List of Abbreviations

"the Basic-Agreement": the Agreement between RED and BLUE as shown in Ex.5

"the Basic-Agreement.Art.(*number*)": the article (*number*) of the Basic-Agreement

"BLUE": BLUE Corporation in Arbitria

"Brown": the deputy general manager of the international department of BLUE.

"CISG": UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS as shown in Attachment 1 of this memorandum

"CISG.Art.*number*(*number*)(*letter*)": the article of CISG

"the CER Purchase Agreement": the CER Purchase Agreement as shown in Ex.7

"the CER Purchase Agreement.Art.(*number*)": the article (*number*) of the CER Purchase Agreement

"Ex. (*number*)": Exhibit in the problem

"Green": Green Corporation, the joint venture of RED and BLUE.

"the Joint-Venture-Agreement": the Joint Venture Agreement between RED and BLUE, creating Green, as shown in Ex.7

"the Joint-Venture-Agreement.Art(*number*)": the article (*number*) of the Joint-Venture-Agreement

"the License-Agreement": the License Agreement between RED and BLUE as shown in Ex.6

"the License-Agreement.Art.(*number*)": the article (*number*) of the License-Agreement

"the NEP-agreement": the license agreement between NEP and BLUE

"NEP": Negoland Electric Power in Negoland

"Para.(*number*)": Paragraph number in the problem

"Prince Robert": the eldest son of Nego III, the minister of environment of Negoland, and a major shareholder of NEP

"RED": Red Corporation in Negoland

"Smith": the deputy general manager of the power generation business department of RED

"UNIDROIT.Art.(*number*)": Articles of UNIDROIT Principles of International Commercial Contracts 2004

"US$": U.S. dollars

I. Introduction

The aim of this memorandum is to delegate BLUE's claims regarding disputes between BLUE and RED.

BLUE's submission that BLUE is not under any obligation regarding two main issues: CO2 emissions reduction technology transaction and discussion of the biomass power generation transaction.

II. Regarding the CO2 Emissions Reduction Technology Transaction

Issue 1: Should the RED's claim that BLUE shall immediately terminate the license agreement with NEP and/or BLUE pay US$1 million be allowed?

BLUE's submissions regarding the NEP-agreement:

BLUE is **not** under **any** obligation to terminate the NEP-agreement for the following reasons:

1. The Basic-Agreement is invalid
2. BLUE is exempt from its obligation owing to a Force Majeure

1. Invalidity of the Basic-Agreement

It is submitted that the Basic-Agreement is invalid for the reasons below, and thus, BLUE is under no obligation to terminate the NEP-agreement.

A.) Completeness of its expected role

i.) The purpose of the Basic-Agreement

The purpose of the Basic-Agreement is to encourage both parties to deal with each other in order to conclude official contracts. In light of this feature of the Basic-Agreement, its effects naturally become invalid as the formal agreement is put into practice to a sufficient extent.

ii.) No termination stipulation

Also, non-existence of the termination clause clearly shows that the Basic-Agreement will become invalid as it accomplishes its purpose.

iii.) Accomplishment of its purpose

With the execution of the three agreements in Ex.5, 6, and 7, the following three main topics have already yielded following results:

1.) CO2 emissions reduction technology transaction[1]

2.) Biomass power generation transaction[2]

3.) CER purchase[3]

Therefore, it is reasonable to conclude that the Basic-Agreement has accomplished its purpose and, as a result, it becomes invalid.

B.) No periodic meetings

Despite the existence of the Basic-Agreement.Art.2, "the periodic meetings...were not held from the beginning"[4]. This shows that the Basic-Agreement is not strictly legally binding.

Therefore, it is clear that the Basic-Agreement is no longer valid.

2. The Conclusion of the NEP-agreement and a Force Majeure

BLUE should be exempt from its obligation due to Force Majeure for the reasons below.

