ISSUE 1: THE "RARE METALS" CASE

SUMMARY OF FACTS

This dispute is between Red Corporation ("Red"), a government-backed entity under the Negoland Ministry of Economy and Trade and Blue Inc. ("Blue"), a private Arbitrian company. Red and Blue have always enjoyed a long-standing business relationship, spanning 17 years.

In 2000, Red and Blue concluded a priority-of-supply agreement ("the Agreement") for Red's exports of rare metals, which benefited both parties. In September 2015, Blue's tungsten refining technology was used for a new plant in Red. In exchange, there was an oral agreement that the priority-of-supply deal should be extended to tungsten, in addition to the existing nickel and titanium contract. Red further agreed to a license fee and monthly royalty payments linked to output. However, heavy rainfalls diminished the production capacity of Red's tungsten plant. Black set up a domestic firm within Negoland, diverting tungsten supplies from Blue. Blue would have made a profit of US$5 million if Red's exports to Blue had not dropped to 0. From November to December 2015,

Red agreed to amend the license agreement to extend usage of Blue's technology to include platinum. However, in January 2016, Red started using Green's platinum refining technology. In March 2016, the Arbitration Centre of Arbitria ordered Green to stop using the technology as it infringed Blue's patent. However, the Patent Office of Negoland eventually approved Green's patent application. Blue then filed a lawsuit to invalidate Green's patent. Meanwhile, Blue's request for Red to pay royalties for usage of the technology was rejected.

Blue is seeking US$5 million in damages from Red for breach the Agreement. Blue is also seeking royalties from Red for breach of the License Agreement.

1. Interpretation Of The Priority-Of-Supply Agreement Includes Tungsten

A. Plain reading of the Agreement shows that the definition of "rare metals" extends beyond nickel and titanium

1. The Agreement between Red and Blue (Exhibit 6) stipulates that Red gave Blue the right to order and purchase rare metals "such as nickel and titanium".

2. It is clear in this phrase that "nickel" and "titanium" are merely examples of the larger class of "rare metals" and was not meant to be restrictive. Therefore, the Agreement should entitle Blue to order and purchase other rare metals, which are "produced by Red or its affiliate on a priority basis to other prospective purchasers in other countries other than Negoland".

B. The Agreement should be interpreted to include tungsten from the parties' common intention based on their subsequent conduct

3. It is the common intention of Red and Blue to extend the meaning of "rare metals" in the Agreement beyond nickel and titanium, from the parties' subsequent conduct.

4. Pursuant to Article 4.3(c) read with Article 4.1(1) of the UNIDROIT Principles of International Commercial Contracts ("PICC"), the parties' conduct subsequent to the conclusion of the contract is relevant when determining the common intention of the parties at the time of the contract's construction. This is to prevail when interpreting terms of the contract. Additionally, Article 4.3, Comment 3 of the PICC also emphasizes the relevance of the parties' subsequent conduct of the parties in long-term contracts.

5. On the facts, Red's intention was to supply platinum on a priority basis to Blue, in addition to nickel and titanium. When Negoland Materials merged into Negoland Metals in 2003 (at [14]), Red began

supplying platinum to Blue in addition to nickel and titanium despite there being no formal modification to the Agreement. Furthermore, Red continued to supply nickel, titanium, and platinum to Blue during a rare metal squeeze in 2004, turning down other overseas buyers who were willing to pay a higher price for platinum to meet Blue's orders. All of the above clearly show that Red had been supplying platinum to Blue on a priority basis over other overseas purchasers for the past year since 2003.

6. Blue's intention was to purchase platinum from Red on a priority basis. This is evinced from the correspondence between Blue and Red at [15]. Blue stressed that they will be "counting on [Red] for stable supplies" of nickel, titanium, and platinum. This practice continued until the dispute over the Agreement arose in November 2015.

7. Therefore, the parties' conduct subsequent to the conclusion of the Agreement for the lengthy 11-year period from 2004 to November 2015 shows that Red supplied Blue with platinum on a priority basis. Since Red made no indication to modify the Agreement, both parties must have intended for the "rare metals" as stipulated in the contract to extend beyond nickel and titanium.

