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

CLAIMANT

CONTIFICA ASSET MANAGEMENT CORP.

Respondent

MEMORIAL FOR RESPONDENT

22 SEPTEMBER, 2013
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STATEMENT OF FACTS

1. This arbitration concerns whether an international corporation should be allowed to use a bilateral investment treaty ("BIT") to shield its foreign investments from a host government’s legitimate regulatory authority.

2. On March 15, 1997, Ruritania and Cronos signed the Treaty of Mutual Promotion and Protection of Foreign Investment (the "BIT").

3. The Claimant, Contifica Asset Management Corp. ("CAM") or (the “Claimant”), a company incorporated under the laws of the State of Cronos, is a subsidiary of Contifica Enterprises Plc. (“Contifica Group”), a sprawling international conglomerate incorporated in Prosperia that comprises holding and operating companies incorporated in over 40 different jurisdictions and is publicly traded on several international stock exchanges.

Acquisition of Freecity Breweries, Inc. by Contifica Group

4. Freecity Breweries, Inc. ("FBI") is Ruritania’s oldest and largest brewery, founded in 1928. Its signature brand, “FREEBREW,” is known for its distinctive flavoring derived from Reyhan, a plant unique to Ruritania that has traditionally been added to a number of local food products. Unlike other products containing this ingredient, FREEBREW contains an unusually high concentration (0.03-0.05 grams of Reyhan concentrate per bottle), particularly when taking into account the signature 0.8 liter FREEBREW bottle.

5. Faced with crippling economic crisis, the Ruritanian government to decided to privatize a number of its assets in an effort to address its significant budget deficit.

6. In 2008, the State Property Fund of Ruritania, a state establishment incorporated under the laws of Ruritania, elected to sell FBI to a private investor. Contifica Spirits S.p.A., a wholly-owned subsidiary of Contifica Group, won the international tender for FBI on
June 30, 2008 and, on the same day, entered into a share purchase agreement to acquire all shares in FBI for US$ 300 million.

7. Contifica Group invested in technology, design, and equipment to make the brewery into a state-of-the-art facility. Output increased by 30% and the brewery was even recognized in 2010 as the “safest place to work” in Ruritania. In addition, FBI was integrated into Contifica Group’s extensive global procurement network, with other Contifica subsidiaries supplying bottles, aluminum cans, yeast, hops and barley to FBI.

8. Less than two years after the acquisition, the shares in FBI were transferred from Contifica Spirits S.p.A. to the Claimant, an entity incorporated in Cronos in order ensure an “investor-friendly environment.” This transfer also included the rights to the principal intellectual property used by FBI, including trademarks corresponding to several brands of beer produced by FBI and the trade dress registrations with respect to the designs of the beer bottles and cans, including the iconic FREEBREW bottle.

*Health Concerns in Ruritania Give Rise to the Regulation of Sale and Marketing of Alcoholic Beverages Act (“MAB Act”).*

9. In response to growing concerns about the impact of alcohol consumption on public health in Ruritania, the Ruritanian parliament adopted the Regulation of Sale and Marketing of Alcoholic Beverages Act (“MAB Act”) on November 20, 2010.

10. The MAB Act includes measures prohibiting marketing of alcoholic beverages (including beer) on television and at sporting events, prohibiting the sale of beer at sport facilities, outdoors and at any place between the hours of 9 pm and 9 am, and requiring that the trademarks/brands of beer be written in the same font and color as all other text on the label (the “plain labeling requirement”). The MAB Act also prohibits the sale of alcohol in containers over 0.51 liters in size.

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1 Exhibit RX1.
11. In response to the MAB Act, FBI implemented a comprehensive reconfiguration of its FREEBREW bottling facilities, completed in April 2011. This transition produced a 60% decrease in sales during the first two quarters of 2011, resulting in a loss of net income of approximately USD $10 million and a 60% loss of revenue.

*Growing Evidence of Health Risks Leads to Labeling Requirements for Reyhan Products*

12. On June 15, 2011, the Human Health Research Institute (HRI), an independent government-funded institution whose Executive Director and the majority of its Board of Supervisors are appointed by the Ministry of Health and Social Security of Ruritania (“MRSS”) released its final report on the pernicious effects of Reyhan on human health. This report, which was based on a controlled clinical study, built on interim findings presented to the Ministry of Health and Social Security by the HRI in 2005.

13. Two weeks after the publication of the final report, the MRSS responded by adopting an ordinance requiring any product containing Reyhan concentrate to be labeled with an explicit warning that “This product contains Reyhan concentrate, consumption of which according to the results of scientific research may lead to higher risk of cardiac complications.” This ordinance affected all products containing Reyhan, from bread and meat products to soft drinks and spirits.

14. On August 20, 2011, FBI wrote to the MRSS to voice concerns about the HRI study, questioning the high dosage of Methyldioxidebenzovat used and the fact that the effects of other FREEBREW ingredients such as alcohol were not addressed separately. FBI also included a report by its own scientist, who opined that the HRI report should have considered other factors such as smoking, diet and weight of the study’s subjects. FBI requested that the labeling requirement be lifted pending further investigation. Opting for a precautionary approach in light of the serious nature of the public health concerns at stake, MRSS denied this request.
15. FBI’s competitors took advantage of the emerging concerns surrounding Reyhan to target FBI with negative publicity.

16. Following the introduction of the new labeling regulations, FBI’s sales fell an additional 20%, with its revenue in the last quarter of 2011 falling to 10% of that of the same period in 2009. FBI responded to this disappointing performance by eliminating redundancies in its work force and decreasing production.

17. Because decreased revenue and profits have made it difficult for FBI to comply with its financial obligations, the company is in ongoing negotiations with its lenders, who agreed not to declare default or enforce their security rights over FBI assets on the condition that they be provided with an additional security package consisting of pledge of (1) all of FBI’s tangible assets; (2) all shares of FBI; and (3) any claims and recovery that CAM may receive in this arbitration.

Ruritania Responds to Allegations of Bribery of State Officials by FBI and Contifica Group Executives

18. Based on information that Messrs. Goodfellow and Straw, executives of FBI and Contifica Group were involved in bribing officials of the State Property Fund of Ruritania in connection with the FBI acquisition, the Prosecutor’s Office commenced an investigation on December 1, 2011. Less than three weeks later, Goodfellow and Straw were notified of the ongoing criminal proceedings and their lawyers informed that Goodfellow and Straw may be summoned for an interrogation in the beginning of 2012. However, on December 23, 2011, after being told by their lawyers that they were free to leave, Goodfellow and Straw were detained in the Freecity International Airport before boarding a flight to Prosperia, in order to stop them from fleeing justice while the bribery investigation was ongoing.

19. A video of the detention of the two suspects taken by a security camera was apparently passed by police to Free TV, who aired it later the same day. In an interview with the
channel a spokesman for the Prosecutor’s Office said that “[the law enforcement agencies of Ruritania] will not let people responsible for corruption escape investigation.”

20. Goodfellow and Straw were released on January 3, 2012. Six months later, the criminal investigation was terminated due to insufficient evidence.
ARGUMENTS

PART ONE: JURISDICTION

I. CLAIMANT’S BIT CLAIMS ARE AN ABUSE OF PROCESS

1. International investment treaties were historically instituted between capital-exporting countries and capital-importing countries to promote investment abroad and to protect foreign investors from the legal frameworks of host states.\(^2\)

2. The unique feature of investment treaties is that they enable foreign investors to sue host states directly, without exhaustion of local remedies, for violations of the governing agreements.\(^3\) This, however, incentives foreign investors to engage in treaty shopping, without any economic intent.”\(^4\) However, when treaty shopping is conducted solely for the purpose of taking advantage of the rights in those transactions, this is an abuse of process.

3. In the present case, Claimant’s claims against Respondent are an example of the abuse of process treaty shopping entails, and thus its claims must be dismissed since this tribunal lacks jurisdiction to hear them.

4. First, the transfer of shares from Contifica Group to Claimant was not a bona fide investment covered by the BIT. The mechanics of treaty interpretation described in the VCLT require the tribunal to find that the meaning of “investment” in the BIT, as well as the intent of parties exhibited in the preamble, does not include Claimant’s acquisition of FBI.

5. Second, the meaning of investment as interpreted in international law through arbitral awards demonstrate that Contifica Group transfer of FBI shares to Claimant does not constitute a bona fide investment that warrants protection under the BIT.

6. Third, the Claimant’s conduct is a clear abuse of process that should not be supported by this tribunal’s exercise of jurisdiction. By engaging in conduct not for the purpose of economic activity, but solely to take advantage of the legal protection it acquired from

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\(^2\) Van Os et. al., at 7.
\(^3\) Id. at 8.
\(^4\) Id. at 9.
the transfer, Claimant’s actions are contrary the purpose of investment treaties, the BIT, and customary international law.

7. For the foregoing reasons, this tribunal should dismiss the Claimant’s claims as an abuse of process and deny jurisdiction.

A. **CLAIMANT’S SHAREHOLDING IN FBI DOES NOT CONSTITUTE AN INVESTMENT UNDER THE BIT.**

8. The jurisdictional determination under UNCITRAL centers on the text of the treaty involved in the dispute. Here, that examination will focus on the language contained in the BIT.

9. In interpreting the language of a BIT, tribunals do so in accordance with Articles 31 of VCLT since it is considered a manifestation of customary international law.\(^5\) Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”\(^6\) The Claimant’s claims do not satisfy the VCLT’s test of interpretation and do not fit within the language or the intent of the BIT.

\(i\). The Claimant’s investment in FBI does not meet the meaning as defined in the BIT.

10. Article 1 of the BIT senumerates various items that are considered investments under the BIT. As an initial matter, it should be noted that the term “investment” in the BIT is not exhaustive, and does not include every form of investment. The text of the BIT is clear that “the investments include in particular, but not exclusively” the items enumerated in the BIT. As noted in Romak noted, there may be investments not included in the list, which may be investments protected by the bit. Thus a broad, literal reading of the text is inappropriate.

