FIFTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION 2014

27 JULY 2014 – 02 AUGUST 2014

CITY UNIVERSITY OF HONG KONG

MEMORANDUM FOR THE RESPONDENT

TEAM CODE: 693R

In the arbitration between

Conglomerated Nanyu Tobacco Ltd.	**AND**	Real Quik Convenience Stores Ltd.
142 Longjiang Drive,		42 Abrams Drive,
Nanyu City,		Solanga,
Nanyu		Gondwana
CLAIMANT		**RESPONDENT**

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LIST OF ABBREVIATIONS

Agreement	The Distribution Agreement, signed 14 December 2010
Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Convention on Contracts for the International Sale of Goods of 1980
CLAIMANT	Conglomerated Nanyu Tobacco Ltd.
ECJ	European Court of Justice
IBA	International Bar Association
p./pp.	page/pages
para	paragraph
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)
RESPONDENT	Real Quick Convenience Stores Ltd.

UNCITRAL	United Nations Commission on International Trade Law

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Bill 275	Gondwandan Senate Bill 275/2011
CISG	United Nations Convention on Contracts for the International Sale of Goods of 1980
CIETAC Arbitration Rules	CIETAC Arbitration Rules 2012
CPL of China	Civil Procedure Law of the People's Republic of China
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
Framework Convention on Tobacco Control (FCTC)	World Health Organisation Framework Convention on Tobacco Control
New York Convention (NYC)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
UNCITRAL Arbitration Rules 2010	UNCITRAL Arbitration Rules (as revised in 2010)

UNCITRAL Arbitration Rules 1976	UNCITRAL Arbitration Rules (1976)
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2010

A. The Arbitral Tribunal has no jurisdiction to deal with the dispute

1) The Agreement between the parties clearly states 12-months negotiation period, which has not elapsed

1. The arbitral tribunal has no jurisdiction to deal with the dispute, because the 12-month negotiation period has not elapsed since the date the dispute arose. The dispute arose on 1 May 2013 (Claimant's Exhibit No.8), the CLAIMANT had to conduct negotiations in good faith. Arbitration claim could only be brought on 1 May 2014.
2. Under the NYC Art II, the dispute between the parties needs to be "in respect of a defined legal relationship, whether contractual or not". Clause 65 of the Agreement between the Parties clearly defines 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 CIETAC..". Since the CLAIMANT brought the claim to arbitration before the 12-month negotiation period has elapsed, the Arbitral Tribunal has no jurisdiction to deal with the dispute and it has to decide so (Art 6, part 1 CIETAC states that CIETAC or the arbitral tribunal may determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case). (IBA Arbitration Guide, China, pp.5-6)

2) Absence of attempt to negotiate

3. It is not uncommon to see arbitration clauses that require some sort of attempt at negotiation or amicable settlement before arbitration proceedings can be commenced. The Arbitration Law does not specifically provide for the consequences if one party fails to comply with the negotiation procedure

before commencing arbitration proceedings. However, Art V(1)(d) NYC states that enforcement of the award may be refused if arbitration procedure was not in accordance with the agreement between parties. In the Pepsi arbitration case, the Chengdu Intermediate People's Court refused to recognise and enforce an international arbitration award based on the failure to comply with pre-arbitral consultation requirements (*Pepsi Co case*) (Arbflash, 2013).

3) The multi-tied dispute resolution clause is binding

4. In order to be sure whether multi-tied dispute resolution clause is binding it is important to:

   (i) Check the position under the governing law of the contract and in the particular jurisdiction where the dispute is to be resolved – different jurisdictions take different approaches to enforceability. The governing law of the contract is - CISG, the dispute is to be resolved in Hong Kong and is governed by CIETAC rules. CISG does not provide for consequences in one of the parties fail to comply with pre-arbitral proceeding. CIETAC has started to apply a strict approach in enforcing pre-arbitration negotiation requirements. Upon submission of the application to commence arbitration, CIETAC will now generally ask the CLAIMANT to provide evidence showing that the parties have attempted to settle the dispute by way of negotiation for the requisite time period. Failing that, CIETAC will ask the CLAIMANT to at least provide a declaration stating that it has attempted to settle the dispute by negotiation with the RESPONDENT. Failure to produce evidence or a suitable declaration could lead to CIETAC declaring that it lacks

jurisdiction to conduct the arbitration. Indeed, RESPONDENTS are increasingly challenging CIETAC's jurisdiction solely on the grounds that the negotiation period had not been observed (IBA Arbitration Guide, China, pp.5-6). The CLAIMANT has no evidence to support his claim. There was no attempt to settle the dispute by negotiation from the date the dispute arose. When parties agree on a binding multi-tier dispute resolution mechanism, they expect that a tribunal seized with the matter at a premature stage would decline to review the case prior to the initial steps having been complied with by the parties (Jolles, p.335).

