Foreign Direct Investment International Moot Competition
November 2010
Pepperdine Law School

Claimant,
Claimant

v.

The Republic of Beristan,
Respondent

MEMORANDUM FOR Respondent

Respectfully Submitted,
Team Petren

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LIST OF ABBREVIATIONS

Art.	Article
BOD	BOD
ECJ	European Court of Justice
FET	FET
ICJ	International Court of Justice
ICSID	International Centre of Settlement of Investment Disputes
ILC	International Law Commission
IP	Intellectual Property
JV	Joint Venture
JVA	Joint Venture Agreement
NPM	Non Precluded Measures

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FACTUAL BACKGROUND

The Republic of Beristan and the United Federation of Opulentia concluded a Treaty on the Encouragement and Reciprocal Protection of Investments on 20 March 1996.

On 18 October 2007 Beritech S. A. , a partially state-owned company established by Respondent, and Claimant – a privately held company incorporated in Opulentia, signed JVA under which established Sat-Connect S.A., the JV company. The Agreement was co-signed by the Respondent so that to guarantee the obligations of Beritech.

Claimant has held 40% minority share in Sat-Connect, while Beritech owned a 60% majority stake. Beritech had the right to appoint 5 directors of Sat-Connect's BOD and Claimant was entitled to appoint 4. A quorum of the Board was held to be obtained with the presence of at least 6 members.

Sat-Connect was established having purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of the system anywhere within the vast expanses of Euphonia. The satellite and communications technology that Sat-Connect would have deployed was for the use of civilian and military purposes.

On 12 August 2009 The Beristan Times published an article in which Beristian government official, speaking off-the record[1], stated that the Sat-Connect project had been compromised due to leaks by Claimant's seconded personnel. The official expressed his assertions that the critical information from the Sat-Connect project was passed to the Government of Opulentia. Both Claimant and the Government of Opulentia have made statements to deny the published story.

On 27 August 2009 with the support of the majority of Sat-Connect's BOD, Beritech invoked Clause 8 of the JV Agreement to compel a buyout of Claimant's interest in the Sat-Connect project. However, the decision was made by five directors of the Board as Alice Sharpeton refused to participate in the voting, because she had no prior notice concerning the agenda of the meeting.

On 28 August 2009 Beritech served notice on Claimant requiring to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

[1] 1st Clarifications, q. 178

On 11 September 2009 staff from the Civil Works Force, the civil engineering section of the Beristian army, operating on Executive Order[2] secured all sites and facilities of the Sat-Connect project. The personnel associated with Claimant were instructed to leave the project sites and facilities, and eventually left[3] Beristian. Later, Beritech moved expeditiously to hire replacement personnel from among individuals with relevant expertise in the Beristan labour market[4].

The Sat-Connect company had not been started to effectively function at the time, when Claimant was removed from the project of Sat Connect. Claimant's total monetary investment in the Sat-Connect project stands at US $47 million.

On 19 October 2009 Beritech filed a request for arbitration for the relief against Claimant under Clause 17 of the JV Agreement and, respectively, paid US $47 million into escrow account, which has been available for Claimant and is being held pending the decision in the arbitration. Claimant refused to accept the payment and refused to respond to the arbitrational request.

On 28 October 2009 Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan

[2] 1st Clarifications, q.155
[3] 2nd Clarifications, q. 204
[4] 1st Clarifications, q. 171

ARGUMENTS

PART ONE: JURISDICITION

1. The Tribunal has no jurisdiction in view of Clause 17 of the JVA

1. ICSID Tribunal should deprive of jurisdiction and Claimant and refer to dispute resolution Clause 17 of JVA as Claimant does not satisfy the jurisdictional requirements provided in Art. 25 of ICSID and Art. 11 of BIT. Claimant does not fulfill the following jurisdictional requirements:

1.2 Secondment of employees does not satisfy the BIT definition of investment

2. Notwithstanding the Tribunal's findings of investment with reference to the rest of the Claimant's actions, secondment of employees is not an investment and, thus Tribunal has no jurisdiction to hear claims that refer to it.

3. The question of whether investment was made should be analyzed the way it was adopted by Tribunals while assessing whether each right that is allegedly being violated derives directly from the object which constitutes an investment. In Joy Mining v. Egypt Tribunal denied the existence of an investment "as a bank guarantee is simply a contingent liability"[5]. In other words, the Tribunal, rather than examining the entire transaction, looked at the bank guarantee, which was but one aspect of the operation, and examined whether it was an investment[6]. In Eureko v. Poland Tribunal as well, in analyzing the existence of an investment, looked not at the overall transaction but at the specific rights of which the investor had been deprived[7].

4. Secondment of employees does not satisfy the consented definition of investment in Art. 1 of BIT, since neither article encompasses any kind of contractual rights of BIT, nor is it a financial deriving from the contract as provided in Art. 1.e of BIT

1.3 Dispute does not derive directly out of an investment

5. Ch. H. Schreuer provides that:

[5] Joy Mining, para. 44
[6] Ch. H. Schreuer and Ursula Kriebaum
[7] Eureko, p. 50-52

> "The requirement of directness... means that the dispute must not only be connected to an investment but also be reasonably connected. Disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objections that they do not arise directly from the investment..."[8]

6. Moreover, Ch. H. Schreuer states that:

> "...transactions that are ancillary to the investment operation are often carried out by means of separate contracts..." [9]

7. The dispute about the expulsion of Claimant's employees that were working in Sat-Connect on basis of the contract (Secondment of employees) between Claimant and Sat-Connect of secondment of employees is not reasonably connected to investment of Claimant. Such contract is peripherial to investment, not only because it is carried out by separate contract, but also that investment is not a *conditio sine qua non* for such contract to be concluded between Claimant and Sat-Connect, that means such contract was likely to be concluded even if the Claimant would not have made an investment, since it is commercial awarding.

1.4 Actions of Sat-Connect can be attributed neither to Beritech nor to Beristan

8. The alleged violations concerning prior notice before the BOD meeting or quorum requirement, are both actions that are subject to Sat-Connect and cannot be attributed to Beritech. Both companies are separate legal entities and Beritech can not be held responsible for the company in which it owns a part of shares which does not constitute neither absolute ownership (Beritech owns 60% of shares in Sat-Connect[10]) or absolute control nor are there any evidences that would prove that Sat-Connect BOD or Chairman receives orders from Beritech to act in certain manner. Thus, the Tribunal could not find Beritech responsible for Sat-Connect's decisions since the threshold of establishment of such responsibility is much higher.

1.4.1 Actions of Beritech cannot be attributed to Beristan

9. Even if tribunal would find the attribution of certain actions of Sat-Connect for Beritech such actions of Beritech as well as an alleged violation of Clause 8 of JVA can not be attributed to the Respondent.