11. First, such an approach, as expounded by the investor in Romak, would strip the word “investment” of any meaning since it would be difficult to ascertain what qualifies as an investment or not since the meaning would be overly inclusive.\(^7\) This would have the

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\(^5\) *Tokios*, ¶27.  
\(^6\) Sureda, at 20-24; see *Tokios*, ¶27; *Romek* ¶172.  
\(^7\) *Id.*
effect of bringing all commercial transactions under the ambit of the word “investment.”

This is the kind of absurd and unreasonable consequence that the Vienna Convention requires tribunals to avoid in interpreting the meaning of treaty provisions.

12. Second, if jurisdiction is granted in this matter, the tribunal will in effect grant “investment” status to every contract Respondent entered into with nationals from Cronos under the BIT. This would ultimately mean that by entering into a contract, Cronos and Ruritania would be renouncing the application of the chosen governing legal framework, as well as the chosen dispute-resolution mechanism. As the tribunal in Romak and Joy Mining explained in addressing this same question, such a broad interpretation of the term “investment” would render the word meaningless.

13. In further examining the meaning of “investment” in the BIT, the tribunal is charged with deferring to the object and purpose of the BIT in its analysis. As a result, arbitral tribunals construe the preamble as part of the context and purpose of the BIT in determining the scope of the transaction at issue.

14. Here, the preamble specifically calls for the economic co-operation and creation of favorable conditions for investments by investors of either contracting state in the territory of the other contracting state. In other words, it is clear that the parties’ intent in reaching the agreement was to protect certain investments and not others. However, the transfer of FBI shares to Claimant did not achieve any of those goals.

15. First, the transfer was intragroup and involved very little investment from Claimant. The shares were transferred from Contifica, Claimant’s parent company, to Claimant for a nominal price. And since the transfer, the record does not show that Claimant has invested or financed any investment opportunities in FBI.

16. Secondly, in balancing the purposes of the BIT, arbitral tribunals consider the effect of over-protection on the promotion of those investments. In Saluka, the tribunal reasoned that “an interpretation which exaggerates the protection to be accorded to foreign investments by investors of either contracting state in the territory of the other contracting state.”

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8 Id. 185.
9 Vienna Convention, Art. 32(b).
10 Romak, ¶ 187.
11 Id.; Joy Mining, ¶58.
12 Exhibit 1.
13 Sureda, at 26-27.
investments” may discourage host States from promoting those investments. Here, awarding jurisdiction could create a situation in which the promotion of foreign investment is unattractive and untenable since potential investors would enjoy broad legal protections at the expense of the host state. In order to prevent the pendulum from swinging in the other direction,¹⁵ this tribunal should not exercise jurisdiction and dismiss claimant’s claim.

17. However, even if this tribunal finds that purpose and intent of the BIT still leaves its meaning “ambiguous and obscure,” the transaction at issue here does not fall within the scope of “investment” according to the legal doctrine established in customary international law.

   ii. Claimant’s acquisition of FBI does not satisfy the meaning of “investment” according to legal doctrine.

18. In order to establish the existence of an “investment”, the tribunal may look to the legal doctrine, as proscribed through various arbitral tribunals.

19. Although the understanding of investment under UNCITRAL is broader than under an ICSID system, there have been recent UNCITRAL decisions that have incorporated a narrower interpretation of investment according to the ICSID approached described in the Salini-test.¹⁶ Under this test, several elements have been found to be essential characteristics of an investment: (a) certain duration, (b) regularity of profit and return, (c) assumption of risk, (d) substantial commitment, and (e) significance for the host State’s economic development.¹⁷

20. In applying the Salini-test to determine the existence of an investment, tribunals disagree as to whether all elements must be present, and their significance at the jurisdictional phase.¹⁸ While some tribunals have applied the Salini elements in strict accordance, others have taken a more pragmatic approach and applied the elements according to the circumstances of the case and the terms of the agreement.¹⁹

¹⁵ Renta, ¶¶ 55-57.
¹⁶ Romak, ¶¶ 198-205.
¹⁷ Salini, ¶¶ 43-58.
¹⁸ Sureda, at 60
¹⁹ Saba Fakes, ¶ 138.
21. Here, the Claimant fails to meet the standard of an investment according to the Salini-test because (a) it did not involve a significant contribution/investment by Claimant, (b) lacked duration, and (c) did not represent intent to conduct economic activity.

   a. Claimant’s purchase of FBI shares does not constitute a significant contribution.

22. In Saba Fakes, the tribunal decided that the low purchase price for a transfer of shares indicated the “lack of any meaningful role” the Claimant played in the corporate structure of the acquired mobile phone company, and thus did not satisfy the meaning of contribution. In that case, Claimant’s $3800 payment for shares valued at $19 billion was seen as not a real investment for economic growth. The tribunal concluded that “had the Claimant acquired any genuine legal rights in the transactions, no doubt he would have been expected to make a contribution (either financial or managerial) beyond the US$ 3,800” actually paid for the shares. Other tribunals have arrived at the same conclusion where contribution was relatively low or insignificant. This is further supported by the fact that Claimant made no other investment in FBI after the initial purchase of shares.

23. In contrast, arbitral tribunals are willing to find an investment when the contribution is significant. In Deutsche Bank & White, the claimants’ investment was satisfied because of claimant’s significant financial contributions, as well as managerial and non-financial resources allocated. As shown in these examples, although the circumstances are similar to this case, the Claimant’s in both examples had committed significant resources – financial and otherwise – for the economic growth of the company.

24. Similar to the claimant in Saba Fakes, Claimant’s $5000 purchase price for a company valued at $300 million does not meet even a minimum threshold needed to show that its investment was a legitimate contribution.

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20 Id.
21 Id., ¶ 139.
22 See Romak, ¶ 221;
23 Deutsche Bank, ¶ 299; White, ¶¶ 7.4.10-19.
b. Claimant’s purchase of FBI shares was not motivated by profit nor intended to pursue economic activity.

25. The goal of BITs is not to protect economic transactions pursued for the sole purpose of taking advantage of the rights afforded by those transactions. These transactions are considered an abuse of process. Claimant’s purchase of FBI was not conducted for economic benefit, and thus does not constitute an investment.

26. In Mobil, the tribunal addressed similar circumstances in which Mobil inserted a Dutch company into its corporate structure in order to access ICSID protection in future disputes. The tribunal awarded jurisdiction to the matter. However, it did opine that the abuse of process entailed when investors only invest for purposes of obtaining BIT protection is done on a case-by-case basis. Therefore, even though the Mobil tribunal found Mobil’s corporate restructuring to be legitimate, it nonetheless found that the legitimacy of such procedural manipulation should be determined based on the circumstances of the transaction in question.

27. Similarly, in Aguas del Tunari, the tribunal found that there was little evidence to suggest an abuse or process and that strategic measures aimed at receiving more BIT protection were in-line with common business practice. That tribunal held that these restructuring measures are permissible even when BIT protection is part of the calculus of the decision-making process. Yet, none of these tribunals have suggested that such strategic actions can be void of any economic value or activity. Therefore, while Claimant’s restructuring of corporate structure is not sufficient for a showing of abuse, the circumstances of its acquisition can help demonstrate an abuse of process.

28. First, the timing of the transfer demonstrates that the sole purpose of the transaction was to access BIT protection. Contifica transferred FBI shares two months after the change in Ruritania’s government, just before the New Way party was widely expected to implement tougher alcohol regulations. As a result, Claimant was on-notice that the

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24 Phoenix, ¶ 93.
25 Mobil, ¶ 177.
26 Aguas del Tunari, ¶¶ 330-33.
27 Id.
29 Id.
regulatory framework would change, and thus re-structured FBI’s ownership in order to access the legal protection under the BIT.

29. Second, the nominal price paid for the shares is a clear indication of Claimant’s motivation and intent with the deal. FBI is worth $300 million, yet Claimant paid only $5000.

30. Last, the memorandum between Claimant’s CEO and General Counsel illustrates that Claimant’s sole purpose of the corporate restructure was to obtain BIT protection and nothing else. In Saluka, the Czech Republic alleged that Saluka’s holding of shares of the Czech bank, which was purchased by the parent company, Nomura, did not constitute an investment with the meaning of the BIT. The tribunal decided that the government’s interpretation was flawed and that the inquire into motivation and subjective intent “cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.”

31. In sum, the jurisprudence on the meaning of investment, especially that promulgated by Salini test, are not satisfied by Claimant’s conduct.

II. THIS TRIBUNAL LACKS JURISDICTION TO HEAR CLAIMANT’S DISPUTE WITH THE STATE PROPERTY FUND OF RURITANIA

32. Respondent respectfully request that this tribunal dismiss Claimant’s dispute with the State Property Fund under the Share Purchase Agreement because it lacks jurisdiction to hear the claims since the Fund is a separate legal entity. Moreover, the contractual claims protected under the agreement should not be elevated to BIT claims.

33. First, under the laws of Ruritania, the Fund is a separate legal entity with its own legal personality independent of the State. As such, Respondent bears no liability for any contractual claims that arise out of non-performance of the agreement.

34. Second, even if the Fund is an organ of the State, the Claimant’s claims should nonetheless be dismissed since the State was acting a contracting party and not as a sovereign authority. Additionally, the regulatory measure implemented by the State was not unjustifiable or discriminatory to Claimant.

30 Saluka, ¶ 304.
35. Last, the Claimant’s contractual claims should not be elevated to BIT claims. The exercise of jurisdiction in this matter would unreasonably internationalize contract claims, thereby, providing excess protection to investors.

A. THE REPUBLIC OF RURITANIA IS NOT LIABLE FOR ANY ALLEGED NON-PERFORMANCE OF THE AGREEMENT BY THE FUND.

36. States are responsible for the actions of their instrumentalities and organs when those actors do not enjoy a separate legal identity. However, once those instrumentalities enjoy their own legal personality and identity, the State cannot be said to be liable for their actions.

37. Here, Respondent is not liable for the non-performance by the Fund of the purchase agreement because (i) the Fund and the Republic of Ruritania are separate legal entities, and (ii) even if they are one entity, Respondent did not go beyond what an ordinary contracting partner would do and act within its sovereign authority.

i. The Fund and Respondent are Separate legal entities.

