FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

27 JULY-2 AUGUST 2014

HONG KONG

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST**
Conglomerated Nanyu Tobacco Ltd.	Real Quik Convenience Stores Ltd.
CLAIMANT	**RESPONDENT**

TEAM NO.753

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LIST OF ABBREVIATIONS

Art.	Article/articles
The Claimant	Conglomerated Nanyu Tobacco Ltd
The Respondent	Real Quik Convenience Stores Ltd
No.	Number
p./pp.	Page/pages
the Agreement	The Distribution Agreement
Parties	CLAIMANT and RESPONDENT
Tribunal	China International Economic and Trade Arbitration Commission Trade Arbitration Commission
CIETAC	China International Economic and Trade Arbitration Commission
Ex.	Exhibit

INDEX OF AUTHORITIES

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ARGUMENTS ON JURISDICITON

I THE ARBITTRAL TRIBUNAL HAS THE JURISDICTION TO DEAL WITH THIS DISPUTE

1. Pursuant to the principle of competence of competence , the tribunal has the authority to rule on these objections to its jurisdiction . (A) The Tribunal should find that , in agreeing to Art. 65 the Agreement , the parties intended to submit all disputes to arbitration . (B) Furthermore , the arbitration clause is valid under the applicable law and rules .[Claimant' s exhibit No. 1]

(A) The Tribunal Has the Authority to Rule on Its Own Jurisdiction and Competence

2. It is a "fundamental principle" of arbitration that " arbitrators have the power to rule on their own jurisdiction" . [FGG, p. 212] This precept of kompetenz-kompetenz is borne out by the applicable rules and laws in the present case [Art. 16 (1) Model law ; Art. 6 (1) CIETAC Rules] . Accordingly , the Tribunal has the authority to decide whether it has jurisdiction to deal with the dispute in light of 12 months negotiation stipulated in the arbitration clause .

(B) Both parties evinced a clear intent to submit their disputes to arbitration .

3. Both parties have been unable to come to an agreement in regards to the dispute, either party may submit the dispute to the CIETAC Hong kong Sub-commission for arbitration . [The agreement Art. 65]

4. Both parties can not come to an agreement in the meeting held in 11April 2013. Nevertheless , the Claimant still willing to continue a further discussion until both parties can reach a mutually beneficial solution .

5. Unfortunately , The Respondent terminated the agreement , effective from 1 June 2013 . And there is no room for negotiation . In order to prevent a further losses , The Claimant has the right to apply the arbitration .

6. The arbitration clause contains two parts (A) Any dispute , controversy , or difference arising out of or in connection with the agreement , the parties shall seek a resolution through consultation and negotiation (B) If , after a period of 12 months has elapsed from the date on which the dispute arose , the parties cannot come to an agreement , either party may submit the dispute to arbitration .

(A) The validity of the pre-positive procedure for negotiation .

7. Stipulating to negotiate just like agreement to agree , that is non-executable , because it is lack of the necessity in certainty . The obligation to negotiation in good faith cannot commerce in practice , because the different positions makes the parties refuses to compromise.[Lord Ackner , Walford v Miles [1992] 2 A.C. 128 at 138 .]

8. Moreover, in the process of the arbitral practice , CIETAC never take the prepositive procedure for negotiation as an obligation to enforcement, it is an alternative procedures relied upon the parties'willingness, and whether the prepositive procedure conducted or not , it will not influence both parties to institute an arbitration immediately. [CIETAC South China Sub-Commission ，the seventh issues on 7 August 2009]

9. The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus too uncertain to enforce ,(2) that is difficult , if not impossible , to say whether, if not impossible ,to say whether , if negotiations are brought to an end , the termination is brought about in good faith or bad faith , and (3) that , since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached , it is impossible to assess any loss caused by breach of the obligation . [Petromec Inc. v Petrleo Brasileiro (2005) EWCA Civ. 891]

10. An undertaking to use one's best endeavours to try to agree , however , is not different from an undertaking to agree , to try to agree , or to negotiate with a view to reaching agreement ; all are equally uncertain and incapable of giving rise to an

enforceable legal obligation . [Little v. Courage Ltd. (1994) 70 P. &C.R. 469]

(B) The 12 months negotiation period is a maximum extent ,and until the first hearing commerce on 28 July 2014 , the 12 months period has lapsed .

