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**FIFTH ANNUAL**  
**INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION**  
**MOOTING COMPETITION**

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**MEMORANDUM FOR**  
**RESPONDENT**

**CLAIMANT**

**RESPONDENT**

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Conglomerated Nanyu Tobacco, Ltd.

Real Quik Convenience Stores Ltd.

142 Longjiang Drive, Nanyu City

42 Abrams Drive, Solanga

Nanyu

Gondwana

**TEAM 509R**

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## TABLE OF DEFINITIONS

Agreement	Distribution Agreement signed on 14 December 2010 between the Claimant and the Respondent
Amicus Curiae	Proposed amicus curiae submitted by the Government on 25 February 2014
Award	Potential award rendered in favour of the Claimant
Bill 275	The “Clean our Air” Bill 275/2011
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Conglomerated Nanyu Tobacco Ltd., a company incorporated under the laws of Nanyu
Dispute	Dispute between the Parties as set out Application for Arbitration dated 12 January 2014, Answer and Statement of Defence dated 12 February 2014 and narrowed by procedural Order No.1 dated 27 February 2014
Government	Gondwandan government
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings effective as of 10 April 2006

Merchandise	Branded merchandise to be provided by the Claimant to the Respondent as described in Clause 2 of the Agreement
Moot Problem	The Fifth International Alternative Dispute Resolution Mooting Competition Moot Problem 2014
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Parties	Claimant and Respondent collectively
Respondent	Real Quik Convenience Stores Ltd., a company incorporated under the laws of Gondwana
Tobacco Products	Tobacco products to be provided by the Claimant to the Respondent as described in Clause 1 of the Agreement
USD	United States dollars

## TABLE OF AUTHORITIES

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CISG	CISG, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3	[22], [24], [26], [30], [32]
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings effective as of 10 April 2006	[18]
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de Lotbinère McDougall/Santens	Andrew de Lotbinère McDougall and Ank Santens, ‘ICSID Tribunals Apply New Rules on Amicus Curiae’ (2007) 22 <i>Mealey’s International Arbitration Report</i>	[13]
Figueres	Dyalá Jiménez Figueres, ‘Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary’ (2003) 14(1) <i>ICC Court Bulletin</i> 71	[5]
Fouchard/Gaillard/ Goldman	Emmanuel Gaillard and John Savage (eds), <i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> (Kluwer Law International, 1999)	[37]
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Redfern/Hunter	Nigel Blackaby and Constantine Partasides, <i>Redfern and Hunter on International Arbitration</i> (OUP, 5 <sup>th</sup> edition, 2009)	[37]
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<b>Hong Kong</b>		
<i>Guangdong v Conagra</i>	<i>Guangdong Agric Co v Conagra International (Far East) Ltd</i> [1992] HKCFI 247	[7]
<i>Hyundai v Vigour</i>	<i>Hyundai Engineering and Construction Company Ltd v Vigour Ltd</i> [2004] HKCFI 205	[3]
<i>Tai Hing v Glencore</i>	<i>Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV</i> [1996] 1 HKC 363	[7]
<b>Hungary</b>		
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<i>Suez v Argentina</i>	<i>Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v Argentine Republic</i> (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010)	[13]
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<i>Jack Kent v Saatchi</i>	<i>Jack Kent Cooke Inc v Saatchi &amp; Saatchi North</i> <i>America</i> , 222 AD 2d 334 (NY App, 1995)	[11]
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## **SUMMARY OF SUBMISSIONS**

The Respondent makes four submissions.

- I.** The Tribunal does not have jurisdiction to hear the Dispute.
- II.** The Tribunal should admit the Amicus Curiae.
- III.** The Respondent's obligations under the Agreement were vitiated.
- IV.** There is a risk that the Award will not be enforced.

## **I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE**

1. The Tribunal does not have jurisdiction to hear the Dispute because: (A) the pre-conditions to arbitration have not been fulfilled; and, (B) the failure to fulfil the pre-conditions bars the Tribunal's jurisdiction.

### **A. The Tribunal does not have jurisdiction to hear the Dispute because the pre-conditions to arbitration have not been fulfilled**

2. The Tribunal does not have jurisdiction to hear the Dispute because: (a) Clause 65 is binding; and, (b) the pre-conditions in Clause 65 were not satisfied.

