GERMAN INSTITUTION OF ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES ADMINISTERED BY THE DIS

CONTIFICA ASSET MANAGEMENT CORP.
Claimant

v.

REPUBLIC OF RURITANIA
Respondent

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STATEMENT OF FACTS

(1) The Claimant in the present proceedings is a member of the Contifica Group, a major international conglomerate that has operations in over 30 countries. The parent company of the group is Contifica Enterprises Plc.

(2) FBI is Ruritania’s oldest and largest brewery, most famous for FREEBREW beer. The beer has a distinct taste due to a flavouring added during brewing, produced from a traditional local plant, Reyhan. FREEBREW contains 0.03 to 0.05 grams of Reyhan concentrate and is traditionally sold in 0.8 l bottles.

(3) FBI was owned by the State Property Fund of Ruritania (“The Fund”) until 2008. Due to a financial crisis, the Fund decided to privatize the brewery. On 30 June 2008 Contifica Spirits, a fully owned subsidiary of Contifica Enterprises Plc, was declared the winner of the tender and entered into a share purchase agreement providing for the acquisition of all shares in FBI.

(4) Following acquisition of FBI, Contifica Group made significant investments. As a result, the output of the brewery increased by 30% to 130,000,000 decaliters per annum and in 2010, the brewery was recognized as “the safest place to work” in Ruritania. In addition, FBI was integrated into the Contifica group’s global procurement network with various subsidiaries of the group supplying bottles, aluminium cans, yeast, hops and barley to FBI.

(5) On March 2010, as part of the intra-group restructuring the shares in FBI were transferred from Contifica Spirits to Claimant. On the same day Claimant acquired rights to the principal intellectual property used by FBI.

(6) On 20 November 2010, the Ruritanian parliament adopted the MAB Act, which severely restricted FBI’s ability to market and sell its products in Ruritania. As the result of implementation of this regulations FBI’s sales dropped by approximately 60% during the first two quarters of 2011 with the company incurring loss of net income of around 10 million US dollars and loss of revenue of 60%.

(7) On 15 June 2011 the HRI, a government-funded institution, released a report claiming that consumers of FREEBREW beer were exposed to a higher risk of cardiac complications due to the effects of Methyldioxidebenzovat, an active chemical ingredient found in Reyhan concentrate. The research purported to be based on analysis of data gathered from a controlled clinical study with a sample group of 150 adult males. The test groups had a daily dosage of 0.15-0.18 grams of Methyldioxidebenzovat added to their drinks.
On 30 June 2011, the Ministry of Health and Social Security adopted an ordinance which requires any product containing Reyhan concentrate to be labeled with an explicit warning that “This product contains Reyhan concentrate, consumption of which according to the results of scientific research may lead to higher risk of cardiac complications”. This decision was adopted without any consultation with FBI or other affected parties.

On 20 August 2011, FBI wrote to the Ministry of Health and Social Security pointing out numerous flaws in the analysis conducted by the HRI as well as its process of raw data collection. It also attached a report from an independent scientist, who opined that the HRI report had failed to consider other factors such as smoking, diet and weight of the individuals. FBI requested that the labeling requirement be lifted pending further investigation of the matter. On 25 August 2011 the Ministry denied this request.

Following introduction of the new labeling regulations on FREEBREW, FBI sales fell by a further 20%, with its revenue in the last quarter of 2011 falling to 10% of the revenue for the same period of 2009. FBI was forced to implement a large-scale redundancy program terminating employment of over half of its employees.

On 15 March 2012, the Board of Directors of FBI decided to partially suspend production decreasing the output to 5’000’000 decaliters per annum. As the result of the fall in revenue and profit, FBI failed to comply with financial covenants established by the credit facilities with its various lenders.

On 1 December 2011, the Prosecutor’s Office of Ruritania commenced investigation against Messrs Goodfellow and Straw, executives of FBI and Contifica Group, regarding their allegedly involvement in bribery of the officials of the State Property Fund of Ruritania in connection with the acquisition of the FBI shares.

On 23 December 2011, Messrs. Goodfellow and Straw were detained in the Freecity International Airport, when boarding their flight to Prosperia. Under Ruritanian law they are free to leave the country pending investigations.

Both executives of the Contifica Group were detained in a cell in the Freecity International Airport until 3 January 2012, when they were released without any explanation. The criminal investigation against them was terminated due to insufficient evidence on 20 June 2012. Ruritanian authorities never apologized for the detentions or offered any compensation.
PRELIMINARY OBJECTIONS

I. Applicable Law

(1) The competence of the Arbitral Tribunal (hereinafter “Tribunal”) over the dispute between Contifica Asset Management Corp. (hereinafter “CAM” or “Claimant”) and the Republic of Ruritania (hereinafter “Ruritania” or “Respondent”) is established by the Article 8 of the BIT.

(2) Article 8 allows the Investor, CAM, to choose unilaterally between litigation of its claims by a tribunal established according to the UNCITRAL Arbitration Rules (hereinafter “UNCITRAL Rules”) or other forms of dispute settlement agreed upon, provided the conditions in para. 1 are observed.

(3) This type of clause referencing UNCITRAL Arbitration is common in practice and has the effect of allowing “foreign investors to resort to investment arbitration without aid or intervention of his national State”.

(4) By commencing arbitration proceedings against Ruritania, Claimant has exercised its right of option and represents an acceptance of Ruritania’s offer to submit disputes to international arbitration.

(5) Moreover, it is clear that Ruritania has consented to the jurisdiction of this Tribunal through the insertion of Article 8 in the BIT. A textual interpretation of the wording in paragraph 2 – “unreservedly and bindingly consent” – “leaves no room to doubt the existence of the State’s consent”.

(6) The BIT is lex specialis between Cronos and Ruritania in two respects. Firstly, from a jurisdictional point of view, it supersedes the provisions of the UNCITRAL Rules, which represent lex generalis. Solely if the BIT does not offer sufficient clues in determining the

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1 Piero Bernardini, Investment Arbitration under the ICSID Convention and BITs, in Gerald Aksen, Global Reflections on International Law, Commerce and Dispute Resolution, Paris, 2005, p. 94.


3 Piero Bernardini, Investment Arbitration under the ICSID Convention and BITs, in Gerald Aksen, Global Reflections on International Law, Commerce and Dispute Resolution, Paris, 2005, p. 95.
Tribunal’s competence or lack thereof would recourse to the **UNCITRAL Rules** be admissible. Hence, the competence of the Tribunal will first be verified, first and foremost, on the grounds of the **BIT**.

(7) Secondly, from a substantive law point of view, the **BIT** is in a *lex specialis / lex generalis* rapport with customary international law as regards the investment’s standard of protection offered by **Ruritania** to the **Claimant**.⁴

(8) **Claimant** shall discuss the matters pertaining to the competence of this Tribunal following the distinction between jurisdiction and admissibility.⁵

(9) Firstly, in order to establish the Tribunal’s personal and temporal jurisdiction, as well as that over the subject-matter, **Claimant** shall prove that all conditions put forth in these three respects by the **BIT** and the **UNCITRAL Rules** are met.

(10) Secondly, in order to prove that **CAM’s** present claims put forward are admissible, **Claimant** shall address *seriatim* the objections raised by the **Respondent** in its Statement of defense.⁶

**II. The Tribunal has jurisdiction to adjudicate the present dispute.**

(11) The principle of *Kompetenz-kompetenz*

“*empowers the arbitrators to rule on their own jurisdiction, which means that challenging the existence or the validity or the scope of the arbitration agreement will not prevent the Arbitral Tribunal from proceeding with the arbitration*”.⁷

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⁶ *Statement of defense*, [2]-[12].

(12) The UNCITRAL Rules expressly provide that “the arbitral tribunal shall have the power to rule on its own jurisdiction”, therefore Claimant submits the present Tribunal is entitled to decide on the jurisdictional and admissibility stage of the case.

(13) Moreover, Claimant shall bring forth arguments proving that the Tribunal also has material, personal and temporal jurisdiction to adjudicate the dispute.

II.A. The Tribunal has jurisdiction *ratione materiae*.

