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 662R

Memorandum for RESPONDENT

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

TEAM 662R

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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

TABLE OF AUTHORITIES

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CIETAC Award 7 August 1993	*CIETAC Award 7 August 1993*
Bulagrian Chamber of Commerce and Industry 24 September 1996	*Coal Case*
Oberster gerichtshof ***Austria*** *15 December 1998*	*Construction Material*

	case
CIETAC Arbitral Award 17 September 2003	*Cotton Case*
Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil). 2 Lloyd's Rep. 257 (K.B.)(1987)	*D.s. T. v. Ras Al Khaimah Nat 'I Oil Co.*
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HIM Portland, LLC v DeVito Builders Inc., 317 F.3d 41	*Portland*
Renusagar Power v. General Electric, Supreme Court of India, 7 Oct 1993	*Renusagar Power v. General Electric*
***U.S**. [Federal] District Court, Northern District of Illinois, Raw Materials Inc. v. Manfred Forberich GmbH & Co., 7 July 2004*	*Used Railroad case*

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. TRIBUNAL LACKS JURISDICTION AS CLAIMANT FAILED TO FULFIL THE PRECONDITIONS TO ARBITRATION

Respondent asserts that the tribunal does not have jurisdiction in the present case as Clause 65 of the agreement lays down mandatory and enforceable pre-conditions to arbitration (A.) which have not been fulfilled by the Claimant in good faith (B.). Further, these conditions are jurisdictional pre-requisites (C.) and their non-fulfillment results in lack of jurisdiction.

A. Clause 65 lays down mandatory and enforceable pre-conditions to arbitration

Clause 65 of the agreement provides for a *mandatory* precondition to arbitration. It is not a vague "agreement to agree" *[Born, p.847; Candid Case]*. This is evidenced by three indicia;

The use of the word "shall" in Clause 65 instead of "may"; "the parties *shall* initially seek a resolution through consultation and negotiation." *[Cl 65, Cl. Ex. 1, ICC Case No. 10256]*

Secondly, clause 65 states that *if* the parties have not been able to resolve the dispute for a period of 12 months, they may apply for arbitration. *[Cl 65, Cl. Ex. 1]*. Where the provision is drafted in mandatory fashion and the right to arbitrate is conditioned on compliance with these requirements, non compliance constitutes a jurisdictional defect. *[Born, p.842; ICC Case No. 12379]*.

Thirdly, the framework for pursuing negotiation and consultation was sufficiently clear. A period of 12 months from the date of the dispute arising was provided for resolving the dispute through pre-arbitration procedure, the failure of which would lead to arbitration. The time limits provided in the agreement are not vague or uncertain, and provide a clear set of guidelines against which a party's best efforts can be measured, hence enforceable. *[Born, p.848; Mocca Lounge]*

B. Claimant has not pursued pre-conditions to arbitration in good faith

The most fundamental effect of an international arbitration agreement is to create a positive obligation on the parties to resolve their disputes in good faith *[Born, 1004, UNIDROIT Art 1.7, CIETAC Rules Art. 9]*. The UNIDROIT principles also impose a similar good faith obligation, which apply to the interpretation of the contract, may also be used for interpreting the arbitration agreement. *[Born, p. 1086; Judgement of 17 November 1995]*.

The Claimant in the present case did not attempt to have negotiations and consultations *in good faith*. As a result, no compromise that could be reached in the 11 April meeting called by the respondent. *[App. For Arb., ¶15]* Further, the 12 month period as mandated by the agreement has also not elapsed, as has been conceded by the claimant. *[App. for Arb., ¶ 22]*

C. The non-fulfillment results in lack of jurisdiction

There is a body of authority that states that when arbitral pre-conditions are couched in mandatory terms and are sufficiently clear, they act as jurisdictional prerequisites. Therefore, non fulfillment result in lack of jurisdiction for the tribunal.*[Portland, Kampner]*. The appropriate remedy is to dismiss the proceedings and render the claim

inadmissible pending completion of the pre-arbitral procedures.*[Judgement of 6 July 2000]*

2. TRIBUNAL SHOULD ADMIT THE AMICUS CURIAE BRIEF

Respondent asserts that the amicus curiae brief should be admitted because it would lead to the passing of an enforceable award (A.) and is not against the equal treatment of parties (B.) Further, the tribunal has the power to admit such a brief (C.)

