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

DIS CASE NO. ARB********

CONTIFICA ASSET MANAGEMENT CORP.

(CLAIMANT)

v.

REPUBLIC OF RURITANIA

(RESPONDENT)

MEMORIAL ON BEHALF OF CLAIMANT
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• Kenneth J. Vandevelde, United States Investment Treaties. Policy and Practice (1992)


• *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors & Respondent State in Investor State Arbitration Dispute*, PATRICK DUMBERRY, Journal of International Dispute Settlement, Vol. 3

• The Evolving Legal Response to Supply Chain Management by Gregory M. Chabon

Statues
• Draft articles on Responsibility of States for Internationally Wrongful Acts.
• Vienna Convention on the Law of Treaties, 1986
### Statement of Facts

<table>
<thead>
<tr>
<th>Sr. no</th>
<th>Dates</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Year: 1928</td>
<td>Ruritania’s oldest and largest brewery FBI</td>
</tr>
<tr>
<td>2</td>
<td>Until 2008</td>
<td>The FBI was owned by the State Property Fund of Ruritania, a state establishment incorporated under the laws of Ruritania.</td>
</tr>
<tr>
<td>3</td>
<td>In the beginning of 2008</td>
<td>The Fund decided to privatize the brewery to curb the dying economy of Ruritania and an international tender was announced.</td>
</tr>
<tr>
<td>4</td>
<td>30 June 2008</td>
<td>Contifica Spirits was declared the winner of the tender. On the same day Contifica Spirits and the Fund entered into a share purchase agreement providing for the acquisition of all shares in FBI.</td>
</tr>
<tr>
<td>5</td>
<td>2010</td>
<td>In a nation-wide competition the brewery was recognized as “the safest place to work” in Ruritania.</td>
</tr>
<tr>
<td>6</td>
<td>17 March 2010</td>
<td>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, including Ruritanian-registered trademarks corresponding to the brands of beer produced by FBI trade dress registrations with respect to the designs of the beer bottles and cans.</td>
</tr>
<tr>
<td>7</td>
<td>20 November 2010</td>
<td>The Ruritanian parliament adopted the Regulation of Sale and Marketing of Alcoholic Beverages Act (“MAB Act”) (Exhibit 3), which severely restricted FBI’s ability to market and sell its products in Ruritania.</td>
</tr>
<tr>
<td>8</td>
<td>April 2011</td>
<td>The reconfiguration was completed. The measures under MAB Act had forced FBI to implement a comprehensive reconfiguration of its bottling line for FREEBREW, while partially suspending bottling of other brands to allow a limited production of FREEBREW in 0.5 l. bottles and cans to continue.</td>
</tr>
<tr>
<td>9</td>
<td>During the first two quarters of 2011</td>
<td>As the result of implementation of this regulations FBI’s sales dropped by approximately 60% with the company incurring loss of net income of around 10 million US dollars and loss of revenue of 60%.</td>
</tr>
<tr>
<td>10.</td>
<td>On 15 June 2011</td>
<td>HRI 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.</td>
</tr>
<tr>
<td>11.</td>
<td>30 June 2011</td>
<td>The Ministry of Health and Social Security adopted an ordinance, which requires any product containing Reyhan concentrate to flaunt a warning that “This product contains Reyhan concentrate, consumption of which ....may lead to higher risk of cardiac complications”.</td>
</tr>
<tr>
<td>12.</td>
<td>July 2011</td>
<td>FBI was provided with access to the report and the underlying materials and discovered that in 2005 an interim report, which found consumption of Reyhan unsafe, was sent by the HRI to the Ministry of Health and Social Security.</td>
</tr>
<tr>
<td>13.</td>
<td>20 August 2011</td>
<td>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</td>
</tr>
<tr>
<td>14.</td>
<td>23 December 2011-3 January 2012</td>
<td>Messrs. Goodfellow and Straw were detained in a cell in the Freecity International Airport.</td>
</tr>
<tr>
<td>15.</td>
<td>20 June 2012.</td>
<td>Criminal investigation against them was terminated due to insufficient evidence.</td>
</tr>
</tbody>
</table>
Arguments Advanced

I. THE CLAIMS SUBMITTED BY CONTIFICA ASSET MANAGEMENT CORP. (CAM) ARE WITHIN THE JURISDICTION OF THIS TRIBUNAL AND ARE ADMISSIBLE IN ACCORDANCE WITH THE RULES OF INTERNATIONAL INVESTMENT LAW.

(1) The parties have consented to submit the present dispute to arbitration, and the Claimant exerted earnest efforts to settle the dispute amicably before filing for arbitration (ratione voluntatis).

1) The Article 25(1) of the ICSID\(^1\) Convention provides jurisdiction over “any legal dispute arising directly out of an investment, between a Contracting State…and a national of another Contracting State, which the parties to the dispute consent…to submit to the Centre.” Claimant contends that all the conditions necessary to establish jurisdiction of the Tribunal are met. Namely, (1) the present dispute is of legal nature and stems directly out of investment; (2) it occurred between a state party and a national of another state; and (3) both parties to the present dispute consented in writing to submit the dispute to the ad hoc arbitral tribunal under UNCITRAL Rules.

2) As in the present case the Claimant’s dispute with Respondent arises out of Claimant’s investment in FBI as well as its significant investment in the technology, design and equipment of the brewery when the shares of Contifica Spirits were transferred to the Claimant.\(^2\) After the Shares were transferred from the State Property Fund of Ruritania (hereinafter “Fund”) to Contifica Spirits then to Claimant, the Respondent began to systematically operate to destroy the Claimant’s investment by preventing the Claimant from pursuing and freely its business of producing as well as selling its popular products including the iconic 0.8 Freebrew bottle, inconsistent with the provisions of the BIT specifically:

i. Breach of Article 2 (1) (b)\(^3\) and for failure to provide fair and equitable treatment of investment as well as full protection and security;

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\(^2\)Statement of Claim, Factual Matrix, Pg.7

\(^3\)Each Contracting State shall in its territory as far as possible promote Investments by Investors of the other Contracting State and admit such Investments in accordance with its legislation and administrative practice and encourage such Investments.
ii. Breach of Article 3 (1) (c)\(^4\) for impairment of investment through arbitrary and discriminatory measures;

iii. Breach of Article 4 (1)\(^5\) for prohibiting the use of the Claimant’s Intellectual Property Rights without due process.

3) Moreover, Article 8(1) of the Treaty of Mutual Promotion and Protection of Foreign Investment\(^6\) between The Republic of Ruritania and The State of Cronos (BIT) states that disputes concerning investments under it should be settled amicably between disputing parties, and if the dispute cannot be settled amicably within a period of three months from written notification of a claim by Claimant, the dispute shall be submitted to international arbitration.

4) Moreover, Article 8(2)\(^7\) of the Present BIT provides that the Investor shall submit the dispute to an ad hoc arbitral tribunal i.e. the German Institution of Arbitration (DIS) which is established in accordance with the rules of the United Nations Commission on International Trade Law. Hence, Claimant being can validly resort to the said dispute resolution mechanism against the Respondent.

2) **Claimant is an “investor” under the Treaty of Mutual Promotion and Protection of Foreign Investment between The Republic of Ruritania and The State of Cronos (BIT) (*ratione personae*).**

1) According to Article 8(1)\(^8\) & Article 8(2)\(^9\) of the Present BIT provides that the “Investor” shall submit the dispute to an ad hoc arbitral tribunal i.e. the German Institution of

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\(^4\)Neither Contracting State shall in its territory impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of Investments of Investors of the other Contracting State.

\(^5\)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 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.

\(^6\)Article 8(1) of the Treaty of Mutual Promotion and Protection of Foreign Investment between The Republic of Ruritania and The State of Cronos (BIT), Factual Matrix, Pg 15.

\(^7\)Article 8(2) of the Treaty of Mutual Promotion and Protection of Foreign Investment between The Republic of Ruritania and The State of Cronos (BIT), Factual Matrix, Pg 15.

\(^8\)Supra 6, Pg 15

\(^9\)Supra 10, Article Pg 15
Arbitration (DIS) which is established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).

2) Claimant submits that it is an investor within the meaning of the Article 1(3) (b) BIT for it owns share i.e. it is the sole shareholder of FBI, which is located in Ruritania as required by the Article, a company incorporated in the Respondent State i.e. Cronos which in this case is the other contracting party to the BIT. Moreover, FBI was acquired by CAM in March 2010 but such enterprise has been in operation and has been with the Contifica Group for almost four years during which the Claimant transformed it into a state of art facility. Furthermore, the Claimant took the risk of investing in the Respondent state despite the fact that it had an unstable economy.\(^\text{10}\) Hence as the shareholder of FBI, the Claimant is a qualified investor protected by the BIT according to Article 1(3).

3) BITs and other investment treaties such as the BIT between Cronos and Ruritania contain a variety of provisions concerning the “investors” nationality. It must be noted that the most commonly used criterion for corporate nationality is just incorporation. Incorporation being the sole criteria eliminates consideration of any other requirement except that under the BIT.\(^\text{11}\) Applying this analogy to the present case, leads to the obvious conclusion that no other criterion apart from “incorporation” shall be used as a parameter to gauge the existence of the “investor”.