II.A.1. Investments in Ruritania are governed by the BIT as *lex specialis*.

(14) The BIT concluded between Ruritania and Cronos contains a definition of what the parties consider as investment. The parties have, in effect, offered a subjective definition of the notion of investment. The Tribunal is bound first and foremost by the parties’ definition, seeing as the BIT is *lex specialis* between them.

(15) In an intensely discussed case, the Ad hoc Committee criticized the initial decision for not having taken into consideration the Malaysia/United Kingdom BIT’s interpretation of investment.\(^9\)

(16) The application of the parties’ subjective definition of investment in the BIT as *lex specialis* is a view shared by numerous tribunals in the ICSID jurisprudence.\(^10\) Claimant submits the definition of investment in Article 1 of the Ruritania-Cronos BIT is to be given priority to any objective test (such as the Salini test).\(^11\)

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\(^8\) UNCITRAL Arbitration Rules, Article 23(1).

\(^9\) *Malaysian Historical Salvors, SDN, BHD v. Malaysia*.


\(^12\) Devashish Krishan, *A notion of ICSID investment*, 1 Transnational Dispute Management 2009, p. 11.
(17) In addition, insofar as the **UNCITRAL Rules** are concerned, the provisions in terms of subject-matter jurisdiction are wide and permissive. Article 1 stipulates that disputes must be “in respect of a defined legal relationship, whether contractual or not”.  

(18) Similarly, the ICSID requirement of a legal dispute has been explained has the “existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation”.  

(19) The requirement is assuredly met for the claims under review have arisen out of **Claimant**’s legal rights conferred by the **BIT**, as detailed in the Merits. Moreover, **Respondent** has accepted that the **BIT** “constitutes a valid international treaty binding on Ruritania, which had been properly signed and ratified by both parties and entered into force”.  

**II.A.2. Claimant’s shares in FBI and its intellectual property rights used by FBI qualify as an investment under the BIT.**  

(20) Pursuant to Article 1(1) of the **BIT**,  

“investments include in particular, but not exclusively: […] (b) shares of companies and other kinds of interest in companies; […] (d) intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights;”  

(21) Thus, the **BIT** offers a broad and detailed (but non-exhaustive) definition of the notion of investment, unequivocally expressing the intent of the parties.  

(22) To begin with, **Claimant** acquired shares in **FBI** by means of an intra-group restructuring on 17 March 2010.  

**CAM** was entered into **FBI**’s register of shareholders on the same date and the acquisition was made public the very next day, observing the Ruritanian law.  

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15 **Statement of defense**, [2].  
16 **Statement of claim**, [9].
Given the express wording of Article 1(1)(b) of the BIT, Claimant asserts its acquired shares fall into the aforementioned category and, hence, qualify as investment under the BIT (since the protection also extends to indirect investments).

A crucial distinction is that Claimant’s shares in FBI are primary shares and not the ordinarily traded portfolio investments. Consequently, the standard of proof incumbent upon CAM is not to demonstrate the expansive view that portfolio investments are covered by the BIT. Rather, the standard of proof is that acquiring this particular type of shares (primary) represents an investment.

CAM’s factual framework in this respect resembles the one in AAPL v. Sri Lanka, where it was held that “the undisputed investments effected by AAPL in Sri Lanka are in the form of acquiring shares in Serendib Company”.

Alternatively, as the Tribunal observed in Société Générale v. Dominican Republic, if any restriction to the qualification of shares as investment had been intended, they would have been embodied in the BIT itself. This was done, for example, in the ASEAN Framework Agreement, which specifically excludes portfolio investments from protection. However, there is no exclusion clause in the BIT which employs the same wording as the French-Dominican BIT in the aforementioned case (“investments include in particular, but not exclusively: [...]”).

This issue has also been addressed by the Tribunal in Saluka v. Czech Republic. In that particular case, the Tribunal refused to exclude from the definition of investment even those shares purchased with the sole purpose of bare profit-making or profit-taking transactions. As a

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17 Procedural Order no. 2, [13].


19 Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, [95].

20 Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, [32].

21 Framework Agreement on the ASEAN Investment Area, Article 1(a).

22 Saluka Investments BV (The Netherlands) v. The Czech Republic, [209].
result, both portfolio investments and strategic investments are covered by the BIT, including the shares acquired by Claimant in FBI.

(28) Secondly, in the matter of the intellectual property rights (hereinafter “IP rights”) used by FBI, these were also acquired by Claimant on 17 March 2010. They include Ruritanian-registered trademarks corresponding to the brands of beer produced by FBI, as well as trade dress registrations with respect to the designs of the beer bottles and cans.

(29) Claimant contends that the principal IP rights acquired from Contifica Spirits represent a protected investment, seeing that Article 1(1)(d) of the BIT expressly refers to intellectual property rights and trademarks.

(30) Moreover, modern international investment law views the protection of intangible rights and, specifically, IP rights as fundamental to investment protection.

(31) In conclusion, the shares in FBI and the IP rights acquired by Claimant constitute protected investments under the BIT and the Tribunal has jurisdiction to decide upon the claims arising from both investments.

II.A.3. The Tribunal has jurisdiction to adjudicate the dispute arising from the Share Purchase Agreement by reason of Article 6(2) of the BIT (umbrella clause).

(32) The “umbrella clause” provisions are used by the States to incur responsibility with respect to other obligations with regard to investments of investors of the other contracting party.

(33) The umbrella clause has first received an in-depth analysis with the occasion of a pair of cases, SGS v. Pakistan and SGS v. Philippines, where the arbitral tribunals reached a different

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23 Statement of claim, [9].


26 SGS Société Générale de Surveillance v. Islam Republic of Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/01/13.
conclusion regarding the extent of the application of the clause. The former case gives a narrow interpretation, while the latter considered that a breach of a contract commitment amounts to a breach of the BIT, giving the clause a wide interpretation.

(34) The clause comprised in the BIT between The Republic of Ruritania and The State of Cronos reads:

“Each Contracting State shall fulfill any other obligation it may have entered into with an Investor or an Investment of an Investor of the other Contracting State.” [emphasis added].

(35) The provision contains the mandatory term “shall” in the same way as in the substantive Articles 2 – 5, as the Tribunal observed in SGS v. Philippines. The language used when referring to State’s conduct with respect to this provision, “shall fulfill”, is clear and straightforward, leaving no room for interpretation. The phrase “any other obligation” is capacious and refers to all kinds of obligations, as the Tribunal has found in Eureko v. Poland, and expressly points to the ones of “other” type, such as the contractual ones.

(36) According to Article 31(1) of the Vienna Convention, to which both Contracting States are parties, a text is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”. In Enron Corp. v. Argentina, the Tribunal observes that the ordinary meaning of the phrase “any obligation” refers to obligations regardless of their nature.

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29 BIT, Article 6(2).

30 SGS v. Philippines, [115].


32 Eureko v. Poland, [246].

33 Procedural Order No. 2, [10].

34 Enron v. Argentina, [274].
As the Tribunal put it in *SGS v. Philippines*, expressly concurred by the one in *Eureko v. Poland*, the Article containing the umbrella clause “means what it says”\(^{35}\).

(37) Aside the use of mandatory language, the placement of the clause within the BIT also points towards a wide interpretation, being positioned before the dispute settlement clauses – Article 7 and in continuation of the substantive obligations provisions – Articles 2 - 5. In contrast with the present situation, in *SGS v. Pakistan*, the umbrella clause was located right before the final provisions, at Article 11, being separated of the substantive clauses – contained in Articles 3 - 7 – by the dispute resolution clauses\(^{36}\). Also, the clause present in the Switzerland - Pakistan BIT was formulated in rather vague terms (such as “constantly guarantee” or “commitments it has entered into with respect to the investments”) that are less clear and categorical than those present in the Switzerland – Philippines BIT\(^{37}\), that are similar to the ones used in the Ruritania – Cronos BIT.

(38) The obligation referred to by the umbrella clause is comprised in the SPA\(^{38}\) and is assumed with regard to an Investment of an Investor of the other Contracting State, as the Treaty requires.

