*" the harm which the measures sought are likely to cause to the other party [YANNACA-SMALL, p. 544]. Although coltan is a scarce resource, there are other suppliers of coltan on a market. Both CLAIMANT and RESPONDENT have obligation against third parties. Consequently, any business relationship will suffer in case of non-delivery on both sides of a supply chain so it is erroneous to argue that only CLAIMANTS situation was endangered. The same applies to uncertainties of the volatile market. The unstable political situation in the region is equally problematic for both parties.

69. It could have been argued that this would be the case if CLAIMANT was compelled to terminate its activities. RESPONDENT submits that this danger was remote and that any financial damage that CLAIMANT might suffer, could be remedied in actions for damages [YANNACA-SMALL, p. 539]. CLAIMANT was aware of the risks involved when entering the Equatorial market. CLAIMANT was a newly formed subsidiary of GLOBAL MINERALS for the very difficult and competitive Equatorian market and that it had very few assets apart from the office it had rented [Ex. R1]. Even if CLAIMANT had not succeeded in entering the market, its reputation could not be undermined because VULCAN COLTAN has none.

70. The damage suffered by CLAIMANT is of an economic nature which can be clearly compensated by pecuniary damages.

71. The Emergency Arbitrator Ms. Chin Hu had no jurisdiction to issue the provisional measures. However, even if the Arbitral Tribunal will reach a conclusion that Ms. Chin Hu had jurisdiction to issue an interim award, RESPONDENT submits that the substantive requirements necessary for issuing an interim measure were not met.

THE CONTRACT WAS VALIDLY AVOIDED

72. CLAIMANT and RESPONDENT entered into a contract for the sale of 30 metric tons of coltan on 28th March 2014 ('Contract'). As to the mode of payment, Article 4 of the Contract stipulated that the Buyer would open a documentary credit (LoC) in favour of the Seller no later than 14 days after the Buyer received the Notice of Transport [Ex. C1]. The same provision explicitly states that the UCP 600 should govern the transaction [Ex. C1].

73. Under the CISG a declaration of avoidance of the contract is made by notice to the party in breach [CISG Art. 26]. The declaration is performative in that once lawfully made, the contract is avoided [YOVEL 2005]. In *J.P.S. v. Kabri Mode*, the Court held that it is not up to the judiciary to avoid contracts under the CISG as this is an entitlement of the parties themselves.

74. RESPONDENT issued two separate notices avoiding the contract with CLAIMANT [Ex. C7 and Ex. R4]. This memorandum will show that RESPONDENT's avoidance on the 7th of July was effective as it met the requirements under the CISG (I). Even if one were to allege the ineffectiveness of this action, RESPONDENT avoided the Contract on 9th July (II).

I. THE CONTRACT WAS VALIDLY AVOIDED ON THE 7TH OF JULY

75. RESPONDENT informed CLAIMANT about the avoidance on the 4th of July and consequently, issued an official declaration of avoidance on the 7th of July [Ex. C7].

76. Issuing a non-conforming LoC in the case at hand is a breach of the obligation to pay the price, obligation that is incumbent upon CLAIMANT. RESPONDENT validly avoided the Contract for a fundamental breach under 64(1) jo. 25 of the CISG. Also, if one were to allege that the fundamental breach has not occurred yet, it was clear under the doctrine of anticipatory breach, Article 72 of the CISG, that CLAIMANT will not perform their obligation to pay the price within the time frame established in the Contract.

The Contract was Avoided in Accordance with Art. 64 (1a) jo. Art. 25.

77. Under Article 64 (1a) CISG, the seller has a right to avoid the contract if the buyer commits a fundamental breach. A fundamental breach is when the breach results in "such detriment to the other party as substantially to deprive him of that which he is entitled to expect under the contract." In *Shuttle Packaging Systems*, the Court held that Article 64 is specifically worded to give the implication that non-payment of the purchase price is the

most significant form of a fundamental breach by a buyer, since, as to a serious non-payment, no additional notifications are required for avoidance of the contract.

