

**TWELFTH ANNUAL**  
**WILLEM C. VIS**  
**INTERNATIONAL**  
**COMMERCIAL ARBITRATION MOOT**

Vienna, Austria  
March 18 to 24 2005

Organized by:

**Institute of International Commercial Law**  
**Pace University School of Law**  
78 North Broadway  
White Plains, NY 10603  
USA

and

**SECOND ANNUAL**

**WILLEM C. VIS (EAST)**

**INTERNATIONAL**  
**COMMERCIAL ARBITRATION MOOT**

Hong Kong

April 5 to 10, 2004

Organized by:

**The Chartered Institute of Arbitrators (East Asia Branch)**  
Hong Kong International Arbitration Centre  
38/F, Two Exchange Square  
Central, Hong Kong SAR

and

**City University School of Law**  
83 Tat Chee Avenue  
Kowloon Tong, Kong Kong SAR

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**THE PROBLEM**

## Table of Contents

|  |    |
|--|----|
| Letter from Fasttrack, 2 July 2004 submitting claim .....                    | 1  |
| Claim .....  | 2  |
| Exhibit No. 1 Letter from Equatoriana, 19 November 2001 .....                | 7  |
| Exhibit No. 2 Contract .....   | 8  |
| Exhibit No. 3 Letter from Equatoriana, 24 February 2002 .....                | 9  |
| Exhibit No. 4 Letter from Mediterraneo, 5 March 2002 .....                   | 10 |
| Exhibit No. 5 Letter from Mediterraneo, 10 April 2002 .....                  | 11 |
| Exhibit No. 6 Letter from Equatoriana, 7 May 2002 .....                      | 12 |
| Exhibit No. 7 Letter from Mediterraneo, 15 August 2002 .....                 | 13 |
| Exhibit No. 8 Letter from Mediterraneo, 25 October 2002 .....                | 14 |
| Exhibit No. 9 Letter from Fasttrack, 11 November 2002 .....                  | 15 |
| Exhibit No. 10 Letter from Equatoriana, 13 November 2002 .....               | 16 |
| Exhibit No. 11 Letter from Fasttrack, 15 November 2002 .....                 | 17 |
| Letter from Swiss Chambers acknowledging receipt of claim, 6 July 2004 ..... | 19 |
| Letter from Fasttrack transferring administrative fee, 12 July 2004 .....    | 20 |
| Letter from Swiss Chambers to both parties, 16 July 2004 .....               | 21 |
| Letter from Fasttrack, 21 July 2004 .....                                    | 23 |
| Letter from Langweiler, 10 August 2004 .....                                 | 24 |
| Answer and counter-claim .....   | 25 |
| Exhibit No. 1 Extract from <b>NYBOT®</b> Cocoa Rules .....                   | 31 |
| Exhibit No. 2 LIFFE Cocoa Futures Contract .....                             | 32 |
| Exhibit No. 3 Monthly average cocoa prices .....                             | 33 |
| Exhibit No. 4 Sugar contract .....   | 34 |
| Exhibit No. 5 Letter from Mediterraneo, 19 December 2003 .....               | 35 |
| Exhibit No. 6 Cargo receipt .....  | 36 |
| Letter from Swiss Chambers, 13 August 2004 .....                             | 37 |
| Letter from Fasttrack, 31 August 2004 .....                                  | 39 |
| Answer to counter-claim .....  | 40 |
| Exhibit No. 12 Damage report .....   | 42 |
| Letter from Langweiler, 31 August 2004 .....                                 | 43 |
| Letter from Swiss Chambers, 3 September 2004 .....                           | 44 |
| Letter from Claimant Arbitrator, 6 September 2004 .....                      | 47 |
| Letter from Swiss Chambers, 13 September 2004 .....                          | 48 |
| Letter from Claimant Arbitrator, 16 September 2004 .....                     | 49 |
| Letter from Swiss Chambers, 22 September 2004 .....                          | 50 |
| Letter from Swiss Chambers, 22 September 2004 .....                          | 51 |
| Procedural Order No. 1, 1 October 2004 .....                                 | 52 |
| Procedural Order No. 2, 30 October 2004 .....                                | 54 |

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

2 July 2004

Arbitration Secretariat  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Dear Sirs:

I represent the Mediterraneo Confectionary Associates, Inc. which, pursuant to Article 7 of the Arbitration Rules of the Chamber of Commerce and Industry of Geneva, hereby submits its request for arbitration against the Equatoriana Commodity Exporters, S.A. in five copies.

Payment will be made for the administrative costs and the provisional advance on the arbitrator's costs as provided in Article 35 upon receipt of your invoice.

Sincerely yours,

(Signed)  
Horace Fasttrack  
Counsel for Mediterraneo Confectionary Associates, Inc.

Encl: Request for arbitration with exhibits

Chamber of Commerce and Industry of Geneva

Request for Arbitration

Mediterraneo Confectionary Associates, Inc.  
Claimant

v.

Equatoriana Commodity Exporters, S.A.  
Respondent

The Claimant, Mediterraneo Confectionary Associates, Inc., hereby requests that the dispute between it and the Respondent, Equatoriana Commodity Exporters, S.A., that is set forth below be submitted to arbitration under the Geneva Arbitration Rules, as provided in the contract between them.

STATEMENT OF CASE

I. Parties

1. Mediterraneo Confectionary Associates, Inc. is a corporation organized under the laws of Mediterraneo. It has its principal office at 121 Sweet Street, Capitol City, Mediterraneo. The telephone number is (0) 555-1235 and the fax number is (0) 555-1237. Mediterraneo Confectionary Associates, Inc. is a producer of various confectionary items. To produce the confectionaries it uses large quantities of cocoa among other ingredients. The confectionaries are sold throughout Mediterraneo and are exported to neighboring countries.
2. Equatoriana Commodity Exporters, S.A. is a corporation organized under the laws of Equatoriana. It has its principal office at 325 Commodities Avenue, Port City, Equatoriana. The telephone number is (0) 487-2314 and the fax number is (0) 487-2320. Equatoriana Commodity Exporters, S.A. is a trader in commodities, including cocoa. Although it largely trades commodities produced in Equatoriana, it also trades commodities produced in other countries.

II. Facts

3. On 19 November 2001 Mr. Harold Smart, account executive for Equatoriana Commodity Exporters, S.A., telephoned Mr. James Sweet, commodity buyer for Mediterraneo Confectionary Associates, Inc., and offered to sell cocoa to it. The two companies have done business together on a number of occasions over the years. At the end of the telephone conversation it was agreed that Equatoriana Commodity Exporters, S.A. would sell 400 metric tons of cocoa beans to Mediterraneo Confectionary Associates, Inc. During the period January-February 2002 Equatoriana Commodity Exporters, S.A. was to fix a delivery date that would be between the months of March to May 2002. The price was set at the current market price on 19

November 2001 of USD .5628 per pound, which was equivalent to USD 1,240.75 per metric ton. (One metric ton equals 2204.6 pounds.) The total contract price for the 400 metric tons was USD 496,299.55.

4. Mr. Smart sent a fax that day (Claimant's Exhibit No. 1) confirming the telephone conversation, a copy of which was mailed with a written contract enclosed. (Claimant's Exhibit No. 2)

5. On 24 February 2002, towards the end of the period during which Equatoriana Commodity Exporters, S.A. was required to name a shipping date for the cocoa, Mr. Smart wrote Mr. Sweet. He referred to the storm that had hit the cocoa producing area in Equatoriana on 14 February 2002, a fact that had been widely reported in the cocoa industry. He went on to say that the extent of the damage was not yet known and that the Equatoriana Government Cocoa Marketing Organization had announced that no cocoa would be released for export through at least the month of March. (Claimant's Exhibit No. 3)

6. Mr. Sweet replied to Mr. Smart on 5 March 2002. (Claimant's Exhibit No. 4) He pointed out that the contract did not call for Equatoriana Commodity Exporters, S.A. to deliver cocoa from Equatoriana. The cocoa could come from anywhere; the source was irrelevant to Mediterraneo Confectionary Associates, Inc. Although he indicated that Mediterraneo Confectionary Associates, Inc. was not under immediate pressure to receive the cocoa, it would be later in the year. If the cocoa had not been delivered by then, Mediterraneo Confectionary Associates, Inc. would have to look elsewhere and would look to Equatoriana Commodity Exporters, S.A. to reimburse it for any additional costs they might incur.

7. During the following month there were several telephone calls in which Mr. Sweet constantly inquired as to when Equatoriana Commodity Exporters, S.A. would fix a date for delivery of the cocoa. This was followed by a letter dated 10 April 2002 from Mr. Sweet to Mr. Smart in which he said that Mediterraneo Confectionary Associates, Inc. expected Equatoriana Commodity Exporters, S.A. to deliver all of the cocoa by the end of May 2002. (Claimant's Exhibit No. 5)

8. Finally, on 7 May 2002 Mr. Smart sent a telefax indicating that 100 tons would be shipped later that month. (Claimant's Exhibit No. 6) They were shipped on 18 May 2002, received and paid for at the contract rate of USD 1,240.75 per metric ton, for a total of USD 124,075.

9. Although Mr. Sweet called Mr. Smart a number of times during the months of June and July inquiring as to the date when the additional 300 tons of cocoa would be delivered, there was no further written correspondence until 15 August 2002 when Mr. Sweet wrote Mr. Smart. (Claimant's Exhibit No. 7) In this letter he wrote that Mediterraneo Confectionary Associates, Inc. would soon need to receive delivery of the remaining 300 tons of cocoa. He reiterated what he had written in his letter of 5 March 2002 (Claimant's Exhibit No. 4) that, if Equatoriana Commodity Exporters, S.A. would not be able to fulfill its obligation, Mediterraneo Confectionary Associates, Inc. would purchase elsewhere and hold Equatoriana Commodity Exporters, S.A. liable for any extra expense that might be incurred.

10. Nothing was heard from Equatoriana Commodity Exporters, S.A. in reply during the following six weeks. Finally, on 24 October 2002 Mediterraneo Confectionary Associates, Inc. purchased 300 tons of cocoa beans from Oceania Produce Ltd. at the then current market price of USD 2,205.26. It notified Equatoriana Commodity Exporters, S.A. of the purchase by fax and letter on 25 October 2002 and stated that a claim for the excess amount it had paid would be made by counsel. (Claimant's Exhibit No. 8) The indicated letter was sent by Mr. Horace Fasttrack to Mr. Albert Tender, President, Equatoriana Commodity Exporters, S.A. on 11 November 2002. (Claimant's Exhibit No. 9)

11. Two days later, on 13 November 2002, Mr. Smart wrote Mr. Sweet that Equatoriana Commodity Exporters, S.A. would have been prepared to deliver the 300 tons of cocoa beans. In that letter Mr. Smart asserted that the contract had not been "terminated" by Mediterraneo Confectionary Associates, Inc. but had been breached by the cover purchase. Mr. Smart stated that he had been instructed to state that Equatoriana Commodity Exporters, S.A. would not pay the USD 289,353 claimed by Mediterraneo Confectionary Associates, Inc. (Claimant's Exhibit No. 10)

12. Since Equatoriana Commodity Exporters, S.A. claimed that the contract had not been "terminated" by Mediterraneo Confectionary Associates, Inc., in an abundance of caution on 15 November 2002 Mr. Horace Fasttrack, counsel for Mediterraneo Confectionary Associates, Inc., wrote to Equatoriana Commodity Exporters, S.A. formally avoiding the contract. (Claimant's Exhibit No. 11)

13. During the subsequent year and a half there have been negotiations to attempt to reach a settlement, but no agreement has been reached.

### III. Arbitration Clause, Applicable Law

14. The arbitration clause in the contract is as follows:

"Any disputes arising with respect to or in connection with this agreement shall be finally decided by three arbitrators in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva. The arbitration shall take place in Vindobona, Danubia and shall be in English."

15. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration without amendment.

16. Danubia, Equatoriana and Mediterraneo are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

17. Both Equatoriana and Mediterraneo are party to the United Nations Convention on Contracts for the International Sale of Goods and have made no declarations or reservations. Therefore, the Convention applies pursuant its Article 1(1)(a).

