TWELFTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2004 – 2005

MEMORANDUM

FOR

EQUATORIANA COMMODITY EXPORTERS, S.A.

- RESPONDENT -

THOMAS ARNTZ | DOMINIC BECKERS - SCHWARZ | BIRKE BREUER

JENNIFER BRYANT | ANNEGRET FOCKE | CHRISTINE KLEIN

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE
LAW CENTRE FOR EUROPEAN AND INTERNATIONAL COOPERATION
(R. I. Z.)

CENTER FOR TRANSNATIONAL LAW
(CENTRAL)

TEAM MEMBERS:

THOMAS ARNTZ | DOMINIC BECKERS - SCHWARZ | BIRKE BREUER
JENNIFER BRYANT | ANNEGRET FOCKE | CHRISTINE KLEIN

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INTERNATIONAL
COMMERCIAL ARBITRATION MOOT

2004 – 2005

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW
PACE UNIVERSITY SCHOOL OF LAW
WHITE PLAINS, NEW YORK
U.S.A.

MOOT CASE NO. 12

LEGAL POSITION

ON BEHALF OF

EQUATORIANA COMMODITY EXPORTERS, S.A.
325 COMMODITIES AVENUE
PORT CITY
EQUATORIANA (RESPONDENT)

AGAINST

MEDITERRANEO CONFECTIONARY ASSOCIATES, INC.
121 SWEET STREET
CAPITOL CITY
MEDITERRANEO (CLAIMANT)

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INDEX OF ABBREVIATIONS

§	Paragraph
Arb. Int'l.	Arbitration International (Law Journal, England)
Art.	Article
Artt.	Articles
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Civil Law Decisions of the Federal Supreme Court, Germany)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-Online	Case Law on CISG http://www.cisg-online.ch
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo.	CLAIMANT's Memorandum
Clout	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
e.g.	exemplum gratia (for example)
ECJ	European Court of Justice
EGCMO	Equatoriana Government Cocoa Marketing Organization
et seq.	et sequentes (and following)
Geneva Rules	Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland
i.e.	id est (that means)
ICC	International Chamber of Commerce
Inc.	Incorporated

IPRax	Praxis des Internationalen Privat- und Verfahrensrecht (Law Journal, Germany)
JuS	Juristische Schulung (Law Journal, Germany)
Ltd.	Limited
NJW	Neue Juristische Wochenschrift (Law Journal, Germany)
No.	Number
Nos.	Numbers
NYBOT Rules	New York Board of Trade Cocoa Rules
OCA Rules	Rules of the Oceania Commodity Association
OGH	Oberster Gerichtshof (Supreme Court, Austria)
OLG	Oberlandesgericht (Higher Regional Court, Germany)
OLGR	OLG Report (Law Journal, Germany)
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
Pro. Ord.	Procedural Order Number 2
Re. Ex.	RESPONDENT's Exhibit
RiW	Recht der internationalen Wirtschaft (Law Journal, Germany)
S.A.	Sociedad Anónima
SchiedsVZ	Zeitschrift für Schiedsverfahren (Law Journal, Germany)
Swiss Rules	Swiss Rules of the Chamber of Commerce and Industry of Switzerland of 4 January 2004
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
v.	versus (against)
Vol.	Volume
ZRVgl.	Zeitschrift für Rechtsvergleichung (Law Journal, Austria)

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STATEMENT OF FACTS

On **19 November 2001** Mr. Smart, representative of EQUATORIANA COMMODITY EXPORTERS, S.A. [*hereafter: RESPONDENT*], called Mr. Sweet, representative of MEDITERRANEO CONFECTIONARY ASSOCIATES, INC. [*hereafter: CLAIMANT*], and offered to sell 400 tons of cocoa beans for a price of USD 496,299.55. An oral contract of sale was concluded during this conversation. This contract, Contract: Cocoa 1045 [*hereafter: Cocoa Contract 1045*] was reiterated by fax and by letter, in which the written contract was enclosed.

RESPONDENT informed CLAIMANT on **24 February 2002** that the Equatoriana Government Cocoa Marketing Organization [*hereafter: EGCMO*] had on **22 February 2002** imposed an embargo on exports of cocoa at least for the month of March, as a consequence of a storm which had hit the cocoa producing areas in Equatoriana on **14 February 2002**. CLAIMANT sent a letter on **5 March 2002** informing RESPONDENT that it was not under immediate pressure to receive the contracted cocoa beans, but that it would need cocoa beans later that year. On **7 May 2002** RESPONDENT informed CLAIMANT about the delivery of the first instalment of 100 tons of cocoa beans. Furthermore, it indicated that it would "look forward" to shipping the remaining 300 tons of cocoa beans "in the very near future". CLAIMANT received 100 tons of cocoa beans from RESPONDENT on **28 May 2002**. CLAIMANT made payment for the 100 tons of cocoa beans in the amount of USD 124,075. RESPONDENT called CLAIMANT on **29 September 2002** and informed CLAIMANT that no new information was available about when the export embargo might be lifted.

CLAIMANT purchased 300 tons of cocoa beans on **24 October 2002** from Oceania Produce Ltd. prior to notifying RESPONDENT of any intention to avoid Cocoa Contract 1045. On **25 October 2002** CLAIMANT informed RESPONDENT that it had purchased 300 tons of cocoa beans, but that letter did not clearly express any intention to avoid Cocoa Contract 1045. On **11 November 2002** CLAIMANT's counsel made a demand upon RESPONDENT for payment of USD 289,353. RESPONDENT notified CLAIMANT on **13 November 2002** that the export of additional cocoa beans sufficient to meet CLAIMANT's need would have been possible at the latest by the end of November. CLAIMANT and RESPONDENT concluded Contract: Sugar 2212 [*hereafter: Sugar Contract 2212*] on **20 November 2003** for 2,500 tons of sugar at the price of USD 385,805. On **15 December 2003** the shipment of 2,500 tons of sugar arrived in Mediterraneo, but was in unusable condition.

In view of the above facts, we respectfully make the following submissions on behalf of our client, Equatoriana Commodity Exporters, S.A., RESPONDENT, and request the Arbitral Tribunal to hold that:

- RESPONDENT is exempt from liability for delayed delivery of the remaining 300 tons of cocoa beans pursuant to Art. 79 CISG.
- CLAIMANT did not validly avoid Cocoa Contract 1045.
- CLAIMANT is not entitled to recover any damages.
- This Tribunal has jurisdiction to consider the counter-claim.

FIRST ISSUE: RESPONDENT IS EXEMPT FROM LIABILITY FOR DELAYED DELIVERY OF THE REMAINING 300 TONS OF COCOA BEANS.

1 Art. 79 CISG exempts RESPONDENT from any liability to CLAIMANT, since RESPONDENT's delay in delivering cocoa beans resulted from an unforeseeable impediment beyond its control. The storm and the subsequent export embargo imposed by the EGCMO made it impossible for RESPONDENT to deliver the full quantity of cocoa beans to CLAIMANT before the end of May 2002 (**A.**). It was not foreseeable to RESPONDENT, when concluding Cocoa Contract 1045, that a storm of sufficient magnitude to destroy Equatoriana cocoa trees would occur, or that EGCMO would subsequently impose an export embargo on Equatoriana cocoa beans (**B.**). Additionally, RESPONDENT could not have avoided or overcome the consequences of the export embargo (**C.**).

A. The storm and the subsequent export embargo imposed by the EGCMO constituted an impediment that caused RESPONDENT's delay in delivery.

2 The export embargo imposed by the EGCMO as a consequence of the storm prevented RESPONDENT from delivering the second instalment under Cocoa Contract 1045. As RESPONDENT was only obliged by Cocoa Contract 1045 to deliver Equatoriana cocoa beans (**I.**), the storm and the resulting export embargo constituted an impediment to RESPONDENT's performance, which was beyond its control (**II.**).

I. RESPONDENT's obligation was limited to delivery of Equatoriana cocoa beans.

3 Cocoa Contract 1045 called only for delivery of cocoa beans from Equatoriana, when interpreted in accordance with Art. 8 (1) and (2) CISG (**1.**). Furthermore, CLAIMANT and RESPONDENT had established a practice referring to delivery of Equatoriana cocoa beans

pursuant to Artt. 8 (3) and 9 (1) CISG (**2.**). For both of these reasons, RESPONDENT's delivery obligation was limited to Equatoriana cocoa beans.

1. Interpreting Cocoa Contract 1045 pursuant to Art. 8 (1) and (2) CISG leads to the result that the parties' contract called only for delivery of Equatoriana cocoa beans.

4 CLAIMANT is bound by RESPONDENT's subjective intention when interpreting Cocoa Contract 1045 pursuant to Art. 8 (1) CISG. RESPONDENT intended to limit its delivery obligation to cocoa beans from Equatoriana when it concluded Cocoa Contract 1045. CLAIMANT knew or must have known this intent, as there are numerous unambiguous indicators. First, RESPONDENT's conduct during previous business occasions is highly relevant in determining its will. Since Cocoa Contract 1045 was written on the same standard form as the parties usually used (*Pro. Ord. para. 15*), the intent understood from prior contracts provides the standard for determining the intent in regard to Cocoa Contract 1045. Under prior cocoa contracts, RESPONDENT has always delivered cocoa beans exclusively from Equatoriana (*Pro. Ord. para. 14*). CLAIMANT knew this because the origin of the cocoa beans was always written on the delivery bags (*Pro. Ord. para. 19*). Furthermore, since it was CLAIMANT's responsibility to arrange the carriage of the goods (*Cl. Ex. No. 2; Pro. Ord. para. 19*), it had to arrange loading from the warehouse in Equatoriana each time, thus must have known that every delivery from RESPONDENT originated in Equatoriana. Since RESPONDENT has never delivered cocoa beans from any place other than Equatoriana, its regular conduct in similar past transactions provides a clear indicator of its intentions here.

5 Additionally, the scope of RESPONDENT's business can be seen clearly in its name, "Equatoriana Commodity Exporters, S.A." This name unequivocally shows that the company exports goods from the market in which it is located. Only on occasion has RESPONDENT departed from this by purchasing goods elsewhere (*Pro. Ord. para. 14; Answer to Notice of Arbitration and Counter-Claim, para. 4*). If RESPONDENT was a wholesaler of goods coming from different countries, its name would not contain "exporters" but rather something like "traders". However, since RESPONDENT mainly exports Equatoriana commodities and has never traded cocoa from any country other than Equatoriana (*Pro. Ord. para. 14*), CLAIMANT's assertion that RESPONDENT was a trader in commodities from other countries (*Request for Arbitration, para. 2*) is irrelevant.

6 Even if CLAIMANT itself did not know RESPONDENT's intention at the time of conclusion of the contract, interpretation of Cocoa Contract 1045 from the point of view of a "reasonable business partner in transactions of the same manner" [*Schlechtriem/Schwenzer – Schmidt-*

Kessel, Art. 8, para. 24] pursuant to Art. 8 (2) CISG leads to the same result. For the interpretation of Cocoa Contract 1045, the knowledge that a reasonable merchant in CLAIMANT's position would have had is sufficient. Such a merchant would have knowledge of previous dealings and negotiations between the parties [*Bianca/Bonell – Farnsworth, Art. 8, No. 2.4; Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8, para. 20*], just as CLAIMANT did here. Considering all the above mentioned facts, an interpretation from that objective perspective leads to the conclusion that CLAIMANT could not have been unaware of RESPONDENT's intent to deliver only cocoa beans from Equatoriana.

7 Interpreting Cocoa Contract 1045 pursuant to Art. 8 (1) and (2) CISG leads to the result that RESPONDENT was only obliged to deliver cocoa beans from Equatoriana and nowhere else. This Tribunal is thus requested to reject CLAIMANT's assertion that Cocoa Contract 1045 called for delivery of cocoa from somewhere other than Equatoriana (*Cl. Memo. para. 49*).

