**DEPARTEMENTO DE DIREITO INTERNACIONAL**

**DIN 0431 – International Relations of Law**

**June 09, 2017**

**São Paulo**

**Memorandum for CLAIMANT**



**University of São Paulo**

**Faculty of Law**

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| **On behalf of:**  RichBrew Inc | **Against:**  Ministry of Commerce of Newland | |
| **Claimant** |  | **Respondent** |

Carolina Jaen Saad • Bárbara Policeno • Daniel Mendes Bioza • Gabriela Bueno Garcia • Lídia Monticelli • Luis Felipe Yonezawa Fernandes • João Epprecht • Julia Semer • Pedro Halembeck

# STATEMENT OF FACTS

1. RichBrew Inc. (hereinafter, “Claimant”), one of the world’s largest beer producers, aims to increase its exports of specialty beers, ordinary beer and non-alcoholic beer to Newland (“State”), known to be wine-drinking country. The Ministry of Commerce of Newland represents the State’s trade policies and rights (“Respondent”).
2. In the late 1950s, Newland limited the importation of beer of any kind to a meagre 50,000 hectolitres per year to protect its many winegrowers against competition from imported beer, a measure stemming from The National Association of Wineries’ (“NAW”) pressure. As the NAW was, and still is, a powerful lobby in Newland politics, domestic beer production remains scant.
3. Upon accession to the WTO, Newland abolished the quantitative restriction on the importation of beer. However, at the same time, it overhauled its tax regime for alcoholic and non-alcoholic beverages, adding to the value added tax (“VAT”) of 21% *ad valorem* applied to all alcoholic beverages, a N$5 ppl on wine; N$6 ppl on ordinary beer; and N$15 ppl on specialty beers.
4. Whilst non-alcoholic beer is not subject to excise tax, it is subject to a VAT of 21% *ad valorem*,whereas soft drinks are subject to 15% *ad valorem*. Also, the State imposes on imported alcoholic beverages resellers more onerous VAT-related administrative requirements.
5. Additionally, the **1991** **Fair Competition Act** establishes that imported, as well as domestic beer and wine, are subject to a minimum price requirement, annually set by the Ministry. The State further prohibits the use of additives in lager while leaving the use of additives in specialty beer and wine unregulated. The ostensible reason for such difference on treatment was that wine, which also has lower taxes, allegedly promotes health benefits if moderately consumed.
6. In addition to many tax policies leading to wine protection, Newland’s **National Federation of Restaurateurs**, a government-sponsored organization, has instructed its 10,000 members not to serve beer with traditional Newland dishes; municipal authorities of Newland’s main wine-producing region prohibit serving beer on weekends; and the **Armed Forces Reform Act**, introduced in 1996, provides that the State’s armed forces may purchase only domestic alcoholic beverages to serve in army mess halls.
7. As a result of all these policies, beer production in Newland has remained small. Moreover, the local industry consists primarily of microbreweries.
8. Another detrimental measure imposed by Respondent is a charge of N$0,5 per litre on alcoholic beverages that are, after importation, bottled in aluminium cans rather than glass bottles, for environmental reasons.
9. Continuing with the environmental protection acts, Respondent intends to lower the excise tax on beer produced by microbreweries to N$5,00 ppl, instead of the N$6,00 ppl for ordinary beer and N$15,00 ppl for specialty beer currently applied.
10. Given Respondent’s persistence on its protection of wine producers and the recent discriminatory State-sponsored measures which are largely detrimental to WTO’s primal aim of spurring free trade, CLAIMANT has decided to seek legal advice.