#### IV. Legal Conclusions

18. The Geneva Chamber of Commerce and Industry has jurisdiction over this arbitration.

19. Equatoriana Commodity Exporters, S.A. was obligated by its cocoa contract 1045 dated 19 November 2001 to notify Mediterraneo Confectionary Associates, Inc. during the months of January or February 2002 of the place where and the date when it would deliver 400 tons of cocoa, such delivery to take place during the months March to May 2002 at the Seller's choice. It failed to give the notice of a delivery date in January or February 2002 as it was required to do. Finally, on 18 May 2002 it made a partial delivery of 100 of the 400 tons. During the next two months there were repeated telephonic and written inquiries as to when the remaining 300 tons would be delivered. The final written inquiry was 15 August 2002. Equatoriana Commodity Exporters, S.A. was informed that Mediterraneo Confectionary Associates, Inc. was running low on supplies and would soon have to purchase elsewhere. Equatoriana Commodity Exporters, S.A. did not reply. By at least 24 October 2002 Equatoriana Commodity Exporters, S.A. was in fundamental breach of contract. Mediterraneo Confectionary Associates, Inc. was consequently authorized to make a cover purchase, which it did at the prevailing market price.

#### IV. Relief Requested

20. Mediterraneo Confectionary Associates, Inc. requests the tribunal to find:

- that it has jurisdiction over this dispute;
- that Equatoriana Commodity Exporters, S.A. was in fundamental breach of its cocoa contract 1045 dated 19 November 2001 with Mediterraneo Confectionary Associates, Inc. by at least 24 October 2002 in that it had failed to deliver 300 tons of the 400 tons of cocoa, which it was required by the contract to do during the months of March to May 2002;
- that Mediterraneo Confectionary Associates, Inc. was justified in making a cover purchase of 300 tons of cocoa at the then current market price on 24 October 2002.

21. Consequently, Mediterraneo Confectionary Associates, Inc. requests the tribunal to order:

- Equatoriana Commodity Exporters, S.A. to pay Mediterraneo Confectionary Associates, Inc. the sum of USD 289,353, being the difference between the contract price for the 300 tons of cocoa of USD 372,225 (USD 1240.75 per ton) and the cover price of USD 661,578 (USD 2,205.26 per ton);
- Equatoriana Commodity Exporters, S.A. to pay interest at the prevailing market rate in Mediterraneo on the said sum from 24 October 2002 until the date of payment;
- Equatoriana Commodity Exporters, S.A. to pay the costs of arbitration

as well as the attorney's fees incurred by Mediterraneo Confectionary Associates, Inc. in this arbitration pursuant to Article 36 of the Arbitration Rules.

(Signed)

Horace Fasttrack  
Counsel

2 July 2004

Claimant's Exhibit No. 1

Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana  
Telephone: (0) 487-2314  
Fax (0) 487-2320

19 November 2001

Mr. James Sweet  
Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo

By Fax and post

Dear Mr. Sweet:

I wish to confirm our telephone conversation of today. As agreed, Equatoriana Commodity Exporters, S.A. will sell, and Mediterraneo Confectionary Associates, Inc. will purchase, 400 metric tons of cocoa beans on the usual terms at USD 1,240.75 per metric ton. In January-February 2002 Equatoriana Commodity Exporters, S.A. will fix a delivery place and date for the beans, which will be between the months of March to May 2002.

A contract embodying these terms will accompany the posted copy of this letter.

Sincerely yours,

(Signed)  
Harold Smart  
Account Executive

Claimant's Exhibit No. 2

Contract: Cocoa 1045

**SOLD BY:** Equatoriana Commodity Exporters, S.A.  
**TO:** Mediterraneo Confectionary Associates, Inc.

Four hundred (400) metric tons net of cocoa beans (in original shipping bags of average weight(s) customary for the Growth), deliverable, at the seller's option, at one of the customary delivery points for the country, between the first and last days of March to May 2002 inclusive; the delivery within such time is to be at seller's option, upon notice to the buyer during the months of January to February 2002.

The Cocoa is to be of standard Grade and Count.

Deviations of up to one percent (1%) in weight are without price allowance. The contract price will be adjusted at the contract rate per pound for deviations in weight of more than one percent.

The price is USD 1,240.75 per metric ton (USD .5628 per pound) for a total of USD 496,299.55. Payment due on notification of loading.

Delivery will be in one or more installments at the option of Seller.

Transportation from delivery point will be arranged by the Seller upon Buyer's request with all costs at the charge of the Buyer.

Any disputes arising with respect to or in connection with this agreement shall be finally decided by three arbitrators in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland. The arbitration shall take place in Vindobona, Danubia and shall be in English.

(Signed)

Harold Smart  
Account Executive  
Equatoriana Commodity Exporters, S.A.

(Signed)

James Sweet  
Commodity Buyer  
Mediterraneo Confectionary  
Associates, Inc.

19 November 2001

23 November 2001

Claimant's Exhibit No. 3

Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana  
Telephone: (0) 487-2314  
Fax (0) 487-2320

24 February 2002

Mr. James Sweet  
Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo

By Fax and post

Dear Mr. Sweet:

I wish to confirm our telephone conversation of today. As has been widely reported, the storm that hit the cocoa producing areas in Equatoriana on 14 February 2002 has caused extensive damage to the crop that was ready for harvesting. It is still not clear just how much crop has been lost and how much may have suffered damage that will reduce its quality below international standards.

The Equatoriana Government Cocoa Marketing Organization has announced that no cocoa will be released for export through at least the month of March. As soon as I have more information I will be sure to let you know.

Sincerely yours,

(Signed)  
Harold Smart  
Account Executive

Claimant's Exhibit No. 4

Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo  
Telephone (0) 555-1235  
Telefax number (0) 555-1237

5 March 2002

Mr. Harold Smart  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Smart:

I refer to our telephone conversation of earlier today. To reiterate, we are very concerned as to whether you will be able to fulfill your agreement to ship to us the 400 metric tons of cocoa that was agreed.

It is irrelevant that there has been an unexpected shortfall in the Equatoriana cocoa crop due to the storm in mid-February or that the Equatoriana Government Cocoa Marketing Organization will not release cocoa for export through at least this month. The contract did not provide specifically for Equatoriana cocoa and the source is completely irrelevant to us.

Although we are not under immediate pressure to receive the contracted cocoa, we will be later this year. Naturally, we would then have to look elsewhere for the cocoa if Equatoriana Commodity Exporters, S.A. has not lived up to its agreement. If that were to happen, we would look to you for reimbursement of any additional costs that we might incur.

Sincerely yours,

(Signed)  
James Sweet  
Commodity Buyer

Claimant's Exhibit No. 5

Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo  
Telephone (0) 555-1235  
Telefax number (0) 555-1237

10 April 2002

Mr. Harold Smart  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Smart:

We have spoken on the telephone several times now in regard to the failure of Equatoriana Commodity Exporters, S.A. to fix a delivery date by the end of February. It is now almost the middle of April and all you have been able to tell me is that you expect the Equatoriana Government Cocoa Marketing Organization to begin releasing cocoa soon for export, though you doubt that you would be able to deliver more than an installment on the contract in the near future.

Naturally we will be happy to receive whatever you are able to send us, but we expect you to deliver the entire 400 metric tons you agreed to deliver and to do it by the end of May.

I look forward to receiving from you a more specific indication as to when and how much you will be delivering.

Sincerely yours,

(Signed)  
James Sweet  
Commodity Buyer

Claimant's Exhibit No. 6

Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana  
Telephone: (0) 487-2314  
Fax (0) 487-2320

7 May 2002

Mr. James Sweet  
Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo

By Fax and post

Re: Cocoa contract 1045

Dear Mr. Sweet:

This is to confirm our telephone conversation of today in which I informed you that the Equatoriana Government Cocoa Marketing Organization had released to us a small amount of cocoa for export. Consequently, we will ship 100 tons Equatoriana cocoa to you this month.

We are expecting a loading date of 18 May. As soon as I have more specific details I will let you know.

I apologize for the delay in fulfilling our contract. The market for cocoa in Equatoriana is very difficult at present, but we look forward to shipping you the remaining 300 tons in the very near future.

Sincerely yours,

(Signed)  
Harold Smart  
Account Executive

Claimant's Exhibit No. 7

Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo  
Telephone (0) 555-1235  
Telefax number (0) 555-1237

15 August 2002

Mr. Harold Smart  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Smart:

It is now five and a half months past the time that Equatoriana Commodity Exporters, S.A. was obligated to notify us of the shipping date for the 400 metric tons of cocoa you sold to us and two and a half months after the end of the contract period for shipping it. All we have seen so far are the 100 tons shipped in May. Therefore, you continue to owe us 300 tons.

We can understand the problems you may be facing but they are your problems, not ours. Our contract was for cocoa, not for Equatoriana cocoa. The price of USD 1,240.75 per ton was the market price when the contract was made last November. The market has been rising steadily and is now in the range of USD 1,900 to USD 2,000 per ton. Let us hope it does not rise any further.

It is obvious that, if we do not receive notification from you soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere. Our stocks are lower than we are comfortable with. If we are forced to purchase elsewhere, we will hold you responsible for our extra costs. If the market continues to rise, and there is some reason to believe that it will, those extra costs will be considerable.

Sincerely yours,

(Signed)  
James Sweet  
Commodity Buyer

Claimant's Exhibit No. 8

Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo  
Telephone (0) 555-1235  
Telefax number (0) 555-1237

25 October 2002

Mr. Harold Smart  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Smart:

I am sure that this letter will not be a surprise to you or to your colleagues at Equatoriana Commodity Exporters, S.A.

We have waited patiently for you to deliver to us the 300 tons of cocoa still outstanding on your cocoa contract 1045 dated 19 November 2001. Delivery was due at the latest 31 May of this year and it is now late October. Since Equatoriana Commodity Exporters, S.A. has shown no intention of delivering to us and we were facing the likelihood of running out of supplies if we waited any longer, yesterday we contracted to buy 300 tons of cocoa.

It is no news to you that the price of cocoa has been increasing almost constantly during the past year. We purchased at the current market price of USD 2,205.26.

You may wish to inform your president, Mr. Tender, that in due course he will receive a letter from our legal counsel making demand on Equatoriana Commodity Exporters, S.A. for USD 289,353. That is the amount that we had to pay for the cocoa beyond the contract price at which you had contracted to supply us.

I am authorized to say that this situation, serious as it is, does not detract from our desire to continue the business relationship we have had with you in the past.

Sincerely yours,

(Signed)  
James Sweet  
Commodity Buyer

Claimant's Exhibit No. 9

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

11 November 2002

Mr. Albert Tender, President  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Tender:

I represent the Mediterraneo Confectionary Associates, Inc. in regard to the failure of Equatoriana Commodity Exporters, S.A. to deliver 300 tons of the 400 tons of cocoa you agreed to sell to it.

Your contract called for the delivery of 400 tons of cocoa during the months March to May 2002 at a price of USD 1,240.75 per metric ton. You delivered 100 tons on 18 May 2002. In spite of repeated telephone calls and a number of letters requesting information as to when the remaining 300 tons of cocoa would be shipped, Equatoriana Commodity Exporters, S.A. no further shipment of cocoa has been made.

Consequently, on 24 October 2002 Mediterraneo Confectionary Associates, Inc. purchased 300 tons of cocoa at the current market price of USD 2,205.26. The total purchase price was, therefore, USD 661,578. I enclose a copy of the cover contract. The contract price that Mediterraneo Confectionary Associates, Inc. was obligated to pay you for the 300 tons was USD 372,225.

I hereby make demand upon Equatoriana Commodity Exporters, S.A. to pay Mediterraneo Confectionary Associates, Inc. the sum of USD 289,353, representing the extra expense that it has suffered through your failure to fulfill your obligations under the referenced contract.

Sincerely yours,

(Signed)  
Horace Fasttrack

Encl: Oceania Contract for cocoa [Not included in Moot Problem]

Claimant's Exhibit No. 10

Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana  
Telephone: (0) 487-2314  
Fax (0) 487-2320

13 November 2002

Mr. James Sweet  
Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo

By Fax and post

Re: Cocoa contract 1045

Dear Mr. Sweet:

We are in receipt of your letter to me of 25 October 2002 and of the letter of 11 November 2002 from Mr. Horace Fasttrack to Mr. Tender.