A.) An Impediment beyond Control

The NEP-agreement was executed because of the strong request from Prince Robert. Moreover, Nomura stated that it would be "impossible to refuse it"[5]. Therefore, the request from him is "an impediment beyond control"[6].

B.) No reasonable expectations

As a government official and a member of the royal family of Negoland, Prince Robert has "a strong influence on politics of Negoland as a whole"[7]. In addition, as a major stakeholder of NEP and the fact that he asked directly to

[1] Ex.5
[2] Ex.6
[3] Ex.7
[4] Para.18.a
[5] Para.22.g
[6] UNIDROIT.Art.7.1.7(1)
[7] Para.22.g

Ota to meet people of NEP, his intention to encourage BLUE to execute license agreement with NEP is clear. This fulfils an impediment which "could not reasonably be expected....to have avoided or overcome its consequences"[8].

Therefore, owing to a Force Majeure, BLUE shall be exempt from its obligation.

For all the reasons above, BLUE is not under an obligation to terminate the NEP-agreement.

BLUE's submission regarding the prize:

BLUE does **not** have to pay US$1 million to RED for the following reasons:

1. BLUE is under no obligation to receive the prize for RED
2. RED's claim for damages should not be allowed

1. No obligation regarding the prize in the License-Agreement

BLUE is under no obligation regarding the prize for the reasons below:

A.) Terms of the License-Agreement

There is **no clause that enacts BLUE's responsibility of getting the prize for RED** in the License-Agreement[9].

B.) Conversation between RED and BLUE

Although there is a conversation referring to the prize[10], BLUE did not state that it would be responsible for or cooperate in getting said prize for RED. In light of the fact that there is no mutual agreement between BLUE and RED, BLUE is not responsible for the prize.

Therefore, BLUE is under no obligation to obtain the prize for RED under the License-Agreement.

8 UNIDROIT.Art.7.1.7(1)

9 Ex.5

10 Para.17.b

2. No Basis for RED's Claim for Damages

It is submitted that there is no basis for RED's claim for damages as demonstrated below.

A.) The principle of foreseeability

i.) According to the License-Agreement.Art.13, the applicable law is UNIDROIT.

ii.) UNIDROIT.Art.7.4.4 stipulates that a party is liable only for harm which it foresaw or could reasonably have foreseen **at the time of the conclusion of the contract.**

iii.) BLUE could not foresee the cancellation of the internal decision for the following reasons:

1.) At a party celebrating signing of the Basic-Agreement, Nomura stated that the Negoland government "will commend the power generator enterprise making the best contribution to environmental protection **in 2009."**[11]

2.) It was impossible for BLUE to foresee that the cancellation of the prize could be affected by any occurrence after 2010.

3.) Prince Robert's approach was not until January 2010[12].

4.) No work for the technology transaction to NEP has started yet[13].

Therefore, foreseeability of harm does not exist, and RED has no right for damages.

B.) Force Majeure

BLUE shall not be liable to pay US$1 million to RED because it shall be exempt due to Force Majeure as stated above, regarding the NEP-agreement and a Force Majeure on page 4 of this memorandum.

Therefore, RED's claim for damages should not be allowed.

[11] Para.17.b
[12] Para.22.g
[13] Para.22.b

For these reasons above, BLUE is under no obligation to pay US$1 million to RED.

Issue 2: Is BLUE under Obligation to Pay US$15 Million?

BLUE's submission:

BLUE is **not** under **any** obligation to pay US$15 million to RED for the reasons below:

1. BLUE fulfilled its obligations
2. There is no basis for RED's claim for damages

1. Fulfilment of Obligations

RED claims that BLUE is liable to pay US$15 million for the following reasons:

(1) BLUE did not supply the technology that could satisfy the initially planned emission reductions.

(2) BLUE failed to dispense advice required as a professional operator[14].

However, it is submitted that BLUE fulfilled its obligations.