[8] Ch. H. Schreuer, 2001, p. 114
[9] Id. p. 116
[10] Uncontested facts, para. 7

10. The most convincing test for attribution of action of legal entity to the state was provided in Maffezini v. Spain.[11] Beritech does not satisfy the following criteria:

1.4.1.2 Beritech does not satisfy functional test

11. As provided by tribunal functional test comprises of examination of:

> "the control of the company by the State or State entities and the objectives and functions for which the company was created."[12]

12. In Maffezini the Tribunal found attribution of the entity to a state, where the entity being private, as in case concerned here, was created by a decree issued by the Ministry[13]. However, here in contract, the entity was not created by governmental act, the procedure of establishment of a company was as ordinary as any private party could adopt and it does not indicate government's intentions to use the entity for satisfying public purposes, as it was in Maffezini[14].

13. In Bayindir's case the Tribunal found attribution of actions of a private entity to state, finding that:

> "[each act] was a direct consequence of the decision of the NHA to terminate the Contract, which decision received express clearance from the Pakistani Government"[15].

14. Here, in contrast, was no decision from above to terminate the contract, but the decision to start buy-out procedure was adopted by Beritech solely under consideration of leak of its confidential information and approved by democratic BOD in which parties share respective parts.

15. Relevant articles of ILC articles on State Responsibility could not be applied as well, since neither the entity is empowered by the law of the State to perform its functions[16] nor it was acting on the instructions of, or under the direction or control of, that State in carrying out the conduct[17].

1.5 The claim is contractual and does not amount to BIT claim

16. Tribunals while interpreting exactly the same formulated contractual dispute resolution clause as Clause 17 in JVA stated, that:

[11] Maffezini, Decision on jurisdiction, paras.76-82
[12] Maffezini, para. 50
[13] Maffezini, Decision on jurisdiction, para. 83
[14] Id, paras. 85-86
[15] Bayindir, Decision on jurisdiction, para. 125
[16] ILC Articles, Art. 5
[17] Id., Art. 8

> "such clause is a valid forum selection clause so far as concerns the Claimant's contract claims which do not also amount to BIT claims, and it is a clause that this Tribunal should respect."[18]

17. Tribunal in Waste Management was concrete in providing the exact and the only case in which the violation of contract amounts to violations of BIT:

> "...it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."[19]

In particular case it is clear that if Claimant alleges violations with respect to contract, the way protect its rights is to refer to dispute resolution under Clause 17 of JVA.

1.5.1 There was no puissance publique in Respondent's actions

18. Even if the Tribunal would hold that the question of whether contractual violations amount to BIT violations should be solved in the following manner:

> "...Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power."[20]

or

> "it [breach of contract] must be the result of behaviour going beyond that which an ordinary contracting party could adopt."[21]

19. Tribunal should refrain from jurisdiction, since Respondent did not act in sovereign capacity.

1.5.1.1 No *puissance publique* in alleged violations of quorum and prior notification requirements

20. Even if the Tribunal would find the violation of quorum requirement for decision-making in BOD or violation of requirement to notify the members of BOD prior to meetings, or violation of unsubstantiated buy-out procedure such violation without doubt is an ordinary contractual violation in which Respondent did not resort to sovereign actions and such violations could have been established on the side of every contractual partner.

[18] SGS v. Pakistan, para. 16; restated in: SGS v Philippines para. 134, as referred to: Vivendi Annulment Commitee, para. 98
[19] Waste Management II, para. 175
[20] Bayindir para. 180; same restated in: RFCC, para 51; Impregilo, para. 260
[21] Impregilo, paras. 260-261, restated in: Bayindir, para. 180

1.5.1.2 No *puissance publique* in alleged violations of unjustified buy-out procedure

21. The Tribunal analyzed the significance for jurisdictional purposes of question whether state's exercised contractual right was in conformity with the contract and stated that:

> "[analyzing hypothetical situation in case state's actions would not contain *puissance publique*] the dispute would in all likelihood have been purely contractual, involving only issues such as whether or not termination of the Lease Contract was justified by City Water's breaches thereof, such issues leading to a negotiation, or a contractual arbitration as necessary."[22]

22. Following the findings of the Tribunal should be concluded that the question of whether Respondent's buy-out was justified under a contract is not relevant for finding jurisdiction and does not raise question *puissance publique* in it.

1.5.1.3 No *puissance publique* in expulsion of Claimant's employees

23. After the contract of secondment of employees being terminated (Beritech served notice on Claimant on August 28, 2009, requiring the latter to hand over possession of all Sat-Connect site facilities and equipment[23] which was terminated and executed on September 11, 2009[24]) there was no legal basis for Claimant's to stay Sat-Connect's facilities and Beritech was entitled to remove the Claimant's employees from the facilities of the company.

24. Moreover, Tribunal has already dealt with similar case in which investor's employees were expulsed from the company on basis of contractual termination and stated:

> "even if the expulsion was conducted in breach of the Contract that would not as such be enough for a finding of expropriation under the Treaty"[25].

25. Such finding of the Tribunal reiterated what Pakistan stated:

> "an investor may remain on a site unlawfully, and it may be perfectly lawful to evict, using force as appropriate"[26].

26. Should be concluded that state may enforce the contractual decision of the private party and it would not amount to expropriation (*puissance publique* for purpose of jurisdiction), notwithstanding whether such unilateral decision was unjustified under the respective contract or not.

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[22] Biwater, para. 488
[23] Uncontested facts, para. 10
[24] Id. para. 11
[25] Bayindir, para. 458
[26] Id.

27. The Tribunal should refrain from jurisdiction, since for the abovementioned reasons the Respondent was not acting in sovereign capacity.

Umbrella clauses

2. Art. 10 of BIT does not extend Tribunal's jurisdiction upon contractual claims

28. Art. 10 of BIT or so called "umbrella clause" should not be interpreted as a provision extending Respondents responsibility under BIT towards all contractual violations of the obligations it has assumed with regard to investments in its territory by investors. Such application of umbrella clause among scholars and various Tribunals is informally agreed to name as "a broad definition" of umbrella clause. Such position of the Respondent should be supported for the following reasons:

2.1 Broad interpretation of umbrella clause does not conform to customary rules on treaty interpretation.

29. Both Beristan and Opulentia have ratified the Vienna Convention on the Law of Treaties[27], thus Tribunal should apply the rules on treaty interpretation provided in Art. 31-32 of Vienna Convention.

