

20TH LAWASIA INTERNATIONAL MOOT COMPETITION 2025
IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORIAL FOR RESPONDENT

THE CASE CONCERNING:

*THE JOINT VENTURE BETWEEN CALYX DREAMBOT INC. AND RIVUS
MICROELECTRONICS GROUP*

BETWEEN

CALYX DREAMBOT INCORPORATED

... CLAIMANT

AND

RIVUS MICROELECTRONICS GROUP

... RESPONDENT

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STATEMENT OF JURISDICTION

The parties, Calyx Dreambot Inc (“**CDI**” or “**CLAIMANT**”), and Rivus Microelectronics Group (“**RMG**” or “**RESPONDENT**”), have agreed that any disputes arising from or connected with the Joint Venture Agreement dated 22.12.2022 (“**JVA**”) shall be resolved by arbitration under the AIAC Rules 2023, with Aurion as the seat of arbitration and Kuala Lumpur, Malaysia as the place of arbitration.

QUESTIONS PRESENTED

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

STATEMENT OF FACTS

CLAIMANT and RESPONDENT are the “**PARTIES**” to this arbitration.

CLAIMANT is a corporation incorporated in Veridia. Veridia is recognised globally for its innovation-driven economy, skilled workforce, and leadership in the semiconductor industry.

RESPONDENT is a state-linked entity incorporated in Aurion, situated in a geopolitically strategic region, boasts a robust workforce, tax incentives, and trade friendly policies. The RESPONDENT operates as a pet project of President Davul Ho (“**President Ho**”) of Aurion, using public funds from the Government Treasury. Moreover, leadership structure and decision-making within RMG was heavily influenced and mirrors internal policies laid down by the Ministry of Economy and the board of directors too comprises of Aurion's Cabinet Ministers.

April - June 2022

President Ho initiated a series of high-level discussions with executives from major Veridian companies to court foreign investment into Aurion’s semiconductor sector.

April 2022

President Ho held a private, closed-door meeting with the CEO of CDI, Ms Al Emret (“**Ms. AE**”). In this meeting, President Ho outlined Aurion’s readiness to partner with Veridian corporations.

May 2022

President Ho conducted a second closed-door meeting, this time directly with CDI's executives. He gave assurances that RMG, his pet project and the proposed local partner, is operating under his influence, and that Aurion's legal and regulatory frameworks would remain stable.

October 2022

The Governments of Aurion and Veridia executed the Aurion-Veridia Bilateral Investment Treaty ("BIT"), which guaranteed fair and equitable treatment, full protection and security.

December 2022

CDI and RMG formalised their commercial cooperation, agreeing that CDI would provide the majority capital, technological expertise, and international market access, while RMG would secure regulatory approvals, obtain permits, and ensure full compliance with all applicable labour and employment laws. The PARTIES formalised the JVA with the purpose of establishing a joint venture ("JV"), which was envisioned as a ground-breaking semiconductor manufacturing hub in Aurion's northern region.

3 January 2023

Aurion Semiconductor Inc. ("ASI") was incorporated as the operational vehicle for CDI's investment.

26 February 2023

CDI had requested for RMG to expedite construction through a Project Acceleration Memo pushing for 15 months while the ordinary timeline is between 24 to 36 months. CDI cited delays as commercially unacceptable and also recommended engaging third-party labour agencies to supplement hiring efforts and accelerate the recruitment process, citing cost effectiveness as a key consideration to mitigate budget constraints.

September 2023

Ms. Al voiced out her concerns to President Ho regarding the construction delays and cost overruns. President Ho told Ms Al that *“for as long as I am here, your concerns will be heard and resolved. Don’t worry”*.

2 October 2023

After CDI’s approval of Beta Workforce Solutions (“BWS”), a third party labour agency, ASI entered into a service agreement with BWS to supply and manage an initial workforce of 1200 workers. The agreement included workforce management, recruitment, deployment, onboarding, lodging and transport, and regulatory compliance. This included ensuring timely submission of workforce audits, periodic compliance reporting, and addressing any concerns related to employment conditions.

September 2024

Through joint efforts by both PARTIES, ASI successfully positioned itself as a competitive player in the global semiconductor supply chain. Industry analysts began touting ASI as one of the fastest-growing semiconductor manufacturers in the region.

30 September 2024

Following weeks of circulating rumours regarding alleged labour violations at ASI, a preliminary report by the Independent Investigative Committee (“**IIC**”) was published. The report, found among others, excessive working hours, poor living conditions, retention of identity documents and a substantial misreporting of workforce audits.

2 October 2024

The Ministry of Trade and Industry of Aurion (“**the Ministry**”) suspended ASI’s operating licence for a period of three (3) weeks. The suspension had a drastic impact on ASI which halted production for three (3) weeks, disrupted supply contracts with major Seratious clients, and led to contractual penalties and heightened scrutiny over ASI’s operations. The suspension was lifted on 23 October 2024 after ASI submitted a revised workforce audit report.

16 December 2024

The Ministry of Trade and Industry of Aurion imposed a fine of USD 500 million on ASI, based on undisclosed actual timesheets allegedly indicating excessive overtime.

24 December 2024

CDI abruptly terminated the JVA only eight (8) days after the imposition of the fine. CDI also demanded that RMG bear sole responsibility for the USD 500 million fine imposed on ASI among other damages claimed.

28 December 2024

The PARTIES exchanged their final communications.

6 January 2025

The CLAIMANT issued a Notice of Arbitration dated 6 January 2025 under the AIAC Rules 2023 to the RESPONDENT.

SUMMARY OF PLEADINGS

ISSUE 1: THE RESPONDENT IS ENTITLED TO INVOKE SOVEREIGN IMMUNITY

The RESPONDENT, a state controlled entity, is rightly entitled to invoke sovereign immunity as a bar to these arbitration proceedings. The JV at the heart of this dispute constitutes a sovereign act, undertaken in furtherance of Aurion's public economy policy, and is therefore shielded by the doctrine of sovereign immunity. The arbitration agreement in Clause 11 of the JVA does not amount to an effective and unequivocal waiver of sovereign immunity, as its operation is expressly conditional upon compliance with Clause 10.2 the prerequisite of obtaining ministerial consent.

