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ASIAN INTERNATIONAL ARBITRATION CENTRE

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MEMORANDUM FOR THE RESPONDENT

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CLAIMANT		RESPONDENT
THE REPUBLIC OF COLTANA	V.	THE MAJESTIC KINGDOM OF RADOSTAN

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF COURT DECISIONS

Abbreviation	Citation
ENGLAND	
JEB Fasteners v Marks Bloom	England and Wales High Court 1983 JEB Fasteners Ltd v. Marks Bloom & Co [1983] 1 All ER 583
M/S Ganesh v Anthony Bingham and Knowles	England and Wales High Court 8 February 2016 M/S Ganesh, Cofely Ltd v. Anthony Bingham and Knowles Ltd [2016] EWHC 240 (Comm)
Smith v Chadwick	England and Wales High Court 18 Feb 1884 Smith v. Chadwick

	(1884) 9 App Cas 187
INDIA	
HRD Corporation v Gail (India)	Supreme Court of India 31 August 2017 HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited 2018 SCC 471
Jagar Nath Singh And Ors. v. Lalta Prasad	Allahabad High Court 13 August, 1908 Jagar Nath Singh And Ors. v. Lalta Prasad 1 Ind Cas 562
Nabha Power Limited v Punjab State Power Corporation	Supreme Court of India 5 October 2017 Nabha Power Limited v Punjab State Power Corporation

	Appeal No. 283 of 2015
Oriental Banking v John Fleming	Bombay High Court 1879 Oriental Banking Corpn v. John Fleming ILR (1879) 3 Bom 242
Ranjit Thakur v Union of India	Supreme Court of India 15 October 1987 Ranjit Thakur v. Union of India AIR 1987 SC 2386
The Board of Trustees of The Port Of Calcutta v Bengal Corporation	Calcutta High Court 20 June 1971 The Board of Trustees of The Port Of Calcutta vs Bengal Corporation Pvt. Ltd.

	A.F.O.D. Appeal No. 102 of 1971
The State of Maharashtra v Dr. Praful B. Desai	Supreme Court of India 1 April 2003 The State of Maharashtra v. Dr. Praful B. Desai (2003) 4 SCC 601
	Supreme Court of India 8 October, 2003 RVE Venkatachala Gounder vs. Arulmigu Viswesaraswami and VP Temple AIR 2003 SC 4548

INDEX OF ARBITRAL AWARDS

Abbreviation	Citation
International Court of Arbitration of the International Chamber of Commerce (ICC)	
DIT v Port Autonome de Douala	ICC Case No. 24211/DDA. 10 November 2020 Douala International Terminal (DIT) v. Port Autonome de Douala
Claimant 1 and Claimant 2 v. Respondent	Procedural Order No. 9 2016 Claimant 1 and Claimant 2 v. Respondent
International Centre for Settlement of Investment Disputes (ICSID)	
Urbaser v Argentina	ICSID Case No. ARB/07/26. 12 August 2010 Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic

	Available at: https://www.italaw.com/sites/default/files/case-documents/ita0887.pdf
Permanent Court of Arbitration (PCA)	
Cairn Energy v India	PCA Case No. 2016-7 31 March 2017 Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India Available at: https://www.italaw.com/sites/default/files/case-documents/italaw8841.pdf

Josias van Zyl v The Kingdom of Lesotho	PCA Case No. 2016-21 24 November 2016 Josias Van Zyl, The Josias Van Zyl Family Trust, The Burmilla Trust v. The Kingdom of Lesotho Available at: https://www.italaw.com/sites/default/files/case-documents/italaw8215.pdf
RSE Holdings v Republic of Latvia	PCA Case No. 2022-41. 24 June 2022 RSE Holdings AG v. Republic of Latvia Available at: https://www.italaw.com/sites/default/files/case-documents/italaw170790.pdf

The Estate of Orlandini-Agreda. v. Bolivia	PCA Case No. 2018-39 8 March 2019 The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10431.pdf
Ad-hoc Arbitration	
S.D. Myers v Government of Canada	Procedural Order No. 18 26 February 2001 S.D. Myers, Inc. v. Government of Canada Available at:

	https://www.italaw.com/sites/default/files/case-documents/ita0749.pdf

INDEX OF RULES, STATUTES AND TREATIES

Abbreviation	Citation
AIAC Rules	Asian International Arbitration Centre Asian International Arbitration Centre Arbitration Rules 2021
IACA	Indian Arbitration and Conciliation Act Indian Arbitration and Conciliation Act 1996
IEA	Indian Evidence Act Indian Evidence Act 1872

STATEMENT OF JURISDICTION

The **Republic of Coltana** ("**Coltana**") and the **Majestic Kingdom of Radostan** ("**Radostan**") have agreed to submit the dispute in Bangalore, India in accordance with Rule 1.1(a) of the Asian International Arbitration Centre Arbitration Rules 2021 ("**AIAC Rules**").

QUESTIONS PRESENTED

(a) Whether Olaf, an Artificial intelligence ("**AI**") powered intelligent lawyer, should be removed as the arbitrator for lack of impartiality;

(b) Whether the Arbitral Tribunal should stay the present proceedings until the conclusion of Anuwat's trial at the International Criminal Court;

(c) Whether the Coltana-Radostan Counter Terrorism Agreement ("**CCTA**") is void; and

(d) In the event, issue (c) is decided in the negative, whether the termination of the CCTA by Coltana is valid.

STATEMENT OF FACTS

1 Coltana and Radostan (collectively, the "**Parties**") are parties to this arbitration. **Coltana**, through substantial investments into its institutions, regularly develops scholars. **Radostan**, led by Prime Minister Yodwicha Kenchana ("**PM Yodwicha**"), is an innovator in advanced technology weaponry, housing leading technological and internet companies.

2 After World War II, the Parties signed the Coltana-Radostan Memorandum of Understanding ("**CRMOU**"). This agreement resulted in numerous collaborations. Among them was Project Olaf. Spearheaded and heavily invested into by PM Yodwicha, this project aimed to create the world's first Artificial Intelligence ("**AI**") lawyer and judge. Oracle Corp, a private Radostan entity, owned Olaf, where PM Yodwicha serves as an independent non-executive director. Coltana sent a delegation which helped design Olaf's machine learning processes and legal training, while also training Olaf to filter out unreliable Internet sources.

3 After Olaf became fully operational, Coltana's technology scholars retained limited access to Olaf. Olaf's success was immediate. It served various entities as legal representative, and as arbitrator in complex arbitrations. It has never arbitrated a matter between Coltana and Radostan. Coltana's Ministry of Technology planned to recognise Olaf as a super-intelligent human person.

4 Advancing its self-learning abilities, Olaf began publishing legal insights. However, International media alleged that Olaf's publications were "overly supportive and defensive" of Radostan's conduct and policies. While Oracle Corp claimed that Olaf

also complimented other nations' policies, a Radostani news portal remarked that they were Radostan's allies.

5 On 15 August 2021, unidentified suicide bombers attacked Coltana. Government websites were also hacked, causing chaos. The public criticised the government's inefficient reaction. Olaf commented that proper investment in counter-terrorism measures could have prevented the incident.

