MEMORANDUM FOR RESPONDENT

TEAM NUMBER: 863R

I. The Tribunal lacks jurisdiction to hear the present dispute as Parties failed to adhere to the 12 month negotiating period set out in Clause 65

Respondent submits that the Tribunal lacks jurisdiction to deal with the dispute at hand, as the Parties have not fulfilled the mandatory pre-arbitration dispute settlement procedure set out in the underlying Contract.

To begin with, it cannot be contested that the reference to consultation and negotiation in Clause 65 of the Contract forms part of a wide arbitration agreement between the Parties. In its statement of claim, Claimant explicitly mentions Clause 65 of the Contract as an "arbitration clause," and not a "dispute settlement clause"[1]. The jurisdiction of the Tribunal derives solely from the arbitration agreement[2]. Hence, non-compliance with the arbitration agreement by the Parties inevitably results in lack of jurisdiction on the part of the Tribunal.

A pre-arbitration negotiation requirement is not so much a procedural requirement, as it is a "very much jurisdictional one"[3]. Here, Claimant has not fully complied with the 12 month waiting period set out in Clause 65 of the Contract before inititating the present proceedings. From the date when the dispute between the Parties first arose, i.e. at the earliest 1 May 2013, to the day when Claimant filed its application for arbitration, i.e. 12 January 2014, only 5 months and 11 days have elapsed, which falls short of the 12-month requirement stipulated in the Contract.

Furthermore, with its premature recourse to arbitration, Claimant blatantly neglected Respondent's offer to negotiate or consult the issue of liquidated damages expressed on 26 September 2013 in Respondent's reply to Claimant's pre-action demand letter[4]. The assertion of Claimant that the Parties already attempted to negotiate on 11 April 2013[5] does not withstand scrutiny for two reasons. First, the subject matter of the negotiations at that time referred to the renegotiation of the

1 *Application for Arbitration, p.2.*
2 *Redfern/Hunter, 1-13.*
3 *Enron v. Argetina, para. 88.*
4 *Application for Arbtiration, p.6, para. 21 in fine.*
5 *Application for Arbitration, para.22.*

Contract, including the change of the fixed tobacco products' prices[6], whereas the current dispute refers only to the non-availability of liquidated damages for reason of impossibility to perform on the part of Respondent. Second, in its letter from 12 April 2013, Claimant expressly mentioned its willingness to negotiate in future to "reach a mutually beneficial solution"[7], which means that Respondent could legitimately believe that Claimant would return to the negotiations before resorting to arbitration. Non-adherence to pre-arbitration negotiation could only then leave the availability of arbitration intact, when the party failing to negotiate does so in good faith[8]. By contrast, the fact that Claimant circumvented any negotiation in the aforementioned period only underlines its bad faith.

Respondent wishes to stress on this point that due to Claimant's market position Claimant enjoyed a stronger bargaining power than Respondent when concluding the Distribution Agreement[9] and could as well proposed a different, more relaxed wording to the pre-arbitration dispute settlement procedure in Clause 65. The fact that it failed to do so only emphasises that the intention of the Parties was to provide for a mandatory recourse to consultation and arbitration within 12 months before any arbitration could be initiated. To employ the words of a national court faced with similar matter, "by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort" and because the 12 month waiting period has not been satisfied, "the arbitration provision has not been activated"[10].

II. The Arbitral Tribunal should admit the Gondwandan government's amicus curiae brief for consideration during the proceedings

Respondent submits that the Arbitral Tribunal should admit the Gondwandan government's amicus curiae brief for consideration ("**AC brief**") during the proceedings for the reasons that AC brief is

6 *Claimant's Exhibit No.6, p.18.*
7 *Claimant's Exhibit No.7, p.19, in fine.*
8 *Welborn Clinic v Medquist Inc 301 3d 634, 638 (7th Cir. 2002).*
9 *Proc. Ord. no. 2, p.36.*
10 *Kemiron Atlantic, Inc. v. Aguakem Int'l, para. 1287, 1291.*

admissible and useful evidence for the proceedings of the arbitration.

