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City University of Hong Kong
HONG KONG, S.A.R.**

**MEMORANDUM FOR
RESPONDENT
(345R)**

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v.

RESPONDENT

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TABLE OF ABBREVIATIONS

&	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

INDEX OF AUTHORITIES

Elizabeth Bay	Elizabeth Bay Developments Pty. Limited v. Boral Building Services Pty. Limited [1995] 36 NSWLR 709
Paul Smith	Paul Smith Ltd. v. H & S International Holding Inc. [1991] 2 Lloyd's Reports 127
Born	Gary B. Born, International Commercial Arbitration(3rd ed, New York: Kluwer Law International, 2009)
Lye/Lee	Kah Cheong Lye and Jeth Lee, 'A Persisting Aberration: The Movement to Enforce Agreements to Mediate' 4(1) Mediation Newsletter: International Bar Association Legal Practice Division 5–14
Eduardo	Eduardo Palmer, Eliana Lopez, The Use of Multi-tiered Dispute Resolution Clauses in Latin America: Questions of Enforceability
King & Spalding	A Practical Guide for Drafting International Arbitration Clauses © 28
ICC 10256	ICC International Court of Arbitration Case No. 10256, 1975
ICC 9984	ICC International Court of Arbitration Case No. 9984, 1975
ICC 6276	ICC International Court of Arbitration Case No. 6276, 1975
ICC 12739	ICC International Court of Arbitration Case No. 12739, 1975
ICC 25	ICC International Court of Arbitration Case No. 25, 1975
Connerly v. State Personnel Bd.	37 Cal. 4th 1169, 39 Cal. Rptr. 3d 788, 129 P.3d 1 (2006)
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)
U.S. v. State of Mich.	940 F.2d 143, 20 Fed. R. Serv. 3d 576 (6th Cir. 1991)
F Kessler	F Kessler, 'Contracts of Adhesion--Some thoughts about Freedom of Contract (1943) 43 Columbia Law Review 629, 631-2
Darner Motor Sales	[Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 396 (Ariz. 1984)]
Kemiron Atlantic Inc. v. Aguakem	Kemiron Atlantic Inc. v. Aguakem Int'l Inc, HIM Portland LLC v. DeVito Builders Inc

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 ARGUMENT

1. THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO DEAL WITH THIS DISPUTE BECAUSE THE 12 MONTH NEGOTIATION REQUIREMENT HAS NEVER BEEN MET.

RESPONDENT firstly would like to concede the tribunal's authority to decide upon its own jurisdiction, and hereby respectfully asks the present tribunal to withdraw from hearing the case because this arbitral tribunal has no jurisdiction to deal with the dispute. Consultation and negotiation agreements are enforceable provisions in Clause 65 and are mandatory preconditions to arbitration. CLAIMANT has failed to fulfill the mandatory preconditions to arbitration. There is no consent of submitting the dispute to arbitration.

2. THE TRIBUNAL SHOULD ADMIT THE AMICUS CURIAE BRIEF BECAUSE IT FULFILLED THE REQUISITES OF ADOPTION OF AMICUS CURIAE BRIEF.

We respectfully ask the tribunal to rule that the tribunal should admit the Gondwanan government's amicus curiae brief for consideration during the proceedings. The reasons are as follows: It does not affect the independence of arbitral tribunal. It can assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. It refers to public interest which is significant for tribunal.

3. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANA GOVERNMENT'S MORE STRINGENT REGULATIONS.

RESPONDENT firstly would like to contend that display requirements of the RESPONDENT's obligation under the agreement should be governed by UNIDROIT Principles of International Commercial Contracts 2010 and hereby consequently prove the RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the new, more stringent regulations following that firstly, the validity of contract is contestable for the existence of mistake at the time the parties entered into contract. Secondly, even if the contract is still valid, the obligations of RESPONDENT's were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations for the hardship of RESPONDENT's performance. Thirdly, even assuming that CISG is applicable, Article 79 does protect the RESPONDENT because there is impediment that is beyond the RESPONDENT's control.

ARGUMENT ON JURISDICTION

ISSUE 1: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO DEAL WITH THIS DISPUTE BECAUSE THE 12 MONTH NEGOTIATION REQUIREMENT HAS NEVER BEEN MET.

1. RESPONDENT firstly would like to concede the tribunal's authority to decide upon its own jurisdiction, and hereby respectfully asks the present tribunal to withdraw from hearing the case because this arbitral tribunal has no jurisdiction to deal with the dispute. Consultation and negotiation agreements are enforceable provisions in Clause 65 and are mandatory preconditions to arbitration [A]. CLAIMANT has failed to fulfill the mandatory preconditions to arbitration [B]. There is no consent of submitting the dispute to arbitration [C].

A. Clearly drafted consultation and negotiation in clause 65 are enforceable and mandatory preconditions to arbitration.

(i) The words "If" and "shall" in clause 65 together unequivocally establish a binding prerequisite to arbitration.

2. The clause stipulates that disputes 'shall initially seek a resolution through consultation and negotiation [Cl. Ex. 1]. It is not merely a vague agreement to agree'[Elizabeth Bay; Paul Smith], rather, it is the mutual consent of both parties to participate in the consultation and negotiation before arbitration. Where a dispute resolution step is "drafted in a mandatory fashion and the right to arbitrate is arguably conditioned on compliance with this requirement," it should be enforced as a condition precedent to arbitration[Born,842]. As "shall" has a binding nature, using the mandatory term "shall" rather than the permissive "may" suggests that conciliation is binding therefore.[ICC 10256; ICC 9984]. By using such words, it has imposed some mandatory procedure before arbitration could initiate. Clause 65 also shows a clear precondition to arbitration, with the words saying that "If, after a period of 12 months has elapsed from the date on which the dispute arose, the Parties have been unable to come to an agreement in regards to the dispute, either Party may submit the dispute to the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Sub-Commission (Arbitration Center) for arbitration[Cl. Ex. 1]. Word "if" stipulates a clear condition whether parties can step into arbitration. "If" and "shall" together establish unequivocally a binding prerequisite to arbitration. It shows that, arbitration is the last stage of resolving the dispute after the fulfillment of negotiation and consultation. Provided it is clear what steps the parties are required to take, it will be considered that the obligation to be sufficiently certain and enforceable.