11. It is inevitable to create controversy in cooperation process, If the parties can resolve it in private , they need not a court to help us . In the meantime , considering that the long-term relationship between both parties and both parties have plenty of business , we stipulated a 12 month negotiation period which allows us ample times as much as possible .

12. A meeting was hold between both parties'representatives on 11 April 2013 and the result was barely satisfactory. That meant that the negotiation failed .[Clamant exhibit No.7] And then the Respondent terminated the contract on May 1 2013. [claimant exhibit No.8] . That indicates that disputes arising out of the agreement on 11 April .

13. The 12 months negotiation period stimulated in contract does not meet the requirements for a validity arbitration clause . Because that clause does not stipulate what to do with all the 12 months . Without the element of uncertainty , the parties have no contractual obligation to fulfill the period of 12 months . [Ashgar/Mughal/Asghar & Co. V. The Legal Services Commission / The Law Society (2004) EWHC 1803(Ch)]

14. Accordingly , in order to avoid aggravation of the loss or damage and minimize it to the least extent , the arbitral tribunal was the last resort for us to resolve the dispute .

II THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE AMICUS CURIAE BRIEF DURING THE PROCEEDINGS

15. The amicus curiae brief from Gondwandan Government wants to express that if the tribunal issues an award in favor of the Claimant , the State legal department may refuse to execute the award according to the New York Convention Art. 5 (2) .

16. Even if Executive Orders and regulations promulgated by the Office of Foreign Assets Control were violated by a contract between a Russian airline.and a New York consultant, the public policy defense did not apply to bar enforcement of an arbitral award against the airline in an arbitration held in Sweden; while the airline alleged that the contract violated the United States's foreign policy respecting Iran, it did not establish that the contract violated the United States' most basic notions of morality and justice.[MGM Produtions Group Inc v. Aeroflot Russian Airlines 2004 W.L. 234871(2nd Cire.(NY))

17. The public policy applies to convention awards considered as l' ordre public véritablement international .

18. Accordingly, from the international opinion , the contract between both parties did not violate the most basic notions of morality and justice . The brief is worthless for the tribunal to take it for a consideration .

ARGUMENT OF MERITS

III. RESPONDENT'S OBLIGATION UNDER THE AGREEMENT WERE NOT VITIATED

A. Respondent has the obligation to pay the liquidated damages

19. The Respondent terminated the contract on May 1 2013 [Claimant's Exhibit No.8] and the RESPONDNET should pay the total $75,000,000 to the CLAIMANT[Claimant's Exhibit No.1 p.11].

B. There is no impediment for respondent to identifiy as exemption from their liability .

a) Bill 275 have not caused an impediment to be in conflicted with contract.

The contract contains two parts obligation of the respondent , (1) Sale and Purchase of Tobacco Products and Branded Merchandise (2) display the Tobacco Products and Branded Merchandise.And the Bill 275 just ask to restrict the packing and the ban the promotion of tobacco products and merchandise with trademark .

i). The restriction of packing and trademark

The Claimant have changed the packing and the respondent can carry out the obligation about packing favorably ,"The CLIAMANT's brand strength was significantly diminished by the new Gondwandan regulations "[DEDENSE ON MERITS NO.13 p. 26]. So this sentence show that the claimant have change the packing and diminished the trademark and respondent can sell them as usual.

ii). The banning of promotion of tobacco product

It can attribute promotional product which was banned by Bill 275 to a kind of tobacco product , "(1)No manufacturer , distributor or retailer may distribute or cause to be distributed any fee sample of cigarettes , smokeless tobacco ,or to other tobacco products; "[CLAIMANT'S EXHIBIT NO.2 p.14]. But the agreement just signed that the "Promotional Merchandise " is the "Branded Merchandise " obtained the branded T-shirts , branded keychains , branded lighters ,branded poster and

others,so it means the promotional merchandise of the agreement are not tobacco products so the Bill 275 was not conflict with the obligation about promotional merchandise.

