SUMMARY OF RED'S SUBMISSIONS

RARE METALS CASE

I. Red is not in breach of the obligation to supply tungsten to Blue.

II. Red is not under obligation to pay prescribed royalties to Blue in connection with the refining of platinum.

FISHERIES CASE

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

IV. The contract signed between Red and Blue on September 1, 2012 should be terminated or amended.

RARE METALS CASE

I. RED IS NOT IN BREACH OF THE OBLIGATION TO SUPPLY TUNGSTEN TO BLUE

Red submits that:

1.1 Red is not obligated to supply tungsten to Blue on a priority basis; and

1.2 Even if such obligation for Red existed, Red is not obligated to supply tungsten to Blue in precedence to Black Negoland

1.1 Red is not obligated to supply tungsten to Blue because tungsten is not the subject of the Priority Supply Agreement

There was a common intention between Red and Blue to interpret "affiliate" written in the agreement regarding the priority supply of rare metals (the "Priority Supply Agreement")[Exhibit 6] as Negoland Metals.

U4.1(1) stipulates that an agreement "shall be interpreted according to the common intention of the parties". In applying U4.1, regard shall be had to all the circumstances [U4.3].

The following circumstances shall be considered:

a) preliminary negotiations between the parties

Blue offered a US$10 million discount regarding the plant replacement project as an exchange for Red's promise to supply the "rare metals produced by Negoland Metals" to Blue on a

priority basis [¶12]. Consequently, all subsequent negotiations were conducted under the premises that the subject of the Priority Supply Agreement would be limited to rare metals produced by Negoland Metals.

d) the nature and purpose of the contract

The meeting between Fox and Ruby in July 2000 [¶12] was held to discuss the price for the plant replacement project for Negoland Metals. Furthermore, supply of rare metals to Blue became realistic because Red was convinced by Blue that production output would boost by improving refining efficiency of Negoland Metals.
Therefore, the subject of the Priority Supply Agreement is rare metals produced in Negoland Metals, whose plant was replaced by Blue.
Therefore, it is assumed that the purpose of the Priority Agreement is to secure rare metals produced by Negoland Metals.

In consideration of the above circumstances, it can be clearly said that there was a common intention between Red and Blue to interpret "its affiliate" written in Priority Supply Agreement as Negoland Metals.
Since tungsten is produced not in Negoland Metals but in Negoland Tungsten, it is not the subject of the Priority Supply Agreement.

1.2 Red is not obligated to supply any rare metals to Blue in precedence to Black Negoland.

Even if tungsten is deemed to be the subject of the Priority Supply Agreement, Red has no obligation to supply any rare metals to Blue in precedence to Black Negoland.
The Priority Supply Agreement determines that Red only has the obligation to prioritize Blue's orders over "other prospective purchasers in other countries than Negoland" [Exhibit 6].
Due to the fact that Black Negoland is a subsidiary located in Negoland, Red is not obligated to treat Blue's orders preferentially to Black Negoland.

II. RED IS NOT UNDER OBLIGATION TO PAY PRESCRIBED ROYALTIES IN CONNECTION WITH THE REFINING OF PLATINUM

Blue may claim that Red is obligated to pay prescribed royalties of refining platinum based on the License Agreement [Exhibit 7] (the "License Agreement") and U7.2.1, because the License Agreement was modified to include the refining of platinum in the conversation between Ruby and Orange [¶24], and also because Green's technology which was used by Red to refine platinum

("Green's Technology") is the same as the one Blue licensed to Red in the License Agreement ("Blue's Technology").

However, Red counter-argues that such a claim should not be accepted because:

2.1 The License Agreement was not modified; and

2.2 Even if the License Agreement was modified, it shall not be applied since Green's Technology differs from the "Licensed Technology".

2.1 The License Agreement was not modified

Article 7.10 of the License Agreement stipulates that no modification of the agreement shall be binding unless made in writing and signed by a duly authorized representative of each of the parties. However, neither party conducted such procedures.
Therefore, since U2.1.18 stipulates that "[a] contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated", the License Agreement was not modified.

Blue may claim that the assertion of the above stipulation should be precluded to the extent that the party has reasonably acted in reliance on the conduct of the other party [The Proviso of U2.1.18], on the grounds that it was reasonable for Blue to wait for Red to send the amendment agreement in reliance of the e-mail communication which took place on December 10, 2015 [¶24].
However, it cannot be said that Blue had acted reasonably in reliance on the conduct of Red. The modification of the License Agreement required only to add platinum within Article 1.1 [¶24]. However, despite the simplicity of the modification, Blue did not remind Red to send the amendment agreement even when Red did not send it for 5 months after the above e-mail communication. This cannot be regarded as a reasonable act in reliance.
Therefore, since the assertion of U2.1.18 cannot be precluded in this case, such modification of the License Agreement was not completed.