(ii) The benchmarks for ending negotiation and beginning arbitration in clause 65 are clear and specific, which makes it a binding prerequisite to arbitration.

3. Clause 65 clearly stipulates the benchmarks for ending the negotiation and starting the arbitration. The starting point of negotiation should be the day when disputes arise and the point of entering into arbitration should be 12 months later after that.[CLAIMANT's exhibit no.1].Since both parties had made it a consent to set a pre-arbitration condition in the contract, and specified a timeframe in which steps are to be taken, such clause should be considered pre-arbitration procedure, as a result of which, arbitration can't be start up without the fulfillment of the obligations of negotiation and consultation. [Kemiron Atlantic Inc. v. Aguakem Int'l Inc, HIM Portland LLC v. DeVito Builders Inc].There were strict modalities of substance and form (time limits, report,etc.),which had been voluntarily made in great detail[ICC,6276,25].
4. Since negotiation period has not completed, parties should not violate their consent on consultation and submit to arbitration.

B. CLAIMANT has failed to fulfill precondition to arbitration.

5. The parties mutually intended to have a mandatory consultation and negotiation step. However, from the date on which the dispute arose, (i) there is no negotiation between two parties and (ii) even if the April meeting can be deemed as a negotiation, CLAIMANT still failed to fulfill the requirements.

(i) There is no negotiation from the date in which the dispute arose.

6. There is no negotiation from the date on which the dispute arose. Disputes arose when RESPONDENT made it sure to CLAIMANT that they would not perform the duty and would be terminating the Agreement.[Cl. App. ¶16].Even tough both parties had discussed about relevant issues in the April meeting, such a discussion could not be seemed as the performance of the preconditioned negotiation, because parties didn't make sure that they would terminated the agreement then and no dispute arise at that time. It was on May 1 that RESPONDENT formally notified CLAIMANT to end its performance[Cl Ex 8],which means that the starting point of negotiation should be on May 1,2013.Besides, it was also clear that when RESPONDENT received CLAIMANT's pre-action demand letter, RESPONDENT notified CLAIMANT in good faith that the parties were to undergo the mandatory and enforceable negotiation and consultation before arbitration.[Cl. App. ¶21]. However, CLAIMANT insisted arbitration and ignored the compulsory precondition to arbitration which they mutually agreed. As the precondition to arbitration has been unfulfilled, the tribunal ought to require CLAIMANT negotiate before commencing a new arbitration. [Lye/Lee 119; Born 847; ICC 12739]

(ii) Even if the April meeting can be deemed as a negotiation, CLAIMANT still failed to fulfill the requirements.

7. CLAIMANT still unfulfilled the requirement because negotiation period does not completed and should not be deemed as futile[a]. Besides, CLAIMANT ought to conduct negotiation in good faith. [b]

a. The period of 12 full months does not completed.

8. Clause 65 stipulated clearly that negotiation period should last 12 full months [Cl. Ex. No.1].And accordingly, both parties should conduct negotiation and consultation with_amicable effort. Parties mutually intended to have such mandatory negotiation because this dispute resolution is a relatively cheap and effective procedure without necessity of resorting to arbitration [Eduardo 16]. Therefore, they chose a fairly long time—12 months— to ensure that they would have enough time to fully discuss and negotiate the dispute again and again until the dispute resolved. And a fully discussed dispute will very likely be settled by such cheap and effective way. However, even though the meeting on April 11 2013 can be seemed as negotiation, there was no deep negotiation in that meeting. CLAIMANT had made every effort to deal with the difficulties in order sustain the contractual relationship with RESPONDENT. However, RESPONDENT didn't make full efforts to come to an agreement with RESPONDENT before they refused to renegotiate. Thus, it's premature to say that the negotiation was "completely hopeless". It is unconvincing that CLAIMANT alleged that consultation would be fruitless before RESPONDENT really made every effort to achieve to some solutions.

b. CLAIMANT should re-negotiate in good faith under such situation.

9. When situation in Gondwana became worse, RESPONDENT notified CLAIMANT in time and tried to find solutions together with CLAIMANT in good faith [Cl. Ex. No.6; Re. Ex. No.3]. While RESPONDENT gave a warning to CLAIMANT, CLAIMANT itself actually has been well aware of the development of the governmental regulations [Cl. Ex. No.2-5] and CLAIMANT took action to challenge Bill 275[Re. Ex. No. 2]. However, CLAIMANT did not give response and continued its strategy [Cl. Ex. No. 7]. Though CLAIMANT eventually had a meeting with RESPONDENT, CLAIMANT could not accept the realities and took an ironclad position that it would not budge from. At last, RESPONDENT clearly notified CLAIMANT that two parties had a compulsory consultation and negotiation step before arbitration, but CLAIMANT still submit its application to arbitration in bad faith. RESPONDENT request CLAIMANT to conduct negotiation in good faith and the tribunal ought to decide that it has no jurisdiction accordingly.

C. Parties have no clear consent to arbitration because clause 65 is a defective

arbitration clause.