A.) BLUE's obligation concerning the Technology

i.) BLUE's duty of best efforts

UNIDROIT stipulates "**the way in which the obligation is expressed** in the contract should be considered to determine a kind of duty."[15]

According to the License-Agreement.Art.7.1, the Technology to be supplied by BLUE is "the best technology" that BLUE "possesses at the time of its disclosure" [16]. Therefore it is clear that there was **no obligation** to provide the technology to achieve **a specific result** of satisfying the planned emissions reduction.

ii.) Fulfilment of BLUE's duty of best efforts

BLUE fulfilled its obligation of best efforts as demonstrated below:

[14] Para.22.j
[15] UNIDROIT.Art.5.1.5(a)
[16] Ex.5

a.) The best technology has been provided and the installation has been finished by the end of 2009[17].

b.) The amount of CO2 emissions reduction at the three thermal plants, where on-site survey was conducted, has achieved the planned level of reduction.[18]

c.) The order to return the subsidy was caused by differences between the planned reduction amount and the actual performance due to the lack of investigation, instead of the technology level. It is not disputed that BLUE had an alternative way to achieve planned level if BLUE had known the existence of decrepit thermal power plants[19].

Therefore, BLUE has fulfilled its obligation regarding the Technology.

B.) BLUE's obligation regarding the advice as a professional operator

The order to return the subsidy was caused by differences between planned emissions reduction and the actual performance due to the lack of sufficient investigation[20]. Regarding the investigation, BLUE has dispensed the advice required of a professional operator as followings:

i.) BLUE clearly stated "To ensure accuracy, we need to conduct on-site surveys at **all power plants…** investigations will take about two months"[21].

ii.) BLUE has declared that it is expecting Red to "select… representative thermal power plants… **to get a good overall picture of your entire …plants**"[22]. As RED has said, **"Because your company doesn't know the details of our power plants"**[23], RED was under obligation to choose appropriate sites which fulfils BLUE's instruction.

[17] Para.18.i
[18] Para.22.h
[19] Para.22.h
[20] Para.22.h
[21] Para.18.e
[22] Para.18.e
[23] Para.18.e

iii.) Decrepit thermal power plants had been a concerning issue for RED[24]; therefore, RED should be aware of the effect of long time usage upon performance. Also, BLUE told RED "actual reductions vary **depending on the current equipment**..."[25] Therefore, to "grasp an overall picture of the entire thermal power plants" [26], RED should have taken the age of the facility into account and chosen **average power plants**.

iv.) From License-Agreement.Art.2.1 BLUE is not under obligation to provide information that is not "free disposal". Since BLUE is a solid business entity[27], it is reasonable to assume that BLUE has keeping its all facilities up to date, not leaving them outdated.

Therefore, the possibility of existence of data concerning decrepit power plants and, moreover, its actual effect to the result of CO2 emissions reduction is quite low.

Given the aforementioned facts, BLUE has fulfilled its obligation to dispense advice upon investigation.

Therefore, there is **no** default of obligations, and Blue is **not** under **any** obligation to pay US$15 million.

2. Exemption or Mitigation of Damages

Even if BLUE's claim is fully or in part not successful, there are, nevertheless, reasons for exemption from damages or mitigation of damages.

A.) Acquisition of the subsidy

In this case, there is no written stipulation concerning the acquisition of the subsidy. Therefore, it is reasonable to interpret that RED, which submitted the subsidy form[28] had a risk of acquiring the subsidy. In addition, RED is the only one to benefit by receiving the subsidy. Therefore, it is reasonable to interpret that the risk of acquiring the subsidy still remains with RED even after the

[24] Para.9
[25] Para.18.e
[26] Para.18.e
[27] Para.14.a
[28] Para.18.e

Basic-Agreement has become invalid.

Therefore, RED has no right to claim damages against BLUE. RED may not rely on the non-performance of BLUE to the extent that such non-performance was caused by another event as to which the first party, or RED, bears the risk[29].

Therefore, RED shall not claim damages from BLUE.