8. On the issue of tungsten's inclusion in the Agreement, Red's intention was to supply tungsten to Blue on a priority basis. At [19], Red told Blue that they were "planning to give [Blue] a similar deal" for tungsten, referring to the Agreement. Furthermore, Red supplied tungsten to Blue based on this intention for the period of September 2015 to November 2015.

9. Blue's intention was to purchase tungsten on a priority basis, as stipulated in the Agreement, as well as to have an active involvement in the tungsten business beyond the priority-of-supply deal. Therefore, it is the common intention of both parties for tungsten to be included into the Agreement.

C. Red's ignorance of the changes made to the final draft agreement is insufficient to excuse them from being bound by the Agreement

10. Red signed the Agreement as an indication of their assent. Pursuant to Article 2.1.6, Comment 1 of the PICC, an indication of assent to an offer is an acceptance if the assent is unconditional and does not contain any variations to the terms of the offer. Red had already signed the final Agreement (Exhibit 6) without qualifying its assent or varying any terms of the Agreement. Therefore, Red's signature constitutes a contractually binding acceptance.

11. Furthermore, it did not matter from a contractual point of view that Red signed "without noticing the difference between the draft agreement attached to the communication (Exhibit 5) and the Agreement (Exhibit 6)", as alleged at [13]. This is especially so for commercial contracts, where the certainty of contract is paramount for businesses to function. Therefore, Red should not be allowed to excuse themselves from the Agreement's obligations due to their oversight in not checking the final draft agreement thoroughly.

D. Even if common intention between the parties cannot be established, a reasonable business person would interpret the term "rare metals" to include tungsten

12. A reasonable business person would interpret the term "rare metals" to include tungsten based on the nature and purpose of the Agreement.

13. Article 4.2(2) of the PICC provides that the Agreement shall be interpreted "in accordance with the meaning which reasonable persons of the same kind as [Red and Blue] would give to it in the same circumstances". Under Comment 2 of Article 4.2(2), relevant circumstances stipulated in Article 4.3 have to be considered in applying the "reasonableness" test. In this case, the relevant consideration is Article 4.3(d), which is the "nature and purpose" of the Agreement.

14. On the facts, it is clear that the Agreement is of a long-term nature and that the purpose of it was for Blue to expand into the rare metals industry. This understanding was communicated to Red at

[12] where Blue said that the plant replacement project was an "opportunity for [them] to expand [their] relationship" with Red to other areas, in particular, the transactions of rare metals. Blue also communicated the "long-term benefits" that they hoped to realize from the Agreement, ensuring a common understanding with Red regarding the nature and purpose of the contract.

15. Furthermore, a reasonable business person is likely to conclude that the Agreement should extend beyond nickel and titanium. A reasonable business person would interpret the Agreement to be non-restrictive because it is likely that new rare metals such as tungsten and platinum would be discovered and parties might want to include them into the Agreement. Hence, limiting the Agreement to only two metals would hinder Blue's realization of "long-term benefits", which was the original purpose of the contract.

16. Therefore, a reasonable business person would extend the Agreement beyond nickel and titanium based on the nature and purpose of the Agreement.

E. Alternatively, Red has an implied obligation to include tungsten in the Agreement stemming from its nature and purpose

17. Red has an implied obligation to include tungsten in the Agreement based on the nature and purpose of the Agreement.

18. Pursuant to Article 5.1.2(a) of the PICC, implied obligations "stem from the nature and purpose of the contract". Illustration 1 shows that a term can be implied when it is "obvious" and "necessary" to achieve an agreement's purpose. But for the implication of this obligation, the restriction of the Agreement to only nickel and titanium will hinder Blue's opportunity to expand into the rare metals industry and realize the "long-term benefits" that Blue communicated to Red at [12].

19. Therefore, there is an implied obligation for Red to supply tungsten to Blue on a priority basis based on the nature and purpose of the Agreement.

2. Breach Of The Priority-Of-Supply Agreement By Prioritizing Sales To Black Negoland

F. An interpretation of the contract between Red and Black Negoland in accordance with the reasonable person test demonstrates that it was not concluded to fulfil domestic sales

20. In interpreting the contract, Article 4.1(1) of the PICC highlights that if a common intention between the parties cannot be established, "the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances". In the present case, the reasonable person test should be done from the point of view of a reasonable businessman.

