RARE METALS CASE

I. Red shall pay Blue US$5 million.

1. Red breached the Agreement of Priority Supply of Rare Metals (Exhibit 6, "Rare Metals Agreement" concluded on August 1, 2000), and Red is liable to pay Blue damages for the loss of profit of US$5 million (*PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACT* 7.4.1&7.4.2).

A. The "rare metals, such as Nickel and Titanium" includes Tungsten.

2. According to Rare Metals Agreement, Red shall provide Blue the rare metals, such as Nickel and Titanium, which are produced by Red or its affiliate in precedence to other prospective purchasers in other countries than Negoland.

3. To determine the common intention of parties, all circumstances including circumstances listed in Article 4.3 of PICC should be taken into account. Considering the circumstances, the terms of the contract (PICC 4.3 (a)) and the conduct of the parties subsequent to the conclusion of the contract (PICC 4.3(c)), the object for Red's performance shall include tungsten.

   a. **The terms of Rare Metals Agreement**

      According to Rare Metals Agreement, the object for Red's performance is "the rare metals, such as Nickel and Titanium, which are produced by Red or its affiliate". According to the ordinary meaning of "such as", "Nickel and Titanium" are the mere examples of rare metals. Thus, "the rare metals" shall include tungsten. And Negoland Tungsten Corp., which produces tungsten, is Red's wholly owned subsidiary (para.21).

      Accordingly, the object for Red's performance shall include tungsten.

   b. **The conduct of the parties subsequent to the conclusion of the contract (PICC Article 4.3(c))**

      In the meeting in February 2014, when Red proposed the priority supply of tungsten, Blue said "You already promised us the priority-of-supply arrangement in the memorandum we signed in the past", and confirmed that the scope of priority supply included tungsten. In response to the remark, Red did not show any intention to deny the remark of Blue (para.19). And from September to October in 2015, Red supplied tungsten to Blue according to the order of Blue (Ex.9), while corporate orders began to pour in from many foreign countries (para.21). Furthermore, when Black proposed to Red for purchasing tungsten to pay 30 percent more than Blue, Red said, "I understand that our company has promised Blue Inc. to priorities Blue in our exports of rare metals" (para.22). These imply that Red and Blue had intention tungsten

was included in the object of priority supply.

Therefore, the object for Red's performance on Rare Metals Agreement shall include tungsten.

4. Red may argue that the object for Red's performance on Rare Metals Agreement is limited to Nickel and Titanium. However, the object shall not be limited to Nickel and Titanium, on account of preliminary negotiations between the parties and the conduct of the parties subsequent to the conclusion between themselves.

   a. **The preliminary negotiations between the parties (PICC Article 4.3(a))**

      In the meeting held in July 2000, Blue and Red remarked the object of their transaction as rare metals (para.12). After that, in the E-mail communication, Blue wrote the object of the priority supply as "rare metals" in July 7 in 2000. However, Red revised the term of the draft for Rare Metals Agreement from "rare metals" to "rare metals (Nickel and Titanium)" in July 19 in 2000 (Ex.5). Against the revision by Red, Blue revised the terms of the draft from "(Nickel and Titanium)" to "such as Nickel and Titanium", because the use of parentheses in the draft rendered the main points of the agreement unclear. And Red signed it without any objection (Ex.6, para.13).

      From the above, there is no common intention between Red and Blue that the rare metals, the object of the priority supply, shall be limited to Nickel and Titanium.

   b. **The conduct of the parties subsequent to the conclusion of the contract (PICC Article 4.3(c))**

      In 2003, Red had Negoland Materials merged into Negoland Metals. This merger prompted Red and Blue to embark on platinum-related transactions (para.14). Red filled all orders placed by Blue after 2000 without fail and without any special conditions attached, although in and around 2004, the demand for rare metals rose sharply around the world, triggering a rare metals squeeze and some overseas buyers have approached Red saying that they will pay anything as long as they can get hold of the supply (para.15). These facts indicate that the objection of the priority supply includes not only Nickel and Titanium but also platinum. Therefore, the object of the priority supply is not limited to Nickel and Titanium.