78. CLAIMANT committed a fundamental breach by issuing a LoC that was not in compliance with the terms the parties agreed upon in their contract of sale. Issuing a non-complying LoC is in effect, equivalent to a refusal to pay.

a.) CLAIMANT breached the Contract

(I.) CLAIMANT Breached the Contract by Issuing the LoC for a Higher Amount

79. CLAIMANT breached Article 3 of the Contract [Ex. C1] which specified the price and quantity of the order. The LoC refers to a higher amount which does not correspond to the amount of coltan agreed in the Contract.

80. On the basis of Procedural Order 1, the arbitration "shall be based on the assumption that the original contract of 28 March 2014 was not amended on the 27 June 2014, but *governed the Parties relationship when CLAIMANT provided the first LoC* on 4 July 2014" [PO.1, *emphasis added*]. However, by corroborating the issuing of the LoC with the e-mail sent by CLAIMANT on the 5th of July 2014, it is clear that CLAIMANT paid for and was expecting 100 metric tons of coltan [Ex. C6]. The LoC reads in its pertinent part "We hereby establish our Irrevocable LoC… for any sum of money not to exceed a total of US$ 4,500,000 when accompanied by this Irrevocable LoC and the following documents *with the content as per the contract* between you and Vulcan Coltan" [Ex C6 *emphasis added*]. Seeing how CLAIMANT at that point insisted that "the contract" was for 100 metric tons of coltan, not 30, the LoC when issued for $4,500,000 and requiring documentation for what the CLAIMANT considered at that time to be the contract is clearly a breach of the original contract, signed on the 28th of March.

81. From the perspective of the RESPONDENT, and any other reasonable trader in the same position, receiving a LoC with that wording and the e-mail from the 5th of July 2014 amounts to imposing a condition through the LoC to accept the modified terms of the initial Contract. That there was a dispute between the parties as to the extent of their obligations generates uncertainty for RESPONDENT as to its own obligations of delivery. In the *Cheese* case it was decided that there is a fundamental breach to make a party's obligations dependent on conditions that were not given in the contract [Cheese case; STAUDINGER p. 335]. A LoC is dependent on the documents submitted by the seller. When

there is controversy as to the extent of the obligations of the seller, it is unreasonable expect that the seller has to accept a LoC with different terms.

82. It is a well-established principle of contract law that contracts must be modified by the mutual agreement of the parties [Art.2.1.1 PICC , BGB ¶151, BW 6:217]. One party cannot unilaterally modify contractual terms and impose them on the other party. Under some systems of law, it could be argued that a beneficiary accepting an LoC with a trade term which differs materially from that of the contract of sale has, by not objecting to the different trade term, and then performing his obligations, modified the original contract of sale [Jimenez]. RESPONDENT could not have taken the chance of using the LoC because his actions could have been interpreted as assent to a contract that it did not desire.

83. No reasonable trader, that had the same information as RESPONDENT when receiving the LoC, would have used it. If this is the case then the LoC issued by CLAIMANT cannot be considered an effective payment.

(ii.) Claimant breached the Contract by unilaterally imposing different delivery terms

84. According to the Contract, the delivery terms were specified as: CIF (INCOTERMS 2010), Oceanside, Equatoriana. The LoC referred to CIP Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana.

85. CLAIMANT, by issuing the LoC with these modified terms, changed the agreed Incoterm and the final destination for delivery, thus unilaterally imposing more onerous obligations on RESPONDENT.

86. INCOTERMS are international commercial terms which allocate responsibilities between buyer and seller in a very precise manner. In documentary sales transactions, the particular importance allocated to the tendering of 'clean' documents follows from the commercial usage [SCHROETER, p 410].

87. CLAIMANT is arguing that the change of INCOTERMS were due to RESPONDENTS actions [CLAIM. MEMO. ¶98-102]. There is a discrepancy between the agreed terms (Contract of March 28) and the LoC in regard to INCOTERMS. Whilst one of RESPONDENTS employees mistakenly ticked the wrong box on the Notice of Transport [PO.2 ¶20]. RESPONDENT never renegotiated the INCOTERMS, and it should have been clear to CLAIMANT that the change in the Notice of Transport was made by mistake.