21. Red is a government corporation under the Ministry of Economy and Trade whose primary interest is to protect the domestic economy (at [3]). Since Red said that they "can't touch the rare metals earmarked for sales within Negoland" (at [12]), the reasonable businessman would interpret the term "domestic sales" to mean "sale of goods within Negoland which would benefit the domestic economy". Given that "Black Negoland exports overseas all amounts of the tungsten bullions it purchases" (at [22]), a reasonable businessman would not consider Black Negoland to fit under the definition of a "domestic corporation".

22. Therefore, Red should be held in breach of the Agreement with Blue for prioritizing the sale of tungsten to Black Negoland.

G. Red should not be allowed to use its contract with Black Negoland to justify its non-performance of the Agreement because Red did not act in good faith when contracting with Black Negoland

23. Pursuant to Article 1.7(1) of the PICC, contracting parties "must act in accordance with good faith and fair dealing in international trade."

24. On the facts, Red agreed to Black's proposal to establish a subsidiary (Black Negoland) in Negoland, aware that this would enable them to prioritize sales to Black. This is because sales to that subsidiary "would not be exports" (at [22]). Furthermore, Black Negoland was especially formed to purchase tungsten on a priority basis from Red. This formation took place on November 5, 2015, five days before Red told Blue that they would not be able to supply Tungsten on a priority basis (at [22]). Even if Black Negoland can be considered a domestic corporation, it is evident that Red knowingly entered into a new contract with Black to circumvent the Agreement. Thus, Red did not act in good faith in contracting with Black Negoland.

25. Therefore, Red's non-performance of the Agreement is unjustifiable and Red should be held in breach.

H. Red is unable to plead hardship because it was a case of self-induced hardship

26. Even if the record rainfall amounts to hardship (at [21]), Red's election to contract with Black suggests that the hardship was self-induced.

27. Looking at the timeline of facts, the record rainfalls flooded the area at the end of October and the company's production decreased from November 2015 (at [21]). However, Red only entered into a contract with Black Negoland after November 5, 2015, when Black Negoland was incorporated. This was after Red knew that its supply of tungsten had dropped. In Exhibit 9, it was shown that from October to November 2015, the total production quantity of tungsten dropped from 120 to 40 tonnes. Additionally, there was also a corresponding increase in the demand in Negoland from 20 to 40 tonnes due to the added demand from Black Negoland.

28. Therefore, in electing to contract with a third party knowing that in the process, it would be in breach of its contractual obligations with Blue, Red cannot then plead hardship and has to continue fulfilling its obligation to supply tungsten.

I. Hardship does not allow Red to non-performance of the Agreement

29. Pursuant to Article 6.2.3(1) of the PICC, the "disadvantaged party is entitled to request re-negotiations". Reading that with Article 6.2.3(2), "the request for re-negotiation does not in itself entitle the disadvantaged party to withhold performance".

30. Therefore, Red still had to continue fulfilling its obligations to supply tungsten on a priority basis to Blue from November 2015 while requesting re-negotiations. However, Red did not do any of the above, choosing to unilaterally stop its performance. Therefore Red should be held in breach of the Agreement.

3. Use Of The Licensed Refining Technology To Refine Platinum

J. Red should pay royalties to Blue due to the formation of a collateral contract on the use of Blue's technology to refine platinum within the License Agreement

31. A collateral contract is a "written or oral agreement associated as a side contract made between the original parties" (*Black's Law Dictionary Free* (2nd ed.)). A collateral contract "[leaves] the earlier written agreement intact and [relates] to a different, independent subject matter". Otherwise, if it "contradicts or qualifies the original contract", a collateral contract cannot be found (*George Letsas & Colm O'Cinneide, Current Legal Problems 2010, Volume 63*, (2011)). According to Comments 1 and 2 of Article 1.2 of the PICC, written evidence for an offer in a collateral contract is allowed.

32. Blue and Red's conversation (at [24]) evinced the formation of a collateral contract on the use of the refining technology for platinum. Blue offered the revision of the "License Agreement to cover platinum refining". Red then "[agrees] with the part to be amended" to allow Blue's License Agreement to be used for platinum. This clear offer and acceptance indicates that a *prima facie* collateral contract is formed. This collateral contract allows the refinement of platinum under the same terms as the License Agreement.

