TWENTY-SECOND ANNUAL

INTERCOLLEGIATE NEGOTIATION COMPETITION

9-10 DECEMBER 2023

PRELIMINARY MEMORANDUM: ROUND A

(ARBITRATION)

TEAM AUSTRALIA (ENGLISH)

THE AUSTRALIAN NATIONAL UNIVERSITY

THE UNIVERSITY OF SYDNEY

THE UNIVERSITY OF TECHNOLOGY SYDNEY

ON BEHALF OF:
RED CORP.
(NEGOLAND)

AGAINST:
BLUE INC.
(ARBITRIA)

COUNSEL:

SUMMARY OF SUBMISSIONS

I. BLUE INC. ('BLUE') has an obligation to transfer half of the materials extracted and a complete copy of the data records obtained from Area β to RED CORP ('RED') under the *Agreement on Distribution of Lunar Materials and Data* ('the *Distribution Agreement*').

II. RED can withhold payment until BLUE fulfils this obligation, and when RED does pay, it is not obligated to pay the additional US$10 million discussed in the 7 May 2023 meeting.

III. The arbitral tribunal should grant RED's petition for interim measures.

IV. RED is not obligated to make the final payment of US$75 million under the *Satellite Launch Agreement* ('*Satellite Agreement*') until BLUE performs its obligations.

V. Pursuant to the *Satellite Agreement,* BLUE is obligated to pay US$150 million to RED which comprises a refund of US$75 million and US$75 million in liquidated damages,

VI. Mr. Bob Orange should be retained as an arbitrator.

CASE I: THE MOON CASE

I. BLUE is obligated to transfer half of the materials extracted and a complete copy of the data records obtained from Area β to RED.

1. The *Distribution Agreement* requires that the material collected shall be "divided equally" between RED and BLUE [Exhibit 6 cl 2.1] and that the parties shall have "equal rights to access" and "equal rights to sell" the material [Exhibit 6 cl 2.3]. The *Distribution Agreement* further provides that the data collected shall be "jointly owned" by RED and BLUE [Exhibit 6 cl 1.1], that the parties shall have "equal rights to access" the data [Exhibit 6 cl 1.2], and that "[n]either Party shall withhold any portion of the data… [unless] required by applicable law" [Exhibit 6 cl 2.3]. This requires that both parties obtain possession and ownership rights over half the material and data. Thus, in not providing half of the material to RED and withholding a copy of the data from RED [Facts ¶20–¶25; Exhibit 13-1] BLUE is in breach of its contractual obligations [art 7.1.1 *UNIDROIT Principles of International Commercial Contracts 2016* ('*UNIDROIT*')].

A. The *Space Resources Act of Negoland* ('*the Negoland Act*') did not make performance impossible or otherwise remove BLUE's obligations to deliver half the material.

2. The *Negoland Act* does not render impossible BLUE'S performance of its obligation to transfer half of the material under the *Distribution Agreement.* The *Negoland Act* itself does not render RED'S possession of space materials illegal, or prevent BLUE from transferring physical possession of the materials to RED. Therefore, the *Negoland Act* is not a force majeure event [art 7.1.7 *UNIDROIT*], and does not make performance of this obligation "impossible in law or in fact" [art 7.2.2 *UNIDROIT*].

3. The statement by the President of BLUE providing that the *Negoland Act* prevents RED from "owning or possessing" space materials [Exhibit 13-1] misinterprets its operation. The *Negoland Act* only purports to transfer ownership rights of space resources to the state [Exhibit 11 art 5], and places obligations on RED to transfer materials it possesses to the state or otherwise follow state instructions [Exhibit 11 art 5.2]. RED has made clear it is willing to become subject to the domestic obligations and regulatory consequences that result from asserting its right to possession of half the materials [Facts ¶22].

4. Whether or not it is impossible for RED to obtain ownership rights will need to be determined by negotiation between RED and the Negolandian government. Nevertheless, the transfer of possession rights remains possible, and is required to facilitate negotiations between RED and the Negolandian government. Thus, BLUE continues to be bound by its obligation to provide possession rights over half the material to RED.

B. The Tribunal should determine the materials be distributed in accordance with the *Distribution Agreement*.

5. The division of the material should be conducted as contemplated by the agreement between the parties. Clause 2.2 of the *Distribution Agreement* requires that the division be made "based on weight, volume, and/or value as determined by the Parties" [Exhibit 6]. Thus, in the event that the Tribunal accepts RED's above submissions, the Tribunal should uphold the parties' express intention and permit a negotiated division of the materials.

