

20TH LAWASIA INTERNATIONAL MOOT COMPETITION

10 OCTOBER TO 13 OCTOBER 2025

ASIAN INTERNATIONAL ARBITRATION CENTER

MEMORANDUM FOR CLAIMANT

CLAIMANT

Calyx DreamBot Inc (“CDI”)

RESPONDENT

Rivus Microelectronics Group (“RMG”)

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STATEMENT OF JURISDICTION

The Parties, Calyx DreamBot Inc (“CLAIMANT”) and Rivus Microelectronics Group (“RESPONDENT”) have agreed to the following. First, the law governing the procedure of the arbitration shall be Aurion law, considering the *lex arbitri* is Aurion. Second, the governing framework for the arbitration should be the Asian International Arbitration Centre (AIAC) Rules 2023. Third, the place of arbitration shall be Kuala Lumpur, Malaysia.

QUESTIONS PRESENTED

- I. Whether RESPONDENT is entitled to invoke sovereign immunity;
- II. Whether CLAIMANT's initiation of arbitration was premature;
- III. Whether RESPONDENT breached the JVA in relation to the alleged labour practices;
- IV. Whether CLAIMANT's termination of the JVA was lawful.

STATEMENT OF FACTS

1. Calyx DreamBot Inc, the largest semiconductor firm in Veridia, and previously, the main supplier to Seratious (hereinafter **“CLAIMANT”**) and Rivus Microelectronics Group, a state-linked entity incorporated in Aurion (hereinafter **“RESPONDENT”**) are the **“PARTIES”** to this arbitration.
2. Veridia and Searitious are two superpowers in the semiconductor sector. Due to the trade conflicts between Veridia and Seratious in the semiconductor sector, Veridian firms have to relocate manufacturing to Aurion, a developing Southeast Asian nation, to maintain access to the global supply chain, especially in Seratious.
3. In October 2022, Aurion and Veridia signed the Bilateral Investment Treaty (**“BIT”**), aimed at securing long-term collaboration between these nations. Beyond the praise, the BIT drew growing criticism over labour rights concerns and the true nature of the BIT, as to whether the BIT is made to benefit a selected few.
4. Following the BIT, President Ho (the President of Aurion), who is ambitious to transform Aurion into a high-tech hub initiative, has initiated the partnership between Rivus Microelectronics Group (**“RMG”**), a state-linked entity in Aurion, and Calyx DreamBot Inc (**“CDI”**), the largest semiconductor firm in Veridia.
5. By the end of December 2022, CLAIMANT and RESPONDENT signed a Joint Venture Agreement (**“JVA”**), with the incorporation of Aurion Semiconductor Inc (**“ASI”**) as the special purpose vehicle of the joint venture.
6. The project was under the supervision of a joint project management team (**“JPMT”**) comprising representatives from both CLAIMANT and RESPONDENT.

7. In order to ensure the timely fulfillment of supply agreements with ASI's key buyers, CLAIMANT reduced the construction timeline to 15 months, significantly shorter compared with the standard timeline of 24 to 36 months.
8. On 20th September 2023, due to the urgent timeline and limited budget, Ms Al Emret, CLAIMANT's CEO, suggested RESPONDENT to engage a third-party labour agency to accelerate recruitment, with an instruction to "minimise labour cost wherever possible"
9. In response, RESPONDENT proposed a shortlist of local labour providers, inter alia, Beta Workforce Solutions ("**BWS**"), an experienced agency with competitive rates. CLAIMANT approved BWS's selection based on RESPONDENT's recommendation and JPMT's consideration.
10. On 2nd October 2023, ASI entered into a "Service Agreement" with BWS.
11. By 20th May 2024, production commenced within a 15-month timeline. ASI successfully delivered multiple shipments to Seratious and established its position in the semiconductor supply chain.
12. On 13th September 2024, allegations of labor violations at the ASI facility emerged, resulting in an investigation by the Independent Investigative Committee ("**IIC**").
13. On 30th September 2024, IIC published the investigation report, which found excessive working hours beyond legal limit, substandard living conditions, recruitment fee charging, and misreporting of workforce audit.
14. Subsequently, Seratious government requested a renewed copy of ASI's workforce, warning that failure to do so would result in an import ban from Aurion.

15. On 2nd October 2024, ASI's operating licence was suspended due to public concern and IIC's findings.
16. During the suspension period, CLAIMANT uncovered BWS's close tie with RESPONDENT, which was undisclosed by RESPONDENT.
17. On 23rd October, ASI submitted a revised workforce audit, followed by the termination of suspension. The suspension has adversely affected ASI's contracts with current clients, as well as its reputation in the global market.
18. On 11th October 2024, following the suspension of ASI and the alleged labour law violations, Ms Emret had formally warned RESPONDENT, but received no response for over 2 months.
19. On 16th December 2024, in light of the actual timesheets disclosed by an employee and cumulative findings of IIC, the Ministry imposed a 500 million USD fine on ASI.
20. On 24th December, CLAIMANT terminated the JVA, requesting RESPONDENT to recover damages incurred by ASI.

SUMMARY OF PLEADINGS

ISSUE 1: RESPONDENT IS NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY

21. RESPONDENT cannot invoke sovereign immunity. First, RESPONDENT is not part of the State of Aurion because it is neither a state-owned enterprise nor exercising sovereign acts; its activities under the JVA with CLAIMANT were purely commercial, including investment and business-enabling tasks rather than governmental functions. Second, even if RESPONDENT were entitled to sovereign immunity, it has waived this right by expressly agreeing to arbitrate under the JVA. This consent to arbitration constitutes a waiver of immunity under international law, preventing RESPONDENT from avoiding the Tribunal's jurisdiction or enforcement of any arbitral award.

ISSUE 2: CLAIMANT'S INITIATION OF ARBITRATION WAS NOT PREMATURE

22. The non-compliance with the negotiation requirement and ministerial consent requirement does not render CLAIMANT's initiation of arbitration premature for 2 reasons. First, the ministerial consent clause shall be invalidated because it is unfairly one-sided and gives Respondent an unjustifiably excessive advantage. Otherwise, the ministerial consent clause is unenforceable due to a lack of clarity and certainty. Second, negotiation is not a condition precedent to arbitration. Otherwise, RESPONDENT's conduct demonstrates that any further negotiations would be futile.

ISSUE 3: RESPONDENT HAS BREACHED THE JVA IN RELATION TO THE ALLEGED LABOUR PRACTICES

23. The Respondent has breached the JVA with respect to the labour practices. This is demonstrated by concrete evidence of labour violations, particularly through clear indicators

of involuntariness and coercion. Since RESPONDENT is obligated under Clause 4.2(f) of the JVA to ensure compliance with labour standards, such violation has constitute RESPONDENT's breach of the JVA.

ISSUE 4: CLAIMANT'S TERMINATION OF THE JVA WAS LAWFUL

24. CLAIMANT was entitled to terminate the JVA since RESPONDENT's breach of Art. 4.2(f) of the JVA has constituted a fundamental breach. Accordingly, strict compliance with the obligation to ensure labour regulatory compliance is of essence under the JVA. In addition, RESPONDENT's breach caused CLAIMANT to lose trust in its future performance. In any event, RESPONDENT cannot rely on CLAIMANT's act to be exempted from liability.