B.) Effect of RED's act

Even if BLUE is liable for damages, RED could have reduced harm if RED has followed BLUE's instruction to choose three appropriate power plants to grasp an overall understanding of the situation.

i.) UNIDROIT.Art.7.4.7 stipulates "Where the harm is due in part to an act or omission of the aggrieved party....the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties"[30].

ii.) As mentioned in page 8 of this memorandum, the cancellation of subsidy was caused by lack of on-site investigation which took place at three new large thermal power plants.

Therefore, BLUE is exempt from its obligation or the amount of damages should be mitigated.

[29] UNIDROIT.Art.7.1.2

[30] UNIDROIT.Art.7.4.7

III. Regarding the Biomass Power Generation Transaction

Since RED's breach of duty caused the cancellation of the subsidy, RED is obliged to pay US$9 million to BLUE, the amount of which BLUE has paid to the government of Negoland.

Even if this claim is unsuccessful, under the Joint-Venture-Agreement, RED is obligated to pay US$4.5 million.

Also, under the CER Purchase Agreement and Ex.8, RED is under obligation to refund US$1.5 million to BLUE.

Issue 1: Is RED under Obligation to Pay US$9 Million or US$4.5 Million to BLUE?

BLUE's submissions:

1. RED is obligated to pay US$9 million to BLUE for the following reasons:
   A.) Breach of duty
   B.) BLUE's right to damages
   C.) No basis to RED's claims
2. Even if the submission above does not succeed, RED is under an obligation to pay at least US$4.5 million to BLUE.

1. RED is obligated to pay US$9 million to BLUE.

It is submitted that the cancellation of the subsidy was caused by RED's breach of duty.

A.) RED breached its duty

i.) Terms of the Joint-Venture-Agreement

According to the Joint-Venture-Agreement.Art.14.3[31], RED's duty was to "procure bird manure and wood waste necessary to operate the power generation facility."

ii.) Interpretation of Art.14.3

RED's duty shall be understood as procuring bird manure and wood waste **in Negoland** for the following reasons:

[31] Ex.6

a.)Before the execution of the Joint-Venture-Agreement, BLUE emphasized the importance of individuality of the two materials as follows: BLUE has informed RED "Actual output varies **depending on the conditions of chicken manure and wood chips**, among other matters"[32].

b.) Considering **the lack of time for investigation**, it was impossible to conduct incineration testing using other samples. Therefore, it was important for RED to provide **the materials with the same constituents** to secure the outcome.

c.) Since both RED and BLUE have conducted incineration testing using samples provided by RED[33], it is reasonable for BLUE to believe that RED would procure the chicken manure and wood chips with the same constituents as the samples. Otherwise, there would be no reason to conduct such a test.

d.) Due to the fact of lack of time and conducting incineration testing, RED knew that RED's duty was to provide materials with the same constituents. Therefore, in light of UNIDROIT.Art.4.2(1), interpretation of the duty should be providing the materials with the same constituents.

e.) Providing the materials in Negoland as a sample[34], RED should have recognized its duty as procuring bird manure and wood waste in Negoland.

Moreover, it is stipulated in CISG that when a party supplied a sample, "the goods do not conform with the contract unless they: (c) possess the qualities of goods which the seller has held out to the buyer as a sample"[35]. Therefore, it is reasonable to think that the sample provider, which is RED, should provide chicken manure and wood waste with same constituents.

[32] Para.20.a
[33] Para.20.d
[34] Para.20.d
[35] CISG.Art.35(2)(C)

Therefore, RED's duty enacted on Art.14.3 of the Joint-Venture-Agreement is to procure bird manure and wood waste **in Negoland**, not from any other place.

iii.) RED's breach of duty

RED supplied BLUE with materials from a neighboring country[36], which clearly constitutes a breach of RED's duty.

B.) BLUE has a right to damages

It is submitted that BLUE may seek damages of US$9 million to RED pursuant to UNIDROIT.

According to UNIDROIT.Art.7.4.2(1), BLUE "is entitled to full compensation for harm sustained as a result of the non-performance".