#### *(a) Clause 65 is binding*

3. An arbitral pre-condition will be binding when it is detailed, precise, and sufficiently certain, or has clearly defined and satisfiable requirements.<sup>1</sup> In this regard, clauses that limit the duration of negotiations to a specified time period are more likely to be upheld.<sup>2</sup> In one case, the requirement that negotiations occur for 30 days before arbitration could be commenced was held to be sufficiently certain to be enforceable.<sup>3</sup>
4. Clause 65 specifies the exact period of time that the Parties must allocate to allow for consultation and negotiation before submitting the Dispute to arbitration.<sup>4</sup> The specific period of time allows the Tribunal to objectively determine with sufficient certainty whether the pre-arbitral requirements have been satisfied. Clause 65 is sufficiently certain.

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<sup>1</sup> *Hyundai v Vigour*.

<sup>2</sup> *Fluor v Solutia*; Judgment of 6 June 2007.

<sup>3</sup> *Fluor v Solutia*.

<sup>4</sup> Moot Problem, 2.

5. The use of the word “shall” imposes a mandatory obligation.<sup>5</sup> Clause 65 states that “the Parties shall initially seek a resolution through consultation and negotiation”.<sup>6</sup> The Parties’ choice to use the word “*shall*” imposes a mandatory obligation. Therefore, Clause 65 is binding on the Parties.

*(b) The pre-conditions in Clause 65 were not satisfied*

6. Clause 65 of the Agreement was not satisfied because the Claimant did not: (i) seek resolution of the Dispute through consultation and negotiation; or, (ii) wait 12 months before submitting its claim to arbitration.<sup>7</sup>

*(i) The Claimant did not seek resolution of the Dispute through consultation and negotiation*

7. A dispute exists if one party makes a claim against another party and that other party does not admit the claim or does not pay.<sup>8</sup>
8. The Dispute arose on 1 June 2013 when the Claimant sent the Respondent the notice to pay the sum of USD \$75,000,000 (**Disputed Sum**).<sup>9</sup> The Respondent did not admit the claim or pay the Disputed Sum.
9. The Parties met on 11 April 2013 to re-negotiate the terms of the Agreement.<sup>10</sup> However, the Dispute had not arisen when the Parties met on 11 April 2013 because the notification to pay the Disputed Sum was sent on 1 June 2013. Therefore, the date that

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<sup>5</sup> Born, 928; Figueres, 72.

<sup>6</sup> Moot Problem, 2.

<sup>7</sup> Moot Problem, 2.

<sup>8</sup> *Tai Hing v Glencore; Tai and Halki v Sopex Oils; Guangdong v Conagra*, 26; Born, 1347.

<sup>9</sup> Moot Problem, 5-6.

<sup>10</sup> Moot Problem, 19.

the Dispute arose was 1 June 2013. The Claimant has not sought to resolve the Dispute through consultation or negotiation.

*(ii) The Claimant did not wait 12 months before submitting its claim to arbitration*

10. The Dispute arose on 1 June 2013. The Claimant filed the Application for Arbitration on 12 January 2014, and acknowledged that it had done so prematurely.<sup>11</sup> The Claimant did not allow 12 months to pass from the date on which the Dispute arose and therefore the pre-conditions to arbitration were not satisfied.

**B. The failure to fulfill the pre-conditions bars the Tribunal’s jurisdiction**

11. Parties to an arbitration agreement are not obligated to participate in arbitration until the conditions precedent have been satisfied.<sup>12</sup> Provisions with specific time periods and concrete pre-arbitration steps are categorised as conditions precedent rather than contractual obligations.<sup>13</sup> In one case, the “clearly stated time limit” of 270 days was held to be a condition precedent.<sup>14</sup> Further, pre-arbitration procedures are held to be strictly binding upon parties and govern their conduct before applying for arbitration.<sup>15</sup>
12. The 12 month time period is a condition precedent because it is clearly stated in Clause 65 of the Agreement.<sup>16</sup> The 12 month time period had not elapsed when the

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<sup>11</sup> Moot Problem, 1, 6.

<sup>12</sup> *International Research v Lufthansa; HIM Portland v DeVito*, 44; *ICC Case No 9812*, 73; Born, 929.

<sup>13</sup> *Silverstein Properties v Paine*, 725.

<sup>14</sup> *Jack Kent v Saatchi; Silverstein Properties v Paine*.

<sup>15</sup> *ICC Case No 6276*, 76.

<sup>16</sup> Moot Problem, 2.

Claimant applied for arbitration on 12 January 2014.<sup>17</sup> As such, the arbitration proceedings should be foreclosed and prevented from continuing.

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<sup>17</sup> Moot Problem, 1.

## II. THE TRIBUNAL SHOULD ADMIT THE AMICUS CURIAE

13. The Tribunal should admit the Amicus Curiae because: (A) amici curiae requests may be accepted despite unilateral objection; (B) it concerns public welfare; and, (C) it would bring a new factual perspective to the arbitration proceedings.