20.So comparing with the obligation of the agreement, the respondent can sell the tobacco product with the new and legal packing and diminished the trademark, and sell the not tobacco promotional merchandise. In the other words , RESPONDENT have no reason to exempt from his liability of paying the liquidated damages because there was no impediment.

b) The consequence can be avoided

Even there is an impediment the fact also have not conform to the factors of Article 79 ,this article ask the impediment or its consequent can not be avoided. But till now the CLAIMANT have changed the packing and the merchandise can be sale legally, "The CLIAMANT's brand strength was significantly diminished by the new Gondwandan regulations "[DEDENSE ON MERITS NO.13 p. 26]" . So it means the consequent of the confliction can be avoid, the claimant just need to change the packing and diminish the trademark and that were really done by the claimant so there was no impediment and its consequent even can be avoided, so respondent will have no reason to exempt from their liability .

C. RESOPNDENT's non-performance of a vaild contractual obligation cannot be under UNIDROIT

a) The obligation under the agreement must be carried out

i) Pursuant to UNIDROIT, a contract validly entered into is binding upon parties[Art.1.3, UNIDROIT].

ii) That in connection with the fact that "Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance" CLAIMANT "is entitled to that sum irrespective of its actual harm."[Art. 7.4.13(1), UNINPOIT]

iii) CLAIMANT also had informed RESPONDENT to pay the damages three times. [Exhibit 9, Exhibit10, Exhibit 11]

b). RESPONDENT is liable for i) loss of profit ii)for cost of connected with the

creating specific tobacco packaging

i) liability of RESPONDENT's loss of profit

I) RESPONDNET liable for the profit of CLAIMANT

The loss of profit or is the benefit which would normally have accrued to the aggrieved party if the contract had been properly performed[UNIROIT commentary,p.234]. The non-performing party is liable only for harm which it foresaw or could reasonably have forseen at the time of the conclusion of the contract[Art.7.4.4, UNIDROIT]

At the time of conclusion of the contract RESPONDENT was aware that he is a buyer who was supposed to buy goods for 10 years.

CLAIMANT is entitled to all the profit which he would have achieved the 10 years long contract if the non-performance by RESPONDENT had not occurred and the contract was carried out duly.

II) The liquidated damages is reasonable

And 20% premium is one part of the loss profit. Pursuant to the Clause 1. Sale and Purchase of Tobacco Products of Agreement, calculate the 20% premium by the average fixed price the minimum quantity and the minimum interval is about $112,000,000. Compared with the $75,000,00, the liquidated damage is reasonable.

ii)In order to comply with the BILL275 ,the cost of specific packing is reliance interest. Denning said"If he has not suffered any loss of profit or if he cannot prove what his loss of profit would have been he can claim in the alternative in the alternative the expenditure which has been thrown away,that is wasted by reason of the breach. "[Anglia TV Ltd.v.Reed(1972)1.Q.B.60] Because RESPONDENT terminated the Agreement, the cost of specific packing becomes a waste of expenditure.

D. Loss cannot be identified as force majeure

a)RESPONDNET can favorably carry out the obligation

i) Pursuant to UNIDROIT, The hardship must comply with 4 conditions: the event occur after the conclusion of the contract,can't foresee,out of control and was

not assumed by the disadvantaged party.[Art.6.2.2 UNIDROIT]

ii) CLAIMANT submit Respondent could reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract. Starting in 2001, there is a tendency that the Gondwandan government began to enforce stricter regulations on the sale and the use of tobacco products. The interval between those regulation is very closed.

b) The general application of loss translated to force majeure

The general translation from economy hardship to the force majeure must identify the economy hardship as fundamental and think about the relationship between the force majeure and economy hardship.