(39) When negotiating BITs, States pay careful attention to the wording of the provisions and when they wish to eliminate the scope of umbrella clauses, practice has shown that they know how to do so\(^{39}\). Even in *SGS v. Pakistan*, the Tribunal did reserve the possibility that a violation of a contract claim could constitute a violation of an umbrella clause\(^{40}\). The Swiss Government had a prompt reaction to the decision, sending a letter to ICSID declaring itself alarmed about the very narrow interpretation, which contravenes the intention of Switzerland when concluding

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\(^{35}\) *SGS v. Philippines*, [119]; *Eureko v. Poland*, [256].

\(^{36}\) *SGS v. Pakistan*, [169].

\(^{37}\) *SGS v. Philippines*, [119].

\(^{38}\) Statement of Claim, Exhibit No. 2.


\(^{40}\) *SGS v. Pakistan*, [172].
BITs and also is contrary to doctrine and the meaning given to similar provisions by other countries.\footnote{Axel Weissenfels, \textit{Umbrella Clauses, Seminar on International Investment Protection}, \url{http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf}, p. 22.}

(40) Since the commitments made by the State towards the Investor involve binding obligations under the applicable national law, it is consistent with the BIT for the contract claims to be incorporated and brought within its framework.\footnote{SGS v. Philippines, [117].} This interpretation is also sustained by the Preamble, according to which the Contracting Parties intend to create favourable conditions for Investments by Investors and recognize that the encouragement and protection of such Investments are essential.\footnote{BIT, Preamble.} It is a well established principle of international law that any treaty must be interpreted in order to render its clauses effective,\footnote{Competence of the General Assembly for the Admission of a State to the United Nations, p. 8.} principle often used by arbitral Tribunals when interpreting BITs.\footnote{Noble Ventures, Inc. v. Romania, [50]; Eureko v. Poland, [248]; SGS v. Philippines, [116].} Therefore, the effect of Article 6(2) cannot be overlooked.

(41) The position that the umbrella clause protects contractual obligations has been held by numerous tribunals.\footnote{SGS v. Philippines, [128]; Enron Corp. v. Argentina, [277]; Waste Management v. Mexico, [73]; Sempra Energy International v. Argentina, [101]; Eureko v. Poland, [250]; Noble Ventures, Inc. v. Romania, [54], [62]; LG&E. v. Argentina, [170]; Consorzio Groupement L.E.S.I.-DIPENTA v. Republic of Algeria, [25(ii)].} It is important to emphasize that the clause elevates contract-based obligations to treaty-based claims in what concerns the \textit{performance} of the obligation, making the respect of such contracts an obligation under the BIT.\footnote{Nathalie Bernasconi-Osterwalder and Lise Johnson, \textit{Commentary to the Austrian Model Investment Treaty}, Study commissioned by the Chamber of Labour for Vienna, Austria, November 2011, p. 13.}

\footnote{SGS v. Philippines, [126].}

(42) In conclusion, the subject-matter of the claims is within the Tribunal’s jurisdictional ambit and the Tribunal has jurisdiction *ratione materiae* to adjudicate the dispute, both with respect to the investments and the claims arising from the SPA.

**II.B. The Tribunal has jurisdiction *ratione personae***

(43) In order to establish the Tribunal’s personal jurisdiction, **Claimant** must verify that the conditions in this respect are met both under **UNCITRAL Rules** and the **BIT**.

(44) Firstly, the **UNCITRAL Rules** are very broad and only refer to the wide notions of *parties*, *claimant* and *respondent*. This is to be expected given their application to “a wide variety of circumstances covering a broad range of disputes, including [...] investor-State disputes”.

(45) Therefore, the requirement put forward by the **UNCITRAL Rules** is unquestionably met, both with respect to **Claimant** and **Respondent**.

(46) In order to assess the Tribunal’s jurisdiction under the **BIT**, **Claimant** shall firstly address the definition of investor contained in the **Treaty**.

(47) Secondly, it shall prove that Ruritania also bears international responsibility for the **Fund**’s actions (in this case, the **Fund**’s non-performance of the obligations it undertook in the **SPA**). This is a necessary step for the claims arising of the **SPA** given that it was concluded with the **Fund** and not directly with **Ruritania**.

**II.B.1. Claimant qualifies as an investor under the BIT**

(48) Under Article 1(3) of the **BIT**, one meaning of investor is

“any entity established in accordance with, and recognized as a legal person by the law of that Contracting State, irrespective of whether or not its liabilities are limited and whether or not it is...”

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a profit seeking company, agency, association or firm; which is the owner, possessor or shareholder of an Investment in the territory of the other Contracting State”.\(^51\)

(49) In determining whether or not \textbf{Claimant} is within the scope of this definition with respect to Cronos, it is imperative that it be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.\(^52\) This type of interpretation is provided by the Vienna Convention on the Law of Treaties which has been ratified by both Ruritania and Cronos.\(^53\)

(50) The ordinary meaning of the term \textit{entity}, as highlighted by the Tribunal in Tokios Tokelès v. Ukraine, is that of “\textit{a thing that has a real existence}”. The meaning of \textit{establish} is “\textit{to set on a permanent or secure basis; bring into being, found (a…business)}”.\(^54\)

(51) \textbf{CAM} fulfills both of these requirements seeing that it is incorporated under the laws of Cronos\(^55\). \textbf{Respondent} has not contested this fact. Moreover, the \textbf{Procedural Order no. 2} has also shed light on the fact that \textbf{CAM} (through its predecessor) has been founded in Cronos in conformity with its laws and regulations since 1983.\(^56\)

(52) Finally, \textbf{Claimant} also fulfills the final requirement of Article 1(3) of the \textbf{BIT} since it is the sole shareholder in \textbf{FBI}\(^57\) and owner of the IP rights used by \textbf{FBI}, both of which have been revealed to constitute investments under the \textbf{BIT} in the previous section.

\(^{51}\) \textit{BIT}, Article 1(3)(b).

\(^{52}\) \textit{VCLT}, Article 31.

\(^{53}\) \textit{Procedural Order no. 2}, [10].

\(^{54}\) \textit{Tokios Tokelès v. Ukraine}, [28].

\(^{55}\) \textit{Statement of Claim}, [2].

\(^{56}\) \textit{Procedural Order no. 2}, [24].

\(^{57}\) \textit{Statement of Claim}, [7], [9].
II.B.2. Ruritania incurs international responsibility for the Fund’s conduct

(53) Under Article 1 of ILC Articles, international responsibility is entailed for every internationally wrongful act of a State, including the case where the obligation is owed to entities other than a State.\(^{58}\) Therefore, ILC Articles are indeed applicable to investment arbitrations,\(^{59}\) as several arbitral tribunals have found.\(^{60}\)

(54) In order for Ruritania to incur international responsibility for the Fund’s non-performance of its obligations set forth in the SPA (a contract concluded between Claimant’s predecessor, Contifica Spirits, and the Fund), CAM must show that the Fund’s conduct is attributable to the state.

(55) Attribution of conduct to a state as dealt with by the provisions of ILC Articles is widely viewed as being codification of customary international law and not just progressive development.\(^{61}\)

(56) Given that the Fund is a separate legal entity with its own legal personality, it cannot be viewed as a de jure organ of Ruritania. Owing to this fact, the conduct of the Fund cannot be attributed to Respondent on the basis of Article 4 of ILC Articles which regulate conduct of organs of the State.

(57) Nonetheless, Article 5 of ILC Articles provides that the conduct of an entity which is not an organ of the State, but is empowered by the law of the State to exercise elements of governmental authority (such as the Fund) shall be considered an act of the State.


\(^{60}\) Noble Ventures, Inc. v. Romania, [69]; Emilio Augustin Maffezini v. The Kingdom of Spain, [78]; Eureko v. Poland, [127][128].

