Contents

I. ATTRIBUTION – Contract with Beritech can be deemed as a contract with State, therefore covered by "umbrella clause" ... 2

II. Respondent violated the BIT as it has unlawfully prevented Claimant from peaceful completion of his contractual duties ... 4

a. Breach of State Contracts entered into with foreigners under Customary International Law 4

b. Umbrella clause operate on the two distinct levels, beside a jurisdictional role, it provides a substantive standard ... 6

c. 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 ... 7

d. Applicability of domestic law to the breach of Art. 10 of the BIT in the view of Art. 14 of the BIT 8

III. Respondent violated fair and equitable treatment standard ... 9

a. Respondent did not satisfy the prescription of the customary international law of the standard of due process ... 10

b. Respondent´s acts amount to arbitrariness prohibited under general international law with respect to the aliens and their property ... 11

c. Respondent has violated Claimant´s legitimate investment-backed expectations as it had acted contrary to its contractual undertakings and its international legal obligations ... 12

d. Breach of FET does not require impairment of the investment ... 13

IV. Respondent violated so-called "non-impairment standard" in Art. 2.3 of the BIT ... 13

V. Respondent had unlawfully expropriated Claimant´s investment by forcible buy-out which did not satisfied the due process requirement ... 14

a. 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. ... 15

b. Scope of protected rights is defined by the Art. 1.1. of the BIT and covers shareholders rights, intellectual property, know how, movables and immovables ... 16

c. The BIT prohibits all measure tantamount to expropriation ... 17

d. The facts amount to the expropriation of contractual rights not only to a breach of contract 18

e. Respondent has violated Claimant´s legitimate investment-backed expectations as it had acted contrary to its contractual undertakings and international legal obligations ... 19

I. ATTRIBUTION – Contract with Beritech can be deemed as a contract with State, therefore covered by "umbrella clause"

1. Although the JV Agreement was concluded between Claimant and Beritech, obligations assumed by Beritech may be attributed to Respondent by the general international rules of attribution as recognized in Articles 4 and 8 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts.

2. Art. 4(1) says that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial *or any other functions* [emphasis added]." From the Commentary we can read that "the term is one of extension, not limitation, as is made clear by the words ´or any other functions.´" Commentary follows that "these functions may involve, e.g. the giving of administrative guidance to the private sector."[1]

3. Acts of Beritech are attributable to Beristan especially by virtue of Art. 8 as Respondent owns 75 % of shares in Beritech which renders him a controlling entity which may determine actions of controlled Beritech independently from the fragmented minority. Commentary to Art. 8, referring to the principle of effectiveness of international law, considers it "necessary to take into account […] the existence of a real link between the person or group performing the act and the State machinery."[2] In respect of corporations, it follows that when „the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State."[3] It is the Claimant´s content that Beritech was guided by the State to achieve a buy-out of the Televative´s interest against the terms of the JV Agreement.

---

[1] ILC Draft Articles – Commentary, p. 41.

[2] Ibid., p. 47.

[3] Ibid, p. 48.

4. Due to the attribution rule, the tribunal in Nykomb v. Latvia[4] acknowledged as covered by the umbrella clause a contract between the investor and a wholly owned state enterprise. In Eureko v. Poland, independent legal personality of Polish State Treasury did not preclude liability of the host state for the breach of the umbrella clause.[5] The way in which each state chooses to divide the work between its subdivisions is without relevance, as was affirmed in SwemBalt v. Latvia.[6] These tribunals interpreted the umbrella clause without any limitation.

5. Claimant encourages the Tribunal to follow the examples given in Nykomb and Eureko. Broad interpretation fits as most convenient to the object and purpose of the BIT and is simply justified by the rules of attribution relevant also to other treaty standards.[7]

6. Claimant may also rely on other awards which applied more restricted attitude to the issue of attribution. According to SGS v. Pakistan, "obligation may be assumed by the host state or its subdivisions or legal representatives thereof, if their acts are under the international law on state responsibility attributable to the host state."[8]

7. As stated in Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria, a contract may be attributed to the host state where the government exercises important influence over the entity and was to some extent involved in the contract negotiations.[9] Respondent guarantees compliance with Beritech´s obligations under the JV Agreement. It is hardly probable that respondent did not have an influence on the negotiations of the JV Agreement, as it actually co-signed the contract.

[4] Nykomb v. Latvia, section 4.2.

[5] Eureko v. Poland, para. 115-134.