4) It is submitted that in principle, it is neither illegal nor improper for an investor, like CAM in the present, to organise its investment in a manner that affords maximum protection under existing treaties. It is a well-established practice for investors to incorporate companies in jurisdictions that are perceived to provide beneficial regulatory and legal environments as well as having favourable investment treaties with other nations.\(^\text{12}\) Most often this will be done through the establishment of a company in a State that has favourable treaty relations with the host State provided the relevant treaties accept incorporation as a basis for corporate nationality. That company will then be used as a conduit for the investment. CAM engaged in what can be termed as, nationality planning which is now regarded as a standard feature of

\(^{10}\) Statement of Claim, ¶ 7, Factual Matrix, Pg 3
\(^{11}\) Mytilineos Holdings SA v. State Union of Serbia and Montenegro and Republic of Serbia, UNCITRAL Arbitration, Partial Award on Jurisdiction, September 8, 2006
\(^{12}\) Aguas del Tunari, S.A. vs. Bolivia, ICSID Case No. ARB/02/3, ¶ 330,332 (Oct. 21, 2005)
diligent management. Hence it is contended that it is neither illegal nor improper for Contifica Spirits to transfer its share-holding to CAM, to achieve a beneficial regulatory and legal environment, including the availability of an investment treaty.

5) The relevance of ‘structured investments’ was pointed out in *HICEE v. Slovakia*14 wherein the Tribunal stated that they are “….not unusual, nor is there anything in the least reprehensible about them; structured investments are commonplace. The purpose being, to secure advantages from incorporation or operation in a particular jurisdiction; …” The advantages anticipated often include the protection of particular bilateral or other treaties covering foreign investment.15 International Practice confirms that it is permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection including access to international arbitration.

6) In *Saluka v. Czech Republic*16 the Claimant was a legal person incorporated under the laws of the Netherlands. The Respondent objected that Saluka was merely a shell company controlled by its Japanese owners. In accordance with the Czech-Netherlands BIT, the definition of ’investor’ in Article 1(b) (ii) includes ‘legal persons constituted under the laws of the Netherlands’.17 The Tribunal said: “The Tribunal cannot in effect impose upon the parties a definition of “investor” other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of contracting state i.e. Cronos in the present case and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.”18

7) In *Aguas del Tunari v. Bolivia*19 the Claimant was a legal person constituted under Bolivian law. It relied on the definition of ‘national’ in Article 1(b) of the Bolivia-Netherlands BIT which included legal persons incorporated in the host State but controlled by nationals of the other State. Aguas del Tunari argued that it was controlled by Netherlands corporations. The Tribunal found that the controlling Netherlands companies were more than just corporate

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14 *HICEE v. Slovakia*, Partial Award, 23 May 2011
15 Ibid, ¶103
16 *Saluka v. Czech Republic*, Partial Award, 17 March 2006
17 Ibid, ¶103
18 Ibid, ¶241
19 *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, 21 October 2005
shells set up to obtain jurisdiction over the dispute before it. Therefore, it found that the BITs nationality requirements were fulfilled.  

8) The Tribunal in Aguas del Tunari clearly endorsed the idea of purposeful planning. It stated that it was neither illegal nor uncommon for investors to locate their operations in a jurisdiction that offers a beneficial legal environment in terms of taxation or the availability of a BIT. The language of the definition of national in many BITs evidences that such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.

9) The case: Tokios Tokelės v. Ukraine requires in-depth deliberation, as the facts of this case bear striking similarity to the present situation. The Claimant was a business enterprise established under the law of Lithuania but it was controlled almost entirely by Ukrainian nationals. Article 1(2) (b) of the Lithuania-Ukraine BIT defines “investor” in respect of Lithuania as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations”. Ukraine argued that whilst Tokios Tokelės was lawfully incorporated in Lithuania, it was not a “genuine entity” of Lithuania for the purposes of the Lithuania-Ukraine BIT and the Convention. Ukraine argued that the Tribunal should adopt a “control test”, and should not permit submit claims against through a foreign-incorporated entity.

10) It was held by the Tribunal, that the Convention leaves the task of choosing the applicable test by which to determine whether a legal person qualifies as a national of a Contracting State to the “reasonable discretion of the Contracting Parties.” In view of the BIT’s clear definition, the Tribunal held that the legal place of incorporation was the only relevant consideration to determine whether the Tribunal had jurisdiction ratione personae. Since Tokios Tokelės was a legal entity duly established under the laws of Lithuania, the majority concluded that Tokios Tokelės qualified as a Lithuanian “investor” for the purposes of the BIT and a “national of another Contracting State” for the purposes of the Convention.

\[20\] Ibid, ¶ 206-323  
\[21\] Ibid, ¶ 330  
\[22\] Supra 25, ¶ 332  
\[23\] Tokios Tokelės v. Ukraine, Decision on Jurisdiction, 29 April 2004  
\[24\] Ibid, ¶ 18  
\[25\] Ibid, ¶ 21-23  
\[26\] Ibid, ¶ 24  
\[27\] Ibid, ¶ 29, 38
11) Comparing this with the case of the Claimant, a conceptual parallel can be easily drawn. The definition of the term Investor as provided in the Article 1(3) of the Bilateral Investment Treaty between the Republic of Ruritania and the State of Cronos includes:

- any entity which is established in accordance with, and recognised as a legal person by the law of that Contracting State, irrespective...or firm;
- Which is the owner, possessor or shareholder of an Investment in the territory of the other Contracting State.

The elements of this definition can be easily brought out in the present situation. The Claimant is an entity established in accordance with the laws of Cronos. Though the controlling Group belongs to another State which is not a party to the Treaty, yet as can be seen from the above submissions, the transfer of shares of FBI to CAM was nothing but a prudent and legal business decision. Secondly, the Claimant is the possessor and shareholder of FBI which is an investment in Ruritania i.e. the other Contracting State.

3) Claimant’s acquiring shares in FBI qualifies as an ‘investment’ under the Treaty of Mutual Promotion and Protection of Foreign Investment between The Republic of Ruritania and The State of Cronos (BIT) (*ratione materiae*).

1) The Article 25(1) of the ICSID\(^{28}\) Convention provides jurisdiction over ‘any legal dispute arising directly out of an investment.’ and Article 8(1) of the BIT \(^{29}\) states that disputes concerning investments under it should as far as possible be settled amicably and if the dispute cannot be settled amicably, the dispute shall be submitted to international arbitration ad hoc arbitral tribunal i.e. the German Institution of Arbitration (DIS) under Article 8(2)\(^{30}\).

2) In the present case Article 1(1)\(^{31}\) of the Bilateral Investment Treaty defines Investment and the definition also includes indirect investment in accordance with laws and regulations of the Contracting State.

3) According to Article 25 of the ICSID convention\(^{32}\) and The *Salini*\(^{33}\) test an investment should have the following characteristics to satisfy the requirements for purposes of the ICSID

\(^{28}\)Supra 1

\(^{29}\)Supra 6, Pg 15

\(^{30}\)Supra 10, Pg 15

\(^{31}\)Article 1(1) of the Treaty of Mutual Promotion and Protection of Foreign Investment, Factual Matrix, Page 9
Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development.

4) In the present case the Claimant purchased shares of FBI and managed the company with its best effort which amount to Contribution or substantial commitment of investor; Proceeding was instituted 2.5 years after the acquisition of shares which amounts to Certain duration of time; the very existence of the dispute indicates the risk which proves Existence of operational risk; and as held in Cosorzo Lesi-Dipenia v. Algeria, that if the other elements are proved then the fourth criteria of Contribution to the Host State’s development is implicitly covered and it amounts to investment.

5) Moreover, Claimant’s made an investment of USD 5,000 for acquiring ownership of shares in FBI which qualifies as an investment under Article 1.1 of the BIT, because investment includes ownership of a company’s shares. Furthermore, Claimant’s made an investment in the technology, design and equipment of the brewery when the shares of Contifica Spirits were transferred to the Claimant. In addition to this, Claimant acquired rights to the principal intellectual property used by FBI, and such trademarks, trade dress registrations also constitute “Investment” under Article 1(1) (d) of the BIT. Therefore, the Tribunal has jurisdiction under the BIT.

6) Furthermore, In Consortium R.F.C.C. v. Morocco, the Saipem v. Bangladesh case it was held that the requirement of such duration is not absolute and can be shortened referring to the circumstances of each case and the interplay with the other criteria. Moreover in Mytilineos it was held that in an ad hoc arbitration, the only requirements that have to be fulfilled in order to confer ratione materiae on the tribunal are those under the BIT. Furthermore, Siemens AG v. The Argentine Republic and Waste Management v Mexico, to prove that if the BIT does not specifically exclude indirect investments, they can be included in the scope of ‘investment’ under the BIT, as long as it can be proven on fact that

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33 Supra 1
34 Saipem v. Bangladesh, ICSID Case No. ARB/05/07
35 Mytilineos Holdings SA v. State Union of Serbia and Montenegro and Republic of Serbia, UNCITRAL Arbitration, Partial Award on Jurisdiction, September 8, 2006
36 Siemens A.G. v. The Argentine Republic, ICSID Case No, ARB/02/8
37 Waste Management v Mexico, (ICSID Case No. ARB(AF)/00/3)
the ‘investor’ is the ultimate beneficiary of the investment. Hence, it can be concluded that Claimant’s acquiring shares in FBI qualifies as an investment under the BIT.

