THE 5TH INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION 2014

Arbitral Tribunal Case No. M2014/24

Between

CONGLOMERATED NANYU TOBACCO LTD.
142 Longjiang Drive
Nanyu City, Nanyu

…. Claimant

And

REAL QUIK CONVENIENCE STORES LTD.
42 Abrams Drive
Solanga, Gondwana

… Respondent

MEMORANDUM FOR CLAIMANT
TEAM CODE – 328C

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20 June 2014

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CLAIMANT'S CASE

I. TABLE OF ABBREVIATIONS

Agreement	The Distribution Agreement between the Claimant and the Respondent dated 14th December 2010
Bill 275	The Gondwandan Senate Bill 275/2011, which was passed into law on 13 April 2012 and entered into force on 1 January 2013.
Branded Merchandise	Merchandise described in Clause 2.2 of the Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	CIETAC Arbitration Rules 2012
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Claimant	Conglomerated Nanyu Tobacco Ltd.
Gondwandan Brief	The amicus curiae brief sought to be submitted by the Gondwandan Department of State, pursuant to the Gondwandan Letter.
Gondwandan Letter	The letter from the Gondwandan Department of State dated 25th February 2014 addressed to the CIETAC Secretariat, titled "Pending Arbitration between Conglomerated Nanyu Tobacco Ltd And Real Quik Convenience Stores Ltd."
HK Ordinance	Hong Kong Arbitration Ordinance 2014, Chapter 609

	IBA	International Bar Association
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	IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
B	ICSID	International Centre for Settlement of Investment Disputes
	p. / *pp.*	Page / Pages
C	Para	Paragraph
	Parties	Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd.
D		
	Respondent	Real Quik Convenience Stores Ltd.
	s	Section
E		
	Tobacco Products	Products described in Clause 1.2 of the Agreement
	Tribunal	The arbitral tribunal formed on 19 February 2014 for the present proceedings
	UNCITRAL	United Nations Commission on International Trade Law
	UNIDROIT	International Institute for the Unification of Private Law
	UNIDROIT PICC	UNIDROIT Principles of International Commercial Contracts 2010

	UNIDROIT	UNIDROIT Principles of Transnational Civil Procedure 2004
A	PTCP	
	WTO	World Trade Organization

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II. INDEX OF AUTHORITIES

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BOOKS / COMMENTARIES

Zeller	Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (New York: Oxford University Press, 2009)

B

Bull	Cavinder Bull, "*Commencing Arbitration*" in Albert Jan Van Den Berg, gen ed, *International Arbitration – The Coming of a New Age? ICCA Congress Series no. 17* (The Netherlands: Kluwer Law International, 2013) 135

C

D

Chan	Chan J, *Amicus Curiae and Non-party Intervention* (1997) 27 Hong Kong LJ at 391-404

Born	Gary B. Born, *International Commercial Arbitration: Volume I* (Netherlands: Kluwer Law International, 2009), p. 842-844

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Born Vol. 2	Gary B. Born, *International Commercial Arbitration: Volume II* (Netherlands: Kluwer Law International, 2009), p. 2623
Felemegas	John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (New York: Cambridge University Press, 2007)

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Nanda — Nitya Nanda, *Amicus Curiae Brief – Should the WTO Remain Friendless?* (2002) CUTS Centre for International Trade, Economics & Environment

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Moser — Michael J. Moser, *Business Disputes in China* (New York: Juris Publishing, Inc, 2007), Ch. 8 "CIETAC Arbitration in a Nutshell"

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Wolfrum — Rudiger Wolfrum, *WTO – Institutions and Dispute Settlement* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2006)

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UNIDROIT PTCP Commentary — Official Commentary to the UNIDROIT Principles of Transnational Civil Procedure 2004, Unif L Rev 2004-4

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CISG Secretariat Commentary — Text of Secretariat Commentary on article 65 of the 1978 Draft of the CISG