PLEADINGS

I. RESPONDENT IS NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY

25. Sovereign immunity, also known as state immunity, is a principle under international law that allows a state to protect its properties and its representatives against other states or foreign private entities before a court or tribunal in a foreign jurisdiction.¹
26. Art. 5 of the UNCSI, to which Aurion is a signatory² stipulates that a State enjoys immunity from the jurisdiction of foreign courts and from measures against its property, except as limited by the provisions of this Convention.³
27. In light of these criteria, it is contended that RESPONDENT cannot invoke sovereign immunity since **(A)** RESPONDENT is not part of the State of Aurion and **(B)** even if the Tribunal finds that RESPONDENT is entitled to sovereign immunity, such immunity has been waived.

A. RESPONDENT is not part of the State of Aurion

28. Under Art. 2.1(b)(iii) of the UNSCI, “*agencies or instrumentalities of the state or other entities*” are treated as a State if they are both entitled to perform and are actually performing sovereign acts.⁴
29. The UNSCI largely reflects the restrictive theory of immunity, which grants immunity only for transactions involving the exercise of governmental authority (*acta jure imperii*) as distinct from commercial activities (*acta jure gestionis*).⁵ In the first instance, sovereign immunity is a matter of the identity of the litigant. Once it is established that one party

¹ James Crawford (1981), p. 487.

² Clarification, p. 1, para. 1.

³ UNSCI, Art. 5.

⁴ UNSCI, Art. 2.1(b)(iii).

⁵ James Crawford (1981), p. 490; Martin Dixon (2013), pp. 187-188.

qualifies as a state and is therefore capable of claiming immunity, the question of whether immunity applies depends on the nature of the acts in dispute.⁶

30. To determine whether an entity is entitled to sovereign immunity as part of the state, that entity must fulfil a two-step test including (1) it is a part of the state and (2) it has undertaken a sovereign act.⁷ Applying the test to this case, RESPONDENT does not qualify as part of the State of Aurion as **(1)** RESPONDENT is not a state-owned enterprise; **(2)** RESPONDENT exercised commercial acts rather than sovereign acts in undertaking the investment activities.

1. RESPONDENT is not a state-owned enterprise

31. While there is no universal definition of a state-owned enterprise, it can be defined as any commercial enterprise in which the State has a majority ownership and control or a controlling interest, so that the State can take part in commercial activities separately from its public administrative function.⁸
32. It is submitted that RESPONDENT did not operate as a state-owned entity of the State of Aurion as **(i)** Aurion does not own RESPONDENT's majority shares and **(ii)** Aurion does not have control over RESPONDENT's activities.

i. Aurion does not own RESPONDENT's majority shares

33. This criterion examines the degree of State involvement in the establishment and ownership of an entity. More specifically, the State must be the owner of a majority of shares or a specified minimum minority ownership, if the government is the largest shareholder. However, even if a state holds a majority of shares or has representatives in the board of

⁶ Martin Dixon (2013), p. 185.

⁷ Malcolm (2008), p. 709.

⁸ Muchlinski, p. 3; OECD Guidelines, p. 14; Maffezini v Spain.

management, mere majority ownership or substantial control by the state does not *ipso facto* make an entity a state-linked entity.⁹

34. In the present dispute, although there may have been reports that capital requirements of RESPONDENT were public funds from the Government Treasury¹⁰, it cannot be automatically that the Aurion government exercises control over RESPONDENT since the government does not hold a majority of shares, which is at least above 50% shares of RESPONDENT.
35. In conclusion, RESPONDENT's shareholding structure does not support its characterization as a state-owned entity.

ii. Aurion does not have control over RESPONDENT's activities

36. The control test for state-owned enterprises has a demanding threshold, requiring both a general control of the enterprise and a specific control of the State over the very specific act¹¹ towards achieving a particular result in its sovereign interests.¹² Simply encouraging or endorsing an action by the government, without direct orders, does not meet this stringent test.¹³
37. Moreover, if the entity had separate legal personality and “considerable freedom in day-to-day commercial activities”, that entity is not so closely connected as to be a state-linked entity.¹⁴ In *CSOB v. Slovak*, it was held that merely enforcing governmental policies does not make an enterprise part of the state, what matters is whether the enterprise acts like a private company, in which case its activities are commercial.¹⁵

⁹ Kovács (2018), p. 84; *Tulip v. Turkey*; *Waste Management v. Mexico II*.

¹⁰ Moot problem, p. 7, para. 27.

¹¹ *Jan de Nul v. Egypt.*,

¹² *Tulip v. Turkey*.

¹³ *Von Pezold v. Zimbabwe*.

¹⁴ *Czarnikow Ltd v. Rolimpex*; *Staur Eiendom v. Latvia*.

¹⁵ *CSOB v. Slovak*.

38. In the present dispute, while it is reported that RESPONDENT's leadership structure and decision making usually were influenced the Ministry of Economy with Cabinet Ministers on its board of directors,¹⁶ Aurion has not issued any direct orders regarding RESPONDENT's in the JVA or its labor practices. At most, it provided only general encouragement, such as facilitating introductory meetings between President Ho and CLAIMANT's executives, which is an entirely ordinary practice in large-scale transactions between states and foreign investors.
39. Furthermore, RESPONDENT is incorporated under Aurion's corporation law and enjoys separate legal personality¹⁷, which indicates its distinction from its shareholders, including the state. President Ho has repeatedly and clearly emphasized that RESPONDENT was a commercially autonomous vehicle¹⁸, which is not subjected to any interference from Aurion.¹⁹ There is no sufficient evidence affirming that Aurion has controlled RESPONDENT and in particular, the JVA between CLAIMANT and RESPONDENT for its sovereign interests.
40. In conclusion, RESPONDENT was not put under direction and control of the State of Aurion in its activities.

2. RESPONDENT exercised commercial acts rather than sovereign acts in undertaking the investment activities

41. In order to distinguish between sovereign acts and commercial acts, two grounds upon which the tribunals could rely are the nature of the act and the purpose of the act.²⁰ However, in determining whether an entity is acting in a sovereign function for the purpose of immunity,

¹⁶ Moot problem, p. 7, para. 28.

¹⁷ Additional Clarifications to the Moot problem, p. 1, para. 1.

¹⁸ Moot problem, p. 5, para. 10.

¹⁹ Moot problem, p. 7, para. 25.

²⁰ Martin Dixon (2013) pp. 188-189.

the nature of the act in question is primarily concerned, not its underlying purposes or the state's interest in it.²¹

42. Even if the tribunal finds that RESPONDENT is a state-owned entity, it still cannot invoke sovereign immunity as **(i)** RESPONDENT is not entitled to perform acts in the exercise of sovereign authority and **(ii)** RESPONDENT discharged commercial acts in undertaking the investment with CLAIMANT.

i. RESPONDENT is not entitled to perform acts in the exercise of sovereign authority

43. In the UNSCI, being “entitled to perform” sovereign acts is a condition that must be met for other entities to be identified as a State under the Convention.²² For an entity to be “entitled” to perform acts in the exercise of sovereign authority, this entitlement must have a foundation in the internal or municipal law of the State concerned.²³ Moreover, the internal law must specifically authorize the conduct as involving the exercise of public authority, which makes it a narrow category.²⁴

44. In this case, there is no evidence that RESPONDENT was legally endowed with sovereign authority in any of Aurion's municipal legislations, nor was it officially endowed with any sovereign powers.