It is unfortunate that you did not give us more specific knowledge ahead of time that you were planning to purchase the cocoa elsewhere. There had been rumors for some time that the Equatoriana Government Cocoa Marketing Organization was planning to release additional cocoa. Undoubtedly you were aware of them, since they had been reported widely.

Those rumors have now been confirmed. Since our contract 1045 had never been terminated by you, we would have been able to ship to you the necessary 300 tons within the next several weeks. You have made no complaint that the delay has caused you any supply problems as yet or any extra expense, except for your action in unnecessarily purchasing cocoa at the price current several weeks ago.

Your actions in purchasing the cocoa elsewhere at a much higher price than that in our contract and demanding from us the difference constituted a breach of the contract on your part. Under the circumstances, I have been instructed to inform you that Equatoriana Commodity Exporters, S.A. sees no reason why it should pay to Mediterraneo Confectionary Associates, Inc. the USD 289,353 mentioned in your letter to me and in that of Mr. Fasttrack to Mr. Tender.

Sincerely yours,

(Signed)  
Harold Smart  
Account Executive

Claimant's Exhibit No. 11

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

15 November 2002

Mr. Albert Tender, President  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Cocoa Contract 1045

Dear Mr. Tender:

Equatoriana Commodity Exporters, S.A. has forwarded to me the letter dated 13 November 2002 from Mr. Harold Smart, an Account Executive with your company, and Mr. James Sweet of Mediterraneo Confectionary Associates, Inc.

The referenced letter is essentially in response to my letter to you of 11 November 2002 in which I made demand on Equatoriana Commodity Exporters, S.A. to pay the sum of USD 289,353 to Mediterraneo Confectionary Associates, Inc. to compensate it for the extra amount it was required to pay for the 300 tons of cocoa that your company failed to deliver.

In the course of his letter, Mr. Smart states that Equatoriana Commodity Exporters, S.A. had not been given specific notice that Mediterraneo Confectionary Associates, Inc. would be purchasing cocoa elsewhere to fill its needs. That is clearly not the case. I refer you in particular to Mr. Sweet's letter of 15 August 2002 to Mr. Smart.

Furthermore, in his letter Mr. Smart suggests that the cocoa contract had not been terminated. The contract was terminated automatically by the failure of Equatoriana Commodity Exporters, S.A. to deliver the cocoa for such a long period later than it was contractually obligated to do so. However, in an abundance of caution I wish now to state clearly that the Mediterraneo Confectionary Associates, Inc. considers the referenced contract to be terminated.

I call upon you to promptly pay the sum of USD 289,353 to Mediterraneo Confectionary Associates, Inc.

Sincerely,

(Signed)  
Horace Fasttrack



FedEx

**Horace Fasttrack, Esq.**  
 Advocate at the Court  
 75 Court Street  
 Capitol City  
 Mediterraneo

**Case no 30000-2004**

Geneva, July 6, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sir,

We acknowledge receipt of your Notice of arbitration received by the Chamber of commerce and industry of Geneva on July 5, 2004.

This matter has been filed under reference **case number 30000-2004** and we would appreciate if you were kind enough to state the complete reference in all future correspondence.

For your information, the Chamber of commerce and industry of Geneva as well as the Chambers of commerce of Basel, Bern, Ticino, Vaud and Zurich have adopted the new Swiss Rules of International Arbitration ("Swiss Rules"), enclosed herewith, which entered into force on January 1<sup>st</sup>, 2004. The Swiss Rules unify and harmonize the arbitration rules of the above-mentioned Chambers of Commerce and replace the Chambers' existing Rules in the field of international arbitration.

Pursuant to Article 1, paragraph 3 of the Swiss Rules, these Rules shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted after January 1<sup>st</sup>, 2004.

According to Section 1.1. of Appendix B of the Swiss Rules, you are invited to pay the amount of **Swiss francs 4'500,--** on the account of the CCIG with UBS SA, Rue du Rhône 8, 1204 Genève, number HU108533.1, with the reference "Arbitration case 30000-2004".

Please be advised that, in accordance with Section 1.3 of Appendix B, the Chamber will not proceed with the arbitration unless and until this payment is made, which means that the Notice of arbitration will be forwarded to the Respondent only when this payment has been received.

The Arbitral Tribunal shall determine any further administrative costs that may be due to the Chambers at a later stage of these proceedings (Article 38(f) and Section 2.3 of Appendix B of the Swiss Rules).

Feel free to contact us should you need further information.

Yours faithfully,

(signed)  
Daniela Jobin  
 Member of the Arbitration Committee

Enclosure : Swiss Rules of International Arbitration

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

12 July 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme Jobin:

Thank you for your letter of 6 July 2004 acknowledging receipt of the request for arbitration in the above referenced case.

Per your instructions the sum of CHF 4.500 has been transferred to the account of CCIG with UBS SA, Rue du Rhône 8, 1204 Genève, number HU108533.1, with the reference "*Arbitration case 30000-2004*". I attach a copy of the transfer order.

I await your further information as to the progress of the request.

Yours sincerely,

(Signed)  
Horace Fasttrack

Chambers of Commerce  
and Industry of      Basel      [www.swissarbitration.ch](http://www.swissarbitration.ch)  
Berne  
Geneva  
Lausanne  
Lugano  
Zurich



FedEx

**Horace Fasttrack, Esq.**

Advocate at the Court  
75 Court Street  
Capitol City  
Mediterraneo

FedEx

**Equatorian Commodity Exporters SA**

325 Commodity Avenue  
Port City  
Equatoriana

**Case no 30000-2004**

Geneva, July 16, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sirs,

We thank Mediterraneo Confectionary Associates Inc. for the payment of CHF 4'500, representing the Registration Fee, received on July 15, 2004, as well as for the Notice of arbitration filed against Equatoriana Commodity Exporters SA on July 5, 2004.

This case has been filed under reference **case no 30000-2004**, which the parties are kindly invited to mention in all future correspondence.

The Respondent will find herewith a copy of the Notice of arbitration together with the exhibits and a copy of the Swiss Rules of International Arbitration.

The Respondent is advised that the Chamber of commerce and industry of Geneva as well as the Chambers of commerce of Basel, Bern, Ticino, Vaud and Zurich have adopted the new Swiss Rules of International Arbitration ("Swiss Rules"), which entered into force on January 1<sup>st</sup>, 2004. The Swiss Rules unify and harmonize the arbitration rules of the above-mentioned Chambers of Commerce and replace the Chambers' existing Rules in the field of international arbitration.

Pursuant to Article 1, paragraph 3 of the Swiss Rules, these Rules shall apply to the present arbitral proceedings, since the Notice of Arbitration was submitted after January 1<sup>st</sup>, 2004.

The Respondent is hereby invited to file its Answer to the Notice of arbitration **within thirty days from receipt of this notification** in accordance with Article 3, paragraphs 7-10 of the Swiss Rules.

The Chamber notes that the amount of the claim is USD 289'353. Under Articles 6, paragraph 4 and 42, paragraph 2 of the Swiss Rules, disputes involving amounts (claim and counterclaim) which do not exceed CHF 1'000'000, are subject to the Expedited Procedure before a sole arbitrator.

Hence, the parties are invited to state **within 30 days from receipt of this letter** whether, for the event that there would be no counterclaim, or that the amount of the counterclaim together with the amount of the claim would not exceed CHF 1'000'000, they would agree to a single arbitrator (see Art. 42, paragraph 2(c) Swiss Rules).

Such consent would not bind the parties in the event that the threshold of CHF 1'000'000 is exceeded. Upon receipt of the Answer to the Notice of arbitration, the Chamber will then be in possession of all the necessary elements to proceed with the constitution of either a one-person or a three-member arbitral tribunal. The Chamber will thus provide new time-limits for the designation of the sole arbitrator by mutual agreement, or the co-arbitrators in case of a three-member arbitral tribunal.

We nevertheless draw your attention to the fact that, in the event that the parties do not agree on the appointment of a sole arbitrator, i.e. if the dispute is to be referred to a three-member arbitral tribunal, the fees of the tribunal are most likely to be higher than those of a sole arbitrator. In fact, the fees of the arbitrators shall be calculated in accordance with Section 2.8 of Appendix B (cf. Article 42, paragraph 2(c) of the Swiss Rules).

Finally, the Chamber notes that the Agreement to Arbitrate provides for the seat of the arbitration in Vindobona, Danubia, i.e. outside of Switzerland. Please be advised that, at this juncture, Article 1, paragraph 2 of the Swiss Rules requires that the seat be in Switzerland. However, on July 6, 2004, the Swiss Chambers decided to amend Article 1, paragraph 2 of the Swiss Rules to allow the seat of the arbitration to be fixed abroad. The amended provision reads as follows:

*“The parties are free to designate the seat of the arbitration in Switzerland or elsewhere.”*

In view of the imminent entry into force of this new provision (on August 1<sup>st</sup>, 2004), the Special Committee of the Swiss Chambers has decided to conduct this arbitration with the seat in Vindobona, Danubia, as from the date it was filed.

We look forward to hearing from you and remain

Yours faithfully,

(signed)

Daniela Jobin  
Member of the Arbitration Committee

Enclosures : - Notice of arbitration and exhibits, for the Respondent  
- Swiss Rules for the Respondent

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

21 July 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme Jobin:

Thank you for your letter of 16 July 2004 in regard to the above referenced case.

We appreciate that you have brought to our attention the desirability of having a single arbitrator rather than three, as provided in the arbitration clause. Although it will be more expensive to have three arbitrators, we would prefer it.

Article 7 of the Swiss Rules provides that, if we could not agree with Equatoriana Commodity Exporters, S.A. on a sole arbitrator within thirty days, the choice of the arbitrator would be made by "the Chambers", which I understand to mean the Arbitration Committee representing all six chambers of commerce and industry. Rather than risk the possibility that we and Equatoriana Commodity Exporters, S.A. would not be able to agree on a sole arbitrator within the thirty days, we would prefer to follow the procedure in Article 8 and in the arbitration clause. That would permit us to appoint one of the three arbitrators, which we feel is important enough to bear the extra cost.

Yours sincerely,

(Signed)  
Horace Fasttrack

Joseph Langweiler  
Lawyer  
14 Capitol Boulevard  
Oceanside, Equatoriana

10 August 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme Jobin:

I acknowledge receipt of your letter of 16 July 2004 addressed to Equatoriana Commodity Exporters, S.A. and the enclosed notice of arbitration and the statement of claim by Mediterraneo Confectionary Associates, Inc.

I represent Equatoriana Commodity Exporters, S.A. in this dispute.

In accord with your letter and the Swiss Rules there is enclosed the Answer to the claim brought by Mediterraneo Confectionary Associates, Inc. The Answer also contains a counter-claim brought on the basis of Article 21(5) of the Swiss Rules.

A transfer of CHF 4.500 has been made to the account of the CCIG with UBS SA, Rue du Rhône 8, 1204 Genève, number HU108533.1, with the reference "*Arbitration case 30000-2004*".

We understand that Mr. Horace Fasttrack has written you that he would prefer that the dispute be settled by a tribunal of three arbitrators rather than by one arbitrator as you had proposed. We are in agreement with him, and for the reasons he gave you.

I look forward to hearing from you further in this matter.

Sincerely yours,

Joseph Langweiler

Encl: Answer and counter-claim  
Copy transfer order [Not included in the Moot Problem]

## Swiss Chambers' Arbitration

Case no 30000-2004

Re : Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

### Answer to Notice of Arbitration and Counter-Claim

#### STATEMENT OF CASE

##### I. Parties

1. Mediterraneo Confectionary Associates, Inc., the Claimant, is a corporation organized under the laws of Mediterraneo. It has its principal office at 121 Sweet Street, Capitol City, Mediterraneo. The telephone number is (0) 555-1235 and the fax number is (0) 555-1237. Mediterraneo Confectionary Associates, Inc. is a producer of various confectionary items. To produce the confectionaries it uses large quantities of cocoa and sugar among other ingredients. The confectionaries are sold throughout Mediterraneo and are exported to neighboring countries.
2. Equatoriana Commodity Exporters, S.A., the Respondent, is a corporation organized under the laws of Equatoriana. It has its principal office at 325 Commodities Avenue, Port City, Equatoriana. The telephone number is (0) 487-2314 and the fax number is (0) 487-2320. Equatoriana Commodity Exporters, S.A. is a trader in commodities, including cocoa and sugar. It trades primarily commodities produced in Equatoriana, although on occasion it trades commodities produced in other countries.