38. Article 8 of the ICL states:

The conduct of any State organ shall be considered an act of the State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

39. As the article makes clear, a State is liable to the actions of its organs. The conduct of these organs will be considered an act of the State if the person or entity acts under the direction or control of the State.

40. The conduct of the Fund does not constitute an organ of State.

41. In White v. India, the tribunal held that the acts of Coal India in relation to the claimant were not attributable to India because the creation, control, organizational structure and ownership over the instrumentality was insufficient to satisfy an “organ” of the State. Moreover, in order to show that Coal India was an organ, the claimant had to demonstrate

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31 Gaillard, at 19.
32 ICL Art. 8; Nicaragua, ¶ 91.
33 White, ¶ 8.1.
that the State had general control over the entity, as well as specific control over the specific act in question.34

42. In this case, it is unlikely that Claimant will be able to demonstrate such control. Here, Claimant may argue that the creation of the Fund, the implementation of the State’s policy objectives, and the eventual selling of the property suggest that the State was in direct control of the Fund. However, as the tribunal in White reasoned that is not enough. In White, the State exercised an extraordinary level of top-down control, the entity was wholly owned by the State, and it regularly exercised direction and control over the entity.35 Yet, the tribunal refused to recognize that Coal India was an organ of the state.36 Therefore, the tribunal should not find the test is satisfied in this instance on a lesser showing of “control”.

43. Secondly, even though Respondent created the Fund, there is no suggestion that Respondent was involved in the drafting, negotiating, and implementation of the agreement. The White tribunal reasoned that the lack of evidence showing, for example, that the employees of Coal India sought approval before negotiating the terms of the agreement further questioned the presence of control the State needed to exercise to demonstrate that it should be liable for the acts of Coal India.37 Similar to the facts in White, the Claimant here has not shown that Respondent was involved in the negotiating of the contractual provisions, and thus is not liable for any non-performance alleged by the Claimant since it did not exert control over the Fund.38 In fact, the record suggests that the Fund entered the agreement on its own accord since it is a party to the contract and not the Respondent.

44. As the above analysis demonstrates, the Fund and Respondent are separate legal entities, and thus Respondent is not liable for any non-performance of the agreement as claimed by the Claimant.

ii. Even if the Fund is an organ of the State, Respondent did not go beyond what a contracting partner would and act as a sovereign authority.

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34 Id., ¶ 8.1.7-18
35 Id., ¶ 8.1.5.
36 Id., ¶ 8.1.18.
37 Id., ¶ 8.1.19..
38 See Gustav, ¶ 313-24..
45. In order for a State to breach a BIT, the State must go beyond its status as a party to a contract and as sovereign authority, “holder of the puissance publique, while performing obligations arising from the Contract.”39 One such authority is the authority to expropriate.

46. In Toto v. Lebanon, the tribunal addressed this issue when determining whether Lebanon had acted as both a contracting partner and sovereign authority in expropriating the sites in which Toto invested.40 The tribunal concluded that since Lebanon had indeed expropriated the sites, it was acting within its administrative authority while performing obligations under the contract.41

47. However, in this case, the facts are very different. Here, Respondent’s actions did not constitute an expropriation since the changes in its regulatory framework “are remedied under the contract law concept of “fait du prince.”42 Under this principle, the actions of the State are disputed as contract claims and not a breach of the treaty.43 The tribunal in Toto decided that the Treaty in question did not sanction administrative changes, but instead required that Lebanon maintain favorable economic conditions for investment.44 Moreover, the tribunal in Toto further concluded that the legislative changes were not discriminatory or unreasonable, and thus did not constitute a violation of the treaty.45

48. Similarly, this tribunal should dismiss Claimant’s claims since the regulatory changes regarding the sale of alcohol in Ruritania fall under the “fait du prince” concept, and its implementation applied to all manufacturers and not discriminatorily to Claimant.46 Additionally, the regulatory changes are well within the ambit of the State to protect the health of its people.

49. In sum, even if this tribunal finds that the Fund and Respondent are the same entity, or that the Fund is an organ of the State, this tribunal should dismiss Claimant’s BIT claims because Respondent was acting as a contracting partner, and not as a sovereign authority while performing its obligations under the agreement.

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39 Toto, ¶ 104.
40 Id., ¶ 97-109
41 Id.; see Joy Mining, ¶ 72.
42 Toto, ¶ 126.
43 Id.
44 Id, ¶ 129.
45 Id.
B. THE UMBRELLA CLAUSE IN THE BIT SHOULD NOT BE EXTENDED TO CONTRACTUAL CLAIMS.

50. Article 6 (2) of the BIT states:

“Each Contracting State shall fulfill any other obligations it may have entered into with an Investor or an Investment of an Investor of the Contracting State.

51. In interpreting umbrella clauses, arbitral tribunals have reached various conclusions. Some have argued that umbrella clauses transform all contractual claims to treaty claims as a way of protecting investors, while others have said that umbrella clauses are operative only when the parties have clearly expressed their intent to consider breaches of contract as breaches of the Treaty.

52. In this case, the Tribunal should adopt the latter definition and dismiss the Claimant’s claims for of lack of jurisdiction because (i) the language in Article 6 (2) limits the BIT’s reach; (ii) the intent of the parties to limit the ambit of the umbrella clause; and (iii) if the intent of the parties is unclear, this tribunal should not exercise jurisdiction over Claimant’s claims.

i. The Language of Article 6 (2) of the BIT clearly limits prevents the elevation of Claimant’s contractual claims to Treaty claims.

53. The text of Article 6(2) demonstrates that this Tribunal may not decide Claimant’s dispute with the Fund regarding contractual violations because the parties’ intent is clear. In applying the language of the BIT, Article 6(2) unambiguously states that each contracting State should observe any obligations “it may have entered into.” It is clear from this language that the BIT’s jurisdiction is only implicated when Respondent, as an entity, has failed to fulfill its obligations. Therefore, and since Respondent is not a party to the agreement, the contractual claims should not be elevated to BIT claims.

54. In Gustav v. Ghana, the tribunal reasoned that where such language exists (in Gustav, the language was “assumed by the State”), there is “no basis to ignore these words, and to extend the ambit of the provision to contractual obligations assumed by other separate

47 El Paso, ¶ 71.
48 BIT Art. 6(1)
entities.” Similar to the umbrella clause in *Gustav*, the umbrella clause in this BIT clearly limits the protection of the BIT to those obligations pursuant to any agreement Respondent may have entered into. As argued above, Respondent is not a party to the agreement, and the Fund’s violations according to the agreement are not attributable to the Respondent since the Fund is not an organ of Respondent. Claimant and the Fund, and no one else, entered into the agreement. There is no mention, by either party in this dispute, of Respondent’s involvement neither in the negotiations process nor in the execution of the agreement. As such, this Tribunal should not extend the protection of the BIT to a purely contractual dispute involving a separate legal entity.

**ii. The Intent of the Parties to limit the dispute mechanisms in the Purchase Agreement is clear in Article 14.2.**

55. Article 14.2 of the agreement specifically provides that disputes arising in connection with the agreement should be resolved under the rules of the International Chamber of Commerce. When an agreement contains an exclusive forum selection clause, which gives jurisdiction to all contractual claims to a specific forum, at the exclusion of all others, the umbrella clause claims are inadmissible.

56. In *Malicorp*, the tribunal usefully explained that the protection afforded in investment treaties do not automatically elevate purely contractual claims to treaty claims when the agreed-upon contract contains a clause granting jurisdiction to an appropriate forum. The tribunal further explained that it is up to the party claiming injury to use the avenues agreed to in the agreement. Similarly, as the tribunal held in *Malicorp*, this tribunal should dismiss Claimant’s claims since Claimant’s have failed to seek redress in the agreed-upon forum. Furthermore, the inclusion of a separate dispute resolution clause, as well as the fact that the governing law is Ruritanian, demonstrates that the parties did not intend to transform domestic and contractual claims into international disputes.

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49 *Gustav*, ¶ X.
50 Exhibit 02.
51 *Id.* at ¶ 14.2.
52 *Malicorp*, ¶ 103.
53 *Malicorp*, ¶ 103.
54 *See Gustav*, ¶ 347.
iii. This Tribunal should dismiss Claimant’s claims if it finds that the agreement and BIT do not clearly establish the parties’ intent.

57. In the absence of clear intent by the parties, the Tribunal should not exercise jurisdiction over Claimant’s claims because (a) the procedure provided in the agreement can adequately and sufficiently protect the investment, and (b) allowing the protection under the BIT to cover contractual claims would eviscerate the goal and purposes of investment treaties.

   a. The dispute resolution clause in the agreement can sufficiently protect Claimant’s interest.

58. As argued above, the dispute resolution clause provided in the agreement evidences the parties’ intent to be bound by that forum’s jurisdiction over contractual claims. As such, as long as the procedure provided in the clause protects investments, and “allows all submissions and arguments to be exhausted,” contracting parties are not able to take advantage of the special methods provided by a treaty.\(^\text{55}\)

59. The tribunal in Malicorp, in addressing treaty shopping, stated that it would be counter to the goals of investment arbitration if parties used these forums as an alternative to the forums designated in the agreement, as well as to appeal an unsatisfactory outcome as a result of using the procedure.\(^\text{56}\) Similarly, Claimant in this matter should not be allowed to forgo the negotiated and agreed-upon forums in order to pursue the forum of their choice.

   b. Granting jurisdiction to hear Claimant’s contractual claims would eviscerate the purpose of investment treaties and unreasonably internationalize contractual claims.

\(^{55}\text{Id.}\)
\(^{56}\text{Id.}\)
60. While there are tribunals that have argued that a violation of a contract automatically implicate the protection of an international treaty,57 others, in response to the idea that the two concepts are different and that contract claims do not amount to treaty violations, argue that dismissal of a umbrella clause claims would be on par with “having a jurisdiction over an empty shell.” These examples, however, are the minority, and in any event would destroy the purpose of investment treaties.