### A. Amici curiae requests may be accepted despite unilateral objection

14. Parties to arbitration do not have the power to unilaterally veto the application by a third-party for amicus curiae status.<sup>18</sup> In *Biwater v Tanzania*,<sup>19</sup> and *Suez v Argentina*,<sup>20</sup> unilateral objections by parties to the arbitration were not sufficient to prevent requests to file amici curiae submissions.
15. As such, the Claimant's objection, in its own right, cannot prevent the Amicus Curiae.

### B. The Amicus Curiae concerns public welfare

16. Amici curiae are often admitted where the arbitral dispute concerns government regulations aimed at the protection of public welfare.<sup>21</sup> In *Methanex Corp v United States*, a third-party was given amicus curiae status because the dispute concerned a governmental ban of a gasoline additive causing groundwater contamination that posed significant public health risks.<sup>22</sup>
17. Amicus curiae status should be granted to public bodies if a dispute concerns an agreement which violates that public body's laws.<sup>23</sup> In *AES v Hungary* and *Electrabel v Hungary*, the Commission of the European Union sought permission to file written

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<sup>18</sup> de Lotbinère McDougall/Santens, 9.

<sup>19</sup> *Biwater v Tanzania*.

<sup>20</sup> *Suez v Argentina*.

<sup>21</sup> Levine; Tienhaara.

<sup>22</sup> *Methanex Corp v United States*.

<sup>23</sup> *AES v Hungary*, [8.2]; *Electrabel v Hungary*, [1.18].

submissions as a third-party on the basis that it regarded power purchase agreements signed between Hungary and the claimants in those arbitrations as unlawful under European Union law.<sup>24</sup> In both instances, the arbitral tribunals granted the Commission of the European Union *amicus curiae* status.

18. The *Amicus Curiae* concerns both public welfare and an unlawful agreement. First, the Dispute concerns the operation and effect of Bill 275. Bill 275 safeguards the health of Gondwandan citizens. Second, the Agreement and the Dispute concern potential infringements of Gondwandan law. On the basis of these two facts, the Tribunal should admit the *Amicus Curiae*.

**C. The *Amicus Curiae* would bring a new factual perspective to the arbitration proceedings**

19. A tribunal must consider whether the non-disputing party's submission would assist the tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.<sup>25</sup> Prospective *amici curiae* must adduce new and special legal or factual perspectives to be admitted.<sup>26</sup>
20. The *Amicus Curiae* brings new perspectives to the Dispute. Two perspectives in particular are notable. First, the *Amicus Curiae* explains the harmful effects of the use of tobacco products, the way in which agreements, such as the Agreement, contribute to the harm, and how the Government has enacted specific and targeted legislation reforms aimed at minimising this harm and safeguarding the health of the Gondwandan

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<sup>24</sup> *AES v Hungary*, [8.2]; *Electrabel v Hungary*, [1.18].

<sup>25</sup> ICSID Rule 37; *Apotex v United States* [21]-[22].

<sup>26</sup> Schliemann.

people.<sup>27</sup> Second, the Amicus Curiae sets out how the Agreement infringes Gondwandan law.<sup>28</sup> The Amicus Curiae will assist the Tribunal in determining issues related to the Dispute because the Amicus Curiae brings a new perspective on two issues. First, the Amicus Curiae explains the harmful effects of tobacco use and how the Government has enacted regulations to safeguard the public health and prevent further casualties. Second, the Amicus Curiae explains the potential infringements that the Agreement may have on Gondwandan law.<sup>29</sup>

21. These perspectives are unique to the Government because the Government has been engaged in tobacco related research since 2001.<sup>30</sup> Neither of the Parties have evidenced such a perspective. The Amicus Curiae therefore adduces new, special and unique factual and legal perspectives and the Tribunal should admit it.

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<sup>27</sup> Moot Problem, 32.

<sup>28</sup> Moot Problem, 32-3.

<sup>29</sup> Moot Problem, 32.

<sup>30</sup> Moot Problem, 4.

### III. THE RESPONDENT'S OBLIGATIONS WERE VITIATED BY BILL 275

22. The Respondent was excused from performing its obligations under the Agreement because Bill 275 frustrated the Agreement. Pursuant to Article 79 of the CISG, the Respondent is exempt because: (A) Bill 275 was an impediment beyond its control; (B) it could not have reasonably foreseen the impediment; (C) it could not have avoided or overcome the impediment; (D) the failure to perform was due to the impediment; and, (E) it notified the Claimant of the impediment. Therefore, (F) the Respondent is exempt from paying liquidated damages.