88. The fact that CLAIMANT changed the place of destination is clearly a contractual breach. The new place of destination is adding a greater distance with a new method of transport. Additionally, the change of INCOTERMS and the economic and legal

consequences are quite substantial. RESPONDENT has to deliver by land as well as by sea and incurs additional insurance costs.

89. In *Bonaventure*, the Court reaffirmed that a buyer's breach of the contract in respect of the final destination of the goods is a fundamental breach of contract under Art. 25 CISG [Bonaventure case].

90. As established above, the imposition of a new obligation relates not only to 30 metric tons of coltan but to 100 metric tons. It is not only the extra carriage but also the additional insurance that refer to this exponentially increased amount of coltan. Such a discrepancy is a conspicuous breach.

91. Since the duties imposed on the buyer by Article 54 CISG are part of the duty to pay the purchase price, the breach of any of those obligations gives the seller the remedies in relation to the non-payment of the purchase price [SCHLECHTRIM & BUTLER p.157].

92. CLAIMANT in the LoC unilaterally changed both the INCOTERMS and the place of delivery from what was agreed upon in the original Contract. This discrepancy clearly constitutes a breach of contract. It will be argued below that this breach caused a substantial detriment to RESPONDENT.

b.) Claimant Suffered a Substantial Detriment

(i.) The issuance of a non-conforming letter of credit generates a substantial detriment

93. With regard to commodities, special standards have to be applied in determining whether there is a fundamental breach. In the commodity market, string transactions prevail and prices are subject to considerable fluctuations [SCHWENZER]. The high price fluctuations and changing market conditions always require the timely delivery of clean documents and the normal handover of the goods, particularly in cases involving string trading and multiple transactions that result from one shipment [WINSOR]. As a result of these many uncertainties, commodity prices can vary substantially from day to day which CLAIMANT fully acknowledges [CLAIM. MEMO. ¶91].

94. In this type of market, issuing a non-conforming letter of credit as a method of payment leaves the seller without his guarantee for the receipt of the price. We have proved above that the LoC was written on the basis of what CLAIMANT believed to have been the contract at the time, and therefore issued a LoC that would have imposed a substantially more onerous principal obligation on our part: delivery of 100 metric tons of Coltan [*see* ¶¶80-83]. Considering the fact that RESPONDENT had been negotiating

contracts with other customers and, subsequently, reached an agreement with CLAIMANT that the difference of 70 metric tons of Coltan could be sold to other customers, RESPONDENT would suffer immense damage if it could not honour said contracts [PO2 ¶33, 34].

95. In the case at hand, the buyer purchased coltan from the seller by agreeing on a price when signing the Contract. CLAIMANT alleges that RESPONDENT is taking advantage of the market price [CLAIM. MEMO. ¶92]. It has to be emphasised that the volatility and consequently, the uncertainty, of this market requires parties to comply strictly with the contracts [PO.2 ¶18]. Such a market does not allow any delays on the side of the seller or the buyer. Any deviations can have a detrimental effect for the whole transaction. This is why it cannot be argued that CLAIMANT is taking advantage of the circumstances. The parties established certain terms and conditions in their Contract and they both understood the importance of sticking to the terms of the Contract. When CLAIMANT breached the Contract and it became clear that the breach would be serious, i.e. the price would not be paid.

(ii) The change of INCOTERMS and place of delivery causes a substantial detriment

96. Changing INCOTERMS and the place of delivery caused a substantial detriment for RESPONDENT. It has to be noted that the breach may be fundamental regardless of whether it occurred in respect of a main obligation or an ancillary obligation [Shoes Case p. 381; Cutlery Case].

97. The LoC is by definition used in situations of limited trust – sellers have concerns about getting paid and buyers want to be sure that the goods they ordered are supplied as per the contract, within the agreed timeframe etc. [Worldbank] The LoC is independent from the sales contract but follows it and serves as the payment mechanism for satisfying the seller's price [Worldbank].

98. Therefore, RESPONDENT would be obliged to adjust his action to the delivery terms as stated on the LoC. Otherwise, the bank would not honour the LoC as the documents must be clean in accordance with the UCP 600.

