DRAFT BENCH BRIEF

FOR MEMORIAL JUDGES AND ARBITRATORS ONLY

The draft has been prepared by Prof. Koji Takahashi (jurisdiction/admissibility), Prof. Freya Baetens and Ms. Mara Smith (all other parts). Memorial judges are welcome to submit comments for refining the Bench Brief prior to the Oral Hearings.

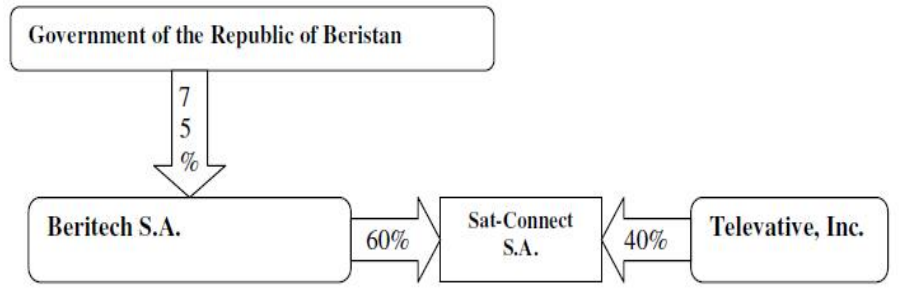
Brief Summary and Factual Background[1]

This case raises the issues of jurisdictional competence of the Tribunal, breach of contract of the Agreement, issues relating to expropriation, discrimination and fair and equitable treatment and national security provisions within the BIT.

- Claimant, Televative Inc., is a privately held company incorporated in Opulentia that specializes in satellite communications technology and systems. Respondent, the Government of Beristan established a state-owned company, Beritech S.A. in 2007. The Beristan government owns 75% interest in Beritech, the remaining 25% is owned by a small group of wealthy Beristan investors, who have close ties to the Beristan government.

- Beritech and Televative signed a joint venture agreement (the "JV Agreement") in 2007 to establish the joint venture company, Sat-Connect S.A. Under Beristan law, the government of Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations; Sat-Connect's corporate offices are located in Beristal, the capital city of Beristan. Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways, for both civilian and military purposes, that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia, which includes Beristan, 6 other countries and the Euphonian Ocean. Beristan armed forces will use the Sat-Connect system.

Diagram of Ownership Structures:



- Beristan and Opulentia are parties to the ICSI Convention and the Vienna Convention on the Law of Treaties.

- On August 12, 2009, The Beristan Times published an article in which a highly placed Beristan government official raised national security concerns stating that the Sat-Connect project had been compromised due to leaks of critical information by Televative personnel to the Government of Opulentia. Both Televative and the Government of Opulentia denied the story.

- During a Sat-Connect board meeting the allegations of the article were discussed. On Aug 27, 2009 Beritech with the support of the majority of Sat-Connect's board of directors invoked Clause 8 of the JV Agreement to compel a buyout of Televative's interest in the Sat-Connect project. Beritech served notice on Televative to hand over possession of the Sat-Connect sites, facilities and equipment and remove personnel within 14 days. The Civil Works Force of the Beristan army thereafter secured the sites and the personnel were ejected from Sat-Connect facilities and evacuated from Beristan.

- Televative's investment is US $47 million. October 19, 2009 Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US $47 million into an escrow account; Televative has refused to accept the payment as well as to respond to

[1] Prepared by Ms. Mara Smith and Prof. Freya Baetens.

Beritech's arbitration request. On October 28, 2009 Televative requested arbitration in accordance with ICSID's Rules of Procedure and notified the government of Beristan.

