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HONG KONG, S.A.R.

MEMORANDUM FOR CLAIMANT

(345C)

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Conglomerated Nanyu Tovacco Ltd
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v.

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TABLE OF ABBRIEVATIONS

&	And
¶	Paragraph
%	Per cent
USD	United States Dollars
Arb.	Arbitration
Art.	Article
CISG	United Nations convention on Contracts for the International Sale of Goods, 2010
Cl. Re.	CLAIMANT's Request for Arbitration
Cl. Ex. No.	CLAIMANT's Exhibit Number
Cl. Memo	CLAIMANT Memorandum
co. ltd	Company limited
et al.	Et alii (and following)
No./Nos.	Number/Numbers
PO. No.	Procedure Oder Number
pp.	pages
Resp. Ans.	RESPONDENT's Answer to Request for Arbitration
Resp. Ex. No.	RESPONDENT's Exhibit Number
Supra	See above
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	versus

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Hunter	Hunter, M., Commentary on Integrated Dispute Resolution Clauses, in ICCA Congress Series No 12 (2005), pp 470-477.
Melnyk	Melnyk, T., The enforceability of multi-tiered dispute resolution clauses: the English law position, in International Arbitration Law Review, Vol 5 No 4 (2002), pp 113-118.
J. Junker	J. Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", 7 California Western International Law Journal (1977) p. 228 at p. 245.
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Pryles	Michael Pryles, 'Multi-tiered Dispute Resolution Clauses' (2001) 18(2) Journal of International Arbitration 159–76
Fouchard/Gaillard/Goldman	Emmanuel Gaillard and John Savage (eds), Fouchard, Gaillard, Goldman on International Commercial Arbitration, (The Hague: Kluwer Law International: 1999)
Figueres, D. J.	Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin Vol. 14/No. 1, Spring 2003.

INDEX OF CASE AND ARBITRAL AWARDS

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Cable & Wireless	Cable & Wireless Plc. v. IBM United Kingdom Ltd. [2002] C.L.C. 1319 (Comm. Ct.)
Bureau Wijsmuller v. United States of America	*U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller v. United States of America (U.S. no. 15), discussed infra at n. 386.*
Audi-NSU Auto Union A.G. v. Adelin Petit & Cie	*Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. v. Adelin Petit & Cie (Belgium no. 2), discussed inpa at n. 379*
LIAMCO v. *Libya*	*U.S. District Court of Columbia, January 18, 1980, LIAMCO* v. *Libya (U.S. no. 33), see infra at n. 380.*
Hilmarton v. OTV	Hilmarton v. OTV *Rev. Arb. 376 (1997), note Ph. Fouchard*
Lloyd's v. Saunders	Lloyd's v. Saunders *210 D.L.R. (4th) 519; 2001 D.L.R. LEXIS 448*
Connerly v. State Personnel	129 P.3d
Ciba-Geigy Ltd. v. Fish Peddler, Inc.	683 So. 2d 522 (Fla. Dist. Ct. App. 4th Dist. 1996)In re J.W., 204 Ill. 2d 50, 272 Ill. Dec. 561, 787 N.E.2d 747 (2003)
Burger v. Lutheran General Hosp.	198 Ill. 2d 21, 259 Ill. Dec. 753, 759 N.E.2d 533 (2001)
Paul Smith	Paul Smith Ltd. v. H & S International Holding Inc. [1991] 2 Lloyd's Reports 127
Aiton	Aiton Australia Pty. Ltd. v. Transfield Pty. Ltd. [1999] NSWSC 996
Poiré v. Tripier	Poiré v. Tripier, Cour de Cassation (civil chamber) mixte, 14 February 2003
Fluor Enterprises	Fluor Enterprises, Inc. v. Solutia Inc., 147 F. Supp 2d 648 (S.D. Tex. 2001)
Whitev. Kampner	Dennis White v. Philip Kampner, et al., unreported, 1992 WL 77216 (Conn.Super.)
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AWARDS

ICC

ICC 8073	ICC International Court of Arbitration Case No. 8037, 1995
ICC 8445	ICC International Court of Arbitration Case No. 8445, 1996
ICC 9977	ICC International Court of Arbitration Case No. 9977, 1999

INDEX OF LEGAL SOURCES

Abbreviation	Citation	Page
CIETAC Rules	China International Economic And Trade Commission Arbitration Rules	1,3,4,9,10,11, 12,13,33
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (with amendments as adopted in 2006), 21 June 1985	3,4,5,6,7
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980	1,2,14-22,18-33
UNIDROIT principles	International Institute for the Unification of Private Law (UNIDROIT) principles of international commercial contracts	21
UNCITRAL Digest of Case Law	United Nations Commission on International Trade Law (UNCITRAL) Digest of Case Law on the United Nations Convention Contracts for the International Sale of Goods	15,22,30
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards	

STATEMENT OF FACTS

1. Conglomerated Nanyu Tobacco Ltd. (the "**CLAIMANT**) is the largest tobacco producer in Nanyu and has a global presence in the worldwide tobacco market which also makes up a significant portion of Nanyu's export economy. Real Quick Convenience Stores Ltd. (the "**RESPONDENT**") is one of the fastest growing convenience store chains in the State of Gondwana.

2. The CLAIMANT and the RESPONDENT have a long-standing business relationship, usually signified by signing 10 years Distribution Agreements. The last Distribution Agreement (the "**Agreement**") between Parties was signed on December 14th, 2010, which provides that the CLAIMANT shall supply and the RESPONDENT shall sell all of the CLAIMANT's products in its stores and display CLAIMANT's variety of products according to the agreement.

3. Prior to 2000 in the RESPONDENT's country, the State of Gondwana, there was little regulation over tobacco products and 35% of the Gondwana population were regular smokers roughly. However, starting in 2001, the State of Gondwana began to implement more stringent regulation on the sale and use of tobacco products, including several packaging requirements and national bans.

4. On March 14, 2011, a Gondwana Senator introduced Bill 275 which introduces far-reaching reforms to tobacco regulation, including the requirements that all tobacco products be placed in generic packaging which would eliminate all trademarks, images, designs, colors or structural elements which used by tobacco producers to characterize its products. Only the band or company's name would be printed on the products.