ISSUE 2: THE CLAIMANT'S INITIATION OF ARBITRATION IS PREMATURE

The procedural steps outlined in Clause 10 of the JVA, including serving a notice of dispute, engaging in negotiations, and securing ministerial consent, are mandatory preconditions to arbitration. The CLAIMANT's failure to take reasonable steps and meaningfully adhere to these steps cannot be excused as futile. By bypassing these conditions precedent, the CLAIMANT acted prematurely, depriving the Tribunal of jurisdiction and rendering the arbitration improper at this stage.

ISSUE 3: THE RESPONDENT DID NOT BREACH THE JVA IN RELATION TO THE ALLEGED LABOUR PRACTICES

There has been no breach. The CLAIMANT's evidence falls short of the required threshold to establish forced labour or any other violation on the balance of probabilities . The obligations to ensure compliance were performed, in the relevant period, by the third-party agency BWS. Further, responsibility was shared between the PARTIES under the terms of the JVA. Any losses incurred were thus not solely attributable to the RESPONDENT, and the CLAIMANT's own active and intervening conduct precludes any assertion of exclusive liability on the part of the RESPONDENT.

ISSUE 4: THE CLAIMANT'S TERMINATION OF THE JVA IS UNLAWFUL

The CLAIMANT's termination of the JVA was neither contractually justified nor executed in good faith pursuant to Clause 8.1 of the JVA. There was no fundamental breach by the Respondent capable of triggering Clause 8.1, and no reasonable notice or opportunity to cure was afforded. Rather, the termination represents a strategic manoeuvre by the CLAIMANT to evade liabilities incurred by ASI, undermining both the purpose of the JVA and the principles of fair dealing.

PLEADINGS

I. THE RESPONDENT IS ENTITLED TO INVOKE SOVEREIGN IMMUNITY.

1. The RESPONDENT asserts that it is entitled to invoke sovereign immunity as an entity controlled by the State of Aurion, and that it has neither waived its immunity nor manifested any consent to submit in arbitration proceedings.

2. In light of the above, RESPONDENT presents three (3) reasons: **(A)** RESPONDENT is an agency or instrumentality controlled by the State of Aurion; **(B)** RESPONDENT's participation in the JV is a sovereign act and not a commercial transaction; and **(C)** RESPONDENT possessed sovereign immunity at all material times and never waived it.

A. THE RESPONDENT IS AN AGENT OR INSTRUMENTALITY CONTROLLED BY THE STATE OF AURION.

3. Article 2(1)(b)(iii) of the UN Convention on Jurisdictional Immunities of States and Their Property (“UNCJISP”) provides that a State and its agencies or instrumentalities enjoy sovereign immunity insofar that they are performing acts in the exercise of sovereign authority of the State.

4. The test for when a corporate entity may be treated as an agency or instrumentality of the State was articulated in *La Générale des Carrières et des Mines v FG Hemisphere*¹, where the Privy Council held that affairs of a company and the state are so closely intertwined that the company cannot be regarded as distinct from the state, it may avail itself of sovereign immunity. Similarly, in *Mellenger v New Brunswick Development Corp*², the court held that the New Brunswick Development Corporation entitled to sovereign immunity on the basis that, having regard to its functions, all its operations were directed towards promoting the industrial development of the New Brunswick province, and it never pursued any ordinary trade or commerce outside of this purpose.

5. The same analysis applies squarely to RESPONDENT's case. RESPONDENT is consistently referred to as a state linked entity and this fact has never been disputed by CLAIMANT.³ More importantly, RESPONDENT's only known business endeavour is the JV with CLAIMANT, which was conceived as the cornerstone of Aurion's semiconductor industry,⁴ a sector of strategic importance to the State's economic policy.⁵

6. Within this JV, RESPONDENT's role is not that of an ordinary commercial trader, but rather that of a liaison and representative for ASI, the special purpose vehicle, tasked with securing expedited regulatory approvals and permits from the Aurion

¹ *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2013] 1 All ER 409, para 48.

² *Mellenger v New Brunswick Development Corp* [1971] 2 All ER 593.

³ Moot Problem at Page 8, Para 30 and Page 12, Para 49.

⁴ Moot Problem at Page 7 and 8, Para 21.

⁵ Moot Problem at Page 3 and 4, Para 5 and 6.

government.⁶ These functions were successfully carried out within a matter of days, reflecting the RESPONDENT's close link with the government.⁷ RESPONDENT's functions are therefore integrally connected to Aurion's economic strategy of developing its semiconductor industry by drawing in foreign investors like CLAIMANT.⁸

7. Accordingly, as in *Mellenger*, all of RESPONDENT's operations are wholly directed towards advancing the State's strategic economic and industrial development policy. It therefore operates as an agency or instrumentality of the Aurion government and is entitled to invoke sovereign immunity.
8. Further, RESPONDENT is subject to significant governmental control, a relevant consideration in determining sovereign immunity as laid down in *Trendtex Trading Corporation v Central Bank of Nigeria*⁹. First, RESPONDENT operates with capital originating directly from the government treasury, and such financial dependence is a critical indicator of state control.
9. Second, there is direct executive involvement in RESPONDENT's commercial operations. President Ho of Aurion personally led business negotiations with Veridian firms, culminating in the JV between the PARTIES,¹⁰ with RESPONDENT even being

⁶ Exhibit 4 (JVA), Page 4, Clauses 4.2(a), (b), (c), (d) and (h) and Moot Problem at Page 8, Para 30 and Page 10, Para 40.

⁷ Moot Problem at Page 8, Para 30 and Page 10, Para 40.

