Team Code – 15A

7TH NATIONAL LAW SCHOOL INTERNATIONAL ARBITRATION MOOT, 2014

IN THE INTERNATIONAL CHAMBER OF COMMERCE ARBITRAL TRIBUNAL

AT RESOLVEVIILLE, REPUBLIC OF RESCINIDIA

ICC Arbitration No: ***/***/*****

IN THE MATTER CONCERNING BILATERAL INVESTMENT TREATY AND SHARE HOLDING AGREEMENT BETWEEN:

CLAIMANT: **NOBLE TECHNOLOGIES INC. (NT)**

-AND-

RESPONDENT: **GOVERNMENT OF RESCINDIA (GOR)**

-MEMORIAL ON BEHALF OF THE CLAIMANT-

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ABBREVIATIONS

¶¶/¶	Paragraph
A.C.	Appeal Cases
A.P.	Andhra Pradesh
ADR	Alternate Dispute Resolution
AIR	All India Reporter
AJIL	American Journal on International Law
All ER	All England Law Reports
AM. U. INT'L L. REV	American University International Law Review
Anr.	Another
AoA	Articles of Association
Arb	Arbitration
Art.	Article
BIT	Bilateral Investment Treaty
Ch	Chapter
Ch.d.	Chancery Division
Cir.	Circuit
Co.	Company
COLUM. L. REV	Columbia Law Review
CTR	Claims Tribunal
Econ	Economic
ECR	European Court Reports
Ed.	Edition
FILJ	Fordham International Law Journal
GOR	Government of Rescindia
Govt.	Government
H.L.	House of Lords
Hon'ble	Honourable
ICC	International Chamber of Commerce
ICJ	International Court of Justice

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILM	International Legal Materials
ILR	International Law Report
Int'l	International
J.	Journal
JVA	Joint Venture Agreement
L.R.	Law Report
Lloyd's Rep.	Lloyd's Law Reports
Ltd.	Limited
NAFTA	North American Free Trade Agreement
NIA	National Intelligence Agency
No.	Number
NST	Natinal Secure Trust
NT	Noble Technologies Inc.
NTI	Noble Technologies Rescindia
NYC	New York Convention
OECD	Organization for Economic Cooperation and Development
p.	Page
pp.	Pages
Pub.	Publication
QB	Queen's Bench
QBD	Queen's Bench Division
R.I.A.A.	Reports of International Arbitral Awards
Rep.	Representative
SC	Supreme Court
SCC	Supreme Court Cases
SHA	Share Holding Agreement
Trib.	Tribunal
U.N.	United Nations

U.S.	United States of America
UKSA	United Kingdom of Sumaliland et All
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
v.	Versus
v.	Versus
Vol.	Volume
W.L.R.	Weekly Law Reports
YB Comm Arb	Yearbook Commercial Arbitration

STATEMENT OF JURISDICTION

Noble Technologies Inc. (NT), the claimant, has the honour to submit the present dispute and its memorandum before this ICC Arbitral Tribunal at Resolveille, Rescindia, under Art 14 of the Share Holding Agreement between NT and National Secure Trust (NST) and Article 9 of the Agreement between the Government of the Republic of Rescindia & the United Kingdom of Sumaliland et All for the Promotion and Protection of Investments in pursuance to Article 4(1) ICC Rules for Arbitration which shall be the governing law for the dispute.

STATEMENT OF FACTS

I

Mr. Rob Seaborne was a resident of United Kingdom of Sumaliand and All [UKSA] and had incorporated a company in September 2001, called Nobel Technologies Inc. ["NT"] in UKSA. Mr. Seaborne was in talks with the Police Departments in different states of UKSA to apply the system of surveillance developed by him to track crimes by December, 2006.

II

The world was facing a crisis where many governments were willing to go to any extent to re-instill a feeling of security in their citizens and the state of Rescindia was no exception to it. Rescindia witnessed a brutal three-day long siege in the heart of the country's commercial capital on November 22, 2006, in response to which, the Rescindian National Intelligence Act, 2006 [NIA Act] was promptly passed through both houses of the Parliament. This Act brought all the agencies that constituted the intelligence network of Rescindia under the supervision of different ministries and ultimately the Prime Minister's Office to function as "NIA". In January 2007, Mr. Poosan Sassiya was deputed as the Chairperson of the Policy Department of the NIA, and an advisory committee was constituted and designated to carry out a supervisory role over the NIA as per Section 21 of the NIA Act. Mr. Sassiya came to know that Mr. Seaborne was the lone individual capable of devising such a surveillance system.

III

By March 2007, Mr. Poosan Sassiya established contact with Mr. Seaborne and within a few weeks of this meeting, Seaborne called Sassiya's office at NIA to discuss the possibility of tweaking the system in a way to function at a much larger scale and towards the particular ends of ensuring security in Rescindia. Seaborne cautioned that he wasn't certain about whether this would work and that it would require significant investment to confirm the sustainability of such scaling up but if it did, it would indeed be the most efficacious crime solving machine.

IV

However, in December 2007, Mr. Sassiya along with Mr. Dodutt, the head of NIA retired from the NIA with the idea of the surveillance system still in its formative stages. The new Inspector General of the Policy Department and the head of the NIA were Mr. Wadhawan and Mr. Krishna respectively, popularly known as W & K. On Sassiya's retirement, Mr. Seaborne offered him to be Vice President, Marketing, of NT to which Sassiya readily

agreed. Sassiya set up a meeting with W in September 2008, to revive plans for a surveillance system. Mr. W was invited to the headquarters of NT where Sassiya gave Mr. W a demonstration of NT's technology and told him of the effectiveness of such a system for the intended use.

V

W made an extremely persuasive presentation to the Consultative Committee regarding NT's project, however the members expressed reluctance owing to the unique legal and moral issues that such "interceptions" would give rise to. Certain significant legal changes were required in the laws of Rescindia for adopting such technology, accordingly, the Rescindian Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2008 came into force on March 28, 2008. In April 2008, the President of Rescindia promulgated an ordinance wherein a trust, National Secure Trust [NST], was established with separate legal personality. Ms. Mende was designated as the secretary of the Board of trustees, who after taking charge, contacted Mr. Sassiya and stated that Rescindia was looking forward to be able to invest in Mr. Seaborne's genius in pursuance of public interest. Ms. Mende invited Mr. Sassiya and Mr. Seaborne to come to Rescindia to discuss the matter further.

VI

Ms. Mende, Mr. W, Mr. Sassiya, and Mr. Seaborne discussed every excruciating detail of the proposed project. On showing concerns about other States having same technology, she was assured that all these problems would be tackled through the design of the project itself and proper programming. In the subsequent meetings at the office of Ms. Mende, Ms. Mende, W and K discussed the viability of the project and other alternatives. They rejected a similar proposal by Alfred Technologies because the agency had concrete information that Alfred Technologies had built a similar surveillance system for the Baltic state of Qumar.

VII

On Ms. Mende's suggestion a company was incorporated in Rescindia with Mr. Seaborne's company and the Trust as equal shareholders. The Shareholder's Agreement ["SHA"] was signed by Mr. Seaborne, Managing Director of N.T. and Ms. Mende as Secretary. An agreement by which the Government of Rescindia agreed to act as a guarantor for the Trust in the event of its defaulting on the obligations delineated in the SHA was also entered into. This agreement was signed by Mr. Seaborne and the appropriate representative of the Government of Rescindia. Noble Technologies Rescindia was incorporated and was

registered with the Registrar of Companies on September 16, 2009. The project was referred to as Project "World I - 1NaB". A performance review in October 2010 revealed that Phase I of the project had successfully been completed and Phase 2 was under way. In the meanwhile, several statutes were enacted that permitted warrantless surveillance and increased security.

VIII

The political scenario of Rescindia changed considerably when the Simpletons' Will Against the Government [S.W.A.G] party swept its way into the State Legislative Assembly in Resolveville winning 75% of the seats polled. During the election campaign, Ms. Mende found that the cost estimates for the Project were reporting a gradual increase with each passing quarter so much so that by January 2013, the cumulative cost had exceeded the funds available with the trust. With the completion of Phase II of the Project World I - 1NaB, NT sent an exercise notice as per Article 9 of the SHA on February 10, 2013. A worried Ms. Mende called on W & K to inform them of the change in circumstance. On February 15, 2013, a resolution was passed by the Board of Trustees to stall exercise of put options under Article 9 of the SHA despite demands being made by Mr. Seaborne.