6 Coltana's President and government officials later attended a meeting with PM Yodwicha, his delegation, and Ini-Tech Inc's ("**Ini-Tech**") CEO, Anuwat Kittisak ("**Anuwat**"). Ini-Tech was controlled by Radostan's Ministry of Defence. While discussing the recent attacks, Coltana emphasised that national security and securing public support were crucial because of the upcoming general elections.

7 To address Coltana's concerns, Anuwat introduced OnionRing, an anti-terrorism software. He claimed it could neutralise terrorist threats. OnionRing could delete its traces from devices while extracting intelligence. Anuwat advised involving government-linked companies to expand OnionRing's coverage.

8 Given Coltana's urgency, the Coltana-Radostan Counter Terrorism Agreement ("**CCTA**") was swiftly signed, despite the extravagant financial commitment. It incorporated general and payment obligations and outlined Ini-Tech's responsibility for the end-to-end process of OnionRing. It stressed cooperation against terrorism and transnational threats. Anuwat emphasised that all collected data is confidential, accessible to Coltana's government only via proper procedures. Due to OnionRing, several terrorist attacks were prevented.

9 On 16 December 2021, Coltana's general elections were held. Despite securing a simple majority, this marked a historic defeat for DPP as OBH garnered significant voter support. Olaf opined that the result was due to DPP's poor governance over the years.

10 Shortly afterwards, a former Ini-Tech employee alleged on Twitter that OnionRing accessed thousands of Coltana electorates' personal data via Ini-Tech's database before directing OBH-supporting advertisements to voters. Ini-Tech and OBH vehemently denied such allegations.

11 On 2 February 2022, unidentified hackers stole Coltana's Bitcoin reserve. Coltana's ability to finance OnionRing under the CCTA was hampered, triggering negotiations between the Parties to alter the payment method for the services of OnionRing.

12 On 7 March 2022, the Department of Justice of the United States of Kola Lumpo ("**DOJ**") announced that Anuwat, as OnionRing's key programmer, has been arrested on the grounds of commissioning cyber war crimes in Ulavu. He will be brought before the International Criminal Court ("**ICC**"). Significantly, before his arrest, Anuwat disclosed that OnionRing detected misappropriation of Coltana's Bitcoin fund by DPP politicians.

13 According to the Ulavu Files which the DOJ released, Dua Lupa, Ulavu's current Prime Minister, wins every election by a supermajority, consistently secures supermajority wins in elections, allegedly facilitated by a software ("**Unidentified Software**") bearing resemblance to OnionRing. The Crime and Corruption Reporting Project ("**CCRP**") reports support this, stating that the Ulavu Intelligence Bureau had acquired hardware used by OnionRing. The Unidentified Software was allegedly used to target

civilians and incorporated in various Autonomous Weapons Systems ("AWS") which Ulavu used to kill anti-establishment forces.

14 One day later, Coltana ceased payment negotiations and terminated the OnionRing services. Coltana initiated arbitration proceedings against Radostan. Radostan nominated Olaf as arbitrator, which Coltana challenges. Additionally, Coltana argues against a stay of the proceedings, as this tribunal has the jurisdiction and necessary documentation to decide the substantive pleadings – i.e., the CCTA's voidability and alternatively, the validity of Coltana's termination.

SUMMARY OF PLEADINGS

I. OLAF SHOULD NOT BE REMOVED AS ARBITRATOR OF THE PRESENT PROCEEDINGS AS IT IS IMPARTIAL

16 The circumstances surrounding Olaf's creation and behaviour do not fulfil the legal threshold of raising justifiable doubts in the mind of a reasonable third party. First, there is no direct relationship between Olaf and Radostan. Moreover, Coltana was involved in the initial programming stages of Project Olaf. While PM Yodwicha did spearhead Project Olaf, he was only an independent non-executive director. Second, Olaf's opinions on the Radostan policies are unrelated as they are not legal in nature. Further, Olaf's comments on the Coltana's government are objective assessments of the available facts. This does not affect Olaf's impartiality when presented with new facts.

II. THE PRESENT PROCEEDINGS SHOULD BE STAYED PENDING ANUWAT'S TRIAL AT THE ICC

17 On a balance of prejudice, the present proceedings should be stayed until the conclusion of Anuwat's trial at the ICC. First, granting a stay would not materially prejudice Coltana since payment obligations are owed by Coltana to Radostan, and a stay will not impair Coltana. Second, a stay would give Radostan a reasonable opportunity to present its case. The overall demeanour of Anuwat, an important witness, cannot be sufficiently observed through alternative means. Third, the outcome of the ICC proceedings and the evidence that is likely to be adduced has a bearing on the issues before this tribunal. Fourth, the delay caused in the current proceedings is not an unreasonable one.

18 Overall, on a balance of prejudice, a stay should be granted because the harm done to Radostan in not granting a stay of proceedings far outweighs the harm done to Coltana if a stay of proceedings is granted. In any case, such harm can easily be monetarily compensated.

III. THE CCTA IS NOT VOID

19 The CCTA is not void as Parties entered it with free consent. First, there is no misrepresentation as any representations made regarding the confidentiality of the information collected by OnionRing were after the CCTA was signed. Second, even if there is misrepresentation, there is no fraud as Radostan's silence does not amount to active concealment. Additionally, the CCTA is not void for illegality since the services of OnionRing does not contravene any Indian statute or public policy.

IV. THE CCTA WAS WRONGFULLY TERMINATED BY COLTANA

20 Coltana did not have any valid grounds to terminate the CCTA. First, there are no express or implied terms stipulating that Radostan is responsible for upholding the confidentiality of the data collected by OnionRing. In any case, Coltana lacks sufficient evidence to discharge its burden of proving that Radostan had not kept the collected data confidential. Second, Radostan had not breached its private obligation to uphold principles of human rights law. Coltana also does not have sufficient evidence to prove that Radostan had breached such an obligation. Even if Radostan had breached any of the aforementioned terms, none of the breaches are sufficiently fundamental to entitle Coltana to validly terminate the contract.

21 Any dispute that arises out of or relates to the agreement will be resolved by arbitration in accordance with the Asian International Arbitration Centre Rules 2021 ("**AIAC Rules**").[1] The Indian Arbitration and Conciliation Act ("**IACA**") is applicable because Parties have agreed that the governing law of the CCTA is Indian Law.[2] The effect of adopting these institutional rules is that they supplement or supplant the procedural rules that apply to the present arbitral proceedings. Therefore, to the extent that the IACA and the AIAC rules are not inconsistent, both shall apply.

V. OLAF SHOULD REMAIN AS ARBITRATOR OF THE PRESENT PROCEEDINGS

A. Olaf has the capacity to preside as an arbitrator in the present proceedings

22 Coltana may contend that Olaf lacks the capacity to preside as arbitrator over the present proceedings because it is not a human, but an artificial intelligence program ("**AI**"). However, the fact that Olaf is AI does not diminish its capacity to preside as an arbitrator. The AIAC Rules and the IACA do not require an arbitrator to be a natural person.[3] These rules may be contrasted with the national legislation of other jurisdictions such as France, Netherlands and Portugal which expressly state that an arbitrator must be a natural person acting with full capacity.[4]

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[1] Record, at [25.3]; CCTA, Article 8.
[2] Record at [25.5]; CCTA, Article 10.
[3] AIAC Code of Conduct, Rule 2.2; See also IACA, s 11.
[4] French Code of Civil Procedure Book IV Chapter II, Article 1450; Netherlands Code of Civil Procedure Book 4 Title 1 Section 1, Article 1023; Portuguese Arbitration Act, Article 9(1).

