

**THE INTERNATIONAL ADR MOOTING COMPETITION
HONG KONG - AUGUST 2010**

MEMORANDUM FOR RESPONDENT

Team Number: 297

TABLE OF CONTENTS

INDEX OF TERMS AND ABBREVIATIONS	3
INDEX OF ARBITRAL AWARDS AND JUDICIAL DECISIONS	4
STATEMENT OF FACTS	7
ARGUMENTS	8
I. THE TRIBUNAL HAS NO JURISDICTION OVER INSTANT CASE	8
1.1 REQUIREMENTS FOR ARBITRATION UNDER THE UNCITRAL MODEL LAW ON ARBITRATION AND THE NEW YORK CONVENTION ARE NOT FULFILLED.....	8
(A) THE ARBITRATION AGREEMENT WAS MODIFIED TO CONFER A RIGHT TO REFUSE SETTLEMENT VIA ARBITRATION	8
(B) CLAIMANT DID NOT REQUEST TO BE REFERRED TO ARBITRATION	9
1.2 CLAIMANT DID NOT FULFILL ITS PRE-ARBITRAL REQUIREMENTS	9
CONCLUSION ON JURISDICTION.....	10
II. THE FAILURE TO MEET THE MINIMUM SALES TARGET IN 2009 DOES NOT GIVE GROUNDS FOR TERMINATION.....	10
2.1 RESPONDENT'S FAILURE TO MEET THE MINIMUM SALES TARGET WAS DUE TO INTERFERENCE BY CLAIMANT	10
(A) CLAIMANT IS OBLIGATED TO PREVENT PARALLEL IMPORTATION AND TO USE A LICENSE GIVEN BY RESPONDENT WITHIN LIMITS UNDER THE AGREEMENT AND PICC.....	11
(B) CLAIMANT'S BREACH OF OBLIGATIONS CAUSED INTERFERENCE WHICH MADE RESPONDENT FAIL TO MEET THE MINIMUM SALES TARGET.....	11
(i) <i>CLAIMANT IS LIABLE FOR PARALLEL IMPORTATION WHICH WAS THE REASON WHY RESPONDENT FAILED TO MEET THE MINIMUM SALES TARGET</i>	12
(ii) <i>CLAIMANT'S INFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHTS OF RESPONDENT AGGRAVATED DECLINING SALES</i>	13

(iii) CLAIMANT ACTED AGAINST PICC ARTS. 5.1.3 AND 5.1.4 WITH DISREGARD FOR ITS OBLIGATIONS OF CO-OPERATION AND BEST EFFORTS	13
(iv) THE TERMINATION FOR FAILURE TO MEET MINIMUM SALES TARGETS WAS AN AFTERTHOUGHT AND CONTRARY TO ESTOPPEL.....	14
2.2 RESPONDENT'S FAILURE TO MEET THE MINIMUM SALES TARGET WAS NOT A FUNDAMENTAL NON-PERFORMANCE.....	15
2.3 TERMINATION DUE TO THE FAILURE TO MEET THE MINIMUM SALES TARGET IS CONTRARY TO GOOD FAITH CONSIDERING EXCEEDING SALES RECORDS OF THE RECENT PAST	15
2.4 EVEN IF IT WAS A FUNDAMENTAL NON-PERFORMANCE OF THE AGREEMENT, CLAIMANT DID NOT GIVE RESPONDENT 21 DAYS TO MAKE REMEDIES PURSUANT TO CLAUSE 21.1.2	16
III. THE SUPER TYPHOON DOES NOT EXCUSE CLAIMANT'S NON-PERFORMANCE	16
3.1 THE SUPER TYPHOON IS NOT <i>FORCE MAJEURE</i>	17
(A) UNUSUAL METEOROLOGICAL EVENTS ARE NOT <i>FORCE MAJEURE</i> IN THE AGRICULTURAL BUSINESS	17
(B) FLUCTUATIONS OF PRICES ARE NOT <i>FORCE MAJEURE</i> IN THE TRADE.....	17
3.2 HARDSHIP DOES NOT GIVE A GROUND FOR TERMINATION UNDER PICC	18
3.3 IMPRACTICABILITY OF PRODUCING THE PRODUCTS WAS CAUSED BY CLAIMANT'S CARELESS POOR CONSTRUCTION OF THE ROOF.....	18
IV. CLAUSE 21.1.4 DOES NOT GIVE A RIGHT TO TERMINATE THE AGREEMENT WITHOUT FUNDAMENTAL NON-PERFORMANCE	19
V. THERE IS NO FUNDAMENTAL BREAK DOWN OF THE RELATIONSHIP.....	19
VI. CLAIMANT IS OBLIGATED TO SUPPLY THE PRODUCT AND LIABLE FOR DAMAGES.....	20
6.1 CLAIMANT SHOULD PERFORM ITS OBLIGATION TO SUPPLY THE PRODUCT	20
6.2 CLAIMANT IS LIABLE FOR DAMAGES TO RESPONDENT	20
REQUEST FOR RELIEF	21