A

CASES AND ARBITRAL AWARDS

Aiton Australia	*Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] 153 FLR 236, 250

B

Am Mfg	*Am Mfg & Trading v Republic of Zaire, ICSID Award No. ARB/93/1 (21 February 1997)*, 36 Int'l Legal Mat. 1531, 1545 (1997)

C

Cumberland	*Cumberland and York Distrib. v Coors Brewing Co*, 2002 WL 193323, 4

D

Ethyl	*Ethyl Corp v Gov't of Canada*, in *NAFTA Award on Jurisdiction (24 June 1998)*, 38 Int'l Legal Mat. 708, paras. 74-88 (1999)

E

Final Award in ICC Case No. 8445	*Final Award in ICC Case No. 8445*, XXVI Y.B. Comm. Arb. 167, 168 (2001)
Interim Award in ICC Case No. 10256	*Interim Award in ICC Case No. 10256*, in Figueres, *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, 14(1) ICC Ct. Bull. 82, 87 (2003)
Interim Award in SCC of 17 July 1992	*Interim Award in SCC of 17 July 1992*, XXII Y.B. Comm. Arb. 197 (1997)
International Association	*Int'l Ass'n of Bridge, Structural etc v EFCO Corp and Constr Products, Inc*, 359 F.3d 954, pp. 956-957 (8th Circ. 2004)

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Hooper Bailie — *Hooper Bailie Assoc Ltd v Natcon Group Pty Ltd* [1992] 28 NSWLR 194, 211

Kashani — *Kashani v Tsann Kuen China Enter Co*, 118 Cal.App. 4th 531, 555 (Cal. Ct. App. 2004)

B

Lauder — *Lauder v The Czech Republic*, Final Award, 3 September 2001

C

Ledee — *Ledee v Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982)

Murphy — *Murphy Exploration and Production v Republic of Ecuador*, Award on Jurisdiction, ICSID Case No. ARB/08/04

D

Nuova — *Nuova Fucinati v Fondmetall International*, (14 January 1993), CLOUT case no. 54 <http://cisgw3.law.pace.edu/cases/930114i3.html> (Italy District Court)

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Parsons — *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974

Raw — *Raw Materials Inc. v Manfred Forberich GmbH & Co*, (6 July 2004), Illinois District Court Case No. 03 C 1154 <http://www.unilex.info/case.cfm?id=987>

Salini — *Salini Construttori v Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (23 July 2001)*, 42 Int'l Legal Mat. 609, 612 (2003)

	SGS	*SGS v Pakistan*, ICSID Case No. ARB/01/13
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	Southland	*Southland Corp. v Keating*, 461 U.S. 1., 7 (1984)
	US-Shrimp Case	*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (6 November 1998), WTO Case Nos. 58 (and 61)
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III. THE CLAIMANT'S CONTENTIONS

A. The Tribunal has jurisdiction to determine the dispute.

1. A failure to comply with the agreement to abide by a 12-month negotiation period does not prevent the Tribunal from seizing jurisdiction over the dispute.

a. <u>The agreement to abide by a 12-month negotiation period does not constitute a condition precedent to arbitration.</u>

1. S 34(1) of the HK Ordinance and Article 6(1) of the CIETAC Rules empower the Tribunal to rule on its own jurisdiction. Accordingly, the Tribunal should declare that it has jurisdiction to determine the dispute as the agreement to abide by a 12-month negotiation period under Clause 65 does not constitute a condition precedent to arbitration.

2. In *Interim Award in SCC of 17 July 1992*, the arbitral tribunal considered a multi-tiered dispute resolution clause which required parties to first settle the dispute by "friendly consultation" before "either party, after 60 days after the dispute arises, [believing] that no solution to the dispute can be reached through friendly consultation… has the right to initiate and require arbitration" [*p.*197]. The tribunal held that the agreement to settle the dispute by "friendly consultations" within sixty days did not evince a sufficiently clear intention "to make the right to resort to arbitration contingent upon the fulfilment of more specific conditions", thus falling short of a condition precedent to arbitration [*Interim Award in SCC of 17 July 1992, p.*197].

