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MEMORANDUM FOR CLAIMANT

SHANGHAI UNIVERSITY OF POLITICAL SCIENCE AND LAW



BETWEEN

THE CHELSEA TEA COMPANY
(CLAIMANT)

AND

THE ALMOND TEA COMPANY
(RESPONDENT)

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STATEMENT OF JURISDICTION

1. To ensure an expeditious resolution of the dispute, the Parties have agreed in writing to submit this dispute to arbitration.
2. The Parties have also agreed to resolve their dispute in accordance with the Kuala Lumpur Regional Centre for Arbitration i-Arbitration Rules (“i-Arbitration Rules”) at Colombo, Sri Lanka.

QUESTIONS PRESENTED

- I. What is the applicable law that should be referred to in this dispute.

- II. Whether or not ATC has breached the Agreement by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia.

- III. Whether or not ATC's use of the word "CEYLON" in respect of its tea products is misleading; and

- IV. Whether or not ATC's use of the ATC's Mark amounts to trademark infringement and/ or passing off.

STATEMENT OF FACTS

The Parties To This Arbitral Proceeding

1. The Claimant, Chelsea Tea Company (CTC), the ‘supplier’ of CTC CEYLON, a company incorporated in Sri Lanka whose registered address is at Lot 14, Dawson Street, Colombo 00202, Sri Lanka.
2. The Respondents, Almond Tea Company (ATC), the ‘Distributor’ of CTC CEYLON, a company incorporated in Singapore whose registered address is at Suite 18-1, Katong Tower, 87 Ceylon Road, Singapore 429665.

Facts

1. The CTC and ATC entered into a distribution agreement on 20 October 2008. According to the Agreement, Claimant appoints Respondent as the exclusive distributor of CTC CEYLON in Malaysia.
2. The following clause appears in the Agreement:
“During the Term and for a period of 12 months after it the Distributor must not be concerned or interested, either directly or indirectly, in manufacture or distribution in the Territory of any goods that compete with the Products, affixed with the Trade Marks or any other arguably similar mark in the Territory.”
3. However, ATC has been growing and manufacturing tea in China, and distributing such tea products under the brand name “SAILOR’S CEYLON” in

Malaysia since November 2012, affixed with ATC's Mark onto the packing of SAILOR'S CEYLON teas.

4. CTC's profits of its sales fell by 30% in 2013. The sales suffered a further 15% drop in 2014. The 2015 figures, however, reported a slight increase of 8% from the previous year.
5. CTC then wrote to ATC immediately asking that ATC pay damages for breach of the Agreement. CTC also demanded that ATC should stop using the ATC's Mark on the package of their tea and to not use the word "Ceylon" to describe their tea.
6. ATC replied by denying that it has breached the Agreement and therefore they will not accede to CTC's demands. ATC contends that they have every right to use the word "Ceylon" on their tea products. They also are of the view that it is well within their legal rights to use the ATC's Mark on their tea packages.
7. As parties could not come to an agreement, CTC and ATC finally decided to settle the matter by arbitration in accordance to clause 22 of the Agreement.

SUMMARY OF PLEADINGS

- I. Malaysian law governs the procedural aspects of this arbitration and the arbitration agreement, because KLRCA i-Arbitration Rules had been chosen by both parties and the seat of arbitration is in Kuala Lumpur, Malaysia.
- II. The laws of Sri Lanka will govern the substantive aspects of this dispute as the closest connection test of the *lex originis*, and *lex loci delicti* indicate as such.
- III. Respondent has breached the Agreement, because the Clause 4.2 is reasonable and valid and during the Term and 12 months after it respondent's distribution of its own tea products compete with claimant and distributing competitive products affixed with the arguably similar mark in Malaysia. Most importantly, the revenue of claimant suffered a lot since respondent breached the Agreement to sell its own products.
- IV. Respondent uses of word "Ceylon" on its tea products is misleading because: "Ceylon Tea" is a famous brand around the world also as a geographical indication is protected in both Malaysia and Sri Lanka. However, Respondent used word "Ceylon" in respect of ATC's tea products is misleading the public also injured Claimant' goodwill and reputation.
- V. Respondent uses of the ATC's Mark amounts to trademark infringement in light of:

Respondent using the identical mark causes deception and confusion and

Respondent uses the identical mark is likely to deceive or cause confusion.

Respondent cause of action for passing off in light of: Respondent cause of action is misrepresentation giving rise to confusion, claimant's trademark related goodwill and reputation in tea industry and respondent's act damaged Claimant's goodwill and reputation.

PLEADINGS

I. IN THE DISPUTE, THE PROCEDURAL LAW SHOULD BE MALAYSIAN LAW AND THE SUBSTANTIVE LAW SHOULD BE SRI LANKAN LAW

1. International arbitration is conducted all over the world against very different legal and cultural backgrounds. In order to provide for a quick, practical and economical settlement of cross-border disputes, different laws probably will govern different aspects of an international arbitration.¹
2. Given that the procedural law and substantive law generally may be different, in this dispute, Malaysian law and Sri Lankan law will respectively govern procedural aspects and substantive merits.

A. Malaysian law should be the procedural law

Malaysian law should be the procedural law because both parties had been chosen KLRCA i-Arbitration Rules and Kuala Lumpur², Malaysia should be the seat of arbitration.

