FIFTH ANNUAL INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

27 JULY - 2 AUGUST 2014

HONG KONG

In the matter of:

Conglomerated Nanyu Tobacco Ltd.

v.

Real Quik Convenience Stores Ltd.

MEMORANDUM FOR RESPONDENT

Team No. 849R

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for International Sale of
Ex.	Exhibit
FCTC	Framework Convention on Tobacco Control 1980
gov.	Government
i.e.	That is
IBM	International Business Machines Corporation
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IPRC	Imperial Petroleum Recovery Corporation
J.	Justice
No.	Number
NYC	New York Convention 1958
NZ	New Zealand
p.	Page

Para.	Paragraph
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar
v.	Versus

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ARGUMENTS

I. THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO DEAL WITH THIS DISPUTE.

1. By inserting a multi-tiered dispute resolution clause in their contract, parties agree to resolve their potential controversies by using two or more escalating steps with an intention that arbitral proceedings will only be commenced in case of the failure of previous ADR techniques *[Carter]*. In other words, arbitral proceeding will not commence until the end of such sequence *[Born, p. 76; Redfern/Hunter, para. 1-67]*.

2. The Distribution Agreement between the parties is for a period of 10 years and such long terms contracts are reliant on the continuing cooperation of the parties during its term *[Berger, p. 2]*. Therefore, such multi-tiered dispute resolution clauses help in preserving the business relationship of the parties by shifting the resolution of the dispute to a sequence of ADR proceedings aimed at cooperation rather than confrontation *[Hunter, p. 73]*.

A. Mandatory language used in the arbitration clause clearly shows the intention of parties

3. Not only the word 'shall' used in the first paragraph, but also the conditional formulation in the subsequent arbitration clause ('If …'), both signal the intention of the parties to make an attempt to resolve the dispute through their

representatives a mandatory condition precedent to initiating arbitral proceedings. *[ICC Award 9977; ICC Bulletin, p. 87, 88]*. Also, such multi-tiered dispute resolution clauses which clearly designate a time at which the time for negotiation comes to an end, courts have held them to be strictly enforceable and devoid of uncertainty *[Aiton v. Transfield, p. 245]*. Both these essential requirements for an enforceable multi-tiered dispute resolution clause are satisfied by Clause 65 and points to the clear intention of the parties to strictly comply with the pre-arbitral procedure.

B. The specified pre-arbitral procedure in the arbitration clause is not uncertain

4. The Supreme Court of New South Wales has held that where the process is sufficiently certain, the agreement to negotiate is capable of legal recognition *[Hooper v. Natcon, p. 209]*. Also, in the famous Channel Tunnel matter, Lord Mustill rejected the contention of the appellants that their chosen method was too slow to suit their purposes *[Channel v. Balfour]*. Therefore, the Claimant is legally obliged to exhaust the 12-months period in undertaking negotiations in good faith and cannot use the longevity of the period as an excuse to commence arbitration proceedings.

5. In a recent decision, Colman J. reversed the traditional approach of the English courts to not enforce agreement to negotiate on the ground of uncertainty *[Walford v. Miles, p. 139]* by stating that "for the courts to decline to enforce contractual reference to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy." *[Cable v. IBM]* This English decision has also been affirmed by the court in Hong Kong wherein the failure to specify a detailed procedure for carrying out negotiations,

before the commencement of arbitration, was not held to unenforceable or uncertain *[Hyundai v. Vigour, p. 89]*.

6. Even the courts in civil law countries such as France, Switzerland and Germany have adopted this international trend of rendering pre-arbitral ADR procedures as enforceable and consequently granting a stay on arbitration proceedings till all other mechanisms listed in the dispute resolution clause are sufficiently exhausted *[Poire v. Tripier; Swiss case; German cases]*. This approach is also reflective of the wording of 2002 UNCITRAL Model Law on International Commercial Conciliation as well as the respective drafting materials *[Art. 13, Model Law on Conciliation]*.