2.1.1 Such interpretation does not correspond to object and purpose of the BIT

30. Art. 31(1) of Vienna Convention on Law of Treaties provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[28]

31. Respondent agrees that one of the primary objects of the BIT is to create favourable conditions for investment. Tribunal in Siemens v. Argentina analyzing object and purpose of the BIT between Germany and Argentina that encompasses the same formulations in its Preamble as here stated:

> "The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative[29]"

32. Respondent does not agree that interpreting Art. 10 of BIT in a manner that would allow investor to pursue its contractual claims with regard to contracts related to investments in ICSID Tribunal would correspond to the object and purpose of the

[27] Uncontested facts, para. 15
[28] Vienna Convention on Law of Treaties, Art. 31.1
[29] Siemens, Decision on Jurisdiction, para. 81

BIT. The Tribunal in Saluka v. Czech Republic was of the same position and found that:

> "The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations[30]."

33. The same should be concluded here: exaggerated protection of the investor would provide legal uncertainty due to the overlap of two different legal systems: national and international and it would discourage the states from attracting foreign investments

2.1.2 Broad definition of umbrella clause would render the rest of the BIT provisions to inutile

34. Tribunal in El Paso v. Argentina assessing the validity of a broad interpretation of umbrella clause stated:

> "if this interpretation to be followed - the violation of *any legal obligation* of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach - it would be sufficient to include a so-called "umbrella clause" and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT."[31]

35. The tribunal in particular case should be consistent with the principle of effectiveness of treaty interpretation which has been already recognized among the tribunals[32] and, thus it should interpret provisions of the BIT in manner which would cause other provisions of the treaty useless.

2.2 Broad definition of umbrella clause would render dispute resolution clause in state-investor contracts to effet inutile

36. If the broad definition of umbrella clause would be adopted that would mean that all contractual disputes are allowed to be submitted to the ISCID tribunal, in such case

[30] Saluka, para. 300
[31] El Paso, para. 76
[32] Holiday Inns, para. 88

Clause 17 of the JVA should be considered as ineffective as it will not be used. The Tribunal in SGS v. Pakistan raised the same concerns:

> "...Consequence would be that an investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract…For that investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice."[33]

37. Thus, it is clear that this is not what the parties intended drawing up the contract and including intentionally the specific dispute resolution clause. Tribunal in El Paso v. Argentina was of the same opinion as well:

> "it is more than likely that the foreign investor will have managed to insert a dispute settlement mechanism into the contract;"

38. Here Tribunal as well should not adopt the interpretation which would render useless the provisions to which parties have freely agreed to and gave the necessary meaning.

2.3 The Art. 10 of JVA is applied only in case state violates contractual obligations exercising its sovereign power .

39. Support for such position could be found in Tribunal's findings in Joy Mining v. Egypt, where it was faced with an analogically formulated umbrella clause[34] and reached the following decisions:

> "[i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case here" [35]

40. Numerous Tribunals have extended the meaning of the magnitude of a contract violation that would trigger Treaty. Following the same line tribunal in Sempra Energy v. Argentina took the following approach towards the umbrella clause:

> "[t]he decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the

[33] SGS v. Pakistan, para. 168
[34] Art. 2(2) of Egypt – United Kingdom BIT „Each contracting party shall observe any obligation it has entered with regard to investment of nationals or companies of the other Contracting Party"
[35] Joy Mining, para. 81

> conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect."[36]

41. The fact that Beristan did not act in sovereign manner is established in paras. 18-27

2.4 Tribunal should refrain from exercising jurisdiction due to the dispute resolution clause in the contract

42. Even if Tribunal would dismiss Respondent's approach towards umbrella clause relevant Tribunal's finding in SGS v. Philippines should be taken into account, that states that umbrella clause:

> "override specific and exclusive dispute settlement arrangements made in the investment contract itself"[37]

and

> "the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively"[38]

43. Thus, even in such approach of the Tribunal Claimant is subject to dispute resolution Clause 17 in JVA and should refer to it as appropriate.

[36] Sempra, para. 310, same reiterated in: CMS, para. 299; El Paso, para. 84
[37] SGS v. Phillipines, para. 134
[38] Id., para. 155

PART TWO: MERITS OF THE CLAIM

3. Beritech was entitled to rely on Clause 8 of the JVA because Claimant breached the confidentiality provision of the contract

44. Beritech properly invoked Clause 8 of the JVA as it did not violate any of the shareholder's rights and established substantiated basis for invocation of Clause of the JVA

3.1 Beritech did not violate notice requirement that is required prior to the BOD meetings.

45. Even though no official prior notice was made before the BOD meeting, the meeting of the BOD on August 21 could be held as a prior notification upon agenda of the meeting on August 27. The notification in BOD meeting prior to next BOD meeting can be held as a proper notification upon agenda of the meeting if almost directors participated in that meeting.[39] On August 21, all members of the BOD were present in which the chairman of the Sat-Connect BOD[40] made a presentation to the directors in which he discussed the allegations that had appeared in the August 12th article in The Beristan Times.[41] Moreover, one director raised the potential relevance of clause 8 of the JVA, and that there was discussion among those present[42].

46. Therefore, it should be concluded that Tevelative's members of the BOD were familiar with the fact there might be voting on buy-out procedure. This can be proved with a fact, that the vast majority of BOD members appointed by Claimant knew that the BOD meeting is going to be arranged[43] and attempted to sabotage, the BOD meeting by not participating in it, because of the reason that the buy-out procedure could be invoked[44]. Thus, such way of informing of the BOD members is consistent with Beristan laws.[45]

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[39] 1st Clarifications, q. 140
[40] Id.
[41] Uncontested facts, para. 9
[42] 1st Clarifications, q. 169
[43] 2nd Clarifications, q. 208
[44] Id.
[45] 1st Clarifications, q140

3.2 Beritech did not violate quorum requirement for decision-making in the BOD

47. The quorum requirement was not violated since the quorum was obtained on August 27th's meeting with the presence of 6 members: 5 directors that were appointed by Beritech and Alice Sharpenton, representing Claimant. Even though Alice Sharpenton left the meeting before its end, the quorum was not lost. Neither Beristan law nor Sat Connect's bylaws regulate the loss of quorum once established[46].

3.3 Beritech did not violate Clause 8 of JVA

48. Since there was a leak of confidential information including information about the technology, systems, IP and encryption to be used and other trade secrets, which is covered in Clause 4(2) and constitutes a material breach under Clause 4(4), and, thus Beritech is entitled to purchase all the interest of the Claimant under Clause 8 of the JVA. The sources of evidences of leak of confidential information is not only Beristan's newspaper's article or rumors in the Beristan military circles, but also the fact that Claimant acknowledged receiving requests from Opulentian government to permit the access to encryption keys but has denied permitting unlawful access[47]. That indicates, that Claimant, however, permitted access to the government of Opulentia to such information, which even though is regarded as legitimate to reveal in Opulentia, but under the Laws of Beristan, which apply to the JVA, is considered to be violation of them as the leaking of confidential information.

