GERMAN INSTITUTION OF ARBITRATION

UNDER THE UNCITRAL ARBITRATION RULES ADMINISTERED BY THE DIS

CASE NO.

MEMORIAL

CONTIFICA ASSET MANAGEMENT CORP.  THE REPUBLIC OF RURITANIA

CLAIMANT  RESPONDENT

TEAM SCHWEBEL
TABLE OF CONTENTS

TABLE OF AUTHORITIES ........................................................................................................... IV

STATEMENT OF FACTS ........................................................................................................... XVII

(I) THE TRIBUNAL HAS JURISDICTION TO HEAR THE CLAIMS SUBMITTED BY CAM AND THESE CLAIMS ARE ADMISSIBLE IN THE LIGHT OF THE FACTS SURROUNDING ACQUISITION OF THE SHARES IN FBI BY CAM ............................................... 1

1. The dispute at hand concerns investment which is protected under Cronos-Ruritania BIT 1
2. Claimant in the present dispute is an investor under Cronos – Ruritania BIT ..................... 3
3. The transfer of shares in FBI from Contifica Spirits to CAM is a legitimate restructuring and does not constitute an abuse of process .......................................................................................................... 4

(II) THE TRIBUNAL HAS JURISDICTION OVER CAM’s CLAIMS BASED ON THE BREACH OF SPA BY FUND AND THOSE CLAIMS ARE ADMISSIBLE .............................. 8

1. The Fund’s actions are attributable to Ruritania .................................................................. 8
2. The breach of SPA amounts to the breach of Cronos-Ruritania BIT ................................. 10
3. The dispute resolution clause contained in SPA does not preclude the exercise of jurisdiction by the Tribunal .......................................................................................................................... 12

(III) BY ADOPTING THE MEASURES FOR THE REGULATION OF MARKETING AND SALE OF ALCOHOL AND IMPOSING FURTHER REQUIREMENTS FOR MARKETING AND SALE OF FREEBREW BEER RURITANIA VIOLATED ITS OBLIGATIONS UNDER CRONOS-RURITANIA BIT ................................................................. 14

1. Actions of Ruritania amount to indirect expropriation of CAM’s investment ................. 14
2. Should the actions of Ruritania be deemed not expropriatory, in any case, they were taken in breach of FET standard .............................................................................................................. 20

(IV) MORAL DAMAGES FOR THE ARREST OF MESSRS GOODFELLOW AND STRAW SHALL BE AWARDED TO CLAIMANT .................................................................................. 22

1. Moral damages are available in principle in investment arbitration ................................. 22
2. Moral damages should be awarded to Claimant since the "exceptional circumstances" standard is met .................................................................23

(V) THE LOSS OF SALES BY CAM'S SUBSIDIARIES LOCATED OUTSIDE OF RURITANIA TO FBI CONSTITUTES A RECOVERABLE ITEM OF DAMAGES ......27

1. CAM's foreign subsidiaries form together with CAM a group of companies which should be treated as investor under Cronos-Ruritania BIT .................................................................27

2. Sales by CAM’s foreign subsidiaries constitute an investment in Ruritania under Cronos-Ruritania BIT. ...................................................................................................................32

3. Ruritania violated its obligations under Cronos-Ruritania BIT through expropriation of the CAM Group’s investments and failure to accord FET, which constitutes the ground for claiming damages. ...................................................................................................................34

PRAYER FOR RELIEF ........................................................................................................35
# TABLE OF AUTHORITIES

## Books and Journals

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author</td>
<td>Source</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
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</tr>
<tr>
<td>Source</td>
<td>Description</td>
</tr>
<tr>
<td>--------</td>
<td>-------------</td>
</tr>
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</tr>
<tr>
<td>Author(s)</td>
<td>Reference</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
### Case law

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ADC Affiliate</strong></td>
<td>ADC Affiliate Limited and ADC &amp; ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16</td>
</tr>
<tr>
<td><strong>ADF Group</strong></td>
<td>ADF Group Inc. v. United Stated of America, ICSID Case No ARB(AF)/00/1. Award</td>
</tr>
<tr>
<td><strong>AES Summit Generation</strong></td>
<td>AES Summit Generation Limited and AES-Tisza Erömükft. v. Republic of Hungary, ICSID Case No. ARB/07/22. Award of September 23, 2010</td>
</tr>
<tr>
<td><strong>Aguas del Tunari</strong></td>
<td>Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, January 29, 2003</td>
</tr>
<tr>
<td><strong>Amco</strong></td>
<td>Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1 (1992);</td>
</tr>
<tr>
<td><strong>Autopista Concesionada de Venezuela</strong></td>
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</tr>
<tr>
<td><strong>Azurix</strong></td>
<td>Azurix Corp v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003</td>
</tr>
<tr>
<td><strong>Barcelona Traction</strong></td>
<td>Belgium v. Spain (Barcelona Traction case), ICJ Case (ICJ Report 1970)</td>
</tr>
<tr>
<td>Organization</td>
<td>Case Description</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Bayandir</strong></td>
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</tr>
<tr>
<td><strong>BGG</strong></td>
<td><em>BG Group Plc v. The Republic of Argentina, UNCITRAL</em></td>
</tr>
<tr>
<td><strong>BIVAC</strong></td>
<td><em>Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Republic of Paraguay, ICSID Case No Arb/07/9, Decision of the Tribunal on Objections to Jurisdiction</em></td>
</tr>
<tr>
<td><strong>Biwater</strong></td>
<td><em>Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (2008)</em></td>
</tr>
<tr>
<td><strong>Bosh International</strong></td>
<td><em>Bosh International, Inc and B&amp;P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, October 25, 2012</em></td>
</tr>
<tr>
<td><strong>CMS</strong></td>
<td><em>CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (2005);</em></td>
</tr>
<tr>
<td><strong>Continental Casualty</strong></td>
<td><em>Continental Casualty Company v. The Argentine Republic, ICSID Case No ARB/03/9.</em></td>
</tr>
<tr>
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</tr>
<tr>
<td><strong>Desert Line</strong></td>
<td><em>Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, February 6, 2008</em></td>
</tr>
<tr>
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<tr>
<td>------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
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<tr>
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</tr>
<tr>
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<tr>
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<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Case</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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<td><em>LG&amp;E Energy Corp., LG&amp;E Capital Corp., LG&amp;E International Inc. v. Argentine Republic</em>, ICSID Case No ARB/02/1</td>
</tr>
<tr>
<td><strong>Lusitania</strong></td>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Territory</td>
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</tr>
<tr>
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</tr>
<tr>
<td>Party 1</td>
<td>Party 2</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Sempra</td>
<td>Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16;</td>
</tr>
<tr>
<td>Société Générale</td>
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</tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Telekom</td>
<td>Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award of July 29, 2008.</td>
</tr>
<tr>
<td><strong>Tokios Tokeles</strong></td>
<td><em>Tokios Tokeles v Ukraine</em>, ICSID Case No ARB/01/12, Decision on Jurisdiction, December 8, 2003;</td>
</tr>
<tr>
<td><strong>Vivendi</strong></td>
<td><em>Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic</em>, ICSID Case No. ARB/97/3, Challenge Decision of 3 October 2001, Decision on Annulment (2002);</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Tobacco Plain Packaging</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>UNCITRAL Arbitration Rules</strong></td>
<td><em>UNCITRAL Arbitration Rules</em> (as revised in 2010 by General Assembly Resolution 65/22).</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. Contifica Asset Management Corp. (‘CAM’ or ‘Claimant’) is a company incorporated under the laws of the State of Cronos. CAM is a member of Contifica group, a major international conglomerate with interests in many industrial areas and operations in over 30 countries. The parent company of Contifica Group is Contifica Enterprises Plc.

2. The Republic of Ruritania (‘Ruritania’, ‘Respondent’ or ‘Government’) is a state where investments protected under the Treaty for the Mutual Promotion and Protection of Foreign Investment between the State of Cronos and the Republic of Ruritania dated March 15, 1997 (‘Cronos – Ruritania BIT’ or ‘BIT’) were made.

