BENCH MEMORANDUM

Confidential

Only for use by the appointed arbitrators of the 2013 FDI International Arbitration Moot
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<th>Paragraph</th>
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<tr>
<td>BIT</td>
<td>Treaty for the Mutual Promotion and Protection of Foreign Investment between the Republic of Ruritania and the State of Cronos 1997</td>
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<tr>
<td>CAM</td>
<td>Contifica Asset Management Corp.</td>
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<tr>
<td>Case</td>
<td>FDI Moot 2013 Case</td>
</tr>
<tr>
<td>CE</td>
<td>Contifica Enterprises Plc.</td>
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<tr>
<td>CS</td>
<td>Contifica Spirits S.p.A.</td>
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<tr>
<td>DIS</td>
<td>German Institution of Arbitration</td>
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<td>FBI</td>
<td>Freecity Breweries Inc.</td>
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<td>FET</td>
<td>Fair and Equitable Treatment</td>
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<td>FMCG</td>
<td>Fast-moving Consumer Goods</td>
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<td>FPS</td>
<td>Full Protection and Security</td>
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<tr>
<td>Fund</td>
<td>State Property Fund of Ruritania</td>
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<td>HRI</td>
<td>Human Health Research Institute</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICC Rules</td>
<td>ICC Arbitration Rules 2012</td>
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<tr>
<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>ILC</td>
<td>UN International Law Commission</td>
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<tr>
<td>IPRs</td>
<td>Intellectual Property Rights</td>
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<tr>
<td>MAB Act</td>
<td>Regulation of Sale and Marketing of Alcoholic Beverages 2008</td>
</tr>
<tr>
<td>NCDs</td>
<td>Non-communicable Diseases</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>SPA</td>
<td>Share Purchase Agreement</td>
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<tr>
<td>TBT Agreement</td>
<td>Agreement on Technical Barriers to Trade 1994</td>
</tr>
<tr>
<td>TRIPS Agreement</td>
<td>Agreement on Trade Related Aspects of Intellectual Property Rights 1994</td>
</tr>
<tr>
<td>USP</td>
<td>Unique Selling Point</td>
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<tr>
<td>WHO</td>
<td>World Health Organisation</td>
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<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
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PURPOSE OF THE BENCH MEMORANDUM

Dear Arbitrator,

The purpose of the Bench Memorandum at hand is to provide you with an outline of the potential arguments that may rise from the FDI Moot 2013 Case and their analysis. To achieve this, the authors\(^1\) have included some of the most common primary sources on the issues raised, in the main body of this Memorandum. Each reference is cited in full in the footnotes on its first appearance and an appropriate short form is used subsequently.

More detailed explanation of the relevant legal issues have been provided in separate boxes which you may ignore if you would prefer a shorter account. You may wish to consider this Memorandum in conjunction with the Bench Skeleton where we have adopted a more adversarial posture and/or the succinct Executive Summary which will be provided in October as a podcast.

This Memorandum is only intended as an aid to arbitrators in the evaluation of the arguments put forward by the participating teams. It is for the arbitrators to evaluate the quality of each argument and assess the advocates’ knowledge of the 2013 Case, the relevant law and their advocacy skills. Thus, in the performance of the aforesaid tasks your personal evaluation of the merits of the Case or the views of the authors of the Bench Memorandum are not to be confused with the independent assessment of each argument. Accordingly, please note that:

a. The inclusion of any argument in the Memorandum is not a testament to its quality.

b. The Memorandum does not offer an exhaustive list of relevant cases and is not a comprehensive treatise on the legal issues raised in the 2013 Case.

Finally, please feel free to contact the authors with any suggestion or criticism. We look forward to meeting you in Frankfurt.

Sincerely,

Nima Mersadi Tabari

22 September 2013

\(^1\) Monika Diehl, Nima Mersadi Tabari and Metka Potočnik.
**DRAMATIS PERSONAE**

**Claimant**
CAM, is a company incorporated in Cronos. In 2010 the shares in FBI were transferred to CAM from Contifica Spirits. CAM is a member of the Contifica Group. CAM has two directors on its board. It comprises of over thirty subsidiaries.

**CE**
Contifica Enterprises Plc, is a company incorporated in Prosperia, with its shares traded on all major stock exchanges. CE is the parent company of the Contifica Group.

**CS**
Contifica Spirits S.p.A., is a company incorporated in Prosperia. CS is a member of the Contifica Group. It manages alcoholic beverages production and is the winner of the tender for the acquisition of FBI shares. CS was the Party to the SPA prior to the assignment of its rights to CAM.

**Group**
Contifica Group, is an international conglomerate consisted of companies incorporated in more than forty jurisdictions. The Claimant and CS are members of the Group and CE is the parent company of the Group.

**Respondent**
Republic of Ruritania, is the Respondent State in the current dispute. FBI is located in its territory. Ruritania is a WTO Member and a Signatory to the International Covenant on Economic, Social and Cultural Rights.

**Cronos**
State of Cronos, is the home State of CAM. Cronos is a WTO Member.
Prosperia

Prosperia, is the country of incorporation of CE.

Fairyland

The seat of arbitration in the current dispute is the capital of Fairyland.

Fund

State Property Fund of Ruritania, is a party to the SPA. It is a separate legal entity established by an Act of the Ruritanian Parliament. The Director General and the Board of Governors are both appointed by the Government of Ruritania. The Fund may make periodic distributions to Ruritania and in the event of its dissolution all its assets and liabilities pass to Ruritania.

FBI

Freecity Breweries Inc., is Ruritania’s oldest and largest brewery. Founded in 1928 and owned by the Fund until the conclusion of the SPA on 30 June 2008; FBI produces a number of different brands of beer. Its most famous and popular brand is “FREEBREW.” It has a distinct taste due to Reyhan flavoring added during the brewing process. Reyhan is a local plant, found only in the mountainous region of Hillgamore.

HRI

Human Health Research Institute, is an institution funded by the government of Ruritania. HRI’s Executive Director and the majority of the Board of Supervisors are appointed by the Ministry of Health and Social Security of Ruritania. HRI released a report claiming that consumers of FREEBREW were exposed to a higher risk of cardiac complications due to the effects of Methylidioxidebenzovat, an active chemical ingredient found in Reyhan concentrate.

Mr Goodfellow

Mr Goodfellow, is the CEO of FBI and an employee of CS and CE.

Mr Straw

Mr Straw, is the General Counsel of the FBI, a member of the Board of Directors of CAM and an employee of CE.