\(^{61}\) Noble Ventures, Inc. v. Romania, [69].
(58) Therefore, the standard of proof incumbent upon Claimant is that the Fund exercises certain elements of governmental authority, altogether without being a de jure instrumentality of Ruritania.62

(59) As highlighted in the Statement of Claim, the governmental authority exercised by the Fund was that of carrying out the privatization of FBI (through the conclusion of the SPA). The ordinary, dictionary meaning of privatization is that of “removing something from government control and place it in private control or ownership”.63 As a result, it appears as evident that the Ruritanian government has decided to delegate the privatization of FBI to the Fund (a state establishment created by an Act of the Parliament of Ruritania).64

(60) This conclusion is also buttressed by the factual framework – a financial crisis with devastating effect on Ruritania’s economy which had led to a significant budget deficit.65 Under these circumstances, the Ruritanian government reacted promptly and singlehandedly decided that “a number of assets should be privatized”.66 The Fund was merely a vehicle for the execution of the government’s decision. As the Tribunal emphasized in Noble Ventures v. Romania, no relevant distinction is to be drawn between such an empowered public institution and a government ministry, in terms of the state’s international liability.67

(61) Moreover, under Article 5 of ILC Articles,

“An entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State”.68


64 Procedural Order No. 2, [5].

65 Statement of Claim, [6].

66 Ibid.

67 Noble Ventures v. Romania, [79].

68 ILC Articles, Article 5, [7].
(62) Therefore, the condition of the Fund exercising governmental authority is met, which translates into Ruritania incurring international liability for the Fund’s non-performance of the SPA.

(63) Alternatively, should the Tribunal consider that the Fund did not exercise governmental authority, Claimant submits that Ruritania is nevertheless internationally responsible for the non-performance of the SPA. This comes by reason of the control exercised by Ruritania over the Fund in implementing the privatization and in concluding the SPA.

(64) Article 8 of ILC Articles qualifies as an act of the State under international law any conduct “on the instructions of, or under the direction or control of, that State”.

(65) The effective control test was also used by the ICJ69 and, more pertinently, in investment disputes.70 The ICSID Tribunal has concluded in the latter respect that, in order to determine whether Pakistan exercised such control over the state-owned company, a detailed analysis of the connections between the two was needed.

(66) In the present case, the connections between the Fund and Respondent could not be more telling. The Fund’s principal managing bodies, the Board of Governors and the Director-General, are both appointed by the Government.71 It may make periodic distributions to Ruritania and in the event of dissolution, all its assets and liabilities pass to Ruritania.72

(67) Consequently, the interplay between Respondent and the Fund is not that of mere influence or cooperation. Respondent exercises actual control over the Fund’s actions, as evidenced most clearly when it directed the Fund to privatize the assets of FBI.73

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69 Case Concerning Military and Paramilitary Activities in and against Nicaragua, [112]-[113].
70 Bayindir Insaat Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan, [125].
71 Procedural Order No. 2, [5].
72 Ibid.
73 Statement of Claim, [6].
(68) As a result, either through Article 5 or Article 8 of the Articles, the Fund’s conduct is indeed attributable to Ruritania, conferring the Tribunal the jurisdiction ratione personae to decide on the claims arising out of the SPA.

II.C. The Tribunal has jurisdiction ratione temporis

(69) In conformity with Article 20 of the UNCITRAL Rules, “[t]he claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim.”

(70) By submitting its statement of claim on 30 September 2012, Claimant exercised its right conferred by aforementioned Article 20, no additional notice of arbitration being required.

(71) Insofar as the Treaty is concerned, Respondent itself has accepted that “the BIT constitutes a valid international treaty binding on Ruritania, which had been properly signed and ratified by both parties and entered into force”.74

(72) In any event, no issue arises in this respect since the dispute began well after the ratification of the BIT (March 1997).

(73) Additionally, Claimant has observed the cooling off period of three months provided by Article 8(1) of the BIT. CAM has repeatedly offered an amicable settlement of the dispute on 10 December 2011 and 31 May 2012, respectively.75 Claimant’s efforts in this respect were futile, needing thus to commence arbitral proceedings.

(74) To conclude, the dispute falls within the jurisdictional scope of the Tribunal in all three respects (ratione materiae, ratione personae and rationae temporis), the Tribunal hence being competent to adjudicate on the admissibility of the claims.

74 Statement of Defense, [2].

75 Statement of Claim, [27].
III. Respondent’s objections to the admissibility of CAM’s claims are unsuccessful.

(75) In its Statement of defense, Respondent argues that the present claims represent an abuse of process due to it being “a classic example of the deplorable practice of treaty shopping”. In this respect, Ruritania contends that the sole purpose for the transfer of the shares in FBI was that of commencing arbitration.

(76) Claimant shall prove, firstly, that invoking the objection of abuse of process cannot constitute a valid ground for this Tribunal to refuse to adjudicate the dispute.

(77) Alternatively, Claimant’s acquisition of shares does not constitute an abusive investment.

(78) In any event, Claimant is a protected investor under the BIT due to the lack of a denial of benefits clause.

III.A. The objection of abuse of process cannot constitute a valid ground for this Tribunal to refuse to adjudicate the dispute.

(79) In international investment law, the abuse of process referred to by Respondent is understood as an apparent investment, an investor’s creation of a legal fiction that grants unentitled access to an international arbitration procedure.

(80) The far-reaching character of such an objection has been emphasized in Rompetrol NV v. Romania, according to which

“it would entail an ICSID Tribunal to, after having determined conclusively (or at least prima facie) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear the dispute, deciding nevertheless not to entertain the application to hear the dispute”.

(81) Claimant submits that the present Tribunal follow the same reasoning as the ICSID Tribunal and reject this objection for it would be impossible to fully assess and premature to decide upon this issue at the preliminary stage, without sufficient supporting evidence.

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76 Statement of Defense, [3].

77 The Rompetrol Group N.V. v. Romania, [115].
(82) In other words, **Claimant** contends that invoking the objection of abuse of process cannot constitute a valid ground for a Tribunal to refuse to hear the dispute despite having already found itself competent in terms of jurisdictional requirements.

**III.B. Claimant’s acquisition of the shares in FBI does not constitute an abusive investment.**

(83) Should the Tribunal consider that deciding at this preliminary stage on the allegedly abusive character of **Claimant’s** acquisition of the shares is appropriate, **Claimant** submits that its conduct does not constitute an abuse of process.

(84) Before discussing such matters, it is essential that the Tribunal keep in mind that the burden of proof regarding an alleged abuse of process lies with the **Respondent**.  

(85) Treaty shopping has been defined in doctrine as

> “the routing of an investment and the associated income through a particular country in order to take advantage of treaty benefits intended for the residents of that country and its treaty partners.”  

(86) To begin with, the acquisition of shares by **Claimant** after an intra-group restructuring does not represent, in and of itself, a violation of international investment, being neither illegal nor unethical as such.  

What is more, such transfers of investments have become “a normal feature of a global economy and the transfers are not as such disqualified from treaty protection”.  

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Furthermore, the sort of nationality planning which Respondent condemns is nowadays seen “as much a standard feature of diligent management as tax planning”. 82

(87) As emphasized in the case of Pac Rim v. El Salvador, the practice of treaty shopping may constitute an abuse of process if the sole purpose of the transfer of investment is

“to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration”. 83

(88) Nevertheless, Claimant’s situation in the case at hand is vastly different on two grounds. Firstly, the aim pursued by Contifica Group in restructuring its subsidiaries was not that of forum shopping, but that of obtaining several tax benefits. The saying “treaty shopping is acceptable, forum shopping is not” 84 is entirely applicable here and a great deal of importance is placed. The highly confidential memorandum (Exhibit RX1) obtained by Respondent by means of an abusive criminal investigation 85 is very clear in this respect, making express mention of the reasoning behind the restructuring – the tax consequences. 86

(89) Secondly, Claimant had no knowledge of any events with a negative impact on the investment prior to the transfer of shares. The transfer took place on 17 March 2010, two months after the New Way party took a hard stance towards the marketing and sale of alcohol and, subsequently, secured the majority in the Ruritanian parliament. Nonetheless, Claimant could not have reasonably relied on the political manifestos of a party during its electoral campaign to conclude that a future dispute would undoubtedly emerge. In addition, one of the two pre-election surveys estimated the New Way Party would secure 190-200 places in the Parliament, therefore less than half, casting a shadow of doubt over the desired regulations.