# ARGUMENTS ON THE MERITS

1. **NATIONAL TREATMENT AND LIKE PRODUCTS**
2. The State’s tax regime for alcoholic and non-alcoholic beverages establishes that alcoholic beverages are taxed by a VAT of 21% *ad valorem*, while soft drinks are subject to a VAT of 15% *ad valorem*. However, although non-alcoholic beer is a soft drink, it is taxed at a 21% *ad valorem* VAT, as if it were an alcoholic beverage.
3. First, the GATT, in its Article III, states, on paragraph 4, that:

*4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

1. Therefore, one must analyse the concept of “like products”. The Panel in US *Malt Beverages* held that ‘in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made so as to afford protection to domestic production [*when quoting GATT Art. III.1*]’.
2. Also, in the US *Auto Taxes* cases, the Panel decided likewise, quoting Article III:2 since this Article ‘could not be interpreted as prohibiting government policy options, based on products, that were **not** taken so as to afford protection to domestic production’
3. The *Alcoholic Beverages* dispute, between US and Japan, ascertains whether two products were like. In this case, the Appellate Body affirmed that the ‘broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures’, concluding that the beverages in analysis were like products.
4. In the dispute under scrutiny, it is questioned whether non-alcoholic beer is a soft drink, and should thus be taxed at a 15% VAT, or a like product to alcoholic beverages, ensuing a 21% VAT. Studies show that non-alcoholic beer is made by removing alcohol from the finished product, or making sure that alcohol is not formed during the brewing process. One of the most common methods is heating the beer to boil away the alcohol; another is to pass the beer through an alcohol filter.
5. Also, the UK Chief Medical Officer (CMO) affirms that non-alcoholic drinks reduce the risk of alcoholism and, consequently, overall health risks. The importance of this type of beverage, as well as its distinction with regular alcoholic beverages, is paramount.

1. Finally, the end consumer of non-alcoholic beverages is distinct from that of alcoholic beverages, as observed by the fact that children under the legal drinking age may drink the latter, but not the former.
2. Therefore, upon analysing the understanding of the Panels and the similarities between non-alcoholic beers and soft drinks, it is evident that the differentiated taxation imposed by the Respondent is a result of protectionism, enforced by means of all the above-mentioned regulations, enacted as of 1950s.
3. **NATIONAL TREATMENT AND RESELLERS OF FOREIGN BEVERAGES**
4. In the late 1950s, Respondent decided to limit beer imports to “a meagre 50,000 hectolitres per year” to protect its local winegrowers against foreign breweries. These quantitative restrictions were then lifted upon accession to the WTO, as Art. XII:1 of the Marrakesh Agreement Establishing the WTO binds prospective members to Multilateral Trade Agreements such as the GATT 1994, whose art. XI:1 prohibits bans “or restrictions other than duties, taxes or other charges”.
5. Notwithstanding this ostensible favouring of free trade, Respondent has since maintained or implemented an array of discriminatory measures. Around the time of its accession, it overhauled its tax regime, setting a 21% *ad valorem* VAT to alcoholic beverages whilst singling out imported alcoholic beverages for “more onerous VAT-related administrative requirements”. Claimant contends this is in breach of Art. III GATT – the national treatment standard.

*Art. III:2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to* ***internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products****. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\**” (Emphasis added).

1. Under the GATT, if Respondent is deemed to charge foreign goods “in excess of” what it charges like domestic products, it will have breached the national treatment standard. Intent on clarifying this provision, the Appellate Body noted in *Japan – Alcoholic Beverages II* that “**even the smallest amount of ‘excess’ is too much**” (emphasis added). Claimant contends the “more onerous” requirements qualify as an inadmissible excess.
2. In *Japan – Alcoholic Beverages I* the Panel detailed the appropriate standard of comparison: “in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable, internal tax but also of the taxation methods”. Therefore, even if Respondent applies the same nominal VAT percentage (21%) to foreign and domestic beverages, the additional burden and costs arising out of administrative requirements amount to a breach of national treatment.
3. Therefore, Respondent is not entitled to charge imported beverages more onerous VAT-related administrative requirements, as this constitutes an unwarranted and manifest excess in relation to domestic products.

