SUMMARY OF RED CORPORATION'S SUBMISSIONS

β CASE

I. Red Corporation ('Red') is not obligated to provide the β-7 series to Blue Corporation ('Blue').

II. If Red is so obligated, the Tribunal should not order Red to provide the β-7 series to Blue.

III. If Red is liable for US$5 million as liquidated damages, Red has a right to set-off this amount against Blue's obligation to pay US$3 million to Red.

EVENT CASE

IV. Blue breached its obligation to ensure that Bolt, Williams, and Hosszu participated in the Nego-Abu Cup.

V. Blue must fully compensate Red for its US$2.1 million loss caused by Blue's breach.

VI. Red is not obligated to share profits from its Internet Streaming Service with Blue.

β CASE

I. Red is not obligated to provide the β-7 series to Blue

Red is not contractually obligated to provide Blue with the β-7 series because:

A. The β-7 series is an upgrade, not a 'program update' of the technology developed by Red. This means the β-7 series falls outside the scope of Article 2 of the Maintenance Agreement between Red and Blue ('the parties') ('the Red-Blue Maintenance Agreement');

B. Transferring the β-7 series to Blue under Article 10 of the Red-Blue Maintenance Agreement would exceed the reasonable efforts required under the contract; and

C. The β-7 series is not materially based on Blue's feedback and data, and so does not fall under Article 4 of the Memorandum of Understanding between Red and Blue ('the MOU').

A. The β-7 series falls outside the scope of Article 2 of the Red-Blue Maintenance Agreement because it is an upgrade, not a 'program update'

1. Article 2 of the Red-Blue Maintenance Agreement requires Red to offer program updates to Blue for the equipment itemized on the Equipment Schedule ('the Services') [Ex 5, Art 2].
2. The parties did not intend for Article 2 to include major equipment upgrades of the kind that produced the β-7 series [UNIDROIT Principles of International Commercial Contracts ('PICC') Art 4.1(1)]. This is because:

2.1. the purpose of the Red-Blue Maintenance Agreement was for Red to maintain the equipment provided by the Sales Agreement between Red, Blue and Yellow Corporation ('Yellow') [Ex 4, 5; para. 22; PICC Art 4.3(d)]; and

2.2. the Red-Blue Maintenance Agreement followed negotiations about the costs of updating the α and/or β series [para. 22; PICC Art 4.3(a)]. The parties understood that any major changes would not fall within the scope of the Red-Blue Maintenance Agreement [para. 22]. In preliminary negotiations, Red used the terms 'program updates', 'select improvements', and 'minor changes' to describe the minor changes necessary to maintain the equipment [para. 22; PICC Art 4.3(a)]. Red distinguished these minor changes from major improvements, such as significant changes to equipment specifications, or design changes [para. 22].

3. The parties' common understanding is reflected in the text of the Agreement:

3.1. the Red-Blue Maintenance Agreement specifically excludes the provision of the new version of the equipment from the Services [Ex 5, Art 6(e)]; and further

3.2. the terms 'replace parts', 'maintain in good working condition', and 'program updates ', as opposed to the term 'upgrade', indicates the parties' common intention that the Services only extend to providing minor updates and not major equipment upgrades [Ex 5, Art 2; PICC Arts 4.1(1), 4.4].

4. A reasonable person with the same kind of commercial experience as the parties would not interpret Article 2 of the Red-Blue Maintenance Agreement as extending beyond minor improvements [PICC Art 4.1(2)]. Such a broad interpretation would allow Blue to claim a right to *any* upgrade of the α and/or β series, irrespective of the research, development, and production costs of a particular upgrade. As a result, Red would have no financial incentive to improve its products. This would be an uncommercial reading of the Red-Blue Maintenance Agreement.

5. The β-7 series is a major upgrade outside the Services because the β-7 series' new technologies:

a) completely remove wearable sensors [para. 33];

b) broaden the analysis performed by identifying the weaknesses of a coach's own player and an opponent [para. 33]; and

c) broaden its data analytics to sport-specific strategies for overcoming opponents [para. 33].