#### A. Bill 275 was an impediment beyond the Respondent's control

23. A party is excused from performing its obligations if that performance is prevented by an impediment beyond its control.<sup>31</sup> State intervention in the form of export or import bans, rationing of goods, exchange controls and trade bans are examples of impediments held to be beyond a party's control.<sup>32</sup> Similarly, in the *Caviar Case*, an impediment was held to exist pursuant to Article 79 when a United Nations trade embargo prevented a party from fulfilling its contractual obligations.<sup>33</sup>

24. Clause 25 obligated the Respondent to display and promote Tobacco Products and Merchandise.<sup>34</sup> Bill 275 prohibited the Respondent from displaying and promoting Tobacco Products and Merchandise.<sup>35</sup> The performance of Clause 25 is wholly inconsistent with the prohibitions in Bill 275. Bill 275 was an impediment that was beyond the Respondent's control (**Impediment**).

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<sup>31</sup> CISG Article 79(1).

<sup>32</sup> Schechtriem/Schwenzer, Article 79 [17].

<sup>33</sup> *Caviar Case*.

<sup>34</sup> Moot Problem, 9-10

<sup>35</sup> Moot Problem, 13.

## **B. The Respondent could not have reasonably foreseen the Impediment**

25. A party is excused from performing its obligations if it could not have reasonably been expected to take the impediment into account at the conclusion of the contract.<sup>36</sup> The relevant test for foreseeability, when applied to the facts, is whether a reasonable person in the shoes of the Respondent, under the actual circumstances at the time of the conclusion of the Agreement, ought to have foreseen Bill 275's initial or subsequent existence.<sup>37</sup>
26. The earliest point in time in which the Parties could have been aware of Bill 275 was 14 March 2011 when it was introduced to Parliament.<sup>38</sup> The Parties could not have been aware of Bill 275 when they entered into the Agreement on 14 December 2010. Further, the amendments in 2009 brought Gondwandan tobacco regulation in line with most major countries.<sup>39</sup> It is not reasonable to expect that the tobacco regulation in Gondwana would surpass those of other major countries and in such a short period of time. This sentiment was reflected by various media statements.<sup>40</sup> On 22 June 2009, the Gondwandan Herald reported that analysts rejected the idea of any stronger tobacco regulations coming into effect in the near future.<sup>41</sup>

## **C. The Respondent could not have avoided or overcome the Impediment**

27. A party is excused from performing its obligations if it could not have avoided or overcome the impediment.<sup>42</sup> A party only needs to avoid or overcome the impediment

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<sup>36</sup> See CISG Article 79(1).

<sup>37</sup> See CISG Article 79(1); Schlechtriem/Schwenzer, Article 79 [13].

<sup>38</sup> Moot Problem, 4.

<sup>39</sup> Moot Problem, 28.

<sup>40</sup> Moot Problem, 17, 28, 38.

<sup>41</sup> Moot Problem, 28.

<sup>42</sup> See CISG Article 79(1).

where there are reasonable means available to do so.<sup>43</sup> While parties to a contract are expected to incur some costs to avoid an impediment, these costs must be commercially reasonable.<sup>44</sup>

28. The Respondent could not change Bill 275, nor could the Respondent increase its expenditure to avoid or overcome the legislative restrictions. In these circumstances, it was not commercially viable for the Respondent to violate Bill 275 in order to comply with the Agreement. Correspondingly, it was not commercially viable for the Respondent to breach the Agreement in order to comply with Bill 275. The Respondent's hands were tied.

**D. The failure to perform was due to the Impediment**

29. The impediment must be the sole reason for the failure to perform.<sup>45</sup>
30. Pursuant to Clause 25, the Respondent was obligated to display the Tobacco Products and Merchandise in its retail stores.<sup>46</sup> Bill 275 prohibited the Respondent from doing this.<sup>47</sup> There was no other factor or event that prohibited the Respondent from its obligations. Bill 275 was the sole reason for the Respondent's failure to perform.

**E. The Respondent notified the Claimant of the Impediment**

31. A party who fails to perform its obligations because of an impediment must notify the other party within a reasonable period of time.<sup>48</sup> However, if both parties know of the existence of the impediment, no notice is required.<sup>49</sup>

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<sup>43</sup> Beale, 983.

<sup>44</sup> Schlechtriem/Schwenzer, Article 79 [14]; *Macromex v Globex*; *Hilaturas v Iraq*.

<sup>45</sup> Schlechtriem/Schwenzer, Article 79 [15].

