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INTERNATIONAL MOOT COMPETITION

11 OCTOBER TO 13 OCTOBER 2025

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM FOR THE RESPONDENT

CLAIMANT
CALYX DREAMBOT
INC

V.

RESPONDENT
RIVUS
MICROELECTRONICS
GROUP

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... 4

STATEMENT OF JURISDICTION..... 15

QUESTIONS PRESENTED 16

STATEMENT OF FACTS..... 17

SUMMARY OF PLEADINGS 20

PLEADINGS 22

I. THE RESPONDENT IS ENTITLED TO INVOKE THE DOCTRINE OF SOVEREIGN IMMUNITY 22

A. The Doctrine of Sovereign immunity is applicable to the respondent..... 22

(1) The Respondent is an agent of Aurion 22

(2) The Respondent was exercising sovereign authority 24

B. The Respondent has not waived its right to the doctrine of sovereign immunity.. 26

(1) The Respondent has not waived its immunity from execution 27

II. THE CLAIMANT’S INITAITON OF ARBITRATION PROCEEDINGS IS PREMATURE..... 29

A. The pre-arbitration steps are mandatory and were not complied with..... 29

B. The pre-arbitration steps should be enforced..... 32

(1) The negotiation step is sufficiently certain 32

(2) The ministerial consent clause is sufficient certain..... 33

(3) The negotiation step is not futile 34

(4) The ministerial consent is not futile 35

C. Non-compliance of the pre-arbitration steps goes to the jurisdiction of the tribunal 36

III. THE RESPONDENT HAS NOT BREACHED THE JOINT VENTURE AGREEMENT	37
A. The working conditions do not meet the threshold of forced labour	37
(1) The living conditions were temporary	38
(2) The withholding of passports was a legitimate labour practice	40
(3) The worker survey is insufficient to show that there was excessive working hours.....	41
B. Even if the working conditions amount to forced labour, the Respondent cannot be found in breach of the JVA.....	42
C. Alternatively, the Respondent did not breach Clause 4.2(f) as it is a clause of best efforts	45
IV. THE CLAIMANT’S TERMINATION OF THE JOINT VENTURE AGREEMENT WAS UNLAWFUL	47
A. The Claimant did not follow the prescribed modes of termination	47
(1) There was no fundamental non-performance as required by Clause 8.1	47
(2) There was no Force Majeure as required under Clause 8.3	49
B. The Claimant acted in bad faith contrary to Article 1.7 of the UNIDRIOT Principles.....	51
C. Conclusion	52

INDEX OF AUTHORITIES

No.	Abbreviation	Citation	Page cited at
ARTICLES AND BOOKS			
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COURT DECISIONS			
10.	<i>Alcom Ltd v Republic of Colombia</i>	UK House of Lords 12 April 1984 <i>Alcom Ltd v Republic of Colombia</i> [1984] 2 All ER 6	27
11.	<i>Apple Sales International v eBizcuss</i>	French Supreme Court 7 October 2015 <i>Apple Sales International v eBizcuss</i> No. 14-16.898	32

No.	Abbreviation	Citation	Page cited at
12.	<i>CC/Devas (Mauritius) Ltd v. Republic of India</i>	England and Wales High Court 17 April 2025 <i>CC/Devas (Mauritius) Ltd v. Republic of India</i> [2025] EWHC 964 (Comm)	27
13.	<i>CJD v CJE</i>	2021 Singapore High Court 19 March 2021 <i>CJD v CJE and another</i> [2021] 4 SLR 734	31
14.	<i>Clavis Securities Plc & Ors v Hussain & Ors</i>	England and Wales High Court 16 July 2021 <i>Clavis Securities Plc & Ors v Hussain & Ors</i> [2021] EWHC 2003 (Ch)	24
15.	<i>Cutcliffe v Univ. of Ulster</i>	US District Court 5 February 2013	22,23

No.	Abbreviation	Citation	Page cited at
		<i>Cutcliffe v Univ. of Ulster</i> 2013 US Dist LEXIS 81336	
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17.	<i>General Dynamics United Kingdom Ltd v. The State of Libya</i>	England and Wales High Court 22 March 2024 <i>General Dynamics United Kingdom Ltd v. The State of Libya</i> [2024] EWHC 472 (Comm)	26, 27
18.	<i>Holloway v Chancery Mead Ltd</i>	England and Wales High Court 30 July 2007 <i>Holloway v Chancery Mead Ltd</i> [2007] EWHC 2495	31

No.	Abbreviation	Citation	Page cited at
19.	<i>Ms X v Banque Privée Edmond de Rothschild</i>	French Supreme Court, First Civil Chamber 26 September 2012 <i>Ms X v Banque Privée Edmond de Rothschild</i> No 11-26.022	32
20.	<i>Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq</i>	England and Wales High Court 20 November 2015 <i>Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq</i> [2015] EWHC 3361 (Comm)	25
21.	<i>Prosecutor v. Krnojelac</i>	International Court of Former Yugoslavia 15 March 2002 <i>Prosecutor v. Krnojelac</i> Case No. IT-97-25	40

No.	Abbreviation	Citation	Page cited at
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25.	<i>Svenska Petroleum Exploration AB v Government of the</i>	England and Wales Court of Appeal	24

No.	Abbreviation	Citation	Page cited at
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ARBITRAL AWARDS			
27.	30-11-2006 Arbitral Award	30-11-2006 Arbitral Award at the Centro de Arbitraje de Mexico	47,48
28.	<i>Almasryia for Operating & Maintaining Touristic Construction Co.</i>	ICSID Case No. ARB/18/2 1 November 2019 <i>Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait</i> , Award on the	35,36

No.	Abbreviation	Citation	Page cited at
	<i>L.L.C. v. State of Kuwait</i>	Respondent Application under Rule 41(5) of the ICSID Arbitration Rules	
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30.	<i>ICC Case No 10256</i>	ICC Case No 10256 12 August 2000 Interim Award	30
31.	<i>Murphy Exploration and Production Company International v. Republic of Ecuador</i>	ICSID Case No. ARB/08/4 15 December 2010 <i>Murphy Exploration and Production Company International v. Republic of Ecuador</i>	34
32.	<i>Teinver v Argentina</i>	ICSID Case No. ARB/09/1	33,34

No.	Abbreviation	Citation	Page cited at
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STATUES AND TREATIES			
33.	<i>Forced Labour Convention</i>	<i>C029 - Forced Labour Convention, 1930 (No. 29)</i>	36,37
34.	JIFSA	<i>Jurisdictional Immunities of Foreign States (Malaysia) Act, 2024</i>	21
35.	New York Convention	<i>New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i>	27
36.	PICC	<i>UNIDROIT Principles of International Commercial Contracts (2016)</i>	19,20,44,45,46,47,48,49 50,51
37.	UKSIA	<i>United Kingdom State Immunity Act 1978</i>	28

No.	Abbreviation	Citation	Page cited at
38.	UNCIS	<i>United Nations Convention on Jurisdictional Immunities of States and Their Property</i> 2004	22
39.	USFSIA	<i>United States Foreign Sovereign Immunities Act</i> 1976	23

STATEMENT OF JURISDICTION

Calyx Dreambox Inc (“**CDI**”) and **Rivus Microelectronics Group** (“**RDI**”) have agreed, pursuant to Article 12 of the Joint Venture Agreement (“**JVA**”) signed between them, to submit any dispute arising between the investors to arbitration administered in Kuala Lumpur, Malaysia in accordance with the Asian International Arbitration Centre Rules 2021 (“**AIAC Rules**”).

