

●RESPONDENT

●*Outline:*

MERITS:

1 Respondent has not committed material breach of the JVA

2 Respondent has not violated any substantive standards of the BIT, nor any provisions of C.I.L.

- Respondent has at all times treated Claimant and its investment fairly and equitably
- Respondent has not violated non-impairment standard in Art. 2(3) the BIT
- No violation of Art. 4 – prohibition of unlawful expropriation – took place

3 Respondent may rely on the Essential security defence in Art. 9 the BIT

● *Respondent has not committed material breach of the JVA*

- Inapplicability of the rules on attribution
- Alternatively, no acts of Beritech attributable to the state
- inadmissibility of Claimant's contractual claims
- proposed effect of the UmCI and applicable law to the issue
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1a) Inapplicability of the rules on attribution

- Obligations under UmCI may arise under various legal systems, i.e. Also under municipal law – from the contract such is the JVA
- JVA is municipal agreement:
- obligations are determined by the law of Beristan
- different parties
- not the purpose of the UmCI to change the parties to the municipal obligations (CMS Annulment)

2b) Alternatively – acts of Beritech are not attributable anyways

- ILC Draft Articles
- referring to Arts. 4-7 – Beritech has no governmental or equivalent function; it is not an organ of the state

- Respondent assumed only a role of guarantor (therefore a distinct person)
- Respondent was never called upon to perform this role
- regarding Art. 8 – according to the Commentary deals also with corporations,
- Respondent owns 75% share solely for commercial purposes
- Commentary – entity must be controlled or directed in order to achieve a particular result (e.g. The buy-out) – cannot be inferred from facts, Claimant did not provide any evidence either

3c) Claims are inadmissible

- Essential basis lies in the contract and its violation
- Even when the ICSID upholds jurisdiction, it shall leave up a determination of the scope, extent and alleged breaches of obligations of any party to the contractual forum – STAY THE PROCEEDINGS (*SGS v. Philip, Vivendi Annulment, Douglas*)
- only then it shall adjudge upon the alleged breaches of BIT, when contractual obligations are duly determined

4d) Effect of UmCI

- UmCI, we submits, protects only against breaches of contracts that only sovereign can effect (changes in law, hampering a possibility to entertain a claim) – *Sempra, El Paso*
- no such interference took place – Respondent emphasizes:
- there had not been any hint of disagreement from the part of Claimant, until the submission to the ICSID
- Alternatively:
- CWF – had a different purpose, justified by acting to eliminate a threat
- newspaper article – that was not an incitement for Beritech to commence the Cl. 8 procedure
- when ICSID deems acts of Beritech attributable and UmCI as protecting also against a simple breaches, we want to point out to the analysis under the applicable law:
- Cl. 17 agreement as to the applicable law: „*in all respects governed by law of Beristan*“
- JVA is a municipal agreement
- No provisions breached, buy-out was in conformity with bylaws, quorum satisfied
- better to leave up for the contractual forum
- **Alleged breaches of substantive standards**
- claims arise from the same set of facts

- therefore we want to emphasize certain fact, relevant for argumentation applicable to all substantive claims

- fact of not complaining against any acts of Beritech, nor respondent at the time rather tends to show, that there was no disagreement from the side of Claimant**

- failure to seek remedies before national authorities/contractual forum disqualifies Claimant's international claims***

- not because of Local Remedies rule, but because of very reality of not complaining makes for the State difficult to infer a possible disagreement***

- support:**

- Lauder: „ *The failure to invoke the Treaty or to advance any violation of the obligations of the Czech Republic, when now disputed actions were taken, tends to show that no violation of property rights were committed at that time.* “

- Generation Ukraine: „*failure to seek redress from national authorities disqualifies Int. Claims, not because the Local Remedies rule, but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable effort by investor to obtain correction.* “

- this applies equally to all claimed substantive standard violations

5No violation of FET

- According to Art. 2(2) of BIT – FET represents a part of C.I.L.

- Respondent's assertion that C.I.L. In the area of treatment of alien's property includes only the 3 areas (Sornarajah, Newcombe, US Uruguay BIT

- protection against violence of non-state actors

- denial of justice

- due process

- other C.I.L. must be proved by Claimant to exist

- in the present case only an alleged **due process violation** can be claimed:

- in Int.Law authorities violation of due process were defined as (ELSI, Genin):

- wilful neglect of duty, act which shocks a sense of judicial propriety

- nothing reaching the threshold took place

- It has to be an act of sovereign

- can be referred only to the acts of CWF

- again, Claimant left voluntarily, Respondent viewed it rather as agreement with the acts

- investment was already terminated by the Buy-out procedure!