7. The most recent judicial pronouncement on this issue is that of Singapore's highest court in an October 2013 judgment wherein the Court strictly enforced an escalation clause and held it to be a precondition to arbitration *[IPRC v. Lufthansa]*, thereby, reversing the liberal stand taken by the High Court in the matter. Thus, the Respondent submits that the Tribunal may suspend the arbitration proceedings till the expiry of the 12-month period due to want of necessary jurisdiction and direct the Claimant to first engage in negotiations and consultations in good faith.

II. GONDWANAN GOVERNMENT'S *AMICUS CURIAE* BRIEF SHOULD BE ACCEPTED FOR CONSIDERATION DURING THE PROCEEDINGS

A. The Tribunal, under the CIETAC Rules, may do what it deems appropriate

8. As per the CIETAC Rules, the arbitral tribunal is empowered to examine the case in any way it deems appropriate *[CIETAC, Article 33(1)]*. Moreover, in the *Methanex* case, the tribunal found that it had jurisdiction to accept third party written amicus submissions under a similar provision in the UNCITRAL Rules *[Waincymer, p. 603]*.

B. The Tribunal may rely upon other transnational rules which expressly deal with third party submissions

9. The CIETAC Rules, much like the UNCITRAL Rules and ICC Rules, do not expressly deal with non-party submissions. In light of such a situation, the arbitral tribunal can apply transnational legal principles, leading to more predictable results *[Fouchard, p. 234]*, the consequence of which is a more uniform international arbitration system.

10. The ICSID Rules expressly address non-party submissions, and place the issue squarely within the arbitrators' discretion to decide *[Kalicki, para 4]*. It is important to understand the rationale behind the exclusion of third-party submissions in commercial arbitrations, and why the same isn't applicable in this case.

11. Some of the reasons for inclusion of third-party submissions in investment arbitrations have been that investor-state arbitrations usually concern "public services sector" which includes "health and safety" *[Tienharra, p. 230];* the decision in the dispute could have a significant impact beyond the Disputing Parties *[Methanex v. US, para 17]*; that decisions in investment arbitrations sometimes effectively "strike

down national regulations" *[Choudhury, p. 775]*; decisions in investment arbitrations "render several issues of public nature and thus public interest" *[Mistelis, p. 178)]*.

12. Commentators believe that the above would not be applicable to commercial arbitrations as they are between private parties *[Eugenia, p. 7]*. However, in the matter at hand, we see that the aforementioned reasons would be applicable as the matter vitally concerns Gondwandan law, which is an important aspect of the current government's public policy *[Moot Problem, p. 32-33]* on public health and could potentially have a negative impact on their tobacco control regulation.

C. The specific ICSID criteria relating to third party submissions have been duly fulfilled

13. As per the ICSID Rules, the tribunal is required to consult with the parties before assessing whether to allow the *amicus* brief *[ICSID, Article 37 (2)]*; however the consent of both parties is not necessary insofar as the tribunal is satisfied that the remaining elements of Article 37(2) have been complied with *[Biwater v. Tanzania, para 50]*.

14. The Tribunal needs to be satisfied that the *amicus* petitioner would **(i)** provide an insight or knowledge exclusive of the disputing parties; **(ii)** address a matter within the scope of the dispute; and **(iii)** have a significant interest in the dispute *[ICSID, Article 37 (2)]*.

15. We have generally seen that in matters of public interest *[Methanex v. US, para 49]*, broad policy issues *[Benasconi-Osterwalderm, p. 204]* tribunals have invited third party submissions. Given that this proceeding arose out of a change in the policy of the Gondwandan government relating to public health, the government would be capable of providing valuable insight in this regard which may assist the Tribunal.

16. The government has stated that it would be very 'straightforward' in its submission and would only address issues relating to its public policy which may affect Gondwandan law and sovereignty *[Moot Problem, p. 32-33]*. As per the New York Convention, enforcement may be refused when the award is contrary to the public policy of the country *[New York Convention, Article V (2) (b)]*. Thus, the *amicus* submission clearly falls within the scope of the dispute. This threat to the government's public policy also reiterates their interest in the dispute.