(4) The Claimant’s acquisition of the shares was a legitimate commercial transaction and it doesn’t amount to abuse of Process.

a) The transfer of shares was made in good faith and for a legitimate business purpose.

1) Claimant’s acquisition of the share is a consequence of pursuing better investment environment. The purpose of the transfer as stated in the highly confidential Memorandum submitted by Respondent was simply to locate operations in a jurisdiction perceived to provide a beneficial tax, regulatory and legal environment.\(^{38}\) In particular, the favourable tax environment in Cronos made the share acquisition an optimal investment for Claimant.

2) The highly confidential Memorandum submitted by Respondent does not state or otherwise show that the purpose of the transfer was to permit a claim against Respondent under the Cronos-Ruritania BIT, which is not mentioned at all. Respondent has not pointed to any other evidence showing that the purpose of the transfer was to enable Claimant to raise claims under the BIT.\(^{39}\)

4) Enterprises respond to economic situations arising from market conditions, in their relations with both third parties and associated enterprises. It should not be assumed that the conditions established in the commercial and financial relations between associated enterprises will invariably deviate from what the open market would demand\(^{40}\). Contifica group’s decision to transfer the shares was a bona fide business decision after a thorough consideration of various variables in the regions. Accordingly, the price or a relationship between the transfer contract between Contifica Spirits S.P.A. and Claimant does not necessarily entail that it was not a bona fide investment under the BIT.

b. Nationality planning to protect investments against future disputes is allowed under international investment law.

1) It must also be noted that the dramatic change of Ruritania’s laws and regulations governing sale and marketing of beer took place on 20\(^{\text{th}}\) November 2010 when the Ruritanian Parliament

\(^{38}\)Exhibit RX1, Factual Matrix, Pg. 24.
\(^{39}\)Ibid, Pg. 24
\(^{40}\)OECD Transfer Pricing Guidelines, Pg. 32
adopted the Regulation of Sale and Marketing of Alcoholic Beverages Act. This Act severely restricted FBI’s ability to market and sell its products in Ruritania and even the draft of the MAB Act was introduced to the Parliament (and became public record) on 20 June 2010. But it was on 17th March 2010 that Contifica Group as part of intra-group restructuring transferred shares from Contifica Spirits to Claimant in FBI.\textsuperscript{41}

2) It is contended that the corporate restructuring affecting the Claimant’s nationality was made in good faith\textsuperscript{42} before the occurrence of the enactment of the new legislation which has become the matter of the dispute later and this restructuring should not be considered as an abuse of process.\textsuperscript{43}

3) In order to determine whether the Claimant’s change of nationality was or was not an abuse of process, it must first be ascertained whether the relevant measure, which caused damage to its investments from November 2010 onwards, took place before or after the change in nationality on 17th March 2010.\textsuperscript{44} And a straight analysis of the factual matrix proves the matter in favour of the Claimant.

4) As held in \textit{Mobil v. Venezuela},\textsuperscript{45} Mobil restructured its investment by interposing a Netherlands holding company and as a consequence of the restructuring, the Delaware and Bahamian companies thereby became 100% owned subsidiaries of the Dutch company.\textsuperscript{46} After the imposition of nationalisation measures by Venezuela, Mobil instituted ICSID arbitration relying on the BIT between The Netherlands and Venezuela. The Tribunal found that the restructuring of the investment was not impermissible, in principle, but depended on the particular circumstances. The aim of obtaining access to ICSID arbitration was held not to be \textit{per se} illegitimate: The Tribunal while accepting that the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT stated that the legality of the restructuring depended upon the circumstances in which it happened.\textsuperscript{47} The Tribunal considered

\textsuperscript{41}Statement of Claim ¶9, Factual Matrix, Pg.3
\textsuperscript{42}\textit{Société Générale v. Dominican Republic}, Decision on Jurisdiction, 19 September 2008, ¶ 84
\textsuperscript{43}\textit{Pac Rim Cayman LLC v. The Republic of El Salvador}, Decision on Jurisdiction, 1 June 2012, ¶ 2.47
\textsuperscript{44}Ibid, ¶ 2.52
\textsuperscript{45}\textit{Mobil Corp. et al. v. Bolivarian Republic of Venezuela}, Decision on Jurisdiction, 10 June 2010.
\textsuperscript{46}Ibid, ¶ 187-192. Under the BIT between The Netherlands and Venezuela not only companies incorporated in The Netherlands but also Companies controlled by Dutch incorporated companies are deemed to be nationals of the Netherlands.
\textsuperscript{47}Ibid, ¶ 190, 191
that this was a perfectly legitimate goal as far as it concerned future disputes. However, in the present case it is clear that Contifica Group had engaged in prospective planning within the framework of the existing BIT. Prospective means that the corporate arrangements must be in place before the dispute arose. Even a limited perusal of the facts of the case can easily reflects that the act of restructuring carried out by the Contifica Group was permitted as it was undertaken before the passing of the MAB Act.

5) In the *Phoenix Case,*\(^{48}\) The Tribunal did not dismiss nationality planning outright. It approved of the decision in *Tokios Tokelės* and said that International investors can structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment.\(^{49}\)

6) This View was confirmed in *Pac Rim Cayman v. El Salvador*,\(^{50}\) the issue before the Tribunal was whether the events leading to the dispute had predated the change of nationality.\(^{51}\) The Tribunal does not dispute that if a corporate restructuring affecting a claimant’s nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process.\(^{52}\)

7) The Tribunal, following Articles 14 and 15 of the ILC Articles on State Responsibility, distinguished one-time acts, continuous acts and composite acts.\(^{53}\) In case of a one-time act, if the relevant act took place after the change of nationality, that change would not be an abuse of process.\(^{54}\) In the particular case, the Tribunal decided that El Salvador’s failure to issue the permits should be considered as a continuous act that had started before the Claimant’s change of nationality but continued thereafter. The Tribunal said: In the Tribunal’s view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal’s view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend

\(^{48}\) *Phoenix v. Czech Republic*, Award, 15 April 2009  
\(^{49}\) *Ibid*, ¶ 94, 95  
\(^{50}\) *Ibid*, ¶ 2.47  
\(^{51}\) *Ibid*, ¶ 2.63 et seq  
\(^{52}\) *Ibid*, ¶ 2.79
upon its particular facts and circumstances\textsuperscript{55}. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute, …\textsuperscript{56}The Tribunal found that the relevant act became known to the Claimant only after the change of nationality through the report of the President’s speech. Therefore, the change in the Claimant’s nationality was not proven to have been an abuse of process precluding the Tribunal’s jurisdiction.\textsuperscript{57}

8) Other tribunals too have found that corporate restructuring is permissible as long as it is not abusive or ‘after the fact’. In \textit{Millicom v. Senegal}\textsuperscript{58} the Tribunal said: Even if it is possible, or even likely that the choice of the subsidiaries was also made considering the protection that their domicile could afford them, this fact alone could not constitute an abusive solution, as long as circumstances have not been established which would demonstrate that such choice was made unknown to the other party and under artificial conditions;\textsuperscript{59}So, in light of these Judgement it is well settled law that pre dispute Nationality planning is completely legal and in the present case the transfer occured prior to the enactment of MAB Act. Moreover, the claimant could not have anticipated such measures coming and their transfer was in good faith and only for purpose of tax exemptions.

c. The investment made by CAM is not excluded by a denial of benefits clause.

1) BITs and other investment treaties such as the BIT between Cronos and Ruritania contain a variety of provisions concerning the investors’ nationality. The requirements for the nationality of corporations vary from one treaty to another. But it must be noted that the most commonly used criterion for corporate nationality is just incorporation. Incorporation being the sole criteria eliminates consideration of any other requirement except that under the BIT.\textsuperscript{60}

2) There are various other criteria that the respondent could have used in the present case as some treaties require various forms of economic bonds to the countries concerned. Such an

\textsuperscript{55}Ibid, ¶ 2.99
\textsuperscript{56}Ibid, ¶ 2.100
\textsuperscript{57}Supra 50, ¶ 2.109-2.210
\textsuperscript{58}Millicom International Operations B.V. and Sentel GSM SA v. Senegal, Decision on Jurisdiction, 16 July 2010.
\textsuperscript{59}Ibid, ¶ 84
\textsuperscript{60}Mytilineos Holdings SA v. State Union of Serbia and Montenegro and Republic of Serbia, UNCITRAL Arbitration, Partial Award on Jurisdiction, September 8, 2006
economic bond may consist of effective control over the corporation by nationals of the State. Alternatively, it may consist of genuine economic activity of the company in the State.

3) In Tokios Tokelės v. Ukraine case\textsuperscript{61}, the Tribunal also found the absence of a denial of benefits clause significance … state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine- Lithuania BIT, by contrast, includes no such “denial of benefits” provision with respect to entities controlled by third-country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text\textsuperscript{62}

4) Similarly in the present case the BIT only mentions one criterion, i.e. Incorporation and it doesn’t provide the denial of Benefit clause. So, it is not up to this tribunal to accept a definition of investor other then what is provided by the BIT. Hence, Claimant being an investor within the meaning of article 1(3) of the Ruritania Cronos BIT can validly resort to a dispute resolution mechanism under Art. 8 of the BIT.

