WALDOCK

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

TELEVATIVE INC.

CLAIMANT

v.

GOVERNMENT OF THE REPUBLIC OF BERISTAN

RESPONDENT

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

In addition to short-form references to sources and authorities defined in the Index of Authorities and List of Sources below the following abbreviations are used in this memorial:

Abbreviation	Definition
Beristan	Republic of Beristan
Beritech	Beritech S.A.
BIT	Bilateral Investment Treaty
BoD	Board of Directors
CWF	Civil Works Force, the civil engineering section of Beristan army
ICSID	International Center for Settlement of Investment Disputes
JVA	Joint Venture agreement between Beritech S.A. and Televative Inc., signed on 18st October 2007
M.	Minutes of the first session of the Arbitral Tribunal
OBBIT	Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and reciprocal protection of investments, signed on 1st January 1997.
Opulentia	United Federation of Opulentia
P.	Annex 2 "Uncontested Facts" to the Foreign Direct Investment Moot Competition Problem 2010
p.	Page
RtQ1,2	Response(s) to questions of the teams from the organizers of the competition as available on www.fdimoot.org
Sat-Connect	Sat-Connect S.A.
Televative	Televative Inc.
USD	United States Dollar
WTO	World Trade Organization
¶ (¶¶)	paragraph(s)

LIST OF AUTHORITIES

TREATIES

Full Citation	Reference
Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159	ICSID Convention

CASES

Full Citation	Reference
ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16 (Cyprus/Hungary BIT) Award, 2 October 2006	ADC
Azurix Corp. v. The Argentine Republic ICSID Case No. ARB/01/12 Award, 14 July 2006	Azurix
BG Group v. The Argentine Republic UNCITRAL Final Award, 24 December 2007	BG
CMS Gas Transmission Company v. TheArgentine Republic ICSID Case No. ARB/01/8 Award, 12 May 2005	CMS
CMS Gas Transmission Company v. Argentine Republic ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007	CMS Decision of the ad hoc Committee
Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9 Award, 5 September 2008	ContinentalCasualty
Corn Products International, Inc. v. The United Mexican States ICSID Case No. ARB(AF)/04/01, Decision on responsibility 15 January 2008	Corn Products
Economy Forms Corp v. Government of the Islamic Republic of Iran (1983) 165 Iran-USCTR, 66	Economy Forms
El Paso Energy International Company v. Argentine Republic ICSID Case No. ARB/03/15 Decision on Jurisdiction, 27 April 2006	El Paso
Elettronica Sicula SpA (ELSI) (United States v. Italy), Judgment of 20 July 1989 (1989) ICJ Reports 15	ELSI
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Feldman Karpa (Marvin Roy) v. United Mexican States (Merits), 7 ICSID Reports 341	Feldman
Genin, Eastern Credit Ltd Inc and AS Baltoil v. Republic of	Genin

Estonia ICSID No. ARB/99/2, Award 25 June 2001	
INA Corp v. Government of the Islamic Republic of Iran (1985) 161 Iran-USCTR, 380	INA
Lauder (Ronald S.) v. Czech Republic 9 ICSID Reports 66, Award 3 September 2001	Lauder
Maletzky and Another v. Freer and Others (A 244/2009) [2010] NAHC 65, 6 August 2010	Maletzky and Another v Freer and Others
MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile ICSID Case No. ARB/01/7 Award, 25 May 2004	MTD
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Noble Ventures v. Romania, ICSID Case No ARB/01/11, Award 12 October 2005	Noble Ventures
Obchodni Banka, A. S. v. the Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999	Obchodni Banka
International Thunderbird Gaming Corporation v. Mexico, Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 136 2006	Thunderbird
Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006	Pan American Energy LLC
Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21 (Greece/Albania BIT)	Pantechniki v. Albania
Pennsylvania v International Union of Operating Engineers US Court of Appeals, Third Circuit No. 80-2160, 19 May 1981	Pennsylvania
Saluka Investments B.V. v. Czech Republic, UNCITRAL arbitration Decision on Jurisdiction , 7 May 2004)	Saluka
S.D. Myers v. Government of Canada (Partial Award) 8 ICSID Rep. 4	SDMyers
SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan ICSID Case No. ARB/01/13 Decision of the Tribunal on Objections to Jurisdiction, 06 August 2003	SGS v. Pakistan
SGS Société Générale de Surveillance S.A. v. Phillipines 8 ICSID Reports (2005) Decision on Jurisdiction, 29 January	SGS v. Phillipines

2004 Sempra Energy International v. Argentine Republic ICSID	Sempra
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Case No. ARB/02/18 IIC 331 (2007) Toto Cosrtuzioni Generali S.P.A. v. The Republic of	Toto Cosrtuzioni
Lebanon ICSID Case No. *ARB/07112* Decision on	
jurisdiction, 11 September 2009 Waste Management, Inc. v. United Mexican States, ICSID	Waste Management
Case No. ARB(AF)/00/3, Award, 30 April 2004.	

LIST OF LEGAL SOURCES

TREATISES AND OTHER PUBLICATIONS

Full Citation	Reference
R. Dolzer, C. Schreuer, Principles of International Investment Law (2008)	DOLZER/SCHREUER
Z. Douglas, The International Law of Investment Claims (2009)	DOUGLAS
B.M. Cremades and David J. A. Cairns Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes in N. Horn and S. M. Kröll (eds) Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects (2004)	CREMADES
N. Horn and S.M. Kröll (eds) Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects, (2004)	HORN
Gwenyth L. Jackaway Media at war: radio's challenge to the newspapers, 1924-1939 (1995)	JACKAWAY
R. Jennings & A. Watts, Oppenheim's International Law (9th edn.) 1992	JENNINGS
C.McLachlan, Shore, Weiniger, International Investment Arbitration: Substantive Principles (2008)	MCLACHLAN
Peter Muchlinski, Federico Ortino, Christoph Schreuer, Oxford handbook of international investment law (2008)	MUCHLINSKI
J. Ralston, The Law and Procedure of International Tribunals (1926) No. 88, 69. Reports of International Arbitral Awards, vol. IX	RALSTON
W. Michael Reisman, Robert D. Sloane Indirect Expropriation and Its Valuation in the BIT Generation (2004)	REISMAN

MISCELLANEOUS

Full Citation	Reference
American Convention on Human Rights (1969) available at http://www.hrcr.org/docs/American_Convention/oashr.html	American Convention on Human Rights
ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institutional Rules), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partD.	ICSID Arbitration Rules

htm

ILC Articles on Responsibility of States for the Internationally Wrongful Acts

Articles on

Merriam-Webster's Dictionary of Law (*1996)* Merriam-Webster, Inc.