6. These major improvements significantly change the equipment's specifications and greatly improve the product's performance compared to the predecessors of the β-7 series [paras. 21, 26, 27]. The β-7 series now has commercial utility pre-game, mid-game and post-game, and is no longer just a training tool that is periodically updated under the Red-Blue Maintenance Agreement [paras. 21-22].

B. Transferring the β-7 series would exceed Red's 'reasonable efforts' obligation

7. The Red-Blue Maintenance Agreement allows Blue to request Red to provide other services not included in the Maintenance fee [Ex 5, Art 10]. If Blue does so, Red will use reasonable efforts to provide such service [Ex 5, Art 10].

8. While Blue requested that Red supply the β-7 series [para. 34], Red cannot comply,

because the Negoland Sports Agency issued a directive requesting Red to refrain from distributing the β-7 series to any party outside of Negoland [para. 34].

9. Making 'reasonable efforts' does not require Red to act against its own commercial interests [Vogenauer and Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP, 2nd ed, 2015) ('Vogenauer') 629].
10. Selling the β-7 series to Blue would exceed the reasonable efforts required by Red under Article 10 of the Red-Blue Maintenance Agreement [Ex 5]: Red would risk its relationship with its regulator and government sanctions from breaching the regulatory directive [para. 34].

C. The β-7 series is not materially based on Blue's feedback and data and does not fall under the obligation under Article 4 of the MOU

11. Article 4 of the MOU requires Red to provide Blue with exclusive use of a test version for one year when Red upgrades the α and/or β series using feedback and data collected at Blue Village [Ex 6, Art 4].
12. That exclusive access is conditioned on the upgrade being materially based on the feedback and data collected at Blue Village. The parties' common intention is shown by:
    12.1. the preliminary negotiations preceding the MOU [PICC Art 4.3(a)]. Blue requested Red to restrict the distribution of future versions that were created 'based on' Blue's feedback and data - after which Red's obligation to provide a test version would be activated [para. 25]. Blue acknowledged that Red could develop upgrades based on other sources of data [para. 25]; and
    12.2. the parties' subsequent conduct [PICC Art 4.3(c)]. Red provided Blue with the updated test version of the β-5 series in January 2015, and the β-6 series in August 2016. In these instances, each upgrade was primarily based on Blue's feedback and data [paras. 26-27].
13. Red's limited use of Blue's feedback and data in the β-7 series, however, does not engage Article 4 of the MOU. Blue's feedback and data was only used to resolve 'some bugs' in the previous β-6 series, and contributed to two minor design changes [para. 33]. These minor changes did not contribute to the defining features of the β-7 series, which were developed independently by Red.
14. Any contrary interpretation of Article 4 would be unreasonable [PICC Art 4.1(2)]: it would reward one party with a new and innovative technology which is primarily the result of the other party's independent efforts.

II. <u>Red should not be ordered to transfer the β-7 series to Blue</u>

If Red is obligated to provide the β-7 series to Blue, Red submits that:

A. Blue cannot demand the transfer of the β-7 series because it would impose an unreasonable burden on Red considering the directive issued by the Negoland Sports Agency ('the Directive'); or

B. alternatively, Red is excused from the transfer obligation because the Directive gives rise to a situation of *force majeure*.