II. THE TRIBUNAL’S JURISDICTION ENCOMPASSES THE BREACH OF WARRANTY UNDER THE SHARE PURCHASE AGREEMENT PURSUANT TO ART. 6(2) AND IS ADMISSIBLE

(1) The alleged breach of the share purchase agreement by the State Property Fund is attributed to the Respondent

1) Under both structural and functional tests Fund constitutes a state agency. Consequently, as Fund constitutes a state entity, its contractual undertakings may be attributable to Respondent and an umbrella clause will apply to contracts signed by Fund.

2) In the landmark Maffezini v Kingdom of Spain\textsuperscript{63} case, the tribunal outlined the two major tests which should be applied to demonstrate that certain body constitutes a state entity. Firstly, under the structural test the direct or indirect ownership or control by the state is to be demonstrated. In case if the structural test is inconclusive the functional test is to be applied:

\textsuperscript{61}Tokios Tokelės v. Ukraine, Decision on Jurisdiction, 29 April 2004
\textsuperscript{62}Ibid, At ¶ 56
\textsuperscript{63}Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7
that is whether an entity at issue carries out functions essentially governmental in nature, or those ‘which are otherwise normally reserved to the state or which by their nature are not usually carried out by private businesses or individuals’.

i. The structural test is satisfied as

- The Fund is admittedly a state establishment which exists by virtue of a legislative enactment.
- The principal managing bodies of The Fund are appointed by Ruritania.
- The Fund’s assets pass automatically to Ruritania in the event of its dissolution.

ii. The functional test is satisfied as the Fund carries out governmental functions.

- The Fund sold its interest in FBI to remedy Ruritania’s budget deficit.
- The Fund makes periodic distributions of proceeds to Ruritania.

3) Ruritania is liable for the Fund’s breach of the agreement because the Fund was exercising “governmental authority” under Article 5\textsuperscript{64} of the 2001 ILC Draft Articles on State Responsibility. The Board of Governors and Director-General were appointed by Ruritania, and the Fund was serving the governmental function of privatizing State-owned companies to solve the national budget deficit.

4) The Fund was nothing but a vehicle to implement the government’s privatization decision and concluded the Agreement under authorization by law. The conduct of the Fund is attributable to the Respondent under Article 5 and Article 8\textsuperscript{65} of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts following its conduct of governmental authority. Privatization constitutes a governmental act.\textsuperscript{66}

\textsuperscript{64} Article 5 of ILC Draft Articles states “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

\textsuperscript{65} Article 8 of ILC Draft Articles states “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”

\textsuperscript{66} Noble-Ventures, Inc. vs. Romania, ICSID-Case No. ARB/01/11, Award, 2006, ¶.79
5) In Noble Ventures v. Romania\textsuperscript{67} held that acts of entities having a separate existence under the municipal law of the State may also be attributable to the State if the requirements of Article 5 or Article 8 of ILC Draft Articles are satisfied, notwithstanding the fact that they do not possess \textit{de jure} authority within the meaning of Article 4 or are commercial acts of state organs as the distinction between commercial and sovereign act is immaterial for the purposes of attribution.\textsuperscript{68}

6) In Dipenta v. Algeria\textsuperscript{69}, the Tribunal held that exercise of ‘dominant or important influence’ over public enterprises \textit{distinct from the State} was sufficient to attribute the acts of those enterprises to the State.

(2) The violation of guarantees in share purchase agreement by the Respondent amounts to the breach of “any other obligations” by virtue of Article 6(2) of the BIT, thus the claims by the Claimant is under the jurisdiction of the tribunal.

1) Article 6(2) of the BIT contains what is commonly referred to as an “umbrella clause”. Claimant asserts that Article 6 of the BIT makes it a breach of the BIT to fail to observe binding commitments including contractual commitments, which Respondent has assumed with regard to the specific investment.\textsuperscript{70} Therefore, contractual arrangements between the investor and the host State – or any other entity, acts of which are attributable to the host State – are subjected to the jurisdiction of the tribunal, as they become the breaches of the BIT itself. \textsuperscript{71} Thus violation of obligations under the agreement leads to violation of the BIT.\textsuperscript{72}

2) Christoph Schreur has given his views on the utility of Umbrella Clause in the following words: “\textit{Clauses of this kind have been added to some BITs to provide additional protection to investors beyond the traditional standard. They are often referred to as umbrella clauses because they put contractual commitments under the BIT’s protective umbrella. They add the}

\textsuperscript{67}Ibid.
\textsuperscript{68}EnCana v. Ecuador, LCIA Case UN3481, ¶154 followed the same approach and although it did not expressly hold that the conduct of ‘non-State actors’ could be attributed to the State, on facts it stated that acts of Petroecuador were attributable to Ecuador - both under Article 5 and Article 8 of the ILC Articles
\textsuperscript{69}Dipenta v. Algeria, ICSID Case No. ARB/03/08, ¶19
\textsuperscript{70}SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, § 128; Newcombe & Paradell, Pg. 436; Weil: Contratspassés entre un Etat et un particulier, Pg. 130
\textsuperscript{71}EUREKO B.V. v. Republic of Poland, 19/08/2005, § 250
\textsuperscript{72}Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 2006
compliance with investment contracts, or other undertakings of the host State, to the BIT’s substantive standards.”

3) A contract is regarded as concluded by the state itself when an entity concluded it on behalf of the state under governmental authority. The breach of warranty would also be a breach of Respondent’s obligation under Art. 6(2) to “fulfill any other obligations it may have entered into with an Investor” as Contifica Spirits assigned its rights under the SPA to Claimant. “Any other obligations” is to be interpreted in accordance with its ordinary meaning and would include contractual obligations. The Tribunal also reiterated this finding in the case of SGS v. Philippines holding that the term “any other obligation” in Art.6(2) of the RC-BIT is capable of applying to obligations arising from a contract.

4) As per the commentary on ILC Articles, an ‘international obligation’ includes a treaty obligation. Since an umbrella clause elevates a contractual breach into a treaty breach, responsibility of States in such instances is attracted not for the breach of a contract, but for the consequent breach of a treaty provision. The Respondent has breached its warranties in the SPA.

5) Moreover, according to Article 31(1) of the Vienna Convention, use of phrases “shall”, “any other obligations”, and “fulfill” indicates that the UC is binding, and includes strong contractual obligations. The substantiality of Article 6 is further supported by its location among other substantial clauses. The BIT’s Preamble states that it purports “to create favorable conditions for investments”, and Article 6 should be interpreted accordingly.

6) A narrower interpretation of Article 6.2 that does not protect Investors from breach of express assurances provided by the host state would deprive the provision of meaning and

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74 Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 2006., ¶80 & ¶86
75 Art. 61 Vienna Convention; EUREKO B.V. v. Republic of Poland, 19/08/2005: “Any” obligations is capacious; it means not only obligations of a certain type, but “any”—that is to say, all—obligations”
76 James Crawford, Commentary on the Articles on State Responsibility (2001) at 35, ¶7
78 Moot-Problem, Exhibit No. 2, Appendix 7, Article 9.2.1
79 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, ¶59; EUREKO B.V. v. Republic of Poland, 19/08/2005 ¶246; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, ¶296-300
violate the maxim of *effet utile*, which states that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. (*Eureko v Poland*).

7) In Compañía de Aguas del Aconquija S.A. and Vivendi Universal vs Argentine Republic\(^8\), the Tribunal ruled that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contract.

**a) Gravity of the breach committed under the Share Purchase Agreement.**

1) This Tribunal has jurisdiction ratione temporis over treaty claims Under Article 6(2) of the BIT Ruritania undertook to observe any commitments it entered into. Pursuant to the Share Purchase Agreement Claimant was guaranteed that the products of FBI do not pose any health threats other than those ordinary for alcoholic beverages.

2) The Fund fundamentally breached the SPA by breaching its warranty that FBI’s products do not pose any risks other than those ordinary for alcoholic beverages. This is a fundamental breach because Claimant is involved in the food and beverage business, where consumer health is of paramount concern. Thus, the Reyhan concentrate warning label requirement caused substantial damage to Claimant.

3) The knowledge qualifier in the SPA representation and warranty is satisfied because the Fund knew, or had reason to know, from the 2005 interim report, that Reyhan consumption may lead to higher risk of cardiac complications.

(3) **Claims based on the breach of share purchase agreement are admissible since the breach of Article 6(2) of the BIT by the Respondent shall be accordingly settled under the dispute settlement resolution (Article 8) of the BIT**

1) CAM’s SPA-related claims are admissible on the following grounds:-

(i) The breach of the BIT is distinct from the breach of the SPA.

(ii.) The forum selection clause in the SPA should not divest this Tribunal of jurisdiction to hear the treaty-based claim.

\(^8\) *Compania-de-Aguas-del-Aconquija-SA, And-Vivendi-Universal-v Argentina, France/Argentina BIT) ICSID-Case-No.ARB/97/3, Decision-on-Annulment-3-July-2002*
2) The present dispute is simultaneously contractual and international. Therefore Claimant may choose between Article 14.2, SPA and the UC\textsuperscript{81}. The arbitration forum stipulated under the BIT must prevail.\textsuperscript{82} The arbitration clause under the BIT prevails the clause under the share purchase agreement.\textsuperscript{83}

a) Claimant has not waived the procedure under Art. 8 of the BIT by the dispute settlement clause in SPA

1) The Claimant has not and never had the intention to waive the dispute resolution procedure under BIT. Clear and convincing evidence is required for the intention of such waiver to be established\textsuperscript{84}. Conclusion of forum selection clause in absence of available BITs leads to presumption against waiver.\textsuperscript{85}

2) In the present circumstances Claimant’s intention of waiver cannot be inferred from Article 14.2 of the Agreement. SPA was negotiated and concluded by Contifica Spirits S.p.A. of Prosperia and it could not have intended to waive the procedure under the present BIT, to which it had no access in any case.