2. The parties have established a practice restricting RESPONDENT's delivery obligation to cocoa beans from Equatoriana according to Artt. 8 (3) and 9 (1) CISG.

8 RESPONDENT's delivery obligation was restricted to Equatoriana cocoa beans, since RESPONDENT and CLAIMANT have established a practice referring to the delivery of cocoa beans from Equatoriana. To establish a practice according to Artt. 8 (3) and 9 (1) CISG, it is sufficient that the parties have acted alike in several previous transactions [*Brunner, Art. 9, para. 3; Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 9, para. 8; Staudinger-Magnus, Art. 9, para. 13*]. Under prior contracts with CLAIMANT, RESPONDENT has always delivered only cocoa beans from Equatoriana (*Pro. Ord. para. 14; Request for Arbitration, para. 2; Answer to Request for Arbitration, para. 2*). Since established practices in the sense of Art. 9 (1) CISG supplement a contract [*Schlechtriem – Junge, Art. 9, para. 7*], they are to be treated as a *de facto* modification of the contract. Therefore, CLAIMANT is bound to the limitation of RESPONDENT's delivery obligation to cocoa beans from Equatoriana.

9 Furthermore, prior to the conclusion of Cocoa Contract 1045, CLAIMANT never expressed any indication of an intent to end or modify the practice between itself and RESPONDENT regarding delivery of Equatoriana cocoa beans. CLAIMANT never expressed any request for delivery from any Group C country other than Equatoriana when concluding its previous cocoa contracts with RESPONDENT. Nor does CLAIMANT's assertion in the letter from Mr. Sweet to Mr. Smart on 5 March 2002 (*Cl. Ex. No. 4*) that it did not expect delivery only of cocoa beans from Equatoriana alter the parties' practice here, since that assertion was made after the conclusion of Cocoa Contract 1045.

10 RESPONDENT has successfully satisfied its burden of proof to establish a practice pursuant to Artt. 8 (3) and 9 (1) CISG. Practices can be proved by showing similar situations without any complaints from one party [*Schlechtriem – Junge, Art. 9, para. 7*]. As CLAIMANT has never complained about the practice of delivering only Equatoriana cocoa beans, RESPONDENT has satisfied this standard.

11 As a result of the established practice between the parties, RESPONDENT's delivery obligation was not broad and general, but rather was restricted to cocoa beans from Equatoriana. Therefore, CLAIMANT's assertion that the delivery obligation arising out of Cocoa Contract 1045 was not limited to Equatoriana cocoa beans (*Cl. Memo. paras. 49 et seq.*) should be rejected by this Tribunal.

II. The export embargo imposed by the EGCMO as the result of the storm constitutes an impediment beyond RESPONDENT's control pursuant to Art. 79 CISG.

12 RESPONDENT is exempt from liability for delay in delivery pursuant to Art. 79 CISG, since the embargo imposed by the EGCMO as a result of the storm constitutes an impediment beyond RESPONDENT's control. The impediment caused the delay in delivering the second instalment of cocoa beans. Accordingly, both requirements of Art. 79 CISG are satisfied.

13 First, the export embargo which the EGCMO imposed as a consequence of the storm that hit the cocoa producing area in Equatoriana and damaged the crop (*Cl. Ex. No. 3*) constitutes an impediment to RESPONDENT's performance, as required by Art. 79 CISG. An export embargo satisfies this requirement, since it presents an obstacle that would also affect other merchants in RESPONDENT's position [*Karollus, p. 207; Keil, pp. 110 et seq.; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 11; Staudinger – Magnus, Art. 79, paras. 28, 32*]. Consequently, the export embargo constitutes an impediment preventing RESPONDENT from delivery.

14 Second, the export embargo is beyond RESPONDENT's control, since it is external to RESPONDENT's own sphere. Natural disasters like storms and state interventions (*fait du prince*) like embargos always constitute external matters [*Achilles, Art. 79, para. 6*; *Honsell – Magnus, Art. 79, para. 12; Schlechtriem, para. 289; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, paras. 14, 37; Staudinger – Magnus, Art. 79, paras. 27, 28*]. Moreover, RESPONDENT has no influence on actions of the EGCMO, which has a monopoly on the cocoa trade in Equatoriana, and distributes cocoa beans produced in Equatoriana to middlemen (*Pro. Ord. para. 11*). As RESPONDENT is just such a middleman, it is dependent on the distributive decisions made by the EGCMO. Therefore, CLAIMANT's assertion that

the export embargo was not an impediment beyond RESPONDENT's control because RESPONDENT could control the EGCMO (*Cl. Memo. paras. 44 et seq.*) is erroneous.

B. RESPONDENT could not foresee the storm and the subsequent export embargo.

15 RESPONDENT could not reasonably have foreseen the storm and the subsequent export embargo imposed by the EGCMO at the time of conclusion of Cocoa Contract 1045. RESPONDENT can also satisfy its burden of proof under Art. 79 CISG by showing that a reasonable person in the same circumstances as RESPONDENT would not have foreseen the impediment [*Brunner, Art. 79, para. 32; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 22; Staudinger – Magnus, Art. 79, para. 32*]. In this case, no reasonable merchant would have foreseen the storm on 14 February 2002, which was the first storm in 22 years that caused damage to the cocoa trees (*Pro. Ord. para. 8*). The earlier storm in 1980 did not result in extensive damage or the imposition of any export embargo (*Pro. Ord. para. 8*). Since such an extraordinary storm was not foreseeable, it was even more impossible to foresee the export embargo that was imposed as a consequence of the storm. Thus, contrary to CLAIMANT's assertion (*Cl. Memo. paras. 47 et seq.*), RESPONDENT could not reasonably be expected to foresee the Equatoriana export embargo.

C. RESPONDENT could not have avoided or overcome the effects of the export embargo pursuant to Art. 79 CISG.

16 Since RESPONDENT's delivery obligation was limited to cocoa beans from Equatoriana, RESPONDENT could not have avoided or overcome the effects of the export embargo. The possibility of avoiding an impediment must be judged by an objective standard [*Honsell – Magnus, Art. 79, para. 11; Staudinger – Magnus, Art. 79, para. 34*]. No other merchant in RESPONDENT's position could possibly have avoided the effects of the export embargo. This satisfies the objective standard, since no legal procedure was available to protest against or seek an exemption from the export embargo (*Pro. Ord. para. 12*). Furthermore, it would not have mattered if RESPONDENT had asked the EGCMO to make an exception to the export embargo, since requests made by other exporters were rejected. Art. 79 CISG should not require sellers to engage in futile acts. CLAIMANT thus cannot assert that RESPONDENT could have avoided the effects of the embargo (*Cl. Memo. paras. 49 et seq.*).

17 Nor can RESPONDENT be held responsible for overcoming the export embargo by purchasing cocoa beans elsewhere. As the delivery of cocoa beans was limited to Equatoriana cocoa beans, RESPONDENT only bore the risk of procurement for those cocoa beans. In case of export embargos, the seller's risk of procurement is abolished [*Schlechtriem – Stoll, Art.*

79, para. 30]. Thus, CLAIMANT's assertion that RESPONDENT had to bear the risk of the export embargo (*Cl. Memo. paras. 44 et seq.*) should be rejected by this Tribunal.

18 Moreover, it would be unreasonable to require RESPONDENT to make an additional purchase of cocoa beans that duplicates its existing contract with the EGCMO. Art. 79 CISG only requires RESPONDENT to make a reasonable effort to overcome the impediment. Here, in the classic embargo situation where prices rose dramatically under conditions of scarcity, RESPONDENT's financial exposure for a second purchase would have been extremely high. Since RESPONDENT is contractually bound to the EGCMO (*Pro. Ord. para. 11*), it would presumably have to take delivery of the 300 tons of cocoa beans it had ordered after the end of the embargo. Since RESPONDENT would not be able to find a new buyer to purchase those goods at the same price it would have to pay if it purchased substitute goods at the top of the market, RESPONDENT's loss would be considerable and thus might jeopardize its financial position. Such a high expenditure goes beyond the limits of what can be considered a reasonable effort to overcome the impediment and its consequences [*Achilles, Art. 79, para. 8; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 23*]. Consequently, RESPONDENT was not obliged to make an additional purchase from another Group C country, since Art. 79 CISG imposes no additional obligation beyond making a reasonable effort. It would go too far to require RESPONDENT to make a large investment of money or time to build up new trade relations with cocoa producers from other countries just to overcome the consequences of a short-term embargo that was certain to expire in the near future. Therefore, RESPONDENT cannot be expected to procure cocoa beans from another market outside of Equatoriana as a substitute, contrary to CLAIMANT's assertion (*Cl. Memo. paras. 49 et seq.*).

19 For all these reasons, RESPONDENT could not have avoided or overcome the effects of the export embargo imposed by the EGCMO as a consequence of the storm.

SECOND ISSUE: CLAIMANT HAS NOT VALIDLY AVOIDED COCOA CONTRACT 1045.

20 Even if this Tribunal comes to the conclusion that RESPONDENT is not exempt pursuant to Art. 79 CISG, CLAIMANT was not entitled to avoid Cocoa Contract 1045 (**A.**). Furthermore, if CLAIMANT was entitled to avoid Cocoa Contract 1045 in regard to the remaining Equatoriana cocoa beans, CLAIMANT did not effectively declare avoidance pursuant to Art. 26 CISG until 15 November 2002 (**B.**).

A. CLAIMANT may not avoid Cocoa Contract 1045.

21 CLAIMANT was not entitled to avoid Cocoa Contract 1045 in regard to the outstanding instalment, since fundamental breach is a prerequisite to avoidance of an instalment contract pursuant to Art. 73 (1) CISG (**I.**). Moreover, even if this Tribunal finds that Art. 73 (1) CISG does not provide the sole basis for avoiding Cocoa Contract 1045, CLAIMANT still may not partially avoid Cocoa Contract 1045, since CLAIMANT cannot satisfy any of the bases for avoidance under Artt. 49 (1) CISG (**II.**).

I. CLAIMANT was not entitled to avoid Cocoa Contract 1045 in regard to the outstanding instalment pursuant to Art. 73 (1) CISG, since the prerequisite of a fundamental breach is not fulfilled.

22 Cocoa Contract 1045 is an instalment contract governed by Art. 73 (1) CISG (**1.**), which permits the buyer to avoid only where it proves that the seller fundamentally breached the contract. CLAIMANT may not avoid Cocoa Contract 1045 in regard to the outstanding instalment, as fundamental breach is the prerequisite to avoidance pursuant to Art. 73 (1) CISG. CLAIMANT has failed to carry its burden of showing fundamental breach of Cocoa Contract 1045 by RESPONDENT (**2.**). Furthermore, CLAIMANT cannot avoid Cocoa Contract 1045 regarding the outstanding instalment by fixing an additional period of time, since Art. 73 (1) CISG allows only avoidance for fundamental breach (**3.**).

1. As Cocoa Contract 1045 called for delivery in instalments, the only legal basis for avoidance is Art. 73 (1) CISG.

23 RESPONDENT and CLAIMANT concluded an instalment contract. Therefore, Art. 73 (1) CISG properly applies to Cocoa Contract 1045, since both prerequisites for applying this provision are satisfied in this case. First, Art. 73 (1) CISG applies when delivery in instalments was contractually agreed by the parties. This requirement is satisfied here, because CLAIMANT and RESPONDENT agreed on the possibility of delivering the 400 tons of cocoa beans in instalments. A contract is considered to be an instalment contract where delivery in instalments is permissable [*Achilles, Art. 73, para. 2; Brunner, Art. 73, para. 2; Karollus, p. 160; Rudolph, Art. 73, para. 7*]. Cocoa Contract 1045 contains an express term stating that "delivery will be in one or more installments at the option of the Seller" (*Cl. Ex. No. 2*). Thus, the contracting parties agreed upon delivery by instalments. Second, Art. 73 (1) CISG applies if one or more instalments have been already delivered by the seller [*Brunner, Art. 73, paras. 2, 4*]. This prerequisite also is satisfied here, since RESPONDENT already shipped one instalment of 100 tons of cocoa beans on 18 May 2002 (*Cl. Ex. No. 6*).