3. Freecity Brewery Inc. (‘FBI’) is Ruritania’s oldest and largest brewery founded in 1928. Until 2008 the company was owned by the State Property Fund of Ruritania (‘Fund’), a state establishment incorporated under the laws of Ruritania. While FBI produces a number of different brands of beer, its most famous and popular brand is “FREEBREW”. It has a distinct taste which is due to a flavouring produced from a local plant, Reyhan, which can only be found in the Hillmagore region of Ruritania and has traditionally been added to a number of local food products. FREEBREW is traditionally sold in 0.8 l. bottles, which were first introduced by the brewery’s founder.

4. For years FBI had been a successful and profit-generating asset. Nevertheless, in the beginning of 2008 due to the financial crisis Fund announced an international tender for private investors in order to sell FBI.

5. On June 30, 2008 Contifica Spirits S.p.A. (‘Contifica Spirits’), a wholly owned subsidiary of Contifica Enterprises Plc., was declared the winner of the tender. On the same day Contifica Spirits and Fund entered into a share purchase agreement (‘SPA’) providing for the acquisition of all shares in FBI for USD 300,000,000.

6. Soon after, Contifica Group made significant investments in the technology, design and equipment of the brewery. As a result the output of the brewery increased by 30%. Besides, FBI
was integrated into the Contifica group’s global procurement network with various subsidiaries of the group supplying raw and packaging to FBI.

On March 17, 2010 as part of the intra-group restructuring, the shares in FBI were transferred from Contifica Spirits to Claimant. On the same day Claimant acquired rights to the principal intellectual property used by FBI (beer trademarks and trade dress registrations).

On November 20, 2010 the Ruritanian parliament adopted the Regulation of Sale and Marketing of Alcoholic Beverages Act (‘MAB Act’), which severely restricted FBI’s ability to market and sell its products in Ruritania.

Pursuant to MAB Act, the marketing of any alcoholic beverages on television and at sporting events was prohibited, as well as serving beer at sport facilities, outdoors and at any place from 9 pm till 9 am. The Act also imposed the plain packaging requirements, under which trademarks/brands of beer be written in the same font and colour as all the other text on the label. Besides, MAB Act prohibited sale of alcohol in containers of over 0.5l.

As a result FBI’s sales dropped by approximately 60% during the first two quarters of 2011 with the company incurring lost net income of around USD 10 million and loss of revenue of 60%.

Human Health Research Institute (‘HRI’) is a government-funded institution. On June 15, 2011 the 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.

On June 30, 2011, the Ministry of Health and Social Security (‘Ministry’) adopted an ordinance, which requires any product containing Reyhan concentrate to be labeled with an explicit warning (‘Ordinance’).

The research of HRI contained numerous flaws in the analysis as well as its process of raw data collection. Moreover, in July 2011 FBI was provided with access to the report and the underlying materials and discovered that in 2005 an interim report, which came to the same conclusions, was sent by HRI to Ministry.
On August 20, 2011 FBI requested Ministry that the labeling requirement be lifted pending further investigation of the matter. On August 25, 2011 Ministry denied this request.

Meanwhile, FBI’s competitors took full advantage of the situation. They sponsored several “analytical” programs on Ruritania’s most popular TV channels, where it was, *inter alia*, highlighted that FREEBREW contains “poisonous Reyhan”. Competitors also started labeling their beers as “Reyhan-free”.

Following introduction of the new labeling regulations on FREEBREW, according to audited IFRS reports FBI sales fell by a further 20%, with its revenue in the last quarter of 2011 falling to 10% of the revenue for the same period of 2009.

As a result, FBI failed to comply with financial covenants established by the credit facilities with its various lenders. On September 15, 2012 lenders agreed not to declare default and not to enforce their security rights over various FBI assets subject to being provided with an additional security package.

On December 1, 2011 the Prosecutor’s Office of Ruritania commenced investigation against Messrs Goodfellow and Straw, executives of FBI and Contifica Group. The Office was acting on “information” that they were allegedly involved in bribery of the officials of Fund in connection with the acquisition of FBI shares.

On December 23, 2011 Messrs Goodfellow and Straw were detained and arrested in the Freecity International Airport. Although they were free under Ruritanian law to leave the country, they were told by the police officers that they were being detained to stop them from “fleeing justice”.

A video of their detention from a security camera was apparently passed by the police to Free TV, Ruritania’s most popular TV channel, which aired it with a blaming commentary later on the same day.

The criminal investigation against the executives was terminated due to insufficient evidence on June 20, 2012. Ruritanian authorities never apologized for the detentions or offered any compensation.
(I) THE TRIBUNAL HAS JURISDICTION TO HEAR THE CLAIMS SUBMITTED BY CAM AND THESE CLAIMS ARE ADMISSIBLE IN THE LIGHT OF THE FACTS SURROUNDING ACQUISITION OF THE SHARES IN FBI BY CAM

22 In accordance with Article 23(1) of the UNCITRAL Arbitration Rules applicable in this arbitration, “the arbitral tribunal shall have the power to rule on its own jurisdiction”. CAM submits that nothing in the present case impedes the exercise of the Tribunal’s jurisdiction.

23 The dispute at hand should be resolved by the Tribunal in accordance with Article 8 of Cronos – Ruritania BIT since (1) it concerns an investment which is protected under the BIT, (2) Claimant is an investor entitled to this claim under the BIT. Moreover, Claimant submits that (3) the transfer of shares in FBI from Contifica Spirits to CAM is a legitimate restructuring and does not constitute an abuse of process.

1. The dispute at hand concerns investment which is protected under Cronos-Ruritania BIT

24 The shares in FBI owned by CAM are a bona fide investment and should be protected under the BIT because (1.1) they fall within the definition of investment under the BIT and (1.2) they meet the requirements established by the academic writers and investment case law.

1.1 The investment of CAM falls within the definition of investment under the BIT

25 Pursuant to Article 1 of the BIT the term “investment” includes “shares of companies and other kinds of interest in companies” as well as “intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights”, “trade-names, trade and business secrets, technical processes, know-how, and goodwill”.

26 On March 17, 2010 Claimant acquired from Contifica Spirits the shares in FBI and “rights to the principal intellectual property used by FBI” (Statement of Claim, para 9), which clearly corresponds to the definition under the BIT.
1.2 The investment of CAM meets the criteria outlined by academic writers and jurisprudence

Investments tribunals formulated special criteria (‘Salini criteria’), which allows to recognize certain transactions as investment.¹ In accordance with these criteria, the investment should correspond to the criteria of the contribution to the host state development, duration and risk. These criteria have been considered universal subject to just few exceptions.²

Concerning contribution to the host state development, the fact that the economic activities of investor are not successful does not prejudice the existence of the investment, “especially when the problems…come from the host State’s actions”.³ When FBI shares were transferred to CAM, it was a valid successor of Contifica Spirits and intended to continue the economic activities as it possessed the full ownership of shares and intellectual property rights. The subsidiaries of CAM were designed especially for production of hops, barley and aluminium cans which are indispensable for FBI, and after the acquisition “CAM put into operation a new production line at the aluminium can plant to serve the needs of FBI” (Procedural Order No.3, point 9). However, the illegal actions of Ruritania made any other development of FBI business impossible.

Salini criteria are “interdependent” and “should be assessed globally”⁴. As FBI investment was prevented from its further development by Ruritania, it obviously could not last for a long time to meet the criteria of duration. The Claimant submits that in the present circumstances the criteria of duration should not be relied upon by the Tribunal since non-compliance with it was caused by the actions of Ruritania itself. The criteria of risk is met since the considerable decrease in FBI value due to illegal actions of Ruritania implies that the risk undergone by CAM as investor was indeed considerable.

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¹ Salini, para.52; Fedax, para. 43; Joy Mining, para.55 to 57; Bayindirpara.130 to 137; Jan de Nul, para. 90 to 96; Saipem, para. 99 to 114; Malaysian Historical Sailors, para. 43 to 46.
² Schreuer, para 67.
³ Phoenix, para 133.
⁴ Salini, para 52
The lower price of share transfer should not be taken into account by the Tribunal when deciding on the existence of investment. An intra-group transaction, especially in the course of corporate restructuring,⁵ made at a lower price than the market one is considered “a normal kind of transaction”⁶ and could not impede the existence of bona fide investment.