IX

In May 2013, Mr. Jhaaduwala became the Prime Minister and based on the revelation that the project would require close to RNR 200,00,00,000 annually for its upkeep and utilisation was not persuaded on a cost benefit analysis that such technology was essential. On July 6, 2013 a former member of the intelligence agency of UKSA, Edward Sundown revealed the unabashed and extensive network of surveillance in the UKSA that involved interception of all kinds of private data for issues of national security. With the onset of September 2013, and the payment of returns becoming due as per Article 9 of the SHA, the board of trustees and the secretary were sent the exercise notice to exercise the put option yet again. However, this notice too went unanswered.

X

After Sundown's expose, a group of computer hackers in the UKSA, called Must Cherish *free* Speech [MCS] published a set of blog posts that revealed the existence of an extensive surveillance system in the UKSA. In these blog posts one cable contained correspondence between the intelligence agency of UKSA and NT about the progress of the surveillance project. Another cable was between Professor X, an employee of NT at the time and a senior intelligence official of UKSA requesting for access codes to the country's CCTV

network. A few investigative news reports also reported that it was possible the Republic of Rescindia had also planned such illegal surveillance. As a result of this, the Ministry of Home Affairs, issued a notification that declared any "Programme that employs mining of private data for mass surveillance" as an illegal activity.

XI

In light of recent reports encircling the world, the Secretary of the Board of trustees of NST sent a strongly worded letter to NT stating that in view of the fraud practiced on the Trust with respect to the exclusivity of Project World I – 1NaB, it had decided to rescind the contract. Moreover, the recent decision of the government rendering mass surveillance of private data illegal, the very purpose of the contract had been frustrated and therefore, the obligations of each party stood discharged.

XII

NT immediately replied clarifying that it had not sold the same technology to any other State. There had been no project of a similar nature that was completed by NT. NT further alleged that although the technology could indeed be put to illegal uses but such use had to be determined by its users and not its makers. NT claimed that the subject matter of the contract or the purpose of the SHA could not be said to have been frustrated and in the present case there could be no distinction between the government and the trust. Finally, N.T. reiterated its demands for the contractual payments that it was entitled to. It pressed for an immediate resolution failing which it would initiate arbitration proceedings.

XII

In October, Mr. Jhaaduwala in his weekly press conference stated that, among others, he had received complaints about gratification being taken by public servants in key ministries and the suspects under these investigations included W and K. Around the same time, the renewal of the ordinance creating and registering the trust was omitted to be taken up in the winter session of the House of People. Ms. Mende replied informing NT that the trust had now dissolved and she was only replying in her personal capacity since the situation was now beyond her control. NT initiated arbitration proceedings against the Government of Rescindia claiming it was liable to be sued under the SHA seeking to recover contractual payments and loss of profits as a consequence of a breach of Article 9 in the SHA. Noble Technologies also asserted its claim under Article 9 of the Bilateral Investment Treaty between UKSA and Rescindia.

ISSUES RAISED

The following questions have been raised before this Hon'ble Tribunal to consider:

-I-

WHETHER THE REQUEST FOR CONSOLIDATION MADE CAN BE UPHELD UNDER THE ICC RULES OF ARBITRATION?

-II-

WHETHER THERE EXISTS AN ARBITRATION AGREEMENT(S) BETWEEN NOBLE TECHNOLOGIES AND THE GOVERNMENT OF RESCINDIA?

-III-

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SUMMARY OF ARGUMENTS

I. WHETHER THE REQUEST FOR CONSOLIDATION MADE CAN BE UPHELD UNDER THE ICC RULES OF ARBITRATION?

The tribunal has jurisdiction to consolidate claims arising out of two separate contractual instruments. The arbitration proceedings were initiated by Noble Technologies Inc. against the Government of Rescindia claiming it was liable to be sued under the SHA seeking to recover contractual payments and loss of profits, NT also asserted its claim under the BIT. The request for consolidation of claims can be upheld under the ICC Rules which provides that claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules. The claims arising under the SHA and BIT can be consolidated primarily because the arbitration clauses of SHA and BIT are compatible. Since the parties had agreed to the same arbitral institution *i.e.* ICC, same seat and language of arbitration, therefore the arbitration clauses of SHA and BIT can be said to be compatible. The choice of procedures within the institution and the applicable law are compatible in both the arbitration agreements. Moreover, the parties to arbitration impliedly agreed that the claims can be arbitrated in a single arbitration. It is assumed when reference to institutional rules is made that the rules are to be applied in their entirety, unless the parties specifically agree otherwise. Since both NT and GOR made the reference to the institutional rules therefore, it would amount to consent to consolidation since no express agreement is required for consolidation of claims arising out of two separate contracts. The consolidation of claims can also be made as it is not against the public policy of Rescindia. Therefore, consolidation of claims can be upheld under the ICC Rules.

II. WHETHER THERE EXISTS AND ARBITRATION AGREEMENT(S) BETWEEN NOBLE TECHNOLOGIES AND THE GOVERNMENT OF RESCINDIA?

There exists an arbitration agreement between NT and the Government of Rescindia even though the Goverment of Rescindia was not a signatory to the

arbitration agreement. This is because the arbitration agreement between NT and NST can be extended to the Government of Rescindia. As the Government of Rescindia took an active part in the negotiation and conclusion of the contract between NT and NST therefore, the arbitration agreement can be extended to it. Moreover the GOR is the alter ego of the NST and hence comes under the ambit of the arbitration agreement. The negotiation of S.H.A. between N.T. and N.S.T. was a result of the active part played by the respondent. NST did not take any actions of its own accord without the assistance of the Government of Rescindia which establishes the active role of the Government of Rescindia. The GOR had complete control over the Project World I 1NaB and therefore, NST acted as the agent of GOR while entering into the SHA. Therefore, there existed an arbitration agreement between NT and GOR.

III. WHETHER THE ARBITRAL TRIBUNAL CAN ARBITRATE UPON ISSUES OF FRAUD AND CORRUPTION?

The tribunal can arbitrate upon issues of fraud and corruption as in the heat of battle such allegations are frequently made, although much less frequently proved. The Government of Rescindia is objecting to the arbitral proceedings on the ground that the dispute was inextricably linked with questions of fraud and allegations of bribery, which are not arbitrable. The arbitral tribunal rules on its own jurisdiction and whether an issue can be arbitrated upon has to be decided by the arbitral tribunal itself. The rules governing the arbitration proceeding in this case is the *lex arbitri* and rules chosen by the parties to govern the proceedings *i.e.* the ICC rules. Fraud is arbitrable as per the laws of Rescindia which is the *lex arbitri* in this case furthermore, the charges against the claimant are not supported by documentary or oral evidence and are based on unsubstantiated and frivolous allegations of the respondent therefore the arbitral tribunal must proceed with the arbitration. The ICC Rules are silent on the issue of arbitrability but it is a settled principle that the presumption always lies in favour of arbitrability. Besides, the Government of Rescindia cannot invoke the provisions of its domestic laws to evade obligations under an agreement. Therefore, the arbitral tribunal can arbitrate upon issues of fraud and corruption

IV. WHETHER THE SHAREHOLDER'S AGREEMENT AMONGST NATIONAL SECURE TRUST AND NOBLE TECHNOLOGIES INC. IN RELATION TO NATIONAL TRUST FOR RESCINDIA WAS RIGHTFULLY TERMINATED.

The SHA provided for the termination of it by the consent of all the Parties expressed in writing. However, in the instant case there was no concurrence of the claimant in termination of SHA in relation to NTI and the agreement was not rightfully terminated. Since SHA is an absolute contract and admits of no exemption from liability on the part of the promisor therefore, its unilateral termination by respondent cannot be considered as rightful. In the present case there could be no distinction between the government and the trust and therefore, the respondent cannot claim frustration induced by its own actions. The frustration of SHA was self induced for evading liability under the agreement. Impossibility of performance does not discharge a liability under the contract unless the promisor can show that performance is impossible without any default on his part. Contrary to the allegation of the respondent, the notification of the Ministry of Home Affairs cannot be said to frustrate the purpose of the SHA. Since the Rescindian laws permit for surveillance in the interests of national security, the rescinding of the agreement in the garb of national security cannot be considered as rightful.

V. WHETHER THE GOVERNMENT OF RESCINDIA IS IN BREACH OF ITS OBLIGATIONS UNDER THE BILATERAL INVESTMENT TREATY BETWEEN THE REPUBLIC OF RESCINDIA & THE UNITED KINGDOM OF SUMALILAND ET ALL.