1. **AC brief is admissible during the proceedings**

The Parties have agreed to adopt the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("**IBA Rules**")[11]. "IBA Rules do not contain any spiecialised rules for investment arbitration such as rules pertaining to the participation of amici curiae"[12]. Nonetheless, pursuant to Art. 9 of IBA Rules, "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence". Therefore, it lies within the discretion of the Arbitral Tribunal whether AC brief is to be accepted.

Pursuant to Art. 3.9 of IBA Rules, IBA Rules allow for taking evidence of documents of not a Party to the dispute. Art. 3.9 of IBA Rules refers to cases where such documents are not provided voluntarily by a person or organisation who is not a Party to the arbitration, but Respondent submits that using the doctrine of *a maiori ad minus*, AC brief which is provided voluntarily by the State of Gondwana may be admitted during the proceedings.

Moreover, the discretion of the Arbitral Tribunal with respect to admissibility of AC brief is further supported by Art. 41.1 and Art. 42.1 of CIETAC Rules binding for the Parties. Pursuant to Art. 41.1 of CIETAC Rules "the arbitral tribunal may undertake investigations and collect evidence on its own initiative as it considers necessary" and pursuant to Art. 42.1 of CIETAC Rules "the arbitral tribunal may consult experts or appoint appraisers for clarification on specific issues of the case". Where with reference to similar discretion left to the Court under Art. 34.2 of ICJ Statute: "the Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative", it is stated that amicus briefs are a useful possibility for the Court to explore[13].

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11 *Clarifications – 6.*

12 *Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide, Cambridge University Press, 2013, p. 28.*

13 *Judge Rosalyn Higgins, Respecting Sovereign States and Running a Tight Courtroom. International and Comparative Law Quarterly, 50 (2001), p. 123.*

2. **AC brief is useful evidence during the proceedings**

It is stated many times in IBA Rules that evidence shall be relevant to the case and material to its outcome (Art. 3.3 b), Art. 3.7, 3.9, 3.11, Art. 4.9, Art. 6.3, Art. 8.5, Art. 9.2). In other words, it shall be found by the Arbitral Tribunal useful for the proceedings. Amici curiae were found useful and admissible in many international arbitrations. In the past decade, the arbitral tribunals in investment arbitrations have become increasingly flexible in allowing non-parties to make written submissions as amici curiae[14]. In case Methanex vs. USA with NAFTA and UNCITRAL binding the Parties, the tribunal found that under its broad procedural discretion granted in Article 15(1) UNICTRAL Arbitration Rules that: "subject to these Rules, the arbitral tribunal may conduct the arbitration in such 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", "it has authority to accept amicus written submissions from the Petitioners"[15].

Amici curiae briefs have been permitted in investment treaty arbitrations on the basis that: 1) the proceedings have concerned issues of public interest, 2) amici curiae can assist the tribunal with special expertise, 3) the arbitral process could benefit from being perceived as more open or transparent[16]. Accordingly, the admissibility of amicus curiae evidence shall be determined in view of the benefits and transparency it can bring to the arbitration.

As to the first prerequisite, it shall be observed that amicus submissions aim to defend important public interests such as those in the case at hand governmental policy and health protection. "The significance of these public interests emphasizes the benefits of bringing them to the attention of

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14 *Christian Schliemann, Requirements for Amicus Curiae Participation in International Investment Arbitration. A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15, The Law and Practice of International Courts and Tribunals 12 (2013), p. 365.*

15 *Methanex, Decision (15 Jan 2001), para. 53.*

16 *Boris Kasolowsky, Caroline Harvey, Amici curiae in investment treaty arbitrations: authority and procedural fairness, Stockholm International Arbitration Review 2 (2009), p. 10.*

arbitrators through the amicus submissions”[17].

As stated in the content of AC brief, the arbitration touches on topics of Gondwandan public policy and may deal with potential infringements of Gondwandan law and sovereignty. Furthermore, the case relates to the actions of the Gondwandan government which were aimed at fulfilling its duty to its citizens by implementing regulations that will safeguard the public health. It is therefore important to establish and present the Gondwandan government’s position and to ensure that its views are understood by the Arbitral Tribunal[18].