[6] SwemBalt v. Latvia, para. 37.

[7] EnCana v. Ecuador, para. 154, 158.

[8] SGS v. Pakistan, para. 166.

[9] Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria, para. 19.

8. The tribunal in Noble Ventures v. Romania recognized an obligation assumed by a state ownership fund as covered by umbrella clause as it had granted governmental powers.[10]

9. Respondent may argue that domestic rules on separate personality should apply. However, Claimant argues that these rule may be applicable in pure contract claims based on widely formulated arbitration clause in the BIT. But only in those where an umbrella clause is absent. In umbrella clause claims "the issue is one of interpretation of the scope of a treaty obligation."[11] In the latter cases the international rules on attribution would apply.[12]

II. Respondent violated the BIT as it has unlawfully prevented Claimant from peaceful completion of his contractual duties

10. 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 has invested in the project with an expectation of a large-scale profit and expected to valorise its know-how and experience. Completion of the project was of its highest interest.

11. The JV Agreement should have served, among other issues, to establish sanctions for breaches of the obligations of respective parties and to set down mechanisms for ensuring that disputes would be settled and alleged breaches would be equitably investigated and, in case of finding a violation, redressed.

a. Breach of State Contracts entered into with foreigners under Customary International Law

[10] Noble Ventures v. Romania**,** para. 79-80.

[11] Newcombe, Paradell., p. 465.

[12] Ibid.; further see Maffezini v. Spain, Objections to Jurisdiction, para. 71-89; Maffezini v. Spain, Award, para. 46-57; Consortium RFCC v. Morocco, para. 34-40.

12. Also general international law deals with unlawful state interferences into the contracts between a State and a foreign party. Breaches of such contracts of certain quality makes the State responsibility of international wrongful act. Sir Gerald Fitzmaurice citing from the unpublished United Kingdom counter-pleading in the arbitral (third) phase of the Ambatielos case[13] concluded that "[i]t is generally accepted that, so long as it provides remedies in its Courts, a State is only directly responsible, on the international plane, for facts involving breaches of contract, where a breach is not a simple breach ... but involves an obviously arbitrary or tortious element, e. g. a confiscatory breach of contract – where the true basis of international claim is the confiscation, rather than the breach *per se* [emphasis original]."[14] In the present case the Tribunal actually deals with a breach committed by the State which has the result of confiscation of Televative´s interest in the Joint Venture.

13. A position that only a certain breaches of contracts can hold a State responsible is espoused by other authorities as well. E. g. *Restatement (third) on Foreign Relations Law of the United States* in § 712 provides that "[a] state is responsible under international law for injury resulting from [...] a repudiation or breach by the State of a contract with a national of another State."[15] A commentary follows that a State is responsible for a breach "if it is discriminatory [...] or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons [...]."[16]

14. To further support the argument, the issue cannot be separated from the firmly established principle of international law that a State cannot, on the international level, plead a lawfulness under its national law of the act which is wrongful under international law to defend itself.[17]

---

[13] *Ambatielos case (merits: obligation to arbitrate),* Judgment of May 19th, 1953: ICJ Report 1953, p.10.

[14] Fitzmaurice, G. *Hersch Lauterpacht – The Scholar as Judge.* Part I. British Yearbook of International Law (1961), 37, pp. 64-5.

[15] *Restatement of the Law Third, Foreign Relations Law of the United States*, The American Law Institute, 1987

[16] cited from Schwebel, S. *Justice in International Law*, p. 429.

[17] ILC Draft Articles with Commentaries, p. 36.

15. There is an extensive list of international arbitral authorities supporting the conclusion that a use of sovereign governmental powers to abrogate a contract gives rise to responsibility under international law.[18]

16. To conclude, even in absence of the BIT, under general international law a State is responsible "if it commits not any breach, but an arbitrary breach, of a contract between that State and an alien."[19] Beristan acted in an arbitrary way and, as argued hereinafter, has violated not only general international law but especially its obligations under the BIT.

b. Umbrella clause operate on the two distinct levels, beside a jurisdictional role, it provides a substantive standard

17. It is submitted that so-called umbrella clause operates on two distinct levels. First, it confers a 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 of defeating the specific undertakings which were by state given to the investor."[20] "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."[21] This interpretation is to be followed as it is applicable to the present factual background and gives a rationale to the existence of the umbrella clause in the BIT.