17. Thus, it is the contention of the respondent that, in this matter, reliance on principles of third party submissions as applied in investor-state arbitrations, may be referred to, and on duly fulfilling these criteria, the *amicus curiae* submission of the government of Gondwana must be allowed.

III. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275

A. Article 79, CISG encompasses the concept of 'frustration of purpose'

18. Article 79 of the CISG lays down the *force majeure* exemption. It is the contention of the respondents that the criteria laid down in Article 79 have been met and hence, the contract has been vitiated. The elements of this provision are that **(i)** there must be an impediment; **(ii)** which could not have been foreseen at the time of the conclusion of the contract; and **(iii)** it could not have been overcome *[CISG, Article 79]*.

19. It has been stated that Article 79 encompasses the American concept of 'frustration of purpose' *[Gabriel, p. 279, 280]*. Thus, Article 79 may excuse performance where an impediment either renders performance impossible or frustrates the purpose of the contract *[Bund, para 12]*.

20. Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged *[Felt v. McCarthy]*.

B. The elements of 'frustration' have been duly fulfilled

21. In order to determine whether there has been frustration of contract, first, the purpose that is frustrated must have been a principal purpose of that party in making the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made *[Restatement (Second) of Contracts, p. 265]*.

22. As per the Agreement entered into between the complainant and the respondent, the respondent is currently paying the complainant a 20% premium for purchase of its products *[Facts, p. 7]*, the respondent has to purchase from the complainant a minimum quantity of cigarettes and branded merchandise compulsorily every three months *[Distribution Agreement, Clause 1.2 (c), 2.2(d)]* and also provide prominent shelf display to the complainant's logos and trademarks *[Distribution Agreement, Clause 25]*.

23. The price premium being paid to the complainant along with the requirement for frequent purchase of cigarettes and similar branded material was based solely on the complainant's dominant position in the world market and the influence its trademark and logo would have on buyers. Without this, the price premium being afforded to them coupled with the bulk purchases at frequent intervals makes little sense, as the product is now merely an undifferentiated commodity, a position agreed upon by tobacco companies faced with similar legislations *[Philip Morris, p. 10; Mitchell]*. Moreover, the new Bill made it impossible for the Respondent to provide prominent shelf space for the respondent as well as sell their merchandise, as it was now declared illegal *[Claimant Ex. 8]*.

24. The Agreement was substantially frustrated as majority of the performance was made completely impossible, while the basis of the contract i.e. the influence of the complainant's trademark was no longer applicable. Both the parties obviously entered into the contract under the assumption that a change of law making the performance

of the contract impossible would not occur. Hence, the elements of frustration were duly fulfilled.

25. Moreover, frustration of the purpose of the performance may only exempt the obligor if the purpose was 'shared' by the supplier in a qualified manner *[Brunner, p. 464; Felt v. McCarthy]*. It is apparent that the complainant in this case also noticed the detrimental value of Bill 275 by the fact that they challenged its constitutional validity in Gondwandan courts, however unsuccessfully. *[Respondent Ex. 2]*

26. Since the contract was heavily based on the influential role of the complainant's trademark, which the parties can no longer rely on, the purpose of the contract has been frustrated by the application of the new law.

C. **Elements of Article 79, CISG have been fulfilled**

27. Also, measures taken by governments are generally considered impediments outside the promisor's sphere of control *[Schlechtreim and Schwenzer, p. 14]*. In the matter at hand, legislation the type of Bill 275 was also not reasonably foreseeable as political analysts stated that a bill of this type was unlikely to pass *[Claimant Ex. 5]*.

