MEMORANDUM FOR RESPONDENT

In a dispute between

CLAIMANT
Contifica Asset Management Corp.
47B Framero Avenue,
Univo,
State of Cronos

v.

RESPONDENT
Republic of Ruritania
Office of Legal Counsel,
Ministry of Foreign Affairs,
1 Liberty Square, Freecity
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STATEMENT OF FACTS

1. Contifica Asset Management Corp. (CLAIMANT) is a company incorporated under the laws of the State of Cronos. It is a subsidiary of Contifica Enterprises Plc., incorporated under the laws of Prosperia, which is the parent company of the Contifica Group.

2. On 15 March 1997, the governments of the Republic of Ruritania (RESPONDENT) and the State of Cronos signed the Treaty for the Mutual Promotion and Protection of Foreign Investments (BIT).

3. On 30 June 2008 the oldest and largest brewery in Ruritania, the Freecity Breweries Inc. (FBI) was sold to Contifica Spirits S.p.A., a fully owned subsidiary of Contifica Enterprises Plc., incorporated in Posteriana for USD 300,000,000. Contifica Spirits S.p.A. and the State Property Fund of Ruritania (SPF) signed the Share Purchase Agreement (SPA).

4. On 17 March 2010, as part of the intra-group restructuring, shares in FBI, as well as the principal intellectual property rights were transferred from Contifica Spirits S.p.A to CLAIMANT.

5. On 15 June 2011, the Human Health Research Institute (HRI), the most respected government-funded institution, revealed that consumers of FREEBREW beer were exposed to a higher risk of cardiac complications due to the effect of Methyldioxidebenzovat, an active chemical found in the Reyhan concentrate, a flavor added to FREEBREW beer.

6. On 20 November 2010, as a result of the stance of the New Way Party which convincingly won the elections, the Ruritanian parliament adopted the Regulation of Sales and Marketing of Alcoholic Beverages Act (MAB Act), which adjusted the already existent regulation on marketing, packaging and sale of alcohol.

7. On 30 June 2011, the Ministry of Health and Social Security (Ministry) adopted an ordinance, based on HRI’s study, requiring all products containing Reyhan concentrate to be labelled with a warning that the consumption of those products could lead to a higher risk of cardiac diseases. All the products containing Reyhan concentrate including bread, meat, soft drinks and spirits were labelled appropriately.

8. On 1 December 2011, the Prosecutor’s Office of Ruritania began a criminal investigation against Messrs. Goodfellow and Straw, executives of FBI and Contifica Group, respectively, on
the basis of alleged bribery of SPF officials in relation to the acquisition of FBI shares. Although
they were informed that they may be summoned for an interrogation, Messrs. Goodfellow and
Straw decided to leave Ruritania and that is why they were detained in the Freecity International
Airport on 23 December 2011. They were released on 3 January 2012.

9. On **31 May 2012**, after not receiving a response to its letter from 10 December 2011, CLAIMANT
wrote again to the President of Ruritania, explicitly invoking Art. 8 of the BIT.

10. On **20 June 2012**, the criminal investigation against Messrs. Goodfellow and Straw was
terminated.

11. On **15 September 2012**, FBI’s lenders agreed not to declare default and enforce their security
rights, as a result of FBI’s inability to comply with its financial obligation, since they were given
an additional security package which included the recovery and claims CLAIMANT may receive in
arbitration.

12. On **30 September 2012**, CLAIMANT filed a request for arbitration with the German Institution for
Arbitration (DIS) under the UNCITRAL Arbitration Rules administered by the DIS International
Chamber of Commerce against the Republic of Ruritania invoking the BIT dispute resolution
clause.

13. On **15 December 2012**, RESPONDENT submitted its objections to the jurisdiction of the DIS and
admissibility of the claims.
PART ONE – PROCEDURAL ARGUMENTS

14. As a preliminary matter, RESPONDENT submits that this Tribunal does not have competence to hear and decide over any of the claims in the present dispute, as procedural requirements within the Cronos-Ruritania BIT have clearly not been met (I). Furthermore, RESPONDENT argues that CLAIMANT’s claims constitute an abuse of procedural rights and should therefore not be heard before this Tribunal exercising its treaty jurisdiction (II).

I THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR ANY OF THE CLAIMS RAISED IN THE PRESENT DISPUTE

15. RESPONDENT asserts that this Tribunal cannot assume jurisdiction with respect to any of the claims arising out of the Cronos-Ruritania BIT, as none of the procedural preconditions for initiating arbitral proceedings, contrary to CLAIMANT’s contentions, are fulfilled (A). What is more, CLAIMANT is attempting to bring within the scope of this arbitration a separate legal dispute with the SPF, and wrongfully represent it as a violation of the BIT. It is, however, impossible for this Tribunal to hear claims based on the breach of the SPA, as they are contractual in nature (B). Finally, RESPONDENT submits that this Tribunal does not have jurisdiction with respect to claims pertaining to alleged moral damages (C).

A. PROCEDURAL PRECONDITIONS FOR INITIATING ARBITRATION UNDER THE CRONOS-RURITANIA BIT ARE NOT FULFILLED

16. It is matter of established international practice that in order for an arbitral tribunal to assume jurisdiction in a particular case, all procedural preconditions need to be fulfilled.¹ In the case at hand, these procedural requirements are stipulated in Article 8 and in the other relevant articles of the Cronos-Ruritania BIT.²

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¹ Congo v. Rwanda, ¶88.
² Claimant’s Exhibit No.1.
17. **Respondent** will unambiguously demonstrate that preconditions concerning jurisdiction *ratione materiae* (i) *ratione personae* (ii) and *ratione temporis* (iii) are not met, and that consequently Tribunal is not competent to decide over **Claimant**’s claims.

i. **The procedural precondition concerning jurisdiction *ratione materiae*** is not fulfilled

18. The Article 8 of the Cronos-Ruritania BIT determines disputes which can be submitted to this *ad hoc* arbitral Tribunal. Those include

*disputes concerning investments between a Contracting State and an Investor of the other Contracting State under this treaty.*

19. In this respect, **Respondent** asserts that the present dispute does not fall under the scope of the BIT dispute resolution mechanisms, because **Claimant**’s ownership over shares and IP rights in FBI does not constitute an Investment in sense of the Cronos-Ruritania BIT.

Namely, as defined in Article 1(1) of the Cronos-Ruritania BIT:

*the term “Investment” means every asset which is...invested in accordance with the laws and regulations of the Contracting State in which territory the Investment is made.*

20. It is beyond doubt that the bilateral treaty underlying this dispute requires that certain assets have been *invested* in the economy of the host State. As underlined in a recent 2012 case before ICSID – *Standard Chartered Bank v. Tanzania* – the essence of investment protection mechanisms relates to the investments actually *made* by an investor, not simply *held* by it – as it requires that investor is *actively contributing* to the investment in question. The tribunal concluded that, in order for claimant to benefit from the dispute resolution mechanisms under the BIT:

...claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of

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3 Claimant’s Exhibit No.1.


5 *Standard Chartered Bank v. Tanzania,* ¶257.
shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.\(^6\)

21. Taking into account the factual backdrop of this case, RESPONDENT asserts that CLAIMANT has not invested actively and thus should not benefit from the dispute resolution mechanisms. This stems not only from the fact that CLAIMANT paid the “token amount of 10’000 Ruritanian pounds (i.e. less than USD 5’000)”\(^7\) for the FBI shares valued at 300 million USD, but failed to further steer the investment and direct its prosperity. CLAIMANT might allege that it undertook to change the infrastructure related to bottling in the FBI plant\(^8\); however this cannot be accepted as CLAIMANT’s active participation in the Investment under the BIT for at least two distinct reasons. Firstly, actions undertaken to comply with regulatory changes should not be regarded as active contribution to an investment. Secondly, it was FBI and not CLAIMANT that had to implement the reconfiguration of the bottling line.\(^9\) Moreover, as stated in Fraport v. Philippines:

> it is possible that an economic transaction that might qualify factually and financially as an investment...falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because legally it is not an ‘investment’ within the meaning of the BIT.\(^10\)

22. Accordingly, RESPONDENT urges the Tribunal to find that CLAIMANT’s passive approach towards its shareholding in FBI cannot in any event qualify as an Investment under the BIT and that it lacks jurisdiction ratione materiae to rule on the merits of the case.

ii. The procedural precondition concerning jurisdiction ratione personae is not fulfilled

23. Limits to jurisdiction ratione personae in investment arbitration require that a tribunal is bound to adjudicate over a dispute concerning an investment between a foreign investor and a host State.\(^11\) RESPONDENT does not contest its standing as Contracting Party to Cronos-Ruritania BIT;

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\(^6\) Ibid, ¶230.

\(^7\) Statement of Defense, ¶7.

\(^8\) Statement of Claim, ¶12.

\(^9\) Statement of Claim, ¶12.

\(^10\) Fraport v. Philippines, ¶306.

\(^11\) UNCTAD, p.9.
however, RESPONDENT firmly objects to CLAIMANT’s standing as an Investor under Article 8 of the applicable treaty.

24. Namely, CLAIMANT had not purchased the shares of the FBI, investing millions of its funds in the economy of Ruritania, developing and increasing its investment, quite the contrary. In the case at hand, Contifica Spirits was the true owner of shares in FBI before these were transferred to CLAIMANT. The transfer took place in accordance with Article 11.1 of the SPA, which stipulates that “the Purchaser may assign all of its rights and obligations under [the SPA] by way of substitution”\(^\text{12}\). Since the parties to the SPA did not specify the exact meaning which should be given to the notion of substitution, the general legal definition should be applied. Pursuant to Black’s Law dictionary, substitution is considered a “process by which one person or thing takes the place of another person or thing.”\(^\text{13}\) In the case at hand, CLAIMANT merely took the place of Contifica Spirits, as provided in the above cited article of the SPA.