##### II. Facts - Transaction

3. The transaction in regard to our cocoa contract 1045 dated 19 November 2001 took place as described in the Claimant's Request for Arbitration, paragraphs 3 through 11. Equatoriana Commodity Exporters, S.A. agrees that there was a letter dated 15 November 2002 from Mr. Horace Fasttrack, counsel for Mediterraneo Confectionary Associates, Inc. that stated Mediterraneo Confectionary Associates, Inc. was avoiding the contract. (Claimant's Exhibit No. 11) Equatoriana Commodity Exporters, S.A. does not know the motivation for the letter.

##### III. Legal Argument

- A. Equatoriana Commodity Exporters, S.A. is not liable for the late delivery

## 1. Contract anticipated sale of cocoa from Equatoriana

4. The statement to be found in the letter from Mr. Sweet to Mr. Smart dated 5 March 2002 (Claimant's Exhibit No. 4) that "The contract did not provide specifically for Equatoriana cocoa ..." is misleading. It is correct that the written contract did not provide "specifically" for Equatoriana cocoa, but there is no doubt that both Mr. Sweet and Mr. Smart contracted in regard to cocoa from Equatoriana. As is indicated by the name of the Respondent, Equatoriana Commodity Exporters, S.A., the Respondent's business is essentially the exportation of commodities from Equatoriana. Only a small portion of its business involves the sale of commodities produced in other countries.

5. It is highly relevant that every sale of cocoa by Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc. has been of cocoa that was produced in Equatoriana. It may well be true, as that letter goes on to say, that "the source is completely irrelevant to us", i.e. to Mediterraneo Confectionary Associates, Inc., at the time that Mr. Sweet wrote the letter. It was not so completely irrelevant at the time of contracting.

6. Equatoriana is not a major producer of cocoa and its cocoa is not of the highest quality. Consequently, Equatoriana cocoa sells at a discount to cocoa from most other producing countries. Although Equatoriana cocoa is not regularly traded on either the New York Board of Trade or on Euronext LIFFE in London, as is true of a few other small producers of cocoa, provision is made in their rules governing pricing for such producers. On the New York Board of Trade cocoa futures are traded in dollars per metric ton. Only a small portion of the futures contracts result in physical delivery of cocoa. Respondent's Exhibit No. 1 contains an extract from the New York Board of Trade Cocoa Rules that shows that, when a contract results in physical delivery, cocoa from countries in Group A is delivered at a premium of USD 160 per metric ton. Cocoa from countries in Group B is delivered at a premium of USD 80 per metric ton while cocoa from countries in Group C is delivered at par. It will be noticed that cocoa from Equatoriana would be included in Group C.

7. Respondent's Exhibit No. 2 shows the same phenomenon in London in the Euronext LIFFE Cocoa Futures Contract, Exchange Contract No. 401. There are two principle differences between it and the New York Board of Trade Rules, besides the fact that the contracts are denominated in pounds sterling. The first is that there are five categories of sources for cocoa instead of three. The second is that differentiation in price between cocoa from different sources is expressed in terms of a discount from the exchange contract price rather than as a premium. Equatoriana cocoa would fall into the lowest price category in London as in New York.

8. The price for the cocoa sold by Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc. in contract 1045 dated 19 November 2001 was priced in US dollars. Respondent's Exhibit No. 3 shows the monthly prices for cocoa in US cents per pound as shown on the website of the International Cocoa Organization. The International Cocoa Organization is an inter-governmental organization created under the auspices of the United Nations. Multiplying the price for the month of November 2001 as shown in Respondent's Exhibit No. 3 by 2204.6

(the number of pounds in a metric ton) shows that the price per metric ton was USD 1,240.75, the price at which the cocoa was sold in contract 1045 between the two parties. The fact that there was no deviation from the basic price indicates that the contract envisaged cocoa coming from a country in category C in the New York Board of Trade Cocoa Rules or the fifth category in the Euronext LIFFE Cocoa Futures Contract, Exchange Contract No. 401. As noted above, those categories included cocoa from Equatoriana and almost no other sources.

**2. Equatoriana Commodity Exporters, S.A. was prohibited from fulfilling the contract within the period provided in the contract**

9. As noted in Mr. Smart's letter of 24 February 2002, (Claimant's Exhibit No. 3) subsequent to the storm that hit the cocoa growing area of Equatoriana on 14 February 2002, the Equatoriana Government Cocoa Marketing Organization announced that no cocoa would be released for export through at least the month of March. The embargo on export of cocoa continued until early November 2002, except for a small amount released in May 2002. It was from that May release that Equatoriana Commodity Exporters, S.A. was able to deliver 100 tons on 18 May 2002 to Mediterraneo Confectionary Associates, Inc. Since there was a governmental prohibition against exporting cocoa from February to November 2002, under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Equatoriana Commodity Exporters, S.A. is exonerated from liability for failure to deliver the remaining 300 tons during that period.

**B. Mediterraneo Confectionary Associates, Inc. was not justified in avoiding the contract**

10. The contract signed in November 2001 called for delivery during the months March to May 2002. It is clear that timely performance was not of importance to Mediterraneo Confectionary Associates, Inc. and there could be no fundamental breach unless the delay was extraordinarily long or the buyer had fixed "an additional period of time of reasonable length for performance by the seller of his obligations" in accordance with Article 47 of the CISG. If it had and Equatoriana Commodity Exporters, S.A. had not delivered during that period (even if exonerated from liability under Article 79), Mediterraneo Confectionary Associates, Inc. would have been authorized to avoid the contract.

11. No additional period of time was fixed by Mediterraneo Confectionary Associates, Inc., as called for by Article 47. The last communication from them prior to their purchase of replacement cocoa on 24 October 2002 and the purported avoidance of the contract on 11 November 2002 was the letter from Mr. Sweet of 15 August 2002. In that letter all that he said was that they would need the cocoa "soon". It is unfortunate that Mediterraneo Confectionary Associates, Inc. did not at least contact Equatoriana Commodity Exporters, S.A. immediately before they purchased the cocoa elsewhere. As stated in the letter of Mr. Smart of 13 November 2002, (Claimant's Exhibit No. 10) there had been rumors for some time that the Equatoriana Government Cocoa Marketing Organization was planning to release additional cocoa, which it did on 13 November. It would then have been possible for Equatoriana Commodity Exporters, S.A. to deliver the remaining 300 tons.

C. Damages claimed by Mediterraneo Confectionary Associates, Inc. are incorrect

12. As a subsidiary and partial defense to be considered only if the Tribunal should find that Mediterraneo Confectionary Associates, Inc. has a claim for damages. Equatoriana Commodity Exporters, S.A. contests the calculation of damages presented by Mediterraneo Confectionary Associates, Inc. in its claim. The price of cocoa, like that of many other commodities, is often very volatile. Therefore, it matters from which date damages are measured. As noted in the claim, Mediterraneo Confectionary Associates, Inc. purchased 300 tons of cocoa on 24 October 2002 at a time when the market price was at almost a historic high of 100.03 cents per pound, (Respondent's Exhibit No. 3) or USD 2205.26 per metric ton for a total contract price of USD 661,578. Also, as noted in the claim, on 15 November 2002 Mr. Fasttrack, counsel for Mediterraneo Confectionary Associates, Inc., purported to avoid the contract. On that date the price for cocoa had gone down to 82.29 cents per pound, or USD 1814.17 per metric ton. If the 300 tons of cocoa had been purchased on the date Mediterraneo Confectionary Associates, Inc. purported to avoid the contract, it would have paid USD 544,251. The amount it paid would have been USD 172,026 more than the contract price in cocoa contract 1045 instead of USD 289,353 as claimed.

#### IV. Counterclaim

##### A. Facts

13. On 20 November 2003 Equatoriana Commodity Exporters, S.A. sold 2,500 metric tons of sugar to Mediterraneo Confectionary Associates, Inc. (Respondent's Exhibit No. 4) The price was USD .07 per pound or USD 154.32 per metric ton, for a total contract price of USD 385,805. The contract was FOB (Incoterms 2000) Port Hope, Oceania. Delivery to the carrier, Oceania Shipping Lines was made in conformity with the contract on 4 December 2003. The sugar was loaded on the vessel, Oceania Condor, on 8 December 2003

14. Mediterraneo Confectionary Associates, Inc. claimed that when the sugar arrived in Mediterraneo it was wet and had become contaminated and could no longer be used for confectionary purposes. (Respondent's Exhibit No. 5) Consequently, it has refused to pay the contract price.

15. According to FOB (Incoterms 2000), section B5 "The buyer must bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the named port of shipment." Confectionary Associates, Inc., therefore, bore the risk of loss during transit. The sugar was in good condition when turned over to the Oceania Shipping Lines for carriage to Mediterraneo as shown by the receipt issued by it. (Respondent's Exhibit No. 6) If there was water damage to the sugar, it was after the risk of loss had passed to Mediterraneo Confectionary Associates, Inc. The water damage is not the responsibility of Equatoriana Commodity Exporters, S.A. and Mediterraneo Confectionary Associates, Inc. is obligated to pay the contract price.

16. Since the contract called for payment ten days subsequent to delivery in Port Hope, Oceania, in accord with Article 78 of the United Nations Convention on Contracts for the International Sale of Goods Mediterraneo Confectionary Associates, Inc. is obligated to pay interest on the outstanding price from 18 December 2003.

## B. Arbitration Clause

17. The contract contained an arbitration clause calling for arbitration by three arbitrators in accordance with the Rules of Arbitration of the Oceania Commodity Association. However, the Tribunal has jurisdiction to consider this dispute pursuant to Article 21(5) of the Swiss Rules, which provides: “The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.”

## V. Relief Requested

18. Equatoriana Commodity Exporters, S.A. requests the Tribunal to find:

In regard to cocoa contract 1045

- That the contract was for the sale of cocoa from Equatoriana;
- That Equatoriana Commodity Exporters, S.A. was impeded through no fault of its own from delivering during the period February to November 2002 more than 100 tons of the 400 tons contracted;
- That Mediterraneo Confectionary Associates, Inc. did not fix a period for delivery pursuant to Article 47 CISG for Equatoriana Commodity Exporters, S.A. to deliver the 300 tons of cocoa not yet delivered;
- That Mediterraneo Confectionary Associates, Inc. was not authorized under Article 49 CISG to avoid the contract;
- That, if the Tribunal were to find that Mediterraneo has the right to damages from Equatoriana Commodity Exporters, S.A., the damages should be measured by the difference between the contract price and the market price on 15 November 2002 and not by the larger difference between the contract price and the price paid by Mediterraneo Confectionary Associates, Inc. in the substitute transaction;

In regard to sugar contract 2212

- That the Tribunal has jurisdiction to consider the counter-claim;
- That any damage that may have occurred to the sugar happened after the risk of loss had passed to Mediterraneo Confectionary Associates, Inc.;
- That Mediterraneo Confectionary Associates, Inc. is obligated to pay the full contract price of USD 385,805 for the sugar.

19. Therefore, Equatoriana Commodity Exporters, S.A. requests the Tribunal to

In regard to cocoa contract 1045

- Dismiss the claim for damages in totality brought by Mediterraneo Confectionary Associates, Inc.;
- Alternatively and only if it finds that Mediterraneo has a claim for damages, find that the damages are limited to USD 172,026.

In regard to sugar contract 2212

- Order Mediterraneo Confectionary Associates, Inc. to pay the full contract price of USD 385,805;
- Order Mediterraneo Confectionary Associates, Inc. to pay interest on the price of USD 385,805 from 18 December 2003 to the date of payment.