33. Therefore, Blue can claim royalties for Red's use of Blue's technology to refine platinum due to the formation of a collateral contract for platinum based on the License Agreement.

K. The arbitral award which both parties willingly submitted to should be enforceable on Red in Negoland

34. The Arbitration Center of Arbitria's award is enforceable because issues of patent infringement are arbitrable.

35. The International Commerce Court held in *Case No. 6097* (1989) that an arbitral tribunal empowered by the parties can rule on the validity of a patent and bind parties to this award. Since patentees can surrender, assign, license or transfer one's patent right to others, they are allowed to arbitrate on patent issues by choosing arbitration as the conclusive and final solution for their patent dispute. Since Green and Blue have agreed to arbitrate on the patent infringement of Green's technology, an arbitral tribunal is allowed to arbitrate on Green's patent infringement.

36. Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") requires each Contracting State to recognize arbitral awards as binding and enforce them accordingly. Given that both Negoland and Arbitria are Contracting States, the arbitral award should be enforceable within Negoland, the country Red is operating in.

L. Red's usage of Green's technology is an infringement of Blue's technology as the arbitral award should be enforced within Negoland given an absence of public policy to the contrary

37. The arbitral award is enforceable within Negoland because there is no public policy to the contrary. Article V(2)(b) of the New York Convention states that recognition or enforcement of an arbitral award may be refused if enforcing it would be contrary to the public policy of that country. Since Arbitria and Negoland are Contracting States to the New York Convention (at [6]), the above consideration would apply to the arbitral award.

38. An arbitral award should "as a matter of comity" be given effect to unless there are public policy considerations to the contrary which "violate the most basic notions of morality and justice" and the award is "fundamentally offensive to that jurisdiction's notions of justice". The Hong Kong Court of Appeal in 1999 referred to the case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 473 US 614* (1985), where the demand for comity required that the Courts enforce the arbitral award "even assuming that a contrary result would be forthcoming in a domestic context." The Federal Court of Australia in *Traxys Europe S.A. v Balaji Coke Industry Pvt Ltd* recognised that a mere violation of domestic law was unlikely to amount to a ground to refuse recognition or enforcement on the basis of public policy.

39. The strict interpretation of "contrary to public policy" is evinced by the Supreme Court of Thailand in *Case No. 7277/2549* because the underlying contract was tainted by bribery, and an enforcement of the award that was based on the tainted contract would be in contrary to public policy. As such, most applications to refuse recognition and enforcement of foreign arbitral awards have rarely been successful (Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1979 INT'L LAW 269, 270).

40. On the facts, the Arbitration Centre of Arbitria issued an arbitral award on March 1, 2017 which ordered Green to stop using Blue's technology immediately and compensate Blue for damages

because the technology used by Green infringed Blue's existing patent. Green's patent application for the disputed technology in Negoland was however approved in April 1, 2017 by the Patent Office of Negoland. There is no public policy to the contrary as the mere violation of domestic patent rules are insufficient and do not "violate the most basic notions of morality and justice".

41. Furthermore, there are positive policy considerations for the enforcement of the arbitral award. The enforcement of the arbitral award will align Negoland's recognition of Green's patent infringement with similar decisions in Meditria and Arbitria. This will improve Negoland's public policy on Intellectual Property protection by aligning it with the principles of the international community.

42. In enforcing the arbitral award in Negoland while taking into consideration the absence of contrary public policy, Green's platinum refining technology in Negoland should be found to infringe on Blue's existing patent in Negoland.

M. Red has to pay prescribed royalties to Blue as they have been using Blue's patented technology

43. The arbitral award has proven that Green's technology is the same as Blue's. As such, Red has to pay prescribed royalties to Blue since they are in essence using Blue's technology.

44. Even in the unlikely conclusion that Green's patent in Negoland takes precedence over the arbitral award, Red's claim is that Green's patent in Negoland precludes them from paying any royalties to Blue. However, the Patent Office of Negoland only approved Green's patent on April 1, 2017, making it the operative starting date of the patent. Given that the Arbitration Centre of Arbitria ruled that Green's technology constituted an infringement of the patents owned by Blue in Negoland and Meditria, it stands to reason that at the very least, Red's use of the technology to refine platinum between March 2016 (the date Red started using Green's technology) to April 2017 should still be subject to royalties payable to Blue.