INDEX OF TERMS AND ABBREVIATIONS

¶	Paragraph of Problem
§	Article of UNIDROIT Principles of International Commercial Contracts of 2004
Agreement	Distribution Agreement
Art	Article
Arts	Articles
Clar.	Clarifications of the Moot Problem
Clause	Clause of the Distribution Agreement
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
Mr.	Mister
Ms.	Miss
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)
PICC	UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004)
Product	sun cream manufactured by Hampton SunCare using Blanco Bean
UNCITRAL	United Nations Commission on International Trade Law

INDEX OF ARBITRAL AWARDS AND JUDICIAL DECISIONS

ICC International Court of Arbitration

Court: ICC International Court of Arbitration

Number: 10422

Date: 00.00.2001

Available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=957>

Cited as: Latin-American Distributor (2001)

Court: ICC International Court of Arbitration

Number: 9875

Date: 00.03.2000

Available at: <http://www.unilex.info/case.cfm?pid=2&id=697&do=case>

Cited as: Japanese Company (1997)

Court: ICC International Court of Arbitration

Number: 10021

Date: 00.00.2000

Available at: <http://www.unilex.info/case.cfm?pid=2&id=832&do=case>

Cited as: Shareholders' Agreement (2000)

Russia

Court: International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation

Number: 18/2007

Date: 08.02.2008

Available at: <http://www.unilex.info/case.cfm?pid=2&id=1478&do=case>

Cited as: Russian Company (2008)

Switzerland

Court: Arbitration Court of the Lausanne Chamber of Commerce and Industry

Date: 25.01.2002

Available at: <http://www.unilex.info/case.cfm?pid=2&id=863&do=case>

Cited as: Belgian Individuals (2002)

Italy

Court: Corte arbitrale nazionale ed internazionale di Milano

Date: 00.03.2008

Available at: <http://www.unilex.info/case.cfm?pid=2&id=1301&do=case>

Cited as: Framework Agreement (2008)

Belgium

Court: Rechtbank [District Court] van Koophandel Hasselt

Number: AR 1849/94

Date: 05.02.1995

Available at: <http://cisgw3.law.pace.edu/cases/950502b1.html>

Cited as: Chilean Company (1995)

Mexico

Court: Centro de Arbitraje de México (CAM)

Date: 30.11.2006

Available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1149>

Cited as: Mexican Grower (2006)

Unknown

Court: Ad hoc Arbitration (Place unknown)

Date: 04.03.2004

Available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=973>

Cited as: Central European Company (2004)

STATEMENT OF FACTS

CLAIMANT Hampton SunCare Ltd. is a company which produce sun cream using Blanco bean. **RESPONDENT** Heng SunCare Ltd. is an exclusive distributor of Hampton SunCare creams in Inachi.

Parties made the Agreement which granted **RESPONDENT** the exclusive right to resell **CLAIMANT**'s sun cream in Inachi from 31 January 2002 to 31 January 2007.

RESPONDENT achieved success substantially exceeding the incremental minimum sales targets. **RESPONDENT** had increased sales by 20% each year.

On **1 March 2010** a super typhoon hit SIS and ruined Blanco bean plantations.

In **2009** **RESPONDENT** failed to attain the sales target and believed it was due to the parallel importation into Inachi. On **10 March 2010**, **RESPONDENT** commenced legal action in the Inachi District Court against **CLAIMANT** for the damages it suffered as a result of the parallel importation.

On **12 March 2010** **CLAIMANT** purported to terminate the Agreement and on **14 March 2010**, **RESPONDENT** amended its suit to include a claim for declaratory relief that the purported termination was unlawful.

On **20 March 2010** **CLAIMANT** filed a notice of the dispute with HKIAC.

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION OVER INSTANT CASE

1. This tribunal has no jurisdiction over the present case for two reasons as follows: **(1.1)** Requirements for arbitration under the Model Law and the New York Convention are not fulfilled; **(1.2)** CLAIMANT did not fulfill its pre-arbitral requirements.

