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

In the matter of Arbitration under

The China International Economic and Trade Arbitration Commission, Hong Kong

CIETAC M2014/24: Conglomerated Nanyu Tobacco Ltd. Real Quik Convenience Stores Ltd.

TEAM CODE 662C

Memorandum for CLAIMANT

ON BEHALF OF:	**AGAINST:**
CLAIMANT	**RESPONDENT**
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COUNSELS

TEAM 662C

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TABLE OF ABBREVIATIONS

CISG	United Nations Convention on Contracts for the International Sale of Goods
¶/¶¶	Paragraph(s)
App. For Arb.	Application for Arbitration
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
Cl. Ex.	Claimant Exhibit No.
CLAIMANT	Conglomerated Nanyu Tobacco Ltd.
FCTC	Framework Convention on Tobacco Control
HKAO	Hong Kong Arbitration Ordinance
IBA	International Bar Association
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
Proc. Ord.	Procedural Order No.
Re. Ex.	Respondent Exhibit No.
RESPONDENT	Real Quik Convenience Stores Ltd.
St. of Def.	Statement of Defence
UNIDROIT PICC	UNIDROIT Principles on International Commercial Contracts

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Kelleth Michael Curtin, Redefining Public Policy in International Arbitration o/Mandatory National Laws, 64 DEF. COUNS. J., 271, 275, 281 (1997)	*Curtin*
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CIETAC Award 7 August 1993	*CIETAC Award 7 August 1993*
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CIETAC Arbitral Award 17 September 2003	*Cotton Case*
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Societe Europeenne d' Etudes et d' Enterprises v Federal Republic of Yugoslavia, (1997) 1 Y.B COM ARB	*Societe Europeenne d' Etudes et d' Enterprises v Federal Republic of Yugoslavia*
Soleimany v. Soleimany, Ct App, Civil Division, 30 Jan	*Soleimany v. Soleimany*

1998	
Judgement of 15 Mar 1999 20 ASA Bull 373 *(Kassationsgericht Zurich)*	*Zurich 1999*

TIMELINE OF FACTS

Date	**Event**
1999	Real Quik Convenience Stores incorporated
2000	Nanyu started using Real Quik as a distributor
2001	Gondwandan government started researching methods of curbing the 35% of the population classified as regular smokers
2002	Implementation of new packaging requirements asking all tobacco products to carry warning labels detailing the harmful effects of smoking
2004	Implementation of a national ban on smoking indoors and preventing bars, restaurants and other businesses from having smoking areas
2005	Implementation of a national ban on smoking in public areas such as parks
2009	Expanded packaging restrictions: - Mandatory warning labels - Graphic images of diseased lungs and autopsies - Labels to take up over 33% of the packaging
22 June, 2009	Criticism of the tobacco regulations as "Too Little Too Late"
14 December, 2010	Second 10-year Distribution Agreement signed between the Parties.
14 March, 2011	Bill 275 "Clean our Air Bill" introduced. Would reform tobacco packaging requirements as follows: - Generic olive green packaging

	- Elimination of all trademarks, images, designs, colours, structural elements - TOBACCO to be printed in bold print on the front - Only identifying mark to be printing the brand/ company's name. This would also be heavily regulated by the govt. regulations - Similar requirements apply to promotional merchandise as well
21 March, 2011	Letter from Real Quik to Nanyu raising concern over the impending Bill 275 and stated that they may have to renegotiate the Agreement.
April, 2011	Nanyu challenged the constitutionality of Bill 275 in the Godwandan Courts. -23 April, 2011: Court decided that it is within its sovereign rights to pass such a Bill
1 April, 2011	Newspaper article on Bill 275 discussing that it was unlikely to be passed
5 April, 2011	Reply from Nanyu stating that it is unlikely that the Bill will be passed and not willing to re-negotiate the Agreement.
13 April, 2012	Bill 275 passed into a law
1 January, 2013 – 1 June, 2013	Average 30% decline in tobacco sales. Nanyu Tobacco suffered 25% decline in sales as compared to the previous year.
11 March, 2013	Real Quik informed Nanyu that they wanted to renegotiate the Agreement
11 April, 2013	Meeting held to discuss the 20% premium. No agreement reached.
12 April, 2013	Letter from Nanyu to Real Quik: - Open to further negotiations but not at this time

