MEMORANDUM FOR CLAIMANT

TEAM NUMBER: 863C

I. The Tribunal has a jurisdiction over the dispute at hand

Conglomerated Nanyu Tobacco Ltd. (hereinafter referred to as "**Claimant**") submits that the Arbitral Tribunal has jurisdiction over the dispute at hand and its jurisdiction is not affected by Respondent's objections toward the fulfillment of negotiation and consultation requirements from Clause 65 of the Contract for three reasons:

1. Consultation and negotiation provisions are not a part of the arbitration agreement.
2. Those provisions are only of procedural nature and can be dispensed with when appropriate.
3. In any way, the observance of the 12-month waiting period was unnecessary, as there was no promising opportunity for the Parties to reach an amicable conclusion.

1. Consultation and Negotiation Provisions Are Not Part of The Arbitration Agreement and Thus Do Not Affect The Jurisdiction of The Tribunal

First of all, Clause 65 of the Distribution Agreement of 14 December 2010[1] is a classic example of the so-called multi-tier dispute resolution clause which includes a staged dispute settlement process[2]. This is evidenced by the title of the Clause used in the Agreement[3] and is explicitly conceded by the Respondent who speaks of Clause 65 as a "Dispute Resolution Clause"[4]. Examination of the said clause reveals two steps of dispute resolution on which the Parties to this proceedings contractually agreed – 1) consultation and negotiation, and 2) final and binding arbitration. The relevant procedural law defines an arbitration agreement as "an arbitration clause in a contract or any other form of a written agreement concluded between the parties providing for the settlement of disputes by arbitration"[5]. Hence, although part of a wider dispute settlement clause, the arbitration agreement in the case at hand is contained only in the second paragraph of Art. 65.1 of the Contract, as only this part of the Contract provides for dispute resolution by arbitration.

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1 *Claimant's Exhibit No.1, p.11.*
2 *Gault/East, passim.*
3 *Record, p.11.*
4 *Statement of Defense, para.4.*
5 *CIETAC Rules, Art. 5.1*; *emphasis added.*

The jurisdiction of the arbitral tribunal is derived solely from the arbitration agreement[6]. Since the contractual provisions referring to negotiation and consultation between the parties do not form any part of the arbitration agreement, the issue of alleged non-compliance with these provisions is irrelevant for the existence of the Tribunal's jurisdiction. Thus, the jurisdiction of the Tribunal remains intact, and the Tribunal remains competent to hear the dispute at hand.

2. **Consultation and Negotiation Provisions Are of Procedural Character and Do Not Deprive The Tribunal of Its Jurisdiction**

Notwithstanding the above, the pre-arbitration dispute settlement ("**PADS**") laid down in Clause 65 of the Contract is merely of procedural nature and any non-compliance therewith could not deprive the Tribunal of its jurisdiction to hear the dispute at hand.

As confirmed in the case law of national courts exerting review over foreign arbitral awards[7], supported by the procedural law[8], determination of legal effects of non-compliance with the PADS provisions lies exclusively within the competence of the arbitral tribunal. Hence, Claimant invites the Tribunal to decide the issue of the character of consultation and negotiation requirements set out in Clause 65 of the Contract on its own and to rely on the consistent jurisprudence of arbitral tribunals.

The requirement of Clause 65 of the Contract of consultation and negotiation precedent to arbitration, together with the 12-month waiting period for initiating arbitration reflects an example of a 'cooling off period' usually found in investment arbitration agreements and decided by different treaty-based arbitral tribunals[9].

Having recourse to jurisprudence in investment arbitration, a waiting period is not a jurisdictional provision but rather a procedural rule thus it does not set a limit to the authority of the tribunal to decide a given dispute on its merits. In *Lauder,* in *SGS* and in *Alps Finance,* the tribunal further stated that to insist that the arbitration proceedings cannot be commenced would amount to an

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6 *Redfern/Hunter, p.1-13.*
7 Davydenko, passim.
8 Art. 6.1 CIETAC Rules.
9 Reed/Paulson, p.49.

overly formalistic approach which would not serve to protect any legitimate interest of the parties.

Consequently, even if Claimant were to be found not to comply with the cooling off period from Clause 65 of the Contract, it still would not set a limit to the Tribunal's jurisdiction to hear the dispute at hand, since the pre-arbitration provisions are procedural rules to be dispensed with when appropriate, and not strict jurisdictional prerequisites.