The case from Ad hoc Arbitration, The Hague, the parties are Chevron Corporation &Texaco Petroleum Corporation and Ecuador.[IIC 421 (2010)]

In that case the Claimants contest the Respondent's argument based on the idea that obligations are only suspended and not extinguished by force majeure under Ecuadorian law. While this premise may be true, the resumption of TexPet's obligations after the force majeure period still did not require TexPet to retroactively contribute crude from subsequent quarterly production to satisfy domestic consumption corresponding to earlier quarters. Contrary to the Respondent's attempts to do so, the retroactive contributions also cannot be categorized as mere "true-ups" of previous quarterly contribution estimations. All these arguments are consistent with what was put forward originally by TexPet in the underlying Ecuadorian litigation .

The Respondent's interpretation would in fact mean that any negative effect of a force majeure situation would exclusively have to be borne by TexPet and in no way by the Respondent. The Respondent also contests the merits of the Force Majeure case (Case 8-92). The earthquake of March 5, 1987 damaged the Trans-Ecuadorian pipeline and effectively "shut in" all the crude that would have been otherwise available to supply local refineries. During the force majeure period, producers were required to deliver whatever oil they could deliver through an alternative pipeline. This was far less, however, than what was needed to satisfy domestic consumption. After the pipeline was repaired, all the producers, including TexPet, were required to

contribute compensation crude purchased at the domestic price over a period of 14 months to be sold on the international market to compensate for the emergency transactions noted above.so it means the respondent would have huge loss if they must to satisfied the domestic needs.

Moreover, the doctrine of force majeure, like the doctrine of hardship and other related concepts, is designed to "distribute between the parties in a just and equitable manner the losses and gains resulting from" an unforeseeable event.(FN: Art. 6:111(3)(b) Principles of European Contract Law 2002; UNIDROIT Principles, at art. 7.1.7 comment 3; id. at arts. 6.2.2 and 6.2.3(3)(b)). The Respondent has not been able to show that the 1973 Agreement or Ecuadorian law provide support for such an unusual interpretation in cases of force majeure.

On the basis of the above, the Tribunal finds that an honest, independent and impartial Ecuadorian judge would have ruled in TexPet's favor in the Force Majeure case.

It can be concluded that the identification of Force Majeure depends on the whether the economy hardship can be identified and whether the economy hardship directly caused by the force majeure.

c) The decline of selling owes to business risk

The Gondwandan government have already set the regulation one by one to decline the range of smoking , but the RESPONDENT also would like to sign the ten years contract means the party willing to take risk of facing a more stringent regulation or law. "Business risk is defined to be the risk inherent in the firm."[Van Home ,pp . 207-8] So the party signed the agreement for its profit must take the risk ,RESPONDENT should not pay more another money if they sell it well so in the other side the CLAIMANT should not bear the loss of RESPONDENT ,and RESPONDENT must take it by itself.

And "There are two major external sources of business risk in the agricultural firm... One is market which produces price variability for both output and input and uncertain variability and quality of the latter."[Stephen C. Gabriel and C. B. Baker 'Concept of Business and Financial Risk']. The decline of selling if not directly for

Bill 275 but the market, and the market is is the sources of business risk ,and this business risk must be undertook by the RESPONDENT must to take the risk and pay the $75,000,000 liquidated damages.

IV. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT ,THERE WOULD NOT BE A RISK OF ENFORCEMENT

A. Arbitral award should be enforced

a) Art. III of New York Convention

The parties have ever signed the agreement which obtained the dispute resolution and the tribunal can end with an award, and arbitral award must be enforced. “Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. ”[Article III New York Convention] .

b) Both parties are the signatures of New York Convention

And each partied had signed the “New york convention”, “Nanyu and Gondwana are both parties to the CISG and the Convention on the recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)”[Application for Arbitration . Applicable law p. 6]. The New York Convention is governing law. So the both parties must be bound by this convention and the arbitral award must be enforced.