B. Red has breached Rare Metals Agreement.

5. According to Rare Metals Agreement, Red gives Blue Corporation the right to order and purchase rare metals in precedence to "other prospective purchasers in countries other than Negoland." The term "other prospective purchasers of countries other than Negoland" should be interpreted as not only purchasers who reside outside Negoland, but also purchasers in Negoland to export rare

metals outside Negoland, on account of preliminary negotiations between the parties and the conduct of the parties subsequent to the conclusion between themselves.

a. **preliminary negotiations between the parties**

In the meeting in July 2000, Red said “We can’t touch the rare metals earmarked for sales within Negoland”, and Blue said “Let’s agree on US$70 million on condition that your company will give priority to the supply to us except what you need for domestic sales” (para.12). This implies that rare metals which Red may reserve in Negoland are necessary for the protection of the domestic industries, but do not include that would be exported to other countries.

b. **the conduct of the parties subsequent to the conclusion between themselves**

The purpose of the agreement is Red gives Blue the interest of rare metals which would be exported to other countries than Negoland. If rare metals are exported to other countries through companies in Negoland, the purpose would be defeated.

6. Therefore, the term “other prospective purchasers of countries other than Negoland" is understood as purchasers who would buy rare metals except those which is necessary in Negoland, and should be interpreted as not only purchasers who reside outside Negoland, but also purchasers in Negoland not to consume rare metals in Negoland but to export them.

7. From November 2015 to March 2016, Red had increased the supply amount of tungsten to Negland domestic companies from 20 tons to 40 tons (Exhibit 9). 20 tons of tungsten had been supplied to Black Negoland, a corporation that Black in Meditria has established to get supply of tungsten from Red. Because of the circumstances of the establishment of Black Negoland, Black Negoland had the purpose to export tungsten to other countries than Negoland. Black Negoland exported overseas all amount of the tungsten bullions it purchases. Black Negoland is formally a company in Negoland, however should be regarded as a prospective purchaser of countries other than Negoland.

8. In any event, it is clear that Black Negoland was incorporated on the purpose to deviatethe Priority Supply Agreement. During the conversation between Red and Black in September in 2015, when Black proposed “We will purchase your tungsten at 30% higher price than other companies, so please prioritize the sales to us”, Red responded “I understand that our company has promised Blue Inc. to prioritize Blue in our exports of rare metals.” Then, Black proposed “if so, our company will set up a subsidiary in Negoland. Could you sell your tungsten to that subsidiary? That would not be exports, so you would be able to prioritize the sale to that subsidiary”, and Red

accept this proposal (para.22).

If it is justified on the Rare Metal Agreement that Red makes a deal with such company as Black Negoland, the purpose of the contract is lost. Thus, “the term "other prospective purchasers of countries other than Negoland" should include such company that is incorporated in order to deviatethe purpose of the Rare Metal Agreement. Accordingly, Red breach the obligation under Rare Metals Agreement for Red supplied tungsten to Black Negoland, and did not supply it to Blue.

9. In conclusion, Red Company preferentially supplied tungsten, which is subject to priority supply, to Black Negoland and did not supply it to Blue, and this constitutes a breach of Rare Metal Contract.

C. Red is liable to pay Blue damages for the loss of profit of US$5 million.

10. Blue would have reaped a profit of US$5 million had it been able to obtain the supply as ordered in the period from November 2015 to March 2016 (para.23). The damage was caused by Red’s non-performance, and there were certainty and foreseeability of the harm. Thus, Red is liable to pay Blue damages for the loss of profit if US$5 million.

II. Red shall pay prescribed royalties in connection with platinum refining.

A. License Agreement was amended to include the refining of platinum.

11. License Agreement 1.1 stipulates Blue grants to Red a license solely to refine Tungsten. License Agreement (Exhibit 7, concluded on February 28, 2014) was amended to include the refining of platinum by the conversation in November 2015 and the exchange of e-mails on December 10, 2015.
12. The License Agreement 7.10 so-called non-oral modification clause stipulates modification of this Agreement requires to be made in writing and signed by a duly authorized representative of each of the parties: provided, however, Article 2.1.18 of PICC stipulates a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.
13. In November 2015, Red said “We should revise the license agreement. I will contact you again about the procedure to revise the agreement”, Blue replied “I see”. On December 10, 2015, Blue said “Is it OK that we will amend only Article 1.1 and add platinum at the end of the article? Should we send you the amendment agreement?” Red replied “Yes, I agree with the part to be amended. We will send the amendment agreement, so please wait a while” (para.24). The

statements of Red made Blue believe the License Agreement was amended without amendment in writing and sign. Blue made no objection to Red's use of the Licensed Technology to refine platinum from March 1, 2016 to May.