3. **Alternatively, the 12-month waiting period from Clause 65 should be deemed to be satisfied, since any consultation or negotiation between the Parties was fruitless**

Claimant submits that it complied with the requirements from Clause 65, as it attempted to negotiate with Respondent.

Claimant accepted Respondent's offer to negotiate an amicable solution to the dispute over Senate Bill No. 275 impact on the Agreement. Those negotiations consisted the form of a meeting between the Parties' representatives at Claimant's offices on 11 April 2013[10]. Pursuant to Claimant's Exhibit No.7, the Parties failed to reach an agreement, and Claimant urged Respondent to continue performing the Agreement 'until a mutually beneficial solution is met'. Thus, Claimant opened itself to further negotiations with Respondent.

On 1 May 2013, Respondent forwarded a notice of termination of the Agreement to Claimant indicating no more interest in reaching a mutually beneficial solution. Claimant thus legitimately perceived Respondent's action as willingness to absolve itself of its contractual performances by means of paying liquidated damages to Claimant.

The aim of contractually agreed negotiation or consultation procedures in strict time frames is to focus on advantages of early settlement[11] rather than to provide tools for tactical maneuvers[12]. A waiting period preceding recourse to arbitration should only then be followed if there is "a promising opportunity for settlement"[13]. Otherwise, it would be pointless to decline jurisdiction. Therefore, the only obligation incumbent upon Claimant is to attempt the consultation or

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10 *Case Study, p.5.*
11 *Schreuer I, p. 232.*
12 *Reed/ Paulson, p. 49.*
13 *Schreuer II, p. 846.*

negotiation[14]. Also, Clause 65 establishes reference to negotiation as a best-effort obligation.

Claimant did attempt to negotiate the disputed issues, but there was no promising opportunity for any settlement between the Parties since the notice of termination of the Agreement. This is not changed by Respondent's surprising demand for negotiation expressed in its letter of 26 September 2013, as it came after more than 110 days of silence of Respondent after learning on 1 June 2013 of the liquidated damages claim from Claimant[15].

Claimant's position to the Disputed Sum at stake remains straightforward, and the need for orderly and cost-effective dispute resolution should not be compromised by delaying tactics of Respondent.

Consequently, the Tribunal should assert its jurisdiction over the dispute at hand as PADS is not part of the arbitration agreement and merely of a procedural character, therefore it may be discretionally dispensed with by the Tribunal.

II. The Arbitral Tribunal should not admit the Gondwandan government's amicus curiae brief for consideration during the proceedings

Claimant submits that the Arbitral Tribunal should not admit the Gondwandan government's amicus curiae brief for consideration ("**AC brief**") during the proceedings for the following two reasons:

1) the rules of evidence governing the arbitration do not contain required grounds for admitting AC brief during the proceedings;
2) pursuant to the rules of evidence governing the arbitration, AC brief should be excluded from evidence.

1. The rules of evidence governing the arbitration do not contain required grounds for admitting AC brief during the proceedings

Claimant submits that rules of evidence governing the arbitration do not contain grounds for admitting AC brief in the proceedings. The Parties have agreed to adopt the IBA Rules on the

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14 *Alps Finance v. Slovakia, para.207, Azurix v. Argentina, para.55.*

15 *Case Study, p.6.*

Taking of Evidence in International Arbitration (2010) ("**IBA Rules**")[16]. "IBA Rules do not contain any spiecialised rules for investment arbitration such as rules pertaining to the participation of amici curiae"[17]. The rules governing the arbitration must contain express provisions for AC brief to be allowed in the proceedings[18]. Amicus curiae must be governed by clearly designated rules for the sake of preserving the rule of confidentiality in the arbitration[19]. Moreover, there is a practice of including provisions of amicus curiae participation in arbitration rules and agreements[20]. Additionally, in investment arbitration case of Tunari vs. Bolivia[21], the tribunal found itself restricted to allow amicus curiae participation referring to the Singapore-USA FTA including express provisions on amicus curiae participation in the absence of similar express provisions in the Netherlands-Bolivia BIT.