As to the second prerequisite, the intervention of amicus curiae also benefits the institutional sphere by increasing the transparency achieved by the submissions. Amicus curiae briefs provide with greater credibility to the mechanism of international investment arbitration itself and make a contribution toward its future consolidation and prevalence[19]. Moreover, in case Biwater[20], the tribunal stated that: “the Petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public, which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context”.

Consequently, admitting AC brief during the proceedings will benefit the arbitration from the perspective of public interest and in view of transparency in the proceedings.

III. The obligations of Respondent under the Agreement have been vitiated due to the enactment of the Senate Bill 275/2011

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17 *Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?. Vanderbilt Journal of Transnational Law, 2008, p. 827; Mary Footer, BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment, Michigan State Journal of International Law 2009, p. 46–47.*

18 *AC brief, p. 32.*

19 *Katia Fach Gómez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest. Fordham International Law Journal, 35 (2012), p. 546.*

20 *Biwater Gauff Ltd. vs. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5 para. 34.*

Respondent has rightfully avoided the performance of its contractual obligations due to the enactment of Senate Bill 275/2011 that rendered the purpose of the Agreement frustrated. The 275/2011 Bill rendered products that were to be delivered pursuant to the Agreement incapable of being resold on Gondwandan market and constituted impediment in the light of Art. 79 CISG. The enactment of restrictive legislation was not foreseeable for parties and it was beyond the control of Respondent. Nevertheless Claimant shall bear the risk of the enactment of the 275/2011 Bill as it is obliged to deliver goods fit for their purpose, i.e. resale in Respondent's stores in accordance with Gondwandan law.

1. **The 275/2011 Bill constituted impediment in the light of Art. 79 CISG**

The 275/2011 Bill constitutes the impediment that frustrated the economic purpose of the Agreement and the balance between parties to it. It is established that the notion of impediment covers the situations of economic impediments where the performance of contract is impracticable and extremely onerous and which are commonly referred to as hardship[21]. Professor Lando specifies that Art. 79 CISG covers situation where *performance has become so burdensome that it would not be reasonable to expect performance*[22].

As the result of the enactment of the 275/2011 Bill the sale on tobacco market in Gondwanda decreased by 30 %. Consequently, the products purchased by Respondent from Claimant could not have been resold and piled in its stockrooms[23]. It has to be stressed that the Agreement was concluded mainly due to a substantial popularity of brands owned by Claimant which was deemed to be of prime quality and which guaranteed that goods purchased pursuant to the Agreements would be sold in intervals prescribed in the Agreement. The 275/2001 Bill substantially diminished the appeal of Claimant's trade marks by means of generally banning their posting and advertising

21 *Niklas Lindström, Changed Circumstances and Hardship in the International Sale of Goods; Denis Tallon in Commentary on the International Sales Law Article 79 at § 3.2.*

22 *Lando, p. 299.*

23 *Claimant's Exhibit No 8, p. 20.*

on cigarette cartons except for narrow permissions[24]. Consequently, products manufactured by Claimant were no longer as attractive as before the enactment of the 275/2011 Bill.

2. **Respondent could not have reasonably foreseen the occurrence of impediment**

Respondent could not have reasonably foreseen the enactment of the 275/2011 Bill. The Bill was proposed by one senator and met with a strong opposition both from society and tobacco manufacturers expressed by long-lasting protests before the building of Gondwandan Senate and legal action taken by tobacco producers, inter alia, Claimant before Gondwandan Constitutional Tribunal. The 275/2011 Bill was also unexpected for political experts that understood this legislation as a tool to obtain support from NGOs supporting the protection of public health[25]. All these actions reflect the unpredictability of the 275/2001 Bill, not expected by society and stakeholders on the market of tobacco products. The enactment of the Bill was specifically not predicted by Claimant which believed that it is doomed to fail in legislative proceedings[26]. The final voting on the enactment of the 275/2011 Bill is also a reflection of political divisions in regard to proposed provisions, since the Bill was enacted only by the majority of 52 to 49.