A. Performance of a transfer obligation would impose an unreasonable burden on Red, considering the Directive

15. If the Tribunal requires Red to provide the β-7 series to Blue, this would place Red in breach of the Directive by a government agency not to distribute the β-7 outside Negoland [para. 34].
16. The parties did not know and could not foresee the Directive at contract formation. The Directive is a 'drastic change of circumstances' that makes performance of Red's obligation 'unreasonably burdensome' [PICC Art 7.2.2(b), Official Comment 3(b)].
17. The consequences of non-compliance with the Directive are severe. If Red does not comply with the Directive:
    17.1. Red will ruin its relationship with the Negoland Sports Agency [para. 34], which is critical to Red's wider business operations [para. 13]; and
    17.2. Red will risk export control and restrictions being imposed on Red from the Negoland Ministry of External Trade [para. 34]. These restrictions will limit Red's future commercial dealings.
18. In these circumstances, performance of Red's obligation to provide the β-7 series to Blue would impose an unreasonable burden on Red.
    18.1. There is a significant risk that the long-term costs of non-compliance with the Directive far exceed the benefits of providing the β-7 series to Blue on this occasion [Vogenauer 894].
    18.2. The Red-Blue Maintenance Agreement is a long-term contract [PICC Art 1.11]. In this relationship, it is contrary to the principles of good faith and fair dealing for Blue to require Red to contravene a government directive, fracture its commercial relationships with the regulator, and risk export restrictions as a consequence of transferring the β-7 series.

B. Alternatively, Red is excused from performance while the Directive applies because the Directive is a *force majeure* event.

19. The Directive is an event that excuses Red's performance within the definition of *force majeure* accepted by the parties.
    19.1. It is the parties' common intention that no party should be liable for failure to perform, where non-performance is attributable to a 'direction of a governmental authority', as evidenced by the Red-Blue-Yellow Sales Agreement [Ex 4, Art 11; PICC Arts 4.1, 4.3(b)].
    19.2. The Directive is a direction from a government authority specifically prohibiting the export of the β-7 series [paras. 5, 34]. Red could not reasonably predict or control the actions of the Negoland Sports Agency, or the Ministry of External Trade [PICC Art 7.1.7(1)].
    19.3. This definition agreed by the parties deviates from the general principles of *force majeure* under PICC Art 7.1.7(1) [PICC Art 1.5; Vogenauer, 868]. The Red-Blue

Maintenance Agreement and the MOU, concluded after the Sales Agreement, should be read consistently with the parties' common intention and prior practice [PICC Arts 4.1, 4.3(b)].

20. Alternatively, Red's non-performance should be excused because the Directive falls within the definition of *force majeure* under PICC Art 7.1.7(1).
    20.1. The Directive and the consequences of non-compliance with it prevent Red from supplying Blue with the β-7 series [para. 34].
    20.2. This situation is beyond Red's control, and Red cannot take any commercially reasonable measures to effect performance [Vogenauer, 873-4].
    20.3. There is no evidence that Red could have anticipated the Directive when the parties formed the contract, or could have taken steps to avoid it or overcome its consequences [PICC Art 7.1.7(1)].
    20.4. Red met the notice requirements under PICC Art 7.1.7(3) when Red notified Blue of the *force majeure* situation within a reasonable time and on Blue's request for the β-7 series [para. 34].

III. If Red is liable for damages for non-performance, Red has a right to set-off the US$5 million payable against Blue's obligation to pay US$3 million to Red

Red submits that:

A. If Red is liable to pay US$5 million as liquidated damages to Blue, Red may set-off this amount against the US$3 million that Blue owes Red;

B. Blue must pay Red US$3 million for Blue's purchase of underwater cameras and sensors from Yellow because this claim has been validly assigned to Red and payment is due; and

C. This Tribunal has jurisdiction to hear Red's claim for US$3 million and to order a set-off.

A. If Red is obligated to pay US$5 million as liquidated damages to Blue, Red may set-off this amount against the US$3 million that Blue owes Red

21. Red may exercise a right of set-off because the conditions required by PICC Art 8.1(1) are satisfied:
    21.1. if Red must pay US$5 million as liquidated damages, both parties would owe each other money [PICC Art 8.1(1)];
    21.2. Red would be entitled to perform Red's obligation following an order of the Tribunal [PICC Art 8.1(1)(a)];
    21.3. the US$3 million debt is evidenced by Exhibit 7 and para. 31. If the Tribunal finds that Blue owes Red US$3 million, Blue's obligation would be ascertained as to its existence and amount [PICC Art 8.1(1)(b); Vogenauer, 1050]; and
    21.4. performance of the obligation has been due since 31 January 2018 [PICC Art 8.1(1)(b)], if the Tribunal finds that Blue owes Red US$3 million.