3) Contifica Spirits just assigned the legal relationship under the SPA to CAM\textsuperscript{86}. By obtaining the Investor status under the BIT Claimant was conferred an additional forum.\textsuperscript{87} Tribunals have established that BIT adjudication applies unless expressly waived in the underlying agreement.

4) Respondent had the opportunity to put in an express waiver of jurisdiction under any applicable bilateral investment treaty in the SPA, which post-dated the BIT, had it desired the contractual dispute resolution clause to prevail –however, it failed to do so. Thus, Claimant may elect treaty adjudication notwithstanding the SPA’s contractual dispute resolution clause.

\textsuperscript{81}\textit{Ibid.} \textsuperscript{¶51-52}
\textsuperscript{82}\textit{Ibid.} \textsuperscript{¶ 105, reprinted in 41 I.L.M. 1135, 2002}
\textsuperscript{83}\textit{Eureko B.V. v. Poland}, Partial Award, 19 August 2005
\textsuperscript{84}\textit{SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay}, ICSID Case No. ARB/07/29, 2010, \textsuperscript{¶178}
\textsuperscript{85} Declaration of Professor Crivelarro in \textit{Société Générale de Surveillance S.A. v. Republic of the Philippines}, ICSID Case No. ARB/02/6, \textsuperscript{¶2}
\textsuperscript{86}\textit{African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo}, ICSID Case No ARB/05/21, 2009, \textsuperscript{¶61}
\textsuperscript{87}\textit{SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay}, ICSID Case No. ARB/07/29, 2010, \textsuperscript{¶181}
III. RURITANIA VIOLATED ITS OBLIGATIONS UNDER THE BIT AND INTERNATIONAL LAW TOWARDS CAM BY ADOPTING THE MEASURES FOR THE REGULATION OF MARKETING AND SALE OF ALCOHOL AND IMPOSING FURTHER REQUIREMENTS FOR MARKETING AND SALE OF FREEBREW BEER.

1. Violation Of The Obligations Under Bit And International Law By Ruritania
1) Claimant submits that the Respondent violated its obligations under the BIT. Specifically, the Respondent breached its duty when Respondent invalidly expropriated Claimant’s investment; when Respondent failed to accord fair and equitable treatment to the Claimant.

2) Vecuna (2003) express that the “protection of private property is a vital element of the broader issue of protection of human rights”. Even if, international law confers that a sovereign state has sovereignty on regulating its economy in order to enhance of welfare of its nation”. At the same time, it requires to oblige international minimum standard treatment on foreigners. Basically, International law principles provide a sovereign State to enjoy their sovereign right to regulate its domestic affairs. On the other hand, this exercise of such right is not unlimited and must have its boundaries.

3) Hence, when a State enters into a bilateral investment treaty and provides number of investment protection guarantees, later on this BIT becomes supranational law and bound by it, and the investment-protection obligations it undertook therein must be honored rather than be ignored by a later argument of the State”s right to regulate. Similarly, Newcombe and Paradell”s (2009, p.329) state that, “International expropriation law mediates between two general principles of international law. One is that states exercise permanent sovereignty over their territories and natural resources. And the second is that states must respect the acquired rights of foreigners” Now, it is a well developed principle in international law that the host states cannot take foreign properties without any compensation. Violating international obligations which recognized by the principle of international law may lead to

88“Indirect Expropriation and right to regulate in International Investment Law”, Working paper on International Investment, Directorate for Financial and Enterprise Affairs, 2004/4
89Ibid.
international responsibility.\textsuperscript{90} Ar. 31 (1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that, —the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”. Further, this was discussed in \textit{LG&E v. Argentina}\textsuperscript{91} case as, “it is well established in international law that the most important consequence of the committing of wrongful act is the obligation for State to make reparation for the injury caused by that act”. In this case tribunal agreed with Claimants that the appropriate standard for reparation under international law is „full” reparation as set out by the PCIJ in the \textit{Factory at Chorzow} case and Article 31 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.\textsuperscript{92}

\textbf{a) Indirect expropriation}

1) Article 4(1) of the BIT provides that investments by investors of either Contracting States may not directly or indirectly be expropriated, except when it is for public benefit; not discriminatory; carried out according to due process; and against compensation. \textit{De facto} expropriation may exist even if the host State does not directly take the foreign investor’s property, if the investor’s use and enjoyment of the property is substantially interfered with. In our case, Respondent’s adoption of the MAB Act (the “Act”) and the Reyhan ordinance severely impacted Claimant’s Investment, causing FBI’s revenue to fall by 90%.

2) In the case of developing countries, in order to attract more inflow of investment they enact laws and regulations, or alter existing laws relating to liberalization of trade and give guarantees to protect foreign investment rather than expropriate.\textsuperscript{93} Foreign investment is also one of the very important components for the economic development of developing countries. As a result, host states are reluctant to expropriate directly and create a bad publicity among international world. Thus, host state may bring number of measures which

\textsuperscript{90}Article 31 (1) of the ILC Draft Articles ; see also, Tschanz and Viñuales., (2009) p.731; Hobér, (2008, 25), author explains in his study that, there is yet another aspect of public international law which is crucially important in investment arbitration, i.e., the law of state responsibility.

\textsuperscript{91}\textit{LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic} (ICSID Case No. ARB/02/1) Award, July 25, 2007)

\textsuperscript{92}Ibid.

can cause serious negative impact on foreign investor, even though foreign investor having his ownership.

3) Investors are in struggle to persuade the tribunal those regulatory measures tantamount to indirect expropriation. In this regard, investor’s legitimate expectation plays a key role. Hence, host states are in a position to respect the existence of legitimate expectation of investor. Because, at the entry of investment, legal framework provided by the host state including minimum standard of treatment, stabilization clause will be an important source of legitimate expectation on the part of the investor. In many cases tribunal has taken into account of legitimate expectation of the investor as an important element to determine whether indirect expropriation has arisen. For instance *Tecmed v. Mexican case* the tribunal states; “the claimant had legitimate reasons to believe that the operation of the Landfill would extend over the long term. The claimant expectation was that of a long term investment relaying on the recovery of its investment and the estimated return through the operation of the landfill during its entire useful life”.  

4) It is important to note that deprivation of enjoyment of property rights of the investor is the central point to determine whether indirect expropriation has occurred. In *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* case tribunal held, “when measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a „creeping” or „indirect” expropriation or, as in the BIT, as measures „the effect of which is tantamount to expropriation”. As a matter of fact, the investor is deprived by such measures of parts of the value of his investment”.  

5) Similarly, Article 10 (3) (a), of the Draft Convention on International Responsibility of States for Injuries to Aliens provides, “any such unreasonable interference with use, enjoyment, or disposal of property as to justify an interference that the owner there of will not be able to

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92 *Tecnicas Medioam Bientales Tecmed v. The United Mexican States* (Case no. ARB(AF)/00/2) Award May 29, 2003, At ¶, 121; see also, Stone Sweet (2010) p.15 noted that, no arbitral tribunal referred to proportionality, even implicitly, before 2000  
93 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6) Awarded, April 12, 2002  
94 *Ibid* ¶ 107
use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference”.  

6) In the *Antoine Goetz and others v. Republic of Burundi* tribunal decided that the withdrawal of the certificate of free zone constituted a measure tantamount to expropriation, defined in Article 4 of the BIT as a “measure depriving of or restricting property rights.” In contrast, *PSEG v. Republic of Turkey* case tribunal says that, “none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation. Although, measures tantamount to expropriation may well make the question of ownership irrelevant” However, due to the act of host state, negative effect of on an investment cannot automatically be considered expropriation. Therefore, it is well established principle that an expropriation to occur, it is necessary for the investor to be deprived in whole or significant part of the property or effective control of its investment or for its investment to be deprived in whole or significant parts its value.

**b) Trademark rights**

1) The Claimant submits that the cumulative effect of the measures adopted by Respondent have resulted to the indirect expropriation of Claimants investment with respect to FBI as well as its trademarks and trade dress rights. It can be deduced that there was indeed expropriation of the trademark and trade dress owned by CAM because of the following acts of the Respondent:

a) Enactment of the Marketing of Alcoholic Beverages Act which curtails the use and enjoyment of the trademark of CAM by requiring the standardization of the labeling design of all alcoholic beverages;

b) Enactment of the Marketing of Alcoholic Beverages Act which curtails the use and enjoyment of the trade dress of CAM by requiring the standardization of the bottle size of all alcoholic beverages destroying the distinguishing trade dress of CAM.