(ii) Ensure that the clause has clear and mandatory language ("must" as opposed to "may"). The underlying clause is drafted in a mandatory fashion "the parties *shall* initially seek a resolution through consultation and negotiation". (Born, 2009, p.842)

(iii) Specify a clear time-frame within which the proceedings steps have to be taken. There is a clear time frame in the arbitration clause, which specifies that the dispute may be submitted to CIETAC for arbitration [only] if, after a period of 12 months, the parties have been unable to come to an agreement in regards to the dispute. The statement in Clause 65 of the Agreement is not vague or ambiguous.

(iv) Where the process is not to be binding, clearly state that it is not to be binding and that the parties are able to commence litigation or arbitration at any time. The underlying contract does not clearly state and does not state at all that negotiation is not binding and that arbitration can be commenced at any time. Quite the contrary, it is

clear that the pre-arbitral procedure is binding on the Parties. The authority or the competence of the arbitral tribunal comes from the agreement of the parties; indeed there is no other source it can come (Redfern and Hunter, p.341). Even when the multi-tiered clause seems unclear, English Courts still tend to think that parties mutually intended to include it into the contract, subsequently the parties wanted it to be binding (see *Cable & Wireless v IBM*). The advantage of such clauses is that they require the parties fully to explore the possibility of amicable settlement prior to the launch of often lengthy, expensive, and disruptive arbitral proceedings. (Redfern and Hunter, 2009 p.115).

4) Asian approach to "friendly negotiations

5. In *International Research v Lufthansa,* the High Court held that the multi-tiered dispute resolution clause was enforceable and the Tribunal would not have jurisdiction to resolve the dispute if the pre-arbitral procedures had not been complied with. *International Research* cited the recent Singapore Court of Appeal decision of *HSBC (Singapore) v Toshin Development*. In that case, the Court of Appeal held that contractual provisions, which require contracting parties to negotiate in good faith, were enforceable. The Court of Appeal cited with approval an excerpt from an article "Rethinking the Role of Law and Contracts in East-West Commercial Relationships": From a traditional Asian perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding

rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies. The Court of Appeal further commented that: “We think that the “friendly negotiations” clauses are consistent with our cultural value of promoting consensus whenever possible”.

B. The Gondwandan government’s amicus curiae brief should be admitted for consideration during this commercial arbitration.

6. Third parties, or non-disputing parties, can participate in arbitration as ‘amicus curiae’, which can be roughly translated as ‘friend of the court’. Amicus curiae can participate in a number of ways, including attending hearings, reading documentation relating to the arbitration and submitting their own written submissions/evidence (sometimes called an amicus curiae brief). Amicus curiae participation is ordinarily justified on the basis that the amicus curiae is in a position to provide the arbitral tribunal with its expertise or special perspective in relation to the dispute (Levine; Greenberg, Kee and Weearmantry, p.518).
7. It is submitted that the Gondwandan government’s amicus curiae brief should be admitted for consideration during the present arbitration, as the parties have implicitly agreed to this through their choice of arbitral procedural rules. This is as, firstly, several general provisions within the agreed procedural rules, the IBA and CIETAC Rules, could be interpreted as permitting amicus

curiae briefs. Secondly, even if the tribunal decides that in fact the IBA and CIETAC Rules are silent on the issue of amicus curiae briefs, Art 1(5) of the IBA Rules provides the tribunal with a discretion to admit evidence, including written submissions from amicus curiae, if it is appropriate to do so. It is submitted that it would be appropriate in this case as: it would protect public welfare and interests; the Gondwandan government is particularly affected by the arbitration; it would improve the transparency and accountability of the arbitration system as well as the quality of the eventual arbitral award; and it would support rather than undermine the fundamental arbitral principle of party autonomy and consent.