2. Claimant in the present dispute is an investor under Cronos – Ruritania BIT

2.1 CAM has Cronos nationality and the doctrine of veil piercing does not apply

The nationality of an investor should be determined in accordance with the BIT under which the investor is seeking protection.⁷ The notion of control can be taken into account only if it is expressly stated in the BIT.⁸ In the Cronos – Ruritania BIT, “investor” is defined through the criteria of incorporation.⁹ Therefore there is no ground for using the criteria of control.¹⁰

2.2 CAM is not a shell corporation created specially to file a claim under the BIT

CAM was incorporated in Cronos as early as in 1983 and was acquired by Contifica Enterprises Plc. in 2003, five years before the purchase of shares in FBI by Contifica Spirits. Obviously, its creation was never intended to serve the filing of claims in the present dispute. Besides, the transfer of FBI shares to CAM was logical as CAM’s subsidiaries played a role in the production of Reyhan beer (Procedural Order No.3, point 9). In that sense CAM is very different from the shell companies which were used in the cases previously heard by tribunals.¹¹

Consequently, the tribunal has jurisdiction to hear these claims since they concern investment that fall within the BIT definition as well as the definition developed by academic writers and CAM is a real investor in the sense of international investment law.

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⁵ Valasek and Dummerly, p.55.
⁶ Société Générale, para 36.
⁷ ADC Affiliate, para. 359; Saluka, para. 241; The Rompetrol Group, para.85; Hulley Enter, para. 415.
⁸ Thorn & Doucleff, p.11–12; Preliminary Report of ILA German Branch, p. 45; McLachlan, p. 191.
⁹ Article 1(3) of the BIT.
¹⁰ Telekom.
¹¹ E.g., Phoenix case; Mobil Corporation
3. The transfer of shares in FBI from Contifica Spirits to CAM is a legitimate restructuring and does not constitute an abuse of process

Under international law the structuring of an investment with the purpose of receiving a beneficial legal environment is not prohibited\(^\text{12}\). The only case where such restructuring could be considered as an abuse is when its sole purpose had been to gain access to arbitration under an investment treaty\(^\text{13}\). The transfer of shares in the present case did not have such purpose and in any case cannot be deemed an abuse of rights.

3.1 The corporate structuring conducted with the purpose of having access to the beneficial regulatory environment is not inappropriate

According to Mobil,

"it is not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment...including the availability of the BIT"\(^\text{14}\).

The Respondent may refer to the Memorandum of 10 March 2010 (Exhibit RX1) prepared by Contifica group executives and discussing possible restructuring options. Claimant submits that this memorandum is in any case inappropriate evidence\(^\text{15}\). Alternatively, the main goal stated in it is “further protection of Contifica group” which is not illegitimate. Moreover, the factors taken into account are an advantageous “legal environment” and “tax consequences” without even mentioning the availability of arbitration under the BIT. Therefore the allegation that the access to arbitration under the BIT was the sole purpose of the transfer is groundless.

3.2 The restructuring took place considerably earlier than any damage occurred or this dispute could be foreseen and thus cannot be regarded as an abuse

As stated by the investment tribunal in Phoenix,

\(^\text{12}\) Mobil Corporation, para 191, 204; Agua del Tunari, para 321, 330; Schreuer and Dolzer, p. 54; Schill, p. 234–35; Valasek & Dumbery, p. 59.

\(^\text{13}\) Phoenix, para 92, 95, 144; Mobil Corporation, para 205; Aguas del Tunari, para 205.

\(^\text{14}\) Mobil Corporation, para 180-181.

\(^\text{15}\) Discussed in Submission IV of this Memorial.
“according to ICSID case law, a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, after damages have occurred”16.

On the contrary, restructuring of investment with the purpose of gaining access to arbitration under BIT is “a perfectly legitimate goal as far as it concerned future disputes”17 i.e. if the damage giving rise to the dispute had not occurred yet.

In the present case the restructuring of CAM’s investment took place on March 17, 2010 eight months before the adoption of MAB Act (Statement of Claim, para 9) which was the main cause of subsequent damage18. As for the damage itself, it was thoroughly calculated as late as in the last quarter of 2011 (Statement of Claim, para 19), i.e. more than a year after the transfer of FBI shares to CAM. The present claim was filed only on September 30, 2012 two and a half year after the restructuring. Thus it is obvious from the facts of the case that the damage and the dispute occurred long after the restructuring and thus the restructuring was perfectly legitimate.

However, the restructuring still can be deemed an abuse even if it took place before the occurrence of damage giving rise to the dispute. This exception applies if the future dispute was already foreseeable at the time of the restructuring. For jurisdiction to be dismissed on the grounds of abuse such disputes should be foreseen “as a very high probability and not merely as possible controversy”.19

To assert the possibility of dispute in advance one should look at “the facts which really gave rise to the dispute”20 i.e. the real cause of the dispute. In the present case it is the adoption of MAB Act which took place on November 20, 2010 (Statement of Claim, para 10). The investment tribunal in Agua del Tunari stated that “severity of the … events that would erupt”

16 Phoenix, para 92; Mobil Corporation, para 205; Schreuer at Fordham Conference, p. 18.
17 Mobil Corporation, para 191, 204.
18 See Submission IV of this Memorial.
19 Pac Rim Cayman, para 2.99.
20 Phosphates in Morocco, para 26; Electricity Company of Sofia, para 82; Right of Passage over Indian Territory, para 34.
could not be foreseen several months prior to the damage. In the same way, the impact of MAB Act on FBI business could not be certainly assessed on March 17, 2010, eight months prior to its adoption. A mere mentioning of tougher regulations towards marketing and sale of alcohol in the New Way party election manifesto available before the restructuring (Statement of Defense, para 6) probably imply “possible controversy” but surely not “very high probability” of the dispute since even the text of MAB was not known yet, to say nothing of the scope of damages it will lead to. The first draft of MAB Act was made public on June 20, 2010, three months after the transfer of shares (Procedural Order No. 2, point 26). Thus even if some remote possibility of clash between FBI business and future regulations of New Way party existed at the moment of transfer, it does not amount to the foreseeability of the present dispute or future damage to FBI investment. It is surely not enough to regard the transfer of FBI shares to CAM as made with the sole purpose to file the present claim and thus the restructuring was not conducted in abuse.

3.3 The possibility of corporate restructuring was envisaged in the share purchase agreement

In Autopista v. Venezuela, the Tribunal upheld its jurisdiction because the corporate restructuring of the claimant was conducted with the consent of the respondent State. In ADC v. Hungary, the use of an affiliate through which the investment was made was known to the State and the jurisdiction of the tribunal was upheld.

In the present case the possibility of an assignment of rights under SPA (Exhibit No.2) to a member of the Contifica Group was expressly permitted by Article 11.1 of SPA. Thus, the transfer of shares with Contifica group was foreseen and permitted by Fund actions of which are attributable to Ruritania and therefore cannot be deemed inappropriate.

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21 Aguas del Tunari, para 329
22 Pac Rim Cayman, para 2.99.
23 Autopista Concesionada de Venezuela, para 124.
24 ADC Affiliate, para 131.
25 See Submission II of this Memorial.
For all the reasons, stated above the Tribunal has jurisdiction to hear the claims submitted by CAM and these claims are admissible in the light of the facts surrounding acquisition of the shares in FBI by CAM.
(II) THE TRIBUNAL HAS JURISDICTION OVER CAM’S CLAIMS BASED ON THE BREACH OF SPA BY FUND AND THOSE CLAIMS ARE ADMISSIBLE

In accordance with Article 8 of Cronos-Ruritania BIT to be heard by the present Tribunal the dispute should involve an investor and an investment as defined by Cronos-Ruritania BIT and the dispute shall be against the State of Ruritania.