A. Admitting the brief would lead to the passing of an enforceable award

The Amicus brief would present the correct position of law in front of the tribunal. The basis of the dispute is the passing of a *new* law, Bill 275; hence the government would be in the best position to help the tribunal reach an informed decision, considering the lack of judicial precedent or other authority *[Letter of State]*.

If the tribunal decides on incomplete/incorrect legal position, the award would be liable to be set aside under public policy *[HKAO 81(1)(2)(b)(2)]*. A prudent arbitrator will always keep an eye on the ground given in S.34 of the model law, to ensure that a valid and enforceable award if finally passed *[Binder, p. 404]*.

B. Admitting the brief is not against the equality of parties

The parties must always have an *equal* right and *reasonable* opportunity to present their case *[HKAO 46/ 81(1)(2)(a)(ii); CIETAC 33]*. Admitting the brief of the state will in no way infringe the right of any party to present their case, they shall both be given equal time and means for their submissions. The procedure followed shall still be neutral and impartial. Further, admitting the brief will indeed help the respondent reasonably present its case. Equality shall only be compromised if the

tribunal sets arbitrary limits to the number of amicus briefs (for instance allowing only one brief per case) or limits them on unequal criteria *[Strong, p. 927]*. This has not been done in the present case, and any amicus brief can be considered by the tribunal if it helps decision making.

Therefore, admitting the brief shall not be violative of equal treatment, but can be seen as a mode of enquiry or evidence collection by the tribunal to gain all the information for a valid award.

C. The tribunal has the power to admit the brief

The parties have agreed that the proceedings be governed by the CIETAC rules; however, these are silent on the matter of amicus briefs *[Cl. Ex. 1, Cl. 65]*. Therefore, the tribunal has the power to conduct the arbitration in any manner it considers appropriate *[HKAO 47(2, CIETAC 33)]*. An agreement that is silent (on amicus briefs) cannot be construed as an agreement to the contrary (so as to exclude them). The scheme of the ordinance is such that when the parties 'fail to indicate' *[HKAO 81(1)(2)(a)(i)]* or fail to agree *[HKAO (1)(2)(a)(iv)]*, it is considered that they have not agreed and their agreement is silent, not to the contrary.

Further, the tribunal also has to power to collect any evidence it considers necessary *[HKAO 47(3)]*, and may decide on the manner in which it shall itself ascertain facts *[HKAO 56(7)]*. The amicus curiae brief can clearly fall within these powers of evidence collection.

3. RESPONDENT IS NOT LIABLE TO PAY ANY DAMAGES TO CLAIMANT

RESPONDENT terminated the agreement as it could no longer fulfil its obligations under the contract. This failure to perform however, was due to impediments beyond RESPONDENT's control. As such, under Art. 79 of the CISG, it shall be not liable for

such failures. All the elements required for applicability of Art. 79 are fulfilled in this case. RESPONDENT's failure to perform its obligations was due to the passage of Bill 275 **(A.)**. Also, RESPONDENT cannot reasonably be expected to have taken the passage of Bill 275 into account at the time of conclusion of the contract **(B.)**. Lastly, RESPONDENT cannot reasonably be expected to avoid or overcome Bill 275's consequences **(C.)**.

A. Respondent's failure to perform the contract was due to passage of Bill 275

To qualify for exemption under Art. 79 of the CISG, RESPONDENT will first show two things: that the impediment was beyond the control of RESPONDENT, and that the failure was a result of the impediment.

Firstly, any act of authority is widely recognized as an impediment beyond the control of commercial parties *[Magnus in Staudinger, Art. 79, ¶28; Coal case]*. There is no evidence of any kind of relationship between the Government of Gondwana and RESPONDENT. The passage of Bill 275 was therefore beyond RESPONDENT's control.