24 If contractual parties have concluded an instalment contract, Art. 73 (1) CISG provides the exclusive legal basis for avoidance [*Brunner, Art. 73, para. 8; Herber/Czerwenka, Art. 73, paras. 2, 9; Honsell – Schnyder/Straub, Art. 73, para. 18; Staudinger – Magnus, Art. 73, para. 10*]. Since Cocoa Contract 1045 is an instalment contract, the only legal basis for avoiding this contract would be Art. 73 (1) CISG.

2. RESPONDENT has not fundamentally breached Cocoa Contract 1045, since its conduct did not cause foreseeable substantial detriment under Art. 25 CISG.

25 CLAIMANT has no basis for avoiding Cocoa Contract 1045, since it has not and cannot show that RESPONDENT's delay in delivering the remaining 300 tons of cocoa beans did not cause substantial detriment to CLAIMANT in the sense of Art. 25 CISG. For this reason, the extraordinary remedy of avoidance should not be available in this case (**a.**). Furthermore, at the time of conclusion of Cocoa Contract 1045, it was not foreseeable that RESPONDENT's conduct would result in substantial detriment to CLAIMANT under Art. 25 CISG (**b.**). Finally, setting a *Nachfrist* does not convert an ordinary breach into a fundamental one (**c.**).

a. RESPONDENT's delay in delivering the remaining 300 tons of cocoa beans did not cause substantial detriment to CLAIMANT in the sense of Art. 25 CISG.

26 Even if this Tribunal finds that RESPONDENT's delay in delivering cocoa beans was not excused by the export embargo, such delay could at most amount to an ordinary breach of contract, but not to a fundamental one giving CLAIMANT the right to avoid Cocoa Contract 1045. A fundamental breach can only be recognized in exceptional cases: first, where delivery on a certain date is of the essence [*Court of First Instance Parma, 24.11.1989; OLG Hamburg, 28.02.1997; OLG München, 08.02.1995; OLGR 1997, pp. 149, 151; Achilles, Art. 25, para. 5; Herber/Czerwenka, Art. 25, para. 8; Honsell – Karollus, Art. 25, paras. 14, 22; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, paras. 2, 9*]; second, in cases involving seasonal goods [*Appellate Court Milan, 20.03.1998; ICC Award No. 8786, 00.01.1997; Brunner, Art. 25, para. 12*]; or third, where the seller refuses to fulfill its delivery obligation at all [*LG Ellwangen, 21.08.1995; OLG Celle, 24.05.1995; OLG Hamburg, 28.02.1997; Koch, p. 250; Staudinger – Magnus, Art. 25, para. 20*]. Since this case does not fall within any of these exceptional situations, no fundamental breach has occurred, and CLAIMANT was not entitled to avoid Cocoa Contract 1045. Finally, CLAIMANT failed show actual loss caused by the late delivery, which is also a necessary element of substantial detriment.

27 First, this case is not one in which delivery of the contracted goods on a certain date is of the essence. Contrary to CLAIMANT's assertion (*Cl. Memo. paras. 30 et seq.*), time is not of the

essence in this case. CLAIMANT seeks to rely on the judgment of the *Court of First Instance Parma, 24.11.1989*, where the contracting parties had agreed that timely delivery was of the essence. However, in this case CLAIMANT and RESPONDENT did not agree upon any specific date for delivery in Cocoa Contract 1045, but rather agreed upon delivery during a three month period between March and May 2002 (*Cl. Ex. Nos. 1, 2*). Furthermore, CLAIMANT tolerated RESPONDENT's delay in delivering the remaining instalment of 300 tons of cocoa beans. Consequently, the judgment of the Court of First Instance Parma is not persuasive here, since the facts of that case are not comparable to the present case.

28 Second, this case is not one in which seasonal goods are involved. Cocoa beans are not seasonal goods which must be delivered during a certain season, such as Christmas trees. Rather, cocoa beans are used by CLAIMANT and most other confectionary producers all year long for confectionary production (*Cl. Ex. No. 4; Pro. Ord. para. 24*).

29 Third, this case is not one in which the seller has refused to perform its contractual obligations. Here, not only did RESPONDENT never refuse to perform its contractual obligation regarding delivery of the contracted cocoa, but it repeatedly assured CLAIMANT that it would deliver the remaining instalment of cocoa beans as soon as the Equatoriana export embargo was lifted. RESPONDENT stated in its letter of 7 May 2002 that it would deliver the remaining 300 tons of cocoa beans "in the very near future" (*Cl. Ex. No. 6*). Furthermore, RESPONDENT called on 29 September 2002 to assure CLAIMANT that it would deliver after the lifting of the export embargo (*Pro. Ord. para. 22*).

30 Finally, in order to show substantial detriment under Art. 25 CISG, the buyer must show that it suffered actual loss [*Bianca/Bonell – Will, Art. 25, para. 2.1.1.2; Graffi, pp. 338-349; Honsell, Art. 25, para. 14; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 9*]. This is a necessary component of substantial detriment, not a substitute for it. Yet CLAIMANT never suffered actual harm here, since its production was never really endangered. CLAIMANT's cocoa stocks, while dwindling, remained enough to support ongoing production. This is clearly shown by the fact that CLAIMANT had in its inventory slightly more than 100 tons of cocoa beans at the time of its hasty purchase of 300 tons of cocoa beans on 24 October 2002 (*Pro. Ord. para. 24*). Given that CLAIMANT's production required an average of 125 tons of cocoa beans per month (*Pro. Ord. para. 24*), we estimate that CLAIMANT used an average of around 4,2 tons per day. Therefore, CLAIMANT could have continued production for at least 25 days after 24 October 2002, and would not have run out of inventory before the end of November 2002 (*Pro. Ord. para. 24*). Since RESPONDENT would have been able to deliver the remaining 300 tons of cocoa beans before RESPONDENT faced any real danger

of running out of stocks (*Cl. Ex. No. 10*), CLAIMANT has never really been in danger of having to stop its production. Therefore, CLAIMANT did not and cannot show that it suffered actual loss. As a consequence, CLAIMANT's existing business relations, its good reputation, and its credibility were never harmed or ever really in danger.

31 The high price of the cocoa beans CLAIMANT paid for the cocoa beans it purchased on 24 October 2002 did not result from RESPONDENT's actions, but from CLAIMANT's premature purchase of substitute goods. It is not RESPONDENT's fault that CLAIMANT paid an excessively high price to purchase more cocoa beans on that date.

32 Since RESPONDENT's delay in delivery did not cause substantial detriment to CLAIMANT within the meaning of Art. 25 CISG, no fundamental breach has been or can be shown. Therefore, RESPONDENT requests this Tribunal to reject CLAIMANT's assertion that the delay in delivering the remaining 300 tons of cocoa beans constitutes a fundamental breach of Cocoa Contract 1045 (*Cl. Memo. paras. 29 et seq.*).

b. At the time of conclusion of Cocoa Contract 1045, it was not foreseeable that RESPONDENT's conduct would result in substantial detriment to CLAIMANT, as required by Art. 25 CISG.

33 If this Tribunal comes to the conclusion that CLAIMANT suffered substantial detriment, then any such substantial detriment was neither foreseeable to RESPONDENT (**i.**), nor to a reasonable person in the same circumstances as RESPONDENT (**ii.**) at the legally relevant time, which was the conclusion of Cocoa Contract 1045 on 19 November 2001.

i. RESPONDENT did not and could not have foreseen that its conduct could cause substantial detriment to CLAIMANT.

34 RESPONDENT did not foresee, nor could it have foreseen that its delay in delivery would cause substantial detriment to CLAIMANT. In such cases the aggrieved party has no right to declare the contract avoided [*Graffi, pp. 338-349*]. Knowledge or foreseeability of the buyer's detriment are relevant for interpreting and assessing the importance of the obligation breached and its significance for the seller [*Achilles, Art. 25, para. 14; Bianca/Bonell – Will, Art. 25, para. 2.2.2.; Holthausen in: RiW 1990, pp. 101, 105; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 11; Staudinger – Magnus, Art. 25, para. 16*].

35 Substantial detriment is always foreseeable at the time of conclusion of the contract in those rare cases where the contract expressly states that performance of an obligation is of the essence [*Graffi, pp. 338-349; Schlechtriem/Schwenzer - Schlechtriem, Art. 25, para. 12*]. This rule does not apply here, however, since the contracting parties did not expressly state that

delivery on a certain date was of the essence [*A.I.2.a.*]. CLAIMANT and RESPONDENT only agreed upon a broad, three-month period during which the delivery of the cocoa beans should take place (*Cl. Ex. Nos. 1, 2*). Thus, since timely delivery cannot be considered to be of the essence in Cocoa Contract 1045, substantial detriment is not *per se* foreseeable.

36 As there is no indication that CLAIMANT and RESPONDENT had an exclusive supply relation, RESPONDENT did not and could not have foreseen that its delay in delivery would result in substantial detriment to CLAIMANT. Without such knowledge, RESPONDENT could reasonably assume that CLAIMANT had access to supplies of cocoa beans from other sources and that it would not face the risk of a production shut-down in case of delay in delivering a single instalment. In this case, RESPONDENT did not and would not have foreseen either the occurrence of any damages, nor the magnitude of the price differential. Furthermore, RESPONDENT could not foresee that CLAIMANT would make a hasty cover purchase at a time when cocoa prices were extremely high (*Re. Ex. No. 3*). Therefore, RESPONDENT could not foresee that CLAIMANT would spend twice as much to obtain the same quantity of cocoa beans from another supplier.

37 As a result, RESPONDENT did not foresee and could not have foreseen that its delay in delivering the remaining instalment might cause substantial detriment to CLAIMANT. As a result, CLAIMANT has no legal basis for declaring Cocoa Contract 1045 avoided.

ii. Additionally, no reasonable person of the same kind in the same circumstances as RESPONDENT could have foreseen that delayed delivery might result in substantial detriment to CLAIMANT.

38 In this case no reasonable person could have foreseen that RESPONDENT's delay in delivery might lead to a substantial detriment to CLAIMANT, as required by Art. 25 CISG. A reasonable person in the sense of Art. 25 CISG means a person similar to RESPONDENT in all attributes [*Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 14*], having knowledge of the whole spectrum of facts and events at the relevant time [*Lorenz, III. B.*]. Since RESPONDENT trades with cocoa beans, the point of view of a reasonable merchant in the cocoa industry is relevant here. A reasonable merchant in the cocoa industry could not have foreseen that the prices for cocoa beans would rise to a historic height, with the result that CLAIMANT would spend twice as much to obtain the same quantity of cocoa beans from another supplier. Thus, no reasonable person in the same circumstances could have foreseen that RESPONDENT's delay in delivery could result in a substantial detriment to CLAIMANT. If no substantial detriment was foreseeable to a reasonable person, then there

cannot be any fundamental breach of contract [*Achilles, Art. 25, para. 13; Brunner, Art. 25, para. 9; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 11*].