25. Since Contifica Spirits is company incorporated under the laws of Posteriana\(^\text{14}\), it is not covered by the Cronos-Ruritania BIT, and therefore could not have invested in accordance with the same BIT. Consequently, by way of substitution, CLAIMANT acquired entitlement over Contifica Spirits’ investment and its position, but not the investment and the status in the meaning of the Cronos-Ruritania BIT. CLAIMANT thus can only be regarded as an emergency surrogate or a substitute for another legal entity not covered by the Cronos-Ruritania BIT. Accordingly, RESPONDENT invites this Tribunal to concluded that condition ratione personae is not fulfilled in the present dispute.

#### iii. This Tribunal lacks jurisdiction ratione temporis to decide over CLAIMANT’s claim

26. RESPONDENT argues that the Tribunal lacks jurisdiction ratione temporis to decide over claims of alleged treaty violations and claims pertaining to investment, damages and related costs that are in essence related to events before CLAIMANT acquired shares in FBI, that is prior to 17 March 2010.

As aptly stated by Judge Huber in Island of Palmas case:

\(^\text{12}\) Claimant’s Exhibit No.2.
\(^\text{13}\) Black’s Law Dictionary, p.1471.
\(^\text{14}\) Statement of Defense, ¶4.
27. Furthermore, in the context of investment arbitration, this approach was supported by the Ad Hoc Committee in *Duke v. Peru*, as well as the tribunal in *Mondev v. USA*. In light of the facts of the present case it follows that any contention of CLAIMANT on alleged BIT breaches on the side of RESPONDENT, which rely on the guarantees and statements from the SPA that was concluded years before CLAIMANT acquired FBI shares, are thus time-barred from the jurisdiction of this Tribunal.

28. Namely, RESPONDENT also suggests that all claims of damages that are associated with the SPA concluded years prior CLAIMANT’s acquisition of FBI shares, should be regarded as falling outside the scope of this Tribunal’s jurisdiction *ratione temporis*.

29. However, even if the Tribunal finds that the previous contention is overly broad in its scope, RESPONDENT maintains that any potential claim of contractual nature relating to acts or omissions of SPF that CLAIMANT wishes to elevate to the level of treaty claims by operation of the “umbrella” clause from Article 6(2) of the Cronos-Ruritania BIT is in effect outside of temporal scope of Tribunal’s jurisdiction.

B. THIS ARBITRAL TRIBUNAL IS NOT COMPETENT TO HEAR THE CLAIMS PERTAINING TO THE ALLEGED BREACH OF THE SPA

30. Tribunal lacks jurisdiction to hear claims arising out of the SPA, as these are of purely contractual nature (i). Additionally, claims arising out of the SPA should be addressed to SPF – a separate legal entity not party to this investment dispute (ii). Furthermore, the “umbrella” clause in the Cronos-Ruritania BIT does not extend the scope of this Tribunal’s jurisdiction so as to include CLAIMANT’s contractual claims (iii). In any event, RESPONDENT asserts that the arbitral clause in the SPA bars this Tribunal from assuming jurisdiction based on the claims therein (iv).

i. Tribunal lacks jurisdiction to hear claims of purely contractual nature

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15 Island of Palmas, p. 845.
17 Mondev v. USA, ¶70.
31. This Tribunal is not an appropriate forum to hear CLAIMANT’s contractual claims based on the breach of the SPA. Namely, Article 8 of the Cronos-Ruritania BIT limits the jurisdiction of the Tribunal to treaty claims only.\textsuperscript{18} However, RESPONDENT’s position on this issue is widely recognized in investment arbitration. As stated by tribunals in landmarks cases including \textit{Duke v. Ecuador} and \textit{Bayındır v. Pakistan} – there is a fundamental difference, in the light of jurisdictional matters, between contract and treaty claims, as breach of contract and breach of treaty are separate questions giving rise to separate inquiries.\textsuperscript{19}

32. Moreover, it is the wording of a particular treaty dispute resolution clause that has been deemed relevant in determining its scope as to whether it encompasses jurisdiction of the investment tribunal to decide on contract claims as well.\textsuperscript{20}

In the present case, the arbitration clause in the Cronos-Ruritania BIT covers only:

\textit{disputes concerning Investments between a Contracting State and an Investor of the other Contracting State under this Treaty.}\textsuperscript{21}

33. Unlike similar clauses, which are broadly formulated without any additional qualifications,\textsuperscript{22} the dispute settlement mechanism in Article 8 of the Cronos-Ruritania BIT expressly restricts this Tribunal's jurisdiction to disputes concerning claims arising out of the Treaty. Contrary interpretation would go against not only prevailing practice of investment tribunals but also interpretative standards from Article 31(1) of the Vienna Convention on the Law of Treaties\textsuperscript{23} to which both CLAIMANT and RESPONDENT are signatories\textsuperscript{24} - that requires interpretation in good faith, in accordance with the ordinary meaning of the treaty terms in their context, in light of treaty’s object and purpose.

\textsuperscript{18} Claimant’s Exhibit No.1.
\textsuperscript{19} Bayındır v. Pakistan, ¶137; Duke v. Ecuador, ¶342.
\textsuperscript{20} Gaillard, p.2.
\textsuperscript{21} Claimant’s Exhibit No.1.
\textsuperscript{22} Gaillard, p.3.
\textsuperscript{23} Vienna Convention, Art.31(1).
\textsuperscript{24} Procedural Order No.2, ¶10.
34. Accordingly, Tribunal is invited to conclude that the formulation of the dispute settlement clause in the Cronos-Ruritania BIT in no way allows the possibility of contractual claims to be encompassed by it and settled before this forum.

   ii. Claims arising out of the SPA should be addressed to SPA – a legal entity that is not a party to the present dispute

35. CLAIMANT is wrongfully attempting to bring within the scope of these arbitral proceedings a separate legal dispute with the SPF, concerning the alleged breach of the SPA. Nevertheless, the RESPONDENT cannot be held liable for any of the obligations of the SPF as it is a distinct legal entity with a separate legal personality.25

36. It is customary international law, that the internal law of the State should be consulted when determining the legal status of an entity.26 In that light, under the municipal law of the Republic of Ruritania, the SPF has a separate legal personality.27

37. CLAIMANT will undoubtedly rely upon existing arbitral practice to show that RESPONDENT and SPF are mutually intertwined. However, Tribunal should reject each and every assertion of CLAIMANT in this regard. Relying upon the structural/functional test laid down in the Maffezini v. Spain 28, Respondent asserts that SPF can only be regarded as a separate legal entity. This follows clearly from the factual nexus of the dispute. In the case at hand, the SPF was established by an Act of the Ruritanian Parliament with a legal personality independent from RESPONDENT.29

In addition to that, the laws of Ruritania stipulate that the State bears no liability for the debts of the Fund,30 and despite the fact that SPF’s managing bodies are appointed by the government of Ruritania31 it is structurally separate from the State organization. What is more, links between the State and agencies or entities with a separate legal personality cannot automatically impede upon an entity’s independence. As supported by the tribunal in Bayindir v. Pakistan:

26 ILC Articles, Art.4(2).
27 Procedural Order No.2, ¶5.
28 Maffezini v. Spain I, ¶82.
29 Procedural Order No.2, ¶5.
30 Statement of Defense, ¶11.
31 Procedural Order No.2, ¶5.
the fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government.\(^{32}\)

38. RESPONDENT reiterates that nothing in the facts of the case implies that the decisions of SPF are in any way dependent on governmental influence. Any contrary inferral by CLAIMANT would clearly result in overstretching of established factual boundaries of the dispute, as it is evident from the functional point of view that the SPF, a legal entity which is structurally independent from the governmental framework and its effective control, does not and could not exercise a governmental function.

39. Bearing in mind all the previous, RESPONDENT urges this Tribunal to conclude that it is without jurisdiction to hear disputes that are in essence between CLAIMANT and the SPF, as a result of the latter’s independent legal status.

iii. The jurisdiction of this Tribunal does not encompass alleged violations of the SPA through operation of the “umbrella” clause

40. Contrary to CLAIMANT’s assertions that the alleged violations of the SPA may be brought under the scope of the Cronos-Ruritania BIT by way of the “umbrella” clause stipulated in Article 6(2) of the BIT, RESPONDENT will demonstrate that this is not the case. More specifically, the wording of the “umbrella” clause from Article 6(2) of the Cronos-Ruritania BIT should not be extensively interpreted \((a)\); and even if it were, it would not cover contracts to which RESPONDENT is not a signatory \((b)\).

   a) Extensive interpretation of the “umbrella” clause in Article 6(2) of the Cronos-Ruritania BIT is not warranted

41. RESPONDENT will demonstrate, in accordance with existing arbitral practice and legal doctrine, that the “umbrella” clause in the Cronos-Ruritania BIT should not be construed extensively in order to avoid negative consequences of that approach.

42. As firstly pointed out by the tribunal in the landmark SGS v. Pakistan case, by allowing all of the obligations entered into by a State to be sheltered under the BIT’s protective umbrella, the entire

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\(^{32}\) Bayindir v. Pakistan, ¶119.
edifice of international investment arbitration would be overburdened with claims of investors seeking to override the basic principles of investment arbitration solely for gaining access to the BIT’s dispute settlement mechanism.\textsuperscript{33}

43. Additionally, provisions in the BITs which provide essential standards of protection (e.g. fair and equitable treatment, full protection and security etc.) would be deprived of their true content and purpose, as it would suffice to invoke the umbrella clause in case of any breach of standard of protection.\textsuperscript{34} However, tribunal in \textit{SGS v. Pakistan} does not stand alone in its approach. As supported by tribunals in \textit{CMS v. Argentina}\textsuperscript{35}, \textit{Pan American v. Argentina}\textsuperscript{36}, the dispute settlement clauses in regular contracts would be rendered superfluous, as due to operation of the “umbrella” clause they would not be binding on the investor but only on the host State. In that respect, tribunals should be especially cautious when interpreting umbrella clauses referring to \textit{any} or \textit{all} other obligations – as is the case in the present dispute\textsuperscript{37} – since these pose the greatest risk of the above mentioned adverse results to the consistency of legal systems.