2.2 Even if the License Agreement was modified, it shall not be applied since Green's Technology differs from the "Licensed Technology" defined in Exhibit 7.

Even if it is deemed that the License Agreement had been modified, Green's Technology differs from Blue's technology, which is equivalent to the "Licensed Technology" in Exhibit 7.
According to the judgement by the Patent Office of Negoland, Green's Technology differs from Blue's Technology.

2.2.1 "Licensed Technology" is in accordance with the patent of "Blue's Technology" in the Law of Negoland.

Article 1.1 of the License Agreement in Exhibit 7, the purpose of the agreement is determined as to grant a non-exclusive license to Red. A non-exclusive license is granted in accordance with a patent. In this case, the purpose of the License Agreement is the usage of patented technology within Negoland. Therefore, “Licensed Technology” is in accordance with the patented technology based on the patent law of Negoland.

2.2.2 The Patent Office of Negoland decided that the Technology is different from “Licensed Technology” by Blue.

The Patent Office of Negoland approved the patent for both the Technology and “Licensed Technology” [¶17, ¶27].
According to TRIPS Article 27, the patents shall be available provided that they are new, involve an inventive step and are capable of industrial application.
Therefore, the Patent Office of Negoland does not approve the same two technologies as Negoland is a member of TRIPS [¶6] and the laws of Negoland patents are bond to TRIPS.
Therefore, the Technology differs from “Licensed Technology”.

Consequently, even if the License Agreement was modified, it shall not be applied since the Technology used by Red differs from “Licensed Technology”.

FISHERIES CASE

III. BLUE IS OBLIGATED TO PAY US$10 MILLION IN DAMAGES TO RED DUE TO A BREACH OF THE CONFIDENTIALITY OBLIGATION

Red submits that:

3.1 The Information (information disclosed by Blue that revealed evidence of the breach of the Convention on the Preservation of Fish Stocks) is a subject of the confidentiality obligation set forth in the Confidentiality Agreement [Exhibit 20]; and

3.2 Blue is obligated to pay Red US$10 million in damages for its non-performance of the confidentiality obligation.

3.1 The Information is a subject of the confidentiality obligation set forth in the Confidentiality Agreement

The Information comes under the "Confidential Information" defined in Section 1 of the Confidentiality Agreement.
According to the definition, information is regarded as confidential when it is

a. "clearly labeled as 'Confidential"; or

b. "reasonably considered to be confidential given the nature of the information or the circumstances surrounding its disclosure".

The Information satisfies requirement b.

First of all, the Information is reasonably considered to be confidential given its nature.

Regarding the interpretation of the word "nature of the information" in the Confidentiality Agreement, the possibility that harm is occurred by the disclosure of the information shall be taken into consideration, based on U4.1 and U4.3(d). This is because in general, confidentiality obligations are determined to prevent any harm from being incurred to the discloser by the disclosure of information.

In addition, Section 5 states that the disclosure of the Confidential Information may cause irreparable harm.
Consequently, the criterion of the Confidential Information shall be whether the information would cause harm to the Discloser.
In this issue, the Information indicates the breach of the Convention so it is clear that its disclosure would cause significant harm to Red.

In consideration of its nature, therefore, the Information is reasonably considered to be confidential. Therefore, the Information is a subject of the confidentiality obligation set forth in the Confidentiality Agreement.

3.2 Blue is obligated to pay Red US$10 million in damages

The conditions for the liability of damages due to non-performance are as follows: (a) non-performance [U7.4.1], (b) causal relationship between the non-performance and harm [U7.4.2], (c) certainty of the harm [U7.4.3], and (d) foreseeability of the harm [U7.4.4].

(a) There was a non-performance by Blue in relation to the Confidentiality Agreement. Blue disclosed the Information [¶35] and thus breached the confidentiality obligation stipulated in Section 2(1)(i) of the Confidentiality Agreement.

(b) There is a clear causal relationship between Blue's non-performance and Red's harm. The disclosure of the Information by Blue was the direct cause of the refusals of exports of supplies to Negoland as well as boycotts of marine products from Negoland [¶35]. As a result, Red suffered harm of US$10 million.

(c) There is a reasonable degree of certainty in Red's harm. As the Information indicates the government's breach of the Convention, it is natural that its disclosure would result in Negoland's loss of credibility, and lead to a plunge in sales of Red, a public corporation of Negoland.