23 Further, in the present proceedings, Parties have agreed that the arbitrator must be (1) independent from the Parties, and (2) objective and reliable, with sound judgement.[5] None of these requirements have mandated that the chosen arbitrator be a human. Therefore, following the procedural law applicable to the present arbitration proceedings and the Parties' intention as evinced in the CCTA, Olaf does not lack the capacity to be an arbitrator by the mere fact that it is an AI.

B. Olaf should not be removed for the lack of impartiality

24 A party may challenge an arbitrator if it is aware of existing circumstances that give rise to justifiable doubts as to the arbitrator's impartiality.[6] To remove an arbitrator for lack of impartiality, there must be circumstances that give rise to justifiable doubts as to the arbitrator's impartiality.[7] These include the existence of any direct or indirect, past or present relationship with, or interest in any of the parties.[8] Justifiable doubts arise when a reasonable third party in possession of the relevant information would have reached the conclusion that there was a real likelihood of bias — i.e., the arbitrator may be influenced by factors other than the merits of the case as presented by the parties

[5] Record, at [25.4]. CCTA, Article 9; AIAC Rules, Rule 9.
[6] AIAC Rules, Rule 11.1; M/S. Ganesh Builders v Shri Nagorao s/o Motiram Kaware ARBITRATION APPEALS NO. 14 OF 2017 ("**M/S Ganesh**"), at [13]-[14]; Ranjit Thakur v. Union of India 1937 SCC 611, at [6]; Hrd Corporation (Marcus Oil) v Gail (India) Limited ("**HRD Corporation**"), at [13]. Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd (2017) 4 SCC 665, at 687-689.
[7] AIAC Rules, Rule 13.1; IACA, s 12(3)(a).
[8] IACA, s 12(1)(a).

in the proceedings.[9] What is required is the ability to consider and evaluate the merits of each case without relying on factors that have no relation to such merits.[10]

25 First, Coltana may contend that there are justifiable doubts as to Olaf's impartiality because of the close association between Radostan's government and Project Olaf. However, Coltana was equally involved in the programming, structuring and training of Olaf, including "designing the architecture of the AI system, collecting, and analysing vast amounts of data as well as providing legal training to Olaf."[11] Thus, Coltana was well placed to correct biases due to its involvement in Olaf's programing. This contention is invalid because there is no evidence that the association between Radostan's government and Project Olaf had influenced the way Olaf was programmed.

26 Second, Coltana may contend that Olaf's allegedly over-supportive stance towards the policies rolled out by Radostan's government,[12] coupled with its alleged criticisms of Coltana's government,[13] gives rise to justifiable doubts as to Olaf's impartiality. Olaf's behaviour fails to establish a real likelihood of bias because its publications were objective.

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[9] The Secretary to the Government, Transport Department v. Manuswamy Mudaliar 1988 AIR 2232, at p 676;

[10] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic ICSID Case No. ARB/07/26 ("**Urbaser v Argentina**"), at [40]; Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm), at [65].

[11] Record, at [11].

[12] Record, at [13].

[13] Record, at [21].

(1) Olaf is impartial because it does not have a relationship with Radostan

(a) There is no direct relationship between Olaf and Radostan

27 Olaf, as a novel AI arbitrator, cannot form a relationship with any party in the present proceedings. It would thus be necessary to instead examine the existence of relationships between the corporation controlling or programming the AI and the party to the dispute. However, it must be noted that no arbitrator can be absolutely independent nor impartial.[14] Therefore, only the existence of a *direct* relationship between Radostan's government and Oracle Corp, the company behind Project Olaf, would give rise to justifiable doubts as to Olaf's impartiality.

28 The absence of a relationship between Olaf and Radostan is indicative of Olaf's impartiality. In *ITD Cementation India v Konkan Railway Corporation* ("***Konkan***"),[15] the relationship between the arbitrator and the respondent was determinative of whether the arbitrator was biased. The arbitrator was partial as (a) it had a past business relationship with the Ministry of Railways, and (b) the Ministry of Railways was in direct control of the respondent.[16] Since the arbitrators were unduly affiliated with the respondents, they were removed.

29 Here, justifiable doubts as to Olaf's impartiality only arise upon a direct relationship between Radostan's government and Oracle Corp. This is not the case. Although PM

[14] Urbaser v Argentina, at [40].
[15] ITD Cementation India Limited vs Konkan Railway Corporation Commercial Arbitration Petition No. 1106 of 2018 ("**Konkan**").
[16] *Konkan*, at [52].

Yodwicha sits on the board of Oracle Corp as an independent non-executive director,[17] an independent non-executive director is not involved in the management of a company. This alone is not indicative that Oracle Corp is under Radostan's control.

30 Oracle Corp is a private entity in Radostan, while the arbitrator in *Konkan* was an employee of the government subsidiary.[18] There is a far greater degree of separation between Oracle Corp and Radostan. An employer-employee relationship gives rise to justifiable doubts as to the employee's impartiality since employers have a greater degree of control over employees. This is because employers effectively control their employees' livelihood. In contrast, there is, at most, a level of affiliation between Olaf and Radostan. This indirect link alone is insufficient to establish justifiable doubts as to Olaf's impartiality.

31 Further, there is no evidence that Oracle Corp's actions were influenced by Radostan's Prime Minister. The existence of a real likelihood of bias cannot be made out based on an indirect link and any such contention by Coltana is speculation.

(b) Even if Olaf can form a relationship with Radostan, this is not prohibited under the IACA

32 The Fifth Schedule of the IACA ("**Fifth Schedule**") lists the types of relationships between the arbitrator and a party to the dispute that give rise to justifiable doubts as to the arbitrator's impartiality.[19] While this list is exhaustive, it remains persuasive in showing the types of relationships that the Fifth Schedule prohibits, of which

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[17] Corrections and Clarifications to the Moot Problem ("***Clarifications***"), at 4.
[18] *Konkan*, at [51].
[19] IACA s 12(1), Explanation 1.

Radostan's association with Olaf falls short. These relationships include the arbitrator having a (1) *significant* financial interest in a party; (2) controlling influence over a party or an affiliate of that party, or (3) close personal or familial relationship with a party. From these examples, it is clear that the Fifth Schedule seeks to account for each party's legitimate interests in a fair process, and to avoid unfair advantages based on any affiliation with the arbitrator.[20] There remains, however, a high threshold to establish justifiable doubt as to an arbitrator's impartiality,[21] owing to the implications on "the integrity of the entire administration of justice".[22] Even if Olaf is similar enough to a human arbitrator to have a relationship with Radostan, the high threshold is not met because Radostan does not share any type of relationship with Olaf that the Fifth Schedule prohibits.

33 First, the fact that Radostan invested substantial resources into Project Olaf does not raise justifiable doubt that Olaf is partial towards Radostan. The investment of such resources reflects the scale and complexity of Project Olaf but does not necessarily translate into Radostan's power to influence Olaf.

