THE INTERNATIONAL ADR MOOTING COMPETITION 2014

July – August 2014

MEMORANDUM FOR CLAIMANT

TEAM CODE: 970C

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

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

¶	Paragraph
AfA	Application for Arbitration
Cl.	Claimant's
Claimant	Conglomerated Nanyu Tobacco Ltd.
Clarifications	Procedural Order No.2
Exh.	Exhibit
No.	Number
p ./ pp.	page/ pages
Parties	Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd.
Respondent	Real Quik Convenience Stores Ltd.
SoD	Statement of Defense
the Agreement/ DA	The Distribution Agreement, Claimant's Exhibit No.1
the Bill/ Bill 275	Bill 275/2011
the State	State of Gondwana
the Tribunal	The Arbitral Tribunal
v.	Versus

INDEX OF AUTHORITIES

BOOKS/COMMENTARIES/PAPERS

Katia Fach Gomez	*Rethinking the Role of Amicus Curiae in International Arbitration: How to Draw the Line favorably for the Public Interest (2012)* *Cited as: Gomez* (¶ 12)
Leisinger Benjamin; Ingeborg Schwenzer	*Ethical Values and International Sales Contracts* *http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html#68* *Cited as: Ingeborg/ Benjamin* (¶ 19)
Obinna Ozumba	*Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency? www.dundee.ac.uk* *Cited as: Ozumba* (¶ 31)
Oscar Samour	*Public Policy Exception to Recognition and Enforcement of Arbitral Awards under the New York Convention, El Salvador* *http://consortiumelsalvador.com/descargas/consortium261.pdf*

	Cited as: Samour (¶ 27)
Peter Schlechtriem	*Commentary on the UN Convention on the International Sale of Goods, 2nd Ed. (1998)* *Cited as:* Schlechtriem (¶ 17)
Peter Schlechtriem; Ingeborg Schwenzer	*Commentary on the UN Convention on the International Sale of Goods (CISG) (2010)* *Cited as:* Schlechtriem/ Schwenzer (¶ 14, 15, 16, 18, 19)
Phanesh Koneru	*The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles (1997)* http://www.cisg.law.pace.edu/cisg/biblio/koneru.html *Cited as:* Koneru (¶ 18)
Sameer Sattar	*Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?*

	http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf
	Cited as: Sattar
	(¶ 26, 30)
Winnie (Jo-Mei) Ma	*Public Policy in the Judicial Enforcement of Arbitral Awards, Lesson for and from Australia, (2005)*
	Cited as: Winnie Ma
	(¶ 25)

REFERRED BOOKS

Bianca- Bonell	*Commentary on the International Sales Law, Giuffre: Milan (1987)*
Gary Born	*International Commercial Arbitration (Kluwer Law International, The Hague, 2009) by Gary B. Born*

CONVENTION/RULES

CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980

FCTC	WHO Framework Convention on Tobacco Control (2003)
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
UNICTRAL Rules	UNCITRAL Arbitration Rules, 2010
UNICTRAL Model Law	UNICTRAL Model Law on International Commercial Arbitration 1985
UPICC	UNIDROIT Principles of International Commercial Contracts, 2010

INDEX OF CASES

Shantou case:	*Shantou Zeng Ping Xu YueliShKuao Co. v. Wesco Polymers Ltd* [2002] H.K.E.C. 76, ¶ 17
Gao case:	*Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. at 645
Hebei case:	*Heberi Import and Export v. PolytekEng'g Co.*, [1999] H.K.L.R.D. (C.F.I.) at p. 688

ICC

ICC Award 9978.	ICC International Court of Arbitration *Award No. 9978* *<http://www.unilex.info/case.cfm?pid=1&do=case&id=471&step=Abstract>*

ICSID

Burlington Resources case:	*Burlington Resources Inc v The Republic of Ecuador* ICSID Case No. ARB/08/5
Murphy case:	*Murphy Production and Exploration Company International v Republic of Ecuador* ICSID Case No. ARB/08/4
SGS case:	*SGS SociétéGénérale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13

InterAguas case:	*AguasProvinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguasServiciosIntegralesdel Aga S.A. v. Argentine Republic, Response to a Petition for Participation as Amicus Curiae*,
	ICSID Case ARB/03/17
	(Salacuse, Kauffman, Kohler, Nikken).
Vivendi case:	*Aguas Argentina S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic, Response to Petition for Participation as Amicus Curiae,*
	ICSID Case ARB/03/19
	(Salacuse, Kauffman, Kohler), UNCITRAL (UK/Argentine BIT).
Tunari case:	*Aguas del Tunari, S.A. v. Republic of Bolivia*.,
	October 21, 2005
	ICSID Case No. ARB/02/3,
	Decision on Respondent's Objection to Jurisdiction
	20 ICSID Rev.-Foreign Inv. L.J. 450 (2005)

Malaysia

Tai Choi Yu case:	*Tai Choi Yu v. Ian Chin Hon Chong*
	[2002] 5 M.L.J. 518 (H.C.)

