

First Draft FDI Moot:

1. Cover page
2. Table of Contents
3. List of Authorities
4. List of Legal Sources
5. (Questions presented, I would recommend them to precede the Arguments)
6. Statement of Facts
7. Arguments (conclusion/prayer for relief could be included)

FACTS + ARGUMENTS = max. 13 000 words

(1.-5.) + additional parts or exhibits = max. 2 500 words

1,5 lining, Times New Roman 12-point, the pages of the statement of facts and arguments together shall be numbered consecutively in Arabic numerals. All other parts of a Memorial shall be page-numbered consecutively in small Roman numerals (i, ii ...). Each page shall be numbered in the middle at the bottom.

How to deal with opposing arguments:

- a) mention and distinguish negative authority
- b) when law is not on your side, appeal to equity
- c) strategic concession (a last resort option!!!)
- d) pointing out that the rule applies differently in different situations

Prediction and addressing of argument of the other side

***DRAFT – Claimant:***

***Summary of pleadings:***

- 1. ICSID Tribunal has jurisdiction with respect to the alleged breaches of the BIT no matter how the JV agreement deals with dispute resolution***
- 2. ICSID Tribunal has jurisdiction over the contract-based claims by virtue of the Article 10 of the BIT (“umbrella clause”)***

3. ***Respondent violated the BIT as it has unlawfully prevented Claimant from peaceful completion of its contractual duties***
4. ***Respondent violated fair and equitable treatment standard by unlawful expulsion of Claimant's personnel***
5. ***Respondent had unlawfully expropriated Claimant's investment by forcible buy-out which did not satisfied the due process requirement***
6. ***Respondent cannot rely on the essential security defense (Art. 9 of the BIT) as the allegation of leak of information was not substantiated to any extent***

***Tady jen co mě napadlo při psaní a nepatří do mých claimů:***

- *SGS v. Pakistan, memorial of Claimant, different legal foundation of contract and treaty claims, notwithstanding their similar factual core*
- *SGS v. Philippines – acknowledges that a BIT is not a self-contained mechanism, but rather open-ended one. It confirms the effective relation between contract and treaty claims and undesirability of addressing them separately (Shany, Y. AJIL, Contract Claims v. Treaty Claims). Argument for open ended nature of BITs could be e.g. FET referring to Customary International Law. Furthermore, insisting on contractual dispute settlement clauses to be referred to domestic courts is in effects analogous to reintroducing exhaustion of local remedies rule, i.e. equating it with denial of justice. This can however tend to stay proceedings (as in SGS v. Philip.) until the comm. arbitration is settled.*
- *The Claimant reject the argument that it waived the jurisdiction of the claims arising from the BIT by the waiver included in Cl. 17 of the JV Agreement. This waiver applies to the disputes “arising out of or relating [JV] Agreement,” it does not apply to the BIT claims, which constitute a different cause of action.<sup>1</sup>*

***ARGUMENTS:***

2. ***ATTRIBUTION – Contract with Beritech can be deemed as a contract with State, therefore covered by “umbrella clause”***
3. ***Respondent violated the BIT as it has unlawfully prevented Claimant from peaceful completion of its contractual duties***

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<sup>1</sup> CMS v. Arg., paras. 70-75, Azurix v. Argentina, paras. 75-79., Enron and Ponderossa v. Argentina, paras. 89-94

The Claimant is under the obligation not to breach the confidentiality of the matters connected with the Sat-Connect project. Respondent undertook the role of guarantor of the Beritech's obligations. The basic purpose of the JV Agreement was to ensure the rights and obligations of the parties during the development and construction of the Sat-Connect project. The Claimant invested in the project with an expectation of large-scale profit and expected to valorize its know-how and experience. The JV Agreement should have served among others to establish sanctions for breaches of the obligations of respective parties and to set mechanisms for ensuring that disputes would be settled and alleged breaches would be equitably investigated and, in cases of finding of violation, redressed.

*3.1. Umbrella clause operate on the two distinct levels, beside a jurisdictional role, it provides a substantive standard – protection from State interference in the contracts*

The role of “umbrella clause” as a substantive standard protects the investor from unlawful interference in the contract committed by State organs. ...