---

[18] Shufeldt claim (Guatemala v. USA), 24 July 1930, RIAA, Volume II, p. 1079-1102; Company General of the Orinoco case (France v. Venezuela), 31 July 1905, RIAA, Volume X, p. 184-285; International Fisheries Company case (USA v. Mexico), July 1931, RIAA, Volume IV, p. 691-746; Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic, 11977, ILR, Volume Volume 53, p. 297 et seq.; In the Matter of Revere Copper and Brass, Ltd. and the Overseas Private Investment Corporation, 1978, ILR, Volume 56, p. 257 et seq. and others.

[19] Schwebel, S. Justice in International Law, p. 434.

[20] McLachlan, Shore, Weiniger, International Investment Arbitration, 2007, p. 117; further see El Paso Energy v. Argentina, para. 81, Sempra v. Argentina, Award, para. 310.

[21] Sempra v. Argentina, Award, para. 310; further see Impregilo v. Pakistan, Dec. on Jurisdiction, para. 260

18. Some commentaries even suggest that umbrella clauses protect an investor´s contractual rights against “any interference which might be caused by either a simple breach of contract or by administrative or legislative acts.“[22] „Such a provision is included in a BIT in order to avoid the uncertainty under general international law whether such breaches of contract constitute infringements of international law.“[23]

19. Claimant submits that the facts constitute a material breach of the JV Agreement in the terms of international law, which subsequently, by virtue of the Art. 10 of the BIT, 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.”[24] As stated hereinbefore, general international law provides a protection of some contracts against a certain acts of a State, umbrella clause in a treaty then resolves an uncertainty accompanying customary international law in the particular area. Therefore any other interpretation given to the umbrella clause than the one described above would deprive it of any meaningful content.

c. *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*

20. First of all, Beristan acting in its sovereign power used military force (“CWF”) against Claimant.[25] Beritech at the time of the expulsion did not have a valid legal title which would stem from a judicial or arbitration proceedings. Thus Respondent unlawfully prevented Claimant from completion of its contractual duties under the JV Agreement connected with a substantial future profit, notwithstanding whether the Beritech´s claim under the Cl. 8 of the JV Agreement was valid or not.

21. For the reasons mentioned above (existence of the undertakings of State vis-a-vis the investor) Claimant contents that the Art. 10 of the BIT is applicable, and was

[22] Dolzer, Stevens, 1995, p. 82.

[23] UNCTAD Series, State Contracts, p. 19.

[24] Dolzer, Schreuer. p. 155.

[25] Annex 2, Uncontested facts, para. 11.

infringed. When Claimant did not agree with the invocation of Cl. 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 [...]"[26] 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.[27]

22. 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 [...]."[28] Specifically with respect to the 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."[29]

23. Further with respect to the SGS cases, it is Claimant´s contention, that in the present situation we do not deal with a mere failure to pay a debt, an essential contract claim, but with a State interference by the use of its sovereign powers, namely by internationally wrongful use of military. This makes the Televative´s claims utterly treaty-based.

d. Applicability of domestic law to the breach of Art. 10 of the BIT in the view of Art. 14 of the BIT

[26] The BIT, Art. 10.

[27] 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., Noble Ventures v. Romania, para. 53.

[28] The BIT, preambule.

[29] SGS v. Phillipines, para. 166.

24. Claimant is aware, in the language of the Vivendi I Decision on Annulment, that a breach of contract and a breach of treaty 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."[30]

25. 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."[31] Art. 42(1) first sentence of the ICSID Convention requires the application of rules of law agreed by the parties. The Art. 14 can be then deemed as such an agreement.[32] Only in the absence of such an agreement the Tribunal can turn to the 2nd sentence of Art. 42(1) of the ICSID Convention.

26. Furthermore, notwithstanding the proper law of the contract, Claimant submits that the breach of Art. 10 of the BIT must be assessed in the terms of international law as the substantive standard of umbrella clause is an international legal standard which can be breached even without a violation of provisions of the proper law of the contract.

III. Respondent violated fair and equitable treatment standard

27. 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]." This standard is viewed by some commentators as a substantive standard of the most general nature among investment treaty standards.[33] Others agree with possible overlaps with other standards, but distinguish it from relative standards, such as e.g. national treatment.[34]

---

[30] 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.

[31] Middle East Cement Shipping v. Egypt, para.87.; Goetz v. Burundi, para. 95, 99.

[32] Ibid.