Responsibility of States MerriamDictionary

STATEMENT OF FACTS

Parties to the dispute

1. The Respondent, Beristan, is one of the seven countries in Euphonia region, and a State party to the ICSID Convention. In March 2007 the Government of Beristan established a state-owned company, Beritech, in which it owns 75% interest (P. ¶2). 8 month later, in October 2007, Beritech signed JVA with Televative and established Sat-Connect under Beristan law (P. ¶3). Beristan signed JVA as guarantor of Berithech's obligations (P. ¶3). Sat-Connect has been created to develop and deploy a satellite network and accompanying terrestrial systems and gateways (P. ¶5). Sat-Connect has its seat in Beristal, the capital city of Beristan (P. ¶3).
2. The Claimant, Televative, is a privately owned company that specializes in satellite communications technology and systems. Televative was incorporated in Opulentia on 30 January 1995 (P. ¶1). It owns a 40% minority share in Sat-Connect and has a right to appoint 4 members of the BoD of Sat-Connect (P. ¶4).

Televative's investment in Beristan

3. Televative transferred its IP rights that related to the project to the Sat-Connect (RtQ2 269) and technology necessary for the project. It also provided the joint venture company with its seconded personnel (RtQ1 160).
4. Sat-Connect was quite successful in developing the communications technology and was about to deploy the systems and network in summer 2009 (M. ¶15).

Disclosing information to Opulentia

5. According to the statement of government defense analyst of Beristan (P. ¶8) Televative's personnel disclosed confidential information relating to the Sat-Connect project to the Government of Opulentia, which constituted a material breach of the JVA (Clause 4) that restricts any dissemination of confidential information without prior approval of Sat-Connect BoD (JVA ¶4).
6. BoD of Sat-Connect discussed the issue of disclosure and application of buyout provision of the JVA (Clause 8) at meeting on August 21, 2009, where the issue was firstly raised (P. ¶9). During the second meeting on August 27, 2009, the BoD voted to approve the invocation of buyout provision of JVA by majority in conformity with the bylaws of Sat-Connect (P. ¶10).
7. After the proper application of the buyout of Televative's interest in Sat-Connect, Beritech served notice on Televative on August 28, 2009, in order to facilitate the latter to transfer the possession of all Sat-Connect site, facilities, and equipment and to

remove all the seconded personnel from the territory of the project within the 14 days as Televative no longer had any legal grounds to stay there (P. ¶10).

8. When the 14 days time-period expired on September 11, 2009, Sat-Connect asked for help of the CWF, the civil engineering section of Beristan army. CWF secured all sites and facilities of Sat-Connect (P. ¶11) and asked the Televative's personnel that were still there to leave the project immediately (RtQ2 248).

Submission of the dispute to arbitration

9. On September 11, 2009 Beritech served notice to Televative of its desire to settle amicably, and in case of failure to proceed with arbitration under JVA Clause 17 (RtQ1 175).

10. On September 12, 2009 Televative notified Beristan of its desire to settle amicably in a written notice of a dispute under OBBIT (RtQ1 133). Televative thus did not answer on the previous notice from Beristan to settle amicably and commence arbitration under JVA, and wished to proceed with arbitration under Article 11 of the BIT.

11. On October 19, 2009 Beritech filed a request for arbitration against Televative under Clause 17 of the JVA and paid US$47 million in escrow account available for Televative (P. ¶13). In its request Beritech sought declaratory relief that it properly exercised its rights under the JVA and damages against Televative (RtQ1 170). Televative refused to accept it and did not respond to Beritech's arbitration request (P. ¶.13).

12. On October 28, 2009 Televative requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified Beristan (P. ¶14).

13. Arbitral Tribunal requested by Beritech on October 19, 2009 was constituted despite the refusal of Televative to participate. The seat of Arbitration is Beristal (RtQ1 118).

14. On November 1, 2009 the ICSID Secretary General registered for arbitration the dispute brought by Televative against Beritech.

Legal framework of the dispute

15. Beristan and Opulentia have ratified the ICSID Convention. Both Beristan and Opulentia are parties to the Vienna Convention on the Law of Treaties and members of the WTO (P. ¶15). They have signed and properly ratified the OBBIT (RtQ1 144).

ARGUMENTS

I. THE TRIBUNAL LACKS JURISDICTION TO DECIDE ON MERITS OF TELEVATIVE'S CLAIMS

16. The jurisdiction of this tribunal should be based on consent of both parties to submit the dispute for arbitration. Beristan submits that Televative may not bring its contractual claims (if any) against Beristan under umbrella clause of OBBIT and therefore rely on OBBIT as the basis for consent for arbitration (Section 1).

17. It is true that Televative seeks to portray certain of its claims as non-contractual (alleged expropriation, breach of FET standard). However, even those claims (along with contractual claims) are currently inadmissible as their resolution hinges on resolution of contractual claims (Section 2).

1. NO JURISDICTION OVER CONTRACTUAL CLAIMS SINCE THE DISPUTE DOES NOT FALL UNDER ARTICLE 10 OF OBBIT ("UMBRELLA CLAUSE")

18. Beristan has not consented to arbitrate contractual disputes with Televative over JVA before ICSID arbitration. Consent is the basic precondition to the jurisdiction of this tribunal.[1] Since it has not been satisfied in this case, the tribunal does not have jurisdiction.

19. The only basis for jurisdiction over contractual claims on which Televative relies is Article 10 of OBBIT. Below Beristan will show that the present dispute does not fall within the ambit of Article 10. However before proceeding to do that Beristan will demonstrate that the dispute over compliance with JVA is purely contractual and thus should not be examined by this tribunal from the perspective of compliance with any other provisions of OBBIT.