2. **Pursuant to the rules of evidence governing the arbitration, AC brief should be excluded from evidence**

Should the Arbitral Tribunal decide to permit AC brief in the proceedings not acceding to the above argumentation, pursuant to Art. 9.2 of IBA Rules, this document should be excluded from evidence for the following reasons:

1) lack of sufficient relevance to the case or materiality to its outcome

Pursuant to Art. 9.2(a) of IBA Rules, relevance and materiality of evidence are required. AC Brief is manifestly irrelevant and immaterial. The Tribunal should consider the evidence irrelevant and immaterial where it is not likely to be necessary to prove the allegations presented to the case. It can be read from the argumentation of the Swiss Federal Tribunal (2004) that: "the arbitral tribunal may refuse to admit evidence (...), if the evidence is insufficient to substantiate a contention, if the fact to be proven has already been established, if it lacks relevance or yet if the tribunal, having conducted anticipatory evaluation of the evidence, comes to the conclusion that it is already convinced and the

16 *Clarifications – 6.*
17 *Ashford, p.28.*
18 *Levine, p.206.*
19 *Noussia, p.152.*
20 *Schliemann, p. 365.*
21 *Aguas del Tunari SA vs. Republic of Bolivia.*

result of the requested probative measure would not modify its decision"[22].

AC brief does not provide any information for the support of allegations. Pursuant to its wording, the Gondwandan government submits AC brief solely to establish its position[23] repeating the Respondent's claims[24]. It does not include any additional facts, research or argumentation that can support the claims. As AC brief does not bring anything new to the case, it should be excluded based on its apparent irrelevance to the case and immateriality to its outcome.

2) grounds of commercial confidentiality and special political sensitivity

Pursuant to Art. 9.2(e) of IBA Rules, the existence of IBA Rules in arbitration should be affected and interconnected with the confidentiality principle in arbitration. Accepting an AC brief jeopardizes a duty of confidentiality of the arbitration[25].

Additionally, pursuant to Art. 9.2(f) of IBA Rules, the document should be excluded from evidence on grounds of special political sensitivity. The Claimant asserts that any information that is included under AC brief is either public and therefore available for the Respondent to bring before the Tribunal and there would be no need for the third party to intervene or not public meaning of special political sensitivity.

AC brief constitutes justification for implementing regulations by the Gondwandan Government[26]. Bureaucratic and political processes associated with parliamentary work which are not public should be regarded as of political sensitivity that is purposely not disclosed. Claimant considers documents evidencing such governmental deliberations and decision-making that are not public as in case of "Cabinet confidence". Under 9.2(f) of IBA Rules, NAFTA tribunals (in cases of Chapter 11 – investment) have consistently upheld the protection of "Cabinet confidences": United Parcel Service of America vs. Canada, Merrill & Ring Forestry LP vs. Canada, Glamis Gold Ltd. vs. USA and Vito Gallo vs. Canada.

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22 *O'Malley, p.269-270.*
23 *AC brief, p.32.*
24 *Clarifications – 13.*
25 *Noussia, p.152.*
26 *AC brief, p.32; Clarifications – 13.*

3) considerations of fairness or equality of the Parties

Admitting AC brief would infringe fairness and equality of the Parties in the proceedings required under Art. 9.2(g) of IBA Rules. Those cover the instances where the State powers have been used excessively. The fundamental test in this respect is whether the conduct regarding evidence violates the ‘‘equality of arms’’ between the Parties i.e. the equal and fair opportunity to prepare one’s case[27]. In present case, AC brief wholly supports the claim of the Respondent[28] and is subjective and one-sided therefore it violates considerations of fairness and equality of the Parties

III. Respondent breached its obligation to deliver Purchase Orders for tobacco products under the Contract

Claimant submits that Respondent unlawfully terminated Distribution Agreement signed on 14th December 2010 (“**Agreement**”) as its obligations were not vitiated by the Senate Bill 275/2011 (“**275/2011 Bill**”) implementation. Respondent breached Agreement and acted in contradiction with pacta sunt servanta (“**PSS**”) principle. Respondent does not fall under the scope of exemption established in Art. 79 CISG. If the Tribunal decides that the evaluation of Respondent's breach refers to relevant provisions of UNIDROIT Principles, Claimant submits that Respondent has also breached its obligation in the light of UNIDROIT Principles.

1. Respondent did not act in conformity with the principle of pacta sunt servanda and breached usages existing between parties that are binding for them

Respondent breached the PSS principle by terminating the Contract by its letter of 1st May 2013[29]. The PSS principle that parties that entered into contractual obligations shall be bound by their agreement is: *the heart of the matter in modern times for reasons of legal certainty and stability*[30] or

27 *O'Malley, p.506.*
28 *Clarifications – 13.*
29 *Claimant's Exhibit No 8, p.20.*
30 *Chengwei Liu.*

fundamental principle of law, which is constantly being proclaimed by international courts[31]. The application of Contract may be excluded only when the avoiding party is *truly innocent*[32]. As Respondent was aware of risks for contractual relations with Claimant, it shall not be exempted from liability for damages.