22. Accordingly, if the Tribunal finds that Red must pay US$5 million as liquidated damages, Red seeks a declaration that it has a right to set-off this obligation against Blue's obligation to pay Red US$3 million because the set-off conditions would be made out.

B. The claim for Blue's US$3 million purchase of underwater cameras and sensors from Yellow has been validly assigned to Red and payment is due

23. Blue is obligated to pay US$3 million for its purchase of underwater cameras and sensors from Yellow under the Sales Agreement between Blue and Yellow [Ex 7, Arts 1, 2] ('the Blue-Yellow Sales Agreement').
24. Yellow's claim against Blue was validly assigned to Red [PICC Art 9.1.1].
    24.1. As collateral for a US$3 million loan from Red, Yellow pledged its US$3 million claim it had against Blue arising from the Blue-Yellow Sales Agreement [para. 31]. This is a valid assignment of the claim to Red [PICC Art 9.1.7(1)]. Blue's consent was not required to validate the assignment [PICC Art 9.1.7(2)].
    24.2. Yellow notified Blue on 1 October 2017 that Yellow's claim against Blue was pledged to Red to secure a debt [para. 31; PICC Art 1.10].
    24.3. Blue may only discharge its obligation to pay the US$3 million by paying Red as the valid assignee, because Blue received notice of the assignment [PICC Art 9.1.10(2)].
25. Payment of the US$3 million became due on 31 January 2018 [Ex 7, Art 2]. Blue must therefore pay Red US$3 million.

C. This Tribunal has jurisdiction to hear Red's claim for US$3 million

26. The Tribunal has jurisdiction to hear Red's claim for US$3 million from Blue for the purposes of set-off [UNCITRAL Arbitration Rules 2010 Art 21(3) 'the Arbitration Rules']. Under the Arbitration Rules, a set-off may be claimed even if one of the claims arises from a contract without an arbitration clause [Vogenauer, 1041-2]. The Blue-Yellow Sales Agreement does not exclude the jurisdiction of the Tribunal. The Dispute Resolution Clause is explicitly non-exclusive [Ex 7, Art 12].
27. Accordingly, Red seeks a declaration that it has a right to set-off its obligation to pay US$5 million liquidated damages to Blue against Blue's obligation to pay Red US$3 million.

EVENT CASE

IV. Blue breached its obligation to ensure that Bolt, Williams and Hosszu's participation in the Nego-Abu Cup

Red submits that Blue breached its agreement to organize the Nego-Abu Cup [Ex 9] ('the Agreement') by not providing athletes in 'good condition' [Ex 9, Art 3(2)] because:

A. Blue could not provide adequate assurance that Bolt would participate in the Nego-Abu

Cup. Even if Blue had provided such adequate assurance, Bolt was not in 'good condition' to compete;

B. Blue failed to ensure that Williams participated in the Nego-Abu Cup; and

C. Blue failed to ensure that Hosszu participated in the Nego-Abu Cup.

A. Blue could not provide adequate assurance that Bolt would participate in the Nego-Abu Cup. Even if Blue had provided such adequate assurance, Bolt was not in 'good condition' to compete

