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## *Rare Metal Case*



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## *Fisheries Case*

## *Rare Metal Case*

-Issue 1-

Red Corporation ("Red") is not in breach of its obligation to supply tungsten to Blue Inc. ("Blue") under the agreement of priority supply of rare metals.

**Red submits Red is not in breach of its obligation to supply tungsten to Blue under the Priority Supply of Rare Metals on August 1, 2000 (Exhibit 6). This is because Red does not have the obligation to supply tungsten to Blue under the License Agreement. Red's obligation under the Priority Supply of Rare Metals was to supply only nickel and titanium. Further, even if Red has the obligation to supply tungsten, Red did not breach its obligation to supply tungsten to Blue in precedence to other prospective purchasers in other countries than Negoland.**

### A. Red did not breach its obligation under the Priority Supply of Rare Metals concluded in August 2000 (hereinafter the "PSA"), because Red is not obligated to supply tungsten to Blue under the PSA.

In this case, Blue might argue that Red breached its obligation to supply tungsten to Blue in the period from November 2015 to March 2016. However, the obligation that Red had under the PSA was to supply **only nickel and titanium** to Blue. Thus, Red did not breach its obligation under the PSA in the period from November 2015 to March 2016.

#### 1 It is the priority supply of only nickel and titanium that Red agreed to give to Blue

**(1)** Red and Blue entered into the PSA on August 1, 2000. The PSA stipulates, "Red Corporation and Blue Inc. agree that Red gives Blue the right and Blue accepts the right to order and purchase 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". When both parties concluded the PSA, they understood that **only nickel and titanium would be supplied** on a priority basis under the PSA. This mutual understanding is evidenced by the business meeting in July 2000, which two parties had before concluding the PSA, and the drafting process of the PSA as shown in Exhibit 5.

**(2)** In the business meeting in July 2000, both parties discussed the construction of nickel and titanium plant of Negoland Metals (Red's 100% subsidiary). When Red asked for the price cut of the construction, Blue requested Red to **sell nickel and titanium** that would be produced by Negoland Metals. When Red asked for the further price down, Blue requested to sell **"rare metals produced by Negoland Metals" to Blue on a priority basis**. This demand of the Blue clearly shows that Blue requested Red to supply only nickel and titanium. This is because, nickel and titanium were the only rare metals that were produced by Negoland Metals, and during the business meeting in July, only nickel and titanium were mentioned. Further, neither Negoland Materials (Red's another 100% subsidiary) nor platinum, which had been produced by Negoland Materials

were discussed in the business meeting. Thus it is clear that both parties understood that only nickel and titanium would be provided by Red to Blue on a priority basis.

**(3)** After the business meeting stated above, both parties started to draft the PSA (Exhibit 5). The process of the PSA drafting clearly shows that both parties understood that only nickel and titanium would be supplied by Red to Blue. First, Ms. Fox from Red wrote in her e-mail "the draft agreement **regarding the priority supply of Nickel and Titanium**" to Mr. Ruby from Blue. Also, in the draft she sent in her e-mail, she inserted "(Nickel and Titanium)" in red color next to the "rare metals", to "reflect mutual understanding" of both parties. Third, towards this Ms. Fox's amendment, Mr. Ruby had replied, "we accept your proposed amendments" without any objection. These exchanges evidence that Red and Blue mutually understood that under the PSA, only nickel and titanium would be supplied by Red to Blue.

**2 Course of dealing shows that "the rare metals" mean only nickel and titanium.**

**(1)** There was a meeting held in February 2014 by Red and Blue, regarding the new plant construction for tungsten mining (¶19). During that meeting, Red suggested Blue that Red could give the priority to Blue for the tungsten supply newly. Ms. Fox remarked "I believe we can give you priority for tungsten supply…", and mentioned that this is "a similar deal" with "nickel and titanium supply". This Ms. Fox's remark shows that she understood that tungsten is out of the scope of "the rare metals" and "the rare metals" means nickel and titanium under the PSA. Further, there was no objection from Blue towards Ms. Fox's understanding.