83 Pac Rim v. El Salvador, [2.100].
85 Statement of defense, [8].
86 Exhibit RX1.
(90) Furthermore, CAM could not have in any way predicted that the “tougher regulations” to be adopted would, in fact, equate to an expropriation. The earliest date at which Claimant could have hinted at this fact was on 20 June 2010 when the draft of the MAB Act first became public record. This date, however, is still three months after the transfer of shares took places. Additionally, it is arguable whether CAM could have relied on this draft given that the Act passed was adopted by only 207 of the 400 members.

(91) In addition, the low purchase price of the shares is not indicative of an abuse. Similarly to SG v. Dominican Republic, the purchase price is not the only element involved in the transaction. There are additional elements involved in the transaction, such returns reinvested or other kinds of interest in companies, all of which fall within the definition of investment under Article 1 of the BIT.

III.C. Claimant is a protected investor under the BIT due to the lack of a denial of benefits clause.

(92) A denial of benefits clause “permits a state to deny the benefits of the treaty to a company which is not controlled from the state of incorporation”. 

(93) As has been emphasized in both doctrine and jurisprudence, “the absence of such a provision is indicative of an expansive conception of nationality of legal entities and is a deliberate product of the investment protection policy […], which is aimed at providing protection to the broadest set of foreign investors possible”.

(94) To conclude, Claimant submits that the lack of such a clause in the BIT indicates the Tribunal should consider CAM a protected investor in all cases.

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87 Société Générale v. Dominican Republic, [36].
88 Muthucumarswamy Sornarajah, The International Law on Foreign Investment, p. 329
89 Aguas del Tunari, S.A. v. Republic of Bolivia; Saluka v. Czech Republic;
MERITS OF THE CLAIM

I. The change in Ruritania’s laws and regulations breaches the obligations assumed by Ruritania through the BIT.

I.A. Ruritania has violated Article 4 of the BIT regarding expropriation of investments.

I.A.1. The concept of indirect expropriation

(96) A State’s interference with private property may amount to expropriation even if its actions do not affect the legal title of property or even if the State denies such intention. Expropriation must be analyzed from a consequential perspective rather than in formal terms, being possible to effect by a series of actions instead of through formal decrees.

(97) Indirect expropriation occurs when the value of an investment is substantially diminished by a State’s action, without necessarily transferring the ownership of the investment.

(98) Creeping expropriations are also a type of indirect expropriation that take place step by step, through a series of actions that have the aggregate effect of destroying the value of the investment. The notion of creeping expropriation has been widely recognized in international practice.


93 Phillips Petroleum Co. Iran v. Iran et al., [100].


95 Cristoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, revised 10 May 2005, [35], [36].

The Iran-United States Claims Tribunal has held consistently that the decisive element is the loss of effective use and benefit of the investment, even if the legal title to property is not affected\(^97\). The well-known award given in *Starrett Housing Corp. v Iran* also holds that even though a State may not purport to interfere with property rights, through its actions it may render those rights so useless, that they must be deemed expropriated\(^98\). The position was reaffirmed in a more recent ICSID case, where the “possession or access to the benefit and economic use” would establish whether an expropriation took place\(^99\).

In the matter of *Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, the Tribunal found that expropriation took place even if the Claimant still had control of the use and operation of its property, but it was no longer an effective one, since the Government had breached its obligations\(^100\).

In *Metalclad v. Mexico*, the Tribunal went even further, stating that

> “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State”\(^101\) [emphasis added].

Also, Claimant’s deprivation of the benefit which it could have expected from its investment has been considered a measure having similar effect to expropriation\(^102\).

In *CME v Czech Republic*, an UNCITRAL Tribunal found that expropriation had taken place due to the destruction of the commercial value of the investment, leaving it as a “company with assets, but without business”\(^103\).

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\(^97\) Tipetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, p. 225; Cristoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, revised 10 May 2005, [16].


\(^99\) *Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica*, [77].

\(^100\) *Revere Copper and Brass Inc. v Overseas Private Investment Corporation*, Award, at pp. 291-2.

\(^101\) *Metalclad Corp. v United Mexican States*, [103].

\(^102\) Antoine Goetz and Others v Republic of Burundi, [124].

\(^103\) *CME v. The Czech Republic*, [591].
(104) Also, the European Court of Human Rights considered that the reduced possibility of exercising the right to use and dispose of a property amounts to expropriation, an investigation of the realities of the situation being necessary.\(^{104}\)

(105) Hence, in order for a State action to be considered indirect expropriation it is required to affect the effective use, to substantially diminish the value of the investment or the expected benefit.

I.A.2. Intellectual property and expropriation

(106) The concept of property also includes intangible rights such as intellectual property or rights obtained under contracts.\(^{105}\) The Iran-US Claims Tribunal considered that “Expropriation [...] may extend to any right which can be the object of a commercial transaction.”\(^{106}\) This interpretation has been unanimously supported by judicial practice, from the early 1900s.\(^{107}\)

(107) In the *Rudloff case*, before the US-Venezuela Mixed Claims Commission, it was stated that the taking away of aliens’ incorporeal property, in the same way as of corporeal property, is considered an international wrong that demands redress.\(^{108}\)

(108) In the *Chorzow Factory Case*, the Permanent Court of International Justice held that the expropriation of the factory determined an indirect expropriation of the patents and licenses belonging to the managing company.\(^{109}\)

(109) The term “investment” as it is defined at Article 1(1)(b) of the BIT also expressly refers to intellectual property. In conclusion, Ruritania has breached its obligation comprised in Article 4 of the BIT with regard to the entirety of CAM’s investment, both tangible and intellectual property - trademarks and trade dress rights - as we shall further argue.

\(^{104}\) Sporrong and Lönnroth v Kingdom of Sweden, [60][63].

\(^{105}\) Cristoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, revised 10 May 2005, [51].

\(^{106}\) Amoco International Finance Corp. v. Iran, [108].

\(^{107}\) Cristoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, revised 10 May 2005, [53].

\(^{108}\) Rudloff Case, p. 250.

\(^{109}\) Certain German Interests in Polish Upper Silesia , p. 44.
(110) The registration of a trademark provides an inherent right to use it. A trademark loses its value if it creates the possibility of confusion with other trademarks, since the definition of a trademark, as provided by the TRIPS Agreement, expressly refers to the trademark’s function of distinguishing between products. Rutania and Cronos are both parties to the WTO, therefore the TRIPS Agreement is a binding legal document to the Contracting Parties.

(111) Recently, Phillip Morris International has introduced claims against Australia and Uruguay regarding the indirect expropriation of the company’s investment due to the substantial deprivation of its intellectual property rights. Similarly to the present case, the responding states have introduced pieces of legislation that require plain packaging and impose strict limitations to the use of trademarks. Also, Ukraine and Honduras have filed claims at the WTO against Australia with regard to the same piece of legislation.

I.A.3. Rutania’s measures effects

(112) Regulatory measures taken by States in exercise of public authority can have the effect of expropriation, even if they are taken for a legitimate public purpose. The decisive criterion that establishes the threshold between simple regulation and regulatory expropriation is a quantitative one, considering the impact of the measure on the investment. As the Tribunal in CME v.

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112 TRIPS Agreement, [15.1].

113 Procedural Order No. 2, [12].


116 Cristoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, revised 10 May 2005, [119].
Czech Republic emphasized, “A change of the legal environment does not authorize a host State to deprive a foreign investor of its investment, unless proper compensation is granted”\textsuperscript{117}. (113) In order to determine whether the measures are expropriatory, one has to establish if the State’s actions are proportional to the protected public interest and to the protection granted to the investment\textsuperscript{118}. There must be a reasonable relationship between the charge imposed to the investor and the aim sought to be realized through the measure\textsuperscript{119}. To measure such a charge, one must take into consideration the size of ownership deprivation, if it was compensated or not and the lack of investor’s possibility to participate in the taking of decisions that affect such investments\textsuperscript{120}. (114) The interference would have to deprive the investor of most of the benefits and the duration of the deprivation must be permanent or for a substantial period of time\textsuperscript{121}. It is considered that an expropriation has taken place, if the investor has been deprived in significant part of the benefit of the property\textsuperscript{122}. (115) The expropriatory measures taken by Ruritania are imposed by the MAB Act, which is an official act issued by the State acting in a public capacity, and by the 30 June 2011 ordinance adopted by the Ministry of Health and Social Security. (116) The MAB Act was adopted with the occasion of a political shift in the country, CAM having no political rights by the means of which it could have affected the taking of such a decision. Also, there was not given any compensation whatsoever\textsuperscript{123}. By forbidding alcohol consumption at sport facilities, outdoors and even at any place after 9 pm\textsuperscript{124}, during the most of

\textsuperscript{117} CME v. Czech Republic, [602].