*3.2. Respondent committed a breach of Art. 10 of the BIT by assisting to Beritech with its unreasonable invocation of Art. 8 of the JV Agreement*

First of all, Beristan acting in its sovereign power used military force against Claimant. Beritech at the time of the expulsion did not have a valid legal title which would stem from judicial or arbitration proceedings. Thus Respondent unlawfully prevented Claimant from completion of its contractual duties under the JV Agreement connected with substantial future profit, notwithstanding whether the Beritech's claim under the Art. 8 of the JV Agreement was valid or not.

***4. Applicability of Art. 10 of the BIT, existence of undertakings of State vis-a-vis investor,  
TOTO SE BUDE ADRESOVAT JIŽ VÝŠE U PŘÍČITATELNOSTI***

Respondent undertook the role of guarantor of Beritech's obligation. Claimant therefore contents that the Art. 10 of the BIT shall be applicable. When Claimant did not agree with the invocation of Art.8 the matter should have been resolved by the means prescribed by the JV

Agreement. Beristan was under the obligation not to act until the Beritech's claim gained a legal basis. This did not happen and Respondent acting in its sovereign power assisted in the abuse of the Art. 8 in the way contrary to its international legal obligation, because under the BIT Respondent "shall constantly guarantee any obligations it has assumed with respect" to this investment. The cause of action is founded exclusively on the dispute settlement mechanism of the BIT, independently from whether there is another dispute concerning the JV Agreement.<sup>2</sup>

##### *5. Umbrella clause provides a separate substantive standard of protection*

Claimant submits that it constitutes a material breach of the JV Agreement, which subsequently, by virtue of the Art. 10, constitutes a violation of the BIT. The existence of the "umbrella clause" (Art. 10) in the BIT has a rationale of providing the investor with more security, it is a safeguard against excesses of a host state and elevates violations of the contracts to the level of international law.<sup>3</sup> Furthermore, the BIT has its object and purpose to "establish favourable conditions for improved economic co-operation between the two countries, and especially for investment by nationals of one Contracting Party in the territory of the other..."<sup>4</sup> Specifically with respect to umbrella clause, tribunal in *SGS v. Philippines* affirmed, that "[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."<sup>5</sup>

In addition, and even more importantly, it is submitted that so-called "umbrella clause" operates on two distinct levels. First, it confers jurisdiction upon the tribunal, as was the case in *SGS v. Philippines*. And secondly, it provides also a substantive standard of protection. This is the case when state interferes by using its sovereign powers in the contract with effect

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<sup>2</sup> *CMS v. Argentina*, Dec. on objections to jurisdiction, paras. 70-76; *Lanco v. Argentina*, Preliminary Decision of the ICSID Tribunal of December 8, 1998, paras. 36, 40.

<sup>3</sup> Dolzer, Schreuer. p. 155.

<sup>4</sup> The BIT, preamble.

<sup>5</sup> *SGS v. Philippines*, para. 166., (problem s *SGS v. Filipíny* je tento odstavec se týká pouze jurisdikce. Kterou ICSID sice měl, avšak dále se odmítl věci zabývat (již jako otázka přípustnosti – admissibility, nikoli jurisdikce) a řízení přerušil, jelikož byla dohodnuta exkluzivní FSC, a proto se rozhodl posečkat, než bude claim vyřešen tímto mechanismem). Toto asi budeme (Saša) muset adresovat a odlišit třeba s odkazem na "abuse of police powers" a postup státu, který přesto zavedl porušení bez ohledu na plnění kontraktu. Poukázat na fakt, že nešlo pouze o nesplacené dluhy ze smlouvy jako u *SGS cases*, ale šlo i o násilné vyhnání personal.

of defeating the specific undertakings which were by state given to the investor.<sup>6</sup> “The 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 conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.”<sup>7</sup> This interpretation is to be followed as it is applicable to the present case and gives rationale to the existence of the “umbrella clause.”