1) Implicit agreement of the parties

8. In the absence of express agreement, an arbitral tribunal would still have the jurisdiction to admit amicus curiae briefs where the parties have implicitly agreed to the admission of amicus curiae briefs in arbitration proceedings. This would be the case where the parties agree on the procedural rules which should govern the arbitration, and these rules regulate amicus curiae briefs (Redfern and Hunter, para.2.52).
9. As the parties in the present case have not expressly agreed on the admission of amicus curiae briefs in arbitral proceedings, it is necessary to consider whether the agreed procedural rules (the CIETAC Rules and the IBA Rules) address this issue.
10. As is the case for most institutional rules, there are no explicit, specific provisions in either the CIETAC Rules or the IBA Rules which specifically

address the admission of amicus curiae briefs in arbitration proceedings (Redfern and Hunter, pp. 105-106; Born, 2014, p. 892).

11. However, it is submitted that it is possible to interpret more general provisions contained within these Rules as permitting amicus curiae briefs. For instance, Art 15(1) of the UNCITRAL Arbitration Rules 1976 (which has since become Art 17(1) UNCITRAL Arbitration Rules 2010), which states that '…the arbitral tribunal may conduct the arbitration in such [a] manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case', was interpreted in cases such as *Methanex Corporation v USA* and *UPS v Canada* to permit the admission of amicus curiae briefs (Vinuales; Fach-Goméz).

12. Although the UNCITRAL Rules do not apply in the present case, various provisions within the CIETAC and IBA Rules, some very similarly worded to Art 15(1), could also be interpreted to permit the admission of amicus curiae briefs. These include Art 22 CIETAC Rules ('[a]n arbitrator shall not represent either party, and shall be and remain independent of the parties and treat them equally'), Art 8(5) IBA Rules ('…the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome…'), Art 33(1) CIETAC Rules ('[t]he arbitral tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties. Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to all parties to make submissions and arguments') and Art 41 CIETAC Rules ('[t]he arbitral tribunal may undertake

investigations and collect evidence on its own initiative as it considers necessary'). Therefore, as these general provisions could be read as permitting amicus curiae briefs, it is submitted that the parties in the present case implicitly agreed to the submission of amicus curiae briefs during arbitration.

2) Tribunal discretion and 'appropriateness':

13. If the tribunal disagrees that general provisions in the CIETAC and IBA Rules could be interpreted so as to permit the submission of amicus curiae briefs, it will be necessary for it to decide whether amicus curiae intervention would be 'appropriate' within the meaning of Art 1(5) IBA Rules.

14. It is submitted that it is appropriate in the present case for the following reasons:

(i) *Protection of the public interest*

15. Amicus curiae briefs 'aim to protect important public interests such as environmental and health protection, human rights, workers' rights, sustainable development, cultural heritage, the fight against corruption and governmental policies. The significance of these public interests emphasises the benefits of bringing them to the attention of arbitrators through the amicus submissions' (Fach-Goméz; Kasolowsky and Harvey).

16. As international investment arbitrations tend to involve and impact upon public interests more than other arbitrations, such as international commercial arbitrations between two private parties, amicus curiae briefs have been most commonly admitted in investment arbitrations.

17. However, this is not to say that other types of arbitration such as international commercial arbitration can never involve public interests and thus merit the

admission of amicus curiae briefs. Indeed, although the present case is an international commercial arbitration between two private parties, it concerns the sale and consumption of tobacco and as such involves significant public health issues. Therefore, it would be appropriate to admit an amicus curiae brief from the Gondwandan government in this case as this would serve to highlight these issues and thus better protect public health.

b. Particularly affected

18. Third parties, who are particularly affected by the issues involved in the dispute and upon whom the arbitral award will have a particular effect, should also be permitted, exceptionally, to participate in the arbitration (Kurkela and Turunen, p. 181).

19. In the present case, the Gondwandan government are particularly affected by the arbitration between Conglomerated Nanyu Tobacco Ltd and Real Quik Convenience Stores Ltd given that tobacco control and restriction is 'a keystone of [their] public policy this term' (Letter dated 25th February 2014). Furthermore, enforcement of the original agreement between the parties in relation to the sale of tobacco products and an arbitral award made in favour of the claimant would greatly undermine its sovereign right to regulate and control its public policy.

20. Thus, this again suggests that the submission of an amicus curiae brief by the Gondwandan government would be appropriate.

c. Transparency and legitimacy

21. The involvement of amicus curiae is also valuable as it increases the transparency, and thus the legitimacy and accountability, of the arbitration system (Kasolowsky and Harvey).