QUESTIONS PRESENTED

- a) Whether RMG is entitled to invoke sovereign immunity;
- b) Whether CDI's initiation of arbitration was premature;
- c) Whether RMG breached the JVA in relation to the alleged labour practices; and
- d) Whether CDI's termination of the JVA was lawful.

STATEMENT OF FACTS

- 1 The present dispute arises against the backdrop of an escalating geopolitical conflict between the global powers of Seratious and Veridia. As artificial intelligence, cybersecurity, and advanced manufacturing become increasingly dependent on semiconductors, access to such technology has become a matter of national strategic interest.
- 2 Facing sanctions and export restrictions imposed by Seratious, Veridia actively encouraged its semiconductor firms to relocate operations to friendly jurisdictions. The developing nation of Aurion emerged as a preferred destination due to its geographic neutrality, untapped natural resources, and favourable investment climate.
- 3 Recognising these advantages, President Davul Ho (“*President Ho*”) sought to attract Veridian capital and technological expertise. In October 2022, Aurion and Veridia concluded a Bilateral Investment Treaty (“*BIT*”) providing Veridian investors with protections including fair and equitable treatment, regulatory stability, and protection against expropriation.
- 4 Central to this broader initiative was the formation of a joint venture between Rivus Microelectronics Group (“*RMG*”), a Aurion company under the influence of President Ho, and Calyx Dreambot Incorporated (“*CDI*”), Veridia’s largest semiconductor firm. The Joint Venture Agreement (“*JVA*”), signed on 20th December of 2022, led to the establishment of Aurion Semiconductor Inc. (“*ASI*”), a special purpose vehicle tasked with developing and operating a semiconductor fabrication facility in northern Aurion. Under the JVA, CDI contributed USD 1.2 billion and provided technical expertise. RMG was responsible for securing land, obtaining permits, and ensuring compliance

with local regulatory and labour laws. RMG's close ties to the State were publicly known, with reports indicating that its board comprised of Cabinet Ministers and that public funds were used to support its operations.

5 On the 23rd of February 2024 CDI insisted on an accelerated construction timeline of 15 months, leaving RMG with only half the time to fulfil its end of the project. Accordingly, RMG used its position to expedite regulatory approvals and fast-track the project. At CDI's insistence, a third-party labour agency was also engaged to expedite recruitment and "minimise labour costs wherever feasible." RMG recommended Beta Workforce Solutions ("**BWS**") and it was ultimately selected and approved by CDI without objection.

6 ASI commenced operations in May 2024. By September, it had surpassed revenue forecasts by 35%, delivering advanced chips to international buyers and positioning itself as one of the fastest-growing semiconductor producers in the region. Unfortunately, its progress was disrupted in September 2024 when an anonymous report from Seratious surfaced online, alleging exploitative labour conditions at ASI.

7 On 17th of September 2024, the Seratious government issued a formal warning that unless Aurion acted immediately, it would impose a complete import ban on all semiconductor products originating from Aurion. With Seratious accounting for a substantial portion of Aurion's semiconductor exports, the threat of an import ban placed the entire industry and Aurion's economic strategy at risk.

8 Accordingly, an Independent Investigative committee ("**IIC**") was formed to assess the accuracy of the claims. The IIC's report, issued on 30th of September 2024, found no evidence of modern slavery. It noted that living conditions were substandard but merely

temporary because ASI's on-site worker dormitories were still being constructed. The report further noted that while overtime may have been extensive, it was, in many cases, voluntary. It also acknowledged administrative issues with passport retention and discrepancies in workforce audits produced by BWS and recommended enhanced monitoring. Further, there were absolutely no instances of debt bondage. Accordingly, the report found that these allegations do not meet the high threshold of modern slavery.

- 9 Despite the absence of conclusive findings, the political pressure from Serarious continued to mount. On 16th of December 2024, following receipt of an undisclosed timesheet allegedly showing underreported overtime hours, the Ministry imposed a USD 500 million fine on ASI. Requests for disclosure of the timesheet's source were denied on grounds of "confidentiality, safety, and national interest."
- 10 On 24th of December 2024, CDI terminated the JVA, citing ongoing breaches and erosion of trust. It demanded that RMG bear the full burden of the USD 500 million fine. When this demand was rejected, CDI commenced arbitration proceedings.

SUMMARY OF PLEADINGS

I. THE RESPONENT IS ENTITLED TO INVOKE THE DOCTRINE OF SOVEREIGN IMMUNITY

1 Sovereign immunity is an established rule of international law. First, the Respondent is an agency of the State of Aurion and was exercising sovereign authority. Furthermore, the Respondent has not waived its right to the doctrine sovereign immunity by entering into the arbitration agreement. Consequently, the Respondent is entitled to invoke the doctrine sovereign immunity.

II. THE CLAIMANT'S INITIATION OF ARBITRATION PROCEEDINGS WAS PREMATURE

2 Pre-arbitration steps are requirements that parties must fulfill before they are able to engage in arbitration. The Pre-Arbitration steps are mandatory and were not complied with, therefore rendering these arbitration proceedings premature. The Pre-Arbitration steps should be enforced as they were sufficiently certain and not futile. The non-compliance of the Pre-Arbitration steps goes towards the jurisdiction of the tribunal, therefore this tribunal does not have jurisdiction.

III. THE RESPONDENT DID NOT BREACH THE JOINT VENTURE AGREEMENT

3 The labour violations do not meet the threshold of forced labour. Even if the alleged labour breaches amount to forced labour, the Respondent cannot be found in breach of Clause 4.2(f) of the JVA as these were primarily caused by the Claimant's directives. Following Article 7.1.2 of the PICC, the Claimant cannot rely on any alleged non-

performance that was substantially caused by its own conduct. Alternatively, the Respondent did not breach Clause 4.2(f) as it is a clause of best efforts.

IV. THE CLAIMANT'S TERMINATION OF THE JOINT VENTURE AGREEMENT WAS UNLAWFUL

- 4 The Claimant did not follow the prescribed avenues for termination under the JVA. There was neither fundamental non-performance nor a Force Majeure event, therefore the Claimant is not entitled to terminate the contract. The Claimant's termination of the JVA was done in bad faith, contravening Article 1.7 of the PICC, therefore rendering the termination invalid.

PLEADINGS

I. THE RESPONENT IS ENTITLED TO INVOKE THE DOCTRINE OF SOVEREIGN IMMUNITY

1 The Claimant's initiation of the current proceeding is an affront to established rules of international law and threatens the stability of interstate relations. First, the doctrine of sovereign immunity applies to the Respondent as it is an agency of Aurion and was exercising sovereign authority. Second, the Respondent has not waived its right to invoke the doctrine sovereign immunity.

A. *The Doctrine of Sovereign immunity is applicable to the Respondent*

2 The relevant law to determine whether the doctrine sovereign immunity is applicable to a party is the United Nations Convention on Jurisdictional Immunities of State and their Property ("*UNCIS*"). The UNCIS reflects aspects of customary international law regarding sovereign immunity,¹ and has been ratified by Aurion, the seat of arbitration. Accordingly, this tribunal, which ought to be subject to the curial jurisdiction of the seat, should apply the UNCIS to determine whether the doctrine of sovereign immunity is applicable to the Respondent.

(1) *The Respondent is an agent of the State of Aurion*

3 The Respondent falls within the definition of 'State' under Article 2 of the UNCIS, which defines a State as 'agencies or instrumentalities of the State or other entities, to

¹ Dixon, M. (2013). *Textbook on international law* (7th ed.). Oxford University Press. at pg 216.

the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.”.