61. The tribunal in Gustav elaborated on the various approaches to umbrella clause interpretations, and illustrated how the principle of is generally accepted. 58 In that case, the tribunal found that the Hamester’s claims of BIT violations by Ghana concerned the conduct related to the contractual obligations. As a result, the tribunal refused to elevate the claimant’s contractual claims to treaty claims. Similar to the facts in Gustav, the Claimant’s claims in this case concern the Fund’s conduct as a contracting party. Even if the Fund’s commercial acts are attributable to Respondent, the acts remain connected to the contractual obligations and would not have engaged Respondent’s international responsibility of Respondent.

62. The only claim that does not involve the Fund is Claimant’s allegations that Respondent’s exercise of its regulatory prerogative in protecting the health of its citizens caused the indirect expropriation their interest in FBI. As already argued, Respondent, even if considered a party of the contract, was acting under its legislative authority. 59 This is an appropriate use of its power as a sovereign authority.

63. Second, in elevating the contract claims, all domestic and contract claims could be internationals and brought under BIT protection since the umbrella clause does not differentiate among obligations. 60 The El Paso tribunal emphasized this fear by suggesting that this is an inappropriate and unreasonable interpretation and application of international law, and would not promote economic-cooperation between parties. 61 As the El Paso tribunal decided, so should this Tribunal decide and refuse to grant Claimant such an overly and dangerously broad interpretation of the umbrella clause.

57 See generally, Noble Ventures.
58 Gustav, ¶¶ 323-221.
59 Supra, ¶ 55.
60 El Paso, ¶ 77.
61 Id.
64. Therefore, this Tribunal should dismiss Claimant’s claims for lack of jurisdiction to hear its contract claims against the Fund.
PART TWO: MERITS

I. RURITANIA’S ACTIONS DO NOT VIOLATE ITS OBLIGATIONS UNDER THE BIT OR INTERNATIONAL LAW.

70. The Republic of Ruritania respectfully requests that the Tribunal dismiss this complaint for lack of jurisdiction. However, even if jurisdiction is found, the Claimant’s allegations have no merit because Ruritania’s actions do not violate its obligations under the BIT or international law.

71. Territorial sovereignty is the bedrock of international law and the right and power to regulate for the public good, as Ruritania has done here, are essential aspects of that sovereignty. International investment law purports to promote investment and, as a result, economic development, by ensuring certain conditions of treatment for foreign investors. Thus, a balance must be struck between the interests of foreign investors and a State’s right to regulate. However, these protections are not, nor have they ever been, intended to privilege the rights of foreign investors at the expense of State sovereignty.

72. Ruritania’s adoption of measures for the regulation and sale of alcohol and the marketing and sale of products containing Reyhan, is clearly within the scope of its inherent regulatory authority. Therefore, the Claimants’ complaints should be dismissed for the following reasons.

73. First, Ruritania did not expropriate the Claimant’s property because the Claimant did not suffer a total or near-total deprivation of the value of its investment. And even if such a deprivation did occur, the MAB Act and Reyhan Ordinance are legitimate regulatory actions that do not constitute compensable expropriation because (i) they are within Ruritania’s police power; (ii) they have a clear public purpose and effect; (iii) they are not discriminatory; (iv) they are proportionate to the harm that Ruritania sought to prevent; and (v) they are bona fide, meaning that they are genuinely aimed at the general welfare.

62 See generally Vadi (2013). See also Brownlie, 447-8.
63 See e.g., Bishop et. al., at 7-8.
74. Second, Ruritania’s actions do not violate its obligation to honor all agreements entered into under the BIT’s “umbrella clause,” Article 6(2). For one, Article 6(2) does not cover the SPA. Moreover, even if the SPA were covered, measures at issue here are consistent with it.

75. Third, Ruritania’s actions are consistent with its obligation to provide fair and equitable treatment to the Investors and Investments of Cronos. First, the MAB Act and Reyhan Ordinance do not fall below the minimum standard of treatment as established by international law, which the obligation of fair and equitable treatment is intended to safeguard. Moreover, even if the Tribunal defines fair and equitable treatment as setting a threshold above the minimum standard under international law, Ruritania’s actions are still consistent with its obligations under the BIT insofar as the measures at issue did not (i) violate any reasonable investment-backed expectations held by the Claimant; (ii) are not arbitrary or discriminatory; and (iii) are not outright abusive.

76. Fourth, the detention of FBI executives Goodfellow and Straw does not violate Ruritania’s obligation to provide full protection and security to investments by the investors of Cronos, because the investment at issue here – FBI – suffered no harm as a result.

77. For the foregoing reasons, Ruritania respectfully requests that the Tribunal find that Ruritania has not breached its obligations under the BIT or international law.

A. Ruritania Has Not Expropriated Claimant’s Property

78. Article 4 of the BIT prohibits direct or indirect expropriation, or measures equivalent thereto, except where such expropriation is for the public benefit, not discriminatory, carried out under due process of law, and against compensation.64

79. The Claimant’s contention that the MAB Act and Reyhan Ordinance are inconsistent with Art. 4 of the BIT is without merit. First, the measures in question do not constitute expropriation because the Claimant did not suffer total or near-total deprivation of the value of its investment (1). Second, even if the Tribunal were to find that such a deprivation occurred, the MAB Act and Reyhan Ordinance are legitimate regulatory

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64 Exhibit No. 1, Art. 4.
actions taken to protect the health of Ruritania’s population, pursuant to its police power, and thus do not constitute a compensable expropriation (2).

i. The measures in question do not constitute expropriation because the Claimant did not suffer total or near-total deprivation of the value of its investment.

80. Expropriation is not defined in the BIT. However, in the context of relevant rules of international law, it is evident that Ruritania’s actions do not constitute expropriation because the Claimant has not been substantially deprived of its investment. That is, the losses sustained by the Claimant’s business do not amount to a permanent and total or near-total deprivation of its investment. This is true of FBI’s recent financial losses as well as the alleged devaluation of its intellectual property.

81. It is well settled in international law that measures taken by a State can interfere with a foreign investor’s property and/or rights to such an extent that they are “rendered so useless that they must be deemed to have been expropriated,” a concept known as indirect expropriation. This may be true even where the expropriatory effect is the result of a series of actions rather than a single measure (“creeping expropriation”) and/or a regulation of general applicability as opposed to a transaction specifically targeting the investor (“regulatory expropriation”). However, the mere fact that government action has a negative impact on an investor’s business does not mean that an expropriation has occurred.

82. First, in order to constitute indirect expropriation, the measure must cause the investment to suffer an economic impact “equivalent to that of direct expropriation”: that is, a total or near-total deprivation of value. Value in this context is understood to encompass both financial value and effective control (i). Second, the deprivation must be permanent and irreversible (ii). Finally, the determination of whether the effects of a regulation constitute indirect expropriation should be approached with a view to avoiding that BITs be manipulated into little more than insurance policies against ordinary business risk (iii).

65 Expropriation (UNCTAD), at 8 (citation omitted); Christie, at 309.
66 See Expropriation (UNCTAD), at 11-12; Taking of Property (UNCTAD), at 10-11.
67 See Expropriation (UNCTAD) at xii; Vivendi v. Argentina II, ¶ 7.5.11; LG&E, ¶ 200; Sempra, ¶¶ 285-6; CMS, ¶ 262; Higgins, at 278.
(i) The Claimant has not suffered total or near-total deprivation of the value of its investment because below-expected economic performance does not, by itself, equate to such a deprivation and there has been no change in the effective control of the investment.

83. The value of FBI, like any company, depends on many factors besides profitability in a given economic period. Just because the company performed below expectations does not mean that the Claimant suffered a substantial deprivation of the value of its investment.

84. In CMS v. Argentina, the tribunal found no expropriation where the investor’s interest in a gas transportation company suffered a significant decrease in value as a result of measures taken to address the Argentine financial crisis, because the investor retained full ownership and control of the shares. Numerous other arbitral tribunals have reached the same conclusion where, like here, the investor retained control of the investment and/or the economic impact amounted to less than a total or near-total deprivation of value.

85. Similarly, while FBI may have experienced a decline in earnings, there is still value in the business, including land, equipment and intellectual property assets. According to the Ruritanian Trademarks Office, the Claimant still owns the trademarks and trade dresses for FREEBREW, as well as those of other FBI products, and retains the exclusive right to use them. The fact that the trade dress registrations pertaining to FREEBREW’s distinctive oversize bottle may no longer be usable under the new regulations does not mean that the Claimant has suffered a total or near-total deprivation of the value of its intellectual property holdings generally, since deprivation of value is evaluated with respect to the investment as a whole and FBI produces several other brands of beer whose distribution is still permitted.

86. Moreover, adverse economic impact alone is not enough to establish expropriation. Whether the investor retains “effective control” is also a factor. In Pope & Talbot, the tribunal held that a State-imposed restriction on lumber exports was not indirect expropriation, despite its significant impact on the investor’s profits, because the

68 CMS, ¶263-4.
69 See e.g., Total v. Argentina, ¶196; Sempra, ¶¶ 284-6; Azurix, ¶ 322; LG&E ¶ 199; AES, ¶ 14.3.1-14.3.3.
70 See Telenor, ¶ 67. See also Penn Central, at 130-1.
71 Pope & Talbot, ¶ 102. See also PSEG, ¶¶ 278-80.
measures did not interfere sufficiently with the investor’s “ability to carry on its business” (i.e., effective control).\(^{72}\) According to the *Pope & Talbot* tribunal, whether a government action constitutes indirect expropriation turns on the presence of “deprivation of the investor in the control of the investment,” such as administration and management.\(^{73}\)

87. The Claimant, like the investor in *Pope & Talbot*, retains control of its assets (including its intellectual property, as discussed above) and is able continue operations, albeit in a different capacity than prior to the regulatory reforms at issue.\(^{74}\) This is true regardless of the Claimant’s current situation with its creditors, for although FBI’s assets, shares and any arbitration claims and recovery have been pledged to its creditors as security, this does not change the fact that the Claimant retains effective ownership and control of FBI. Therefore, there has not been a deprivation of control sufficient to constitute expropriation under Article 4 of the BIT.