In regard to the arbitration

- Order Mediterraneo Confectionary Associates, Inc. to pay all costs of the arbitration, including the costs for legal representation and assistance incurred by Equatoriana Commodity Exporters, S.A. in this arbitration, in accord with Article 38 of the Swiss Rules.

(Signed)  
Counsel

10 August 2004

**NYBOT®**  
**Extract from Cocoa Rules**  
**(Full text of the Cocoa Rules can be found at**  
**<http://www.nybot.com/>. Click on Rulebooks. Chapter 9 of the NYBOT® Rules**  
**governs Cocoa Futures and Options)**

**Rule 9.18. Grading Cocoa**

(a) All Cocoa to be delivered in Exchange-Segregated Lots must be certified as deliverable with respect to Growth, Description, Condition, Count and Grade in accordance with the provisions of this Rule.

(b) The Growth, Description, Condition, Count and Grade of Cocoa which may be delivered on an Exchange Futures Contract are as follows:

(i) *Growth and Description*

The following Growths and Descriptions of Cocoa, as such Growths and Descriptions may from time to time be known in the trade, may be delivered at the premiums or at par as indicated below:

**Group A—Addition of \$160—per metric ton**

Ghana—Main Crop Nigeria—Main Crop

Ivory Coast—Main Crop Sierra Leone—Main Corp

Lome—Main Crop

**Group B—Addition of \$80—per metric ton**

Arriba (Ecuador) Ivory Coast Panama

Bahai (Brazil) Jamaica Salvador

Cameroon Indonesia-Java Samoa

Sri Lanka Liberia—Main Crop San Thorme

Chiapas (Mexico) Masie Nguema Surinam

Costa Rican (Fernando Poo) Tabasco (Mexico)

Ghana—Mid-Crop New Guinea Trinidad

Grenada New Hebrides Venezuela

Guatemala Nicaragua Victoria (Brazil)

Hispaniolas (Dominican Republic) Nigeria—Light Crop Zaire

Honduras

**Group C—At Par**

Bolivia

Haiti

Indonesia-Sulawesi

Malaysia

Para (Brazil)

Peru

Sanchez (Dominican Republic) and all other growths not presently specified above.

Respondent's Exhibit No. 2

LIFFE

EXCHANGE CONTRACT NO. 401

**COCOA FUTURES CONTRACT**

CONTRACT TERMS - Issue Date: 11 October 2001

ADMINISTRATIVE PROCEDURES - Issue Date: 7 December 2000

- 4.08 A Seller shall deliver under a Contract a Delivery Unit which exclusively contains Cocoa from a single Origin stated from time to time to be in the following Origin Groups. A Delivery Unit delivered under a Contract shall be subject to the discount stated in respect of the following Origin Groups, or such other discount as may be prescribed by the Board from time to time.
- (a) Origin Group 1: Cocoa delivered from one of the following Origins shall not be subject to a discount: Ghana; Cote d'Ivoire; Nigeria; Sierra Leone; Togo; Cameroon; Equatorial Guinea; Democratic Republic of Congo (formerly known as Zaire); Western Samoa; Grenada Fine Estates; Trinidad & Tobago Plantation; and Jamaica.
  - (b) Origin Group 2: Cocoa delivered from one of the following Origins shall be subject to a discount of £25 per tonne: Sao Tome and Principe; and Sri Lanka.
  - (c) Origin Group 3: Cocoa delivered from one of the following Origins shall be subject to a discount of £50 per tonne: Brazil Bahia Superior; Brazil Vitoria Superior; Ecuador; and Papua New Guinea.
  - (d) Origin Group 4: Cocoa delivered from the following Origin shall be subject to a discount of £75 per tonne: Malaysia.
  - (e) Origin Group 5: Cocoa delivered from any other Origin shall be subject to a discount of £100 per tonne.

Respondent's Exhibit No. 3

Monthly Average Cocoa Prices <sup>a/ b/</sup>  
1971-2004

| Year               | Jan    | Feb    | Mar    | Apr    | May    | Jun    | Jul    | Aug    | Sep    | Oct    | Nov    | Dec    |
|--------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| US cents/<br>pound |        |        |        |        |        |        |        |        |        |        |        |        |
| 1971               | 27.23  | 25.48  | 24.47  | 24.76  | 23.16  | 24.04  | 25.89  | 26.91  | 25     | 22.47  | 21.96  | 21.79  |
| 1972               | 24.26  | 24.94  | 26.12  | 26.37  | 27.87  | 28.19  | 29.24  | 31.04  | 32.85  | 33.02  | 32.51  | 33.37  |
| 1973               | 32.47  | 33.87  | 38.3   | 42.73  | 53.03  | 58.02  | 70.3   | 64.22  | 60.25  | 58.72  | 51.87  | 51.74  |
| 1974               | 50.89  | 58.38  | 67.39  | 82.6   | 82.71  | 70.28  | 71.67  | 73.48  | 72.35  | 79.18  | 75.59  | 64.36  |
| 1975               | 67.19  | 67.84  | 62.64  | 56.2   | 48.01  | 44.9   | 52.85  | 53.25  | 52.47  | 56.7   | 55.99  | 59.83  |
| 1976               | 63.7   | 65.04  | 64.17  | 74.32  | 80.2   | 87.26  | 88.75  | 96.23  | 108.41 | 117.39 | 132.67 | 134.92 |
| 1977               | 156.45 | 173.15 | 182.92 | 162.66 | 171.53 | 192.84 | 197.84 | 180.02 | 174.65 | 167.48 | 157.87 | 144.87 |
| 1978               | 135.08 | 128.14 | 153.35 | 156.1  | 142.19 | 135.68 | 143.47 | 152.43 | 170.09 | 173.57 | 182.77 | 179.03 |
| 1979               | 165.77 | 158.85 | 154.02 | 147.29 | 152.32 | 157.82 | 147.47 | 142.18 | 146.13 | 138.72 | 136.77 | 144.52 |
| 1980               | 143.63 | 146.78 | 140.18 | 131.97 | 117.24 | 113.27 | 111.77 | 104.85 | 108.2  | 104.54 | 98.57  | 95.7   |
|                    |        |        |        |        |        |        |        |        |        |        |        |        |
| 1981               | 94.94  | 92.57  | 95.97  | 95.69  | 87.68  | 75.31  | 92.91  | 101.92 | 106.01 | 98.55  | 93.28  | 95.46  |
| 1982               | 99.25  | 94.67  | 88.35  | 79.17  | 77.79  | 71.29  | 71.59  | 70.74  | 76.48  | 74.29  | 69.91  | 74.55  |
| 1983               | 80.93  | 88.1   | 84.34  | 85.15  | 93.67  | 104.22 | 104.45 | 104.46 | 96.98  | 95     | 100.68 | 115.25 |
| 1984               | 118.93 | 113.28 | 115.04 | 115.05 | 121.45 | 112.72 | 100.54 | 100.41 | 104.83 | 102.39 | 102.29 | 97.09  |
| 1985               | 100.68 | 103.12 | 101.26 | 101.64 | 96.57  | 94.88  | 100.24 | 103.21 | 106.24 | 107.19 | 104.22 | 107.93 |
| 1986               | 105.4  | 100.63 | 95.58  | 90.25  | 86.44  | 86.48  | 91.74  | 93.79  | 100.08 | 94.03  | 91.65  | 89.65  |
| 1987               | 89.66  | 88.83  | 91.16  | 93.88  | 93.82  | 90.74  | 95.93  | 91.7   | 90.16  | 86.73  | 87.91  | 86.05  |
| 1988               | 89.5   | 81.6   | 76.44  | 74.8   | 77.42  | 73.67  | 72.95  | 65.67  | 56.21  | 59.16  | 66.96  | 68.12  |
| 1989               | 65.17  | 67.23  | 63.9   | 58.57  | 54.78  | 56.8   | 61.02  | 58.29  | 51.75  | 48.25  | 45.79  | 44.01  |
| 1990               | 45.12  | 46.56  | 51.32  | 60.58  | 65.61  | 60.08  | 61.04  | 58.53  | 62.21  | 59.31  | 61.32  | 58.69  |
|                    |        |        |        |        |        |        |        |        |        |        |        |        |
| 1991               | 56.36  | 55.1   | 54.9   | 51.97  | 48.18  | 47.21  | 46.75  | 51.66  | 57.8   | 58.97  | 59.68  | 61.99  |
| 1992               | 58.17  | 54.1   | 51.19  | 47.37  | 45.15  | 43.66  | 50     | 53.43  | 51.03  | 48.58  | 48.8   | 46.98  |
| 1993               | 46.97  | 45.22  | 44.24  | 45.92  | 45.24  | 44.78  | 48.1   | 49.76  | 57.51  | 58.63  | 60.29  | 61.47  |
| 1994               | 57.33  | 55.74  | 59.29  | 56.36  | 62.5   | 66.18  | 70.41  | 70.37  | 67.4   | 65.68  | 65.18  | 63.48  |
| 1995               | 66.63  | 68.51  | 67.36  | 66.64  | 65.56  | 65.19  | 61.87  | 64.09  | 63.36  | 63.26  | 65.16  | 62.54  |
| 1996               | 61.21  | 62.14  | 60.72  | 66.06  | 69.13  | 69.74  | 67.84  | 68.03  | 66.96  | 67     | 66.65  | 66.88  |
| 1997               | 64.8   | 62.27  | 69.11  | 71.26  | 71.14  | 76.58  | 76.08  | 74.94  | 80.27  | 78.99  | 76.87  | 78.8   |
| 1998               | 75.67  | 74.43  | 77.98  | 78.31  | 81.39  | 78.1   | 77.67  | 76.37  | 76.54  | 74.68  | 72.34  | 68.71  |
| 1999               | 66.01  | 63.89  | 59.57  | 53.8   | 48.2   | 52.7   | 50.5   | 47.92  | 48.14  | 46.33  | 41.84  | 41.67  |
| 2000               | 41.63  | 38.97  | 42.32  | 41.34  | 41.23  | 42.71  | 42.49  | 39.82  | 40.06  | 39.83  | 36.33  | 36.45  |
|                    |        |        |        |        |        |        |        |        |        |        |        |        |
| 2001               | 43.84  | 52.48  | 51     | 49.06  | 48.97  | 44.1   | 43.87  | 46.91  | 46.26  | 49.21  | 56.28  | 60.64  |
| 2002               | 62.79  | 67.67  | 72.21  | 71.18  | 72.82  | 75.24  | 84.76  | 88.93  | 98.16  | 100.03 | 82.29  | 91.75  |
| 2003               | 99.1   | 101.57 | 90.48  | 87.44  | 79.37  | 71.63  | 70.78  | 71.28  | 74.01  | 67.22  | 68.54  | 73.81  |
| 2004               | 73.68  | 71.17  | 68.24  | 65.2   | 64.13  | 63.86  | 70.74  | 78.44  |        |        |        |        |

a/ The table is taken from the web site of the International Cocoa Organization, <http://www.icco.org/prices/pricesave.htm>. The daily price for cocoa beans is calculated using the average of the quotations of the nearest three active future trading months on the London Cocoa Terminal Market and on the New York Coffee, Sugar and Cocoa Exchange at the time of the London close.

b/ To determine the price in US dollars per metric ton, multiply by 2204.6

Respondents Exhibit No. 4

Contract: Sugar 2212

**SOLD BY:** Equatoriana Commodity Exporters, S.A.  
**TO:** Mediterraneo Confectionary Associates, Inc.

2,500 metric tons of sound Raw Centrifugal Cane Sugar in bulk at 7 cents net cash U.S. currency per pound (USD 154.32 per metric ton) based on 97 degrees average polarization with standard adjustment for other grades. Total contract price USD 385,805 payable ten days after delivery.

The sugar delivered under this contract shall have been manufactured no earlier than twelve (12) calendar months preceding the delivery month specified below. Seller shall be responsible for all expenses pertaining to delivery and loading of sugar into the vessel, including freight taxes and other taxes of the country of origin of any nature. Normal pilotage, wharfage charges, customs fees and similar charges pertaining to the entry or exit of the vessel at loading port are for the account of the Buyer. Sugar delivered shall be free and clear of all liens and claims of any kind. The sugar delivered shall be freely available for export.