4 To invoke sovereign immunity, two elements must be fulfilled by the Respondent – it must be an (1) agency of the State and it must be (2) exercising sovereign authority.

5 In interpreting the meaning of “*agencies or instrumentalities*” in the 1st element, regard should be had to the United States Foreign Sovereign Immunities Act (“*USFSIA*”) as the phrase was adopted from this legislation.² Given that there is a lack of caselaw on the UNCIS, the USFSIA is persuasive in understanding the application of the UNCIS. The USFSIA defines an agency or instrumentality of the State as a separate entity which is an organ of a State or is State-owned.³ To determine whether an entity is an organ of the State, the US courts adopt a broad interpretation. The US courts have also developed a multi-factorial test to determine if the entity is performing a public have activity, including factors such as:⁴

- (a) the circumstances around the entity’s creation,
- (b) purpose of its activities,
- (c) degree of governmental supervision, and
- (d) financial support by the government.

6 This broad interpretation of “agencies and instrumentalities” has been applied in various cases from the US. In the 2013 US District Court case of *Cutcliffe v Univ. of*

² Reece Thomas, K. (2024). The commercial activity exception to state immunity: An introduction. Edward Elgar Publishing (“**The commercial activity exception to state immunity**”) at pg 125.

³ United States Foreign Sovereign Immunities Act 1976 (“*USFSIA*”) section 1603.

⁴ The commercial activity exception to state immunity at pg 121.

Ulster, the University of Ulster was held to be a State organ as it had a “public role, public mission, and public funding”.⁵ Furthermore, in 2021 US Court of Appeals for the Fifth Circuit case of *Al-Qarqani v Saudi Arabian Oil Co*, the Saudi State oil company was a ‘foreign State’ for the purposes of the USFSIA as it was a distinct legal entity incorporated under Saudi law and majority owned by the Saudi government.⁶ These cases evince a low threshold for determining whether an entity is an agent of a State.

7 It is R’s position that the Respondent is an agent of the State of Aurion for the following reasons. Presently, the capital requirements of the Respondent was funded by the public treasury of Aurion.⁷ The Respondent is all under the oversight of President Ho and is widely known as “President Ho’s pet project.”⁸ The leadership structure and the policies of the Respondent closely mirrored the Ministry of Economy with Aurion’s Cabinet Ministers sitting on the board of directors.⁹ Furthermore, the purpose of the Respondent is to establish Aurion as a global leader in the semiconductor sector and to drive the country’s economy. Essentially the Respondent has a public role, mission and funding, and has close ties to Aurion’s strategic and economic objectives. Consequently, the Respondent is an agent of the State of Aurion.

(2) *The Respondent was exercising sovereign authority*

8 Further, the Respondent was also performing acts in the exercise of sovereign authority. The general principle is that an act is a sovereign act if it can only be carried out by a

⁵ *Cutcliffe v Univ. of Ulster* 2013 US Dist LEXIS 81336 (D Me 2013).

⁶ *Al-Qarqani v Saudi Arabian Oil Co* 2021 WL 5711555 (5th Cir. Dec. 2 2021).

⁷ The Facts at [27].

⁸ The Facts at [27].

⁹ The Facts at [28].

State.¹⁰ Clear evidence that the act in question was an exercise of governmental authority must be furnished. This requires demonstrable State control and integration into national policy.¹¹

9 On the contrary, immunity does not apply where the conduct is inherently commercial and mirrors those of private market players.¹² However, this does not mean that every act with certain hallmarks of a commercial deal will have the effect of excluding the application of sovereign immunity. Reference may be made to the decision 2007 English Court of Appeal case of *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (“**Svenska Petroleum**”). In *Svenska Petroleum*, Court of Appeal acknowledged that the agreement contained hallmarks of a commercial deal because as it was a joint venture for oil exploration with detailed commercial terms. However, the court held that “the fact that it relates to the exploitation of oil reserves within the territory of the State suggests that it involves an exercise by the State of its sovereign authority in relation to its natural resources and so falls outside the realm of activities which a private person might enter into.”¹³ It can be gleaned that acts, which although seemingly commercial in nature, will be considered an act in exercise of the doctrine sovereign immunity if the act involves, as its subject matter, something which can only be controlled by the State.

10 This principle was similarly endorsed in the 2015 English High Court case of *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq*, where the court held that the Kurdistan Regional Government’s execution of oil exploitation agreements

¹⁰ *The commercial activity exception to state immunity* at pg 112.

¹¹ *Clavis Securities Plc & Ors v Hussain & Ors* [2021] EWHC 2003 (Ch).

¹² *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2017] HCA 21.

¹³ *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] 1 All ER (Comm) 909 (“**Svenska Petroleum**”) at [133].

constituted a sovereign act.¹⁴ Such a characterisation of activities involving natural resources has also been affirmed by the United Nations which “has repeatedly recognised the principle that a sovereign State has the sole power to control its natural resources.”¹⁵

11 The Respondent was under the direct oversight of the Aurion’s government. The JVA was part of Aurion’s broader national policy to bolster its economy and secure technological and industrial capabilities. Crucially, it involved exploitation of the natural resources such as “silica, rare earths and precious metals”¹⁶ found in the Aurion’s northern region. The north has even been described as a “golden mine to semiconductor manufacturing.”¹⁷ This clearly constitutes an act which can only be done by a State and not by any private market player. Therefore, the Respondent was engaged in a sovereign act.

B. The Respondent has not waived its sovereign immunity

12 Sovereign immunity comprises of immunity from jurisdiction (“*IOJ*”) and immunity from execution (“*IOE*”). *IOJ* means that a sovereign State cannot be compelled to submit to the jurisdiction of another State. On the other hand, *IOE* refers to the immunity that a State enjoys from being subject to any measures of constraint by a national court.¹⁸

¹⁴ *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm) (“**Pearl Petroleum**”).

¹⁵ 477 F.Supp. at 567 (referring to UN General Assembly Resolutions Nos. 1803, 3821, 3201, 3171, 3016 and 2158).

¹⁶ The Facts at [6].

¹⁷ The Facts at [6].

¹⁸ Meng, Zixin. *State Immunity and International Investment Law*. Singapore: Springer, 2022 at pg 60.

- 13 A waiver of IOJ would naturally flow from an agreement to arbitrate as such an agreement evinces an intention by both parties to submit their dispute to a tribunal. However, such a waiver of IOJ does not extend to a waiver of IOE.¹⁹ On the contrary, a waiver of IOE *must* be express and distinct.²⁰
- 14 The IOJ does not affect the jurisdiction of the tribunal. However, IOE remains relevant as any award rendered by this tribunal would not be enforceable if the Respondent had not waived IOE.

(1) The Respondent has not waived immunity from execution

- 15 A waiver of IOE requires an express undertaking by the foreign State.²¹ The foreign State must have “expressly consented to the taking of such measures”.²² This mirrors the requirement in the domestic legislation on the doctrine sovereign immunity of most countries.²³
- 16 However, the Respondent takes the position that a lower threshold for a waiver ought to be applied. This lower threshold was applied in the 2024 UK High Court case of *General Dynamics United Kingdom Ltd v. The State of Libya* (“**General Dynamics**”). There, the English High Court held that the clause which stated that the award would be “final, binding and wholly enforceable” constituted an intention to waive IOE.²⁴ The

¹⁹ UNCIS Articles 7, 19, 20.

²⁰ Chamlongrasdr, D. (2007). *Foreign state immunity and arbitration*. Cameron May at [6.43].