The Government of Rescindia is in breach of its obligations under the BIT between GOR and UKSA. NT is an investor with the meaning of BIT and is entitled to claim benefits under GOR- UKSA BIT. Since NST was an instrumentality of the GOR and operating under the exclusive control and funding of the Rescindian government, was instrumental in discharging the state function of facilitating surveillance for mitigating external and internal threats to security, GOR will be responsible for breach of its obligations towards NT. The Government of Rescindia is in breach of its contractual obligation by not honouring the terms of the Guarantee agreement, arbitrarily changing its laws and not responding to the exercise notice given by NT. Moreover, the GOR was in violation of a number of commitments under the GOR-UKSA BIT, which resulted in unfair treatment and

indirect expropriation. The Rescindian government has breached its treaty obligation by not according a fair and equitable treatment to investments made by NT. Moreover, the decision of GOR of not renewing the ordinance was instituted in bad faith and amounted to indirect expropriation. Since the officials of GOR interacted with NT without holding any post in NST which implicitly facilitated the legitimate expectation of NT that the government will support the investment through its policies and legal framework. However, the legitimate expectation was not met with appropriate response from GOR which further led to breach of its commitments. Therefore, GOR is in breach of its obligations under the BIT between Republic of Rescindia and UKSA.

ARGUMENTS ADVANCED

I. WHETHER THE REQUEST FOR CONSOLIDATION MADE CAN BE UPHELD UNDER THE ICC RULES OF ARBITRATION.

Claimant contends that NT initiated arbitration proceedings against the GOR claiming it was liable to be sued under the SHA seeking to recover contractual payments and loss of profits as a breach of Article 9 in the SHA and under Article 9 of the BIT. The Government of Rescindia argued that claims arising out of two separate contractual instruments cannot be made in a single arbitration.[1] However, the ICC Rules permit consolidation of claims under Art 9 which states that subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules if the Court is *prima facie* satisfied that: (a) the arbitration agreements under which those claims are made may be compatible, and (b) all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. In the present case, the consolidation of claims will be upheld because both the arbitration agreements under BIT and SHA were compatible **[A]** and the parties impliedly agreed that those claims can be made in a single arbitration **[B]**. Moreover, such consolidation is also not against the public policy of Rescindia **[C]**.

A. The arbitration agreement of SHA and BIT are compatible.

The parties intended to submit the entire operation to a single arbitral tribunal by incorporating identical clauses in the various related contracts.[2] Incompatibility can be ascertained when the seat, constitution of the arbitral panel, arbitral institution[3] or the

[1] Moot Proposition ¶36.

[2] S.I. Strong, *The Sound of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 Mich. J. Int'l L. 1017 (2009); Fouchard, et al., *Fouchard Gaillard Goldman on International Commercial Arbitration* [New York: Aspen Publ., 1999], at p. 521.

[3] Alan Redfern, et al., *Law and Practice of International Commercial Arbitration*, 4th edn [London: Sweet & Maxwell, 2004], ¶ 3-72 et seqq.

applicable procedure differ[4]. In multiple contract scenarios consolidation by reference to institutional rules will supersede the party agreement in the circumstances where the seat, language of arbitration, choice of institutions, choice of procedures within the institutions, applicable law either on the merits or procedurally are all compatible and same number, qualification or selection procedures for arbitrators has been envisaged in the agreement.[5] In the present case, the arbitration agreements are compatible because they provide for same language i.e., English, same seat, i.e. Rescindia[6], same arbitral institution i.e. ICC[7] and compatible composition of arbitral institution[8] under both SHA and BIT. Therefore it can be concluded that the arbitration agreements under both SHA and BIT are compatible.

B. The parties to arbitration impliedly agreed that the claims can be arbitrated in a single arbitration.

It is an established proposition that when reference to institutional rules is made that the rules are to be applied in their entirety, unless the parties specifically agree otherwise.[9] The scope of the arbitration agreement is to be interpreted broadly.[10] Hence it can be safely assumed that when both NT and GOR made the reference to the institutional rules then that would amount to consent to consolidation since no express agreement is

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[4] Poudret and Besson, *Comparative Law of International Arbitration*, [London: Sweet & Maxwell, 2007] at p. 240; Paul D. Friedland, *Arbitration Clauses for International Contracts*, 2nd ed. [New York: Juris Publishing, 2007] at p. 135; Julian D. M. Lew, et al., *Comparative International Commercial Arbitration*, [New York: Kluwer Law International, 2013] ¶ 16-59.

[5] Alan Redfern, et al., *Law and Practice of International Commercial Arbitration*, 4th edn [London: Sweet & Maxwell, 2004], at p. 153.

[6] Art 14(2) SHA, Art 9(2) (iv) of BIT.

[7] Art 14(1) SHA, Art 9(2) (b) of BIT.

[8] Art 12(4), ICC ADR Rules, 2012 and Art 9(2) of BIT, ANNEXURE II.

[9] *Id* at p.80.

[10] Gerhard Walter, *Die Internationale Schiedsgerichtsbarkeit in der Schweiz, in Internationale Schiedsgerichtsbarkeit*, ed. Peter Gottwald [Bielefeld: Gieseking, 1997] at p. 823.

required for consolidation of claims arising out of two separate contracts.[11] Consolidation is referred to via the inclusion of the institutional rules **[1]**.[12]

1. Consolidation is referred via the inclusion of the institutional rules in the arbitration agreement.

The agreements must, in addition to covering the applicability of arbitration, cover the parties, the substantive claim, and an agreement to arbitrate cases together.[13] It is generally legitimate to presume that by including identical arbitration clauses in the various related contracts, the parties intended to submit the entire operation to a single arbitral tribunal.[14] In the instant case, NT and Govt. of Rescindia had both submitted their claims to ICC and hence had impliedly consented to consolidation.

C. Consolidation of claims is not against the public policy of Rescindia.

If consolidation is based on the parties' implied consent, then Article V (1) (d) [of the NY Convention] would presumably not be offended.[15] The aforementioned article may be precluded if not raised according to the law of the seat.[16] Article V (1) (d) states that enforcement could be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. Only when the enforcement of the award, and not the award itself, would violate

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[11] Catherine Yannaca, *Consolidation of Claims: A Promising Avenue for Investment Arbitration?, International Investment Perspectives*, [Paris Cedex: OECD Publishing, 2006] at p. 235.

[12] Lara Michaela Pair, *Consolidation in International Commercial Arbitration – the ICC and Swiss Rules*, Dissertation no. 3923 Eleven Publishing / 2011, Den Haag. p.79.

[13] Eric A. Schwartz, *Multi-party Arbitration and the ICC in the Wake of Dutco*, 10 J. INT'L ARB. 5, 11 (1993).

[14] Fouchard, et al., *Fouchard Gaillard Goldman on International Commercial Arbitration* [New York: Aspen Publ., 1999], at p. 521.

[15] Gary B. Born, *International Commercial Arbitration in the United States: Commentary & Materials*, 2nd Ed, [New York: Kluwer Law International, 2001] at p. 695.

[16] Thomas Henkel, *Konstituierungsbezogene Rechtsbehelfe im Schiedsrichterlichen Verfahren nach der ZPO*, (March 1, 2007) (unpublished J.D. dissertation, Humboldt University of Berlin), available at http://edoc.hu-berlin.de/dissertationen/henkel-thomas-2007-05-08/HTML. (Accessed on 05 April 2014).

public policy will enforcement be denied.[17] Procedural mistakes also must have the potential for an impact on the award to be objectionable.[18] The municipal laws of such countries provide that, where parties are disabled from choosing their arbitrators, such awards are to be set aside on the ground of breach of public policy[19] however in the instant case, in its response to the Notice of Arbitration, the Govt of Rescindia nominated Mr. Burrows as its arbitrator.[20] In the *Siemens AG v Dutco* case[21], the Court did object to the parties being permitted to consent to institutional rules that and held that it would result in inequality in the selection of arbitrators. This does not mean that the parties could not have chosen the rules and joint proceedings and it was held that only the unequal selection of the arbitrators that resulted was against public policy and could not be agreed to. Since the parties were not subjected to unequal treatment, hence the consolidation of claims arising out of two separate contracts would not be violative of Art. V (1) (d) of New York Convention.