New Way Party

New Way Party, is a political party which secured majority in the Ruritanian Parliament by mid-January 2010. The party’s manifesto at the time took a hard stance towards marketing and sale of alcohol.
## TIMELINE

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
</tr>
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<tbody>
<tr>
<td>1928</td>
<td>FBI is founded.</td>
</tr>
<tr>
<td>15 March 1997</td>
<td>The BIT is concluded.</td>
</tr>
<tr>
<td>2005</td>
<td>HRI interim report was sent to the Ministry of Health and Social Security of Ruritania.</td>
</tr>
<tr>
<td>Beginning of 2008</td>
<td>The Fund announced an international tender for the sale of FBI shares.</td>
</tr>
<tr>
<td>30 June 2008</td>
<td>CS won the tender and entered into the SPA with the Fund.</td>
</tr>
<tr>
<td>2008–2010</td>
<td>The output of the FBI is increased by 30%.</td>
</tr>
<tr>
<td>2010</td>
<td>FBI is recognized as the “safest place to work” in Ruritania. The title is won in a nation-wide competition.</td>
</tr>
<tr>
<td></td>
<td>FBI is integrated to the Contifica Group’s global procurement network.</td>
</tr>
<tr>
<td>1 March 2010</td>
<td>Mr Straw sent Mr Goodfellow the confidential memorandum on various mechanisms for “achieving further protection of Contifica Group’s investment in Ruritania”.</td>
</tr>
<tr>
<td>17 March 2010</td>
<td>FBI shares were assigned to CAM by CS.</td>
</tr>
<tr>
<td>April 2010</td>
<td>New Way Party secured the majority in the Ruritanian Parliament.</td>
</tr>
<tr>
<td>20 June 2010</td>
<td>The draft of the MAB Act was introduced to the Ruritanian Parliament and became public record.</td>
</tr>
<tr>
<td>April 2011</td>
<td>FBI completed the reconfiguration of the bottling line for Freebrew.</td>
</tr>
<tr>
<td>First half of 2011</td>
<td>FBI sales dropped by 60%; the company incurred $10 million loss of net income and 60% loss of revenue.</td>
</tr>
<tr>
<td>15 June 2011</td>
<td>HRI released a report regarding on the negative effects of Methylidioxidebenzovat.</td>
</tr>
<tr>
<td>30 June 2011</td>
<td>The Ministry of Health and Social Security adopted an ordinance which required any product containing Reyhan concentrate to be labelled with an explicit warning.</td>
</tr>
<tr>
<td>July 2011</td>
<td>FBI was provided with access to the 2011 HRI Report and the underlying materials, including the 2005 HRI Interim Report.</td>
</tr>
<tr>
<td>20 August 2011</td>
<td>FBI wrote to the Ministry of Health and Social Security of Ruritania pointing out flaws in the 2011 HRI Report. In the same correspondence FBI also requested temporary lifting of the labelling requirements, pending an investigation.</td>
</tr>
<tr>
<td>25 August 2011</td>
<td>The Ministry of Health and Social Security of Ruritania denies FBI’s request for the temporary lifting of the labelling requirement.</td>
</tr>
<tr>
<td>2011</td>
<td>FBI competitors started sponsoring “poisonous Reyhan” advertising campaign.</td>
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<tr>
<td>Date</td>
<td>Event</td>
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<tr>
<td>1 December 2011</td>
<td>Ruritanian Prosecutor commenced investigation against Messrs Goodfellow and Straw.</td>
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<tr>
<td>10 December 2011</td>
<td>The Claimant wrote to the President of Ruritania and its Minister of Foreign Affairs invoking violation of expropriation, FET and FPS guarantees in the BIT.</td>
</tr>
<tr>
<td>19 December 2011</td>
<td>Messrs Goodfellow and Straw were notified of the criminal proceedings, their lawyers were told they might be summoned at the beginning of 2012.</td>
</tr>
<tr>
<td>23 December 2011</td>
<td>Messrs Goodfellow and Straw were detained in Freecity Airport. A video of their arrest was aired on Free TV.</td>
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<tr>
<td><strong>Last quarter of 2011</strong></td>
<td>FBI sales fell by a further 20% with its revenue falling to 10% of the revenue for the same period in 2009.</td>
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<tr>
<td></td>
<td>FBI terminated the employment of over half of its employees.</td>
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<tr>
<td>3 January 2012</td>
<td>Messrs Goodfellow and Straw were released from detention.</td>
</tr>
<tr>
<td>15 March 2012</td>
<td>FBI partially suspended the production of FREEBREW.</td>
</tr>
<tr>
<td>31 May 2012</td>
<td>The Claimant wrote to the President of Ruritania invoking arbitration clause contained in Art. 8 BIT.</td>
</tr>
<tr>
<td>20 June 2012</td>
<td>The criminal investigation against Messrs Goodfellow and Straw was terminated.</td>
</tr>
<tr>
<td>15 September 2012</td>
<td>FBI reached an agreement with its lenders.</td>
</tr>
<tr>
<td>30 September 2012</td>
<td>Statement of Claim is filed.</td>
</tr>
<tr>
<td>15 December 2012</td>
<td>Statement of Defense is filed.</td>
</tr>
<tr>
<td>15 January 2013</td>
<td>The Arbitral Tribunal was constituted.</td>
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<tr>
<td>5 February 2013</td>
<td>The Tribunal held a Conference call with the Parties.</td>
</tr>
<tr>
<td>11 February 2013</td>
<td>Procedural Order No. 1 was issued.</td>
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<tr>
<td>21 June 2013</td>
<td>Procedural Order No. 2 was issued.</td>
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ARGUMENTS AND ANALYSIS

I. APPLICABLE LAW

1. The applicable law to the procedural matters of the Case is enshrined in the UNCITRAL Arbitration Rules and the Official Rules of the FDI Moot as administered by the DIS.2 The seat of arbitration is the capital city of Fairyland and its domestic rules of procedure, which are identical to the 2006 UNCITRAL Model Law on International Commercial Arbitration, are the lex arbitri.3 The applicable law to the substantive issues of the Case is the BIT which in turn is to be interpreted in accordance to Articles 31 and 32 of the VCLT.

The VCLT interpretation approach is a process of progressive encirclement where the interpreter starts with the ordinary meaning of the terms of the treaty, then in their context and finally in light of the treaty’s object and purpose; and through this three step inquiry relatively closes in upon the proper interpretation.4 Context here includes the text of the underlying treaty and any instrument accepted as a related instrument by both parties in connexion with the conclusion of the treaty.5 The Tribunals must also consider any subsequent agreement between the parties regarding the interpretation of the treaty; any subsequent practice in application of the treaty which establishes an agreement between the parties; and, any relevant rule of international law applicable to the relationship of the parties.6 The Tribunal is required to utilise this method of interpretation in good faith.7 If interpretation leads to “ambiguous”, “obscure” or “manifestly absurd or unreasonable” results the tribunal may then have recourse to supplementary means including the travaux préparatoires of the treaty and the circumstances of its conclusion.8 Relevant rules of international law, are defined by reference to the sources of international law recognised by Article 38(1) of the ICJ Statute. These are: general or particular international conventions and treaties signed and ratified by the parties which have established express rules applicable to the issues at hand; international customary law; general principles of international law; and finally as a subsidiary source, judicial decisions and arbitral awards of international forums (subject to the caveat that no doctrine of stare decisis applies in international law) and legal doctrine as espoused by distinguished publicists.9

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2 Case 26.
3 ibid.
4 Aguaas del Tunari SA v Bolivia, Jurisdiction (21 October 2005) ICSID Case No. ARB/02/3 [hereinafter: AdT v Bolivai (Jurisdiction)] ¶91.
5 VCLT, Article 31(2); Enron Corporation and Ponderosa Assets LP v Argentine Republic, Jurisdiction (14 January 2004) ICSID Case No. ARB/01/3 [hereinafter: Enron v Argentina (Jurisdiction)] ¶¶46-47.
7 ibid.
8 VCLT, Articles 31(1) and 32.
Please note that, the existence, nature and validity of rights or interests to be protected under the BIT must be assessed through the use of domestic legislation of Ruritania. Ruritania has signed and ratified the Paris Convention for the Protection of Industrial Property and all its amendments. Both parties are members of the WTO, therefore the provisions of the TRIPS Agreement are relevant as the minimum standard of IPRs’ protection. WTO law may be of use to the Tribunal in performing an adequate interpretation of the fair and equitable treatment or the proportionality principle in cases of indirect expropriation. This said however, the Claimant cannot rely purely on a claim of a breach of a WTO law obligation such as the TRIPS Agreement to establish a violation of the BIT.