45. Therefore, RESPONDENT has not been endowed by any laws with the power to act in the exercise of sovereign authority.

ii. RESPONDENT discharged commercial acts in undertaking the investment with CLAIMANT

²¹ Trendtex v. Central Bank.

²² UNSCI, Art. 2.1(b)(iii).

²³ UNSCI Commentary, p. 98;

²⁴ ARISWA Article 5, Commentary (7).

46. Pursuant to Art. 10.1 of the UNSCI, a state cannot invoke sovereign immunity if it engages in a commercial transaction with a foreign natural or judicial person. Therefore, to be entitled to sovereign immunity, the transaction between CLAIMANT and RESPONDENT must not fall under the scope of “commercial transaction” in Art. 2(1)(c) UNSCI. In that sense, RESPONDENT has discharged commercial acts in undertaking the investment.
47. According to Article 2.1(c)(iii) UNSCI, commercial transactions include “any other contract or transaction of a commercial, industrial, trading or professional nature [...]”.²⁵ The expression “commercial transaction” also covers investment matters.²⁶
48. In contrast, an activity will be considered non-commercial when it is under exclusive competence of the sovereign, governmental units or state agencies, legislative activity, administrative action, and the development of public policy. In international investment, these activities can include granting licenses, approving or blocking commercial transactions, imposing quotas, fees, or expropriating companies. In *Maffezini*, acts such as giving advice to the investor were held as commercial.²⁷
49. In this case, CLAIMANT and RESPONDENT entered into a JVA, which set the foundation for a ground-breaking semiconductor manufacturing hub in Aurion. Its main function with CLAIMANT was to establish and operate a semiconductor facility, which is an ordinary commercial activity that is no different from how any private entity would act.
50. In the JVA, RESPONDENT is responsible for business-enabling activities rather than sovereign ones, such as procuring the necessary alienation of Land from the Aurion government for ASI’s Facility; securing all regulatory approvals, operational permits required for ASI’s establishment and operations; representing ASI’s interests in discussions with the

²⁵ UNSCI, Art. 2.1(c)(iii).

²⁶ UNSCI Commentary, p. 335.

²⁷ *Maffezini v. Spain*.

Aurion government and relevant regulatory bodies; etc.²⁸ More specifically, RESPONDENT does not issue permits, enact laws or exercise regulatory powers, but rather solely acting in pursuit of a commercial venture, namely the semiconductor manufacturing.

51. RESPONDENT may rely on the fact that RESPONDENT leverages its status as a state-linked entity to accelerate governmental approvals to argue that RESPONDENT's acts are sovereign. However, it is notable that RESPONDENT is a state-linked commercial entity which is different from a state-owned enterprise, and operates in a purely commercial capacity. The fact that RESPONDENT enjoyed favorable regulatory treatment from the government does not convert its conduct into a sovereign act.
52. In conclusion, the activities undertaken by RESPONDENT throughout CLAIMANT's investment were purely commercial acts.

B. Even if the Tribunal finds that RESPONDENT is entitled to sovereign immunity, such immunity has been waived

53. RESPONDENT has expressly agreed to arbitrate under Clause 6 of the JVA, thereby waiving its right to invoke sovereign immunity.
54. Art. 7 of the UNSCI provides that a State cannot invoke immunity from jurisdiction where it has expressly consented to the exercise of jurisdiction, including either through an international agreement²⁹ or a written contract.³⁰ It is well established that a State's agreement to arbitration constitutes a waiver of immunity³¹, both with respect to jurisdiction and to recognition of any resulting award.³²

²⁸ Exh. 4, Clause 4.2.

²⁹ UNSCI, Art. 7.1(a).

³⁰ UNSCI, Art. 7.1(b).

³¹ Born (2014), p. 44; Redfern/Hunter (2015), para. 11.144.

³² Born (2014), p. 24.

55. Pursuant to Rule 1 of the AIAC Rules, when parties agree in writing to submit their disputes to AIAC arbitration, such dispute shall be resolved by arbitration exclusively under the AIAC Rules, be conducted and administered by the AIAC.³³ This principle is further reinforced by Rule 17.4 of the AIAC Rules, under which parties expressly and irrevocably waive recourse to national courts and undertake to carry out arbitral awards without delay.³⁴
56. By entering into the JVA, which contains a binding arbitration clause,³⁵ RESPONDENT has given such express consent. By consenting to arbitration, RESPONDENT has waived not only immunity from jurisdiction but also immunity from enforcement to the extent necessary to give effect to the arbitral process. Accordingly, RESPONDENT cannot now rely on sovereign immunity to avoid the jurisdiction of this Tribunal or the binding force of its final award.
57. In conclusion, RESPONDENT's agreement to arbitrate under the JVA indicates that it has waived its right to invoke sovereign immunity.

II. CLAIMANT'S INITIATION OF ARBITRATION WAS NOT PREMATURE

58. RESPONDENT challenges the Tribunal's jurisdiction or the admissibility of the claim on the ground that the negotiation requirement and ministerial consent requirement have not been fulfilled before the commencement of arbitration. However, CLAIMANT's initiation of arbitration was not premature because **(A)** Non-compliance with the ministerial consent requirement does not preclude the commencement of arbitration; **(B)** Non-compliance with the negotiation requirement does not preclude the commencement of arbitration.

³³ AIAC Rules 2023, Rule 1.

³⁴ AIAC Rules 2023, Rule 17.4.

³⁵ Exh. 4, Clause 11.

A. Non-compliance with the ministerial consent requirement does not preclude the commencement of arbitration.

59. RESPONDENT may argue that the non-fulfilment of the ministerial consent requirement leads to the Tribunal's lack of jurisdiction to hear the case because the ministerial consent requirement is a condition precedent to any proceedings.

60. However, the non-compliance with the ministerial consent requirement does not preclude the commencement of arbitration because: **(1)** The ministerial consent clause shall be invalidated because it is unfairly one-sided and gives Respondent an unjustifiably excessive advantage; **(2)** Otherwise, the ministerial consent clause is unenforceable due to a lack of clarity and certainty; **(3)** Even if the Tribunal finds Art. 10.2 to be valid and enforceable, RESPONDENT is barred from invoking a lack of ministerial consent.