	- Continue with the Agreement as it currently exists
19 April, 2013	Letter from Real Quik to Nanyu
1 May, 2013	Real Quik informed Nanyu that it would not be able to perform its duties. Wanted to terminate the Agreement w.e.f. 1 June, 2013.
1 June, 2013	Nanyu sent a letter to Real Quik asking them to pay $75,000,000 as a consequence for early termination of the Agreement
1 July, 2013	1st Default Notice issued to pay the Termination Fee within 30 days
2 August, 2013	2nd/ Final Notice issues to pay the Termination Fee within 30 days
2 September, 2013	Pre-action Demand Letter issued to Real Quik to pay immediately
26 September, 2013	Real Quik replied stating that the termination was for reasons beyond their control and hence liquidated damages do not apply. Also stated that as per clause 65, negotiation and consultation to be resorted to before arbitration.
12 January, 2014	Application for Arbitration submitted by Conglomerated Nanyu Tobacco
19 February, 2014	Notice on the Formation of the Arbitral Tribunal in Case no. M2014/24: - Sara Fan – Nanyu - John Worhington – Real Quik - Richard Castle – Presiding Arbitrator
25 February, 2014	Letter from the Department of State, Gondwana stating their interest to submit an *amicus curiae* brief in this case - Raised concern on the enforceability of any arbitral award in favour of Nanyu as it is against the public policy of Gondwana

ARGUMENTS ADVANCED

1. ARBITRAL TRIBUNAL HAS JURISDICTION IN THE PRESENT MATTER

Claimant asserts that the tribunal has jurisdiction in the present case as the agreement to negotiate and consult is a mere expression of intention and not a jurisdictional pre-requisite (A.) Further, denying the tribunal jurisdiction will lead to an anomalous situation (B.). Should the tribunal find that negotiation and consultation was a condition precedent, it should not dismiss the proceedings (C.)

A. Pre-arbitral procedures specified are a mere expression of intention

Clauses calling for attempts to settle a dispute amicably are primarily expressions of intention, and should not be applied to oblige the parties to engage in fruitless negotiations or delay an orderly resolution of a dispute. *[Born, p. 847; ICC Case No. 8445]*. Further, compliance with such pre-arbitral procedures is not a jurisdictional condition for commencing arbitration. *[EFCO; ICC Case No. 10256; ICC Case No. 8445; Born, p. 842]*.

The parties did not intend to make negotiation and consultation a condition precedent; this is also evidenced from the fact that no framework for the pre-arbitral procedures have been provided, for instance the number of sessions required, any particular institutional rules applicable, persons who must participate etc. *[Born, p. 848; Portland; Kampner]*. The time limits provided in the agreement are vague and uncertain, and do provide a clear set of guidelines against which a party's best efforts can be measured, hence the agreement to negotiate and consult is unenforceable. *[Born, p. 848; Candid Case; Mocca Lounge]*

Further while interpreting the effect of non-compliance of the pre-arbitral procedures, the tribunal must keep in mind the pro-arbitration presumption used for interpretation of the scope of arbitration agreements. According to this presumption, a valid arbitration clause should generally be interpreted expansively, *[Born, p. 1063]*, and where the language of the arbitration clause is capable of bearing at least two interpretations, that interpretation should be favoured which gives the tribunal jurisdiction over the claims *[Onex Corp.]*. This presumption applies with special force in the field of international commerce as it is presumed that rational business people would prefer a single, centralized mechanism for resolving their disputes when they enter into an International Arbitration Agreement *[Penzoil Exploration]*. Since the same presumption applies in the current case, the tribunal should interpret Clause 65 in such a manner so as to give itself expansive jurisdiction. This implies that even if it finds that the negotiation and consultation was required, this should not be held to deny itself jurisdiction.

B. Denying jurisdiction will lead to an anomalous situation

If the tribunal finds that the pre-arbitral procedures were a condition precedent, and declares that it does not have jurisdiction, this would lead to anomalous situation.

Under S.20 of the HK Arbitration Ordinance (modeled upon Art.8 UNCITRAL), a court would have jurisdiction over a matter subject to arbitration, if the arbitration clause is inoperative. In the present case, if the pre-arbitral procedures are held to bar the jurisdiction of the tribunal, that would mean they are inoperative. This would permit litigation in the interim period *[Kemiron]*.

However, this would go against the parties' intention to have a single unified dispute resolution mechanism, and would increase the complexity, cost and delay in the proceedings. Therefore, the tribunal should not hold that it does not have jurisdiction, even if it finds that negotiation was mandatory.