Claimant submits that (1) the Republic of Ruritania is a party to the dispute over the breach of SPA since it undertook obligations under SPA through Fund, (2) the breach of SPA amounts to the breach of Cronos-Ruritania BIT. Therefore the Claimant is entitled to file those claims with the present Tribunal in accordance with Article 8 of the Cronos-Ruritania BIT. Moreover, the dispute resolution clause contained in SPA does not preclude the exercise of jurisdiction by the Tribunal pursuant to Cronos-Ruritania BIT (3).

1. The Fund’s actions are attributable to Ruritania

The Republic of Ruritania is a party to the dispute since the actions of Fund are attributable to it. Pursuant to international investment case law\textsuperscript{26}, the issue of attribution is to be decided in accordance with Draft articles on the responsibility of states for internationally wrongful acts (‘ARS’).\textsuperscript{27}

ARS providers for three cases where actions of an entity can be attributed to the State: (i) an entity is a State’s organ\textsuperscript{28} (ii) an entity exercises elements of governmental authority\textsuperscript{29} (iii) an entity acts “on the instructions of, or under the direction or control” of the State\textsuperscript{30}. Claimant

\textsuperscript{26} Gustav Hamester, para 171; Bosh International, para 142.
\textsuperscript{27} ARS, art. 4.
\textsuperscript{28} Ibid, art. 5.
\textsuperscript{29} Ibid, art. 8.
\textsuperscript{30} Ibid.
submits that although under the laws of Ruritania Fund is a separate legal entity (Statement of Defense, para 11), its actions are attributable to Ruritania as falling into cases (ii) and (iii).

1.1 Fund conduct is attributable to that of Ruritania since it exercises elements of governmental authority

Article 5 of ARS stipulates that

“[t]he conduct of a person or entity which is not an organ of the State … 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”. 31

First, selling the shares in FBI constitutes management of state property, which is a governmental activity and thus requires certain governmental authority. Additionally, Fund sold the shares in implementation of state privatization policy adopted by the government as an anti-crisis measure (Statement of Claim, para 6).

Second, Fund was created by the adoption of the parliamentary act (Procedural Order No. 2, point 5) which means that its powers to exercise governmental authority come from the act of law.

Third, Ruritania never invoked ultra vires conduct of Fund and thus it is estopped from submitting that the conclusion of SPA lies beyond the powers of Fund.

For these reasons, Fund’s entering into SPA with Contifica Spirits should be attributable to Ruritania in accordance with Article 5 of ARS.

1.2 The conduct of Fund is attributable to Ruritania since it is directed and controlled by Ruritania

Article 8 of ARS stipulates that

31Ibid, art. 5.
“[t]he 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”.32

55 First, in accordance with Statement of Claim, para 6

“the financial crisis had severely affected Ruritania’s economy and had led to a significant budget deficit. To remedy this situation the government decided that a number of assets would be privatized. As the result in the beginning of 2008 the State Property Fund of Ruritania decided to sell the brewery to a private investor…”

56 The underlined words show that Fund acted on the instructions of Ruritania since the decision of privatization of certain assets was taken by Ruritanian government and FBI was sold as a result of this governmental decision.

57 Second, Ruritania exercises control over Fund through appointment of its principal management bodies (the Board of Governors and the Director-General) (Procedural Order No. 2, point 5).

58 For these reasons, Fund’s entering into SPA with Contifica Spirits should be attributable to Ruritania in accordance with Article 8 of ARS.

2. The breach of SPA amounts to the breach of Cronos-Ruritania BIT

59 In accordance with Article 6(2) of Cronos-Ruritania BIT

“[e]ach Contracting State shall fulfil any other obligations it may have entered into with an Investor or an Investment of an Investor of the other Contracting State.”

60 This article represents the so-called umbrella clause which equates the breach of any obligation undertaken by the State to the breach of Cronos-Ruritania BIT itself.

61 Pursuant to the general rule of interpretation of international treaties established by Article 31 of the Vienna Convention on the Law of Treaties

32Ibid, art. 8.
This rule is supplemented by the principle of effectiveness, pursuant to which all treaty provisions must be construed to give them effect. In spite of the fact that decisions of tribunals in relation to umbrella clauses differ, this difference depends on the exact wording of umbrella clause which should be analysed on case-by-case basis. Taking in mind all these rules, Claimant proceeds to the interpretation to the umbrella clause at hand.

First, the umbrella clause contained in the Cronos-Ruritania BIT directly speaks of obligations the State may have entered into, i.e. of contractually agreed promises the State makes in respect of the investor of the other Contracting State. The words “entered into” imply bilateral obligations resulting from contracts and not any other obligations, e.g. resulting from acts of legislation.

Second, the reference to any obligations comprises all obligations of a State which relate to the investment. This understanding of the clause was shared by the tribunal in Bureau Veritas, which held that the wording of umbrella clause was undoubtedly capable of being read to include the relevant contractual arrangement:

“The words “any obligation” are all encompassing […] On a plain meaning they are undoubtedly capable of being read to include a contractual arrangement.”

Third, since Article 6(2) uses the term “shall” and forms part of the Article which contains major substantial obligations, there is no doubt that the umbrella clause was intended to
create obligations, and obviously obligations beyond those specified in other provisions of the Cronos-Ruritania BIT itself.\textsuperscript{39}

Fourth, it is difficult to think of any other agreement (than an investment contract) which the Contracting States may have had in mind when drafting this provision. Indeed, as stated in \textit{Noble Ventures},

\begin{quote}
“[s]ince States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral investment treaties, it is difficult to understand the notion “obligation” as referring to obligations undertaken under other “international” agreements.”\textsuperscript{40}
\end{quote}

Claimant submits that such wording is sufficiently clear and unambiguous to turn failure of Ruritania to observe contractual obligations into breach of the Cronos-Ruritania BIT.

3. The dispute resolution clause contained in SPA does not preclude the exercise of jurisdiction by the Tribunal

Respondent may argue that the dispute concerning the breach of SPA should be resolved in accordance with the clause 14.2 of SPA. However, Claimant submits this clause does not preclude this Tribunal from deciding the matters concerning SPA. The existence of an exclusive dispute resolution clause in a contract cannot operate as a bar to the application of treaty standard to State’s conduct in order to find a treaty breach. As noted by annulment committee in \textit{Vivendi} and then endorsed in other cases,\textsuperscript{41}

\begin{quote}
“A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty.”\textsuperscript{42}
\end{quote}

And further:

\begin{thebibliography}{10}
\bibitem{39} \textit{Noble Ventures}, para 56.
\bibitem{40} Ibid, para. 51.
\bibitem{41} Eureko, para 106 and 107; \textit{SGS v. Pakistan}, para.147; \textit{Impregilo}, para.258; \textit{Azurix}, para. 76. SGS v. Paraguay, para 138.
\bibitem{42} \textit{Vivendi}, para 103.
\end{thebibliography}
“[…] It is one thing to exercise contractual jurisdiction … and another to take into account the term so far a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in … the BIT.

In this regard, Claimant believes that the warranty breach destroyed investor’s legitimate expectation created by the warranty which amounts to violation of fair and equitable treatment (‘FET’) standard set forth in Article 2 of the Cronos-Ruritania BIT. Consequently, the matters relating to the breach of the SPA can be resolved in the present proceedings. It is to note that the broad wording of the treaty dispute resolution clause allowing adjudication of “disputes concerning Investments” does not impede the Tribunal’s power to decide matters relating to contracts.

43Vivendi, para 105.
44Para 98 of this Memorial
(III) BY ADOPTING THE MEASURES FOR THE REGULATION OF MARKETING AND SALE OF ALCOHOL AND IMPOSING FURTHER REQUIREMENTS FOR MARKETING AND SALE OF FREEBREW BEER RURITANIA VIOLATED ITS OBLIGATIONS UNDER CRONOS-RURITANIA BIT

Claimant submits that by adopting MAB Act and Ordinance (1) Ruritania indirectly expropriated CAM’s investment, that such measures are not justified by public interest and in any case, are disproportionate, (2) Ruritania acted in breach of FET standard.