II. WHETHER THERE EXISTS AN ARBITRATION AGREEMENT(S) BETWEEN NOBLE TECHNOLOGIES AND THE GOVERNMENT OF RESCINDIA?

The Claimant contends that there exists an arbitration agreement between NT and the Government of Rescindia as many legal systems impose no requirement that agreements to arbitrate must take the form of signed documents.[22] Hence, even though the Government of Rescindia was not a signatory to the arbitration agreement still the agreement can be extended to it **[A]** since it took active part in the negotiation of the contract and NST was

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[17] Andrés Jana et al., *Article V(2), in Recognition And Enforcement Of Foreign Arbitral Awards: A Global Commentary On The New York Convention* (Herbert Kronke Et Al. Eds.) [New York: Kluwer Law International, 2010] at pp. 365, 366.

[18] María Elena, *Alvarez De Pfeifle, Der Ordre Public-Vorbehalt Als Versagungsgrund Der Anerkennung Und Vollstreckbarerklärung Internationaler Schiedssprüche* [Originally presented as the author's thesis (doctoral) Universiteat Hamburg], 2008 (2009) at p. 161.

[19] *Focus Brands Trading (India) Pvt Ltd And Anr. Vs. Campari International S.A.M And Anr.*, Ia Nos. 7826-7827/2010 In Cs (Os) 702/2010.

[20] Moot Proposition ¶37.

[21] *Siemes AG v. Dutco*, Cour de cassation, 1e civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

[22] William W. Park, *Non-signatories and International Contracts: an Arbitrators Dilemma*, 28 Yale J. Int'l L 7, (2009).

an agency of GOR **[B]**. Lastly there also exists an arbitration agreement between NT and GOR under the BIT **[C]**.

A. The fact that GOR did not sign the arbitration agreement with NT is not determinate test for the presence of arbitration agreement between NT and GOR.

The fact that the party to the debate, or about whom the debate is taking place as in this case, did not sign the arbitration agreement is not determinative of the issue.[23] Hence the mere fact that GOR had not signed an arbitration agreement could not be determinative of the issue that the arbitration agreement can extend to it or not.

B. The arbitration agreement between Noble Technologies and N.S.T can be extended to the Government of Rescindia under SHA.

It is an established proposition that a third party shall be deemed to be bound by an arbitration agreement if it took active and substantial part in the negotiation or performance **[1]** of the main contract. Moreover, NST was an agency of GOR and hence GOR would also fall under the ambit of the arbitration agreement **[2]** and even if it does not amount to an agency still GOR is the alter ego **[3]**.

1. The Government of Rescindia took an active part in the negotiation of the SHA.

A third party will be deemed to be bound by an arbitration agreement if it took an active and substantial part in the negotiation or performance of the main contract, which gives rise to the presumption that it was aware of the arbitration agreement.[24] National Intelligence Agency was formed by Rescindian National Agency Act, 2006 and was ultimately under the supervision of the Prime Minister.[25] The negotiation of S.H.A. between N.T. and N.S.T. was a result of the active part played by the respondent. Moreover Mr. Wadhawan and

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[23] *National Union Fire Insurance Company of Pittsburgh, Pa, et al v. Belco Petroleum Corporation et. al.* 88 F.3d. 129: 1996 US App. LEXIS 15952 at pg. 134.

[24] Blaise Stucki, *Extension of Arbitration Agreements to Non Signatories,* (29 September 2006) http://www.docstoc.com/docs/47479901/Main-Contract-Arbitration (Accessed on 05 March 2014)*;* ICC Case No. 11160, joining a non-signatory that played a significant role at the time of contract formation.

[25] Moot Proposition ¶ 2.

Krishna, who were the I.G. of Police Department and the head of NIA respectively[26], were actively involved in the process as Ms. Mende, Mr. W, Mr. Sassiya and Mr. Seaborne spent many breakfast meetings in the capital city of Rescindia, Resolveville, going into every excruciating detail of the proposed project.[27] Ms. Mende was initially apprehensive of this wait-and-watch attitude but she eventually came on board with some positive reinforcement from Mr. W about Mr. Seaborne's capabilities.[28] In *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs*[29], where the Government of Pakistan rejected any suggestion that it was a party to the contract or that it had consented to the arbitration agreement, and denied the arbitral tribunal's jurisdiction on those bases, the tribunal held that the arbitration agreement extended "to parties that did not actually sign the contract but were directly involved in the negotiation and performance of such contract […]"[30]. Therefore, since the G.O.R. actively participated in the conclusion of SHA, it will be bound by the arbitration agreement.

1. *NST is an agency of the GOR.*

An agency relationship may be demonstrated by written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority).[31] In *Bridas, S.A.P.I.C., et al vs. Government of Turkmenistan*[32], where an Argentinean corporation, entered into a joint venture agreement (JVA) with a production association formed and owned by the Government of Turkmenistan at the time the JVA was signed, the ICC Tribunal held that the Government was bound to arbitrate the dispute with Bridas even though the Government did not sign the JVA. When the matter reached the Fifth Circuit, it found that a court may find agency from a variety of factors, including:

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[26] Moot Proposition ¶ 10.

[27] Moot Proposition ¶ 17.

[28] Moot Proposition ¶ 18.

[29] *Dallah Real Estate & Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, [2008] EWHC 1901 (Comm), [2008] App.L.R., at ¶ 49.

[30] Pierre Mayer, *The Extension Of The Arbitration Clause To Non-Signatories — The Irreconcilable Positions of French And English Courts*, Am. U. Int'l L. Rev. at p. 834.

[31] *Hester Intern. Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir.,1989); *Arriba Limited v. Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir., 1992).

[32] *Bridas,S.A.P.I.C.,et alvs.Government of Turkmenistan*, 345 F.3d 347 (5th Cir., 2003).

correspondence that confirms, during negotiations of the underlying agreement, that "[…] all rights established in the organization documents are fully and completely guaranteed by the [non-signatory]"[33]. Placing heavy reliance on this case it can be concluded that NST acted as the agent of GOR hence binding the GOR to the arbitration clause. If a party signs an agreement in the capacity of a non-signatory's agent, the non-signatory may be bound by the agreement's arbitration requirement.[34]

2. *Arguendo NST was not an agency of GOR, GOR was the alter ego of NST.*

Courts will apply the alter ego doctrine and hold a parent liable for the actions of its instrumentality in the name of equity when the corporate form is used as a "sham to perpetrate a fraud."[35] In making an alter ego determination, a court is concerned with reality and not form, [and with] how the corporation operated.[36] The doctrine applies only if "(1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.[37] As in this case GOR exercised complete control over the NST with respect to the development of Project "World I-1NaB" and such control was used to commit fraud or wrong that injured NT (the Government's inaction that caused the Trust to cease to exist), therefore, GOR was the alter ego of NST.

3. The GOR was a guarantor for the specific performance of the SHA.

Some guarantees are very closely related to or almost identical to the underlying agreement and in such cases it is crystal clear that the interpretation is always in favour of extending the arbitration agreement to the guarantors.[38] In the instant case as well, the guarantree

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[33] *Id* at p.6.

[34] *Srivastava vs.Commissioner,* 220 F.3d 353, 369 (5th Cir., 2000).

[35] *Pan Eastern Exploration Co. v . Hufo Oils,* 855 F.2d 1 1 06, 1 1 32 (5th Cir.1 988).

[36] *United States v . Jon-T Chemicals, Inc*., 7 68 F.2d 686, 693 (5th Cir.1 985).

[37] *Bridas,S.A.P.I.C.,et alvs.Government of Turkmenistan,* 345 F.3d 359 (5th Cir., 2003).

[38] Matti Kurkela, Santtu Turunen , *Due Process in International Commercial Arbitration,* (Oxford 2nd ed.) 2010 at p. 60.

agreement[39] was very closely related to the Master Agreement, i.e., the SHA as it guaranteed for the specific performance of SHA. Hence the arbitration agreement under the SHA can be extended to the guarantor, i.e., GOR.

D. There exists an arbitration agreement between NT and GOR under BIT.

The majority of arbitration clauses in modern BITs express consent on the part of the two Contracting States to submit to tribunal's jurisdiction, for the benefit of nationals of the other State party to the treaty. There is a valid arbitration agreement between NT which is an investor of UKSA and other contracting party, i.e., GOR under Art 9 of the BIT[40] however the negotiation prerequisite will not affect the present arbitration since NT can seek to benefit from a more favourable dispute settlement mechanism contained in the India-Australia BIT using the MFN Clause in the Rescindia-UKSA BIT **[1]**.