5. Although Bill 274 met strong oppositions domestically, it managed to become law on April 13, 2012 by a winning vote of a very small margin. The requirements subsequently entered into force on January 1st, 2013. Between that and June 2013, the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels

6. Between March 21st, 2011 and March 11th, 2013, RESPONDENT attempted to raise concerns about the regulations in Gondwana with the CLAIMANT several times and its wishes to renegotiate the contract. Although parties managed to sit together on April 11, 2013, efforts to renegotiate the contract failed. CLAIMANT also took action before the court of Gondwana in an effort to challenge the constitutionality of the Bill which failed either.

7. On May 1, 2013, RESPONDENT notified the CLAIMANT that it would no longer be able to perform its duties under current Agreement because of

impossibilities caused by passage of Bill 275 and other several regulations. The CLAIMANT subsequently requested the liquidated damages set out in the termination clause of the Agreement, which the RESPONDENT refused to pay.

8. On January 12th, 2014, CLAIMANT brought the arbitration claim based on the Dispute Resolution clause as set out in the original Agreement before the current tribunal.

SUMMARY OF ARGUMENTS

ISSUE 1 THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF THE 12 MONTH NEGOTIATION PERIOD BECAUSE THE CONCLUSION OF NEGOTIATION IS NOT A PREREQUISTE AND FURTHER NEGOTIATION EFFORTS ARE FUTILE.

RESPONDENT objects to the jurisdiction of the Tribunal on the basis of the construction of Clause 65 of the Agreement, alleging that CLAIMANT did not conduct negotiations and consultations in good faith and the CLAIMANT was barred from bringing this claim to arbitration until a period of 12 months had passed since the dispute arose, i.e. 1 May 2014. As a preliminary matter, the Tribunal has the authority to determine its own jurisdiction. Secondly, CLAIMANT was under no obligation to carry on negotiation before arbitration as the agreement to negotiation is unenforceable for uncertainty. Thirdly, CLAIMANT fulfilled the negotiation prerequisite in good faith and as the negotiation is fruitless CLAIMANT is entitled to the rights of bringing this claim to arbitration. And finally, the tribunal should consider further negotiation futile and proceed to hear the merits.

ISSUE 2 THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF BECAUSE IT DOESN'T MEET THE REQUISITION FOR ADOPTION.

CLAIMANT hereby contends that the letter provided by the Gondwandan State Department should not be included in the arbitration proceeding. The amicus curiae should not be admitted because it lacks independence. The amicus curiae is not qualified evidence as it doesn't provides any external perspective. Moreover, the amicus brief system should not be adopted in arbitration because it does not represent public interest.

ISSUE 3 RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDAWANDAN'S NEW REGULATIONS BECAUSE NOTHING HAS RENDERED PERFORMANCE UNDER AGREEMENT IMPOSSIBLE.

Here, despite the implementation of Bill 275 and the Gondwandan government's more stringent regulations, the RESPONDENT's obligations under the Agreement remain intact and not vitiated for both matters governed by the CISG 1980 and matters governed by the UNIDROIT 2010.

ISSUE 4 THERE WOULD NOT BE A RISK OF ENFORCEMENT FOR THE GROUNDS FOR REFUSAL REGULATED IN THE NEW YORK CONVENTION ARE NOT MET.

CLAIMANT hereby contends that there should not be a risk of enforcement because the grounds for refusal contained in the New York Convention have not been met. The public policy exception should be narrowly construed. Article V.2(b) concerning grounds for refusal under the New York Convention is not applicable in this particular case. In addition, other grounds for refusal of enforcement have not been met.

ARGUMENT ON JURISDICTION

ISSUE 1 THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF THE 12 MONTH NEGOTIATION PERIOD BECAUSE THE CONCLUSION OF NEGOTIATION IS NOT A PREREQUISTE AND FURTHER NEGOTIATION EFFORTS ARE FUTILE.

1. RESPONDENT objects to the jurisdiction of the Tribunal on the basis of the construction of Clause 65 of the Agreement, alleging that CLAIMANT did not conduct negotiations and consultations in good faith and the CLAIMANT was barred from bringing this claim to arbitration until a period of 12 months had passed since the dispute arose, i.e. 1 May 2014. In the following, The CLAIMANT will show that as a preliminary matter, the Tribunal has the authority to determine its own jurisdiction [A]. Secondly, CLAIMANT was under no obligation to carry on negotiation before arbitration as the agreement to negotiation is unenforceable for uncertainty [B]. Thirdly, CLAIMANT fulfilled the negotiation prerequisite in good faith and as the negotiation is fruitless CLAIMANT is entitled to the rights of bringing this claim to arbitration [C]. And finally, the tribunal should consider further negotiation futile and proceed to hear the merits [D].

A. The tribunal is authorized to determine its own jurisdiction over the question of whether the pre-arbitration requirement has been met.

2. Neither CLAIMANT nor RESPONDENT disputed the existence of a valid and binding arbitration agreement in Clause 65 of the contract [CLAIMANT's Exhibit No.1] arbitration agreement is the primary source of the Tribunal's authority.

3. Clause 65 provides that the Parties shall initially seek a resolution through consultation and negotiation when dispute appears. If, the Parties have been unable to come to an agreement after a period of 12 months has elapsed from the date on which the dispute arose, either Party may submit the dispute to the China International Economic and Trade Arbitration Commission [CIETAC] Hong Kong Sub-Commission [Arbitration Center] for arbitration which shall be

conducted in accordance with the CIETAC's arbitration rules. According to Article 6.1 CIETAC Rules, the presiding arbitrators shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. Identically, Article 16(1) UNCITRAL Model Law Rules also provides that, the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Both provisions admit the competence of the Tribunal to rule on its jurisdiction.

4. That the tribunal is authorized to decide whether the pre-arbitration requirement has been fulfilled is considered as a generally accepted approach in international arbitration. Further, this question arises out of, or in connection with, the agreement containing the arbitration clause and thus falls within the purview of the Tribunal.

B. Negotiation under clause 65 is not a compulsory precondition to arbitration for lack of certainty thus CLAIMANT was under no obligation to carry on negotiation before arbitration.