- CWF had a different purpose – essential security!

- Legitimate expectations
- specific represented only by guarantor's role
- was not called upon
- general – legal framework relied on:
- no change of the host state law

6 No infringement of non-impairment standard in Art. 2(3) BIT

- Art.2(3) prohibits to subject “management, maintenance, enjoyment, transformation, cessation and liquidation of investment” to unjustified or discriminatory measures
- DISCRIMINATION – nothing as it's a relative standard (Pope&Talbot, S.D.Myers) – no appropriate comparator
- UNJUSTIFIED – narrower than unreasonable or arbitrary
- according to the ordinary meaning (VCLT, 31(1))
- justification of some sort must be provided – it does not require to subject this J. to any other criteria
- J = acting to eliminate a threat to national security (CWF), in case Beritech's actions attributable – invoking a terms of contract
- Even reasonableness satisfied:
 - acts to be R. they have to have a rational relationship to the legitimate governmental policy (Saluka, LG&E)
 - Arbitrary – wilful disregard of law (Azurix), extreme insufficiency of action (Genin), even a bad faith (Genin)
- Nothing reaching this threshold:
 - threat to national security (legitimate national defence policy cannot be confused with unreasonableness)
 - terms of the contract

7 No unlawful expropriation took place:

- We pray the Tribunal to dismiss this claim at hand as lacking any basis in facts, for the following:
 - a) basic precondition of expropriation is to be it an **involuntary taking**
 - Claimant agreed with buy-out Cl. In the JVA
 - remained personell left voluntarily and CWF were not enforcing the contractual terms
 - no complained filed, no explicit or implicit manifestation of disagreement from the view of Respondent, until the submission to ICSID

- b) Once again, the **fact of not complaining** disqualifies the Claims (*Generation Ukraine, Lauder*)
- c) Alternatively: It must be **distinguished between a mere breach of contract and expropriation of contractual rights**
 - emphasized by various investment awards (*Azurix, SPP. v. Egypt, Waste Management*)
 - especially *Parkerings Compagniet v. Lithuania* – 3 cumulative conditions:
 - use of sovereign powers
 - in the present case (when CWF deployed investment already terminated; CWF had a different purpose)
 - investor has to be prevented from bringing its claim
 - nothing like that, Cl. Could have done so
 - substantial decrease of value:
 - decrease of Sat-Connect’s (Beritech’s) decision, which Respondent does not view attributable to it
 - contractually agreed amount of compensation is held escrow – no total loss
 - Agreed consequence of the breach of contract cannot be deemed as an expropriation**

●**Respondent is allowed to rely on Art. 9 of the BIT – essential security exception**

- for 3 reasons:
 - 1) Art. 9 is a self-judging clause
 - 2) ICSID has no power of review, except for the test of Good Faith
 - 3) Art. 9 was invoked in good faith
- Ad 1) wording of clauses using “it considers..,” “it determines” related to the phrase “necessary for the protection of its essential security interests”
- is self-judging
- this clause grants a State a sole discretion to determine the clause’s scope and extent of application (as a dicta in *Sempra, CMS Annulment, LG&E*)
- State is a sole arbiter
- Ad 2) standard of review limited to the Bona fidei test

- (ICJ ruling Djibouti v. France, interpreting a similar provision in Convention on Mutual Assistance in Criminal Matters)
- stems also from Art. 26 of VCLT
- Ad 3) reasons why invocation was in good faith
- advanced satellite & telecommunication systems intended to be used by military directly implicate national security issues
- protection includes also pro futuro measures designed to eliminate an imminent threat
- Teleative is legally bound in Opulentia – required to share info with Opulentian government in order to combat terrorism
- although Claimant denies – Respondent cannot exclude a potential future danger
- considering fragile and tensed relations between the States
- State is presumed to act bona fidei (Fitzmaurice, Law and Procedure of International Tribunals)
- Claimant has not produced any sufficient evidence, that there has been a bad faith

FOR THE REASONS JUST PRESENTED WE PRAY THE TRIBUNAL TO DISMISS THE CLAIMANT'S CASE ON MERITS, IN CASE IT UPHOLDS ITS JURISDICTION

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