44. Admittedly, case law of investment tribunals with respect to the issue of interpretation of the “umbrella” clause is to a certain extent polarized, as it will probably be emphasized by CLAIMANT. Nonetheless, RESPONDENT remains firmly in its position that Tribunal should decline jurisdiction with respect to the contract claims arising out of the SPA. If this Tribunal nonetheless decides that the wording of the “umbrella” clause in the underlying BIT is to be interpreted broadly so as to potentially elevate breaches of the SPA to the level of treaty claims, it would still be precluded from jurisdiction as Respondent is \textit{not} a party to the SPA.

\textit{b) The “umbrella” clause does not encompass contracts concluded between the Investor and a separate legal entity}

\textsuperscript{33} SGS v. Pakistan, ¶166,168.
\textsuperscript{34} Ibid, ¶168; Reinisch, p.25.
\textsuperscript{35} CMS v. Argentina, ¶209-302.
\textsuperscript{36} Pan American v. Argentina, ¶96-116.
\textsuperscript{37} Claimant’s Exhibit No.1.
45. In several investment arbitrations, tribunals have decided not to allow contractual obligations to be covered by the umbrella clause if these obligations have been entered into by entities with a separate legal personality.\(^ {38} \)

46. In that light, the tribunal in *Impregilo v. Pakistan* refused to allow contracts entered into by the Pakistan Water and Power Development Authority to be brought under the relevant, treaty “umbrella” clause, since it had a status of an independent legal entity under Pakistani law.\(^ {39} \) Similarly, in the *Nagel v. Czech Republic*,\(^ {40} \) the Tribunal found that the failure of the state enterprise to comply with its obligation of representations to the investor, pursuant to the contract in force between them, did not entail an automatic breach of treaty obligations by the Czech Republic, due to the state enterprise’s separate legal personality.\(^ {41} \) According to the tribunal:

\[
\text{while [the State Enterprise] was a party to the Cooperation Agreement, [the Republic] was not. Although [the State Enterprise] was a fully owned state enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of [the Republic].} \tag{42}
\]

47. Moreover, the *Azurix v. Argentine* tribunal even considered that a breach of a contractual obligation by a state province did not trigger the “umbrella” clause from the US-Argentina BIT, as it was the province and not Argentina itself which was a party to the investment contract.\(^ {43} \)

48. In accordance with the previous, the Tribunal should find it lacks jurisdiction with respect to any and all contract-based claims of CLAIMANT, as the “umbrella” clause from the Cronos-Ruritania BIT is inoperative in the context of the present dispute and alleged breaches of the SPA.

iv. In any event, arbitral clause in the SPA bars this Tribunal from assuming jurisdiction based on the claims therein

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\(^{38}\) Dolzer/Schreuer, p.175.

\(^{39}\) Impregilo v. Pakistan, ¶223.

\(^{40}\) Nagel v. Czech Republic, ¶¶162, 165.

\(^{41}\) Gallus, p.3.

\(^{42}\) *Ibid.*

\(^{43}\) Azurix v. Argentina, ¶384.
49. Even if this Tribunal determines that it, in general, has jurisdiction to hear CLAIMANT’s contractual claims, this Tribunal should stay this proceeding in favor of the exclusive dispute settlement clause stipulated in the SPA.

50. Namely, the arbitration clause given in Article 14.2 of the SPA, provides a valid dispute settlement mechanism for resolving disputes arising out of or in connection with the SPA.\textsuperscript{44} The forum provided in the arbitration clause in the SPA has precedence over the BIT dispute settlement mechanism, since it relates to that specific contract.

51. As concluded by the tribunal in \textit{BIVAC v. Paraguay}, dispute settlement mechanism from the Contract was a:

\begin{quote}
valid exclusive jurisdiction clause for the resolution of any contractual disputes and that [the dispute settlement clause in the Treaty] could not override that clause.\textsuperscript{45}
\end{quote}

52. Respondent asserts that, in line with the principle of \textit{pacta sunt servanda}, the choice of the parties to the SPA with respect to the forum competent to adjudicate any controversies arising out of that contractual relationship must be upheld by this Tribunal, as contrary standing would be in contravention with the very essence of stipulating arbitration.

\textbf{C. THIS TRIBUNAL IS NOT COMPETENT TO DECIDE OVER THE CLAIMS PERTAINING TO MORAL DAMAGES, RESULTING FROM ALLEGED VIOLATION OF THE GUARANTEE OF FULL PROTECTION AND SECURITY}

53. Respondent asserts that claims for the compensation for the alleged moral damage caused to CLAIMANT are not within the scope of this Tribunal’s jurisdiction (i). Furthermore, \textit{RESPONDENT} argues that this arbitral Tribunal is not an appropriate forum for hearing the claims with respect to alleged moral damage caused to CLAIMANT’s employees (ii).

\textit{i. This Tribunal is not competent to decide over the claims pertaining to alleged moral damage caused to CLAIMANT}

\textsuperscript{44} Claimant’s Exhibit No. 2.

\textsuperscript{45} \textit{BIVAC v. Paraguay}, ¶159.
54. Contrary to Claimant’s contentions, Respondent asserts that the BIT does not cover claims pertaining to moral damages. Article 2(b) of the Cronos-Ruritania BIT guarantees full protection and security only to “Investments” made under the BIT.

55. The term “Investment” is defined in Article 1 as any asset which is directly or indirectly invested, without any mention of non-material goods of any kind. Therefore, the issue this Tribunal faces is whether alleged moral damages caused to Claimant could be considered as being part of the Investment under the BIT. On similar grounds, tribunal in the Zhinvali v. Georgia decided that it lacked jurisdiction over the dispute, since reputation did not qualify as an investment. Furthermore, if Tribunal decides that Cronos-Ruritania BIT fails to address this issue, it would be safe to assume that Claimant could attempt to establish its request on Ruritanian national law and its basic principles. However, even if it does, its claim would still not be fit for jurisdiction of this Tribunal. Namely, in Generation v. Ukraine the tribunal held that the claimant’s cause of action based – on the relevant article of the Ukrainian Constitution for “moral damages inflicted by unlawful decisions” – was beyond the scope of its jurisdiction which was limited to BIT breaches.

56. Respondent affirms that Tribunal should follow this line of reasoning and concluded that either protection of non-material goods of the investor, for which moral damages could be claimed, is not included in the BIT or that claims for moral damage based on general principles of municipal law fall directly outside of Tribunal’s jurisdiction.

ii. This Tribunal is not competent to decide over the claims pertaining to alleged moral damage caused to Claimant’s employees

57. Respondent asserts that this Tribunal cannot hear the claims related to alleged moral damage caused to Claimant’s employees, since the Investor cannot seek legal redress in the name of its employees. As stressed in Grimm v. Iran, tribunal concluded it lacked jurisdiction to address failures to protect the life and safety of an individual, Mr. Grimm, because these failures could

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46 Claimant’s Exhibit No.1.
48 Generation v. Ukraine, ¶17.6.
not be treated as measures affecting the investment.\textsuperscript{49} In a more recent case, tribunal in \textit{Funnekotter v. Zimbabwe} reiterated it regarded the issue of moral damages of individuals as inadmissible.\textsuperscript{50} What is more, as stressed in \textit{Lemire v. Ukraine} where request for damages was also rejected, the threshold for the tribunal to decide to award moral damages \textit{to a party injured} by an unlawful act of a state could only be justified in very exceptional and extreme circumstances that would amount to a situation where:

\[ \ldots \text{the ill-treatment contravenes the norms according to which civilized nations are expected to act; \ldots the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation.} \textsuperscript{51} \]

58. It is beyond doubt that none of outlined severe or illegal treatments occurred in the present case as Messrs. Goodfellow and Straw were only detained and arrested on suspicion of bribery as prescribed by Ruritanian law. What is more, Messers. Goodfellow and Straw are neither Investors in terms of the BIT nor in any event parties to these proceedings. Hence, this Tribunal cannot exercise jurisdiction with respect to claims for alleged moral damage caused by their arrest and detention.

59. Even in the case that the Tribunal considers Messrs. Goodfellow and Straw to be investors in light of the BIT, it would still be impossible for this Tribunal to hear their claims on the alleged moral damage as Article 8 of the Cronos-Ruritania BIT provides the requirement of attempting to settle any dispute with regard to the investment amicably before initiating arbitration,\textsuperscript{52} a procedural step not abided by Messers. Goodfellow and Straw prior to these proceedings.

\section*{II THE CLAIM CONSTITUTES AN ABUSE OF PROCESS}

60. Even if the Tribunal concludes that it has jurisdiction in the present proceedings, \textbf{RESPONDENT} will demonstrate, that this Tribunal may not hear \textbf{CLAIMANT’s} claims as they represent an abuse of process and should, therefore, be found inadmissible.

\textsuperscript{49} Grimm v. Iran, p.23.

\textsuperscript{50} Funnekotter v. Zimbabwe, ¶¶138-140.

\textsuperscript{51} Lemire v. Ukraine, ¶333.

\textsuperscript{52} \textit{Ibid.}
61. Namely, the facts and circumstances of the case undoubtedly indicate that the rationale of the internal restructuring within the Contifica Group was to gain access to the Cronos-Ruritania BIT dispute settlement mechanism, as the transfer took place at the time the occurrences which led to the present dispute could have been foreseen (A), while business correspondence between Contifica Group executives only confirms the purpose of restructuring (B). In any event, CLAIMANT’s actions can only be deemed as emanation of abusive treaty shopping (C).

**A. THE OCCURRENCES WHICH GAVE RISE TO THE PRESENT DISPUTE WERE FORESEEABLE TO CLAIMANT AT THE TIME OF THE TRANSFER OF SHARES IN FBI**

62. CLAIMANT might argue in the present proceedings that the internal restructuring of the Contifica Group, pursuant to which CLAIMANT gained all shares in FBI, as well as the principle IP rights, had been planned and materialized before any events which prompted the dispute at hand occurred. Contrary to that, RESPONDENT asserts that the restructuring had been implemented following the series of events which lead to the present dispute.