II. JURISDICTION AND ADMISSIBILITY

A. IS THE CLAIMANT AN INVESTOR?

2. In order to satisfy jurisdictional requirements the Tribunal _ratione persona_ under Article 8 of the BIT, the Claimant will argue that it is an investor of Cronos. The Claimant will submit that it is a company incorporated in Cronos and its principle place of business is also located in Cronos. Accordingly, invoking Article 1(3)(b) of the BIT, the Claimant will submit that the appropriate test for the tribunal to apply is the formalistic test of nationality, which is manifestly satisfied by the Claimant.

3. The Respondent however, will argue that the tribunal should pierce the corporate veil since,
   a. the reorganization was concluded when the new policies could have been anticipated;
   b. the sale was designed to satisfy only the technicalities of a transfer of ownership and was not a real transaction based on a true valuation of transferred assets; and,

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11 Case 28, ¶2.
12 Case 29, ¶12; A van Aaken, “Fragmentation of International Law: The Case of International Investment Protection” (2008) 17(1) _Finnish Yearbook of International Law_ 91, 106 et seq.
13 Case 15.
15 Case 2, ¶2.
16 Case 10.
18 Case 21, ¶6.
19 ibid, ¶7.
c. it is clear from the confidential memorandum that the sale was solely intended to avail the Group of BIT protection.  

Thus, the substitution of CS by the Claimant was solely for the purpose of treaty shopping which constitutes an abuse justifying the piercing of the corporate veil by the Tribunal. The Respondent will submit that by piercing the corporate veil it is clear that the investor is neither the Claimant nor CS but the mother company in Prosperia which is not covered by the BIT. Alternatively, if the tribunal is only satisfied with piercing the veil were an abuse is manifest and thus stops at the second rung of the “corporate ladder”, ie. CS, the Claimant does not have standing to bring a claim where CS would be the potential investor.

The issue of nationality is “within the domestic jurisdiction of the State” claimed to be the State of nationality. This said however, when the nationality of an investor is challenged the tribunal is competent to decide on the issue. In investment treaty arbitration, tribunals often apply a strict formalistic test. In particular, where there is an express reference to a formalistic approach in the underlying treaty, the tribunals have so far favoured its application. In general, piercing the corporate veil is an “exceptional” process and it is not to be used unless there is “misuse of the privilege of legal personality” or “evasion of legal requirements”. Thus, the corporate veil shall remain intact and the tribunal shall follow the formalistic approach unless the Respondent submits evidence of “abuse of rights” by the investor, manifested as abuse of legal personality or corporate form, treaty or convention purposes, or the system of international investment protection.

4. The Claimant will argue that, in general, “Treaty Shopping” through “Nationality Planning” is an acceptable and common method of mitigating legal risk in international business. In particular,  

a. the Respondent was aware of the possibility of internal transfer of assets within the Group and had expressly approved the possibility of substitution of CS by other Group members in the SPA;
b. the substitution had taken place prior to the instigation of the dispute and even prior to the enactment of the relevant measures; and,
c. it should not be expected from an investor to remain unfazed by changes in the business environment which includes political development in the host State, but any actions taken in response to such developments shall not be considered as actions taken in anticipation of an eminent dispute.

Thus, the temporal aspect of the test for forum shopping is not satisfied since Nationality Planning in response to the socio-economic changes and political developments is an acceptable occurrence in international business substitution and does not amount to forum shopping. The Claimant will argue that corporate form shall remain intact.

In principle it is permissible for an investor to organise its investments in a way that it benefits from maximum protection under existing treaties.\(^{30}\) This is known as “Nationality Planning” by the investor and refers to treaty shopping prior to making an investment. But, where the claimant in an investment dispute seeks to extend the jurisdiction of the tribunal and the protections offered in a specific treaty to its investments by restructuring the investment after or in anticipation of an eminent dispute, some tribunals have favoured piercing the corporate veil to prevent forum shopping by the claimant.\(^ {31}\) Tribunals in principle have allowed a claimant to benefit from the protections of a particular treaty by prudent nationality planning but have not allowed a claimant to invoke the dispute resolution mechanism of a particular investment treaty by restructuring its investments.\(^ {32}\)

The question of abuse of legal personality or corporate form may arise in instances of “Migration of Companies,”\(^ {33}\) a term which refers to cases where nationals of third states structure their investments through a corporation incorporated in another state to benefit from the protections offered to the investors of that state. In the authors’ view, in such cases the crucial factor, which elevates the restructuring action to the level of an abuse of right and thus should allow the tribunal, to move beyond the formalistic test is the temporal aspect of the action. If such action was taken in order to invoke treaty protection after a dispute had started or in anticipation of an eminent dispute there should be a rebuttable presumption that the claimant has indulged in forum shopping.\(^ {34}\)

5. The Claimant will also argue that the Tribunal shall not admit the confidential memorandum relied upon by the Respondent to support the submission that the sale was solely intended to avail


\(^{31}\)TSA Spectrum de Argentina SA v Argentina, Award, (19 December 2008) ICSID Case No. ARB 05/5, ¶152.


\(^{34}\)Cementownia “Nova Huta” SA v Turkey, Award (17 September 2009) Ad hoc-UNCITRAL, ¶117; also see: Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of Congo, Award (1 September 2000) ICSID Case No. ARB/98/7.
the Group of BIT protection. The Claimant will argue that the Tribunal shall not consider the confidential memorandum, as it is a classic example of a “Fruit of the Poisonous Tree”. The Claimant has to satisfy the Tribunal of the applicability of the aforesaid quintessentially American doctrine in investment treaty arbitration. The most prudent line of argument for Claimant would be to raise the principle of equality of arms between the parties and argue that allowing submission of evidence attained through unsavoury and illegal methods would jeopardise this fundamental principle.

The Tribunal has broad discretion regarding the admission of evidence and it may determine admissibility, relevance and materiality of the confidential memorandum. In exercising its discretion however the Tribunal should be mindful of the effect of wrongly excluding evidence which will negatively impact the recognition and enforcement of any award rendered. The authors propose that the Tribunal must first, considering the \textit{prima facie} submissions of the Claimant, establish if the evidence was obtained unlawfully. If the Tribunal’s view is in the positive, the burden of proof will shift from the Claimant to the Respondent to argue on admissibility of the evidence.

### B. HAS THE CLAIMANT MADE A BONA FIDE INVESTMENT?

6. In light of the role that the Group has played in this case and the issues raised above the Respondent will argue that since:

- all the relevant capital expenditure from the date of the transfer of ownership of FBI to CS has been made by the Group headed by CE;
- in principle shareholding resulting from a reassignment of assets does not possess the characteristics of an investment as it is merely a financial transaction and,
- in any case the substitution in the absence of quantum meruit was merely a corporate manoeuvre to benefit from the BIT where it should not apply;

CAM’s shareholding in FBI does not amount to a \textit{bona fide} investment as it is not:

- an investment for the purposes of the BIT; and in any case,
- \textit{bona fide}.

\textsuperscript{35} See: \textit{Silverthorne Lumber Co. v United States}, 251 U.S. 385 (1920); \textit{Nardone v United States of America}, U.S Supreme Court (1938); \textit{Methanex Corporation v United States of America}, UNCITRAL, Award (3 August 2005) and Letter from Tribunal (1 June 2004).