1. Actions of Ruritania amount to indirect expropriation of CAM’s investment

Claimant submits that measures taken by Ruritania have the effect of indirect expropriation prohibited by Article 4 of Cronos-Ruritania BIT which provides that

“Investments by Investors of either Contracting State may not directly or indirectly be expropriated […] 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 […] in the territory of the other Contracting State”.

Indirect expropriation generally covers interference by a State with the use of the property or with the enjoyment of the benefits even where the legal title to the property is not affected. In particular, indirect expropriation includes measures which deprive the investment of its value.

1.1 The “public interest” character of Ruritania's measures does not exclude the possibility of expropriation and should not be taken into account by the Tribunal

Claimant acknowledges the right of sovereign state to take measures protecting public interest. However, if these regulations deprive an investor of use and benefits of its investment, they amount to expropriation notwithstanding their “public interest” character.

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46 AES Summit Generation, para. 14.3.1.
47 Orrego Vícuña, p. 8; Kriebaum, p. 726; Mostafa, p. 279; Nikiema, p. 19.
measures is rarely taken into account by investment tribunals. In *Santa Elena*, the tribunal held that a government is obliged to pay compensation notwithstanding the purpose for which the measure in question was implemented.

However, the State measures amount to expropriation only in case of substantial interference into the investment, the level of which is determined on case-by-case basis. In the *Tokios Tokeles*, the tribunal held that

> "...one can reasonably infer that a diminution of 5% of the investment’s value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient. The determination in any particular case of where along that continuum an expropriation has occurred will turn on the particular facts before the tribunal".

Claimant submits that the marketing measures adopted by Ruritania resulted in a substantial depreciation of the investment and thus amounted to expropriation notwithstanding their “public interest” character.

First, **labeling requirements** unreasonably imposed on the investor caused substantial drop of sales of the beer (*Statement of Claim, para 19*). The introduction of the warning on FREEBREW bottle in relation to the possible cardiac complications led to the fact that consumption of FBI beer got associated with cardiac problems which, being the leading cause of death, made consumers reluctant to buy FBI products.

Second, by adopting the **plain packaging requirements** (*Statement of Claim, para 11*) Government stripped the investor of the right to effectively use and receive benefits from the registered FREEBREW trademark which is considered to be an investment in accordance with Article 1 of Cronos-Ruritania BIT. These requirements combined with the ban on marketing alcoholic beverages on television made the trademark considerably lose in value. Although the

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48 *Starrett Housing; Pope; Patrick Mitchell; BGG; Biwater; Tokios Tokeles; Santa Elena.*
49 *Santa Elena*, para. 72.
50 *Tokios Tokeles*, para. 120.
51 *WTO Fact Sheet.*
legal title to the trademark of CAM was intact, its value was diminished which clearly corresponds to the definition of indirect expropriation\textsuperscript{52}. Moreover, the legal title itself was put in jeopardy, since under Ruritania law the non-use of the trademark for 5 years could result in the cancellation of the trademark registration (\textit{Procedural Order No 2, point 3}).

Third, \textbf{bottle size regulations} stripped the investor of the right to use the iconic 0.8l.bottle which is registered as a trademark (\textit{Statement of Claim, para 12}). Moreover, they resulted in substantial damage linked to the forced reconfiguration of the bottling line with a partial suspension of the beer production (\textit{Procedural Order No 2, point 6}).

The value of investment is assessed by its profitability\textsuperscript{53}. Following MAB Act FBI’s sales dropped roughly by 60\% during the first two quarters of 2011 with the company incurring loss of net income of around 10 million US dollars and loss of revenue of 60\% (\textit{Statement of Claim, para 13}). As a result of the labeling regulations FBI’s sales fell by a further 20\%, with its revenue in the last quarter of 2011 falling to 10\% of the revenue for the same period of 2009 (\textit{Statement of Claim, para 19}). Thus the measures taken by Ruritania resulted in considerable decrease in profitability of FBI. Moreover, following the regulations the FBI was eventually put on the verge of bankruptcy (\textit{Statement of Claim, para 21}).

It is also to mention that the drop of sales could not be linked to the poor management of the brewery, since the direction of the FBI proved to be very successful at the earlier stages of its operation (\textit{Statement of Claim, para 8}).

Thus, though CAM retained the legal title to the investment, the value of the investment was significantly depreciated therefore the acts of Ruritania constitute the indirect expropriation made in violation of Article 4 of the Cronos-Ruritania BIT.

\textsuperscript{52} Lo, p. 521.
\textsuperscript{53} Klonsky.
1.2 Should the “public interest” nature of Ruritania’s measures be taken into account by the Tribunal, the measures are in any case expropriatory because of their disproportionality

In case the Tribunal pays attention to the “public interest” nature of Ruritania's measures, the balance between the public interests and the interests of the investor should be observed. If the measures used to protect public interest are held to be disproportionate, the regulation is tantamount to expropriation. The approach is referred to as “proportionality” approach.

The proportionality test was applied in a number of arbitral cases. There is no universal set of criteria to balance the opposing interests, still the doctrine developed some guidelines in this respect. Stone Sweet and Mathews suggest the following criteria: legitimacy of the measure, its suitability (which requires the measures to be appropriate to protect the interest in question), its necessity (which requires that there is no other less restrictive alternative to reach the same end) and proportionality stricto sensu (which requires the measures not to be disproportionate with regard to the pursued objective). Other criteria comprise genuineness of public purpose, legitimate expectations of the investor and character of the measure.

Claimant submits that even if “public interest” nature of Ruritania’s measures is to be taken into account, these measures are disproportionate because (1.2.1) they violated the legitimate expectations of CAM, (1.2.2) they were not taken in bona fide, (1.2.3) they were not suitable, (1.2.4) they were not necessary, (1.2.5) they were discriminatory and thus constitute expropriation in any case.

1.2.1 The measures taken violated the legitimate expectations of the investor

The measures taken by Ruritania could not be anticipated by CAM and thus violate its legitimate expectations. First, Cronos-Ruritania BIT does not provide for any exceptions to the rule set out

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54 Mohamed Razik, p. 2.
55 Bossche, p. 283.
56 Tecnicas Medioambientales; LG&E; El Paso; Continental Casualty.
57 Sweet and Matthew.
58 Kriebaum, p. 732.
in Article 4 (as opposed to a number of bilateral and multilateral treaties which generally pay special attention to the cases not covered by expropriation provisions).  

Second, Ruritania dramatically changed the legal environment relied on by CAM to make investment. At the time the investment was made CAM could not expect Government to ban the use of trademark on FBI products, since Ruritania was the very first country in the world to implement plain packaging requirements.

Third, Ruritania violated the legitimate expectations of the investor based on the international obligations of Ruritania, in particular on Article 7 of the Paris Convention (according to Procedural Order No 2, point 2 Ruritania is party to the Convention) which reads as follows

“[t]he nature of the goods […] to which a trademark is to be applied in no case form an obstacle to the registration of the mark”.

In our case the registration of trademarks to products of specific nature (alcoholic beverages) is put in jeopardy, since MAB Act impeded the use of FREEBREW trademarks and such non-use will in 5 years result in its deregistration.

Moreover, Ruritania violated Article 17 of TRIPS (according to Procedural Order No 2, point 12 Ruritania a member state of WTO and thus party to TRIPS) which reads as follows

“[m]embers may provide limited exceptions to the rights conferred by a trademark […] provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties”.

The measures taken by Government do not fall within this Article, since (i) an outright ban on using a trademark cannot be considered as a limited exception, (ii) the legitimate interests of the owner were not taken into consideration, since they were implemented without any prior consultations.

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59 Nikiema, p. 7.
60 CMS; Sempra.
61 Tobacco Plain Packaging Act 2011.
62 See para 78 above.
Fourth, legitimate expectations of CAM were violated by the labeling regulations since they are at odds with the warranty given by the state\textsuperscript{63} that the products of FBI do not pose any risk to consumers\textsuperscript{64}. Such “inconsistency of action between two arms of the same government \textit{vis-à-vis} the same investor” was criticized by the tribunal in \textit{MTD} \textit{v Chile}\textsuperscript{65}.