34 Second, although Radostan was involved in Project Olaf, it did not direct Olaf's programming to favour itself. This is due to Coltana's equal involvement in the creation and implementation of Project Olaf, especially at the initial stage. Notably, Coltana's

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[20] *Halliburton*, at p 1090-1, The Fifth Schedule incorporates the categories from the red list of the International Bar Association Guidelines. As such, examining the purpose of the IBA Guidelines is instructive; see *M/S Vansh Enterprises v Jaipur Zila Dugdh Utpadak Sahkari* S.B. Arbitration Application No. 82/2021**,** at [61], *HRD Corporation*, considering the 246th Law Commission of India Report 2014, at [35].
[21] *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI v BOJ*"), at [141].
[22] *BOI v BOJ*, at [58], citing oft-cited dissenting judgement of De Granpré J in *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369, at [113].

top scholars, lawyers and judges, including its Solicitor-General, assisted in many different stages of structuring Olaf and provided legal training to Olaf.[23] This is the only point when Olaf could have been trained to favour Radostan.[24] Coltana had ample opportunity to ensure that Olaf was programmed to be impartial, and would have noticed if Olaf was trained to favour Radostan. Further, despite Coltana's involvement, it has not produced any cogent evidence that Radostan had tampered with Olaf's training.

35 Third, there is no close personal relationship between Radostan and Olaf. This is demonstrated by Olaf's inability to develop emotions or feelings. Moreover, it was programmed to decide cases purely on law and facts.[25] As an AI programme, Olaf is incapable of forming close personal connections with Radostan, such as those prohibited under the Fifth Schedule. Further, as elaborated above, Radostan and Olaf have no direct relationship.[26]

(2) Olaf's publications are insufficient to establish justifiable doubt as to its impartiality

36 Extra-judicial comments are insufficient to establish justifiable doubt.[27] Such comments give rise to justifiable doubt as to a judge's impartiality only when these views are expressed so trenchantly that it appears that the judge cannot hear the case

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[23] Record, at [11].
[24] Record, at [11]; See also P. Linardatos, V. Papastefanopoulus and S. Kotsiantis, "Explainable AI: A Review of Machine Learning Interpretability Methods", *National Library of Medicine* (25 December 2020), <https://pubmed.ncbi.nlm.nih.gov/33375658/>.
[25] Record, at [42].
[26] Pleadings, at [7]-[11].
[27] Newcastle City Council v Lindsay [2004] NSWCA 198 ("**Newcastle**"), at [30]. Gaudie v Local Court of New South Wales [2013] NSWSC 1425 ("**Gaudie**"), at [175].

with an open mind.[28] It must be shown that the arbitrator would rely on his expressed opinions without giving proper consideration to the facts, circumstances, and arguments presented by the parties to the proceedings.[29]

37 In *Urbaser v Argentina*, Urbaser applied for the removal of Argentina's party-appointed arbitrator for partiality. The arbitrator had made writings on issues relevant to the arbitration in his capacity as a legal scholar. The court rejected the application as the mere showing of an opinion on a legal issue relevant in a particular arbitration was insufficient.[30]

38 Similarly, although Olaf criticised Coltana's government and supported Radostan's policies, these were based on Olaf's objective analysis. Olaf used the information available at the time, which related to how Coltana could have prevented the Sapura Bay bombings and the cyber-attacks.[31] Further, there is no evidence that it would not properly consider fresh facts and arguments presented to it in the course of the proceedings.

39 Nevertheless, when the subject matter of the extra-judicial opinion differs from the specific issues in the proceedings, these opinions will not be a significant consideration in assessing bias.[32] An arbitrator in the present proceeding would have to decide on two types of issues: issues of law and fact. First, Olaf has not expressed an opinion on any legal issues relevant to the present proceedings. Second, Olaf has commented generally

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[28] *Locobail*, at [36]; *Gaudie*, at [175].
[29] *Urbaser v Argentina*, at [40], *Locobail*, at [37]; *Gaudie*, at [175].
[30] Urbaser v Argentina, at [40]-[41].
[31] Record, at [21].
[32] *Gaudie*, at [183]; *Locobail*, at [85].

on some factual issues relevant to the present proceedings. Its comments are not specific enough to raise justifiable doubts. For instance, although Olaf expressed its opinion that the election outcome was a result of DPP's poor performance, the specific factual issue in the present proceedings is whether Ini-Tech did interfere in that election. Thus, Olaf's publications pertain to starkly different matters from the present proceedings and are irrelevant.

VI. THE PRESENT PROCEEDINGS SHOULD BE STAYED PENDING ANUWAT'S TRIAL AT THE ICC

40 This tribunal has the power to stay the present proceedings.[33] This is so it may ensure the fair, expeditious, economical, and final resolution of the dispute.[34] Radostan's request for a stay should be granted because the prejudice to Radostan if the tribunal does not grant a stay far outweighs the prejudice that Coltana would suffer if a stay was granted (the **"balance of prejudice"** test),[35] which can be monetarily compensated.

41 First, Radostan will be deprived of a reasonable opportunity to present its case if the present proceedings continue at a normal pace.[36] Second, the outcome of the ICC proceedings is material to the present proceedings.[37]

C. A stay is necessary to give Radostan a reasonable opportunity to present its case

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[33] AIAC Rules, Rule 13.1.
[34] Rule 13.1 AIAC Rules 2021, Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India PCA Case No. 2016-7 ("**Cairn Energy**"), at [114]; The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia PCA Case No. 2018-39 Procedural Order No. 2 ("**Julio Miguel**"), at [5].
[35] *Cairn Energy*, at [115]; *S.D. Meyers Inc. v. Canada* Procedural Order No. 17 of 26 February 2011 ("***S.D. Myers***"), at [10].
[36] Cairn Energy, at [114].
[37] Cairn Energy, at [114].

42 The right to be heard, a key tenet of natural justice, applies to arbitration proceedings.[38] This principle is also enshrined in Rule 13.1 of the AIAC Rules which states that Parties must be given a reasonable opportunity to present their case.[39] Coltana may contend that Radostan's reasonable opportunity to be heard can be satisfied by a written witness statement signed by Anuwat, or a virtual hearing being conducted for Anuwat.

43 A witness statement, however, is unable to replicate important aspects of testifying in person, including the ability to cross-examine a witness regarding key points of contention before a tribunal. This deprives this tribunal of an opportunity to clarify parts of Anuwat's testimony and written statements, and to test Anuwat's credibility regarding his account of events through thorough cross-examination. Radostan is denied the opportunity to meaningfully test the veracity of Coltana's evidence if the tribunal proceeds to hear the claims based solely on hearsay evidence regarding the statement made by Anuwat before his arrest in his absence.

44 Given the fact that Anuwat is in detention in the ICC, a virtual hearing would also be unsuitable. This is because many practical uncertainties surround the logistics of such an arrangement. This includes the availability of on-site IT technicians, safeguarded cross-border connections to prevent unlawful interception by third parties, and security of video conference participants.[40] In any case, the ICC procedural rules do not provide

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[38] Austin Ignatius Pullé, "Securing Natural Justice in Arbitration Proceedings" *Asia Pacific Law Review. 20, (1)*, (2012), at 63-87.
[39] AIAC Rules, Rule 13.1.
[40] Sang Jin Lee, Michael van Muelken, "Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future", *Kluwer Arbitration Blog* (23 June 2021) <https://arbitrationblog.kluwerarbitration.com/2021/06/23/virtual-hearing-guidelines-a-comparative-analysis-and-direction-for-the-future/>

guidance on whether it is even possible for a detainee to attend virtual hearings regarding another matter. Therefore, the option of holding a virtual hearing for Anuwat is not likely to be viable for the purposes of the present proceedings.