(ii) *The effects of the disputed measures are not of sufficient duration to constitute expropriation.*

88. The adverse business effects suffered by FBI here also fall short of indirect expropriation because they are neither permanent nor irreversible in nature.\(^{75}\) In *S.D. Myers v. Canada*, the tribunal held that a temporary border closure to certain hazardous waste exports was not expropriatory because the effect of the measure was merely a delay in the investor’s ability to realize its investment, not a permanent or irreversible deprivation.\(^{76}\)

89. Here, too, although the MAB Act and Reyhan Ordinance do not purport to be themselves temporary, their impact on the Claimant is neither permanent nor irreversible. Since it retains ownership and control of its assets, the Claimant is fully capable of adapting its business model to the new regulatory environment.

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\(^{72}\) Pope & Talbot, ¶¶ 100-102. See also Chemtura, ¶ 264.

\(^{73}\) Pope & Talbot, ¶ 100). See also PSEG ¶ 278; Azurix ¶ 322; Feldman, ¶¶ 151-52; Sempra, ¶ 281.

\(^{74}\) See Feldman, ¶ 152.

\(^{75}\) Tecmed, at para 116; SD Myers, ¶¶ 183-4; Suez v. Argentina, ¶ 123.

\(^{76}\) S.D. Myers, ¶¶ 284, 287. See also LG&E ¶¶ 199-200.
(iii) The BIT is not intended to insure the Claimant against ordinary business risk.

90. The object and purpose of the BIT is to intensify economic cooperation and promote investment by creating favorable conditions for investors. However, it is widely recognized that protections against unlawful expropriation are not intended to merely “compensate for failed business ventures.”77 Thus, finding that no expropriation occurred here is consistent with the object and purpose of the BIT, as well as the policy considerations underpinning international investment law generally.

ii. Even if the tribunal finds that the Claimant suffered a total or near-total deprivation of the value of its investment as a result of the MAB Act and Reyhan Ordinance, no expropriation occurred because these measures are a valid exercise of Ruritania’s police power.

91. Even if the Tribunal determines that the Claimant did experience a total or near-total deprivation of the value of its investment as a result of Ruritania’s actions, there is no compensable expropriation because the measures taken are a valid exercise of the State’s police powers.

92. It is a widely accepted principle of customary international law that regulatory action taken by the State to protect the health of its population is not expropriation, even where it results in a substantial deprivation of the value of the investment.78 For example, in Chemtura v. Canada, the tribunal held that “irrespective of the existence of a contractual deprivation,” the forced termination of the investor’s registrations to use a certain pesticide that was “within [the government’s] mandate,” taken in a “non-discriminatory manner,” and “motivated by the increasing awareness of the dangers . . . to human health and the environment,” was “a valid exercise of the State’s police power and, as a result, does not constitute an expropriation.”79

93. Similarly, the MAB Act is an example of a set of measures that any responsible government should take to address the public health concerns associated with alcohol, and the Reyhan Ordinance is a legitimate precautionary response to a potentially serious

77 Waste Management II, ¶¶ 156-160; Feldman, ¶ 112; Reinisch, at 27.
78 See Expropriation (UNCTAD); Harvard Draft Convention, Art. 10(5); Rest. 3d Foreign Relations § 712 cmt. g.
79 Chemtura, ¶ 266 (emphasis added).
public health threat about which information is still emerging. Thus, these actions are not expropriatory and do not give rise to a responsibility to compensate because they are (i) non-discriminatory measures of general application; (ii) adopted and applied in good faith; (iii) for the protection of legitimate public welfare objectives.\textsuperscript{80}

\textit{(i) The MAB Act and Reyhan Ordinance are not discriminatory.}

94. Ruritania’s actions are not discriminatory. First, Art. 3(2) expressly excludes “measures that have to be taken for reasons of public security and order”\textsuperscript{81} from the definition of the kind of arbitrary and discriminatory conduct prohibited by the BIT. Both the MAB Act and Reyhan Ordinance were enacted for the purpose of addressing serious public health threats, which if left unaddressed may have potentially serious implications for general security and order.

95. The severe public health consequences of alcohol use are well documented. For example, the World Health Organization (“WHO”) reports that alcohol is “the world’s third largest risk factor for disease burden” and is associated with “many serious social and developmental issues, including violence, child neglect and abuse, and absenteeism in the workplace.”\textsuperscript{82} Such dangers are not limited to alcohol: the WHO reports that “acute and chronic changes in health status” produced by any number of causes can have “direct and indirect impacts on security,” and that “epidemics may lead to destabilization, political unrest, civil disorder or long-term deterioration of . . . economic viability.”\textsuperscript{83} Similarly, the results of the HRI study connecting Reyhan to increased risk of cardiac complications point to a problem that, without an effective government response, could well lead to widespread and chronic health consequences for a large portion of Ruritania’s population, particularly given the popularity of FREEBREW.

96. The MAB Act applies indiscriminately to all vendors and producers of alcoholic beverages. The Reyhan Ordinance applies to all products containing Reyhan, including

\footnotesize{\textsuperscript{80} See e.g., Fireman’s Fund, ¶ 176(j); Saluka v. Czech Republic, ¶¶ 255-8; Methanex, ¶ 410, Physicians on Phillip Morris.}
\footnotesize{\textsuperscript{81} Exhibit No. 1, Art. 3(2).}
\footnotesize{\textsuperscript{82} See WHO Alcohol Fact Sheet.}
bread and other food staples. There is nothing in the record to support that either the MAB Act or the Reyhan Ordinance makes explicit distinctions on the basis of nationality or apply only to specific entities. So, neither law is discriminatory on its face.

97. Nor are they discriminatory in effect. To determine whether a measure is discriminatory in effect, the widely followed Pope & Talbot decision looks to three elements: (1) the relevant subject for comparison [“comparator”]; (2) the relative treatment each comparator receives; and (3) whether any factors exist that justify a deviation in treatment.\(^8^4\) In the case of discrimination based on nationality, the subject of comparison is a domestic investor whose circumstances resemble those of the foreign investor claimant “in all relevant respects, but for nationality.”\(^8^5\) This means a domestic investor that is in the same line of business as the claimant, often a direct competitor.\(^8^6\)

98. Here, problems arise even at the first element. FBI is the only brewery that sells beer in containers over 0.5 liters, and FREEBREW contains a higher concentration of Reyhan than other beers, particularly when taking into account the signature 0.8 liter FREEBREW bottle. Because FBI’s position in the market is so unique, there simply is no domestic brewery that is really like FBI “in all relevant respects, but for nationality.”\(^8^7\) Thus, because there is no genuine comparator, there can be no finding that the measures taken by Ruritania treat like entities differently on the basis of nationality, or any other basis for that matter.

99. Even assuming that there are other Ruritanian companies comparable to FBI, the MAB Act and Reyhan Ordinance still withstand scrutiny. As to the second element of the Pope & Talbot test, relative treatment of each comparator, the record indicates that FBI has indeed been impacted disproportionately. But the fact that the objectives of these measures result in a greater impact on FBI is a function of the unique nature of the Claimant’s investment, not a reflection of the measures themselves. In other words, this deviation in treatment is justified.

100. In Feldman v. Mexico, the tribunal found unlawful discrimination where a U.S. investor’s cigarette export business was denied tax rebates that were granted to the only comparable

\(^8^4\) Weiler, at p. 567 (citing Pope & Talbot, at ¶¶ 9-37).
\(^8^5\) Methanex, ¶¶ 16-17. See also S.D. Myers, ¶ 243; Feldman, ¶¶ 166, 171.
\(^8^6\) Feldman, ¶ 171; S.D. Myers ¶ 250-1.
\(^8^7\) Methanex, ¶ 16-17.
business, which happened to be Mexican-owned. But there, unlike here, the respondent State was unable to demonstrate that the difference in treatment was based on compliance with the objectives of the law, as opposed to the investor’s nationality.

101. Here, though, FBI is the only company in Ruritania that sells .8 liter bottles and uses a higher concentration of Reyhan in its beverages. Thus, any disproportionate impact on FBI is not due to its being a foreign-owned business, but because the unique attributes that set FBI’s products apart in the market are the same ones that make them inconsistent with the legitimate public health objectives of the MAB Act and Reyhan Ordinance.

102. Not only do the measures taken by Ruritania not discriminate on the basis of nationality, they also do not discriminate against FBI individually. Unlike in Feldman, where the refusal of tax benefits and subjection to audit targeted the investor’s business in an individual capacity, the MAB Act and Reyhan Ordinance are not directed specifically to the Claimant but instead are equally binding upon all business entities operating in Ruritania. The fact that FBI has been uniquely affected is, as discussed above, merely the result of the uniquely problematic nature of its products. Thus, the MAB Act and Reyhan Ordinance are not discriminatory.

(ii) The MAB Act and Reyhan Ordinance were adopted and applied in good faith.

103. The MAB Act and Reyhan Ordinance are bona fide regulatory measures, adopted and applied in good faith, because they (1) bear a reasonable relationship to their stated objectives; and (2) are proportionate to those objectives.