NAFTA

Merrill case:	*Merrill & Ring Forestry L.P. v. Canada*,
	Investor's Response to the Petition for Communication, Energy and Paperworkers Union of Canada, The United Steel Workers and the British Columbia Federation of Labour,
	(NAFTA Arb. 2008). ¶ 25

UNICTRAL

Ethyl Corp case:	*Ethyl Corp v Canada*,
	June 24th 1998,
	UNICTRAL 38 ILM 708 (1999)
UPS case:	*United Parcel Service of America INC (UPS) v. Canada, Decision of the Tribunal on Petition for Intervention and Participation as Amicus Curiae*,
	October 17, 2001
	UNICTRAL case (Keith, Fortier, Cass)

Methanex case:	*Methanex v. United States of America. Decision on Jurisdiction and Admissibility (Veeder, Rowley, Reisman),* UNCITRAL Case, August 7, 2002.

United Kingdom

Re Northern Ireland Rights

Commission case:	*Re Northern Ireland Human Rights Commission*, [2002] UKHL 25.
Taylor case:	*Taylor v. Bhail,* [1996] CLC 377.
Soinco case:	*Soinco SACI &Anr v. Novokuznetsk Aluminium Plant &Ors.* [1998] QB 406
Tinsley case:	*Tinsley v. Milligan* [1993] UKHL 3

United States

US Tobacco case:	*United States Tobacco Co. v. Minister for Consumer Affairs* [1988] 83 A.L.R. 79 (F.C.A.)

Neal-Cooper v. Texas:	*Neal-cooper Grain Co. v. Texas Gulf Sulphur Co* United States Court of Appeals, Seventh Circuit - 570 F.2d 348
Mechanised Construction case:	*American Construction Machinery & Equipment Corporation Ltd. v. Mechanised Construction of Pakistan Ltd.* 659 F. Supp 426 (SDNY, 1987)

ARGUMENTS

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

1. Contrary to Respondent's objections *[Cl.Exh.No.1]*, Claimant in the following will establish that the arbitral tribunal has jurisdiction to deal with this dispute even considering the 12 month negotiation period stipulated in DA.

A. The requirement of 12 month negotiation period is wholly complied with.

2. Pursuant to Clause 65 of the Agreement, the Parties shall initially seek a resolution through consultation and negotiation and after a 12 month period from whence the dispute arose, the Parties may submit the dispute for arbitration *[Cl.Exh.No.1]*. In the *Burlington Resources* case, it was held that the dispute occurs when the conditions are created such that, the fulfillment of the obligations of one party under an agreement becomes impossible.
3. In the present matter, the dispute arose not when the Agreement was terminated, but when the grounds that led to this termination were developed. Since, Respondent has notified Claimant about the new regulations and its consequent inability to perform the duties under the Agreement *[Cl.Exh.No.8]*, one can safely conclude that Bill 275 was the cause for termination of the Agreement by Respondent. Accordingly, the date of enforcement of Bill 275 i.e. January 1, 2013 *[Facts,¶12]* is the starting date for calculating the cooling-off period under Clause 65. Considering the date of Application for Arbitration i.e. January 12, 2014, Claimant submits that the requirement of 12 month negotiation period is wholly complied with.

B. In any event, the need for renegotiation and consultation is a mere procedural formality.

4. The 12 month period 'cooling-off' period does not impose a formal requirement on Parties. The purpose of this period is to allow Parties to engage in good-faith negotiations before initiating arbitration *[Ethyl Corp case]*. Keeping the full observance of the cooling-off period, the concept of reasonable and efficient access to arbitral instances and the right to access to arbitral justice is also impaired *[Murphy case]*. In the *SGS case,* the tribunal found the claim to observe the cooling off period as inconsistent with quick access to procedure as the parties already had the opportunity to renegotiate terms which later proved unsuccessful.
5. Similarly, in the instant dispute, the Parties on April 11, 2013 met to negotiate a possible alteration in the terms of DA owing to the changed circumstances in Gondwana and the negotiations were inconclusive. Thus, there is no need for Claimant to wait for 12 months to complete before making such application for arbitration.