	TIMELINE
30-Jan-95	• Televative privately held company incorp in Opulentia
Mar-07	• Government of Beristan established a state owned company, Beritech SA. • Beristan Gov owns 75%, 25% owned by Beristian investors
18-Oct-07	• Beritech and Televative sign joint venture (JV Agreement) establishing Sat-Connect. • Beristan Gov co-signs as guarantor of Beritech's obligations. • Sat Connect located in Beristal, capital of Beristan.
12-Aug-09	• Beristan Times published article raising national security concerns that Sat-Connect project had been compromised due to leaks by Televative personnel. • Televative and Gov of Op deny the story
27-Aug-09	• Beritech with support of majority of Sat Connect BOD invoked Clause 8 of JV Agreement to compel buyout of Televative's interests
28-Aug-09	• Beritech served notice on Televative • Requires hand over of possession of Sat Connect within 14 days
11-Sep-09	• Staff from CWF, civil engineering Beristan army, secured all Sat Connect sites • Televative personnel were instructed to leave project sites
19-Oct-09	• Beritech filed request for arbitration against Televative under Clause 17 of JV Agreement
28-Oct-09	• Televative per BO BIT requests arbitration in accordance with ICSID rules and notified government of Beristan
1-Nov-09	• ICSID Sec Gen registers Televative arbitration disputes against Gov of Beristan

Claimant and Respondent Contentions

The Parties and Tribunal have agreed on a procedure to the effect that at this stage the Tribunal shall only address the following:

A. Whether the Tribunal has jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement ("JV Agreement");

B. Whether the Tribunal has jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT;

C. Whether Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement;

D. Whether Respondent's actions or omissions amount to expropriation, discrimination, a violation of fair and equitable treatment, or otherwise violate general international law or applicable treaties;

E. Whether Respondent is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a defense to Claimant's claims.

Jurisdiction/Admissability[2]

The questions of jurisdiction correspond to (a) and (b) under the heading "Written and Oral Procedures.":

> The Parties and the Tribunal have agreed that at this stage the Tribunal shall only address the following:
>
> (a) whether the Tribunal has jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement ("JV Agreement");
>
> (b) whether the Tribunal has jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT.

For the sake of analytical convenience, we shall deal with those questions in the reverse order.

Question (b)

The Tribunal's jurisdiction is expressly limited to "disputes ... that concern an obligation ... under this Agreement" (Article 11 of the Beristan-Oplulentia BIT). Whether Claimant's contract-based claims under the JV Agreement arise out of such disputes will depend on whether "any obligation" in the umbrella clause contained in Article 10 of the said BIT covers obligations under commercial contracts such as the JV Agreement.

Respondent would place a restrictive interpretation to the expression "any obligation." There are several ways to give this expression a restrictive meaning. Thus, for example, it may be construed to cover only state contracts (administrative contracts) which derive from the exercise of sovereign power. While Article 31(1) of the Vienna Convention on the Law of Treaties provides that the terms of a treaty must be interpreted in accordance with the ordinary meaning to be given in their context and in the light of the treaty's object, Respondent would emphasise the context and purpose. It would see the purpose of investment treaties as establishing a balance between the interests of the host state and those of the investors. A broader reading - elevating obligations under commercial contracts to treaty obligations – would tilt the balance too much in favour of the investors. Such a reading would also obviate other protections contained in investment treaties. Respondent may cite in support of restrictive interpretations decisions such as SGS v. Pakistan, El Paso Energy v Argentina and Pan American Energy LLC v Argentina.

Claimant would argue that "any obligation" includes obligations under commercial contracts by relying on literal interpretation. The unqualified language ("any obligation") should be given an ordinary meaning as prescribed by Article 31(1) of the Vienna Convention on the Law of Treaties. Claimant would look to the preamble of the Beristan-Oplulentia BIT and see its purpose as establishing favourable conditions for investment. Claimant may cite decisions such as SGS v. Philippines in support.

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[2] Prepared by Prof Koji Takahashi

Question (a)

If the question (b) is resolved in favour of Claimant, the next question which arises is whether the jurisdiction of the Tribunal is ousted by Clause 17 of the JV Agreement which provides for exclusive submission to local arbitration. This question may be posed also with respect to the claims under the general international law and the Beristan-Opulentia BIT.