99. A commodities market functions on the basis of perfect competition principles. That means that the marginal cost is equal to the average cost, which implies that any unpredicted duties substantially increase his expenses. The change of the place of delivery and the change of INCOTERMS produce more costs for RESPONDENT. Even if the costs would not be considered sufficient for the substantial detriment requirement in objective

terms, the parties can themselves determine what kind of deviations from the contract they consider substantial. The proposition from CLAIMANT to deliver to his premises was explicitly rejected during the negotiations [Ex R1]. This clearly shows that it was of essential importance for the seller that the goods be delivered to port, as agreed in the Contract.

c.) The substantial detriment was foreseeable

100. The non-complying LoC generated a substantial detriment which was foreseeable. RESPONDENT, as any other reasonable trader on the volatile market, would not have accepted the payment guarantee which was faulty.

101. Under art. 64, the party may be held liable not only for losses which it actually foresaw, but also for losses which it 'ought to have foreseen' or 'could reasonably have foreseen'. To make the party liable, it is not necessary to prove that this party actually foresaw the loss in question as long as it was in the position to reasonably foresee that loss [EL-SAGHIR].

102. The obligation to pay the price in a contract of sale is the main obligation of the buyer, and non-performance of this obligation always generates a substantial detriment. The seller is not receiving the main thing he contracted for. The payment by means of LoC and the delivery of goods fixed by the INCOTERMS constitute essential obligations, respectively for the buyer and for the seller [Apple Juice Concentrate; P1997/482].

103. CLAIMANT was aware of the trading rules and the principles governing LoC itself [Ex. C1]. A reasonable trader involved in the commodities trade would know that this non-conformity was foreseeable.

The Contract was Validly Avoided for an Anticipatory Fundamental Breach in Accordance with 72 CISG

104. Even if RESPONDENT did not suffer a substantial detriment at the time of issuing the declaration of avoidance on the 7th of July because the deadline for payment has not yet passed at that time, he was still entitled to avoid the Contract. Article 72 CISG allows one of the contracting parties to avoid the contract prior to the date of performance if it becomes clear that the other party will commit a fundamental breach. When issuing the declaration of avoidance on the 7th of July it was clear that CLAIMANT would not pay in time.

105. CLAIMANTS main obligation as a buyer is the payment for the goods as agreed in the Contract. Non-payment of the purchase price is the most significant form of a breach by a buyer and clearly fundamental as it deprives the seller entirely of what he was entitled to expect under the Contract.

106. In the *LG Krefeld*, the Court of first instance held that the seller had the right to declare the second contract avoided under CISG art. 72(1),(2), since even before the delivery of the goods it was clear that the buyer would not pay the purchase price and would thereby commit a fundamental breach of contract. The buyer had not performed under the prior contract although the seller had requested it several times and had even commenced legal action.

107. In addition, in the *Skin Care Products* case, the Court held that if the other party does not provide adequate assurance of performance, it is more easily concluded that a. fundamental breach will be committed [Skin Care Products Case].

108. In the present case, it was clear that CLAIMANT would commit a fundamental breach. After RESPONDENT informed CLAIMANT that the LoC is clearly not conforming and cannot be accepted, Mr. Storm sent an e-mail stated that the LoC is in line with the (what he called) changed contract and requested the delivery of 100 metric tons within the time agreed [Ex. C6].

109. Under Article 72(2) CISG, if the time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit them to provide adequate assurance of their performance. RESPONDENT gave immediate, clear notice to CLAIMANT of the faulty LoC by voicemail [PO.2 ¶21]. However, when giving assurance of performance, CLAIMANT did the opposite by continuing to insist on delivery of 100 tons of coltan in his reply, as opposed to what was agreed between the parties [Ex. C6].

CLAIMANT cannot invoke Art. 64 (2) as no valid 'payment' has been rendered

110. CLAIMANTS assertion that a payment has already been rendered is invalid, as no payment was made. Article 54 CISG stipulates that necessary measures and formalities which are requirements for the payment are part of the duty to pay [UNCITRAL Digest Art. 54]. The buyer's obligation to pay the price includes taking such steps and complying with such formalities which may be required by the contract '… to enable payment to be made, such as registering the contract with a government office or with a bank, as well as

applying for a LoC or a bank guarantee to facilitate the payment of the price" [Secretariat Commentary to Article 64].