Delivery during December 2003 to be made by Oceania Sugar Producers, FOB (Incoterms 2000) Port Hope, Oceania to Buyer's nominated vessel

Any disputes arising with respect to or in connection with this agreement shall be finally decided by three arbitrators in Port Hope, Oceania in accordance with the Rules of Arbitration of the Oceania Commodity Association in English.

(Signed)

Equatoriana Commodity Exporters, S.A.

(Signed)

Mediterraneo Confectionary  
Associates, Inc.

20 November 2003

21 November 2003

Respondent's Exhibit No. 5

Mediterraneo Confectionary Associates, Inc.  
121 Sweet Street  
Capitol City, Mediterraneo  
Telephone (0) 555-1235  
Telefax number (0) 555-1237

19 December 2003

Mr. Gerold Hunt  
Equatoriana Commodity Exporters, S.A.  
325 Commodities Avenue  
Port City, Equatoriana

Post and Fax (0) 487-2320

Re: Your Sugar Contract 2212

Dear Mr. Hunt:

This is to confirm our telephone conversation of today. The shipment of sugar under your contract 2212 arrived on Monday, 15 December. It was soaked and has become contaminated. It obviously cannot be used at all for the confectionary purposes for which it was purchased and we are of the opinion that it cannot be used for human consumption at all.

From all appearances the sugar became fouled prior to loading into the containers.

Under the circumstances we will not be paying the purchase price. Moreover, we would like to know what you wish to be done with the sugar.

Sincerely,  
(Signed)  
Robert Sawyer

Respondent's Exhibit No. 6

OCEANIA SHIPPING LINES

CARGO RECEIPT

Goods: 2,500 metric tons bagged sugar

Received from: Oceania Sugar Producers

Condition: Apparent good condition

Purpose: Stuff into container for shipment

Vessel: Oceania Condor

Sailing date:

Destination: Capitol City, Mediterraneo

Notify party: Mediterraneo Confectionary Associates, Inc.

Telephone: (0) 555-1235

(Signed)

4 December 2003

THIS IS NOT A SHIPPING DOCUMENT

Chambers of Commerce and Industry of  
 Basel Berne Geneva Lausanne Lugano Zurich  
[www.swissarbitration.ch](http://www.swissarbitration.ch)



FedEx

**Horace Fasttrack, Esq.**

Advocate at the Court  
 75 Court Street  
 Capitol City  
 Mediterraneo

FedEx

**Joseph Langweiler, Esq.**

Lawyer  
 14 Capitol Boulevard  
 Oceania  
 Equatoriana

**Case no 30000-2004**

Geneva, August 13, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sirs,

We acknowledge receipt of the Answer to the Notice of arbitration and Counterclaim received from Equatoriana Commodity Exporters SA by fax on August 10, 2004, and by mail on August 12, 2004, a copy of which is enclosed herewith for the Claimant.

We thank the Respondent for the payment of the amount of CHF 4'500 representing the fees for the Counterclaim, received on August 12, 2004.

In view of the Notice of arbitration and of the Counterclaim, the amount in dispute does not exceed CHF 1'000'000. Pursuant to Article 42, paragraph 2(a) of the Swiss Rules, the arbitral proceedings shall therefore be conducted in accordance with the **Expedited Procedure**.

In view of the letter received from the Claimant on July 21, 2004 (a copy of which is enclosed herewith for the Respondent) and of the Respondent's Answer to the Notice of arbitration, the parties have not agreed to designate a sole arbitrator. The arbitration will thus be subject to a tribunal composed of three members as provided in the arbitration clause, and the fees of the three arbitrators will be computed in accordance with Section 2.8 of Appendix B (cf. Article 42, paragraph 2(c) of the Swiss Rules).

Each party is now invited to designate its arbitrator by **August 31<sup>st</sup>, 2004**, pursuant to Article 8, paragraph 1 of the Swiss Rules. Failing such designation, the Chamber shall appoint the arbitrator(s) in accordance with Article 8, paragraph 2 of the Rules.

The parties are kindly advised that all designations of arbitrators by the parties are subject to confirmation by the Chamber, pursuant to Article 5 of the Swiss Rules.

Finally, the Chamber notes that the counterclaim appears to arise out of a different contract than the claim, which contract contains an arbitration agreement referring to the Rules of Arbitration of the Oceania Commodity Association. If appropriate, it will be for the arbitral tribunal to rule on its jurisdiction (Article 21, paragraph 5) over the counterclaim.

Yours faithfully,

(signed)

Daniela Jobin  
Member of the Arbitration Committee

Enclosures :    - Answer and Counterclaim, for the Claimant  
                  - Copy of the letter by Claimant of July 21, 2004, for the Respondent

Horace Fasttrack  
Advocate at the Court  
75 Court Street  
Capitol City, Mediterraneo  
Tel. (0) 146-9845  
Telefax (0) 146-9850

31 August 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme Jobin:

I acknowledge your letter of 13 August 2004 enclosing the answer and counter-claim of Equatoriana Commodity Exporters, S.A.

Enclosed is the Answer to the counter-claim. There will indeed be a challenge to the jurisdiction of the tribunal to hear the counter-claim.

As you have requested, Dr. Claimant Arbitrator is hereby nominated to serve as the claimant appointed arbitrator. Dr. Claimant Arbitrator has his office at 423 River St. Riverside, Mediterraneo. A copy of his curriculum vitae is attached.

Sincerely yours,

(Signed)  
Horace Fasttrack

Encl: Dr. Claimant Arbitrator, curriculum vitae [Not included in Moot Problem]

## Swiss Chambers' Arbitration

Case no 30000-2004

Re : Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

### Answer to Counter-Claim

#### I. Transaction

1. The intended purchase of 2,500 metric tons of sugar from Equatoriana Commodity Exporters, S.A. took place as described in the counter-claim. As set forth in the letter from Mr. Robert Sawyer to Mr. Gerold Hunt of Equatoriana Commodity Exporters, S.A. dated 19 December 2003, when the sugar arrived it was unusable for human consumption. Attached as Claimant's Exhibit No. 12 is the report by the surveyor.

#### II. Legal Argument

##### A. The Tribunal lacks jurisdiction to hear the counter-claim

2. The contract contained an arbitration clause calling for arbitration in Port Hope, Oceania in accordance with the Rules of Arbitration of the Oceania Commodity Association. The reason for choosing arbitration before the Oceania Commodity Association was that the sugar was supplied by Oceania Sugar Producers and delivered to the carrier in Port Hope, Oceania. Furthermore, the Oceania Commodity Association is specialized in commodity arbitrations.

3. There would normally be no question of jurisdiction under the Swiss Rules given the arbitration clause in the contract. The only basis for jurisdiction is Article 21(5), which provides "The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause."

4. Article 21(5) cannot give jurisdiction to the Tribunal to consider the dispute between Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters, S.A. Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters, S.A. never agreed to the provision. When they entered into cocoa contract 1045 they contracted for the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva. Those Rules to which they agreed, which are still in existence and apply to domestic Swiss arbitrations, contain no provision of this type that purports to give a tribunal organized under the Swiss Rules jurisdiction even

though the dispute “is the object of another arbitration agreement or forum-selection clause.” While Mediterraneo Confectionary Associates, Inc. does not object to the general application of the Swiss Rules considered as a new version of the Geneva Rules as applicable to international arbitrations, it does object to the application of Article 21(5).

B. Article 21(5) covers only set-off defences and not counter-claims

5. Article 21(5) states that it applies to set-off defences. It does not say that it gives jurisdiction to the Tribunal to consider counter-claims. Equatoriana Commodity Exporters, S.A. itself labels its discussion of the dispute in regard to sugar contract 2212 as a counter-claim. It thereby recognizes that its claim in regard to that contract cannot be heard by this Tribunal. If it wishes to institute an arbitration, it must do so as provided in the arbitration clause, namely under the rules of the Oceania Commodity Association.

6. If the tribunal rules that it does have jurisdiction, the maximum extent of relief that Equatoriana Commodity Exporters, S.A. could receive would be a set-off against the recovery that will be awarded Mediterraneo Confectionary Associates, Inc. in its claim.

C. The sugar was unfit for human consumption

7. As noted above, when the sugar arrived, it was unfit for human consumption. As a consequence of the fundamental breach of contract by Equatoriana Commodity Exporters, S.A., Mediterraneo Confectionary Associates, Inc. is not obligated to pay the purchase price.

### III. Plea

8. Mediterraneo Confectionary Associates, Inc. requests the Tribunal to declare

- that it has no jurisdiction to consider the counter-claim;
- that, if it has jurisdiction, it would only be to consider the assertions of Equatoriana Commodity Exporters, S.A as a set-off defense and not as a counter-claim;
- that, if it has jurisdiction, Mediterraneo Confectionary Associates, Inc. is not obligated to pay the price for the sugar because it was unfit for human consumption when it was delivered.

(Signed)  
Horace Fasttrack

31 August 2004

(Claimant's Exhibit No. 12)

[Damage report by surveyor. Not included in the Problem.]

Joseph Langweiler  
Lawyer  
14 Capitol Boulevard  
Oceanside, Equatoriana

31 August 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme Jobin:

I wish to acknowledge receipt of your letter of 13 August 2004 in which you invite the two parties to this arbitration to designate an arbitrator by 31 August 2004.

I should like to inform you that the respondent designates Mr. Respondent Arbitrator, 114 Seaview St., Oceanside, Equatoriana, as the respondent nominated arbitrator.

Sincerely,

(Signed)  
Joseph Langweiler

Encl. CV Mr. Respondent Arbitrator [Not included in Moot Problem]

Chambers of Commerce and Industry of  
 Basel  
 Berne  
 Geneva  
 Lausanne  
 Lugano  
 Zurich

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**Dr. Claimant Arbitrator, Esq.**  
 423 River St.  
 Riverside  
 Equatoriana

**Case no 30000-2004**

Geneva, September 3, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sir,

We are pleased to inform you that you have been designated by the Claimant as arbitrator in the above-mentioned case, in which the Chamber of commerce and industry of Geneva is the administrating institution.

The arbitration shall be conducted under the Swiss Rules of International Arbitration, a copy of which is enclosed herewith for your information.

The parties are the following:

**Mediterraneo Confectionary Associates, Inc**  
 121 Sweet Street  
 Capitol City  
 Mediterraneo

Claimant, represented by

**Horace Fasttrack, Esq.**  
 Advocate at the Court  
 75 Court Street  
 Capitol City  
 Mediterraneo  
 Tel. : + 0 146 9845 / Fax : + 0 146 9850

versus

**Equatorian Commodity Exporters SA**  
 325 Commodity Avenue  
 Port City  
 Equatoriana

Respondent, represented by

**Joseph Langweiler, Esq.**  
Lawyer  
14 Capitol Boulevard  
Oceania  
Equatoriana

The claim is based on a contract of purchase of cocoa beans signed by the parties in 2001. The agreement to arbitrate refers to the Chamber of Commerce and Industry of Geneva and the seat of the arbitration is in Vindobona, Danubia. The claim amounts to USD 289'353.

The Respondent has filed a counterclaim, based on a contract of purchase of sugar signed in 2003. The counterclaim amounts to USD 385'805. The agreement to arbitrate refers to the Rules of arbitration of the Oceania Commodity Association, with the seat of the arbitration in Port Hope.

In view of the amount in dispute, the provisions of Article 42 paragraph 2 of the Swiss Rules are applicable to the arbitral proceedings, which shall be conducted in accordance with the **Expedited Procedure**. Consequently, the award shall be made within six months from the date when the Chamber transmitted the file to the Arbitral Tribunal (Art. 42 paragraph 1 (d)).

For your information, the Respondent has designated Dr. Respondent Arbitrator, in Oceanside, Equatoriana, as co-arbitrator.

In order to allow the Arbitration Committee to confirm you as arbitrator pursuant to Article 5, paragraph 1 of the Swiss Rules, we kindly invite you to confirm that you are willing and able to accept the appointment. In this respect, we thank you in advance for completing and returning the attached consent and statement of independence, together with your curriculum vitae.