1. The MFN Clause would apply to the dispute settlement clause.

The MFN clause applies without limitation to all treatment of investments, including dispute settlement mechanisms. The purpose of the MFN standard is to prevent discrimination against the nationals of different countries and ascertain equality of treatment regardless of nationality. In the context of international investment, MFN clauses thus contribute to the harmonisation of the level of protection accorded to foreign investors and their investments.[41] It was held in the *Emilio Agustı´n Maffezini v Kingdom of Spain* case that 'notwithstanding the fact that the basic treaty… does not refer expressly to dispute settlement as covered by the most favoured nation…there are good reasons to believe that today dispute settlement arrangements are inextricably related to the protection of foreign investors… if a third-party treaty contains provisions for the settlement of disputes that are more favourable… than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN] clause'. Hence, NT can seek to benefit from a more favourable dispute settlement mechanism contained in the India-Australia BIT[42], which contained no such mandated duration for negotiation as a condition precedent under its Dispute

[39] Annexure VI.
[40] Annexure II.

[41] *See.* Gaillard, E., Establishing Jurisdiction Through a Most-Favored-Nation Clause, Vol. 233-No, 105 NYLJ (2005).

[42] India-Australia BIT, 4th May 2000.

Resolution Clause but allowed for international arbitration without any definite negotiation period since the present BIT also contains an MFN clause under Art. 4 of BIT.[43]

III. WHETHER THE ARBITRAL TRIBUNAL CAN ARBITRATE UPON ISSUES OF FRAUD AND CORRUPTION?

Claimant contends that the tribunal can arbitrate upon issues of fraud and corruption as it is a settled proposition that where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction.[44] Indeed, in the heat of battle such allegations are frequently made, although much less frequently proved. In the present case, it is not for the courts but for the tribunals to decide on their own jurisdiction **[A]**.It is a well settled proposition that fraud is arbitrable as per the lex arbitri which is the laws of Rescindia **[B].** However, even if fraud is not arbitrable as per laws of Rescindia, yet GOR cannot invoke its municipal laws to evade the performance of its contractual obligations **[C]**.

A. The arbitral tribunal rules on its own jurisdiction.

The principle of competence-competence is consistent with the parties' implied or express intent that any and all disputes arising out of their relationship be arbitrated, including disputes about their dispute resolution agreements.[45] The Government of Rescindia is objecting to the arbitral proceedings on the ground that the dispute was inextricably linked with questions of fraud and allegations of bribery, which are not arbitrable.[46] The ICC Rules 2012 provides that if any party against which a claim has been made (…) raises one or more pleas concerning the existence, validity or scope of the arbitration agreement (…) the arbitration shall proceed and any question of jurisdiction (…) shall be decided directly by the arbitral tribunal.[47] Therefore, the arbitral tribunal shall rule on its own jurisdiction.

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[43] Annexure II.

[44] Alan Redfern, et al., *Law and Practice of International Commercial Arbitration*, 4th edn [London: Sweet & Maxwell, 2004], ¶3-23.

[45] Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something indeed come from nothing?*, May 7, 2003 at p. 6.

[46] Moot Proposition ¶ 38.

[47] Article 6(3) of ICC Rules 2012.

B. Fraud is arbitrable as per the laws of Rescindia.

The country of the seat of the arbitration has the most obvious and efficient suitability to control arbitrations held and awards rendered within its territory.[48] In the instant case, the rules governing the arbitration are *lex arbitri* and the ICC's institutional rules. Both permit the arbitrability of fraud in this case **[1]**.

1. The rules governing the arbitration are lex arbitri and the rules chosen to govern the proceedings by the parties.

The rules that govern an international arbitration are the mandatory provisions of the *lex arbitri* i.e., the law of the place of arbitration, which are generally cast in broad terms and the rules that the parties may have chosen to govern the proceedings, such as those of the ICC or of UNCITRAL.[49] Article 14(1) of S.H.A. provided that all disputes arising out of the present contract shall finally be settled under the Rules of Arbitration of the ICC. Hence, the rules chosen to govern the proceedings by the parties are the ICC Rules. The arbitration agreement being a part of the contract there is no governing law clause. The S.H.A. provides the governing law for the agreement. Since the ICC Rules are silent on the issues of fraud and corruption **[a]** and fraud is arbitrable as per the laws of Rescindia, which is the *lex arbitri* **[b]** in the given case therefore, the tribunal must proceed with the dispute. In such cases, the presumption is always in favour of arbitrability **[c]**. The tribunal would be competent to arbitrate upon issues of fraud and corruption**[d]** since the claims against the claimant are not backed by substantial evidence**[e]** and therefore the matter is arbitrable in the instant case.

a. The ICC Rules are silent on the issue of arbitrability of fraud and corruption.

Article 19 of the ICC Rules provides for the rules governing the proceedings and states that the proceedings shall be governed by the ICC Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle.[50] The ICC Rules are

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[48] Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards*, [Frankfurt am Main: Peter Lang, 2010] at p. 141.

[49] Alan Redfern, et al., *Law and Practice of International Commercial Arbitration*, 4th edn [London: Sweet & Maxwell, 2004], ¶1.73.

[50] Article 19 of the ICC Rules, 2012.

silent on the issue of arbitrability of fraud and corruption, and hence the laws of *lex arbitri* are to be taken into account.

b. The laws of Rescindia are the laws governing arbitration.

Article 14(2) of the S.H.A. provided that the seat or legal place of the arbitration shall be Resolveville, Rescindia.[51] *Lex arbitri* i.e., the law of arbitration is the law of the country where the arbitration is held.[52] The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or '***lex arbitri*** ' of the arbitration), is well established in both the theory and practice of international arbitration.[53] In the absence of any express choice as to the law governing the arbitration agreement, the law of the seat will be the governing law of the arbitration agreement.[54] Therefore, the *lex arbitri* in this case are the laws of Rescindia (*i.e.*, Arbitration and Conciliation Act, 1996).

c. The presumption is always in favour of arbitrability.

Strong presumption favours arbitrability of disputes in the commercial sector, and doubts with respect to arbitrability should be resolved in favor of coverage.[55] There is a presumption in favour of arbitration if the question is *whether* the dispute is arbitrable.[56] There is a trend towards broadening the scope of arbitration.[57] Since the dispute resolution clause of S.H.A. provided that all disputes arising out of the present contract shall finally

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[51] Moot Proposition Annexure 1.

[52] Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration***,** [New York: Oxford University Press, 2002] at ¶1.204 p.

[53] Alan Redfern, et al., *Law and Practice of International Commercial Arbitration,* 4th edn, [London: Sweet & Maxwell, 2004], p. 98.

[54] *Bharat Aluminium Co. Ltd. Vs. Kaiser Aluminium Technical Services Inc*, 2012 (9) SCC 552.

[55] William Mark McKinney, *McKinney's Consolidated Laws of New York Annotated,* [New York: West Group, 1998] at p. 356.

[56] *First Options*, 514 U.S. 938, 938 (1995).

[57] Michael W. Buhler, Thomas H Webster, *Handbook of ICC Arbitration*, [London: Thomson Sweet & Maxwell, 2010] at p. 115, ¶ 6-113.

be settled under the Rules of Arbitration of ICC,[58] therefore the parties had *animus arbitrandi* and hence the presumption will be in favour of arbitrability.

d. The arbitral tribunal is competent to arbitrate upon issues of fraud and corruption in Rescindia.

Claimant maintains that the issues of fraud and corruption are arbitrable as per the laws of Rescindia. In *Bombay Gas Co Ltd v Parmeshwar Mittal*[59] the Court held that the contention of the respondent that since the petitioner had fabricated the record which amounted to a criminal offence, so the dispute could not be referred for arbitration was without any merit. The Court was of the view that since Section 8 was of mandatory nature such an argument could not be accepted.[60] It has been settled by *M. Venkateswara Rao v. N. Subbarao*[61], that the person against whom fraud is alleged has an option to have the matter decided by the Civil Court.[62] Since the allegations of fraud are made against the claimant, the option of having the dispute resolved by a domestic Court lies with the claimant and the respondents are bound by the arbitration agreement since fraud is arbitrable as per the *lex arbitri.*

e. The charges against the claimant are evidentially unsubstantiated.

The Secretary of Board of Trustees of NST alleged fraudulent practices by NT with respect to the exclusivity of Project World I- 1NaB.[63] This allegation was based on the publications in the form of a set of blog posts made by a group of computer hackers in the UKSA, which revealed the existence of an extensive surveillance system in the UKSA.[64] However, independent due diligence of NT's previously completed projects by NST indicated that no similar project was either completed or ongoing. Due diligence means a prospective buyer's or broker's investigation and analysis of a target company, a piece of property, or a

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[58] Annexure I, Article 14.