C. Respondent created an understanding that the dispute could be resolved by arbitration.

6. In the DA, the Parties agreed that any dispute that arose between them would be resolved by arbitration. When the Parties met on April 11, they met to renegotiate the terms of the Agreement. Since this meeting was unsuccessful, the next step as per the DA was to bring this issue before an arbitral tribunal *[Cl.Exh.No.7]*. Therefore, Claimant had a legitimate expectation based on this understanding that after the inconclusive negotiations, arbitration would follow. In questioning the jurisdiction of

this Tribunal, pursuant to Article 1.8 of UPICC 2010, Respondent has violated the implied mutual understanding which was built on the actions of Respondent itself.

II. THE TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S *AMICUS CURIAE* BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

7. The Gondwandan government's *amicus* curiae brief must not be admitted by the Tribunal because it does not fulfill the criteria for such an admission as has been observed in arbitration proceedings over the years.

A. The subject matter of arbitration does not effectively involve public interest of Gondwana.

8. *Amicus curiae* have a role to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the parties litigating may not be able to provide *[Schliemann, p.371; UPS case]*. In the *InterAguas case*, detailed conditions for admission of *amicus curiae* briefs were laid down, that have been followed in subsequent decisions as well *[Vivendi case]*. The appropriateness of the subject matter was one of the conditions. It was held that *amicus curiae* submissions are to be allowed only when the subject matter of arbitration is deeply intertwined with issues of public interest and human rights obligations.

9. In the present matter, enforcement of an award in favour of Claimant will neither be against any public interest of Gondwana, nor will it affect people besides the parties involved in the dispute. In another case, petition for *amicus curiae* submissions was rejected even though public interest was involved in the proceedings, because the

petitioner could not fully satisfy the court of its suitability *[Tunari case]*, which is discussed in the following sub-issue.

B. The Gondwandan State does not fulfill the suitability condition for admission of *amicus curiae* submission.

10. The standard of suitability was laid down in the *InterAguas case* for non-parties seeking to become *amicus curiae* in arbitration proceedings. Herein, it was observed that suitability entails expertise, experience and independence of the non-party petitioner. The non-party must be a completely independent entity with no bias or relations with either disputing party *[InterAguas case; Mohan]*. Further, the *amicus curiae* should have no personal interest in the case as a party and must not advocate a point of view in support of one party or another *[US Tobacco case]*. It has also been opined that *amicus curiae* must keep within "the limits of a non-partisan view of a particular case" *[Re Northern Ireland Rights Commission case]*. In the mentioned case, the petition was rejected on the ground that the Commission would argue "strenuously in view of human rights and their protection" instead of simply assisting the court *[Mohan, p.17]*.

11. In the present matter, the State of Gondwana is seeking for admission of *amicus curiae* only to drive the Tribunal away from passing the award in favor of Claimant. The State is not an independent non-party that would help the court by providing unique unbiased expertise and experience and hence should not be admitted as *amicus curiae.*

C. *Amicus curiae* brief would prove detrimental to the arbitration proceedings.

12. In the following, it will be established that the admission of such a non-party as *amicus curiae* would be detrimental to the functioning of this arbitration proceedings.

i) It will undermine consensual nature of arbitration.

It has been seen that even when one party objects to the admission of *amicus curiae* the Tribunal must reject a petition for the same *[Tunari case]*. Here, Claimant is against such an admission and hence this should in effect veto the admission of Gondwandan government's *amicus curiae* brief *[Gomez, p.549]*.

ii) Protection for Claimant required.

In the present facts, the *amicus* submissions are more likely to run counter to Claimant's position and prioritize the state's position. Since it is likely to put pressure on the Tribunal to conform to the state's views, procedural protection for Claimant in such a situation becomes a necessity *[Methanex case]*. Providing Claimants certain autonomy in matter of admission of *amicus curiae* in the arbitration is one form of such procedural protection *[Gomez, p.551]*. Therefore, the *amicus curiae* brief must not be admitted by the Tribunal as it clearly jeopardizes Claimant's position.

iii) Extra burden and costs on Claimant.

The involvement of *amicus curiae* would increase the length of this arbitration as well as costs on Claimant *[Merrill case]*. This would have a negative impact on the quality of arbitration, which is not what Claimant had agreed upon with Respondent *[Article 17, UNCITRAL Rules]*.

iv) *Amicus curiae* by invitation only.

It has been opined that it is not right to accept, as *amicus curiae*, one that appears without invitation of the court *[Tai Choi Yu case]*. Petitioning for *amicus curiae*

submissions undermines locus standi of the petitioner as is seen in the case of State of Gondwana here *[Ma Wai-kwan case]*.

For all the aforementioned reasons, the Tribunal must dismiss the request of allowing to become *amicus curiae* in this arbitration.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW REGULATIONS.