5. RESPONDENT argues that the clause 65 negotiation procedure has not been fulfilled [Statement of Deference ¶¶ 5-7] presumes that the agreement to negotiate is enforceable and constitutes a precondition to arbitration. However, agreements to negotiate in good faith are unenforceable and cannot constitute a precondition to arbitration in this case as clause 65 is very ambiguous for lack of the detailed information of when and how to negotiate. And there is also no benchmark which can indicate when the parties shall file the case to arbitration. Thus clause 65 did not impose on the parties a sufficiently certain obligation to negotiate.

6. The MDR clause which constitutes precondition to arbitration should be clear enough to state both parties obligation to negotiate. For example, in the dispute resolution clause in Cable & Wireless, it specifically stated that parties could not take legal action until the first tier processes had been completed and also, in Fluor Enters. Inc. v. Solutia Inc., the Parties impose the restriction of representatives, times, and approach of negotiations. Contrary to the above cases' MDR clauses, Clause 65 stipulated no detailed and compulsory obligation for parties to carry on a negotiation. RESPONDENT may argue that the clause 65 set a time limitation which is 12 months. However, under clause 65, it is not a clear benchmark for the beginning and the end negotiation. Thus the parties cannot reach an agreement when to file the case to arbitrate according to clause 65. It is of great importance that parties stipulated when ADR, in this case negotiation, has come to an end [Aiton ¶74; Scanlon 3].Where there is ambiguity, a tribunal should prefer a conclusion where it has jurisdiction [Chartered Institute of Arbitrators 336]. The aim of setting a 12 months' limitation is to prevent an endless negotiation and save both Parties' time and money, while as the

negotiation is fruitless, there is no need the Parties wait for more time. That is what the parties agreed to and RESPONDENT cannot now seek a strict interpretation. Therefore, negotiation in good faith in this case is unenforceable as the parties intention can only be fathomed by conjecture and surmise.

7. It is the same in case law. In the U.S., one district court judge held that the negotiation in good faith is unenforceable as it implicates so many factors that are themselves indefinite and uncertain which only led to speculation and surmise [Candid Productions, Inc. v. Int'l Skating Union]. Also in England, it was held that an agreement to negotiate is unenforceable for lack of certainty [Paul Smith 131; Courtney & Fairbairn; Walford v. Miles 181]. In civil law jurisdictions holdings are not very different. For instance, in France and the Netherlands, agreements to negotiate, mediate or conciliate in good faith are unenforceable unless they are sufficiently certain [Pryles 167-8; Howtek 48; Poiré v. Tripier368; NJ Kort 2001/13, Palmer/Lopez 289-90]. Cases concerning negotiation, conciliation and, mediation in good faith are all of explanatory value as international jurisprudence considers them each comparable non-binding forms of ADR [Fouchard/Gaillard/Goldman ¶16].

8. Furthermore, clause 65 contained no express undertaking by the parties to exclude the Tribunal's jurisdiction in the case of failure to negotiate. It does not state that negotiation was a "condition precedent" to arbitration and the general approach of tribunals is that "negotiation remains entirely optional" except where the parties have agreed to the contrary [ICC No. 8073]. Nor did clause 65 contain any language to state that the parties agreed in a binding and unequivocal manner to first engage in pre-arbitral conciliation [Chartered Institute of Arbitrators 336]. In contradistinction, the pre-arbitral step has been held to be compulsory where, e.g., the contractual clause was entitled "Mandatory Negotiation" [White v. Kampner 264, 266]. RESPONDENT drafted the contract with the clause 65 agreement to arbitrate, and RESPONDENT failed to articulate precisely that negotiation should be a condition precedent to arbitration. Thus it led to a flexible interpretation of the clause.

C. CLAIMANT fulfilled the negotiation prerequisite in good faith and as the negotiation is fruitless CLAIMANT is entitled the rights of bringing this claim to arbitration.

(i) CLAIMANT fulfilled the negotiation prerequisite in good faith.

9. A party cannot avoid arbitration because of the other party's failure to comply with multiple prior steps of a grievance procedure as long as that other party acted in good faith to preserve its right to arbitration [Welborn v. Medquist]. In this case, CLAIMANT can request arbitration because it didn't bypass negotiation. The Parties had already attempted to negotiate on 11 April 2013

[CLAIMANT's Exhibit No. 7], which showed the CLAIMANT's good faith in resolving the dispute.

10. As a general matter, multiple steps laid out in an dispute resolution clause are not mandatory. In ICC No. 9977 the arbitrator holding that the formal description of features in a "a prior mandatory process", such as description of the representatives, timing provisions, formal encounters, were not of the essence but rather implied an attitude and behavior of the parties inspired in a true and honest purpose of reaching an agreement. The tribunal also found that the first tier was satisfied since the parties' management had been in direct contact through written communications and the CLAIMANT had invited the RESPONDENT through various communications to settle differences.

11. Similarly, CLAIMANT carried forth an attitude evincing a "true and honest purpose of reaching an agreement" [ICC No. 9977] by attending the negotiation to solve the dispute [CLAIMANT's Exhibit No. 7]. Furthermore, CLAIMANT send the first and the second "Notice of Default" [CLAIMANT's Exhibit No. 9 and No.10] and issued a pre-action demand letter [CLAIMANT's Exhibit No.11] on 2 September 2013 while RESPONDANT didn't provide any response until 26 September 2013. In any event, CLAIMANT respected the requirement to negotiate, participating in good faith, which RESPONDENT should be estopped from denying so.

(ii) As the negotiation is fruitless, there would be no point in waiting for a full 12 months after the dispute arose to submit its claim to arbitration.

12. The main reason parties conclude MDR clauses is the expectation that this will facilitate quick and cost-effective dispute resolution [Pryles, p 160; Palmer/Lopez, p 289; Melnyk, p 118; Hunter, p 470; Bertrand, pp 140-141]. Therefore, where it is blatantly obvious that an amicable first tier will fail, a party's insistence to hold the other party to the agreed procedure for purely formalistic reasons violates the very purpose of negotiation and would further delay and obstruct the arbitral proceedings.

13. In several cases, courts and tribunals have applied a pragmatic approach and refused to oblige CLAIMANT to initiate an amicable pre-arbitral tier because it cannot be considered reasonable to force the parties into fruitless settlement proceedings that merely increase the expense and delay of the resolution of the issue [ICC Cases No 8445, 9977; Halifax Financial Ltd v Intuitive Systems Ltd, 21 December 1998; Figueres, p 72]. Previously, tribunals refuse to remand parties to negotiation or consolidation when it already occurred. [ICC Case No. 8445].