[33] Mann, F. A., British Treaties for the Promotion and Protection of Investments, (1981) 52 BYBIL p. 241, further see 1992 World Bank Guidelines

[34] Vasciannie, S., The Fair and Equitable Treatment Standard in International Investment Law and Practice (1999) 70 BYBIL p. 99

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

28. 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 the both standards include "due process requirement,"[35] which was not complied with.

29. Claimant did not have an opportunity to react on or defend himself 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.[36] It applies to all forms of government decision making in which host state decisions affect the rights of the investor.[37] 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[38] or with the situation when government failed to notify of the seizure of property.[39] In all these cases tribunals found a breach of fair and equitable treatment.

30. When the executive decision to dispatch the CWF to expel the Claimant´s personnel was made, Claimant should have been heard and should have had an opportunity to react on a false charges by Beritech. Moreover, in the situation that the executive order was issued as a result of an incitement of a private entity under the municipal law of Beristan – Beritech. This conclusion based on the municipal law of Beristan, however, does not affect the issue of attribution of the acts of Beritech to Respondent under international law.

---

[35] Sornarajah, p. 329-30., Newcombe; Dolzer; Reinisch (eds.)

[36] *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.

[37] Newcombe, A., Paradell, L. Law and Practice of Investment Treaties. 2009. Kluwer Law International. Alphen aan den Rijn. p. 244.

[38] *Metalclad Corporation v. Mexico,* ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000, para. 91.

[39] Middle East Cement Shipping v. Egypt, para. 143.

b. Respondent´s acts amount to arbitrariness prohibited under general international law with respect to the aliens and their property

31. 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. General prohibition of arbitrariness is incorporated to the FET by virtue of Art. 2.2. of the BIT.

32. Arbitrariness falls within the concept of abuse of rights and this concept is an expression of the principle of good faith,[40] codified in Art. 26 of *VCLT* and accepted by many authorities.[41] 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.[42]

33. Widely cited definition of arbitrariness appears in the ELSI case, where the ICJ opined, that "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [...]. It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."[43] In connection with Investment Treaty Arbitration, jurisprudence to date confirmed that state conduct

[40] Newcombe, Paradell, p. 247.

[41] 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

[42] 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).

[43] Elettronica Sipula S.p.A. (ELSI) (USA v. Italy), Judgment, 20 July 1989, para. 128.

arbitrary under international law is a breach of FET.[44] 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."[45]

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

34. 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 its contractual obligations as a guarantor under the JV Agreement, Claimant, as a reasonable investor, could not have expected that it would be forcibly expelled from the Project without a due process and in the absence of a timely, orderly and substantive basis for the expulsion.[46]

35. "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 […]."[47] In the present case both explicit and general undertakings took place on the part of Beristan.

36. Legitimate expectations is closely connected with the good faith principle of customary international law, enshrined among others in the Art. 26 and 31(1) of the VCLT. The imperative not violate legitimate expectation form a crucial part of FET standard. "[T]he close parallels between the requirement to fulfill ´legitimate

[44] Waste Management Inc. v. Mexico, 30 April 2004, Award, para. 98.

[45] CMS v. Argentina, 12 May 2005, Award, para. 290.

[46] *Metalclad Corp. v Mexico* , Award, 30 August 2000, 5 ICSID Reports (2002) 209, para. 107.

[47] Dolzer, R., Schreuer, Ch., p. 104

expectations´ and the requirement to accord ´treatment´ that is ´fair and equitable´ in nature are particularly evident."[48]

d. Breach of FET does not require impairment of the investment

37. Last but not least, Claimant submits that for a breach of FET to be found no requirement of impairment exists.[49] 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."[50]

IV. Respondent violated so-called "non-impairment standard" in Art. 2.3 of the BIT

38. The Claimant further contents that its personnel was subjected to "unjustified or 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 security defence, for the arguments provided later in the memorial, Claimant contests that there was no ground was such an invocation.

39. The wording of the BIT suggests, by the use of disjunction, that it is entirely sufficient that the protected investment was impaired either by "unjustified" or "discriminatory" measures.[51] The management, maintenance and enjoyment of the Claimant´s investment was unreasonably impaired without objective justification by the acts of CWF and the subsequent expulsion of the personnel. "Unjustified measures" shall be interpreted as equivalent to "unreasonable" as they both point to the measures which

---

[48] 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.

[49] Newcombe, Paradell, p. 262.

[50] Pope & Talbot, para. 181.