6. In the alternative and without prejudice to **[5]**, if the Tribunal itself determines the division of the materials it should do so in accordance with clause 2.2 of the *Distribution Agreement*, which requires that the division be made "based on weight, volume, and/or value as determined by the Parties" [Exhibit 6]. The *Memorandum of Understanding* [Exhibit 5 cls 2(i), 2(ii)], in specifying which materials each party is interested in, demonstrates a common intention [art 4.1 *UNIDROIT*] to divide the material according to its *subjective value* for either party.

7. For BLUE, the material has minimal value other than its financial return to a subsequent purchaser [Exhibit 13-1]. For RED, it holds intrinsic value for research and determination of the viability of future business endeavours [Facts ¶19; Exhibit 5]. The single 10 kg rock will best serve these purposes for RED and should therefore be distributed to RED. BLUE, which can expect the same sale value regardless of the materials it receives, should keep the remaining rocks and regolith. Such a division will also ensure both parties obtain an equal weight of 10 kg.

C. The *Arbitrian Order concerning handling of data pertaining to the Moon* ('*the Order*') did not remove BLUE's obligations to deliver RED a copy of the data.

i. *The Order* does not make performance impossible.

8. Under Arbitrian law, BLUE is permitted to distribute the data to RED upon submitting the required documents [Facts ¶20]. Thus, *the Order* does not render BLUE's distribution of the data "impossible in law" [art 7.2.2 *UNIDROIT*[or its non-distribution "required by applicable law" [Exhibit 6 cl 1.3]. BLUE has simply been required to take an additional administrative step—submitting the required document to the Government of Arbitria—in order to fulfil its obligations to distribute the data to RED.

ii. Submitting the required document does not give rise to hardship.

9. A party is only absolved of its contractual obligations for hardship where the requirements for performance become so onerous as to fundamentally alter the equilibrium of the contract [arts 6.2.1, 6.2.2 *UNIDROIT*]. For an increase in cost of performance to meet this threshold, it must be a "dramatic rise" in cost, or one that

makes performance "far more expensive" for one party [art 6.2.2 Official Commentary, *UNIDROIT*].

10. Here, *the Order* and the subsequent government requirement for BLUE to guarantee that RED will not use the data contrary to Arbitrian national security [Facts ¶20] does not fundamentally alter the equilibrium of the contract or so substantially increase the cost of BLUE'S performance.

11. While there is a risk of BLUE becoming liable for a fine of US$1 million, this is conditional on the Government of Arbitria deeming RED to have used the data contrary to national security. Even were this to eventuate, the fine would be insufficient to fundamentally alter the equilibrium of the contract. BLUE has valued a copy of the data at US$50 million [Facts ¶24], of which the US$1 million fine is only 2%, not including the further value BLUE has attained through the use of the data [Exhibit 6 cl 1.2]. Thus, the risk of a US$1 million fine does not absolve BLUE of its obligations under the *Distribution Agreement* [art 6.2.1 *UNIDROIT*].

iii. In the alternative and without prejudice to (ii), the Tribunal should alter the *Distribution Agreement* to restore equilibrium.

12. In the alternative and without prejudice to **[9]–[11]**, where the Tribunal does find hardship, it may, if reasonable, adapt the contract to restore its equilibrium [art 6.2.3(4) *UNIDROIT*]. When adapting a contract to restore equilibrium, the Tribunal should aim for a 'fair distribution' of costs between the parties [art 6.2.3 Official Commentary, *UNIDROIT*].

13. Here, the Tribunal should adapt the contract to restore equilibrium and maintain commercially efficacious contractual relations. The Tribunal may alter clause 1.2 of the *Distribution Agreement* to restrict RED from using the data contrary to Arbitria's national security, or indemnify BLUE against the government fine contingent on RED'S use of the data contrary to Arbitria's national security. This adaptation would fairly distribute the changed costs of performance between the parties and restore equilibrium whilst maintaining BLUE'S obligation to transfer the data.

II. RED can withhold payment, as payment is conditional upon the performance of BLUE transferring materials and data.

A. RED can withhold payment under the *Agreement for Cost Sharing for the Lunar Probe Project* ('*Cost Sharing Agreement*') until BLUE fulfils its obligations under the *Distribution Agreement*.

14. As established at **(I)**, BLUE has not performed its obligations under the *Distribution Agreement* by its continuing failure to deliver the material and data to which RED is entitled [art 7.1.1 *UNIDROIT*]. RED may withhold performance until BLUE tenders performance [art 7.1.3 *UNIDROIT*].