²¹ UNCIS Article 19.

²² UNCIS Article 19.

²³ *Foreign Sovereign Immunities Act 1976* (United States); *State Immunity Act 1978* (United Kingdom); *Jurisdictional Immunities of Foreign States Bill (Malaysia)*. (2024).

²⁴ *General Dynamics United Kingdom Ltd v. The State of Libya* [2024] EWHC 472 (Comm) (“**General Dynamics**”).

court found that the phrase implied that the award could be enforced without limitation and aligns with the principle of good faith under Swiss law.

17 However, the decision in *General Dynamics* ought to be departed from insofar as it states that such language indeed constitutes an express waiver for IOE as required by s 13(3) of the United Kingdom State Immunities Act (“*UKSIA*”) and *Alcom Ltd v Republic of Colombia*.²⁵ Even if this tribunal were to adopt this approach, clause 11 of the JVA does not contain such language in reference to the enforcement of an arbitral award. Therefore, any argument of inferring a waiver of IOE from the language of an arbitration clause must fail.

18 Alternatively, the Claimant also cannot rely on the New York Convention to support a finding of a waiver of IOE. This was evidenced in the 2025 English High Court case of *CC/Devas (Mauritius) Ltd v. Republic of India* (“*CC/Devas*”). The Court there held that the ratification of the New York Convention is not, without more, a waiver of the doctrine of sovereign immunity under the UKSIA.²⁶ The Court emphasised that “[a] waiver of State immunity by treaty or convention must always be express, and expressed in a clear and recognisable manner, as by an unequivocal agreement.”²⁷ Article III of the New York Convention, which obliges contracting States to recognise and enforce awards within the rules of procedure of the forum State, does not meet the required standard for a waiver of sovereign immunity. Likewise, this tribunal should not find a waiver of IOE simply because Aurion and Veridia are signatories to the New York Convention.

²⁵ *Alcom Ltd v Republic of Colombia* [1984] 2 All ER 6 (“*Alcom Ltd*”).

²⁶ *CC/Devas (Mauritius) Ltd v. Republic of India* [2025] EWHC 964 (Comm) (“*CC/Devas*”).

²⁷ *CC/Devas* at [82].

19 These cases highlight the uncertainties and problematic nature of finding a waiver of IOE which is not express. A waiver inferred from language, or international conventions should not be considered as a waiver of the doctrine of sovereign immunity unless it is clear, express and unequivocal. Given that the JVA contains no such express waiver, the Respondent has not relinquished its IOE.

II. THE CLAIMANT'S INITIATION OF ARBITRATION PROCEEDINGS IS PREMATURE

20 This tribunal is not seized with jurisdiction as non-compliance of pre-arbitration steps goes to the jurisdiction of the Tribunal. The pre-arbitration steps as outlined in Clause 10 of the JVA reflects parties' intention to resolve disputes amicably through negotiations. Unfortunately, The Claimant has disregarded these express intentions and commenced arbitration without any attempt whatsoever to resolve the dispute amicably. In these circumstances, the Claimant has sought to argue that the pre-arbitration steps were not a condition precedent to arbitration. However, the Respondent submits that compliance with Clause 10 is mandatory. Furthermore, the pre-arbitration steps should be enforced as they are sufficiently certain and would not be an exercise of futility.

A. *The pre-arbitration steps are mandatory, and were not complied with*

21 Parties must adhere to dispute resolution clauses which they have covenanted to.²⁸ Presently, the Claimant alleges that the Respondent failed to comply with international labour standards pursuant to Clause 6 of the JVA.²⁹ Specifically, Clause 6.3 states that:

²⁸ Gary Born, Marija Scekic "Chapter 14: Pre-arbitration procedural requirements 'A Dismal Swamp'" ("Gary Born, 'A Dismal Swamp'") in Practising Virtue Inside International Arbitration (David D. Caron ed) (Oxford University Press, 1st Ed, 2015) at p 246.

²⁹ Exhibit 4, p 5, Clause 6.

“In the event of any alleged non-compliance, the Parties *shall* refer to Clause 10 — Dispute Resolution.”³⁰

22 Clause 10 is reproduced below:³¹

Clause 10 — Dispute Resolution

10.1 Parties agree to regulate their own affairs and resolve any dispute arising from or connected to this Agreement amicably through negotiations between an appointed representative of each of the Party which shall commence within fourteen (14) days from the date on which either Party has served written notice on the other containing particulars of the dispute in question. A dispute is deemed to arise upon the issuance of a written notice.

10.2 Any proceedings, claims, or suits in relation to any dispute or controversy, arising out of or in connection with this Agreement shall NOT be commenced before first obtaining the consent of the Minister in charge of economic policy, foreign investments and trade of Aurion.

23 The pre-arbitration steps should be interpreted “in accordance with the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances” pursuant to Article 4.1(2) of the UNIDRIOT Principles of International Commercial Contracts (2016) which is the governing law.³² The language in Clauses 6 and 10 such as “*shall*”, “*shall NOT*”, and “*before first*” would be interpreted by a

³⁰ Exhibit 4, p 5, Clause 6.3

³¹ Exhibit 4, p 7, Clause 10.

³² Exhibit 4, Clause 12.

reasonable person as creating a mandatory obligation for disputes to be first settled through negotiations and only brought to arbitration after obtaining ministerial consent.

24 The 2022 ICSID case of *EcoDevelopment v Tanzania* lends support to this interpretation. In this case, the dispute resolution clause contained similar language which indicated that the obligation was mandatory through the application of the word “shall”.³³ Clause 10.2 creates a mandatory requirement for ministerial consent to be obtained prior to the commencement of any proceedings.

25 That the presence of obligatory language supports the interpretation of pre-arbitral steps being mandatory is bolstered when contrasted against cases that only use permissive language. For example, in *ICC Case No. 10256*, the dispute resolution clause specified that if parties were unable to resolve a dispute through mediation, then they “may” refer it to an expert who would consider the dispute.³⁴ Consequently, the tribunal held that the clause was non-binding because the term “may” suggested that compliance with the Pre-Arbitration Steps was permissive and not mandatory. Either party was thus free to refer the dispute to arbitration, whether or not the Pre-Arbitration Steps had been fulfilled.

26 Although the pre-arbitration steps have been established to be mandatory, Claimant made no effort to attempt to initiate negotiations in accordance with Clause 10.1. There is also no evidence to show that the Claimant made any attempt to obtain the requisite ministerial consent. As such, the Claimant has indeed initiated these arbitrations proceedings prematurely.

³³ *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania*, ICSID Case No. ARB/17/33, Award (13 April 2022) at [256].

³⁴ *ICC Case No 10256*, Interim Award (12 August 2000).

27 The Claimant may argue that Clause 10.2 should not be enforced due to reasons of unfairness. Firstly, the principle of party autonomy is fundamental to arbitration proceedings.³⁵ The parties cannot claim that clause 10.2 is manifestly unfair as they have consented to this clause, at formation of contract. Moreover, the requirement is not unfair as it reflects Aurion’s sovereign interest in foreign investment regulation. Crucially, the clause does not oust arbitration entirely but it merely imposes a procedural safeguard.

B. The pre-arbitration steps should be enforced

28 Compliance with the pre-arbitration steps may not be required where the steps in the clause are uncertain. The test of uncertainty is dependent on whether the pre-arbitration steps provide sufficient detail such that no further agreement on the necessary details is needed.³⁶ Additionally, compliance with pre-arbitration steps is also not required where strict adherence would be futile.³⁷ However, neither of these exceptions are available to the Claimant because the negotiation steps are sufficiently certain and are not futile.