39 Therefore, even if this Tribunal finds that RESPONDENT's conduct resulted in substantial detriment to CLAIMANT in the sense of Art. 25 CISG, this Tribunal should reject CLAIMANT's assertion that RESPONDENT or a reasonable person of the same kind could have foreseen that such conduct might result in such detriment to CLAIMANT, as required by Art. 25 CISG (*Cl. Memo. paras. 37 et seq.*). Rather, we respectfully request this Tribunal to find that RESPONDENT did not fundamentally breach Cocoa Contract 1045, since any such detriment was not foreseeable to RESPONDENT or to a reasonable person of the same kind as RESPONDENT (*Cl. Memo. paras. 37 et seq.*).

c. CLAIMANT's effort to fix an additional period of time (*Nachfrist*) cannot result in a fundamental breach under Cocoa Contract 1045.

40 Efforts to set a *Nachfrist* are legally ineffective under an instalment contract, since this extraordinary remedy is not available in cases where the contract calls for delivery in instalments [*Herber/Czerwenka, Art. 73, para. 2; Staudinger – Magnus, Art. 73, para. 10*]. The drafters intended that buyers under instalment contracts are not permitted to rely directly on Artt. 49 (1) (b) and 47 (1) CISG, nor can those buyers achieve the same result indirectly [*Bianca/Bonell – Will, Art. 73, para. 1.2.1.3.*]. For this reason, a buyer under an instalment contract, like CLAIMANT in this case, cannot turn an ordinary delay into a fundamental breach of contract by fixing an additional period of time [*Brunner, Art. 25, para. 8; Schlechtriem/Schwenzer – Hornung, Art. 73, para. 13*].

41 In conclusion, since Cocoa Contract 1045 is an instalment contract governed by Art. 73 (1) CISG, and RESPONDENT did not commit a fundamental breach of Cocoa Contract 1045, CLAIMANT may not avoid this contract in regard to the remaining instalment of 300 tons of Equatoriana cocoa beans.

3. CLAIMANT cannot avoid Cocoa Contract 1045 regarding the outstanding instalment by fixing an additional period of time, since Art. 73 (1) CISG allows only avoidance where there has been fundamental breach.

42 As Cocoa Contract 1045 is an instalment contract [*A.I.1.*], CLAIMANT cannot rely on fixing an additional period of time as a basis for avoidance of Cocoa Contract 1045 in regard to the outstanding instalment. According to the wording of Art. 73 (1) CISG which governs instalment contracts, the only legal basis upon which the buyer can avoid an instalment contract is where the seller has committed a fundamental breach [*Brunner, Art. 73, para. 8;*

Enderlein/Maskow/Strohbach, Art. 73, para. 3; Herber/Czerwenka, Art. 73, para. 2; Honsell – Schnyder/Straub, Art. 73, para. 18]. Therefore, CLAIMANT cannot rely on the CISG's *Nachfrist* provisions in connection with Cocoa Contract 1045, since those provisions do not apply to instalment contracts.

II. Even if this Tribunal finds that Art. 73 (1) CISG does not provide the sole basis for avoidance, CLAIMANT still may not partially avoid Cocoa Contract 1045, since it cannot satisfy any of the bases for avoidance under Art. 49 (1) CISG.

43 Even if this Tribunal does not apply the CISG's special restrictive rules governing instalment contracts to Cocoa Contract 1045, CLAIMANT still has no right to avoid Cocoa Contract 1045. First, CLAIMANT cannot partially avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1) and 49 (1) (a) CISG, since RESPONDENT did not commit a fundamental breach (**1.**). Second, CLAIMANT cannot rely on the CISG's *Nachfrist* provisions in Artt. 51 (1), 45 (1), 47 (1) and 49 (1) (b) CISG to partially avoid Cocoa Contract 1045, since it has failed to satisfy the prerequisites to these provisions (**2.**). Furthermore, RESPONDENT cannot be held responsible for CLAIMANT's failure to fix a specific additional period of time, as CLAIMANT argued (**3.**).

1. CLAIMANT cannot avoid Cocoa Contract 1045 partially under Artt. 51 (1), 45 (1) and 49 (1) (a) CISG, since RESPONDENT did not commit a fundamental breach.

44 As we argued above [*A.I.2.a.*], RESPONDENT did not commit a fundamental breach of Cocoa Contract 1045 in regard to the remaining 300 tons of cocoa beans as required by Art. 25 CISG. Therefore, CLAIMANT was not entitled to partially avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1) and 49 (1) (a) CISG.

2. CLAIMANT had no right to partially avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1), 47 (1) and 49 (1) (b) CISG, since CLAIMANT's communications with RESPONDENT were ineffective to fix an additional period of time.

45 CLAIMANT's written and oral communications with RESPONDENT did not suffice to fix an additional period of time, since they failed to satisfy the prerequisites of Artt. 45 (1) and 47 (1) CISG. CLAIMANT's letter of 5 March 2002 was ineffective to set an additional period of time, since the contractual delivery period had not yet expired (**a.**). None of CLAIMANT's communications satisfied the prerequisites of Art. 47 (1) CISG, since they never fixed a specific date (**b.**). Finally, the requirement of Art. 47 (1) CISG that the additional period of time be reasonable is in addition to the requirement that a specific time period be set, and is not a substitute for specification, as CLAIMANT has argued (**c.**).

a. CLAIMANT's letter on 5 March 2002 did not fix an additional period of time, since the contractual delivery period had not yet elapsed.

46 CLAIMANT did not effectively fix an additional period of time in its letter of 5 March 2002, since the contractual delivery period had not yet expired. It is an absolute prerequisite under Art. 45 (1) CISG that the seller's failure to perform its contractual obligation already existed at the time the buyer exercises its rights under Artt. 46 to 52 CISG [*Brunner, Art. 47, para. 3; Honsell – Schnyder/Straub, Art. 47, para. 14; Schlechtriem/Schwenzer – Müller-Chen, Art. 47, para. 11; Staudinger – Magnus, Art. 47, para. 14*]. Fixing an additional period of time prematurely does not cause a reasonable period of time to start to run as of the expiry of the contractual delivery period [*Brunner, Art. 47, para. 3; Schlechtriem/Schwenzer – Müller-Chen, Art. 47, para. 11*]. As RESPONDENT and CLAIMANT agreed on a delivery period between 1 March and 31 May 2002 (*Cl. Ex. No. 2*), RESPONDENT was legally entitled to deliver at any time within that period according to Art. 33 (b) CISG. Therefore, RESPONDENT was entitled to deliver the contractual amount of cocoa beans until 31 May 2002, and had not failed to perform its delivery obligation as of 5 March 2002. Furthermore, there was no reason for CLAIMANT to assume at that time that RESPONDENT had refused to deliver the cocoa beans. Rather, RESPONDENT tried hard to perform its obligations within the contractual period of time, as shown by its shipment of cocoa beans on 18 May 2002. Therefore, CLAIMANT was obliged to wait until 1 June 2002 before it could set an additional period of time. Consequently, CLAIMANT's statement on 5 March 2002 was legally ineffective to fix an additional period of time under Artt. 45 (1) and 47 (1) CISG.

b. None of CLAIMANT's statements were effective to fix an additional period of time, since CLAIMANT never set a specific date as required by Art. 47 (1) CISG.

47 None of CLAIMANT's statements satisfied the prerequisite under Art. 47 (1) CISG that the buyer fix a specific date by which RESPONDENT must deliver. The fixing of an additional period of time must be unmistakable and unequivocal in order to protect the seller from legal uncertainty about the existence of a deadline. A general demand by the buyer that the seller perform "promptly" or the like does not satisfy the requirement to "fix" a period of time under Art. 47 (1) CISG [*Bianca/Bonell, Art. 47, para. 2.1.3.1.; Honnold, Art. 47, para. 289; Honnold – Secretariat Commentary, Art. 43, para. 7; Honsell – Schnyder/Straub, Art. 47, paras. 20, 21; Schlechtriem/Schwenzer – Müller-Chen, Art. 47, paras. 4, 5*]. Many courts have confirmed the requirement of a specific date and held that general demands for delivery were not effective to fix an additional period of time [*LG Düsseldorf, 11.10.1995; OLG*

Düsseldorf, 24.04.1997; OLG Nürnberg, 20.09.1995]. In its letter of 15 August 2002 and its telephone call on 29 September 2002, CLAIMANT merely urged RESPONDENT to deliver the cocoa beans by its statement that it would have to purchase elsewhere, if it did not receive notification of the shipping date "soon" (*Cl. Ex. No. 7; Pro. Ord. para. 22*). The notion "soon" does not fulfill the essential prerequisite of specification under Art. 47 (1) CISG, since it describes a period of time whose end is not discernible. Even if the letter of 5 March 2002 had been legally recognizable, it also failed to satisfy the specificity requirement. Therein CLAIMANT announced that it "was not under immediate pressure to receive the contracted cocoa but it will be later this year" (*Cl. Ex. No. 4*). Contrary to CLAIMANT's assertions (*Cl. Memo. paras. 21 et seq.*), this statement was too vague to fix an additional period of time. In addition, it was ambiguous, because it gave the impression that CLAIMANT did not mind if RESPONDENT did not observe the contractual delivery period. Therefore, none of CLAIMANT's separate statements was specific enough to fix an additional period of time.

48 Even all of CLAIMANT's statements taken as a whole did not make clear that a final deadline had been set for delivery of the remaining cocoa beans. Rather, they left RESPONDENT with an ambiguous picture about CLAIMANT's intentions. If this Tribunal would accept such vague announcements as sufficient to fix an additional period of time, it would lead to legal uncertainty and undermine the principle of good faith in international trade, which must be upheld pursuant to Art. 7 (1) CISG. Recognizing CLAIMANT's statements as sufficient to fix an additional period would open the door to abuse of Art. 49 (1) (b) CISG, since every vague statement could be interpreted as an additional period of time that would justify avoidance of a contract, contrary to the intentions of the drafters that avoidance be the most drastic remedy and available only in rare cases [*Bianca/Bonell – Will, Art. 49, para. 1.1.; Schlechtriem/Schwenzer – Müller-Chen, Art. 49, para. 2; Piltz, § 5, para. 194; Staudinger – Magnus, Art. 7, para. 49*]. Consequently, this Tribunal should insist upon a specific date to "fix" an additional period of time under Art. 47 CISG, and find that CLAIMANT's statements were legally insufficient to fix an additional period of time.

c. The requirement of Art. 47 (1) CISG that the additional period of time be reasonable is in addition to the requirement that a specific time period be set, and is not a substitute for specification.

49 Contrary to CLAIMANT's assertion (*Cl. Memo. paras. 23 et seq.*), the requirement that an additional period of time under Art. 47 (1) CISG be reasonable is an independent requirement, in addition to the requirement that the period of time be stated precisely. The purpose of

requiring the additional period of time to be specific and unmistakable is to protect the seller from legal uncertainty about the existence of a deadline [*B.II.2.*]. In contrast, the requirement that the period of time be of reasonable length serves merely to make it possible that the seller has enough time to make up for the delayed delivery [*Honsell – Schnyder/Straub, Art. 47, para. 23; Schlechtriem/Schwenzer – Müller-Chen, Art. 47, para. 6*]. Therefore, these two prerequisites do not protect the same interest. Consequently, reasonableness does not satisfy the need for specificity, and vice versa. Therefore, both requirements should be upheld.