A. The present dispute over compliance with JVA is contractual in its nature

20. To decide whether there is a contractual dispute or a dispute arising out of OBBIT, it is necessary to establish what rules or provisions are alleged by Televative to have been violated.[2]

21. Televative claims that Beristan have improperly invoked the buyout clause in the JVA, that is that Beritech has not complied with the provisions of JVA establishing the

[1] ICSID Convention, Article 25

[2] HORN, P. 327

conditions under which buyout is permitted.[3] Thus, the dispute is about whether Beritech have acted in compliance with the rules governing protection of confidentiality and buyout procedure. Beristan would also stress that Televative admits that the present dispute is a contractual one.[4]

22. Beristan further submits that it is for this Tribunal to judge on the nature of the dispute submitted to it. Thus, mere reference by Televative to the provisions of OBBIT cannot be the proper basis for the Tribunal have jurisdiction. As Jan Paulsson put it in Pantechniki, "one cannot deem a person to be 10 feet tall."[5] This approach is also upheld by scholars. Professor Douglas noted that

> "*the claimant's own characterization of the legal foundation of its claims cannot be determinative because an investment treaty Tribunal is not a court of general jurisdiction with adjudicative power to determine any disputes between investors and states.*"[6]

23. The dispute at hand, irrespective of the Claimant's allegations, stays purely contractual, and as stated below it is moreover cannot be covered by the umbrella clause in the OBBIT.

B. Obligations of Beristan under the JVA are not covered by the umbrella clause of OBBIT

24. Article 10 of OBBIT provides:

> *"Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."*

25. Beristan submits that this provision covers only those obligations that are undertaken by a State in its capacity as sovereign or where those obligations are breached by exercise of sovereign authority. On the contrary, where the contract in question is purely commercial or alleged breach does not involve exercise of sovereign authority, such actions are not covered by Article 10 of OBBIT. In the present case, the JVA is a purely commercial transaction and therefore the breach thereof cannot be brought before the Tribunal.

26. Indeed similar views have been expressed in a number of previous cases dealing with similar clauses. For example, in *CMS* the Tribunal has analyzed the umbrella clause

[3] M., p. 6

[4] Ibid, p. 7

[5] Pantechniki v. Albania, ¶ 44

[6] DOUGLAS, p. 264

which is contained in Article II(2)(c) of the Argentina – U.S. Bilateral Investment Treaty and provides as follow, that Each Contracting Party:

> "*shall observe any obligation it may have entered into with regard to investments.*"[7]

27. That umbrella clause has the same wording as Article 10 of OBBIT.

28. Adressing the scope of this clause, the Tribunal concluded that:

> *"not all contract breaches result in breaches of the Treaty. The standard of protection of the treaty and obligations or a violation of contract rights protected under the treaty."*

29. Further the Tribunal stated that:

> *"purely commercial contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor."*[8]

30. Annulment Committee in *CMS* has not denied the above statement:

> *"Thus the Committee's finding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that "the Respondent breached its obligations <...> to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty."*[9]

31. This position was also confirmed by the Tribunal in *El Paso*, where the Tribunal stated that:

> *"The answer to the question raised above, that is, whether the existence of a so-called umbrella clause changes the Tribunals intermediary conclusion to the effect that it has no jurisdiction over purely contractual claims, and that it can only entertain treaty claims, is clearly in the negative. Indeed, the Tribunal has jurisdiction only over the treaty claims, the latter including, pursuant to the wording of Article VII (I) [of U.S. – Argentina BIT], the claims based on the violation of an investment agreement entered into by the foreign investor with the State as a sovereign"*[10].

32. The same approach can also be found in *Pan American*, where the Tribunal concluded that

> *"In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentina-US BIT, which states that "each Party shall observe any*

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[7] CMS, ¶ 296

[8] CMS, ¶ 299

[9] CMS Decision of the ad hoc Committee, ¶ 100

[10] El Paso, ¶ 86

> *obligation it may have entered into with regard to investments", does not elevate any contract claim into a treaty claim."*[11]

33. Therefore, the tribunals consistently denied umbrella clause protection to purely commercial contracts.

34. Similarly in this case, the JVA was a purely commercial contract, albeit significant for the security of Beristan. Beristan has agreed to act as a guarantor in this transaction, however not in exercise of its sovereign authority, since the facts of the case indicate that the guarantee's purpose was to provide financial comfort to Televative. The buyout of Televative's interest has not been carried out in exercise of Beristan's sovereign powers, and indeed not by Beristan at all.

35. Therefore, the JVA and the alleged violation thereof lacks required participation of Beristan and thus such alleged violation does not violate Article 10 of OBBIT. Accordingly, this tribunal does not have jurisdiction over the relevant dispute.

2. ALL OF TELEVATIVE's CLAIMS ARE INADMISSIBLE DUE TO PENDING CONTRACTUAL ARBITRATION BETWEEN BERISTAN AND TELEVATIVE

36. Beristan submits that irrespective of whether Televative's claims fall under the OBBIT, they should be dismissed, because all the parties have agreed to resolve their disputes in commercial arbitration.[12]

A. Televative's contractual claims should be resolved by commercial arbitration in Beristan

37. Beristan submits that Televative by signing the JVA agreed to the exclusion of any other forum to Beristan arbitration over the disputes relating to JVA. Thereby, Televative has waived its rights (if any) to refer such dispute to arbitration under OBBIT. In support of this statement Beristan draws attention to the formulation of dispute resolution clause which as follows is formulated in "exclusive" language:

> *"The dispute shall then be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended. Each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute."*[13]

38. In such circumstances the JVA disputes should be resolved by commercial arbitration. As observed by Professor Douglas

[11] Pan American Energy LLC , ¶ 109

[12] JVA (17)

[13] JVA(17)

> *"the parties' consent to investment treaty arbitration is no more 'solemn' than their consent to the submission of their contractual disputes to a different forum."*[14]

39. This conclusion is supported by consistent jurisprudence of previous arbitral tribunals. Thus, in *Saluka* Tribunal examined dispute resolution clause contained in sale purchase agreement on which Czech Republic based its counterclaims. The dispute resolution clause was formulated in "exclusive" language:

> *"All or any disputes or differences arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the UNCITRAL Rules, the seat of that arbitration being in Zurich."*[15]

40. The Tribunal noted that arbitration clause was expressed in "*mandatory terms*"[16] and that the counterclaims filed by the Czech Republic fell within the scope of the clause and, consequently, the Tribunal declined its jurisdiction and gave effect to the dispute resolution clause in the share purchase agreement.