B. If the tribunal were to issue an award in favor of the claimant do not means the respondent must to be in conflict with the Bill 275.

a) The requirement of CLAIMANT

The CLAIMANT just ask the $75,000,000, “The total value of relief claimed in this arbitration is USD 75,000,000.”[Application for Arbitration p. 1]. If the tribunal in favor of the CLAIMANT just means the respondent must to pay the $75,000,000 liquidated damages, but not require the respondent to carry out the obligation under

the agreement or ask the respondent to sell the merchandise illegally. So to enforce this arbitral award will not infringe the Bill 275.

b) Confliction of Bill 275 is not the result of the award which in favor of the claimant

The Bill 275 was not the reason why the respondent could not carry out its obligation any more . Realistically , the agreement had signed that the respondent must to buy the tobacco produced and the branded merchandise[Claimant's Exhibit NO.1 p 8]. But the bill 275 even have not created any impediment of the performance, "The CLIAMANT's brand strength was significantly diminished by the new Gondwandan regulations "[DEDENSE ON MERITS NO.13 p. 26]. The obligation of buying and displaying can be carried out as usual. So the Bill 275 can not be identified as the reason to non-perform and if the tribunal in favor of the claimant it also not means to ask the respondent to infringe Bill 275.

C. Bill 275 is not a public policy

Even if The respondent terminated the agreement for the Bill 275, "we are left with no choice. Continued performance of our obligation under the Distribution Agreement would result in us breaching Gondwandan laws, and I would rather terminate the Agreement than face a governmental fine or possibly jail." [Claimant's Exhibit NO.8 p 20]. The Bill 275 also can not identified as the public policy.

The enforcement would have a risk only if the arbitral award is conflicted with the New york convention Article V "2.Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:...(b) The recognition or enforcement of the award would be contrary to the public policy of that country. "[Article V. 2 .(b) New york convention].

a) "Public Policy should be construed narrowly."

i) Identification of public policy

As the case from American court of appeal 1974 (American parson&whittmore against the Egypt RAKTA) : the American court of appeal upholds the narrowly

construed of the public policy under the NYC and this result is accepted by the HongKong court ,the case is about the Egypt built a factory and the money came form America, this project had contracted to an American company named parson&whittmore, and the other party is the Egypt company named RAKTA ,and there was a arbitration clause , but after that there have been a war happened between the America and Egypt so the American Aid agencies refuse to give money to the parson&whittmore any more , so the parson&whittmore terminated the agreement. But the RAKTA disagreed that so they submitted to the arbitral tribunal and in favor of this case. But the parson&whittmore refuse to enforce for the award go against the public policy ,but the American court of appeal did not agree this reason and said :" the convention's public policy defense should be construed narrowly . Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. " So it means that if the arbitral award was in conflict with the state's most basic notion of morality and justice . It will be identified as infringe public policy.

Application of this case is that

I) The parties' countries are not the same

II) The dispute resolution are arbitration

III)The relationship are also the contract relationship

IV) They also terminated the agreement for the policy reason.

So public policy can just be construed by the narrowly meaning.

ii) Bill 275 had not infringed to the state's most basic notions of morality and justice

Public policy can be considered as two parts , one is the "public", another is "policy". No doubted that the Bill 275 have been passed by Senate of Gondwandan into law[Claimant's Exhibit NO.2 p. 13], so Bill 275 is a policy definitely.

And it also obtained another part --"public", as the identification of public policy: should not violated the state's most basic notions of morality and justice. And the most basic notion of morality and justice base on the all people.

Gondwandan senator introduced the "Clean our Air" Bill 275/2011("Bill 275").