104. First, these measures bear a genuine relationship to their stated objectives (i.e., they are not arbitrary). This inquiry is not a license for a tribunal to substitute its own judgment for that of the host State. Rather, the goal is to distinguish between bona fide laws and those that are merely pretextual.90

105. In Meerafpel v. Central African Republic, the Central African Republic (“CAR”) enacted a ban on tobacco exports (ostensibly to guarantee the investor’s tax obligations by preventing transfer of its major assets out of the country), failed to respect the decisions

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88 Feldman, ¶¶ 181-184.
89 Id., ¶¶173-80.
90 See Fortier & Dryer, at 320.
of its own courts overturning the ban, took over the investor’s inventory and equipment and transferred them to a third party after the company ceased local operations, and repudiated the protocol that it had signed to allow the company to resume operations in the CAR.\footnote{See Meerapfel; Hepburn.} The tribunal found that these measures “did not relate to any progressive public health legislation” and were instead, when taken together, “routine” interferences tantamount to expropriation.\footnote{Meerapfel, ¶¶ 353-57. See also CME, ¶ 609.} Similarly, in \textit{S.D. Myers}, the stated objective of a Canadian export restriction on lumber was held to be false: its real intent was not environmental protection but protection of domestic industry.\footnote{S.D. Myers Inc., ¶ para 255; cf. Feldman, supra note X, at para X (See Dugan, at 463.)}

106. These are just a few of the many instances where tribunals have refused to accept State measures as having been enacted in good faith because they lacked a reasonable relationship to their purported objectives.\footnote{Saluka ¶ 273; Tecmed ¶ 122; LG&E, ¶ 195.} Moreover a substantial number of tribunals have stressed the need for deference to the judgment of the State in this inquiry.\footnote{Tecmed, at ¶ 122 et seq.; LG&E ¶¶ 195-96; Azurix, ¶¶ 311-12; Continental Casualty ¶ 227.} Unlike the measures at issue in \textit{Meerapfel} and \textit{S.D. Myers}, the MAB Act and Reyhan Ordinance are directly related to the issues that they purport to address: namely alcohol abuse and the potential cardiac side effects of excessive Reyhan consumption, respectively.

107. Second, these measures bear a “reasonable relationship of proportionality” to the “aim sought to be addressed.”\footnote{LG&E, ¶ 198.} In \textit{LG&E v. Argentina}, having taken into consideration the issue of proportionality, the tribunal nevertheless found no expropriation where the Argentine government took admittedly “severe” measures that had a “certain impact” on the Claimant’s investment.\footnote{LG&E, ¶ 198.} Here, like in \textit{LG&E}, although the burden on the Claimant is admittedly substantial, it is by no means excessive in relation to the public health objectives of the measures taken.

108. There is nothing uncommon about banning the marketing or sale of alcohol during sporting events to prevent an association between alcohol and a healthy lifestyle and athletic excellence. Similarly, labeling requirements are a logical response to the need to raise public awareness of the health risks associated with Reyhan. Indeed, such approaches are used in countries around the world. And while the negative advertising on...
the issue of Reyhan by FBI’s competitors may have been excessive, this conduct is not attributable to the State and therefore should not factor in to this inquiry.

(iii) The MAB Act and Reyhan Ordinance protect legitimate welfare objectives.

109. The MAB Act and Reyhan Ordinance were enacted to protect legitimate welfare objectives: that is, they aim to address a genuine problem whose existence is supported by evidence. This should not be understood as requiring a tribunal to second-guess an agency’s analysis of the scientific evidence available to it. Rather, it need merely ensure that some legitimate evidence exists to support the supposed purpose of the government’s action.

110. The goal is to identify measures like those at issue in Ethyl Corp., where the Canadian government’s decision to settle the investment claim brought against it was strongly influenced by a complete lack of evidence to demonstrate that the investor’s product posed the sort of risks to human health that the regulation at issue was intended to address, or in Tecmed and S.D. Myers, where the tribunal found that the available evidence revealed just the opposite: the treatment of the investor in fact had no basis in the purported public interest purpose of the government’s actions. By contrast, in Methanex v. United States, the tribunal upheld California’s ban on the fuel additive MTBE. The fact that the health and environmental reasons ostensibly motivating the ban were supported by scientific evidence was a key factor in the tribunal’s decision to uphold it.

111. But the State need not wait for evidence to reach the level of certainty – if such a thing even exists in the ever-changing field of scientific research – before acting to ensure the wellbeing of its citizens. In Chemtura, the tribunal upheld regulations enacted by the Canadian government based on “increasing awareness of dangers . . . to human

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98 See e.g., Feldman, ¶¶135-6.
99 Molloo et. al., at 29-30 (citing Ethyl Corp).
100 Tecmed; S.D. Myers
101 Methanex, Part IV. D. ¶15.
health”\textsuperscript{103} where those regulations resulted in the suspension of the Claimant’s registrations immediately upon the conclusion of the relevant studies.\textsuperscript{104}

112. Here, the MAB Act was enacted after parliamentary and public debate, while the Reyhan Ordinance, for its part, resulted from a risk assessment based on the extensive study by the HRI, a respected independent research institution. Unlike in \textit{Tecmed} and \textit{S.D. Myers}, the organs of Ruritanian government were convinced of the need to enact these measures, and unlike in \textit{Ethyl Corp.}, they had substantial evidence to support that evaluation. The fact that a separate evaluation commissioned by the Claimant reached a different result does not change the fact that the government made its decisions based on scientific evidence and extensive debate, both of which pointed to a legitimate public need.

113. Thus, Ruritania owes the Claimant no compensation because the Claimant’s investment was not expropriated. First, the Claimant retains control of a substantial portion of FBI’s assets so there has not been a total or near total deprivation of the value of the investment. Second, even if such a deprivation did occur, the effect of the regulatory measure on the investor is not the only relevant factor. If it were, no State would ever be able to regulate for the wellbeing of its citizens without fearing the wrath of foreign investors – a result that is surely not consistent with the goals of the BIT or of international law generally. The MAB Act and Reyhan Ordinance are legitimate applications of Ruritanian’s police power: are non-discriminatory, adopted and applied in good faith, and aimed at the protection of legitimate public welfare objectives. Therefore, no compensable expropriation has occurred.

\textbf{B. RURITANIA’S ACTIONS DO NOT VIOLATE ITS OBLIGATION TO HONOR ALL AGREEMENTS UNDER ART. 6(2) OF THE BIT.}

114. As discussed above with respect to jurisdiction, Article 6(2) does not bring the Share Purchase Agreement (“SPA”) within the scope of the BIT. But even if it did, this would not give rise to a claim under the BIT because Ruritania did not breach the SPA.

\textsuperscript{103} \textit{Chemtura}, ¶266 (emphasis added).
\textsuperscript{104} \textit{Chemtura} ¶32-4.
115. First, the SPA is not covered by the BIT. Article 6(2) provides that “[e]ach Contracting State shall fulfill any other obligations it may have entered into with an Investor or an Investment of an Investor of the other Contracting State.”\textsuperscript{105} The plain language of the provision indicates that this “umbrella clause” applies only to agreements between the parties to the BIT (or their investors). The SPA was executed between the State Property Fund of Ruritania and Contifica Spirits, S.P.A. (a company incorporated under the laws of Posteriana). Therefore, even if an SPA could theoretically be brought under the protection of the BIT, this one is not because the BIT covers only agreements between Ruritania (and its Investors) and Cronos (and its Investors).

116. Second, even if the SPA were covered, there is no claim here because the SPA has not been breached. The plain language of the warranty provision stipulates that Ruritania guarantees only “to the best of its knowledge” that “the products of the Brewery do not pose any risks to the consumers, other than those which are ordinary for similar alcoholic beverages.”\textsuperscript{106} When the SPA was executed, the HRI study on Reyhan had not yet been released. Nor does the fact that preliminary information on the effects of Reyhan was available as early as 2005 amount to a breach of this warranty, since it is perfectly reasonable for a government to refrain from making guarantees based only on tentative results of a complex long-term scientific study.

117. Therefore, because Article 6(2) does not apply to the SPA and, even if it did, the SPA was not breached, Ruritania’s actions are consistent with its obligations under this “umbrella clause.”

\textbf{A. RURITANIA’S ACTIONS ARE CONSISTENT WITH ITS FAIR AND EQUITABLE TREATMENT OBLIGATIONS.}

118. Article 2(1)(b) of the BIT requires that fair and equitable treatment (“FET”) be accorded by each Contracting Party to Investments by Investors of the other.\textsuperscript{107} Ruritania’s actions are consistent with this obligation because they comply with the minimum standard of treatment established by customary international law. However, even if this Tribunal

\textsuperscript{105} Exhibit No. 1, Art. 6(2).
\textsuperscript{106} Exhibit No. 2.
\textsuperscript{107} Exhibit No. 1, Art. 2(1)(b).
interprets FET to require a level of treatment above the aforementioned minimum standard, Ruritania’s actions are still permissible under the BIT because they (i) do not frustrate the investor’s legitimate expectations, (ii) are not arbitrary or discriminatory, and (iii) do not constitute outright abuse.

(a) The measures in question do not fall below the minimum standard of treatment as established by customary international law.

119. Even though the language of the BIT does not expressly tie the concept of “fair and equitable treatment” to the minimum standard of treatment under customary international law, the Treaty’s object and purpose as well as the relevant rules of international law that provide the context for this term, support such a reading. It takes particularly grievous conduct to breach this international minimum standard and Ruritania’s actions clearly do not qualify.

120. The Oxford English Dictionary defines “fair” as treating equally without favoritism or discrimination.108 Similarly, “equitable” is defined as “fair and impartial.”109 In practice, arbitral tribunals have often interpreted the ordinary meaning of “fair and equitable treatment” as treatment that is not arbitrary or discriminatory.110 However, the fact that the BIT specifically addresses arbitrary and discriminatory treatment in Article 3(1)(c)111 suggests that the FET standard must have some additional significance in order to avoid redundancy.