In order to prove a right for damages, the following is required: existence of non-performance of duty and causal relationship between non-performance of duty and damages[37], certainty[38], and foreseeability[39].

i.) UNIDROIT.Art.7.4.1 and non-performance of RED's duty

According to UNIDROIT.Art.7.4.1, "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies…"

As stated above, RED has not performed its duty.

ii.) Causal Relation

The cancellation of the subsidy was caused by non-achievement of the initially planned amount of output for the biomass generation power plant[40]. This was caused by RED's non-performance of procuring chicken manure and wood chips with the same constituents as samples[41].

Clearly, there is a causal relation between the non-performance by RED and the cancellation of the subsidy.

[36] Para.23.b
[37] UNIDROIT.Art.7.4.1
[38] UNIDROIT.Art.7.4.3
[39] UNIDROIT.Art.7.4.4
[40] Para.23.a
[41] Para.24

iii.) Certainty of harm

Damages occurred due to the fact that BLUE has returned the subsidy, which was US$9 million, to the Negoland government[42].

iv.) Foreseeability of harm

RED mentioned a possibility of the cancellation of the subsidy[43]. Therefore, both RED and BLUE were aware that the harm would be caused if RED failed to procure chicken manure and wood chips. Therefore, there is foreseeability of harm.

C.) No Basis for RED's Claims

There is no basis for RED's claims[44] as follows.

i.) BLUE's responsibility

According to the Joint-Venture-Agreement.Art.14.2, BLUE's responsibility is to supply the necessary technology and information regarding biomass power generation.

a.) As the output of a biomass power plant depends on bird manure and wood waste procured by RED, if RED failed to fulfill its duty, BLUE's duty will be limited to making its **best efforts in the performance**[45]**,** which does not include providing the technology which achieves a specific result.

b.) The extent of duty of BLUE is limited to providing RED with information related to the operation of the biomass power generation. BLUE's duty is thus limited to conducting incineration testing **using samples that are supposed to be used at the actual power plant**. Therefore, BLUE is under no obligation to conduct testing using samples from other areas.

ii.) BLUE's request for RED not to bribe Orange

BLUE's refusal of bribery shall not be a reason for BLUE's responsibility for the cancellation of subsidy. Bribery is not only prohibited both in Negoland and

[42] Para.26.b
[43] Para.20
[44] Para.25.b
[45] UNIDROIT.Art.5.1.5(d)

Artribia[46], but also an action against fair dealing principles[47] as stated in treaties adopted by international organizations[48]. In addition, RED agreed with BLUE on not to bribe RED in the conversation between Ota and Nomura[49].

Therefore, there is no basis for RED's claim that bribing Orange would have avoided the cancellation of the subsidy, and BLUE has no responsibility for the cancellation of the subsidy.

Therefore, RED is under obligation to pay US$9 million to BLUE.

2. RED is under obligation to pay at least US$4.5 million to BLUE

Even if BLUE's claim is in part or fully unsuccessful, the damages should be divided in half between RED and BLUE because both companies are liable for Green's default of obligations. Therefore, RED is under obligation to pay at least US$4.5 million.

The Joint-Venture-Agreement.Art.14.4 stipulates "In case that Green becomes liable to the third party other than the Parties because of its acts or omissions, both parties equally share the liability."[50] In this case Green damaged the Negoland government, **a third party**.

Therefore, it is reasonable that the damage of US$9 million shall be divided equally between BLUE and RED.

[46] Para.24
[47] UNIDROIT.Art.1.7
[48] Para.6
[49] Para.24 last two lines
[50] Ex.6

Issue 2: Is RED under obligation to pay US$1.5 million as the upfront payment to BLUE?

BLUE's submissions:

1. RED is under obligation to pay US$1.5 million to BLUE for the following reasons:
   A.)BLUE has a right to terminate the CER Purchase Agreement
   B.)According to the written guarantee by RED[51], RED should pay for damages
2. BLUE does not bear the risk of not being able to obtain a satisfactory number of credits.