(1) The negotiation step is sufficiently certain

29 Clause 10.1 does not require parties to be unsuccessful at negotiation before arbitration can proceed. Rather, it merely requires parties to make an attempt at negotiation. The words “agree to regulate their own affairs and resolve any dispute arising from or connected to this agreement amicably through negotiations” merely give rise to an obligation to attempt to resolve any dispute. This is not a condition precedent that mandates failure. This interpretation finds support in *Emirates Trading Agency LLC v*

³⁵ *CJD v CJE and another* [2021] 4 SLR 734 at [1].

³⁶ *Holloway v Chancery Mead* [2007] EWHC 2495 at [81].

³⁷ Gary Born, ‘*A Dismal Swamp*’ at p 253-254.

Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm),³⁸ where the English High Court held that a clause requiring parties to seek resolution of disputes through “friendly discussions” for four weeks was to be understood as an obligation to engage in genuine discussions, not prove the negotiations had failed. Similarly, Clause 10.1 is best understood as requiring efforts to negotiate, not as barring arbitration in the absence of a failed negotiation. Accordingly, it is sufficiently certain as an attempt or efforts to negotiate would have been the threshold required.

(2) *The Ministerial Consent Clause is sufficiently certain*

30 Clause 10.2 is a form of asymmetrical clause, as it affords the Respondent greater ease in invoking Arbitration. Asymmetrical clauses afford more rights on one party compared to the other.³⁹ Following the 2015 French case of *Apple Sales International*, the French courts upheld an asymmetrical clause because the discretion was objectively limited and predictable.⁴⁰ Similarly, it could be argued that clause 10.2 is objectively limited. It specifies a clear responsible official of the Minister in charge of economic policy, foreign investments, and trade of Aurion.

31 It is acknowledged that not all asymmetrical unilateral clauses will be upheld, particularly where it engenders uncertainty and unpredictability. This was the case in *Rothschild v Banesto*,⁴¹ where parties had agreed on a clause which allowed the bank to bring proceedings in any jurisdiction of its choosing, while binding the client exclusively to one court. The court found this unpredictable as the bank could

³⁸ *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).

³⁹ *Apple Sales International v eBizcuss*: Cass. 1ere Civ, 7 October 2015, 14-16.898.

⁴⁰ *Apple Sales International v eBizcuss*: Cass. 1ere Civ, 7 October 2015, 14-16.898.

⁴¹ *Ms X v Banque Privée Edmond de Rothschild* (French Supreme Court, First Civil Chamber, 26 September 2012, No 11-26.022).

unilaterally select or change the forum at any time. However, Clause 10.2 is distinguishable from *Rothschild* because it does not confer any discretionary or open-ended forum selection power on either party. It does not allow parties to choose among multiple jurisdictions. Instead, the clause imposes a single procedural precondition of how the party initiating proceedings must first obtain the consent of a clearly identified official. Therefore, clause 10.2 is certain.

(3) *The negotiation step is not futile*

32 The Claimant may contend that, due to the deplorable state of the relationship between the parties, any attempt at amicable resolution would be futile. However, such an assertion is unsubstantiated on the facts. The threshold for the futility exception to be met is a high one and only found in exceptional circumstances. It is the Respondent's position that this threshold is not met.

33 In *Teinver v Argentina*, parties were required to negotiate for six months before bringing the dispute to the Argentine courts for another 18 months before it could be brought to arbitration.⁴² However, despite non-compliance with this requirement, the tribunal there held that the futility exception applied and did not require the parties to satisfy the pre-arbitration steps.⁴³ The tribunal reached this conclusion as it was evident that the parties' stance would not change – there had been an intensive year-long negotiation and three attempted settlement agreements.⁴⁴

⁴² *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, (“**Teinver v Argentina**”) ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) at [74].

⁴³ *Teinver v Argentina* at p 25.

⁴⁴ *Teinver v Argentina* at p 14.

34 The present case is clearly in contrast with the situation in *Teinver v Argentina*. The only communication between the parties was through a short exchange of messages.⁴⁵ Such exchanges cannot be regarded as sufficient to amount to futility. The Claimant failed to serve any notice of dispute nor appointed any representative on its behalf to settle the dispute amicable. Consequently, any argument of futility raised by the Claimant is dead in the water, given the absence of any meaningful effort to negotiate.

(4) *The ministerial clause is not futile*

35 Additionally, the Claimant cannot argue that the ministerial consent clause is futile. The futility of a procedural step cannot be asserted unless the party has at least attempted compliance. In the *Murphy Exploration and Production Company International v. Republic of Ecuador*, the tribunal rejected the argument that previously failed negotiations between Ecuador and other investors would necessarily fail. The tribunal held that to determine whether negotiations succeed, the parties must have “first initiate” these negotiations.⁴⁶

36 This applies to the present case, where parties had not yet initiated any of the pre-arbitration steps. Here, the President’s special officer merely stated “pls stop spreading fake news... contact my ministers to resolve any issues.”⁴⁷ However, this message cannot be construed as a categorical refusal to provide ministerial consent for arbitration. On the contrary, the officer explicitly invited CDI to “contact [his] ministers,” which indicates that the door to dialogue remained open.⁴⁸ Thus, there

⁴⁵ Exhibit 11.

⁴⁶ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4 at [135].

⁴⁷ Exhibit 11.

⁴⁸ Exhibit 11.

remains a reasonable prospect of obtaining the minister's consent. Clause 10.2 must be respected, and the parties cannot circumvent the procedural requirements.

C. *The non-compliance of the pre-arbitration steps goes to the jurisdiction of the tribunal*

37 The Pre-Arbitration Steps are condition precedents to arbitration, the non-compliance of which deprives this Tribunal of its jurisdiction to hear the case. Hence, even if the Pre-Arbitration Steps are uncertain or futile, the tribunal does not have the jurisdiction to bypass them and hear the dispute.

38 Pre-arbitration steps are condition-precedents to arbitration that had to be fulfilled before the Arbitrator could assume jurisdiction. In the 2019 ICSID case of *Almazyria v Kuwait*, the issue was whether the Respondent fulfilled the pre-arbitration steps of submitting a timely preliminary objection.⁴⁹ The tribunal held that such steps are an “*integral part of the State’s consent rather than a negligible formality*” which would go towards the tribunal’s jurisdiction.⁵⁰

39 Likewise, in the present case, the Pre-Arbitration Steps of negotiation and mediation are mandatory condition precedents to arbitration which have not been fulfilled. Accordingly, the agreement to arbitrate cannot be invoked and the Tribunal does not have jurisdiction to hear the case.

⁴⁹ *Almazyria for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules (1 November 2019) at [24].

⁵⁰ *Almazyria for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules (1 November 2019) at [39].

III. THE RESPONDENT DID NOT BREACH THE JOINT VENTURE AGREEMENT

40 The labour violations do not meet the threshold of forced labour. Even if the alleged labour breaches amount to forced labour, the Respondent has not breached of Clause 4.2(f) of the JVA as these violations were primarily caused by the Claimant’s directives. Alternatively, the Respondent did not breach Clause 4.2(f) as it is a clause of best efforts.