121. The “VCLT”, to which both Ruritania and Cronos are parties, provides that a treaty shall be interpreted according to “the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”112 Context is defined in the VCLT to include subsequent agreements between the parties, subsequent practice in the application of the treaty, and any relevant rules of international law applicable to the parties’ relations (defined by the Statute of the International Court of Justice to including

\[\text{108 Oxford English Dictionary.}\]
\[\text{109 Id.}\]
\[\text{110 See e.g., Lemire, ¶259.}\]
\[\text{111 Exhibit No. 1, Art. 3(1)(c).}\]
\[\text{112 VCLT, Art. 31.}\]
international conventions [treaties], international custom [“CIL”], general principles of law, and judicial decisions and scholarly writings\(^{113}\). \(^\text{114}\)

122. Looking next to context, it is widely recognized that the requirement to accord fair and equitable treatment embodied in international investment treaties is meant to imply the minimum standard of treatment under customary international law: FET is intended to guarantee a “floor” below which the treatment of an investor, whether foreign or local, may not fall. For example, the 1967 OECD Draft Convention on the Protection of Foreign Property, which although not itself legally binding has been frequently cited by arbitral tribunals and international scholars and was used by most OECD countries as the basis of their international investment agreements,\(^{115}\) made clear that the fair and equitable treatment standard “conforms to the ‘minimum standard,’ which forms part of customary international law.”\(^{116}\)

123. A number of arbitral tribunals have interpreted FET as equivalent to the minimum standard of treatment required by international law.\(^{117}\) For example, in \textit{Occidental v. Ecuador}, when faced with whether the fair and equitable treatment required by the U.S-Ecuador BIT established a standard beyond that prescribed by customary international law without explicit language to that effect,\(^{118}\) the tribunal held that held that “the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment.”\(^{119}\)

124. In order to violate the minimum standard under customary international law, a State’s treatment of a foreign investment and/or investor must be grievous indeed. In \textit{Neer v. Mexico}, a case long treated by international tribunals as the foundation for the concept of the minimum standard of treatment, the U.S-Mexico Claims Tribunal held that, “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of

\(^{113}\) ICJ Charter, Art. 38.  
\(^{114}\) VCLT, Art. 31.  
\(^{115}\) FET (UNCTAD), at 5.  
\(^{117}\) See generally Dolzer et. al., at 137; \textit{Vivendi II}, ¶ 6.6.4.  
\(^{118}\) \textit{Occidental}, ¶¶ 189-90.  
\(^{119}\) \textit{Id. See also CMS}, ¶¶ 282-4; \textit{Rumeli}, ¶ 611; \textit{El Paso}, ¶¶ 331-7.
international standards that every reasonable and impartial man would readily recognize its insufficiency.”

125. While recognizing that this standard articulated in 1926 may not be directly applicable to circumstances nearly a century later, subsequent tribunals have nevertheless affirmed its ongoing relevance, holding that the applicable standard should be a contemporary understanding of the Neer test. For example, in International Thunderbird Gaming Corporation v. Mexico, the tribunal affirmed that the content of the minimum standard of treatment “should reflect evolving international customary law,” but went on to make the important clarification that: “the threshold for finding a violation of the minimum standard of treatment still remains high.”

126. Tribunals including International Thunderbird have equated this “high” standard to a few common elements, particularly treatment that is not just arbitrary or discriminatory but grossly and egregiously so. Applying such a standard, the tribunal in International Thunderbird found that the Mexican government’s closure of the Claimant’s gaming facilities and denial of Claimant’s requests for injunctive relief from the aforementioned closures did not violate Mexico’s fair and equitable treatment obligations under the NAFTA.

127. As discussed at length above, the MAB Act and Reyhan Ordinance are not discriminatory: neither on their face nor in effect. Moreover, even if the Tribunal were to find that these measures did, in effect, impact the Claimant’s investment while leaving other comparable businesses unharmed, any such differentiation would have a legitimate basis in light of these laws’ public health goals. Thus, even if the MAB Act and Reyhan Ordinance could be characterized as discriminatory, they are certainly not egregiously so.

128. Furthermore, these measures do not breach the international minimum standard of treatment because they are neither arbitrary (lacking a reasonable basis) nor made in bad faith. For example, in Saluka, the tribunal held a government agency’s conduct to be arbitrary where it provided financial assistance to some financial institutions but not...
others, despite having no legitimate reason for such a distinction.\textsuperscript{125} In contrast, as discussed above, the MAB Act and Reyhan Ordinance are regulatory actions of general application, based on legitimate findings and taken in good faith in the public interest of preventing the pernicious effects of excessive alcohol use, particularly among young people, and informing the public about the potential cardiac effects of Reyhan products through commonsense labeling measures.

129. Where, as here, a State’s regulatory action is subject to extensive study and debate and is supported by scientific evidence, it is difficult to see how such conduct could be considered arbitrary or in bad faith, let alone egregiously so. Neither would such a finding be desirable, since it would chill needed regulatory activity.

\textit{(b) Even if the Tribunal finds that FET requires a higher level of treatment than the international minimum, Ruritania’s actions are permissible.}

130. Even if the tribunal were to define the standard of FET as independent, and indeed higher, than the minimum standard under customary international law as described above, Ruritania’s actions would nevertheless be permissible. Previous arbitral tribunals that have treated FET as an independent standard have defined it as encompassing factors such as whether the State’s conduct: (i) defeats the investor’s legitimate expectations; (ii) demonstrates manifest arbitrariness; (iii) discriminates against the investor on wrongful grounds; or, (iv) constitutes “outright abusive treatment.”\textsuperscript{126}

131. The issues of arbitrariness and discrimination have been disposed of above. Thus, the following discussion will focus on whether Ruritania’s actions (i) defeat the Claimant’s legitimate expectations; and (ii) are “outright abusive.” Finally, the fair and equitable treatment is not an absolute or strict liability standard, but is meant afford deference to the State’s judgment (iii).

\textit{(i) Stability and the protection of the investor’s legitimate expectations.}

\textsuperscript{125} \textit{id., ¶498-9.}
\textsuperscript{126} FET (UNCTAD), at 63. \textit{See also} Dolzer, at 145-160; Vadi (2013), at 104.
132. At first glance the most investor-favorable interpretation of FET, many tribunals have held that international investment agreements entitle foreign investors to stability and the protection of their legitimate expectations. This means that the FET standard may be violated where the investor is deprived of the legitimate expectation that the conditions existing when it agreed to make the investment would remain unchanged.\footnote{Parkerings-Compaignet, \(\text{¶}329-31\); Tecmed, \(\text{¶}154\).}

133. However, the protection of investor expectations is neither subjective nor absolute.\footnote{See Suez, \(\text{¶}209\); Vadi 2013, at 104.} Expectations are protected only where they are (a) legitimate, based on specific representations made by the host State to the investor or, absent such representations, the circumstances surrounding the conclusion of the agreement\footnote{Parkerings-Compaignet A.S. \(\text{¶}331\); Thunderbird, \(\text{¶}147\); PSEG v. Turkey, \(\text{¶}241\).} and (b) reasonable, taking into account foreseeable risks.\footnote{See EDF, \(\text{¶}217\).} Tribunals have repeatedly held that changes in the political and regulatory environment are among the most foreseeable risks that an investor must consider.\footnote{Continental Casualty \(\text{¶}202\); Methanex, Part IV. D, \(\text{¶¶}9-10\); Fortier & Drymer, at 307.}

134. In *Parkerings-Compaignet A.S. v. Lithuania*, the tribunal held that where the government had made no specific assurances to the investor that there would be no changes to the law impacting its investment, and the investment in question was made under circumstances that made legal reforms not only not unpredictable but in fact foreseeable (namely, during the time that Lithuania was transitioning from its Soviet past to a future as a member of the European Union), the investor had no legitimate expectation that the regulatory environment would remain constant.\footnote{Parkerings-Compaignet \(\text{¶}329-38\).} Similarly, the (qualified) representations made in the SPA with respect to the safety of FBI’s products made no guarantees to the Claimant that the regulatory framework to which FBI and its products are subject would remain unchanged. Nor does the BIT make any such representation, neither by its terms nor by implication.\footnote{See Total, at \(\text{¶}115\).}

135. It is not reasonable for an investor to expect the regulatory environment to remain static in any business venture, let alone one involving the production of alcohol containing a unique ingredient and sold in above-average serving-sizes. Public health regulations are
meant to evolve in response to new information and must be allowed to do so.\textsuperscript{134} The regulation of alcohol in particular has undergone significant and repeated changes in most countries over the course of the last century and Ruritania is no exception. The BIT places no limitations on Ruritania’s ability to take such measures.

Moreover, in Ruritania, the New Way party’s anti-alcohol rhetoric had been prominently featured in the media coverage during the election period preceding the share purchase, and the need to eliminate the association between sport and alcohol was already under discussion in public fora. Thus, to expect that Ruritania would take no further regulatory action in this sector is neither legitimate nor reasonable, and therefore is not protected by the FET standard.

A finding to the contrary would essentially allow investors to use international investment agreements as insurance policies against reasonably foreseeable changes in the business environment.\textsuperscript{135} The purpose of international investment law is to provide foreign investors with the protections needed to encourage them to invest in the host state, not to render them immune from the kinds of basic risks faced by all businesses.

The Permanent Court of International Justice (“PCIJ”) stressed this distinction in \textit{Oscar Chinn}, holding that the losses suffered by a foreign investor’s transport and shipbuilding businesses did not amount to the deprivation of a right. Rather, as the PCIJ stated and numerous international tribunals have since echoed,

\begin{quote}
“[n]o enterprise...can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantages of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.”\textsuperscript{136}
\end{quote}

To treat all regulatory change as a defeat of investors’ expectations is not only detrimental to State sovereignty and has a freezing effect on much-needed public policy measures, but also defeats the purpose of the BIT, which is to promote economic cooperation \textit{between} contracting States, not give the foreign investors of one State

\textsuperscript{134} See Vadi (2013), at 105.
\textsuperscript{135} See Waste Management ¶¶177-8.
\textsuperscript{136} \textit{Oscar Chinn}, ¶100.
immunity from business risk at the expense of the other’s ability to regulate effectively for the wellbeing of its citizens. Indeed, the prospect that either party would sign on to a binding international agreement intended to produce such an effect is absurd.

(ii) Ruritania’s actions do not constitute “outright abusive treatment.”

140. The concept of “outright abusive” treatment is narrow in scope, pertaining only to treatment that is perpetrated against an investor under “manifestly no lawful grounds,” or “for improper reasons” like “national prejudice or political revenge.” Since the MAB Act and Reyhan Ordinance are not arbitrary or discriminatory and do not violate any legitimate expectations of the investor, as demonstrated above, one can hardly assert that these measures qualify as outright abusive treatment. Furthermore, any suggestion that the incident involving Messrs. Goodfellow and Straw was outright abusive is similarly without merit.