3. The procedural aspects of an arbitral proceeding is regulated by the institutional rules chosen by the parties and the law of the seat of arbitration.³

(a) KLRCA i-Arbitration Rules had been chosen by both parties

4. Referring the Arbitration clause in the problem, any dispute shall be settled by

¹ Mark Roe, *International arbitration: substantive, procedural and mandatory rules* (International Arbitration Guide, 2011), pp.52-53.

² Moot Problem, Clause 22.1, APPENDIX A, p.17.

³ C v. D [2007] EWCA Civ 1282 [2007] All ER 61, para. 17; Government of India v. Cairn Energy India Pty Ltd, [2012] 3 MLRA 1, pg. 3, para. 9(1).

arbitration in accordance with KLRCA i-Arbitration Rules (hereinafter “KLRCA rules”).⁴ Both parties had expressly decided KLRCA rules as their institutional rules.

(b) Kuala Lumpur, Malaysia should be the seat of arbitration

5. Since the KLRCA rules is the institutional rules in the arbitration, in accordance with rule 6, the parties may agree on the seat of arbitration. Failing such agreement, the seat of arbitration shall be Kuala Lumpur, Malaysia unless the arbitral tribunal determines, having regard to all circumstances of the case, that another seat is more appropriate.⁵
6. In regard to this rule, firstly, it suggests that Kuala Lumpur has the most possibility to be the seat arbitration in terms of the essence of the article. Secondly, other places may be the seat of arbitration if the tribunal determines it appropriate. However, Kuala Lumpur is the most appropriate seat of arbitration regarding all circumstances of the case.
7. In *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated*, it was held that where the parties have not designated a seat of arbitration, the arbitral panel must consider all significant factors in determining an appropriate seat of arbitration. The factors include that
 - (i) the proposed procedure*
 - (ii) the centrality of the dispute*
 - (iii) the subject matter in this dispute*

⁴ Id, [2].

⁵ KLRCA i-Arbitration Rules, (Rule 6).

*(iv) and the convenience of the parties*⁶

8. In the present case,

*(i)*As mentioned above, pursuant to rule 6, KLRCA rules, Kuala Lumpur is the proposed and most potential seat of arbitration.

*(ii)*The centrality of the dispute and the subject matter arise from the distribution agreement signed by both parties in Malaysia.

Conclusively, it is most appropriate to choose Kuala Lumpur, Malaysia as the seat of arbitration.

B. As Malaysia should be the seat of arbitration, the Malaysian law shall govern the procedures of the arbitration.

9. English law clearly favors the orthodox theory whereby the law of the seat is necessarily the procedural law governing the arbitration. In *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*, the Court held that the presumption in favor of the law of the “seat” was “irresistible” in the absence of an explicit choice of some other law.⁷

10. The seat of the arbitration is therefore significant, as, under most legal systems, it will determine the procedural law, which will apply to an international arbitration.⁸

⁶ *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated* [2001] 1 All ER (Comm) 514, para. 52.

⁷ *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334.

⁸ Yann Guermontprez, *HOW DO YOU DETERMINE THE PROCEDURAL LAW GOVERNING AN INTERNATIONAL ARBITRATION?* 31, May, 2006.

C. The substantive law applicable to the dispute should be Sri Lankan law.

11. The substantive law is the law governing the subject and merits of the dispute.

Under article 35, KLRCA rules, the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.⁹

The substantive law applicable to the dispute should be Sri Lankan law because:

In the arbitration, Sri Lankan law is the most appropriate law and the proper law indicates that Sri Lankan law should to be the applicable law to the merits

a) In the arbitration, Sri Lankan law is the most appropriate law

12. When determine which substantive law is appropriate, the closest connection test is generally applied. However, it does not mean this test can be used in any dispute resolution. As to the closest connection test, it may include different factors such as the place where the contract is made or the place where performance is to occur. However, the key to determine which applicable law is appropriate; it lies in the certain situation in the case.

13. In the present dispute, the crux lies in whether respondent has breached the agreement and whether respondent's use of the word 'CEYLON' and its mark amounts to misleading and trademark infringement or passing off. Accordingly, in the arbitration, claimant seeks relief as follows¹⁰:

(i) Payment of damages

⁹ KLRCA i-Arbitration rules, (Art 35).

¹⁰ Moot Problem, p5.

(ii) An order that parties can only refer to tea grown and manufactured entirely in Sri Lanka as 'Ceylon Tea', which means respondent cannot use the word 'CEYLON', as well as its logo

(iii) An order that respondent discontinue the sale of its products as 'Ceylon tea' and recall those products.

14. Basically, claimant does not have the ownership of the word 'Ceylon' or the famous lion logo. Reasons why claimant came up with the orders mentioned above is that Ceylon tea products play a vital role in the tea industry of Sri Lanka. Tea production is one of the main sources of foreign exchange for Sri Lanka.¹¹ So the result of arbitration is not only important to claimant but to the whole tea industry of Sri Lanka.

15. Furthermore, in the Rome Convention, article 4.2, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.¹²

16. After analyzing, the performance of the contract and the enforcement of the arbitration have a great impact on the Sri Lanka where the tea industry is the main source for the country's economy. Conclusively, Sri Lankan law is the

¹¹ Tea production in Sri Lanka, (available at: https://en.wikipedia.org/wiki/Tea_production_in_Sri_Lanka).