2. **Respondent may not justify its non-performance of its obligations under the Agreement**

The Agreement's breach is unjustified and gives rise to its liability for damages. Art. 79 CISG stipulates that exemption for damages is granted in the case of impediment beyond the control of non-performing party which may not be reasonably expected to take into account such impediment. Firstly, the 275/2011 Bill does not amount to an impediment frustrating the purpose of the Agreement, since it did not result in a substantial decrease in Claimant's tobacco product sales. Event rendering the performance of contractual obligations more onerous is not an exempting impediment both under CISG and UNIDROIT Principles[33]. The impediment under Art. 79 CISG is *unmanageable risk or a totally exceptional event: (...) force majeure, economic impossibility or excessive onerousness*[34]. Gondwana started to enact restrictive anti-tobacco legislation in 2001 gradually increasing pressure upon tobacco manufacturers and sellers in 2002, 2004 and 2009. Where the 2009 Act provided for far-reaching packaging regulations. Nevertheless, it was openly criticized as insufficient for the protection of public health and minors[35]. Respondent was aware that Gondwanda's government embarked on persistent legislation aimed at curbing tobacco consumption. Therefore, Respondent shall be liable for the non-performance of the Contract since it does not fall under the exemption established in Art. 79 CISG.

3. **The breach of the Agreement is not justifiable under UNIDROIT Principles**

If Tribunal decides to evaluate the breach of the Contract under UNIDROIT Principles, Claimant

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31 *Liamco v. Libya.*
32 *Lookofsy, p. 130.*
33 *Niklas Lindström.*
34 *Chinese goods case*.
35 *Respondent's exhibit No. 1, p.28.*

submits that the breach may not be justified pursuant to art. 6.2.1, 6.2.2 and art. 6.2.3 UNIDROIT Principles. Art. 6.2.1 of UNIDROIT Principles stipulates that contracts shall be binding even in cases where performance becomes more onerous for one party. Art. 6.2.3 provides that in the case of hardship defined in art. 6.2.2, the Contract may be terminated only by the Court. Thus, Respondent terminated the Agreement wilfully failing to refer the case to relevant Court. Moreover, the enactment of more stringent legislation could have been reasonably taken into account by Respondent. The foreseeable alteration of contract's equilibrium in present case does not fall under the UNIDROIT Principles notion of hardship. Moreover, it was proven in similar cases that awareness of political tensions in a given region is not a justification for the termination of long-term contract[36].

IV. **Any award in favour of Claimant would be enforced by the relevant courts**

Claimant submits that the concerns raised in AC brief regarding the enforcement of a potential award in favour of Claimant are ill-founded. Claimant sees no risk for future enforcement of the award, as none of the narrowly formulated grounds for refusal set out in Art. V of the New York Convention ("**NYC**") would be satisfied.

1. **Grounds for refusal of enforcement from NYC are to be interpreted narrowly**

The regime for enforcement of foreign arbitral awards in NYC is founded on the pro-enforcement bias of state courts. Therefore, the grounds for the refusal of enforcement from NYC, including the public policy ground from Art. V(2), should be construed narrowly. The term "public policy" used in art. V(2) of NYC constitutes a reference to international public policy. Violation of such exists only when enforcement of the award would offend the notions of morality and justice[37]. Consequently, a mere non-compliance with local laws does not cause the award to violate public

36 *Commentary on UNIDROIT Principles, p.215.*
37 *Federal Supreme Court of Switzerland, 10 July 2006.*

policy[38].

2. **Enforcement of the award would not contradict public policy of Gondwana**

This arbitration involves a mere commercial dispute between the Parties with subject matter of non-payment of liquidated damages due to Claimant under the Agreement. AC brief, however, concerns an utterly different subject, i.e. the permissibility of state regulatory action toward the fulfillment of a public interest. The Parties' dispute over non-payment is hardly uncommon for the reality of contemporary commercial transactions. As such is to be dissociated from the AC brief's allegations that the present arbitration "may (…) deal with potential infringements of Gondwandan law and sovereignty."

Consequently, Claimant asserts that there is no risk that any award in favour of Claimant would not be enforced in Gondwana.

38 *Van den Berg, p.360.*