28. On April 16 2018, Bolt received a four-year suspension from the Anti-Doping Organization of Arbitria [para. 40]. Red had a reasonable belief that Blue could not fulfill its contractual obligation to supply Bolt's performance. Red was entitled to treat this as anticipatory non-performance and refuse Bolt's participation in the Nego-Abu Cup [PICC Art 7.3.4].
    28.1. When Bolt's eligibility to compete became uncertain, Red was entitled to adequate assurance of Bolt's participation [PICC Art 7.3.4].
    28.2. Blue could not guarantee that the Sports Arbitration Tribunal of Arbitria ('the Tribunal') would make a decision before the Nego-Abu Cup. Appeals to sports law tribunals often take longer than ten weeks [*Pechstein v International Skating Union (ISU)*, CAS Case No. 2009/A/1912, 25.11.2009; *Tyler Hamilton v United States Anti-Doping Agency (USADA) & Union Cycliste Internationale (UCI)*, CAS Case No. 2005/A/884, 10.02.2006.]
    28.3. Even if the Tribunal made a decision in time, there was no guarantee that the Tribunal would reduce Bolt's ban. Blue's declaration that the Tribunal would reduce Bolt's ban was not sufficient reassurance, because the Tribunal's decision was outside Blue's control [Vogenauer, 950, 952].
29. Red was also entitled to refuse Bolt's participation in the Nego-Abu Cup as Bolt was not in 'good condition' [Ex 9, Art 3(2)].
    29.1. The parties understood 'good condition' to mean good physical condition unaffected by banned substances at the time of competition. Bolt's performance at the Nego-Abu Cup may have been affected by the substances.
    29.2. Bolt's doping violations would have undermined his 'good condition' by compromising the fairness and legitimacy of the Nego-Abu Cup. The express purposes of the Nego-Abu Cup were to celebrate diplomatic relations between Negoland and Arbitria and to celebrate the opening of Blue Village and Red Stadium [para. 36; Ex 9]. For the parties to achieve the Agreement's purpose they must maintain the perceived legitimacy of the Nego-Abu Cup.

B. Blue failed to ensure that Williams participated in the Nego-Abu Cup

30. Blue was obligated to ensure Williams participated in the Nego-Abu Cup [Ex 9, Art 2(8)]. Instead, Williams ran a fee-based tennis clinic at the same time as the Nego-Abu Cup which was endorsed and permitted by Blue [para. 43].
31. Blue's failure to produce Williams is not excused by the weather forecast because:

31.1. Blue was aware of the possibility of high temperatures when the Agreement was concluded. Blue had access to previous weather reports that showed a risk of extreme weather patterns in Negoland [Ex 1, paras. 3, 9]. Blue knew the Nego-Town Tennis Centre was outdoors and that Williams would play outside [Ex 9, Art 2(4); para. 42]; and

31.2. it was unreasonable for Blue to excuse Williams from participating in the Nego-Abu Cup over two weeks prior to the event, based only on a weather forecast. Forecasts are unreliable; at the time, there was only a 50% chance that temperatures would be above 40 degrees and did not reach 40 degrees on the day of her scheduled match [paras. 42-43].

32. Red was obligated to cooperate with Blue [Ex 9, Art 1(4); PICC Arts 1.7; 5.1.3]. This required Red to consider Williams' request [*Parties Unknown*, Arbitral Award, 04.03.2004].

33. Red considered and validly refused her request because:
    a) it was uncertain whether temperatures would exceed 40 degrees [para. 42];
    b) it would increase operational costs [para. 39];
    c) it would cause Red to run the event at a US$150,000 loss [paras. 39, 42]; and
    d) it would damage Red's reputation as Red would need to cancel one third of sold tickets [para. 42].

C. Blue failed to ensure that Hosszu participated in the Nego-Abu Cup

34. The parties agreed that Hosszu would participate in the Nego-Abu Cup [Ex 10]. The letter to the Steering Committee validly modified the Agreement [Ex 10; PICC Art 3.1.2]. Blue was obligated to provide Hosszu for the Nego-Abu Cup [Ex 10]. Blue was required to purchase a first-class airplane ticket for Hosszu as a condition for Hosszu's appearance [Ex 10; para. 44]. Hosszu's non-appearance was caused by Blue's failure to buy this first-class ticket [para. 44].

35. Blue is not entitled to relief under Article 4(1) of the Agreement for *force majeure*. Article 4(1) displaces the PICC *force majeure* principles [PICC Art 1.5]. The parties agreed to notify of a *force majeure* incident in writing, without delay [Ex 9, Art 4(1)]. However, Blue failed to notify Red in writing of Hosszu's non-attendance [para. 44]. Blue also failed to organize a time for the parties to meet and discuss ways 'to cope with the situation' as required [para. 44].

36. In any event, Article 4(1) only provides relief to a party in situations that are 'beyond the reasonable control of a party'. Blue had control over its travel arrangements and subsequent actions. Blue would have avoided the volcano if Blue had purchased the correct ticket [para. 44].