B. Red used the Technology equal to the Licensed Technology of Blue to refine platinum.

14. Whether a technology is the same as another technology should be judged on the basis of comprehensive consideration of circumstances, namely the judgment of each country's agency. Since each country independently establishes a legal system concerning patent rights, it is assumed that infringement of a patent right is recognized in a certain country and not in a certain country. However, judgment that recognizes patent infringement is important. In general, when patent infringement is recognized, a certain technology is the same as a technology protected by a patent right, and if it is a comparative examination between the same technology, it is unlikely that judgment on the identity of both technologies will be different depend on countries.

15. In the present case, there were following judgement and determinations.

    a. On March 1, 2017, the Arbitration Center of Arbitria issued an arbitral award, which ordered Green to stop using the technology immediately and compensate Blue for damages caused by the patent infringement because the Technology used by Green at Green's platinum refining plants in Meditria was the same as the technology for which Blue has the patent, and the use of the Technology constituted an infringement of the patents owned by Blue in Negoland and Meditria (para.27).

    b. On April 1, 2017, the Patent Office of Meditria refused the patent application by Green in Meditria for the technology applied by Green was the same as the technology for which Blue has the patent (para.27).

    c. On April 1, 2017, the Patent Office of Negoland approved the patent filed for by Green in Negoland, and subsequently registered Green as patent holder (para.27).

    d. On May 1, 2017, the Patent Office of Negoland rejected Blue's objection that the Patent Office of Negoland should not have approved the patent filed by Green without judging the issue of the similarity of the Technology and the technology of Blue (para.27).

16. The facts of (a) and (b) show that the Technology was the same as Blue's Licensed Technology. The arbitral award which recognized the patent infringement should be regarded important. In addition, the arbitration was held between parties of Blue and Green, and partied elected arbitrator by themselves. Thus, the judgement was issued by fair and equitable values. Furthermore, as to the determination of the Patent Office Meditria, it clearly states the Technology was the same as

Blue's Licensed Technology.

17. On the other hand, the facts of (c) and (d) were not reliable. As to the approval of the patent by the Patent Office of Negoland, since it did not judge about similarity of the technology, this fact is not reliable to determine the similarity of the technology. Furthermore, since the Patent Office of Negoland rejected the Blue's objection without judging similarity of the technology, this is fact also unreliable.

18. Considering overall the facts mentioned above, the Technology is the same as Blue's Licensed Technology and Red used the Technology to refine Platinum.

C. Red shall pay royalties for using the Licensed Technology to refine platinum.

19. In accordance with Article 3.2 of License Agreement, Red shall pay to Blue a running royalty equal to three percent (3%) of the Production Amount each calendar month which produced by using the Licensed Technology.

FISHERIES CASE

I. Red's Claim shall be dismissed.

20. Blue has not breached the obligations under the Confidentiality Agreement, because the Information exposed is not "Confidential Information", and there was no fault of Blue as to the publication of the Information.

A. The Information is not "Confidential Information".

21. Blue has not breached the obligation to keep in confidence the Confidential Information of the Discloser under Section 2(1)(i) of the Confidentiality Agreement, because the Information exposed is not "Confidential Information".

22. "Confidential Information" is defined as "(i) the existence of the Project, and (ii) any and all confidential, proprietary or secret information which are disclosed by the Discloser, and are clearly labeled as "Confidential", or should be reasonably considered to be confidential given the nature of the information or the circumstances surrounding its disclosure" (Article 1(1) of the Confidentiality Agreement).

23. These circumstances indicate the common intention that the range of the "Confidential Information" is limited to the information concerning fish stocks. Therefore, the confidential information in the Confidentiality Agreement is interpreted as the information concerning fish stocks. According to this definition, the Information exposed did not directly related to the study on fishes stocks (para. 35), and it cannot be said the "Confidential Information".