14. In ICC Case 8445, both parties held polar positions and were unlikely to compromise. [Id.]. Furthermore, the Zurich Tribunal established three factors in

determining whether remanding the case was futile. [Id.]. First, litigation had already begun, so it determined that an-amicable settlement was even more remote. [Id.]. Second, the lapsing of time and the large claim for damages evidenced the futility of forcing negotiations. [Id.]. Third, the original agreement calling for an attempted settlement was primarily an-expression of intention that must be examined through the present situation. [Id.]. The tribunal held that the original intention to force settlement negotiation should not be obligatory if it would be fruitless or delay resolution. And it is in the best interests of the parties to allow a request for arbitration when it has been "quite obvious that the parties were too divided to entertain an amicable settlement" [Figueres, p 72]. In this case, as there was no result in the meeting, and the parties "were too divided to entertain an amicable settlement", there would be no point in waiting for a full 12 months after the dispute arose to submit its claim to arbitration.

D. Should the tribunal consider negotiation unfulfilled, it should not close arbitral proceedings as negotiation and arbitration can operate in parallel and it conforms interests of the parties.

15. Should the Tribunal find that CLAIMANT's negotiation and the time limitation did not fulfill the requirements of clause 65, that failure nonetheless did not affect the tribunal's jurisdiction to consider the merits of the dispute on the ground that negotiation and arbitration can operate in parallel, and it's in the best interests of the parties.

16. Non-compliance with a pre-arbitral step will not generally invalidate an arbitration agreement [Born 846] and arbitration can operate in parallel. The settlement reached the arbitral proceedings has additional advantages as the tribunal can record the settlement in the form of an arbitral award on agreed terms. Whereas an agreement reached in negotiation would only have the legal nature of a contractual obligation, which means that such agreement is not directly enforceable but has to be fully litigated as a contractual claim [Bühring-Uhle/Kirchhoff/Scherer2], settlement reached in the arbitration proceedings or prior to it could be enforceable.

17. The parties specifically designated clause 65 as MDR dispute resolution mechanism, and their objective is to facilitate a rapid and cost effective settlement of disputes. To close the proceedings would be costly and cause undue delay which is contrary to the parties' evinced intention. Both CLAIMANT and RESPONDENT, as reasonable business entities, seek business efficacy. It is therefore in the best interest of the parties that the arbitral proceedings are continued and a settlement agreement, if any, is recorded in an enforceable award.

18. **In conclusion,** the Tribunal has the authority to determine its own jurisdiction [A]. Secondly, CLAIMANT was under no obligation to carry on negotiation

before arbitration as the agreement to negotiation is unenforceable for uncertainty [B]. Thirdly, CLAIMANT fulfilled the negotiation prerequisite in good faith and as the negotiation is fruitless CLAIMANT is entitled the rights of bringing this claim to arbitration [C]. And finally, should the tribunal consider negotiation unfulfilled, it should not close arbitral proceedings as negotiation and arbitration can operate in parallel and it conforms interests of the parties [D].

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF BECAUSE IT DOESN'T MEET THE REQUISITION FOR ADOPTION.

19. CLAIMANT hereby contends that the letter provided by the Gondwandan State Department should not be included in the arbitration proceeding. The amicus curiae should not be admitted because it lacks independence. [A]. The amicus curiae is not qualified evidence as it doesn't provides any external perspective [B]. Moreover, the amicus brief system should not be adopted in arbitration because it does not represent public interest. [C].

A. The amicus curiae should not be admitted because both the government and the amicus curiae lack independence.

(i). Gondwana government, as the party submitting amicus curia brief, lacks independence.

20. In this case, the RESPONDENT is one of the fastest growing convenience store chains in the state of Gondwana. Formed in 1999, the RESPONDENT is a dominant player and it is estimated that the Respondent has over 70 % market share in Gondwana's convenience store sector. From the fact we can see, every year Gondwana government gets much taxes from RESPONDENT and thus it will definitely has strong desire to keep RESPONDENT developing well. What's more, RESPONDENT dominates the convenience store sector in Gondwana. If RESPONDENT has to pay CLAIMANT a large amount of money, the whole field will be greatly injured and the economy of Gondwana will be affected. Since it's a field closely related to people's life, people's life will also be influenced. As the government of Gondwana , it has great responsibility in keep the compensation from happening. In addition, from the fact "while others fear that the Bill may be a massive overstep by the government" , "Political analysts state however, that the "Clean Our Air" Bill may have more bark than bite". [CLAIMANT's Exhibit No.5] , we can see that the " Clean Our Air" Bill has received much resistance and questioning. If the tribunal rules in favor of RESPONDENT, it means that the tribunal consider this Bill as reasonable and that it will help Gondwana government carry out the Bill. RESPONDENT is not only a company governed by Gondwana government, it's a partner with

Gondwana government and it shares great mutual interests with Gondwana government. It's reasonable to doubt whether the amicus curiae brief is object and whether Gondwana is in favor of RESPONDENT. Gondwana lacks independence from RESPONDENT, therefore, it should be disregarded

(ii) The content of the amicus curiae brief lacks independence.

21. In the letter sent by Gondwana government, it says "if the Arbitral Tribunal is inclined to issue an award in favor of the CLAIMANT, any such award would be contrary to Gondwandan public policy. Although Gondwana is a party to the New York Convention, we are also aware that any enforcement of an award must be in line with our public policy." Although Gondwana government doesn't say it out, but it expresses quite clearly that if the tribunal doesn't rules in favor of RESPONDENT, it will not enforce the award. The amicus curiae brief is not opinions from the independent third party. It's threatening. Gondwana is not expressing its opinions peacefully, it is forcing the tribunal. The attitude makes people to believe that Gondwana government is not sensible which makes the amicus curiae brief lack of independence and objectivity. Therefore, the amicus curiae brief should not be admitted.

