

# CLAIMANT

## **Outline:**

### **Jurisdiction:**

1. ICSID jurisdiction is not affected by Clause 17 of the JV Agreement
2. Additionally, ICSID has jurisdiction by virtue of Art. 10 „umbrella clause“ of the BIT

### **Merits:**

3. Respondent materially breached the JV Agreement
4. Violation of substantive standards of protection of the BIT (FET, Non-impairment Standard, Unlawful expropriation)
5. Respondent is not allowed to rely on the Essential security exception in the Art. 9 of the BIT in the present case

## ***a) ICSID has jurisdiction, notwithstanding the Clause 17 of the JV Agreement***

**1. ICSID jurisdiction is established under the applicable rules of international law which was satisfied with**

**2. Its jurisdiction cannot be superseded by municipal contract as is the present JV Agreement**

**AD 1) International rules establishing ICSID's jurisdiction are represented by ICSID Convention – Art. 25 read together with Art. 11 of the BIT**

- From Art. 25 we infer 4 criteria to be met:
  1. Dispute has to be of a legal nature:
    - Claimant argues the violation of obligations arising under the BIT
    - BIT – a treaty is a source of international law – Art. 38(1)a of the ICJ Statute
      - obligations arising from an international treaty are of legal nature
    - Claimant seeks a legal remedy (damages or restitution)
    - enough for a dispute to be of legal nature (Schreuer: ICSID Commentary; The Report of the Executive Directors of the WB on ICSID)
    - El Paso: “when claimant claims in terms of law and respondent answers in terms of law” there is a dispute legal nature
  2. Dispute arising directly out of the investment:
    - Question whether:

- covered investment according to the BIT and ICSID
- relation between investment and dispute
- Investment according to the Salini test – 4 criteria:
  - 1) contribution of money/assets – 47 mil. USD monetary + 100 mil. IP rights; 2) duration (JVA signed on 18.Oct.2007); 3) risk; 4) contribution to the host state development (transfer of innovative technologies, employment for Beristian people)
- Art. 1(1) BIT:
  - para. b) shares; para. d) patents, designs, IP and industrial rights, know-how, good will; e) rights of a financial nature accruing e.g. by contract

3. Nationality – Art. 1(4) BIT – embodies the Incorporation rule

4. Consent:

- Claimant consented by submission to ICSID from 28 Oct. 2009
- Respondent by its so-called jurisdictional offer in Art. 11 BIT, a well-settled practice
- Question of the scope of the offer/consent:
  - *ratione personae*:
    - covered investor (arguments already presented)
    - State – significant part of the acts complained of committed by State itself (allegation of the leak, acts of CWF); alternatively, separate legal personality of Beritech does not preclude international responsibility of Respondent for acts attributable thereto (will be argued later on)
  - *subject-matter jurisdiction*:
    - Claimant is complaining of the breaches of the BIT substantive standards – essential basis lies within the treaty
    - in case ICSID classifies the claims as contractual – effect of umbrella clause elevates certain contractual obligations to the treaty obligations
      - the same set of facts can give rise to the breaches of contract and to the breach of treaty; qualification of conduct under international law is rather independent (Vivendi Annulment, ELSI, ILC Art. 3) no clear border line between contract/treaty claims
      - complex of Respondent's acts and omissions gives rise to the infringement of the treaty obligations
- **Waiting period is not a jurisdictional requirement:**
  - attempt to settle amicably within 6 months
  - a well-settled case-law, based on findings of PCIJ and ICJ, deems it a merely procedural requirement (Lauder, Ethyl, SGS v. Pakistan)
  - Respondent manifested its refusal to negotiate by the deployment of CWF –

settlement was in view of Claimant elusive

- Waiting period already expired

## **AD 2) The JV Arbitration is not a competing jurisdiction**

- Cl. 17 of the JVA: *“dispute arising out of or relating to this agreement”*
  - as a municipal contract cannot reasonably be expected to encompass international obligations arising under the BIT
- Investment Arbitration dealing with breaches of the BIT can be commenced only by means prescribed by Art. 11 of the BIT
  - can be commenced only investor
  - The JV Arbitration is not bound by UNCITRAL Arbitration Rules, not to be confused with UNCITRAL Model Law incorporated into 1959 Arbitration Act of Beristan
  - Waiting period drafting standard in Cl.17 JVA is strictly prohibitive
    - *“party cannot commence arbitration until”*

***b) Additionally, ICSID has jurisdiction over the all claims by virtue the Art. 10 BIT***