[51] Heiskanen, V. Arbitrary and unreasonable measures (2008) In: Reinisch, A.(eds.).Standards of Investment Protection, Oxford University Press, p. 99; further see Lauder v .Czech Republic, para. 219.

are "not founded on reason or fact, nor on the law."[52] It is further argued, that the term is in close relation with the general concept of arbitrariness referred to hereinbefore. (Black´s Law Dictionary to support the definition!). According to Veijo Heiskanen, unjustified or unreasonable measure are those for which "a justification or a rationale has in fact been provided [...], but there is no reasonable (or rational) relationship between the purported justification and a legitimate governmental policy."[53] An information from a project for civilian purposes, used partly by a military, can be hardly a threat to a national security. Notwithstanding, that a leak of information was a mere unsubstantiated allegation.

40. As to the relation of the standard of the non-impairment standard to FET standard, it is submitted that they do not "differ substantially."[54] "The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor."[55] In the similar vein, CMS tribunal concluded any breach of the non-impairment standard "is in itself contrary to fair and equitable treatment."[56]

41. However, it is the Claimant´s contention that the main difference between FET and the non-impairment requirement is that for a breach of the former no impairment of the investment need to be found, contrary to the latter.

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

---

[52] Lauder, para. 232

[53] Heiskanen, V. Arbitrary and unreasonable measures (2008) In: Reinisch, A.(eds.).Standards of Investment Protection, Oxford University Press, p. 104; further see Saluka, para. 461; LG&E, Decision on lability, para. 158.

[54] Saluka, para. 461.

[55] Ibid.

[56] CMS v. Argentina, para. 290.

a. 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.

42. Respondent assumed the international legal obligation under the Art. 4.1(1) of the BIT. According to this article "*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."*

43. 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,"[57] "(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]."

44. 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, meaning that "measures" applied must be "prescribed by law" *and* by "judgments or orders issued by Courts or Tribunals having jurisdiction."

45. The context in which the terms are used in the BIT points also to such interpretation, the term "courts/tribunals...having jurisdiction" beside the Art. 4 only appears in the Art. 11.1.(a),(b), referring to the dispute settlement mechanism. In the latter context they can hardly refer to an executive or administrative organ.

46. Finally, the object and purpose of the BIT can be extracted from the preamble, as was already noted. Investment protection shall then be deemed as a basic purpose. The primary rule for interpretation set out in Art. 31(1) of the VCLT seems entirely sufficient in this context because it gives an unequivocal content to the term "courts/tribunals...having jurisdiction."

---

[57] Sempra, decision on annulment, para. 188

47. The executive order[58] 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.

48. This argument is even more convincing when the executive order could not be appealed.[59] Therefore the requirement in Art. 4.1.(1) was not satisfied even if the Tribunal espouses the interpretation that "tribunals/courts having jurisdiction" includes executive or administrative organs of State as well.

49. Last but not least, Beritech in its request for arbitration from 19 October 2009 "sought a declaratory relief that it properly exercised its rights under the JV Agreement."[60] Therefore the sequence of steps of Beritech and Respondent seems entirely arbitrary, as the execution took the first place and declaratory legal title was sought afterwards.

b. Scope of protected rights is defined by the Art. 1.1. of the BIT and covers shareholders rights, intellectual property, know how, movables and immovables

50. The definition of investment is wide enough to cover all rights which were negatively affected by the acts of Respondent. Shareholding is defined as an investment and therefore is protected. This protection extents as well to the know how or managerial skills.[61] Shareholders are protected no matter if they are majority or minority.[62]

51. By the buy-out of the Televative´s interest the right to its shareholding was neutralized. By now Claimant cannot control, maintain or manage its investment at all. By the forcible expulsion the assets of Sat-Connect were negatively affected and these form the Claimant´s indirect investment.

---

[58] Response to the requests for clarification no. 155.

[59] Response, 2nd., Cl. No. 228.

[60] Clarifications, 1st, Cl. No. 170.

[61] Genin, para. 324., Eureko, para. 145.

[62] Enron & Ponderosa, jurisdiction, para. 39; CMS Jurisdiction, para. 51

52. Art.1.1.(d) refers to various kinds of protected intellectual property rights. Claimant, who is a global leading enterprise in developing of new satellite communication technologies, invested in the Project a great deal of know how, goodwill and other kinds of intellectual property rights. "The Claimant alleges that the value of the intellectual property over the life of the technology would be in excess of US$ 100 million."[63]

c. The BIT prohibits all measure tantamount to expropriation

53. The BIT prohibits all measures having similar effects as expropriation, nationalization or requisition unless they satisfy the conditions there stated.[64] It is evident that the compensation provided was not according the rule prescribed in Art. 4.1.(3).