45 Even if a virtual hearing is possible, such a method is not ideal. Given Anuwat's importance as key programmer of the OnionRing software and CEO of Ini-Tech, the credibility of his testimony on the features of OnionRing is crucial. This tribunal's ability to discern the credibility of his testimony through cross-examination would therefore be undermined since it would be difficult to capture subtle cues from Anuwat's countenance and body language over a virtual platform.[41] Therefore, given the rationale behind adducing evidence from Anuwat and the circumstances surrounding his detainment at the ICC, it would be prudent for this tribunal to award a stay of proceedings in order to allow Radostan a reasonable opportunity to present its case.

D. The outcome of the ICC proceedings is material to the issues before this tribunal

46 The outcome of the ICC proceedings is material because it is premised on issues of fact that have a bearing on the issues in the present proceedings. It is acknowledged that an arbitral tribunal is competent to make its own findings of fact, and the outcome of any parallel proceedings or criminal proceedings are not binding on the tribunal.[42] However, the outcome of said proceedings are not wholly irrelevant to a tribunal's determination

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[41] Sam Sharpe, Sinyee Ong, "Virtual Arbitration Hearings – When to Conduct Hearings Virtually? How should Virtual Hearings be Conducted?" *Sharpe & Jagger LLC Briefing Note* (13 August 2020) <https://sjlaw.com.sg/wp-content/uploads/2020/08/2020.08.13-Virtual-Arbitration-Proceedings.pdf>

[42] *Claimant 1 and Claimant 2 v. Respondent* Procedural Order No. 9 of 2016, at [12]; *CSY v CSZ*, at [33].

of the issues before it. This tribunal may grant a stay of proceedings if the parallel proceedings concern matters decisive for the outcome of the case.[43] This is in the interests of "avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics".[44]

47 Although the present proceedings and the ICC proceedings are not premised on substantially similar legal issues, a stay is warranted because the issues in both proceedings are determined by similar issues of fact. The legal issues before this tribunal are whether the CCTA is rendered void for illegality and/or fraudulent misrepresentation, and whether the CCTA had been validly terminated in the alternative ("**the Contractual Issues**"). For the tribunal to make such a determination, the tribunal must also make a finding on certain key factual issues, such as whether OnionRing had provided Ini-Tech and Radostan unauthorised access to the data that it had collected and whether OnionRing had interfered in Coltana's general elections.

48 Yet, identifying whether OnionRing has these functions is related to the question of whether the Unidentified Software contained such similar functions. This is because both softwares have "very similar features" and are run by identical equipment.[45] Further, Anuwat was arrested as the key programmer of OnionRing for supporting cyber war crimes in Ulavu,[46] indicating that OnionRing and the Unidentified Software are potentially the same, or at the very least substantially similar. Should the ICC make a finding the Unidentified Software contained features that assisted the Ulavu

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[43] *Claimant 1 and Claimant 2 v. Respondent* Procedural Order No. 9 of 2016, at [11]; *CSY v CSZ*, at [32].
[44] *Cairn Energy*, at [47].
[45] Record, at [37]-[38].
[46] Record, at [38].

government to commit cyber war crimes and gain unauthorised access to devices of unknowing individuals, this would constitute relevant information in making a determination of whether the CCTA is void or validly terminated.

49 Even if Coltana claims there is sufficient evidence,[47] Radostan requires Anuwat as a key witness in the present proceedings. Anuwat, being the key programmer of OnionRing, would have the best understanding of the functions of OnionRing. Therefore, his testimony is necessary for the tribunal to make a finding of fact as to whether OnionRing had provided such unauthorised access to Radostan. This factual finding in turn determines the Contractual Issues at hand.

50 Further, there is currently insufficient evidence before this tribunal to make an informed determination of the issues at hand. The evidence that will likely be adduced by Coltana are mere allegations that OnionRing had provided Ini-Tech unauthorised access to the data. Such allegations include a bare, one-page statement posted by a disenchanted former employee of Ini-Tech who is currently under investigations for sexual misconduct.[48] With insufficient evidence, it is difficult for the tribunal to make a finding of fact and determine whether the CCTA is void or validly terminated.

51 Contrastingly, the ICC would have more cogent evidence on OnionRing than this tribunal does. This is because an ICC judge can issue warrants for arrest and a summons to appear only after investigations by the ICC have revealed adequate evidence of crimes of sufficient gravity falling within the ICC's jurisdiction. A stay of the present

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[47] Record, at [43].
[48] Record, at [30]-[31].

proceedings pending the conclusion of the trial is necessary to allow this tribunal to make accurate factual findings as far as possible.

52 Given the sparsity of evidence in the current proceedings, this tribunal would benefit both from a direct testimony from Anuwat and from the ICC's detailed fact-finding processes. The tribunal may also be able to use such information to guide its decision-making as well, since the evidence currently proffered by Coltana are bare unverifiable allegations. Such allegations may only be verified with a conclusive testimony by Anuwat before this tribunal, which is another reason that justifies a delay in the present proceedings. While the concern of a delay in the present proceedings is not completely unfounded, this must be balanced against the justice that granting a stay would not cause a harm disproportionate to the benefits it would bring.

VII. THE CCTA IS NOT VOID

53 The Indian Contract Act ("**ICA**") sets out the elements of a valid contract.[49] A contract is validly formed when there is an offer which is duly accepted with valid consideration.[50] The contract must also be entered into with the free consent of parties,[51] between parties competent to contract,[52] and for a lawful object and consideration.[53] In the absence of any of these requirements, the agreement is not a valid contract. The effect of this is that the agreement is not enforceable by law and therefore void.[54]

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[49] Indian Contract Act 1872 ("**ICA**").
[50] ICA, at s 2(a), (b), (d)
[51] ICA, s 14.
[52] ICA, s 11.
[53] ICA, s 10.
[54] ICA, s 2, 10 and 14.

54 Presently, Coltana will likely contend that the free consent of the Parties had been vitiated by fraud and/or misrepresentation. This could render the CCTA void pursuant to sections 10 and 14 of the ICA, and voidable pursuant to section 19.[55] However, the CCTA satisfies all the aforementioned requirements of a valid contract. The present analysis will focus on establishing the presence of free consent and the lawfulness of the consideration in question, namely the services of OnionRing.

A. Coltana's consent to the CCTA was not vitiated by fraud

55 Consent is free unless obtained by fraud, misrepresentation, undue influence, coercion, or mistake.[56] Since both Parties entered into the contract at arm's length and are governments that are financially capable of seeking legal advice, there is no issue of either party being under undue influence or coercion. The analysis for this issue would therefore focus on consent to the contract not being induced by misrepresentation and fraud, which are the two vitiating factors that Coltana is likely to rely on. For present purposes, fraud within the meaning of section 17 of the ICA refers to fraudulent misrepresentation, while misrepresentation within the meaning of section 18 of the ICA refers to negligent and innocent misrepresentation.[57]

56 To establish fraud under section 17 of the ICA, Coltana bears the burden of proving that:

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[55] ICA s 19; *Central National Bank Ltd vs United Industrial Bank Ltd* AIR 1954 SC 181, at [8].
[56] ICA, at s 14.
[57] Chen-Wishart, Mindy, KV Krishnaprasad, *Invalidity* "Fraud, Misrepresentation, and Mistake in Indian Contract Law" (Oxford University Press, 2022), at p 107.