1. The ministerial consent clause shall be invalidated because it is unfairly one-sided and gives Respondent an unjustifiably excessive advantage

61. In this case, the Tribunal shall invalidate the ministerial clause for 2 grounds: **(i)** The Party's autonomy in drafting Clause 10.2 JVA is restricted by Equal Treatment; **(ii)** The ministerial consent clause gives Respondent an unjustifiably excessive advantage under the UNIDROIT Principles.

i. The Party's autonomy in drafting Clause 10.2 JVA is restricted by Equal Treatment

62. Pursuant to Art. 17.1 AIAC Rules, the Tribunal must ensure equal treatment and a fair opportunity for both Parties to present their case This principle is also echoed in Art. 18 ML, which mandates that "*the parties shall be treated with equality*" and in Art. V(1)(b) New York Convention, which precludes enforcement of an award when a party was unable to present its case, includes equality of treatment.

63. Equal treatment of Parties is a fundamental procedural right widely recognized not only in arbitration but also in dispute resolution in general.³⁶ In international practice, the principle of equal treatment extends to all aspects of an arbitration, including the Parties' procedural agreements.³⁷ Based on the equal treatment grounds, the Tribunals/Courts often refuse to enforce the asymmetrical provision and declare it invalid, not affecting the validity and enforceability of the remainder of the agreement.³⁸ More specifically, an arbitration agreement is considered asymmetric when it confers procedural advantages exclusively on one party, thereby granting it broader discretion in determining the forum, jurisdiction, or procedural steps for resolving disputes.³⁹
64. In *X v. Rothschild* case, the French courts invalidated a dispute resolution clause that granted one party the unilateral right to select any forum for dispute resolution, while denying the other party similar rights. The court found this violated Article 23 of the Brussels I Regulation because it created a condition entirely dependent on one party's will, undermining equality in deciding jurisdiction.
65. In this case, Clause 10.2 creates an asymmetric dispute resolution mechanism by imposing a precondition to any proceedings (litigation, mediation, arbitration, etc.), which is obtaining consent from RESPONDENT's minister. This unfairly grants RESPONDENT a significant advantage, as it is a State-favored entity closely connected to the very authority whose consent is required. Consequently, RESPONDENT faces no comparable restriction, while CLAIMANT's ability to access any dispute resolution mechanism is placed entirely at the discretion of a party aligned with RESPONDENT's interests.

³⁶ Art. 5.2, 22.4, 37.2 ICC Rules; Art. 13.1. HKIAC Rules; Art. 20.1. CIETAC Rules; Art. 6 ECHR; Scherer/Prasad/Prokic p. 1-5; *Steel v. UK*.

³⁷ Holtzmann & Neuhaus (1989), para. 62; Scherer/Prasad/Prokic (2018), p. 4.

³⁸ Born (2021), p. 92; *Russkaya v. Sony Ericsson*; *Arnold v. UCLC*.

³⁹ Ashford (2020), p. 347.

66. The close relationship between RESPONDENT and its government and its minister is illustrated by the following facts:

(1) The joint venture between CLAIMANT and RESPONDENT stemmed from the fact that President Ho, the President of Aurion, had introduced RESPONDENT to CLAIMANT's CEO;⁴⁰

(2) It is widely known in Aurion that RESPONDENT is President Ho's pet project;⁴¹

(3) RESPONDENT's BOD comprises Aurion's Ministers and usually mirrors the internal policies laid down by the Ministry of Economy;⁴²

(4) RESPONDENT has a state-linked status, which has been leveraged to accelerate government approval;⁴³

(5) The report of the Aurion Government concerning RESPONDENT's breach of labor standards is alleged to be biased, considering RESPONDENT's status as a state-linked entity and RESPONDENT's close ties to the Government.⁴⁴

67. Consequently, given that RESPONDENT is a state-favored entity, the Respondent's minister is bound to refuse to give his consent for the sake of RESPONDENT's interests. This results in CLAIMANT's high risk of losing access to justice and its time and costs incurred due to a delay in dispute resolution.

68. In conclusion, the Tribunal shall invalidate Clause 10.2 JVA on the ground of unequal treatment because under this Clause, the initiation of any dispute resolution proceedings deprives CLAIMANT of access to any dispute resolution mechanisms.

⁴⁰ Moot problem, p. 6, para. 20.

⁴¹ Moot problem, p. 7, para. 27.

⁴² Moot problem, p. 7, para. 28.

⁴³ Moot problem, p. 8, para. 30.

⁴⁴ Moot problem, p.12, para. 49.

ii. The ministerial consent clause gives Respondent an unjustifiably excessive advantage under the UNIDROIT Principles

69. The Joint Venture Agreement is governed by PICC.⁴⁵ Under Art. 3.2.7 PICC, a party may avoid the contract, or a specific term thereof, if at the time of its conclusion, such contract or term unjustifiably gives the other party an excessive advantage. In this case, Clause 10.2 JVA creates gross disparity because **(1)** It provides Respondent with an excessive advantage **(2)** which is also unjustified.
70. **First**, an excessive advantage means that “disequilibrium in the circumstances needs to be so great as to shock the conscience of a reasonable person”.⁴⁶
71. Under Clause 10.2 JVA, RESPONDENT gains an additional procedural advantage because, compared to CLAIMANT, RESPONDENT has a closer relationship with its State’s government and its ministers.⁴⁷ Therefore, there is no chance that RESPONDENT’s minister accepts CLAIMANT’s initiation of any proceedings (mediation, arbitration, litigation) because this dispute stems from RESPONDENT’s alleged violation of labour law and deeply influences Aurion’s reputation.
72. To conclude, the commencement of any proceedings is only subject to the whim of RESPONDENT, an unfair advantage that “shocks the conscience of a reasonable person”.
73. **Second**, the excessive advantage of the dispute resolution clause is unjustified because in this case, the bargaining power of Parties is not equal for 2 main reasons:
74. *Firstly*, there is a disparity in status, resources, and influence favoring RESPONDENT. The JVA stemmed from a political facilitation by President Ho, who personally introduced

⁴⁵ Exh. 4, p.7.

⁴⁶ Unidroit (2016), Art. 3.2.7, p. 110.

⁴⁷ Moot problem, p. 7, para. 27-28.

RESPONDENT to CLAIMANT's CEO through closed-door negotiations.⁴⁸ This high-level intervention signaled RESPONDENT's privileged status and access to governmental influence, creating a backdrop of political pressure on CLAIMANT.

75. *Secondly*, CLAIMANT faced a significant information asymmetry compared to RESPONDENT. The BIT and JVA negotiations are exclusive, closed-door meetings between President Ho, RESPONDENT, and CLAIMANT without public or broader investor participation.⁴⁹ The lack of transparency is evident in the suppression of public discourse and censorship of independent media investigating the BIT's details.⁵⁰ Such control over information flow restricted CLAIMANT's ability to make fully informed decisions or to challenge terms that may have been unfavorable.
76. Therefore, Clause 10.2 JVA should be declared invalid under Art. 3.2.7 PICC, as it creates a gross disparity by conferring upon RESPONDENT an excessive and unjustified advantage in the dispute resolution mechanism.

2. The ministerial consent clause is unenforceable due to a lack of clarity and certainty

77. Pre-arbitration requirements should be enforced as mandatory conditions if the provision contains clear and unequivocal language with specific procedural criteria governing the pre-arbitral steps and the defined consequences for skipping these steps.⁵¹
78. In *Children's Ark v. Kajima*, even when the DR provision requiring Parties to refer the disputes to the Liason committee before commencing any proceedings contains the term "*shall first*" and a clear "*chronological sequence*" governing the dispute resolution mechanism, the court refused to enforce the pre-arbitral steps on the ground of uncertainty

⁴⁸ Moot problem, p. 6, para. 20-21.