\textsuperscript{38} Case 3, ¶8.
No common definition for investment is available in legal sources. The absence of a common definition has
the benefit of defining the term “Investment” in accordance to the object and purpose of the investment
instrument, which contains it. Accordingly, the Tribunal must consider the underlying treaty, the definition
of investment therein and the types of assets and rights which it purports to protect. Investment tribunals have,
in light of the ever more expansive definitions of investment offered in treaties, moved on from the classical
notion of direct investment as laying out money or property in a business venture in expectation of profit.

The underlying treaty in an investment dispute is *lex specialis* and as such tribunals have to apply the
express will of the parties contained in such treaty even if the expansive definition includes proprietary rights
of any sort including even claims based on sales contracts. On the other hand, it seems that the common
thread in all instances of the application of an expansive definition is the satisfaction of an association with or
link to an obvious investment. It naturally follows that, transactions which taken into isolation may not
qualify as investments may nevertheless be so considered, if all things accounted for, they may be taken as a
part of the overall operation of an investment.

7. The Claimant will argue that the BIT covers both direct and indirect investments. The transfer of
shares from CS to CAM qualifies as an indirect investment by the Claimant. Moreover, as
discussed above, securing the most effective level of legal protection by way of treaty shopping
amounts to common international business practice and thus Claimant’s investment is *bona fide.*
The Tribunal may at this point press the Claimant to clearly identify its investment, in particular
to clarify if the profits projected for the agricultural and bottling businesses are included in
Claimant’s proposed definition for investment or merely incidental to the investment.

C. **DOES THE TRIBUNAL HAVE JURISDICTION TO ADJUDICATE ON QUESTIONS
OF THE TRIPS AND TBT AGREEMENTS?**

8. Investment treaty tribunals have jurisdiction over investment treaty disputes. They do not have
the jurisdiction to decide disputes under WTO law (the TRIPS Agreement, the TBT Agreement).
The authority to interpret WTO law and State obligations arising out of it is to remain within the
jurisdiction of the WTO Dispute Settlement System. Should the Claimant advance any claims

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43 *CSOB v Slovakia* (Jurisdiction) ¶72 et seq.
on the proposition of the WTO law (i.e. alleged breach of the TRIPS Agreement) this Tribunal is to deny jurisdiction.

9. More likely however the Claimant is to use the TRIPS Agreement in an interpretative role, to further define the content of the BIT obligations that the Respondent State has undertaken.\(^{45}\) Thus, the Claimant rather than bringing a WTO law claim, will seek to enforce its BIT-derived rights. In this case, arguments forwarding the role of the TRIPS Agreement as an embodiment of a minimum standard are better placed in the FET discussion. The TRIPS Agreement has no automatic effect on an investment analysis and the Claimant should not be granted legal standing to challenge WTO law, since in principle it does not have standing under the WTO Dispute Settlement System.

D. ARE CLAIMS ARISING FROM THE SHARE PURCHASE AGREEMENT ADMISSIBLE BEFORE THE TRIBUNAL?

10. The Respondent will argue that any claim funded on an alleged breach of the SPA or any SPA provision is not admissible in the current proceedings since,

a. the SPA is a private agreement between the Fund and the CS and consequently neither of the parties to the dispute before this tribunal have standing to bring any Claim based on the SPA;\(^{46}\)

b. any dispute arising from the SPA shall be finally resolved through the SPA dispute resolution provision in accordance with the laws of Ruritania and subject to ICC Rules;\(^{47}\)

c. in any case the Fund is not an organ of the Respondent State and its undertakings cannot be enforced against the Respondent.\(^{48}\)

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\(^{46}\) Case 18; Azurix v Argentina, Award (23 June 2006) ICSID Case No. ARB/01/12, ¶384; Burlington Resources v Ecuador, Decision on Liability, (14 December 2012) ICSID Case No. ARB/08/5, ¶233; Impregilo S.p.A. v Pakistan, Jurisdiction (22 April 2005) ICSID Case No. ARB/03/3, ¶98.

\(^{47}\) Toto Costruzioni v Lebanon, Jurisdiction (11 September 2009) ICSID Case No. ARB/07/12, ¶202; Bureau Veritas v Paraguay, Jurisdiction, (29 May 2009) ICSID Case No. ARB/07/9, ¶159.

\(^{48}\) Case 5, ¶5 and 22, ¶11; CMS Gas v Argentina, Jurisdiction (17 July 2003) ICSID Case No. ARB/01/8 [hereinafter: CMS v Argentina (Jurisdiction)] ¶208; Loewen v United States of America, Jurisdiction (9 January 2001) ICSID Case
Accordingly, although the BIT contains an umbrella clause in Article 6(2),\(^{49}\) it nevertheless does not cover the SPA and as such the Claimant’s submissions regarding the guarantees provided in the SPA are not admissible.

The umbrella clause arguably provides the express agreement, which elevates otherwise “private law obligations subject to municipal laws” to “international obligations at least at part subject to International Law”.\(^ {50}\) The effect, application and even definition of the umbrella clause in practice however is subject to an ongoing debate as investment tribunals have so far adopted,

1. an expansive definition of the clause which provides for the automatic elevation of all state-undertakings to treaty obligations;\(^ {51}\)
2. a strictly narrow approach to the interpretation of the clause permitting its application only if a shared intent of the parties can be identified from the underlying treaty that provides for the elevation of a breach the relevant obligation to the level of a treaty breach;\(^ {52}\)
3. a limited definition of the underlying obligation, which only covers undertakings that the host State has entered into in its capacity as the sovereign;\(^ {53}\)
4. a holistic approach which provides for the integration of the underlying provisions of the municipal law obligation (i.e. a contract or a unilateral declaration)\(^ {54}\) under consideration, in the underlying treaty.\(^ {55}\)

11. The Claimant will argue that the SPA is admissible in the present dispute since,

a. the Fund was created by an act of the Respondent’s Parliament and its managing bodies are chosen by the Respondent and consequently the actions and undertakings of the Fund are attributable to the Respondent;\(^ {56}\)
b. in the alternative, the Fund is the alter ego of the Respondent; and,
c. the umbrella clause, elevates the obligations entailed in the provisions of the SPA to treaty level.\(^\text{57}\)

It follows that the contractual dispute resolution clause does not apply to guarantees of SPA, which have been elevated to treaty level.

### III. Merits

#### A. Do the Respondent’s Actions Amount to Expropriation of the Claimant’s Investment?

12. The Claimant will argue that its investment has been expropriated since,

   a. the Respondent has indirectly expropriated Claimant’s IPRs by adopting the MAB Act and relevant policies; and,
   
   b. even if each of the individual measures adopted by the Respondent, alone does not amount to indirect expropriation, their cumulative effect is depriving the Claimant of its investment.