41. In *Woodruff* case, in which the American–Venezuelan Mixed Commission of 1903 had dismissed a claim under a contract contained an exclusive jurisdiction clause in favour of the Venezuelan courts on the ground that

> "*by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission*." [17]

42. Thus, the Commission agreed to accept jurisdiction in event of denial of justice or unjust delay of justice, but the claimant in that case had never even initiated proceedings in the Venezuelan courts as it established in provisions of contract.

43. Furthermore, the dispute that Televative is trying to submit to this Tribunal is already before commercial arbitration in Beristan.[18] Since (i) Televative, Beristan and Beritech have agreed to resolve their disputes by such means; (ii) Televative does not claim justice would be denied to it in Beristanian arbitration, this tribunal should dismiss Televative's claims on the basis of *lis pendens* principle.[19]

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[14] DOUGLAS, p. 365

[15] Saluka, ¶ 52

[16] Ibid, ¶ 54

[17] RALSTON, p. 213

[18] P., ¶ 13

[19] M., ¶¶ 6 – 7

B. Televative's non-contractual claims are inadmissible

44. Beristan does not contest that claims arising out of OBBIT are independent and shall be separated from contractual claims.[20] But Beristan submits that these claims arising out of OBBIT are closely connected with contractual disputes (see ¶¶ 21-27 above), thus, to avoid the situation of parallel arbitration contractual dispute shall be resolved first.

45. The Tribunal in *SGS v. Pakistan* stated that

> *"At the level of jurisdiction, a claim has in its view been stated by SGS under both provisions [umbrella and FET clauses]. But, there being an unresolved dispute as to the amount payable, for the tribunal to decide on the claim in isolation from decision by the chosen forum under the CISS Agreement [the contract] is inappropriate and premature. The Tribunal holds that it has jurisdiction over SGS's claims under Articles X(2) and IV of the BIT, but that in respect of both provisions, SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually agreed process."*[21]

46. In *SGS v. Philippines* the Tribunal also came to the conclusion that it is the Host States courts, which have jurisdiction to resolve disputes arising out of the contract:

> *"But 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. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS's contract claim. Until the question of the scope or extent of the Respondent's obligation to pay is clarified – whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement – a decision by this Tribunal on SGS's claim to payment would be premature."*[22]

47. Beristan submits that it is impossible to assess whether Beristan's conduct meets the relevant standards until the contractual matter has been settled, the case should be found inadmissible.

II BERISTAN IS NOT LIABLE FOR ANY BREACH OF THE JVA

48. Beristan's liability arises only if Beritech is in default under the JVA (RtQ1 152). Beristan submits that this is not the case. Beritech has properly commenced buyout of Televative's interest in Sat-Connect. Televative's claim that is has been illegally

[20] CREMADES, p. 326

[21] SGS v. Pakistan, ¶¶ 162-163

[22] SGS v. Phillipines, ¶ 155

"prevented from completing its contractual obligations"[23] is misguided. Following the buyout of its interest in Sat-Connect it no longer had any substantive rights under the JVA.

49. Televative claims that Beristan committed a "material breach" of the JVA. Material breach is generally understood as a "breach of contract that is so substantial that it defeats the purpose of the parties in making the contract and gives the nonbreaching party the right to cancel the contract and sue for damages."[24]

50. Actions taken by Respondent do not anyhow result in material breach of the agreement as they were fully consistent with the JVA.

A. Legitimate invocation of Clause 8 (Buyout) of the JVA

51. Clause 8 of the JVA provides:

> *"If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement".*

52. To assure the legitimacy of invocation of Clause 8 of the JVA Beritech will show (i) the fact of disclosure of confidential information by Televative's personnel (ii) attribution of the disclosure to Televative (iii) compliance of the buyout procedure with the JVA (iv) material breach of the JVA (v) absence of any justification of the disclosure of information.

(i) the confidential information was disclosed by Televative's personnel

53. Televative's personnel disclosed confidential information to Opulentia. Determination of what constitutes confidential information is governed in JVA (4(2)), permission for dissemination of the said information is to be approved by the BoD, as well as it is for the BoD to decide whether it has been disclosed as it is the intra-corporate issue that has nothing to do with the Tribunal. The BoD is authorized by its parties to decide on the matter (JVA 4(1)). The information was confidential, because it consisted of trade secrets, technology, systems, encryption technology of the Sat-Connect project. [25]

54. Alleged disclosure of the information is firmly proved by the government defense analyst that has no direct relationship with Beritech. (RtQ1 162) in The Beristan Times' publication August 12, 2009 (RtQ1 178). Journalists have always been required to offer

[23] M., ¶ 15

[24] MERRIAM-WEBSTER'S DICTIONARY OF LAW

[25] M., ¶ 15; JVA 4(2)

some form of proof that the information they publish is legitimate.[26] Every journal verifies information before printing, especially when providing it in the manner of an affirmative proposition, as it makes the author responsible for his or her words.[27] Moreover, in the *Nicaragua* case, the International Court of Justice used the reports in mass media as an evidence for the purposes of international dispute.[28]

55. Therefore the fact of disclosure of confidential information is clearly proved in this case.

(ii) the disclosure is attributable to Televative

56. The disclosure is attributable to Televative because it was carried out by Televative's personnel seconded to Sat-Connect.

> *"Respondeat superior, a doctrine centuries old, is predicated on the assumption that an employer will be held responsible for the acts of an employee. The rationale for this view is succinctly expressed by the common law maxim qui facit per alium facit per se."*[29]

57. Clause 4(1) JVA imposes obligation to ensure observance of confidentiality requirement on both parties of the agreement. As Televative's seconded personnel actually committed the disclosure of condidential information, the responsibility for such a disclosure should be held on Televative as the party to the agreement.

(iii) buyout procedure is in compliance with the JVA

58. The approval of buyout was carried out in full compliance with the JVA and the bylaws of Sat-Connect. The meeting was and remained with quorum, the decision to approve buyout was made by the majority and the directors had sufficient notice of the meeting.

59. 6 members were present at the meeting on August 27, 2009, which complies the quorum requirement of the JVA.[30] The fact that one member left the meeting (Ms. Alice Sharpeton) does not render the decision void as no lost of quorum regulations are passed in Beristan (RtQ2, 8).