Whether there is a conflict of jurisdiction agreements

The jurisdiction of the Tribunal is not ousted unless there is a conflict between the jurisdiction agreement provided by Article 11 of the Beristan-Opulentia BIT and the jurisdiction agreement contained in Clause 17 of the JV Agreement.

With respect to the claims under the general international law and the Beristan-Opulentia BIT, Claimant will argue that there is no conflict of jurisdiction agreements since Clause 17, being a clause in a contract, concerns only contract-based claims. Respondent may contend that since the arbitral tribunal under Clause 17 of the JV Agreement has jurisdiction over "any dispute arising out of or relating to this Agreement", it extends to cover whatever legal basis, be it domestic law or international law.

As regards the contract-based claims arising under the JV Agreement, Claimant may argue that there is no conflict of jurisdiction agreements on the ground that those claims have been converted by the umbrella clause into a treaty claim: what is precisely claimed before the Tribunal is a breach of the *guarantee* of the observance of the contractual obligations (Article 10 of the Beristan-Opulentia BIT), the guarantee being provided by the treaty.

Respondent will contest this assertion by arguing that the treaty claim based on the guarantee of the observance of the contractual obligations is essentially the same as the underlying contractual claims. The extent of the parties' contractual obligation 'is still governed by the contract, and it can only be determined by reference to the terms of the contract' (SGS v. Philippines).

If Respondent's argument prevails, there is a conflict of jurisdiction agreements. Then, the next question is whether the jurisdiction of the Tribunal is ousted by Clause 17 of the JV Agreement.

Whether Clause 17 excludes the jurisdiction of the Tribunal

It is a matter of interpretation of the parties' intention since both Article 11 of the Beristan-Opulentia BIT and Clause 17 of the JV Agreement constitute an arbitration agreement between Claimant and Respondent. This problem is essentially different from *lis alibi pendens* in that the latter concerns situations in which there is a contest between multiple fora each of which has jurisdiction.

Claimant may invoke Article 26 of the ICSID Convention which provides that agreement to arbitrate under the Convention is deemed to be an exclusive submission to the arbitration. Respondent will, noting that Article 26 itself is subject to contrary provision by the parties, point out that Article 11 of the Beristan-Opulentia BIT makes available three alternative methods of dispute resolution for the Claimant's choice.

Respondent may invoke the *lex specialis* rule to argue that Clause 17 of the JV Agreement overrides Article 11 of the Beristan-Opulentia BIT. The former is a clause accepted by a specific investor concerning a specific investment whereas the latter is a general offer addressed by a State to all the qualifying investors concerning all the investments falling within the scope. For the invocation of the *lex specialis* rule, Respondent may cite SGS v. Philippines (The majority opinion in SGS v. Philippines took the view that the local arbitration agreement took precedence over the treaty arbitration agreement on the basis that those agreements overlapped with each other and yet held that the treaty tribunal retained jurisdiction by finding that the overlap did not concern jurisdiction but admissibility).

On the other hand, Claimant may, citing such authorities as Aguas del Tunari v. République de Bolivie, submit that the standing offer of arbitration by Respondent as contained in Article 11 of the Beristan-Opulentia BIT is maintained even after Claimant has accepted Clause 17 of the JV Agreement. Claimant may, citing the dissenting opinion by Crivellaro in SGS v. Philippines, base its submission on the view that an arbitration clause in an investment treaty is meant to provide the

investors with a better alternative to the local courts which may be prejudiced in favour of the host State government. Noting that Clause 17 of the JV Agreement provides for arbitration rather than litigation, Respondent may retort by saying that arbitral tribunals are generally impartial. Claimant will maintain that there is a risk of interference by the local courts with respect to the procedural conducts or the annulment of the award.