50 CLAIMANT seeks to rely on two cases to support its argument that setting a reasonable time makes it unnecessary for the buyer also to fix a specific period for the seller to deliver delayed goods. Neither of those cases supports that conclusion in this case. First, CLAIMANT refers to the case before the *Appellate Court Barcelona, 3 November 1997*, which held that the buyer's tolerance of late delivery of numerous instalments was equivalent to the granting of an "additional period of time" to the seller under Art. 47 CISG. However, the present case involves only one single delayed instalment, since RESPONDENT shipped the first instalment of cocoa beans on 18 May 2002, which was within the contractual delivery period. It was merely late in delivering one instalment of cocoa beans, through no fault of its own. This is not like the situation in the case before the Appellate Court Barcelona, where the seller consistently failed to meet the delivery deadline. Therefore, CLAIMANT's tolerance of the delay of *one* outstanding instalment cannot be sufficient to constitute a granting of an additional period of time to RESPONDENT, whose conduct cannot be compared with that of the seller in the case before the Appellate Court Barcelona.

51 The second case CLAIMANT proposes to show that a reasonable time can be a substitute for a specific period is also unlike our case and thus inapplicable. The *Appellate Court Versailles, 29.01.1998*, held that the seller's failure to repair a machine pursuant to its promise to do so justified the buyer to avoid the contract because of fundamental breach. In that case the facts were very different from ours, since the Appellate Court Versailles found on the facts before it that there was no room for any misunderstanding between the parties that the contract had come to an end. Here, however, RESPONDENT was left in the dark about when CLAIMANT definitely needed the cocoa beans and could not discern the end of the extended delivery period, since CLAIMANT's communications were ambiguous and did not fix a firm deadline. Moreover, the French case involved avoidance pursuant to *delivery of non-conforming goods* under Art. 49 (2) (b) (ii) CISG, while in this case CLAIMANT seek to avoid for *non-delivery* pursuant to Art. 49 (1) (b) CISG. However, the reasons that might make it appropriate to waive the specificity requirement in cases involving delivery of non-

conforming goods do not apply in cases involving non-delivery, like this one. In the French case, goods had an objectively weighty but repairable defect, which the seller promised but failed to eliminate within a reasonable period of time [*Schlechtriem – Huber, Art. 49, para. 13*]. Specificity was not needed to protect the seller in that case. Since the seller itself in that case fixed the reasonable period of time for repairing the machine under Art. 48 CISG, the seller knew that a period of time was running. However, in this case, RESPONDENT needed to be protected from legal uncertainty about the existence of a deadline for its delivery, since CLAIMANT is the party who allegedly fixed an additional period for RESPONDENT's performance. Where the buyer has such a power over the seller, specificity is essential, since the seller must be able to discern what the buyer expects it to do. Thus, the exceptional interpretation of Art. 47 (1) CISG in cases involving failure to repair under Art. 49 (2) (b) (ii) CISG is not applicable in this case, where the CLAIMANT's *Nachfrist* argument, if any is allowed at all, can only be based on Art. 49 (1) (b) CISG.

52 Consequently, neither the award of the Appellate Court Barcelona nor the judgment of the Appellate Court Versailles should persuade this Tribunal to abandon the requirement that the additional time period be stated with precision as a prerequisite to the extraordinary remedy of avoidance. The facts of those cases are not comparable with the present case, and the interest served by the specificity requirement would be undermined if this Tribunal were to overlook the need for specificity in the context of Art. 47 (1) CISG. Therefore, this Tribunal should not accept CLAIMANT's assertions, but rather should uphold the requirement that the buyer fix both a specific and a reasonable additional period of time.

3. RESPONDENT was not responsible for CLAIMANT's failure to set a specific additional period of time according to Art. 80 CISG.

53 It would be inappropriate for this Tribunal to use Art. 80 CISG as a basis for waiving the requirement that CLAIMANT fix a specific additional period of time required by Art. 47 (1) CISG, as CLAIMANT has asserted (*Cl. Memo. paras. 25 et seq.*). Art. 80 CISG can only be used, if the reason for the failure to perform the contractual obligation is in the sphere of the contractual partner [*Schlechtriem – Stoll, Art. 80, para. 3*]. Here, CLAIMANT's failure to fix a specific additional period of time did not fall within RESPONDENT's sphere of responsibility, since RESPONDENT did not withhold information needed to determine CLAIMANT's need for cocoa production. RESPONDENT provided CLAIMANT with all available information concerning the embargo and the possibility of making delivery. It promptly informed CLAIMANT about the storm and the export embargo (*Cl. Ex. No. 3*) and

the release of a small amount of cocoa beans for export (*Cl. Ex. No. 6*). Even if there was no new information about the possibility to deliver between June and November 2002, RESPONDENT called CLAIMANT to let it know that no further information was available yet (*Pro. Ord. para. 21*). Contrary to CLAIMANT's assertions (*Cl. Memo. para. 24*), RESPONDENT had no duty to inform CLAIMANT about unsubstantiated rumors. As these rumors were inherently inofficial and thus unreliable, RESPONDENT did not want to waste CLAIMANT's time or raise false expectations about a possible lifting of the export embargo. Consequently, RESPONDENT did not withhold any information from CLAIMANT.

54 Rather, the information needed to calculate the amount of time before CLAIMANT's inventory of cocoa beans would run out was in CLAIMANT's possession and RESPONDENT had no way to know exactly how much cocoa was needed for CLAIMANT's production. Therefore CLAIMANT could have defined a specific and reasonable additional period of time without relying on vague expressions in its communication with RESPONDENT. CLAIMANT's yearly average requirement amount to 1,500 tons of cocoa beans, which averages about 125 tons of cocoa beans per month (*Pro. Ord. para. 24*). It is safe to assume that CLAIMANT knows at all times what is the level of its stocks and how long it could maintain its production. Therefore, since CLAIMANT could certainly have calculated the amount of time before its inventory would run out [*A.I.2.a.*], its failure to fix a specific additional period of time falls within its own sphere of responsibility and cannot be attributed to RESPONDENT.

B. Even if CLAIMANT was entitled to avoid Cocoa Contract 1045 in regard to the remaining cocoa beans, CLAIMANT did not effectively declare avoidance pursuant to Art. 26 CISG until 15 November 2002.

55 Even if CLAIMANT was entitled to avoid Cocoa Contract 1045 in regard to the remaining 300 tons of cocoa beans, its letters and statements prior to 15 November 2002 were ineffective to constitute a valid declaration of avoidance pursuant to Art. 26 CISG, since they did not make clear that Cocoa Contract 1045 was terminated (**I.**). Moreover, this Tribunal should uphold the requirement that there be an explicit declaration of avoidance in order to promote good faith and fair dealing in international trade according to Art. 7 (1) CISG (**II.**). Therefore, CLAIMANT declared avoidance of the Cocoa Contract 1045 only by Mr. Fasttrack's letter on 15 November 2002.

I. CLAIMANT did not declare avoidance of Cocoa Contract 1045 until 15 November 2002, since it never made clear that Cocoa Contract 1045 was terminated.

56 Neither CLAIMANT's letter of 25 October 2002 (**1.**) nor its previous letters and statements (**2.**) constituted a valid declaration of avoidance of Cocoa Contract 1045, since they did not satisfy the high standard of clarity and precision that is required for a declaration of avoidance under Art. 26 CISG.

1. CLAIMANT did not declare avoidance on 25 October 2002, since it did not make clear that Cocoa Contract 1045 was terminated in regard to the remaining instalment of cocoa beans.

57 CLAIMANT's letter of 25 October 2002 informing RESPONDENT about the "cover purchase" that took place the day before was not legally effective pursuant to Artt. 26 and 49 (1) CISG as a partial declaration of avoidance regarding the 300 tons of cocoa beans. In order to be legally valid, a declaration under Art. 26 CISG must satisfy a high standard of clarity and precision, even though the term "avoidance" need not be used [*Honsell – Karollus, Art. 26, para. 11; Schlechtriem/Schwenzer – Müller-Chen, Art. 26, para. 10; Staudinger – Magnus, Art. 49, para. 25*]. To ensure legal certainty regarding the continued existence of a contract, it is essential that the declaration be explicit and cannot be made implicitly [*LG Frankfurt, 16.09.1991; Honsell – Karollus, Art. 26, para. 11; Herber/Czerwenka, Art. 49, para. 11; Piltz, § 5, para. 272*]. CLAIMANT did not state explicitly in its letter of 25 October 2002 that Cocoa Contract 1045 regarding the remaining cocoa beans was terminated, but only informed RESPONDENT about its additional purchase on 24 October 2002 (*Cl. Ex. No. 8*). Thus, an explicit declaration of avoidance was missing. As CLAIMANT did not fulfill its duty to declare avoidance in an unequivocal and unmistakable way, RESPONDENT could not know whether Cocoa Contract 1045 was avoided or whether CLAIMANT meant to hold on to the contract in spite of its additional purchase. Consequently, CLAIMANT's letter on 25 October 2002 could not constitute a valid declaration of avoidance.

2. Even if taken as a whole, CLAIMANT's previous letters and statements were too vague to be considered to be a declaration of avoidance under Art. 26 CISG.

58 CLAIMANT only urged RESPONDENT to deliver the cocoa beans by its series of letters and statements prior to the "cover purchase" on 24 October 2002, but did not declare avoidance thereby, as CLAIMANT has argued (*Cl. Memo. paras. 55 et seq.*). CLAIMANT announced that it would purchase the cocoa beans elsewhere, unless RESPONDENT notified it of the shipping date for the remaining cocoa beans (*Cl. Ex. Nos. 4, 5 and 7; Pro. Ord. para. 22*).

However, CLAIMANT never made clear that it was no longer prepared to perform Cocoa Contract 1045. Since it never stated that it no longer needed the 300 tons of cocoa beans, CLAIMANT even gave the impression that it intended to hold RESPONDENT to its delivery obligation. RESPONDENT, like any other reasonable person would have understood CLAIMANT's statement as an order to deliver but not as a declaration of avoidance.

II. To promote good faith and fair dealing in international trade, this Tribunal should require an explicit declaration of avoidance under Artt. 26 and 49 (1) CISG.

59 This Tribunal should uphold the requirement of an explicit declaration of avoidance to promote good faith and fair dealing in international trade pursuant to Art. 7 (1) CISG. Ignoring the requirement for an explicit declaration of avoidance would lead to legal uncertainty and put sellers in an untenable situation, since they need to know if the contract has been terminated or not [*Honsell – Karollus, Art. 26, para. 3*]. Allowing CLAIMANT's correspondence as a whole, or CLAIMANT's letter of 25 October 2002 standing alone to suffice as a declaration of avoidance of Cocoa Contract 1045 in regard to the remaining cocoa beans would undermine the principle of good faith in international trade, since the differences between a mere reminder to deliver and a declaration of avoidance would be ignored and would be no longer discernible. The only situation in which it might be appropriate to allow a buyer to avoid the contract without having first made an explicit declaration of avoidance is which the seller has refused to perform its delivery obligation seriously and finally [*OLG Hamburg, 28.02.1997*]. However, that is not the case here, since RESPONDENT never refused to perform its delivery obligations, but even "looked forward to shipping CLAIMANT the remaining 300 tons of cocoa beans" (*Cl. Ex. No. 6*). Therefore, this Tribunal should uphold the requirement of an explicit declaration of avoidance in this case.

THIRD ISSUE: CLAIMANT IS NOT ENTITLED TO RECOVER ANY DAMAGES.

60 CLAIMANT cannot recover any damages, since it has not avoided Cocoa Contract 1045 properly (**A.**). Even if this Tribunal finds that CLAIMANT has properly avoided Cocoa Contract 1045 the recoverable damages must be limited (**B.**). Furthermore, CLAIMANT may not recover any additional damages (**C.**). Finally, any recovered amount must be reduced, since CLAIMANT failed to fulfill its duty to mitigate loss pursuant to Art. 77 CISG (**D.**).

A. Even if timely delivery by RESPONDENT is not excused, CLAIMANT may not recover any damages arising out of its additional purchase, since it failed to avoid Cocoa Contract 1045 validly.