⁴⁹ Moot problem, p. 5-7, para. 11, 16, 26.

⁵⁰ Exh. 3A, 3B.

⁵¹ Redfern/Hunter (2015), para. 2.90; Jolles (2006), p.336; Kayali (2010), p.569; Tang v. Grant, para. 60.

and unclarity. This is because: (1) the Liaison Committee only consisted of Claimants' representatives, and there was no clear procedure or obligation for Respondent to participate; (2) the process lacked defined rules and clarity on how disputes were referred to the Committee; (3) the clause lacked certainty on when the condition was satisfied.

79. In the current case, Clause 10.2 states that “*Any proceedings ... shall NOT be commenced before first obtaining the consent of the Minister in charge of economic policy, foreign investments and trade of Aurion*”. This clause is insufficiently clear and certain because there are no guidelines on how consent is acquired, which party bears the responsibility to acquire consent, and what the defined consequence is if the Minister refuses to give consent. Besides, there is no time limitation period when this requirement is exhausted, leading to a high risk that the proceedings will be delayed or may not proceed forever if no consent is acquired.
80. To conclude, clause 10.2 shall not be enforced due to a lack of clarity and uncertainty.

3. Even if the Tribunal finds Art. 10.2 to be valid, RESPONDENT is barred from invoking a lack of ministerial consent

81. It is RESPONDENT's duty to acquire consent when CLAIMANT gave notice about the contract termination rather than CLAIMANT's duty.
82. According to Art. 1.8 PICC, “*a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment*”.
83. In this case, RESPONDENT is incorporated in Aurion under the law of Aurion, where consent is required. Besides, compared to CLAIMANT, RESPONDENT has a closer relationship with its State's government and its ministers.⁵² In addition, under Clause 4 of the

⁵² Moot problem, p. 7, para. 27-28.

JVA, RESPONDENT is obliged to secure “*all regulatory approvals, operational permits, and compliance certifications required for ASI’s establishment and operations*” and “*represent ASI’s interests in discussions with the Aurion government and relevant regulatory bodies*”.⁵³

All of the reasons above have created CLAIMANT’s reasonable expectation and understanding that RESPONDENT holds the duty of acquiring its minister's consent whenever the Parties initiate a proceeding to resolve the dispute.

84. However, instead of acquiring consent, RESPONDENT now relies on its failure to fulfil its obligations to delay the dispute resolution proceedings to the detriment of CLAIMANT’s incurred loss of time and money due to the delay.

85. In particular, there is no evidence that RESPONDENT has ever attempted to solve the dispute by obtaining the consent or has given notice to CLAIMANT if there are any difficulties in obtaining the minister’s consent. Instead, RESPONDENT showed a cavalier attitude and refusal to negotiate constructively.⁵⁴

86. To conclude, RESPONDENT showed their bad faith and inconsistent behaviour, which prevents it from relying on its failure to challenge the Tribunal’s jurisdiction.

B. Non-compliance with the negotiation requirement does not preclude the commencement of arbitration

87. RESPONDENT may argue that the non-compliance with the negotiation requirement leads to the Tribunal’s lack of jurisdiction to hear the case because negotiation is a mandatory pre-arbitral step.

88. However, this argument is misplaced because the non-compliance with the negotiation requirement does not preclude the commencement of arbitration because: **(1)** Negotiation is

⁵³ Exh. 4, p. 4.

⁵⁴ Moot problem, p. 14, para. 60.

not a condition precedent to arbitration; (2) Otherwise, RESPONDENT's conduct demonstrates that any further negotiations would be futile.

1. Negotiation is not a condition precedent to arbitration

89. In order to be considered a mandatory condition precedent, the provision must express such intention through a "clear and unequivocal" language.⁵⁵ More specifically, the non-compliance with procedural requirements only precludes arbitration if the right to arbitrate is conditioned on compliance with this requirement by stating expressly that "*only if the parties are unable to resolve their dispute through good faith negotiations after 30 days, then either party may refer the dispute to arbitration...*" or "*If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause*".⁵⁶
90. In this case, regarding the negotiation requirement, the provision states that "*Parties agree to regulate their own affairs and resolve any dispute...amicably through negotiations... which shall commence within fourteen (14) days...*". A reasonable person can agree that there is no explicit expression of a conditional connection between negotiation and arbitration, rendering negotiation not a precondition to arbitration. That provision could be interpreted to mean that negotiation could only commence 14 days after a written notice is issued, and after this period, no negotiation shall take place. Therefore, the Parties can initiate arbitration at any time, as negotiation is optional within a 14-day period and not relevant to arbitration.
91. To conclude, negotiation is not a condition precedent to arbitration.

⁵⁵ Jolles (2006), p.336; Kayali, p.569; Tang v. Grant, para. 60.

⁵⁶ Born (2009), p.841; Prime Mineral v. Emirates Trading.

2. Otherwise, RESPONDENT’s conduct demonstrates that any further negotiations would be futile

92. Negotiation is defined as a mutual and voluntary effort of the parties to resolve the dispute amicably without the involvement of any third party.⁵⁷ As negotiations rely on mutual participation by the parties, a party’s unwillingness to cooperate makes the negotiation process redundant and incapable of being judicially enforced.⁵⁸ Thus, the courts and tribunals often consider negotiation agreements as “agreements to agree”, which is therefore unenforceable.⁵⁹
93. In the present case, negotiation is futile. Between 11 October and 27 December, CLAIMANT’s stern warnings and requests for both Parties’ cooperation were read but ignored, showing RESPONDENT’s unwillingness to engage in meaningful negotiations.⁶⁰ In addition, on 24th December, CLAIMANT formally notified RESPONDENT of the termination of the JVA, citing ongoing breaches by RESPONDENT and the significant risks posed by continuing the partnership. However, there has been no official response from RESPONDENT. Instead, RESPONDENT’s CEO message dismissed CLAIMANT’s claims as nonsensical and even showed a cavalier attitude: “*You know who RESPONDENT is and that the fine can be waived right...*”.⁶¹ This dismissiveness and lack of constructive engagement leave no room for further negotiation.
94. To conclude, as further negotiation would be pointless, the Tribunal shall not render the initiation of arbitration premature due to skipping negotiation.

⁵⁷ Kayali, p.553.

⁵⁸ Garimella (2016), p. 166

⁵⁹ Redfern/ Hunter (2015), para. 2.90

⁶⁰ Moot problem, pp. 13-14, para. 54-60.

⁶¹ Exh. 11.

III. RESPONDENT HAS BREACHED THE JVA IN RELATION TO THE ALLEGED LABOUR PRACTICES

95. Under Clause 4.2(f) of the JVA, RESPONDENT as the local partner, was explicitly entrusted with the responsibility of ensuring compliance with all applicable laws and international standards, including ethical practices.⁶² However, RESPONDENT failed to uphold its obligation since **(A)** the labour practices violations existed and **(B)** RESPONDENT has not fulfilled its obligation under Clause. 4.2(f) of the JVA.