¹² CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS opened for signature in Rome on 19 June 1980, (Art 4.2).

appropriate to the merits of the dispute.

b) The proper law indicates that Sri Lankan law should to be the applicable law to the merits

17. The proper law of the contract is the main system of law applied to decide the validity of most aspects to the contract including its formation, validity, interpretation, and performance.
18. Section 30(4) of the MAA 2005 provides that where parties have failed to agree upon the applicable law, “the arbitral tribunal shall apply the law determined by the conflict of laws rules”. Although the arbitral tribunal shall apply the conflict of law rules, this tribunal is not expressly restricted to only apply the existing principles under the laws of Malaysia.¹³
19. In the present dispute, a bind insistence on the conflict rules of the *lex arbitri* will not enter a satisfactory situation for both parties. To this extent, the arbitration is not binding by the conflict of laws rules of Malaysia.
20. Alternatively, there is an appropriate conflict of laws rules should be applied in the arbitration.

(i) Lex originis

21. The doctrine of *lex originis* refers to the the law of the jurisdiction in which property originated. In the present dispute, it refers to the original production area of the Ceylon Tea, which is Sri Lanka. As mentioned above, Ceylon tea is a vital production for Sri Lanka and the basic crux of the dispute results from the

¹³ Simon Greenberg, *International Commercial Arbitration: An Asia-Pacific Perspective*, pg. 104, 3.34.

tea grown and manufactured area whether is Sri Lanka.

22. Given that if the tea production of respondent is grown in Sri Lanka, there may be not the dispute at all. In essence, the *lex originis* doctrine is crucial to the dispute resolution. In conclude, the substantive law to the merits should be Sri Lankan law.

II. ATC HAS BREACHED THE AGREEMENT BY DISTRIBUTING SAILOR'S CEYLON AFFIXED WITH THE ATC'S MARK IN MALAYSIA

23. Claimant claims that respondent has breached the agreement mainly based on the clause 4.2 of the agreement. To begin with, this clause is reasonably and valid. Furthermore, respondent's act amounts to breach of agreement in essence.

A. Clause 4.2 is reasonable and valid

24. Under common law, in the type of contracts of exclusive dealing where one party commits itself to take all supplies of a particular product from a single supplier, may be enforceable if reasonable. There are three main factors to consider:

(i) The geographical area covered

(ii) The length of time involved

(iii) And the scope of the activities covered¹⁴

In this dispute, clause 4.2 is reasonable thus valid mainly because: the length of time involved is reasonable; the geographical covered is reasonable and the restraint is necessary.

(i) The length of time involved is reasonable

25. In the case Nordenfelt¹⁵, Nordenfelt manufactured guns and had a global customer base. He dealt with the company MNGA, and the business contract contained a term that prohibited Nordenfelt doing a competing business

¹⁴ Routledge, "Contracts in Restraint of Trade", (Chapter 14.4).

¹⁵ Morse felt v. Maxim, Nordenfelt Guns and Ammunition Co [1894] AC 535.

anywhere in the world for 25 years. The court held that the prohibited term was reasonable given the global customer base and the price paid for the business. And also in the case of *Rogers v Parry*¹⁶, it was held that a promise by a joiner not to trade from his house for 21 years was enforceable against him since the time and place was certain. Furthermore, in the case of *Roussillon*¹⁷, Lord Justice Fry stated that a restraint unlimited in space need not be void, since the real question was whether it went further than necessary for the promisee's protection.

26. In the dispute at hand, the limitation actually is not to manufacture and distribute any other tea products in the territory of Malaysia during the term of contract and a period of 12 months. This restraint had a certain place and time which were far from the restraint mentioned in the case above.

(ii) The geographical covered is reasonable

27. Considering that respondent's main market is Southeast Asia, as a successful tea manufacturer, it has a consumer base in this area. So the restrictions above are reasonable thus valid.

(iii) The restraint is necessary

28. Furthermore, it was necessary to do so, not only because respondent's market was the Southeast Asian market, but also the aim of the distribution agreement was to help claimant enter and develop in Malaysia. The restraint can protect respondent's interest from respondent's act of doing a competing business.

¹⁶ *Rogers V Parry* (1613) 2 Bulstr. 136

¹⁷ *Roussillon v Roussillon* (1880) 14 Ch.D. 351

29. To sum up, clause 4.2 is reasonable thus valid, respondent shall perform his obligations under the Agreement.

B. Respondent's acts had violated the clause thus breaching the agreement.

Respondent's acts had violated the clause thus breaching the agreement in light of: During the Term and 12 months after it respondent's distribution of its own tea products compete with claimant and distributing competitive products affixed with the arguably similar mark in Malaysia. Most importantly, the revenue of claimant suffered a lot since respondent breached the Agreement to sell its own products.

30. As Clause 4.2 provided: "During the Term and for a period of 12 months after it the Distributor must not be concerned or interested, either directly or indirectly, in manufacture or distribution in the Territory of any goods that compete with the Products, affixed with the Trade Marks or any other arguably similar mark in the Territory¹⁸."

(a) During the Term and 12 months after it respondent's distribution of its own tea products compete with claimant

(i) Distributing goods during the Term in the Territory

31. Since November 2012, ATC has been distributing tea products under the brand name "SAILOR'S CEYLON" in Malaysia. As the Agreement entered into in

¹⁸ Moot Problem, APPENDIX A, p3.