B. The amicus curiae is not qualified evidence as it doesn't provides any external perspective.

22. Amicus curiae's brief does not provide an external perspective to tribunal and it can't make substantive effect on tribunal's verdict. The brief's content involves Gondwandan public policy Gondwandan law and sovereignty. But in our bilateral letters there is sufficient descriptions about the policy of the government, national situation and so on. "The Gondwandan Senate has proposed a new Senate Bill that would increase restrictions on both cigarette and tobacco packaging as well as potentially restrict the sale and display of tobacco branded promotional merchandise."[CLAIMANT Exhibit No.3] The amicus curiae doesn't provide more about the policy of the government. Thus the brief does not provide extra information or perspective to tribunal. Therefore the amicus curiae should not be admitted.
23. In conclusion, the weight of this evidence is not that enough to provide an external perspective for tribunal. It should not be adopted.

C. The amicus brief system should not be adopted in arbitration because it does not represent public interest.

24. Amicus curiae's brief is not relevant to public interest. Public interest is the welfare or well-being of the general public. It means there is an equal chance for everyone in society to benefit or suffer from a change. Here there's some evidence to prove the definition is not satisfied in this case. "Demonstrations have

been held daily in front of the Senate Building since the Bill was announced by both pro and anti- tobacco lobbyists. The Bill has been hailed by some as a great step forward in public health regulation, while others fear that the Bill may be a massive overstep by the government, in a move that would make the tobacco market in Gondwana one of the most stringently regulated markets in the world."[CLAIMANT's Exhibit No. 5, P17]It is clear that divergence exists towards the Bill 275.The government's policy can't be regarded as representative of public interest because not everyone experiences the same after the enactment of Bill 275.Thus tribunal can't use international trend as reason to allow this brief.

25. **In Conclusion**, CLAIMANT hereby contends that the letter provided by the Gondwandan State Department should not be included in the arbitration proceeding. The amicus curiae should not be admitted because it lacks independence [A]. The amicus curiae is not qualified evidence as it doesn't provides any external perspective [B]. Moreover, the amicus brief system should not be adopted in arbitration because it does not represent public interest [C].

ARGUMENT ON MERITS

ISSUE 3 RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDAWANDAN'S NEW REGULATIONS BECAUSE NOTHING HAS RENDERED PERFORMANCE UNDER AGREEMENT IMPOSSIBLE.

26. Here, despite the implementation of Bill 275 and the Gondwandan government's more stringent regulations, the RESPONDENT's obligations under the Agreement remain intact and not vitiated for both matters governed by the CISG 1980 [A] and matters governed by the UNIDROIT 2010 [B].

A. For matters governed by the CISG 1980, the RESPONDENT's obligations under the Agreement remain intact and unvitiated despite the implementation of Bill 275 and the Gondwandan government's regulations.

27. As provided in Clause 66.1 of the Agreement, the contract is governed by the CISG 1980, supplemented for matters which are not governed by the CISG, by the UNIDROIT principles of international Commercial Contracts 2010.

28. The main issue at dispute here is whether Article 79 of CISG is applicable since RESPONDENT contended in defense that the termination of the Agreement was due to factors outside of the RESPONDENT's control, which could not have been

foreseen at the time the Agreement is signed, and that RESPONDENT is relieved of payment of penalty. Such contentions arise out of provision of Article 79, as discussed below.

29. Article 79 of CISG is not applicable because the impediment is not so substantial to a degree that it's beyond RESPONDENT's control in the present case.

(i) The RESPONDENT is still able to purchase tobacco products from CLAIMANT and sell it in its store. In this case, RESPONDENT's interest is not prominently compromised.

30. Among introduction of reforms to tobacco regulations in Bill 275, was restriction on promotion and packaging. However, import and sale of tobacco product is not prohibited in this bill, which means RESPONDENT can still buy tobacco from CLAIMANT, and sell it in Gondwandan. Also, CLAIMANT's product can still be distinguished by the brand and company's name on the package.

31. Furthermore, it is asserted that "Nanyu brand is strong"[Cl. Ex. No.7 para.3]. Thus, between 1 January 2013 and 1 June 2013, the tobacco industry in Gondwandan experienced an average 30% decline in sales through all channels. Meanwhile in comparison, CLAIMANT suffered only an approximate 25% decline in sales (facts 13), which shows that the RESPONDENT's business is not as gravely affected as other competitors. Further, no evidence can prove that the decline of sales caused by Bill 275 will last long enough to render his effort futile, since there still 7 and a half years to go after the termination of the Agreement with a ten-year span.

32. Even though the RESPONDENT is now unable to sell promotional merchandise in its store considering the implementation of Bill 275, which specifically curtail the distribution of any material containing or displaying trademarks or marks associated with tobacco products, it's tobacco production and supply that makes up a significant portion of Nanyu's export economy (facts 2), not sales of the branded promotional merchandise, the impact of which on the RESPONDENT's revenue is infinitesimal, to be frank. Since the branded merchandise are solely meant for promotional purpose.

33. Even if the tribunal decides that Bill 275 will unbalance the performance of the contract, it is only rendered more difficult other than rendered impossible. The performance of the obligation in this case would incur a financial loss, but this did not prevent RESPONDENT from the performance of the agreement. Thus, such impediment is not substantially compromising. The question then arises whether the parties or the judge have the possibility to modify the contract. This issue is not expressly settled in Article 79 CISG, or in any other Article of the CISG. TALLON is of the opinion that a uniform application of Art. 79 is not

reconcilable with the application in a Contracting State of the theory of changed circumstances. (M. CLAEYS, De bijzondere rechtsmiddelen van partijen, in: H. VAN HOUTTE, J. ERAUW, P. WAUTELET, ed., Het Weens Koopverdrag, Intersentia, 1997, p. 264, no. 7.100).

(ii) Parties have already been aware of the policy at the time of signing and therefore the impediment was not beyond parties' control.

34. Article 79 specifies the circumstances in which a party "is not liable" for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies. Paragraph (1) relieves a party of liability for "a failure to perform any of his obligations" if the following requirements are fulfilled: the party's non-performance was "due to an impediment"; the impediment was "beyond his control"; the impediment is one that the party "could not reasonably be expected to have taken into account at the time of the conclusion of the contract"; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences".