A. *The working conditions do not meet the threshold of forced labour*

41 The Claimant may argue that the Respondent had breached Clause 4.2(f) of the JVA by breaching the labour and employment laws therein. These laws refer to the ILO Forced Labour Convention, 1930 (No. 29) (“*Forced Labour Convention*”) because the Aurion Labour Code 1994 declares the application of the forced labour convention without modification⁵¹ and it is also public knowledge that Aurion has ratified the forced labour convention.⁵²

42 According to Art(2)(1) of the Forced Labour Convention, three requirements must be fulfilled to support a finding of forced labour:⁵³

- (a) work;
- (b) menace of penalty; and
- (c) involuntary offer.

⁵¹ Correction and additional clarifications to the moot problem, page 1.

⁵² Exhibit 2.

⁵³ International Labour Organization. (1930). *Forced Labour Convention (No. 29)*, Article 2(1).

43 ‘Work’ refers to any work that does not fall within the exemptions under Article 2(2) of the Forced Labour Convention, such as work extracted for compulsory military service laws.⁵⁴ Menace of penalty refers to the application of some form of coercion or penalty to compel workers to work.⁵⁵ Involuntary offer refers to working without free and informed consent.⁵⁶ The elements of menace of penalty and involuntary offer are often found concurrently.⁵⁷ To establish forced labour, the courts have taken a holistic, fact-sensitive approach. This entails looking at the cumulative effect of multiple factors to determine whether the situation amounts to forced labour.

44 Having established the elements required to find forced labour, it is submitted that the Respondent has not breached its obligations under the JVA comply with all applicable local and international labour standards for the following reasons.

(1) *The living conditions were temporary*

45 The first plank of the Claimant’s argument is that the working conditions were abusive. Indeed, the ILO’s indicators of forced labour state that one sign of abusive living conditions is when workers are “subjected to substandard living conditions, made to live in overcrowded and unhealthy conditions without any privacy”.⁵⁸ The ILC Committee Report found that the workers living in congested living conditions and there were 6 workers placed in 185-square-foot rooms.⁵⁹ Although this may raise concerns about abuse, it must be noted that the ILO indicators highlighted that such

⁵⁴ International Labour Organization. (1930). *Forced Labour Convention (No. 29)*, Article 2(2).

⁵⁵ International Labour Office. (2018). *Guidelines concerning the measurement of forced labour* (p. 2). Geneva: International Labour Organization.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ International Labour Office. (2012). *ILO indicators of forced labour* (p. 23). Geneva: International Labour Organization.

⁵⁹ Exhibit 10, clause 3.5.

conditions “alone do not prove the existence of forced labour”.⁶⁰ A contextual analysis is imperative to determine the existence of forced labour. Overcrowding by itself, in the absence of other coercive elements, does not meet the threshold for forced labour under international standards. In the 2007 US District Court case of *Roe v. Bridgestone*, the workers lived in “one-room shacks in filthy shanty towns”. However, the court still rejected the plaintiffs’ claim of forced labour stemming from their alleged inability to leave quit their jobs because of the real or perceived absence of employment alternatives. The court reiterated that, without a deliberate infliction of harm, the definition of forced labour would expand to reach many people who work at poor jobs to support themselves simply because they have no better alternative.⁶¹

46 Presently, the living conditions of the BWS workers were not abusive to reach the threshold of forced labour. While the workers were described to be living in congested living conditions, they were housed in structurally-sound accommodation and were subjected to regulatory labour inspections.⁶² Moreover, the temporary nature of the accommodation was fully disclosed to stakeholders, This can be contrasted with the conditions considered in the 2007 Court of Appeal of Liège case of *Public Ministry v Wang Li Kang, Wang Qi et al.* In that case, the court found the existence of forced labour because the workers were living in unsanitary conditions, with only mattresses in an open construction site for sleeping. The workers also ate off the ground. They also lacked basic essentials such as a bathroom or hot water.⁶³ The workers were described to be living in congested living conditions, they were housed in structurally-sound

⁶⁰ International Labour Office. (2012). *ILO indicators of forced labour* (p. 23). Geneva: International Labour Organization.

⁶¹ *Roe v. Bridgestone*, 492 F. Supp. 2d 988 at 1016 – 1019.

⁶² The facts at [47].

⁶³ *Public Ministry v. Wang Li Kang, Wang Qi et al.*, Court of Appeal of Liège, Decision No. 2007/245 (24 January 2007).

accommodation and were subjected to regulatory labour inspections.⁶⁴ While these arrangements were not ideal, they do not constitute the level of severe neglect found in *Wang Li Kang*, especially given how the workers in this case had access to basic essentials.⁶⁵ Thus, these living conditions do not amount to a menace of penalty and involuntary offer that constitutes forced labour.

(2) *The withholding of passports was a legitimate labour practice*

47 The Claimant also argues that the withholding of passports would fulfil the element of menace of penalty or involuntary offer. However, this argument is flawed because the passports withheld solely for visa processing. In the ILO's guidebook, the retention of identity documents constitutes forced labour only when workers are unable to receive documents on demand and the workers feel that they are unable to leave their job without risking their loss.⁶⁶ Presently, there were procedurally necessary reasons for the withholding of passports. The passports were withheld solely for visa processing, a legal administrative requirement, not as a coercive mechanism.⁶⁷ Moreover, there is no indication that the retention created a perception that leaving the job would result in the permanent loss of their passports. On the contrary, workers were neither held incommunicado nor physically prevented from leaving the worksite. Therefore, the fact of passport retention alone, without any intent to control or exploit, cannot be considered forced labour under international standards.

⁶⁵ The Facts at [47].

⁶⁶ International Labour Office. (2012). *ILO indicators of forced labour* (p. 17). Geneva: International Labour Organization.

⁶⁷ Clarifications and Additional Clarifications to the Moot Problem, pg 1.

(3) *The worker survey is insufficient to show that there were excessive working hours*

48 The Claimant might argue that the worker survey is sufficient to indicate that there were excessive working hours. However, this is an inaccurate characterisation as the IIC's workers survey contain heavily mixed accounts on whether there might be coercion. In the 2002 International Court for the Former Yugoslavia case of *Prosecutor v. Krnojelac*, the Court held that the beliefs of the workers were legally insufficient to show that there was forced labour.⁶⁸ This was due to how there were mixed accounts by different workers. In that case, many of the prosecution witnesses made no clear attempts to demonstrate the factual basis for the conclusions of forced labour. In fact, several detainees testified that they never refused to work or expressed disagreement with orders to work. When accounts differ regarding the reason for overtime, and a significant number of workers confirm it was entirely voluntary, this weakens any claim of objective coercion.

49 Similarly, here, there was varied accounts produced by the workers. Although 54% of workers reported that they felt compelled to work overtime or avoid wage deductions, this does not amount to forced labour.⁶⁹ This survey data reflects the workers subjective perceptions rather than objective evidence of actual wage deductions or threats.

50 Furthermore, this same report also indicated that the other 46% of workers described overtime as voluntary and workers chose to work overtime to meet production bonuses.⁷⁰ This suggests that the extended hours stemmed from individual choice and economic incentives rather than compulsion. The presence of such mixed accounts

⁶⁸ *Prosecutor v. Krnojelac*, Case No. IT-97-25 (15 March 2002) at [376].

⁶⁹ Exhibit 10, Clause 3.5.

⁷⁰ Exhibit 10, Clause 3.5.

underscores the inconsistency and unreliability of the workers' perceptions as a basis for legal conclusions. This reinforces the conclusion that the data merely reflects the workers subjective impressions rather than any objective evidence of actual wage deductions or threats.