⁸ Moot Problem at Page 4, Para 9 and Page 5, Para 14.

⁹ *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, page 548 and 560.

¹⁰ Moot Problem at Page 7, Para 25 and Page 4, Para 10.

described as President Ho's "*pet project*".¹¹ CLAIMANT was fully aware of this governmental interference, as Ms Al Emret would raise CLAIMANT's concerns relating to the JV directly to President Ho.¹² Further, RESPONDENT's board of directors is also composed of Aurion cabinet ministers.

10. RESPONDENT's leadership structure and decision making is also heavily influenced and mirrors the Minister of Economy's policies. When a company's internal decisions consistently mirror ministerial policy and its board is populated by government officials, it signals that the government is not merely providing guidance, it is exercising control through those directors.

11. In sum, RESPONDENT is not an ordinary commercial entity but a State-controlled instrument through which the Aurion state executes strategic economic policy. Its operations are wholly directed towards advancing the State's economic objectives, while its governance and decision-making are within the control of Aurion cabinet ministers. Applying the principles in *La Generales* and *Mellenger*, RESPONDENT's identity cannot be distinguished from that of the Aurion state and therefore it is entitled to the protection of sovereign immunity.

¹¹ Moot Problem at Page 7, Para 27.

¹² Moot Problem at Page 9, Para 35.

B. THE RESPONDENT POSSESSED SOVEREIGN IMMUNITY AT ALL TIMES AND NEVER WAIVED IT.

12. RESPONDENT does not dispute the commercial transaction exception to sovereign immunity under Article 10 of the UNCJISP, which provides that sovereign immunity does not apply to any dispute arising from those commercial transactions. However, it is respectfully submitted that RESPONDENT's act of participating in the JV with CLAIMANT constitutes a sovereign act, having regard to its underlying public purpose of developing Aurion's economy.
13. Restricting the determination of a commercial transaction or sovereign act to only considering the nature of the act itself is overly restrictive as the JV does not exist in a vacuum. Article 2(2) of the UNCJISP provides that while the nature of the transaction is the first consideration, the purpose of the transaction should also be taken into account. States are to be given an opportunity to prove that a transaction should be treated as non-commercial because its purpose is clearly public.¹³ This two-pronged test allows a safeguard to developing states, like Aurion,¹⁴ to protect its endeavours to promote economic development.¹⁵

¹³ International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991), Page 20.

¹⁴ Moot Problem at Page 3, Para 5.

¹⁵ International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries (1991), Page 20.

14. It is pertinent to note that Aurion is a developing country¹⁶ with a strategic economic policy of becoming globally recognised as a semiconductor powerhouse.¹⁷ This economic policy is pursued through attracting foreign investments¹⁸ and signing a BIT with Veridia to foster trade relations with Veridian semiconductor firms, like the CLAIMANT.¹⁹ The JV which was entered into within two (2) months of the BIT, is not a typical commercial project but was understood by both PARTIES to be a landmark deal intended as the cornerstone of Aurion's semiconductor industry.²⁰
15. Further, the sovereign purpose of the JV is supported by the inclusion of Clause 10.2 in the JVA which requires ministerial consent before proceedings arising from the JVA can commence. This reinforces that the JV is a sovereign act that implicates the interest of the Aurion state.
16. Taken as a whole, the JVA is not purely profit-driven. It is an instrument for achieving Aurion's strategic national interest of developing its semiconductor industry. Thus, even if CLAIMANT characterises the JVA as commercial in nature, its sovereign purpose takes it outside the scope of the commercial transaction exception in Article 10 of the UNCJISP.

¹⁶ Moot Problem at Page 3, Para 5.

¹⁷ Moot Problem at Page 4, Para 6 and Page 7, Para 22.

¹⁸ Moot Problem at Page 4, Para 9.

¹⁹ Moot Problem at Page 5, Para 12.

²⁰ Moot Problem at Page 7, Para 21 and Page 8, Para 29.

C. THE RESPONDENT POSSESSED SOVEREIGN IMMUNITY AT ALL TIMES AND NEVER WAIVED IT.

17. Although the submission to an arbitration agreement is typically regarded as a waiver of sovereign immunity, it is well established in international law that a waiver of sovereign immunity, whether expressed or implied, must be complete and unequivocal to be effective.
18. This principle is affirmed in *Libra Bank Ltd v Banco Nacional de Costa Rica*²¹. It flows from the restrictive approach to interpreting waivers of sovereign immunity, as recognised by the International Law Commission in its Report on Jurisdictional Immunities which provides that “*there is no room to recognise an implication of consent of an unwilling State which has not expressed its consent in a clear and recognisable manner*”.²² This commentary, quoted by Lord Goff in the *General Dynamics v Libya*²³ case, reinforces that the threshold for a valid waiver is high.
19. In the present case, the arbitration agreement in Clause 11 of the JVA cannot be regarded as an unequivocal waiver. Clause 11 is expressly subject to Clause 10.2 which imposes a mandatory precondition, that the prior written consent of the Minister in charge of economic policy must be obtained before arbitral proceedings may commence. This requirement is not an empty formality. Rather, it reflects

²¹ *Libra Bank Ltd v Banco Nacional de Costa Rica* 570 F. Supp. 870 (S.D.N.Y. 1983).

²² Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, Yearbook of the International Law Commission, 1984, vol. II(1), A/CN.4/376, Page 75 and 58.

²³ *General Dynamics United Kingdom Ltd v The State of Libya* [2025] EWCA Civ 134.

RESPONDENT's deliberate reservation of the sovereign discretion over whether to waive immunity.

20. Therefore, Clause 11 does not on its own amount to an effective waiver of sovereign immunity. Unless and until ministerial consent is granted, which it has not been obtained in the present case, RESPONDENT's agreement to arbitrate remains conditional and incomplete.