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97 Article 10 (3) (a) of the Draft Convention on International Responsibility of States for Injuries to Aliens  
99 *Ibid*, Introductory Note, p. 455  
100 *Ibid*, Case No. ARB/02/5  
2) Despite the fact that the BIT allows expropriation, it must satisfy the conditions set forth in Article 4 of the BIT as outlined above. However, the Claimant submits that the Respondent state was unable to comply with such requirements because the taking is not for public profit; it is discriminatory; not carried out according to due process of law; and without any compensation.

c) **Regulatory measures of the host State may lead to indirect expropriation**

1) Customary international law also recognized that States have a right to regulate commercial and business activities within its territory.\(^{102}\) Further, arbitral tribunals also held that State has the right to adopt measures having a social or general welfare purpose.\(^{103}\) At the same time it has a duty to prevent the worsening of the situation and could not simply leave events to follow their own course, therefore, “it is quite evident that measures had to adopted to offset the unfolding crisis”.\(^{104}\)

2) In addition to this, tribunal is observed by *The American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States* in *AES v. Republic of Hungary*, “a state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory […].”\(^{105}\) Although, in *AES v. Argentina* case Tribunal did not accept the arguments put forwarded by respondent that the measures taken were general bearing aimed at restoring the economy and were not specifically related to or targeted Claimant”s investment and the dispute did not arise directly out of an investment.\(^{106}\) In this case tribunal said that, “as a sovereign State, the Argentina Republic had a right its economic policies; but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these

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\(^{102}\) *Indirect Expropriation and the right to regulate in International Investment Law*, Working paper on International Investment, Directorate for Financial and Enterprise Affair, 2004/4

\(^{103}\) Ibid. ¶ 195

\(^{104}\) *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3) ¶s 306-308

\(^{105}\) Mostafa (2008) p 196; *AES v. Hungary award*, Supra note 62, ¶ 14:3:4, it was concluded that the effects of reintroduction of the Price Degrees do not amount to an expropriation.

\(^{106}\) *AES Corporation v. Argentina Republic* (Case No. ARB/02/17)
guarantees and protection. Under this provision, directness has to do with the relationship between the dispute and the investment rather than between measures and investment”.

3) It is very essential to note that how far governmental measures deprive property rights of investors according to their respective treaty provisions. If those host states regulatory measures affects so, regulatory measures turn into regulatory expropriation. Thus, in Tecmed S.A. v. Mexico, case Tribunal said that,

“[In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance]”.

4) The first case under the Iran-United States Claims Tribunal was Starrett Housing, which dealt with the appointment of Iranian managers to an American housing project. The Tribunal concluded that an expropriation had taken place:

“[It is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even thought the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner]”.

5) In the Sea-Land case one of the issues was alleged expropriation of a bank account. The Tribunal did not find any substantial deprivation of or interference with the claimant’s rights to his account and rejected the claim by noting that the “account remains in existence and available in rials, at Sea-Land’s disposal”.

6) In S.D. Myers, a United States company, which operated a PCB remediation facility in the United States, alleged that Canada violated NAFTA Chapter 11 by banning the export of PCB waste to the United States. The Tribunal also distinguished regulation from expropriation primarily on the basis of the degree of interference with property rights:

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107 Ibid ¶ 57-60
108 Azurix Corp. v. Argentine award, supra note 18, ¶ 115.
112S.D Myers v. Canada, Final Award, 21 October 2002
“expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser interference”. 113

7) The arbitral Tribunal in the case CME (the Netherlands) v. the Czech Republic114 observed a different approach. CME, the Claimant, had purchased a joint venture media company in the Czech Republic and alleged, inter alia, breach of the obligation of the [host country] not to deprive the investor of its investment115 because of the actions of the national Media Council. The Tribunal, citing inter alia, the Tippets and Metalclad cases, found that an expropriation had occurred because “the Media Council’s actions and omissions…caused the destruction of the [joint-venture’s] operations, leaving the [joint venture] as a company with assets, but without business”. 116 It stated also that although “regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state” the administrative measures taken by the host country did not fall under this category. It therefore concluded that, “Expropriation of [the company’s] investment is found a consequence of the [host country’s] actions and inactions as there is no immediate prospect at hand that the [joint venture] will be reinstated in a position to enjoy an exclusive use of the license”117

8) Another relevant decision is the Revere Copper118 case (1980). The case arose from a concession agreement – which was to last for twenty five years – made by a subsidiary of the Revere Copper company with the government of Jamaica. The government, despite a stabilisation clause in the agreement ensuring that taxes and other financial liabilities would remain as agreed for the duration of the concession, increased the royalties. The company found it difficult to continue operations and closed operations and claimed compensation under its insurance contract. The Arbitral Tribunal,119 assuming that the contract was governed by international law, found that there had been a taking by the government and observed.120

113The Tribunal added that: “the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs”.
114CME (Netherlands) v. Czech Republic (Partial Award) (13 September, 2001)
115Article 5 of the 1991 Bilateral Investment Treaty between the Netherlands and the Czech Republic
116CME ¶ 591, Pg. 166.S
117Ibid, ¶ . 607, Pg. 171
118Revere Copper & Brass Inc. v. Overseas Private Investment Corporation, 56 International Legal Materials 258
119The Tribunal was set up under the American Arbitration Association.
120Revere Copper & Brass Inc. v. Overseas Private Investment Corporation, 56 International Legal Materials 258
[“In our view, the effects of the Jamaican Government’s actions in repudiating its long term commitments to RJA (the subsidiary of RC), have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated....”]

9) Although the insurance agency (OPIC) argued that RJA still had all the rights and property and that it could operate as it did before, the Tribunal responded that “this is may be true but...we do not regard RJA’s control of the use and operation of its properties as any longer effective in view of the destruction by government action of its contract rights”.

10) It is crucial to note, excessive power of host states on measures may constitute expropriation. Normally, existence of regulatory actions or measures of the government will not be eliminated from the definition of expropriation. Most instances, government argues that the measures taken by it, even if it contains negative impact to the investor, for public purpose which is no compensable taking. In such situation, Arbitral Tribunal takes into account all negative impacts caused by the measures or actions to determine the characteristic of expropriation, whether such measures are proportion to the protected public purpose and investor’s right/ protection which were agreed to be granted under investment treaty. Generally, BITs do not define clearly what constitute an expropriation and they include an express term “expropriation” and add “any other action that has equivalent effects”. They do not express which measures or actions would constitute acts “tantamount to expropriation”. Therefore the Tribunal should have to look to international law in determining the relevant criteria for evaluating the claim.121

11) Most importantly, under Article 4.1 of the BIT, compensation is required for expropriation to be lawful. Additionally, under international law, compensation must be immediate, adequate and effective. However, in the present case, Respondent’s expropriatory acts were unlawful because compensation was not offered or given to Claimant.

d) **Expropriation may extend to any commercial right (goodwill, market share)**

In *Pope & Talbot v. Canada*, the tribunal considered that the “investment’s access to the United States market is a property interest subject to protection under Article 1110”,122 given that the ability to sell softwood from British Columbia to the United States was an important element of

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121 *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID, Case No. ARB/98/4, award December 8 (2000)) at ¶ 18

122 *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, ¶ 96.
the business. (However, it did not consider it to be a separate investment, but assessed the impact of the loss of the export business on the investor’s enterprise as a whole.)
The *Methanex v. USA* tribunal held that some of these interests are relevant only for purposes of valuation, but do not constitute discrete assets that could be expropriated separately. With respect to Methanex’s claims that it had lost customer base, goodwill and market share, the tribunal held that:

“In the view of the Tribunal, items such as goodwill and market share may ... constitute ... an element of the value of an enterprise and as such may have been covered by some of the compensation payments. Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.”¹²³

(Emphasis added.)

e) **Principle of Proportionality**

1) Principle of proportionality’s definition itself brings three separate criteria to satisfy administrative or legislative measures. In other way, proportionality is testing the measures which qualify certain criteria.

2) The step, “suitability”, requires that the measures must be appropriate to protect the interest in question and presuppose a degree of causal relationship between the measure and the objective pursued. Simply, the measure must suite the objective and this test avoids unsuitable measures which lead to arbitrary or discriminatory. One who can argue simply the measure is not suitable at all to objective of public interest. Hence, suitability of measures depends on case to case analysis.

3) The next step is “necessity”. It means that the measures has taken foremost important to achieve the objective and to confirm that there is no other less restrictive alternative is available to accomplished the same end.

4) The measures has taken by the host state is suitable, and at the same time necessary to achieve the objective than there is no room for discriminatory treatment. Therefore, proportionality application requires non discriminatory treatment. The last step is “proportionate *stricto sensu*”. The last step it is to prove the measures must not be excessive

¹²³ *Methanex v. USA*, Final Award, 3 August 2005, Part IV, Chapter D.¶ 17
or disproportionate with regard to the pursued objective. It must follow due process of law when measures are taken by government.

**f) Fair and equitable treatment**

1) FET is considered as backbone to the all bi-multilateral investments treaties. This was repeated in *CMS v Argentina* award and state that “there can be no doubt that a stable legal and business environment is an essential element of fair and equitable treatment”. Predictability and stability and consistency of the host State’s legal framework have associated with FET.

2) FET can appear in two different ways, one is that it creates an autonomous, treaty based standards, and another is accordance with international law. The United States, France and the United Kingdom prefer the latter one. According to Dolzer and Schreuer, the FET is considered as a rule of international law, therefore, it cannot determine under the host state laws. The FET standard may be violated even if the investor receives the same treatment as national of the host state receives. Similarly, in *Tecmed* case tribunal understood that the FET was resulting from an autonomous interpretation, the text of Article 4(1) of the agreement according to its ordinary meaning (Article 31 (1) VCLT) or from international law and the good faith principle. Likewise, Judge Schwebel defined FET as “fair and equitable treatment is a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non discrimination, and proportionality”.