111. As argued above, CLAIMANT has breached the Contract as the LoC clearly did not refer to the contract agreed by the parties.

CLAIMANT Cannot Rely on the Nachfrist Provision

112. CLAIMANT argues that RESPONDENT set an additional time (Nachfrist) in the voicemail left to CLAIMANT [CLAIM. MEMO. ¶¶121-135]. In the voicemail on the 4th of July, Mr Winter pointed at the non-comformity of the LoC issued by CLAIMANT and asked for a conforming letter "*at the latest by Monday morning*" [PO.2 ¶21].

113. Under the CISG an option to provide an additional time by the seller is provided in Art 63(1). CLAIMANT is correct in arguing that such an additional time has to grant more time for performance than originally agreed upon under the contract [Claim Memo ¶127]. It has to be emphasised that Nachfrist is not a prerequisite of avoidance. Fixing an additional period of time under Article 63(1) is the seller's right, but not his obligation. This is especially true "if…the failure by the buyer to perform his obligation amounts to a fundamental breach of contract, the seller is authorized to declare the contract avoided…without having any obligation to fix first an additional term of performance for the buyer." [KNAPP p.460].

114. In the voicemail, RESPONDENT did not issue an additional time, and nor did he intend to do so. The deadline for delivering the LoC was the 9th of July (this will be discussed later in the memorandum). The time set in the voicemail was the 7th and therefore RESPONDENT could not have possibly set an additional time within the meaning of Article 63(1), as the contractual deadline has not lapsed yet. The purpose of the voicemail was to inform CLAIMANT about the discrepancies concerning the LoC and asking for valid payment. RESPONDENT did not set an additional time, but instead validly avoided the Contract under Article 64(1a) (see below).

115. RESPONDENT's message on the voicemail from 4th July 2014 [Ex. C6] did not constitute an additional period of time (Nachfrist) [Article 63(1) jo. Article 25].

116. The circumstances of this case constitute a fundamental breach under the meaning of Article 25 CISG, as RESPONDENT was substantially deprived of what he was entitled to expect under the Contract. CLAIMANT could have foreseen what the consequences of a non-complying LoC would lead to. Also, it was clear to RESPONDENT, under Article 72 CISG, that CLAIMANT will not perform his main obligation. CLAIMANT's argument that

the payment has been rendered is not confirmed by his behaviour. CLAIMANT's argument that RESPONDENT set an additional period of time is irrelevant.

II. THE CONTRACT WAS VALIDLY AVOIDED ON THE 9TH OF JUNE

117. Following the avoidance on the 7th of July, treated above, no further action was necessary on the part of the RESPONDENT. The argument made by RESPONDENT in the first avoidance is sufficient. However, following the notification of the avoidance, CLAIMANT issued a second LoC on the 9th of July. RESPONDENT made it unequivocally clear in its answer, provided on the same day that it would not accept this LoC as a performance of the Contract [Ex. R4].

118. In its memorandum, CLAIMANT did not provide an argument that addresses RESPONDENTS avoidance made on the 9th of July. However, although CLAIMANT did not advance any arguments, RESPONDENT acknowledges that the burden of proof rests on the party seeking to avoid the contract [SCHWENZER, p.911].

119. The following part will show that every element for the second avoidance has been met. RESPONDENT submits that this declaration was validly made on the basis of Art 64(1a) CISG. Under this Article, the seller can avoid a contract if the buyer has committed a fundamental breach under Article 25. RESPONDENT submits that such a fundamental breach was committed by CLAIMANT with regards to this second LoC. Therefore, even if the notice of avoidance issued on the 7th of July is not considered effective, the Contract was avoided by RESPONDENTS notice issued on the 9th of July.

The Second LoC Constituted a Fundamental Breach

120. Under Article 25, a fundamental breach is committed if a contractual breach causes a substantial detriment, and if this detriment is foreseeable.

121. The LoC was delivered on the 9th of July. RESPONDENT submits that the deadline for the delivery of the LoC under the Contract was the 8th of July. This means that CLAIMANT committed a contractual breach through late payment (i). Secondly, this late payment amounts to a substantial detriment because under the Contract timely performance was of the essence (ii). Lastly, this detriment was foreseeable (iii).