II. THE CLAIMANT'S INITIATION OF ARBITRATION IS PREMATURE

21. Clause 10 of the JVA stipulates the dispute resolution mechanism in the event of a dispute arising out of the agreement.²⁴ This clause is divided into two (2) subclauses which together outline three (3) step processes that must be followed before arbitral proceedings can commence.

22. First, Clause 10.1 provides that for a dispute to arise, either party must first serve a written notice on the other containing the particulars of the dispute in question. Secondly, within fourteen (14) days of the service of such notice, the PARTIES are required to commence negotiations through an appointed representative of each party. Thirdly, Subclause 10.2 provides that the prior written consent of the Minister in charge of economic policy, foreign investments and trade of Aurion must be obtained before any proceedings in relation to the dispute can be commenced.

²⁴ Exhibit 4, Page 7.

23. The CLAIMANT has failed to fulfill Clause 10 prior to issuing the Notice of Arbitration. In light of the above, the RESPONDENT respectfully submits that arbitration is therefore premature for the following reasons: **(A)** Clause 10 is a mandatory pre-arbitration requirement and **(B)** Clause 10 is sufficiently certain to be enforceable.

A. CLAUSE 10 IS A MANDATORY PRE-ARBITRATION REQUIREMENT.

24. Article 1.3 of the UNIDROIT principles²⁵, the governing law of the JVA, embodies the fundamental principle of *pacta sunt servanda*, whereby a contract validly entered into is binding upon the PARTIES. Both CLAIMANT and RESPONDENT therefore have an obligation to comply with the agreed dispute resolution process in its entirety.

25. CLAIMANT, however, has disregarded these contractual obligations. It commenced this arbitration process prematurely, by serving a Notice of Arbitration on 06.01.2025 without (1) first serving notice of dispute under Subclause 10.1, (2) exhausting negotiations, or (3) obtaining the written consent of the minister under Clause 10.2.

26. To further support RESPONDENT's contention, the AIAC Rules 2023,²⁶ the governing procedural framework of the arbitration, has provided that prior to the commencement of arbitration, the parties must have satisfied all the existing pre-conditions to arbitration. This is provided in Rule 2(1)(b) of the AIAC Rules 2023:

²⁵ Article 1.3 of the UNIDROIT Principles.

²⁶ Rule 2(1)(b) of the AIAC Rules 2023.

1. *The Party or Parties commencing arbitration under the AIAC Arbitration Rules shall file a notice of arbitration, as described in Article 3, with the AIAC, accompanied by the following:*

[...]

(b) confirmation that all existing pre-conditions to arbitration have been satisfied;

27. It is therefore submitted that CLAIMANT's failure to satisfy the pre-arbitration requirements in Clause 10 renders the arbitration proceedings premature.

B. CLAUSE 10 IS SUFFICIENTLY CERTAIN TO BE ENFORCEABLE.

28. The wording of Clause 10.1 renders written notice of dispute and subsequent negotiations a mandatory precondition to the commencement of arbitration under Clause 11. Clause 10.1 contains an express deeming provision, stipulating that “*a dispute is deemed to arise upon the issuance of a written notice*” by one party to the other specifying the particulars of the dispute.

29. The legal effect of deeming clauses is observed in *Amanah Merchant Bank Bhd v Lim Tow Choon*,²⁷ citing *Lewison, The Interpretation of Contracts*²⁸, whereby if a deeming clause is used, “*it is conclusive as to the deemed meaning or consequence*” and operates with finality. The contractual trigger for a “*dispute*” under the JVA is

²⁷ *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 2 CLJ 1.

²⁸ Lewison, *The Interpretation of Contracts* 5th Edition, para 14.12.

therefore stipulated by Clause 10.1, and without compliance, no dispute exists for the purposes of arbitration.

30. The absence of cross-reference to Clause 10.1 in Clause 11 does not diminish its operative force. The same contractual interpretive principle applied in *Imation Corporation v Koninklijke Philips Electronics NV*²⁹ provides that the same terms used in different parts of a contract must be given a consistent meaning throughout. The term “*dispute*” in Clause 11 must therefore be construed in accordance to the deeming provision in Clause 10.1, that is a dispute only arises upon the issuance of a written notice.

31. Moreover, the structure and sequencing of Clause 10.1 reinforces its mandatory nature. Clause 10.1 prescribed that negotiations “*shall*” commence negotiations between an appointed representative of each party within fourteen (14) days from the service of written notice of dispute. As Mr Justice Teare observed in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,³⁰ a dispute resolution clause which prescribes a limited duration even without a proper procedure or framework is enforceable as the limited duration for the clause to be exhausted eliminates uncertainty due to its potential indefiniteness of such process. As such, the presence of the 14 day period for negotiations to commence is sufficient to constitute Clause 10.1 to be certain, mandatory and enforceable.

²⁹ *Imation Corporation v Koninklijke Philips Electronics NV* (2009), US Federal Circuit.

³⁰ *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.

32. Clause 10.2 is similarly drafted in a sequenced manner as required in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*³¹ where a clause that the parties should “*first*” seek to resolve disputes in accordance with a stated procedure, before resorting to arbitration was mandatory and enforceable.
33. Here, the operative words in Clause 10.2 which indicate the sequence of procedures are as the following; “*any proceedings [...] shall NOT be commenced before first obtaining consent of the Minister [Emphasis added]*”. Clause 10.2 explicitly provides that proceedings, including arbitrations, can only commence after the consent of the minister if obtained and as such it is a precondition to arbitration.
34. The wording of Clause 10.1 is also mandatory. The term “*shall*” followed with a capitalised “*NOT*” in Clause 10.2 clearly indicates the PARTIES’ intention that the requirement for ministerial consent is a mandatory obligation rather than a discretionary formality.
35. This interpretation is consistent with the ordinary meaning of “*shall*” as affirmed in the judgement by the ICSID tribunal in the case of *Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*³² where the tribunal was of the view that the term and usage of the word “*shall*” in a pre-arbitration clause indicates the binding character of each step in sequence before the institution of arbitration.