C. Arguendo, the appropriate remedy is not dismissal of arbitral proceedings

The obligation to negotiate and consult was a substantive obligation, but does not prevent procedural commencement of arbitration *[Zurich 1999]*. Further, a party should not be allowed to prolong the resolution of the dispute by insisting on adherence to procedural formalities *[ICC Case No. 8445]*. In the present case, there have already been attempts to renegotiate the agreement, but to no avail *[para 15, App to arbitrate]*. Any possibility of a compromise seems remote, considering that both the parties have maintained their positions and the exchanges have become 'increasingly acrimonious'*[ICC Case No. 8445]*.

Therefore, the tribunal should not dismiss the arbitral proceedings, but instead continue the arbitration for an *effective and speedy* resolution of the dispute, as was the intention of the parties.

2. TRIBUNAL SHOULD NOT ADMIT THE AMICUS CURIAE BRIEF

Claimant asserts that the amicus curiae brief should not be admitted by the tribunal as this would be against the intention of the parties (A.) and would compromise the

confidentiality and equality of the proceedings (B.) Further, it would also cause unnecessary delay and increase the cost of the proceedings. (C.)

A. The tribunal must act as per the parties' intention

The parties in arbitration have extensive freedom to agree on any procedure to be followed by the tribunal. *[HKAO 47; Born , p. 1749]*. Further, an arbitral award can even be set aside if it is not in conformity with the parties' agreement *[HKAO 81(1)(2)(a)(iv)]*. In the present case, the parties agreed that the arbitration would be conducted in accordance with the CIETAC rules. *[Cl. Ex. 1, Cl.65]*. The CIETAC rules do not permit the inclusion of any amicus curiae brief. Therefore, the choice of such rules by the parties makes clear their intention to prevent admitting any such brief. If the parties wanted to allow amicus curiae briefs, they would have chosen the rules of such an institution which allows for the inclusion of amicus curiae briefs by the tribunal, such as the LCIA *[Art.41, LCIA]*.

Further, even if the arbitral tribunal deems that it has discretion to determine the procedure under HKAO 47, the procedure it selects cannot favor one party over another *[HKAO 47(2); Binder, p. 258; Born, p. 758]*.

B. The brief would compromise confidentiality and equality of parties

The most basic requirement of any arbitration is to ensure equal treatment of parties *[HKAO 18; CIETAC 33; Born 1750]*. If the tribunal allows the state's amicus curiae brief, there is no doubt that the state shall oppose an award in favour of the claimant *[Letter of State, Para6]*. This shall not only compromise equal treatment of parties, but may also create a bias or influence in the mind of the arbitrators, which may leave the award liable to be set aside *[HKAO 81(1)(2)(a)(iv)/ (2)(b)ii)]*.

Further, inclusion of the state may breach the confidential nature of the proceedings, which is an essential of arbitration. *[CIETAC 36; Born, p. 2250]*. The CIETAC rules which govern this arbitration allow proceedings to be held in the open only if both parties agree, which has not happened currently. Further, they mandate that no person shall disclose to any outsider any matter relating to the case *[CIETAC 36(2)]*. If the government's brief is accepted, it shall gain knowledge of the proceedings, yet there is no way that the tribunal can ensure non-disclose by the government.

C. The brief would cause unnecessary cost and delay

It is the duty of the tribunal to ensure fair and speedy resolution of the dispute, without *unnecessary* expense *[HKAO 3(1/ 46(3)(c); Born 1743]*. Currently, neither party has brought up the matter of public policy in its submissions.*[App for Arb.; St. of Def]* It would be appropriate to leave the examination of this issue to the courts at a later stage, *if* either party feels the need to make an application for setting aside the award. Before such an application, considering the issue by the tribunal would be premature, beyond the scope of the submissions of the parties and would create unnecessary expense and delay.

3. CLAIMANT IS ENTITLED TO A SUM OF USD $75,000,000 AS A CONSEQUENCE OF RESPONDENT TERMINATING THE CONTRACT

RESPONDENT is obligated to pay USD $75,000,000, irrespective of any claims of exemptions from paying damages under Article 79 of the CISG, since Clause 60 of the Agreement is a penalty clause and *not* a damages clause **(A.)**. Even if the Tribunal holds Clause 60 of the Agreement to be a damages clause, RESPONDENT is not exempted from paying said damages as it could have foreseen the passage of further restrictive measures at the time of conclusion of the Agreement **(B.)**. In any

case, RESPONDENT has failed to show a causal link between the impediment and his non-performance **(C.)**.