15. RED may withhold performance of its obligations under the *Cost Sharing Agreement* until BLUE tenders performance of its obligations under the *Distribution Agreement*. This is because the two agreements are necessarily interconnected, forming part of the same overall project agreement in furtherance of the missions laid out in the *Memorandum of Understanding* [Exhibit 5]. The two agreements respectively set out the burdens and

benefits borne by and afforded to the parties and their terms inform and give effect to each other. To separate one agreement as containing obligations independent of the other would perversely distort the commercial equilibrium of the agreement – to expect the parties to have contracted on the basis that they may incur a cost without receiving equivalent reward is commercially unreasonable. The parties contracted on a basis of balanced participation, investment and reward, and therefore disproportionate distribution of reward would be perverse to the agreement.

16. Furthermore, the reference to 'project activities' [Exhibit 7 cl 3.1] which precede the calculation of costs, is to be construed to include the transfer of materials and data to reflect the common intention of the parties [arts 4.1(1), 4.3 *UNIDROIT*]. For RED, the entire purpose of undertaking the project was to acquire the data and materials on the Moon. This would be apparent to BLUE after two years of preliminary negotiations prior to deciding to work jointly on resource extraction [art 4.3(a) *UNIDROIT*]. The preambles, identical in both agreements, likewise ground both within a broader contractual framework set out by the *Memorandum of Understanding*. Furthermore, the terms of the *Cost Sharing Agreement* are premised on and informed by the substantive obligations set out in the *Distribution Agreement* and must therefore be interpreted in light of it [art 4.4 *UNIDROIT*]. All these factors indicate that the parties' common intention was for settlement of funds to be conditional upon the transfer of materials and data.

17. Thus BLUE's non-performance under the *Distribution Agreement* entitles RED to withhold performance under the *Cost Sharing Agreement* until BLUE performs [art 7.1.3 *UNIDROIT*].

B. Following from (A) and in the alternative to (I), RED may terminate the contract without payment.

18. Thus, in the alternative and without prejudice to **(I)**, even if BLUE has been released of its obligations to deliver the material and a copy of the data as a result of the *Negoland Act* and *the Order,* RED may nevertheless terminate the *Cost Sharing Agreement* without providing payment.

19. Though establishing force majeure, impossibility in law may remove a party's obligations to perform, the remaining party retains the right to terminate the contract [arts 7.2.2(3)(a), 7.1.7(2) Official Commentary *UNIDROIT*]. Since the agreements should be read in tandem, even where BLUE has been removed of its obligation, RED may nevertheless terminate the *Cost Sharing Agreement* without providing payment.

C. RED is not liable to pay the additional US$10 million discussed in the May 7th meeting.

20. The *Cost Sharing Agreement* explicitly provides that it may only be amended by written agreement between the parties [Exhibit 7 cl 4.1]. A contract can only be modified in accordance with its terms or as otherwise provided in the principles [art 1.3 *UNIDROIT*]. All contractual terms should be given effect [art 4.5 *UNIDROIT*], and out of respect for the parties' clear intention on contracting, "no oral modification" are binding [*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24]. Clause 4.1 thus prevents any remarks during oral discussion on May 7th from amending the monetary provisions of the *Cost Sharing Agreement.*

21. In the alternative and without prejudice to **[20]**, the oral discussion was anyway inconclusive and insufficiently determinative to effect contractual amendment [art 4.1(1) *UNIDROIT*]. The RED Project Manager's statement "we could probably adjust the cost" is properly construed only as acknowledging the possibility of further negotiation, not as a present offer of new terms [art 4.1.2 *UNIDROIT*]. As such it is insufficiently definite to constitute an effective offer of new terms [art 2.1.2 *UNIDROIT*].

III. The Tribunal should grant RED's petition for interim measures.

22. The Tribunal may grant an interim injunction prohibiting BLUE from selling any of the data or the material extracted from Area β [arts 26(2)(a)–(d) *UNCITRAL Arbitration Rules 2021* (*'UNCITRAL'*)] where the Tribunal is satisfied that RED will suffer harm from the failure to grant an injunction, that such harm is not adequately reparable by an award of damages, and that such harm substantially outweighs the harm to BLUE should the injunction be granted [art 26(3)(a) *UNCITRAL*]. These elements are satisfied for both **(A)** the data and **(B)** the material.

23. As demonstrated by submissions **(I) – (II)**, RED also has reasonable prospects of success in this arbitration [art 26(3)(b) *UNCITRAL*].