51 Further, the claimant might argue that the fact that the workers skipped meals proves that there was coercion.⁷¹ However, this is insufficient to prove that there was coercion. Employees commonly forgo breaks voluntarily to boost productivity or earn bonuses. There is no evidence that the Respondent directed workers to skip breaks. This confirms that this was self-directed behaviour. Given that the evidentiary issues of these timesheets, they can be unsubstantiated allegations. Unsubstantiated allegations of threatened deductions cannot support a forced labour claim.

B. Even if the working conditions amount to forced labour, the Respondent cannot be found in breach of the JVA

52 The Respondent cannot be found liable of a breach in the JVA as it was the party that was primarily responsible for the breach. Following Article 7.1.2 of UNIDROIT, a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event that the first party bears the risk.⁷²

53 Pursuant to the UNIDROIT Principles of International Commercial Contracts 2016 commentary to Article 7.1.2, actions that are considered are those that were made

⁷¹ Exhibit 10, Clause 3.5.

⁷² UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (pp.157). International Institute for the Unification of Private Law.

impossible or were partially impeded by the counterparty.⁷³ The illustration to Article 7.1.2 indicates that if A agrees to begin construction on B's land on 1 February, but B locks the gate and denies A access, B cannot subsequently claim that A failed to perform. The test for this is Article 7.1.2 is “if the contribution of the obligor (substantially) outweighs” the contribution of the obligee.⁷⁴

54 Here, the Claimant’s actions substantially outweighed the contributions of the Respondent. The Respondent’s alleged breach occurred within the jointly managed company of ASI,⁷⁵ under which the Claimant played an active and instrumental role in shaping both the timeline and cost parameters of this labour arrangement. The Claimant had committed acts that directly caused the circumstances which led to the labour violation.

55 First, the Claimant issued an official memo demanding that the Respondent take immediate actions to expedite construction to 15 months instead of 24-36 months.⁷⁶ This compressed deadline created intense pressure on labour sourcing and compliance standards. This forced rushed recruitment and compromise.

56 Additionally, the Claimant’s CEO, Al Emret, also strongly pressured the Respondent to compress the timeline. In an email to the Respondent, Al Emret used strongly worded language such as how the Claimant “cannot afford any more delays” or how such delays would “make or break”.⁷⁷ The deadline of 3 December 2023 also showed the

⁷³ UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (pp. 157-158). Rome: International Institute for the Unification of Private Law.

⁷⁴ Brödermann, E. (2023). *UNIDROIT Principles of International Commercial Contracts: An article-by-article commentary* (2nd ed, Chapter 7, p. 4). Kluwer Law International.

⁷⁵ Exhibit 4.

⁷⁶ Exhibit 5.

⁷⁷ Exhibit 6.

Claimant's deliberate involvement in setting compressed timelines for workforce recruitment.⁷⁸ Within the context of this email, the CEO's instructions of "minimise labour costs wherever feasible" would further indicate that the Claimant was prioritising speed and cost-efficiency over proper due diligence in the workplace.⁷⁹

57 Moreover, the Claimant interference in the recruitment process substantially outweighed the Respondent's actions. The Respondent merely proposed a list of labour agencies which included BWS.⁸⁰ On the contrary, it was the Claimant that made several representations to BWS to recruit workers who would be "highly dedicated and capable of meeting the demanding production schedules".⁸¹ These representations show how the Claimant embedded urgency and output maximisation into the hiring process. Furthermore, the Claimant's previous recruitment campaigns were also adopted by BWS.⁸² These actions showcases how the Claimant's interference in the recruitment process substantially outweighed the Respondent's actions.

58 The culminative evidence of the Claimant's involvement highlights how they played an integral role in causing any alleged labour practices by the Respondent. Following Article 7.1.2 of PICC, the Claimant cannot rely on the Respondent's performance issues as a legal breach since any non-performance was materially caused by the Claimant's own acts or omissions.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Facts at [37].

⁸¹ Facts at [38].

⁸² Facts at [38].

C. *Alternatively, the Respondent did not breach clause 4.2(f) of the JVA as it is a clause of best efforts*

59 Clause 4.2(f) of the JVA is a clause of best efforts. According to Article 5.1.5 of the UNIDROIT principles, in order to determine whether a clause is a clause of best efforts, regard must be held to factors such as (a) contract wording; (b) price and terms; (c) normal risk level; (d) other party's influence on performance.⁸³ In the 2023 Paraguay case of *Tribunal de Apelación en lo Civil, Comercial y Laboral – Sexta Sala*, the court held that a clause of best efforts would not contain deadlines such as the finishing of construction within 60 to 90 days.⁸⁴ This would amount to a clause of specific results. Here, it could be argued that the wording of this clause does not refer to any specific deadline. Hence, this factor points to how the clause could be inferred as a clause of best efforts.

60 Moreover, according to the UNIDROIT commentary, if one party has a degree of influence over the other party, this fact may transform the duty into duties of best effort.⁸⁵ Here, the Claimant has significant commercial influence over the Respondent through imposing strict deadlines and cost-cutting measures.⁸⁶ This pressure reduces the Respondent's exclusive control over compliance. This factor also points to a best-efforts interpretation.

⁸³ UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (pp.105-107). Rome: International Institute for the Unification of Private Law.

⁸⁴ *Tribunal de Apelación en lo Civil, Comercial y Laboral – Sexta Sala*

⁸⁵ Brödermann, E. (2023). *UNIDROIT Principles of International Commercial Contracts: An article-by-article commentary* (2nd ed, Chapter 5, p. 4). Kluwer Law International.

⁸⁶ Exhibit 6.

- 61 Additionally, according to the UNIDROIT commentary, when a party's obligation involves a high degree of risk, it is generally to be expected that that party does not intend to guarantee a result.⁸⁷ Here, it could be argued that compliance with labour laws in volatile or developing countries, especially when third party contractors or informal recruitment channels are involved, often involves high risk. This unpredictability suggests that the obligation should be of best-efforts. The combination of these factors leads to the inference that the clause should be interpreted as a best-efforts clause.
- 62 The Respondent has made a best-effort's attempt to fulfil its obligations. The Respondent took active and reasonable steps to comply. The Respondent did not unilaterally choose a labour agency. It shortlisted several local manpower agencies and presented them to the Joint Project Management Team (JPMT), which included the Claimant's representatives.⁸⁸ Ultimately, the Claimant interfered in the recruitment process and the Claimant's recruitment strategies were adopted by BWS.⁸⁹
- 63 The service agreement with BWS required collaboration between ASI and BWS on compliance audits, periodic reporting, and employment conditions.⁹⁰ This demonstrates that the Respondent established structural mechanisms for monitoring compliance. Further, the Claimant explicitly pressured the Respondent for cost reduction and faster workforce mobilisation and directly requested use of third-party agencies to minimise costs and speed up onboarding.⁹¹ These constraints limited the Respondent's ability to fully safeguard against non-compliance risks. Moreover, when non-compliance

⁸⁷ UNIDROIT. (2016). *UNIDROIT Principles of International Commercial Contracts* (pp.105-107). Rome: International Institute for the Unification of Private Law.

⁸⁸ Facts at [37].

⁸⁹ Facts at [38].

⁹⁰ Exhibit 5.

⁹¹ Exhibit 6.

surfaced, the Respondent worked with authorities to produce a revised workforce audit.⁹² The subsequent lifting of the license suspension indicates remedial efforts and willingness to cooperate.⁹³ Ultimately, since the Respondent fulfilled its best-efforts obligations, it could not be argued to have breached clause 4.2(f) of the JVA.