N. Even if there was no collateral contract, Red has breached their License Agreement with Blue by using Blue's technology for platinum when it was expressly stated that it can only be used for tungsten

45. In the absence of a collateral contract, Red is also liable for breach of the License Agreement as they used the technology for platinum. Section 1.1 of the License Agreement in Exhibit 7 states that the license is "solely to refine tungsten". However, by using the technology for platinum, Red has breached Section 1.2 of the License Agreement in "[using] the Licensed Technology other than the purpose as set forth in Section 1.1". This breach entitles Blue to claim for damages as the technology has been extended without a License Agreement to refine platinum. The quantum of damages is determined by the royalties that Blue would have collected if not for Red's breach of the License Agreement.

ISSUE 2: THE "FISHERIES" CASE

SUMMARY OF FACTS

In 2005, Red developed a fish feed called Red Mix but it did not sell well until Blue started purchasing it in 2006. The reputation and sales of both Red Mix and Blue's salmon improved. When Red released the improved Super Red Mix in 2012, Red and Blue signed a Requirements Contract.

In March 2016, Red and Blue signed a Confidentiality Agreement regarding a joint study project on fish stocks. However, Red's employee mistakenly leaked confidential project-related information to Blue. Blue's employee accidentally opened an innocent-looking email attachment infected by a new strain of virus, exposing the confidential project-related information. Subsequently, Negoland's exports of marine products plummeted but eventually recovered to its previous level after the Ministry announced new measures to conserve fish stocks.

Red is seeking US$10 million in damages from Blue, whom they claimed breached their Confidentiality Agreement. Additionally, in September 2016, Red requested that the Requirements Contract be re-negotiated on grounds of hardship. Blue rejected the request and Red brought the case to arbitration, seeking an amendment or termination of the contract.

1. Blue Cannot Be Liable For The Consequences Of The Leak Because Blue Had Acted In Accordance With The Requirements Of The Confidentiality Agreement

A. Blue was not in breach of the Confidentiality Agreement as they had exercised a reasonable degree of care to prevent a breach of confidentiality as required in the contract

1. The interpretation of the standard terms of the contract pursuant to Article 4.1, Comment 4 of the PICC illustrates the test for reasonableness to determine what constitutes a reasonable standard of care as required in the present contract. Under the Article, "standard terms should be interpreted primarily in accordance with the reasonable expectations of their average users irrespective of the actual understanding which either of the parties to the contract concerned, or reasonable persons of the same kind as the parties, might have had." Therefore, the test of reasonableness should be a definitive standard that is not in contention.

2. On the facts, section 2(1)(iv) of the Confidentiality Agreement (Exhibit 20) stipulates that "[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". The following provision would constitute a standard term employed in Confidentiality Agreements and interpretation of the terms is thus subject to Article 4.1 Comment 4, where it is necessary to look at the plain meaning of the contract and interpret it in a way that is commercially sensible.

3. Employing the test of the "reasonable expectations of their average users", the contract would require the parties to have exercised a standard, precautionary measure that is common practice among companies. This is to ensure that they will be able 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". The exposure of the confidential information was the result of opening a virus-infected email attachment Blue's employee had received. However, Blue had already maintained the standard programs they had been using throughout the company to check for virus-infected emails, and frequently informed their employees to be wary of email attachments sent by strangers (at [34]). Thus, the steps taken by Blue can be construed to have been undertaken with a reasonable degree of care in accordance with the reasonable expectations of the average user. In addition, it would not have been consistent with the "reasonable expectations of [an] average user" either to have taken steps to prevent the unforeseeable. The virus that had produced the information leak was a new strain that bypassed the virus-infected email check programme. Furthermore, the email used the name of Blue's important customer and appeared very natural. In the context of Blue's precautionary and prudent conduct, it would be in the "reasonable expectations of [an] average user" that it was safe to open the email received.

4. Therefore, Blue has acted in accordance with a reasonable standard of care and met their contractual obligations under the Confidentiality Agreement.