63. Namely, the restructuring took place on 17 March 2010, only two months after the New Way party (NWP) secured the majority in the Ruritanian parliament. It was a well-known fact that NWP propagated a more stringent stance towards the marketing and sale of alcoholic beverages, as set out in their election manifesto which was brought to the media’s attention during the course of the election campaign. In addition to that, the question of prohibiting the association of alcohol consumption with sports and a healthy lifestyle was even discussed during a debate which preceded the elections. Although it would be reasonable to assume that CLAIMANT could not have foreseen the exact influence of NWP’s election victory, RESPONDENT impugns the possibility of the fact that CLAIMANT did not anticipate more restrictive regulation in this field, and decided to take appropriate action. This is especially so, since the legislation in place had only barred sale of alcohol to consumers under 21 as well as any proclamations of

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55 Ibid.
57 Ibid.
positive health effects of alcohol.\textsuperscript{58} In addition, general laws prohibiting deceptive marketing practices and regulating labeling of beverages were in place, \textsuperscript{59} leading to the conclusion that only more restrictive rules were to be expected.

**B. THE TRUE PURPOSE OF THE TRANSFER WAS DISCLOSED IN THE CONFIDENTIAL LETTER BETWEEN CONTIFICA GROUP EXECUTIVES**

64. RESPONDENT submits that the true motive behind the Contifica Group’s internal restructuring is laid out in the confidential letter sent from Mr. Adam Straw to Mr. Lucas Goodfellow.\textsuperscript{60}

65. In the aforesaid letter, it is clearly stated that several means of “achieving further protection of the Contifica Group” have been considered,\textsuperscript{61} which RESPONDENT will show, undoubtedly implies the need to structure the investment in a jurisdiction which has in force a BIT arrangement with Respondent. If read carefully, the letter discloses that the haste was behind the whole restructuring process – the Group wanted a jurisdiction where a subsidiary was already established. This was crucial as the process for restructuring had to be implemented very quickly. Such a prompt re-routing of the investment can only indicate that they anticipated a change of wind with respect to legislation in the field of sale and marketing of alcohol in Ruritania and the problems that might arise therein. If the intention of the Contifica Group was indeed to provide a more “tax friendly” environment for its investment, it would have organized for the initial purchase of shares to be executed by CLAIMANT – a long standing company within the group.

66. Moreover, after having pointed out the need to secure an “investor-friendly environment,”\textsuperscript{62} out of the over 30 jurisdictions in which Contifica Group was present,\textsuperscript{63} only three seemed to satisfy the condition of an investor-friendly environment. What these three jurisdictions all have in common, is a BIT arrangement in place with Respondent (Cronos, USA, Switzerland),\textsuperscript{64} contrary

\textsuperscript{58} Procedural Order No.3, ¶3.
\textsuperscript{59} Ibid.
\textsuperscript{60} Respondent’s Exhibit No.1.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Statement of Claim, ¶4.
\textsuperscript{64} Procedural Order No.3, ¶7.
to the situation with the countries Prosperia and Posteriana (the jurisdictions in which Contifica Enterprises—the parent company, and Contifica Spirits).

Hence, the only possible conclusion is that the main motive for the internal reorganization was the need to bring the investment under BIT’s protective umbrella, so as to be able to initiate the present arbitration proceedings.

**C. Claimant’s actions can only be deemed as emanation of abusive treaty shopping**

68. “Treaty shopping” is defined as “the conduct of foreign investors in acquiring the benefits of investment treaties in their actual or planned host state through third countries, through which their investment needs to be routed”65. As stated in the Mobil v. Venezuela case:

> to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute […] an abusive manipulation of the system of international investment protection…66

69. Moreover, as stressed by the tribunal in Phoenix v. Czech Republic:

> protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.67

70. If Claimant’s inactivity with respect to the investment is also taken into consideration (as it clearly did not acquire FBI shares for the purpose of engaging in economic activity), coupled with all the circumstances of the case, Tribunal can only conclude that any and all claims filed by Claimant under the protection of the BIT can be considered as abusive, evidently lacking bona fides. Thus, Respondent politely urges the Tribunal to dismiss all claims put forward by Claimant.

**III Conclusion on Procedural Issues**

71. In summary, Respondent urges this Tribunal to decide that it has no competence to hear any of claims raised by Claimant as they fall outside of its jurisdiction. In an unlikely event that

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65 Os/Knuttnerus, p. 9.
66 Mobil v. Venezuela, ¶205.
Tribunal decides to assume jurisdiction, RESPONDENT requests that all CLAIMANT’s claims are rejected as inadmissible, due to the fact that CLAIMANT abusively engaged BIT protection.

PART TWO – ARGUMENTS ON MERITS

72. Contrary to CLAIMANT’s allegations, RESPONDENT will demonstrate that the acts and omissions of SPF are not attributable to RESPONDENT (I). RESPONDENT will also show that it did not violate any of its obligations under the Cronos-Ruritania BIT since its actions represent the exercise of its legitimate police and regulatory powers and do not in any manner constitute expropriation (II). Moreover, RESPONDENT will prove that it provided CLAIMANT with fair and equitable treatment (III) and that it complied with its duty of full protection and security (IV). Finally, RESPONDENT respectfully requests the Tribunal to find that CLAIMANT is not entitled to the full amount of damages claimed (V).

1 ACTS AND OMISIONS OF THE STATE PROPERTY FUND SHOULD NOT BE ATTRIBUTED TO RESPONDENT

73. It is generally accepted in international law that acts or omissions of separate legal entities are not ipso facto attributable to the State. The question of attribution is governed by the International Law Commission’s Articles on State Responsibility (ILC Articles), which reflect customary international law in this sphere and which are consistently applied by international tribunals and courts when assessing the issue of attribution.

74. In the case at hand, RESPONDENT will demonstrate that the acts of the SPF cannot be attributed to Ruritania, since the SPF is not a State organ (A.), it does not exercise elements of governmental authority (B.), and its conduct is not effectively directed or controlled by RESPONDENT (C.).

A. SPF IS NOT A STATE ORGAN

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68 Dolzer/Schreuer, p.219.
69 Malumfashi, p.9.
70 Hober, p.551; Maffezini v. Spain I, ¶78; Noble Ventures v. Romania, ¶¶69-70; Eureko v. Poland, ¶128.
75. The question of determining whether a particular entity could be considered a State organ is governed by Art. 4 of the ILC Articles. It should be noted that investment tribunals generally disregarded the possibility of attribution whenever the entity in question had a separate legal personality under the municipal law of the State.  

76. As a matter of example, in AMTO v. Ukraine, the tribunal found that Energoatom was not a State organ after having applied Art. 4 of the ILC Articles, since it was established as a separate legal entity under Ukrainian law and provided with separate legal responsibility. Additionally, the Bayindir tribunal followed the same line of reasoning and found that the National Highway Authority of Pakistan had a distinct legal personality under Pakistani laws and therefore Article 4 of the ILC Articles was inapplicable.

77. In a similar vein, Ruritanian law grants the SPF a distinct legal personality and explicitly stipulates that the State shall not be held responsible for its acts. Bearing in mind the circumstances of the case which support RESPONDENT’s assertions, the Tribunal should find that SPF cannot be considered a State organ and thus its acts and omissions cannot be attributed to RESPONDENT.

B. SPF DOES NOT EXERCISE ELEMENTS OF GOVERNMENTAL ACTION

78. Article 5 of the ILC Articles relates to entities which do not fall under the definition of a State organ under Article 4, but which are “empowered by the law of that State to exercise elements of the governmental authority…in that particular instance.” CLAIMANT might contend that, by carrying out the government’s decisions in the process of privatization, the SPF entered into a contractual arrangement with Contifica Spirits. However, RESPONDENT asserts that there is no evidence in the facts of the case to support such an involvement in the privatization process by the SPF. On the contrary, the decision to sell the FBI was an independent business decision made by the managing organs of the SPF. Moreover, the autonomy of this decision is sustained by the

71 Bayindir v. Pakistan, ¶119; AMTO v. Ukraine, ¶101; Noble Ventures v. Romania, ¶69.
72 AMTO v. Ukraine, ¶101.
73 Bayindir v. Pakistan, ¶119.
74 Statement of Defense, ¶11.
75 ILC Articles, Art.5.
SPF’s structural and functional independency of the State organization, as RESPONDENT already illustrated earlier in the Memorial (see section Part One, I, B, (ii)).

C. THE SPF IS NOT UNDER RESPONDENT’S EFFECTIVE CONTROL

79. The last means that CLAIMANT might use in order to try to prove that SPF’s actions should be attributed to RESPONDENT potentially appears in Art. 8 of the ILC Articles. This provision specifies that a particular act of a State entity is attributable to the State in case that its conduct has been directed or controlled by the State.\textsuperscript{76}

80. However, there is no evidence in the present case to impugn the independence of the SPF’s management. Namely, the mere fact that the managerial board is appointed by the government of Ruritania does not suffice to automatically consider their decision-making process as directed or controlled by RESPONDENT. Similarly, just because in many countries an ombudsman is appointed either by the government or the parliament, it does not imply that it is not independent in the decisions it takes.

81. Therefore, RESPONDENT invites the Tribunal to find that the possibility of attributing acts and omissions of the SPF to Ruritania cannot be upheld under this condition as well as the above mentioned ones.

82. Consequently, RESPONDENT respectfully invites the Tribunal to find that the acts and omissions of SPF can in no way be attributed to RESPONDENT.

II RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INVESTMENT

83. Contrary to CLAIMANT’s allegations that RESPONDENT unlawfully expropriated its investment\textsuperscript{77}, RESPONDENT will demonstrate that its actions towards CLAIMANT’s investment fall within the State’s police and regulatory powers (A.). Namely, all of RESPONDENT’s actions were undertaken with the sole aim to protect the health of Ruritania’s citizens (B.). Consequently, this Tribunal should find that CLAIMANT is not entitled to any compensation (C.).