3.4 Beritech did not act in bad faith

49. Beritech's actions neither individually nor cumulatively violate Claimants rights, because any enjoyment of the right, on which there is a mutual beforehand agreement, can not be constituted as an act of bad faith. The conclusion that Beritech did not act in bad faith supports the fact that Beritech sought declaratory relief that it properly exercised its rights under the JVA[48]. Had Beritech acted in bad faith, it would have on its own initiative refer to the court for finding that it properly exercised its rights under the JVA.

[46] 2nd clarifications, q. 255
[47] 1st Clarifications, q. 178, Except from "Beristan Times" Article
[48] Id., q. 170

4. Expropriation, discrimination, violation of FET, other violations of international law and applicable treaties

4.1 Respondent has fulfilled its obligations to provide fair and equitable treatment.

50. Art. 2(2) of the BIT provides that both parties are entitled to FET.

51. The judgment of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case[49] and Claimant has a burden to prove that facts of this particular case are in breach of FET standard.

52. Respondent emphasizes that it is affirmed either in practice of Tribunals and in practice of States, either in NAFTA context and in prominent doctrine that FET standard must be limited to international minimum standard[50]. Yet, Myers Tribunal has considered that a breach of FET occurs only when "[i]t is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective"[51] and Neer Tribunal held the FET standard to be violated when State actions amount to an "outrage, to bad faith, to willful neglect of duty", such that an "impartial man could recognize its insufficiency"[52].

53. However, the Waste Management Tribunal extended the concept of breach of FET and established the position that infringement of standard is found when the conduct is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial property […] or a complete lack of transparency and candour in an administrative process" [53]

54. Despite the variety of concepts of breach of FET, Respondent notes that it has neither violated international minimum standard, outraged or showed bad faith, nor, as Claimant alleges, did not act in non-transparent, arbitrary, discriminatory manner or infringed legitimate expectations. It acted in light of national treatment and non-discriminatory standards.

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[49] Mondev, para. 118
[50] OECD F&E, page 10; AAPL para. 634 - 639; AMT para 6.10; Genin para 367; Leben, pp. 7-28; Sornarajah p. 335; NAFTA FTC Interpretation of Article 1105; 2004 U.S. Model BIT (in particular its article 5(2); CMS para. 282 – 284.
[51] Myers para 56, 263
[52] Neer p. 60
[53] Waste Management p. 986, 98

55. Respectively, Respondent notes that it treated the Claimant's investment fairly and equitably. Therefore, it will be asserted that **(a)** Respondent acted in non-arbitrary manner; **(b)** reasonable expectations of Claimant were satisfied; **(c)** Respondent acted under transparent manner and; **(d)** there was no bad faith or malice intention.

4.1.1 Respondent acted in non-arbitrary manner

56. Respondent accepts the guidelines of measuring arbitrary manner defined by Claimant in light of FET standard, but finds the application of factual background as well as JVA to be false.

57. First of all, it emphasizes that the procedure of buy-out of shares is under the scope of JVA and shall not be considered in light of infringement of FET standard.

58. Secondly, even if relations under JVA would not be considered to have only contractual nature, Respondent notes that it was entitled to unilaterally terminate the contract under Clause 8 of JV Agreement, because Claimant committed a material breach.

59. Thirdly, Respondent notes that Claimant contests the material breach without proper assessment of constituting a confidentiality breach as there is no such general requirement to ground the violation only over direct evidence. Respectively, it shall be constituted that information appeared in the Beristan Times could have been relied as a valid source of evidencing the violation of confidentiality requirements.

60. As a consequence, it cannot be agreed that decision was relied on prejudice or that there was infringement of due process or rule of law.

61. Therefore, actions of Respondent cannot be considered as arbitrary.

4.1.2 Respondent conducted in respect with Claimant's reasonable expectations

62. Respondent states that not every single expectation that an investor could possibly have need to be respected by the State[54].

63. It further emphasizes that Claimant alleges the infringement of legal expectations on open ended language and vague criteria, what, in words of professor Dolzer "gives rise to speculations"[55].

[54] Ortino, Sheppard and Warner p. 135.
[55] Dolzer and Schreuer, p. 88

64. Respondent submits that the fact that investor lost any money does not indicate a breach of FET obligation, because obligation is concerned with the State's conduct rather than the result of the investment[56]. Therefore, the fact that Claimant has not received the market-based price for owned shares does not constitute an infringement of Claimant's legitimate expectations.

65. Moreover, the only reasonable legitimate expectation which Claimant had was set forth under Clause 8 of JV Agreement and it was properly fulfilled by Respondent, as payment was offered under both parties consent expressed in JV Agreement.

66. Furthermore, regarding the procedural questions of decision-making in Board, Respondent notes that in principle something more than simple illegality is necessary to render an act inconsistent with FET clauses[57]. Alice Sharpeton had been appointed at Board by Claimant, but refused to participate and left the meeting before its end without any justifiable reason. Therefore, even if we agreed that there was a procedural breach, it cannot be constituted as a breach of legitimate expectations as it was due to inappropriate conduct of a person appointed by Claimant.

67. As a consequence, Respondent shall not be regarded as have breached the legitimate expectations of Claimant.

4.1.3 Respondent acted in a transparent manner as the legal ground was known to Claimant

68. Claimant asserts that were was no legal ground for the Respondent to buy-out shares.

69. In Bayindir v. Pakistan Tribunal stated that "[p]ublic administrations are regularly involved in managing different types of contracts and act, in this regard, in a manner which is not fundamentally different from that in which a private corporation handles its contractual relationships"[58]. Respectively, the Respondent is not required to grant the procedures which have not been agreed under the JV Agreement; therefore, lack of transparency cannot be constituted as all the conditions to both contracting parties were known from the beginning.

[56] Lauder, p. 291
[57] ADF, para 90
[58] Bayindir para 345

70. Furthermore, Gami Tribunal found that not every act of maladministration amounts to a breach of FET[59] and prominent scholars expounded that "[…] the investor is bound by host State law at the date of investment, and cannot bring a complaint of unfair treatment for a subsequent faithful application of it"[60].

71. In this case it cannot be concluded that State having followed and applied the law could be regard as conducted in non-transparent manner.

4.1.4 Respondent did not have bad faith or malice intentions

72. Claimant concluded that Respondent acted in bad faith or had malice intentions in a sense that the Sat-Connect project was overtaken having intention to do it illegitimately and seconded personnel was evacuated without any legal background.