Bill 275 would introduce far-reaching reforms to tobacco regulation in Gondwana[Application for Arbitration Facts NO.10 p. 4]. But it met with strong opposition from member of the Gondwandan Senate[Claimant's Exhibit NO.5 p. 17], at last it also passed into law on 13 April 2012 by vote of 52-49[Claimant's Exhibit NO.2 p. 13]. It can concluded that the Bill 275 is not supported and considered by the a large number of people. "Morality comes from private, inner states of an individual" which as the essay of Lois M. Eveleth [Philosophy, Law, and Morality--Lois M. Eveleth ,Salve Regina University p. 2], so the morality must depend on the all citizen. And yet before the Bill 275 have been passed the almost all major tobacco producers and distributors. Immediately after Bill 275 was introduced, domination were held in the front of the Senate building [Claimant's Exhibit NO.5 p. 17]. Above all, the result of voting is 52-49, so it means the Bill 275 just passed by simple majority, and almost a half assemblymen object this Bill. And the requirement of public policy must to base on the state's most basic notion of morality and justice, but there was a large number of people object it and it even just passed by the simple majority ,so in the other world it can just claimed as the more notion of morality and justice but not the most notion of morality and justice. In short , the Bill 275 can not be identified as the public policy.

b) Bill 275 is different from "FCTC"

World Health Organization have passed an < WHO Framework Convention on Tobacco Control > as a treaty adopted by the 56th World Health Assembly on 21 May 2003. This convention was signed widely. But Bill 275 is different from it.

i) Bill 275 is more stricter than "FCTC"

I) The restriction of surface packing is different

Bill 275 is more stricter , it have signed that "A cigarette pack or cigarette carton must comply with the following requirement: a. The pack or carton must be rigid and made of cardboard ,and only cardboard; b. The pack or carton is closed: i. Each outer surface of the pack or carton must be rectangular; and ii. The surfaces of the pack or carton must meet at firm 90 degree angles;" [Claimant's Exhibit NO.2 p. 13]. But the "FCTC" have no requirement about this.

II) The restriction of colour and finish of retail packaging

Bill 275 is more stricter, it have signed that: “All outer surfaces and inner surfaces of the retail packaging, and both sides of any lining of a cigarette pack must be in matte finish; and a. If regulations are in force prescribing a colour – must be that colour; and b. Otherwise must be drab olive green. ” [Claimant’s Exhibit NO.2 p. 13] It have stipulate the only olive green colour can be used. But the “FCTC” have no requirement about the colour and finish.

III) The restriction of brand ,business, company or variant name

Bill 273 is more stricter, it have signed that: “Any brand, business or company name, or any variant name, for tobacco products that appears on the retail packaging of those products: ....b. Must not appear more than once on any of the following outer surfaces of the pack or carton: i. For a cigarette pack – the front, top and bottom outer surfaces of the pack; ii. For a cigarette carton – the front outer surface of the carton, and the 2 smallest outer surfaces of the carton; and c. May appear only on the surfaces mentioned in paragraph (b); ...and ii. In the centre of the space remaining on the front outer surface beneath the health warning. ”[Claimant’s Exhibit NO.2 p. 14] the packing in Gondwana is rigorous,but the “FCTC” just ban those thing to be used promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions[Article 11 FCTC p. 9].

ii) “FCTC” is hardly to be enforced

Even there are many countries have signed the convention but this convention have not obtained the clause of enforcement and there is any other convention stipulate it. So the observation of this convention will have a risk.

Moreover , the smoking situation of Gondwana is serious “it is estimated that roughly 35% of population smoked some from of tobacco product and could be classified as a regular smoker.”[Application for Arbitration NO.7 p. 4] So the Gondwandan government sets the regulation must to base on the substantial and consummate step by step.

PRAYER FOR RELIEF

In light of the submissions made above, CLAIMANT respectfully request Tribunal to declare that:

- Liquidated damages in sum of UED$75,000,000 pursuant to Clause 60 of the Agreement.
- The RESPONDENT to pay all cost of the arbitration, including the CLAIMANT's expenses foe legal representation, the arbitration fee paid to CIETAC, and the additional expense of the arbitration as set out in Article 50, CIETAC Arbitration Rules;
- 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.

Signed on the 12th of January, 2014