A. RESPONDENT’S ACTIONS REPRESENT A LEGITIMATE EXERCISE OF ITS POLICE AND REGULATORY POWERS

\textsuperscript{76} ILC Articles, Art.8.

\textsuperscript{77} Statement of Claim, ¶28.
84. An often cited definition of police power says that it entail measures that "aim directly to secure and promote the public welfare."\(^{78}\) Pursuant to Art. 12(1) of the International Covenant on Economic, Social and Cultural Rights (Covenant), to which RESPONDENT is party,\(^{79}\) "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The right to regulate for reasons of public health is thus an inherent attribute of State sovereignty.\(^{80}\) Article 12 of the Covenant follows on to say that the:

\[\text{steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for [...] the prevention, treatment and control of epidemic, endemic, occupational and other diseases}^{81}\].

85. It is undisputed that alcohol itself has various negative impacts on human health and life. Namely, excessive alcohol use may cause cancer\(^{82}\), heart disease\(^{83}\), car crashes, trigger suicides and homicides, etc.\(^{84}\) That is the reason why the Ruritanian law had prohibited deceptive marketing practices and the sale of alcoholic beverages to persons under 21 since 1992.\(^{85}\) It also explains why in 2010 the Ruritanian Parliament adopted the MAB Act,\(^{86}\) which, among other, addressed the prohibition of sale of alcoholic beverages in bottles bigger than 0.5l, the prohibition of advertising during sport events, as well as the plain packaging requirement.\(^{87}\) RESPONDENT’s concern for its citizens’ health is also the reason why the Ministry adopted the ordinance requiring any product containing Reyhan concentrate to be labeled with an explicit warning nearly half a year after the MAB Act.\(^{88}\) Namely, the HRI revealed that the consumption

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\(^{78}\) Stoebuck, p.1057.  
\(^{79}\) Procedural Order No.2, ¶28.  
\(^{80}\) Wang, p.9.  
\(^{81}\) ICESCR, Art.12(2)(c).  
\(^{82}\) <cancerresearchuk.org>  
\(^{83}\) <drinkaware.co.uk>  
\(^{84}\) Jernigan, pp.5-7.  
\(^{85}\) Procedural Order No.3, ¶3.  
\(^{86}\) Statement of Claim, ¶10.  
\(^{87}\) Claimant’s Exhibit No.3.  
\(^{88}\) Statement of Claim, ¶15.
of FREEBREW beer increased the risk of cardiac complications. Specifically, FREEBREW beer contains Reyhan concentrate, 80% of which is Methyldioxidebenzovat - an active substance which is responsible for cardiac complications.89

86. CLAIMANT alleges that the issuing of this ordinance, coupled with other circumstances, led to its investment being expropriated. However, for a measure to constitute regulatory expropriation the measure should be a discriminatory one. In the case at hand, however, the ordinance proclaimed that not only FREEBREW beer, but any product containing Reyhan concentrate had to be labeled. Therefore, it cannot be deemed discriminatory and cannot be seen as expropriation, since it did not specifically target CLAIMANT’S investment nor did it put Claimant in a more disadvantageous position than the other producers of products containing Reyhan.

87. Various tribunals, such as the ones in Chemtura v. Canada and LG&E v. Argentina concluded that States have the power to adopt measures having a social or general welfare purpose. The Tribunal in the Chemtura v. Canada stated that a non-discriminatory measure, motivated by the increasing awareness of the dangers presented by lindane for human health was a valid exercise of the State’s police powers and did not constitute expropriation. Similarly, RESPONDENT’S desire to warn its citizens of the negative impact from consuming products containing Reyhan, including FREEBREW beer, should be viewed as a legitimate exercise of governmental discretion and not expropriation.

88. Seeing how RESPONDENT implemented measures which were non-discriminatory and designed to protect a legitimate public welfare objective, this Tribunal should find that no expropriation occurred in the case at hand.

89 Statement of Claim, ¶14.
90 Procedural Order No.3, ¶12.
92 Statement of Claim, ¶28.
93 Subedi, p.77; Annex 10-C(4)(b) CAFTA.
94 Statement of Claim, ¶15; Statement of Defence, ¶15.
95 Chemtura v. Canada, ¶266.
96 LG&E v. Argentina I, ¶195.
97 Chemtura v.Canada, ¶266.
B. RESPONDENT’S ACTIONS WERE AIMED AT IMPROVING PUBLIC HEALTH

89. The MAB Act is an example of a set of measures any responsible government should take to address the problems of alcohol consumption. While CLAIMANT asserts that by resorting to such medium RESPONDENT violated its obligations under the Cronos-Ruritania BIT, RESPONDENT will demonstrate that all of RESPONDENT’s measures, including the plain packaging measure (i.), the reduction of the bottle size (ii.) and the ban of advertising (iii.), were motivated by the sole objective to prevent any association between alcohol and a healthy lifestyle and therefore do not in any manner violate its obligations.

i. The plain packaging requirement was aimed at improving public health

90. CLAIMANT asserts that its trademark and trade dress rights were expropriated by RESPONDENT when it enacted Section 8 of the MAB Act. CLAIMANT substantiates this assertion by alleging that its trademarks include words, words in specific fonts and colors and designs on labels and Section 8 prohibits the use of any technique which would highlight the “brand” of the beverage. It is submitted in doctrine that, when a state determines that a trademark must either be restricted or its visual display affected, expropriation occurs only to the extent that the basis for the trademark—the ability to distinguish between goods and services—is diminished. Nevertheless, in the case at hand CLAIMANT failed to justify its contentions, since the Record does not contain any proof that the trademarks’ ability to distinguish CLAIMANT’s products from products of its competitors had vanished. On the contrary, according to the records of the Ruritanian Trademarks Office CLAIMANT is still registered as the owner of the respective trademarks and trade dresses.

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100 Procedural Order No.2, ¶17.
101 Claimant’s Exhibit No.3.
102 Halabi, p.365.
103 Ibid, p.357.
104 Statement of Defense, ¶16.
91. The argument that plain packaging violates trademarks has been discussed mostly in cases regarding the tobacco industry. Mark Davison, a senior law expert from the IP Research Institute of Australia at Monash University, stated that the said argument is inconclusive. He continued that while there is a right to prevent others using your trademark, there is no right to use your own trademark given by the WTO agreement.\(^{105}\) The view that the argument concerning the “negative impact” of plain packaging is not a persuasive one was confirmed by the High Court of Australia in 2012. The Court rejected the constitutional challenge mounted by several key players in the tobacco industry who strongly opposed the passing of the Australian Government’s *Tobacco Plain Packaging Act 2011* (Cth) (Act) on the basis that it amounted to an acquisition of their statutory intellectual property on "unjust terms".\(^{106}\)

92. Finally, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) itself proclaims in Art. 8 that:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health […] provided that such measures are consistent with the provisions of this Agreement.\(^{107}\)

93. Considering that even though RESPONDENT adopted measures necessary to protect public health, CLAIMANT is still the registered owner of the respective trademarks, it should be deemed that RESPONDENT exercised the rights granted to it by TRIPS and international law and CLAIMANT cannot allege that it breached its obligations.

**ii. The measure concerning the reduction of the bottle size was aimed at improving public health**

94. Another measure which CLAIMANT sees as the cause of its losses is the provision which prohibits the sale of beer in containers larger than 0.5l. Seeing how all producers of beer are bound by this prohibition, CLAIMANT cannot allege that it is in any way discriminatory. On the contrary, this measure is yet again aimed at improving public health because it is deemed that by decreasing the bottle size, consumption decreases as well.\(^{108}\) Namely, when speaking of malt liquors, which

\(^{105}\) [tobaccotactics.org]

\(^{106}\) [mondaq.com]

\(^{107}\) TRIPS, Art.8(1).

\(^{108}\) [theguardian.com]
FREEBREW beer is because it contains 5% of alcohol, a standard drink is calculated as a 12 ounce glass of beer, which is equal to 0.35l. Although according to some views, malt liquor beers can be sold in 1l bottles, the combined effects of higher alcohol content, larger serving size, and faster consumption can result in higher blood alcohol levels, an increased risk of aggressive behavior, and other alcohol-related problems.

95. Therefore, having in mind RESPONDENT’s motive to decrease alcohol consumption, the reduction of the bottle size is a reasonable measure. Moreover, since it is both aimed at protecting public health and it is not-discriminatory, this Tribunal should find that the reduction of the bottle size represents a legitimate exercise of RESPONDENT’s police powers and does not constitute expropriation.

iii. The ban of advertising was aimed at improving public health

96. Regarding the ban of advertising and sale of alcoholic beverages at professional sport establishments, it has to be emphasized that

the fact that promotion is allowed, ubiquitous and heavily linked to mainstream culture, communicates a legitimacy and status to alcohol that belies the harms associated with its use. It also severely limits the effectiveness of any public health message.

97. This explains the rationale for the measure envisaged in Section 6 of the MAB Act.

98. CLAIMANT might allege that the measure is too austere, however the recent study carried out at the University of Leicester Department of Media and Communication, found that there are links that can be made between advertising and teenage drinking. Besides this study, there are more than a dozen longitudinal studies that have linked youth exposure to alcohol advertising to the likelihood that kids will begin drinking early or, if they have already started drinking, drink

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110 <health.alcoholism.about.com>
111 Ibid.
112 British Medical Association, p.22.
113 Claimant’s Exhibit No.3.
114 <news-medical.net>
more.\textsuperscript{115} Namely, alcohol advertising has the potential of portraying drinking as socially desirable, of recruiting new drinkers and of increasing drinking among current drinkers.\textsuperscript{116}

99. \textbf{RESPONDENT} is not alone in its policy against advertising of alcoholic beverages. Namely, France’s \textit{Loi Evin}, adopted in 1991, among other restrictions on alcohol advertising, prohibited the broadcast of sporting events where alcohol advertisements are displayed.\textsuperscript{117} Provisions in the Treaty establishing the European Community allowed France to maintain its law on alcohol advertising when it was challenged at the European Court of Justice by the European Commission and the UK government. The Court found that the prohibitions did conflict with Art. 59 of the European Treaty. However, the Court concluded that these prohibitions were permissible because they were aimed at protecting health.\textsuperscript{118} Similarly, the Tribunal in the case at hand should find that the \textbf{RESPONDENT’S} prohibition of advertisement of alcoholic beverages was a legitimate measure aimed at improving public health.