(i) The second LoC Constituted Late Payment

122. A contractual breach is the prerequisite for the establishment of a fundamental breach under Article 25 CISG [SCHWENZER, p.208]. RESPONDENT submits that the second LoC constituted late payment and thus a contractual breach. Article 54 CISG, addressing the

obligation to pay, stipulates that necessary measures and formalities which are requirements for the payment are part of the duty to pay [UNCITRAL Digest on Art. 54]. The obligation to pay the price therefore includes steps to enable payment, such as the opening of a LoC [Secretariat Commentary on article 60 of the 1978 Draft]. CLAIMANT acknowledges that the opening of the LoC was a fundamental obligation of the agreement [CLAIM. MEMO. ¶72].

123. Under the Contract, the LoC has to be established by the Buyer not later than fourteen days after the Buyer received the notice of transport [Ex. C1]. The Notice of Transport was received by CLAIMANT on the 25th of June [Ex. C2]. The LoC was drawn up by the issuing bank on the 8th of July and sent by courier to RESPONDENT [Ex. C8]. The LoC was delivered at RESPONDENTS premises on the 9th of July.

124. The LoC can be considered 'established' only when it has been delivered at RESPONDENTS premises (a). Secondly, the time period for the delivery of the LoC ended on the 8th July (b.). Finally RESPONDENT submits that the MST standard time is relevant (c.).

a.) The Obligation of Establishing the LoC is Fulfilled when the LoC is Delivered at RESPONDENTS' Premises

125. According to Article 4 of the Contract "A LoC (…) shall be established by the Buyer" [Ex. C1]. RESPONDENT submits that this contractual obligation is fulfilled when the LoC is delivered at RESPONDENT'S premises.

126. The purpose of the LoC is to provide the seller with the security that he will receive payment. In the present case, the use of a documentary credit was agreed upon insistence of the seller [CC. ¶7]. It provided the security RESPONDENT required for deals exceeding one million US dollars [Ex. R1, ¶5]. Before having received the LoC, RESPONDENT has no security, as the presentation of the actual letter is a necessary requirement for payment. This means that the fact that the bank might have issued the LoC to CLAIMANT has no effect on RESPONDENT. Only when RESPONDENT received the LoC, the purpose of the LoC is achieved and CLAIMANTS obligation fulfilled.

b.) The Deadline for Delivery Expired on 8th of July

127. Having established that the LoC must be delivered to RESPONDENT, it is necessary to determine at which point of time this obligation was due. The Contract provided that 'A LoC (…) shall be established by the Buyer not later than fourteen days after the Buyer

received the notice of transport in regard to shipment'[Ex. C1]. For the Notice of Transport, Article 2 of the Contract provided the deadline of 31 August 2014 [Ex. C1].

128. One has to consider therefore, that the time period for the delivery of the LoC was triggered by an event, which itself had a certain time period. It is for this reason that it makes sense that the second time period starts running immediately after the first period ended.

129. From the point CLAIMANT received the notice of transport, he was able to request the LoC at the issuing bank and send it to RESPONDENT. It was his obligation to do so in a time period that ended after fourteen days after the delivery of the notice of transport, meaning the 8th of July.

c.) The Mediterraneo time zone must be used for determining the time period

130. To determine if the performance was timely it is necessary to ascertain which time zone should be applicable to the contractual obligation of establishing the LoC as it was delivered to RESPONDENT on the 9th of July MST but on the 8th of July RST. This is due to the fact that RESPONDENT and CLAIMANT operate on time zones diverging by 5 hours.

131. Danubian law, which is the applicable law, has adopted Article 1.12 of the PICC, stating that 'the relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise'. The example used in the PICC to illustrate this provision is that of a party setting the time by making an offer [PICC p.32]. However, in the present case the time in question is the deadline for delivering the LoC established in the Contract [Ex. C1]. The parties drew up this Contract together, and it is not known who suggested the time of performance of this obligation [PO. 2 ¶10]. Hence, neither of the parties is setting the time and the time zone should be determined by examining the circumstances.