A. The Tribunal should issue an interim injunction prohibiting BLUE from selling the material to BLACK and The Government of Arbitria.

24. To prevent imminent harm to RED [art 26(2)(b) *UNCITRAL*] and maintain the enforceability of an arbitral award [art 26(2)(c) *UNCITRAL*], BLUE's sale of materials to BLACK and The Government of Arbitria must be injuncted.

25. As explained at **[5]**, RED is entitled under clause 2.2 of the *Distribution Agreement* to jointly negotiate with BLUE regarding the division of materials, "based on weight, volume, and/or value". In contracting prior to negotiations, BLUE unilaterally determined the division of materials, to the detriment of RED. If upheld, there is a real risk that these sale contracts will lead to imminent harm to RED [Facts ¶24], as the dissipation of assets prevents the transfer of the materials to RED [arts 26(2)(b)–(c) *UNCITRAL*].

26. Without an injunction, RED would suffer harm not adequately repairable by an award of damages [art 26(3)(a) *UNCITRAL*]. Without access to the materials, RED is unable to conduct desired research and recommence its scientific exploration into semiconductors, its main business operation [Facts ¶19; Exhibit 5 cl (2)(i)]. Because an award of damages would not provide a substitute for RED'S uniquely obtained rocks, nor would it provide the means to research the collected rocks, the essence of RED'S business would be lost were the injunction not granted.

27. RED would suffer substantially more harm if an injunction were not granted than BLUE would suffer were the injunction granted [art 26(3)(a) *UNCITRAL*]. Despite BLUE'S expression of concern that government support may be withdrawn, following the termination of the injunction, BLUE would maintain the right to sell its materials to the Government of Arbitria [Facts ¶24]. In contrast, without an injunction, RED would be deprived of the essential benefit for which it entered into the *Distribution Agreement* [Exhibit 6 cl 2.2]. Further, if BLUE were permitted to sell the material to BLACK, RED would be placed at a market disadvantage as BLACK is a competitor in the area of semiconductors [Facts ¶24].

B. The Tribunal should issue an interim injunction prohibiting BLUE from selling the data.

28. Though each party has equal rights to distribute and benefit from the data [Exhibit 6 cl 1.2], selling the data before RED has obtained a copy undermines the competitive advantage RED is entitled to expect as one of the first two actors to sell or otherwise exploit the data commercially. There are finite resources, so early access to the data is commercially relevant to conducting uncontested mining operations. The unquantifiable loss of this value distorts the contract's status quo [art 26(2)(a) *UNCITRAL*] and cannot be adequately remedied by an award of damages [art 26(3)(a) *UNCITRAL*].

29. If the injunction were granted, BLUE would still retain its right to use the data upon the resolution of the arbitration and so BLUE would not suffer any comparable harm [art 26(3)(a) *UNCITRAL*].

30. In the alternative and without prejudice, to **[28]–[29]**, an injunction should be granted to prevent BLUE transferring any data to the Government of Arbitria. Under article XI of the *Outer Space Treaty*, the Arbitrian government has an obligation to inform the public and scientific community "to the greatest extent feasible and practicable, of the nature, conduct, locations and results…" of activities conducted in outer space. Upon receipt of data, the government of Arbitria may be compelled under international law to publicly distribute some elements of the data. If this data enters the public domain, RED'S ability to benefit from the data commercially will be undermined.

CASE II: THE SATELLITE CASE

IV. Pursuant to the *Satellite Agreement*, RED is not obligated to make the final payment of US$75 million to BLUE.

A. RED can withhold payment under the *Satellite Agreement* until BLUE performs its obligation.

31. Under article 3.1 of the *Satellite Agreement*, RED's obligation to pay BLUE US$75 million is "due upon successful orbital insertion" of Red Star. The proper interpretation of this phrase in the context of the whole *Satellite Agreement* [art 4.4 *UNIDROIT*] is to impose on BLUE a "duty to achieve a specific result" [art 5.1.4(1) *UNIDROIT*], namely the delivery of Red Star to the target geostationary orbit [Exhibit 14 art 1.1] for its intended use by RED as a communications satellite [Facts ¶26].

32. In order for Red Star to function as intended, it must be launched to a specific location in geostationary orbit. The deliberate use of the term "successful", and omission of terms synonymous with "attempt" and "efforts", in the expression of BLUE's obligation in article 3.1, demonstrates that the obligation requires a specific result [art 5.1.5(a) *UNIDROIT*]. Other contract terms in which BLUE "commits to" and "guarantees it will deliver the Red Star to the specific Geostationary Transfer Orbit" [Exhibit 14 art 8.2 *Performance Guarantee* cl 1, 2], further support this interpretation of BLUE'S duty as one to achieve the specific result of launching to the specified location in geostationary orbit [art 5.1.5(b) *UNIDROIT*].