#### *6. Applicability of domestic law to the breach of Art. 10 of the BIT*

Claimant is aware, in the language of the Vivendi I Decision on Annulment, that breach of contract and breach of the BIT are two “different questions, each of which to be determined according to its own proper or applicable law law—in the case of the BIT, by international law; in the case of the ... Contract, by the proper law of the contract.”<sup>8</sup> However, Claimant submits that the Art. 14, so-called “preservation of rights clause, “does not permit (a contrario) application of less favorable provisions of the host state domestic law.”<sup>9</sup> Art. 42(1) first sentence of ICSID requires the application of rules of law agreed by the parties. The Art. 14 can be then deemed as such an agreement.<sup>10</sup> Only in the absence of such an agreement the Tribunal can turn to the 2<sup>nd</sup> sentence of Art. 42(1) of ICSID.

“The dispute resolution clause in the JV Agreement cannot serve as a bar to the application of the BIT.”<sup>11</sup> However the question of jurisdiction was already dealt with above.

Tohle tam asi nedáme, nezdá se mi to příliš kvalitní argumentace:

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<sup>6</sup> McLachlan, Shore, Weiniger, *International Investment Arbitration*, 2007, p. 117; further see *El Paso Energy v. Argentina*, para. 81, *Sempra v. Argentina*, Award, para. 310.

<sup>7</sup> *Sempra v. Argentina*, Award, para. 310; further see *Impregilo v. Pakistan*, Dec. on Jurisdiction, para. 260

<sup>8</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, para.

<sup>9</sup> *Middle East Cement Shipping v. Egypt*, para.87., něco podobného má být i *Goetz v. Burundi*, para. 95,99 – ale na to potřebuji francouzštináře.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Vivendi I*, Decision on Annulment, para. 95,96,101,103

Furthermore, under the JV Agreement Claimant assumed not only obligations but as well rights. The crucial one was right to completion of its contractual duties, however subjected to certain conditions. According to Art. 1(1)c of the BIT (“... any right of a financial nature accruing by... contract) this right is protected as an investment. The prevention from exercising this right shall be considered then as an impairment of investment. *Ano, vím, že se nejedná o “right of a financial nature.” Možná je to slepá ulička, ale proč to nezkusit.* The condition of “investment ... in conformity with the laws and regulations of the host state” is satisfied and not disputed by Respondent.

The BIT as an international treaty must be interpreted in accordance with the rules of interpretation applicable to the international treaties, therefore Vienna Convention on the Law of Treaties is applicable.

***7. Respondent violated fair and equitable treatment standard by unlawful expulsion of Claimant’s personnel***

*i. Respondent did not satisfy the prescription of the customary international law of standard of due process*

According to Art. 2.2 respondent “shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment (hereinafter as “FET”) ... of the investments of the Claimant. Claimant submits that, without the need of resolving the debate whether FET goes beyond the minimum standard of treatment under customary international law, it is accepted, that both standards include the “due process requirement,” which was not complied with. Claimant did not have an opportunity to react on and defend itself against the action of CWF. Acts of military are attributable to the state. In the context of investment treaty arbitration, a violation of due process standard was found for instance when the decision was based on inappropriate considerations.<sup>12</sup> It applies to all forms of government decision making in which host state decisions affect the rights of the investor.<sup>13</sup>

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<sup>12</sup> *Técnicas Medioambientales Tecmed, S.A. v. Mexico, para. 129; Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000, para. 92-94.

<sup>13</sup> Newcombe, A., Paradell, L. *Law and Practice of Investment Treaties*. 2009. Kluwer Law International. Alphen aan den Rijn. p. 244.