22. The participation of amicus curiae, including through the submission of written briefs, ‘promotes a general interest in procedural openness and ensures that the broader public does not perceive the arbitration process as ‘secretive’’ (Bastin, pp. 223-224). This in turn increases the legitimacy of arbitral proceedings and gives it ‘greater credibility…and makes a contribution toward its future consolidation and prevalence’ (Fach-Goméz).
23. For these reasons, it is submitted that it is ‘appropriate’ for Gondwana’s amicus curiae brief to be admitted.

d. Better arbitral awards

24. The parties to an arbitration are often unable to provide comprehensive information and evidence about the interests involved in arbitration and the potential impact of an arbitral award. Amicus curiae briefs are valuable as they provide ‘useful additional perspectives, factual, legal, and technical, to the arbitral tribunal’. This, in turn, enhances the quality of the arbitral award, benefitting both the parties and the general interests which may be affected by the arbitral decision (Fach-Goméz; Bastin, pp. 224-225).
25. The Gondwandan government’s written submissions will provide additional information relating to the potential impact on public health and its sovereignty if an arbitral award is made in favour of the claimant. The amicus curiae brief will thus provide the tribunal with valuable additional information and insight into the consequences of its decision, and so it is again submitted that the admission of Gondwana’s amicus curiae brief should be admitted.

e. Party autonomy

26. Party autonomy and consent are key principles in arbitration (Moses, pp. 2-3). Even though the claimant does not consent, it is submitted that the admission of an amicus curiae brief within the current arbitral proceedings would not, in fact, violate this fundamental value. This is as the parties have agreed for the arbitration to be conducted according to the IBA and CIETAC Rules, which provide arbitral tribunals with the discretion to take evidence, including from amicus curiae, as it deems appropriate if both sets of rules are silent on the matter (Art 1(5) IBA Rules).
27. This again suggests that it would be appropriate to admit Gondwana's written submissions into the arbitration.

3) Conclusion

28. Based on the above arguments, the Gondwandan government should be permitted to submit an amicus curiae brief in arbitral proceedings between Conglomerated Nanyu Tobacco Ltd and Real Quik Convenience Stores Ltd.

C. The Respondent's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwandan government's new, more stringent regulations.

1) The circumstances are caught by Article 79 CISG so that the RESPONDENT's obligations have been vitiated

29. The RESPONDENT's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwandan government's new more stringent regulations, and is thus not liable to pay the liquidated damages claimed because: **a**. There was an impediment beyond the RESPONDENT'S control; **b.** the impediment "could not have been reasonably taken into account" by the RESPONDENT "at the conclusion of the contract"; **c**. the impediment or the consequences of the impediment "could not have been reasonably avoided or overcome"; **d.** the non-performance was due to such an impediment (Art 79 CISG. See also *Macromex)*; and **e.** the RESPONDENT informed the CLAIMANT of the impediment in a timely manner (Art 79 CISG. See also *Steel bar case*).

(i) The Law:

30. The issue here is whether the implementation of Bill 275 and the Gondwandan government's new more stringent regulations constitute an "impediment" within the ambit of CISG Article 79. The Belgian Supreme Court (Hof van Cassatie) decided in *Scafom* that "changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature so as to increase the burden of performance of the contract in a disproportionate manner can, under certain

circumstances, form an impediment in the sense of this provision of the Convention." Therefore, it is unnecessary to prove that the changed circumstances rendered performance of contractual obligations impossible. It is sufficient to prove that there was "serious disturbance of the contractual equilibrium" (Dewez et al.). The Court decided however that the issue cannot be resolved by reference to Article 79 alone and therefore Article 7.2 of the CISG operates, in the view of the Court, so as to require reference to general principles of international commercial law that are contained in particular in the UNIDROIT Principles. Articles 6.2.1–6.2.3 of the UNIDROIT Principles provide that the disadvantaged party (in this case the RESPONDENT) must make a request of renegotiation, which the other party must meet in good faith (See Dewez et al, pp.132-133).