**III. THE STATE’S EXTRA CHARGE FOR THE TYPE OF PACKING USED IN IMPORTED BEVERAGES**

1. Respondent imposed a charge of N$0,5 per litre on alcoholic beverages that are, after importation, bottled in aluminium cans rather than glass bottles, for allegedly environmental reasons. The only possible basis for this imposition would be GATT Art. XX, “g”, which establishes the General Exceptions to the agreement as noted below:

*Article XX*

*General Exceptions*

*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*

*(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*

1. The issue at hand is whether this additional imposition is (i) effective for the purposes of environmental protection and (ii) symmetrical in relation to all players in the market, both domestic and imported.
2. Regarding the first point, the measure cannot be upheld, as (a) the imposition is only applied to imported beverages, and not all beverages bottled in aluminium cans, which comprises a small share of the market and (b) aluminium cans are completely recyclable, such as glass containers.
3. According to the Aluminum Association[[1]](#footnote-2), aluminium is one of the most recycled materials on the market today. It can be consistently recycled directly back into itself in a true closed loop. Not only is aluminium completely recyclable, but it is also the most valuable recycled material, with additional potential profits of over USD 1 billion only in the USA. Therefore, since aluminium is completely recyclable and harmless to the environment, additional charges, in favour of other packing materials, are unreasonable and non-sustainable. Consequently, this measure does not achieve its purported environmental protection.
4. Also, the treatment is not symmetrical to all players, because only imported beverages are subject to the surcharge. If it were to be symmetrical, both domestic and imported beverages would fall under the scope of the charge.
5. This surcharge, therefore, imposes a clear competitive advantage to wine makers. It is clear that both aluminium and glass bottles can be recycled, with a clear advantage to aluminium recycling, and there is no obvious reason to surcharge aluminium cans, especially only the ones containing imported beverages.
6. The imposition is, hence, not in accordance with the GATT Art. XX exceptions noted above and should be abolished.

**IV.THE FAIR COMPETITION ACT**

1. Analysing the entirety of the State’s beverage market, one can easily conclude that RichBrew Inc. is subjected to highly unfair competition due to the RESPONDENT’s protectionism. Despite the State’s enactment of the Fair Competition Act of 1991 – that establishes a minimum price requirement for beer and wine, imported and domestic – the differentiated taxation and sanitary barriers that apply to Rich Brew’s products makes it impossible for the company to set prices as low as the State’s national products, and therefore they cannot enter the market successfully.
2. The State’s Custom Service charge of N$0.5 per litre of alcoholic beverages bottled in aluminium cans, for example, is clearly directed to discourage the entry of foreign beer on their national market. Other measures, such as the same taxation on non-alcoholic beer as that of alcoholic products also affects directly the importation of Richland’s beer, as previously exposed.
3. Furthermore, the State’s prohibition on the use of additives in lager, while not regulating the use of comparable products in specialty beers and wine elicits the true intent behind the regulations. The State cannot argue that this prohibition is related to any public health policies for its citizens, as the national – and highly consumed – wines are free to use these additives.
4. It is inadmissible for a country to privilege the national production and at the expense of free trade, and the barriers imposed by Respondent prevent any remotely fair competition in the beverage market. It is known that a recent market research proved that there is an increasingly high demand for beer in the State, and it’s also clear that the domestic specialty beer market cannot sate this demand. It would thus be sensible for one of the largest beer producers in the world to establish themselves in this market.
5. The protectionist stance, however, is disguised by a so-called ‘wine-drinking culture’. Cultural preferences cannot be scapegoats for the impediment of free trade, especially in light of the recent demand, and in light of the threat that this demand poses to the winegrowers lobby (NAW), that – as stated – has a considerable power in the country.
6. Thus, the State only adheres formally to the Free Competition Act, whilst deterring free trade at every possible moment.