(d) The harm could be foreseen.
Section 5(1) in the Confidentiality Agreement indicates that each Party acknowledges that monetary compensation may not be sufficient to cure the same when Confidential Information is disclosed. Therefore, each Party already foresaw when concluding the Confidentiality Agreement that harm beyond monetary compensation such as injury of Discloser's reputation when there was a non-performance of the confidentiality obligation. It is reasonably foreseeable that Red's sales decrease when injury of Red's reputation occurs.
Therefore, the harm could have been foreseen at the time of the conclusion of the Confidentiality Agreement.

Therefore, Blue is obligated to pay Red US$10 million in damages.

Expected counterarguments by Blue

3.1' This information is not a subject of the confidentiality obligation

Blue may claim as follows:
This Information cannot reasonably be considered to be confidential from its nature.
This Information proves the permission of the illegal fishing activities by Negoland in breach of the Convention on the Preservation of Fish Stocks.
Therefore, this Information includes the nature as harming the public welfare when not disclosed.
Taking this into account, this information shall be disclosed so that it should not come under "reasonably considered to be confidential".

Red counter-argues as follows;
Even if this Information includes the nature as harming the public welfare, it can come under the "Confidential Information".
In the first place, the welfare which the Agreement protects was for the parties concerned in the negotiation, that is, Red and Blue, not for public.
In addition, Section 2.(3) [Exhibit 20] stipulates that in case the Confidential Information is required to be disclosed by government authorities or law, subject to taking reasonable steps, the information may be disclosed.
This stipulation presupposes that the information which is required to be disclosed, that is, even which is related to illegal truth would be included in the Confidential Information.
Therefore, the nature of this Information as harming the public welfare when not disclosed shall not be a criterion for judging whether it comes under the Confidential Information.

3.2' The confidentiality obligation does not apply to the Information

Blue may claim that the obligations shall not be applied in this issue according to Section 2.(2) (ii).
The Information was disclosed despite standard programs installed in the system to check virus-infected e-mails and repeated warnings toward staff to be careful with email attachments sent from strangers. Especially in this issue, “the email used the name of Blue's important customer and appeared very natural” [¶35].
For the reasons above, Blue may claim that since the Information became accessible to the public through no fault of Blue, the confidentiality obligation does not apply to the Information in accordance with Section 2.(2)(ii).

However, it cannot be said that Blue had no fault in the disclosure of the Information.
As Blue's employees were frequently told to be careful with e-mail attachment [¶34], they recognized that opening the unknown e-mail attachment would lead to the disclosure.

Therefore, the employee's negligence of checking the address of the virus-infected e-mail and his opening the attachment inadvertently [¶34] caused the disclosure of this Information.
Therefore, as Blue's employee in question had a clear fault, Blue also had a fault.
Consequently, Blue is not exempted from the breach of the confidential obligation.

IV. THE CONTRACT SIGNED BETWEEN RED AND BLUE ON SEPTEMBER 1, 2012 SHOULD BE TERMINATED OR AMENDED

Red submits that:

4.1 If the court finds hardship, the Requirements Contract (the "Contract")[Exhibit 17] may be amended or terminated;
4.2 Hardship exists; and
4.3 The Contract shall be amended as is stated in Exhibit 21 or terminated

4.1 If the court finds hardship, the Contract may be amended or terminated

U6.2.3(1) stipulates that in case of hardship the disadvantaged party is entitled to request renegotiations.
In this issue, if hardship is deemed to exist, U6.2.3(4) can be applied because the agreement between Red and Blue could not be reached within a reasonable time [¶37, U6.2.3(3)].
Therefore, Red may resort to the court, and if the court finds hardship, the Contract may be amended or terminated.

4.2 Hardship exists

According to U6.2.2, "[t]here 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 or because the value of the performance a party receives has diminished", and the "events" have to meet requirement (a)〜(d).

4.2.1 The equilibrium of the Contract was fundamentally altered because the cost of Red's performance has increased, and the value of the performance Red receives has diminished.

This was caused by the occurrence of these events stated in Exhibit 21: ①a decrease in Red's catch of Negoland fish ("Event 1"), ②changes in foreign exchange rates ("Event 2"), and ③refusal to sell ingredients by suppliers ("Event 3")

4.2.1.1 The cost of Red's performance has increased.

As the result of Event 2, the cost of the production of the Product has doubled, causing an increase in the cost of Red's performance.

4.2.1.2 The value of the performance Red receives has diminished.

At the time the Contract was entered into, Red could benefit from securing stable sales from Blue by imposing a minimum purchase quantity.

However, Red's production of the Product was reduced by half as a result of Event 1 and 3.

On the contrary, the demand for the Product remains unchanged, consequently leading to excessive demand.

In this situation, there is no benefit for Red in securing a minimum purchase quantity of 1,000 tons from Blue.

Therefore, the value of the performance Red receives has diminished.