IV. THE CLAIMANT’S TERMINATION OF THE JOINT VENTURE AGREEMENT WAS UNLAWFUL

64 The Claimant’s termination of the JVA was unlawful as it did not follow the contractually prescribed modes of termination under Clause 8 of the JVA.⁹⁴ Further, this termination was made in bad faith, contrary to Article 1.7 of the UNIDRIOT Principles,⁹⁵ and is therefore unlawful.

A. The Claimant did not follow the prescribed modes of termination

65 Clause 8 of the JVA outlines 3 lawful methods of termination, none of which were followed.⁹⁶ Clause 8.1 allows termination in the event of a “fundamental non-performance, clause 8.2 allows termination if both parties mutually agree in writing and clause 8.2 allows termination in the event of a force majeure event. Presently, none of the above conditions for termination has been met.

(1) *There was no fundamental non-performance as required by clause 8.1*

⁹² Facts at [50].

⁹³ Facts at [50].

⁹⁴ Exhibit 4 clause 8.1. -8.3

⁹⁵ UNIDROIT, Principles of International Commercial Contracts (2016).

⁹⁶ Exhibit 4 clause 8.1. -8.3

66 Clause 8.1 of the JVA allows termination only in the event of a ‘fundamental non-performance’.⁹⁷ Paragraph 2 of Article 7.3.1 of the PICC provides the following criteria to ascertain whether a non-performance is fundamental:⁹⁸

- (a) The non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract
- (b) Strict compliance with the obligation which has not been performed is of essence under the contract
- (c) The non-performance is intentional or reckless
- (d) The non-performance gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance.
- (e) The non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

Presently, none of the above factors are present.

67 First, the Claimant was not substantially deprived of what it was entitled to expect under the JVA. The Claimant entered the JVA for the purpose of establishing a semiconductor production facility, in order to benefit from Aurion’s emerging market. In line with such expectations ASI became fully operational within the expedited 15-month schedule and exceeded production targets by 35%.⁹⁹ Despite the temporary suspension, production resumed after three weeks.¹⁰⁰

⁹⁷ UNIDROIT, Principles of International Commercial Contracts (2016).

⁹⁸ UNIDROIT, Principles of International Commercial Contracts (2016).

⁹⁹ The Facts at [42].

¹⁰⁰ The Facts at [50].

68 Although ASI faced contractual penalties, and some clients did begin “reassessing” their long-term commitments to ASI, no clients have terminated contracts with ASI. These commercial vicissitudes should not amount to a substantial deprivation of the Claimant’s expectations. In an unreported CAM case,¹⁰¹ the tribunal had found that in a sale and purchase agreement, one party’s complete failure to deliver the goods on time amounted to a fundamental non-performance. Presently, all target deadlines were met, and as such, there was no substantial deprivation of the Claimant’s expectations.

69 Article 7.3.1(2)(b) states that “intentional non-performance” could render a non-performance a fundamental one, thereby giving the aggrieved party the right to terminate the contract. However, in the present case there is no evidence that any of the alleged non-performances were done intentionally.

70 Article 7.3.1(2)(b) states that if a party “cannot rely on the performance of another party’s future performance”, this could lead to a finding that a non-performance is fundamental. Further, where non-performance was intentional, then a party is entitled to place “no reliance on future performance”.¹⁰² Presently, production resumed in 3 weeks and the Ministry had accepted the Respondent’s updated audits. Accordingly, neither factor point towards a finding of fundamental non-performance.

(2) *There was no Force Majeure event as required under clause 8.3*

71 The Claimant cannot avail itself to clause 8.3 to terminate the contract. Clause 8.3 allows either party to terminate the JVA in the event that the party is unable to perform its obligations due to a force majeure event.¹⁰³ Presently, the Claimant was not rendered

¹⁰¹ 30-11-2006 Arbitral Award at the Centro de Arbitraje de México (CAM).

¹⁰² 30-11-2006 Arbitral Award at the Centro de Arbitraje de México (CAM).

¹⁰³ Exhibit 4 clause 8.3.

incapable of performing its contractual obligations. Production resumed within three weeks, and the Claimant likely had the necessary resources to pay the fine, thereby fulfilling its obligations to pay under the contract.

72 Even if the tribunal finds that the Claimant was rendered ‘unable to perform’, the fine and the suspension are unlikely to amount to force majeure events. Article 7.1.7, of the UNIDROIT principles defines a force majeure event as an impediment that (i) is beyond the party’s control, (ii) could not reasonably have been foreseen at the time of contracting, and (iii) could not be avoided or overcome.¹⁰⁴ It is accepted that the government’s eventual decision to impose the fine was beyond the control of either party, however the remaining elements remain unmet.

73 Turning to the second element, it is submitted that the fine and suspension were reasonably foreseeable. At the time of contracting, Aurion’s lax labour protections were a matter of public concern. Media commentary and civil society reports had already warned that the BIT may result in exploitative labour practices.¹⁰⁵ The Claimant, as a sophisticated commercial entity, ought to have anticipated heightened regulatory scrutiny. Accordingly, it is untenable for the Claimant to now argue that the imposition of a regulatory fine was unforeseeable.

74 The fine was imposed due to clearly documented failures in workforce audit reporting, including the underreporting of approximately 10,000 hours of overtime.¹⁰⁶ These failures are a result of internal mismanagement. Further, the suspension was temporary and was lifted within three weeks following the submission of a revised audit.¹⁰⁷ This

¹⁰⁴ UNIDROIT, *Principles of International Commercial Contracts* (2016).

¹⁰⁵ Exhibit 2 and 3A; The facts at [15].

¹⁰⁶ The Facts at [56].

¹⁰⁷ The Facts at [56].

demonstrates that the suspension and fine was a consequence of internal failures. Accordingly, it cannot be characterised as force majeure under Article 7.1.7.

B. *The Claimant acted in bad faith contrary to Article 1.7 of the UNIDROIT Principles*

75 The Claimant's termination of the JVA was not a genuine exercise of its contractual rights but rather an attempt at distancing itself from the negative consequences arising out of the regulatory non-compliance. The termination, coming immediately after the imposition of a USD 500 million fine, and not earlier when the IIC report was released demonstrates a lack of good faith in the termination.

76 Under article 1.7 of the UNIDROIT principles, parties must act in accordance with good faith and fair dealing in the performance and enforcement of contracts.¹⁰⁸ Presently, the Claimant had waited until the imposition of the USD 500 million fine in December 2024 to terminate the JVA.¹⁰⁹ However, the allegations of labour law violations had been made by the government of Seratiou in September 2024. The IIC released its findings on 30 September 2024.¹¹⁰ However, the Claimant only issued the termination notice nearly three months later, and crucially, after the regulatory fine had been imposed.¹¹¹ This delay demonstrates that the termination was not triggered by concern over labour law violations but by the financial consequences. Consequences that the Claimant had also contributed to. Accordingly, the Claimant's termination was brought about in bad faith and is therefore invalid.

¹⁰⁸ UNIDROIT, Principles of International Commercial Contracts (2016).

¹⁰⁹ The Facts at [59].

¹¹⁰ Exhibit 10.

¹¹¹ The Facts at [59].

C. Conclusion

77 In conclusion the Claimant's termination of the JVA was unlawful. There was no fundamental non-performance by RMG under clause 8.1, as ASI met its operational targets and remained commercially viable. Even if there were breaches, the Claimant had also materially contributed to them and is therefore precluded from relying on such breaches. The claimant was not entitled to terminate under clause 8.3, as the suspension and fine did not amount to force majeure events. Further, the termination by the claimant was brought about in contravention of the duty of good faith and fair dealing. Accordingly, the termination was invalid.