100. The General Agreement on Trade in Services (GATS), which applies to \textbf{RESPONDENT} and the State of Cronos by virtue of their membership in the WTO,\textsuperscript{119} also provides the basis for \textbf{Respondent’s} actions. Namely, Art. XIV of the GATS proclaims that

\begin{quote}
subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures [...] necessary to protect human, animal or plant life or health; [...].\textsuperscript{120}
\end{quote}

101. Considering that all of the previously mentioned measures were undertaken with the sole purpose of protecting the health of Ruritania’s citizens, this Tribunal should find that \textbf{RESPONDENT} did not breach its obligations by expropriating \textbf{CLAIMANT’S} investment.

102.

\textsuperscript{115} <alcoholism.about.com>
\textsuperscript{116} Global Status Report, p.58.
\textsuperscript{117} <cigarettelectronique.net>
\textsuperscript{118} Gould, pp.367-368.
\textsuperscript{119} Procedural Order No.2, ¶12.
\textsuperscript{120} GATS, Art. XIV(b).
C. CLAIMANT IS NOT ENTITLED TO ANY COMPENSATION

103. CLAIMANT asserts that RESPONDENT failed to pay fair compensation for the damages caused.\(^{121}\) RESPONDENT neither contests such allegations, nor admits to having an obligation to pay compensation because,\(^ {122}\) as it was previously demonstrated (see section Part Two, II, A), all the actions taken by the government of Ruritania are within the scope of any state’s police and regulatory authority.

104. Namely, where economic loss arises out of *bona fide* general regulation aimed at preventing nuisance, it should be considered an acceptable exercise of the police power and therefore would be non-compensable\(^ {123}\). Similarly, tribunals in *Saluka v. Czech Republic*\(^ {124}\) and *Methanex v. USA*\(^ {125}\) found that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

105. Consequently, since RESPONDENT’S actions represent its exercise of police powers aimed at protecting public health, this Tribunal should find that RESPONDENT is not liable to pay compensation to CLAIMANT.

III RESPONDENT DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD AND ACTED IN FULL COMPLIANCE WITH ITS OBLIGATIONS CONTAINED IN THE CRONOS-RURITANIA BIT

106. Contrary to CLAIMANT’S allegations\(^ {126}\), RESPONDENT submits that it acted in full conformity with the Article 2 of the Cronos-Ruritania BIT that prescribes the duty of fair and equitable treatment.

107. As stated by Stephen Schill:

\(^{121}\) Statement of Claim, ¶28.

\(^{122}\) Statement of Defense, ¶13.

\(^{123}\) Vadi, p.109.

\(^{124}\) Saluka v. Czech Republic, ¶276.

\(^{125}\) Methanex v. USA, ¶410.

\(^{126}\) Statement of Claim, ¶28.
fair and equitable treatment standard can be understood as embodying the rule of law as a standard that the legal systems of host states have to embrace in their treatment of foreign investors.\textsuperscript{127}

108. However, a judgment of what actually represents fair and equitable cannot be applied universally, but it can only be interpreted according to the particular circumstances of the case.\textsuperscript{128} In the case at hand, RESPONDENT had to harmonize and balance the interests of CLAIMANT with the public interest and its sovereign power to regulate the issues vital for its citizens in their best interest. Still, its actions towards CLAIMANT were entirely legal and in conformity with the relevant standards of protection.

109. Therefore, contrary to the allegations made by CLAIMANT, RESPONDENT will demonstrate that it did not frustrate CLAIMANT’s reasonable and legitimate expectations (A.) and that it treated the CLAIMANT in a non-arbitrary and non-discriminatory manner and in any event its actions were committed in a good faith (B.).

A. RESPONDENT’S ACTIONS DID NOT FRUSTRATE CLAIMANT’S REASONABLE AND LEGITIMATE EXPECTATIONS

110. It is generally accepted in the international practice that legitimate expectations form a base of the fair and equitable treatment standard being the dominant element of the same.\textsuperscript{129} Moreover, the arbitration tribunals stressed out many times that the legal framework present at the moment of the conclusion of the investment should be seen as a pledge and indication of possible violation of legitimate expectations of the investor.\textsuperscript{130}

111. However, the obligation to uphold and protect investor’s legitimate expectation needs to be balanced against other constraints that may exist on the side of the host State. As stated in the S.D. Myers the determination of a breach of the fair and equitable treatment needs to be made

\textsuperscript{127} Schill, p.151.
\textsuperscript{128} Waste Management II v. Mexico, ¶99; LG&E v. Argentina II, ¶96.
\textsuperscript{129} Saluka v. Czech Republic, ¶¶301,302; Siemens v. Argentina, ¶300; Thunderbird v. Mexico, ¶147; Waste Management II v. Mexico, ¶98.
\textsuperscript{130} National Grid v. Argentina, ¶173; Occidental v. Ecuador, ¶191.
“[i]n the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”131

112. As written by professor Vaughan Lowe:

\[
[t]he \text{tenor of the cases suggests that it is now regarded as ‘unfair’ or ‘inequitable’ for a state to make material changes in the business environment that prevailed when the investor committed itself to its investment.}
\]

113. Moreover, the maintenance of the same legal provisions “[d]oes not mean the freezing of the legal system”.133 A legal framework of a host State is adaptable to any new emerging circumstances and the host state’s sovereign right is to enact new legislation that will answer to those challenges.134

114. In the case at hand, RESPONDENT had to tackle a substantial problem of alcoholism along with the emerging issue of harmful plant that threatened to blemish public health. Ruritania struggled with the issue of alcoholism for a long time and one of the means was a law from 1992 that prohibited the sale of alcoholic beverages to persons under 21 and claims that supported positive health effects of alcohol.135 Therefore, the regulation introducing the requirement of labeling the products containing Reyhan represented a logical sequel of the previously enacted measures and should have come as no surprise to CLAIMANT.

115. CLAIMANT might allege that its legitimate expectations were frustrated by the unpredictable legislative actions taken by the new political leadership of RESPONDENT. However, the Tribunal should not be mislead by such allegation since, according to numerous pre-elective public opinion surveys, it became obvious that the New Way Party will win enough seats in the national Parliament which will put it into position to make a decisive influence on the enactment of laws.136 Furthermore, an investor of such a vast and powerful business, as Contifica Asset Management Corporation is, should have been informed of the political program preached by

131 S.D. Myers v. Canada, ¶263.
133 Enron v. Argentina, ¶261.
134 AES v. Hungary, ¶9.3.29.
135 Procedural Order No.3, ¶3.
136 Procedural Order No.3, ¶19.
one of the most influential political factors in the country.\textsuperscript{137} During pre-election campaign and especially after the elections when the New Way Party secured enough seats in the Ruritanian Parliament, its hard stance towards the issue of consumption of alcohol became apparent.\textsuperscript{138} The already existing policy on sale of alcohol to the minors and general laws prohibiting deceptive marketing practices and regulating labeling of beverages apply to alcoholic beverages are present in the Ruritanian legal framework for about 18 years.\textsuperscript{139} Therefore, the adoption of the MAB Act that allegedly severely restricted FBI’s ability to market and sell its products in Ruritania\textsuperscript{140}, came as a natural consequence of everything previously stated.

116. Having in mind that the legitimate expectations of the investor cannot be based on the “[i]mmutability of the legal order, the economic world and the social universe”,\textsuperscript{141} and that

\begin{quote}
\textit{“any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times”},\textsuperscript{142}
\end{quote}

it is clear that in the case at hand the expectations of CLAIMANT regarding the business and legal conditions in Ruritania were not legitimate nor reasonable. A diligent and prudent investor is the one which “has taken into account all circumstances surrounding the investment, including the political, socioeconomic, cultural and historical conditions prevailing in the host State”.\textsuperscript{143} This is the standard that CLAIMANT in the case at hand fails to meet because it did not assess all present circumstances that directly affects its investment. Consequently, CLAIMANT cannot invoke frustration of its legitimate expectations.

117. Furthermore, the goal of the fair and equitable treatment standard of protection cannot solely rely on personal motivations and deliberation.\textsuperscript{144} The expectations of foreign investors have to be

\begin{flushleft}
\textsuperscript{137} Procedural Order No.2, ¶9.
\textsuperscript{138} Statement of Claim ¶¶9,10; Statement of Defense, ¶6; Procedural Order No.2, ¶9.
\textsuperscript{139} Procedural Order No.3, ¶3.
\textsuperscript{140} Statement of Claim, ¶10.
\textsuperscript{141} Impregilo v. Argentina, ¶290.
\textsuperscript{142} AES v. Hungary, ¶9.3.34.
\textsuperscript{143} Duke v. Ecuador, ¶340.
\textsuperscript{144} EDF v. Romania, ¶219.
\end{flushleft}
legitimate and reasonable enough under *particular* circumstances in order to be protected.  

Also, the investor’s expectations must be coupled with a justifiable purpose and in any event, they do not depend on mere intension of the parties to the BIT, but also on the lining of the enforceable duties.  

In fact, “[B]ilateral Investment Treaties are not insurance policies against bad business judgments”  

Unfortunately, CLAIMANT failed to do so because it disregarded the necessity of RESPONDENT to act as a sovereign and regulate issues of public importance. Consequently, CLAIMANT was not prepared and could not adjust to the changes that came as a result of the enactment of MAB Act and Ordinance.

118. Therefore, the expectations of the CLAIMANT were not grounded on sources that could be seen as certain enough for the Investor and so the CLAIMANT cannot invoke the frustration of its reasonable and legitimate expectations. This is for the reason that it should not base its reasoning on the issues that were positive to be changed with time.