[59] AIR 1998 Bom 118.

[60] *Id.*

[61] A.I.R. 1984 A.P. 200.

[62] Annual Survey of Indian Law, Volume XX: 1984, [New Delhi: The Indian Law Institute, 1984] at p. 38.

[63] Moot proposition ¶ 31.

[64] Moot proposition ¶ 29.

newly issued security.[65] Such audit of a potential investment serves to confirm all material facts in regards to a sale.[66] The claimant acted in good faith and permitted the due diligence, hence the allegations of the respondent are unsubstantiated and not supported by heavy documentary and oral evidence.

C. Arguendo fraud is not arbitrable as per the laws of Rescindia, the Government of Rescindia cannot invoke the provisions of its domestic law to evade the performance of its obligations.

The Respondent alleges that the dispute is not arbitrable since it is inextricably linked with questions of fraud and allegations of bribery and hence, must be advanced in a domestic Court.[67] It is a settled principle that invocation of non-arbitrability on the basis of domestic law is no defence for the state entity concerned. The invocation of non-arbitrability on the basis of domestic law is no defence for the state entity concerned[68] and will certainly not affect the legal position of third states. Article 27 of the Vienna Convention on Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Therefore, the respondents cannot invoke the provisions of its domestic law to evade the performance of its obligations.

IV. WHETHER THE SHAREHOLDER'S AGREEMENT AMONGST NATIONAL SECURE TRUST AND NOBLE TECHNOLOGIES INC. IN RELATION TO NOBLE TECHNOLOGIES RESCINDIA WAS RIGHTFULLY TERMINATED?

The claimant contends that, SHA was wrongfully terminated as there was no consensus of NT concerning the termination **[A]**. SHA is an absolute contract without exemptions thus the non-performance would amount to infringement of common law rule of sanctity of contracts **[B]**. Put Options are legal rights conferred under Rescindian laws, its non execution is corollary to wrongful termination **[C]**. The GOR notification merely prohibits private mining of data, whereas NTI operations are conducted using publicly available

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[65] Bryan A. Garner, *Black's Law Dictionary*, 9th ed., [London: West Group, 2009] at p. 469.

[66] Bill G. Marks, *The Other Side of Law: The Power of Compassion in Making Tough Legal Decisions*, [Bloomington : Author House, 2008] at p. 42; Tim S. Mceneny, *Unlocking Your Entrepreneurial Potential*, [Bloomington: iUniverse, 2012] at p. 175.

[67] Moot Proposition ¶ 38.

[68] Article 3 of the ILC Articles on State Responsibility.

data, SHA contained no provisions for non performance on account of change in circumstances. Since there is no distinction between GOR & NST, a promisor cannot rely upon self induced frustration. **[D]**. SHA cannot be said to be vitiated on grounds of fraud as exclusivity was not the subject matter of contract **[E]**.

A. There was a unilateral termination of SHA.

Claimant asserts that that Article 15 of SHA provides for the situation that SHA may be terminated by the consent of all the Parties expressed in writing. However, in the instant case there was no concurrence of NT in termination of SHA in relation to NTI and the agreement was not rightfully terminated.

B. SHA is an absolute contract and admits of no exemption from liability on the part of GOR.

In *Taylor v Caldwell*[69] BLACKBURN J recognised that the rule of 'Sanctity of Contracts' as earlier laid down in the *Paradine v Jones*[70] case, 'is applicable when the contract is positive and absolute, and not subject to any condition either express or implied'. *Prima facie*, an absolute contract admits of no exemption from liability on the part of the promisor not withstanding an occurrence which has put it beyond his power to perform it.[71]

C. Rescindia legal regime allows Optionality Causes for Equity Shares and such contract is thereby enforceable as per *lex loci solutionis*.

In December 2007, a notification was issued whereby it was clarified that optionality clauses, inter alia, may henceforth be allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside Rescindia under the Foreign Direct Investment (FDI) Scheme.[72] The SHA was entered on September 16, 2009 and it imposes binding obligation on contracting parties.

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[69] *Taylor v Caldwell* (1863) 3 B&S 826: 122 ER 309.

[70] *Paradine v Jane* KB (1647) Aleyn 26: 82 ER 897.

[71] H.G. Beagle, *Chitty on Contracts*, 20th ed., [London: Sweet & Maxwell, 2004] at p. 204; *Paradine v. Jane* (1646), Aleyn 26, 82 E.R. 897.

[72] Moot Clarification dated March 21, 2014.

Further, Bombay High Court in the *under noted*[73] case held that preemptive rights over shares is enforceable, unless barred by the AoA.

D. The subject matter of the contract or the purpose of the SHA could not be said to have been frustrated by the recent notification issued by the Government of Rescindia.

The Claimant asserts that the purpose of the contract was the use of the machine for general surveillance purposes and not in the manner and purposes now deemed illegal in Rescindia **[1]**. The absence of change in circumstances clause expressly indicates that the contractual obligations could not be set aside **[2]**. The law laid down by S.C. of India permits interference by a public authority with the exercise of right to privacy in the interests of national security **[3]**. In case the tribunals find frustration, it would be self induced on account of GOR's actions **[4]**. Frustration leaves undisturbed any legal rights already accrued in accordance with the terms of contract **[5]**.

1. The contract was for the creation of technology using only publicly available data

GOR cannot claim the discharge of their liability under the contract as the contract was for the creation of technology which had multiple purposes including surveillance using only publicly available data as well as for different crimes.[74] The Ministry of Home Affairs, exercising its power under Section 19 of the NIA Act issued a notification that declared any "Programme that employs mining of private data for mass surveillance" as an illegal activity." **[Annexure IV]**.[75] However, it is to bring to attention of tribunal that surveillance system developed by NT uses only publicly available data. The subject matter of the contract or the purpose of the SHA could not be said to have been frustrated by the recent notification issued by the Government of Rescindia as the purpose of the contract was the use of the machine for general surveillance purposes and not only in the manner and purposes now deemed illegal in Rescindia.

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[73] *Messer Holdings Limited Vs. Shyam Madanmohan Ruia and Ors.* [2010] 159 Comp Cas 29 (Bom).

[74] Moot Proposition ¶ 32.

[75] Moot Proposition ¶ 30.

2. The SHA had no provision for rebus sic stantibus.

ICC Tribunal in *under noted*[76] case held, while parties were free to include an express term providing for adaptations to changing conditions (*Rebus Sic Stantibus*), the lack of such an express clause in the present contract meant that the contractual obligations could not be set aside. The ICC Tribunal in *Seller (Belgium) v Buyer (Romania)* [77] held that the doctrine of change of circumstances did not excuse the defendant's non-performance, given that it was to be applied with caution. This was particularly the case for international transactions, where the parties could be presumed to be aware of the relevant risks, and could have made explicit contractual provision for their occurrence. Failure to incorporate such provision in SHA cannot relieve parties of their obligations as to their respective performance required as per the Shareholder's Agreement. The principle of *Rebus Sic Stantibus*, is likewise limited to cases where compelling reasons justify it, having regard to the character of the changes, the type of contract, the requirements of fairness and equity and all the circumstances. [78] These did not justify its application in the present arbitration.

3. Judicial rulings of the Supreme Court of India authorises surveillance in interests of national security.

The Supreme Court of India in the cases of *Gobind v. State of Madhya Pradesh & Distt. Registra*r[79] and *Collector, Hyderabad and Anr. v. Canara Bank Etc*[80] emphasising on the need of surveillance quoted the European Convention on Human Rights, which came into force on 3-9-1953, as it represents that there can interference by a public authority with the exercise of right to privacy in the interests of national security.[81] A similar view is

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[76] *Buyer (Japan) v Seller (Belgium*), ICC Award in Case No. 2708 in 1976.

[77] *Seller (Belgium) v Buyer (Romania)*, ICC Award in Case No. 2404 in 1975.

[78] *Dalmia Dairy Industries, Cement Company (India) v National Bank of Pakistan*. Final Award in Case No. 1512 in 1971.

[79] 1975 AIR 1378.

[80] *Distt. Registrar and Collector, Hyderabad and Anr. v. Canara Bank Et**c*** AIR 2005 SC 186.