(ii) ***Application of the law to the facts:***

31. The new Gondwandan regulations made it both seriously burdensome for the RESPONDENT to perform some of his contractual obligations and also impossible to perform other obligations. The obligation to purchase 10,000,000 cartons of cigarettes per year from the CLAIMANT and place orders in intervals of no less than three months (Claimant's Exhibit No.1) was no longer economically viable for the RESPONDENT due to the effect of the new Gondwandan regulations, over which the RESPONDENT had no substantial control. The regulations effectively commoditised the cigarette cartons, by prohibiting the use of all trademarks and logos, and forcing tobacco manufacturers to use standardized packaging (See Part II, Section 21 of Bill 275). This inevitably resulted in considerably less demand for the product and its piling up in the stockrooms. Also, it was practically impossible

for the RESPONDENT to buy 2,000,000 pieces of branded merchandise (Claimant's Exhibit No.1) because it could not legally sell it, due to Section 21, *Restrictions on sale and promotion of tobacco products* (2) of Bill 275.

32. **2)** It was not reasonable to expect the RESPONDENT to have taken the impediment into account at the time of the conclusion of the contract.

(i) The contract between the parties was signed on 14 December 2010 that is before 13 April 2012 when the bill was passed, and before the Gondwandan senator introduced the Bill, namely the 14 March 2011.

(ii) The Bill was passed into law on 13 April 2012 and only by a majority of 52-49 which shows the uncertainty of the Bill being transposed into the law.

(iii) The Gondwandan Herald mentioned that political analysts did not think that the Bill would have any real impact on tobacco consumption and that analysts stated that after the 2009 regulations, even stricter restrictions so soon after were unlikely to pass (Claimant's Exhibit No. 5). The Gondwandan Herald is generally regarded as a leading daily Gondwandan newspaper, being a major and reputable publication in Gondwana, with both a print and an online presence. This shows how even experts did not anticipate that the Bill would pass into law or that it would turn out to significantly impact on the tobacco industry.

(iv) In addition, both the CLAIMANT and its advisors felt that the risk of this legislation passing was low (Claimant's Exhibit No. 4). The CLAIMANT is the biggest market player in the tobacco industry in Nanyu, with a global presence and thus the CLAIMANT's opinion must have significant weight. The opinion was also based on solid factual

grounds, namely that in the international context similar legislation either failed to pass or was declared unconstitutional by the courts (Claimant's Exhibit No. 4). This shows that it was not reasonable to expect the RESPONDENT to foresee the passage and operation of the regulations at the time of the conclusion of the contract.

33. **3)** The RESPONDENT could not be reasonably expected to avoid or overcome the impediment or its consequences. First, it had no power to lobby and challenge the proposals or standing to challenge the legislation itself. Second, it had made efforts to renegotiate the contract (Claimant's Exhibits No. 3 and 6, Respondent's Exhibit No. 3) while the CLAIMANT was unwilling to seriously consider any of the issues, taking an ironclad position (Claimant's Exhibits No. 4 and No. 7).

34. **4)** It is clear that the termination of the contract was due to the impediment mentioned above (Claimant's exhibits no. 6 and 8).

35. **5)** The RESPONDENT gave notice to the CLAIMANT of the impediment and its effect on its ability to perform, which was received within a reasonable time after knowledge or constructive knowledge of the impediment. Thus, they owe no damages to the CLAIMANT, under Art 79(4). Soon after the Bill's proposal (21 March 2011) the RESPONDENT raised concerns to the CLAIMANT regarding the minimum quantities and intervals in the Agreement and compliance with the governmental regulations (Claimant's exhibit no. 3). The RESPONDENT did raise the same concerns again (11 March 2013 – Claimant's exhibit No. 6), as well as raising a concern with regards to the 20% premium payable to the CLAIMANT. Concerns were raised again on 19 April 2013 (Respondent's Exhibit No. 3). It cannot be claimed that the

RESPONDENT took too long to raise these concerns after the Bill came into force, as it was necessary to allow that period to pass in order to ascertain what the effect of the Bill was on the viability of the RESPONDENT's contractual obligations, and how permanent it was likely to be. The RESPONDENT wished to avoid making a premature assessment of the situation so as not create any unfair problems with the CLAIMANT, with which they have had a long and trusting working relationship.

D. If the Tribunal were to issue an award in favour of the Claimant, there would be a risk of enforcement.

36. As a party to the New York Convention (NYC), Gondwana is under an obligation to recognise and enforce the CIETAC award (NYC, Art I(1) and III). Gondwandan courts may refuse enforcement if the recognition or enforcement of the award would be contrary to the public policy of Gondwana (NYC, Art V(2)(b)).

37. The RESPONDENT submits that **a.** Art V(2)(b) does not distinguish between domestic public policy and international public policy, **b.** enforcement of the award not only contradicts Gondwana's mandatory laws but it is also injurious to public health, **c.** enforcement of the award is contrary to Gondwana's international treaty obligations.