**B. RESPONDENT TREATED CLAIMANT IN A NON-ARBITRARY AND NON-DISCRIMINATORY MANNER AND IN ANY EVENT ITS ACTION WERE TAKEN IN GOOD FAITH**

119. According to numerous cases, arbitrary measures are characterized as the measures taken solely on the voluntary grounds, deprived of a legal cause. As found by the ICSID tribunal in *Genin v. Estonia*

> arbitrary acts are those [s]howing willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.  

120. By the opinion of the respected scholars, the term “arbitrary” should be construed so as to entail a measure that inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a

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145 Saluka v. Czech Republic, ¶304.
146 M.C.I. v. Ecuador, ¶278.
147 Maffezini v. Spain II, ¶64.
149 Genin v. Estonia, ¶367; Brownlie, pp.527-531.
measure taken for reasons that are different from those put forward by the decision maker; a measure taken in willful disregard of due process and proper procedure.\textsuperscript{150}

121. The enactment of MAB Act and Ordinance, as well as measures implemented subsequently, \textit{a contrario}, did not include any expression of inaptitude. In fact, they were based on prescribed procedure\textsuperscript{151}, coming as a consequence of a scientific findings\textsuperscript{152} and the understanding of the Ruritanian officials that effective reaction is vital\textsuperscript{153}.

122. For example, during the procedure of the enactment of the MAB Act, CLAIMANT, as the member of The Association of Alcoholic Beverages Producers and Importers (AABPI), had the opportunity to express its opinion concerning the necessity of the new legislation.\textsuperscript{154} However, the legislator did not find its claims relevant nor convincing enough to include them.

It is held in \textit{Parkerings v. Lithuania} decision

\textit{It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion.}\textsuperscript{155}

123. The MAB Act was enacted in order to regulate the actions of all the producers of alcohol, and not inflict damage to just one of them. Furthermore, a need to resolve the problem of overconsumption of alcohol in Ruritania is a legitimate reason that justifies the enactment of this act. Therefore, norms established by law that may seem unjust to CLAIMANT since it affected its business cannot, in any event, be seen as arbitrary.

124. Furthermore, CLAIMANT mentioned the alleged deficiencies in the procedure of enactment of the Ordinance brought by the Ministry of Health and Social Security. Namely, this Ordinance was adopted without any consultation with FBI or other affected parties.\textsuperscript{156} According to the Public Health Act and the procedure described in it, consultations with the affected parties are not a part

\begin{footnotesize}
\begin{enumerate}
\item EXPERT OPINION OF PROF. SCHREURER IN EDF V. ROMANIA, \textsection 303.
\item PROCEDURAL ORDER NO. 3, \textsection 10, 15; STATEMENT OF CLAIM, \textsection 10.
\item STATEMENT OF CLAIM, \textsection 14, 15.
\item STATEMENT OF DEFENSE, \textsection 15.
\item PROCEDURAL ORDER NO. 3, \textsection 15.
\item PARKERINGS V. LITHUANIA, \textsection 332.
\item STATEMENT OF CLAIM, \textsection 15.
\end{enumerate}
\end{footnotesize}
of the adopting procedure.\textsuperscript{157} In addition, CLAIMANT questions the reasonableness of the Minister’s decision and the advice that he got. It is important to highlight that the advice given to the Minister is, as the sole term shows, just an advice, that does not have to be taken into account and does not represent a binding criterion. Moreover, CLAIMANT’s argument that the RESPONDENT did not consider any other, less invasive measure before it implemented the said Ordinance is pointless, since the both parties agreed that the followed procedure fulfilled the requirements of the legal system.\textsuperscript{158} All above-mentioned justifies that the procedure of establishing the Ordinance was not directed strictly to affect CLAIMANT and that this act was not destined to harm it. It was based on a report of a respected institution and not on a personal discretion. Consequently, the allegations made by CLAIMANT concerning the arbitrariness of the Ordinance brought by the Ministry of Health and Social Security should fall.

125. RESPONDENT’s actions cannot be qualified as discriminative towards CLAIMANT. However, discrimination requires more than a different treatment.\textsuperscript{159} A certain case needs to be treated differently from similar cases without justification,\textsuperscript{160} a measure must be “discriminatory and expose[s] the claimant to sectional or racial prejudice,”\textsuperscript{161} or a measure must “target[ed] CLAIMANT’s investments specifically as foreign investments.”\textsuperscript{162} \textsuperscript{163}

126. Here, the measures introduced by the MAB Act are general and applied to all the producers of alcoholic beverages. The marketing of any alcoholic beverages, not only beer on television and at sporting events was prohibited. Serving of any alcoholic beverages at sport facilities, outdoors and at any place is generally forbidden from 9pm till 9am. All the trademarks have to be written in the same font and color which disables the possibility of any specific brand to stand out among the others.\textsuperscript{164} Finally, the requirement for smaller packaging\textsuperscript{165} affects all of the producers

\textsuperscript{157}Procedural Order No.3, ¶10.
\textsuperscript{158}Ibid.
\textsuperscript{159}Lemire v. Ukraine, ¶261.
\textsuperscript{160}Saluka v. Czech Republic, ¶313.
\textsuperscript{161}Waste Management II v. Mexico, ¶98; Methanex v. USA, ¶274.
\textsuperscript{162}LG&E v. Argentina II, ¶147.
\textsuperscript{163}Lemire v. Ukraine, ¶261.
\textsuperscript{164}Statement of Claim, ¶11.
\textsuperscript{165}Statement of Claim, ¶12.
in Ruritania equally. It should be noted that FBI produces many other species of beer sold in 0.5l containers and that this measure hit only Freebrew, which is the only one among many other brands produced in this brewery. Also, it is possible that some other producers of other kinds of alcohol beverages pack their products in the containers bigger than 0.5l and so they could be affected by this measure too. However, CLAIMANT presented its own situation as discrimination without providing a Tribunal with some other relevant sources, other than its own statement, that could witness.

127. The elements of discrimination cannot be found even in the issue of Ordinance prescribing the warning labels for Reyhan side effects. According to the research conducted by the HRI, the Reyhan concentrate contains harmful substance Methyldioxidebenzovat that could severely affect the health of the consumers. Freebrew is just one of the products containing this dangerous ingredient that has been labeled.\textsuperscript{166} Additionally, CLAIMANT’s attempt to discredit the whole research that this measure was based on is at least absurd. The dangerous and serious quantities of the Methyldioxidebenzovat intake\textsuperscript{167} that has been taken into account were not used by chance. It is to be expected that the Ruritanian population has those quantities deposited in their organisms during time, regardless of Freebrew intake, since Reyhan is a traditional ingredient of many goods used in Ruritania.\textsuperscript{168}

128. Therefore, the actions undertaken by RESPONDENT can qualify only as the steps taken to protect the public in Ruritania, regardless of the provenience of the producer, since all the parties affected come from and outside of Ruritania.\textsuperscript{169}

129. In any event, even if this Tribunal finds that RESPONDENT violated the fair and equitable treatment standard, it is certain that those actions were not committed in bad faith. As stated by the doctrine, the good faith principle is the common theme of the issues of fair and equitable treatment, encompassing all of the other elements herein.\textsuperscript{170} However, the actions of RESPONDENT were committed in a good faith, trying to reconcile the opposing interests of the

\textsuperscript{166} Statement of Defense, ¶15.
\textsuperscript{167} Statement of Claim, ¶14.
\textsuperscript{168} Statement of Claim, ¶5.
\textsuperscript{169} Procedural Order No.2, ¶8.
\textsuperscript{170} Dolzer/Schreuer, p.156.
Investor and the interests of the citizens of Ruritania expecting the sovereign authority to act always in its best concern. “To the modern eye [s]tate may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”\textsuperscript{171} Therefore, the Tribunal should disregard Claimant’s argument for bad faith.

IV  RESPONDENT DID NOT VIOLATE THE STANDARD OF FULL PROTECTION AND SECURITY

130. Respondent respectfully submits that it did not violate the full protection and security standard (FPS) prescribed by Art. 2(1)(b) of the Cronos-Ruritania BIT when treating Claimant’s investment. As it was recognized in, theory and practice,\textsuperscript{172} FPS standard does not entail an absolute protection of investor from host State’s regulatory acts and measures. Rather, it requires from the host State to pay due diligence in protecting investments in its territory and refrain from using legislative and regulatory measures which are not reasonable under the circumstances.\textsuperscript{173}

131. Respondent will show that it did not breach FPS standard with respect to Claimant as it acted with due diligence in protecting Claimant’s investment \textit{(A).} Additionally, Respondent’s measures with respect to Claimant’s investment should be deemed reasonable under the circumstances \textit{(B).} Consequently, Claimant is not entitled to claim damages arising out of the alleged breach of FPS standard.

A. RESPONDENT ACTED WITH DUE DILIGENCE IN PROTECTING CLAIMANT’S INVESTMENT

132. The standard for determining the breach of FPS requirement was established by the ICJ in the ELSI case\textsuperscript{174} and later accepted by other international investment fora.\textsuperscript{175} Pursuant to the said standard, the breach of FPS requirement shall exist when a host State fails to apply ‘due diligence’ when taking care of problematic situations with respect to the investment.\textsuperscript{176}

\textsuperscript{171} Mondev v. USA, ¶116.
\textsuperscript{172} Dolzer/Stevens, p.61; ELSI, ¶108; AAPL v. Sri Lanka, ¶68; Dolzer/Schreuer, p.161.
\textsuperscript{173} Dolzer/Schreuer, pp.161-162.
\textsuperscript{174} ELSI, p.108.
\textsuperscript{175} El Paso v. Argentina, ¶208.
\textsuperscript{176} ELSI, p.108.
133. As established by the tribunal in Eurotunnel the boundaries of sovereign appreciation are crossed solely if the host State’s incapacity to keep the public order becomes unbearable.\textsuperscript{177} FPS standard will not be affected when the host State applies its powers to ‘legislate’ and ‘regulate’ and, in general, takes measures that are appropriate in such circumstances.\textsuperscript{178}

134. In the case at hand, CLAIMANT might allege that the FPS standard of treatment of its investment was violated by legislative action of RESPONDENT, through the adoption of the MAB Act and Ordinance, and by coercive action, through detention of CLAIMANT’S officers, Messrs. Goodfellow and Straw. However, none of these measures is contrary to the requirements of FPS standard.