3. **The occurrence of impediment was beyond the control of Respondent**

The enactment of the 275/2011 Bill was beyond control of Respondent. Respondent is not capable of controlling or impeding legislative processes initiated in Gondwandan legislative bodies. It was only Claimant who was able to challenge the constitutionality of the 275/2011 Bill as it was a party whose intellectual property rights were affected by the Bill. Therefore, Respondent shall have taken all necessary steps to defend its interests before Gondwandan courts.

Respondent has made its best efforts to ameliorate the impact of the 275/2001 upon the contractual relations with Claimant. The latter party was informed about the legislative procedure and had an opportunity to counteract the enactment of the 275 Bill which it has taken.

4. **Claimant did not agree to deliver goods fit for their purpose**

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24 *Claimant's Exhibit No. 2, p. 13, 14.*
25 *Claimant's Exhibit No. 6 and p. 18.*
26 *Claimant's Exhibit No. 4, p. 16.*

Finally, Respondent's obligations were vitiated due to unwillingness of Claimant to deliver goods fit for their purpose, to wit: for the sales on the territory of Gondwana. As it was decided in many cases that when seller knows the final destination where goods are resold it shall adhere to the regulations that affects the characteristics of goods subject to a given contract existing in this country[27]. Claimant insisted on selling merchandise which could not have been legally resold by Respondent in Gondwanda. Respondent is known for its prominent position on the market of Gondwanda where goods were supposed to be sold[28]. Consequently, Claimant was aware that merchandise was not fit for resale in the country where Respondent carries out its business activities. Claimant shall have adhered to new packaging regulations and accept Respondent's proposition to amend contractual obligations to avoid breaching Gondwandan law and deliver goods fit for their purpose.

IV. **Any award in favor of Claimant would be at risk of enforcement**

Respondent submits that any potential award in favor of Claimant would most probably be refused enforcement by the domestic courts in Gondwana on the basis of Art. V(2)(b) of the New York Convention, i.e. contradiction with Gondwandan public policy, for two reasons: a violation of procedural public policy and contradiction with the most basic principles of Gondwandan legal system.

Firstly, it is accepted that public policy ground from art. V(2)(b) of the Convention covers also procedural aspects[29]. Should the Tribunal render an award in the present proceedings without redirecting the Parties to negotiation, such award would be made contrary to the procedure agreed upon by the Parties which is set out in Clause 65 of the Contract. Non adherence to the pre-

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27 *France 23 January 1996 Supreme Court (Sacovini/M Marrazza v. Les fils de Henri Ramel); France 13 September 1995 Appellate Court Grenoble (Caito Roger v. Société française de factoring); Germany 21 August 1995 District Court Ellwangen (Spanish paprika case).*

28 *Application for Arbitration, point 3.*

29 *Amsterdam Rechtbank.*

arbitration procedure served as a ground of enforcement in the decisions of national courts [30].

Secondly, public policy connotes the notions of public good and public interest[31]. Enforcement of an award would be refused if it offends the enforcing state's most basic notions of justice[32] or social order[33]. In particular, public policy is contradicted by violations with constitutional rights, as well as fundamental principles of civil law[34].

An award imposing damages for non-performance under a contract for reasons of adherence to national laws is equal to compelling the Respondent in enforcement proceedings to perform an illegal act[35]. Moreover, such award would be tantamount to punishing Respondent for its compliance with mandatory national laws on tobacco control. Those national laws have been deemed by the Constitutional Court of Gondwana as a fulfilment by the state of its duty to protect the citizens health and public safety, thus they serve a legitimate public interest[36] Lastly, obligating a party to pay for its compliance with universally binding laws would amount to a disregard of basic notions of law, according to which impossibility to perform absolves from liability.

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30 *Sichuan Pepsi-Cola; Sichuan Yunlv Development.*
31 *Renusagar Power, para.24; Ras Al Khaimah, paras. 246, 254.*
32 *Heibei.*
33 *Born, p.1189.*
34 *Jena, para. 503.*
35 *Steel Authority of India, para.22.*
36 *Record, p.29.*