73. The Mondev Tribunal established that a finding of substantive bad faith in relation to a claim under the FET standard would require a decision to be "clearly improper and discreditable" and also that the decision would have to be sufficient to subject the investment to unfair and inequitable treatment[61] by itself. Furthermore in Genin case it was stated that FET would include subjective bad faith in case the acts violated the minimum standard[62].

74. It cannot be concluded, as stated above, that international minimum standard was breached. That is not even contested by Claimant. Accordingly, acting under State law in order to grant the national security cannot be in no way regarded as bad faith or malice intentions.

4.2 Full protection and security

75. Art. 2(2) of BIT obliges to treat the investors of each party in accordance with full protection and security of the investments of investors of the other party standard.

76. The state does not have an international duty to prevent, in an absolute way, all negative acts from occurring[63]. Nor it has a duty to observe "on the basis of the treaty, […] all the contractual obligations, when the investment has a contractual nature."[64]

[59] Gami, para. 110
[60] McLachlan p. 237
[61] Mondev, para. 127
[62] Genin para 241, 267
[63] OECD F&E, p. 26, 115
[64] RFCC parag 51

77. The tribunal in Azurix stated that: “[T]he provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be […] disturbed”[65].

78. Hence, Respondent holds that reasonable measures were taken for the purpose of national security. Therefore, the full protection and security clause was fully in compliance with the actions of Respondent.

4.3 Respondent did not act unjustified and discriminatory

79. Art. 2(3) of BIT obliges parties to ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.

80. Respondent, as stated above, bought out the shares under Clause 8 of JV Agreement, acted under legal background and in light of national security issues.

81. Therefore, it cannot be constituted that discrimination was against a foreign investor as the same actions would have been taken against any other entity, which breached the law and threatened national security.

4.4. Respondent did not discriminate claimant’s employees on nationality

82. Claimant states that Respondent favoured local Beristian personnel, who ultimately replaced Claimant’s seconded personnel, and as a consequence, such action resulted in discrimination.

83. According to European Court of Justice ruling in case Clift v. The United Kingdom it was established that “a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized”[66]. It was further elaborated by ECJ in Carson and Others v. The United Kingdom case, where it was stated “[t]he Contracting State enjoys a margin of

[65] Azurix, 408
[66] Carson para. 63

appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment"[67].

84. Respectively, Respondent notes that on 12 August 2009 in the Beristan Times published article it was emphasized that the Sat-Connect project had been compromised due to leaks only by Claimant's seconded personnel. That justifies the reasons why certain procedures were not enacted on Beristian. Simply, there was no legal and factual background.

85. Accordingly, it cannot be established that Respondent discriminated non-nationals over nationals.

4.5 Respondent acted in accordance with national treatment

86. Art. 3(1) of the BIT provides that investors and investments of a Contracting Party should not be accorded treatment less favorable than a state would accord to its own investors and investments.

87. International tribunals pose the following questions to determine whether an investor receives the national treatment bilateral investment treaties require: (1) is there any less favorable treatment provided to the investor claiming a breach of national treatment than that afforded domestic investors?; (2) what was the State's intention behind the action taken?; and (3) are the subjects in like circumstances?[68].

88. Two types of discriminatory measures support a less favorable treatment claim: (1) de jure discriminatory measures which are laws or actions that are discriminatory on their face; and (2) de facto discrimination, which is a non-discriminatory act that effectively discriminates against an investor[69].

89. Respondent states that there was no less favorable treatment provided to the Claimant as Claimant was treated in same regard as Respondent. The buy-out clause was triggered under procedure set down in JVA and the seconded personnel was evacuated legally. Therefore, subjects were not in like circumstances, because Respondent has not made any violations, and, as a consequence, either de jure, either de facto discrimination could not be established.

4.6 Respondent has not unlawfully expropriated claimant's property.

[67] Clift para. 61
[68] LG & E, p. 146, Pope & Talbot, p. 31 - 80, Investor-State Arbitration, at p. 400
[69] Investor State-Arbitration, p. 408

4.6.1 Sat-Connect BOD decision is not attributable to Beristan

90. The necessary condition to qualify taking as an expropriation is the attribution to the State.[70] All the actions of Sat-Connect or Beritech cannot be attributed to Beristan as proved in paras. 8-15. Assuming arguendo the actions are attributable to the Respondent the following analysis will be provided.

4.6.2 Definition of expropriation provided in the BIT

91. Art. 4 (2) of the BIT provides:

> „Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.“[71]

92. In the international law expropriation is considered to be the most severe action taken by a state that interferes with the investment. That is why the standards that are required to establish expropriation are very strict.[72]

4.6.3 There has been no direct expropriation because Respondent did not take any property

93. Direct expropriation is defined as a physical taking of property by a state government through regulatory measures or acts specifically targeted at the property.[73]

94. Sat-Connect BOD submitted Claimant's shares in the Sat-Connect JV to be held in escrow. The shares of Claimant have been not directly expropriated because the title of shares remains with the Claimant. The escrow does not take the title away from the owner.

4.6.4 There has been no indirect or 'creeping' expropriation

95. The general consensus is that to constitute indirect or "creeping" expropriation, the impact of the interference in the investment has to be "of a certain 'magnitude or

[70] Tradex Hellas
[71] BIT, Article 4.
[72] Sornarajah, p. 346
[73] LG & E para. 187; Telenor, para. 63; Tecmed para. 113

severity'."[74] To be significant what is required is a "substantial loss of control or value.[75]

96. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. [76]

4.6.4.1 The Claimant holds control over investment

97. In PSEG Global v Turkey, the tribunal held that, in order to establish an expropriation, -"there must be some form of deprivation of the investor in the control of the investment [or] the management of day-to-day-operations of the company"[77]

4.6.4.1.1 The decisions of the BOD of Sat-Connect to trigger buy-out satisfied legal procedure requirements

98. The Sat-Connect BOD decision was adopted through the democratic procedure of voting. As it is elaborated above: (i) the prior notification of the agenda has been properly made[78]; and (ii) the quorum requirement in the BOD meeting was met as well[79]. Thus there is no deprivation of the investor in the control of investment.