2008, It's during the term of the Agreement. Moreover, pursuant to the definition of the "Territory" in the Agreement, "Territory" means "Malaysia". Therefore, it's clearly that respondent distributing tea products during the term of the Agreement, which breaches the agreement.

(ii) Distributing tea products that are compete with the claimant's products in Malaysia.

32. To begin with, both products' nature is same. Both "CTC CEYLON" and "SAILOR'S CEYLON" are tea products, most importantly, both of them are same kind of tea, black tea. Moreover, both products are distributed in the same geographical area, Malaysia. Both products share tea market in Malaysia and gain benefits from selling black tea products. As matter of facts, the proportion of market share of CTC's tea products (which were under ATC's distributorship) is believed to be equal to the market share of ATC's own products in 2009 - 2013. Also both products' recommended retail prices are very similar. In light of those factors mentioned above, respondent's products are compete with the claimant's products in Malaysia.

(b) Respondent distributing competitive products affixed with the arguably similar mark in Malaysia.

33. The logo and brand name of respondent's tea production is arguably similar to claimant's trademark which also breached the Agreement. And this session will be clarified in detail in relation to the ISSUE D later.

c) The revenue of claimant's Ceylon tea suffered a lot since respondent breached the Agreement begins to sell its own products.

34.

YEARS	REVENUE (COMPARED TO THE PREVIOUS YEAR)
2008	0%
...	...
2012	35%
2013	<u>30%</u>
2014	<u>15%</u>
2015	23%
...	...

From the aspects above, respondent has breached the agreement by distributing SAILOR'S CEYLON affixed with the ATC's mark in Malaysia. Respondent shall stop distributing SAILOR'S CEYLON and pay the damages.

III. ATC'S USE OF WORD 'CEYLON' IN RESPECT OF ITS TEA PRODUCTS IS MISLEADING

35. Respondent uses of word "Ceylon" on its tea products is misleading because:

The mislead conduct often happens on well known products, "Ceylon Tea" is a famous brand around the world also as a geographical indication is protected in both Malaysia and Sri Lanka. However, Respondent used word "Ceylon" in respect of ATC's tea products is misleading the public also injured Claimant's goodwill and reputation. Consequently, the Respondent shall stop the misleading action.

A. "Ceylon Tea" is a famous brand around the world

36. "Ceylon Tea" is a famous brand around the world because: "Ceylon Tea" business has a long history and sales in global, Sri Lanka also ranks as the 3rd biggest tea producing country

(a) "Ceylon Tea" business has a long history

37. Ceylon Tea first exported in early 1880s and become the biggest tea exporter in the world in 1965¹⁹. Ceylon Tea started business over one hundred years ago.

(b) "Ceylon Tea" in global sales

38. "Ceylon Tea" exporting into over a hundred countries around the world²⁰ and become a global brand.

¹⁹ Sri Lanka Tea Board Official Web Site, (available at: <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>).

(c) Sri Lanka ranks as the 3rd biggest tea producing country

39. By 2011 Ceylon tea production was at 33 million tons, which ranks first in the world tea export value. Today, Sri Lanka ranks as the 3rd biggest tea producing country globally, and one of the world's leading exporters with a share of around 19% of the global demand.²¹

B. “Ceylon tea” as a geographical indication is protected in both Malaysia and Sri Lanka

40. “Ceylon tea” as a geographical indication being protected in both Malaysia and Sri Lanka because: “Ceylon Tea” is a geographical indication, and, the geographical indication is protected under TRIPS Agreement

(a) “Ceylon Tea” is a geographical indication

41. “Ceylon Tea” is a geographical indication because: “Ceylon” is not only the former name of the country also the key word given tea products quality and reputation, most importantly, both Sri Lankan law and WIPO provided Ceylon tea as a geographical indication.

(i) “Ceylon” is the former name of the country

²⁰ Ibid.

²¹ Story of tea: Basilur Tea Sri Lanka, (available at: <http://www.basilurtea.com/basilur-tea/>).

42. Sri Lanka has a former name known as Ceylon, a name it kept for nearly a quarter-century after independence. Because it is so famous, abandoning it means to start over again. So the Tea from Sri Lanka would still be marketed as Ceylon.²² Therefore, the word “Ceylon” has secondary meaning Sri Lanka.

(ii) “Ceylon” is the key word given tea products quality and reputation

43. To begin with, the humidity, cool temperatures, and rainfall of the country's central highlands provide a climate that favors the production of high-quality tea. This makes Ceylon tea a distinctive taste and impeccable aromas²³. Furthermore, Ceylon Tea always conformed to strict quality standards laid down and administered by the Sri Lanka Tea Board. Consequently, the tea origin in Ceylon stands for unique characteristic and high quality and that's what makes it famous worldwide²⁴. Therefore, the tea origin from Ceylon related goodwill and reputation in the tea industry.

In short, the quality, reputation or other characteristic of the tea is essentially attributable to its origin place, Ceylon.

(iii) Both Sri Lankan law and WIPO provided Ceylon tea as a geographical indication

44. The Sri Lankan law and WIPO²⁵ specifically recognized “Ceylon tea” as a best known geographical indication and “Ceylon” as a geographical name.²⁶

²²Sri Lanka Tea Board Official Web Site, (available at: <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>).