141. In Desert Line Projects, LLC v. Yemen, the tribunal found that the government’s treatment of the investor, which included detaining several of the investor’s employees without cause in order to extract a legal settlement from the investor, amounted to abusive treatment. Here, though, the Claimant’s employees were not detained without cause or in a bad faith attempt to place the investor under duress. Rather, the detention of Messrs. Goodfellow and Straw, suspects in a corruption investigation that was ongoing at the time, was the result of the Ruritanian police’s legitimate concern that the executives were fleeing justice.

(iii) FET is not a strict liability standard.

142. Lastly, FET is not a strict liability standard. That is, regulatory measures taken by the State are owed a certain degree of deference and the burden is on the Claimant to show that those measures amount to a violation. As aptly stated by the tribunal in AES v. Hungary,

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137 FET (UNCTAD), at 62.
138 Id. at 83.
139 Desert Line Projects, ¶191.
“[th]e standard is not one of perfection. It is only when a State’s acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable [...] that the standard can be said to have been infringed.”\textsuperscript{140}

143. Thus, where, as here, the State has made a colorable showing that its actions were fair and reasonable, taken in good faith and in the public interest, the principle of sovereignty dictates that its regulatory prerogative should be upheld.

II. DAMAGES

144. Ruritania does not consider it proper or fruitful to address the matters of quantum of damages at this stage. Suffice it to note that the amount of damages claimed is grossly exaggerated and unsubstantiated. The Tribunal’s questions with respect to the type of damages to be considered are addressed as follows.

145. First, the Claimant’s request for moral damages for the incident involving Messrs. Goodfellow and Straw should be denied because the Claimant has suffered no harm, as discussed above. However, even if the Claimant did have a colorable claim here, it would not meet the exceptional circumstances required to warrant moral damages.

146. Second, the loss of sales by CAM’s subsidiaries located outside of Ruritania to FBI does not constitute a recoverable item of damages because loss of sales (profits) is only rarely recoverable under international law and even if the Claimant were able to justify such compensation, it should not include Claimant’s subsidiaries outside Ruritania. These sales are not part of the Claimant’s purported “investment” in Ruritania and thus should not be recoverable.

A. CLAIMANT’S REQUEST FOR MORAL DAMAGES IS WITHOUT MERIT

\textit{i. Any harm to the Claimant arising from the incident involving Messrs. Goodfellow and Straw could not rise to the level of exceptional circumstances necessary to warrant moral damages.}

\textsuperscript{140} AES, ¶9.3.40. See also Vivendi II, ¶6.5.14 et seq.
147. Even if the tribunal were to find that the Claimant had suffered an actionable harm here, compensation for moral damages are granted only in exceptional circumstances. In *Lemire v. Ukraine*, the tribunal defined the basis for moral damages narrowly, holding that “State action will only qualify as an exceptional circumstance, for which moral damages are warranted, if it: (1) implies physical threat or illegal detention; (2) causes a deterioration of health, stress, anxiety, or loss of reputation; or, (3) has generally grave or substantial effects.” This reading adopted by the tribunal in *Lemire* and followed by the tribunal in *Arif v. Moldova*, weighs against awarding moral damages here.

148. The tribunal in *Lemire* arrived at its test for moral damages by looking to a series of cases involving extreme acts of violence such as armed “siege,” a torpedo attack on a civilian ocean liner resulting in the loss of over one hundred innocent lives, and seizure of property by force that included beating of employees to the point of hospitalization. In contrast to these horrific abuses, the *Lemire* tribunal found that the irregular awarding of frequencies, excessive inspections and attempt to charge abusive renewal fees did not warrant moral damages. Similarly, the *Arif* tribunal found that extensive investigations and subsequent tax penalties, which the claimant characterized as “harassment” and suggested “turned him into a beggar,” did not merit moral damages.

149. Any harm suffered by the Claimant as a result of the incident involving Messrs. Goodfellow and Straw would be much closer to the facts of *Lemire* and *Arif* than to those of the cases of wanton violence that the *Lemire* tribunal relied on to reach its conclusion. Moreover, unlike in the cases discussed in *Lemire*, the Ruritanian police did not act with the intent of causing harm to the Claimant or its employees. Goodfellow and Straw were detained to prevent them from fleeing the country during an ongoing corruption investigation. And while the Ruritanian police force could have been more transparent in

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141 *Lemire*, ¶326.
142 Id., ¶333. See also *Arif*, ¶592.
143 *Arif*, ¶592.
144 *Lemire*, ¶326-333 (citing *Desert Line Projects* (armed “siege”); *The Lusitania Cases* (torpedo attack on civilian ocean liner); *The Siag Case* (attack and beating)).
their handling of said detention, this incident does not even come close to the kind of exceptional circumstances that past tribunals have held to warrant moral damages.

150. Furthermore, any harm to the investor or investment that could conceivably result from this incident would be manifested solely in economic terms, such as increased transaction costs. The tribunal in Rompetrol Group NV v. Romania made abundantly clear that such injuries are “just another example of actual economic loss or damage, which is subject to the usual rules of proof.”

151. The claimant in Rompetrol at least attempted to demonstrate that the reputational damage in question affected the investment’s creditworthiness and ability to obtain financing. Here, though, the Claimant has offered no evidence whatsoever to support its assertion that the investor, CAM, or its investment, FBI, suffered damage as a result of the detention of Messrs. Goodfellow and Straw and subsequent media coverage. Therefore, the caution counseled by the Rompetrol tribunal is even more apropos here than to the facts of that case.

152. Thus, the Claimant’s request for moral damages is without merit and should be denied.

**B. Loss of Sales by CAM’s Subsidiaries Outside of Ruritania Does Not Constitute a Recoverable Item of Damages.**

153. The loss of sales by CAM’s subsidiaries located outside of Ruritania to FBI do not constitute a recoverable item of damages. Lost profits are awarded under international law only in exceptional circumstances and the present case does not qualify.

154. The goal of compensation under international law is to make the injured party whole. In some cases this may include reparation for loss of profits. However, loss of profits may only be recovered under exceptional circumstances, where the loss can be

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146 Rompetrol, ¶289.
147 Id., ¶290.
148 Chorzow, ¶68.
149 Id.
“established”; that is, where the loss is “certain” and has “already occurred.”\textsuperscript{150} And while this inquiry is not necessarily limited by geographical boundaries \textit{per se}, the fact remains that as a jurisdictional matter, this Tribunal is tasked with determining compensation only in relation to injury to investors or investments covered by the scope of the BIT: that is, those in the territory of the State Party whose measures are at issue.\textsuperscript{151}

155. In \textit{Cargill Inc. v. Mexico}, the tribunal decided to compensate “up stream losses”—losses suffered by other of the Claimant’s subsidiaries outside Mexico as a result of the harm to its investment in Mexico.\textsuperscript{152} This ruling was upheld by the Supreme Court of Ontario on appeal, which found that compensation under the NAFTA is subject to a causation requirement but not to any territorial limit.\textsuperscript{153} The Court found that “up stream losses” were in fact recoverable where Cargill’s production facility outside Mexico was directly impacted by the actions taken by the Mexican government within its territory.\textsuperscript{154} However, this ruling is tied to a specific factual situation that is not analogous to that of CAM’s subsidiaries here. The Cargill facility in Mexico was merely a distributor of high fructose corn syrup (HFCS) and was therefore dependent upon its parent company outside of Mexico to supply it with HFCS in order to function.\textsuperscript{155} By contrast, the tribunal in \textit{ADM v. Mexico} held that loss of profits from decreased sale of HFCS to Mexico by the Claimant’s other subsidiaries outside of Mexico were not recoverable where only the subsidiary in Mexico was directly affected by the increased tax on HFCS.

156. While the facts here indicate that FBI was indeed part of the global Contifica supply network, suggesting a stronger causal connection than was seen in \textit{ADM}, this is still not equivalent to the symbiotic relationship between parent and subsidiary that led

\textsuperscript{150} \textit{Vivendi II}, ¶6.9.3-6.9.7; \textit{LG&E}, ¶51.
\textsuperscript{151} \textit{ADM}, ¶274; \textit{Cargill I}, ¶¶ 521-522.
\textsuperscript{152} \textit{Cargill I}, ¶526.
\textsuperscript{153} \textit{Cargill II}, ¶¶82-4.
\textsuperscript{154} \textit{Id.}, ¶¶71-4.
\textsuperscript{155} \textit{Cargill I}, ¶524.
the Cargill tribunal to determine that the parent company was “so associated with the claimed investment . . . as to be compensable under the NAFTA.”

157. The realities of today’s global economy in which multinationals like the Contifica Group comprise the majority of foreign investors counsel a narrow reading here, to avoid exposing States to virtually infinite liability for the impact of their actions not only on investments within their territory, but on a far-flung web of related subsidiaries in every corner of the globe. “Up stream damages” should be awarded only where the facts unambiguously support treating a subsidiary outside of the host State as so integral to the investment that it is treated as part of the investment itself and protected by the BIT. The vastness of the Contifica network precludes such a finding here.

III. CONCLUSION

158. This arbitration is not about protectionism, bad faith or veiled intentions; it is about avoiding the unnecessary and undesirable pitfalls of pitting the economic interests of foreign investors against the ability of host States to exercise their sovereign regulatory powers within their own territory.

159. As scholar Deborah Sy aptly stated in reference to another consumer product whose marketing and sale have evolved in response to public health concerns, tobacco, “[t]he theory behind promotion and protection of foreign investments and foreign investors is grounded on assumptions that the foreign investment will serve as a means to promote development, not undermine it.” Promoting development includes promoting the health and wellbeing of the public. That this may at times have economic consequences for foreign investors does not necessarily imply that there has been a violation of their rights under international law.

156 _Id._ ¶¶ 523-5.
157 Sy, at 642.
160. With those considerations in mind, Republic of Ruritania respectfully requests that this Tribunal dismiss the complaint for lack of jurisdiction. But even jurisdiction is found, the Claimant’s allegations should fail on their merits because Ruritania’s adoption of measures regulating the sale of alcohol and the marketing and sale of products containing Reyhan are a legitimate exercise of the State’s inherent police powers and as such do not violate any of its obligations under the BIT or international law.