Expulsion without prior notice from state-agencies can be paralleled with the revocation of license without notice and without opportunity for the licensee to be heard<sup>14</sup> or with the situation when government failed to notify of the seizure of property.<sup>15</sup> In all these cases tribunals found a breach of fair and equitable treatment. **V případě Genin v. Estonia podobný skutkový stav neznamenal porušení FET – použít pro respondent.**

ii. *Respondent's acts amount to arbitrariness prohibited under general international law with respect to the aliens and their property*

Respondent's measures based on a mere possibility of alleged material breach of the JV Agreement without any substantiation and without a legal title confirming such breach are to be viewed as arbitrary. Arbitrariness falls within the concept of abuse of rights and this concept is an expression of the principle of good faith,<sup>16</sup> codified in Article 26 of *VCLT* and accepted by many authorities.<sup>17</sup> In connection with property it is explicitly expressed in Art. 17 paragraph 2 of *the Universal Declaration of Human Rights*, which provides that “no one shall be *arbitrarily* deprived of his property“ (emphasis added). *Universal Declaration* is considered to be a part of customary international law.<sup>18</sup> In connection with Investment Treaty Arbitration, jurisprudence to date confirmed that state conduct arbitrary under international

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<sup>14</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000, para. 91.

<sup>15</sup> *Middle East Cement Shipping v. Egypt*, para. 143.

<sup>16</sup> Newcombe, Paradell, p. 247.

<sup>17</sup> Charter of United Nations, Art. 2.2; *Elettronica Sicula S.p.A. (ELSI)(US v. Italy)*, 1989, ICJ Rep 15, para. 124, 128; *Case Concerning Rights of Nationals of the United States of America in Morocco*, 1952, ICJ Rep 176, at 212; Memorandum by the International Law Commission Secretariat, *Expulsion of Aliens*, 10 July 2006, A/CN.4/565.; Hersch Lauterpacht (ed.), *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, p. 298; *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, at para. 46

<sup>18</sup> GA resolution 1514 (XV) 1960: *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Art. 7, adopted unanimously;

GA resolution 1904 (XVIII) 1963: *Declaration on the Elimination of All Forms of Racial Discrimination*, Art. 11, adopted unanimously;

*Montreal Statement of the Assembly of Human Rights 2* (New York), reprinted in 9 *Journal of the International Commission of Jurists*, No. 1, p. 94, at 95 (June 1968).

law is a breach of FET.<sup>19</sup> In CMS Award tribunal stated that “[t]he standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.”<sup>20</sup>

The Claimant further contents that its personnel was subjected to unjustified and discriminatory measures. It is submitted that Televative’s seconded employees were unreasonably expelled from the country, without any justifiable reason. Although Respondent may rebut this claim, invoking national

*iii. Breach of FET does not require impairment of the investment*

Last but not least, Claimant submits that for a breach of FET to be found no requirement of impairment exists.<sup>21</sup> As stated in Pope & Talbot award, lack of forthrightness in communication or other arbitrary conduct towards the investor constitutes breach of fair and equitable treatment.<sup>22</sup>

**8. Respondent had unlawfully expropriated Claimant’s investment by forcible buy-out which did not satisfied the due process requirement**

- i. Respondent violated its obligation under the Art. 4.1 as it has subjected the Claimant’s investment to the measures which temporarily limited its joined right of ownership, control and enjoyment.*

Respondent assumed the international legal obligation under the Art. 4 of the BIT. According to this “*investments ... shall not be subject to any measures which might limited permanently or temporarily its joined rights of ownership, control and enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.*”

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<sup>19</sup> Waste Management Inc. v. Mexico, 30 April 2004, Award, para. 98.

<sup>20</sup> CMS v. Argentina, 12 May 2005, Award, para. 290.

<sup>21</sup> Newcombe, Paradell, p. 262.

<sup>22</sup> Pope & Talbot, para. 181.

Vienna Convention on the Law of treaties (hereinafter as “VCLT”), by which Beristan is bound, sets in its Art. 31 and 32 rules for interpretation of international treaties. According the paragraph 1) of the Art. 31, which must be “the point of reference,”<sup>23</sup> “(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* [emphasis added].“ It is evident from the ordinary meaning rule that both conditions prescribed in the Art. 4.1(1) of the BIT must be satisfied cumulatively, meant “measures” applied must be “prescribed by law” *and* by “judgments or orders issued by Courts or Tribunals having jurisdiction.” The context in which the terms are used in the BIT points also to such interpretation, “courts/tribunals...having jurisdiction” appears beside the Art. 4 only in the Art. 11.1.(a),(b), referring to the dispute settlement mechanism. In the latter context they can hardly refer to an administrative organ. Finally object and purpose of the BIT can be extracted from the preamble as was already noted. Investment protection shall be then deemed as the basic purpose. The primary rule for interpretation set out in Art. 31(1) of the VCLT seems entirely sufficient in this context.