1.1 REQUIREMENTS FOR ARBITRATION UNDER THE UNCITRAL MODEL LAW ON ARBITRATION AND THE NEW YORK CONVENTION ARE NOT FULFILLED

2. RESPONDENT commenced legal action for the damages and amended the suit to include a claim for declaratory relief that the purported termination of the Agreement was unlawful [¶12;15]. Therefore disputes are already pending before the Court of Inachi. Inachi has adopted the Model Law without any alterations and is also a party to the New York Convention.
3. In the instant case, the arbitration agreement is invalid or inoperative for the reasons bellow: (A) It has been modified; (B) CLAIMANT made no request for arbitration at all.

(A) THE ARBITRATION AGREEMENT WAS MODIFIED TO CONFER A RIGHT TO REFUSE SETTLEMENT VIA ARBITRATION

4. Clause 22 provided that failing mutual resolution, Parties shall be submitted to the arbitration [¶4]. Nevertheless, an agreement can be modified [§1.3] and the new agreement has made to hold the arbitration without prejudice to Parties' rights to challenge the jurisdiction of the tribunal [¶16]. Thus, RESPONDENT has a right to challenge the jurisdiction of the tribunal under the modified agreement while original arbitration agreement is invalid. If agreement is invalid or incapable of being performed, the court shall not refer the parties to arbitration [Model Law Art. 8(1); New York Convention Art II.3.].

(B) CLAIMANT DID NOT REQUEST TO BE REFERRED TO ARBITRATION

5. CLAIMANT should submit requests not later than when submitting its first statement on the substance of the dispute [Model Law Art. 8(1)]. However, CLAIMANT did not request to be referred to arbitration.

1.2 CLAIMANT DID NOT FULFILL ITS PRE-ARBITRAL REQUIREMENTS

6. Even if the arbitration agreement is valid and fulfilled the condition, CLAIMANT did not fulfill its pre-arbitral requirements as follows: **First**, The Parties have contractual obligations to prior co-operative conflict resolution [Clause 22.1]. **Second**, Legal action never preclude any attempts to amicably resolve disputes. Even though RESPONDENT commenced legal action, there were lots of other alternative measures to resolve the dispute outside the court such as conciliation, modification of agreement, etc. **Third**, there was no attempts to mutually resolve the dispute. CLAIMANT hid the truth and did not do anything in good faith.

CONCLUSION ON JURISDICTION

7. The Tribunal has no jurisdiction as the preconditions to arbitration are not fulfilled.

II. THE FAILURE TO MEET THE MINIMUM SALES TARGET IN 2009 DOES NOT GIVE GROUNDS FOR TERMINATION

8. Clause 10 prescribes the minimum sales target. In 2009 RESPONDENT failed to attain the sales target. However, **(2.1)** RESPONDENT's failure was due to interference by CLAIMANT. **(2.2)** Even if the failure was not due to interference by CLAIMANT, it was not a fundamental non-performance. **(2.3)** Moreover, considering RESPONDENT's exceeding sales records of the recent past, it is contrary to good faith. **(2.4)** In addition, CLAIMANT did not give RESPONDENT 21 days to make remedies.

2.1 RESPONDENT'S FAILURE TO MEET THE MINIMUM SALES TARGET WAS DUE TO INTERFERENCE BY CLAIMANT

9. A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk [§7.1.2]. One party is barred from invoking imperfect performance acts by the other, if the one caused such acts by its own behavior [*Belgian Individuals(2002)*].

10. (A) CLAIMANT is obligated to prevent parallel importation and to use a license given by RESPONDENT in so far as is necessary to complete its obligations under the Agreement.

(B) However, CLAIMANT breached obligations causing interference which made RESPONDENT fail to meet the minimum sales target.

11. Therefore, CLAIMANT cannot rely on RESPONDENT's failure which caused by CLAIMANT's interference to terminate the Agreement.

(A) CLAIMANT IS OBLIGATED TO PREVENT PARALLEL IMPORTATION AND TO USE A LICENSE GIVEN BY RESPONDENT WITHIN LIMITS UNDER THE AGREEMENT AND PICC

12. Clause 5.1 prohibits parallel importations explicitly. Besides, Clause 5.2 specified each Party's obligation to use its best efforts to prevent the sale of Products in the Territory by other persons. CLAIMANT is also under obligations of co-operation and best efforts pursuant to PICC Arts. 5.1.3 and 5.1.4.