²³ Id, [11].

²⁴ Id, [22].

²⁵ WIPO/GEO/BKK/13/INF/4

²⁶ The Intellectual Property Act, No. 36 of 2003, (Art. 191).

(b) The geographical indication being protected under TRIPS Agreement

45. Both Malaysia and Sri Lanka are the contracting parties of TRIPS Agreement. Under the TRIPS Agreement, one of the member country's geographical indications should be protected in all the member countries²⁷.

To sum up, "Ceylon Tea" as a geographical indication shall be protected in both Malaysia and Sri Lanka.

C. Respondent used word "Ceylon" in respect of ATC's tea products is misleading.

46. Respondent used word "Ceylon" in respect of ATC's tea products is misleading because: "SAILOR'S CEYLON" is not satisfy the legal means of Ceylon Tea but also uses the word "Ceylon" to imply a connection of "Ceylon Tea". Consequently, Respondent's act is likely to injure claimant's goodwill and reputation.

(a) "SAILOR'S CEYLON" is not satisfy the legal means of Ceylon Tea

47. As the TRIPS Agreement provided: "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical

²⁷ TRIPS Agreement (Art. 2. 3).

area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good²⁸;

As the SLTB provided the legal definition of “Ceylon Tea”, only the tea be grown and manufactured entirely in Sri Lanka also conformed to strict quality standards can be described as “Ceylon Tea”²⁹. However, “SAILOR’S CEYLON” be grown and manufactured entirely in China³⁰. It’s not satisfy the legal means of “Ceylon tea”.

(b) Respondent uses the word “Ceylon” misleadingly

48. Respondent uses the word “Ceylon” misleadingly because: Respondent imply a connection with “Ceylon Tea” that will mislead the public both products are pure Ceylon Tea have high quality and originating from Sri Lanka.

(i) Respondent imply a connection between both products

⌚ Use word “CEYLON” on tea products

49. Even if respondent didn’t use “Ceylon Tea” directly, however, the word “Ceylon” is the key word given tea products quality and reputation. Furthermore, respondent uses the word “Ceylon” on its tea products. Even if its products literally true as to the territory and region in which the goods originate, the uses of “Ceylon” on its tea products will mislead and imply the false origin also breaches the TRIPS Agreement³¹.

²⁸ TRIPS Agreement (Art. 22. 2)

²⁹ Id, [22].

³⁰ Moot Problem, p 4.

³¹ TRIPS Agreement (Art. 22. 4).

② Use the similar trade name

50. The trade name “CTC CEYLON” and “SAILOR’S CEYLON” is similar, seems like a series of products. So it’s easier to be misled.

③ Both products distributing by respondent

51. Respondent as the exclusive distributor in Malaysia, which means both products coming from same distribution channels also is using the same marketing methods by respondent³². It will increase the possibility of misleading.

(ii) Respondent use the word “Ceylon” mislead the public and consumers

52. Respondent uses the word “Ceylon” on its tea products is likely to mislead the consumers both products are originating in Sri Lanka. Most importantly, Ceylon tea prices highest in the world, 32% higher than the international average price.³³ Respondent use the word “Ceylon” on its tea products is likely to mislead the consumers both products are high valued Ceylon tea with high quality.

*(c) **Respondent’s act is likely to injure claimant’s goodwill and reputation***

53. Respondent’s act is likely to injure claimant’s goodwill and reputation because: Respondent makes use of claimant’s reputation and causes mislead is likely to injure and dilution claimant’s goodwill and reputation, also,even if there is no actual mislead occurred, respondent’s act is unlawful.

(i) Respondent makes use of claimant’s reputation

³² Further Clarifications, Question 25.

³³ Id, [22].

54. Respondent as claimant's exclusive distributor for five years³⁴ has fully knowledge of Claimant's products and do not use "Ceylon Tea" directly to describe their products but implying the connection with claimant's pure Ceylon tea. Respondent takes the unfair advantages of claimant's goodwill and reputation to sell its own products.

(ii) Respondent cause mislead is likely to injure and dilute claimant's goodwill and reputation

55. Ceylon Tea always known as the high quality and a distinctive taste, however, the consumers may mislead by the word "Ceylon" and think "SAILOR'S CEYLON" as Ceylon tea. It may dilute the unique characteristic and flavor of Ceylon tea, also will change the general impression about the high quality pure Ceylon tea, especially the consumers who are not familiar with Ceylon Tea.

(iii) Even if there is no actual mislead occurred, respondent's act is unlawful.

56. It is not necessary for misleading to have actually occurred the likely of misleading can be presumed.³⁵

D. The Respondent shall stop the misleading action

57. Because respondent's act causes misleading and takes unfair advantages of Claimant's goodwill and reputation to sale its products. In order to protect the claimant's right and interests. Claimant ask respondent to:

³⁴ Moot Problem, APPENDIX A, p 1.

³⁵ The Intellectual Property Act, No. 36 of 2003, (Art. 121, 4).

(a) Only refer to tea grown and manufactured entirely in Sri Lanka as “Ceylon Tea”

(b) Stop using the name “SAILOR’S CEYLON” or other words contains “CEYLON”.