Secondly, there is a causal link between the impediment and non-performance *[Kroll/Mistellis/Viscasillas, p. 1079]*. Bill 275, or the 'Clean Air' Act, was sought to be introduced to reduce tobacco demand *[App. For Arb., ¶10]*. In fact, certain provisions of the Bill make one aspect of the Agreement completely *impossible* to perform, i.e. Sale of Branded Merchandise *[Cl. Ex. 2]*. CLAIMANT itself acknowledges this fact *[Cl. Ex. 7]*. By removing all trademarks, logos and other identifying material from tobacco packaging, the regulation has removed all uniqueness from CLAIMANT's products. This differentiation is important, since CLAIMANT's trademark is what would distinguish it from other lesser known brands *[St. of Def., ¶13]*. As such, the 20% price premium imposed by CLAIMANT is not justified. Moreover, with RESPONDENT

not being able to sufficiently promote CLAIMANT's brand, the case would elevated from that of financial hardship, to commercial impracticability, both of which are in fact recognized as an impediment under CISG *[CISG AC Op. 7, r. 3.1]*.

CISG has sought to reconcile doctrines of *frustration, imprevision, impracticability, Wegfall der Geschäftsgrundlage, eccesiva onerosita sopravvenuta*, by using the neutral term "impediment" *[CISG AC Op. 7, ¶26]*. The parties have agreed to supplement CISG with the UNIDROIT principles *[Cl. Ex. 1, Clause 66]*. The Commentary to the UNIDROIT PICC, Art. 7.1.7, defining force majeure, requires it to be read with Art. 6.2.3, defining hardship and its effects *[UNIDROIT Official Commentary]*. 'Hardship' is defined as an occurrence of events that "*fundamentally alters the equilibrium of the contract" [UNIDROIT PICC, Art. 6.2.2]*. The rules allow for the disadvantaged party to request renegotiation. In fact, courts may even terminate the contract, or parties may adopt it with a view to restore the equilibrium.

B. Respondent cannot reasonably be expected to have foreseen the passage of Bill 275 at the time of conclusion of contract

Foreseeability has to be evaluated from the standard of a reasonable person *[Construction Material case]*. However, this standard must take into account if, according to the 'commercial circumstances' prevalent at the time of conclusion of contract, there was a 'real risk' of the occurrence of the said impediment *[Brunner, p. 158; Used Railroad case]*.

CLAIMANT itself notes that regulatory measures were periodically passed in Gondwana, in 2002, 2004, 2005 and 2009, during the previous Distribution Agreement with RESPONDENT *[App. For Arb., ¶9]*. These regulations had already covered the fundamental requirements that FCTC signatory countries need to fulfil *[Arts. 7-13,*

FCTC]. In fact, the latest regulation expanded the packaging restrictions of Tobacco Products requiring graphic images and a prescribed space to display warning labels *[App. For Arb., ¶9d.]*. RESPONDENT was in no position to foresee a passage of such a bill.

In fact, according to analysts reported by the Gondwana Herald, Gondwana's leading daily *[Proc. Ord. 2, ¶22]*, it was "*highly unlikely that the Gondwana government will continue to implement stricter regulations*". It also noted that the current regulations as of 22 June 2009, a year before the latest Distribution Agreement was signed, "*bring[s] Gondwana in line with most major countries*" *[Re. Ex. 1]*. RESPONDENT, or any other person under the same circumstances would have undoubtedly *not* foreseen passage of such a legislation.

This is bolstered by the fact that even when the bill was first introduced in Gondwana, CLAIMANT itself did not even think it would pass successfully. In its letter on 5 April 2011, CLAIMANT with regard to Bill 275 stated that "*similar legislations in other regions have failed to pass"* and that "*there [was] no real risk that the legislation in Gondwana would change*". As such, CLAIMANT itself couldn't have foreseen passage of such legislation. On the contrary, it ended up assuring RESPONDENT not to worry about passage of such legislations *[Cl. Ex. 4]*.

C. Respondent cannot reasonably be expected to avoid or overcome Bill 275's consequences

CLAIMANT may note that in case RESPONDENT is able to fulfil its obligations through alternative means, it may not claim exemption under Art. 79. However, in the present case, RESPONDENT has no possible alternative means to fulfil its obligations.