3. Similarly, Clause 65 merely requires the parties to abide by a negotiation period of 12 months before commencing arbitration. Therefore, the 12-month negotiation period does not constitute a condition precedent to arbitration, the non-compliance of which may deny the Tribunal its jurisdiction to determine the dispute.

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b. <u>The agreement to abide by a 12-month negotiation period is merely a procedural requirement.</u>

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4. Arbitral tribunals and national courts are generally "reluctant to conclude that compliance with contractual procedural requirements is a jurisdictional condition for commencing an arbitration" [Born, *p.*842]. Arbitral tribunals have held that procedural requirements in an arbitral agreement are not ordinarily jurisdictional provisions [see *Am Mfg*, *p.*1545; *Salini*, *p.*612; *Ethyl*, paras.74-88; *Interim Award in ICC Case No. 10256*, *p.*87]. Similarly, national courts have held that non-compliance with procedural requirements do not constitute a bar to the commencement of arbitration [*Hooper Bailie*, *p.*211; *Aiton Australia*, *p.*250; *International Association*, *pp.*956-957]. Properly characterised, the agreement to abide by a 12-month negotiation period is a mere procedural requirement and not a condition precedent to arbitration.

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c. <u>The agreement to abide by a 12-month negotiation period does not affect the jurisdiction of the Tribunal.</u>

5. Further, an agreement to abide by a waiting period "has traditionally been held not to disentitle a tribunal from having jurisdiction over the dispute" [Bull,

*p.*147).

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6. In *Lauder*, the arbitration agreement required the claimant to wait 6 months before initiating arbitration in the ICSID. The tribunal nevertheless held that the waiting period was merely a procedural rule and not a jurisdictional provision, noting that an insistence on the six-month waiting period would amount to an "unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties" [*Lauder* at [190]].

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7. Similarly, the arbitration agreement in *SGS* required the parties to enter into consultations for 12 months before the dispute could be submitted to ICSID arbitration. The tribunal found the relevant provisions to be merely "directory and procedural rather than mandatory and jurisdictional in nature" [at [184]]. Furthermore, the tribunal was of the view that halting the arbitration and requiring the claimant to first consult with the respondent before re-submitting the dispute to arbitration "[did] not appear consistent with the need for orderly and cost-effective procedure" [*SGS* at [184]].

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8. The Claimant submits that the reasoning of the tribunal in *Murphy*, which held that it had no jurisdiction over the dispute because the parties had failed to comply with a requirement of a 6-month period of consultation and negotiation, does not adequately explain the departure from the traditional position that a waiting period does not present a jurisdictional barrier to arbitration. In particular, the *Murphy* tribunal found that the *Lauder* tribunal had failed to give effect to the object and purpose of the waiting period without elaborating on what

such object and purpose was, or how the latter tribunal's interpretation of the waiting period did not accord with the same. The tribunal also disagreed with the *SGS* decision because it regarded a waiting period as a "fundamental requirement" to be complied with and "an essential mechanism in many bilateral investment treaties" without further explanation of why a waiting period is so regarded [*Murphy* at [149] and [154]].

9. Accordingly, the agreement to abide by a 12-month negotiation period in the present case is an agreement to abide by a waiting period, the non-compliance of which does not affect the jurisdiction of the Tribunal to hear the dispute.

2. Even if the 12-month negotiation period was expressed as a condition precedent to arbitration, it should not be given jurisdictional effect.

10. The Tribunal should, as courts and arbitral tribunals have done, decline to give jurisdictional effect to the 12-month negotiation period even if it was expressed as a condition precedent to arbitration [Born, *p.*844].