**V.THE PROHIBITION OF BEER SALES**

1. In addition, municipal government agencies have prohibited the serving of beer in wine-producing regions, clearly favouring the national wine industry in detriment of importation of other beverages, such as beer, hindering or even impeding free trade in the region. This is in violation of GATT, Art. III, paragraph 1, which establishes:

*Art. III:1. The contracting parties recognize that* ***internal*** *taxes and other internal charges, and* ***laws****,* ***regulations and requirements affecting the internal sale, offering for sale,*** *purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.\**” (Emphasis added)

1. As Respondent has failed to concretely prove any sanitary, health, technical, or environmental reason for this prohibition, it may only be seen as an attempt from the Respondent to protect the State’s national industry, infringing the very core of GATT/WTO.

**VI.LOWERING TAX TO BEER PRODUCED BY MICROBREWERIES**

1. In addition to its so called environmental protection acts, Respondent also intends to lower the excise tax on beer produced by microbreweries to N$5,00 ppl, instead of the current N$6,00 ppl for ordinary beer and N$15,00 ppl for specialty beer.
2. In this sense, it is important to highlight that excise taxes levied on imported and domestic products are internal taxes subject to the national treatment provision of Art. III:2, first sentence, which reads:

"*The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products*".

1. Also, the application of a lower rate of federal excise tax on domestic beer from the State’s producers, a rate unavailable to imported beers, constitutes unfair and unfavourable treatment to the imported product. It is, therefore, inconsistent with the national treatment provision of Art. III:2, first sentence.
2. At this point, one could argue that the intent of the lower tax was to subsidize small producers and that reduction in the rate of the excise tax was a GATT-consistent means of providing such a subsidy. To this effect, paragraph 8(b) of Art. III establishes that:

"*The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article* ...".

1. However, the ordinary meaning of the text of Art. III:8(b), especially the use of the words "shall not prevent", suggests that Art. III does apply to subsidies, and that Art. III:8(b) only clarifies that the product-related rules in paragraphs 1 through 7 of Art. III "shall not prevent the payment of subsidies exclusively to domestic producers". The words "payment of subsidies" refer only to direct subsidies involving a payment, not to other subsidies such as tax credits or tax reductions.
2. The specific reference to "payments ... derived from the proceeds of internal taxes ... applied consistently with the provisions of this Article" relates to after-tax-collection payments and also suggests that tax credits and reduced tax rates inconsistent with Art. III:2, which neither involve a "payment" nor result in "proceeds of internal taxes applied consistently with ... this Article", are not covered by Art. III:8(b).
3. This textual interpretation is confirmed by the context, declared purpose and drafting history of Ar. III. Its context shows its close interrelationship with the fundamental GATT provisions in Arts. I and II, as well as the deliberate separation of the comprehensive national treatment requirements in Art. III from the subsidy rules in Art. XVI. The most-favoured-nation requirement in Art. I, as well as tariff bindings under Art. II, would become ineffective without the complementary prohibition in Art. III on the use of internal taxation and regulation as a discriminatory non-tariff trade barrier. The additional function of the national treatment requirements in Art. III to enhance non-discriminatory conditions of competition between imported and domestic products could likewise not be achieved.
4. As any fiscal burden imposed by discriminatory internal taxes on imported goods is likely to entail a trade-distorting advantage for import-competing domestic producers, the prohibition of discriminatory internal taxes in Art. III:2 would be ineffective if discriminatory internal taxes on imported products could be generally justified as subsidies for competing domestic producers in terms of Art. III:8(b).
5. Art. III:8(b) limits, therefore, the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.
6. In this sense, the drafting history of Art. III confirms the above interpretation. The Havana Reports[[2]](#footnote-3) recall in respect of the provision corresponding to Art. III:8(b):

"*This sub-paragraph was redrafted in order to make it clear that nothing in Article [III] could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub- Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article [III] would override the provisions [of Article XVI]*".

