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

27th July – 2nd August, 2014

MEMORANDUM FOR THE CLAIMANT

"CONGLOMERATED NANYU TOBACCO LTD."

TEAM CODE: 381C

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Case No. M2014/24

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LIST OF ABBREVIATIONS

&	**And**
¶	**Paragraph**
AA	**Arbitration Agreement**
AFA	**Application for Arbitration**
ARB	**Arbitration**
Art.	**Article**
CE	**Claimant Exhibit**
CIETAC	**China International Economic and Trade Commission Arbitration Rules**
CISG	**United Nations Convention for International Sales of Goods**
Corp.	**Corporation**
DA	**Distribution Agreement**
Disp.	**Dispute**
ed.	**Edition**
i.e.	**that is**
ICC	**International Chamber of Commerce**
ICSID	**International Centre for Settlement of Investment Dispute**
Int'l	**International**
Ltd.	**Limited**
Mgmt.	**Management**
No.	**Number**
NYC	**Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York , 1958**

PO	**Procedural Order**
PSS	**Pacta Sunt Servanda**
Transt'l	**Transnational**
UNCITRAL	**United Nations Commission on International Trade Law**
UNIDROIT	**International Institute for the Unification of Private Law**
USD	**United States Dollar**
v.	**Versus**

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CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980 19 ILM 668 (1980) 10th April 1980 (¶¶ 25, 29, 36)
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 7 ILM 1046 (1968) 7th June 1959 (¶¶ 44, 46)
UNCITRAL	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (with amendments as adopted in 2006) 24 ILM 1302 (1985) 21st June 1985 (¶¶ 9, 15, 45, 46)

UNIDROIT	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts, 2010 15 UST 2504 21st April 1940 (¶¶ 25, 37)

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23rd December, 1974

(¶ 39)

STATEMENT OF FACTS

1 Conglomerated Nanyu Tobacco Ltd. [CLAIMANT] entered into a 10 year distribution agreement with Real Quik Convenience Stores Ltd. [RESPONDENT] on 14.12.2010 for distribution of tobacco products.

2 The Gondwandan Government has over the years introduced stringent regulations to curb sale and use of tobacco products:

2002	Packaging Requirement: Warning Labels detailing harmful effects of smoking.
2004	National ban on smoking indoors, preventing bars, restaurants and other businesses having smoking areas.
2005	National ban on smoking in public areas.
2009	Expansion on packaging restrictions: mandatory warning labels including graphic images of diseased lungs and autopsies.

3 On 14.03.2011 Gondwandan Senator introduced the "Clean our Air" Bill 275/2011. Bill 275 faced heavy controversy and strong opposition from members of the Gondwandan Senate and all major tobacco producers and distributors. Nonetheless it, was passed into law on 13.04.2012 by a vote of 52-49.

4 After passing of the Bill, the Gondwandan's tobacco industry as well as the CLAIMANT suffered a decline in sales of 30% and 25% respectively.

5 On 11.03.2013 RESPONDENT notified the CLAIMANT that it wished to renegotiate the Agreement in the light of the new Governmental regulations. Consequently on

11.04.2013 meeting was held to negotiate the 20% price premium given to the CLAIMANT. Parties were unable to come to an agreement.

6 Pursuant to same, the RESPONDENT on 01.05.2013 notified its intention to terminate the agreement effective 01.06.2013.

7 On 01.06.2013, the CLAIMANT sent a letter to the RESPONDENT for payment of USD 75,000,000 for terminating the contract before expiry of 10 years.

8 Subsequently on 01.07.2013, 02.08.2013 and 02.09.2013 two notices and a demand letter were sent to RESPONDENT respectively, demanding the Disputed Sum.

9 The RESPONDENT on 26.09.2013 wrote back in reply to all the notices dispatched by the CLAIMANT.

10 The CLAIMANT on 12.01.2014 submitted the dispute for Arbitration as the parties could not come to an agreement over the period.