\textbf{1.2.2} Ruritania's measures were not taken in bona fide manner

The measures taken could not be considered bona \textit{fide since} their genuine aim was to get rid of a potentially problematic FBI factory at the height of economic crisis in Ruritania.

\textbf{1.2.3} The measures were not suitable

The measures were not suitable to protect the public health since there is no available scientific research proving (first) that lesser bottle volume leads to lesser alcohol consumption and (second) that Reyhan consumption leads to cardiac problems. The study made by HRI had a number of flaws: (i) it failed to test the effects of Reyhan on females, (ii) it failed to consider the effects of Methyldioxidebenzovat while accompanied with alcohol, (iii) its conclusions were made with regard to the effects of the daily consumption of a much higher dosage of Methyldioxidebenzovat than can be found in FREEBREW(\textit{Statements of claim, paras 14, 17}).

\textbf{1.2.4} Measures were not necessary

Measures were not necessary to reach the aim since there were less intrusive means to do so. Thus, instead of labeling requirements Government could have launched social advertizing drawing the public attention to cardiac problems which could be possibly associated with Reyhan consumption.

\textsuperscript{63} Pandya and Moody, p. 106.

\textsuperscript{64} As discussed in Submission 2; Exhibit No. 2, para 9.2.1.

\textsuperscript{65} \textit{MTD}, para 163.
1.2.5 The nature of measures was discriminatory

The measures taken had discriminatory nature since similar producers were treated differently\(^{66}\). Following HRI report one should consume approximately 4.125l. of FREEBREW a day over 10 years to have the detected cardiac complications\(^{67}\). Still, such excessive alcohol consumption will lead to heart diseases irrespective of Reyhan consumption. Thus, FREEBREW beer and other beer products consumption lead to the same consequences, but only FREEBREW beer was stigmatized by labeling requirements.

2. Should the actions of Ruritania be deemed not expropriatory, in any case, they were taken in breach of FET standard

In case the Tribunal finds that the measures taken by Ruritania were not expropriatory, in any case, they are illegal since FET standard under Article 3 of the Cronos-Ruritania BIT was violated.

Since FET is a well-established legal concept it is to be interpreted taking into consideration arbitral case law and other sources of general international law\(^{68}\). Summarizing such sources professor Schreuer says that FET generally includes transparency, stability and the investor’s legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment\(^{69}\). In relation to FET, the standard of proof is lower than that for expropriation\(^{70}\), because violation of any of the above amounts to FET breach. Since Claimant has already demonstrated that the measures adopted by

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\(^{66}\) *Saluka*, para 313.

\(^{67}\) Statement of Claim, para 5, 14; Procedural Order No 3.

\(^{68}\) *ADF Group*, para 184.

\(^{69}\) Schreuer, *Fair and Equitable Treatment*, p.373-374.

\(^{70}\) *Ibid*, p. 133.
Ruritania violated the legitimate expectations of the investor and were not taken in good faith\textsuperscript{71}, FET is broken and measures adopted by Ruritania are to be deemed illegal.

\textsuperscript{71}See paras 86, 93 of this Memorial
(IV) MORAL DAMAGES FOR THE ARREST OF MESSRS GOODFELLOW AND STRAW SHALL BE AWARDED TO CLAIMANT

The illegal arrest and detention of Messrs Lucas Goodfellow and Adam Straw, the executives of FBI and Contifica group (‘Executives’), resulted in moral damage suffered by Claimant. Taking into account the general principle of full compensation, stipulating that the breach of an engagement involves an obligation to make reparation in an adequate form\(^2\), Claimant submits that (1) moral damages compensation is available in principle within investment arbitration and (2) moral damages should be awarded to Claimant since "exceptional circumstances" standard is met.

1. Moral damages are available in principle in investment arbitration

Claimant submits that in the context of investment arbitration moral damages should be recoverable. In the present case moral damage caused to Claimant is tantamount to the loss to its reputation and credit. Reputation and credit of the business are regarded to be an integral element of a company’s goodwill, which from accounting prospective equals to the difference of company’s market price after deduction of sum of net assets and liabilities of the company.\(^3\)

It is unanimously held at the international level that loss of reputation is compensable.\(^4\) In *Lusitania*, the tribunal held that

> “the mere fact that moral damages are difficult to measure and estimate by monetary standards makes them none the less real and affords no reason why the injured should not be compensated.”\(^5\)

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\(^2\) **ARS**, art. 31, para 1; *Factory at Chorzow*, para 44.

\(^3\) *Evans and Mellen*, p. 266.

\(^4\) *Kröll and Mistelis*, p. 425.

\(^5\) *Lusitania*, p. 40.
The same view was adopted in *Desert Line Projects LLC v. The Republic of Yemen*, where the tribunal held that "moral damages may also be recovered besides pure economic damages".  

2. **Moral damages should be awarded to Claimant since the "exceptional circumstances" standard is met**

The prerequisite for awarding moral damages in investment arbitration is the compliance with "exceptional circumstances" standard which was developed by the tribunals in *Desert Line Projects LLC v. The Republic of Yemen* and *Lemire v. Ukraine*.

The standard is met in the following circumstances:

(i) the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms in accordance with which civilized nations are expected to act (see 2.1 below), and

(ii) the State's actions cause stress, anxiety and other mental suffering such as loss of reputation and credit (see 2.2 below), and

(iii) both cause and effect of moral damage are grave or substantial (see 2.3 below).  

Claimant submits that the facts of the present case correspond to the characteristics of "exceptional circumstances" stated above.

2.1 **Ruritania's actions include illegal detention and ill-treatment that contravene the norms in accordance with which civilized nations are expected to act**

By conducting arrest and detention of Executives Ruritania violated international human rights law, international investment law, as well as its own domestic law, which clearly amounts to the contravention of norms in accordance with which civilized nations are expected to act.

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76*Desert Line*, para 289.
77Ibid.
78*Lemire v. Ukraine*, para 333.
Firstly, illegal arrest and detention is generally considered by human rights court case law to be an interference with the liberty of the individual\(^79\), which is "in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".\(^80\) Ruritania's actions amount to infringement of the universally recognized human right to liberty and security of person\(^81\) and, therefore are inconsistent with the international law principle of respect for human rights, stipulated by nations in the UN Charter.\(^82\)

Secondly, Ruritania's actions contravene obligations generally inherent to a host state under BITs, i.e. to provide full protection and security (\textit{Exhibit No. 1 to the Statement of claim, Art. 2, para 1, subpara b}) and not to impair by arbitrary or discriminatory measures management of Investment (\textit{Exhibit No. 1 to the Statement of claim, Art. 3, para 1, subpara c}). The duty to provide full protection and security implies a State’s guarantee of stability in a secure environment, physical, commercial and legal.\(^83\) In \textit{AAPL v. Sri-Lanka}, the tribunal held that the characteristic "full" means obligation of a Contracting State to undertake all possible measures necessary to prevent from duress, physical damage or any other harm that a well-administered government could be expected to exercise under similar circumstances.\(^84\)

The arrest and detachment in a cell in the Freecity International Airport of Messrs Goodfellow and Straw by Ruritanian police officers on December 23, 2011 (\textit{Statement of Claim, para 25}) was a priori unlawful deed since it violated Ruritanian law that allows to leave the country pending investigations (\textit{Statement of claim, para 23}). Thus, there was no legitimate basis for continuing to detain them.