(c) Stop sale of its products described as “Ceylon Tea” and to recall all such products from the market

Respondent should recall all “SAILOR’S CEYLON” tea products under the TRIPS Agreement³⁶.

³⁶ TRIPS Agreement (Art. 46).

IV. ATC'S USE OF THE ATC'S MARK AMOUNTS TO TRADEMARK INFRINGEMENT AND PASSING OFF

58. ATC's use of ATC's Mark amounts to trademark infringement and passing off because: Respondent using the identical mark cause deception and confusion constituted trademark infringement, and, Respondent's act constituted passing off, Consequently, respondent must stop the infringement act and pay the damages.

A. Respondent using the identical mark causes deception and confusion, which constituted trademark infringement.

59. Under the trademark act, "The trademark shall be deem to be infringed by any person who, not being the proprietor of the trade mark or a registered user using a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion."³⁷

60. Therefore, Respondent using the identical mark causes deception and confusion constituted trademark infringement in light that: Respondent's mark is identical with claimant's trademark, and, respondent uses the identical mark is likely to deceive or cause confusion.

(a) Respondent's mark is identical with claimant's trademark

³⁷ Intellectual property Act, No. 36 of 2003 (Art. 5. 1).

61. Respondent's mark is identical with claimant's trademark because: The consumers usually have an imperfect recollection of both marks and both marks' dominant feature is Lion.

(i) Consumers usually has an imperfect recollection³⁸ of both marks

62. Both marks only take the 4%'s space on the packaging³⁹, because both marks are so small, so it's more difficult to distinguish it and it is easier to be confused.

63. Moreover, the average consumers normally perceive a mark as a whole and do not proceed to analyze its various details.⁴⁰ Only rarely consumers have the chance to make a direct comparison between the different marks.⁴¹ So analyzed as a whole they looks identical. Most importantly,

64. Tea is not a luxury; the consumer won't raise the high level of attention to distinguish it. Account should be taken of the fact that consumer place his trust in the imperfect picture of them that he has kept in his mind.⁴² Consumers usually remain an imperfect recollection that both marks are same.

(ii) Both marks' dominant feature is Lion

65. The consumers usually remain an imperfect recollection of both marks. So the dominant feature plays an important role in determining the likelihood of confusion⁴³, especially when both marks are so small. As the pictures applied,

³⁸ FISON'S Plc v NORTON HEALTHCARE LTD, [1994] FSR 745 [UK]

³⁹ Further Clarifications, Question 21.

⁴⁰ SABEL BV v PUMA AG, RUDOLF DASSLER, ECJ, 11 November 1997, C-251/95, ECR 1997, I-6191.

⁴¹ LLOYD SCHUFABRIK MEYER & CO GmbH v KLIJSEN HANDEL BV, ECJ, 22 June 1999, C-342/97, ECR 1999, I-3819.

⁴² Ibid.

⁴³ THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A CASE BOOK (WIPO, 3rd Edition-2012), p 112.

both marks' dominant feature is Lion, also in same color. So it has a great possibility to cause confusion.

(b) Respondent use the identical mark is likely to deceive or cause confusion

66. Respondent use the identical mark is likely to deceive or cause confusion because: The identical mark is likely to deceive and cause confusion. Most importantly, even if there is no actual confusion, the likelihood of confusion should be presumed.

(i) The identical mark is likely to deceive

67. Deception means if the public are induced to buy by mistaking the insignia of B for that which they know to be that of A⁴⁴. Since the main function of a trademark is to distinguish or identify a product or service in the market.⁴⁵ Respondent use the identical mark is likely to lead consumers to buy less respondent's products by mistake and think those are claimant's products which constituted deception.

(ii) The identical mark is likely to cause confusion

68. Confusion means causing bewilderment, doubt or uncertainty.⁴⁶ When consumers faced with two identical marks, especially the consumers who are not familiar with the every details of claimant's trademark, they are easy to be

⁴⁴ PHONES4U v PHONE4U.CO.UK, [2006] EWCA Civ 244 [UK].

⁴⁵ THE COURT OF LAW OF THE ANDINE COMMUNITY, Case No 194-IP-2006 .

⁴⁶ Cadila Health Care Ltd Cadila Pharmaceuticals Ltd AIR 2001 SC 1952 [India]; Boswell-Wilkie Circus v Brian Boswell Circus, 1984 (1) SA 734 (N) [South Africa].

confused, feeling uncertainty and feeling hard to distinguish it. So it's likely to buy products with mistake.⁴⁷

*(iii) Even if there is no actual confusion, the likelihood of confusion should be presumed*⁴⁸

69. It is not necessary for confusion to have actually occurred, but likelihood of confusion has a detrimental effect comparable to actual confusion.”⁴⁹

To sum up, Respondent using the identical mark cause deception and confusion constituted trademark infringement.

B. Respondent cause of action for passing off

70. The cases make it possible to identify the elements which must be present in order to create a valid cause of action for passing off⁵⁰:

- (i) a misrepresentation*
- (ii) to prospective customers of his or ultimate consumers of goods supplied by him,*
- (iii) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence)*

⁴⁷TRIPS Agreement (Art. 16. 1) .

⁴⁸ Intellectual property Act, No. 36 of 2003 (Art.160. 3, a).