(a) a party to the contract had made a representation on a material fact ("**the Representor**"), which turned out to be false;

(b) the Representor committed an act under section 17 of the ICA;

(c) the Representor must have intended to deceive the other party or induce him to enter into the contract; and

(d) the representation had induced the other party to enter into the contract.[58]

57 Radostan had not made any representation to Coltana. Even if it had, Coltana is unable to prove that the representation was false. Notably, the threshold of proving fraudulent misrepresentation is high, since a finding of fraud would result in the representee being able to claim damages for all actual losses flowing from his reliance of the fraudulent misrepresentation, even if it was not connected with the deceit. Therefore, this tribunal should not easily make a finding of fraud.

(3) Radostan had not made a representation as to a material fact that turned out to be false

58 Coltana may argue that Radostan, by maintaining silence, represented that the data collected by OnionRing ("**the Collected Data**") would be kept confidential and only accessible by Coltana's officials ("the **Confidentiality Representation**"). This may be discerned from Coltana's repudiation of the CCTA the day after Anuwat alleged that there were Bitcoin transactions involving the bank accounts of senior DDP politicians,

[58] *RC Thakkar v The Bombay Housing Board AIR* 1973 Guj 34, at [37].

which necessarily implied that Ini-Tech was able to access the data collected by OnionRing.

(c) No representation was made by Radostan

59 A representation is a statement of fact made *before* the parties' entry into the contract.[59] Since neither Radostan nor Ini-Tech had made any positive statements in this regard before the conclusion of the CCTA, the Confidentiality Representation must have been made by silence.

60 Mere silence however does not amount to fraud, even if Radostan was aware that Coltana was proceeding under a misapprehension of facts.[60] The exceptions to this general rule is where there is a duty to speak or where such silence is equivalent to speech. Presently, Radostan did not have a duty to speak, nor were there circumstances which rendered Radostan's silence equivalent to speech.

61 There is no general duty to disclose facts which might be equally within the means of knowledge of both parties.[61] This holds true even if one party was aware of the other's ignorance and could have easily corrected him,[62] or if one party had "failed to disclose a fact known to him which the other party would have regarded as highly material, if it had been revealed."[63] Therefore, Radostan had no duty to disclose every single feature

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[59] *RC Thakkar v The Bombay Housing Board* AIR 1973 Guj 34, at [31]. *Vestas Wind Technology India v Inox Renewables Limited* ARBITRATION PETITION NO.1088 OF 2015 along with ARBITRATION PETITION NO.599 OF 2015 ("***Vestas***"), at [223]-[224].
[60] Sarabjit Singh v Indu Sabharwal 211 (2014) DLT 171, [11]; Vestas, [178].
[61] *Vestas*, [156].
[62] Pollock & Mulla, *The Indian Contract & Specific Relief Acts* (LexisNexis, 16th Ed, 2016) ("**Pollock & Mulla**"), p 417-419.
[63] Banque Financiere S.A v Skandia (U.K.) Insurance Company Limited [1990] 1 Q.B. 655, at 759.

of OnionRing, only material features that are crucial to the object of the contract as well as features that could not be discovered by Coltana. However,

62 This generally arises only in particular classes of contract:

(a) Contracts uberrima fides

(b) Contracts between persons standing in a fiduciary relationship, between an insurer and insured, or where one party stands in fiduciary relationship with another.

Presently, the CCTA falls under neither scenario as it was concluded between two parties dealing at arm's length.

63 While this duty may nonetheless arise outside these classes of contract, there is generally no duty to disclose facts which are or might be equally within the knowledge of both parties, or where both parties had the means to discover such facts.

64 Besides the fact that the Parties were dealing at arm's length, Coltana had the opportunity to examine the features of OnionRing to determine whether the software was suited for the state's purposes. A trial run of the software could have been carried out, but Coltana had chosen not to for unrelated political reasons, stating that the general elections were fast approaching.[64] Therefore, whether OnionRing had features Coltana alleges it has is well within the means of Coltana to discover. Therefore, there was no duty to speak, and no representation can arise.

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[64] Record, at [24].

(d) Even if there was a representation, it was not false

65 Even if a representation as to the confidentiality of the data had been made, such representation was not false. Coltana will likely rely on two instances to prove that the representation was false. First, the allegation by a former employee of Ini-Tech that OnionRing had gained access to the personal data of thousands of Coltana's electorates through Ini-Tech's database ("**First Allegation**").[65] Second, Anuwat's statement that OnionRing "had detected a significant amount of Bitcoin expenditure, transaction and/or movement within Coltana's state involving the bank accounts of senior DPP politicians", implying that Ini-Tech had access to the data collected by OnionRing ("**Second Allegation**").[66]

66 However, these two bare allegations are insufficient to prove on a balance of probabilities that any representation as to the confidentiality of the data collected by OnionRing is false.[67] The First Allegation was constituted within a one-page statement on the former employee's Twitter account. This can be starkly contrasted against other whistle-blower statements published through reputable newspaper platforms, which often have rigorous fact-checking procedures in place to ensure the veracity of the claim. Further, the lack of any accompanying evidence means that these allegations are unverifiable. Furthermore, the former employee is currently facing charges of sexual misconduct within the company. This casts further doubt on his credibility and reliability as a whistle-blower of the company, since such a disillusioned employee may

[65] Record, at [30].
[66] Record, at [39].
[67] Indian Evidence Act 1872, s 101.

be motivated to level false allegations against Ini-Tech and Radostan. The Second Allegation was similarly a bare assertion made to the media without any accompanying evidence supporting the truth in such an allegation. Additionally, this allegation has been vehemently denied by Coltana.[68]

67 Indeed, a finding of fraud can be made even in the absence of positive and tangible proof. This is because fraud is "secret in its origin and methods adopted … cannot always be proved by producing positive and tangible evidence".[69] Therefore, circumstantial evidence could lead to the inference that fraud had been committed. However, the standard of proof here is very high — the evidence *must* lead to the conclusion that fraud had been committed.[70] Fraud must be an inexorable conclusion. Courts have cautioned against drawing an inference of fraud from speculations and surmises, however suspicious or strange the circumstances may be, or however grave the doubts that exist.[71]

68 Considering general pronouncements, Coltana will not be able to discharge its burden of proving each element and that Radostan had committed fraudulent misrepresentation. This is because there is not only a lack of evidence for each allegation, but there could also be other explanations as to why the former employee of Ini-Tech and Anuwat had made those statements.

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[68] Record, at [39].
[69] RC Thakkar v The Bombay Housing Board AIR 1973 Guj 34, at [43].
[70] Paresh Nath Mallick vs Hari Charan Dey (1911) ILR 38 Cal 622, [2].
[71] Harjas Rai Makhija (Dead) Through Legal Representatives v. Pushparani Jain C.A. No. 11491/2016, [23].