33. As the launch service provider, BLUE has sole responsibility for, and control over, the conduct of launch operations, such that RED has no influence over BLUE's performance

[art 5.1.5(d) *UNIDROIT*]. BLUE's 95% success rate of launching telecommunication satellites indicates that the probability of non-achievement is low, which supports the conclusion that the duty is to achieve a specific result [art 5.1.5(c) *UNIDROIT*]. The significance of RED's US$150 million investment supports the conclusion that the duty is to achieve the specific result of delivering Red Star into the specific geostationary orbit, and not merely attempting to do so [art 5.1.5(b) *UNIDROIT*].

34. BLUE's failure to achieve insertion of Red Star into the target orbit [Facts ¶29] constitutes non-performance of BLUE's duty under article 3.1 of the *Satellite Agreement* [art 7.1.1 *UNIDROIT*]. As RED's payment is fixed to occur upon BLUE's satisfaction of its specific obligation [art 6.1.1(a) *UNIDROIT*], RED "may withhold its performance until [BLUE] has performed" [art 7.1.3(1) *UNIDROIT*].

B. In the alternative, BLUE failed in its duty to use best efforts towards ensuring the Satellite was successfully inserted into orbit.

35. In the alternative and without prejudice to submission **(A)**, if the duty imposed on BLUE by article 3.1 of the *Satellite Agreement* is not to ensure a specific result but rather a duty of best efforts [art 5.1.4(2) *UNIDROIT*], BLUE is nevertheless in breach, as it failed to exercise the level of care reasonably expected in the circumstances. Satellites are high-value assets and achieve their purpose only if they are delivered to a specific location. As such, a high standard of care is expected of companies undertaking satellite launches.

36. A reasonable company would have done more to ensure that Red Star was launched during conditions conducive to its successful orbital insertion. A company with BLUE's expertise in satellite launching would be aware that increased solar activity and the possibility of a geomagnetic storm significantly increased the risk to which Red Star would be exposed during launch [Facts ¶29]. BLUE was aware that should a storm escalate to a G4 magnitude, it would not have "available technology to protect the launch vehicle" [Exhibit 15]. Consequently, BLUE'S failure to make enquiries into the likelihood of a geomagnetic storm significantly departs from the standard of care reasonably expected of a company contracted to perform a satellite launch. BLUE is therefore in breach of its duty and RED may withhold payment [art 7.1.3(1) *UNIDROIT*].

C. BLUE's non-performance is not excused by force majeure and RED may continue to withhold payment of the US$75 million.

37. The *Satellite Agreement* force majeure clause [Exhibit 14 art 6] prevails over the general *UNIDROIT* force majeure provision [art 7.1.7 *UNIDROIT*] and regulates the extent to which intervening events constitute force majeure. The geomagnetic storm which occurred on 13 January 2023 [Facts ¶29] did not constitute force majeure under article 6 of the *Satellite Agreement*. As such, BLUE is not excused from liability for the non-performance of its launch obligations. In order to establish that the geomagnetic storm of G4 magnitude was a force majeure event, BLUE would have to demonstrate that the storm constituted an "unforeseeable circumstance preventing fulfilment of the contract" and an "event beyond [BLUE'S] reasonable control" [Exhibit 14 art 6.1].

38. The G4 geomagnetic storm is not an "unforeseeable circumstance", as geomagnetic storms were clearly within the contemplation of the contract and the parties at the time of contracting. The *Satellite Agreement* implicitly allocates the risk of adverse atmospheric

conditions to BLUE through BLUE'S contractual guarantee under article 8.2 of the *Satellite Agreement* and the *Performance Guarantee*. Further, BLUE'S specific experience in successfully launching satellites into space [Facts ¶7], demonstrates BLUE'S awareness at the time of contracting of the risks of a geomagnetic storm occurring and affecting launch operations.

39. Further, it was within BLUE'S reasonable control to avoid the storm which prevented BLUE'S fulfilment of its obligation to launch Red Star into the target orbital parameters by launching on another day when no possible geomagnetic storm was forecast. Given that the launch window had not yet closed [Exhibit 14 art 2.1], the storm's interference with the launch could have been avoided and was therefore not "beyond [BLUE'S] reasonable control". BLUE'S non-performance is not excused by force majeure, and as such, RED is not obligated to make the final payment under article 3.1 of the *Satellite Agreement*.