3) Generally, in expropriation cases, it is difficult to establish that the expropriation has occurred without direct taking of property. Arbitral tribunals continuously address that the measures taken by host state must ensure transparency in the functioning of the public authorities and the lack of predictable framework for investment contrary to legitimate expectation of the investor and commitments made by the host state are considered as

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124 *CMS Gas Transmission Company v. Argentine Republic* ICSID Case No. ARB/01/8, Decision on Jurisdiction of July 17, 2003  
125 Kingsbury and Schill (2009) Pg.10  
127 Dolzer and Schreuer (2008) Pg.123  
128 *Tecmed* case  
129 Cited in *MTD Equity Sdn, Bhd, and MTD Chile S.A v Republic of Chile* Case No. ARB/01/7, Award My 25, 2004, ¶ 109
breaches of FET.\textsuperscript{130} Consequently, investment Tribunals has to determine whether host state’s measures violate the FET. According to Redferen (2004, paras 11-25) the standard may need to examine “the impact of the measures on the reasonable investment – backed expectations of the investor; and whether the state is attempting to avoid investment – backed expectations that state created or reinforced through its own acts”.

4) The doctrine of legitimate expectations is a doctrine of public law that law protects individuals from changes to representations made by Government bodies.

5) The scope of the doctrine can cover both the protection of substantive and procedural rights. By substantive protection it is meant that the doctrine protects the individual by forcing the Government body to make good its representation to the individual by altering or keeping its policy, or law, where it harms an individual’s interests. By way of contrast, procedural legitimate expectations offer a more limited form of protection by affording rights of effective participation, where there is a change of position by the state.\textsuperscript{131} This includes a right to be heard prior to a decision being made by a Government body and a right to make representations during the decision-making process.\textsuperscript{132} The absence of such an opportunity to participate in administrative decision making may lead to compensation.

6) Since a FET violation requires a lower threshold compared to expropriation, based on the aforementioned arguments, Respondent inevitably breached the FET provision. More specifically, the extreme measures are arbitrary for the reasons discussed above, such as lack of consultation in adopting the Act and inconclusive evidence on which HRI report was based.

\textbf{g) Character of governmental measures, i.e. the purpose and the context of the governmental measure}

1) A very significant factor in characterising a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State’s right to promote a recognized “social purpose”\textsuperscript{133} or the “general welfare” by regulation.

\textsuperscript{130}West management v. United Mexican Status (ICSID case No. ARB(AF)/00/3, award June 2, 2000, ¶ 98; MTD Chile case 114

\textsuperscript{131}R. Singh, ‘Making Legitimate Use of Legitimate Expectations’ (1994) 144 NLJ 1215 atvpx.1215(1)

\textsuperscript{132}C. Forsyth, ‘The Provenance and Protection of Legitimate Expectations’ [1988] CLJ 238 at Pg. 253-254

2) As a response to the growing jurisprudence in this field, the recently concluded US-Free Trade Agreements with Australia\textsuperscript{134}, Chile\textsuperscript{135}, Central America\textsuperscript{136}, Morocco\textsuperscript{137} and Singapore\textsuperscript{138} and the new US model BIT\textsuperscript{139} provide explicit criteria of what constitutes an indirect expropriation. In the Annexes on Expropriation, they state that:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and

(iii) the character of the government action.

In addition, they address indirect expropriation and the right to regulate: Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

\textbf{IV. MORAL DAMAGES MAY IN PRINCIPLE BE AWARDED BY THE TRIBUNAL TO CLAIMANT FOR THE ARREST OF MESSRS GOODFELLOW AND STRAW, WHICH RESPONDENT ACCEPTS CONSTITUTED A BREACH OF ITS OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY.}

The tribunal has the jurisdiction to award moral damages owing to article 3 of the BIT.

\textbf{1. The detention of the claimant’s executives by the State of Ruritania is breach of its international obligation}

\textsuperscript{134}US-Australia Free Trade Agreement signed on March 1, 2004, [Annex 11-B, Article 4(b)]

\textsuperscript{135}The US-Chile Free Trade Agreement was signed on June 6, 2003 (Annex 10-D)


\textsuperscript{137}US-Morocco Free Trade Agreement signed on June 15, 2004 (Annex 10-B)

\textsuperscript{138}US Trade representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo on 6 May, 2003

\textsuperscript{139}For the text of the model BIT see http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm
In the general and broadest meaning moral damages are simply the opposite of material damages, i.e. damages that entail a financial or an economic loss. The International Law Commission (ILC)’s Commentaries to its Draft Articles on Responsibility of States for Internationally Wrongful Acts (‘ILC Articles’) provides the following illustration of the type of moral damages affecting an individual that can be compensated: ‘non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.\(^\text{140}\)

As per Wittich, moral damages include personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life.\(^\text{141}\) Thus it specifically includes the injury to the credit or reputation of a legal entity, such as a corporation or its executives, for instance.\(^\text{142}\)

As per the ILC draft article on state responsibility, article 31 specifically mentions the cases when the state would be held responsible for reparation in case of breach of an international responsibility. It is noted that Ruritania has signed and ratified the ICCPR, thus the illegal detention of FBI executives’ Messer Goodfellow and straw, as per article 9 (1) and (5) of the same, marks the detention illegal thereby making it an internationally wrongful act. The state of Ruritania has also accepted that they did not follow the due process of law, which violates the said articles of ICCPR. International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. It was held in the M/V “Saiga” case\(^\text{143}\), the tribunal held that Saint Vincent and the Grenadines’ entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.\(^\text{144}\)

2. Article 2(b) of the BIT guarantees full protection and security to the contracting parties

\(^{140}\)Draft articles on Responsibility of States for Internationally Wrongful Acts’, 2001, Article 31 & Article 36
\(^{142}\)Satisfaction as a Form of Reparation for moral damages suffered by investor & respondent state In investor State Arbitration Dispute’, PATRICK DUMBERRY, Journal of International Dispute Settlement, Vol. 3
\(^{143}\)Saint Vincent and the Grenadines v. Guinea, International Tribunal for the law of the Sea, 1999
\(^{144}\)Draft articles on Responsibility of States for Internationally Wrongful Acts’, 2001, Article 31 & Article 36
1) In the BIT between CAM & State of Ruritania, article 2 (b) guarantees fair and equitable treatment as well as full protection and security under this BIT. The concept of fair and equitable treatment was similarly discussed in a 2008 investment arbitration tribunal where the claimant turned to ICSID after Yemeni authorities refused to pay certain construction bills, and pressured DLP into an unfavourable settlement of the dispute.

2) DLP also complained that company executives had been harassed and mistreated by armed tribes, and members of the Yemeni military. Thus, in addition to seeking compensation for its financial losses, DLP also sought moral damages for the pain and suffering of its executives, and the harm inflicted upon its reputation, credit and business opportunities. In the final award, the ICSID arbitrators nodded to other international cases where moral damages were awarded in certain exceptional circumstances.\textsuperscript{145}

3) Article 39 of the Magna Carta states: \textit{“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful Judgment of his Peers, or by the Law of the land”}.\textsuperscript{145}

4) Likewise the French Declaration of the ‘natural and imprescriptibly rights of a man’ including freedom from arrest and detention except in conformity with the law. Article 7 stated, in part: "No man may be indicted, arrested or detained except in cases determined by law and according to the forms which it has prescribed."

5) The detention of Messers Goodfellow and Straw was an arbitrary\textsuperscript{146} detention, thus as per the article 9(1) of ICCPR, the arrest and detention of the two executives was arbitrary, violating the international law. It should be well noted that the state of Ruritania has accepted its fault of not providing full safety and security to the other contracting party. In \textit{Benvenuti \\& Bonfant v. People's Republic of the Congo}\textsuperscript{147} the tribunal acknowledged that government’s activities disturbed the claimant’s work and caused loss of harm and reputation. Therefore as per article 2(1)(b) of the BIT in the present case, the government of Ruritania has breached

\textsuperscript{145} \textit{Desert Line Projects LLC v. Yemen} (n 3) ¶ 179, 286
\textsuperscript{146} Definition as per Websters Third Edition New International Dictionary
\textsuperscript{147} \textit{Benvenuti \\& Bonfant v. People's Republic of the Congo}, ICSID (W. Bank) Case No. ARB/77/2, Award, 1 1.1 (Aug. 15, 1980).
its obligation to provide full safety and security to the contracting party. The executives of the claimant company were illegally detained prejudiced in the laws of land.

6) The case of **Desert Line LLC v Yemen**

   The case of **Desert Line LLC v Yemen** has clearly mentioned that though the executives of the claimant company were detained, it suffered loss of reputation as a legal person. Finding that the physical duress exerted on Desert Line’s executives was malicious, the tribunal ultimately ruled that the government of Yemen was liable “for the injury suffered by the Claimant, whether it is bodily, moral or material in nature.” The Tribunal held that Yemen should provide compensation to a corporation for its officers’ psychological suffering (in this case, the ‘stress and anxiety of being harassed, threatened and detained’)

7) The detention of the executives of Contifica group and the harm to the reputation of company by airing their detention on their most popular TV channel are examples of how their reputation was damaged and how arbitrary their detention was owing to a mere ‘information’, as against the due process of law.