4.6.4.2 Expropriation requires a loss or diminution in value of an investment

99. As underlined in international jurisprudence, the whole or the majority of the investment has to be made worthless for the investor for the expropriation to occur. Following ECHR in Sporrong / Lonnroth case, when the right in question lose some of its substance but do not disappear completely, one cannot talk about indirect expropriation.[80] Moreover, in all other cases where tribunals decided that expropriation in fact took place, they considered situations in which the value of the investment dropped almost to zero.[81] Another definition states: substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use

[74] Reinisch I at 30 (citing Pope & Talbot, Inc. v. Government of Canada, (Interim Award) 7 ICSID Rep 43, 69).
[75] Id. at 29 (citing UNCTAD, Taking of Property 41 (2000)).
[76] Nykomb Synergetics para. 4.3.1
[77] PSEG, para. 278
[78] Para. 44
[79] Paras. 45-46
[80] Sporrong/Lonnroth vs. Sweden, para. 63
[81] Middel East Cement, CME, Metalclad.

of the rights targeted by the measure to an extent that they render their further possession useless.[82]

100. Contrary to direct expropriation, indirect expropriation is less evident, and generally occurs when an act has effectively expropriated the property without a physical taking of the title, amounting to an affect that has "significantly deprived an investment of economic value[83]

4.6.4.2.1 Temporary interference does not amount to substantial deprivation

101. The interference with the property must be not only substantial, but also lasting for a certain period of time.[84] The investment could be considered as having be indirectly expropriated if the deprivation of the foreign investor's property was not temporary.[85] The longer the interference is in duration, the more likely it will viewed as an expropriatory measure.[86] The irreversibility and permanence of the contested measures is necessary requirement for establishing expropriation.[87] The tribunal in International Technical Products required the existence of an "irreversible taking" of property rights to award compensation. [88] The interference must also be of substantial duration: in effect, permanent. Temporary interference only leads to expropriation when the investment's development depends on an inflexible timeline.[89]

102. Whether or not a measure of interference will be seen as temporary or permanent will depend on the facts of the case.[90] Escrow in its essence is temporary interference with property which is not irreversible and permanent taking, therefore cannot be recognized as expropriatory measure.

4.6.4.2.2 The decision to replace personnel has not substantially deprived value of investment

103. The management or key personnel have been not replaced. Only the employees have been replaced by the local Beristan labor[91]. This was done expeditiously thus it

[82] RFCC para. 69
[83] Telenor, para. 63
[84] OECD, p. 10-14
[85] Tecmed, para. 116. LG&E, para. 193
[86] Middle East Cement; Metaclad; CME.
[87] Plama, para. 193
[88] International Technical Products, para. 240-241;Starret, p.122,154; Tippets,p.219.
[89] LG&E, para. 193
[90] Metalclad para 116; Azurix para. 285
[91] 1st Clarifications, q. 171

cannot be regarded as substantial deprivation. Even when personnel are expelled, an investment is not expropriated absent significant economic loss.[92]

4.6.4.2.3 None compensation for IP rights does not amount to substantial economical loss

104. Funds for the monetary investment value of made investment is provided for the shares of the Claimant. Non compensation for the IP rights is only minor and ephemeral therefore it cannot be regarded as substantial loss. The value of the IP is not established. The Claimant asserts that it exceeds US$ 100 million without any evidence[93]. Indeed, expropriation occurs when "the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral".[94]

4.7.5 Claimant is not entitled to compensation of future profits

105. The test for expropriation cannot be considered in the abstract or based exclusively on the Claimants' loss of profits, which is not necessarily a sufficient sole criterion for an expropriation.[95]

4.7.5.1 Sat-Connect is not a "Going-Concern"

106. A "going concern" is defined as: an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.[96]

107. The Tribunal referred to previous arbitral awards that had stated that "an award based on future profits [was] not appropriate unless the relevant enterprise [was] profitable and [had] operated for a sufficient period to establish its performance record" and held that "compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty"[97]

[92] Biwater,para. 223,348
[93] 1st Clarifications, q. 165
[94].Pope & Talbot, paras. 101-02
[95] Archer Daniels para. 248
[96] World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV, § 6.
[97] CAA & Vivendi Universal, para.8.3.3

108. The Tribunal reasoned that because the enterprise had not become a going concern when it was expropriated, "any conclusions [regarding lost profits] would be highly speculative.[98] The Sat-Connect does not generate nor income nor the profit because the technology is not yet developed. Taking into consideration that Sat-Connect is not a going-concern and does not have any record of received profits, and following the reasoning of Tribunals in other cases such as Asian Agricultural Products Limited v. Republic of Sri Lanka[99], Metalclad Corp. v. United Mexican States[100] the Claimant is not entitled to the future profits.

[98] Rubins and Kinsella p. 254
[99] Paras. 292-93
[100] Paras. 119-122

5. Essential Security

109. In order to analyze whether Respondent is entitled to rely on Art. 9 (Essential Security) of the BIT (Art. 9) as a defense to removing Claimant from the Sat-Connect project , first of all we have to clarify the standards of defense set in Art. 9. This is important, because recent practice of interpretation of articles with same or similar provisions to Art. 9 is ambivalent and contradictory in a subject area of should "state of necessity"[101], be interpreted as part Non-precluded measures[102] (NPM) clauses, which composes Art. 9. And even in the light of understanding that at the moment there might not be one unquestionable standard of interpretation of NPM as to construct a legal stable position in contradictory situation takes years, rather than months we will accept the latest practice[103] of ICSID Tribunals and view "state of necessity" defense and contractual defense provided by the Art. 9 of the BIT as separate ones. Thus, as it is agreed that the Tribunal in current process shall be only addressed by the applicability of Art. 9, which is separate from the "defense of necessity".

110. In the very beginning of the analysis of the defense under Art. 9 it is important to state the legal effect to parties of this case if the argumentation for the implementation of the Art. 9 will prove to be successful. In that case:

- Beristan could not be found liable for act of expropriation, infringements of FET, discrimination or any other potential violations of the BIT, as "[t]he exceptions contained in NPM clauses preclude the applicability of the specified substantive obligation(s) of the BIT to acts that fall within the scope of the clause"[104].

- Thus as there would be no breach of BIT there would not be any reason compensate the investor in any way under the requirements of BIT.

[101] Construct, which is imprinted in customary international law International Law Commission's State Responsibility articles. Text of the document available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last time opened 2010 09 15 13:55)
[102] Non-precluded measures are "provisions [of BIT] that limit the applicability of investor protections under BIT in exceptional circumstances". Mourra p. 106
[103] Presented in CMS annulment, Sempra annulment, Enron annulment
[104] Mourra p. 147.

- Also if the NPM clauses of the BIT is successfully invoked, there might be the situation, that Tribunal does not have jurisdiction in this case.

111. To prove that Art. 9 of the BIT is applicable in this case brought under Tribunal first of all we have to find correct interpretation of meaning of NPM clauses laid down in BIT in order to determine the requirements for the application of the article. And then it is our burden to prove, that conditions for the application of the Art. 9 are met and thus "there is no breach of any Treaty obligation"[105].