Respondent may argue that letting the Tribunal hear the claims may give rise to the risk of inconsistent decisions at least to the extent that those claims are dependent on the breach of underlying contract. The Tribunal will rule upon the breach of underlying contract since it can hear and determine any preliminary issues to adjudicate the claims which are properly brought before it. On the other hand, the local arbitration was commenced by Beritech against Televative under Clause 17 of the JV Agreement and despite Televative's refusal to participate, the proceedings are in progress. Since Respondent, as guarantor, assumes the obligations of Beritech under the JV Agreement upon Beritech's default, its contractual obligations are to be determined indirectly in the local arbitration. Hence the risk of inconsistency between the decisions of the Tribunal and those of the local arbitral tribunal. Claimant may respond to this concern by saying that even if the Tribunal retains jurisdiction, it has power to stay proceedings until the local arbitration runs its course under Article 44 of the ICSID Convention if it finds it appropriate to do so in order to avoid inconsistent decisions (as was decided to be done in SGS v. Philippines).

It is imaginable that some Respondent memorials could argue that by agreeing to Clause 17, Claimant has opted for a "fork-in-the-road" provided for by Article 11(1)(b) of the Beristan-Opulentia BIT, to the exclusion of the other fora referred to in Article 11(1). Claimant would point out several obstacles which this argument will face. Thus, it would be doubtful that a simple agreement to arbitrate would constitute the submission of dispute within the meaning of Article 11(1). Besides, it was Beritech, rather than Claimant, who commenced the local arbitration. Furthermore, Article 11 does not, unlike clearer languages of some fork-in-the-road clauses, expressly say that a choice of one of the listed options will foreclose the others.

Substantive Aspects[3]

Discussion of Issues

(d) Whether Respondent's actions or omissions amount to expropriation, discrimination, a violation of fair and equitable treatment, or otherwise violate general international law or applicable treaties;

D. Expropriation

Overview

A violation of the following material standards in the Beristan-Opulentia BIT (B-O BIT) could be discussed: Art. 4 §2 (expropriation) Art. 2 (discriminatory and fair/equitable treatment) Art 3 (national treatment); and potentially other standards.

1. Art. 4 §2: Expropriation

Claimant is only entitled to a remedy if the Buyout and forced expulsion was a violation of Art 4 §2 of the BIT regarding expropriation.

The teams should discuss possible consequences of the BIT, problems related to meaning of expropriation, whether or not there was an expropriation and if there was, was it for public policy reasons.

There is room for parties to take varying positions. Accordingly the focus should be more on the quality of the argument and less on compliance with the following notes, which represent only a partial approach (and structure) to the answer.

a) Definition of Expropriation

According to Art 4(1) of the BIT (Annex 1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of

[3] Prepared by Ms. Mara Smith and Prof. Freya Baetens.

ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction. Art 4(2) of the BIT states Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.[4]

b) Major cases

SD Meyers v Government of Canada[5]

Metalclad Corp v United Mexican States[6]

c) Analysis

Here students should first begin the analysis with a statement about what expropriation is and continue by applying the BIT Art 4.2 to the facts of the problem. Students will have to discuss both Direct Expropriation and Indirect Expropriation as well as compensation issues. Claimant should argue that the Buyout is a direct expropriation with an alternative argument that the buyout was an indirect expropriation based on the governmental influence in forcing the buyout.

i. Consequences of Art. 4 sec. 2 of the BIT

Respondent will argue that the buyout, if a direct expropriation, is within the purview of the BIT. Respondent will argue that they are entitled to rely on the exceptions for public purpose and national interest because of the allegations which were made public in the Beristan Times. Respondent will further argue that full and immediate compensation was provided through the buyout provision.

Claimant will argue that because of the ties the Beristan government has to Beritech (as 75% owner, as guarantor of Beritech's obligations to the Sat-Connect project, location of Sat-Connect in state capital, etc.) the buyout is a direct expropriation. Claimant will argue that Respondent's argument for utilizing the public policy exception and the national interest exception is flawed without more than speculation. Claimant will argue that the compensation offered through the buyout is not full