1. RED is under Obligation to Pay US$1.5 Million to BLUE

Due to non-performance of RED, BLUE has a right to terminate the CER Purchase Agreement.

A.) BLUE's right to terminate the CER Purchase Agreement

According to the CER Purchase Agreement.Art.3.1, "if the Project Entity (Green) does not deliver all of the CERs… within fifteen (15) business days… on which it was required to deliver those CERs…, the Buyer (BLUE) may terminate this Agreement".

According to the fact that no emission credits were issued by the CDM[52], it was impossible for Green to deliver credits within (15) business days. Therefore, BLUE may terminate the CER Purchase Agreement.

B.) BLUE's Right for Damages

RED is obliged to pay US$1.5 million for the reasons shown below.

i.) BLUE's Right to Request Green to pay US$1.5 Million

According to the CER Purchase Agreement.Art.3.2, when the agreement is terminated, Green shall return US$1.5 million which has been paid by BLUE.

ii.) RED's Responsibility to pay US$1.5 Million

[51] Ex.8
[52] Para.27

According to the guarantee made by RED on August 9th[53], RED is under obligation to pay US$1.5 million to BLUE in case Green is obliged to repay such amount to BLUE. It is undisputed that this guarantee is legally binding[54] and RED is obliged to pay for Green's debt.

Therefore, RED is obligated to pay US$1.5 million to BLUE.

2. No bearing of risk

BLUE does not bear the risk of failing to obtain sufficient amounts of credits.

A.) Oral promise by Brown

i.) Oral promise by Brown

In August 2009, Brown stated "if you accept this (pricing of US$10 per ton) and we are be able to be registered with the United Nations CDM Executive Board, then we could give in and bear the risk of not being able to obtain a satisfactory number"[55].

ii.) Oral promise is not legally binding

The Joint-Venture-Agreement.Art.21.2 [56] is a merger clause, which "indicating that the writing completely embodies the terms on which the parties have agreed"[57]. Therefore, "a contract… cannot be contradicted or supplemented by evidence of prior statements or agreements." In light of this, the oral promise, which was made before the conclusion of the Joint-Venture-Agreement, is not legally binding.

iii.) Even if the oral promise is valid, BLUE does not bear the risk

Risk as mentioned here, refers to the risk when default of duty by neither of the parties exists. In this case, non-issue of credit was caused by RED's default, and therefore, this is not the case of risk.

[53] Ex.8
[54] Para.27
[55] Para.21.b
[56] Ex.6
[57] UNIDROIT.Art.2.1.17

Therefore, BLUE does not bear the risk pursuant to the oral promise by Brown.

B.) No basis for RED's claim regarding the performance of the biomass power generation

RED may claim that the reason for Green's obligation to return the upfront payment to BLUE is that emissions credits were not issued due to the failure of the performance of biomass power generation. As stated in Issue 2.1(page 12 of this memorandum), the failure is due to RED's default of duty to provide bird manure and wood waste in Negoland.

Therefore, BLUE is not responsible for this failure. Thus, this claim of RED's should not be allowed.

C.) RED's possible claim to share the liability

Based on the last sentence of Ex.8 and the Joint-Venture-Agreement.Art.14.4, RED may claim that the returning amount of upfront payment should be divided in half.

However, BLUE is not considered as "a third party" in the Joint-Venture-Agreement.Art.14.4 because BLUE is a party involved in the Joint-Venture-Agreement.

Therefore, this is not the case that the Joint-Venture-Agreement.Art.14.4 should be applied and RED's claim of reduction of the damages should not be allowed.

Therefore, BLUE does not have to bear the risk of failing to obtain sufficient amounts of credits.

IV. Conclusion

As aforementioned reasons, BLUE has no obligation to terminate the NEP-agreement, nor obligation to pay any damages to RED. Instead, RED is obliged to pay damages of US$9 million and, furthermore, RED is obliged to return the upfront payment.