B. The risk created is not within the agreed parameters between Red and Blue and thus Blue was not in breach of the Confidentiality Agreement

5. Article 4.1.1 of the PICC details that "[a] contract shall be interpreted according to the common intentions of the parties". The definition of "Confidential Information" as "the existence of the Project" pursuant to Section 1(1)(i) of the Confidentiality Agreement should be subjected to the common

intentions of both Blue and Red when the contract was first concluded. In addition, the interpretation of the terms of the contract should also be consistent, as set out in Article 4.4 that "terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear".

6. Blue and Red concurred at [33] that a confidentiality agreement between them would relate to the sharing of data regarding fish stocks and thus established the necessity of signing such an agreement. In this vein, both Blue and Red were aligned in their intentions of allocating the risk of disclosing information solely to the sharing of data on fish stocks. Therefore, Blue interprets "the existence of the Project" in section 1(1)(i) to refer exclusively to the research project regarding fish stock in the sea around Negoland and Arbitria. It has also been confirmed that the information leaked does not directly relate to the study on fish stocks and would not constitute information relating to "the existence of the Project". Hence, the information leaked would not classify as "Confidential Information" under the limb of section 1(1)(i) and the disclosure of the information could not be in breach of the Confidentiality Agreement.

7. The information leaked also does not satisfy the definition of "Confidential Information" set out in section 1(1)(ii). Section 1(1)(ii) includes "any and all confidential, proprietary or secret information which are disclosed by the Discloser, and are clearly labelled as 'Confidential', or should be reasonably considered to be confidential given the nature of the information or the circumstances surrounding its disclosure" as "Confidential Information". However, it could not have been the intentions of both parties to make Blue liable to protect all kinds of confidential information. Thus, it would be contrary to Article 4.1.1 to hold that the contract should be interpreted against Blue's intention. Blue's intention was to restrict the allocation of risk to information disclosure only to the sharing of data regarding fish stocks. This interpretation of the terms would also be consistent with Article 4.4 given that the contract hinged upon the sharing of fish stocks data. Since it has been ascertained that the information leaked does not directly relate to the study on fish stocks, Blue had no obligation to protect the confidential information disclosed as it does not fulfil the conditions in section 1(1)(ii). Therefore, Blue was not in breach of the Confidentiality Agreement.

C. Blue cannot be liable for the consequences of the leak because Red's mistake created the conditions for the information leak to be possible

8. Blue cannot be liable for the damages caused by the leak because Red's act of sending the confidential information was the dominant cause of the information leak.

9. The significance of causation on the part of the aggrieved party in relation to the damages sought is endorsed in Article 7.4.7 of the PICC read with Article 7.1.7. In particular, Article 7.4.7(3) provides that "[t]he conduct of the aggrieved party or the external events as to which it bears the risk may have made it absolutely impossible for the non-performing party to perform. If the requirements of Article 7.1.7 are satisfied, the non-performing party is totally exonerated from liability." With reference to Article 7.1.7(1), it states that "[n]on-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

10. On the facts, Red conceded at [35] that their employee had mistakenly sent Blue the confidential information which was not intended to be disseminated. This mistake bore the risk of such information being leaked eventually since it was no longer confined within the company. Moreover, the mistake made it impossible for Blue to perform its obligations of nondisclosure of information under the Confidentiality Agreement because it would necessitate Blue to stop short of opening the email and thereby prevent the virus attack from resulting in an information leak. The email had bypassed the virus-infected email check programme and "used the name of Blue's important customer" while appearing very natural. It would not be reasonable to have expected Blue to undertake drastic measures not to open emails received. Since Blue's non-performance in the Confidentiality Agreement was due to a virus leak beyond its control given that it had taken reasonable steps to preclude such a situation and acted with a reasonable degree of care as

previously submitted. As such, Blue "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" as Article 7.1.7(1) requires.

11. Moreover, Section (2)(ii) of the Confidentiality Agreement further reiterates that Blue should not be responsible for the damages incurred from the supposed breach of confidentiality. The Confidentiality Agreement states that "[n]otwithstanding the foregoing, the obligations set out in 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". Therefore, Blue would be completely absolved from incurring the costs of any damages suffered by Red because Blue was not in breach of the Confidentiality Agreement.