**(2)** Red has been supplied platinum to Blue from 2003. However, Red supplied platinum to Blue to keep a good business relationship with Blue and Red has not prioritized platinum supply to Blue based on the PSA. In fact, Red had mentioned that Red had supplied platinum to Blue because "stable business relationship" and "mutual trust" were important (¶15). Further, both parties never mentioned about the PSA while Red has been supplying platinum to Blue. These indicate that nothing else, for example, platinum, was included in "the rare metals".

**(3)** Further, Red had supplied tungsten for two months from September 2015 (Exhibit 9). However, there is no fact that evidences this supply was made under the PSA. Also, both parties did not mention the PSA before or during the tungsten supply.

**(4)** In the meeting with Black Corporation in November 2015, Mr. Orange of Red said; "I understand that our company has promised Blue Inc. to prioritize Blue in our exports of rare metals" (¶22). Blue might allege this remark is the evidence that shows tungsten was included in "the rare metals". However, Mr. Orange's remark could not be an evidence that shows any other rare metals, especially tungsten, were included in the objects of the PSA since Mr. Orange's remark was a personal "understanding", which was never checked with Red, based on his uncertain memory.

**3 Both parties have never agreed to add tungsten into the scope of "the rare metals".**

There was no expressed or implied agreement to add tungsten into "the rare metals". First, during the meeting in February 2014 which was stated above, Red and Blue did not agree to add tungsten into the "the rare metals". At the same meeting, what Red and Blue agreed was that Red would pay running royalty in addition to the upfront license fee for Blue's technology license while there was no agreement regarding the priority supply of tungsten. Also, there is no fact that proves both parties' agreement to add tungsten before or after the meeting in February 2014. Therefore, it is obvious that Red and Blue have never agreed to add tungsten into "the rare metals" under the PSA.

**B. Red did not breach its obligation under the PSA because Red did not have any tungsten left after the domestic sales**

**1 Negoland companies are prioritized over Blue under the PSA.**

Even if the tribunal finds that Red has been obligated to supply tungsten to Blue under the PSA, Red submits Red did not breach its obligation to supply tungsten during November 2015 to March 2016. The PSA stipulates, Red has obligation to supply the rare metals to Blue **"in precedence to other prospective purchasers in other countries than Negoland"**. Thus, Blue is only prioritized over foreign companies and is not prioritized over Negoland companies. During November 2015 to March 2016, all of produced tungsten was sold out within domestic sales due to the record rainfalls that attacked the area of the tungsten plant. Thus, Red could not supply tungsten to Blue because there was no tungsten left to export.

**2 Black Negoland is a Negoland company and it shall be prioritized over Blue.**

Blue might argue that supplying tungsten to Black Negoland in precedence to Blue is a breach of the PSA because that Black Negoland was established to bypass the PSA because Black Negoland is established after the communication between Red and Black in November 2015. However, Red did not establish Black Negoland to bypass the PSA. In fact, **Black Negoland was established solely by Black** under the laws of Negoland. The mere fact that Mr. Orange explained about the priority supply in the meeting with Black in November 2015 does not prove Red induced Black Negoland by bypassing the PSA. Thus, Red is not in breach of its obligation under the PSA.

-Issue 2-

Red is not obligated to pay the royalties to Blue under the License Agreement (hereinafter the "Tungsten License Agreement") for using Blue's refining technology to refine platinum

**Red submits Red is not obligated to pay the royalties to Blue under the Tungsten License Agreement shown in Exhibit 7. This is because Red has never used the Blue's Technology to refine platinum. Red has been using the platinum refining technology of Green's to refine platinum in the plant in Negoland. Therefore, Red is not obligated to pay the royalties under the Tungsten License Agreement.**

**A. Red is not obligated to pay the royalties to Blue because Red has not using the Blue's rare metals refining technology (hereinafter the "Blue's Technology"). Red has been using the Green's platinum refining technology (hereinafter the "Green's Technology") to refine platinum.**

The technology Red has been using to refine platinum from March 1, 2016 in its plant in Negoland, was the Green's Technology. This is shown by the fact that Red concluded the license agreement with Green, a Meditrian company, to use the Green's Technology in Negoland on January 10, 2016 shown in Exhibit 11 (hereinafter the "Platinum License Agreement"). And in fact, Red began to use the Green's Technology to refine platinum from March 1, 2016 (¶25). Further, in Negoland, the Green's Technology and the Blue's Technology are not same and what Red used was the Green's Technology. Therefore, Red did not use the Blue's Technology under the Tungsten License Agreement.