13. In the following it will be established that the DA was neither impossible *[*A*]* nor illegal *[*B*]*, to perform the Agreement.

A. There was no impossibility of performance of the Agreement.

14. Respondent is exempted from liability, under Article 79(1) CISG only if the failure to perform is due to an 'impediment' which is beyond its control, unforeseeable, and unavoidable *[Schlechtriem/Schwenzer, p.1067,¶10]*.

i) Bill 275 was not an impediment beyond Respondent's control.

a. An impediment never existed.

15. Impediment is objective nature of the hindrance rather than its personal aspect *[Tallon, p. 579]*. Bill 275 did not prohibit the sale and display of tobacco products but regulated the manner of their sale, provided requirements for retail packaging and appearance of tobacco products *[Cl.Exh.No.2]*. Further, prohibition with respect to free samples was only for distribution, not for use in counter displays, thus not creating any impediment.

b. The purported impediment would not have been beyond Respondent's control.

An exemption under Article 79 is granted only if the impediment lies outside the promisor's sphere of control *[Schlechtriem/ Schwenzer, p.1067]*. Since Claimant had already incurred necessary developmental and manufacturing costs to comply with the Gondwandan regulations *[AfA, ¶14]*, the specific requirements of Bill 275 would not have been beyond Respondent's control.

ii) Purported impediment was foreseeable.

16. At the time of conclusion of contract, if the impediment is prudently foreseeable, then the parties are understood to have assumed the risk that performance may be hindered by the impediment *[Schlechtriem/Schwenzer, p.1068]*. Since Gondwana is a party to FCTC *[Clarification 16]*, it was foreseeable that it would implement legislations for tobacco products within 3 years of signing the Convention *[FCTC Articles 7, 11]*. It has been held that previous governmental regulations put a party on notice of possible further government action *[Neal-Cooper v. Texas]*. As Respondent has been dealing in tobacco products since 1999 *[AfA, p.3]*, it should have reasonably expected such a legislation before singing the 10 year long DA.

iii) Impediment and its consequences were avoidable.

17. To claim exemption under Article 79, the promisor must have taken ample steps in order to overcome the effects of the State's intervention *[Schlechtriem, p.611]*. Except promotion of branded merchandise on which renegotiate could be initiated, Respondent must have avoided the termination through proper compliance with the DA as the products were in line with the new Bill *[Cl.Exh.No.7]*. Importantly, since Claimant is an established brand in Gondwana, Respondent should have known that former's hold on the market was not going to be affected despite the new regulations *[Cl.Exh.No.7]*.

iv) In any event, Respondent is liable to pay liquidated damages.

18. As requirements of Article 79(1) are not met, Respondent is not exempted from paying damages under Article 79(5) *[Schlechtriem & Schwenzer p.1082]*. Even if the Tribunal finds that Respondent is excused for non-performance of obligations, Article 79(5) preserves Claimant's right to collect the penalty payment/liquidated damages *[ICC Award No. 9978 (1998)]* and the clause agreed upon by the Parties should be given full effect under Article 6, CISG *[Koneru, pp. 105-152]*.

B. It was not illegal to perform the Agreement.

19. Respondent contends that it cannot perform its obligations in order to comply with the new Bill *[Cl.Exh.No.6]*. However, in the following it will be shown that such performance would not be illegal. Pursuant to Article 4(a), CISG, the validity of the contract and public law regulations condemning certain behavior is not governed by CISG *[Schlechtriem/Schwenzer p.76 & Ingeborg/ Benjamin]*. Therefore, such matters have to be governed by UPICC 2010 *[AfA, p.6]*.

i) Domestic law of Gondwana is inapplicable.

20. In the present case, since the parties have agreed to submit disputes arising from their contract to arbitration, arbitrators are thereby not bound by a domestic law of Gondwana *[UPICC, Comment 4(a) to Preamble]*. Further, there is no obligation on the seller to supply goods, which conform to all statutory or other public provisions applicable in the importing State *[Mussels case]*.

ii) Performance of obligations would not infringe mandatory rules of Gondwandan law.

21. Respondent was continuously performing its obligation in Gondwana even after the introduction of Bill 275 and did not face any governmental sanctions *[AfA,¶ 13]*. Thereby, obligations of the Agreement and Bill 275 could be obeyed simultaneously proving that there was no infringement of mandatory rules of Gondwana despite the performance of the Agreement.

iii)In any event, Claimant is entitled to liquidated damages.