V. Pursuant to the *Satellite Agreement*, BLUE is obligated to pay US$170 million to RED.

A. Under the *Performance Guarantee,* RED has the right to recover liquidated damages in the amount of US$75 million.

40. Clause 3(b)(iii) of the *Performance Guarantee* sets out that "liquidated damages equivalent to 100% of the Launch Service Fee" are payable if there is a total loss of Red Star. The total loss of the Red Star [Facts ¶29] is not excused by an exception in the *Performance Guarantee* and therefore RED retains the right to recover liquidated damages under this clause. As RED has paid US$75 million of the Launch Service Fee to date [Facts ¶27], this is the current payable amount of liquidated damages under clause 3(b)(iv) of the *Performance Guarantee*.

i. The Satellite malfunction or anomaly exception in clause 4(a) of the *Performance Guarantee* is inapplicable.

41. The vanishing of the Blue Super Rocket No. 5 ("Launch Vehicle"), along with Red Star, does not constitute a Satellite malfunction or anomaly within the meaning of clause 4(a) of the *Performance Guarantee*. Clause 4(a) of the *Performance Guarantee* should be construed as exempting BLUE from liability only for anomalies in the Satellite arising out of a failure by RED in constructing Red Star. It would be inconsistent with the nature and purpose of the *Satellite Agreement,* and commercially unsound, if BLUE were exempted due to anomalies associated with its own Launch Vehicle [art 4.3(d) *UNIDROIT*].

42. The anomaly was not an anomaly in the Red Star. The anomaly was initially detected in BLUE'S Launch Vehicle guidance system and was concluded to be an anomaly in the Launch Vehicle's sensor [Facts ¶29]. As an anomaly in the Launch Vehicle's sensor does not fall within the scope of clause 4(a) of the *Performance Guarantee* BLUE may not rely on this exception.

ii. The Act of God exception in clause 4(b) of the *Performance Guarantee* is inapplicable.

43. The geomagnetic storm of G4 magnitude cannot be characterised as an "Act of God" and therefore BLUE may not rely on the exception in clause 4(b) of the *Performance Guarantee*. An "Act of God" is conventionally understood as "[a]n event due to natural causes … so exceptionally severe that no-one could reasonably be expected to anticipate or guard against it" [Oxford Dictionary of Law, 2018].

44. Although a geomagnetic storm of G4 magnitude is a severe event, BLUE'S decision to launch on 13 January 2023, despite the warnings of increased solar activity and reliable predictions of a possible geomagnetic storm, meant that it failed to take steps within its reasonable control to "anticipate or guard against [the storm]". As explained at **[39]**, it was within BLUE'S reasonable control to launch on a later date within the stipulated launch window.

B. BLUE cannot invoke article 4.3 of the *Satellite Agreement* to claim that RED has waived its claim, as BLUE was grossly negligent in conducting the launch services.

45. The Cross-Waiver Clause in article 4.3 of the *Satellite Agreement* excludes BLUE'S liability "arising out of the launch services" except where BLUE is grossly negligent. The term "gross negligence" must be given the meaning that a reasonable person in RED and BLUE'S position would give it at the time of contracting [art 4.1(2) *UNIDROIT*]. This should be interpreted in light of the conventional understanding that gross negligence is "more fundamental than a failure to exercise proper skill and care constituting negligence", and typically demonstrated where a party's actions are "undertaken with actual awareness of obvious risks involved, and with serious disregard to these risks." [*Hellespont Ardent (Red Sea Tankers Ltd v Papachristidis) [1997] 2 Lloyd's Rep 547* [18]–[19]].

46. BLUE'S (i) staff drinking to excess causing the launch failure on 10 January 2023 [Facts ¶28]; (ii) subsequent decision to launch on 13 January 2023 with knowledge of a possible geomagnetic storm [Facts ¶29]; and (iii) failure to thoroughly investigate and repair anomalies in the rocket [Facts ¶29] together reflect BLUE'S serious disregard of obvious risks of which it was aware, constituting BLUE'S gross negligence, such that RED is entitled to claim for damages.

i. BLUE was grossly negligent in failing to launch on 10 January 2023.

47. Article 2.1 of the *Satellite Agreement* sets out the "period of time" within which BLUE was required to perform its launch obligations [art 6.1.1(b) *UNIDROIT*], specifically between 15 December 2022 and 31 January 2023. Within this "launch window" [Exhibit 14 art 2.1] BLUE was obligated to launch the Satellite at a time when "performance could be rendered" [art 6.1.2 *UNIDROIT*].