13. In addition, RESPONDENT granted CLAIMANT a license to exploit its trademarks and Product descriptions in Inachalese language only in so far as is necessary to complete its obligations under the Agreement [¶6;Clause 12]. In short, there was a limit as to the license.

(B) CLAIMANT'S BREACH OF OBLIGATIONS CAUSED INTERFERENCE WHICH MADE RESPONDENT FAIL TO MEET THE MINIMUM SALES TARGET

14. CLAIMANT's breach of obligations caused interference which made RESPONDENT fail to meet the minimum sales target as follows: (i) CLAIMANT is liable for parallel importation which was the reason why RESPONDENT failed to meet the minimum sales target; (ii) CLAIMANT's infringement of the intellectual property rights aggravated situation; (iii) CLAIMANT acted against PICC with disregard for its obligations of co-operation and best efforts; (iv) The termination for failure to meet minimum sales targets was an afterthought and contrary to *estoppel*.

(i) CLAIMANT IS LIABLE FOR PARALLEL IMPORTATION WHICH WAS THE REASON WHY RESPONDENT FAILED TO MEET THE MINIMUM SALES TARGET

15. A sales manager of CLAIMANT provided suspect quantities of the Inachalese language Product for Buccaneer who caused parallel importation directly. The quantities sold to Buccaneer were objectively greater than would be expected given the size of the Ornian market [¶10].

16. Corporations are bound by acts of its employees within the scope of their business. The sales manager did the work not as a separate legal entity but as an employee of the corporate body, CLAIMANT. Thus, CLAIMANT cannot claim that supply to Buccaneer was not an act of CLAIMANT

17. Moreover, the sales manager must have reported the quantities sold to Buccaneer and executives of CLAIMANT could have been aware of the fact that objectively greater

quantities were supplied to Ornia. Ordinary person who is in charge of managing a company must become suspicious of such oversupply. Therefore, CLAIMANT should have at least had constructive, if not actual knowledge of the parallel importation.

18. It would be contrary to the principle of good faith to do indirectly what the contract prevents from doing directly [*Japanese Company(1997)*]. At least, CLAIMANT indirectly caused parallel importation which led to RESPONDENT's loss.

(ii) CLAIMANT'S INFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHTS OF RESPONDENT AGGRAVATED DECLINING SALES

19. Furthermore, CLAIMANT's infringement of the intellectual property rights of RESPONDENT aggravated the situation. RESPONDENT granted CLAIMANT a license to exploit the trademarks or product descriptions only in so far as is necessary to complete its obligations under the Agreement [Clause 12]. However, CLAIMANT abused it and made it difficult for Inachian consumers to distinguish between RESPONDENT's and the others. Moreover, the same package made it hard to find whether they were counterfeits or from elsewhere [annex B]. It is obvious that it was significant interference by CLAIMANT.

(iii) CLAIMANT ACTED AGAINST PICC ARTS. 5.1.3 AND 5.1.4 WITH DISREGARD FOR ITS OBLIGATIONS OF CO-OPERATION AND BEST EFFORTS

20. CLAIMANT did not inform RESPONDENT of the result of investigation. RESPONDENT could not know the actual circumstances because CLAIMANT left RESPONDENT holding misconception [¶10]. RESPONDENT was in a state of total neglect and could not take action in a timely manner. It was contrary to §5.1.3. In addition, CLAIMANT did not comply with §5.1.4 because it did not pay enough attention in such circumstances as stated above.

(iv) THE TERMINATION FOR FAILURE TO MEET MINIMUM SALES TARGETS WAS AN AFTERTHOUGHT AND CONTRARY TO ESTOPPEL

21. Sales figures for 2009 were provided to CLAIMANT on or before 15 February 2010 [Clause 10.3]. However, CLAIMANT purported the termination for failure to meet minimum sales targets after approximately one month after which happens to be. It was also 2 days after RESPONDENT's filing of the lawsuit. It is reasonable to infer that CLAIMANT's decision to terminate the Agreement was an afterthought. In other words, it was an improvised countermeasure against RESPONDENT's legal action.

22. A party is prevented from terminating the contract after leading the other party to believe it would tolerate that party's breach [*Framework Agreement(2008)*]. CLAIMANT took no notice of RESPONDENT's failure at first. Accordingly, RESPONDENT believed reasonably that the Agreement remain valid even though it failed to meet minimum sales targets. In reliance, RESPONDENT continued its business. If RESPONDENT had known that the failure brought termination, RESPONDENT would have found new business partner. As a consequence, CLAIMANT is prevented by *estoppel* to terminate the Agreement.