The executive order<sup>24</sup> does not by any mean satisfy the prescribed conditions, however without any doubt caused a harsh limitation of the protected rights under the BIT. The protected rights under the Art. 4.1.(1) were effectively neutralized and Claimant has no control over them anymore.

- ii. *Respondent has violated Claimant’s legitimate investment-backed expectations as it had acted contrary to its contractual undertakings and international legal obligations*

Claimant also submits that its legitimate investment-backed expectations were violated by the action of CWF attributable to Respondent. Bearing in mind the international obligations Beristan has assumed under the BIT and contractual obligations as a guarantor under the JV Agreement, Claimant, as a reasonable investor, could not have expected that it could be forcibly expelled from the Project without a due process and in the absence of a timely, orderly and substantive basis for the expulsion.<sup>25</sup> According to the UNCTAD Series from

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<sup>23</sup> Sempra, decision on annulment, para. 188

<sup>24</sup> Response to the requests for clarification no. 155.

<sup>25</sup> *Metalclad Corp. v Mexico* , Award, 30 August 2000, 5 ICSID Reports (2002) 209, para. 107.

2007, “investment-backed expectations of the investor constitute another factor in considering whether the degree of interference with rights of ownership is substantial enough to amount to an indirect expropriation.”<sup>26</sup> “Legitimate expectations may be created not only by explicit undertakings on the part of the host state in contracts but also by undertakings of a more general kind. In particular, the legal framework provided by the host state...”<sup>27</sup> In the present case both explicit and general undertakings took place on the part of Beristan.

Legitimate expectations is closely connected with the good faith principle of customary international law, enshrined among others in the Art. 31(1) of the VCLT and plays a crucial role as a guiding principle in recognizing expropriation cases. This was held by several investment awards.<sup>28</sup> Claimant does not content that violation of “investment-backed expectation” shall be a sole basis for finding of expropriation, however when accompanied by effective neutralization of the investment it should lead the Tribunal to such finding.<sup>29</sup>

“[T]he close parallels between the requirement to fulfill ‘legitimate expectations’ and the requirement to accord ‘treatment’ that is ‘fair and equitable’ in nature are particularly evident.”<sup>30</sup>

*iii. The BIT prohibits all measure tantamount to expropriation*

The BIT prohibits all measures having similar effects as expropriation, nationalization or requisition unless they satisfy the conditions there stated.<sup>31</sup> It is evident that the compensation provided was not according the rule prescribed in Art. 4.1.(3). Furthermore, it is highly dubious whether the measure were taken in conformity with all legal provisions and procedures, especially for the reasons stated above (absence of due process, preservation of

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<sup>26</sup> UNCTAD Series, *Investor-state Dispute Settlement and Impact on Investment Rulemaking* [online]. Geneva: United Nations, 2007, p. 58.

<sup>27</sup> Dolzer, R., Schreuer, Ch., p. 104

<sup>28</sup> *Thunderbird v Mexico*, Award, 26 January 2006, para. 147, *Azurix v Argentina*, Award, 14 July 2006, paras. 316-322, *CME v. Czech Republic*, Partial Award, 13 Sept. 2001, para. 601, *Metalclad*,

<sup>29</sup> *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, para. 149-150, *Metalclad Corp. v Mexico*, Award, 30 August 2000, 5 ICSID Reports (2002) 209, para. 103, 107.

<sup>30</sup> Fietta, Stephen, "Expropriation and the “Fair and Equitable” Standard The Developing Role of Investors’ “Expectations” in International Investment Arbitration," *Journal of International Arbitration* 23, no. 5 (2006): 378.

<sup>31</sup> The BIT Art. 4.1.(2), 4.1.(3).

rights clause, seizure of assets not based on judgment or order of Court or Tribunal having jurisdiction).