The Respondent will object to both claims since,

   c. the economic effect of the impugned measures does not meet the required level of substantial deprivation; and,
   
   d. each and every measure adopted by the Respondent constitute legitimate, non-discriminatory, regulatory activities with the aim of protecting public health and thus is lawful under the BIT and does not merit compensation.

   a. **Indirect Expropriation of the Claimant’s IPRs**

13. Arguing on a claim of indirect expropriation, the parties here, will *primarily* identify and present the Tribunal with firstly with the scope of the protected rights, secondly the character of the impugned measures and thirdly the proposed test and the applicable law to the indirect expropriation claim. Consequently, the Claimant will submit that level of interference with its IPRs amounts to indirect expropriation of its investments. In considering the submissions of the parties, the Tribunal must note, it is undisputed that the Claimant acquired all IPRs including

\(^{57}\) See: *Sempra v Argentina*, ICSID Case No. ARB/02/16, Award (28 Sept 2008) ¶¶305-314; *SGS v Pakistan*, ICSID Case No. ARB/01/13, Jurisdiction (6 August 2003) ¶¶166-172; *SGS v Philippines* (Jurisdiction) ¶¶118-128.
a. the registered trade marks FREEBREW, RURILITE and HILLMAGORE STOUT for beer; and,

b. trade dress registrations with respect to the designs of the beer bottles and cans (including the iconic 0.8 FREEBREW bottle) via assignment from CS on 17 March 2010, as part of an intra-group restructuring.\(^{58}\)

14. The Respondent enacted the MAB Act on 20 November 2010.\(^{59}\) Firstly, the Claimant will submit that its IPRs are protected investment under Article 1(1)(d) of the BIT.\(^{60}\) Moreover, it will submit that, FREEBREW is well known mark since FBI, founded in 1928, is Ruritania’s oldest and largest brewery and FREEBREW is its most famous and popular brand.\(^{61}\) IPRs are not defined within the BIT. The law applicable to the validity, scope and creation of these rights is the domestic law of the host State – Ruritania.\(^{62}\) Secondly, the Claimant will submit that the MAB Act has eroded the value of its IPRs.

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Section 8 of the MAB Act states that:

“Any alcohol shall be served or sold in containers of 0.5 l. or less. The label should be plain white and all the text on the label should be the same colour and in the same font. No technique should be used to highlight the brand of the beverage.”\(^{63}\)

Ruritania’s Trade Mark Act states that:

“The Patent Court of Ruritania shall cancel registration of a trademark upon application of an interested party if the trademark has not been used for five years.”\(^{64}\)

Plain packaging of alcohol products, as adopted by the Respondent, has so far not been adopted in any jurisdiction. Alcohol consumption is however, seen as one of the four causes of NCDs globally. NCDs are not passed from person to person and are of long duration and generally slow progression. The four main types of NCDs are cardiovascular diseases, cancers, chronic respiratory diseases and diabetes. The four global risk factors are tobacco use, physical inactivity, harmful use of alcohol and unhealthy diets. Consequently, the WHO has pledged to fight the risks arising out of excessive alcohol consumption and tobacco use.\(^{65}\) Thus, the teams may draw analogies with the recent developments in the regulation of tobacco trade.

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\(^{58}\) Case 3, ¶9.

\(^{59}\) Case 3, ¶10.

\(^{60}\) Case 10.

\(^{61}\) Case 2, ¶5.

\(^{62}\) UNCTAD (2012) 22-23.

\(^{63}\) Case 18.

\(^{64}\) Case 28, ¶3.

Australia has followed the Guidelines of the WHO Framework Convention on Tobacco Control and adopted plain packaging legislation for tobacco products. Australia adopted the Tobacco Plain Packaging Act in 2011. The Act prohibits the use of non-word marks in trade of tobacco products. Trade mark proprietors may use their brand names on tobacco packaging only in standardized form (font and size). All packaging is standardized and will be presented in the same colour (drab brown), with increased health warnings (75% on the front and 90% of the back of the tobacco pack). These measures have been challenged both in national and international fora. The challenge has failed in the national forum. The relevant international investment treaty arbitration cases are still pending.

Less stringent measures were adopted by Uruguay. Uruguay has adopted legislation mandating the “single brand” representation rule and increased health warnings (80% on both sides of the pack) for all tobacco products. The measures are currently the object of an investment treaty claim, brought forward by Philip Morris, a Swiss investor. In July 2013, an ICSID tribunal has accepted its jurisdiction to hear the merits of the dispute. The industry’s challenge to Uruguay is also still pending.

As for the size of the containers, analogies may be drawn from the 2012 New York City ban on large soda containers, which ultimately failed. To this date there has been no international investment treaty arbitration case dealing with the expropriation of trade marks specifically or IPRs more generally.

15. Thirdly, the Claimant will submit that
   a. the applicable law to the claim of indirect expropriation of the Claimant’s IPRs is stated in Article 4 of the BIT;
   b. the appropriate test to be applied by the Tribunal is one of substantial deprivation in its broadest formulation; and,
   c. the Tribunal should follow the sole effect doctrine in applying the test.

The Respondent on the other hand will object to the application of the aforesaid test and propose a more stringent test.

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68 Philip Morris Asia Limited v Australia, PCA-UNCITRAL, Case No. 2012-12 [hereinafter: Philip Morris v Australia].
Article 4(1) of the BIT provides that:

“Investments by Investors of either Contracting State may not directly or indirectly be expropriated, nationalized or subjected to any other measure taken by a Contracting State or a state agency of the Contracting State the effects of which would be equivalent to expropriation or nationalization (hereinafter referred to as Expropriation) in the territory of the other Contracting State except where such Expropriation is

(a) for the public benefit;
(b) not discriminatory;
(c) carried out under due process of law; and,
(d) against compensation.”

Consequently, the Tribunal has to address the following two points in deciding on the claim of indirect expropriation:

i. To what extent is partial expropriation compensable under Article 4(1) of the BIT?
ii. Whether the level of interference amounts to expropriation?

On the issue of partial expropriation, some tribunals have rejected such an approach and some have endorsed it. When rejecting the concept, tribunals have viewed the investment as a whole. Even in cases that supported the proposition of compensation for partial expropriation, claims would be successful only when

i. the overall investment project could be disassembled into a number of discrete rights;
ii. the State has deprived the investor of a right which is covered by one of the items in the definition of investment in the applicable investment protection treaty; and,
iii. the right is capable of economic exploitation independently of the remainder of the investment.

On the issue of the level of interference, although there is no single formulation of the relevant test, there is more or less a consensus that the threshold is high. Numerous authorities describe the test as one of substantial deprivation.

16. The Claimant will argue that it is entitled to compensation for partial expropriation since,

a. its IPRs can be exploited independently; or alternatively,

b. its IPRs represent a significant part of its investment and therefore a substantial deprivation of these rights amounts to deprivation of its entire investment.

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71 Case 12.
73 S.D. Meyers v Canada, Final Partial Award, 13 November 2000, ¶283; Waste Management v Mexico, Award, 30 April 2004, ¶141; GAMi v Mexico, Award, 15 November 2004, ¶¶126-127, 131.
74 UNCTAD (2012) xi-xii.
75 Kriebaum is generally advocating for partial expropriation, but conditioning it. U. Kriebaum, “Partial Expropriation”, 8 Journal of World Investment & Trade 69 2007, 83.
77 Deutsche Bank AG v Sri Lanka, Award (October 2012) ICSID Case No. ARB/09/02, ¶¶506, 523.
Substantial deprivation in the broadest sense was referred to as “deprivation of the owner, in whole or in a significant part, of the use or reasonably-to-be-expected economic benefit of the property”. Thus the test will be satisfied by the deprivation of the investor of its fundamental rights of ownership in a manner that is not merely ephemeral. Such an interference will leave investor’s rights useless so they will be deemed expropriated. In other words, only when the economic effects equal to that of direct taking, the test is satisfied. Other tribunals, have adopted a more stringent test, requiring a radical deprivation of the economical use and enjoyment of the investment. This stringent test is satisfied if the rights related thereto have ceased to exist, the assets involved had lost their value or economic use, any form of exploitation thereof has disappeared and the economic value of the use, enjoyment or disposition of the assets or rights affected have been neutralised or destroyed.