D. **Claimant is not entitled to any compensation**

28. Finally, as the contract has been vitiated in this case by a *force majeure* event, the complainants are not entitled to receive any compensation, as it has been held that a

clause which provided for payment of a compensation fee even in the case of *force majeure* events was not valid, since it would be contrary to the general principle of CISG Article 79, which requires discharge of the obligor of an obligation in the case of *force majeure* events *[ICC Arbitration Case No. 7585/1994]*.

IV. AWARD IN FAVOUR OF THE CLAIMANT WOULD BEAR THE RISK OF ENFORCEMENT

29. Article 5(2)(b) of the NYC specifies public policy as ground for non-enforcement of a foreign arbitral award. In general, public policy is a traditional ground for the refusal of the enforcement of foreign arbitral awards, foreign judgments as well as foreign law and the degree of the fundamentality of moral conviction or policy is conceived differently in every state. *[van den Berg, p. 373]* Hence, public policy is considered a variable notion *[Kenya v. Bank]* that is open textured and flexible *[Renusagar v. General Electric]*. It has been judicially interpreted in various civil law countries to be wider in scope as compared to common law jurisdictions *[Lew, para. 401]*.

30. In order to give due recognition to the pro-enforcement bias that is inherent in the language NYC, the legislatures and courts of a number of countries have sought to qualify or restrict the scope of public policy by applying a test of international public policy *[van den Berg on IPP, p. 502; Sikric]*.

A. Gondwana's international public policy has been violated

31. The international public policy of any State includes (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; (iii) the duty of the State to respect its obligations towards other States or international organizations. *[New Delhi Conference, R. 1(d)]* The arbitral award in favour of the CLAIMANT would violate Gondwana's international public policy because Bill 275 serves to protect its essential social interest [*Claimant Ex. 5*] and discharge its international obligations under the WHO's Framework Convention on Tobacco Control (FCTC) to which Gondwana is a party [*Clarification 16*].

32. Bill 275 has been enacted by the Gonwandan Senate for the betterment of public health, which is in the social interest of the country, by making the advertising of tobacco products illegal and regulating the packaging of tobacco products. Gondwana is a party to the FCTC and Bill 275 is in conformity with the letter and spirit of Part III which enlists measure relating to the reduction of demand for tobacco *[FCTC, Article 11, 13]*. Therefore, Gondwana is discharging its international obligations under the FCTC by enacting Bill 275.

33. The Supreme Court of Gondwana has already struck down the constitutional challenge to Bill 275 mounted by the CLAIMANT and has upheld the Gondwandan government's power to institute regulations protecting public health and safety as well as its duty to do so as a sovereign power [*Respondent Ex. 2*]. The High Court of Australia recently rejected a similar challenge to its packaging regulations issued

under the Tobacco Plain Packaging Bill of 2011 *[British American Tobacco v. Australia]* and many other states are also considering similar measures *[NZ Report; UK Report]*. Therefore, the risk of enforcement of an award in Claimant's favour would be further escalated as it would contrary be to the judgment of Gondwana's highest court and thus constitutes a violation of its public policy *[O&Y v. Bummash]*.

B. Award cannot be enforced partially

34. When the enforcement of an award attracts the public policy exception under Article 5(2)(b) of the NYC, the Court can choose to enforce the part of the award that does not violate public policy [*Southwire; in J.J. Agro; Westman International]*.

35. However, in the present case, the only relief sought by the CLAIMANT under the distribution agreement is the enforcement of its termination clause so as to compel the RESPONDENT to pay liquidated damages of USD 75,000,000 [*Claimant Ex. 11*]. Therefore, if made in favour of the CLAIMANT, this award would in violation of Gondwana's public policy as a whole and is not capable of being partially enforced.

RELIEF REQUESTED

In light of the arguments advanced, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal lacks requisite jurisdiction to deal with this dispute.
2. The amicus curiae brief submitted by the Gondwandan Department of State should be allowed.
3. RESPONDENT'S obligations under the Agreement were vitiated by virtue of Bill 275.
4. An award in favour of the CLAIMANT bears the risk of enforcement