24. In any event, the Information does not fall within the scope of the “Confidential Information” in light of the definition of the Confidentiality Agreement.
25. The Information does not show “the existence of the Project”, because the Information is the evidence of the approval by Negoland’s Ministry of Agriculture, Forestry and Fisheries of fishing activities carried out by Negoland’s fishing vessels along its coasts in breach of the Convention on Fish Stocks (para.35).
26. The Information is not the information clearly labeled as “Confidential”. Since the information must be “clearly” labeled as “Confidential”, a description reasonably considered as “Confidential” is insufficient, and it should definitely be shown as a "Confidential". Although some of the documents in the Information are marked “For Ministry Internal Use Only” (para.35), these are ambiguous indications and are not clearly labeled as "Confidential".
27. The Information is not the information which “should be reasonably considered to be confidential given the nature of the information or the circumstances surrounding its disclosure” for the following reasons.
    a. With respect to “the nature of the information”, [規範]. The Convention on Fish Stocks stipulates that if any fishing activity in breach of the Convention is found, a contracting state must administer necessary action and disclose such illegal activity to the public (para.35).
    b. With respect to “the circumstances surrounding its disclosure”, the Information was originally received by Red from the Ministry and was never intended to travel beyond the confines of Red’s offices, but Red’s employee gave it together with other confidential information to Blue by mistake. Such facts are not grounds for considering the Information reasonably as confidential. This is because there is a lot of exchange of information among companies, and if they are in a joint project implementation relationship, the amount will be even larger. If all the information sent along with the confidential information is understood to be confidential information, the scope of recipient's confidentiality obligation would be excessively expanded, which puts an excessive burden on the recipient.
28. In conclusion, the Information exposed is not “Confidential Information”, and there was no breach of obligation by Blue to keep in confidence the Confidential Information under the Confidentiality Agreement.

B. There was no fault of Blue as to the publication of the Information.

29. If the Information is the Confidential Information, there was no breach of the obligation by Blue. Section 2(2)(ii) stipulates if any portion of the Confidential Information is or becomes accessible

to the public through no fault of the Recipient, the obligation set out in Section 2(1) shall not apply to the information.

30. The existence of "fault" should be judged by whether or not the Recipient observe a duty of care under the Confidentiality Agreement. According to Section 2(2)(iv), the Recipient shall use (a) a reasonable degree of care at least, and (b) the same degree of care as the Recipient would use with respect to its own confidential information of similar importance. This is a duty of care, and "no fault" means to observe this duty of care. Blue has observed this duty of care as below.
    a. Blue paid a reasonable degree of care to the Information. "A reasonable degree of care" means attention to the extent that it avoids the risk of information leakage which is usually assumed. This is because it is impossible for companies to take measures against unprecedented risks. Blue has a standard program for checking the presence or absence of viruses from external e-mails, and also frequently calls attention to officials not to open strange attachments (para. 34). If it is an ordinary virus, it could be detected by the virus-infected e-mail program, but the e-mail was loaded with a new kind of virus and passed through the program. In addition, if the e-mail was sent from an unknown name, the employee did not open the attached file. However, the email used the name of Blue's important customer and approved very natural, and the employee opened the attached file inadvertently. From the above, Blue used a reasonable degree of care that can avoided a normal risk of information leakage.
    b. Blue paid the same degree of care to the Information as Blue would use with respect to Blue's confidential information. This is confirmed by the fact that some internal confidential information of Blue also has been exposed (para.34). Blue used the same degree of care to the Information as Blue used to the Blue's confidential information.
31. In conclusion, the Information became to the public through no fault of Blue, and the obligation under Section 2(1) cannot be applied to Blue. Then, there was no breach of the Confidentiality Agreement. Then, Blue is not liable to pay US$ 10 million to Red

II. Red's Claim shall be dismissed.

A. There is no hardship.

32. Red may argue that the following events serve as evidence of a hardship. However, the events (Exhibit 21) shall not serve as evidence of a hardship. Thus, the Requirements Contract, signed between Red and Blue on September 1, 2012 (Exhibit 17), shall not be terminated and amended.
    a. Because of the global warming and change of ocean currents, catch of Negoland fish reduced

by half.

b. The import cost of ingredients has increased sharply due to changes in foreign exchange rate.

c. After the publication of the Information, some suppliers refused to sell Red ingredients needed for the production of Super Red Mix, and Red is only able to secure a supply equivalent to about 1/2 of the previous level from new sources of supply.

33. The each event is not (1) an event which has causes a fundamental alteration of the equilibrium of the contract, (2) Red can reasonably consider event at the time of concluding the contract, and (3) the event was not beyond the control of Red. In addition, (4) the risk of the event was assumed by Red (PICC 6.2.2).