69 Therefore, it is highly unlikely that fraud can be made out because there was no representation made in the first place as to the confidentiality of the data; even if there was such a representation, it was not false because it cannot be verified that the allegations were true.

B. B. Claimant's consent has not been vitiated by misrepresentation

70 A misrepresentation is also unlikely to be made out in the present proceedings. Misrepresentation means and includes:

(a) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement; or

(b) any breach of duty which brings an advantage to the person committing it by misleading another to their prejudice, albeit without an intent to deceive.[72]

71 The present proceedings likely fall under category (b), which is an innocent misrepresentation. The subject-matter of every agreement is agreed by Parties to possess a certain value or quality. Therefore, if one party innocently or otherwise leads another party to make a mistake of fact as to this value or quality, this amounts to misrepresentation.[73]

72 Next, to establish a claim under section 18, there are four requirements to fulfil:

(a) a party to the contract had made a representation as to a material fact;

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[72] ICA, at s 18.
[73] Avtar Singh, *Law of Contracts and Specific Relief* (EBC, 12th Ed, 2021), at p 82

(b) the representation turned out to be false;

(c) the representor's act must fall under one of the general categories of misrepresentation under section 18; and

(d) the representation had induced the other party to enter into the contract.

73 Claims in fraud and misrepresentation share elements (a), (b) and (d). It was earlier established that there had been no representation made by Radostan as to the confidentiality of the data in question; and even if there was such a representation, Coltana is unable to prove that this representation was false.[74] Further, Radostan had no duty to speak. Hence, a claim in misrepresentation cannot be made out and Coltana's consent to the CCTA remains valid.

VIII. THE CCTA WAS NOT VALIDLY TERMINATED BY COLTANA

74 Coltana has no grounds to terminate the CCTA because Radostan has not breached any of its obligations under the CCTA. Even if Radostan committed any breach, they are not sufficiently fundamental to entitle Coltana to validly terminate the CCTA.

A. Radostan did not breach any terms of the CCTA to uphold the confidentiality of data collected by OnionRing

75 Coltana may contend that Radostan has breached a term of the CCTA to safeguard the confidentiality of Coltana's data by gaining unauthorised access to it. This contention is invalid for two reasons. First, the CCTA does not have an express nor an implied

[74] Pleadings, at [49].

term stipulating that Radostan is responsible for safeguarding the confidentiality of the Collected Data. Second, even if such a term were to exist, Coltana lacks sufficient evidence to show that Radostan had gained unauthorised access to Coltanas' data. There is no contractual breach for Coltana to rely on.

(1) The CCTA does not have any term that Radostan must uphold the confidentiality of the Collected Data

76 Preliminarily, there are no express terms in the CCTA which provide that the data collected by OnionRing must be protected by confidentiality, or otherwise impose an obligation on Radostan not to use the data collected by OnionRing. Coltana would therefore likely contend that a term providing for such may be implied in the CCTA (the "**Confidentiality Term**").

77 A term implied in fact usually arises to give effect to the presumed intention of the parties to the contract regarding a matter not expressly mentioned but which they would presumably have agreed should be part of the contract.[75] To imply a term in fact, the following five conditions must be fulfilled:

(a) it must be reasonable and equitable to imply terms;

(b) the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it ("**Business Efficacy Test**");

[75] The Moorcock [1886-89] All ER Rep 530 (CA) ("***The Moorcock***"), 66.

(c) the term must be so obvious that "it goes without saying" ("**Officious Bystander Test**");

(d) the term must be capable of clear expression;

(e) the term must not contradict any express term of the contract.[76]

78 A high threshold must be met before the courts will imply a term in fact.[77] This is owing to the principle that the courts will not make a contract for the parties, nor will it improve the contract for the parties however desirable the improvement may be.[78] In the present proceedings, it is unlikely that this high threshold can be met. This is because necessity being a cornerstone of the test for implied terms,[79] the term that Coltana proposes to be implied into the CCTA is not necessary.

79 It is not disputed that a term providing for the confidentiality of data would be reasonable or equitable. Additionally, it is not disputed that the Confidentiality Term would be capable of clear expression and does not contradict any express terms of the contract. Nonetheless, the Confidentiality Term cannot be implied as it does not fulfil both the Business Efficacy Test and the Officious Bystander Test.

80 The term will be implied if it is necessary to give business efficacy to the transaction as must have been intended by both parties.[80] The touchstone of this test is necessity.

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[76] Nabha Power Limited vs Punjab State Power Corporation Limited Civil Appeal No. 179/ 2016 ("**Nabha Power Limited**"), [43]; BP Refinery (Westernport) Pty Limited v Shire of Hastings (1977) 180 CLR 266 ("**BP Refinery**"), 282-283.
[77] Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 SLR 193, [100].
[78] Nabha Power Limited, citing Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board, (1973) 1 WLR 601 (609), [19].
[79] The Moorcock, 69-70; Nabha Power Limited, [38].
[80] Nabha Power Limited, [34]; B.P. Refinery, 282-283.

The court ought not to imply a term merely because it would be a reasonable term to include if the Parties had thought about the matter, or because one party would not have entered into the contract unless the Confidentiality Term was included had the Parties thought about the matter. Instead, the analysis entails the ascertainment of the presumed intention of the Parties,[81] which includes circumstances such as the preliminary negotiations of the Parties, and the nature and purpose of the contract.[82]

81 Presently, the whole purpose of the CCTA is not undermined due to the non-inclusion of the Confidentiality Term. OnionRing can still successfully satisfy the purpose of the CCTA without keeping the data confidential, unlike in *The Moorcock*, where the safety of the vessel is implicit in the contract for it to ground at the jetty. This is as the object of the CCTA is to combat terrorism and other transnational threats for the improvement of Coltana's overall security.[83] These objectives have already been achieved since OnionRing possesses counter-terrorism capabilities. First, OnionRing has been designed to "operate in stealth mode" and to enable "governments to remotely and covertly extract valuable intelligence from a variety of devices."[84] Secondly, Coltana government's security and intelligence department had reported that OnionRing was highly successful in identifying and preventing numerous cyber-attacks and terrorist plots, contributing significantly to the country's overall security".[85] Since the nature of

[81] *Nabha Power Limited*, [34], citing The Moorcock, 68.
[82] Pollock & Mulla, 168.
[83] Record, [24].
[84] Record, [23].
[85] Record, [27].

the counter-terrorism abilities do not require that the data collected is confidential, it is not necessary to imply the Confidentiality Term into the CCTA.

82 Coltana may rely on the ceremony in Legolas, where Anuwat asserted that "the data collected [is] kept confidential and can only be accessed by the government of Coltana through appropriate procedures", to show that the Parties had preliminarily intended for the Confidentiality Term to be implied into the contract.[86] However, as implied terms are premised upon the Parties' intentions as ascertained from the language of the contract, subsequent conduct will not shed light on such prior intentions. As such, Anuwat's subsequent statement as to the confidentiality of the data should be disregarded in determining whether the Confidentiality Term should be implied.

83 The Officious Bystander Test is not fulfilled either. A term fulfils this test only in a situation where an officious bystander had suggested adding such a term in the contract, both parties would have replied, "oh of course, that goes without saying!". This test can be seen as an elaboration and extension of the Business Efficacy test.[87] This term must be strictly necessary,[88] to the extent that it tacitly formed part of the contract.