61 CLAIMANT may not recover damages pursuant to Artt. 74 to 76 CISG, since it failed to avoid Cocoa Contract 1045 properly. CLAIMANT cannot rely on Artt. 75 or 76 CISG to calculate its damages, since avoidance is an absolute precondition to the recovery of damages under these provisions (**I.**). Nor may CLAIMANT rely on Art. 74 CISG to recover the sum it claims, since no damages for non-performance can be recovered under this provision (**II.**).

I. CLAIMANT may not claim damages arising out of its additional purchase under Artt. 75 or 76 CISG, since it did not validly avoid Cocoa Contract 1045.

62 CLAIMANT is not entitled to rely on Artt. 75 or 76 CISG to recover the extra expenses it incurred by making its ill-timed substitute transaction. CLAIMANT seeks to recover USD 289,353 in damages, which amount equals the difference between the price of the outstanding instalment of 300 tons under Cocoa Contract 1045 of 19 November 2001, and the price CLAIMANT paid to purchase an additional 300 tons of cocoa beans on 24 October 2002 (*Cl. Memo. para. 65*). CLAIMANT thus relies on Art. 75 CISG to calculate the amount of damages it may recover (*Cl. Memo. paras. 62 et seq.*). Yet in this case, CLAIMANT may not rely on Art. 75 CISG, since this provision is only available if the contract has been properly avoided [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 5, Art. 76, para. 3; Witz/Salger/Lorenz – Witz, Art. 75, para. 2, Art. 76, para. 4*]. Since CLAIMANT has failed to satisfy the essential prerequisite of avoidance, it cannot recover any damages pursuant to Art. 75 CISG. For the same reason, this conclusion also follows for Art. 76 CISG.

II. Nor is CLAIMANT entitled to recover damages arising out of its additional purchase under Art. 74 CISG, since damages of that type cannot be recovered under this provision.

63 The damages in the amount of USD 289,353 that CLAIMANT seeks to recover must be characterized as damages for non-performance, since they would substitute for the performance of the contract. However, the proper remedy for cases involving non-performance are Artt. 75 and 76 CISG [*MüKo – Huber, Art. 74, para. 9; Schlechtriem, para. 309; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 74, para. 5*]. As explained above, CLAIMANT cannot rely on those provisions in this case. But nor can CLAIMANT fall back on Art. 74 CISG to recover the USD 289,353 it claims, since Art. 74 CISG does not provide for damages arising out of non-performance.

64 Art. 74 CISG is only available to calculate damages in cases where the parties still stick to the contract [*AG Nordhorn, 14.06.1994; OGH, 06.02.1994; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 74, para. 5*]. In cases involving non-performance, all that can possibly be

recovered under Art. 74 CISG are incidental damages additional to those recoverable (given proper avoidance) pursuant to Artt. 75 and 76 CISG [*AG Nordhorn, 14.06.1994; OGH, 06.02.1996; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 74 CISG, para. 5*].

65 Any other interpretation of the CISG would lead to inappropriate results, since it would allow a claimant who has failed to satisfy the strict requirements of avoidance under Artt. 25 and 49 CISG to achieve the same economic result by claiming damages resulting from non-performance as if it had fulfilled all prerequisites to avoidance [*MüKo – Huber, Art. 74, para. 9; Schlechtriem, para. 309*]. This would allow CLAIMANT to destroy the contract without having set a *Nachfrist* or proved fundamental breach. Letting CLAIMANT recover damages for non-performance without avoiding Cocoa Contract 1045 is the same as allowing *de facto* avoidance. This would violate the basic principle of *pacta sunt servanda* under the CISG, which places a very high barrier to avoidance in order to serve the goal of upholding contractual relations between international parties [*MüKo – Gruber, Art. 74, para. 9; Schlechtriem, para. 309*]. Thus, CLAIMANT may not recover any damages whatsoever pursuant to Artt. 74 to 76 CISG, since it did not validly avoid Cocoa Contract 1045.

B. Even if this Tribunal finds that Cocoa Contract 1045 was properly avoided, CLAIMANT may only recover limited damages.

66 Even if this Tribunal finds that CLAIMANT properly avoided Cocoa Contract 1045, it may nevertheless not recover the full USD 289,353 it claims. The damages it may recover must be limited to what this Tribunal considers appropriate. CLAIMANT is not entitled to damages measured in accordance with Art. 75 CISG, because it failed to make a valid cover purchase (**I.**). Any damages CLAIMANT may recover under Art. 76 CISG must be limited (**II.**).

I. CLAIMANT may not recover damages measured in accordance with Art. 75 CISG, since it did not make a valid cover purchase.

67 CLAIMANT is not entitled to damages measured in accordance with Art. 75 CISG. The purchase of 300 tons of cocoa beans on 24 October 2002 was not a reasonable cover purchase, and thus did not fulfill the requirements of Art. 75 CISG (**1.**). Even if this Tribunal finds that the requirements of Art. 75 CISG are fulfilled, the damages recoverable by CLAIMANT must be limited to the amount reasonably foreseeable at the time of conclusion of Cocoa Contract 1045 (**2.**).

1. CLAIMANT did not make a reasonable substitute transaction.

68 CLAIMANT may not rely on Art. 75 CISG to calculate its recoverable damages, since it did not fulfill the requirements of this provision. Art. 75 CISG provides that "if the contract is

avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement ... the party claiming damages may recover the difference between the contract price and the price in the substitute transaction...". CLAIMANT neither made its "cover purchase" in a reasonable manner nor within a reasonable time after avoidance.

69 First, assuming that Cocoa Contract 1045 was avoided on 15 November 2002 (*Cl. Memo. para. 77*), CLAIMANT did not enter into its substitute transaction within a reasonable time after that date, as required by Art. 75 CISG, but rather did so more than two weeks before, on 24 October 2002 (*Cl. Ex. No. 8*). Therefore, CLAIMANT's purchase on 24 October cannot be viewed as a valid cover transaction for Cocoa Contract 1045. The requirement of avoidance before entering into a substitute transaction is mandatory and may not be ignored [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 3; Witz/Salger/Lorenz – Witz, Art. 75, para. 6*]. In addition to being a precondition to the recovery of damages for non-performance [*A.II.*], the requirement that avoidance has to take place before entering into a substitute transaction is necessary to ensure good faith in international trade pursuant to Art. 7 (1) CISG. It would undermine good faith to allow CLAIMANT to enter into a substitute transaction, while RESPONDENT still believed in the validity of the contract. The party who enters into a substitute transaction must make it unambigously clear that the contract will not be performed any more [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 5*]. However, CLAIMANT did not do so here, and thus RESPONDENT still intended to fulfill its delivery obligation.

70 Even if this Tribunal were to find that the requirement of avoidance prior to the cover purchase had been satisfied in this case, CLAIMANT still cannot recover damages measured in accordance with Art. 75 CISG, since the cover purchase was not made in a reasonable manner. A substitute transaction is only reasonable if a buyer relying on Art. 75 CISG acts like a careful and reasonable merchant, trying to make its cover purchase at the lowest price reasonably possible [*Bianca/Bonell, Art. 75, para. 2.4; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 6; Staudinger – Magnus, Art. 75, para. 16*]. CLAIMANT did not comply with these requirements since it could have achieved a lower price had it only waited a little longer before buying the cocoa beans. CLAIMANT entered into the substitute transaction too early, even though it should have known that prices were likely to be lower in November 2002 than they were in October 2002. CLAIMANT bought the 300 tons of cocoa beans in October 2002 at a time when the price for cocoa beans was at an almost historic height of 100.03 cents per pound (*Re. Ex. No. 3*). Had CLAIMANT waited until November 2002, it could have purchased the cocoa beans at the significantly lower price of 82.29 cents

per pound. CLAIMANT could easily have waited until November 2002 to do so, since it was not in danger of running out of cocoa in October. CLAIMANT still had 100 tons of cocoa beans in stock at the time of its alleged substitute transaction and would not urgently need more inventory until the end of November (*Pro. Ord. para. 24*).

71 It must have been clear to CLAIMANT that prices were likely to be lower in November than in October 2002. The main harvest of cocoa beans takes place in October [*Chocosuisse, p. 20*]. This would have led to a larger amount of cocoa being traded on the world market. In turn, the prices for cocoa beans were likely to decrease, since in a functioning commodity market a large supply in face of a steady demand results in lower prices. Therefore, CLAIMANT's substitute transaction was premature. It should have waited until November 2002, when prices were likely to and did in fact decrease significantly. By purchasing additional cocoa on 24 October 2002, CLAIMANT did not behave like a reasonable merchant, as required by Art. 75 CISG, since it did not do everything in its power to purchase the cocoa beans at a lower price. CLAIMANT therefore may not recover damages arising out of its alleged substitute transaction pursuant to Art. 75 CISG.

2. If this Tribunal finds that CLAIMANT fulfilled the requirements of Art. 75 CISG, damages should nevertheless be limited to the amount reasonably foreseeable to RESPONDENT at the time of conclusion of the contract.

72 Even if this Tribunal finds that CLAIMANT fulfilled all the prerequisites of Art. 75 CISG, it may nevertheless not recover the entire USD 289,353 it claims. CLAIMANT may only recover limited damages, since it was not foreseeable to RESPONDENT that damages in such an extraordinarily high amount might arise out of Cocoa Contract 1045. Lack of foreseeability leads to a reduction of recoverable damages to the amount which was reasonably foreseeable at the time of conclusion of the contract [*Bianca/Bonell – Knapp, Art. 74, para. 2.13; Weitnauer in: IPRax, p. 83; Faust, p. 10*]. In cases where there has been an extraordinary change in prices after the contract was concluded, the damages resulting from a cover purchase under Art. 75 CISG are not foreseeable to the promisor [*Schlechtriem – Stoll, Art. 75, para. 9; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 6*]. At the time of conclusion of Cocoa Contract 1045, RESPONDENT could not anticipate that cocoa prices would rise so dramatically. It could not have been aware when Cocoa Contract 1045 was concluded on 19 November 2001 that the prices would nearly double from 56.28 cents per pound in Novemer 2001 to 100.03 cents per pound in October 2002, less than one year later. This is emphasized by the fact that the prices for cocoa had fallen steadily in 2001 until

October (*Re. Ex. No. 3*). Thus RESPONDENT could not have foreseen the extent of the price differential at the time of conclusion of Cocoa Contract 1045. This Tribunal should therefore limit any recoverable damages under Art. 75 CISG to what amount it considers appropriate.

II. CLAIMANT may only recover limited damages under Art. 76 CISG.

73 CLAIMANT may not recover the entire USD 289,353 it claims under Art. 76 CISG (*Cl. Memo. paras. 77 et seq.*) for two reasons. First, with avoidance taking place in November 2002, the only amount that could be recovered under Art. 76 CISG is USD 172,024. Calculation of damages according to Art. 76 CISG refers to the difference between the contract price and the market price at the time of avoidance. The difference between the current market price in November 2002 for 300 tons of cocoa beans (i.e. USD 544,251) and the USD 372,225 that CLAIMANT paid for additional cocoa beans in October 2002 is USD 172,024. Second, even if avoidance took place in October as asserted by CLAIMANT (*Cl. Memo. paras. 55 et seq.*), it may only recover damages in the amount reasonably foreseeable at the time of conclusion of Cocoa Contract 1045. As shown above [*B.I.2.*] the extraordinary rise of cocoa prices was not foreseeable to RESPONDENT at that time. This Tribunal should therefore limit the amount of recoverable damages to an amount it considers appropriate.