[81] A.H. Robertson, *Privacy and Human Rights*, [London: Manchester University Press, 1973] at p. 176.

enshrined in the Halsbury's Laws of England[82] and has been upheld by the Indian S.C in the case of *Sharda v. Dharmpal*[83] and also in *People's Union of Civil Liberties v Union of India*.[84]

4. Arguendo, contract being frustrated Rescindia cannot rely on self induced frustration.

In the present case there could be no distinction between the government and the trust and therefore, the government could not claim frustration induced by its own actions. It is asserted that, a party who has been in fault cannot rely on frustration due to his own wrongful act.[85] The essence of frustration is that it should not be due to the act of the party seeking to rely on it,[86] and it must be some "outside event or extraneous change of situation".[87] A contracting party cannot rely on "self-induced frustration that is frustration due to his own conduct or to the conduct of those for whom he is responsible".[88] It is well established that a party whose act has given rise to the event which is alleged to have frustrated the contract cannot invoke the doctrine of frustration; reliance cannot be placed upon a self-induced frustration.[89]

The frustration has been held to be "self-induced" where the alleged frustrating event was caused by a breach[90] or anticipatory breach of contract[91] by the party claiming that the

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[82] Lord Mackay, *Halsbury's Laws of England*, 4th Ed, Volume 8(2), [New Delhi: Lexis Nexis, 2013] ¶149, 164.

[83] AIR 2003 SC 3450.

[84] AIR1997 SC 568.

[85] *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301,327; *Joseph Constantine Line Ltd v Imperial Smelting Corpn Ltd,* 1942 AC 154, 200.

[86] *Hirji Mullji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 505; *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1935] A.C. 524,527; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp. Ltd* [1942] A.C. 154,163,170,171,187,200; *Denny Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265,274.

[87] *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal,* [1983] 1 A.C. 66, 729.

[88] *Bank Line Ltd v Arthur Capel & Co,* [1919] A.C. 435,452.

[89] *J. Lauritzen A.S. v. Wijsmuller B.V.*, [1990] 1 Lloyd's Rep. 1 at p. 8.

[90] *Ocean Tramp Tankers Corp v V/O Sovfratch (The Eugenia)* [1964] 2 Q.B. 226,237*; accord Paul Wilson & Co. AS v. Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854; *Cheall v Assn. of Professional Executive and Computer Staff* [1983] 2 A.C. 180,189.

contract has been frustrated, where an act of the party claiming that the contract has been frustrated broke the chain of causation between the alleged frustrating event and the event which made performance of the contract impossible,[92] and where the alleged frustrating event was not a supervening event or "something altogether outside the control of the parties".[93] A party who has been at fault or whose act was deliberate will generally be unable to invoke frustration because of the difficulty which such a party will inevitably face in showing the existence of a supervening act which is outside his control.[94] Mere difficulty alone will not absolve a party of the duty to perform its obligations.[95]

5. In any event, NT's Rights accruing before the frustrating event remain enforceable.

Claimant asserts that rights accruing before the frustrating event remain enforceable. This may cause hardship, as exemplified in *Chandler v Webster*.[96] The effect of impossibility of performance does not rescind the contract *ab initio*, while leaving undisturbed any legal rights already accrued or payment already made in accordance with the terms.[97] The completion of Phase-II of project on February 10, 2013 i.e. before the issuance of Ministry of Home Affair's notification[98] and subsequent clarification[99], entitles NT for payments to be received in accordance with Article 9 of SHA., entitles NT for payments to be received in accordance with Article 9 of SHA.

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[91] *New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France* [1919] A.C. 1, 6.

[92] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C 524.

[93] *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 736.

[94] *J. Lauritzen A.S. v. Wijsmuller B.V*., [1990] 1 Lloyd's Rep. 1,10; cf *Joseph Constantine Line Ltd v Imperial Smelting Corpn Ltd*, 1942 AC 154, 166-167.

[95] H.J. Berman, *Excuse of Non-Performance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963).

[96] [1904] 1 K.B. 493.

[97] *Fibrossa Spolka Akcyjna v. Fairbairn, supra*, 46, 67, 83; *accord Hirji Mulji v. Cheong Yue* S.S. Co., [1926] A.C. 510; *The British Movietone News Ltd. v. London and District Cinemas Ltd.*, [1952] A.C. 166.

[98] Annexure IV.

[99] Annexure V.

E. There was no fraud as to exclusivity of Project World I- 1NaB.

The Claimant asserts that there was no fraud perpetrated on NST, as exclusivity was not the subject-matter of contract, in order to establish fraudulent representation the burden of proof lies on the reprsentee **[1]**. Leaked cables were obtained from tainted channels and they do not possess any probative value **[2]**.

1. The burden of proof lies on representee to establish fraud.

In an action in fraud it is for the representee affirmatively to prove the fraud and the burden is no light one.[100] The term "fraudulent purpose" connotes an intention to go "beyond the bounds of what ordinary decent people engaged in business would regard as honest"[101] ; or "involving, according to the current notions of fair trading among commercial men, real moral blame." [102] Mr. Seaborne cautioned that he wasn't certain about the performance of project.[103] A crucial fact is that, Rescindia rejected a similar proposal by Alfred Technologies because it had built a similar surveillance system for the Baltic state of Qumar. In any event, extensive independent due diligence of NT's projects is conclusive of that no similar project was either completed or ongoing.[104]

2. The leaked cables do not possess any probative/evidentiary value.

The Latin expression *ex turpicausa non oritur actio* ("*ex turpi*") is usually translated as "a right cannot stem from a wrong".[105] The source of leaked cables on which the government of Rescindia relies is not any newspaper or reporting authority but a web based blog referring cables illegally leaked by another website. A genuine reporting agency through its

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[100] *Hornal v Neuberger Properties Ltd* [1957] 1 Q.B. 247.

[101] *R v Grantham* [1984] 1Q.B. 675; 79 Cr App.R.86.CA.

[102] *Re Patrick & Lyon Lt*d [1933] Ch. 786, Ch D, per Maugham J. at p.790.

[103] Moot Proposition ¶ 9.

[104] Moot Proposition ¶ 19.

[105] *See, Diversion of Water from the Meuse* case, Judgment, 1937 P.C.I.J., (ser. A/B) No. 70; (ser. C) No. 81, para. 240 (June 28). *Also see,* Case Concerning Mil. &Paramil.Acts. In &ag. Nic. (*Nic. v. U.S.*), Merits, Judgment, 1986 I.C.J. Reps. 14 (June 27) (Schwebel, dissent. op. at para. 270); U.S. Dipl. & Cons. Staff in Tehran, 1980 I.C.J. Reps. 53-5, 62-3 (May 24) (Morozov&Tarazi, JJ. dissent. ops.); Legal Status of E. Greenland (*Den. v. Nor*.), 1933 P.C.I.J. (ser.A/B) No. 53, 95 (Apr. 5) (Anzilotti).

reporting standards and mechanism to ensure the source-report relationship maintains the authenticity of the information. If the source of the report itself is not legal, then the report cannot be of any evidentiary value.

V. WHETHER THE GOVERNMENT OF RESCINDIA IS IN BREACH OF ITS OBLIGATIONS UNDER THE BILATERAL INVESTMENT TREATY BETWEEN THE GOVERNMENT OF RESCINDIA & UNITED KINGDOM OF SUMALILAND ET ALL?

Claimant contends that NT is an investor with the meaning of BIT[106] and is entitled to claim benefits under GOR- UKSA BIT. NST is an instrumentality of GOR and therefore latter is responsible for breach of its obligations towards NT **[A]**. The Rescindian government has breached its treaty obligation by not according a fair and equitable treatment to investments made by NT **[B]**. Instituted in bad faith, GOR decision on non-renewing of the ordinance amounts to indirect expropriation **[C]**.

A. NST is an instrumentality of the Government of Rescindia.

NST is an instrumentality of the GOR and operated under the exclusive control and funding of the Rescindian government. It was incorporated for a public purpose and was instrumental in discharging the state function of facilitating surveillance for mitigating external and internal threats to security.

According to an ICC award[107], an "instrumentality" can be defined as an entity of the State which: (1) has its own legal personality; (2) was created by the State with a specific purpose (such as regulating the State's oil resources); and (3) is controlled by the State. A clear definition of a State "instrumentality" is:

"[The State entity] ..... completely controlled by and dependent on the X Government's decisions, and the Government exercised its powers to such a degree that [the State entity] must be seen as an instrumentality of, or agent for, the X Government."[108]

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[106] Annexure 2 Article 1 (c) BIT.

[107] *Defense Industry of State X v. European Company*, ICC Case No. 6465, Aug. 15, 1991 Interim Award; ICC Case No. 7245, Jan. 28, 1994 Interim Award; ICC Case No. 7373, *European State Company v. Middle-East State Company*, Feb. 3, 1997 Final Award, unpublished, ¶ 14.