17. The Claimant will rely on domestic trade mark law and the TRIPS Agreement to show that due to the operation of the MAB Act, it has been substantially deprived of its investment in its IPRs. In particular:

a. Articles 15 and 16 of the TRIPS Agreement provide for protection of trade mark functions such as the origin function.

b. By limiting the design of the trade marks and other IPRs, the MAB Act is diminishing their distinctiveness, thereby reducing the trade marks’ strength.

c. The MAB Act is interfering with all trade mark functions, reducing their capability to firstly inform the consumers about the quality of the goods and secondly to bring in custom and maintain or create a market share for the goods protected by the mark.


79 Metalclad Corporation v Mexico, Award (30 August 2000) ICSID Case No ARB (AF)/97/1 [hereinafter: Metalclad v Mexico (Award)] ¶103.


81 Starrett Housing Corp v Iran (1984) 4 IUSCTR 122 [hereinafter: Starrett Housing v Iran].

82 Pope & Talbot v Canada (Interim Award) ¶¶99, 102; Enron v Argentina (Award), ¶245; Compania de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic, Award (20 August 2007) ICSID Case No ARB/97/3, ¶11 and 34; Sempra v Argentina, Award (28 September 2007) ICSID Case No ARB/02/16 [hereinafter: Sempra v Argentina] ¶284; CMS v Argentina (Award) ¶¶259-264.

83 Técnicas Medioambientales TECMED SA v Mexico, Award (29 May 2003) ICSID Case No ARB (AF)/00/2, (unofficial translation from the Spanish original) [hereinafter: TECMED v Mexico (Award)] ¶115.

84 TRIPS, Articles 15(1) and 16(1); ECJ Case C-206/01 – Arsenal Football Club plc v Matthew Reed [2003] ETMR 19, 34 IIC 542 (2003), ¶51; ECJ Case C-48/05 – Adam Opel AG v Autec AG, intervenier: Deutscher Verband der Spielwaren-Industrie eV, ¶21 (ECJ, Jan, 25, 2007); ECJ Case C-236/08 to C-238/08 – Google France SARL and Google Inc v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Lutecei SARL, Google France SARL v Centre National de Recherche en Relations Humaines (CNRRH) SARL and others ¶49 (CJEU, Mar. 23, 2010); Interflora Inc., Interflora British Unit v Marks & Spencer plc (CJEU, Sep. 22, 2011) ¶34; British American Tobacco v Australia.

d. The trade mark “FREEBREW” is a well-known mark and is to be protected beyond the scope of its fundamental function. Article 6bis of the Paris Convention for the Protection of Industrial Property and 16(3) of the TRIPS Agreement support the proposition that well-known marks merit protection even in cases where there is no confusion in the market.

e. By limiting the trade mark use to plain white labels, with no highlights for trade marks permitted, the economic interests of the Claimant to build its brand (investment function) or to stimulate the demand through its marketing message (advertising function) are severely limited.

f. The MAB Act through limiting the size of alcoholic containers has effectively deprived the Claimant of its registered trade dress (trade mark) of the iconic FREEBREW bottle.

g. By virtue of Ruritania’s Trade Mark Act, Claimant’s trade marks will be open to invalidation for non-use, if not used as registered.

The Tribunal will be addressing the difficult question of delineating the concept of indirect expropriation from legitimate and non-discriminatory regulatory activities. Only the former would result in the obligation of the Respondent to pay compensation as requested by the Claimant.

Please note that, in principle there is,

i. no requirement of enrichment on behalf of the Respondent State for a finding of expropriation,

and,

ii. no consensus as to what role or weight should the nature or character of the impugned measures carry.

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87 CJEU Case C-149/11- Leno Merken BV v Hagelkruis Beheer BV, 19 December 2012, ¶29.


89 ibid.

90 Case 3, ¶9; Case 4, ¶12 and Case 29, ¶6.

91 Case 28, ¶3.


Based on this premise, some tribunals have adopted a purist reading of the sole-effect doctrine, which posits the question of effect above all other criteria.\(^9^4\) When a measure meets the standard of gravity required to establish expropriation, other factors will not influence the analysis of a finding on indirect expropriation. Other tribunals take the police powers of the state into account\(^9^5\) and consider the host State’s purpose for implementing a measure. If the measure aims to meet a particular public purpose, then protections granted to foreign investors for indirect expropriation may effectively be outweighed by the public policy concerns of the sovereign State. Finally, some tribunals adopt a mixed effect and purpose approach.\(^9^6\) The mixed approach or the contextual approach, prescribes the consideration of all factors of a particular case with the aim to seek the appropriate balance between the rights of foreign investors and the power of the host State to freely regulate in pursuing public welfare causes.

18. The Respondent will submit that the Claimant has not been substantially deprived of its investment as,

a. the Claimant is still the registered owner of its IPRs,\(^9^7\)

b. the MAB Act does not cause confusion among the consumers, therefore the fundamental functions of Claimant’s trade marks are not impaired;

c. any interference with economic functions is not severe enough as to amount to substantial deprivation;

d. although the registered trade mark regarding the iconic bottle of FREEBREW has been rendered useless its overall effect is not substantial; and,

e. the Claimant is still in control of its investment and has complete management over FBI.\(^9^8\)

In the alternative, the Respondent will submit that

f. its alcohol policy amounts to no more than legitimate, non-discriminatory regulation aimed at protection of public health.\(^9^9\)

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\(^9^4\) Phelps Dodge Corp v Iran, Award (1986) 2 IUSCTR 121 (1986), 130; : Starrett Housing v Iran, 155; Tippett v Iran, 225-226; ITT Industries Inc v Iran, Award (1983) 2 IUSCTR 348, 352; Pope & Talbot v Canada (Interim Award) ¶102; Southern Pacific Properties (Middle East) Ltd v Egypt, Award (20 May 1992) ICSID Case No ARB/84/3, ¶227; Compañía del Desarrollo de Santa Elena, SA v Costa Rica, Award (17 February 2000) ICSID Case No ARB/96/1 [hereinafter: Santa Elena v Costa Rica (Award)] ¶¶71-72; Metalclad v Mexico (Award) ¶¶106-107, 111; Patrick Mitchell v Congo, Annullment (1 November 2006) ICSID Case No ARB/99/7, ¶53; Biwater Gauff (Tanzania) Ltd v Tanzania, Award (24 July 2008) ICSID Case No ARB/05/22, ¶463; Tokios Tokeles v Ukraine (Award) ¶120 and Siemens v Argentina, ICSID Case No ARB/02/8 (6 February 2007), ¶270.

\(^9^5\) Methanex Corporation v United States of America, Award (3 August 2005) NAFTA-UNCITRAL, part IV(D) ¶15; Chemtura Corporation v Canada, Award (2 August 2010) NAFTA-UNCITRAL, ¶¶93 and 266.


\(^9^7\) Case 23, ¶16.

\(^9^8\) Nykomb v Latvia (Award) 4.3.1; PSEG Global v Turkey, Award (19 January 2007) ICSID Case No ARB/02/5, ¶278.
g. the measures adopted do not impair the fundamental function of trade marks, thus are proportional to the aim of protecting public health;\textsuperscript{100} and, 

h. in any case there are no conditions for compensating the Claimant for partial expropriation.