**2.2 RESPONDENT'S FAILURE TO MEET THE MINIMUM SALES TARGET
WAS NOT A FUNDAMENTAL NON-PERFORMANCE**

23. A party may terminate the agreement where the failure of the other party to perform an obligation under the agreement amounts to a fundamental non-performance [§7.3.1(1)]. Even if the failure was not due to interference by CLAIMANT, it was not a fundamental non-performance.

24. In determining whether a failure amounts to a fundamental non-performance, regard shall be had to whether the non-performance is intentional or reckless [§7.3.1(2)(c)]. RESPONDENT aggressively promoted Hampton's re-branded Product in Inachi. But RESPONDENT's sales of the Product dropped sharply, despite continued aggressive advertising. It is clear enough that the non-performance was not intentional or reckless. Thus, It was not a fundamental non-performance.

**2.3 TERMINATION DUE TO THE FAILURE TO MEET THE MINIMUM
SALES TARGET IS CONTRARY TO GOOD FAITH CONSIDERING
EXCEEDING SALES RECORDS OF THE RECENT PAST**

25. Manufacturer's claim for breach of contract is contrary to good faith where distributor purchased a substantial quantity of goods in excess of yearly quota at the end of previous year [*Central European Company(2004)*]. RESPONDENT consistently substantially exceeded the incremental minimum sales targets set for the years 2001-2007 [¶6]. Considering RESPONDENT's past achievement, CLAIMANT's attempt to terminate the

Agreement, based on RESPONDENT's failure for one year which was even attributable to CLAIMANT, indicates that CLAIMANT acted in bad faith.

2.4 EVEN IF IT WAS A FUNDAMENTAL NON-PERFORMANCE OF THE AGREEMENT, CLAIMANT DID NOT GIVE RESPONDENT 21 DAYS TO MAKE REMEDIES PURSUANT TO CLAUSE 21.1.2

26. If a party defaults, the other party shall give the defaulting party 21 days to make remedies. [Clause 21.1.2]. If performance conform to the agreement, the aggrieved party will lose its right to terminate the agreement unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the non-conforming performance [§7.3.2(b)].

27. However, CLAIMANT purported to terminate the Agreement without giving RESPONDENT 21 days to make remedies. Thus, CLAIMANT did not fulfill the condition of termination under the Agreement and did not comply with PICC.

III. THE SUPER TYPHOON DOES NOT EXCUSE CLAIMANT'S NON-PERFORMANCE

28. A super typhoon hit SIS and ruined CLAIMANT's Blanco beans. But (3.1) it was not *Force Majeure* or (3.2) hardship. (3.3) It was caused by CLAIMANT's careless poor construction. Thus, the super typhoon does not excuse CLAIMANT's non-performance and it could not be a ground for termination.

3.1 THE SUPER TYPHOON IS NOT *FORCE MAJEURE*

29. It is not *force majeure* if it is not unforeseeable [§7.1.7(1)]. **(A)** The super typhoon is not *force majeure* because unusual meteorological events are not *force majeure* in the agricultural business. **(B)** on top of that, price rising caused by the super typhoon is also not *force majeure* because fluctuations of prices are not *force majeure* in the trade.

(A) UNUSUAL METEOROLOGICAL EVENTS ARE NOT *FORCE MAJEURE* IN THE AGRICULTURAL BUSINESS

30. Destruction of crops by extraordinarily heavy rainstorms and flooding is not an exempting event because it is not unforeseeable by grower with longstanding experience in agriculture [*Mexican grower(2006)*].

31. SIS is never safe from typhoon because it is located in tropical region where developing of typhoon is possible and it is an insular country which is subject to maritime climate change including unusual meteorological events [¶1]. In addition, weather patterns have become a little erratic due to global warming [Clar. No.2]. Thus, the super typhoon is not unforeseeable by Parties. In other words, the super typhoon is not *force majeure*.

(B) FLUCTUATIONS OF PRICES ARE NOT *FORCE MAJEURE* IN THE TRADE

32. After a super typhoon hit SIS the price beans rose. However, fluctuations of prices are foreseeable events in international trade and far from rendering the performance

impossible they result in an economic loss well included in the normal risk of commercial activities [*Chilean Company(1995)*]. Accordingly price rising of Blanco beans cannot be construed as an event of *force majeure*.