12. Thus, Red cannot rely on Blue's alleged failure to adhere to the Confidentiality Agreement to claim for damages consequent of a breach of confidentiality because Red was responsible for the very risk they had created through their mistake. Blue should be absolved of liability relating to the confidential information leak because Blue did not breach the Confidentiality Agreement.

2. Red Cannot Amend or Terminate the Contract Because The Reasons In Exhibit 21 Do Not Constitute Hardship

D. As there is no hardship, Red should not amend or terminate the contract because the events were reasonably foreseeable and the appropriate risks were assumed

13. Pursuant to Article 6.2.2 Comment 3(b) of PICC, events that could have reasonably been taken into account by the disadvantaged party at the time the contract was concluded, cannot consist hardship.

Natural Events were reasonably foreseeable

14. According to Exhibit 21, Red cites hardship on the grounds that the change in ocean currents in the coastal area of Negoland has decreased their catch of Negoland fish. On the facts, global warming has become more pronounced recently (since summer of 2016), affecting ocean currents and hence fish supplies. The phenomenon of global warming and its effects have been exponentially on the rise. Furthermore, the link between the aggravating effects of global warming and the changes in ocean currents, given Negoland's geographical situation, should not be "unpredictable".

Economic Events were reasonably foreseeable

15. Red also cites the fact that costs of imports has increased sharply in recent years (Exhibit 21). In 2011, the Tribunal de Contas da União pointed out that even currency fluctuations could be reasonably foreseeable at the time of the conclusion of the contract and the risks of such an event should have also been assumed by the foreign companies. Furthermore, in *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino vs. Granbanco S.A.* [2012], hardship could not be concluded because there was insufficient evidence that an economic crisis made the contract more onerous. Case law has shown that fluctuations in costs and economic circumstances may occur, but as long as it cannot be proven to alter the fundamental balance of the contract or reasonable foreseeability and risks can be assumed, hardship cannot be pleaded.

16. On the facts, Red should have had sufficient time to reasonably foresee the impact global economic circumstances on their businesses at the time of contract formation since they happened over 'years' of sharp increase. Furthermore, it is precisely because Red is dependent on overseas suppliers that they should have reasonably foreseen and thus taken into consideration other countries' market fluctuations.

17. Red further cites that the breach of confidentiality agreement resulted in a failure of sources, which caused some suppliers to pull out. However, given Negoland's prime geographical location (at [2]), and political support (at [3]), there is no difficulty in extending its scope of influence and reaching

out to secure a stock or back-up sources or suppliers. These would help to reduce the effects of the ocean current shifts and fluctuating costs of imports.

Appropriate risks could have been assumed for Natural Events

18. Red cannot plead hardship because the risks of the ocean currents affecting Negoland's fish supplies were already assumed by Blue, and Red was aware of the allocation of risk.

19. Pursuant to Article 6.2.2, Comment 3(d), if the disadvantaged party had assumed the risk of the change in circumstances, there can be no hardship. This principle was used to plead hardship in *Centro de Arbitraje de México (CAM)* [2006], but the claim failed because the grower was expected to assume the risk of occurrence of extraordinary rainfalls which would destroy its crops. On the facts, Blue would be the disadvantaged party. Blue entered the market for raw materials and is deemed to have accepted the risk of supervening natural events affecting its fish supplies.

20. Pursuant to Article 7.3.6, Comment 4, this risk of deterioration or destruction of the subject matter fundamental to the performance of a contract, should lie with the person in control of that performance. Given that Red Corp. is an active exporter of salmon, trout, mackerel and other fishes (at [28]), it should have the requisite geographical and business expertise and knowledge in dealing with the risks assumed by Blue.

21. Therefore, as the appropriate risks could have been assumed by Blue and Red is aware of such a risk assumption, hardship cannot be pleaded.

22. Ultimately, PICC lays out a conjunctive test for the pleading of hardship under Article 6.2.2. As the factors listed under Article 6.2.2 cannot be entirely proven and Blue has in fact, disproved some of them, there is no clear evidence of hardship. Therefore, Red should not be allowed to request for an amendment or termination of the existing Requirements Contract.