19. In response to points raised above, the Claimant will submit that,

a. the measures adopted were discriminatory as the Claimant was the only producer using mostly 0.8 l. bottles, while its competitors mainly used 0.5 l. bottles or cans;\textsuperscript{101}

b. the Respondent has based its actions on a single scientific study executed by the HRI which did not fully explore the effects of all ingredients and had wholly ignored the effects of Reyhan consumption in youth;\textsuperscript{102} and in any case,

c. the public purpose test is only one of the four requirements for lawful expropriation outlined in Article 4 of the BIT and satisfying it does not exempt the Respondent from paying the appropriate compensation.\textsuperscript{103}

The Tribunal has to face the issue of scientific evidence and the possibility of the use of the precautionary principle, which will allow the Respondent to regulate even where the scientific proof it relies on is not conclusive, in international investment law. The BIT is silent on this point. But, the teams can nevertheless rely on the WHO documents related to the NCDs. Within the context of the public health regulation, the precautionary principle refers to the margin of appreciation applied to state actions for the preservation of public health even in the absence of scientific certainty on correlation or causality. An example can be found in Article 19(2) of the Energy Charter Treaty. In WTO law, the Cartagena Protocol\textsuperscript{104} provides the first ‘hard’ international legal basis for the precautionary principle.\textsuperscript{105}


\textsuperscript{101} Case 4, ¶12.

\textsuperscript{102} ibid, ¶14.

\textsuperscript{103} Santa Elena v Costa Rica (Award) ¶¶71-72.

\textsuperscript{104} UNEP/CBD/EXCOP/1/L-5.

b. CREEPING EXPROPRIATION OF THE CLAIMANT’S INVESTMENT

20. The Claimant will argue that measures adopted by the Respondent resulted in creeping expropriation of its investment\(^\text{106}\) since,

a. the prohibitions and prescriptions entailed in Sections 6-8 of the MAB Act;

b. the publication of the HRI report; and,

c. the subsequent statements and actions of the Respondent;

were of a discriminatory nature and cumulatively had substantially deprived the Claimant of its investment, in particular resulting in,

a. a decrease of approximately 60% in sales of FREEBREW during the first two quarters of 2011 amounting to lost revenues of around 10 million USD\(^\text{107}\);

b. a further decrease of 20% in sales of FREEBREW leading to the dramatic fall of revenue in the last quarter of 2011 to 10% of the revenue for last quarter of 2009,\(^\text{108}\) and finally,

c. partial suspension of FBI’s production on 15 March 2012.\(^\text{109}\)

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**Creeping expropriation, involves the breach of the non-expropriation guarantee by the host State through a composite act and refers to a form of indirect expropriation with a distinctive temporal quality, whereby a series of acts by or attributable to the host State over a period of time culminate in taking or substantial deprivation of investment.**\(^\text{110}\) In other words creeping expropriation is indirect expropriation when step-by-step measures adopted by the host State, although considered individually may not satisfy the test, cumulatively result in substantial deprivation.\(^\text{111}\)

21. The Respondent will submit that impugned measure are non-discriminatory regulatory measures for protection of public health and thus do not amount to expropriation and in any case expropriation is lawful since,

a. the measures undertaken by the Respondent were:

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\(^{107}\) Case 4, ¶13.

\(^{108}\) Case 5, ¶19.

\(^{109}\) ibid., ¶20.

\(^{110}\) *Generation Ukraine Inc v Ukraine*, Award (16 September 2003) ICSID Case No. ARB/00/9, ¶20.22; *SARL Benvenuti & Bonfant v Congo*, Award (8 August 1980) ICSID Case No. ARB/77/2, ¶357; *Liberian Eastern Timber Corporation v Liberia*, Award (31 March 2006) ICSID Case No. ARB/83/2, ¶367; *Metalclad v Mexico* (Award) ¶107; *Tradex Hellas v Albania*, Award (29 April 1999) ICSID Case No. ARB/94/2, ¶191; *Santa Elena v Costa Rica* (Award) ¶172.

\(^{111}\) ibid.
i. non-discriminatory as they applied to all alcoholic drinks,
ii. for public benefit in light of the precautionary principle,
iii. through lawful means; and,
b. while compensation has not been paid yet, mere delay in payment should not render an otherwise lawful action unlawful.

In the alternative the Respondent will raise the general defence of necessity. This will be discussed below.\textsuperscript{112}

While a failure by the State to pay any compensation for direct expropriation can be seen as unlawful, in cases of indirect expropriation it does not suffice to render the measures adopted unlawful. As the very expropriatory nature of the measures is only potentially established at the time of the tribunal’s decision, the obligation to pay compensation should be deemed to arise only from the time of such finding.\textsuperscript{113}

22. In Response to the above submission, the Claimant will argue that:

a. The public benefit of the Respondent’s actions is highly suspect because of the dubious nature of the HRI Report.

b. The Respondent has failed to comply with the due process of law by its omission to consult those affected through the adoption of the new measures.

c. In any case the Respondent has manifestly failed to offer any compensation or consider appropriate measures regarding the calculation and provision of compensation prior to the adoption of the new measures as required by the BIT.\textsuperscript{114}

The Claimant’s response to the defence of necessity will be discussed below.\textsuperscript{115}

\textsuperscript{112} See: III(E).
\textsuperscript{113} UNCTAD (2012) xii.
\textsuperscript{115} See: III(E).
B. **DO THE RESPONDENT’S ACTIONS AND OMISSIONS BREACH THE FAIR AND EQUITABLE TREATMENT OBLIGATION DUE TO THE CLAIMANT’S INVESTMENT?**

Article 2(B) of the BIT provides that:

> “Each Contracting State shall in its territory [...] in every case accord Investments by Investors of the other Contracting State fair and equitable treatment as well as full protection and security under this Treaty.”

The wording of Article 2 of the BIT does not refer to international law, customary international law or the minimum treatment standard rather it contains an autonomous FET obligation, two elements of which are investor’s legitimate expectations and transparency.117

23. The Claimant will rely on the autonomous nature of the FET standard in Article 2(B) of the BIT to widen its scope of protection. The Respondent on the other hand will argue that although an autonomous standard, it is still one of a high threshold and subject to interpretation in accordance to its context. The preamble of the BIT which is to be considered by the Tribunal in interpreting the relevant provision, recognises that the creation of “*favourable conditions for investments*” and their “*encouragement and protection*” is “*essential to the prosperity of both nations*” but also the “*welfare of their nationals*”.118

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116 Case 10-11.
118 Case 9.
120 ibid.
121 Continental Casualty Co v Argentina, Award (Sept. 5, 2008) ICSID Case No. ARB/03/9 [hereinafter: Continental Casualty v Argentina (Award)] ¶261.
122 Grand River Enterprises Six Nations Ltd and others v United States (Award), UNCITRAL Arbitration (January 2011), ¶144.
24. The Claimant will submit that firstly, the Respondent has breached the BIT’s FET obligation by breaching the Claimant’s legitimate expectations. The Respondent has breached the Claimant’s legitimate expectations by adopting and implementing the MAB because:

   a. The registration of the Claimant’s IPRs in Ruritania generated proprietor’s legitimate expectations that it will be able to use its IPRs in the course of trade. As a result of the MAB Act, the Claimant has lost the right to use its IPRs in the course of trade.123

   b. The Respondent is a WTO member. The TRIPS Agreement generated legitimate expectations, including an expectation of non-discriminatory treatment that the Claimant as a registered trade mark proprietor may reasonably rely on.124

   c. The SPA Agreement generated a legitimate expectations by virtue of Article 9.2.1 that the products of the FBI do not pose any risk to the consumers, which were trumped by the Reyhan policies by the Respondent.125

   Transparency is as an element of the autonomous FET standard.126 It obligates the State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.127