8) The unlawful detention of the executives caused harm to the reputation of contifica group and owing to its legal identity; Contifica should be entitled to moral damages. In **Lemire v Ukraine** , it laid down “exceptional circumstances” in which a tribunal can award moral damages

   a. the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act
   b. the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and

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148 *Desert Line Projects LLC v. Republic of Yemen*, ICSID (W. Bank) Case No.ARB/05/17, Award, In 1-14 (Feb. 6, 2008)


150 *Desert Line Projects LLC v Yemen* (n 3) ¶ 179, 286.

151 ¶ 22, 23, 24

152 *Libyan Arab Foreign Investment Company (LAFICO) v Republic of Burundi*, Award, 4 March 1991, 96 ILR Pg. 279

153 *Joseph Charles Lemire v Ukraine*, ICSID (Case ARB/06/18) Award, 28 March 2011, ¶ 333
c. both cause and effect are grave or substantial

Taking into consideration the above referred, it is very well explained that the state of Ruritania has not only breached its obligation to provide full protection and security to the contracting state, as per BIT, but has also breached its international obligation which binds the state to pay moral damages.

V. THE LOSS OF SALES BY CAM’S SUBSIDIARIES CONSTITUTES A RECOVERABLE ITEM OF DAMAGES.

The issue arises out the claims that CAM has raised on Ruritania in their submission alleging that the loss accrued pursuant to the MAB Act, should also suffice the loses which have occurred to subsidiaries of CAM.

1. Ruritania has a breach of obligation and subsidiaries accord to the investments, directly or indirectly.

1) Before instating the submissions on the issue, claimants highlight Article 31 of the Vienna Convention which states that BIT was to be interpreted in accordance with the principles set out in the Vienna Convention on the Law of Treaties, which required the tribunal to interpret the BIT in good faith and give the terms of the BIT their ordinary meaning, assessed in context and in the light of the BIT’s object and purpose. The award in Azurix Corp v Argentine Republic\textsuperscript{154}, the tribunal's decision makes it clear that the good faith requirement of the Vienna Treaty can be widely interpreted, and the tribunal uses this as a basis for including the explanatory notes in the interpretative process.

2) Article 31 of the Treaty of United Nations of Responsibility of States for Internationally Wrongful Acts can give the close insight of the numerous obligations of the state of ruritania for the reparation of the injury that has been inflicted upon their policies in form on the MAB Act. On the question, whether such was instituted in the BIT or not, it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form\textsuperscript{155}. The loss would not have occurred but for Ruritania’s

\textsuperscript{154} Azurix v. Argentine Republic, ICSID Case No ARB/01/12, Award 14 July 2006

\textsuperscript{155} UNCITRAL Arbitration Proceedings CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic (Para 615-617) on September 13, 2001
breach of its obligation under the BIT\textsuperscript{156}. The formulation of Article 31 avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach\textsuperscript{157}.

3) The tribunal while adjudicating the claims in \textit{Azurix v. Argentine Republic}\textsuperscript{158}, while stating the contentions of respondents that ABA, while being a subsidiary of Azurix, is not entitled to claim losses being a subsidiary, that Azurix is “trying to have it both ways”: Azurix is “washing its hands” of its subsidiaries’ obligations by using the BIT\textsuperscript{159}, that the subsidiaries \textbf{are not an investment}\textsuperscript{160}, rejected the arguments to alter ego and said that the only condition is that, whatever the form an investment may take, it must be directly or indirectly owned or controlled by nationals or companies of the other party to the BIT\textsuperscript{161}.

2. \textbf{The damages on account of subsidiaries are within the scope of adequate compensation to be awarded in case of expropriation.}

1) The damages to the subsidiaries outside \textit{Ruritania} are within ‘proximate causality’ because FBI’s operation was totally dependent on materials imported from them. \textit{In Cargill v. Mexico}\textsuperscript{162}, where lost sales of goods produced outside Mexico were recognized to be compensable, the claimants plead that the same shall be accorded to Contifica Asset Management and shall be entitled to the damages. The tribunal’s observations are very pertinent to establish the claim of Claimants. In this case \textit{supplying HFCS to Cargill de Mexico was an inextricable part of Cargill's investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico}\textsuperscript{163}.

\textsuperscript{158}Azurix v. Argentine Republic, ICSID Case No ARB/01/12, Award 14 July 2006 ¶61
\textsuperscript{159}Ibid, ¶3 (final award) (Rejoinder to parties)
\textsuperscript{160}Azurix v. Argentine Republic, ICSID Case No ARB/01/12, Award 14 July 2006 ¶61
\textsuperscript{161}Ibid
\textsuperscript{162}Ibid, ¶523
\textsuperscript{163}Ibid, ¶523
Though no direct ban has been imposed, but the indirect expropriation Ruritania has inflicted upon CAM, is the same reason that no they now have an inability to sell in Ruritania.

2) While adjudicating the above case, the tribunal also mentioned and relied upon the case of **Pope & Talbot Inc. v. Canada**\(^\text{164}\). It was held, “Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction. It is, in fact, a very important part of the 'business' of the Investment”.

3) **In the “Rainbow Warrior” arbitration**\(^\text{165}\) it was initially argued that “in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation”, but the parties subsequently agreed that unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State\(^\text{166}\).

4) The Court concludes that the broad nature of the definition of "investment of an investor of a Party", in particular the use of the words directly or indirectly", together with the objective of NAFTA that it shall be interpreted and applied to meet the objectives of NAFTA, support the finding of the Tribunal at paragraph 231 : “On the evidence and on the basis of its interpretation of NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of NAFTA and that Myers Canada was an "investment"”.

5) To establish the relationship between loss of sales by CAM’s subsidiaries and State Property Fund of Ruritania, it is submitted that:-

   a. Loss of sales by Claimant’s subsidiaries was caused by FBI. They are suffering losses of sales and had to go through a redundancy process because of the unfair regulations taken by Respondents\(^\text{167}\).

   b. After a series of measures adopted by Respondent to FBI, **FBI’s output of FREEBREW beer declined sharply; and FBI equivalently lost control of normal production and management.**

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\(^\text{164}\) Pope & Talbot Inc. v. Canada, NAFTA/UNCITRAL, Interim Award on 26 June 2000

\(^\text{165}\) Rainbow Warrior affair, UNRIAA, volume XX (Sales No E/F.93.V.3), pg. 215 (1990) pp. 266–267 ¶ 107 and ¶109

\(^\text{166}\) Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), Pg. 215 (1990)

\(^\text{167}\) Statement of Claims, ¶19
6) The principles upon which compensation should be awarded derive from the applicable international law rules. The Tribunal in S.D. Myers\textsuperscript{168} concluded that: by not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA\textsuperscript{169}.

7) Respondent is liable for the compensation for the damage caused, which can be summarized by these arguments:

\begin{itemize}
\item Claimant’s activities and its supply chains formed by CAM”s subsidiaries is an inseparable part of Claimant’s investment. Encumbrances in the supply chains\textsuperscript{170} would therefore affect Claimant’s performance\textsuperscript{171}.
\item Where lost sales of goods produced outside Mexico were recognized to be compensable, the claimants plead that the same shall be accorded to Contifica Asset Management and shall be entitled to the damages\textsuperscript{172}.
\item Claimant and the subsidiaries have a direct connection between each other and the investments accorded by Ruritania to CAM shall be similarly accorded to the subsidiaries as well. Such direct connection is essential in establishing the investment of other parties\textsuperscript{173}.
\end{itemize}

Respondent’s failure to comply with the fair and equitable treatment by its regulations is the direct cause of Claimant’s loss of sales in and out of Respondent’s jurisdiction. BIT Article 2.2 stipulates that returns from an investment shall enjoy the same protection as the original investment.

\textsuperscript{168}S.D Myers v. Canada, Final Award, 21 October 2002
\textsuperscript{169}(SD Myers, supra page 65, First Partial Award at ¶. 309).
\textsuperscript{170}The Evolving Legal Response to Supply Chain Management by Gregory M. Chabon
\textsuperscript{171}L.E.S.I - DIPENTA v. The Republic of Algeria, ICSID-Case No. ARB/03/08, Award, 2005, ¶ 25
\textsuperscript{172}Cargill v. United Mexican States, (ICSID Case No ARB(AF)/05/Z) on September 18, 2009
\textsuperscript{173}S.D Myers v. Canada, Final Award, 21 October 2002
Conclusion and Prayer for Relief

The State of Ruritania through this proceeding has summarized their pleadings and requests the tribunal to adjudge and declare:

1. That the tribunal has the jurisdiction over the claims submitted by CAM and the same are inadmissible in the light of facts surrounding the acquisition of shares.
2. That the tribunal has jurisdiction over the claims submitted by CAM on the alleged breach of SPA and the same are admissible.
3. That the actions of Ruritania amounted to expropriation thus attracting due compensation as per Article 4(3) of the BIT including the compensation for the loss of market share and goodwill.
4. That the state of Ruritania has failed in its obligation to provide full protection and security as per the terms of BIT and thus are entitled to be awarded for moral damages.
5. That losses are accrued to the subsidiaries of CAM due to the losses to CAM and any such claim arising from them shall adequately be paid as damages.

All of which is respectfully submitted.

XYZ LLP
On behalf of Contifica Asset Management