ARGUMENTS ADVANCED

A. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THE DISPUTE IN LIGHT OF THE 12 MONTH NEGOTIATION PERIOD STIPULATED IN THE ARBITRATION AGREEMENT.

1 The Arbitral Tribunal has jurisdiction to deal with the dispute between Nanyu Tobacco Ltd. [CLAIMANT] and Real Quik Convenience Stores Ltd. [RESPONDENT]. This proceeds from the following arguments:

I. *Clause 65 in the Distribution Agreement is not an obstacle to the Tribunal's jurisdiction.*

i) The parties were unable to come to an agreement.

2 The AA [*Clause 65, DA*] requires the parties "*to try to come to an agreement initially*". Thus, it requires the parties to seek a resolution through negotiation and consultation. However, it does not set out any specific procedure to be followed in reaching to an amicable settlement [*Salini*]. The parties attempted pre-arbitral settlement but failed to come to an amicable agreement [*AMT*]. However, this does not render the RESPONDENT's consent to arbitral jurisdiction ineffective [*Sutton/Gill/ Gearing,* 48*; Kassationsgericht*].

3 The fact that stands unhinged is that the CLAIMANT seriously endeavoured to negotiate with the RESPONDENT. Lengthy communications dating from 11.03.2013 signify that negotiations were attempted resulting in the lapse of a majority of the requisite time period without any solution [*Alps*].

4 The interpretation of the Arbitration Clause holds the rationale that the RESPONDENT should not be brought before the Arbitral Tribunal without being given the opportunity to

discuss the matter with the CLAIMANT [*Alps*]. However, considering the current factual matrix, the RESPONDENT had been given ample opportunity to harmoniously resolve the dispute [¶*18-20, AFA*].

ii) All the available remedies have been exhausted before making the application for arbitration.

5 It must be noted that the CLAIMANT took all reasonable steps [¶¶ 17-20, *AFA*] to bring the dispute to the RESPONDENT's attention and resolve the matter amicably. However, considering that the parties were not able to come to an agreement despite lengthy communications, any further attempt at negotiation is bound to be futile [*Ethyl*]. No purpose would be served by stalling the arbitration [*No. 8445*] and even less so, by forcing the CLAIMANT to renegotiate which amounts to an unnecessary, over formalistic approach and would further not serve any legitimate interest of the parties [*Azurix; Ethyl; Lauder*].

6 Furthermore, it could potentially allow a party that does not really wish to negotiate to obstruct and delay arbitration proceedings [*Wena*]. The International law requirement of exhaustion of remedies must be disregarded as it has been demonstrated that in fact no remedy is available and every attempt at exhaustion has been ineffectual [*Ethyl*].

7 Furthermore, it must be noted that the 12 month waiting period does not form a prerequisite for jurisdiction of the Tribunal and is merely a procedural rule that may, in fact, lead to delay of the arbitral proceedings [*SGS*; *Wena*].

8 It can be safely stated that various Tribunals have not forced parties to adhere strictly to the terms of a negotiation clause [*Lauder; Bayindir; Occidental; Paushok*]. Therefore, no purpose can be served by any further suspension of CLAIMANT's rights to proceed to arbitration [*Schreuer,* 8].

II. *The Tribunal has the authority to rule on its own jurisdiction.*

9 The Tribunal has an unfettered authority to determine and rule upon its own jurisdiction by applying the accepted legal principle of *kompetence-kompetence* [*Born,* 853,857; *No.7929*]. This authority of the Tribunal has been further validated by Art.16 of UNCITRAL and Art.6.3 of CIETAC.

Conclusion

10 The Tribunal has jurisdiction to deal with the present dispute as the parties could not come to an agreement even after the exhaustion of all available remedies by the CLAIMANT.

B. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S *AMICUS CURIAE* BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

11 The Gondwandan Government's *amicus curiae* brief should not be admitted because:

I. *The Tribunal lacks jurisdiction to accept amicus curiae briefs.*

12 Owing to the essential feature of arbitration, i.e., is its consensual nature [*Sutcliffe/Sabater*, 51], the decision with regard to *amicus* participation must be left in the hands of the parties to the arbitration [*Tunari*; *Levine,* 208].