10. RESPONDENT contends that both parties actually have no clear consent to arbitration which proved by the permissive word “may” used in clause 65[Cl. Ex. No. 1]. Therefore the Tribunal has no jurisdiction to rule on this case.
11. Arbitration is consensual in nature and is dependent upon the parties’ agreement. Drafting the arbitration clause should be careful and clear in order to avoid unnecessary disputes. Word “shall” has a more binding nature compared with “may”. The law is reasonably settled that the use of the word “may” in this sense means the parties are not required to initiate arbitration.[ICC case 9984; ICC case 10256; US case]Therefore, when drafting an arbitration agreement, it is preferable to state that any disputes “shall” be resolved by “binding ”arbitration.[King & Spalding]
12. Here, parties have a clear consent to consultation by using the mandatory and binding term “shall”. However, when talking about arbitration, parties adopted a permissive term “may” to express their willings which is too vague to indicate clearly both parties’ consent. And without their mutual consent, arbitration clause is invalid. Accordingly, the Tribunal has no jurisdiction over the dispute.
13. **In Conclusion**, the Tribunal has no jurisdiction to hear the merits of the claim in these arbitral proceedings.

ISSUE2: THE TRIBUNAL SHOULD ADMIT THE AMICUS CURIAE BRIFE BECAUSE IT FULFILLED THE REQUISITES OF ADOPTION OF AMICUS CURIAE BRIEF,

14. We respectfully ask the tribunal to rule that the tribunal should admit the Gondwandan government’s amicus curiae brief for consideration during the proceedings. The reasons are as follows: It does not affect the independence of arbitral tribunal [A]. It can assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties [B]. It refers to public interest which is significant for tribunal [C].

A. The recognition of Amicus curiae brief will not influence the independence of the tribunal.

- (i) All the arbitrators are selected by both parties or in the way agreed freely by both parties, therefore actually the independence of the tribunal is in the control of both parties.**

15. In this case, Conglomerated Nanyu Tobacco Ltd. appointed Ms. Sara Fan as their arbitrator, while Real Quik Convenience Stores Ltd. appointed Prof. John

Worthington as their arbitrator. Both parties have jointly appointed Mr. Richard Castle as the presiding arbitrator. Neither party challenges arbitrators' qualification which means that both parties are satisfied with the appointment of the arbitrators. Both parties have best control of the selection of arbitrators which means basically those three arbitrator are independent enough and will make right choice therefore actually the amicus brief will make no impact on the independence of the tribunal.

(ii) There are many rules to make sure that the arbitrators are competent which ensures the independence of the tribunal.

16. Pursuant to CIETAC Article 28, "When appointing arbitrators pursuant to these Rules, the Chairman of CIETAC shall take into consideration the law as it applies to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant" which means the independence of the tribunal will be ensured again by arbitration rule.

(iii) Since arbitration organizations are non-government organizations, it don't have to be obliged from any government opinion.

17. First of all, CIETAC doesn't belong to any government, therefore it doesn't need to take any order from any government including Gandwandan government. Secondly of all, arbitration organization doesn't take money or any interest from Gandwandan government, therefore it doesn't need to ingratiate itself with Gandwandan government. Third of all, since CIETAC is an organization with high reputation all over the world , there's little that Gandwandan government can do to impact CIETAC. Therefore, the independence of the tribunal will not be influence by the amicus curiae brief.

B. The evidence provides an external perspective for tribunal to decide.

(i) Amicus curiae requires the third party to provide the information facts or opinions about the case.

18. Amicus curiae is an important system in Common Law Procedure. According to the Black Law Dictionary, amicus curiae is "the person who has strong interest or understanding to the subject matter, and hands in written statement to the court forwardly or according to the request of the court". In line with The Public International Law Dictionary, "amicus curiae is the person or organization who is not a party of the dispute but submits some information about the case to help the court do a correct adjudication. Thus it can be seen that amicus curiae is a system which involves a third party provides facts or opinions to the court during the trial.

(ii) There is a global trend that tribunals admit amicus curiae briefs if they provide an external perspective about the case.

19. Amicus curiae joined NAFTA arbitration case: NAFTA firstly accepted amicus curiae statement in the case of [Methanex v. USA]. In this case, the tribunal received two applications of amicus curiae. After severally hearing opinions from both sides and the dispute party, the tribunal decided it had the authority to accept amicus curiae's written submissions in accordance with UNCITRAL Article 15(1). Later, in the case of [Glamis Gold Ltd v. USA], Quechuan Indian Nation asked for submitting amicus curiae's written submission. It claimed that it can help the tribunal give the verdict by providing specific facts and legal materials involving the disputable land's cultural and environmental values, the history of mining project's approval, civil and international law concerning protection of aboriginal land, the potential negative effect causing by prevailing consequence etc. It is noteworthy that the US government was totally in support of the application of Quechuan Indian Nation. It explained that this organization can provide a unique viewpoint and perspective from the aspect of history, religion and culture which is different to the parties.

20. Amicus curiae joined ICSID arbitration case: In the case of [AAS v. Argentina], five NGOs applied for joining arbitration procedure as amicus curiae. The tribunal regarded this issue as a procedure problem which it has discretion towards. Finally the third party's submission was accepted because the tribunal thought amicus curiae can provide an external perspective, help the tribunal make a right verdict considering general interests, and promote the transparency of arbitration procedure at the same time. Later, ICSID amended its arbitration rules, which added conditions of accepting amicus curiae's written submission in Article 37. The new rule Article 37(2) regulates: After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
 - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the non-disputing party submission would address a matter within the scope of the dispute;
 - (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission. [ICSID Arbitration Rules]

21. Although UNCITRAL and CISG rules which both parties agree to apply do not regulate explicitly whether tribunal has the authority to accept Amicus curiae's statement, more and more cases show the tribunal's tendency of giving the third party, amicus curiae, the right to submit statements via explaining arbitration rules. In fact, amicus curiae's brief indeed has positive influence on a more just adjudication because some cases also refer to public interest. To avoid unnecessary negative impact on the public, concerning the third party's perspective is meaningful. What's more, allowing the submission of amicus curiae can enhance the transparency of whole arbitration procedure and legitimacy of arbitration system.