⁴⁹ “MODEL PROVISIONS ON PROTECTION AGAINST UNFAIR COMPETITION presented by the International Bureau of WIPO, (Notes on Article 2, 2.02)

Also Criminal Resource Manual 1715. www.usdoj.gov.

⁵⁰ Scotland: William Grant and Sons Ltd v Glen Catrine Bonded Warehouse Ltd [1999] ScotCS 58; Australia: Fletcher Challenge Ltd v Fletcher Challenge (Pty) Ltd [1982] FSR 1; Canada: Kirkbi Ag v Ritvik Holdings Inc 2005 SCC 65.

71. Therefore, Respondent cause of action for passing off in light of: Respondent cause of action is misrepresentation giving rise to confusion, claimant's trademark related goodwill and reputation in tea industry and respondent's act damaged Claimant's goodwill and reputation.

(a) Respondent cause of action is misrepresentation giving rise to confusion

72. Broadly stated, the factors to consider in determining misrepresentation are⁵¹:

- (i) The nature of the marks i.e. whether the marks are word marks or figure marks.*
- (ii) The degree of [resemblance] between the marks.*
- (iii) The nature of the goods in respect of which they are used as trademarks.*
- (iv) The similarity in the nature, character and performance of the goods of the rival traders.*
- (v) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.*

73. Therefore, Respondent cause of action is misrepresentation giving rise to confusion in light of: Respondent make a misrepresentation; likelihood of association cause by Respondent's misrepresentation and respondent rising confusion and deception intentional.

(i) Respondent make a misrepresentation

⁵¹ CADILA HEALTH CARE v CADILA PHARMACEUTICALS AIR 2001 SC 1952 [India].

① *Both marks are figure marks and both marks are identical*

74. As A. (a) mentioned before.

② *The same kind of products or serves*

75. Both parties sells same kind products, tea.

③ *The same products' markets and using the trademarks at the same time*

76. Respondent distributing both products in the Malaysia at the same time⁵².

(ii) *Likelihood of association cause by Respondent's misrepresentation*

77. Likelihood of confusion may include the likelihood of association⁵³.

① *The similar marketing methods and channels of distribution*

78. Respondent is seemed as the exclusive distributor in Malaysia, which means both products coming from same distribution channels also using the same marketing methods⁵⁴.

② *The similar company name, trade name and trademark*

79. The Company name, CTC and ATC; the trade name, CTC Ceylon, sailor's Ceylon as well as the identical mark seem like a series of marks and products. This will cause customers to think the respondent's business was connected to claimant's high quality products and there was accordingly a high probability that this would lead to false recognition and confusion⁵⁵.

80. Respondent used the identical trademark and trade name imply a connection⁵⁶

⁵² Id, [31].

⁵³ THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A CASE BOOK (WIPO, 3Rd Edition-2012), p 108.

⁵⁴ Id, [33].

⁵⁵ Osaka District Court, Oct. 15, 1993.

⁵⁶ Union v Union Soleure (1984) BIE 137.

between the claimant's products and respondent's products which violates trademark's rights.⁵⁷

(iii) Respondent rising confusion and deception intentionally

① *Use the identical mark, brand name only after become the exclusive distributor*

81. Respondent has never use of "SAILOR'S CEYLON" and the marks before 2008⁵⁸, they created the new mark and new brand name just happened after become the exclusive distributor in Malaysia.

② *Only use the identical mark, brand name in Malaysia*

82. Respondent has not used the identical mark on any of its other products in Malaysia⁵⁹, only use it on "SAILOR'S CEYLON". Moreover, Respondent's products marketed in Britain, Germany and Southeast Asia⁶⁰, however, during respondent as the exclusive distributor in Malaysia, respondent only use the identical mark, brand name in Malaysia⁶¹.

Respondent intentionally created the overlapping markets and made use of it to take advantages.

③ *Only use the identical mark, brand name on the same kind of tea as claimant*

83. Respondent also selling green tea and white tea in Malaysia under different brand names⁶² but they only use the identical mark, brand name on black tea

⁵⁷ Intellectual property Act, No. 36 of 2003 (Art. 7. 2, c).

⁵⁸ Further Clarifications, Question 5.

⁵⁹ Clarifications, Question 3.

⁶⁰ Further Clarifications, Question13.

⁶¹ Id, [58].

⁶² Further Clarifications, Question16.

products affixed with the identical mark. Claimant's tea products are black tea, too.

④ *It is not necessary for Claimant to prove respondent's notion*

84. Deception is the gist of the tort of passing off, but it is not necessary for a plaintiff to establish that the defendant consciously intended to deceive the public⁶³. So whether respondent intend to passing off or not, the infringement can be presumed.

(b) Claimant's trademark related goodwill and reputation in tea industry

85. Claimant's trademark related goodwill and reputation in tea industry because: The lion logo as a well known certification trademark⁶⁴ to distinguish the tea products certified by specific origin, mode of manufacture and qualify also convey the Ceylon tea's goodwill and reputation.

(i) The lion logo is well known

86. The lion logo is globally trademarked and is a registered trademark in over a hundred countries around the world.⁶⁵

(ii) The lion logo as a Certification trademark to distinguish the tea products certified by specific origin, mode of manufacture and qualify

87. To begin with, the lion logo on the package of tea is a guarantee for 100% pure Ceylon tea grown and manufactured entirely in Sri Lanka⁶⁶. Furthermore, the

⁶³ HARRODS LTD v HARRODIAN SCHOOL LTD , [1996] RPC 697 (CA).