<sup>46</sup> Moot Problem, 1, 8.

<sup>47</sup> Moot Problem, 2, 13.

<sup>48</sup> CISG Article 79(4).

32. On 14 March 2011, Bill 275 was introduced to Parliament.<sup>50</sup> One week later, on 21 March 2014, the Respondent notified the Claimant that Bill 275 would have adverse effects on the Agreement.<sup>51</sup> On 1 January 2013, the requirements under Bill 275 were officially entered into force.<sup>52</sup> On 1 May 2013, the Respondent notified the Claimant that Bill 275 was rendering performance of the Agreement impossible.<sup>53</sup> In any event, the Claimant was aware of Bill 275 and no notification was required.<sup>54</sup>

**F. The Respondent is exempt from paying liquidated damages**

33. In accordance with the CISG, a party that is exempt from performing its obligations is exempt from paying damages.<sup>55</sup> The exemption from damages extends to include liquidated damages.<sup>56</sup>
34. The Respondent is exempt from performing its obligations under the Agreement because of the fatal effect that Bill 275 had on the Clause 25 obligation.

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<sup>49</sup> Schlechtriem/Schwenzer, Article 79 [46].

<sup>50</sup> Moot Problem, 4.

<sup>51</sup> Moot Problem, 15.

<sup>52</sup> Moot Problem, 5.

<sup>53</sup> Moot Problem 20.

<sup>54</sup> Moot Problem, 16.

<sup>55</sup> See CISG Article 79(5).

<sup>56</sup> Schlechtriem/Schwenzer, Article 79 [51]; CISG Opinion.

#### **IV. THERE IS A RISK THAT THE AWARD WILL NOT BE ENFORCED**

35. Issuing an award in favour of the Claimant poses a risk of non-enforcement because:  
(A) The Government's public policy is clearly defined; and, (B) the Award is not enforceable because it is contrary to public policy.

##### **A. The Government's public policy is clearly defined**

36. For the public policy exception to apply, the policy in question must be explicit, well-defined and dominant.<sup>57</sup>
37. The Government has publicly declared that it is striving to regulate tobacco use so as to safeguard the health of the Gondwandan people and that this is the motivation behind Bill 275.<sup>58</sup> Starting in 2001, the Government began enforcing regulations aimed at achieving its public policy goal. Subsequently, the Government further entrenched this policy in 2002, 2004, 2005, 2009 and in 2012 with Bill 275. In 2014, Malcolm Reynolds of the State Legal Department in Gondwana stated that tobacco control and restriction is a keystone of the Government's public policy.<sup>59</sup> Accordingly, the Government's public policy is clearly defined.

##### **B. The Award is not enforceable because it is contrary to public policy**

38. A country may refuse to enforce an award where it goes against that country's public policy.<sup>60</sup> The term 'public policy' referred to in the NYC is the public policy of the

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<sup>57</sup> W R Grace v Local Union, 766.

<sup>58</sup> Moot Problem, 32.

<sup>59</sup> Moot Problem, 33.

<sup>60</sup> NYC, Article V(2)(b).

enforcement state.<sup>61</sup> The purpose of this exception is to protect public policy from private international law.<sup>62</sup>

39. Bill 275 gives effect to the public policy by controlling and restricting the sale and promotion of branded tobacco and merchandise products.<sup>63</sup> If a Gondwandan court were to enforce the Award, it would undermine this policy by punishing the Respondent for complying with Gondwandan law. Therefore, a Gondwandan court is unlikely to enforce the Award because it is contrary to public policy.

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<sup>61</sup> Redfern/Hunter, [11.107]; *Renusagar Power v General Electric*; *KS AG v CC SA*; *German Charterer v Romanian Shipowner*.

<sup>62</sup> Born, 3647; See generally Fouchard/Gaillard/Goldman, 996-8.

<sup>63</sup> Moot Problem, 13-4.

### **REQUEST FOR RELIEF**

The Respondent respectfully asks the Tribunal to adjudge and declare that:

- I.** The Tribunal does not have jurisdiction to hear the Dispute; or alternatively,
- II.** A declaration that this Agreement has been frustrated; and,
- III.** The Respondent is not liable to pay any alleged termination penalty due to the Agreement being frustrated.

The Respondent respectfully requests the Tribunal to award that:

- 1.** The Claimant pay all costs of the arbitration, including the Respondent's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in CIETAC Arbitration Rules Article 50.
- 2.** The Claimant pay the Respondent interest on the amount set forth in item 1 above, from the date that expenditures was made by the Respondent to the date of payment by the Claimant.

Respectfully Submitted

Counsel for the Respondent