³¹ *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246.

³² *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Decision on Jurisdiction 2nd July 2013, para 150.

36. Taken together, the language, structure and legal effect of Clause 10.1 and 10.2 makes them mandatory preconditions to arbitration.

C. THE CLAIMANT DID NOT TAKE ANY REASONABLE STEPS TO SATISFY CLAUSE 10.

37. For the exception of futility to arise, CLAIMANT as the bypassing party must have taken reasonable efforts to satisfy the pre-arbitration requirements. This principle is affirmed in *Swiss Timing Ltd v Organizing Committee Commonwealth*³³ where the court held that the petitioner's conduct of sending three (3) formal letters over the span of three (3) months constituted a reasonable effort to resolve the dispute through discussions and negotiations before finally resorting to arbitration.

38. As the initiator of this arbitration proceedings, the CLAIMANT bears the burden of demonstrating compliance with the pre-arbitration requirements stipulated in Clause 10 of the JVA.

39. The only attempt CLAIMANT made at fulfilling Clause 10 was sending a short thread of WhatsApp messages to the Respondent on 11.10.2024.³⁴ All the messages were sent within a span of two (2) minutes and made passing reference to labour law investigation and the alleged suppression of information. These messages did not

³³ *Swiss Timing Ltd v Organizing Committee Commonwealth* AIR 2014 Supreme Court 3723.

³⁴ Exhibit 11, Page 1.

clearly set out CLAIMANT's position as to whether a dispute had arisen, nor did it constitute a notice of dispute as envisaged in Clause 10.1.³⁵

40. On the contrary, the messages stating "*we have to move on and continue with operations*"³⁶ indicate that, at the time, CLAIMANT considered the matter capable of resolution rather than a dispute requiring the invocation of the dispute resolution mechanism under Clause 10. CLAIMANT did not use the term "*dispute*" nor was there any initiation to commence negotiations.³⁷ In short, there is no indication that a dispute had arisen and RESPONDENT had no obligation to reply and commence negotiations.
41. CLAIMANT's approach also departs from the PARTIES' established practice, whereby any concerns or business directives were communicated through formal channels, that is either via official memos³⁸ or email correspondence.³⁹ Raising the matter through a WhatsApp groupchat, an inherently informal medium, does not constitute a reasonable effort to initiate negotiations under Clause 10.1.
42. Even if CLAIMANT were to argue that negotiations under Clause 10.1 would have been futile, there is no basis to suggest that obtaining the minister's consent under Clause 10.2 would have been futile. CLAIMANT made no attempt whatsoever to obtain the written consent of the minister prior to serving its Notice of Arbitration on

³⁵ Exhibit 11, Page 1.

³⁶ Exhibit 11, Page 1.

³⁷ Exhibit 11, Page 1.

³⁸ Exhibit 5.

³⁹ Exhibit 6 and 7.

the 06.01.2025.⁴⁰ Therefore, any argument that consent would not have been given by the minister is merely based on presumption.

43. For these reasons, CLAIMANT cannot invoke the futility exception to bypass Clause 10. There is a lack of reasonable effort to fulfill negotiations under Clause 10.1 and mere speculation as to the minister's unwillingness to consent under Clause 10.2 does not suffice. In absence of clear evidence that compliance with Clause 10 would have been futile, the Tribunal must give effect to the PARTIES' contractual obligations and require adherence to the agreed procedures.

III. THE RESPONDENT DID NOT BREACH THE JVA

44. CLAIMANT seeks to establish a breach by RESPONDENT of the JVA and for RESPONDENT to bear full liability for the compliance failures and damages incurred therefrom⁴¹.

45. However, to do this, CLAIMANT must show on the balance of probabilities that it is more probable than not⁴² that it is RESPONDENT that caused the breach alleged. Further, it must also be shown that there is certainty of harm.⁴³ This means, the

⁴⁰ Moot Problem at Page 14, Para 62.

⁴¹ Moot Problem at Page 14, Para 62.

⁴² C Brown, *A Common Law of International Adjudication* (2007) 92, at 19 ; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep, [26] (Separate Opinion of Judge Greenwood).

⁴³ Article 7.4.3 of the UNIDROIT Principles.

occurrence of harm must be reasonably certain⁴⁴ and there must be a sufficient causal link between the non-performance or breach alleged and the harm incurred.⁴⁵

46. It is respectfully submitted that on the facts presented, no breach by RESPONDENT can be established.

A. THERE IS NO CONCLUSIVE PROOF

47. The Ministry's suspension of ASI's license and imposition of USD 500 million fine was based on the cumulative findings of the IIC Report.⁴⁶ However, these findings alone fail to meet the required threshold of conclusive evidence in proving forced labour.⁴⁷

48. The IIC itself found no conclusive evidence to categorize the practices as modern slavery or forced labour.⁴⁸ Each finding taken individually is also inconclusive. First, regarding working hours, the evidence from workers were themselves conflicting.⁴⁹ Second, the living conditions of workers were only temporary due to construction of the ASI facility and workers were provided with all basic essentials. The living space, 185-square-foot⁵⁰, was also more than average of that required by the International

⁴⁴ Official Comment 1 to Article 7.4.3 of the UNIDROIT Principles.

⁴⁵ Official Comment 3 to Article 7.4.3 of the UNIDROIT Principles.

⁴⁶ Moot Problem at Page 12, Para 50, Line 1 & at Page 13, Para 56, Line 7.

⁴⁷ Verite. "Forced Labour in the Production of Electronic Goods in Malaysia" (2014), Pg 15. ; U.S. Customs and Border Protection (2016) Forced Labour Enforcement, Withhold Release Orders, Findings, and Detention Procedures. ; Written Evidence Submitted by Modern Slavery and Human Rights Policy and Evidence Centre (FLS0034), pg 3.

