

FDI MOOT 2010:

Outline – 1st meeting, July 14, 2010:

- a) věcná část
- b) sponzoring
- c) hotely a letenky (mail Zdeněk Nový, confirmation of payment)
- d) assignments na příště (studijní materiály – Subedi, Shaw, Douglas, UNCTAD, články apod.)

Pleadings:

- 1) Jurisdiction of ICSID in view of Cl. 17 of JV Agreement (exclusive forum selection clause)
- 2) Jurisdiction of ICSID over the contractual claim by virtue of Art. 10 (observation of commitments)
- 3) Material breach of the JV Agreement by Beristan – preventing of completing contractual duties of Televative connected with substantial future profit
- 4) Substantial BIT claims – expropriation, discrimination, FET (Art. 2, 4, 10 of the BIT), general Int. Law or Treaties
- 5) Essential security clause as a defense

Můj brief:

1) JURISDICTION:

- Respondent: separate arbitral proceeding issued, Televative did not respond – did not try to settle it amicably
- Art. 10 – **umbrella clause** – jurisdiction over contractual claims, where state assumed obligations
- Art 11 – Dispute Settlement:
 - o obligation of state under this BIT – contractual claims by virtue of Art. 10 as well
 - o **waiting period** (Schreuer článek) – 6 months – jurisdictional or procedural requirement?
 - Dolzer – procedural aspect of consent, however practice is not uniform (case law: Dolzer, s. 249)
- **Forum Selection Clause (FSC) in JV Agr. – Vivendi I** (exclusive FSC does affect the right to go to Inv.Arb. to pursue violations of the BIT; but close link with the contract – resort to domestic courts? – Annulment Committee: state can breach a contract and not a BIT and vice versa – para 219; !!! exclusive FSC cannot serve as a bar to the application of the BIT – paras. 95, 96, 101, 103)
- !!! Contract claims are subject to FSCs – but ICSID jurisdiction is not affected as to the BIT claims (**CMS v. Argentina** – paras. 70-75; **SGS v. Pakistan** – paras. 43-74, 143-147; **Azurix** paras. 26-36, 75-79, **Enron v. Argentina**, paras. 89-94; **Eureko v. Poland**, partial award, paras. 81, 89, 92-114) – v našem případě je ale umbrella clause, tzn. porušení smlouvy se státem je “povýšeno” na porušení BIT !!!
- Dolzer, s. 220 – “undesirable practice of ‘claims splitting’ can undermine the object and purpose of BITs” – podporuje tvrzení, že porušení tohoto kontraktu by mělo být přezkoumáváno ICSID, resp. v co nejmenším počtu paralelních řízení
- Přístup k Umbrella clause – divergentní od r. 2003 (**SGS v. Pakistan**, paras. 167-173), do té doby tradiční pro investor příznivý výklad - VCLT – Art. 31 (**Noble Ventures v. Romania**, para 51) – další case law prozkoumat hlouběji, jsou zde rozdílné přístupy (**El Paso v. Argentina**, p. 72-74, 77 et seq.; **Pan American v. Arg.**, p. 101-103, **SGS v.**

Philippines, p. 119, 128, 155; *Eureko v. Poland*, p. 246-248, *Siemens v. Argentina*, p. 206, *Impregilo v. Pakistan*, p. 223) + článek o BIT X Contract claims!!!

- Requirement of CONSENT TO JURISDICTION:
 - o obsažen v BIT – Art. 11 doplněn o Art. 10, tzn. contractual claims as well.

2) SUBSTANTIAL PART:

- **Attribution** of acts and omissions to Beristan: - guarantor, acted on the Beritech's "notice"
- **Arbitrariness:**
 - o Beristan had an opportunity to respond to the charges of the leak of info:
 - acted arbitrary
 - lack of due process – forcible removal based on “**executive order**,” Televative no opportunity to challenge it in that moment (less restrictive measures available)
 - **abuse of rights** – in order to employ Cl. 8 of JV Agr. (Buy-out), there should have been some sort of proceedings attempted to acquire a legal title (executive order without Televative being part in not sufficient)
 - o *ELSI case*, para. 124, 128 + *dissent Schwebbel* – prohibition of arbitrariness as an obligation of result, not a conduct!
- **Expropriation:**
 - o ten článek má podivně dvě části, jedna se týká realizace vlastnických práv a zákazu jejich omezení (viz další odrážka) a druhá je klasická expropriační klauzule. Takže scope je širší, než bývá zvykem.
 - o Art. 4.1.1. – “permanent or TEMPORAL LIMITATION of joined rights of ownership, possession, control and enjoyment” (Televative is not able, at least temporarily, to enjoy its rights)
 - o legitimate expectation
 - o Podmínky vyvlastnění: !!! provided by law + by JUDGMENTS OR ORDERS OF COURTS HAVING JURISDICTION !!! – **executive order does not satisfy**
 - o difference between the value under the BIT and under the JV Agr. – full market value!
 - o **jak chrání mez. smlouvy IP?**
- **Discrimination:**
 - o expulsion and evacuation of Televative personnel without any proceedings (breach of minimal standard)
- **Contract claims X BIT Claims:**
 - o Art. 10 – “**umbrella clause**” – Beristan as a guarantor of the JV Agr. – Televative was prevented from peaceful completion of his contractual duties
 - o naše Umbrella clause (UC) je de facto identická s britskou modelovou BIT, další viz German Model BIT, ECT (Art.10.1)
 - o rationale for UCs is better investor's security, **safeguard for excesses of a host state!**
 - o **abusive use of Cl.8 of JV** – absence of good faith
 - o **Applicable law?** (tady bych rád, kdyby mi s tím mohl pomoci Saša) – host state (*MINE v. Guinea*, dec. on annulment) + international law (Art. 42 ICSID)
 - BIT as a primary source (*AAPL v. Sri Lanka*, paras. 18-24; *Wena Hotels*, paras. 78-9; *LG&E*, para. 85, 97-8), ale jinak se na to diva *SOABI v. Senegal* – bylo použito pouze vnitrostátní právo (paras. 5.02 et seq.), můžeme použít pro Respondenta.
 - Art. 42 ICSID – “corrective role of Int. Law” – i.e. prevails in case of conflict (*CDSE v. Costa Rica*, para.64-5; *Amco v. Indonesia*, resubmitted case, award, para.40; *LG&E*, para.94)

- Využití i **Preservation of Rights clause** (Art. 14 of the BIT), která a contrario vylučuje aplikaci pro investor méně příznivé národní právo (*Middle East Shipping*, para. 87)
 - **BIT PREVAILS OVER ANY OTHER RULE LESS FAVOURABLE !!!**
- **Breach of JV:**
 - **right to complete contract as a protected right** (Art. 1.1.c of the BIT – “...any right of a financial nature accruing by...contract.”)?! – recognized in by domestic law (JV Agr. where the state is a guarantor) as a valid contract, not disputed by Respondent
 - what establishes the facts of the breach? what establishes whether there was a breach of contract or not? – **DOMESTIC LAW!** – s tímto je třeba se nějak poprat!! (*MTD Equity v. Chile*, paras. 118, 204) – **domestic law is a part of applicable law**, not a fact to be proved!!!! – nějak to hrát na nedodržení standardů due process
 - **můžeme užít vnitrostátní právo o vyvlastnění**, které známe díky clarifications!!! – “Private property shall not be taken for public use without just compensation and due process.” – nebyl due process!
 - Newcombe nabízí tuhle formuli pro posuzování contractual claims:
 - contractual rights – protected as a protected investment
 - contractual obligations – protected by umbrella clause
 - analysis of the alleged breach:
 - 1st – analysis under domestic law
 - 2nd – analysis of a breach of the BIT
 - **co se týče porušení JV Agr. jako porušení BITky, pokusil bych se argumentovat tím způsobem, že šlo o porušení FET (abuse of rights, arbitrariness, lack of due process). Budeme to brát take jako expropriaci a zde, můžeme argumentovat i porušením vnitrostátního práva (due process) a stejně tak BIT (Art. 4.1.1 ...by judgments or orders of courts or tribunals having jurisdiction).**
- **Due Process:**
 - unfairness and lack of transparency in administrative process (e.g. *Waste Management*, para. 127) – forcible removal and evacuation of personnel
 - inappropriate considerations (*TECMED*, paras. 209; *Metalclad*, para. 92-3)
 - usually part of a breach of FET – failure of providing a notification of confiscation – *Middle East Shipping*, para. 143; v našem případě taktéž stát neposlal žádnou výzvu, že majetek dojde k silovému postupu. Notification zaslal Beritech jako soukromá osoba, která nedisponuje silovými složkami
 - CWF expelled Televative BEFORE Beritech opted for arbitration!!!
 - **zvážit, co je object and purpose of Buy-out clause!**
- **National Security:**
 - ...which states determines! – is it self-judging? can ICSID decide on whether there was such an interest?
 - Opulentia is situated within Euphonia
 - napadlo mě na příští kolo “Requests for clarifications” se zeptat, zda-li všechny BIT Beristánu mají tuhle klauzuli, a pokud ne, tak argumentovat MFN a Preservation of Rights clause, že se tohle pro Claimanta nemusí použít. Já vím, jde to asi proti object and purpose, ale MFN je přeci kouzelný standard ;)
- **Preservation of Rights clause – Art. 14 of the BIT**