RESPONDENT is plainly barred from selling Branded Merchandise under the Agreement *[Cl. Ex. 2]*. Unlike in ordinary cases under Art. 79, the obligation here is not to procure goods or pay price, but to make minimum purchase orders *[Cl. Ex. 1]*. Bill 275 prevents would prevent a reasonable business person from making profits to a gross extent that it cannot even cover costs. Add to that the fact that RESPONDENT can now in no way promote the products.

Moreover, RESPONDENT did try to find alternative means to make the business relation last by attempting to renegotiate even before the passage of the Bill *[Cl. Ex. 3]*. RESPONDENT tried again after the Bill was passed *[Cl. Ex.6]*, however, CLAIMANT has absolutely refused to budge from its ironclad position *[St. of Def., ¶18]*. Any means that RESPONDENT tried to adopt to save the Agreement, were quashed by CLAIMANTS repeated refusals to renegotiate.

4. AWARD PASSED IN FAVOUR OF CLAIMANT WILL BE NON ENFORCEABLE

It is an accepted norm that a State has the ultimate right to refuse to enforce an arbitral award

within its jurisdiction on grounds of public policy. *[New York Convention (Article V.2(b); Model Law (Article 36(1)(b)(ii)]*. Further, the state courts determine what constitutes public policy in their respective jurisdictions and whether an arbitral award should be enforced or not. However, it is the duty of this Tribunal to render an enforceable award.

RESPONDENT will show that the award may be rendered unenforceable on the grounds of Article V(1)(c) of the NY Convention **(A.)**, or on the basis of Art. V(2)(b) **(B.)**.

A. The award may be refused to be enforced under Art. V(1)(c) of the NY Convention

Art. V(1)(c) describes situations where the dispute submitted to arbitration is "*beyond their scope*", or in other words is inarbitrable. In the present case, while coming to the determination of rights and liabilities of the parties, the Tribunal has to necessarily go into the question of whether Bill 275 indeed posed an impediment to the performance of RESPONDENT's obligations under the dispute. This would require the Tribunal to go into the provisions of the Bill and interpret them, a task that is reserved solely with the courts of Gondwana. The point is not that the tribunal may make a faulty interpretation of such law, but in fact that the Tribunal has no power to interpret the statue of Gondwana. Disputes involving issues relating to fundamental policy (procedural or substantive) are not arbitrable *[Blackaby et al, ¶2.133; Tweeddale/Tweeddale, ¶4.31]*. In such cases, courts are deemed to have exclusive jurisdiction *[Rogers, p. 18]*. Additionally, anybody apart from the judges (including arbitrators) is generally unfamiliar with such complex laws and could apply them wrongly *[Guzman, p. 1291]*.

B. The award may be refused to be enforced on the grounds of Public Policy as per Article V (2)(b)

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; Seven Seas Shipping v. Tondo]*. The laws of a country serve as an indicator for public policy. Public policy, used to describe the imperative or mandatory rules that parties cannot exploit, *[Lalive, p. 261]* is outside and beyond the

scope of arbitration and stays within exclusive judicial jurisdiction of the State where enforcement of an award is sought *[Mistelis, p. 19]*.

In the context of international arbitration, public policy is normally considered from the basis of the New York Convention, where it constitutes an acknowledgement of the ultimate right of state courts to determine what constitutes public policy within their jurisdictions *[Mayer, p. 255]*.

Enforcement of foreign arbitral awards may be denied on this basis only when enforcement would violate the forum state's most basic notions of morality and justice and that enforcement of the same would be clearly injurious to the public good *[DST v. Rakoil; Shore, p. 255]*.The Tribunal while deciding this issue, will be interpreting the Clean Air Act, part of the public policy of Gondwana. The issue may not only be inarbitrable, but also be contrary to the fundamental norms of clean air and anti-smoking prevalent in Gondwana.

REQUEST FOR RELIEF

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

1) The Tribunal does not have jurisdiction to decide upon the disputes of under this arbitration.

2) The Amicus Curiae Brief of the Govt. of Gondwana may be admitted.

3) The Claimant is not entitled to a sum of USD $75,000,000

4) The award if rendered in favour of Claimant will suffer from risk of non enforcement.