**1 In Negoland, the Green's Technology and the Blue's Technology are not same.**

**(1)** The Green's Technology is different from the Blue's Technology. Green informed Red that **the Green's Technology was original and "developed independently"** when Red asked Green about the Green's Technology (¶26). In fact, in Negoland, **the Green's Technology has been registered as a patent in Negoland** in April 2017 while the Blue's Technology has been already registered as a patent from January 2014. The fact that both the Green's Technology and the Blue's Technology exist clearly shows that at least in Negoland, the Green's Technology and the Blue's Technology are different, and what Red has been using to refine platinum is the Green's Technology.

**(2)** Blue might allege the Green's Technology and the Blue's Technology are same and Red has been using the Blue's Technology because there was an arbitral award in Arbitria saying that the Green's Technology is an infringement of the Blue's Technology because they are same. However, the arbitral award does not have a binding force to Red since **Red was not a party to the arbitration**. Thus, the arbitral award should not be an evidence that shows the Green's Technology that Red has been using is same with the Blue's Technology.

**(3)** Blue might also allege that the Green's Technology and the Blue's Technology are same because a patent application of the Green's Technology in Meditria was rejected due to a reason that the Green's Technology was same as the Blue's Techology in Meditria. However, this fact does not support the allegation that both technologies are same and Red has been using the Blue's Technology. Based on Paris Convention, **the patent is independent in each country**. Thus, the fact that Green's patent application was refused in Meditria could not be an evidence to support Blue's allegation that two technologies are same and Red has been using the Blue's Technology. In this case, **since Red has been using the Green's Technology in Negoland, what Negoland has judged regarding the Green's Technology is important**. In Negoland, the Green's Technology has been registered as a patent. Therefore, in Negoland, the Blue's Technology and the Green's Technology are not same and Red has been using only the Green's Technology.

**2 Red has been using the Green's Technology to refine platinum in Negoland.**

**(1)** Red concluded the Platinum License Agreement with Green to use the Green's Technology to refine platinum in Negoland. The Platinum License Agreement was concluded on January 10, 2016, as shown in Exhibit 11. After the conclusion of the Platinum License Agreement, Red paid the license fee to Green under Article 1.4 of the Platinum License Agreement and in fact, **Red started using the Green's Technology to refine platinum from March 1, 2016 (¶25)**. Red has been using the Green's Technology rather than the Blue's technology because the Green's Technology significantly had improved the efficiency of refining platinum for Green and the Green's Technology was cheaper than the Blue's Technology. Thus, Red chose the Green's Technology and started to use the Green's Technology under the Platinum License Agreement.

**(2)** On the other hand, there is no license agreement between Red and Blue regarding a platinum refinery. Thus, Red has not been using the Blue's Technology to refine platinum. Blue might argue that the Tungsten License Agreement has been amended to add the platinum refinery into the scope of the license (¶24). However, an amendment was made between two parties neither in oral communication between two parties in November 2015 nor during the e-mail communication in December 2015. Section 7.10 of the Tungsten License Agreement stipulates a signed written amendment is required to amend the agreement. However, both the oral communication and e-mail communication are not a signed written amendment. Also, no written amendment agreement has been executed after the oral communication and the e-mail communication. Thus it is obvious that there was no amendment between two parties to add 'refining platinum' into the scope of the license under the Tungsten License Agreement. Therefore, the Tungsten License Agreement is not a license agreement regarding the platinum supply and there is no agreement between Red and Blue regarding the platinum refinery.

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## *Fisheries Case*

-Issue 1-

Blue is obligated to pay US$10 million in damages to Red due to a breach of the confidentiality obligation under the UPICC 7.4.2 to 7.4.4.