25. The Claimant will submit that secondly, the Respondent has breached the BIT’s FET obligation through lack of transparency because:

   a. The Respondent did not disclose its intention of the drastic change in alcohol control policies at the time of investment. Prior to the adoption of the MAB Act in 2010, there was no indication that the Respondent planned to limit the use of IPRs either in advertising or in relation to the trade of alcohol products. All limitations were reduced to marketing and did not involve the use of IPRs in packaging. The Claimant therefore had no opportunity to take this into consideration when

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124 TRIPS Agreement, Article 15(4).
125 Case 18.
127 Tecmed v Mexico (Award) ¶154.
making its investment in 2008. Thus, the legal and business environment has drastically changed since the Claimant invested in the Respondent State.\textsuperscript{128}

b. The “plain packaging” requirement in respect with “the prohibition of highlighting” a trade mark was adopted by the Parliament and was never publicly discussed, since it was not included in the draft MAB Act.\textsuperscript{129}

c. The Respondent took inconsistent positions as to the health implications of Reyhan in food products.\textsuperscript{130} The Respondent was aware of Reyhan’s effects since 2005.\textsuperscript{131} But nevertheless it made representations through the Fund that the products of the FBI do not pose any risks to the consumers, other than those which are ordinary for similar alcoholic beverages.\textsuperscript{132}

The Tribunal must examine the alleged breaches individually but must also consider the totality of the measures and assess whether the cumulative effects of the measures taken by the Respondent amount to a violation of the FET standard.\textsuperscript{133} In performing this task the Tribunals must consider all circumstances of the Case, including the public purpose of the impugned measures.\textsuperscript{134}

26. The Respondent will submit that it is in full compliance with its FET obligations because:

a. The FET standard is not a catch all provision to compensate an investor in the case of any economic loss.\textsuperscript{135}

b. The TRIPS Agreement prescribes negative rights in intellectual property. The Claimant’s negative right to enforce its IPRs against third parties remains unaffected by the MAB Act.\textsuperscript{136}

c. The Claimant remains the registered proprietor of all of its IPRs and remains free to use its IPRs in trade as per the MAB Act requirements. The SPA guarantees do not grant additional protection to the Claimant, as the actions of the Fund are not attributable to the Respondent.

\textsuperscript{128} Case 33, ¶3.
\textsuperscript{129} Case 34, ¶5.
\textsuperscript{131} Case 4-5, ¶¶15-16.
\textsuperscript{132} Case 18.
\textsuperscript{133} \textit{Rompetrol Group N.V. v Romania}, Award (May 6, 2013) ICSID Case No. ARB/06/3, ¶238.
\textsuperscript{134} \textit{Continental Casualty v Argentina} (Award) ¶261.
\textsuperscript{135} Vandevelde (2010) 49.
d. Increasing alcohol consumption control is a new but common trend in the international community and the Respondent was implementing its regulation in order to protect its citizens (in particular youth) from alcohol abuse.\(^{137}\)

e. The measures adopted regarding Reyhan are non-discriminatory and apply to all food and drink items, not solely to the alcoholic beverages. Despite the now available contrary evidence, the Respondent acted on the assumption of the legitimacy of the HRI Report.\(^{138}\)

C. **DO THE RESPONDENT’S ACTIONS AND OMISSIONS BREACH THE FULL PROTECTION AND SECURITY OBLIGATION DUE TO THE CLAIMANT’S INVESTMENT?**

27. The Claimant will submit that it is within the scope of the jurisdiction of this Tribunal to award “Moral Damages”.\(^{139}\) Moreover, the Respondent is in manifest breach of its FPS obligations and the Tribunal shall award “Moral Damages” accordingly, because the arrest of Messrs Goodfellow and Straw is a breach of the Respondent’s FPS obligations as,

a. it constitutes lack of State action in face of imposition of physical harm in the form of unlawful arrest of the Claimant’s employees and breaching their right to liberty with no good reason;\(^{140}\) and,

b. regardless of imposition of physical harm, the Respondent failed to guarantee the security of the investment under the broad doctrine of FPS by arresting the Claimant’s employees contrary to the due process of law.\(^{141}\)

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\(^{137}\) See: WHO (2013).


\(^{140}\) See: *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) ¶¶82-95; *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990) ¶¶45-53; *Telemed v Mexico*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) ¶¶175-177; *Sempra v Argentina*, ICSID Case No. ARB/02/16, Award (28 Sept 2008) ¶¶321-324; *National Grid v Argentina*, ad hoc-UNCITRAL, Award (3 November 2008) ¶¶187-190; *BG Group v Argentina*, ad hoc-UNCITRAL, Award (24 December 2007) ¶¶323, 328.

Under international law, the aggrieved party could be compensated for an injury inflicted resulting in mental suffering, injury to feelings, humiliation, shame, degradation and loss of social position or injury to its credit or reputation. In investment arbitration, the ICSID tribunal in Desert Line v Yemen, considered the harassment and detention of the investor’s executives and the significant injury it had caused to their reputation. The tribunal decided accordingly that the physical duress in particular was malicious and thus entitled the investor to compensation for moral damages to an amount entirely within the discretion of the tribunal.

28. The Respondent will submit that it is not in breach of its FPS obligations under this BIT. Respondent concedes that it may have violated the rights of the Claimant’s employees but

a. the Tribunal lacks jurisdiction to hear this claim for moral damages as it ventures into Human Rights;
b. the BIT at hand specifically only extends FPS obligations to the investment and not the investor, and,
c. corporations as juridical persons inherently lack the capacity to suffer damages to personality rights of the nature alleged by the Claimant.

Thus, any breach of the rights of individuals employed by the investor does not amount to a breach of the Respondent’s FPS obligations.

D. IS THE LOSS OF SALE BY THE BOTTLING AND AGRICULTURAL BUSINESSES RECOVERABLE?

29. Regarding the agricultural and bottling businesses, the Tribunal must consider the following issues:

a. Are the profits projected for the agricultural and bottling businesses part of the Claimant’s investment or merely incidental to it?
b. Are the agricultural and bottling businesses subsidiaries to the Claimant or other corporations in the Group?
c. Are the alleged damages directly caused by the Respondent’s actions?
d. Has the Claimant in any way mitigated the losses?

142 Lusitania Cases, Opinion (1923) 7 RIAA 32, 40.
143 Desert Line Projects v Yemen, Award (6 February 2008) ICSID Case No. ARB05/17, ¶¶284 et seq.
144 ibid.
145 Biloune & Maine Drive v Ghana InV Ctr (1993) 95 ILR 183, ¶¶202-203. Note that this dispute was subject to Ghanaian law.
146 BIT, Article 2(b).
147 Sabahi (2011) 136.
148 Case 3, ¶8; Case 35, ¶18.
E. THE DEFENCE OF NECESSITY

30. The Respondent will submit that in any case it is excluded from any liability for the alleged breaches of its BIT obligations since,

a. the actions of the Respondent were within the exercise of the State’s legitimate regulatory powers in the face of emergency circumstances threatening the health of its citizens; and,

b. they were proportional to the magnitude of the threat and the Tribunal in considering this issue should apply the doctrine of “Margin of Appreciation” which warrants the adoption of a precautionary approach by the State.  

![Article 25 of the ILC Articles of Responsibility of States for Internationally Wrongful Acts provides that:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;
   and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.”](#)

31. The Claimant will in response submit that the Respondent may not rely on the necessity defence in this case since,

a. the customary law defence of necessity is not relevant to the matter of alcohol control as, it cannot be reasonably argued that alcohol consumption poses a grave and imminent peril to the essential interests of the State; and,

b. in any case the actions of the Respondent are not proportional.  

- END -