V. Blue is required to fully compensate Red for its US$2.1 million loss

Red submits that:

A. Red's loss of US$2.1 million was the foreseeable, reasonably certain result of the non-

appearance of Bolt, Williams, and Hosszu;

B. Damages should not be reduced or apportioned because this loss was not caused by Red's actions, and Red took reasonable steps to mitigate its losses; and

C. Damages should not be reduced or apportioned because Blue indemnified Red against all losses linked to Blue breaching its obligations under the Agreement.

A. The loss of US$2.1 million was the foreseeable, reasonably certain result of the non-appearance of Bolt, Williams, and Hosszu

37. Red is entitled to full compensation for the harm suffered [PICC Art 7.4.2].
38. Red's loss of ticket sales revenue was reasonably foreseeable if Blue failed to provide Bolt, Williams, and Hosszu [PICC Art 7.4.4]. The loss was reasonably foreseeable because the marketing for the Nego-Abu Cup featured them as 'key participating athletes' [para. 41]. The athletes 'bolstered' ticket sales and refunds were reasonably foreseeable if the named athletes cancelled [para. 39].
39. Red's loss from ticket sales is certain at the date of the hearing. Red lost US$700,000: US$250,000 from track and field, US$250,000 from tennis, and US$200,000 from swimming [para. 46; [PICC 7.4.3].
40. It was reasonably foreseeable that Red would suffer US$1.4 million in lost sale of television broadcasting rights if Blue failed to provide Bolt, Williams, and Hosszu [PICC Art 7.4.4]. The parties agreed to allow TV networks to terminate their contracts if these athletes failed to participate [paras. 41, 43, 45].
41. Red's loss from broadcasting is certain at the date of the hearing. Red lost US$1.4 million: Red lost US$500,000 from track and field, US$500,000 from tennis, and US$400,000 from swimming. [para 46; PICC Art 7.4.3].

B. Damages should not be reduced or apportioned because Red did not cause the losses and Red took reasonable steps to mitigate harm

42. Red took reasonable steps to mitigate harm [PICC Art 7.4.8]. Red pursued and secured two young athletes to replace Bolt and Hosszu [para. 48].
43. Red did not cause or interfere with Blue's ability to provide Bolt [PICC 7.1.2]. Red was entitled to refuse Bolt's participation [PICC 7.1.4].
44. Red did not contribute to its tennis losses [PICC Art 7.4.7]. Moving the venue was not a 'reasonable step' to mitigate harm [PICC Art 7.4.8]. The forecast was uncertain as there was only a 50% chance of the temperature exceeding 40 degrees [para. 42]. Moving the venue would have caused Red a loss of US$150,000 [paras. 39, 42]. It would have caused Red to suffer reputational damage for ticket cancellations [para. 42]. In the event of a 40-degree day, Red could have rescheduled, postponed, or suspended the game to ensure Williams' safety [PICC Art 7.4.8].

C. Damages should not be reduced or apportioned because Blue indemnified Red against all losses linked to Blue breaching its obligations under the Agreement

45. Red relied on the valid and enforceable indemnity clause in Article 3(9) in claiming all losses it suffered from Blue breaching the Agreement [Ex 9]. The words 'indemnify and hold harmless' require the non-performing party to indemnify the aggrieved party, regardless of the remoteness of harm or if an event broke the causal link [Ex 9, Art 3(9)]. Red suffered US$2.1 million in damages in lost ticket sales and TV broadcasting rights. Blue must pay Red for those losses.