3.2 HARDSHIP DOES NOT GIVE A GROUND FOR TERMINATION UNDER PICC

33. In case of hardship the disadvantaged party is entitled to request renegotiations [§6.2.3(1)].

In case of hardship the disadvantaged party is not entitled to declare termination but has to request the tribunal to do so, and only after that party has requested renegotiation and renegotiation has failed [*Shareholders' Agreement(2000)*]. In a word, hardship does not give a ground for termination without a request for renegotiation. However, CLAIMANT did not request renegotiation.

34. Furthermore the super typhoon is not hardship. Destruction of crops by extraordinarily heavy rainstorms and flooding is not a case of hardship because grower typically assumes risk of occurrence of such meteorological events [*Mexican grower(2006)*]. The super typhoon is a similar extraordinary meteorological event which does not amount to hardship.

3.3 IMPRACTICABILITY OF PRODUCING THE PRODUCTS WAS CAUSED BY CLAIMANT'S CARELESS POOR CONSTRUCTION OF THE ROOF

35. During the super typhoon, the roof of one of CLAIMANT's major storage was blown off [¶13]. In short, only one roof was blown off. It is reasonable for owners of plantation in

SIS to foresee the possibilities of typhoon and to build storages to ensure the roof is wind-proof. However, CLAIMANT built storages unsubstantially. It was not a meteorological accident but human error.

IV. CLAUSE 21.1.4 DOES NOT GIVE A RIGHT TO TERMINATE THE AGREEMENT WITHOUT FUNDAMENTAL NON-PERFORMANCE

36. Clause 20 was inserted to guarantee RESPONDENT four year notice of termination so as to protect substantial planned investments. When CLAIMANT desires to terminate the Agreement, RESPONDENT should be given notification. CLAIMANT, however, did not give such notification.

37. In determining what is an appropriate term, regard shall be had to the intention of the parties, the nature and purpose of the contract, good faith and reasonableness [§4.8(2)]. Clause 21.1.4 should be interpreted to mean steps to terminate the Agreement when fundamental non-performance occurs in order to be consistent with Clause 20 which guarantees long-term relationship. Clause 21.1.4 does not give a right to terminate the Agreement unconditionally.

V. THERE IS NO FUNDAMENTAL BREAK DOWN OF THE RELATIONSHIP.

38. CLAIMANT did not fulfill its pre-arbitral requirements as stated at 1.2 hereof while it is contrary to good faith [*Russian Company(2008)*]. Moreover, CLAIMANT acted in bad faith as mentioned previously at 2.1.2 and 2.3 hereof. CLAIMANT who endangered the relationship alleges unilaterally that there is fundamental breakdown which gives a ground

for termination. However, it is contrary to good faith and RESPONDENT desires to maintain the relationship.

VI. CLAIMANT IS OBLIGATED TO SUPPLY THE PRODUCT AND LIABLE FOR DAMAGES

39. The Agreement is not terminated as pointed out above. Therefore **(6.1)** CLAIMANT should perform its obligation to supply the Product and **(6.2)** CLAIMANT is liable for damages to RESPONDENT irrespective of termination of the Agreement.

6.1 CLAIMANT SHOULD PERFORM ITS OBLIGATION TO SUPPLY THE PRODUCT

40. Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance [§7.2.2]. Supply of the Product is not impossible because CLAIMANT can purchase Blanco beans from other growers. Under the Agreement, CLAIMANT is not a grower but a manufacturer. Parties can reflect the cost increase in the price of the Product.

6.2 CLAIMANT IS LIABLE FOR DAMAGES TO RESPONDENT

41. Even if the agreement is terminated, a claim for damages is not affected by termination [§7.3.5(2)]. Aggrieved party entitled to full compensation for harm suffered as result of other party's non-performance [*Mexican Grower(2006)*]. Even if notice of termination is effective, notifying party is liable for damages [*Latin-American Distributor(2001)*].

Therefore, CLAIMANT is liable for damages resulting from the parallel importation and the discontinuance of supply.

REQUEST FOR RELIEF

42. RESPONDENT respectfully requests the tribunal to find that:
1. The tribunal should not exercise the jurisdiction over the dispute;
 2. The Agreement is not terminated;
 3. CLAIMANT should perform its obligation to supply the Product;
 4. CLAIMANT is liable for damages to RESPONDENT;
 5. RESPONDENT should be awarded the costs of the arbitration.