48. It was decided that BLUE would perform the launch on 10 January 2023, a "beautiful day" on which no geomagnetic storm was predicted [Facts ¶27–¶28]. These circumstances were conducive to a successful launch. However, BLUE failed to perform its obligation at a time when circumstances indicated performance could be rendered because its personnel "had been drinking excessively the day before" [Facts ¶28].

49. BLUE was aware that staff drinking to the point of professional incapacitation was a recurring issue within BLUE which had repeatedly caused launch delays in 2022 [Facts ¶29]. BLUE responded to this serious issue only with "warnings" rather than "concrete measures" to prevent this behaviour [Facts ¶29], thus allowing the problem to continue and impact the Red Star launch. Noting the limited launch window of 48 days [Exhibit 14 art 2.1] and RED'S significant US$150 million investment in the launch of Red Star [Exhibit 14 art 3], failing to ensure that its staff were capable of launching on 10 January 2023 demonstrates BLUE'S serious disregard for the risk this posed to the successful launch of Red Star. Consequently, BLUE significantly increased the risk of exposing the Red Star launch to adverse weather conditions by reducing the launch window to less than 21 days.

50. The statement RED made to BLUE "that can't be helped" [Facts ¶28] must be given the meaning a reasonable person in BLUE'S position would give it in the circumstances [art 4.2(2) *UNIDROIT*]. This statement cannot be reasonably ascribed a meaning other than a conversational professional nicety calculated to maintain a positive working relationship [art 5.1.3 *UNIDROIT*]. It would be unreasonable to construe this as a concession that BLUE is not responsible for the conduct of its employees.

ii. BLUE was grossly negligent in launching on 13 January 2023 during a predicted geomagnetic storm.

51. Following BLUE'S failure to launch on 10 January 2023, BLUE decided to launch Red Star on 13 January 2023 during a predicted possible geomagnetic storm, which further constitutes grossly negligent conduct as it had "actual awareness of [the] obvious risks".

52. BLUE was aware that "reliable space forecasts" indicated a risk of increased solar activity and the possibility of a geomagnetic storm on 13 January 2023 [Exhibit 16]. As discussed at **[36]**, BLUE failed to make further inquiries into the precise probability of adverse weather. Further, it was within BLUE'S reasonable control to reschedule the launch to a later day within the stipulated launch window, as explained at **[39]** [Exhibit 14 art 2.1]. Choosing to proceed to launch Red Star, with full knowledge of the substantial increased risk to which Red Star may be exposed, indicates BLUE'S serious disregard for the obvious risk.

iii. BLUE was grossly negligent in failing thoroughly to investigate and repair anomalies before launching on 13 January 2023.

53. BLUE failed thoroughly to investigate and repair anomalies in the Launch Vehicle before launching [Exhibit 16], which, in the context of the launch conditions, contributes to BLUE'S grossly negligent conduct.

54. BLUE'S inadequate investigation of the Launch Vehicle's guidance system and repairs of the Launch Vehicle's sensors resulted in the Launch Vehicle anomaly remaining unrepaired [Facts ¶29]. The consequence of conducting a Launch Vehicle inspection with only one person [Facts ¶29] was the inaccurate conclusion that the Launch Vehicle anomaly had been repaired [Exhibit 15]. This approach, particularly when launching during a heightened risk of launch failure due to atmospheric conditions **[51]–[52]**, amounts to gross negligence by BLUE as it reflects a serious disregard for the impact Launch Vehicle abnormalities, an obvious risk, may have on a successful satellite launch.

C. Under article 5.1 of the *Satellite Agreement,* RED has the right to a refund of the portion of the Launch Service Fee already paid.

55. RED is entitled to a "refund of 50% of the total contract amount" following a launch failure attributable to BLUE [Exhibit 14 art 5]. A refund of 50% of the total contract amount equates to US$75 million [Exhibit 14 art 3.1]. Therefore, BLUE must provide RED a US$75 million refund.

56. The words "launch failure" should be interpreted in "the light of the whole contract" [art 4.4 *UNIDROIT*], the overriding objective of which is the launch of Red Star into a specific geostationary orbit [Exhibit 14 art 1.1]. Restrictive interpretation of "launch failure" would be contrary to this overriding intention and at odds with the commitments made by BLUE in the *Performance Guarantee.* Accordingly, the incident on 13 January 2023 [Facts ¶29] constituted a launch failure attributable to BLUE, entitling RED to a refund of US$75 million.