Here, Coltana may argue that it "goes without saying" for the Confidentiality Term to be implied, since the Collected Data should be protected by such an obligation, and only be accessible to Coltana. However, the imposition of such an obligation does not necessarily follow from the collection of data, especially given the current context. The Collected Data must be accessed by Ini-Tech and analysed to ensure OnionRing's operational effectiveness.

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[86] Record, at [26].
[87] Reigate v. Union Manufacturing Co. [1918] 1 K.B. 592, [40].
[88] Nabha Power Limited, citing Equitable Life Assurance Society V/s Hyman, (2002) 1 AC 408 (459), [20].

Limiting the access of the Collected Data to only Coltana would impede the identification of terrorist threats. Therefore, an officious bystander, considering this context, would not be so ready to deduce that the data collected should be kept confidential entirely.

Since both the Business Efficacy Test and the Officious Bystander Test are not fulfilled on the facts, the Confidentiality Term cannot be implied.

(2) Coltana has insufficient evidence to support an allegation that Radostan had gained unauthorised access to the Collected Data

84 Even if a term stipulating Radostan's obligation to keep the data confidential was implied into the CCTA, Coltana lacks sufficient evidence to prove that Radostan had breached this term by gaining unauthorised access to the Collected Data.

85 A party bears the burden of proving the existence of this fact if it asserts the existence of such a fact.[89] The standard of proof for proving the existence of a fact is either proof by "clear and convincing evidence", or proof by a preponderance of the evidence, meaning that one party to the dispute has more evidence in its favour than the other.[90] Here, Coltana will likely seek to rely on the First Allegation and the Second Allegation to establish its claim. However, neither would allow Coltana to successfully discharge its burden of proof.

86 The credibility of the First Allegation is doubted for three reasons. First, the brevity of the rogue employee's statement strongly indicates that the allegation is unverified.[91]

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[89] IEA, at s 101.
[90] Suman Devi & Anr. v Mahesh Arora & Anr. on 11 October, 2021, at [10].
[91] Pleadings, [30].

Such unsubstantiated statements should be of limited weight. Secondly, the allegation was made on a social media platform, where anyone could air their grievances, with no way of verifying the claims or their identity.[92] The credibility of the First Allegations is doubted further considering the circumstances within which the statement was made and the content of the statement.[93] Thirdly, the former employee's motive behind posting allegations against Ini-Tech is doubtful as he is being investigated for sexual misconduct in Ini-Tech and his employment was terminated.[94] With the lack of supporting evidence and the circumstances within which the former employee had levelled such allegations, the First Allegation does not constitute "clear and convincing evidence" to prove that Radostan had gained unauthorised access to the Collected Data.

87 The Second Allegation similarly fails to meet the standard of proof required to prove the existence of unauthorised access to Radostan. This claim is also not supported by any evidence, other than Anuwat's declaration outside the ICC that "he will reveal everything and let the court bring justice to him".[95] It remains a bare assertion which has been denied by Coltana.[96] Therefore, the Second Allegation does not meet the standard of proof of "clear and convincing" evidence, nor on the preponderance of evidence. Notably, the lack of relevant evidence surrounding this bare assertion and the fact that such evidence will likely be revealed during the ICC proceedings is a pertinent reason underlying Radostan's request for a stay of proceedings.

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[92] Pleadings, [50].
[93] Pleadings, [50].
[94] Record, at [31].
[95] Record, at [39].
[96] Pleadings, at [50].

88 As both allegations Coltana is likely to rely on falls short of meeting the standard of "clear and convincing" evidence, Coltana lacks sufficient evidence to prove that Radostan had unauthorised access to the data collected by OnionRing. Hence, a breach of the Confidentiality Term, if found to be implied, cannot be established.

89 Additionally, this tribunal is urged to draw an adverse inference against Coltana that Coltana's investigation findings had not revealed any relevant evidence pertaining to Radostan's alleged breach. The court may draw an adverse inference against a party if the party withholds important documents in his possession that may shed light on the facts at issue, even if this party does not bear the burden of proving the particular issue at hand.[97] Factors the court will consider include the relevance of the withheld evidence and whether the other party could apply for the inspection and production of the documents.

90 Here, Coltana had announced the termination of Ini-Tech's services after its investigations on the alleged interference in Coltana's 2021 general elections. Coltana also retained OnionRing citing the need for further investigation.[98] Moreover, Coltana objected to a stay of proceedings and claimed that the documents available were "sufficient".[99] Coltana, however, failed to disclose any such documents to this tribunal regarding its investigation findings on OnionRing that justifies the need for such further investigation. If Coltana's investigation had indeed discovered that Coltana's internal affairs had been meddled with, revealing such documents before this tribunal would aid

[97] Gopal Krishnaji Ketkar v. Mahomed Haji Latif AIR 1968 SC 1413, [3].
[98] Record, at [40].
[99] Record, at [43].

Coltana in establishing the third and fourth issues in the present proceedings. The fact that Coltana had chosen to remain silent on the investigation proceedings shows that Coltana lacks the type of evidence it requires to establish its case.

91 Indeed, the mere non-production of documents will not automatically lead to an adverse inference being drawn against Coltana.[100] Therefore, this tribunal is urged to direct Coltana to produce its findings from the investigation it had conducted in relation to the interference in Coltana's 2021 general elections. The failure to comply with such an order would justify this tribunal's decision to subsequently draw an adverse inference against Coltana that it has no conclusive evidence on the third and fourth issues.

B. Even if the implied terms were breached, these breaches are not sufficiently fundamental to entitle Coltana to terminate the contract

92 An aggrieved party is entitled to terminate the contract when a fundamental breach arises. A fundamental breach deprives the innocent party of substantially the whole benefit of the contract.[101] The benefit intended to be received by the parties must be based on the intention of the parties as expressed in the contract.[102] In the present proceedings, the benefit was for Coltana to receive the services of OnionRing to combat terrorism, cyber-attacks, and other transnational threats.

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[100] Mahendra L. Jain v. Indore Development Authority (2005) 1 SCC 639, [38]; Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr AIR 1967 SC 256, 11; Union of India v Ibrahim Uddin (2012) 8 SCC 148, [10].
[101] Rural Road Development Authority v LG Chaudhary Engineers & Contractors (2012) 3 SCC 495 ("**LG Chaudhary**"), 848.
[102] LG Chaudhary, 852.

Even if Radostan breached implied terms or any general obligations in the CCTA, none of these breaches are sufficiently fundamental to deprive Coltana of substantially the whole benefit of the contract. This is because "OnionRing [was] proved to be highly successful in detecting and preventing criminal activities in Coltana".[103] Further, reports from Coltana's government indicated that the OnionRing could identify and prevent cyber-attacks and terrorist plots, "contributing significantly to the country's overall security".[104] Coltana had enjoyed the benefits which were intended under the CCTA in subscribing to the OnionRing's services. A breach of privacy, however egregious, is irrelevant to OnionRing's ability to deliver the intended benefits of detecting and preventing terrorism and transnational threats. There is no conclusive evidence that such a breach of privacy would have undermined OnionRing's ability to combat terrorism.

[103] Record, at [27].
[104] Record, at [27].