\(^79\) \textit{Ocalan v. Turkey}, para 105; \textit{Kart v. Turkey}, para 123; \textit{Steel v. UK}, para 54.
\(^80\) \textit{USA v. Iran}, para 91.
\(^81\) \textit{The Universal Declaration of Human Rights}, Art. 9; \textit{the International Covenant on Civil and Political Rights}, Art. 9.
\(^82\) \textit{The UN Charter}, preamble, art. 1, 55.
\(^83\) \textit{Biwater}, para 729.
\(^84\) \textit{AAPL v. Sri-Lanka}, para 77.
The police force is clearly a state body and, thus, the acts performed during police investigation are attributable to the state. Police officers intentionally did not free Executives from restraint, which amounts to Ruritania’s failure to undertake all possible measures that could be expected from a Contracting State to prevent the investment from duress and, therefore, breach of its obligation to accord investments full protection and security under the BIT.

2.2 Malicious prosecution of Executives caused substantial loss of Claimant’s reputation and credit

Claimant asserts that arbitrary arrest and detention of Executives, further broadcasted on Ruritania’s most popular TV channel and commented by State officials (Statement of Claim, para 24), resulted in substantial reputational damage. Portrayal of Claimant’s executives in mass media as criminals responsible for corruption led to negative public opinion in regard to FBI and, correspondingly, its production.

Moreover, Claimant states that it suffered serious moral damages as a result of Ruritania’s unlawful prosecution actions: Executives suffered the stress, disgrace and anxiety of being threatened and retained in custody during Christmas holidays, away of their families and in unacceptable conditions.

2.3 The Ruritania's unlawful actions and the resulting injury are grave and substantial

Claimant asserts that the character of the unlawful deed (i.e. arrest and detention) that caused moral damage is grave and substantial because it contravenes: (i) applicable municipal law, (ii) international law (the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights) and (iii) the BIT. Moreover, a violation of basic human right (a right to liberty and security) constitutes a violation of the obligation erga omnes, i.e., obligation of the State towards international community as a whole.

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85 Gustav Hamester, para 292; ARS, art. 4, para 1.
86 Barcelona Traction, para 33.
Furthermore, the effect of the unlawful deed (i.e. moral damage suffered by Claimant) is substantial and grave as well, as the aforementioned actions taken by Ruritania's police officials together with the campaign initiated by Ministry (Statement of Claim, paras 14, 15) were aimed at destroying Claimant’s credit and positive reputation and led to significant loss of its revenues, further suspending of production and failure to perform numerous financial obligations. As a consequence, Claimant lost a significant number of prospective business opportunities and profits.

Thus, Claimant submits that the moral damage in relation to the loss of its reputation should be fully compensated.
(V) THE LOSS OF SALES BY CAM’S SUBSIDIARIES LOCATED OUTSIDE OF RURITANIA TO FBI CONSTITUTES A RECOVERABLE ITEM OF DAMAGES

118 Claimant submits that sales of raw and packaging by its subsidiaries located outside of Ruritania (‘CAM’s foreign subsidiaries’) to FBI are to be regarded as a part of Claimant’s purported investment in Ruritania. Thus, the loss of those sales (“directly resulting from FBI’s cessation of operations” (Statement of Claim, para 30)) constitutes a recoverable item of damages.

119 In order to prove this Claimant will demonstrate that (1) CAM’s foreign subsidiaries together with CAM form a group of companies (‘CAM Group’), which in its integrity should be treated as investor under the Cronos – Ruritania BIT, (2) sales by CAM’s foreign subsidiaries to FBI constitute an investment in Ruritania under the Cronos-Ruritania BIT, (3) Ruritania violated its obligations under Cronos – Ruritania BIT through expropriation of CAM Group’s investments and failure to accord FET to those investments, which constituted the ground for claiming damages.

1. CAM’s foreign subsidiaries form together with CAM a group of companies which should be treated as investor under Cronos-Ruritania BIT

120 In accordance with Article 1(3) of the Cronos-Ruritania BIT, the term "investor" means with regard to each Contracting State, inter alia,

“any entity which is established in accordance with, and recognized as a legal person by the law of that Contracting State […] which is the owner, possessor or shareholder of an Investment in the territory of the other Contracting State”.

121 Although this definition is based on a incorporation test, Claimant submits that it is lawful and justifiable for the Tribunal to depart from that formal criterion and recognize that Claimant forms

87 Treaty of Mutual Promotion and Protection of Foreign Investment between The Republic of Ruritania and The State of Cronos, Article 1.3 (Exhibit No.1)
together with its foreign subsidiaries an integrated group of companies (CAM Group), which should be regarded as investor under the Cronos-Ruritania BIT and thus to be treated accordingly.

International arbitral practice have elaborated the “group of companies” doctrine (‘GCD’) based on an “economic approach”, under which “strict legal distinctions (i.e. provisions on distinct legal personality of a company) not reflecting the underlying economic realities, may be disregarded”.

In other words, it is possible for the purposes of the present case to ignore distinct legal personality of CAM and its foreign subsidiaries by means of applying the GCD and so extend the Cronos-Ruritania BIT (as well as an dispute resolution clause contained in it) from CAM to its foreign subsidiaries.

Criteria for application of the GCD were formulated in commercial arbitral jurisprudence. Thus, a company which is not a signatory to arbitration agreement may be regarded a proper claimant due to (i) its important role in conclusion, performance or termination of respective transactions (1.1); (ii) the fact that it constitutes one economic reality (une réalité économique unique) together with a signatory company (1.2); (iii) mutual consent of all the parties to the proceedings to participation of a “non-signatory” in respective transactions (1.3).

Apparently, it would not contradict the nature of these criteria if they (after certain technical changes) are applied in an investment dispute.

1.1 CAM’s foreign subsidiaries, as well as CAM, played a large role in making the investment in FBI, and their respective were inseparable from those of CAM

According to Dow Chemical v. Isover Saint Gobain,

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88 Czech Republic B.V, para.22.
90 The SG Report to UNCITRAL , page 5, note 1.
91 “Non-signatory” would be replaced by “a company not recognized as investor under a certain BIT”, and “investments” would take the place of “transactions” and “contracts”.

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“... the arbitration clause expressly accepted by certain of the companies of the groups would bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses... appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise”92.

127 CAM’s foreign subsidiaries did evidently participate in “performance” of CAM’s investments by supplying raw and packaging to FBI. This kind of CAM’s foreign subsidiaries’ activities is not to mix with their independent business activities (which were carried out parallel to investments). The difference consists in the fact that the latter could not perform their contractual obligations to produce packaging for FBI without making use of intellectual property of CAM – e.g. trade dress with respect to the design of the beer bottles and cans (including the iconic 0.8 FREEBREW bottle). Irrespective of whether there were any license contracts between CAM and its foreign subsidiaries, “the primary involvement of the parent company”93 in contractual obligations of the subsidiaries is obvious.

1.2 The CAM’s foreign subsidiaries constitute one economic reality (une réalité économique unique) together with CAM

128 Unity of economic activities of two or more companies is closely related to their common purpose, unity of their business processes and primary effective control by one company over another.

129 In Dow Chemical v. Isover Saint Gobain, the tribunal decided that

“the fact that the parent company exercised absolute control over its subsidiaries to be a crucial factor in extending the arbitration agreement to the parent which had not participated in it”.94

130 This point was reaffirmed by the European Court of Justice when it was deciding on its jurisdiction over affiliated companies (with regard to the European Community competition law). When developing the “single economic entity doctrine” the Court stated that

92 Dow Chemical, p. 136.
93 Yarvin and Derains, p. 149-152.
94 Czech Republic B.V., para 23.
“the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct on the parent company”\(^95\), and specified the criteria of “imputability”:

“[s]uch may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company”\(^96\).

This was reaffirmed in the *Continental Can*:

[“imputability” of the subsidiary’s conduct to the parent company] is true in those cases particularly where the subsidiary company does not determine its market behavior autonomously, but in essentials follows directives of the parent company”.\(^97\)

As follows from the facts at hand, CAM did exercise effective control over its foreign subsidiaries within the framework of investment in FBI:

(i) major shareholding in its foreign subsidiaries \(a\ priori\) enables CAM to make key decisions concerning their activity;

(ii) “following the acquisition, CAM put into operation a new production line at the aluminum can plant to serve the needs of FBI” (*Procedural Order No. 3, point 9*). Besides, it was CAM that engaged its foreign subsidiaries in dealing with FBI. In this situation, CAM’s foreign subsidiaries did not “determine its market behavior autonomously, but in essentials followed directives of the parent company”.\(^98\)

Factual background indicates that CAM is a mere managing company and in fact does not carry out any industrial activity, while its subsidiaries were “but an instrumentality” through which CAM was to “realize the investment”\(^99\). This is another reason to consider CAM together with its

\(^95\) *Dyestuffs*, para133; *Geigy*, para 44.