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[4] For more information on definitions on expropriation: The term expropriation, in many definitions, is not addressed directly [http://trans-lex.org/112050 Fortier, L. Yves, *Caveat Investor: The Meaning of "expropriation" and the protection afforded investors under NAFTA* in: News from ICSID / International Centre for Settlement of Investment Disputes, ICSID Vol. 20 No. 1, at 1 et seq.]. To define "expropriation" in a general manner based on legal dictionaries and the US Model BIT (2004), The term "expropriation" refers to certain actions taken by a State that interfere with property rights. "Direct" expropriation is the taking of property through formal transfer of title or outright seizure [64 US Model BIT (2004)]. Based on the broad NAFTA Chapter 11 definition "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) a public purpose (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1) and (d) on payment of compensation in accordance with paragraphs 2-6 [providing that compensation must be "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place… Compensation shall be paid without delay and be fully realizable… compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment…On payment, compensation shall be freely transferable"][http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/chap11.aspx?lang=en#article_1110 NAFTA Part Five Investment, Services and Related Matters Chapter Eleven Investment**;** Article 11 10: Expropriation and Compensation]. "Indirect forms of expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefit" Law and practice of investment treaties: standards of treatment. Andrew Newcombe, Lluis Paradell.

[5] S.D. Myers, Inc., an Ohio corporation that processes and disposes of PCB waste, filed claims against Canada under the UNCITRAL Rules on October 30, 1998 for alleged violations of NAFTA Articles 1102, 1105, 1106 and 1110 arising out of Canada's ban on the export of PCB wastes from Canada to the United States in late 1995. S.D. Myers claims that, as a result of the ban, it "suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada."[http://www.state.gov/s/l/c3746.htm SD Meyers v Government of Canada.]

[6] The Metalclad Corporation, a U.S. waste disposal company, instituted arbitration proceedings against Mexico under the ICSID Additional Facility Rules. Metalclad alleged breaches of NAFTA Articles 1102, 1103, 1104, 1105, 1106(1)(f), 1110 and 1111. Its notice of arbitration asserted that Mexico wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that Metalclad had built in La Pedrera, San Luis Potosi, despite the fact that the project was allegedly built in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements. The notice sought damages of US$43,125,000 "plus damages for the value of the enterprise taken."[http://www.state.gov/s/l/c3752.htm Metalclad Corp. v United Mexican States]

compensation since the buyout only returns Claimant's paid-in investment and does not consider future profits, intellectual property, or trade secrets.

Claimant will argue that if there was no direct expropriation, there was an indirect expropriation when the Beristian military personnel removed Claimant's personnel from all offices, sites and facilities of the Sat-Connect project.

Issues teams could discuss include:

- Whether there is sufficient proof that there is a public policy or national interest concern which warrants utilizing the exception in the BIT.
- Whether the national security concerns were foreseeable given the nature of the project and if that foreseeability prevents the national interest exception in the BIT.
- Whether a civil engineering section of an army is considered military personnel which can remove personnel from a site by force enough to be considered expropriation.
- Whether anticipatory future profits are compensable
- Whether the buyout compensation provision anticipated intellectual property rights, trade secrets and "know how" as part of the paid-in investment.

2. Art 2 §3: Discrimination

Claimant is only entitled to a remedy if the Buyout was a violation of Art 2 §3 of the BIT regarding discrimination.

The teams should discuss possible consequences of the BIT, problems related to meaning of discrimination, and whether or not there was discrimination.

a) Definition of Discrimination

According to Art 2§3 of the BIT both contracting parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contract Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.[7]

b) Major Cases

Pope & Talbot Inc. v Government of Canada[8]

c) Analysis

Claimant will argue the buyout was discriminatory because forcing the removal of Claimant's personnel and replacing them with Beristian personnel is a means of favoring local interests. Art 2 §3 provides for no unjustified or discriminatory measures. Respondent will argue the removal and

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[7] "To understand the underlying issues and dynamics it is important to recognize that discrimination in foreign investment involves a number of factors that distinguish it from discrimination in trade in goods:

- The theory of comparative advantage does not apply to the liberalization of foreign direct investment;
- Discrimination typically involves a single private investor on the one hand and a state on the other. This impacts not only the dynamics of the relationship but also the willingness of either party to document the outcome;
- Investors acquire continuing rights in the host country, becoming economic citizens. This further impacts the relationship between investor and host country authorities;
- Productive investments are dynamic over long periods of time;

Discrimination can occur at the time of an initial investment or later~~.~~. [http://www.oecd.org/dataoecd/1/59/1819921.pdf OECD/OCDE Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues. Konrad von Moltke Global OECD Forum on International Investment Conference on Foreign Direct Investment and the Environment].