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

55. Due to the acts attributable to the government of Beristan it is evident, that the result is a total loss of the Claimant´s investment. There was a taking of the Claimant´s possession, as he was forced to hand over all the facilities of the Project, and there was an "interference with the shareholder´s rights [and] with the management´s control over or running of the enterprise."[65]

56. For the expropriation to be found, the effect of the State measure are more important than the intent behind those measures.[66] This view is supported by the ordinary meaning of the term "measures having similar effect."[67] The Siemens tribunal opined

[63] Responses, 1st, Cl. No. 165.

[64] The BIT Art. 4.1.(2), 4.1.(3).

[65] Nykomb, para. 120.

[66] Subedi, S., p. 121; TECMED; Azurix; Siemens; Santa Elena.

[67] The BIT, Art. 4.1.(2)

that “[t]he treaty refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate.”[68] “It is recognized under international law that measure taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed as have been expropriated, even though the State does not purport to have expropriated them [...].”[69] In the Metalclad award was held that not only an outright seizure, “but also covert or incidental interference with the use of property *which has the effect* of depriving the owner, in whole or in significant part, *of the use* or reasonably-to-be-expected *economic benefit* of property even if not necessarily to the obvious benefit of the host State [emphasis added].”[70]

57. The existence of buy-out clause in the JV Agreement does not mean that the final decision on buy-out would rest on Beritech itself, nor on the Sat-Connect board of directors, where Beritech appoints a majority of them. When a measure having the effect of a complete neutralization of the Claimant´s investment is in question, Respondent was not allowed to leave it up to the private entity such is Beritech. This measure could have only been adopted by the court or tribunal having jurisdiction, only in this case the contractually agreed amount would be sufficient to fulfil Respondent´s international obligations. Otherwise, full and immediate compensation should have been paid.

d. The facts amount to the expropriation of contractual rights not only to a breach of contract

58. “If intangible assets, including contract rights, are protected property rights, then they may be subject to expropriation which, in turn, may lead to an obligation to compensate. […] The guiding principle in locating an expropriation appears to be whether a state has acted in its sovereign capacity, exercising its governmental or

---

[68] Siemens award, para. 270.

[69] Starrett Housing Corporation v. Iran, cited from Subedi, S., p. 123

[70] Metalclad, para. 103.

public power or authority."[71] This conclusion is supported by various arbitral awards rendered to date.[72]

59. In this vein, it is important to note, that expropriation is always an "inherently governmental act"[73] and it must be distinguished from a mere failure to pay a debt or a breach of a contractual obligation.

60. In the current case, Claimant argues that it was expropriated by the acts of CWF, the acts of Respondent. Without this governmental assistance in dubious invocation of the buy-out clause by Beritech, which was furthermore motivated by excluding the Claimant from the Project right before its finalization for the reasons unrelated to his performance, no expropriation would take place. As an evidence of this motivation can be used a statements of the Beristani governmental official in Beristan Times.[74]

61. The cumulative effect of the Government´s acts (actions of CWS) and omissions (failure of properly investigate the Beritech´s buy-out claim in accordance with due process before enforcing it) "de facto expropriated corporate shares in the [...] company."[75]

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

1. According to the UNCTAD Series from 2007, "investment-backed expectations of the investor constitute another factor in considering whether the degree of interference

---

[71] Reinish, A. Expropriation (2008) In: Muchlinski, Ortino, Schreuer (eds.), p. 418.

[72] Shufeldt case; *Phillips Petroleum Co v Iran* , 21 Iran-US CTR 79 (1989) para. 75; *Waste Management, Inc v United Mexican States* , ARB(AF)/00/3, Award, 30 April 2004, para. 160, 174; Azurix, para. 315.

[73] *Waste Management, Inc v United Mexican States* , ARB(AF)/00/3, Award, 30 April 2004, para. 168.

[74] Responses, 1st, Cl. No. 178.

[75] Benvenuti and Bonfant v. Congo, para. 758.

with rights of ownership is substantial enough to amount to an indirect expropriation."[76]

Legitimate expectations plays a crucial role as a guiding principle in recognizing expropriation cases. This was held by several investment awards.[77] 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.[78]

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

[77] *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, Metaldclad,

[78] *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.