A. The labour practices violations existed

96. Pursuant to Art. 2(1) of the FLC (No. 29), “forced or compulsory labour” is defined as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.⁶³ This definition requires both elements, involuntariness and coercion to be presented simultaneously in order to constitute forced labour.⁶⁴

97. To measure, it is necessary also to define the different concrete “indicators” of involuntary work and coercion, and to assess whether they are present in one or more of the stages of the employment cycle.⁶⁵ The ILO’s framework categorizes indicators into those demonstrating involuntariness and those demonstrating a menace of penalty, often with "strong" or "medium" designations. For a forced labor determination, at least one indicator of involuntariness and one indicator of menace of penalty must be present in a given dimension, and one of the indicators must be strong.⁶⁶

⁶² Exh. 4, Clause 4.2(f).

⁶³ FLC (No. 29), Art. 2(1).

⁶⁴ Hard to see, harder to count, p. 7.

⁶⁵ Hard to see, Harder to count, p. 7.

⁶⁶ ILO (2012), p.28.

98. In this regard, CLAIMANT submits that the alleged labour practices at ASI semiconductor facility constitute forced labour under applicable laws since both **(1)** evidence of involuntariness and **(2)** evidence of coercion attributable to RESPONDENT were found.

1. The evidence of involuntariness existed

99. Deciding whether work is performed voluntarily often involves looking at external and indirect pressures, such as the absence of wages or remuneration, or the seizure of the worker's identity documents. The principle that all work relationships should be founded on the mutual consent of the contracting parties implies that both may leave the work relationship at any moment, subject to giving reasonable notice in accordance with national law or a collective agreement. If the worker cannot withdraw his/her consent, without fear of suffering a penalty, the work may be considered to be forced labour, starting from the moment he or she has been denied the right to stop working.

100. With regard to the working hours, the imposition of overtime would constitute forced labour if it is above the limits permitted by national legislation or collective agreements. In such cases, it is appropriate to examine the circumstances in which a link arises between an obligation to perform overtime work and the protection against forced labour. Specifically, although workers may in theory be able to refuse to work beyond normal working hours, their vulnerability means that in practice they may have no choice and are obliged to do so in order to earn the minimum wage.⁶⁷

101. In the present dispute case, 54% of workers reported working beyond the legal limits for regular working hours in order to meet KPIs, otherwise their wages are threatened to be cut.⁶⁸ Thus, the work is imposed by exploiting the worker's vulnerability under the dismissal of payment below minimum level, which constitutes forced labour under the Convention. The

⁶⁷ ILO (2007), para. 132.

⁶⁸ Exh.10, para. 3.4.

fact that ASI deliberately falsified workforce audits by underreporting 10,000+ overtime hours⁶⁹ is not merely an administrative error, but rather a selective omission to conceal its true overtime hours, which are likely to surpass the overtime limits under Aurion's national legislations.

102. In conclusion, there existed involuntariness in the employment of the workers at ASI's facility.

2. The evidence of coercion attributable to RESPONDENT existed

103. Threat of penalty may consist, inter alia, in the suppression of rights or privileges, such as the refusal to pay wages or forbidding a worker from travelling freely. "Menace of any penalty" should be construed broadly. It "need not be in the form of penal sanctions" but might also take the form "of a loss of rights or privileges" such as a promotion, transfer, access to new employment, housing, etc.⁷⁰

104. As the key element in many situations of forced labour is coercion, migrant workers may be coerced through withholding their passports. Retaining the identity documents of migrant workers would increase the risk of forced labour as it deprives workers of their passports or identity documents, thus restricting their freedom of movement. The retention of these documents or other valuable personal possessions can be considered an indicator of forced labour if workers are unable to access them at their discretion and if they feel they cannot leave employment without risking the loss of the documents. In many cases, without such documentation, an employee may not be able to obtain another job or even access certain services as a citizen. In cases where the employer is holding onto workers' documents for

⁶⁹ Moot problem, p. 13, para. 56.

⁷⁰ ILO (2007), para. 37.

safekeeping, workers must have access to the documents at all times, and there should be no constraints on the ability of the worker to leave the enterprise.⁷¹

105. In the case at hand, passports were withheld under the false pretense of "visa processing". However, when the employees requested the return of their request was rejected with the justification that the passports were still being processed for visa application purposes. However, no specific timeline was provided for their return, and no passport was ever returned to any of the employees.⁷² This demonstrates a clear disregard for the employees' rights and personal freedom.

106. Finally, under the ILO General Principles and Operational Guidelines for Fair Recruitment, workers shall not be charged directly or indirectly, in whole or in part, any fees or related costs for their recruitment.⁷³ However in this case, a majority of migrant workers reported paying recruitment fees of 500 USD, highlighting RESPONDENT's failure to adhere to internationally recognized fair recruitment practices.

B. RESPONDENT has not fulfilled its obligation under Clause. 4.2(f) of the JVA

107. Pursuant to Clause 4.2(f) of the JVA, RESPONDENT is entrusted with ensuring full compliance with all applicable labour and employment laws. However, as proved in the first argument, RESPONDENT itself has conducted labour practices violating the applicable laws.

108. ASI is a semiconductor hub established under a JVA between CLAIMANT and RESPONDENT. Therefore, even if RESPONDENT argues that it has fulfilled its obligation and that the liability shall be shifted to other entities, it should be still held liable since (1) RESPONDENT, as a parent company, would be held liable for the conduct of ASI and (2) ASI has not complied with the labour regulations.

⁷¹ ILO (2015), p. 17.

⁷² Additional Clarifications to the Moot problem, p. 1, para. 3.

⁷³ ILO (2019), para. 17.1.

1. RESPONDENT, as a parent company, would be held liable for the conduct of ASI

109. In the case *Akzo v. Commission*, in order to determine whether the parents company can be held liable for the conduct of the joint venture company, the judge has relied on the decisive influence test. In order to determine whether decisive influence exists, weight must be given to the de facto influence, i.e, the actual influence that the parent companies exercised over the joint venture company, rather than the labelling of the joint venture company.⁷⁴ It was held that the criterion of decisive influence is whether the joint venture company does not decide independently upon its own market conduct, but carries out in all material respects the instructions given to it by the parent company, having regard in particular to the economic, organizational and legal links between the legal entities concerned.

110. In that sense, it is contended that **(i)** ASI was partly controlled by RESPONDENT with regard to its corporate structure and **(ii)** RESPONDENT has interfered upon ASI's conduct.

i. ASI was partly controlled by RESPONDENT with regard to its corporate structure

111. The presence of a parent company representative on a joint venture's board is sufficient to establish the parent company's influence over the joint venture.⁷⁵

112. Under the Joint Venture Agreement ASI's governance and operations were entirely dominated by its two parent companies, where RESPONDENT held 49% of the shares, meaning that RESPONDENT was able to exert almost partial control over the operation of ASI.⁷⁶

ii. RESPONDENT has interfered upon ASI's conduct

113. According to the JVA, RESPONDENT is under the obligation to expedite permits and act for ASI's best interest.

⁷⁴ European Commission (2008), para. 481.