(iii) The amicus curiae brief in this case provide the tribunal with external perspective.

22. Coming back to our case, the brief coming from Gondwandan Department of State read: "As you are well aware, this arbitration touches on topics of Gondwandan public policy, and may well deal with potential infringements of Gondwandan law and sovereignty." [Page32] We conclude that the government does provide an external perspective concerning the political background, law basis and Gondwandan's future trend. It proves the fact said by RESPONDENT is true. Also, the government submits brief in person may indicate that the real situation is stricter than RESPONDENT's description.

C. The amicus brief system should be adopted in arbitration because it represents public interest.

23. The literal meaning of the term "amicus curiae" is a friend of the court. [Connerly v. State Personnel] The term refers to persons, whether attorneys or laypersons, who interpose in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct an investigation or other proceeding on request, or by court appointment. [U.S. v. State of Mich.]
24. Although CISG as well as UNICITRAL which CLAIMANT and respondent agreed to apply in the arbitration clause doesn't contain such rules about amicus curiae, we claim that amicus curiae system still be suitable for arbitration for reasons as followed.
25. The origins of international law include the general principles of law and legal principles to determine the secondary (especially jurisprudence, international law doctrine, and important resolutions of international organizations). See Statute of The International Court of Justice Article 38 paragraph 1 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b.

international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. As a consequence, jurisprudence should be considered when judging the arbitration case.[Statute of The International Court of Justice Article 38 paragraph 1]

26. There is a global trend to accept amicus curiae as a kind of merits to participate in the cases.
27. Britain is the first country to apply amicus curiae in the court .According to our survey, the earliest case we have found dates back to 1656.The judge in The Protector v Geering case held that "it is for the honor of a court of justice to avoid error in their judgments... Errors are like felons and traitors; any person may discover them, they do caput gerere lupinum, vid. Hob. 5, error, though by consent." [Protector v Geering]
28. America has a long history of using amicus curiae as a basic system in legal practice. Since Green v. Biddle, amicus curiae is widely spread in serious kinds of cases. [Green v. Biddle]What's more, government has the power to be an amicus curiae without the agreement of two parties if fundamental interests are involved in the case, see Florida v. Georgia[Florida v. Georgia]
29. Meanwhile, there are some attempts of amicus curiae on arbitration tribunal recent years. In CAS(Court of Arbitration for Sports) Statutes of the Bodies Working for the Settlement of Sports-Related Disputes 2010 "...in the procedure. After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix. R42 Conciliation the President of the Division, before the transfer...", also see Chapter 5, Part II: Text of the CAS Procedural Rules, Arroyo (ed) in Arbitration in Switzerland: The Practitioner's Guide (2013), Legislation date: 1 March 2013.
30. The State of Gondwana address a matter of significant interest in this case so his opinion should be considered as amicus curiae brief. The Gondwandan government declared that "...this arbitration touches on topics of Gondwandan public policy, and may well deal with potential infringements of Gondwandan law and sovereignty." "The Gondwandan government has made it a point to reduce tobacco consumption and promotion. Tobacco consumption is one of the world's leading causes of death, and its harmful effects are well documented. The Gondwandan government is fulfilling its duty to its citizens by implementing regulations that will safeguard the public health and prevent further casualties in the future." [Department of State letter, Page 32] The government published the Bill 275 and passed it into law to curb the population of smoked citizen as well as to protect the environment of the country especially the air and public hygiene. Beside the strong opposition from the official members and the public, another

one of several effects of this action is the increasing disputes between tobacco company and distribution stores about packaging costs. As the parties in this case are the largest tobacco producers in Nanyu and one of the fastest growing convenience store in the state of Gondwana, which are well-known to people, the arbitration draws a great attention to the public. And the cause is the introduction of Bill 275 by the state of Gondwana, the government plays an important role in this case. What's more, the opinion of this tribunal would have a strong influence in the implement of Bill 275 which concerns the prestige of Gondwandan government. The commitment that the state of Gondwana participates in this arbitration as amicus curiae is to prevent non-transparency and just for both parties. "Based on a review of more than fifty arbitral awards involving allegations of corruption, this article examines the role that these tribunals are playing in international anti-corruption efforts (see the Appendix for a table of these awards)."[Cecily Rose]. Therefore, the opinion of Gondwana government should be considered as amicus curiae for its concerned public interests.

31. **In conclusion**, we respectfully ask the Tribunal to rule that the amicus curiae should be admitted. Firstly, the independence will not be influenced by the amicus curiae brief. The appointment procedure ensures the independence of the Tribunal. What's more, the government does provide an external perspective concerning the political background, law basis and Gondwana's future trend. In addition, the amicus curiae does represent the public interest. The amicus curiae tells about the public policy of Gondwana government. Therefore, the tribunal should admit the amicus curiae brief

ARGUMENT ON MERITS

ISSUE 3 RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations.

32. RESPONDENT firstly would like to contend that display requirements of the RESPONDENT's obligation under the agreement should be governed by UNIDROIT Principles of International Commercial Contracts 2010.[A], and hereby consequently prove the RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the new, more stringent regulations following that firstly, the validity of contract is contestable for the existence of mistake at the time the parties entered into contract,[B]. Secondly ,even if the contract is still valid , the obligations of RESPONDENT's were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations for the hardship of RESPONDENT's performance [C]. Thirdly, even assuming that CISG is applicable, Article 79 does protect the RESPONDENT because there is

impediment that is beyond the RESPONDENT's control [D].