132. The LoC is to be delivered to RESPONDENTS premise in Mediterraneo. It is therefore reasonable that the time of delivery should be determined according to the Mediterraneo Standard time. It follows from this that this time zone should then be used to calculate the 14 day time period.

133. Secondly, in the message left by Mr. Winter on Mr. Summer's voicemail on the 4th of July 2014, he left no doubt that RESPONDENT expected to receive the LoC "on Monday morning *our time*" [PO.2 ¶21]. It must be pointed out that in its response to this voicemail, Mr. Winter did not address the issue of when the LoC was to be delivered [Ex. C6].

134. It has been shown above that it is reasonable to determine the deadline for the delivery of the LoC to be the 8th of July according to the Mediterraneo Standard Time. However, the LoC was only delivered at RESPONDENTS premises on the 9th of July [Ex. R1]. This constitutes a clear breach of contract.

(ii.) Late delivery constituted a substantial detriment because time was of the essence

135. The second condition for a breach to be considered fundamental under Art 25 is that it causes a 'substantial detriment'. RESPONDENT accepts that the requirements for an avoidance under the CISG are strict and that generally mere late payment is not sufficient [STAUDINGER, p.736]. However, late payment does amount to a fundamental breach of contract if *time of payment is of the essence* [SCHWENZER, p.897]. Whether time is of the essence is a question of contract interpretation under Articles 8 and 9 [SCHWENZER, p.897]. Contract interpretation depends not only on the wording of its provisions, but also on external factors. Indeed, circumstances, customs, usage or other relevant factors can make time of the essence [GRAFFI, p.340].

136. The following circumstances prove that in this particular case time was of the essence: the use of CIF incoterms, the fact that coltan is sold in a commodities market, and finally the payment by LoC and the bilateral and communicative nature of the contract, make the obligation to pay the price as time sensitive as the obligation to deliver the coltan.

a.) *RESPONDENT suffered a substantial detriment as a result of this late delivery because time was of the essence*

137. Once RESPONDENT was in possession of a valid LoC, it was his obligation to ship the goods to Oceanside, Equatoriana according to the modalities of the CIF incoterm [Ex. C1].

138. The use of the CIF Incoterms serves the interests of both parties, as it balances the risks between them. CIF stands for 'Cost, Insurance and Freight'. It is meant for transport by shipment and stipulates that risk passes to the buyer as soon as the goods are boarded, while the seller bears the costs for the transport and has to cover for the insurance [GOODE, p. 227]. The Appellate Court Hamburg held that when a CIF Incoterm is used, this "*by definition determines the contract to be a transaction for delivery by a fixed date*" [*Iron molybdenum case*]. SCHWENZER argues that the inclusion of a CIF Incoterm

indicates the fundamental importance of the contractual time of delivery [SCHWENZER, p.421]. It is the burden of proof of the opposing party to show that other factors indicate the intention of the parties that time was not of the essence [SCHWENZER, p.421]

139. It makes sense to apply strict conditions to a contract involving the CIF Incoterm. It is the seller that is to arrange and pay for the shipment. He can only do so after he is certain that he will receive payment. A delay in payment in such a case always generates a substantial detriment to the seller.

140. RESPONDENT submits that while already the inclusion of the CIF incoterms can be seen as sufficient evidence that time was of the essence, other factors confirm this conclusion. Here, one should consider the following two circumstances: The fact that the parties were dealing in a commodities market and the fact that payment was conditioned on delivery.

141. The second factor that will be examined is the fact that coltan is sold in a strongly volatile market. If goods are subject to strong price fluctuations, timely payment is of the essence [SCHWENZER, p.897]. This rule makes sense when considering the general uncertainty in a commodity market. One may argue that concerning volatility, it is only when the currency experiences fluctuations that the buyer is dependent on timely payment. However, this assumption cannot be upheld as it is also essential for the seller to receive timely payment in the case of a volatile market for the goods sold. Should the payment not be made and the contract avoided, the seller will have to sell his goods to another party. In a volatile market this is connected to a great amount of uncertainty as to the price and the interest on the market. Such uncertainty is in itself a substantial detriment in international trade.

142. The coltan market is extremely volatile and therefore, it was essential for RESPONDENT to receive payment in time [PO.2 ¶30]. This payment was unfortunately not provided by CLAIMANT and consequently RESPONDENT was able to avoid the contract.