[108] ICC Case No. 6465, Aug. 15, 1991 Interim Award; see also ICC Case No. 7472, Jan. 16, 1995 Interim Award, ICC Case No. 7245, *European company v. Municipality of X*, Jan. 28, 1994 Interim Award.

In another ICC award, the issue of whether the State entity is an "organ" or an "instrumentality" seems to be determined in accordance with the internal law of the State.[109] According to the internal law of Rescindia, an entity is the agency and instrumentality of the state if such entity is financially, functionally, administratively dominated, by or under overriding control of the government.[110]

B. The GOR did not accord Fair and Equitable Treatment to NT.

The GOR arbitrarily changed its municipal laws without ensuring any legal stability this resulted in violation of the doctrine of *Pacta Sunt Servanda* and Article 3(2) of GOR-UKSA BIT **[1]**. The decision of GOR for non-renewal of ordinance disappointed the legitimate expectations of investor, i.e. NT **[2]**.

1. The GOR's actions are in breach of its obligations under Article 3(2) of BIT & in disregard to cardinal principle of Pacta Sunt Servanda.

The fair and equitable treatment standard is the most common general absolute standard of treatment in the BITs.[111] The requirement of fair and equitable treatment has been defined as the good faith principle under which foreign investors expect the host State to act in a consistent manner without arbitrarily revoking any pre-existing decisions.[112] The reasonableness principle prohibits the treatment that is arbitrary or motivated by political or discriminatory considerations,[113] it has become a widely applicable restriction on host-state treatment of foreign investment[114]. The actions of the Government of Rescindia were

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[109]ICC Case No. 6465, Aug. 15, 1991 Interim Award; ICC Case No. 7472, Jan. 16, 1995 Interim Award, ICC Case No. 6775, Jan. 28, 1998 Final Award.

[110]*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 1; *Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649.

[111] Kenneth J. Vandevelde, *Bilateral Investment Treaties*, [New York: Oxford University Press, 2010] at p. 190.

[112]*TECMED S.A. v. Mexico,* (2003) 43 I.L.M. 133, ¶ 122.

[113] *Supra* 110 at p. 189.

[114] *Supra* 110 at p. 190.

arbitrary and motivated by political considerations. Stability of the legal and business framework in the State party is an essential element of fair and equitable treatment.[115]

Article 3(2) of the BIT states that: 'Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party'.[116] In the *Inmaris* case, the blatant abrogation of contractual obligations by the State has been held to be a breach of the principle of 'fair and equitable treatment'.[117] Therefore, the resolution of the Board of Trustees for stalling exercise of put option[118] and to rescind the contract[119] was arbitrary in nature and was a breach of fair and equitable treatment. The obligation to observe contractual obligations towards the investor is covered under this standard because *pacta sunt servanda* is an obvious application of the stability standard.[120] The Government of Rescindia is in breach of its contractual obligation by not honouring the terms of the Guarantee agreement, arbitrarily changing its laws and not responding to the exercise notice.

2. The GOR disappointed the legitimate expectation of the investor.

Where the investor has relied on the representations of the government and taken an action based on that, the legitimate investor expectations play a crucial factor in determining whether violation of the fair and equitable standard has taken place[121] State responsibility could attach where the investor has placed detrimental reliance upon legitimate expectation.[122] The officials of GOR interacted with NT without holding any post in NST which implicitly facilitated the legitimate expectation of NT that the government will

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[115] *LG & E Energy Corp and ors v. Argentina*, (2007) 46 I.L.M. 3.

[116] Annexure II.

[117] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, (ICSID Case No. ARB/08/8)

[118] Moot Proposition ¶23.

[119] Moot Proposition ¶31.

[120] *Noble Ventures v. Romania,* ICSID Case No.ARB/01/11,Award, 12 October 2005, ¶ 182.

[121] *MTD Equity SdnBhd and MTD Chile SA v. Republic of Chile*, 44 I.L.M. 91 (2005).

[122] Case Concerning the Temple of PreahVihear (*Cambodia v. Thailand*) 1962 I.C.J.6 (I.C.J Report (Merits); JF O'Connor, *Good Faith in International Law*, [Hampshire: Dartmouth Publishing Co, 1991] at pp. 92,93.

support the investment through its policies and legal framework.[123] However the government decided not to renew the ordinance and it disappointed the legitimate expectation of the investor.

C. Acts of GOR amounts to Indirect Expropriation.

The Rescindian government decided not to renew the ordinance and made its state owned entity NST extinct which in effect seized the due payment of returns to be paid to NT in lieu of its services and leading to indirect expropriation of NT's investments **[1]**. The sole effect of the government's decision of non renewal of the ordinance resulted in indirect expropriation **[2]**.

1. The GOR is in breach of its obligation under Art 5 of BIT.

Article 5 of BIT provides that Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Hence the BIT provides for indirect expropriation and the GOR is in breach of the same. It is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[124] A typical feature of indirect expropriation is that the State denies the very existence of an expropriation and justifies its actions as a legitimate exercise of its regulatory or police powers, thereby rejecting the investor's claim of compensation.[125] Similarly in the given case as well, the act of GOR of passing the notification[126] which declared any programme or system that entails mass electronic or non-electronic data

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[123] Moot Proposition ¶ 14.

[124] *GAMI Investments v. Mexico*, Final Award, 15 November 2004, ¶ 126.

[125] R. Dolzer and C. Schreuer, *Principles of International Investment Law*, [Oxford: Oxford University Press, 2007] at p. 89.

[126] Annexure IV, Notification No. 2934/2013.

collection, storage, search and analysis in light of national security illegal and the omission of GOR to discuss the ordinance which resulted in the dissolution of NST[127] have reduced the benefits and rights of the investor (NT) so much that it amounts to be expropriated.

2. The sole effect of the termination of the Shareholder's agreement amounts to expropriation.

The degree to which a governmental measure affects property is of cardinal significance when determining if an indirect expropriation has occurred. Indeed, it is often stated that should the effect of a measure reach a certain threshold, a finding of expropriation is unavoidable.[128]In *Starrett Housing*[129] the Tribunal stated that indirect expropriation occurs when property rights 'are rendered so useless that they must be deemed to have been expropriated', whilst in *Tippetts* expropriation was held to occur 'whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral'.[130] In the *Patrick Mitchell Annulment* case, the Tribunal stated that –a practice of arbitrators - at present a majority of them - in international investment disputes' is to have 'reference only to the effect of the measure for the investor, without taking into account the purpose sought by the expropriating authority'.[131] The Tribunal in *Biwater* recognised and implicitly accepted the approach whereby 'many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the effect of relevant acts, rather than the intention behind them'.[132] The sole effect of the government's action of not renewing the ordinance and not responding to the exercise notice of NT is the seizure of the investment of NT and thus amounts to indirect expropriation

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[127] Moot Proposition ¶ 35.

[128] J Martin Wagner, *International Investment, Expropriation and Environmental Protection*, (1999) 29 Golden Gate University Law Review 465 at p. 536(1999). *Also see,* Rudolf Dolzer & Felix Bloch, *Indirect Expropriation: Conceptual Realignments?*, 5 International Law Forum 155 at p. 164 (2003).

[129] *Starrett Housing* (1983) 4 Iran-US CTR 122 at 155.

[130] *Tippetts* (1984) 6 Iran-US CTR 219 at 225.

[131] *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No ARB/99/7 (Annulment Proceedings) (1 November 2006) at [53] ('Patrick Mitchell Annulment').

[132] *BiwaterGauff (Tanzania) Ltd.v. United Republic of Tanzania*, ICSID Case No ARB/05/22 at p. 463.

PRAYER

In the light of the facts stated, issues raised, authorities cited and arguments advanced the Counsel for the Claimant respectfully requests the tribunal to:

1. Hold that the request for consolidation can be upheld under the ICC Rules of Arbitration.
2. Hold that there exists an arbitration agreement between NT and Government of Rescindia.
3. Hold that the arbitral tribunal is competent to arbitrate upon issues of fraud and corruption.
4. Declare that the Shareholder's Agreement amongst NST and NT in relation to NTI was not rightfully terminated.
5. Declare that the Government of Rescindia is in breach of its obligation under the Bilateral Investment Treaty between Republic of Rescindia & The United Kingdom of Sumaliland et All.

And pass such other order or orders as the Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed.

Sd/-

Counsel for Claimant