A. The RESPONDENT's obligation under the agreement with regard to display requirements and the display issue should be governed by UNIDROIT Principles of International Commercial Contracts 2010.

33. According to the Agreement, The RESPONDENT would provide prominent counter space to display the CLAIMANT's variety of products, the CLAIMANT would supply the RESPONDENT with free promotional materials for use in counter displays and The RESPONDENT would ensure that the CLAIMANT's merchandise would be prominently displayed within the RESPONDENT's stores [CLAIMANT's Exhibit No. 1]. There are five terms constitute the RESPONDENT's main obligations and three of them are relevant with the display issue.
34. The model clause for inclusion in the contract is "This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)", which means by using this Model Clause, the parties achieve a twofold result: first, their contract will be governed by the CISG and not by the otherwise applicable domestic law which has not incorporated the CISG; second, since the CISG will apply not as a matter of binding domestic law but, rather, only as a "soft law" instrument chosen by the parties to govern their contract, the UNIDROIT Principles may be used to interpret and supplement the CISG not only with respect to issues covered by the CISG but not expressly settled by it (cf. Article 7(2) CISG), but also with respect to other issues of general contract law which are outside the scope of the CISG but may become relevant also in the context of sales contracts (such as contracting on the basis of standard terms, authority of agents, defects of consent, illegality, conditions, set-off, assignment of rights, limitation periods, etc.).
35. CISG applies to contracts of sale of goods between parties whose places of business are in different states. In this scenario, the display issue is conspicuous and clear outside the scope of the CISG but become relevant in the context of sales contracts. According to the analysis of the model clause in this contract, the display issue should be discussed on the ground of UNIDROIT Principles of International Commercial Contracts 2010.

B. For the existence of mistake at the time the parties entered into contract, the validity of contract is contestable.

36. Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded pursuant to Article 3.2.1 of UNIDROIT Principles of International Commercial Contracts 2010 which render the whole contract invalid and consequently there is no foundation for RESPONDENT's obligation (i). Therefore, the RESPONDENT's obligations under the Agreement were vitiated

by the implementation of Bill 275 and the Gondwanda government's new, more stringent regulations (ii).

(i) The RESPONDENT's avoidance of the Agreement under the UNIDROIT Principles 2010 should be considered lawful on the grounds that there is a crucial and material mistake (as defined by Article 3.2.1).

37. Pursuant to ARTICLE 3.2.1 (Definition of mistake) Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.
38. Here, at the time the agreement was negotiated the CLAIMANT erroneously assumed that no stricter regulation would be implemented within the life of the Agreement, which is even backed by CLAIMANT themselves, claiming that "the risk of this legislation passing is relatively low.

(ii) The consequent of invalidity of the contract is that obligations regarding the display requirement naturally be vitiated.

39. Pursuant to ARTICLE 3.2.2(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or (b) the other party had not at the time of avoidance reasonably acted in reliance on the contract. (2) However, a party may not avoid the contract if (a) it was grossly negligent in committing the mistake; or (b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.
40. The introductory part of paragraph (1) determines the conditions under which a mistake is sufficiently serious to be taken into account; sub-paragraphs (a) and (b) of paragraph (1) add the conditions regarding the party other than the mistaken party; paragraph (2) deals with the conditions regarding the mistaken party.
41. Actually, there is not a strictly mistaken party. Because When the Agreement was negotiated in 2010, the Gondwana government had already introduced packaging restrictions in 2009. Nobody thought that new, stricter regulation would be implemented within the life of the current Agreement (RESPONDENT's Exhibit No. 1). As a result, when negotiating the 2010 Agreement, the Parties were not concerned about whether the products in question would be prohibited in the future. Unfortunately, two years later, the Gondwana Senate introduced Bill 275, which was exactly what both Parties had reasonably assumed would not happen. Also the truth confirmed again by the reply letter from CLAIMANT which

contain”...The Senate Bill in Gondwana has been brought to my attention. However, both my advisers and myself feel that the risk of this legislation passing is relatively low. Similar legislation in other regions have failed to pass, and in other regions where such legislation has been attempted, such legislation has been found to be unconstitutional. At the present moment, we are not convinced that there is a real risk that the legislation in Gondwana will change, nor do we believe that it would impact current sales and/or operations in Gondwana.”(CLAIMANT’s Exhibit No. 3). Two parties just have a reasonable assumption about future base on the relevant fact, however , now we can see that it is an erroneous assumption. Consequently we could conclude the contract for mistake, the contract is invalid in that sense and obligations will naturally be vitiated.

C. Even if the contract is still valid , the obligations of RESPONDENT’s were vitiated by the implementation of Bill 275 and the Gondwana government’s new, more stringent regulations for the hardship of RESPONDENT’s performance.

42. Here, if the contract is valid , the RESPONDENT could prove that the obligations of RESPONDENT’s were vitiated for the hardship of RESPONDENT’s performance through the RESPONDENT had already taken measures to obtain public permissions, and it had been refused(i), and the resulting fluctuation in prices and the impossibility of performing the majority of material clauses of the Agreement on the part of the RESPONDENT should be considered hardship as defined in UNIDROIT Principles 2010 Article 6.2.2.(ii)

(i)The RESPONDENT had already taken measures to obtain public permissions, and it had been refused. The refusal affecting the validity of the contract renders the majority of the material elements of the contract impossible to perform.

a. The term “public permission” is to be given a broad interpretation.