\textsuperscript{118} Tecmed v. Mexico, [122]; LG&E v. Argentina, [189].

\textsuperscript{119} Tecmed v. Mexico, [122].

\textsuperscript{120} Tecmed v. Mexico, [122]; James and Others v. United Kingdom, [63].

\textsuperscript{121} Cristoph Schreuer, The Concept of Expropriation under the ETC and other Investment Protection Treaties, revised 10 May 2005, [81].

\textsuperscript{122} Metalclad v. Mexico [103]; CME v. Czech Republic [606]; Tecmed v. Mexico, [115]; Consortium RFCC c. Royaume du Maroc, [69]; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, [107].

\textsuperscript{123} Procedural Order No. 2, [7].

\textsuperscript{124} Statement of Claim [11].
the recreational time period of an ordinary day and in the main places of social interaction, where the consumption of alcoholic beverages such as beer is most favorable and also, by prohibiting the marketing of any alcoholic beverages on television and at sporting events, Ruritania does not leave any possibility of maintaining the benefit of the investment.

(117) The result of the implementation of these regulations was a drop in FBI’s sales by 60%, a loss of net income of 10 million US dollars and a loss of revenue of 60%\(^{125}\).

(118) Within a few months after the adoption of the MAB Act, the Ruritanian Government issued an ordinance based on a report released by Human Health Research Institute. The HRI is a government-funded institution, with its Executive Director and the majority of the Board of Supervisors appointed by the Government\(^{126}\). The ordinance requires any product containing Reyhan to be labeled with the following warning: “This product contains Reyhan concentrate, consumption of which according to the results of scientific research may lead to higher risk of cardiac complications”\(^{127}\). FBI wrote to the Ministry of Health and Social Security, pointing out several flaws in the analysis, attaching a report from an independent scientist and requesting further investigation\(^{128}\). The Ministry adopted the ordinance without any consultation with the affected parties and without taking into consideration FBI’s notification\(^{129}\).

(119) After the introduction of the labeling regulations, FBI sales dropped by a further 20%, the revenue dropped to 10% of the one registered in the same period of the previous year, FBI was forced to partially suspend production and failed to comply with financial covenants established by credit facilities with lenders\(^{130}\). Competitors took advantage of the situation and, therefore, the investment’s commercial value was irredeemably destroyed\(^{131}\).

(120) Through the introduction of the new labeling regulations, Ruritania has also effectively expropriated CAM’s trademark and trade dress design, rendering the intellectual property rights

\(^{125}\) Statement of Claim [13].

\(^{126}\) Statement of Claim [14].

\(^{127}\) Statement of Claim [15].

\(^{128}\) Statement of Claim [17].

\(^{129}\) Statement of Claim [15], [17].

\(^{130}\) Statement of Claim [19] - [21].

\(^{131}\) Statement of Claim [18].
held by Claimant completely useless. The traditional 0.8 l bottle introduced by the brewery’s founder and now prohibited by the law was one of the most important elements of FBI’s trademark, being its main advantage before competing beers, marketed mostly in 0.5 l bottles. Moreover, the plain packaging requirements, namely the requirement that the trademark or brand be written in the same font and color as all the other text on the label, does not leave any means by which FBI can distinguish its product of the competitors’.

(121) Also, FREEBREW, the FBI’s most famous and popular brand, contains Reyhan, which gives it a distinctive taste. Reyhan is a traditional plant, which can only be found in Ruritania. Consequently, the moving of the company in a different country is not reasonably possible. Without having the possibility to maintain a benefit in the country and without having a possibility to withdraw from the country, the Investor has incurred such a great financial loss as if the State would have physically destroyed the property.

(122) Before the introduction of the new regulations, FBI produced 130,000,000 decaliters per annum and was recognized as the safest place to work in Ruritania. After the adoption of the new measures, FBI’s output has decreased to 5,000,000 decaliters per annum, that is a 26 times lower output, and the company was forced to implement a large-scale redundancy program terminating employment of over half of its employees.

(123) Considering all the above arguments, Claimant submits that its Investment in Ruritania, including its intellectual property rights, has been effectively expropriated.

\[132\] Statement of Claim [5].

\[133\] Statement of Claim [12].

\[134\] Statement of Claim [5].


\[136\] Statement of Claim [8].

\[137\] Statement of Claim [19], [20].
I.B. Ruritania has violated Article 2(1) of the BIT by failing to provide fair and equitable treatment.

(124) The BIT further provides that the Contracting States have the duty to accord Investors fair and equitable treatment. The concept of fair and equitable treatment is a widely accepted standard that encompasses good faith, due process, non-discrimination and proportionality, the precise meaning of the notion being established by the effective application to specific facts. Also, in classical international law, fair and equitable treatment comprises a duty of protection of foreign property by the host State.

(125) According to Article 31 of the VCLT, a term of a treaty should be interpreted in good faith, in accordance with its ordinary meaning. In their ordinary meaning, the terms “fair” and “equitable” refer to a legitimate, unbiased conduct, in need to consider all the circumstances of the case.

(126) The positioning of the standard at the beginning of the BIT, at Article 2, without making any reference to the minimum standard of treatment, shows the drafters’ intention to create a general obligation, the specific content remaining open for interpretation on a case-by-case basis.

I.B.1 Proportionality

(127) On several occasions it has been stressed that fair and equitable treatment imports an obligation of proportionality. The application of proportionality principle in the context of an

\(\text{BIT, Article 2(1)(b).}\)

\(\text{MTD v Republic of Chile, [109]; CME v. The Czech Republic, [157]; Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, [602].}\)

\(\text{United Nations Centre on Transnational Corporations (UNCTC), Bilateral Investment Treaties, 1988, [118].}\)

\(\text{VCLT, art. 31(1).}\)

\(\text{National Grid Plc v. Argentine Republic, [168].}\)


\(\text{Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, [404]; MTD v. Republic of Chile, [109]; Tecmed v. Mexico, [122].}\)
administrative action requires that administrative measures must not be more drastic than necessary for achieving the desired purpose\textsuperscript{145}.

(128) Regarding the adoption of the MAB Act, Claimant submits that the Act is a disproportionate measure because of the size of the deprivation and the lack of compensation, also considering the inability of the Investor to influence the adoption of the Act, as it was previously argued at Section 1.1.C.

(129) As to the ordinance containing the labeling regulations, Claimant submits that the Reyhan concentrate poses no imminent risk to people’s health, being a traditional plant, used frequently in local foods since at least 1928\textsuperscript{146}. Moreover, the report released, on which the ordinance was grounded, claimed that specifically consumers of FREEBREW beer were exposed to a higher risk of cardiac complications, even though the study was conducted on subjects whose relevant background – such as diet, smoking or weight - was not taken into consideration, with drinks other than FREEBREW beer and containing up to 5 times higher dosage of Reyhan concentrate\textsuperscript{147}. FBI has pointed out to Ruritania the numerous flaws of the study, requiring further investigation\textsuperscript{148}. Ruritania motivates this hastily introduced ordinance by arguing that the State “is entitled to adopt a cautious approach rather than wait for years to obtain unassailable evidence of the risk”\textsuperscript{149}.

(130) Since the newly imposed regulations had a drastic effect on the investor\textsuperscript{150} while for the state they were a merely cautious approach, they cannot be considered proportionate.