13 It must be further noted that arbitration being a creature of contract [*Hosking,* 289], the imposition of limits on the opportunity for the Gondwandan Government to intervene in the present arbitration is nothing but enforcing the parties' original AA [*Sutcliffe/Sabater*, 51].

14 The DA makes no mention of including a third party during arbitral proceeding [*CE No.* 1] which implies that both parties did not consent for the same. Moreover, the CLAIMANT objected to any admission of the *amicus curiae* [*PO* 1*, ¶ 4*].

15 Moreover, Art. 33(1) of CIETAC and Art. 19(2) of UNCITRAL do not permit the acceptance of Gondwandan Government's *amicus curiae* brief. They are merely concerned with procedural matters and not the substantive issue of who are parties to the arbitration [*Methanex*]. Thus, the Arbitral Tribunal lacks power to allow the *amicus* brief [*Tunari*].

II. ***The Gondwandan*** **Government** ***has no stake in the arbitration.***

16 The Gondwandan Government assumes that the issues concern it simply because the background to the arbitration relates to tobacco consumption [*Biwater*] and seems more interested in publicizing or addressing the economic or cultural aspects potentially surrounding the arbitration [*Sutcliffe/Sabater*, 52]. However, it must be noted that the arbitration mainly relates to the relief which the CLAIMANT is entitled to receive by way of the AA [*Clause 60.2, DA*].

17 The concerns of the Government are factually and legally irrelevant to the issues for consideration in this arbitration. This follows from the following arguments:

a) The RESPONDENT generates its revenue by selling various commodities to the consumers of Gondwana. There is no Government fund being utilized in the functions of the RESPONDENT [*Clarification No.* 1*, PO* 2]. Therefore, the payment of damages also will be done through private earnings of the RESPONDENT that does not in any way involve the Gondwandan taxpayers' money.

b) The Agreement entered into between the parties is unique and the RESPONDENT has not come into a similar agreement with any other distributor [*Clarification No.* 10*, PO* 2]. One of the primary considerations for a court while considering a case is its eventual outcome on the rise of similar litigation [*Bjorklund,* 1295]. However, an award in favour of the CLAIMANT will not set a precedent for other distributors to claim a similar relief in the Courts of Gondwana.

III. ***The disadvantages of accepting amicus curiae brief.***

18 It must be noted that confidentiality, established as an inherent procedural feature of arbitration, would be violated with the interference of Gondwandan Government [*Lew/Mistelis/Kroll,* 141]. This consideration is central given that arbitral disputes already run, on average, several years and entail large costs for both CLAIMANT and RESPONDENT [*Ishikawa,* 392; *Friedland,* 10].

19 Both the parties are private entities and will have to make payment for the cost of *amici* from their own money [*Rubins,* 20] thus, imposing an extra burden on them [*Tienhaara,* 240].

20 Furthermore, the submission of *amicus* brief will also affect the workload of the Arbitral Tribunal [*Bjorklund,* 1293]. By accepting the *amicus* brief and multiplying submissions, the arbitration runs the risk of too closely resembling court litigation [*Levine,* 220] which the parties wanted to avoid by opting for arbitration.

Conclusion

21 The Gondwandan Government's *amicus* brief should not be considered because its acceptance has not been consented to between the parties; the Government has no

legitimate interest in the arbitration. Moreover, it is likely to cause immense disadvantages to the parties and the Tribunal.

C. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND OTHER STRINGENT GONDWANAN REGULATIONS.

22 The implementation of Bill 275 and the Gondwandan Government's stricter regulations do not vitiate the RESPONDENT's obligations because:

I. *CLAIMANT is entitled to damages due to Termination of the agreement.*

23 *Pacta Sunt Servanda* is a paramount feature of contract law according to which the sanctity of the Agreement is required to be maintained and it is primarily in the public interest to hold contractual agreements binding under any circumstances [*Kull,* 44].