60. The following decision was made in compliance with the majority requirement (RtQ1, 149).

61. The meeting of BoD was held with a prior notice of the all BoD members about the day, the fact that only one Televative's appointed member preferred to come was the sole decision of the remained members. As for the absence of agenda proposition, the aim of

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[26] JACKAWAY, p. 69

[27] E.g. American Convention on Human Rights (1969) Article 13

[28] Nicaragua, ¶ 63

[29] Pennsylvania v. International Union of Operating Engineers at 469 F. Supp. 329

[30] P., ¶¶ 2, 4

such proposition is to inform BoD members of what is going to be discussed at the meeting, while in the present case, they already knew about it, as the same question arose on the previous 21 August meeting, and most of the members did not came just because they knew of the agenda and did not wish to take part in discussion (RtQ2, 208).

62. Therefore, the decision of the BoD of Sat-Connect on buyout was made in compliance with all the JVA and bylaw requirements.

(iv) actions of Respondent constitute a material breach of the Agreement

63. Invocation of Clause 8 is deemed legitimate under the JVA if the agreement is materially breached. Respondent submits that Televative breached confidentiality requirements of the JVA Clause 4(4), which Televative and Beritech have freely agreed to treat as "material breach."[31]

64. Evidence of the breach of confidentiality has been already addressed above. Thus admitting the presence of actual disclosure of confidentiality information by Televative, Beritech states that it directly leads to the material breach of the JVA.

(v) there exists no justification of the disclosure of information

65. Disclosure of the information in question was not permitted under the terms of the JVA. Disclosure is permitted when (i) the information is publicly accessible, (ii) the disclosure is required by law (iii) disclosure is necessary to enforce the terms of the Agreement. The burden of proving the facts underlying those exceptions is on Televative. Since there is no evidence substantiating them, Televative may not rely on them in this case.

66. Therefore, the invocation of Clause 8 was done in a proper way in compliance with the requirements of the JVA, to which both companies are parties.

<u>B. No impediments imposed to prevent Claimant from completing its contractual duties</u>

67. Claimant submits that its expulsion and forcible removal of its personnel prevents it from completing its contractual duties.

68. Actions of Beristan were solely aimed at assistance to Beritech in implementing the Sat-Connect BoD decision. As a guarantor to the JVA Beristan is entitled to ensure the proper fulfillment of obligations under JVA. Thus inability on the Televative's part to comply with the JVA resulted in the buyout of its interest. Nevertheless if it was not for the breach of agreement, Televative could have continued its participation.

[31] JVA 4(4)

69. Furthermore, now as the Televative's interest is already redeemed, Televative no longer has any contractual duties to impose impediments on.

70. Thus the negligent conduct of the Claimant authorized Respondent to carry out the expulsion.

III. THE OBBIT DOES NOT APPLY TO THE ACTIONS TAKEN AGAINST TELEVATIVE, AS THEY WERE TAKEN TO PROTECT ESSENTIAL SECURITY INTERESTS

71. Under the OBBIT certain actions of Beristan are excluded from the scope of protections granted by OBBIT to the investors. Under Article 9 those are the actions taken to protect Beristan's essential security interests. In the present case, even assuming that Beristan is responsible for the conduct of Beritech, even assuming the relevant actions constituted expropriation, they were taken to protect Beristan's essential security interests and as such are not covered by OBBIT.

72. Article 9 of OBBIT reads as follows:

> *Nothing in this Treaty shall be construed:*
> *<...>*
> *2. to preclude a Party from applying measures that it considers necessary <...>for the protection of its own essential security interests.*[32]

73. Beristan understands this Article as

> "*self-judging insofar as each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article.*"[33]

It is intended to

> "*provide flexibility in the application of international obligations, recognizing that necessity to protect national interests of a paramount importance may justify setting aside or suspending an obligation, or preventing liability from its breach."*[34]

74. Even in case the Tribunal would not find it self-judging, Beristan submits that it is of no importance in the present case whether or not the information in question was actually disclosed. It's rather relevant here that there were valid grounds to suspect Claimant of such disclosure and therefore Beritech's faith in Televative was compromised.

75. Essential security interests comprise

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[32] OBBIT, Article 9

[33] Sempra, ¶ 366

[34] Continental Casualty, ¶ 168

> "*interest indispensable to keeping the country safe from internal as well as external threats and the maintenance of the peaceful domestic order."*[35]

It also covers military and economic security of the State.[36]

76. Several segments of the Beristani armed forces intend to use the Sat-Connect system.[37] The disclosure of the information pertaining to this system to a foreign entity undoubtedly implicates essential security interests of any State.

77. Any measures performed by Respondent were solely designed to maintain its peace and security. Thus Beristan actions in question are justified on essential security grounds.

IV. BERISTAN FULLY COMPLIED WITH ITS OBLIGATIONS UNDER THE OBBIT

1. NONE OF TELEVATIVE'S ASSETS WERE EXPRORPIATED IN BREACH OF OBBIT

78. Televative's interest is currently in the process of being purchased by Beritech under the procedure envisaged by the JVA between them. It is unclear whether the Televative has its ownership title to shares in Sat-Connect, since they are held in escrow (RtQ1 138). However, even if Televative does not currently own the shares, Beristan did not expropriate them.

79. Expropriation "*denotes the taking of property by the state for the use of the state*"[38] or also as explained in *SDMeyers* as "*a 'taking' by a governmental type authority of a person's 'property'.*"[39] Since in this case Televative's shares in Sat-Connect are purchased by a private company, Beritech, there simply cannot be any direct expropriation by Beristan.

80. Below Beristan will demonstrate that it is not responsible for the conduct of Beritech or Sat-Connect and its actions do not constitute indirect expropriation.

(i) Conduct of Beritech and Sat-Connect is not attributable to Beristan

81. The mere fact that a state establishes a corporate entity is not a sufficient basis for the attribution of subsequent conduct of the entity.[40]

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[35] Continental Casualty, ¶¶ 170, 175

[36] Ibid, ¶ 175

[37] P., ¶ 6

[38] Tokios Tokeles, ¶ 117

[39] SDMeyers, ¶ 280

[40] MUCHLINSKI, p. 557

82. Like in the situation in *Lauder* in the absence of any proof that the "*actions which seriously interfered with the Claimants property rights",* i.e. invocation of the buyout procedure and the subsequent expulsion of personnel,

> *"were one of the State, <...> there can be no expropriation under the Treaty."*[41]

83. Beritech despite being a state-owned company is an independent and separate corporate entity, with its own management and BoD. There is only one state official on the BoD (RtQ1, 135). Obviously, one member does not have any substantial impact on the decision-making of the BoD and therefore Beristan does not control Beritech's BoD.