(131) Without providing any compensation and without consulting the interested parties, the State has breached the requirements of fair and equitable treatment.

\textsuperscript{145} Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, [403].

\textsuperscript{146} Statement of Claim [5].

\textsuperscript{147} Statement of Claim [14], [17].

\textsuperscript{148} Statement of Claim [17].

\textsuperscript{149} Statement of Defense [15].

\textsuperscript{150} Memorial for Claimant, Section 1.1.C.
I.B.2. Legitimate expectations

(132) Under the fair and equitable standard, the host State has an obligation to act consistent with the Investor’s legitimate expectations. A reversal of assurances which have led to these expectations will be considered a violation.

(133) There is a consistent body of cases that support this view, where a change in the laws of the State has been regarded as a breach of Investor’s legitimate expectations.

(134) When acquiring FBI, Ruritania’s oldest and largest brewery, founded in 1928, which was a successful and profit-generating asset up until the financial crisis, that registered a significant profit in the first 2 years of activity, Contifica Group had the reasonable expectations that the State would maintain a reasonable legal framework and an open attitude towards the products of FBI. By adopting the MAB Act and the 30 June 2011 ordinance, Ruritania has failed to meet fair and equitable treatment’s requirements.

I.C. Ruritania has violated Article 2(1) of the BIT, breaching the guarantee of full protection and security.

(135) A State’s obligation to ensure full protection and security implies a guarantee of physical, commercial and legal stability, in a secure environment.

(136) According to Article 31 of the Vienna Convention on Law of Treaties, a term of a treaty should be interpreted in good faith, in accordance with its ordinary meaning. The general

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152 Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 The Journal of World’s Investment & Trade 3 (2005), p. 374.

153 MTD v. Chile, [109]; CME v. Czech Republic, [611]; Joseph Charles Lemire v. Ukraine, [264].

154 Occidental Exploration and Production Company v. The Republic of Ecuador, [181][187]; Tecmed v. Mexico, [154].

155 Statement of Claim [5].

156 Statement of Claim [6].

meaning of the phrase “protection and security” refers to a status of being shielded from threats or risks of a various nature, depending on the context\textsuperscript{159}. Therefore, the term is broad enough to cover more than physical harm.

(137) Article 2 of the BIT refers to a higher standard, of full protection and security. As it has been held in \textit{Azurix v. Argentina}\textsuperscript{160} and in \textit{Biwater Gauff (Tanzania) Ltd v. Tanzania}\textsuperscript{161}, being qualified as “full”, the obligation of protection and security extends, in its ordinary meaning, beyond the standard of physical integrity, which is only one aspect of security. Being closely associated with fair and equitable treatment\textsuperscript{162}, which is not limited to physical situations, the standard is not limited to physical protection\textsuperscript{163}.

(138) Also, the placement of the clause at the beginning of the substantive section suggests that a general protection is intended, overarching the fulfillment of the other, more specific obligations, that follow and represent different aspects of the general standards\textsuperscript{164}. The clause is positioned in Article 2, together with the promotion, encouragement and fair and equitable treatment provisions, aiming to create a favorable framework of investment co-operation.

(139) According to the same Article 31, a term should be interpreted in the light of the object and purpose of the treaty\textsuperscript{165}. The Preamble of the BIT between Ruritania and Cronos expressly refers to the importance of the protection of Investments, which is essential for the prosperity of both nations\textsuperscript{166}.

\textsuperscript{158} VCLT, art. 31(1).


\textsuperscript{160} \textit{Azurix v. Argentine Republic}, Award, [408].

\textsuperscript{161} \textit{Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania}, [729].

\textsuperscript{162} BIT, Article 2(1)(b).


\textsuperscript{165} VCLT, art. 31(1).

\textsuperscript{166} BIT, Preamble.
(140) In *CME v. Czech Republic*, the Tribunal found that under the guarantee of full protection and security

“the host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”

(141) The standard of protection and security and fair and equitable treatment are concepts that often overlap and are referred to together. Protection and security obliges the host state to act in a manner that confers the Investor and its Investment the necessary protection while fair and equitable treatment refers to the manner in which the state treats the Investment when interacting with it.

(142) Article 2 of the BIT makes reference to both standards in the same paragraph. In *National Grid v. Argentina*, the Tribunal stated that the inclusion in the same article of both concepts implied an extended protection and found that the changes introduced by State’s measures and the uncertainty regarding compensation for the impact of the measures on the investment were contrary to the protection and security guaranteed.

(143) In *Occidental v. Ecuador*, the alteration of the legal environment in which the investment was made was deemed a violation of both fair and equitable treatment and full protection and security, which require stability and predictability of State’s actions.

(144) In *Metalclad v. Mexico* and in *Tecmed v. Mexico*, the Tribunals insisted on the need of legal stability and considered the States actions to be in breach of its obligation of fair and equitable treatment, which, in the case at hand is inherently connected to full protection and security.

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167 *CME v. The Czech Republic*, [613].


170 *National Grid Plc v. Argentine Republic*, [189].

171 *Occidental Exploration and Production Company v. The Republic of Ecuador*, [191].

172 *Metalclad Corp. v United Mexican States*, [99].

173 *Tecmed S.A. v. Mexico*, [154].
(145) In conclusion, the drastic change in the laws of Ruritania and the uncertainty of compensation for the damages thus caused breach the full protection and security obligation from the BIT.

II. The arrest of Contifica Group employees has breached the guarantee of full protection and security.

(146) The State’s conduct in relation to the arrest of Messrs. Goodfellow and Straw is a violation of Article 2 of the BIT regarding the obligation of full protection and security.

II.A. Psychological pressure

(147) The standard of protection and security generally requires the host state to protect the foreign investment’s or investor’s physical integrity. In a broader view, the guarantee to full protection and security also includes harassment, even if there was no physical damage. Also, the obligation to confer protection and security extends to actions by organs and representatives of the state itself, not only to actions committed by private actors.

(148) In Eureko v. Poland, the Tribunal discussed the alleged harassment of Claimant’s senior representative as a breach of the protection and security standard, considering that the acts described come close to the line of treaty breach. However, it did not conclude that there was a

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176 Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, [730]; Parkerings-Compagniet AS v. Republic of Lithuania, [355]; Wena v. Egypt, [84]-[95]; American Manufacturing & Trading Inc. v. Republic of Zaire, [6.05].


178 Eureko v. Poland, [236].
violation since Claimant did not prove that Poland was the author of the actions, but it did state that if the actions were repeated and sustained they may incur the state’s responsibility.\textsuperscript{179}

(149) In \textit{Azurix v. Argentina}, the Tribunal confirmed that “full protection and security may be breached even if no physical violence or damage occurs”\textsuperscript{180}.

(150) In the case at hand, the persecution of Messrs. Goodfellow and Straw is a violation of the full protection and security guarantee. The fact that authorities’ conduct was unlawful is uncontested, as the Government of Ruritania notes in Statement of Defense\textsuperscript{181}.

(151) Mr. Goodfellow is the Chief Executive Officer of FBI, employee of Contifica Spirits SPA and Contifica Enterprises PLC\textsuperscript{182}. Mr. Straw is the General Counsel of FBI, member of the Board of Directors of CAM and an employee of Contifica Enterprises PLC\textsuperscript{183}. Although they were notified of the ongoing criminal proceedings, under Ruritanian law they are free to leave country pending investigations\textsuperscript{184}. They were informed through their lawyers that they may be summoned for an interrogation after the holiday season, in the beginning of 2012\textsuperscript{185}. When boarding their flight to Prosperia, both executives were detained in a cell in the airport for 12 days, from 23 December 2011 until 3 January 2012\textsuperscript{186}, when they were released without any explanation\textsuperscript{187}. The criminal investigation against them was terminated but the Ruritanian authorities never apologized or offered any compensation\textsuperscript{188}.