We look forward to receiving the above in order to be in a position to confirm you soon as arbitrator for the Claimant.

Finally, we would like to stress that prior to your confirmation and receiving the file, you should not take any action in this arbitration.

Please do not hesitate to contact us, should you need further information.

Yours faithfully,

(signed)

Daniela Jobin  
Member of the Arbitration Committee

Enclosures : - Swiss Rules of International Arbitration  
- Statement of independance

CC to the parties

[A similar letter was sent to the arbitrator designated by the Respondent]



**Arbitration No: 30000-2004**

**CONSENT TO APPOINTMENT**

and

**STATEMENT OF INDEPENDENCE**

**Name :**

(1) I hereby consent to my appointment as arbitrator in this arbitration.

(2) I undertake to act in accordance with the Swiss Rules of International Arbitration applicable to this arbitration.

(3) I declare that I am, and shall remain, impartial and independent of the parties.

**(4)(Please delete whichever of the following two statements does not apply)**

(i) I further declare that to the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence.

(ii) In accordance with Art 9, paragraph 2 of the Swiss Rules I wish to disclose the following circumstances: (**Use separate sheet.**) To the best of my belief, these circumstances do not impair my impartiality or independence.

(5) I undertake to disclose to the Chamber of Commerce and to all parties, any circumstances arising in the future which are likely to give rise to justifiable doubts as to my impartiality or independence, until the arbitration is concluded.

**Signed:**

**Date:** \_\_\_\_\_

Dr. Claimant Arbitrator  
423 River St.  
Riverside, Mediterraneo

6 September 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme. Jobin:

I acknowledge receipt of your letter of 3 September 2004 in which you inquire whether there are any circumstances likely to give rise to justifiable doubts as to my impartiality or independence as arbitrator in the above-referenced matter.

There are no such circumstances and I shall be privileged to receive confirmation from the Swiss Chambers of my nomination as an arbitrator. A completed copy of the form you sent me is attached.

Yours sincerely,

(Signed)  
Claimant Arbitrator

Encl. Consent to appointment form

[A similar letter was received from Mr. Respondent Arbitrator.]

Chambers of Commerce and Industry of  
 Basel Berne Geneva Lausanne Lugano Zurich  
[www.swissarbitration.ch](http://www.swissarbitration.ch)



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**Dr Claimant Arbitrator, Esq.**  
 423 River Street  
 Riverside  
 Mediterraneo

FedEx

**Respondent Arbitrator, Esq.**  
 114, Seaview St.  
 Oceanside  
 Equatoriana

**Case no 30000-2004**

Geneva, September 13, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sirs,

Thank you for your letters of September 6, 2004.

I have the pleasure to inform you that the Arbitration Committee has confirmed you as co-arbitrators in the matter mentioned above, pursuant to Article 5 of the Swiss Rules. You will find enclosed a copy of your respective statements of independence.

In accordance with Article 8, paragraph 2 and Article 42, paragraph 1(a) of the Swiss Rules, you are invited, **within fifteen day from receipt of this letter** to designate the presiding arbitrator. Failing such designation, the Chamber shall appoint the presiding arbitrator.

We thank you in advance and remain

Yours faithfully,

(signed)

Daniela Jobin  
 Member of the Arbitration Committee

Encl. : - Copy of your respective statement of independence [not included in Moot Problem]

CC to the parties

Dr. Claimant Arbitrator  
423 River St.  
Riverside, Mediterraneo

16 September 2004

Mme Daniela Jobin  
Chamber of Commerce and Industry of Geneva  
4, Boulevard du Théâtre  
P.O. Box 5039  
CH-1211 Geneva 11  
Switzerland

Re: Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Dear Mme. Jobin:

Upon the receipt of your letters confirming our appointment as arbitrators in the above referenced case, Mr. Respondent Arbitrator and I conferred by telephone in regard to the naming of the presiding arbitrator. We have agreed to designate Professor Presiding Arbitrator. We have discussed his designation as presiding arbitrator with him and he is in agreement. Professor Presiding Arbitrator is a well known arbitrator in Danubia and he has presided over a number of international arbitrations.

I attach a copy of his curriculum vitae.  
His address is Schiedsgericht Strasse 36, Vindobona, Danubia.

Yours sincerely,

(Signed)  
Claimant Arbitrator

Encl. CV Professor Presiding Arbitrator [Not included in Moot Problem.]

[A letter was sent to Professor Presiding Arbitrator requesting a statement as to his impartiality and independence similar to that sent to the two party designated arbitrators and he sent the requested statement.]

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and Industry of      Basel      [www.swissarbitration.ch](http://www.swissarbitration.ch)  
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Lausanne  
Lugano  
Zurich



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**Professor Presiding Arbitrator, Esq.**  
Schiedsgericht Strasse 36  
Vindobona  
Danubia

FedEx

**Dr Claimant Arbitrator, Esq.**  
423 River Street  
Riverside  
Mediterraneo

FedEx

**Respondent Arbitrator, Esq.**  
114, Seaview St.  
Oceanside  
Equatoriana

**Case no 30000-2004**

Geneva, September 22, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sirs,

I thank Prof. Presiding Arbitrator for his letter of September 21, 2004, a copy of which is enclosed herewith for the co-arbitrators.

I have the pleasure to inform you that the Arbitration Committee has confirmed Prof. Presiding Arbitrator as Chairman of the arbitral tribunal, pursuant to Article 5 of the Swiss Rules. Thus, I am pleased to provide you with the file, including all relevant documents transmitted by the parties.

In accordance with Article 41 paragraph 1 of the Swiss Rules, you are now invited to request the parties to pay the deposit on the cost of the arbitration. We thank you in advance for providing the Chamber with a copy of such request.

We take this opportunity to remind you that the Agreement to arbitrate provides that the arbitration is subject to the **Expedited Procedure**, pursuant to Article 42 paragraph 1 of the Swiss Rules.

Finally, the Arbitration Committee would be most grateful if you could provide it with a copy of the time-tables containing the steps of the proceedings (Art. 15 paragraph 3 of Swiss Rules).

We thank you in advance for your kind cooperation and remain

Yours faithfully,

(signed)

Daniela Jobin  
Member of the Arbitration Committee

Chambers of Commerce and Industry of  
 Basel Berne Geneva Lausanne Lugano Zurich  
[www.swissarbitration.ch](http://www.swissarbitration.ch)



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**Horace Fasttrack, Esq.**  
 Advocate at the Court  
 75 Court Street  
 Capitol City  
 Mediterraneo

FedEx

**Joseph Langweiler, Esq.**  
 Lawyer  
 14 Capitol Boulevard  
 Oceania  
 Equatoriana

**Case no 30000-2004**

Geneva, September 22, 2004

**Re : *Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA***

Dear Sirs,

Please be advised that, according to Article 5 of the Swiss Rules, the Arbitration Committee has confirmed Professor Presiding Arbitrator as Chairman of the arbitral tribunal.

The parties will find enclosed herewith a copy of the statement of independence received from Prof. Presiding Arbitrator, together with his curriculum vitae.

The Arbitration Committee transmitted today the file to the arbitral tribunal, as mentioned in our letter of this day to the arbitrators, a copy of which is attached herewith for your information.

The parties are invited to communicate henceforth directly with the arbitral tribunal.

Yours faithfully,

\_\_\_\_\_  
 (signed)  
 Daniela Jobin  
 Member of the Arbitration Committee

Enclosure : - Copy of the letter from Prof. Presiding Arbitrator [Not enclosed in Moot Problem]  
 - Copy of our letter of this day to the parties

Swiss Chambers' Arbitration

Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Procedural Order No. 1

1. The Arbitral Tribunal, composed of Mr. \_\_\_\_\_, Dr. \_\_\_\_\_, and myself as chairman, has authorized me in conformity with the Swiss Rules for International Arbitration, Article 31(2) to make procedural rulings alone.
2. On 30 September 2004 \_\_\_\_\_, counsel for the Claimant, Mediterraneo Confectionary Associates, Inc., \_\_\_\_\_, counsel for the Respondent, Equatoriana Commodity Exporters, S.A. and I had a conference call in which we discussed the procedures that should be followed in the arbitration. Because of the special nature of this Moot arbitration, it was agreed that the objections raised by Mediterraneo Confectionary Associates, Inc. to the counter-claim filed by Equatoriana Commodity Exporters, S.A. would be considered at the same time as the substantive claim of Mediterraneo Confectionary Associates, Inc.
3. Counsel agreed that the Tribunal might be able to decide the claim presented by Mediterraneo Confectionary Associates, Inc. on legal issues alone, without the need for an extensive procedure to determine facts beyond those already set forth in the Statement of Claim and the Statement of Defense.
4. In regard to the counter-claim, it will first be necessary to decide whether the tribunal should consider it on the merits and, if so, whether the relief granted to Equatoriana Commodity Exporters, S.A. should be limited to a set-off to any relief granted to Mediterraneo Confectionary Associates, Inc. in its claim. If the tribunal does decide to consider the counter-claim on the merits, it would be necessary at a later time to engage in a more detailed examination of the condition of the sugar at the time the risk of loss passed from Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc.
5. As noted above, it is not expected that there will need to be an extensive procedure to determine facts at this stage of the arbitration. Those factual issues that may need to be developed at this first stage of the arbitration will be determined in accordance with the procedures found in the Rules of the Twelfth Annual Willem C. Vis International Commercial Arbitration Moot. In accordance with those Rules questions may be submitted to Professor Eric Bergsten, preferably by e-mail at [eric.bergsten@chello.at](mailto:eric.bergsten@chello.at), by Friday, 22 October 2004. The answers are expected to be distributed to all parties by 29 October 2004.

6. It was agreed that the memoranda should be prepared by Mediterraneo Confectionary Associates, Inc. for submission by e-mail by 9 December 2004 followed by hard copy in the required number to arrive by 15 December 2004. Equatoriana Commodity Exporters, S.A. is to submit its memorandum by e-mail by 27 January 2005 followed by hard copy in the required numbers to arrive by 1 February 2005.

7. The memoranda should discuss the following issues. In regard to cocoa contract 1045:

- Whether Equatoriana Commodity Exporters, S.A. was excused from delivering the 300 tons by reason of the embargo placed on the export of cocoa by the Equatoriana Government Cocoa Marketing Organization from mid-February to early November 2002;
- If Equatoriana Commodity Exporters, S.A. is not excused, whether Mediterraneo Confectionary Associates, Inc. can claim damages for the late or non-delivery; and
- If Mediterraneo Confectionary Associates, Inc. can claim damages, the proper amount of those damages.

The memoranda should not discuss whether pre-award or post-award interest can be claimed by Mediterraneo Confectionary Associates, Inc. There should also be no discussion of the allocation of the costs of arbitration.

8. In respect of sugar contract 2212, the memoranda should discuss whether the tribunal has jurisdiction to consider the counter-claim. The memoranda should also discuss whether, if the tribunal has jurisdiction to consider the counter-claim, the recovery would be limited to a set-off against any recovery that Mediterraneo Confectionary Associates, Inc. might recover in regard to the cocoa contract.

9. Oral arguments will be scheduled in the month of March 2005 in Vienna and in April in Hong Kong. All participants in the Vienna arguments will be invited to a welcoming event followed by a reception on the evening of Friday, 18 March 2005. Arguments will take place beginning the following morning, Saturday, 19 March 2005. Participants will also be invited to a welcoming party sponsored by the Moot Alumni Association on Thursday evening, 17 March 2005. Participants in the Hong Kong arguments will receive their schedule at a later time.

(Signed)  
President of the Tribunal

1 October 2004

## Swiss Chambers' Arbitration

Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

### Procedural Order No. 2

Following the procedure agreed upon by the parties and set forth in Procedural Order No. 1, the parties have submitted a number of requests for clarifications. The responses to those requests are set forth below.

#### **Legal Rules and Arbitration**

**1. Are Danubia, Equatoriana, Mediterraneo and Oceania common law or civil law countries?**

Equatoriana and Oceania are civil law. Mediterraneo and Danubia are common law and English speaking.