⁷⁵ Alliance One International vs. Commission.

⁷⁶ Exh. 4, p.3, para. 3.2.

114. In response to CLAIMANT's concern about the progress of the production timelines, RESPONDENT has engaged a third party labour supplier to contract with ASI.⁷⁷ This indicates that ASI in fact, had no autonomy over its contractual party and it was bound to enter into a contract with a party that was already determined by its parents. RESPONDENT further influenced ASI's contractual party t by sharing their recruitment campaign to BWS, thus determining the terms of employment for ASI's workforce without the company's acting independently.⁷⁸
115. In conclusion, ASI cannot be regarded as an autonomous entity exercising independent business judgement, but it was merely a vehicle through which the joint venture partners coordinated their businesses conduct. As ASI was under the control of CLAIMANT and RESPONDENT, ASI's infringement is to be attributed to its parent.

2. ASI has not complied with the labour regulations

116. RESPONDENT, as the parent company of ASI, is in charge of ensuring compliance with labour regulations. Therefore, any breaches of labour practices by ASI are attributable to RESPONDENT. CLAIMANT further submits that **(i)** ASI is liable for any violations regarding labour practices and **(ii)** in any event, ASI is jointly liable for BWS's violations of labour practices

i. ASI is liable for any violations regarding labour practices

117. Irrespective of the workforce being recruited by BWS, ASI remains the employer of the workers.
118. In several cases, the Court holds that the principal employer is responsible for safeguarding the workers' rights, as well as being liable for any violations related to labour practices after

⁷⁷ Moot problem, p. 9, para. 37.

⁷⁸ Moot problem, p. 9, para. 38.

taking over the workforce. In determining the principal employer, it is important to detect where these indicators, which include direct pay include payment of wages, the right to regulate the labour, and ultimate control and supervision of contract labour, lies in.⁷⁹

119. Under the agreement, the BWS is contractually responsible for recruiting, deploying and managing the workers for and on behalf of ASI throughout the workers' employment, but it is ASI who has the discretionary power to regulate and make ultimate control over the workforce. In the case at hand, ASI was fully responsible for workforce management within 12 months.⁸⁰ It is evident from the IIC report that the violations had occurred within 12 months from the date on which the Service Agreement was concluded.⁸¹ Therefore, ASI shall bear full liability for any violations arising during that period.

120. Additionally, after the workers have been transferred to ASI's site, ASI has the sole power to train the workforce, decide the manner in which the workers are to be made use of.⁸² This view is further supported by the fact that in response to the rising market demands from Seratious clients, ASI has decided to "ramped up the production capacity", without consulting with BWS.⁸³ This decision demonstrates ASI's full autonomy in making use of the labour, making ASI an employer who has full control over the workforce and thus, being liable for the violations regarding labour practices.

ii. In any event, ASI is jointly liable for BWS's violations of labour practices

121. Even if the Tribunal found that ASI is deemed not to be the employer, ASI shall be jointly liable as it is also obliged to collaborate with BWS to oversee the workforce management

⁷⁹ Gujarat Electricity Board v. Shantilal R. Desai; International Airport Authority v. Worker's Union.

⁸⁰ Moot problem, p. 9, para. 39.

⁸¹ Moot problem, p. 9, para. 38; Exh. 10.

⁸² Moot problem, p. 10, para. 40.

⁸³ Moot problem, p. 10, para. 41.

including ensuring timely submission of workforce audits, periodic compliance reporting, and addressing any concerns related to employment conditions.

122. However, ASI has failed to properly supervise BWS's workforce management, thus making room for several violations of the labour practices to be incurred by BWS, such as poor living conditions, passport confiscation, and incorrect workforce audit report.
123. ASI, as the client company, should require BWS to adhere to codes of conduct and social responsibility standards that client companies are audited against, as well as getting involved in the recruitment process and the management of the workers
124. Therefore, since ASI is also obliged to collaborate with BWS to oversee the workforce, its failure to manage BWS's conduct would hold ASI jointly liable for BWS's violation.
125. In conclusion, RMG breached the JVA in relation to the alleged labour practices by failing to ensure compliance with applicable labour laws and international standards, resulting in significant financial and reputational harm to CDI.

IV. CLAIMANT'S TERMINATION OF THE JVA WAS LAWFUL.

126. Pursuant to clause 8 of the JVA, the Parties may terminate the JVA due to a fundamental non performance or breach.⁸⁴ Art. 7.3.1(2) of the UPICC provides several factors to be taken into account in determining whether a breach is deemed fundamental. Two of which include whether strict compliance with the obligation which has not been performed is of essence under the contract and the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.⁸⁵
127. CLAIMANT was entitled to terminate the JVA since RESPONDENT's breach of Clause 4.2(f) of the JVA has constituted a fundamental breach. (A) Accordingly, strict compliance

⁸⁴ Exh.4, p.6, para 8.1.

⁸⁵ UPICC, Art.7.3.1(2)(b), Art.7.3.1(2)(d).

with the obligation to ensure labour regulatory compliance is of essence under the JVA. **(B)** Furthermore, RESPONDENT's breach caused CLAIMANT to lose trust in its future performance.

A. Strict compliance with the obligation to ensure labour regulatory compliance is of essence under the JVA

128. The relevant factor under Art. 7.3.1(2)(b) is not the seriousness of the non-performance but rather the nature of the contractual obligation for which strict performance might be of essence.⁸⁶ Therefore, the parties are free to determine which term is crucial and constitutes the essence of the contract, and be strictly complied with. The parties may either expressly or implicitly characterize terms as "of the essence" through their intentions.⁸⁷

129. In the current case, the parties did not explicitly classify the obligation to ensure compliance with labour law under Clause 4.2(f) as of essence under the JVA. However, the essentiality of this obligation can be drawn from the intention of the parties, expressed in the understood in **(1)** the surrounding circumstances and **(2)** the purpose that the contract served.⁸⁸

1. According to the surrounding circumstances, the obligation to ensure compliance with labour law under Clause 4.2(f) is of essence under the JVA.

130. Prior to the entry of the JVA, in Aurion's official press release, Veridia's Minister had acknowledged Aurion's ratification of the FLC, which imposes a binding legal obligation for Aurion to eradicate forced labour.⁸⁹ This acknowledgement demonstrates Veridia's emphasis on the obligation to maintain high standards of business conduct, particularly by prohibiting forced labour and safeguarding workers' rights. Therefore, it is CLAIMANT's expectation

⁸⁶ Unidroit (2016), Art. 7.3.1, p. 223

⁸⁷ Enderlein/Maskow(1992), p. 113

⁸⁸ Vogenauer (2015), p.929, para. 41-42; Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd

⁸⁹ Exh.2, para. 4

that RESPONDENT, as a state linked entity whose acts are influenced by Aurion's government, would uphold its obligation to ensure labour law compliance after entering into the JVA, so that it aligns with Veridia's ethical practices.