84. Beristan may be held responsible for the conduct of Beritech only if the latter (i) constitutes a state organ or (ii) is a body empowered to exercise elements of governmental authority or (iii) is controlled by Beristan.[42] None of this is true for Beritech.

85. Beritech is not a state organ. Under customary international law

> *"an organ includes any person or entity which has that status in accordance with the internal law of the State*."[43]

Beritech is not a state organ under Beristani law and therefore not a state organ in terms of international law.

86. For a body to be empowered with elements of governmental authority the test set out in *Toto Cosrtuzioni* can be applied: (a) implementation of State's projects, (b) being under administrative control of a State authority, (c) funded from the State budget.[44]

87. No specific projects are given to Beritech from the State. Beritech carries out its activities in conformity with the Telecommunications Act 1996 passed in view of the privatization of telecommunication services in Beristan (RtQ1 166).

88. Beritech independently provides telecommunication services in Beristan (RtQ1 161). It is not subjected to any specific administrative control; it is free to enter into contract and is liable for its breach under JVA. Moreover, the Telecommunications Act does not

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[41] Lauder , ¶ 202

[42] Articles 4,5,8 of ILC Articles on Responsibility of States for the Internationally Wrongful Acts

[43] Article 4(2) of ILC Articles on Responsibility of States for the Internationally Wrongful Acts; Economy Forms Corp ***v.*** Government of the Islamic Republic of Iran (1983) 165 Iran-USCTR, ¶ 66

[44] Toto Cosrtuzioni, ¶ 51

mention Beritech as a specific provider, thus the application of the Act is extended to every company in Beristan (RtQ2 266).

89. Beritech is not financed from the State budget. It has its own sphere of operations, which is not limited to JVA project (RtQ1 161) and is quite a successful enterprise itself. The mere fact of being a state-owned company does not result in directly financing of it. Beritech has its own capital autonomous from the State budget (P. ¶ 2).

90. Finally, Beritech is not controlled by Beristan. Under international law, in order to prove attribution of the actions of a non-state actor to a State it is to be shown that entity exercises governmental authority.[45] However in the present case actions of Beristan were "*essentially commercial rather than governmental in nature*."[46] Protection of commercial secrets is one of the most important principles of business; therefore, the possibility to protect commercial interests is a right that belongs to Beritech as an entity undertaking commercial activity. Thus the decision of the BoD of Sat-Connect, which includes members appointed by Beritech was only the realization of commercial activity that is not functionally connected with Beristan.

91. The same analysis may be applied to the managing system of Sat-Connect. Sat-Connect comprises 9 members in the BoD, 5 of which in accordance with the proportionality of the shares are appointed by Beritech. It is to be underlined, that none of the management personnel in Sat-Connect is directly appointed by Beristan (RtQ2 268). Therefore, Sat-Connect is not a body empowered with elements of governmental authority as none of its parties exercise one and

> "*nemo plus juris ad alium transferre potest, quam ipse haberet (no one can transfer to another a greater right than he has himself)*."[47]

92. Therefore, actions of Beritech and accordingly of BoD of the Sat-Connect do not fall within the scope of the definition of expropriation as an action taken by the State. No material action has been taken by the State in this case as to expropriate Claimant's interest in the joint-venture company.

(ii) Nothing in Beristan's conduct amounts to indirect expropriation

93. Beristan's conduct has not resulted in indirect expropriation.

> "*A creeping expropriation constitutes an expropriation accomplished by a*

[45] MUCHLINSKI, p. 557

[46] Obchodni Banka, ¶ 20

[47] Maletzky and Another v. Freer and Others, ¶ 16

> *cumulative series of regulatory acts, malfeasance, and omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign investor of the value of its investment.*"[48]

94. Actions of Beritech do not meet the aforesaid criteria. The only regulatory act in the case was Executive Order, passed in a response to the unlawful refusal of the Claimant's personnel to leave the project site. Before this enforcement action was taken a request for vacation of the site was sent 14 days prior to the expulsion (on August 28, 2009). Therefore, the said action does not constitute an unreasonable interference carried out by the State, but only a lawful regulatory measure of response on the wrongful act.

95. As found by various Tribunals

> *"for any expropriation to occur the state must deprive the investor of a "substantial" part of the value of the investment."*[49]

96. By the time of expulsion Televative's shares along with the USD 47 million of monetary investment in the Sat-Connect were already purchased to Televative (RtQ1 138). Thus it was not deprived of the investment.

(iii) Even assuming Beristan is responsible for termination of the JV, termination of commercial contract does not constitute expropriation

97. Beristan is a guarantor under the JVA in the present case, i.e. it only acts as a subsidiary in case of the breach of the contract, not exercising the governmental authority. Therefore, even in case the Tribunal will find that Beritech breached its contractual obligations when applying buyout provision, mere breach of a contract does not result in expropriation.

98. As was shown by Tribunals on the similar occasions, for example in the award in *Azurix:*

> "*contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract*."[50]

99. The similar approach is used by the Tribunal in *Waste Management:*

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[48] REISMAN, p. 122-123

[49] Tokios Tokeles, ¶120; CMS, ¶ 262; Waste Management, ¶155

[50] Azurix, ¶ 315

> *"it is not the function of international law on expropriation to place on State the burden of compensating for the failed business ventures, absent arbitrary intervention by the State."*[51]

Thus even if the JVA was illegally terminated, Televative's remedy is recourse to the contractually agreed forum – arbitration in Beristan (JVA ¶ 17). It is only if there is denial of justice in this forum, may the argument that Televative's investment has been expropriated be raised.[52]

100. Therefore, as termination of the JVA is strictly a commercial act Beritech can not be internationally liable for it.

(iv) Even if Televative's investment has been expropriated, it has been expropriated in full compliance with the OBBIT

101. In any event, even if there was taking in this case, it complied with all requirements of OBBIT. It was i) in the national interest ii) against immediate full and effective compensation, iii) on non-discriminatory basis, iv) in conformity with all legal provisions and procedures.[53]

102. The alleged taking was carried out in the national interest. One of the ultimate purposes of the Sat-Connect project is to improve the satellite and communications technology for the Beristian armed forces (P. ¶ 6). Hence, it is "*the strategic interest*"[54] for Beristan to ensure that no other country would have any access (even the future possibility of such an access) to the encryption ciphers, keys and pads of the future production of the Sat-Connect. Since Televative together with its personnel provided valid grounds for suspecting them in disclosure of confidential information to the Government of Opulentia it was in the public interest of Beristan to discontinue Televative's participation in the project.