5.1. Requirements set in Art. 9 of the BIT

112. Art. 9 goes as follows:

> „Nothing in this Treaty shall be construed:
>
> to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests."[106]

113. According to the two currently leading experts in the field of NPM clauses William W. Burke-White and Andreas von Staden there are three key structural elements in the Art. 9 which must be analyzed in order to determine if acts of the State brought under Tribunal falls under regulation of the BIT[107]. These are:

- Permissible objectives – list of goals "in the pursuit of which measures deviating from other substantive treaty provisions are not precluded by the BIT"[108].
- Nexus requirement – "link between the measures adopted by the host state that might breach the treaty and the permissible objectives stated in the provision"[109].
- Scope – "the breadth <…> of the NPM clause's application vis-à-vis the other treaty provisions"[110].

[105] Sempra annulment para. 204
[106] BIT Article 9(2)
[107] Mourra p. 113.
[108] Id.
[109] Id.
[110] Id.

114. Thus in order for Beristan not to be legally liable under the BIT for breaches of this treaty we have to prove, that BIT itself allows Beristan to act in ways, which otherwise would be considered to be illegal (scope), in certain situations (nexus requirement) of pursuit of objectives listed in BIT (permissible objectives). Therefore the following argumentation will be directed exactly to that goal.

5.1.1. Permissible objectives

115. Permissible objectives, as it was mentioned before, are "permissible ends towards which state action must be directed if the NPM clause is to preclude a violation of the treaty"[111]. In our case it is either "maintenance or restoration of international peace or security"[112] or "protection of [Beristan's] own essential security interests"[113]. And as it is quite clear that in the case at hand there is no threat to international peace and security, we are going to prove that Beristan's acts, which are escalated as illegal by claimant, were in order to protect its essential security interests.

116. The burden of proof in order to do that is to provide evidence:

- that national security, for the protection of which Beristan removed Claimant from the Sat-connect project, is implicated in the term of essential security interest, which is established in the BIT;
- and that act's of Defendant articulated in this case were directed toward protection of national security.

117. "Because the treaty itself did not elaborate on or explain what was meant by essential security interest, the content of the provision must be found elsewhere"[114]. The most appropriate place to look would probably be the practice of ICSID tribunals as one of their duties was to explain and interpret certain provisions of BIT's.

118. At the moment there have been four main cases investigated under ICSID tribunals where the term of essential security interest was considered. These are (in no particular order) CMS, Enron, Sempra and LG&E (including the annulments). And

[111] Mourra, p. 125
[112] BIT Article 9(2)
[113] Id.
[114] Oxford handbook. p. 495-496; see also Enron para. 333.

the observations of them clearly supports the position, that national security (military relating matters) is incorporated to the term of essential security interests.

119. The Tribunal in LG&E case states:

> „The Tribunal rejects the notion that Art. XI is only applicable in circumstances amounting to military action and war.“[115]

120. Similarly the Tribunal in Sempra case reaches the conclusion that:

> "Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law."[116]

121. So as we can see, not only that the Tribunals rejected the opinion, that provisions of Article containing term "essential security interests" are only applicable in national security sphere, meaning that they apply both here and somewhere else, they also suggest that military threats as main issues of national security are also the origins of concept of essential security, thus obviously inseparable from it.

122. Furthermore, it is also clearly noticeable, that "[t]he most recent interpretations of the 'essential security' permissible objective arise in the context of the aforementioned ICSID arbitrations against Argentina and confirm a broad reading of 'essential security'"[117] having that in mind there is one more claim to be maid concerning interpretation of essential security, and it is the rephrasing of CMS Tribunal:

> "there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude [national security issues] from the scope of Art. [9]"[118].

123. Practice of ICJ also seems to approve the conclusion that national security interests are part of essential security interests. This is done in the quite recent Oil platforms case, where "conception of essential security interests advanced by the United States and acknowledged by the ICJ appears to include economic interests, such as the flow of maritime commerce, as well as territorial or military interests[119].

[115] LG&E para. 238 (emphasis added).
[116] Sempra para. 374
[117] Mourra p. 130.
[118] CMS para 359
[119] Mourra p. 127.

124. Thus the only conclusion, which seems to be stemming from information provided above, is that national security or military interests, as it can also be called, are part of essential security interests recorded in BIT.

125. And in our case it is quite obvious that the act of removing Claimant from the Sat-Connect project was done in order to ensure the national security interests. This is because leaking important information to another countries government, with which Beristan have tense relationships[120], definitely qualifies as threat to military interests.

126. So at this point of argumentation it is important to state, that acts of Beristan, disputed by the Claimant in this case, were directed to the aims, which are set in the NPM clauses of the BIT.

5.1.2. Nexus requirement

127. "The nexus requirement of NPM clauses requires a link between the actions taken by a state that would otherwise violate the treaty and the permissible objectives provided for in the NPM clause"[121]. The formulation BIT's Art. 9 is that state party of the BIT is allowed to apply "measures that it considers necessary for <…> the protection of its own essential security interests"[122].

128. One very important note to be made here, is that provisions of Art. 9 of the BIT are explicitly self-judging. This means that "State Party [of the BIT] taking the measures is itself to be the judge of their necessity"[123]. And this has several consequences:

- In order to prove, that the removal of Claimant from the Sat-Connect project does not breach obligations under BIT, we have to provide evidence that acts of Beristan were considered by it necessary for the protection of national security.

- "Such explicitly self-judging NPM clauses, containing the "it considers necessary" language or similar formulations could be read as an absolute bar to judicial or arbitral review"[124].

[120] Uncontested fact number 15
[121] Mourra p. 120.
[122] BIT Art. 9 [emphasis added]
[123] Sempra annulment para. 193
[124] Burke-White and Staden p. 376

129. First of all from the side of the Defendant we would like to state clearly, that we believe that it is enough for the Beristan to claim, that the removal of Claimant from the Sat-Connect project was necessary for the protection of essential security interests in order to satisfy the requirements of Art. 9 of the BIT. It is because of the self-judging nature of Art. 9 necessity's standards, which implies understanding of "absence of "judicially manageable standards of a legal nature for the evaluation of national security interests"[125]. In other words, there is no other subject than the State itself, capable to decide better what is necessary for the protections of it vital interests, thus it would be unacceptable to allow for a certain other subject to revise such decisions made by the state. To disagree with this position, would mean to deny the intent of countries, which creates its NPM clauses expressively self-judging.