11. First, it has been observed that clauses which compel parties to negotiate before resorting to arbitration, especially those requiring parties "to commit themselves for a specific time period" present "an unnecessary delay of the inevitable which only serves to increase costs and time wasted" [Bull, *p.*138].

12. Second, even if a term was expressed as a condition precedent to arbitration, "surely a party may not be allowed to prolong resolution of a dispute by insisting

on a term of the agreement that, reasonably construed, can only lead to further delay" [*Cumberland, p.*4, citing *Southland, p.*7].

13. As the parties had already attempted to negotiate on 11 April 2013, and the negotiation proved fruitless, Clause 65 "should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute" [*Final Award in ICC Case No. 8445, p.*168]. Therefore, the 12-month negotiation period should not be given jurisdictional effect.

B. The Gondwandan government's unsolicited *amicus curiae* brief is inadmissible.

1. The Gondwandan Brief was not specifically requested by the Tribunal in accordance with procedure.

14. The procedure in the present arbitration is to be governed by the CIETAC Rules and IBA Rules, as expressly agreed upon by the Parties. The procedure is further subject to the provisions of the law of the seat of arbitration, namely the HK Ordinance, pursuant to s 47(1) of the same [Moser, *p.*125].

15. The Gondwandan Brief is inadmissible, as the governing procedure does not provide for the admission of unsolicited *amicus curiae* submissions. Article 42 of the CIETAC Rules stipulates that "[t]he arbitral tribunal may consult experts or appoint appraisers for clarification on specific issues…". S 54(1) of the HK Ordinance states that "the arbitral tribunal… may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal…". Article 6 of the IBA Rules is couched in similar terms. It is clear from the governing

procedure that *amicus curiae* submissions should (i) be made by experts or appraisers appointed by the Tribunal, and (ii) deal with specific issues that have been pre-determined by the Tribunal.

16. The Gondwandan Brief, being unsolicited and dealing with issues not specifically determined by the Tribunal, would clearly violate governing procedure and is inadmissible.

2. The Gondwandan Brief would improperly interfere with the Tribunal's independence and its ability to make a fair and just decision.

17. Even if the Gondwandan Brief was filed according to procedure, the Brief should nonetheless be inadmissible as it would improperly interfere with the Tribunal's duties. Pursuant to s 46(3) of the HK Ordinance, the Tribunal is required "to be independent" and "to act fairly and impartially as between the parties". Similarly, Principle 13 of the UNIDROIT PTCP requires a tribunal to consider that "the mechanism of the amicus curiae submission [does] not interfere with the [tribunal's] independence", and that it would assist the tribunal in reaching a "fair and just decision of the case" [UNIDROIT PTCP Commentary, P-13B, P-13D].

18. It is also suggested that a tribunal "may refuse a request to file an amicus brief… when the request is a disguised petition…" [Chan at *p.*401]. This suggestion is in line with the general principles contained in s 46(3) of the HK Ordinance. A disguised petition would certainly constitute improper pressure on a tribunal's independence.

19. The Gondwandan Brief should be rejected as it would effectively be a petition for a ruling in the Respondent's favour. Para 6 of the Gondwandan Letter urges the Tribunal to "strongly consider the effect of an award in the Claimant's favour, and the deleterious impact that it would have… in the state of Gondwana". Para 7 of the same contains an implied threat that any award for the Claimant would not be enforced in Gondwana. It is clear that the Gondwandan Brief would improperly pressurise the Tribunal into ruling for the Respondent, and interfere with the Tribunal's ability to act independently.

20. Further, admitting the Gondwandan Brief would unfairly skew the Tribunal's perspective towards ruling in the Respondent's favour. As there are no corresponding briefs from other relevant parties such as the Gondwandan farmers and human rights advocates, there would be a disproportionate emphasis on one party's concerns. This effect is well-illustrated by cases in the context of WTO disputes. In the *US-Shrimp Case*, environmental issues were over-emphasised and human-rights issues were neglected, because only briefs from environmental groups were submitted [Nanda, *pp.*5-6]. As it became evident that "intense pressure" from interest groups could lead to unfair outcomes, the admission of amicus curiae briefs has met with protests from "nearly all WTO Members" [Wolfrum, *p.*420].