C. CLAIMANT may not recover any additional damages.

74 CLAIMANT is not entitled to recover any additional damages that it claims to have incurred (*Cl. Memo. para. 80*) for two reasons. First, CLAIMANT failed to include this claim for additional damages incurred in connection with the substitute transaction such as additional transportation costs (*Pro. Ord. para. 27)*. Since there was no reason for CLAIMANT to exclude the additional costs from its claim, this Tribunal should exercise the discretion granted to it by Art. 20 (1) Swiss Rules and not allow CLAIMANT to claim such additional damages. Second, CLAIMANT did not provide any proof regarding the additional damages it claims. Thus, CLAIMANT is not entitled to recover any additional damages.

D. Any amount recovered by CLAIMANT must be reduced, since RESPONDENT did not comply with its duty to mitigate loss according to Art. 77 CISG.

75 If this Tribunal comes to the conclusion that CLAIMANT may recover damages, the total must be reduced by an appropriate amount to be determined by this Tribunal, in view of the fact that CLAIMANT failed to comply with its duty to mitigate loss according to Art. 77 CISG. In order to act in accordance with this duty, every reasonable effort has to be made [*Ryffel, p. 81*]. CLAIMANT lacked this effort as it did not take appropriate measures to avoid damages resulting from RESPONDENT's late delivery.

76 Rather than mitigate its losses, CLAIMANT exacerbated them by hastily purchasing an amount in excess of its needs in replacement for those not yet delivered by RESPONDENT. It would have been perfectly sufficient to secure CLAIMANT's production if CLAIMANT had cover purchased a smaller amount like 100 tons of cocoa beans instead of 300 tons of cocoa beans at an extremely high market price. Combined with the 100 tons that CLAIMANT still had in its inventory (*Pro. Ord. para. 24*), this smaller amount would have been absolutely sufficient to secure CLAIMANT's production until the end of December.

77 CLAIMANT should have known that buying only a smaller amount of cocoa beans would have led to a mitigation of damages since it should have known that prices were likely to fall in November [*B.I.1.*]. Thus, CLAIMANT did not take appropriate steps to mitigate damages. This Tribunal should therefore reduce any amount recoverable by CLAIMANT to what it considers appropriate.

FOURTH ISSUE: THIS TRIBUNAL HAS JURISDICTION TO CONSIDER THE COUNTER-CLAIM.

78 This Tribunal should exercise its power to rule on its own jurisdiction pursuant to Art. 21 (1) Swiss Rules and decide that it has jurisdiction to consider the counter-claim. The Swiss Rules apply in full and govern this proceeding (**A.**). RESPONDENT raised its counter-claim in accordance with the Swiss Rules (**B.**). Art. 21 (5) Swiss Rules confers jurisdiction on this Tribunal to decide the sugar claim (**C.**). This Tribunal should consider the full extent of RESPONDENT's counter-claim (**D.**). Even if this Tribunal finds that it should not consider the counter-claim to its full extent, it should at least consider it as a set-off against CLAIMANT's damages (**E.**).

A. The Swiss Rules apply in full and govern this proceeding.

79 The Swiss Rules constitute the framework for the present proceeding. They are applicable to the present arbitration (**I**.). CLAIMANT's objection concerning the applicability of Art. 21 (5) Swiss Rules should be dismissed (**II.**).

I. The Swiss Rules are applicable to the present arbitration.

80 The Swiss Rules replaced the Geneva Rules and thus automatically apply to the present dispute pursuant to Art. 1 Swiss Rules (**1.**). In addition, CLAIMANT and RESPONDENT gave their assent to conduct the present arbitration under the Swiss Rules (**2.**).

1. The Swiss Rules apply by force of law pursuant to Art. 1.

81 The Swiss Rules govern the present proceeding. In Cocoa Contract 1045 the parties agreed to submit any dispute that might arise from that contract to a tribunal to be conducted under the Geneva Rules. For international arbitrations, those Rules have been replaced by the Swiss Rules, which apply automatically by force of Art. 1 (1) Swiss Rules. Art. 1 (3) Swiss Rules further provides that "unless the parties have agreed otherwise, [the Swiss Rules] shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after [1 January 2004]." The Notice of Arbitration for this proceeding was submitted in July 2004. Therefore the Swiss Rules govern this arbitration pursuant to Art. 1 (1) and (3) Swiss Rules.

2. In addition the parties gave their assent to the application of the Swiss Rules.

82 Although no separate agreement by the parties to apply the Swiss Rules was necessary, the parties also assented to the application of the Swiss Rules in this case. Since the Swiss Rules apply automatically to the present arbitration, Art. 1 (3) Swiss Rules clearly implies that no separate agreement is necessary. Rather, Art. 1 (3) Swiss Rules only provides an "opt out" possibility where the parties mutually agree to exclude the application of the Swiss Rules. However, in this case RESPONDENT and CLAIMANT expressed their assent to resolve their dispute under the Swiss Rules by referring to provisions thereof in their correspondences (*letter from CLAIMANT to CCIG of 21 July 2004; letter from RESPONDENT to CCIG of 10 August 2004*). Thus they implicitly agreed upon the application of the Swiss Rules although this was not required for them to govern this proceeding.

II. CLAIMANT's objection concerning the applicability of Art. 21 (5) Swiss Rules should be rejected.

83 CLAIMANT objected to the application of Art. 21 (5) Swiss Rules in its Answer to the Counter-Claim (*Answer to Counter-Claim, para. 4*). This Tribunal should reject CLAIMANT's objection for three reasons. First, CLAIMANT may not object to the application of Art. 21 (5) Swiss Rules since it had already assented to the application of the Swiss Rules without reservation (**1.**). Second, CLAIMANT objected too late (**2.**). Third, there is no reason why this Tribunal should consider Art. 21 (5) Swiss Rules inapplicable, since this provision was neither unexpected nor is it extraordinary (**3.**).

1. CLAIMANT may not object to the applicability of Art. 21 (5) Swiss Rules, since it had already assented to the application of the Swiss Rules without reservation.

84 CLAIMANT cannot object to the applicability of Art. 21 (5) Swiss Rules, since it implicitly assented to the application of the Swiss Rules without reservation by referring to provisions of

the Swiss Rules in its correspondence [*A.I.2.*]. The principle of *pacta sunt servanda* binds the parties to this agreement until they mutually agree to depart from it. In the present case CLAIMANT and RESPONDENT did not agree to exclude Art. 21 (5) Swiss Rules and therefore are bound to apply the Swiss Rules in whole. CLAIMANT's unilateral objection cannot compel a different result.

2. CLAIMANT objected too late to the application of Art. 21 (5) Swiss Rules.

85 CLAIMANT did not object promptly and therefore this Tribunal should not entertain its objection. Art. 30 Swiss Rules provides that a party "shall be deemed to have waived its right to object" if it fails to raise procedural objections promptly after gaining knowledge of the reason for objecting. CLAIMANT's counsel, Mr. Fasttrack, had every reason to know that Art. 21 (5) Swiss Rules would apply in these proceedings. He learned on 6 July 2004 that the new Swiss Rules, which harmonize the existing body of rules in Switzerland, would govern the current arbitration proceeding (*letter from CCIG to Mr. Fasttrack on 6 July 2004*). Mr. Fasttrack replied to CCIG in a letter dated 21 July 2004, in which he quoted provisions of the new Swiss Rules. This conduct clearly shows that Mr. Fasttrack must have read the Swiss Rules, at the latest by 21 July 2004, but probably even earlier (*letter from Mr. Fasttrack to Mme. Jobin, Member of the Abitration Committee, of 21 July 2004*). Thus CLAIMANT failed to object promptly after gaining knowlege and has therefore waived its right to object.

86 This interpretation of Art. 30 Swiss Rules is in conformity with the principle of good faith in arbitral proceedings, which is laid down by Art. 15 (6) Swiss Rules. The principle of good faith requires the parties not to behave in a manner that contradicts the intention shown by their prior behavior (*non concedit venire contra factum proprium*) [*Berger in: International Economic Arbitration, p. 166*]. This rule is the key to maintaining the atmosphere of trust that is essential for arbitration. Once these proceedings had commenced under the Swiss Rules and no timely objection was forthcoming from CLAIMANT, RESPONDENT was entitled to make its plans and proceed on the assumption that all provisions of those Rules would apply. This trust would be destroyed by admitting CLAIMANT's late objection. This could not only lead to a need for RESPONDENT to revise its strategy, but also might result in wasted extra expenses incurred in reliance on the applicability of a procedural framework. CLAIMANT was therefore obliged to raise its objections to the application of Art. 21(5) Swiss Rules much earlier than it did. Because it failed to object promptly, when it had an opportunity to do so, its objection should be rejected by this Tribunal.

87 CLAIMANT may not assert that its objection was timely pursuant to Art. 21 (3) Swiss Rules, since that provision is not relevant to CLAIMANT's objection. Art. 21 (3) Swiss Rules provides that "as a rule, a plea that the arbitral tribunal does not have jurisdiction shall be raised in the ... reply to the counter-claim." However, CLAIMANT's objection to the application of Art. 21 (5) Swiss Rules is of a fundamentally different nature from an ordinary plea that a tribunal lacks jurisdicion. The question whether Art. 21 (5) Swiss Rules applies here, along with the rest of the provisions of the Swiss Rules, is essentially a question about which procedural rules govern the arbitration, and not really a question about jurisdiction at all. The fact that the answer to that preliminary question may have an impact on the scope of jurisdiction of this Tribunal does not compel a different result. Art. 21(3) only gives a general rule that applies "as a rule" in standard cases, but clearly recognizes that there will be exceptions to that basic rule. The question of whether all or just some provisions of the Swiss Rules are incorporated into the parties' arbitration agreement under Cocoa Contract 1045 is just such an exception that falls outside the normal rule in Art. 21(3) Swiss Rules. Thus, this Tribunal should not entertain CLAIMANT's objection.

3. There is no reason why this Tribunal should consider Art. 21 (5) Swiss Rules inapplicable, since this provision was neither unexpected nor is it extraordinary.

88 There is no reason why Art. 21 (5) Swiss Rules should not be applied in this case. CLAIMANT may not argue that a separate agreement concerning the applicability of Art. 21 (5) Swiss Rules is necessary, beyond the automatic application by virtue of Art. 1 (3) Swiss Rules. Even if one might insist upon such a requirement in cases where the substituted rules contain a provision that is entirely unexpected and extraordinary, such a rule would not prevent the applicability of Art. 21 (5) Swiss Rules, since it was neither unexpected nor extraordinary. The Swiss Rules combine the most modern and effective provisions from the existing body of rules in Switzerland with the UNCITRAL Rules [*Peter in: SchiedsVZ, p. 61*] (*letter from the CCIG to CLAIMANT on 6 July 2004*). It should not have surprised CLAIMANT (or its counsel) that a provision like Art. 21 (5), which is similar to provisions of the Zurich and the Basel Chamber of Commerce [*Art. 27 Zurich Rules*], appears in the Swiss Rules. Thus, there is no reason why this Tribunal should consider Art. 21 (5) Swiss Rules inapplicable. CLAIMANT's objection should therefore be rejected.

B. RESPONDENT's counter-claim was raised in the appropriate manner.

89 RESPONDENT raised its counter-claim under Sugar Contract 2212 properly. This counter-claim was raised in RESPONDENT's Answer to the Notice of Arbitration, in compliance

with Art. 3 (9) Swiss Rules, which says that "any counterclaim ... shall in principle be raised with the respondent's answer to the Notice of Arbitration". This provision demonstrates the continuity between the new Swiss Rules and the Geneva Rules in regard to the possibility of raising counter-claims. Art. 8 Geneva Rules is virtually identical to Art. 3 (9) Swiss Rules. Thus, CLAIMANT's assertion that counter-claims are not authorized under the Swiss Rules as they were under the Geneva Rules (*Cl. Memo. para. 93*) is erroneous.