103. As stated in *SDMeyers*

> *"expropriations that are conducted for a public purpose, on a non-discriminatory basis and in accordance with due process of law - are "lawful" under Chapter 11 [of NAFTA] provided that compensation is paid in accordance with the <…> fair market value of the asset <… > formula."*[55]

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[51] Waste Management, ¶ 177

[52] R. JENNINGS, p. 927; Feldman, ¶ 94

[53] OBBIT, Article 4(2)

[54] ADC, ¶ 392

[55] SDMeyers, ¶ 308

104. The buyout of interest was made against immediate full and effective compensation. Immediately after the decision to suspend Televative's shares in Sat-Connect was adopted, all the shares together with the compensation composed of the total monetary investment of Claimant in the Sat-Connect project, i.e. USD 47 million, were put in escrow, so that Beritech would be able to get it as soon as all the proceeding in the arbitral tribunal would be finished. This compensation comprises all the possible money that Claimant could be entitled to as the loss profit it claims to have a right to is not generally included in the compensation.

105. Under OBBIT Article 4 the just compensation shall be equivalent to the real market value of the investment prior to the moment in which the decision to expropriate is announced. In the present case money was granted right after the decision was made, and thereby before the public announcement of such a decision. Furthermore, the real market value corresponds the value of assets which are represented by shares here, and with the investment in the project.[56] Thus the compensation requirement is fully met in the case.

106. In sum, all legal requirements have been complied with in the present case. The decision to suspend shares and to redeem the investment of the Claimant was made at the meeting of the BoD each of whom was properly notified (RtQ2, 208) as required for commencing the buyout procedure (RtQ2, 242) by the majority of the voters while the quorum requirement was fully met.

107. Thus, even assuming the Televative's interest was expropriated, it was expropriated in accordance with the OBBIT.

2. DISCRIMINATION

108. Article 2 of OBBIT states

> "*the companies and firms <…> shall in no way be subject to discriminatory measures."*

109. Various tribunals that dealt with discrimination questions do usually apply model set out either in *ELSI* or *Genin,* that

> "*discriminatory treatment is to give foreign investors a less favorable treatment than that granted to nationals."*[57]

110. In order to establish discrimination Televative needs to prove: i) the likeliness of comparators, ii) consideration of the relative treatment received by each comparator in like circumstances, iii) justification of the any difference so found.[58]

[56] See, e.g. INA, ¶ 380

[57] BG, ¶ 350

[58] Thunderbird, ¶ 170

111. There are manifestly no facts to satisfy all of those criteria.

112. Firstly, like competitors constitute the ones, who "*operate in similar circumstances as commercial competitors with."*[59] In the case at hand the expelled personnel and their potential like competitors operated within the same joint-venture company and executed practically the same duties. However the very reason for the expulsion was a malicious conduct of Televative's personnel (disclosing of the confidential information they were deemed to keep in secret in compliance with Clause 4 (3) JVA). And the potential competitors are not suspected of any acts of the similar kind. Thus the competitors do not operate in similar circumstances.

113. Secondly, the treatment of competitors were relevant in like circumstances. Tribunal in *SDMeyers* stated that

> *"the concept of like circumstances invites examination of whether a non-national investor complaining of less favourable treatment is in the same sector as the national investor. "* [60]

114. The operating sector of both the Televative's personnel and the appointed one is practically the same. However, for the treatment to be irrelevant in the like circumstances, Claimant

> "*has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality.*"[61]

115. The expulsed personnel of Televative were not composed only of nationals of Opulentia, as Televative is a multinational enterprise (RtQ1 178). The only job requirement provided for the new employees of Sat-Connect was the relevant expertise in the Beristan labor market (RtQ1 171). Thus, issuance of Executive order was not specifically directed against Televative's employees on the basis of their nationality.

116. And finally, there is no need to provide any justification on the differences as long as they naturally can not be found in the present case. Though even if the treatment would be found different, while addressing the like circumstances one

> "*must take into account circumstances that would justify governmental regulations that treat differently in order to protect the public interest.*"[62]

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[59] EC-Bananas, ¶¶ 7.323, 7.329

[60] SDMeyers, ¶ 248

[61] Noble Ventures, ¶ 180

[62] SDMeyers, ¶ 180

117. Expulsion of Televative's personnel was a measure, aimed at prevention of the posterior disclosure of confidential information to various subjects, which constitutes a justification for discrimination, as Tribunal in *Corn Products*[63] found.

118. Therefore no discrimination can be found in the actions of Beristan in the case at hand.

3. BERISTAN ACCORDED TELEVATIVE FAIR AND EQUITABLE TREATMENT

119. Article 2 of OBBIT provides:

> "*Both contracting parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment*"[64]

120. Fair and equitable treatment encompassed under customary international law such fundamental standards as good faith, due process, non-discrimination, and proportionality.[65] As the Tribunal in *Waste Management* stated that

> "*the standard is to some extent a flexible one which must be adapted to the circumstances of each case*"[66]

121. As stated by the same tribunal:

> "*Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."*[67]

122. Beristan will demonstrate below that the facts of the present case do not support finding of any form of unfair or inequitable treatment.

A. Beristan did not act arbitrarily

123. Beristan states that the issuance of the Executive order was not arbitrary, as it was not an "*act which shocks, or at least surprises the sense of judicial propriety*."[68]

124. Beristan submits to apply the test pointed out in *Azurix* in order to determine whether an action is or not arbitrary: (i) it should be taken by the proper authority, (ii) for the proper

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[63] Corn Products, ¶ 137

[64] OBBIT, Article 2 (2)

[65] MTD, ¶ 109

[66] Waste Management, ¶ 99

[67] Ibid, ¶ 98

[68] ELSI , ¶ 128

purpose, (iii) because of relevant circumstances, (iv) and should not be patently unreasonable.[69]

125. Firstly, Executive order was issued by the Government of Beristan, which is undoubtedly the proper authority for administrating activities of CWF. CWF is actually the civil engineering section of Beristan army and is therefore responsible for ensuring the stability in the operation of projects on the territory of Beristan (P. ¶ 11).