24 Clause 60.2 of the DA necessitates the RESPONDENT to pay liquidated damages of USD 75,000,000 if the agreement is terminated within three years of its conclusion. It is imperative to note that the DA was concluded on 14.12.2010 and was terminated by the RESPONDENT on 01.05.2013, i.e. within 3 years [¶¶ 6 & 16, *AFA*]. Hence, the RESPONDENT is under a contractual obligation to pay damages.

25 Termination of the Agreement simply implies non-performance of the Agreement [*Chengwei,* 59]. The absence of a provision relating to non performance in the CISG necessitates a reference to the UNIDROIT [*Clause 66, DA*]. The fact that the DA mandates payment of damages to the CLAIMANT in case of non-performance irrespective of its actual harm, has already been sufficiently stressed upon[*Clause 60.2, DA;* Art. 7.4.13, *UNIDROIT*] and stands further validated.

26 Furthermore, it must be noted that though termination of the DA relieves the RESPONDENT from its contractual obligations, every clause of the avoided Agreement

does not cease to be effective nor do all the rights and obligations provided for in the contract automatically come to an end [*Chengwei*, 163].

II. ***Art. 79 of CISG does not exempt the RESPONDENT from paying damages.***

i) Bill 275 was not an impediment for the performance of the Agreement.

27 Art.79 only provides an exemption where performance is impossible and an event which makes performance objectively impossible constitutes an impediment [*Flambouras*, 277]. This Article exempts the RESPONDENT from performing the Agreement if the enforcement of Bill 275 forms an impediment. When performance merely becomes difficult due to change in circumstances, the change does not constitute an impediment [*King,* 10].

28 The purpose of the DA was to sell and distribute tobacco products which were not prohibited by Bill 275 and it was passed only with the intention of regulating smoking in Gondwana as it was highly prevalent among its population [¶ 8, *AFA*]. This signifies that the DA as a whole was not rendered impossible of performance because of the Bill, but rather only the requirements to display promotional merchandise and providing counter and shelf space had been subjected to the requirements of the Bill [*Clause 25 DA;* ¶ 10, *AFA*].

29 Sale and distribution of the goods supplied could be performed, unhindered, albeit with more difficulty but these activities were not marred with impossibility. Thus, the passing of the Gondwandan Bill is not an impediment and the RESPONDENT cannot avail the exemption under Art.79 of CISG.

30 Inter alia, even if found that the passing of Bill 275 is an impediment then it is imperative to note **that the impediment could reasonably be expected to be taken into account**

at the time of the conclusion of the agreement and the impediment and its consequences could be avoided and overcome.

III. ***The impediment could have been foreseen.***

31 One of the elements that must be proved by the RESPONDENT before it enjoys the remedial effects of Art. 79 is that of foreseeability [*King*, 20]. Failure to satisfy this requirement denies the exemption to the RESPONDENT [*Metallic Sodium*]. Bill 275 was introduced in 2011 after a series of attempts were taken by the Gondwandan Government from the year 2002 to regulate smoking [¶ 9, *AFA*]. From the attempts it could be reasonably expected by the RESPONDENT that stricter regulations could be enforced.

IV. ***The impediment and its consequences could have been avoided and overcome.***

33 If found that the impediment could not be foreseen then the RESPONDENT has to further prove that it could not have avoided the impediment or its consequences [*Lindstrom*, 9]. Once the effects of the impediment started to show, the RESPONDENT had the obligation to do anything under its control to promote timely performance [*Arroyo,* 20].

34 Bill 275 was introduced to regulate smoking and only the provisions of Clause 25 of the DA were hit by it. The impediment could be avoided by the RESPONDENT through mere consensus between the parties for an alteration in the agreement.

Conclusion

36 It can be concluded that Bill 275 did not vitiate the RESPONDENT's obligations towards the DA and the CLAIMANT is entitled to damages not only due to the cardinal

principle of *PSS* but also owing to RESPONDENT's non-performance. Furthermore, the Bill not being an impediment could have been avoided and thus RESPONDENT cannot seek an exemption under Art.79 of CISG.

D. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOUR OF THE CLAIMANT, THERE WOULD BE NO RISK OF ENFORCEMENT.

37 The CLAIMANT is entitled to a sum of USD 75, 000, 000 [Art 1.3*, UNIDROIT*] due to the RESPONDENT's non–performance [Art 7.4.13, *UNIDROIT*]. This payment is in pursuance to the agreement between the parties [*Clause 60.2, DA*]. It is imperative to maintain the sanctity of the contract (i.e. the DA) between the parties and it must be upheld under all circumstances. This forms the premise for the basic contractual principle; *PSS* and lays down the foundation for the following arguments:

I. *An award in favour of the CLAIMANT would not violate Gondwandan Public Policy.*

38 The main objective of Bill 275 is to regulate the sale and distribution of tobacco products. However, it must be noted that Clause 60.2 of the DA which grants relief to the CLAIMANT, does not form the subject matter of Bill 275.

39 This lends credence to the fact that an award in favour of the CLAIMANT would not be incompatible with the Gondwandan legal system [*Hunter/Blackaby/Partasides*, 419]. Furthermore, due to an absence of an element of illegality, the award will not constitute a departure from the Gondwandan public policy [*Shell*; *Parsons*].

40 It has been observed in a plethora of cases that public policy denotes fundamental legal principles and an award would violate public policy only if it conflicts with fundamental notions of justice [*Makina*; *Pension Case*]. The present laws governing tobacco

consumption do not completely ban smoking but merely impose restrictions on the same [¶¶ 9-10, *AFA*].

41 Any award in favour of the CLAIMANT, when such laws are in force in Gondwana, would not fundamentally offend the most basic and explicit principles of justice and fairness [*Corporacion*].

42 Furthermore, the enforcement of the arbitral award would not affect Gondwana or its people in any manner [*Soleimany*] because the Gondwandan Government has no stake in the RESPONDENT and no taxpayer's money would be involved in the payment of damages [see *supra* ¶¶ 16-17].

43 Also, a series of strict laws regulating tobacco use have been a part of Gondwana's legal system since 2002 [¶ 9, *AFA*] yet the RESPONDENT found it convenient to ignore the concern that the DA would contravene Gondwandan public policy during its conclusion on 14.12.2010 [*¶ 6, AFA*]. It is only now, to relieve itself from the liability to pay damages, that the RESPONDENT has raised the issue of the DA being violative of public policy.

II. *There exists a presumptive obligation on the Gondwanan Courts to enforce an International Arbitral Award.*

44 It is imperative to note that there is a high rate of voluntary compliance with Arbitral Awards and extremely low rate of non-enforcement in situations where awards are not automatically observed [*Berg,* 6]. Gondwana being a party to the NYC [¶ 24, *AFA*], its national courts are under a duty to enforce Arbitral Awards and its national procedural rules also mandatorily recognize such awards as binding [Art. III, *NYC*].

45 One of the major objectives of International Commercial Arbitration being the provision of a final and binding resolution to disputes, the Gondwandan Government is under a

general obligation to recognize the arbitral award as binding and enforceable in its Courts, irrespective of the country in which it was made [Art. 35(1), *UNCITRAL*].

Conclusion

46 The award in favour of the CLAIMANT would not violate the Gondwandan public policy due to non-existence of any element of illegality and thus, would not affect Gondwana in any manner. Furthermore, the NYC and the UNCITRAL, presumptively obligate the Gondwandan courts to enforce the Arbitral Award.

RELIEF REQUESTED

In light of the arguments advance, CLAIMANT respectfully requests the Tribunal to direct that:

1. The RESPONDENT should pay the liquidated damages in the sum of USD 75,000,000 pursuant to Clause 60 of the Agreement.

2. The RESPONDENT should pay all costs of arbitration, as set out in Art. 50, CIETAC Arbitration Rules.

3. The RESPONDENT to pay the CLAIMANT interest on the amounts set forth in items 1 and 2 above; from the date those expenditures were made by the CLAIMANT to the date of payment by the RESPONDENT.