**Blue has the obligation to keep the Confidential Information secret under the Confidentiality Agreement written in Exhibit 20 (hereinafter the "Agreement"). In this case, Blue has breached its obligation to keep the information that Red had given to Blue (hereinafter the "Information") secret by Blue's fault. The Information was the Confidential Information under the Agreement.**

### A. Blue has the obligation to keep the Information in confidence under the Agreement.

Red and Blue signed the Agreement on 15 March 2016 because both parties were going to handle the study data and results concerning fish stocks which had not been publicly disclosed (¶33). Section 2 (1) (i) of the Agreement stipulates "the Recipient shall keep in confidence and not disclose or

disseminate to any third party the Confidential Information of the Discloser". In this Agreement, the Confidential Information is defined in Section 1 (1). Section 1 (1) stipulates, "'**Confidential Information**' shall mean … 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".

**1 The Information is Confidential Information under the Agreement.**

**(1)** The Information was Confidential Information under the Agreement considering the nature of the information and the circumstances surrounding its disclosure. As for the nature of the information, some of the documents in the Information were marked "For Ministry Internal Use Only" (¶ 35) and this mark means that **the Information has never intended to be disclosed to the public.** In addition, **the Information has not been publicly available** and only Red and the Ministry of Agriculture, Forestry and Fisheries knew the Information. Regarding the circumstances surrounding its disclosure, **the Information was given to Blue together with other Confidential Information (**¶35). It is clear that the Information is the Confidential Information under the Agreement.

**(2)** Blue might allege that the Information is not the Confidential Information because the Information should have been publicly disclosed by either Negoland or Red under the Convention on Fish Stocks (hereinafter the "Convention"). However, there are two reasons why the duty of disclosure under the Convention does not deprive the information of the character of the Confidential Information under the Agreement. First, the fact that Negoland which is the contracting party of the Convention has the duty of disclosure does not mean that Red has the duty of disclosure because they are totally different entities. Second, even if Red has the duty of disclosure as a public company, such fact does not affect the character of the Information as the Confidential Information. This is because the definition of the Confidential Information does not exclude the information which should have been disclosed from the Confidential Information.

**(3)** Blue might also argue that the Information is not the Confidential Information under the Agreement because the Information was not related to the study project on fish stock. The purpose of the Agreement was to keep the Confidential Information regarding the study project on fish stock which has never been publicly disclosed. First, "Blue shall keep **any and all** Confidential Information which are disclosed by Red" and it does not limit the scope of the Confidential Information based on the content of the Information in the definition.

## B. Blue has breached its obligation to keep the Information secret under the Agreement.

**1 Blue has breached its obligation to keep the Information secret under the Agreement by leaking the Information.**

**(1)** As a result of breach of Blue's obligation, the Information was exposed on the Internet. Blue did not use the reasonable degree of care with the Confidential Information under the duty of care. Section 2 (1) (iv) stipulates, "the Recipient shall use the same degree of care, but no less than a reasonable degree of care, to avoid disclosure, publication or dissemination of the Confidential Information as the Recipient would use with respect to its own Confidential Information of similar importance". In this case, Blue did fail to keep the Confidential Information secret under Section 2 (1) (i). There are two facts to prove that Blue failed to use the reasonable degree of care. First, the virus had passed through the virus-checking programs although Blue had the standard type of program. Second, the employee of Blue had carelessly opened the virus-infected attachment although Blue told the employee to be careful with the unknown attachments. Since Red would give the Confidential Information regarding the Confidential Information of Negoland government to Blue, Blue should have installed the more advanced program to use the reasonable degree of care. In addition, the employee inadvertently opened the virus-infected attachment even though the employee had been told to be careful with the e-mails files sent by strangers. The careless behavior of Blue's employee means that Blue did not use the reasonable degree of care to keep the Information in confidence.

**(2)** Blue might argue that Blue did not breach the obligation to keep the Information in confidence because the Information has been publicly disclosed not by Blue's fault. Section 2 (2) (ii) stipulates, "Section 2 (1) shall not apply to any portion of the Confidential Information of the Discloser which is or becomes accessible to the public through no fault of the Recipient". The virus which had passed through Blue's checking program was new and some other Blue's Confidential Information had also exposed (¶34). However, as stated above, Blue did fail to use the reasonable degree of care with the Information not only the virus had passed but also the employee had inadvertently opened the virus-infected attachment. Thus, the virus attacking is not the evidence that there is no fault of Blue.