131. In addition, under the JVA, both parties share the obligation to ensure labour regulatory compliance, where CLAIMANT would provide cooperation for RESPONDENT to fulfill such obligation.⁹⁰ Thus, it is apparent that parties consider this obligation to be of great importance and share the common interest in ensuring compliance with labour laws.

132. In conclusion, it can be inferred from the intention of the parties that the obligation under Art.4.2(f) was an essential contractual obligation from which parties cannot deviate.

2. According to the purpose of the JVA, the obligation to ensure compliance with labour law under Art. 4.2(f) is of essence under the JVA.

133. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*, Koompahtoo and Sanpine had entered into a joint venture agreement for the the development and sale of part of Koompahtoo's land. However, the Agreement was terminated due to Sanpine failure to fulfill its obligation related to development programs, monthly reporting, banking and spending of money, and maintaining proper books. In light of the Agreement's commercial purpose and the business relationship it established, the majority judge held that observance of these obligations was of essence under the Agreement. Accordingly, the contract established a joint venture for a land development project of considerable size and complexity, to be carried out over a number of years. Koompahtoo brought to the joint venture its land. Sanpine brought its management and financial expertise. Sanpine's obligations as to dealing with joint venture funds and maintaining proper books and accounts were of importance, not only to working out the ultimate result of the joint venture when the land had been developed and sold, but

⁹⁰ Exh.4, p.4, Art. 4.1(c)(ii), Clause 4.2(f)

also to enabling the parties to be informed of the financial position of the project, and to make decisions and judgments based on it. As it is necessary for Koopahtoo to assess the financial state of the joint venture, this obligation is considered to be essential.⁹¹

134. In the case at hand, CLAIMANT and RESPONDENT entered into the JVA for the establishment of the semiconductor supply chain, where RESPONDENT can offer an abundant and competitive priced workforce.⁹² As RESPONDENT contributed significantly to the local workforce for the project, its obligation to ensure labour regulatory adherence was vital to manage the workforce necessary for the operation of the project. Moreover, the semiconductor chips would be primarily exported to Seratious. Since Seratious has long respected human rights, fair labour practices,⁹³ and as Seratious is imposing strict control over the semiconductor sector,⁹⁴ it is crucial to ensure that the practice is fully compliant with labour law.

135. Additionally, the JVA is not a standalone agreement, rather, it is the direct outcome of the BIT, which was signed to facilitate foreign investment in Aurion's semiconductor sector. As a result, the JVA should be interpreted consistently with the BIT. One of the objectives of the BIT is to create job opportunities in Aurion's semiconductor sector.⁹⁵ Thus, the joint venture would make use of a significant amount of local manpower, making it crucial for the members of the joint venture to establish a secured working environment for the workers.

136. Besides, there is a rising public and experts' concern over the weak labour protection regime and the risk of forced labour in Aurion, which were well-documented and widely reported in the media and industry-specific publications.⁹⁶ This issue is also reported in Veridia's

⁹¹ Koopahtoo Local Aboriginal Land Council v. Sanpine Pty Limited.

⁹² Moot problem, p.4, para. 7.

⁹³ Exh.8, para. 1.

⁹⁴ Moot problem, p.3, para. 4.

⁹⁵ Moot problem, p.5, para. 13.

⁹⁶ Moot problem, p.5, para. 15; Exh.3A.

industrial sector, where forced labour has been a common practice over the last few years and has been prosecuted.⁹⁷ These concerns and past incidents related to forced labour in Aurion and Veridia renders it vital to impose strict adherence to labour provisions.

137. Given the surrounding circumstances of Aurion, as well as the purpose of the JVA, it can be seen that the obligation to ensure labour compliance is of essence, and thus strict performance is mandated.

B. RESPONDENT's breach of the JVA caused CLAIMANT to lose trust in RESPONDENT's future performance

138. Article 7.3.1(d) of the UPICC enables the aggrieved party to terminate the contract if the breach gives the aggrieved party reason to believe that it cannot rely on the other party's future performance. The concept of "future performance" refers to the cases where the performance has to be made in several steps or over a certain period of time⁹⁸, which is commonly referred to as a long term contract. Three elements typically distinguish long-term contracts from ordinary exchange contracts: duration of the contract, an ongoing relationship between the parties, and complexity of the transaction. The joint venture agreement, given its duration and complexity, is considered to be a long term contract.⁹⁹

139. The reasonable man criterion plays a crucial role for determining whether the non-performance is grounds for non-reliance in future performance. The first key factor justified the loss of reliance on future performance is the risk of the breach occurring in the future.¹⁰⁰ One of the relevant indicators of future breach is the issue of repeated breach.¹⁰¹ The second crucial factor to consider is the attitude of the defaulting party to the contract and to

⁹⁷ Clarification, para. 8.

⁹⁸ Unidroit (2016), Art. 7.3.1, p. 255; P . Huber in Vogenauer (2015), p.930, para. 46-47.

⁹⁹ Unidroit (2016), Art. 1.11, Comment 3, p.3.

¹⁰⁰ Bradford v. Williams; Peel, Treitel (2019), para. 18-032 (n 62).

¹⁰¹ Carter (2018), para. 8-17.

its future performance, i.e. whether the other party is capable of making proper future performances.¹⁰² If a breach indicates the intention of the default party to be no longer bound by the contract, such a breach may give rise to a right for the innocent party to refuse further performance.¹⁰³

140. Following IIC's investigation, ASI was found to submit the workforce audit that underreported the number of workers involved in overtime and hours of overtime. This violation from ASI has already constituted RESPONDENT's failure to ensure compliance with labour law under Art. 4.2(f). Regardless of Aurion's warning afterwards,¹⁰⁴ ASI still failed to submit the accurate workforce audit. These ongoing failures have amounted to RESPONDENT's repeated breaches of its obligation under Art. 4.2(f) reasonably led CLAIMANT to lose faith in RESPONDENT's future performance.

141. Moreover, subsequent to the suspension and imposition of fine on ASI, CLAIMANT has sent urgent warnings to RESPONDENT. Yet, over a period of more than 2 months, CLAIMANT offered no response demonstrating a clear disregard for the situation and a refusal to engage in any communications to cure its breach.¹⁰⁵

142. By virtue of CLAIMANT's lack of willingness for future performance, CLAIMANT has objective and justified grounds to believe that it cannot rely on RESPONDENT's future performance.

¹⁰² Suisse Atlantique v. NV Rotterdamsche Kolen Centrale, 435.

¹⁰³ Suisse Atlantique v. NV Rotterdamsche Kolen Centrale, 435.

¹⁰⁴ Moot problem, p. 12, para. 49.

¹⁰⁵ Moot problem, p. 13, para. 55; Exh.11.

PRAYERS FOR RELIEFS

In light of the above, CLAIMANT hereby submits the following requests:

- 1) Declare that RESPONDENT is not entitled to invoke sovereign immunity.
- 2) Hold that CLAIMANT's initiation of arbitration was not premature.
- 3) Hold that RESPONDENT breached the JVA in relation to the alleged labour practices.
- 4) Hold that CLAIMANT's termination of the JVA was lawful.
- 5) Request the RESPONDENT to pay damages incurred by ASI.