143. The last factor discussed for making timely payment of the essence is the synallagmatic nature of the contract at hand. Under the Contract payment was to be made through a LoC. Once RESPONDENT was in possession of a valid LoC, it was his obligation to ship the goods to the Oceanside, Equatoriana [Ex. C1]. As stated above, the payment method of LoC was chosen to grant RESPONDENT with security as to the payment in light of the lack of trust between the parties [Ex. R1]. It is in the nature of this documentary sale that the seller's obligation to deliver the goods is only triggered when he received the LoC from the buyer.

144. The duty to make payment is a 'condition precedent', under English law, as it rests the fulfilment of another duty by the other party [STANNARD, p. 119]. In the Civil Law, the equivalent of such a condition precedent could be identified in Article 1184 of the French Code Civil. This provision states that 'A resolutely condition is always implied in synallagmatic contracts when one of the parties did not perform their obligations.

b.) CLAIMANTS payment is a 'Condition Precedent', Without which RESPONDENTS Obligation never arises

145. This means that unlike in regular sales contracts, the seller's obligation is linked directly to the buyer's obligation to make payment. This also means that if payment is performed late, this has direct consequences for the seller's obligation. Indeed, timely payment must be seen to be of the essence. To ask for performance when the promisee is at fault of late delivery is to ask the promisor to do something that he or she never agreed to: *non haec in foedera veni*- it was not this that I promised to do [STANNARD, p. 119].

146. Even if one would not to accept such a strict rule under the CISG, there is no doubt as to the fact that the payment through a LoC is another factor making timely payment essential to RESPONDENT. The payment by LoC in itself does not make time of the essence, but this is the case if other relevant circumstances are present [STAUDINGER, p. 773]. Considering this argument together with the two points provided above, i.e. the CIF Incoterm and the commodity market, it is clear that time was of the essence.

147. It was established above that the LoC was delivered after the deadline agreed upon under the Contract. Considering the above factors which made time of the essence, RESPONDENT suffered a substantial detriment in not receiving timely payment.

(iii.) The Substantial Detriment was Foreseeable

148. As a last condition for a fundamental breach, the substantial detriment has to be foreseeable to the party in breach of the contract. This foreseeability test involves both a subjective and an objective element [SCHWENZER, p.417]. It is important to recognize that the detriment does not necessarily need to be of an economical nature [STAUDINGER p.773].

149. CLAIMANT, and especially its mother company GLOBAL MINERALS, is an experienced trader in the Coltan market. As such they must have been aware of the fact that time is of the essence when the price of goods is as volatile as it is in the coltan market. Therefore, both objectively and subjectively a substantial detriment for the seller was foreseeable.

150. In conclusion, RESPONDENT submits that the avoidance issued on the 9th of July fulfilled all elements required under Article 64(1)(a) CISG. The LoC was delivered late, constituting a breach of Contract. Due to the particular circumstances of this case, late payment constituted a substantial detriment to RESPONDENT, a result which was foreseeable to CLAIMANT.

151. One has to bear in mind that the declaration of avoidance on the 9th of July was not necessary as the Contract was already validly avoided by RESPONDENT on the 7th of July. However, CLAIMANT continued his activities in an effort to keep the Contract alive. In addressing CLAIMANT's subsequent actions, RESPONDENT showed respect to his business partner. Regrettably, CLAIMANT did not feel it necessary on his part to address RESPONDENT's email on the 9th of July in his Memorandum.

REQUEST FOR RELIEF

Therefore RESPONDENT respectfully requests the Tribunal to:

i) join GLOBAL MINERALS GROUP to this arbitration proceeding;

ii) vacate the measure of the emergency arbitration;

iii) grant damages and reimburse expenses of arbitration;

RESPONDENT further respectfully suggests the Tribunal to reject CLAIMANT's request to:

iv) deliver to CLAIMANT 30 metric tons of coltan as per the avoided contract of 28th March 2014;

v) reimburse CLAIMANT for all damages it incurred due to the belated delivery of CLAIMANT; and to

vi) bare CLAIMANTS costs arising out of this arbitration

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