## C. Blue is obligated to pay US$10 million due to Blue's breach of the obligation.

Due to Blue's breach of its obligation as proven above, exports of marine products from Negoland plummeted in the period from April to December of 2016, and Red incurred a loss of US$10 million (¶35). There is no dispute that the damages amounting to US$10 million wouldn't have arisen if the Information had not been leaked by Blue (¶36). In addition, both parties have acknowledged that if the Recipient discloses the Information, it would cause irreparable harm and significant injury to the Discloser (Section 5 (1) of the Agreement). Under this Article, there was a foreseeability of the significant damage by disclosing the Confidential Information to the third party when the Agreement concluded. Therefore, Blue is obligated to pay US$10 million in damages to Red due to a breach of the Agreement under the UPICC 7.4.2 to 7.4.4.

**D. The amount of damages shall not be reduced because Red did not contribute to the harm.**

Since Red unintendedly gave the Information to Blue (¶35), Blue might allege that the amount of damages shall be reduced because Red's act partially contributed to the harm of US$10 million. The UPICC 7.4.7 stipulates, "Where the harm is due in part to act or omission of the aggrieved party…, the amount of damages shall be reduced to the extent that these factors have contributed to the harm". However, Red's act did not contribute to the harm because Blue had to keep the Information secret regardless of how Red has given the Information to Blue. If the Information had been kept in confidence, the damages would not have occurred. Thus, Red did not contribute to the harm.

-Issue 2-

Red requests the tribunal to amend the Requirement Contract, which is regarding the Sales Contract of Super Red Mix, in order to restore the equilibrium of the Requirement Contract.

**Red and Blue concluded the Requirement Contract (hereinafter the "Contract") for the sales of Super Red Mix (hereinafter the "SRM") in September 2012. However, the situation surrounding Red has significantly changed and the equilibrium of the Contract has been fundamentally altered. Although Red had requested to renegotiate the Contract many times (¶37), Blue rejected it (Exhibit 22). In order to restore the balance, Red requests the tribunal to amend the Contract under the UPICC 6.2.3.**

**A. Hardship in the UPICC.**

**1 The fundamental idea of the UPICC is to maintain the equilibrium of the contract.**

Under the UPICC, the equilibrium of the contract is critical and should be maintained since "Good faith and fair dealing" is the fundamental idea of the UPICC 1.7. The comment 1 of the UPICC 1.7 stipulates, "6.2.3 (3) (4), which constitute a direct or indirect application of the principle of good faith and fair dealing". The hardship is based on the good faith and fair dealing. **When the equilibrium of the contract has been fundamentally altered, there is the hardship under Article 6.2.2 of the UPICC.** According to the UPICC 6.2.3, the tribunal may terminate or adapt the contract in order to restore the equilibrium of the contract.

**B. There was the hardship due to the occurrence of three events.**

**1 Definition of the hardship under the UPICC.**

The UPICC 6.2.2 stipulates, "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control by disadvantaged party and (d) the risk of the events was not assumed by the disadvantaged party".

Pursuant to this article, there is the hardship because Red has the heavy burden to perform its obligation. Thus, the equilibrium of the Contract has been fundamentally altered. The following paragraphs prove the existence of the hardship in precisely.

**2 The hardship has occurred in this case due to the occurrence of three events.**

**(1)** There is the hardship because the following three events have occurred at the same time. The three events which consist the hardship are as follows; (i) The catch of Negoland fish which is essential for SRM as the ingredients slashed by half due to the sudden change of Negoland Ocean Current. (ii) A sudden fluctuation of the foreign exchange rates caused the sharp increase in the cost of imports. (iii) The suppliers refused to supply the ingredients of SRM after Blue illegally leaked the Confidential Information. As a result, some suppliers refused to sell the ingredients needed for the production of SRM. Red forced to find other suppliers and new suppliers had only half of the capacity of supply.