43. “Public permission” includes all permission requirements established pursuant to a concern of a public nature, such as health, safety, or particular trade policies. It is irrelevant whether a required license or permit is to be granted by a governmental or by a non-governmental institution to which Governments have delegated public authority for a specific purpose. Thus, the authorization of payments by a private bank pursuant to foreign exchange regulations is in the nature of a “public permission” for the purposes of this Article. The situation which brought by Bill 275 and the Gondwana government’s new, more stringent regulations is conspicuous and clear following the purpose of this article, because the introduce of bill275 based on the reality that the increase of amount of smoking people and aimed to clean the air which appear as public interest.

b. Two parties had already taken measures to obtain public permissions, however, application for public permission was denied.

44. According to PICC Article 6.1.14 (Application for public permission)Where the

law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

45. if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;
46. (b) in any other case the party whose performance requires permission shall take the necessary measures.
47. In this scenario, The parties had already taken measures to obtain public permissions, and it had been refused. The refusal affecting the validity of the contract renders the performance of contract impossible in part.
48. According to RESPONDENT's exhibit no.2, the CLAIMANT has been well aware of the implementation of bill 275 and the development of more stringent government regulation. The CLAIMANT has also taken measures to try and curtail these regulations, going so far as to challenge the constitutionality of Bill 275 before the Gondwana courts. However, the court decided in its judgment on 23 June 2011 to protect public right and safety, thereby denied the CLAIMANT's application for public permission.

c. Impossibility for the RESPONDENT to comply with the exact provisions of the agreement that stipulate the specific requirements for display result in the rules on non- performance shall apply in this case.

49. Also, pursuant to art 6.1.17(1), there is sufficient evidence showing that not only did the display requirement part of the contract, but also the entire contract was invalidated by the refusal of obligation. Since no tobacco trademarks, images, designs, or other identifying brand marks would be allowed, thereby it would be impossible for the RESPONDENT to comply with the exact provisions of the agreement that stipulate the specific requirements for display. In pursuant to art 6.1.17(2), the rules on non- performance shall apply in this case. Consequently, RESPONDENT's liability of non-performance shall be excused owing to force majeure, since the impediment incurred by the implementation of bill 275 and government's harsher regulation is apparently beyond its control and RESPONDENT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
50. Therefore, the RESPONDENT's obligation with regarding to display requirements was vitiated.

(ii) The resulting fluctuation in prices and the impossibility of performing the majority of material clauses of the Agreement on the part of the RESPONDENT should be considered hardship as defined in UNIDROIT Principles 2010 Article 6.2.2.

a. Maintain the performance for RESPONDENT under the agreement 2010 is unconscionable and should be considered hardship.

51. Between 1 January 2013 and 1 June 2013, the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels. The

CLAIMANT in particular suffered an approximate 25% decline in sales as compared to the same period in 2012. It is hard for RESPONDENT ,almost impossible to maintain the performance under the agreement 2010 and the vanish of brand effect is meaning the CLAIMANT's market share would't be same as before, which mean the RESPONDENT has no duty to put the negotiated price in the Agreement was 20% higher than similar distribution agreements signed between the RESPONDENT and other smaller tobacco companies or wholesalers with considering the CLAIMANT's dominant position in the worldwide tobacco market. It is not fair .

52. Pursuant to Article 6.2.2 (Definition of hardship)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, we could know that it is clear that the cost of a RESPONDENT's performance has increased and the introduce of bill 275 fit all the limitation of applying hardship.

b. The RESPONDENT's obligations under the Agreement were vitiated by virtue of the hardship of RESPONDENT performing the contract.

53. According to Article 6.2.3 (Effects of hardship)(1) In case of hardship the disadvantaged party is entitled to request renegotiations. 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, there are two method RESPONDENT could choose to deal with the hardship. In this case, RESPONDENT choose to renegotiate, if it is succeed, the previous obligations would be naturally vitiated, and if not, like what happened, the responded still has no reason to keep the same performance like before or adopt the reason like "We appreciate that you may have difficulties with selling the promotional merchandise as required under the Agreement. I would be open to further discussion on this aspect, but at the present moment, we are unable to come to terms on a renegotiated Distribution Agreement."(CLAIMANT's Exhibit No. 7), so the RESPONDENT could bring action to the court and seek for termination of contract. Virtually , two ways lead to the same result --the obligation are vitiated.

D. Even assuming that CISG is applicable, Article 79 does protect the RESPONDENT because there is impediment that is beyond the

RESPONDENT's control.

54. If there is any possibility that the CISG is applicable, Article 79 should be applied here because of the introduce of Bill 275 and more stringent regulation is beyond RESPONDENT's control (i) and the existence of impediment of RESPONDENT's obligation (ii) , therefore, the RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations pursuant to CISG Art.79 .(iii)

(i) The introduction of Bill 275 and more stringent regulation is beyond RESPONDENT's control on the ground of RESPONDENT's faith when the RESPONDENT entered into contract.

55. If Bill 275 has been foreseen at the time of the conclusion of the contract, a reasonable person would not sign a contract the same as the Distribution Agreement. Both RESPONDENT and its advisers feel that the risk of such regulation passing is relatively low because of the similiar legislation in other regions have failed to pass , and in other regions where such legislations have been attempted , such legislations have been found to be unconstitutional at that time the RESPONDENT prepared to entered into contract (CLAIMANT's Exhibit No.4) . At that moment, there is no doubt that RESPONDENT are not convinced that there is a real risk that the legislations in Gondwana will change, nor does they believe that it would impact current sales and/or operations in Gondwana. Based on the facts , the conclusion of the introduce of Bill 275 and more stringent regulation is beyond RESPONDENT's control is conspicuous and clear.

(ii) The implementation of Bill 275 and the Gondwana government's new, more stringent regulations led to the impediment of RESPONDENT's obligations.