135. As far as RESPONDENT’S legislative action is concerned, RESPONDENT adopted the new regulation on the labeling of products containing Reyhan as soon as the scientific research that confirmed the negative effects of this substance was fully completed. Not only did RESPONDENT refrain from acting upon interim and unofficial reports, thus protecting the credibility and integrity of its regulatory function, but it also adopted such measures as were needed to protect both the public health and the integrity of CLAIMANT’S investment. Namely, had Respondent not taken legislative action with respect to the control of the labeling of products containing Reyhan, CLAIMANT might have been exposed to producer liability towards the consumers that might have been affected by the adverse effects of Reyhan. Therefore, the Tribunal should find that RESPONDENT’S legislative action was reasonable under the circumstances and necessary to protect not just the general public in Ruritania, but CLAIMANT’S capital as well. Consequently, RESPONDENT’S legislative actions did not breach FPS requirement.

136. As far as the measures taken towards Messrs. Goodfellow and Straw are concerned, RESPONDENT yet again acted in full compliance with FPS requirement. The detention of CLAIMANT’S officials was lawful and reasonable due to the circumstances. Both officials were under investigation upon the allegations of bribery, and as they did not yet appear before the Prosecutor, RESPONDENT needed to take the measures that would prevent them from potentially fleeing the justice. RESPONDENT respectfully draws the Tribunal’s attention to the fact that

\textsuperscript{177} Eurotunnel v. France and UK, ¶310.
\textsuperscript{178} AES v. Hungary, ¶13.3.2.
CLAIMANT’s officials were not arrested as soon as the investigation against them had begun, but only more than three weeks later, at the Freecity International Airport, at the moment when they were trying to leave the country.\(^{179}\) They were released in the very moment when there was not any further need for their detention. Furthermore, the RESPONDENT, as a party to all the most relevant human right treaties, acted in compliance with these provisions and respected their human rights. This is blatantly confirmed by the fact that none of the detained persons suffered any physical harm.\(^{180}\)

137. What is more, since both of CLAIMANT’s officials were released due to the lack of evidence,\(^{181}\) their reputation and credit remained intact.

138. In light of all of the above arguments, the Tribunal is respectfully invited to find that RESPONDENT did not fail to apply due diligence in its actions towards CLAIMANT and, consequently, did not breach the obligation of FPS.

**B. RESPONDENT’S ACTIONS TOWARDS CLAIMANT WERE REASONABLE UNDER THE CIRCUMSTANCES**

139. CLAIMANT might allege that the investigation against Messrs. Goodfellow and straw was instigated as a means of pressure on CLAIMANT and that it constitutes a breach of the FPS standard. RESPONDENT submits that the Tribunal should not follow that line reasoning, since all the measures that RESPONDENT took towards Messrs. Goodfellow and Straw came as a result of extensive and determined fight against corruption in Ruritania.\(^{182}\) The Tribunal should note that the business and legal community worldwide has become increasingly sensitive towards corruptive practices. This is not only reflected by the increasing legislative action aimed at combating corruption and other fraudulent acts and practices, but also in the proliferation of various anti-corruption bodies, such as the Global Compact and the Group of States against Corruption within the Council of Europe or Transparency International. RESPONDENT’S fight

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\(^{179}\) Statement of Claim, ¶23.

\(^{180}\) Procedural Order No.3, ¶22.

\(^{181}\) Statement of Claim, ¶25.

\(^{182}\) Statement of Claim, ¶24.
against corruption should therefore be seen and considered as the adherence to this general trend of fighting against corruption.

140. In its actions towards Messrs. Goodfellow and Straw RESPONDENT did not act upon any personal or other preferences, nor did it provide a treatment less favorable, arbitrary or discriminatory towards CLAIMANT. Respondent duly respected the requirements of due process and released the detained officials as soon as there became no more reasons for their detention. While they were detained, Messrs. Goodfellow and straw were treated in accordance with all the applicable international standards and did not suffer any kind of physical harm. Therefore, the Tribunal should find that all RESPONDENT’S measures were reasonable under the circumstances and in full conformity with the requirements contained in Art.2 (1) (b) of the Cronos-Ruritania BIT.

V CLAIMANT IS NOT ENTITLED TO THE FULL AMOUNT OF DAMAGES CLAIMED, IF ANY

141. RESPONDENT will demonstrate that CLAIMANT is neither entitled to recovery of damages resulting from the loss of sales (A), nor is it entitled to compensation for alleged moral damages arising out of the detention of Messrs. Goodfellow and Straw (B).

A. CLAIMANT IS NOT ENTITLED TO RECOVERY OF DAMAGES RESULTING FROM THE LOSS OF SALES

142. RESPONDENT will demonstrate that CLAIMANT is not entitled to recovery of damages resulting from the loss of sales (i). Nevertheless, if this Tribunal decides to award CLAIMANT damages, RESPONDENT will show that the amount requested by CLAIMANT is grossly excessive and should therefore be reduced by the Tribunal (ii).

i. The loss of sales is not recoverable because it is not a result of expropriation

143. Contrary to CLAIMANT’S allegations that its trademark and trade dress rights, as well as its profits were expropriated, RESPONDENT demonstrated that its acts represent the exercise of its legitimate police powers and do not constitute expropriation (see section: Part Two, II). Regarding lost profits, it is stated in doctrine that the compensability of lost profits helps the Tribunals

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183 Procedural Order No.3, ¶22.
differentiate between lawful and unlawful expropriation.\textsuperscript{184} According to that view, expressed by the majority in \textit{Amoco v. Iran}, lost profits must only be compensated in case of unlawful expropriation.\textsuperscript{185} However, seeing how in the case at hand no expropriation, let alone an unlawful one occurred, the Tribunal should reject CLAIMANT’s claim for lost profits.

\textbf{ii. The amount requested for the loss in sales is grossly excessive to the harm resulting therefrom and should thus be reduced}

144. In the event this Tribunal finds that CLAIMANT is entitled to recovery of damages resulting from the loss of sales, it should conclude that the amount requested is grossly excessive to the harm resulting therefrom.

145. It is established in case law that four and a half years of successful business operations would provide sufficient evidence of the recovery of lost profits, unless there are other reasons to disallow the claim.\textsuperscript{186} RESPONDENT does not contest that FBI has been a profit-generating asset for years\textsuperscript{187}. However, RESPONDENT asserts that there are circumstances which preclude compensation for lost profits. Namely, in the \textit{Phelps Dodge v. Iran} case the Tribunal rejected claims for lost profits because it deemed that due to the general effects of the Iranian Revolution the business in question was unlikely to continue to be profitable.\textsuperscript{188} In the case at hand, the sale of alcohol was put in spatial and time frames: it was prohibited at professional sport establishments and it was forbidden to serve alcohol between 9a.m. and 9p.m.\textsuperscript{189} Therefore, similarly as in the \textit{Phelps Dodge v. Iran}, the Tribunal in the case at hand should find that it is highly unlikely that CLAIMANT would have continued to gain the same profit as it did before the introduction of the MAB Act.

146. Consequently, even if this Tribunal decides to award CLAIMANT damages, it should reduce their amount.

\textbf{iii. Claimant is not entitled to compensation for moral damages}

\textsuperscript{184} Ripinsky/Williams, p.87.
\textsuperscript{185} Amoco. v. Iran, ¶¶191-205.
\textsuperscript{186} AIG v. Iran, ¶108.
\textsuperscript{187} Statement of Claim, ¶6.
\textsuperscript{188} Phelps Dodge v. Iran, ¶30.
\textsuperscript{189} Claimant’s exhibit No.3.
147. Not only did CLAIMANT not suffer expropriation of its investment, but it was also treated in accordance with all the other relevant standards of protection (see section: Part Two, IV). Consequently, CLAIMANT suffered no damages at all, let alone moral damages. As stated in the *Lemire v. Ukraine* case:

“[m]oral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that:

- 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;

- 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 both cause and effect are grave or substantial.”¹⁹⁰

148. In the case at hand, Messrs. Goodfellow and Straw did not suffer any kind of physical duress. The detention that suffered both of CAM’s officials was lawful and reasonable due to the circumstances. They were released in the very moment when there was not any further need for their detention. Furthermore, Respondent, as a party to all the most relevant human right treaties, acted in compliance with these provisions and respected their human rights. Since both of CAM’s officials were released due to the lack of evidence, their reputation and credit remained intact.

149. Therefore, RESPONDENT asks the Tribunal to dismiss the claims relating to the moral damages, since no elements of said conduct could be found in the acts of RESPONDENT.

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¹⁹⁰ *Lemire v. Ukraine*, ¶333.
REQUEST FOR RELIEF

150. On the basis of the foregoing arguments and RESPONDENT’s prior written pleadings, RESPONDENT respectfully requests the Tribunal, while dismissing all contrary requests and submissions by CLAIMANT,

151. TO ADJUDGE AND DECIDE that:

   1. This Tribunal has no jurisdiction to hear any of the claims raised in the present dispute;
   2. The claim constitutes an abuse of process;
   3. RESPONDENT did not expropriate CLAIMANT’s investment;
   4. RESPONDENT provided fair and equitable treatment;
   5. CLAIMANT is not entitled to the damages claimed;

152. And TO ORDER CLAIMANT to:

   1. Reimburse RESPONDENT for all of the costs of arbitration proceedings, including the costs of legal representation.

RESPECTFULLY SUBMITTED ON 22 SEPTEMBER 2013

[Signature]

Team CAN ADO

On behalf of RESPONDENT, Republic of Ruritania
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