35. Here, the impediment is not beyond RESPONDENT's control since RESPONDENT shall not risk going against the law passed by the government. In addition, such impediment is reasonably foreseeable since starting in 2001, over the ten-year period, not only did the Gondwandan government enforce stricter regulations on the sale and use of tobacco product, but they gradually expand the scope of restriction, starting from a packaging requirement of carrying warning label and spiraling into a full-blown ban on smoking in public area. Also, such stricter regulations were all implemented before the conclusion of the contract which is on 14 December 2010. Further, as a company owns over 70 percent of market share, there must be someone in RESPONDENT's company analyzing the risk and market. Thus, it is highly foreseeable by RESPONDENT that the government is going to implement a more stringent restriction in the near future. Moreover, a reasonable person in the same situation would utilize all sources to try to avoid such impediment.

36. Therefore, RESPONDENT could reasonably be expected to have taken the impediment into account at the conclusion of the contract and have avoided it or its consequences.

(iii) There is a likelihood that Bill 275 is going to be annulled and therefore the fluctuation of tobacco price is only temporary.

37. Despite the fact that CLAIMANT fail to challenge Bill 275 in April 2011, there is a great possibility that Gondwandan government will not continue Bill 275. "Demonstrations have been held daily in front of the Senate Building"[Cl. Ex.

No.5 Para.2] and "discussion about Bill 275 dominated press coverage for the next several weeks"[facts para.11]because of strong discontentment and opposition towards this bill. Bill 275 was passed into law at an advantage of merely 3 votes on 13 April 2012. However, "Bill 275 is scheduled to be tabled before the Senate and voted on sometime next year."[Res. Ex. No.2 para.6]Since "smoking is prevalent in Gondwandan"[fact para.8], the sales of tobacco is not likely to decrease continuously under the influence of Bill 275. The temporary plummet of tobacco price is likely to soon be replaced by a rise demonstrating the rewarming of the tobacco market.

38. Bill 275 was likely to only cause a temporary fluctuation of tobacco price, which means the obligation of RESPONDENT to purchase tobacco at the contracted price and quantity remained intact. The Commercial Court of Hasselt has ruled that changes in prices are foreseeable and do not exempt the parties from performance of their obligations. The court stated, moreover, that the performance of the obligation in such a case would imply a financial loss, but that this did not prevent the performance of the agreement. The conclusion of a contract that is not lucrative or that is even a losing proposition, is part of the risks that belong to commercial activities. (Kh Hasselt, 2 May 1995, AR 1849/94, unpublished, mentioned in: R. PEETERS, Overzicht van rechtspraak van het Weens Koopverdrag in België, T.B.H. 2003, p. 127, no. 6.4.).

39. Therefore, for matters governed by the CISG 1980, the RESPONDENT's obligations under the Agreement remain intact and unvitiated despite the implementation of Bill 275 and the Gondwandan government's regulations.

B. For matters governed by UNIDROIT Principles 2010, the RESPONDENT's obligations under the Agreement remain intact and unvitiated despite the implementation of Bill 275 and the Gondwandan government's regulations.

40. As discussed above, 66.1 of the Agreement states "this contract shall be governed by CISG, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts 2010."

41. Referring to the sphere of application, we find that Article 1 of the CISG states, "This Convention applies to contracts of sale of goods between parties whose places of business are in different States." Even if the tribunal decides that displaying the products is majority of parties obligation and therefore is governed by UNIDRIOT Principles 2010, the obligations are still not vitiated.

(i) The obligation on display is not vitiated by UNIDROIT Principle of International Commercial Contracts 2010 for there being no substantial hardships to exempt RESPONDENT's responsibilities and justify the non-performance.

42. Article 6.2.2 of the UNIDROIT states, “ There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party”.

43. We admit that the change of the policy is known to the RESPONDENT after the conclusion of the contract, but we do not admit that the event is unforeseeable. Policy is made according to the specific circumstances based on a specific time. Since the world is fast developing, it is easy to foresee that the policy would be changed. Besides, the agreement was signed in 2010, and from 2001 to 2009, the Gondwandan government enforce stricter regulations on the sale and use of tobacco products for many times. It can be easily foreseen that the policy on the ban of the package may be stricter. Also, though the change of the policy may be beyond the control of the RESPONDENT, they have the responsibility to foresee the change and take measures to decrease or even prevent the risks. So the implementation of Bill 275 and the Gondwandan government’s new, more stringent regulations cannot be regard as hardship of the performance of the contract.

44. Article 6.2.3 of UNIDOIRT states, “ (1) In case of hardship the disadvantaged party is entitled to request renegotiation. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium”.

45. On 11 March 2013, the RESPONDENT requested a renegotiation in a reasonable time, but the parties were unable to come to an agreement and in the end the Agreement remained the same. On 1 May 2013, the RESPONDENT notified the CLAIMANT that it would be terminating the Agreement. However, it is not in accordance with the procedure of the UNIDROIT. The parties shall resort to the court upon the failure to reach agreement.

(ii) RESPONDENT still has the ability to display merchandise complying with requirements, thus Gondwandan government’s regulations do not prevent displaying.

46. According the Agreement, the RESPONDENT would provide prominent counter place to display the CLAIMANT's variety of products. The sale and display is two different part of the whole transaction. The restrictions on the package of the products do not affect the display procedure. Even if the trademarks on the package of the products is totally banned, since there was a contract, the RESPONDENT should still perform its obligations unless the CLAIMANT do not want them to do so.

47. In the *Amalgamated Investment v John Walker (1976)*, John Walker Ltd sold to Amalgamated Investment Co Ltd a bonded warehouse and bottling factory for £1,710,000 for occupation or redevelopment. Amalgamated asked whether the building was designated historic or of architectural interest. John Walker said it was not. Unfortunately, on 22 August 1973 the Department of Environment listed the property. The contract was signed on 25 September 1973. Then the Secretary of State wrote to John Walker that it had been listed, taking effect on that day. The property value dropped to £200,000 (because a listed property which one cannot easily develop is often worth less money). Amalgamated asked for the contract to be set aside for common mistake, or for frustration, depending on whether the listing took effect before or after 25 September. The Court of Appeal said the listing took effect on 27 September, when the Secretary signed the listing papers. However the contract was not frustrated. It held that Amalgamated had taken on the risk that the building could be listed. This was shown by the nature of their pre-contractual enquiries. So the listing did not make the contract something radically different from that contemplated by the parties. As in this case, even if the change of the regulations only may affect the value of the display of the product, it does not radically affect the performance of the obligation on displaying. RESPONDENT can still display the products in the specific places as agreed.