126. Secondly, Executive order was issued for the proper purpose of removing from the project's site people that were not allowed to stay there (RtQ2 248). In the like situation in *ELSI* the tribunal found that the requisition order did not violate FET standard as by the time of requisition the shareholders no longer had rights of control and management over *ELSI*.[70]

127. The same could be found in the situation in question. By the time the Executive order was issued, the 14 days period for the removal of all the seconded personnel have already passed,[71] and moreover, Televative's rights towards the operating of the project finished on the August 27, 2009.

128. Thirdly, the circumstances under which the order was issued were relevant. After September 11, 2009 Televative's personnel had no lawful ground to stay within the territory of the project in accordance with the buyout provision enacted on August 27th decision of BoD.[72] Thus it was the "*statutory obligation*"[73] of the Beristan Government to protect the interests of the other participants of the project and Beristanian national security.

129. Furthermore, Claimant failed to provide the BoD of Sat-Connect with any arguments in its defense, and preferred mostly just not to come to the meeting on August, 27, 2009, while being informed of it to take pace, and thus precluded Respondent from having any valid grounds not to believe in the disclosure.

130. Fourthly, it was a reasonably expected reaction to the refusal of the Claimant's personnel to leave the project after the 14 day term provided to comply with the notice issued to them. Sat-Connect is no doubt of significant importance for Beristan if to speak about

[69] Azurix, ¶ 386

[70] ELSI, ¶ 100

[71] P., ¶ 11

[72] P.,¶ 10

[73] Genin, ¶ 370

the experimental telecommunication project it is operating, but it was not merely for this specific project that CWF would exercise their regulatory functions. Sat-Connect did not have any other possible way to solve the situation apart from with the help of the CWF.

131. In addition, no arbitrariness could be found here as it was also the risk for the project that the operational personnel, responsible for it, [74] would be removed. It could have taken certain time to find the proper replacement, but the BoD took the hazards in order to protect the project from the worse danger. In the like situation the mere suspicion of disclosure could have resulted in the proper action, not to say about the affirmation of an independent from the company management (RtQ1 162) government defense analyst.

132. No specific assurances on the investment have been made by Beritech towards Televative (RtQ2 253). The investor must take the conditions of the host State as he finds them. He cannot make a subsequent complaint if his investment fails merely because of laws, policies which were in place at the time of investment.[75]

133. Therefore, Beristan's actions do not meet the test requirements for arbitrariness. On the contrary, Beristan acted in a reasonable and lawful manner when issued the Executive order.

B. Respondent acted in good faith

134. As it was stated in *Genin*, once it is established that the measure is justified, in order to amount to violation of the BIT,

> *"any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action."*[76]

135. Good faith requirement encompasses two possible variants of interpretation, i.e. in contractual relationships in accordance with article 1.7 of UNIDROIT Principles of International Commercial Contracts (RtQ1 136), and as a general principle of international law which is often included in FET standard. Though absence of bad faith does not prove the standard being met, the presence, on contrary of good faith effort on the part of the state agencies to fulfill the requirements of host State law will be a powerful indication that the standard has been met.[77]

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[74] M., ¶ 15

[75] McLachlan, p. 237, ¶ 7.107

[76] Genin, ¶ 371

[77] Dolzer/Schreuer, p. 100

136. Beristan will further address the following interpretation of the good faith principle:

> "*the long-term relationship in which the investor provides most of the required resources at the outset of the project expecting to receive a fair return in a stable relationship within the legal order of the host state thereafter."*[78]

137. Respondent affirms that it executes all the investor-relating actions in full consistency with the preamble of OBBIT, which is aimed at establishing:

> *"favorable conditions for improved economic co-operation between the two countries, <...> stimulating business ventures."*[79]

138. The issuance of the Executive Order was designed to fulfill the established aim, so that the stable relationships between the countries remain the same (RtQ1 147). It is also to be stated that the decision to use the CWF was adopted only after the refusal of Televative's personnel to leave the project within the prescribed time limit.

139. September 11, 2009 was the day when 14 day period finished and when Televative's personnel had no more legal grounds to be present there. Thus the expected reaction of any company on such negligent conduct of the expelled party would be asking the CWF or any organization of the similar kind for assistance. The prompt reaction of Respondent thus was aimed at preventing the continuation of the conflict situation, and no more than that.

140. As stated in *Genin*, presentation of "*ample grounds for the action taken*" [80] indicates that no violation of the fair and equitable treatment standard has occurred. Respondent presented in this case various reasonable grounds for the decision. Therefore, Responent was not in violation of fair and equitable standard.

141. Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created.[81] There is no evidence that issuance of the Executive Order, and the consequent expulsion of personnel were not in consistency with the initial aim of such a procedure, as the CWF is the organization the activity of which is limited to solving the conflict situations within the country of Beristan.

142. Thus Beritech acted in accordance with good faith principle providing foreseeable conditions for the investor.

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[78] DOLZER/SCHREUER, p. 5

[79] OBBIT, Preamble

[80] Genin , ¶ 367

[81] DOLZER/SCHREUER, p. 7

C. Due process requirement was fully met by Respondent

143. Respondent understands the due process constitutes one of the elements of FET, since

> "*the legal procedure must be of nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."*[82]

144. Respondent claims that Claimant was provided with all the possible variants within Beristan to address its possible claims at the local Court. Televative had a chance to file a protest or at least express its view on the situation both in the BoD meeting on August 21, 2009, were the possibility of invoking buyout provision was discussed (RtQ1 169) and on August 27, 2009, were the voting concerning the actual invocation of buyout took place. However it did not take the opportunity to do it.

145. Usage of administrative powers by the host state for improper purposes or inconsistently leads to the breach of the requirement[83]. Though it is true that Executive Order could not be appealed, but indeed it is not the validity of Order to be in question here, but the BoD decision that it was passed in pursuance of. While Respondent affirms that the decision was made in full consistency with the bylaws, Claimant, however, had an opportunity to appeal this decision; no impediments were imposed on it to do so.

146. Therefore, the actions of Beristan did not lead to the violation of due process.

Respectfully submitted,

Team Waldock

[82] ADC, ¶ 435

[83] McLachlan, p. 234