**(2)** These three events fulfill the (a) to (d); (a) All of these events occurred in 2016 after the conclusion of the Contract. (b) It was not reasonable for Red to consider that a series of events would occur when both parties concluded the Contract in 2012. The survey shows that there was the plenty of Negoland fish (¶32). Also, the foreign exchange rate had been stable for 13 years (Exhibit 4). Further, Red could not foresee that the capacity of suppliers would suddenly become half due to the breach of confidentiality by Blue. (c) All of these events were beyond the control of Red. Especially, it was far beyond the control of Red that Blue breached the confidentiality obligation. (d) There is no fact that Red has assumed the risk of the occurrence of three events. Therefore, these three events are sufficient to find that there is the hardship.

## C. The equilibrium of the contract has been fundamentally altered because the burden to perform the obligation by Red has deeply increased.

**1 Limitation of the quantity has become burden for Red to perform its obligation.**

As a consequence of these three events, the equilibrium of the Contract has been fundamentally altered. In light of the fundamental idea of the UPICC, as stated above, the burden to perform the obligations by contracting parties should be balanced. This is because the following three events caused that the production capacity of SRM has been cut down by half and the cost of its production has doubled. Besides, many experts agreed that it is not expected that the situation will be improved in the near future (Exhibit 21). However, its balance has been altered and Red has the excessive burden to perform its obligation. The production capacity of SRM has decreased to 5,000 tons which were the half of the previous amount of production and the cost of its production has doubled. Under the terms and conditions, Red would be forced to supply all SRM which Red could produce in the current situation if Blue requests to supply the maximum amount as 5,000 tons in accordance with the Contract.

**2 The price of SRM has become a burden for Red to perform its obligation.**

In addition, it was a burden for Red that Red shall supply SRM to Blue with 10% off from the regular price. Since the cost of production has doubled due to the hardship, Red announced new regular price as 2.5 Nego-Lira to all customers. Only Blue has refused that new price (¶37). If Red supplied SRM under the same condition as the previous deal, which is 10% off from the 1.8 Nego-Lira, Red would deeply suffer from the loss as much as Red supplied to Blue. Therefore, the equilibrium of the Contract has been fundamentally altered.

**D. Red requests the tribunal to amend the Contract in order to restore the equilibrium of the Contract regarding the price and limitation of the quantity.**

Due to the existence of the hardship, Red requests the tribunal to amend the Requirement Contract under the UPICC 6.2.3 to restore the equilibrium of the Contract. The Red's request is shown as follows.

**1 The maximum quantity will be 1,200 tons.**

Considering the recent quantity of order from Blue, which is about 2,400 tons, 5,000 tons is unrealistic as the maximum quantity. Limiting the amount of maximum supply to 1,200 tons, which is the half of the quantity Blue order in a year, by reflecting the fact that Red's ability of supply has dropped into the half, is fair and equitable (Exhibit 21). However, if the tribunal finds 1,200 tons is unreasonable, Red is willing to set the maximum quantity into 2,400 tons because Blue has never ordered more than 2,400 tons and that amendment should not cause the disadvantage to Blue.

**2 The provision of minimum quantity will be deleted.**

This minimum quantity was set for the benefit of Red. However, under the current situation, this provision has become not a merit for Red, rather became the burden for Red due to the hardship. Thus, Red requests the tribunal to delete its provision.

**3 There shall be no discount for the regular price (2.5 Nego-Lira).**

Red has the right to change the regular price. Section 2 of the Contract stipulates "The regular price of the Product, which shall be applied to the transactions that will be conducted under this agreement in each calendar year, will be set and informed to the Purchaser by the Supplier at the beginning of the calendar year" (Exhibit 17). In 2017, Red announced 2.5 Nego-Lira as the regular price of SRM (Exhibit 21) and all customers other than Blue have accepted that new regular price (¶37). In addition, 10% off from the regular price was agreed in the exchange for the minimum quantity which Blue has to purchase from Red. However, as mentioned above, if the provision of minimum quantity will be deleted, the 10% discount will be also deleted. Thus, Red requests to amend the price with 2.5 Nego-Lira.