⁴⁸ Exhibit 10, Pg 4, Para 5.1.

⁴⁹ Exhibit 10, Pg 2, Para 3.4.

⁵⁰ Exhibit 10, Pg 3, Para 3.5.

Labour Organization.⁵¹ Third, the withholding of worker passports was not coercive or restrictive of freedom of movement thus did not violate international standards⁵² and the justification provided by BWS was also accepted by a domestic body in Aurion, the IIC⁵³. Lastly, the misreporting of workforce audits were caused by BWS as the party responsible at the material time.⁵⁴

49. Thus, taken individually or as a whole, the IIC findings are not conclusive evidence and thus cannot prove forced labour. The Ministry also relied on actual timesheets by an undisclosed ASI employee.⁵⁵ While the Ministry's findings are not questioned, CLAIMANT cannot solely rely on these inconclusive and unauthenticated documents to establish breach. The mere imposition of fine and suspension on ASI is not prima facie proof of a breach by RESPONDENT.

50. RESPONDENT respectfully submits, this Tribunal must still find on the facts if there was conclusive and certain evidence⁵⁶ to establish a breach, and the absence of such is therefore fatal to the CLAIMANT's position.

⁵¹ International Labour Organisation. R.115, Workers' Housing Recommendation, 1961 (No. 115).

⁵² ILO Indicators of Forced Labour, pg 17.

⁵³ Exhibit 10, Pg 3, Para 3.6 & Additional Clarification 3.

⁵⁴ Exhibit 10, Pg 3, Para 3.7.

⁵⁵ Moot Problem at Page 13, Para 56.

⁵⁶ *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 2, 17.

B. THE RESPONDENT’S OBLIGATIONS UNDER THE JVA WERE TRANSFERRED TO A THIRD-PARTY AGENCY

51. In establishing a breach, a direct, proximate and uninterrupted causal link must be shown to exist. RESPONDENT submits that at the material time, RESPONDENT was not solely responsible for the relevant obligations allegedly breached as there was a mutually-intended transfer of obligations to a third party.⁵⁷
52. Upon entering into the JVA, the subsequent conduct of the PARTIES⁵⁸ indicate the mutual intention to transfer obligations of workforce management and recruitment to a third-party agency, BWS.
53. This is seen by CLAIMANT’s explicit instruction to engage a third-party labour agency⁵⁹ and the execution of a Service Agreement between BWS and ASI pursuant to which BWS was transferred the obligation of “*full scope of workforce management*” including recruitment, onboarding, lodging and regulatory compliance.⁶⁰ CLAIMANT had also specifically instructed RESPONDENT to share its previous recruitment campaigns⁶¹ which CLAIMANT knew was the manner in which RESPONDENT initially retained full control over compliance with local labour laws.⁶²

⁵⁷ Article 9.2 of the UNIDROIT Principles.

⁵⁸ Article 4.3(c) of the UNIDROIT Principles.

⁵⁹ Moot Problem at Page 9, Para 36, Line 4 ; Exhibit 5 Para 4.1 ; Exhibit 6.

⁶⁰ Moot Problem at Page 9, Para 38, Line 4.

⁶¹ Ibid, at Line 9.

⁶² Moot Problem at Page 8, Para 33, Line 5.

54. This demonstrates a clear understanding and agreement to temporarily relinquish the RESPONDENT's control over workforce recruitment and management and labour law compliance, which are the RESPONDENT's obligations under Clause 4.2(e) and (f) of the JVA alleged to be breached.

(i) There was consent and approval by the CLAIMANT.

55. The consent of the other contracting party to delegate or transfer obligations may be manifested in both express words or conduct. In the *International Commercial Arbitration Court (ICAC) Award of 19 December 2008*⁶³, the tribunal in deciding there was a valid transfer of payment obligations, evaluated the parties' relations, the claimant's acceptance of the third party's performance and the correspondence between the parties, among others.

56. Similarly, in *Hansalaya Properties and Anx v Dalmia Cement (Bharat) Ltd*⁶⁴ the common intention and subsequent conduct of the parties was ascertained through the letters exchanged between the parties which constituted the agreement between them.

57. Here, there exists both express and implied consent by CLAIMANT. First, it was CLAIMANT that instructed RESPONDENT to engage a third-party labour agency.⁶⁵ Second, the selection and recruitment of BWS was by the Joint Project Management

⁶³ *ICAC, Case No 14/2008*, Award, 19 December 2008, Russia/Arbitration/Petrachkov, Bekker.

⁶⁴ 2008 SCC, 20 August 2008.

⁶⁵ Moot Problem at Page 9, Para 36, Line 4 ; Exhibit 5 Para 4.1 ; Exhibit 6.

Team (“JPMT”)⁶⁶ which consists of representatives from both PARTIES⁶⁷. Third, the Service Agreement was executed between the joint venture company, ASI and BWS⁶⁸. These facts show CLAIMANT’s involvement, decision-making ability and knowledge in the entire process of hiring BWS and therefore, manifests CLAIMANT’s consent on the transfer of obligations to BWS.

58. Further, even after the Service Agreement was executed, CLAIMANT communicated with BWS on all matters regarding workforce recruitment and management including holding several personal discussions with BWS.⁶⁹ Thus, CLAIMANT’s consent and approval was clear, unequivocal and manifest throughout.

(ii) The material time of the alleged breach was during the performance of a third party.

59. The Service Agreement between ASI and BWS outlines a transitional structure whereby BWS was responsible for twelve (12) months from 02.10.2023 to 02.10.2024.⁷⁰ The findings of the Independent Investigative Committee (“IIC”) including misreporting of workforce audits was published on 30.09.2024⁷¹, within the transitional period when BWS was responsible for regulatory compliance.

⁶⁶ Exhibit 7.

⁶⁷ Moot Problem at Page 8, Para 32, Line 9.

⁶⁸ Moot Problem at Page 9, Para 38.