E. Where both parties should uphold good faith and fair dealing, Red should not amend or terminate the contract

23. Furthermore, pursuant to Article 1.7 of the PICC, both parties have to conform to the general principle of good faith and fair dealing. The definition of good faith and fair dealing has not been explicitly defined in the PICC. However, good faith, as construed from Illustration 4, requires parties to take the necessary steps to prevent either party from suffering heavy losses. We may also construe the meaning of good faith from case law applying PICC. In *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, good faith was found on the basis of transparency and acting honestly. It would not be in good faith for the defaulting party to leave the aggrieved party vulnerable and continue profiting at the aggrieved party's expense.

24. On the facts, interdependence between Red and Blue is evident. At [29], Blue acknowledged their long-term working relationship with Red and agreed to try out Red's new feed even though they are not known on the market. Blue was one of Red's earliest patrons for Red Mix. After which, Red Mix started gaining popularity on the market (at [31]). After Blue switched to Red Mix, Blue reaped substantial benefits, in terms of both reputation and price (soaring by 50%). At [32], Blue highlighted that the success of Blue Salmon owed entirely to Red Mix and expressed a new intention (during their meeting in August 2012) to purchase Super Red Mix, which Blue stressed would be 'indispensable' for the farming of Blue Salmon.

25. As noted in obiter in *Bobux Marketing Limited v Raynor Marketing Limited* [2001] NZCA 348, which applied PICC, there exists an implied duty of good faith in contract performance, particularly in long-term contracts. Red and Blue's oral agreements had always been based on mutual trust that fairness and good faith will be observed by both parties. Ultimately, Red elected not to uphold the initial Requirements Contract with Blue and chose to protect its profitability by turning to other customers.

26. Therefore, Red should not be allowed to terminate or amend the contract to their own advantage, to Blue's detriment, as it will be against the principles of good faith and fair dealing.

3. Where Hardship Is Proven, Blue's Proposes Modifications To Red's Proposal Of Amendments

F. Blue agrees to Red's proposal to increase the regular price from 1.8 to 2.5 Nego-Lira effective from January 1, 2017

27. Blue recognizes that it is reasonable for Red to increase the price of Super Red Mix from 1.8 to 2.5 Nego-Lira in order to reflect the change in the exchange rate from 1.1 to 1.4 (Nego-Lira to US Dollars), as shown in Exhibit 4.

G. Blue counter-proposes that Red maintains the 10% discount

28. This discount should exist independently of the minimum purchase term that was agreed upon by both parties. This is to distinguish Blue as Red's first patron (Exhibit 29). While Red Mix was initially unpopular, Blue had helped protect Red's business by using a sample of their feed, to the mutual benefit of both parties (Exhibit 31). Furthermore, given past dealings in the rare metals case between Red and Blue, it is evident that Red and Blue's partnership is intimate. On this basis of long-term mutual trust and loyalty, the increase in demand should not eliminate the discount.

H. Red proposes amending the maximum quantity of supply from 5000 to 1200 tons per year but Blue counter-proposes that the maximum quantity should remain at 5000 tons

29. Red is obligated to maintain the maximum quantity of marine product exports initially agreed upon in the Requirements Contract (Exhibit 17). In 2017, Red's exports of marine products have been restored to the previous level (at [35]). Therefore, there are no grounds for Red to decrease the maximum quantity of supply.

30. Furthermore, it appears that Red has pegged the decrease in the maximum quantity to the tentative measures agreed upon during the pending dispute on hardship. However, Blue only accepted this measure with reservations that its acceptance will have no impact on its future claims (at [37]).

I. Blue agrees to Red's proposal to remove the minimum purchase provision

31. Blue initially agreed to a minimum purchase provision for the benefit of Red. Blue has also requested for an annual supply of 2400 tons as evidenced by Blue's purchase order in 2016 (Exhibit 19) and this figure is unlikely to decrease. Therefore, the minimum purchase provision would be irrelevant.

J. Summary of Blue's amendments to the contract

32. In summary**,** Blue agrees to the increase in the regular price from 1.8 to 2.5 Nego-Lira and to the removal of the minimum purchase provision of 1000 tons. However, Blue counter-proposes that it is only reasonable that the maximum quantity of supply must remain at 5000 tons and the discount of 10% to still remain in force.