34. (1) The events do not cause fundamental alteration of the equilibrium of the contract. According to PICC 6.2.2, the fundamental alteration of the equilibrium of the contract must be caused by the increase of cost of a party's performance.

a. The equilibrium of the Requirement Contract is that Red promises Blue to sell the Super Red Mix at 10% discount of regular price and to provide it on a maximum total quantity of 5,000 tons, while Blue promises to buy it on a minimum total quantity of 1,000 tons.

b. In the present case, the cost of production has doubled and the cost of Red's performance has increased. However, it has not caused any alteration of the equilibrium of the Requirement Contract. This is because, Red is able to obtain consideration for the increase in performance cost by raising the regular price of the Super Red Mix. Furthermore, if the regular price of the Super Red Mix raises, Red may sale Blue 1,000 tons of the Super Red Mix , because Blue is obliged to purchase minimum total quantity of 1,000 tons. Accordingly, increase of the cost of production of the Super Red Mix has not caused the alteration of the equilibrium of the Requirement Contract.

35. (2) The events could reasonably have been taken into account by Red (PICC 6.2.2(b)). Fluctuations in exchange rates usually occur, and the parties involved in international transactions usually enter into contracts taking into account the risk of the change of exchange rates. In order to submitthat fluctuations in exchange rates could not reasonably be considered, it is necessary for it to fluctuate sharply in the short term. Illustration 3 of Article 6.2.2 in specific states that 80% change of currency value in one month is a case of hardship. In the present case, the fluctuation of the exchange rate from January 2016 to September is 40%. In light of this example, the currency fluctuation is moderate, and it should be said that this degree of fluctuation could be considered reasonably.

36. (3) The publication of the Information is under Red's control. PICC clearly states that the hardship event impeding performance must be external to the party invoking it. Thus, the debtor may not rely on self-induced hardship. That is to say, the difficulties of performance by the debtor may not be the result of its own act or negligence. The Publication of the Information was caused by Red incorrectly providing the Information to Blue, which Red should have been held in Red's offices. (paras.34-35). The event was led by Red's own negligence, and was under Red's control.

37. (4) The risk of the following events was assumed by Red.

    a. The assumption of risks need not be explicit, but is presumed by circumstances. At the time of the preliminary negotiations between Red and Blue, Blue asked Red "what is your production capacity like for Super Red Mix?", and Red replied "Our recent study confirmed that there is plenty of supply of Negoland fish, enough for our production of the Super Red Mix". This fact shows that concluding 15-year long-term contract, Red ensured that it would be able to provide Super Red Mix to Blue stably. Accordingly, the reduction of Negoland fish has been assumed by Red.

    b. In international trades, exchange rate frequently changes, and each party assumes the risk of such fluctuations and enters into a transaction. If the fluctuation is small, each party should assume the risk. They may hedge risk by foreign exchange contract. In the present case, the rate of Nego-Lira has dropped just 30% from January 2016 to January 2016 (Ex.4). Red did not take the measure to hedge the risk expected by the contract with Blue. Therefore, Red shall undertake the risk of exchange rate.

    From the above, Red may not invoke Article 6.2.2, because the increase of the expense of performance does not cause the fundamental alteration of the equilibrium of the contract or fulfill the additional requirements to claim hardship.

B. The tribunal shall adapt the contract what is following.

38. In any case of hardship, it is not reasonable to adapt Red's requests. According to Article 6.2.3 (4)(b), the tribunal may adapt the contract with a view of restoring its equilibrium. Thus, the adaption it may direct is limited to the extent that it is enough to restore the equilibrium of the contract.

39. The equilibrium of Requirement Contract is kept by the relation that Red has the obligation to provide Super Red Mix to Blue at 10 % discount of regular price on a maximum total quantity of 5,000 tons, on the other hand, Blue has obligation to buy it on a minimum total quantity of 1,000

tons.

Although the profit of Red from Requirements Contract has been decreasing because the cost of production has doubled, Red has the right to raise the regular price of Super Red Mix and rectify the imbalance of Requirements Contract. Thus, the provision stipulating 10% discount in Article 2 of the Requirements Contract should not be deleted. And the supply volume of Super Red Mix, which Red can supply, has decreased by half. Then, both the maximum supply amount, which Red is obliged to supply, and the minimum supply amount, which Blue is obliged to purchase, shall be reduced to half. Namely, the minimum total quantity of "1,000 tons" of Article 4.1 should be revised as "500 tons", and the maximum total quantity of "5,000 tons" of Article 4.2 should be revised as "2,500 tons".

40. In conclusion, Requirements Contract should not be amended or terminate, because there is no hardship in the present case. In any case of hardship, the tribunal should adapt the contract as is mentioned above.