48. RESPONDENT is able to perform the obligation on display. RESPONDENT is one of the fastest growing convenience store chains in the state of Gondwana. It now owns over 500 stores in Gondwana and is continually expanding. It is a dominant player and it is estimated that the RESPONDENT has over 70% market share in Gondwana's convenience store sector. It is easily observed that RESPONDENT is really a company in a large scale. Displaying the products of the CLAIMANT is not too hard. Besides, the restriction on the tobacco packaging does not affect much on the service of the RESPONDENT. So the RESPONDENT's ability to perform the contract is not affected.

49. In Conclusion, CLAIMANT contends that despite the implementation of Bill 275 and the Gondwandan government's more stringent regulations, the RESPONDENT's obligations under the Agreement remain intact and not vitiated for both matters governed by the CISG 1980 [A] and matters governed by the

UNIDROIT 2010 [B]

ISSUE 4 THERE WOULD NOT BE A RISK OF ENFORCEMENT FOR THE GROUNDS FOR REFUSAL REGULATED IN THE NEW YORK CONVENTION ARE NOT MET.

50. CLAIMANT hereby contends that there should not be a risk of enforcement because the grounds for refusal contained in the New York Convention have not been met. The public policy exception should be narrowly construed. Article V.2(b) concerning grounds for refusal under the New York Convention is not applicable in this particular case [A]. Other grounds for refusal of enforcement have not been met [B].

A. Article V. 2. (b) concerning grounds for refusal of enforcement in New York Convention is not applicable to the dispute in this case.

51. Since Nanyu and Gondwana are both parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") [*par. 24 Application for Arbitration*], disputes regarding enforcement of the arbitral award should all be discussed under the provisions of New York Convention.

52. The RESPONDENT may argue that, according to Article V. 2. (b), the arbitral award to be issued by this tribunal, if in favor of the CLAIMANT, would be contrary to the public policy of Gondwana and would constitute a ground for refusal of enforcement for the court of Gondwana. However, we believe that Bill 275 or the tobacco control and restriction of Gondwana does not fall within the scope of public policy in Article V.2. (b).

(i) The Public Policy in New York Convention should be construed narrowly and applied to extreme cases only.

53. In Article V. 2. (b) of New York Convention, it says that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that...[t]he recognition or enforcement of the award would be contrary to the public policy of that country. The Convention does not further explain or precisely define what constitutes a public policy. But there must be a standard for the tribunal to decide whether an award to be issued is against the public policy mentioned in the New York Convention. Because we can see that, there are tens of thousands of provisions from a country's laws or regulations or bills or other similar legal documents. And there are more than a hundred nations governed by the New York Convention, which means the quantity of conflictions of laws may be a result of an exponential growth. And if we simply interpret this term from its plain

meaning or what we believe is the plain meaning, or worse still, interpret by the standard of the domestic court which is sought for a refusal of enforcement, then it is highly possible that a majority of arbitral awards would be in a danger of being refused, which is totally depending on the discretion of the domestic court. Obviously, it is against the spirit of International arbitration and the purpose of the New York Convention, a convention rectified by 143 countries, which is to regulate and promote the recognition and enforcement of foreign arbitral awards.

54. In fact, it is generally accepted that the public policy in New York Convention should be construed narrowly and applied to extreme cases only. According to the legislative history of Article V(2)(b), the drafting committee of the New York Convention has adopted the standard raised by the ECOSOC Draft Convention of 1955, providing that "clearly incompatible with public policy or with fundamental principles".

55. Such narrow interpretation of the public policy in New York Convention is also broadly supported by a great number of nation's legal practice. Although the public policy provisions are frequently invoked, out of some 140 decisions, enforcement of an arbitration agreement and an arbitral award was refused in five decisions only on account of public policy. And the specific reasons why an arbitral ward was refused in the five cases are as follows: that there exists violation of due process by not forwarding to the RESPONDENT a letter submitted by the CLAIMANT to the arbitrator[Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 1 I), that names of the arbitrators were not made known to the parties[Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14), discussed supra at n. 207], discussed supra at n. 215.], and that the subject matter was non-arbitrable[U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller v. United States of America (U.S. no. 15), discussed infra at n. 386.][Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. v. Adelin Petit & Cie (Belgium no. 2), discussed inpa at n. 379][U.S. District Court of Columbia, January 18, 1980, LIAMCO v. Libya (U.S. no. 33), see infra at n. 380.]. Looking deep into the details of these five cases , it is not hard to find that none of these cases resembles to the case we are discussing, in other words, the violation of public policy alleging by the RESPONDENT was not supported by any of these cases. Such narrow interpretation is also typically supported by Parsons & Whittemore v. Societie Generale de L'Industrie du Papier (RAKTA), in which it provided "the forum State's most basic notions of morality and justice" .[J. Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", 7 California Western International Law Journal (1977) p. 228 at p. 245.]. Similar provisions can also be found in other international conventions such as 1979 Montevideo Convention (They are not MANIFESTLY CONTRARY to the principles and laws of the public policy (ordre public) of the State in which recognition or execution is sought.) and Convention on the Law Applicable to

Contractual Obligations (The application of a rule of the law of any country specified by this Convention may be refused only if such application is MANIFESTLY INCOMPATIBLE with the public policy ("ordre public") of the forum.).

(ii) Bill 275 does not fall into the scope of public policy in Article V. 2. (b) regarding the narrow interpretation of public policy.

56. According to the exposition above, the public policy in the New York Convention should be interpreted narrowly and be invoked only when the arbitral award was clearly incompatible with public policy or with fundamental principles. Or it can be invoked when the arbitral award was against the forum State's most basic notions of morality and justice.