⁶⁹ Moot Problem at Page 9, Para 38, Line 6.

⁷⁰ Moot Problem at Page 9, Para 38 & Para 39.

⁷¹ Moot Problem at Page 11, Para 47 ; Exhibit 10.

60. The Aurion Ministry's suspension of ASI's license was imposed to compel revised workforce audit reports due to the misreported audits by BWS⁷² and the subsequent USD500million fine was imposed for discrepancies in the revised audits for worktime hours during the same period where BWS was responsible.⁷³
61. Thus, at the material time in which the breach alleged was found, it was not RESPONDENT but BWS that was responsible for workforce management and regulatory compliance. This breaks the chain of causation and any damages incurred is not caused by RESPONDENT.

(iii) In any case, the CLAIMANT's inconsistent behaviour bars its claim for breach

62. It is trite that where one party has represented or caused understanding to the other, it is prevented from later acting differently. Article 1.8 of the UNIDROIT Principles provides for this :

*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.*⁷⁴

⁷² Moot Problem at Page 12, Para 50.

⁷³ Moot Problem at Page 13, Para 56.

⁷⁴ Article 1.8 of the UNIDROIT Principles.

63. To further illustrate, where one party mistakenly understands that the contract can be performed a certain way and the other party is aware and stands by while such performance proceeds, and both parties meet regularly but nothing is discussed regarding the mistakes in performance, the latter is precluded from insisting that the performance is not as required under the contract.⁷⁵
64. In the *Arbitral Award of 04.03.2004*⁷⁶, despite being perfectly aware of the situation, the claimant made no objections regarding the other party's failure or mistakes in performance until the late stage when it sought to terminate the contract. Invoking Article 1.8, it was held that the claimant was prevented by its own actions from claiming a breach of contract.
65. On the present facts, CLAIMANT gave explicit instructions on hiring a third party recruitment agency and had approved BWS. CLAIMANT took liberties engaging with BWS directly and conducting itself in a manner of substituting RESPONDENT's obligations by taking these tasks off of the RESPONDENT's hands. Even when the IIC Report was published and ASI blamed BWS for the oversight in misreporting of audit reports⁷⁷, there were no objections regarding accountability.
66. RESPONDENT adhered to all directions by CLAIMANT, ensured transparency and approval before hiring BWS and CLAIMANT continued to accept performance by

⁷⁵ Illustration 2 to Article 1.8 of the UNIDROIT Principles.

⁷⁶ *Arbitral Award of 04.03.2004*, Ad hoc Arbitration.

⁷⁷ Exhibit 10, Para 3.7.

BWS for twelve (12) months. CLAIMANT is thus prevented by its own conduct from claiming a breach and that RESPONDENT must take full responsibility of damages incurred by ASI.

C. IN ANY EVENT, THE BREACH IS NOT SOLELY ATTRIBUTABLE TO THE RESPONDENT.

67. Even if there had been an obligation, any breach alleged is not solely attributable to RESPONDENT as there was shared responsibility and an interference by CLAIMANT.

68. Article 7.1.2 of the UNIDROIT Principles provides that a party cannot rely on the non-performance of the other where it was caused by the former's act or omission or any other event for which it bears the risk.

(i) The JVA imposes shared responsibility.

69. While the PARTIES' intention is clear as to separate responsibilities in Clause 4.1 and Clause 4.2 of the JVA, equally, the JVA sets out that neither party has undue influence over operations and management of ASI⁷⁸. This connotes that both PARTIES shared responsibility in day-to-day operations and decision-making. Thus, CLAIMANT was aware and involved in all matters including workforce management, recruitment and regulatory compliance.

⁷⁸ Exhibit 4, Page 3, Clause 3.3 of the JVA.

70. Clause 6.1 and 6.2 of the JVA is also unequivocal that both PARTIES, including CLAIMANT, have a responsibility to adhere to all applicable laws, fair labour practices, and human rights, among others.⁷⁹ Thus, the obligation is joint and not unilateral on RESPONDENT.
71. Further, even if the primary obligation did vest with RESPONDENT, CLAIMANT is not absolved from obligations relating to ensuring compliance of local labour laws. Clause 4.1(c)(ii) of the JVA mandates CLAIMANT to give full cooperation in this regard.⁸⁰ A duty to cooperate is not only to refrain from hindering the other's performance but encompasses taking affirmative steps to enable the other party's performance.⁸¹ This is especially where one party has no experience in that matter but the other party is familiar and experienced, notwithstanding the contractual provisions, the latter is expected to give at least some assistance to the former.⁸²
72. CLAIMANT is a global leading firm in semiconductor manufacturing from Veridia, a state where incidents of modern slavery are prevalent⁸³. When the IIC Reports were published and a suspension imposed on ASI to compel revised audit reports, CLAIMANT was privy to all matters including the workforce audits. Thus, cooperation in submitting the revised reports in a timely and accurate manner could be reasonably expected but CLAIMANT did not attempt to advise, oversee nor assist.

⁷⁹ Exhibit 4, Page 5, Clause 6.

⁸⁰ Exhibit 4, Page 4, Clause 4.1(c)(ii) of the JVA.

⁸¹ Official Comment 1 to Article 5.1.3 of the UNIDROIT Principles.

⁸² Illustration 1, Official Comment 1 to Article 5.1.3 of the UNIDROIT Principles.

⁸³ Clarification No. 8.

73. This shared responsibility and CLAIMANT's failure to ensure such therefore amounts to shared liability. Thus, even if there was a breach, RESPONDENT is not fully liable for damages incurred.

(ii) The CLAIMANT's involvement materially caused the alleged breach.

74. CLAIMANT was also not an external party with a passive role in ASI but had active and continuing involvement in ASI's management and operations including workforce recruitment and management.