**2. What is the period of limitations (prescription) for bringing a contractual claim in the relevant legal system?**

Equatoriana, Mediterraneo and Oceania are all party to the Convention on the Limitation Period in the International Sale of Goods. The Convention can be found on the UNCITRAL web site. The period of limitation in the Convention is four years.

**3. Is Oceania a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

Yes.

**4. Do the Rules of Arbitration of the Oceania Commodity Association contain any provision on counter-claims or set-offs?**

The provision is identical to Article 19(3) of the UNCITRAL Arbitration Rules.

“In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.”

**5. Was the adoption of the Swiss Rules of International Arbitration and their replacement for international arbitration of the arbitration rules of the six chambers of commerce, including Geneva, publicized?**

The adoption of the Swiss Rules was well publicized in interested circles and known by lawyers who engage in international commercial arbitrations. The arbitration rules of each of the six chambers of commerce, including Geneva, continue to be valid for domestic Swiss arbitrations.

**6. Would there be a significant difference between arbitration in a specialized body such as the Oceania Commodity Association and a body for international commercial arbitration in general, as provided in the Swiss Rules?**

Commodity exchanges and many trade associations have an associated arbitration facility for disputes arising in the particular exchange or trade. Those arbitration facilities would be subject to the same arbitration law as any other arbitration facility in the same country. They would have their own rules and arbitrators would almost always come from the members of the exchange or participants in the trade concerned. The use of the associated arbitration facility is required for exchange traded contracts under the rules of commodity exchanges such as the New York Board of Trade and LIFFE and for contracts between members of many trade associations. Specialized arbitration facilities are particularly useful when the dispute is in regard to the quality of the commodities delivered or where specialized practices in the trade are concerned. Where the dispute involves general questions of law or trade practices, specialized arbitration facilities have no particular advantage over arbitration institutions for international commercial arbitration in general. Of course, where the parties have a choice of arbitration institution, the choice is normally made in the underlying contract at the time of sale and not later when the nature of the dispute is known.

The two parties in this case do not belong to any association that would require arbitration in any particular arbitration institution. Cocoa and sugar are the only two commodities sold by Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc. and all the contracts had the same arbitration clauses as found in the two contracts in question.

**Cocoa contract**

**7. Did the various persons involved in this case act within the scope of their authority?**

Yes. It might be mentioned that the arbitral center always demands a written power of attorney of the legal representatives of the parties. Those documents were submitted but are not included in the case file.

**8. Does Equatoriana often experience storms in the cocoa growing area?**

Storms occur in Equatoriana, as they do in most places. The storm on 14 February 2002 was the first storm in 22 years that had caused damage to the cocoa trees. The damage in 1980 was not extensive.

**9. Were cocoa growing areas in other countries affected by the storm?**

No.

**10. When was the export ban ordered and when did it end?**

The first order was on 22 February 2002 and covered the month of March 2002. On 20 March 2002 the order was extended until further notice. The export ban was rescinded on 12 November 2002.

**11. What is the authority and procedures of the Equatoriana Government Cocoa Marketing Organization?**

The Organization is an official entity. It has a monopoly on the purchase of cocoa from the producers. It does not sell to buyers outside Equatoriana. There are a few local users of the cocoa beans that purchase from the Organization, but the vast majority of the cocoa is sold to exporters, such as Equatoriana Commodity Exporters. The Organization stores the cocoa in its warehouses. When an exporter enters into an export contract it places an order with the Organization for an equivalent amount. Delivery to the ultimate purchaser is made directly from the Organization's warehouse on the delivery date or during the delivery period, March to May 2002 in this case. The usual procedure was followed in respect of cocoa contract 1045 up to the export embargo.

**12. Could Equatoriana Commodity Exporters, S.A. have petitioned against the export embargo or asked for an exemption from it?**

There was no legal procedure available for Equatoriana Commodity Exporters, S.A. to protest the export embargo. It could always have asked for an exemption. It did not do so. Several other exporters did ask for exemptions and all were rejected.

**13. How long has Equatoriana Commodity Exporters, S.A. been in business and do they have a good reputation?**

It has been in business since 1961 and it has a good reputation.

**14. Has Equatoriana Commodity Exporters, S.A. ever supplied anyone with cocoa beans that did not originate in Equatoriana?**

No. As indicated in both the Statement of Claim and the Statement of Defense, on occasion it trades commodities produced in other countries. It could do so with cocoa beans, but it never has. The sale of cocoa beans represents about 20 per cent of its total business.

**15. Was cocoa contract 1045 on a standard form of Equatoriana Commodity Exporters, S.A.?**

Yes. Equatoriana Commodity Exporters, S.A. adapted the contract form from the form to be found in the New York Board of Trade Cocoa Rules 9.03.

**16. To what did the words "usual terms" refer to in Claimant's Exhibit No. 1?**

They referred to the contract form as used in contract 1045, which had been used in all previous cocoa contracts.

**17. What do the words “at par” mean as used in the New York Board of Trade Cocoa Rules (Respondent’s Exhibit 1) in regard to Group C?**

Contracts are traded on the New York Board of Trade, and on LIFFE in London, for future delivery of cocoa among members of the exchange. The contracts are absolutely standardized except for the price. The New York Cocoa Rules call for the following procedure. At specified periodical intervals the contracts that each member has purchased are set off against contracts that the member has sold. A member that has sold more contracts than he has purchased must be prepared to deliver physical cocoa to a member that has bought more contracts than he has sold. Only about two per cent of the contracts result in physical delivery of cocoa. The cocoa that is to be delivered is already in a warehouse licensed by the exchange. In fulfillment of an exchange traded contract the seller can deliver cocoa produced anywhere that he has stored in a warehouse. Nevertheless, since cocoa from places listed in Group A is of a higher quality, the buyer must pay the seller USD 160 per metric ton in addition to the price for the contract. If cocoa from a place listed in Group C is delivered, no additional payment need be made. It will be noted that Group C includes a number of named countries and “all other growths not presently specified above.” Cocoa from Equatoriana is not specified, so it would fall within Group C.

The prices for any given commodity – here cocoa – paid on the major exchanges establish the world-wide market price for that commodity. Contracts such as cocoa contract 1045 are negotiated on the basis of the prices for cocoa being paid on the exchange, though they often vary from that price for specific reasons, such as the quantity purchased. Similarly, the price in those individually negotiated contracts will reflect what is to be found in the exchange rules, namely that the cost of cocoa from places listed in Group A in the New York rules is higher than for cocoa from places in Group C.

**18. What do the words “standard grade and count” mean?**

Reference is made to the full text of NYBOT® Cocoa Rule 9.18 at the URL noted in Respondent’s Exhibit No. 1 for an explanation.

**19. Did Mediterraneo Confectionary Associates, Inc. know that the cocoa delivered in its previous contracts with Equatoriana Commodity Exporters, S.A. came from Equatoriana?**

Yes. Origin was always known since it was the buyer’s responsibility to arrange for the carriage of the goods. Moreover, the bags in which the cocoa was packed indicated their origin.

**20. Did either country, Mediterraneo or Equatoriana, have any regulations that would have required that the cocoa be of Equatoriana origin?**

No

**21. Was anything said in the telephone call of 5 March 2002, referred to in Mr. Sweet's letter of 5 March 2002, in regard to a date by which delivery had to be made?**

No, other than that Mediterraneo Confectionary Associates, Inc. expected delivery during the contractual period, which would not expire for almost three months.

**22. Was there any communication between Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters Mr. Sweet's letter of 15 August 2002 and the purchase of the 300 tons of cocoa on 24 October 2002?**

There was one telephone call from Mr. Smart to Mr. Sweet on 29 September 2002 in which he said that there was no indication as yet as to when the export ban would be rescinded. Mr. Sweet reiterated the concerns expressed in his letter of 15 August 2002.

**23. Has there ever been a legal dispute between Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters or unilateral avoidance of the contract?**

No.

**24. What are the yearly requirements for cocoa of Mediterraneo Confectionary Associates, Inc.?**

Its yearly requirements average 1,500 metric tons. The 400 metric tons contracted for would, therefore, equal slightly over its average requirements for three month. By the time of its purchase of 300 metric tons on 24 October 2002 it had slightly more than 100 metric tons in inventory. Around the end of November it would have had to cease producing certain of its products unless it had received additional cocoa. All that it purchases is used in its confectionary business. It never purchases cocoa for resale.

**25. Could Mediterraneo Confectionary Associates, Inc. have purchased the 300 tons from a different supplier at a lower price?**

There were a multitude of suppliers from whom the cocoa could have been purchased. The purchase was at the then current market price and it is doubtful that a lower price could have been found. Mediterraneo Confectionary Associates, Inc. had purchased from Oceana Produce Ltd. in the past at the market price.

The chart from the International Cocoa Organization in Respondent's Exhibit No. 3 shows the average price paid for cocoa during a given month. It does not show the daily fluctuations. For the purposes of this arbitration (Moot) the prices shown in the chart for any given month are considered to represent the market price for cocoa purchased on any given day during that month.

**26. Was the cocoa purchased in the cover contract of the same grade as that from Equatoriana?**

Yes

**27. Did the cover purchase price include the transport costs?**

In both the contract with Equatoriana Commodity Exporters, S.A. and in the cover contract the transport costs were the responsibility of the buyer. Those costs were slightly higher in the cover contract, but they were not included in the claim. The possibility of including them now is subject to Swiss Rules, Article 20.

**28. How much cocoa was released to Equatoriana Commodity Exporters, S.A. by the Equatoriana Government Cocoa Marketing Organization in May?**

The Organization required each exporter to submit the contracts they had entered into. The Organization then released specific amounts for each of those contracts. It released 100 metric tons for the contract with Mediterraneo Confectionary Associates, Inc.

**29. Could Mediterraneo Confectionary Associates, Inc. have known about the plans of the Organization to terminate the export ban before it purchased the 300 replacement tons?**

The rumors that it would do so were circulating in interested circles in Equatoriana and in the cocoa industry world-wide. However, a small purchaser, such as Mediterraneo Confectionary Associates, Inc., would not necessarily have heard them. If called on to do so, the relevant personnel for Mediterraneo Confectionary Associates, Inc. would testify that they did not know of the rumors.

**Sugar**

**30. Was sugar contract 2212 on a standard form of Equatoriana Commodity Exporters, S.A.?**

Yes.

**31. Why did the sugar contract provide that delivery would be made by Oceana Sugar Producers?**

As described in the statement of Defense, paragraph 2, Equatoriana Commodity Exporters, S.A. trades primarily commodities produced in Equatoriana, although on occasion it trades commodities produced in other countries. On this occasion it sold sugar produced in Oceania. Shipment of the sugar to Mediterraneo Confectionary Associates, Inc. was directly from Oceania by the party that had sold the sugar to Equatoriana Commodity Exporters, S.A.

**32. How trustworthy is the statement on the cargo receipt that the sugar was in “apparent good condition” when it was received by Oceania Shipping Lines?**

The first issue is whether the tribunal has jurisdiction in regard to the sugar contract. That is to be considered in the memoranda and the oral hearings during the Moot. Only if the tribunal has jurisdiction will the tribunal consider the merits of the dispute at a time subsequent to the Moot. If the sugar was as bad on arrival as claimed, the dispute would revolve around the question which party bore the risk of loss at the time

the deterioration occurred. According to FOB Incoterms 2000, A5 on Transfer of Risks:

“The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship’s rail at the named port of shipment.”

As stated in the Statement of Defence, para. 15, FOB Incoterms 2000, B5 provides that the buyer bears the risk of loss once the goods have passed the ship’s rail. In addition, the buyer bears the risk of loss in two situations that are not relevant to the facts in regard to this sugar contract. It will be noted that the cargo receipt states only that the carrier has received the sugar but not that it has yet been loaded on a ship. If the deterioration occurred prior to loading, the seller bears the risk of loss. If the deterioration occurred after loading, the buyer bears the risk of loss. The time of the passage of the risk of loss from seller to buyer is an important factor in each of the thirteen different Incoterms 2000.

(Signed)  
President of the Tribunal

30 October 2004