56. With the Bill 275 passed into law, CLAIMANT's strength was significantly diminished. Brand effect was weakened seriously under the regulation of Bill 275. Although brand is allowed to appear on the retail packaging of tobacco products [Cl. Ex. No.2 para.3(3)], strict regulation is required. "Any brand, business or company name, or any variant name, for tobacco products that appears on the retail packaging of those products: ...Must not appear more than once...Must appear across one line only; and must appear: Horizontally below, and in the same orientation as, the health warning; and in the Centre of space remaining on the front outer surface beneath the health warning." [Cl. Ex. No.2 para.4] The price of CLAIMANT's product will weaken its competitiveness further. Products shall be sold in RESPONDENT's store at a fixed price according to the contract.[facts, 6.a]nevertheless, demand were decreasing sharply due to the regulations of Gondwana, which means the market price will declining

accordingly. customers were less inclined to buy CLAIMANT's product in the RESPONDENT's retail stores as opposed to other, lesser-known brands. Thus, the 20% price premium in the Agreement [facts para.7] is no longer reasonable, because the premise of the contract is including CLAIMANT's dominant position in the worldwide tobacco market.

57. Moreover, RESPONDENT was obligated to purchase a minimum quantity of tobacco products from CLAIMANT [Cl. Ex. No.1 Art.1]. With the Bill 275 passed into law, CLAIMANT in particular suffered an approximate 25% decline in sales as compared to the same period in 2012. The obligation of minimum quantity of purchase will unreasonably increase RESPONDENT's storage charges. Worse still, RESPONDENT was obligated to purchase a minimum quantity of branded merchandise from CLAIMANT [Cl. Ex. No.1 Art.2] since the display and sale of those merchandise is prohibited under Bill 275, those purchase fee will unreasonably increase RESPONDENT's financial burden which directly turned into impediment of RESPONDENT'S obligation.

(iii) The RESPONDENT's obligations under the Agreement were vitiated by virtue of the impediment (as defined by CISG Art.79).

58. Confronted with all these situations, RESPONDENT attempt to raise these concern with CLAIMANT multiple times. Even the further cooperation is unfavorable to RESPONDENT, it attempted to renegotiate with CLAIMANT to make the cooperation possible, considering the long-term business partnership. However, the renegotiation is fruitless. The parties agreed on the promotion and display requirements, nor did they agreed on the price and quantity of purchase. On the other hand, major tobacco companied are forced to "wait and see" since Bill 275 is scheduled to be tabled before the Senate and voted on sometime next year. Therefore, it is a long run for RESPONDENT to suffer the consequences of inconformity between the Distribution Agreement and the law in Gondwana. Thus, there is no choice for RESPONDENT but terminating the Agreement.
59. According to CISG Art.79, A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. Thus, because of the introduce of Bill 275 and more stringent regulation is beyond RESPONDENT's control and the existence of impediment of RESPONDENT's obligation , the RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations pursuant to CISG Art.79.

- 60. In Conclusion,** RESPONDENT would like to contend that obligations were vitiated by implementation of Bill 275 and Gondwana Government's more stringent regulations. The display requirements of the RESPONDENT's

obligation under the agreement should be governed by UNIDROIT Principles of International Commercial Contracts 2010 [A]. The validity of contract is contestable for the existence of mistake at the time the parties entered into contract [B]. Even if the contract is still valid , the obligations of RESPONDENT's were vitiated by the implementation of Bill 275 and the Gondwana government's new, more stringent regulations for the hardship of RESPONDENT's performance [C]. CISG Article 79 does protect the RESPONDENT because there is impediment that is beyond the RESPONDENT's control [D].

ISSUE 4 THERE WOULD BE A RISK OF ENFORCEMENT IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT BECAUSE OF VIOLATION OF PUBLIC POLICY AND ARBITRAL PROCEDURE IN THE CONTRACT.

A. If the Tribunal were to issue an award in favor of the CLAIMANT there would be a risk of enforcement for violation of Article V 2 (b) of New York Convention, because it will go against the public policy of the Gondwana and will thus become unenforceable.

(i) The contract violates the public policy of Gondwana because the contract itself is illegal according to Bill 275 and thus unenforceable.

61. According to the contract, the RESPONDENT is obligated to continuously purchase and sell branded tobacco products and merchandising materials from the CLAIMANT. However, Bill 275 of Gondwana harshly regulates the packaging of tobacco products that no trademark or decorating patterns shall appear on the package of tobacco products, which consequently banned the selling of CLAIMANT's products with the current packaging whose style was understood by the two parties when signing the contract. Also, Bill 275 states that *no manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trademarks or marks associated with tobacco products*. While the branded T-shirts, key chains, lighters and posters which RESPONDENT was obligated to purchase and provide to the customers are definitely materials containing trademarks or marks associated with tobacco products. Thus, both displaying merchandising materials and causing to be distributed any merchandising material is against Bill 275, one of the laws of Gondwana.

62. According to Article V 2(b) of New York Convention, *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 the*

recognition or enforcement of the award would be contrary to the public policy of that country. Thus, because of the illegality of the contract according to Bill 275 of Gondwana, the contract violates the public policy of Gondwana and an award of enforcing the liquidated damage clause of such illegal contract cannot be enforced by the court of Gondwana.