130. This position is also defended by the well respected scholar and the former member of United Nations' International Law Commission and judge of ICJ Sir Hersch Lauterpacht. This is because of the fact, that to review an invocation of the reservation for good faith would undercut the very purpose of the reservation, which was to take certain matters outside the ambit of Court review. In his Separate Opinion in the Certain Norwegian Loans case[126] he claims, that if the country made a reservation in the treaty for certain exceptions of the treaty, the need of which have to be decided by the state itself, third party (court ot arbitral tribunal), does not have the right to overlook it, "in the absence of agreement of [Beristan] to submit to the jurisdiction"[127]. And in our case there is no evidence which suggests existence of such agreement.

131. And to add credibility to this position we have to state, that point of view presented is not internationally uncommon and has accepted, as "[i]n the original GATT context <…> [when] the claim has been made that when a state invokes the national security exception, "a panel could not or should not be established.""[128].

132. Nevertheless, as previous statement of disagreement to submission to judicial review to revise decision of necessity made by the State is not undisputable in the international law, from the side of the Defendant we will also provide argumentation

[125] Id. 376
[126] Certain Norwegian Loans p. 52-53
[127] Id. p. 59
[128] Burke-White and Staden p. 376

which will prove, that the acts of the Defendant were compatible with the standard of "good faith", as it is mentioned as a possible ground of revision of actions taken by the State[129]. So as the possibility of "good faith review <…> requires even states that have adopted explicitly self-judging NPM clauses to analyze their own invocation of the clause and articulate a rationale for the clause's applicability", the burden of proof in order to satisfy criteria of Art. 9 of BIT is to show, that the removal of Claimant from the Sat-Connect project was truly considered necessary by the Beristan to in order to protect its national security interests.

133. And to prove that we need to take into consideration the following:

> The government of Opulentia, which is the country having tense relationships with Beristan[130], is under its national laws making[131] Claimant to hand over "critical information"[132] (encryption ciphers, keys, and pads[133]), which is directly related to the functioning of Beristan's military[134]. Not only that, there is also indication[135] from the "highly placed Beristian government official"[136] printed in a trustworthy source[137], that leaking of this and other kinds of information[138] concerning Sat-Connect project is true. And on the top of that there is acknowledgement[139] from the Claimant of the requests of both, lawful and unlawful[140] nature, to give access to encryption keys, which are, as it is mentioned above, part of the critical information of the project.

134. Thus it can definitely be concluded, that national security of Beristan is at least potentially in danger. Furthermore we also have to keep in mind, that information relating tracking leaks of information related to military services definitely belongs

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[129] See Sempra para. 388, LG&E para 214.
[130] Uncontested Facts, para. 15
[131] „[T]here are more and more foreign laws compelling disclosure of encryption ciphers, keys, and pads to national security services." 1st Clarification, q.178
[132] Uncontested Facts, para. 8
[133] 1st Clarification, q. 178
[134] Id.; See also Uncontested fact, para 6
[135] „...analyst indicated that..." (Emphasis added) Clarification number 178; See also Uncontested fact number 8.
[136] Uncontested Facts, para. 8
[137] 1st Clarification, q. 168
[138] Clarifications, q. 178 „...there have been leaks not only involving encryption technology, but also concerning the technology, systems, and intellectual property of the Sat-Connect project..." (Emphasis added)
[139] 1st Clarification number 178 „Claimant acknowledged receiving requests..." (Emphasis added)
[140] „...has denied permitting unlawful access." (Emphasis added) 1st Clarifications, para. 178

to intelligence sphere, thus it is also part of national security field, where information is not easily accessible. In addition to that, Art. 9(1) of the BIT includes provisions, that protects Beristan's right not to reveal such information.[141]

135. The bottom line here is that keeping in mind, that "good faith" test requires, that the act of removing Claimant from the Sat-Connect project at least would not to be "obvious and deliberate misuse"[142] of self-judging nature NPM clauses of the BIT. And that acts of Beristan, would have been rationally based in the way, that the "reasonable person in the state's position could have concluded that there was a threat to national security <...> sufficient to justify the measures taken"[143]. We from the side of Defendant believe that criteria mentioned above is passed by the Beristan, due to the evidence provided, which concludes, that it acted in a "good faith".

136. And that leads us to conclusion, that even in the case, where the Tribunal would decide, that it is not enough for the Beristan to simply claim that its acts were necessary to protect its national security interests, the nexus requirement would still be satisfied, as there is evidence, that the removal of Claimant from Sat-Connect project was considered reasonably by the republic of Beristan.

5.1.3. Scope of Art. 9(2)

137. Now, that we have provided evidence that BIT allows the state to pursuit protection of its interests in national security sector, it is important to examine what relation does acts committed to in order to preserve national security has with another provisions of the treaty. This is because Art. 9(2) of the bit could be only used as a defense against accusations of the Claimant if it would be proved that the BIT itself implicates it as the defense.

138. The precise wording of the Art. 9 the BIT tells us that: "Nothing in this Treaty shall be construed to preclude a Party from applying measures that it considers necessary <…> for the protection of its own essential security interests"[144]. Thus the relationship with other treaty provisions is such, that if the provisions of Art. 9 of the BIT is being implemented none of the others applies, if they would have had an effect in that situation.

[141] BIT Art. 9(1)
[142] Burke-White and Staden p. 380
[143] Id. p. 380 (Emphasis added)
[144] Art. 9 of the BIT (Emphasis added)

5.2 Conclusion of the application of Art. 9 of the BIT to the present situation

139. The evidence was provided, that Claimants removal was made in order to protect national security, which is part of essential security interests, and that in any case Beristan carried out actions, which were necessary to that goal, compatibly to the standards of good faith. Also it was demonstrated that BIT allows these kinds of action, and excludes[145] them from the sphere of BIT regulations. This begs for the following legal conclusions:

- Because of the successful invocation of NPM clause, as we do have proved that the criteria of it are met in this case, Beristan should be excused from any "residual liability under the BIT"[146].

- Furthermore as the "NPM clause exempts measures adopted for the specified permissible objectives from <...> all of the substantive obligations under the BIT"[147], and if the Tribunal agrees, that because of self-judging essence of NPM clause decision of the Beristan can not be judicially reviewed at all[148], it should come to the conclusion, that the Tribunal has no jurisdiction in this particular case.

[145] See Mourra p. 147
[146] Mourra, p. 148
[147] Id. p. 147
[148] Proved in para. 125-128

CONCLUSION ON MERITS OF THE CLAIM

140. Because of the reasons mentioned Respondent can not be found liable for expropriation, discrimination, violation of FET, or other violate general international law or applicable treaties. It also can not be found liable for breaches of the contract between Beritech and Claimant.

141. Nevertheless if the Tribunal in this case finds violations of the bit committed by respondent, it should also notice, that regulations of the BIT can not be applied to judge actions of Respondent, because the Essential security defense exempts Respondent from any liability under the BIT.