22. When the mandatory rule does not expressly prescribe the effects of infringement, the parties have the right to exercise contractual remedies depending on the parties' knowledge of the infringement and reasonable expectations as to the enforceability of the contract *[UPICC, Article 3.3.1(3)(e)&(g)]*. Claimant did not know the purported infringement because when it entered into DA, Bill 275 had not been introduced. Further, Respondent created a reasonable expectation of enforceability of DA in the mind of Claimant and later used Gondwandan law to not perform its obligations. Thus, Claimant is entitled to liquidated damages.

IV. AN AWARD IN FAVOR OF CLAIMANT WOULD NOT BE AT A RISK OF ENFORCEMENT IN GONDWANA.

23. Claimant is entitled to the Disputed Sum under Clause 60 (Termination Clause) of the DA as was agreed to by Respondent at the time of conclusion of the contract. An award to this effect would not be at a risk of enforcement under Article V(2)(b) of the NYC as would not be contrary to Gondwandan public policy due to the reasons explained in the following.

A. The award would not be illegal.

24. Pursuant to the phrase "...recognition or enforcement of the award in Article V(2)(b) of the NYC, it is the enforcing of the award and not the award itself that must be contrary to the applicable public policy." *[Winnie Ma]*. Here, the actual enforcement of the award is merely what has been stipulated in the DA which is in itself not contrary to the public policy of Gondwana.

25. With regard to Bill 275, the only provision that is disputed is the provision relating to branded merchandise which Respondent had already not been performing since implementation of the Bill *[Cl.Exh.No.6]*. Respondent is alleging that the award in favour of Claimant would be against public policy because the DA itself is illegal. However, since only one provision of the DA is being disputed as "illegal" so the entire contract cannot be deemed to be illegal by Respondent conveniently. The other provisions are absolutely undisputed and could have been carried out peacefully, and hence the contract is not itself illegal or against public policy in any manner *[Taylor case]*.

26. In the *Shantou case*, respondents attacked an award on the basis of an illegal contract. However the court rejected this argument. In another case, an award ordered payment of damages by one party, which was challenged on the ground that the agreement breached European competition law and hence the award that gave effect to such a contract violated public policy. However it was held that public policy exception needed a narrow approach and hence only gross breach of fundamental rule of law was an acceptable ground *[Thales case; Sattar, p.8]*. Therefore, in this case, the allegation of an illegal DA cannot have effect on the enforcement of the award.

B. The award is not contrary to public policy of Gondwana.

27. When considering the validity and enforceability of an arbitral award, there is always a presumption that it is enforceable. In fact, "pro-enforcement is itself a public policy" *[Ozumba, p.9]*. A refusal of enforcement is made in very extreme circumstances of breach and the onus of proving such non-enforcement on public policy grounds lies solely on the party claiming it. *[Gao case]*. Respondent does not fulfill these extreme circumstances requirement as the award being asked by Claimant is simply what was agreed upon by the parties under the DA, which is not illegal in any way.

28. The purpose of using the phrase "may be refused" in Article V of the NYC, gives the enforcing court the "discretion to enforce the award even if such enforcement may contravene the applicable public policy" *[Samour, p.17]*. Considering this, but not conceding that award would be against public policy, the court may exercise this discretion and enforce the arbitral award as the degree of the consequences of the public policy violation would not justify non-enforcement.

29. When the matter of enforcement of award will be considered before a court, the court would be concerned only with the award and not the underlying contract even when there is a question of illegality *[Soinco case]*. Alternatively, it must be considered that to what extent public conscience would be affronted by recognizing rights that are created by illegal transactions *[Tinsley case]*. In this case, mere awarding of liquidated damages will, in no way, harm public health, social good or public conscience, rather it would promote the ends of equity and justice by compensating Claimant for an untimely termination of the DA, as was agreed by the parties.

30. Courts have gone to great lengths to ensure that arbitral awards are enforced and their enforcement is not delayed by allegations such as Respondent *[Sattar, p.5]*. Courts

have not only shown comity in rejecting public policy claims*[Hebei case]* but also overridden considerations of comity just to enforce arbitral awards that were challenged on public policy grounds *[Mechanised Construction case]*. Therefore, an award in Claimant's favour is at no risk of enforcement whatsoever.

RELIEF REQUESTED

In light of the arguments advanced and authorities cited, Claimant requests the Tribunal to find that:

A. the Tribunal has jurisdiction to deal with this dispute;
B. the Gondwandan government's *amicus curiae* brief cannot be admitted;
C. Respondent's obligations under the Agreement were not vitiated by implementation of Bill 275 and therefore, Respondent is liable to pay liquidated damages of USD $75,000,000 to Claimant; and
D. an award in favor of Claimant would not be at a risk of enforcement.