21. Therefore, to protect the Tribunal's independence from external pressure and its ability to come to a fair and just decision, the Gondwandan Brief should be rejected.

C. The Respondent's obligations under the Agreement were not vitiated by the implementation of Bill 275.

22. Article 79 of the CISG, which is the agreed governing law, sets out conditions under which a defaulting party may be exempted from paying damages for failing to perform a particular obligation. However, the Respondent is liable for the liquidated sum claimed because (i) Article 79 does not exempt a party from paying agreed liquidated sums, (ii) performance of the Agreement was largely possible, and (iii) the impediment was reasonably foreseeable.

1. Article 79 of the CISG does not affect claims for liquidated sums.

23. Article 79 does not exempt the Respondent from paying the liquidated sum claimed. Article 79(5) of the CISG states that "[n]othing in this article prevents either party from exercising any right other than to claim damages under [the CISG]". Damages under the CISG would "consist of a sum equal to the loss… suffered" [CISG, Article 74]. Since the Claimant is claiming an agreed liquidated sum for non-performance, and is "entitled to that sum irrespective of its actual harm" [UNIDROIT PICC, Article 7.4.13(1)], the claim is clearly <u>not</u> a claim for damages and would not be affected by Article 79.

2. Article 79 of the CISG does not exempt the Respondent from paying the liquidated sum because performance of the Agreement was largely possible.

24. Even if Article 79 applies to claims for liquidated sums, it would not exempt the Respondent. It is clear from the drafting history of Article 79 that the term

"impediment" should only govern situations where performance is impossible. In particular, the "UNCITRAL debates show that the CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance" [Felemegas, *p.*501]. As the concept of hardship, as opposed to impossibility, was deliberately omitted from the CISG, no "gap" exists and the concept cannot be imported into the CISG via the UNIDROIT PICC or domestic laws [Zeller, *pp.*164, 168]. The requirements for impossibility of performance was endorsed by the Courts [*Nuova*; *Raw*].

25. Further, even if one part of a contract was rendered impossible to perform, a party is not automatically exempted from all its obligations. A party is only exempted from paying damages for the particular obligation that is impossible to perform. The remainder of the contract would continue to bind both parties. This approach is well illustrated by Example 65C of the CISG Secretariat Commentary, which reads: "[i]f the machine tools… could not arrive in time, Seller would [only] be exempted from damages for late delivery". It is clear that while the seller in Example 65C may be exempted from paying damages for breaching the particular clause concerning time of delivery, it would still be under an obligation to perform the remainder of the contract by delivering the tools at a later time.

26. In the present case, the Respondent is not exempted from paying damages with regard to its obligations under Clauses 1 and 2 of the Agreement. It was clearly still possible for the Respondent to continue buying the tobacco products and branded merchandise under Clauses 1 and 2, as nothing in Bill 275 prohibited

these bilateral transactions. Mere economic hardship would not suffice.

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27. It was also possible for the Respondent to continue providing shelf space and counter displays for the Tobacco Products and Branded Merchandise pursuant to Clauses 25.1, 25.2, 25.3, and 25.5. Bill 275 does not prohibit the display and sale of Tobacco Products as long as they comply with the packaging requirements. As regards the Branded Merchandise, Bill 275 only prohibits the distribution of such merchandise [Bill 275, s 21]. The word "distribute" is defined in the Cambridge Advanced Learner's Dictionary, 4th ed, as "to give something out to several people, or to spread or supply something". The Respondent could have fulfilled its obligations under the Agreement by putting on display, but not selling or supplying the Branded Merchandise to consumers.