4.2.1.3 The equilibrium of the contract was altered fundamentally.

As is written above in 4.1.1.1 and 4.1.1.2, whereas Red is disadvantaged by its obligation to sell at least 1,000 tons of the Product at a 10 % discount to Blue despite the twofold increase in the cost of production, Blue still benefits from securing the Product at a discount.

Therefore, the equilibrium of the contract was altered fundamentally.

4.2.2 Event 1, 2, 3 each satisfies all of the additional requirements stipulated in U6.2.2 (a)~(d).

(a) Event 1, 2, 3 occurred after the conclusion of the contract

Event 1, 2, 3 occurred in and after 2016, while the Contract was concluded in 2012, and therefore satisfy requirement (a).

(b) Event 1, 2, 3 could not reasonably have been taken into account by Red at the time of the conclusion of the contract

Regarding Event 1, it was confirmed that there was a plentiful supply of Negoland fish [¶32] at the time of the conclusion of the contract. In this situation, Red could not have reasonably considered that the catch of Negoland fish would be reduced by half.

Regarding Event 2, Negoland's economy remains on a solid trajectory [¶3], and according to Exhibit 4, foreign exchange rates have been extremely stable from 2000 to 2015.

Regarding Event 3, Negoland's Ministry of Agriculture, Forestry and Fisheries has failed to act on news of illegal fishing activities [¶35]. At the time the Contract was concluded, Red did not have any information which would lead to supply refusals. In addition, since the Confidentiality Agreement was concluded in 2015, the damage caused by the disclosure of the confidential information could not reasonably considered at the time the Contract was made.

Consequently, Red could not have reasonably taken into account any of the occurrences of Event 1, 2, 3 at the time of the conclusion of the Contract, still less their simultaneous occurrence. Thus, requirement (b) is satisfied.

(c) Event 1, 2, 3 was beyond Red's control
Regarding Event 1, the change of the ocean currents is a natural phenomenon, and thus was beyond Red's control.
Regarding Event 2, the rapid change of foreign exchange rates were triggered by the negative views and activities of speculators [¶6], which was beyond Red's control.
Regarding Event 3, the disclosure was caused by Blue's breach of the confidentiality obligation, and thus was beyond Red's control.
Therefore, requirement (c) is satisfied.

(d) The risks of Event 1, 2, 3 were not assumed by Red
According to comment 3 of U6.2.2, a risk is assumed when it is taken over expressly, or is followed from the nature of the contract.
First, no statements within the Contract refer to the assumption of any risk.
Second, as contracts related to fisheries do not assume risks from their nature, no risks follow from this Contract from its nature.
Consequently, the risks of Event 1, 2, 3 were not assumed by Red, and thus requirement (d) is satisfied.

For these reasons above, hardship does exist.

4.3 The Contract shall be amended as is stated in Exhibit 21 or terminated

4.3.1 The 10% discount should be terminated

In the Contract, Red's benefit of securing stable sales and Blue's benefit of purchasing on a 10% discount and securing a stable supply was in equilibrium.
As is shown in ⑥ on Exhibit 21, however, now the demand for Super Red Mix surpasses the supply. In this situation, Red no longer benefits from securing the stable sales.
As a result, the equilibrium of the contract was lost, and the discount only opposes Red on significant disadvantages.
Consequently, the 10% discount should be terminated to restore the equilibrium of the Contract.

4.3.2 The regular price should be increased from 1.8 Nego-Lira to 2.5 Nego-Lira

Regarding the changes in the exchange rate between the Abu-Dollar and the Nego-Lira, 1 Abu-Dollar was equal to 1 Nego-Lira. Now the exchange rates are changed and 1 Abu-Dollar is equal to 1.4 Nego-Lira.
Accordingly, increasing the regular price from 1 Nego-Lira to 2.5 Nego-Lira does not change the ratio between these two currencies.
Therefore, increasing the regular price from 1.8 Nego-Lira to 2.5 Nego-Lira is necessary to restore the equilibrium of the Contract.

4.3.3 The amount of maximum supply shall be lowered to 1,200 tons

Due to the significant decrease of production, keeping the supply of 5,000 tons to Blue shall lead to the termination of the relationship with Red and other customers.
Furthermore, admitting the maximum supply of 5,000 tons leads to a significant harm in the future when the production of Super Red Mix recovers, since Blue would be the only existing customer in spite of the recovered production.
Under such circumstances, it is a disadvantage for Red to admit the maximum supply of 5,000 tons of the Super Red Mix.
In order to keep the relationship with all the customers and treat them fairly, the supply of Super Red Mix to all the customers including Blue shall be limited to half of their demands.
In order to achieve the above, the amount of maximum supply shall be reduced to 1200 tons, half of the quantity of supply in 2016.