⁶⁴ Sri Lanka Trade Marks Acts, No. SO of 1964 (Art. 38).

⁶⁵ Sri Lanka Tea Board official website, (available at: <http://www.pureceylontea.com/index.php/features/lion-logo>).

⁶⁶ Id, [22].

‘GMP’ certification (Good Manufacturing Practices⁶⁷) is the secret of achieving this high standard on the measurement of quality assurance for ‘Ceylon tea’ produced through good manufacturing practices. The famous lion logo stands for pure Ceylon tea in high quality standards. And to ensure what consumers buy is Ceylon tea, the only way is looking for the lion logo. The lion logo guaranteed the highest standards quality of Ceylon tea and is famous in the worldwide also convey the Ceylon tea’s goodwill and reputation around the world.

(c) Respondent’s act damaged Claimant’s goodwill and reputation

88. Respondent’s act damaged Claimant’s goodwill and reputation because: Respondent takes unfair advantages of claimant’s goodwill and reputation and respondent cause the likelihood of confusion is likely to injure the goodwill and reputation of claimant’s trademark.

(i) Respondent takes unfair advantages of claimant’s goodwill and reputation

① *Respondent make use of claimant’s reputation*

89. Because claimant’s products are high valued pure Ceylon Tea related goodwill. Respondent cause confusion to takes unfair advantages of claimant’s goodwill and reputation to sell its products to gain benefits.

⁶⁷ GMP’ is a international standards on Good Manufacturing Practices (GMP) for Processing of Black Tea, Good Hygienic Practices (GHP) for storage, Blending, Packing and Transport of Tea, HACCP and food safety standards against the standard auditing protocol.
<http://www.pureceylontea.com/index.php/2014-02-26-10-02-57/the-sri-lanka-tea-board/quality-assurance-certification>).

② Respondent make use of slight price gap to gain benefits

90. Respondent's products are only RM1 - RM2 lower than that of claimant⁶⁸.

Under this circumstance that the consumers are confused and may think both products are in same quality, than they would tend to choose respondent's lower price products.

(ii) Respondent cause the likelihood of confusion is likely to injure the goodwill and reputation of claimant's trademark.

① Respondent damages and dilutes claimant's goodwill and reputation.

91. As Issue III, C. c (i) mentioned before. The confusion act is injured claimant's goodwill and reputation⁶⁹.

② Respondent caused an adverse impact on claimant's profits.

92. Sri Lanka tea industry had a remarkable year in 2013, with bumper production, highest average auction prices.⁷⁰ However, claimant's sales profits fell by 30% in 2013 and suffered a further 15% drop in 2014⁷¹. These data shows respondent not only takes advantages of claimant's goodwill and reputation to gain benefits but also causes an adverse impact on claimant's profits.

③ Even if there is no actual loss, respondent's act is unlawful.

93. It's not necessarily to prove that one person will be injured and the other will

⁶⁸ Further Clarifications, Question17.

⁶⁹ Intellectual property Act, No. 36 of 2003 (Art. 7. 2, e).

⁷⁰ Overview of Sri Lankan Tea Industry in 2013, (<http://www.pureceylontea.com/index.php/tea-market-updates/download/6-tea-market-update/47-fourth-quarter-2013>).

⁷¹ Clarifications, Question10.

gain illicit benefit, but that there will be confusion in the mind of the public⁷².

To sum up, respondent's act constituted passing off.

C. The Respondent should stop the infringement act and pay the damages

(a) Respondent should stop the infringement act

94. Respondent's act constituted trademark infringement, respondent should stop using ATC's logo and to recall all the products from the market.

(b) The respondent should pay the damages to be determined by the profits of

ATC made by the sale of SAILOR'S CEYLON in Malaysia

95. The respondent should pay the damages under the TRIPS Agreement⁷³.

⁷² THE PIANOTIST COMPANY LTD (1906) 23 RPC 774 [UK], judgment, "It's not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods".

⁷³ TRIPS Agreement (Art. 45. 2).

PRAYER FOR RELIEF

On the basis of the aforementioned submissions, the Claimant requests this arbitral tribunal to make the following orders:

- I. The laws of Malaysia govern the procedures of this arbitration.
- II. The applicable laws to the substantive matters of the dispute are the laws of Sri Lanka.
- III. Respondent has breached the Agreement by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia.
- IV. Respondent uses of the word "CEYLON" in respect of its tea products is misleading.
- V. Respondent using of the ATC's Mark amounts to trademark is infringement and passing off.
- VI. Respondent should pay the damages, and the payment of damages to be determined by the profits of ATC made by the sale of SAILOR'S CEYLON in Malaysia.
- VII. An order that parties can only refer to tea grown and manufactured entirely in Sri Lanka as 'Ceylon Tea';
- VIII. An order directing ATC to stop using the name 'SAILOR'S CEYLON', the ATC's Logo, or any other name or mark containing the word 'CEYLON' or a lion device if its tea does not originate from Sri Lanka; and

IX. An order directing ATC to discontinue the sale of its products described as ‘Ceylon tea’ and to recall all such products from the markets.

Respectfully submitted,

Counsel for the Claimant.