\(^96\) *Ibid.*.

\(^97\) *Europemballage*, para 15.

\(^98\) *Ibid.*.

\(^99\) *Amco*, para 389.
subsidiaries “one and the same economic reality (une réalité économique unique)”\textsuperscript{100}, a single entity, where CAM performs a function of CEO/Board of directors and subsidiaries are its “workshops”. And, since CAM was a leader of the CAM Group when the latter invested in FBI, it is entitled to claim damages incurred by the whole CAM Group (including CAM’s own damages and ones of the CAM’s foreign subsidiaries).

1.3 All the parties to arbitration mutually consented to CAM’s foreign subsidiaries in investment to FBI

The mutual consent of CAM and its foreign subsidiaries to “perform” investments in FBI has been proven above, while such a consent of Ruritania represented by Fund\textsuperscript{101} was less obvious but still was implied. Article 11.1. of SPA points out that there is a special relationship between the members of the Contifica group (and thus the CAM Group as well):

> “[n]either Party may assign any of its rights or obligations under this Agreement, except that the Purchaser may assign all of its rights and obligations under this Agreement by way of substitution to any company, which is a member of the Contifica Group”.

Such a privileged position of the Contifica group members (including the CAM group as well) as compared to any other “external” company is evidence of special economic and institutional connection between them.

Ruritania should have expected that CAM “for reasons of organisation and of expediency internal to the group”\textsuperscript{102} could engage CAM’s foreign subsidiaries to participation in investment to FBI\textsuperscript{103}. Consequently, Ruritania should have known that its unprecedented measures (and

\textsuperscript{100} Dow Chemical, p. 136.  
\textsuperscript{101} See Submission 2 of this Memorial.  
\textsuperscript{102} See ICC case no. 1434 of 1975.  
\textsuperscript{103} Hanotiau, p.253 – 360.
primarily expropriation) against Claimant’s investment in FBI could and would “impact on the operations of all the Group”. 104

Accordingly, Fund (and hence Ruritania) had no objection to CAM’s foreign subsidiaries’ participation in investment to FBI.

2. Sales by CAM’s foreign subsidiaries constitute an investment in Ruritania under Cronos-Ruritania BIT.

As far as ratione personae is already examined and it is proven that the CAM’s foreign subsidiaries should be treated as investors under the Cronos-Ruritania BIT, ratione materiae should be scrutinized now.

2.1 Sales by the CAM’s foreign subsidiaries to FBI (‘Sales’) comply with the tests contained in the definition of investment under Cronos-Ruritania BIT

Article 1 of Cronos-Ruritania BIT contains a very broad definition of investment, which reads as follows:

“[t]he term "Investment" means every asset which is directly or indirectly invested in accordance with laws and regulations of the Contracting State in which territory the Investment is made by Investors of the other Contracting State”.

Consequently, Sales may be regarded as investments under Cronos-Ruritania BIT, as they comply with all the tests contained in this definition. They constitute “assets” (due to the fact that sales consist of contractual rights of certain economic value) “invested by Investors of the other Contracting State” (as proven in paras 120-140 above, that the CAM’s foreign subsidiaries are to be treated as Investors under the Cronos-Ruritania BIT) in the respective “territory”.

2.2 Sales by the CAM’s foreign subsidiaries to FBI meet the criteria of investment elaborated in investment arbitral practice

It is a common that investment treaties may contain a very broad definition of investment or even fail to provide for any definition. Investments tribunals formulated widely applied criteria (‘Salini criteria’) which allow to recognize certain transactions as investment. These criteria are as follows:

(i) a contribution of resources;
(ii) a “certain duration of performance of the contract”;
(iii) “participation in the risks of the transaction”;
(iv) contribution to the host State economic development.

As Sales meet the criteria, they may be regarded as Investment under Cronos-Ruritania BIT.

2.3 Sales by the CAM’s foreign subsidiaries to FBI differ from ordinary business activities of the former

There are some features that distinguish “investment sales” by the CAM’s foreign subsidiaries to FBI from ordinary sales carried out by “external” (not belonging to the CAM Group) suppliers:

(i) Beer packaging supplied by CAM’s subsidiaries to FBI was of a very specific nature. In fact, it was produced exclusively for FBI (as CAM even put into a new production line for cans “to serve the needs of FBI” (Procedural Order No.3, point 9) and in close cooperation with CAM (since without using intellectual property (trade dress registrations) owned by CAM sales would not have been carried out). Moreover, due to unique form of iconic bottles produced by CAM’s subsidiaries for FBI there was no way to sell them to any other company even abroad;

105 Schreuer, para 67.
106 Salini, para.52; Fedax para. 43 Joy Mining, para. 55 to 57; Bayindirvpara.130 to 137; Jan de Nul para. 90 to 96; Saipem, para. 99 to 114; Malaysian Historical Sailors, para. 43 to 46.
107 See para 27-29 of this Memorial.
(ii) CAM Group’s raw supplies to FBI constituted a thoroughly organized process (as it ran within the Group) controlled by CAM and thus it was much safer for FBI to purchase raw from CAM’s subsidiaries rather than from “external” suppliers. Thus, high quality of raw and regularity of supplies was more or less guaranteed.

3. Ruritania violated its obligations under Cronos-Ruritania BIT through expropriation of the CAM Group’s investments and failure to accord FET, which constitutes the ground for claiming damages.

Under Article 4 of Cronos-Ruritania BIT, Ruritania undertakes not to expropriate or take any other measures equivalent to expropriation in relation to investments under the Cronos-Ruritania BIT save that they are “for public benefit, not discriminatory, carried out under due process of law and against compensation”\textsuperscript{108}. Thus, having in fact broken this obligation\textsuperscript{109} Ruritania shall compensate for the damage incurred by the CAM Group, including lost sales by the CAM’s foreign subsidiaries.

Alternatively, should the Tribunal consider that Ruritania did not violate Article 4, Claimant submits that Ruritania violated FET standard (\textit{Article 2.1 (b) of the Cronos-Ruritania BIT})\textsuperscript{110}, which basic principles are “transparency, stability, procedural propriety and due process, action in good faith and freedom from coercion and harassment”\textsuperscript{111}.

Consequently, as Ruritania failed to “accord investments [of the CAM’s Group] fair and equitable treatment”, the damages suffered by the whole CAM Group are subject to recovery.

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\textsuperscript{108}The Cronos-Ruritania BIT, Article 4.1.
\textsuperscript{109}See Submission 3 of this Memorial
\textsuperscript{110}The Cronos-Ruritania BIT, Article 2.1 (b).
\textsuperscript{111}Schreuer, \textit{Fair and equitable treatment}, p.126.
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PRAYER FOR RELIEF

In the light of the foregoing, Claimant respectfully requests this Tribunal to find that:

(A) the Tribunal has jurisdiction to hear the claims submitted and these claims are admissible given the facts surrounding acquisition of the shares in FBI by CAM;

(B) the Tribunal has jurisdiction over the claims based on the breach of SPA by Fund and those claims are admissible;

(C) Ruritania violated its obligations under Cronos-Ruritania BIT by adopting the measures for the regulation of marketing and sale of alcohol and imposing further requirements for marketing and sale of FREEBREW beer;

(D) moral damages for the arrest of Messrs Goodfellow and Straw shall be awarded to Claimant;

(E) the loss of sales by CAM’s subsidiaries located outside of Ruritania to FBI constitutes a recoverable item of damages.

RESPECTFULLY SUBMITTED ON SEPTEMBER 22, 2013

Team Schwebel

On behalf of Claimant,

Contifica Asset Management Corp.