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28. Provided that all other conditions under Article 79 are fulfilled, which is denied, the Respondent could only be exempted from paying damages for a breach of Clause 25.4 which stipulates that "all displays" shall feature the Seller's trademarks and logos. Regardless, this would not affect the Claimant's claim for the liquidated sum, which is an agreed sum that must be paid irrespective of the actual damages that would otherwise be awarded [UNIDROIT PICC, Article 7.4.13(1)].

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3. Article 79 of the CISG does not exempt the Respondent because the implementation of Bill 275 was reasonably foreseeable.

29. Article 79 would not apply if the supervening events could "reasonably be expected to have [been] taken… into account [by the defaulting party] at the time

of the conclusion of the contract" [CISG, Article 79]. The determination would be based on what a reasonable person equally situated would have foreseen [Zeller, *p.*174].

30. Article 79 is inapplicable in the present case, because the implementation of Bill 275 was reasonably foreseeable. The Gondwandan government progressively took steps to curb the prevalence of smoking in Gondwana since 2001, including imposing packaging requirements and smoking bans in 2002, 2004, 2005, and 2009. Further, anti-tobacco lobbyists lobbied for further packaging restrictions after the 2009 regulations, citing the prevalent use of "brightly coloured packages" [Respondent's Exhibit No. 1]. The Respondent, an experienced market player dealing with tobacco products since 2000, must have known about these regulations and events. In these circumstances, further packaging restrictions akin to those in Bill 275 were clearly reasonably foreseeable at the time of contracting.

D. The arbitral award is enforceable as it is not contrary to public policy.

1. Enforcement of the arbitral award would not be contrary to international public policy.

31. Article V(2)(b) of the New York Convention provides that the competent authority in the country where the recognition or enforcement of an arbitral award is sought may refuse such recognition or enforcement if it "would be contrary to the public policy of that country". Similarly, Article 36(1) of the UNCITRAL Model Law provides that an arbitral award may be denied

recognition or enforcement if it "would be contrary to the public policy of [the] State".

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32. Courts have held that the public policy contemplated by Article V(2)(b) is "international" public policy as opposed to "domestic" public policy [*Parsons, p.*974 ; *Ledee, p.*187; *Kashani, p.*555]. While there is no agreed definition on what constitutes "international public policy", it is clear that reading the "public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility" [*Parsons, p.*974]. Since a "circumscribed public policy doctrine was contemplated by the Convention's framers", a "supranational emphasis" to public policy should be adopted [*Parsons, p.*974].

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33. Therefore, Gondwana's parochial policy of tobacco control and restriction does not amount to international public policy which could be invoked to resist enforcement of the arbitral award.

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2. Enforcement of the arbitral award would not be contrary to Gondwana's domestic public policy.

34. As argued above, the Respondent failed to perform obligations which were not vitiated by the implementation of Bill 275 and terminated the Agreement prematurely. Thus, enforcement of the arbitral award would not be contrary to Gondwana's domestic public policy of tobacco control and restriction, as the substantive claim on which the award is based is not prohibited by Bill 275 [Born

Vol. 2, *p.*2623].

IV. RELIEF REQUESTED

35. In light of the Claimant's arguments, the Claimant humbly requests the Tribunal to find that:

(i) The Tribunal has jurisdiction to determine the matter and/or the 12-month negotiation period should not be given jurisdictional effect;

(ii) The Gondwandan government's *amicus curiae* brief is inadmissible as it was not specifically requested and would improperly interfere with the Tribunal's independence and ability to reach a fair and just decision;

(iii) Pursuant to Article 79 of the CISG, the Respondent's obligations under the Agreement were not vitiated by the implementation of Bill 275; and

(iv) An award by this Tribunal is enforceable as it is neither contrary to international or Gondwanda's domestic public policy.

Dated this 20th day of June 2014.

TEAM 328C
COUNSEL FOR THE CLAIMANT