38. Therefore, the award violates Gondwandan public policy and the public policy defence under Art V(2)(b) NYC can be invoked by the Gondwandan courts to refuse enforcement of the award.

1) Art V(2)(b) does not distinguish between domestic public policy and international public policy

39. The RESPONDENT submits that Art V(2)(b) clearly refers to cases where an award is contrary to public policy of the enforcement state and that not all national courts distinguish between domestic and international public policy.

40. In *Dutch Appellant v Austrian Appellee*, the Supreme Court of Austria refused enforcement of a Dutch award because it conflicted with Austrian public policy and held that no distinction between domestic and international public policy is envisaged in Art V(2)(b). A similar conclusion was reached by the Delhi

High Court, which also doubted any distinction between domestic and international public policy, and held that the award violated Indian public policy by imposing damages for actions that would have supposedly breached Indian export control legislation (*COSID v Steel Authority of India Ltd*).

41. Tobacco control and restriction is a keystone of Gondwana's public policy (Letter from Gondwandan Department of State). The present arbitration agreement includes obligations to sell tobacco products and display promotional materials contrary to Bill 275. If the award is made in favour of the CLAIMANT and damages are awarded for breach of such an agreement, then the enforcement of the award would constitute a violation of Gondwana's public policy.

2) The award not only contradicts national mandatory laws but it is also injurious to public health

42. The RESPONDENT submits that the outcome of the award, apart from infringing Gondwana's legislation, also possesses a threat to international public health, and for this reason, enforcement of the award must be refused based on Art V(2)(b).

43. Not all states require a violation of public policy in order to refuse enforcement of an award. For example, Article 258 of the Civil Procedure Law (CPL) of China incorporates the NYC grounds for refusing enforcement of foreign awards, but instead of 'public policy' the term 'social and public interest' is used. Whereas, the former applies only when enforcement violates basic notions of morality and justice (*Parsons and Whittemore v RAKTA (US case))*, public interest may include any interest which is public and not isolated to a

small group (Zhou). A violation of social public interest includes threats to public health and tobacco consumption is regarded as one of these threats (Li; World Health Organisation).

44. Even if 'public interest' is not accepted and the term 'public policy' is used, the enforcement of the award should still be refused. It is recognised that the public policy defence can be invoked where the enforcement of the award would be clearly injurious to the public good or wholly offensive to the member of the public on whose behalf the powers of the state are exercised (*Deutsche Schachtbau-und v. Ras Al Khaimah (English Case)*). As tobacco consumption harms not only active smokers but also passive ones, tobacco control is considered as a public good which requires action both at national and international levels (Vadi, pp. 94-95). Tobacco control also highlights the special responsibility of states in public health matters and states must protect their citizens from any possible risks to the public health.

3) The award is contrary to the enforcement state's international treaty obligations

45. The RESPONDENT submits that the outcome of the award infringes Gondwandan government's duty to respect its international obligations under the Framework Convention on Tobacco Control (FCTC) and that the public policy of protecting international public health must prevail over the public policy of sustaining international arbitral awards.

46. International public policy means, among others, "the duty of the State to respect its obligations towards other States or international organisations"

(International Law Association Committee, Final Report, Recommendation 1(d)). For example, following the decision of the European Court of Justice (ECJ) in *Eco Swiss China v Benetton*, national courts can refuse enforcement of an award that is contrary to EU competition laws, in particular, Article 85 of the EC Treaty.

47. The FCTC covers a wide variety of issues, including measures for the regulation of the contents of tobacco products, packaging and labelling, and ban and restriction on advertising. The enforcement of an award imposing damages for breach of a tobacco distribution agreement would be contrary to the provisions of the FCTC and would violate international public policy.

48. The enforcement of an award granting damages for breach of a tobacco distribution agreement would undermine Gondwandan government's ability to regulate and control tobacco consumption. Enforcing the award would mean that agreements which are similar to the present distribution agreement may be held to be valid even if they impose obligations contrary to Bill 275 and, therefore, other tobacco providers may continue to sell the same amount of tobacco and promote tobacco products in the same way as they did before Bill 275 was passed.

49. In addition, enforcement of the award may be seen by Gondwandan citizens as a failure of the governmental mechanisms to control the sale and consumption of tobacco products and this can result in citizens having doubts about the effectiveness of the tobacco control policy, thereby, diminishing its authority.