75. CLAIMANT pushed for acceleration of the project which caused severe financial overruns.⁸⁴ To compensate for its error, CLAIMANT then pushed to commence production and urged for acceleration of workforce recruitment by hiring a third-party labour agency while cutting costs.⁸⁵ RESPONDENT swiftly responded with five (5) recommended labour agencies but suggested BWS as being the best fit according to CLAIMANT's criteria of cost-efficiency.⁸⁶

76. If CLAIMANT had followed the industry construction norms and not expedited the schedule from 24-36 months to 15 months⁸⁷, the financial overruns and thereafter the outsourcing and transfer of workforce recruitment and management to an external

⁸⁴ Moot Problem at Page 8 & 9, Para 34.

⁸⁵ Moot Problem at Page 9, Para 36 ; Exhibit 5 Para 4.1 ; Exhibit 6.

⁸⁶ Moot Problem at Page 9, Para 37 ; Exhibit 7.

⁸⁷ Moot Problem at Page 8, Para 32.

party would not have occurred. Even then, CLAIMANT gave specific instructions to BWS to recruit workers who are highly dedicated, capable of meeting production demands⁸⁸ and who prioritised work above all else.⁸⁹

77. Thus, but for CLAIMANT's actions, the alleged breach would not have occurred. Therefore, an absence of a direct, proximate and uninterrupted causal link, CLAIMANT's position that there was a breach and for RESPONDENT to bear full liability must fail.

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

A. THERE IS NO FUNDAMENTAL NON-PERFORMANCE OR BREACH ENTITLING TERMINATION UNDER CLAUSE 8.1 OF THE JVA.

78. CLAIMANT's position is that it is entitled to terminate the JVA for the fundamental breach by RESPONDENT.⁹⁰ Clause 8.1 of the JVA only allows termination on account of a fundamental non-performance or breach. RESPONDENT respectfully submits that there was no breach let alone a fundamental breach entitling CLAIMANT's termination of JVA.

⁸⁸ Moot Problem at Page 9, Para 38, Line 6.

⁸⁹ Moot Problem at Page 8, Para 33 & Page 9, Para 38. CDI instructed to share recruitment campaigns with BWS containing such criteria.

⁹⁰ Moot Problem at Page 14, Para 61, Line 2.

79. Article 7.3.1 of the UNIDROIT Principles on fundamental non performance is applied in the same manner for cases of fundamental breach⁹¹ and termination. The Australian High Court invoked the same in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*⁹² in deciding that a fundamental breach is that of an essential term of the contract which contravenes the commercial purpose⁹³ mutually intended by both parties.
80. The commercial purpose of the JVA was to build a ground-breaking semiconductor manufacturing hub in Aurion⁹⁴ for which ASI was created⁹⁵.
81. This purpose was fulfilled with ASI positioning itself as a competitive player and surpassing initial forecasts by 35%⁹⁶ and there therefore exists probable grounds to continue operations at ASI. This was affirmed even by CLAIMANT's CEO, Ms Al Emret through WhatsApp messages stating to "*move on and continue with operations*"⁹⁷ during the suspension period. There is also absence of concrete facts indicating cessation or complete halting of operations after the suspension or fine.

⁹¹ *Centro de Arbitraje de Mexico (CAM)*, Award, 30 November 2006.

⁹² (2007) 233 CLR 115

⁹³ Court referred to *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632.

⁹⁴ Moot Problem at Page 8, Para 29.

⁹⁵ Exhibit 4, Page 1, Preamble of the JVA.

⁹⁶ Moot Problem at Page 10, Para 42.

⁹⁷ Exhibit 11, Page 1.

82. Thus, ASI's commercial viability is not substantially diluted and the commercial purpose of the JVA still exists. Thus, no fundamental breach has occurred and thus termination is unlawful.

B. THE TERMINATION WAS NOT MADE IN GOOD FAITH.

83. A cornerstone of all contractual performance is that parties must conduct themselves in good faith.⁹⁸ This includes notifying the other party of intention to terminate within reasonable time and allowing sufficient time to cure a possible breach. Article 7.3.2(2) of the UNIDROIT Principles provides that the right to terminate is lost if notice is not given within reasonable time after becoming aware of the non-performance.

84. In the *Arbitral Award of 2001*⁹⁹, it was held that the duty to inform the intention to terminate within reasonable time is premised on the principle of good faith.

85. The breach alleged by CLAIMANT is regarding the labour practices which is a matter that CLAIMANT would have been reasonably aware of from the time the IIC Reports were published on 30.09.2024, three (3) months before CLAIMANT's termination of the JVA. The delay in informing RESPONDENT in good faith of any error in performance and allowing reasonable time to cure its breach before resorting to termination of the JVA is an act not in good faith.

⁹⁸ Article 1.7 of the UNIDROIT Principles ; Article 26 of the Vienna Convention on the Law of Treaties.

⁹⁹ *International Court of Arbitration, Arbitral Award of 2001*, ICC Case No. 10422.

86. Further, the timing of termination after becoming aware of the imposition of fine also indicates a lack of good faith termination due to its abrupt and immediate nature. Despite the 3 months during which CLAIMANT was aware of IIC findings, the CLAIMANT's decision to terminate eight (8) days after the imposition of fine reflects a strategic and calculated manoeuvre merely to escape financial and reputational liabilities arising out of the PARTIES' joint efforts under the JVA.
87. Therefore, the failure to inform in a timely manner, provide reasonable time to cure breach and the circumstances of the termination indicates a lack of good faith termination and thus, CLAIMANT's right to terminate is lost.

PRAYERS FOR RELIEF

In light of the submission above, counsel for the RESPONDENT respectfully invites the Tribunal to declare that:

- I. The RESPONDENT is entitled to invoke sovereign immunity as it is a state-controlled entity;
- II. The CLAIMANT's initiation of arbitration is premature;
- III. The RESPONDENT did not breach the JVA in relation to the labour practices; and
- IV. The CLAIMANT's termination of the JVA was consequently unlawful.