VI. Red is not obligated to share profits from Red's Internet Streaming Service with Blue

Red submits that:

A. The Agreement and preliminary negotiations show that the parties did not intend 'event telecasting' to include internet streaming;

B. Sharing internet streaming profits is inconsistent with the commercial decisions made by the parties; and

C. Even if the Agreement includes internet streaming profits, Red is not required to share Red profits.

A. The language of the Agreement and preliminary negotiations shows the parties did not intend 'event telecasting' to include internet streaming

46. The plain meaning of 'telecasting' is 'to transmit by television'. The parties did not adopt a different usage that changes this definition. Red's 'electric product expertise' [para. 13] and Blue's streaming expertise [Ex 3] shows that both understood technology and that 'telecasting' means 'to transmit by television' [PICC Art 4.1(1)].
47. The parties distinguished between the terms 'streaming' [Ex 9, Art 3(7)] and 'telecasting' [Ex 9, Art 3(8)]. The terms were not used interchangeably throughout the preliminary negotiations [para. 37(12)] and the Agreement [Ex 9]. They used 'streaming' in the context of '*distributed* … via … streaming programs' [Ex 9, Art 3(7)]. In contrast, they used 'telecasting' in the context of '*televise* … on … TV channels' [Ex 9, Art 3(7)]. This shows that both Blue and Red understood the difference between the two methods of broadcasting [PICC Art 4.4]. Given this distinct use, it would be unreasonable for 'telecasting' to be read to include internet streaming – this would deprive the term 'streaming' of meaning [PICC Art 4.6].
48. The parties only used the prefix 'tele' when referring to television broadcasting. The similarity between the term 'televise' and 'telecasting' highlights their intended meaning – that 'telecasting' only refers to television broadcasting.
49. In the alternative, a reasonable person in the position of the parties and their commercial experience would understand the term 'telecasting' as being different from, and excluding internet streaming [PICC Art 4.2(2)].

B. Sharing internet streaming profits is inconsistent with the commercial decisions made by the parties

50. The parties agreed to distribute the Nego-Abu Cup on Red's streaming service and Blue TV [Ex 9, Art 3(7)]. They were not obligated to share the profits from those platforms [Ex 9, Art 3(8)]. The parties intentionally omitted an obligation to share profits from either Red's streaming service or Blue TV. This decision was intentional: the parties both own and operate profitable internet streaming services [Ex 2, 3]. Further a reasonable person in the parties' position would have foreseen the potential to substantial profit from streaming.
51. Blue had an obligation to sell broadcasting rights for the Nego-Abu Cup to terrestrial TV networks [Ex 9, Art 3(7)]. The use of the phrase '*in addition*' during preliminary negotiations [para. 37(12)] shows that the parties understood that selling broadcasting rights was an obligation independent from distributing the Nego-Abu Cup on both Red's internet streaming service and Blue TV. This obligation to share profits appears directly after the phrase 'Blue will be in charge of the sales of broadcasting rights' [para. 37(12)]. Therefore, it was the parties' common intention that profit sharing would only attach to profits made from broadcasting the competition on terrestrial TV networks [Ex 9, Art 3(7); para. 37].
52. This interpretation is supported by the post contractual conduct of the parties [PICC Art 4.3(c)]. Blue has not shared the US$100,000 it made from Blue TV with Red [para. 48].
53. This division of profits makes commercial sense. Blue made a business decision to televise the Nego-Abu Cup on Blue TV rather than Blue's streaming service [Ex 9, Art 3(7)]. Blue could have profited from streaming the Nego-Abu Cup on its streaming service. They chose not to [para. 18; Ex 9, Art 3(7)]. It would be commercially unreasonable to allow Blue to share the profits from Red's internet streaming, which is a pay-per-view service and an income stream Blue chose not to pursue.

C. Even if the Agreement includes internet streaming profits, Red is not required to share its profits

54. Blue is not entitled to share Red's internet streaming profits because Blue has breached its obligation of good faith and fair dealing under the Agreement [Ex 9, Art 1(4); PICC Art 5.1.2(e)]. It is commercially unreasonable to interpret the Agreement to require parties to share profits where one party has not fulfilled its obligations. Such an interpretation would allow Blue to financially benefit from breaching the Agreement in situations where broadcasting is more profitable than ticket sales [para. 48].
55. Blue is also barred from claiming damages from Red because Blue did not act in good faith, and otherwise breached the Agreement [*Barranquilla (Colombia),* ICC International Court of Arbitration, 25.01.2002].