D. Further, pursuant to article 5.2 of the *Satellite Agreement,* BLUE is liable to a penalty of US$20 million.

57. The launch failure on 13 January 2023 constitutes breach of the *Satellite Agreement* such that BLUE is obligated to pay a penalty of US$20 million [Exhibit 14 art 5.2]. The penalty clause in article 5.2 was expressly distinguished from the liability cap pertaining to damages in article 4.2 of the *Satellite Agreement* and clause 3(b)(iv) of the *Performance Guarantee* [art 4.1(1) *UNIDROIT*]. Therefore, the penalty does not fall within the scope of the liability cap.

VI. Mr. Bob Orange should be retained as an arbitrator.

58. Arbitrators are required to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality [art 11 *UNCITRAL*]. Further, arbitrators are open to challenge if any circumstances exist that give rise to justifiable doubts as to their impartiality [art 12(1) *UNCITRAL*]. The threshold for "justifiable doubts" is high, namely where a "reasonable and informed third party would [believe] that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case" [art 2(c) *IBA Guidelines on Conflicts of Interest in International Arbitration 2021* ('*IBA Guidelines*')].

59. The mere expression of a legal opinion on an issue arising in arbitration is insufficient to cast justifiable doubt on an arbitrator's impartiality [art 4.1.1 Green List *IBA Guidelines*]. On 25 September 2023 Mr. Orange made a general comment expressing a legal opinion in the abstract in the context of a hypothetical factual scenario materially different from the one at hand [Facts ¶33]. Mr. Orange made no statements which reflect a particular view of the parties and specific issues involved in these proceedings. Having regard to the general and hypothetical nature of his comment, no reasonable third party would conclude that Mr. Orange's comments demonstrated the influence of a factor beyond the merits of the case.

60. As legal professionals do, Mr. Orange made an academic observation on the content of the law, suggesting that the bar to proving force majeure in the context of knowledge of a likely geomagnetic storm is high [Facts ¶33]. This observation was neither definitive nor unequivocal. Further, this comment does not indicate prejudgment of BLUE's conduct

and the strength of its argument, nor does it shed light on Mr. Orange's own state of mind regarding BLUE's capacity to meet the hypothetical threshold.

61. Moreover, Mr. Orange's comment pertains specifically to force majeure in the context of knowledge of a likely geomagnetic storm. By contrast, the forecasts at hand predict the possibility of a G1 geomagnetic storm, not its likelihood [Facts ¶29; Exhibit 15; Exhibit 16]. Mr. Orange's comment implicitly acknowledges that the probability of risks involved may influence determination of force majeure, and deals with a hypothetical situation materially different from the relevant facts of these proceedings. As such, there are no circumstances likely to give rise to justifiable doubts as to Mr. Orange's impartiality, and Mr. Orange should be retained as an arbitrator.

62. Requests to remove an arbitrator may be made for tactical reasons. The evidence suggests that BLUE has formed the view that, owing to Mr. Orange's critical legal mind and expertise in the space industry, he will assess the merits of the case and may rule against BLUE on the law. This does not constitute legitimate grounds for removal.

ORDERS SOUGHT

Counsel for RED respectfully request of the Tribunal that:

I. An arbitral award be granted in the MOON CASE to the effect that BLUE must provide RED with half the materials, with the division to be determined through negotiation between the parties, or, in the alternative, with the 10 kg rock being provided to RED.

II. An arbitral award be granted in the MOON CASE to the effect that BLUE must submit the required document to the Arbitrian Government, and subsequently provide RED with a copy of the data.

III. BLUE'S request for an arbitral award requiring RED to pay US$110 million be rejected.

IV. An interim injunction preventing BLUE from selling the material and data to BLACK and the Government of Arbitria be issued.

V. BLUE'S request for an arbitral award requiring RED to pay US$75 million be rejected in the SATELLITE CASE.

VI. An arbitral award be granted in the SATELLITE CASE to the effect that BLUE is liable and must pay RED in the amount of US$170 million, which comprises US$75 million in liquidated damages, a refund of US$75 million and a penalty of US$20 million.

VII. BLUE'S petition to remove Mr. Bob Orange as an arbitrator be rejected.

CERTIFICATE OF VERIFICATION

We hereby confirm that only members of Team Australia whose names are listed below have written this memorandum.

Respectfully signed and submitted by Counsel on the twenty-seventh day of November 2023.