A. Clause 60 of the Distribution Agreement is a Penalty Clause and NOT a Damages Clause

Where parties provide for an "agreed sum" to be paid in cases of breach or termination, they derogate from provisions of Articles 74-79 of the CISG, through Article 6 *[CISG AC Op. 10, r. 2]*. Despite nomenclature, if the intention underlying the clause is to impose penalties, then an exemption under Article 79 is not applicable *[Kroll/Mistellis/Viscasillas, p. 1060]*.

Clause 60 shows that the sum of money to be claimed decreases with the number of years the business relationship lasts. There is no formula adopted which would take into account factors like costs incurred, profits lost etc. Moreover, the range of price spent by RESPONDENT per year would be anywhere between USD $45,000,000 to USD $200,000,000 *[Cl. Ex. 1, where cheapest brand is worth $4.50, and costliest is worth $20.00]*. Under Art. 8(2) of the CISG, any person under RESPONDENT'S circumstances would interpret this to be a provision encouraging the buyer not to terminate the agreement, and to continue performing it for as long as possible. Hence, this is a penalty clause, a right independent of claim for damages, therefore not covered under Art. 79 *[Art. 79(5) CISG]*.

B. Respondent could have foreseen passage of further restrictive measures at the time of conclusion of Distribution Agreement

Foreseeability is a part of risk allocation in the contract *[Kroll/Mistelis/Viscasillas, p. 1075]*. When the contingency is sufficiently foreshadowed at the time of contracting, it is assumed to be factored into the business risks associated with the transaction

[Construction Material Case]. As such, if there are rules in force, or there is a reasonable likelihood that certain rules may be enforced, one may conclude that any upcoming rule impeding performance is foreseeable *[Coal Case; Cotton Case,]*.

At the time of conclusion of contract on 14th December 2010, RESPONDENT being an entity involved in tobacco sales in Gondwana for over a decade *[App. For Arb., ¶3]*, could have reasonably foreseen further restrictive measures being initiated by the Government.

Firstly, a series of restrictive measures was implemented during the course of CLAIMANT and RESPONDENT'S previous Agreement, where tobacco sale was restricted as many as 4 times: in 2002, 2004, 2005 and 2009 *[App. For Arb., ¶9]*. Even so, anti-tobacco analysts viewed these regulations as "not enough" to dissuade smoking from minors *[Re. Ex. 1]*.

Secondly, with Gondwana, being Signatory to the FCTC *[Proc. Ord. 2, ¶16]*, a reasonable commercial entity would factor that Gondwana may enact further laws in pursuance of its international obligations under Article 7 of the treaty, to reduce demand for Tobacco.

Thirdly, RESPONDENT ought to have negotiated for a clause which took into account passage of such legislative measures, as is common practice by many companies *[ICC Case 3099/1979; ICC Case 3100/1979; ICC Case 2216/1974]*. The lack of such clause only indicates that RESPONDENT took upon itself the risk in the situation when such a legislation was enforced *[Kroll/Mistellis/Viscasillas, p. 1085; CIETAC Award 7 August 1993]*.

C. Respondent has failed to show a causal link between the impediment and Non-Performance

CLAIMANT notes that out of the several obligations RESPONDENT has in the Distribution Agreement, few are indeed impossible to perform. To that extent CLAIMANT does not expect RESPONDENT to sell Branded Merchandise *[Cl. Ex. 7]*. However, RESPONDENT may not use this as an excuse to terminate the entire agreement. Bill 275 does not vitiate RESPONDENT's obligations to sell the Tobacco Products.

There must be a causal link between the impediment and RESPONDENT's non-performance, which is lacking in the present case *[Kroll/Mistelis/Viscasillas, p.1078]*. Aside from packaging requirements, Bill 275 does not place restrictions on the sale of such products *[Cl. Ex. 2]*. In fact, it is CLAIMANT who has suffered from manufacturing costs of new packaging requirements *[App. For Arb., ¶14]*. RESPONDENT is not prohibited from using common advertising practices like billboards, hoardings, posters etc., but merely the *sale* of *merchandise* displaying logos or trademarks.

Further, the CLAIMANT company name can still be displayed in all its uniqueness on the Tobacco Product, since the relevant provision allows for display of brand, business or company name, and any variant name *[Cl. Ex. 2, p. 14]*. The name in itself is an identifying mark of CLAIMANT's business.

Despite decline in sales, there is no evidence to show that CLAIMANT's market share has changed *[Cl. Ex. 7]*. On the contrary, where the average decline in sales of the entire tobacco industry is 30%, CLAIMANT in particular suffered only a 25% decline *[App. for Arb., ¶13]*. This shows that CLAIMANT's brand strength is intact.