(152) If in \textit{Eureko v. Poland} the Tribunal did not find a breach of the guarantee due to the fact that the harassment of Investor’s representative could not be clearly attributed to the State, in the

\begin{footnotes}
\item[179] \textit{Eureko v. Poland}, [237].
\item[180] \textit{Azurix v. Argentina}, [406].
\item[181] Statement of Defense, [17].
\item[182] Procedural Order No. 2, [21].
\item[183] \textit{Ibid}.\n\item[184] Statement of Claim, [23]-[24].
\item[185] Statement of Claim, [22].
\item[186] Statement of Claim, [22], [25].
\item[187] Statement of Claim, [25].
\item[188] Statement of Claim, [25].
\end{footnotes}
case at hand the breach is clearly attributable to Ruritanian police authorities. Even if Messrs. Goodfellow and Straw were not physically injured, they have been under intense psychological pressure.

II.B. Due Diligence Obligation

(153) In AAPL v. Sri Lanka, the Tribunal observed that a proper interpretation of the protection and security clause has to take into account the spirit and objectives of the treaty, which seeks to secure an adequate investment environment\textsuperscript{189}. It considered the obligation to guarantee full protection and security to be a due diligence one, “with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State”\textsuperscript{190}. The position is generally accepted, an obligation of due diligence in taking measures to protect the foreign investment being incumbent to the host State\textsuperscript{191}.

(154) The unlawful arrest of Contifica Group’s highly regarded employees, the permission given by the police to post a footage of the detention taken by a security camera on Ruritania’s most popular TV channel and the declaration of the spokesman for the Prosecutor’s Office that the employees are responsible for corruption and try to flee investigation\textsuperscript{192} have roughly damaged Claimant’s Investment.

(155) The conduct of the Ruritanian authorities cannot be considered due diligence, but acting against expectations of a secure environment in a modern organized State. Not only have they unlawfully detained Messrs. Goodfellow and Straw, but they have damaged the public image of the entire Investment by making inaccurate declarations regarding two of Investor’s most important representatives in Ruritania.

\textsuperscript{189} Asia Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, [51].

\textsuperscript{190} Asia Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, [77].


\textsuperscript{192} Statement of Claim, [24].
(156) In conclusion, Ruritania has breached its obligation of guaranteeing full protection and security by not acting with due diligence with respect to the criminal investigation of Contifica Group’s employees and by unlawfully detaining them.
I. Change in Ruritania’s Laws

(157) For purposes of state responsibility and the obligation to make adequate reparation\textsuperscript{193}, international law does not distinguish indirect from direct expropriations\textsuperscript{194}. As an ICSID panel has previously held, no matter how beneficial to society a measure is, where a property is expropriated, the state’s obligation to pay compensation remains\textsuperscript{195}.

(158) On the basis of the BIT between the two States, Claimant is entitled to a just compensation as a full equivalent to the expropriated property. Article 4(3) of the BIT provides that in the event of expropriation, the determination and payment of compensation must have been made at or prior to the time of expropriation\textsuperscript{196}. Regarding the substance of compensation, the same article provides that it must be equivalent to the value of the expropriated Investment immediately before the date on which the actual or threatened expropriation became publicly known\textsuperscript{197}.

(159) In case of creeping expropriations, the moment of expropriation is the day when the interference has caused a more or less irreversible deprivation of the property\textsuperscript{198}. In \textit{Amoco International Finance Corp. v. Iran}, the Tribunal found the expropriation of the Investment to be complete on 24 December 1980, but awarded compensation based on the value of its interest as of 31 July 1979, when it determined that the de facto taking has occurred\textsuperscript{199}. In other words, it awarded damages considering the value of the Investment at the beginning of the series of expropriatory measures taken by the State.

\textsuperscript{193} ILC Articles, Articles 1, 31.


\textsuperscript{195} Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, [72].

\textsuperscript{196} BIT, Article 4(3).

\textsuperscript{197} BIT, Article 4(3)(b).


(160) The adoption of the MAB Act had a substantial impact on Claimant’s Investment, becoming the first publicly known measure that threatened to expropriate, marking thus the moment of reference to the compensable value of the Investment. Therefore, Ruritania has an obligation to pay compensation for the damages caused comprising the value of Claimant’s interest in FBI before measures adopted by Ruritania, namely before the adoption of the MAB Act.

(161) In another train of thoughts, if a business unit is in its entirety considered to be claimant’s protected investment then compensation for all of the damage caused to the business must be awarded to the claimant\(^{200}\). The BIT in place between Cronos and Ruritania protects direct as well as indirect investment made by Investors of the other Contracting State and does not restrict them to the territory of the host state\(^{201}\). Indirect investment refers to businesses held by subsidiaries to the Investor\(^{202}\).

(162) CAM has integrated FBI into the Contifica group’s global procurement network, where various subsidiaries of the group supply bottles, aluminum cans, yeast, hops and barley to FBI\(^{203}\). Due to FBI’s cessation of operations, Claimant has registered a loss of sales by its bottling and agricultural businesses directly linked to FBI. Consequently, Claimant has a right to compensation for the loss of sales produced, to itself and its subsidiaries.

(163) As the BIT between Cronos and Ruritania does not establish the damages to which the Investor is entitled in case of breach of obligations aside from expropriation – for fair and equitable treatment and full protection and security - , the appropriate standard of reparation will be compensation for the loses suffered, as it was established in \textit{Chorzow Case}:

\begin{footnotesize}
\begin{itemize}
\item[\(^{201}\)] BIT, Article 1(1).
\item[\(^{203}\)] Statement of Claim, [8].
\end{itemize}
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“reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”\(^\text{204}\).

(164) The line between expropriation and breach of fair and equitable treatment or full protection and security is rather thin and, therefore, Claimant leaves it open for the Tribunal to establish the appropriate reparation in what concerns these circumstances of the case.

II. **Arrest of Contifica’s employees**

(165) The responsible State is under an obligation to make reparation for the injury, whether material or moral, caused by the internationally wrongful act\(^\text{205}\). The appropriate form of reparation sought is compensation, which can be awarded for financially assessable non-material damage\(^\text{206}\). Ruritania’s breach of guarantee of full protection and security in regard to the unlawful arrest and detention of Contifica’s employees gives rise to an obligation of full reparation of the moral damages caused.

(166) In *Benvenuti & Bonfant v. Congo*, the ICSID Panel awarded moral damages to Claimant for the intangible damages suffered by claimant that included loss of reputation and psychological pressure exerted on the personnel\(^\text{207}\). In a more recent case, *Desert Line v. Yemen*, the Tribunal found that it is generally recognized that a legal person may be awarded moral damages, besides pure economic ones\(^\text{208}\). It did consider the difficulty to substantiate this sort of prejudice and agreed that even though hard to measure by monetary standards, the moral damage is real and should be compensated\(^\text{209}\). The Tribunal awarded moral damages also considering loss

\(^{204}\) *Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), [47].

\(^{205}\) ILC Articles, Article 31.


\(^{207}\) *Benvenuti & Bonfant v. People’s Republic of the Congo*, [4,96].

\(^{208}\) *Desert Line Projects LLC v. Republic of Yemen*, [289].

of reputation and the stress and anxiety of detention that caused psychological suffering\textsuperscript{210}. More recently, in \textit{Funnekotter v. Zimbabwe}, the Tribunal awarded moral damages for the psychological pressure endured by Claimant\textsuperscript{211}.

(167) In the case at hand, Claimant is entitled to moral damages for the breach of guarantee of full protection and security, considering the loss of reputation caused by the televised footage of the executives’ detention, the inaccurate declarations made by the spokesman of the Prosecutor’s Office and the psychological suffering of Messrs. Goodfellow and Straw, who were unlawfully arrested and detained.


\textsuperscript{211} Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, [138];
PRAYER FOR RELIEF

For the reasons stated above, the Claimant respectfully asks this Arbitral Tribunal to adjudge and declare that:

1. It has jurisdiction over the claims with respect to the acquisition of shares in FBI by CAM;

2. It has jurisdiction over the claims arising from the Fund's breach of the SPA;

3. Respondent's objections to the admissibility of the claims are unsuccessful and the claims are admissible;

4. There was a breach of Article 4 of the BIT regarding expropriation;

5. There was a breach of Article 2(1) of the BIT with respect to the fair and equitable treatment requirements;

6. There was a breach of Article 2(1) of the BIT with respect to full protection and security.