63. There are several cases to support the point that a court may refuse an enforcement of an arbitral award enforcing an illegal contract on the basis of violation of public policy of that country. In *St John Shipping Corp v Joseph Rank Ltd* case [1956 3 All ER 683 at 687, 1957 1 QB 267 at 283 case], Devlin J specified general principles of illegal contract. He stated that the contracts that are made to breach the law are unenforceable. He also mentioned that the intent of the parties to breach the law must be shown, and if both of the parties had intention to break the law, the contract is completely unenforceable, and if only one party had the intention of breaking the law, in his part the contract is unenforceable. If we apply the logics of the abovementioned case, after passing the Bill 275 in their communication with RESPONDENT, even though knowing that several parts of the contract are against the law, the CLAIMANT mentioned that they “urge you to continue performing the Distribution agreement as you have been doing, until we reach a mutually beneficial agreement”. We evidently can see in CLAIMANT’s side intention to break the law of the country, which was completely unacceptable for RESPONDENT. We can conclude that the contract in the CLAIMANTs side must be unenforceable, using the logics of Judge, because we can see intention to break the law. Also, there are cases in England when the court has denied the enforcement of contracts because of its contradiction with the public policy. Those cases were examined in *Westacre Investments Inc v Judoimport-SDPR Holding Co Ltd*. A judge after examining the following cases, *Israel Discount Bank of New York v Hadjipateras* [1984]; *Vervaaeke v Smith* [1983], *In Re Macartney* [1921], Astbury J concluded that the principle that the English court would not enforce contract against the public policy of this country wherever it was made, applied as “directly to the enforceability of foreign judgments founded on contracts contrary to public policy or rights of that character.” As another very famous case, *Soleimany v Soleimany* 1998, which also included enforcement of an illegal contract, the court found that even though the arbitral tribunal have granted a decision and in vast majority of cases that national courts recognize those awards, because of the fact that the contract was illegal, it goes against the English public policy and is unenforceable.
64. Therefore, the court in Gondwana has the ground of refusal of enforcement regarding the illegality of the contract and the illegal intent of CLAIMANT.

(ii) There is a significant violation of New York Convention because the letter submitted by Gondwana government has expressed strong objections on basis of domestic public policies.

65. The representative of the Gondwana Department of State in his letter to CIETAC mentioned that the arbitration touches public policy of Gondwana and deals with potential infringements of the law and sovereignty of the country. The letter very clearly emphasizes that tobacco control and restriction is a keystone of the public policy of Gondwana. Any possible award in favor of CLAIMANT will serve to undermine the county's right to regulate and control public policy. Moreover, if the tribunal makes the award in favor of CLAIMANT it will go against the public policy of the country. Therefore, it is evident that Gondwana Department takes Bill 275 as a public policy of that country.
66. According to Article V (b) of New York Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country finds that the recognition or enforcement of the award would be contrary to the public policy of "that country". That is to say, the public policy is only the public policy of the country, here in this case, Gondwana. There is no word in the lines of this article suggesting that any international public policy should be brought in.
67. Although there are cases that enforced the award of an international arbitral tribunal with the enforcement against the domestic law of that country, giving public policy so narrow a construction that it must be characterized as having no meaningful definition, leaving it pragmatically useless if not altogether nonexistent. Such interpretation would render courts of countries to blindly pay lip service to international commercial arbitration. It is concluded that this attitude could have adverse effects on international commercial arbitration as parties would no longer wish to use this mechanism of dispute settlement fearing the deprivation of the public policy defence as a "catch-all" to protect "the integrity of arbitration.
68. Therefore, interpreting from the plain meaning of New York Convention, the court can refuse the enforcement of an arbitral award in favor of the CLAIMANT for the contract violates the domestic public policy of Gondwana.

(iii) The award is also unenforceable because it has violated fundamental principles of international public policy based on legislative intent.

69. International Law Association (ILA) committee on International Commercial Arbitration in its conference in 2002 have discussed and made some recommendations to countries who want to apply public policy exception. This is the last conference where this issue was discussed thus the recommendations proposed by the committee must be taken into account by national courts.

Here are several requirements that this committee proposed:

- International public policy of a country includes (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it

is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State (Recommendation 1(d))

- Award should be denied only if enforcement would violate the forum state's most basic of morality and justice. (Persons & Whittemore, US Court of Appeals, 174) (Recommendation 1b)
- Public policy violation must be relatively obvious or clear (recommendation 1b)
- Only public policy of the State where enforcement is sought should be applied (Recommendation 1c)

70. If we take those recommendations into consideration we can see that our case falls within the category of violation of public policy. First, the award is against the fundamental principles that the state is trying to protect, and it goes against rules that are designed to protect social interest of the state. Gondwana government mentioned that the tobacco control and restriction is a keystone in their social policies and as a sovereign state they have the power to institute regulations protecting public health and safety. Moreover, not only the award is against fundamental principles of the country but also it is against states justice, after enacting Bill 275.

71. **In conclusion**, because of the illegality of the contract, and the violation of domestic and international public policy, the court of Gondwana has the right to refuse the enforcement of an arbitral award in favor of the CLAIMANT under New York Convention.

B. If the Tribunal were to issue an award in favor of the CLAIMANT there would be a risk of enforcement for violation of Article V 1(d) of New York Convention, because the arbitral procedure was not in accordance with the 12-month negotiation requirement in the contract.

72. According to Article V 1(d) of the New York Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties,

73. As we have already discussed in the first issue, the arbitral tribunal has no jurisdiction to deal with this dispute because the 12-month negotiation requirement in the arbitration clause of the contract between the parties has never been met. Therefore, if the tribunal deliver an award disregarding the arbitral procedure regulated in the contract, the court of Gondwana has the right to refuse

the enforcement of such award for the arbitral procedure was not in accordance with the agreement of the parties.

REQUEST FOR RELIEF

RESPONDENT hereby respectfully requests the tribunal to:

1. Withdraw from hearing the current dispute for its lacking of jurisdiction pursuant to relevant rules and Clause 60 of the Agreement;
2. Decide that the RESPONDENT is not liable to pay any alleged termination penalty;
3. Require the CLAIMANT to pay all costs of Arbitration, including RESPONDENT'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.