In any case, if RESPONDENT believes promotion of tobacco products to be significant to the agreement, it still cannot claim exemption under Art. 79 of the CISG as it could have overcome the consequences by alternative means *[Brunner, p.321]*. The extent to which a party must go for finding alternatives, is quite high. Scholarly opinion has in fact not even ruled out the applicability of 'absolute limit of sacrifice' *[Iron-Molybdenum Case]*. CISG corresponds to such a standard *[Kroll/Mistelis/Viscasillas, p. 1077; Secretariat Commentary, Art. 65, ¶7-8]*. In the present case, even by a far lesser standard, RESPONDENT is not exempt from paying damages. RESPONDENT is not prohibited from using common advertising practices like billboards, hoardings, posters etc., but merely the *sale* of *merchandise* displaying logos or trademarks.

4. THE AWARD RENDERED BY TRIBUNAL HAS NO RISK OF NON-ENFORCEMENT

The goal of the New York Convention was to provide uniform procedures for enforcing foreign arbitral awards, while minimising the effect of discrepancies between the laws of different countries. *[Gaja, p. 143]* and the principal purpose underlying it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts *[Scherk v Alberto-Culver Co.]*. In accordance with these principles, CLAIMANT will show that the grounds for refusal under NY Convention are too narrow to affect this case **(A.)**. Also, the award if rendered in favour of CLAIMANT would be all the more in line with Gondwana's public policy **(B.)**.

A. Grounds for refusal under NY Convention are too narrow to affect this case

It is widely accepted that the exception to enforcement of arbitral awards on the grounds of public policy must be assumed with caution *[Dell Computer v. Union des*

consommateurs; Soleimany v. Soleimany]. Public policy can be defined as a country's basic perception of morality and justice [*Parsons & Whittemore v. Papier and Bank of America; Fotochrome v. Copal Company*]. Furthermore, in addition to being construed narrowly *[PakUto Investment Ltd. v. Klockner East Asia Ltd.; Eco Swiss China Time Ltd v Benetton International NV]* a public policy offense must contain some element of illegality which is clearly injurious to the public good or, wholly offensive to the ordinary reasonable man *[DST v. Rakoil]*.

The scope of public policy should be restricted further in the international sphere than in

domestic policy *[Honotiau, p. 730]*. The laws of a country serve as an indicator for public policy. However, it is not necessary that a country's international public policy has to be the same as its domestic public policy *[May Ln, p. 747]*. The court shall balance the interests of its own domestic public policy with the needs of international commerce *[Curtin, p. 281]*.

B. Enforcement of the award itself is in line with the Public Policy of Gondwana

Pro-enforcement is itself a public policy. The general pro-enforcement bias requires a narrow interpretation of the public policy under Art.V(2)(b) New York Convention *[Parsons & Whittemore Overseas Inc. v. RAKTA;; Hebei v. Polytek]*. Accordingly, the public policy of enforcement state should be confined to the state's most basic notions of morality and justice *[ILA Final Report, ¶25; Kronke et al., p.365; Smart v. Domotique; Soleimany v. Soleimany]*.

The rationale for pro-enforcement is to create respect for the finality of an award and also to encourage enforceability of an award among state parties to the NYC *[van*

den Berg (1981), p.268]. It is established that Article V (2)(b) of the Convention should be construed narrowly *[Gao Haiyan v Keeneye Holdings Ltd]* and due consideration should be given to the stability of international trade. The contravention of mandatory domestic law provisions with the award does not automatically constitute a ground for refusing enforcement *[Adviso N.V v Korea Overseas Construction]* and thus the contravention of a prospective arbitral award with Bill 275 shall not be grounds enough for non-enforcement.

Lastly, the right to a commercial reservation under the New York Convention gives right to the signatory state to declare that the Convention will apply only to issues considered as commercial under the national law of the state making such a declaration. *[New York Convention, art I (3)]*. This reservation allows a signatory state to limit its obligations to differences arising out of legal relationships that are considered as commercial *[Pryles, p. 245]*. The fact that Gondwana made the Commercial Reservation shows that it is all the more willing to give special recognition and enforcement to such relationships *[Proc. Ord. 2, ¶29]*.

REQUEST FOR RELIEF

For the reasons stated in this Memorandum, Counsel respectfully requests the honorable Tribunal to declare that:

1) The Tribunal has jurisdiction to decide upon the disputes of under this arbitration.

2) The Amicus Curiae Brief of the Govt. of Gondwana may not be admitted.

3) The Claimant is entitled to a sum of USD $75,000,000

4) The award if rendered in favour of Claimant will not suffer from risk of non enforcement.