57. First of all, it is worth noting that in the standard requires the arbitral award to be “clearly incompatible” with public policy. Such term can be interpreted to be that a minor breach of the domestic rule of the country or lack of serious circumstances is not sufficient to form a valid refusal of enforcement of an arbitral award. This interpretation can be supported by the case Hilmarton v. OTV*[Rev. Arb. 376 (1997), note Ph. Fouchard]* ,the case Society of Lloyd’s v. Saunders *[210 D.L.R. (4th) 519; 2001 D.L.R. LEXIS 448]*,and the case Inter Martime Management SA v. Russin & Vecchi, where the courts decided that the violation of jus cogens of Switzerland does not necessarily constitutes the violation of the public policy of Switzerland *[Tribunal Fédéral, 9 January 1995 (Inter Maritime Management SA v. Russin & Vecchi) Yearbook XXII (1997) pp. 789-799 (Switzerland no. 28)]*. In this case at hand, CLAIMANT did not mean to force RESPONDENT to sell branded merchandise disregarding the regulations of Bill 275, conversely, CLAIMANT appreciated that RESPONDENT may have difficulties with selling the promotional merchandise as required under the Agreement and would be open to further discussion on this aspect*[par.4 CLAIMANT’s Exhibit No. 7]* . The reason why they fail to come to an agreement is that they held different opinions on the selling price of the tobacco products. Neither does this issue violate Bill 275 nor does it infringe the policy of tobacco control and restriction in Gondwana. Therefore, arbitral award to be delivered by the tribunal will in no way be clearly incompatible with public policy of Gondwana.

58. Secondly, Bill 275 is only a set of provisions of law lately came into force. There is no other facts proving that it is the fundamental policy or it stands for the most basic morality or justice. Tobacco control and restriction is not as fundamental as provisions of Constitution of Gondwana, which stands for the most basic and fundamental policies of Gondwana. Oppositely, there are a couple of facts proving that Bill 275 was unpopular in Gondwana and was strongly opposed. After the Bill 275 being proposed , demonstrations were held daily in front of the

Senate Building. Also, there were political analysts stating that the“Clean Our Air”Bill (Bill 275) might have more bark than bite*[CLAIMANT's Exhibit No. 5]*. Another fact is that Bill 275 was passed into law by a vote of 52-49, which was just more than half *[par.10 Pg.4]*. Considering the huge controversy described above, it is apparent that such overly stringent restriction of tobacco distribution is not within the most basic notions of morality and justice.

59. Therefor, Bill 275 does not fall into the scope of public policy in Article V. 2. (b) regarding the narrow interpretation of public policy.

(iii) Assuming Bill 275 is within the scope of public policy of the New York Convention, there still lacks of the ground for refusal of enforcement since the public policy of respecting the final and binding arbitral award and protecting the stability of legal system prevails the public policy of tobacco control and restriction.

60. While discussing the whether the policy tobacco control and restriction of Gondwana is a public policy mentioned in the New York Convention, there is another important issue we can not ignore. The issue is that there lies another important public policy to protect the stability of legal system and to respect the finality and binding force of international arbitral award when considering the ground of refusal of enforcement in this case. This policy can be reflected by the objective of the New York Convention, which is that foreign and non-domestic arbitral awards will not be discriminated against and Parties is obliged to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal *[UNCITRAL Guide on the New York Convention]*. Since Gondwana is a contracting state of the New York Convention, then the New York Convention is part of the law of Gondwana and the public policy behind provisions of New York Convention also constitutes a public policy of Gondwana. More specifically, Gondwana should at the most extent esteem the finality and binding force of an international arbitral award, for the sake of maintaining the business order and the trade relations with other contracting states and avoiding international conflictions.

61. Moreover, in the instant case, the government of Gondwana had already written to the tribunal to explain the national situation of Gondwana, and the facts and exhibits in the case also gives a thorough explanation of the tobacco control and restriction of Gondwana. In other words, the tribunal was not blinded to the policy of Gondwana. Then, courts of Gondwana should trust in the legal quality and professional ability of the arbitral tribunal.

62. Since we have discussed above that there is no clear or direct violation of the Bill 275 and that there exists no serious circumstances, the interest of protecting the policy of tobacco control and restriction is weaker than the interest of respecting the final and binding arbitral award. The opinions above can be supported by the case Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd, in which it states that if one carried out a balancing exercise as between the public policy of enforcing awards and the public policy of not enforcing illegal contracts that since the offensiveness of the illegality alleged in this instance was not at the highest level, the balance was in favor of upholding the award [*Westacre Investments Inc -v- Jugoimport-SDPR Holding Co Ltd, ComC, Appeal from, ([1999] QB 740, [1998] 3 WLR 770, [1998] 4 All ER 570, [1998] 2 Lloyd's Rep 111, [1998] CLC 409)*].

63. In conclusion, there exists no valid grounds for the court sought for refusal of enforcement of the arbitral award of the tribunal to refuse the enforcement under Article V. 2. (b) of the New York Convention for the public policy alleged by the Gondwana government and the RESPONDENT does not fall into the scope of public policy of New York Convention which should be interpreted narrowly. And even though the tribunal finds it within the public policy mentioned in the New York Convention, the Article V. 2. (b) still cannot be applicable for the the public policy of respecting the final and binding arbitral award and protecting the stability of legal system prevails the public policy of tobacco control and restriction.

B. Other Grounds for Refusal of Enforcement in the New York Convention are not met.

64. According to the New York Convention Article V: in some circumstances Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked. In issue4 the arguing points are that: 1.whether the contract violate the applicable law ; 2.the legitimacy of the arbitral tribunal procedure.

65. First, both countries are contracting states, so the New York Convention should be applicable to this case, and all arguments should be settled under the the New York Convention. According to the New York Convention Article III: Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. Furthermore we have already discussed in issue3 that there is no breach of the applicable law (CISG and UNCITRAL) so the New York Convention is enforceable.

66. Second, as we have discussed above in issue1 that the arbitral tribunal has jurisdiction to deal with this dispute so the arbitration is in accordance with the

legal procedure.

67. **In Conclusion**, CLAIMANT hereby contends that there should not be a risk of enforcement because the grounds for refusal contained in the New York Convention have not been met. The public policy exception should be narrowly construed. Article V.2(b) concerning grounds for refusal under the New York Convention is not applicable in this particular case [A]. Other grounds for refusal of enforcement have not been met [B].

REQUEST FOR RELIEF

CLAIMANT hereby respectfully requests the tribunal to:

1. Award the CLAIMANT liquidated damages in the sum of USD $75,000,000 pursuant to Clause 60 of the Agreement;
2. Require the RESPONDENT to pay all costs of Arbitration, including the CLAIMANT's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules;
3. Require the RESPONDENT to pay the CLAIMANT interests on the amount set forth in items 1 and 2 above, from the dates those expenditures were made by the CLAIMANT to the date of payment by the RESPONDENT.