C. Art. 21 (5) Swiss Rules confers jurisdiction on this Tribunal to hear the sugar claim.

90 This Tribunal's jurisdiction under Art. 21 (5) Swiss Rules is not undermined by the clause in Sugar Contract 2212 calling for arbitration under the OCA Rules. This conclusion clearly follows from the wording of Art. 21 (5) Swiss Rules, which allows defences to be considered "even … if they are subject to another arbitration agreement." CLAIMANT's concerns as to the expertise of this Tribunal (*Cl. Memo. para. 87*) are unfounded, since the members of this Tribunal, as well as the Swiss Rules themselves, are more than adequate to ensure the quality of the arbitration of both the cocoa and the sugar disputes.

91 This Tribunal, consisting of experienced lawyers, is fully competent to hear all claims arising out of both the cocoa and the sugar contracts. While it may be advisable to let a tribunal consisting of experts in a certain field of commodity trade decide over so-called "look-sniff arbitrations" [*Tackaberry/Marriott – Perry, para. 16-005*], meaning disputes which only concern issues of quantity or quality of the commodity [*Weigand, Part 1, para. 57*], that is very different from arbitrations that turn on complex legal issues. In cases like this one, only persons having legal training possess the necessary legal knowledge and expertise, and are therefore sufficiently skilled to ensure a competent judgment [*Redfern/Hunter, para. 1-89*]. The counter-claim arising out of Sugar Contract 2212 involves complex commercial legal questions about documentary transactions and risk of loss, rather than commodity-specific questions about sugar. Such complicated matters should thus be put before legal rather than commodity specialists. For this reason, we assert that this Tribunal possesses the necessary expertise to decide the counter-claim based on Sugar Contract 2212.

92 This conclusion is buttressed by the fact that the parties appointed two members of this Tribunal at a point of time when they already knew that the sugar dispute might become subject to this arbitration. The parties knew that a counter-claim had arisen under Sugar Contract 2212 and that this Tribunal had been asked to hear that counter-claim. Consequently, both parties had an interest in selecting arbitrators who possessed sufficient expertise. In choosing their arbitrators, CLAIMANT and RESPONDENT composed a tribunal which is

fully capable of deciding over a commodity dispute, regardless of whether it involves cocoa beans or sugar. Therefore, contrary to CLAIMANT's assertion (*Cl. Memo. para. 87*), the parties would not be deprived of their right to appoint competent arbitrators if this Tribunal also decides the claim under Sugar Contract 2212.

93 Moreover, the Swiss Rules provide a more than adequate framework for deciding any questions that might arise under Sugar Contract 2212. These rules guarantee the highest level of expert knowledge needed to achieve a proper resolution of the case. Even if this Tribunal might need to address questions that require more detailed knowledge about sugar trade than any of its members possess, it can hear experts pursuant to Art. 27 (1) Swiss Rules. Furthermore, Art. 15 (1) Swiss Rules permits this Tribunal a great discretion as to the conduct of the proceedings, which enables this Tribunal to adapt the proceeding to the needs of the parties. Moreover, while the parties are represented by lawyers in this proceeding, this might not be possible under the OCA Rules, since it is often the case that lawyers are not admitted to participate in specialized commodity arbitration proceedings [*Redfern/Hunter, para. 4-24; Weigand, Part 1, para. 57*]. It is not certain that this holds true in Oceania, but it is clear that arbitral proceedings have different characteristics in different contexts.

94 Finally, it would not be inefficient to consider the sugar dispute here, contrary to CLAIMANT's assertion (*Cl. Memo. para. 86*). CLAIMANT argues that the arbitration must be conducted in Oceania, close to the port of shipment. This Tribunal could achieve this result under Art. 16 (2) Swiss Rules, which provides that it is not necessary that the actual proceedings be conducted at the seat of arbitration. Thus, this Tribunal could hear witnesses in Oceania or even conduct the whole arbitration there, if necessary. Hence, allowing this Tribunal to decide the counter-claim arising under Sugar Contract 2212 would not necessarily be inefficient on the basis of distance from the port of shipment. There are no reasons why this Tribunal should not apply Art. 21 (5) Swiss Rules to the present case. Accordingly, we urge this Tribunal to exercise jurisdiction to consider RESPONDENT's counter-claim.

D. This Tribunal should consider RESPONDENT's counter-claim to its full extent.

95 Although Art. 21 (5) Swiss Rules does not explicitly mention counter-claims, this Tribunal should still consider RESPONDENT's counter-claim for two reasons. First, counter-claims do not substantially differ from set-off defences and should therefore be treated equally under Art. 21 (5) Swiss Rules (**I.**). Second, considerations of procedural economy and efficiency compel the application of Art. 21 (5) Swiss Rules to counter-claims as well as set-offs (**II.**).

I. Counter-claims do not substantially differ from set-off defences and should therefore be treated equally under Art. 21 (5) Swiss Rules.

96 Since set-off defences and counter-claims are closely related, they should be treated alike for purposes of Art. 21 (5) Swiss Rules. This provision reflects the fundamental principle that a tribunal should be authorized to consider any defence presented by a respondent in order to achieve "a 'net' judgement between the parties" [*Berger in: Arb. Int'l, p. 58*]. Once the parties are involved in a proceeding, the tribunal should aim to achieve a final decision that resolves all disputes between the parties. This fundamental policy is also recognized by Switzerland's highest court, the Federal Supreme Court, which insists that "le juge de l'action est le juge de l'exception" (the judge of the main proceeding is also the judge for any defence) [*BGE 06.05.1959, p. 107*]. Counter-claims and set-off defences are devices for a respondent to reduce the amount the claimant may recover in part or in whole by setting the recoverable amounts of the parties against each other [*Berger in: Arb. Int'l, p. 58*]. It is therefore not surprising that a set-off is regarded as a "counterclaim in disguise" [*Berger in: Arb. Int'l, p. 58; Berger in: International Economic Arbitration, p. 465*]. Whether this goal is reached by a counter-claim or a set-off is unimportant, so long as the entire dispute between CLAIMANT and RESPONDENT is resolved. Therefore counter-claims and set-off defences should be treated alike under Art. 21 (5) Swiss Rules.

II. Considerations of procedural economy and efficiency compel the application of Art. 21 (5) Swiss Rules to RESPONDENT's counter-claim to the full extent.

97 This Tribunal should apply Art. 21 (5) Swiss Rules to RESPONDENT's counter-claim for reasons of procedural economy and efficiency. It would be inefficient and economically wasteful not to consider RESPONDENT's defence to the full extent in the current proceedings. If these issues are not combined, then there will necessarily have to be a second arbitration running parallel to this one. This is inevitable since RESPONDENT is entitled to recover more from CLAIMANT under the sugar claim than CLAIMANT seeks to recover for delayed delivery of cocoa beans. Thus, if the sugar claim is only considered to the limited extent of a set-off defence, then RESPONDENT will have to initiate a second proceeding to recover the difference between the value of the two claims. It is hard to believe that the drafters of the Swiss Rules intended such an absurd result, particularly since the principles of procedural economy and efficiency are among the reasons parties choose to arbitrate their disputes in the first place [*Berger in: International Economic Arbitration, p. 464*]. Since Art. 21 (5) Swiss Rules is intended to increase the effectiveness of arbitral procedure [*Peter in:*

SchiedsVZ, p. 62], a violation of this principle would be particulary inappropriate in an arbitration under the Swiss Rules like the present one.

98 It would be economically wasteful to require a second arbitration procedure. The costs of institutional arbitration decrease relatively as the amount in dispute rises [*Diedrich in: JuS, p. 159*]. Thus, the administration and the arbitrators' fees to be paid in a single arbitration would be lower than those to be paid in two separate arbitrations between the same parties dealing with two disputes. Also, the parties' legal fees would be likely to increase.

99 In addition to being more expensive, it would also be procedurally inefficient to conduct two arbitrations instead of one, since two arbitrations usually take more time than one. Saving time is one of the most important motivations for entering into an agreement to arbitrate disputes [*Redfern/Hunter, para. 1-36*]. It can be assumed that the parties in this case place great importance on temporal efficiency, since the current arbitration is conducted under an expedited procedure (*letter from CCIG to the parties of 13 August 2004*). If the dispute between CLAIMANT and RESPONDENT is decided by only one tribunal. It will condense the amount of time needed to resolve the parties' differences. Thus, this Tribunal should consider RESPONDENT's counter-claim to the full extent and not limit the applicability of Art. 21 (5) Swiss Rules to set-off defences.

100 Irrespective of whether the drafters of the Swiss Rules intended to omit counter-claims under Art. 21 (5) Swiss Rules, as asserted by CLAIMANT (*Cl. Memo. para. 92*) or not, the distinction between counter-claims and set-offs cannot be sustained in practice and should be abandoned. Once set-offs are allowed, a successful respondent who, like RESPONDENT here, is entitled to recover more from CLAIMANT than vice versa, will always have to initiate a second proceeding to recover the difference between the values of the two off-setting claims. There is no guarantee that RESPONDENT would be equally successful in the second proceeding, since the second tribunal is not bound to the findings of the first one. This would lead to economic waste, since the parties will have to file new pleadings with the second tribunal covering the same issues that were heard (and decided) already by the first tribunal. Also this could lead to contradictory results, which might cause parties to lose trust in arbitration as an efficient method for resolving their disputes. This situation could also lead to an ongoing series of cases, for example, if the claimant were to win on the issue of liability in the second tribunal (after having lost before the first tribunal) and then try to recover from respondent what the first tribunal had allowed as an off-set against claimant's recovery.

101 For all of the above reasons, RESPONDENT respectfully requests this Tribunal to hear its counter-claim to the full extent.

E. Even if this Tribunal finds that it should not consider RESPONDENT's counter-claim to the full extent, it should at least consider it as a set-off defence against CLAIMANT's recoverable damages.

102 If this Tribunal finds that RESPONDENT's counter-claim cannot be heard to its full extent under Art. 21 (5) Swiss Rules, it should at least admit the defence arising under Sugar Contract 2212 as a set-off. Art. 21 (5) Swiss Rules, which applies to this case and allows this Tribunal to hear the sugar claim, clearly aims to protect RESPONDENT from having to pay damages to CLAIMANT when RESPONDENT is entitled to recover at least the same amount back from CLAIMANT under another dispute. Therefore, this Tribunal should at the very least consider RESPONDENT's claim as a set-off against any damages CLAIMANT may recover, in order to uphold the intentions of the drafters of the Swiss Rules.

103 Even if this Tribunal decides that Art. 21 (5) Swiss Rules does not apply in the current case, it should nonetheless hear RESPONDENT's defence as a set-off. Set-offs have been recognized as an important defence long before the adoption of Art. 21 (5) Swiss Rules. The origins of set-off defences can be followed back to Roman law, and many contemporary legal systems still recognize them [*Berger in: Arb. Int'l, pp. 54 et seq.; Berger in: RIW, pp. 426 et seq.*]. Set-off also plays an important role in arbitration [*Berger in: RIW, pp. 427 et seq.*]. As noted earlier, procedural efficiency and economy are the bedrock of arbitral procedure and support the admission of defences [*D.II.*]. This Tribunal should therefore hear RESPONDENT's claim in connection with the parties' sugar trade as a set-off defence.

REQUESTS FOR RELIEF

In view of the above submissions, may it please the Tribunal to declare that:

- RESPONDENT is exempt from liability for delayed delivery of the remaining 300 tons of cocoa beans pursuant to Art. 79 CISG.
- CLAIMANT did not validly avoid Cocoa Contract 1045.
- CLAIMANT is not entitled to recover any damages.
- This Tribunal has jurisdiction to consider the counter-claim.

For Equatoriana Commodity Exporters, S.A.

(signed)_____ 27 January 2005

Counsels