1. The drafters of Art. III explicitly rejected a proposal by Cuba at the Havana Conference to amend the Article to read:

"*The provisions of this Article shall not preclude the exemption of domestic products from internal taxes as a means of indirect subsidization in the cases covered under Article [XVI]*".[[3]](#footnote-4)

1. The same conclusion can be reached regarding the so called environmental protection goal: disguised as a general exception foreseen by Art. XX(b), the reduced tax rate only applicable to local microbreweries is a clear violation of the main section of the abovementioned Art. XX(b) as it provides a disguised restriction on international trade, since no foreign company can benefit from this lower rate.
2. Therefore, the expansive interpretation of Art. XX(b) is not supported by the text, context, declared purpose and drafting history of Art. XX and, if carried to its logical conclusion, such an interpretation would virtually eliminate the prohibition in Art. III:2 of discriminatory internal taxation by enabling contracting parties to exempt all domestic products from indirect taxes.

**VII.CONCLUSION**

1. The arguments herein presented have exposed how dramatically RESPONDENT's regulations are non-compliant with WTO’s primal aim of spurring free trade, regardless of the fact that the State is a signatory member of WTO.
2. The State’s wine producers are protected on the basis of regulatory antipathy towards the CLAIMANT's ambition of strengthening its export flows to the State, reflected in severe state-sponsored constraints that manipulate the relative competitiveness of active players in the country’s beverage market.
3. As exposed divulged, the GATT, in its Art. III, demands equally favorable conditions to like products in the same territory. Nonetheless, the first argument presented brings attention to the fact that non-alcoholic beer and soft drinks are subject to distinct taxation, in opposition to the presence of sufficient similarities supporting the classification of both types of drinks as like products. Given that no legally relevant argument was provided to support such differences, one must conclude that their applicability is driven by pure protectionism.
4. In addition to the like product’s taxation disparities, the RESPONDENT charges imported beverages more onerous VAT-related administrative requirements. Such practice is, once again, in evident breach of Art. III GATT (national treatment) and its prohibition of any excess in relation to domestic products.
5. Even the packaging material of the imported products was deemed by the RESPONDENT to be reasonably subject to discriminatory practices. The third detrimental initiative applied by the RESPONDENT takes effect on the material used in the packaging of the imported beverages, whereby aluminium cans are restrained in favor of glass containers. The imposition of an additional charge per liter bottled in aluminum is excessive for being exclusively applied on imported beverages. Furthermore, aluminum is proven to be just as environmentally harmless and recyclable as glass, thus invalidating any environmental reason supporting such discrimination.
6. The Claimant’s economic necessities and competitive conditions are severely hindered by the State’s selective regulatory constraints. Despite the existence of enacted of the Fair Competition Act of 1991 – that establishes a minimum price requirement to beer and wine, imported and domestic – the different taxation and sanitary barriers that applies to the products of Claimant makes it impossible for the company to set prices as low as the national equivalents in the State, and therefore they cannot successfully enter the market.
7. In addition to all market entry barriers, once the imported products are in the territory their consumption is narrowed by restrictions on commercialization during weekends in several regions. Such practice is evidently divergent from GATT, Art. III, which establishes that the sale of imported products should not be influenced by internal regulations.
8. The most explicit case of protectionism of domestic players by the Respondent lies on taxes applicable to microbreweries. Such proposition amounts to a clear breach of several of GATT’s principles, notably the taxation excess of imported products and the ineligibility of tax reductions as a form of acceptable state subsidy to producers.
9. In the light of the arguments herein presented, one is both legally and economically lead to conclude that competitive conditions faced by the Claimant under the State’s jurisdiction are severely hindered in favor of the local wine industry.
10. Therefore, it would be prudent for further legal action to be undertaken by the competent authorities as to compel the Respondent to reassess its regulatory practices towards the State’s domestic beverage market, under the WTO’s principles and rulings, on behalf of the global free trade.

1. http://www.aluminum.org/industries/production/recycling [↑](#footnote-ref-2)
2. Havana Reports, page 66. [↑](#footnote-ref-3)
3. E/CONF.2/C.3/6, page 17; E/CONF.2/C.3/A/W.32, page 2. [↑](#footnote-ref-4)