[8] Pope & Talbot, Inc., a U.S. investor with a Canadian subsidiary that operates softwood lumber mills in British Columbia, claimed against Canada under the UNCITRAL rules alleging that Canada's implementation of the U.S.-Canada Softwood Lumber Agreement violates NAFTA provisions 1102 (national treatment), 1105 (minimum standard of treatment), 1106 (performance requirements) and 1110 (expropriation). Under the Softwood Lumber Agreement, Canada agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet. According to Pope & Talbot, Canada's allocation of the fee-free quota was unfair and inequitable. Pope & Talbot initially alleged damages totaling over US$507 million [http://www.state.gov/s/l/c3747.htm Pope & Talbot Inc. v Government of Canada].

replacement of Claimant's personnel was justified and necessary based on national security/interest grounds.

Claimant has two main arguments: a) that the purpose of the removal of Claimant's personnel is for a discriminatory means and/or b) the effect of the removal of Claimant's personnel is discriminatory. In either circumstance Claimant must demonstrate that the reason is to favor local interests. Alternatively, Claimant can argue that even if there was a national security risk triggering a justified reason for the removal of the personnel, the risk was foreseeable. If Claimant can demonstrate that the risk was foreseeable the burden to prevent the risk shifts to the Respondent and eliminates justification based on national security concerns for removal of Claimant's personnel.

If Respondent can substantiate the national security risk and demonstrate that the risk was not foreseeable, and thus preventable on Respondent's part, this is a prevailing argument.

3. Art 2 §2: Fair and Equitable Treatment and General International Law

Claimant is only entitled to a remedy if the Buyout was a violation of Art 2 §2 of the BIT regarding fair and equitable treatment and if it was in violation of customary international law.

The teams should discuss possible consequences of the BIT, problems related to meaning of fair and equitable treatment, whether or not the treatment was fair and equitable. Teams should discuss what customary international law is, if the treatment violated international law or applicable treaties and if so how.

a) Definition of Fair and Equitable Treatment

According to Art 2 § 2 of the BIT both contracting parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party.[9]

b) Major Cases

L.F.H. Neer and Pauline Neer (USA) v. Mexico[10]

The propriety of governmental acts should be put to the test of international standards…the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or

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[9] The obligation to provide "fair and equitable treatment" is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries. It is an "absolute", "non-contingent" standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most favored nation" principles which define the required treatment by reference to the treatment accorded to other investment1. Although some references to the standard can be found in the first negotiating attempts of multilateral trade and investment instruments, it became established as a principle mainly through the increasing network of bilateral investment treaties…. The OECD has on two occasions in the past referred to the "fair and equitable treatment standard" by linking it to the minimum standard required by international law and general principles of international law4 without however comprehensively analyzing its specific content. Since then, a growing case law has been developed, which could shed light on the normative content of the standard [http://www.oecd.org/dataoecd/22/53/33776498.pdf OECD/OCDE Working Papers on International Investment #2004/3 Fair and Equitable Treatment Standard in International Investment Law] "[T]he BIT requires the signatory governments to treat foreign investment in a fair and equitable way. Under international law, this requirement is generally understood to provide a basic and general standard which is detached from the host State's domestic law. While the exact content of this standard is not clear, the Tribunal understands it to require an international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard. Laws that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[[9] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award of 25 June 2001, ¶ 367(quotations omitted)].

[10] *"Neer Claim"* The 1926 Neer decision by the US-Mexico Claim Commission is the landmark ruling on the international minimum standard. The case was brought by the United States on behalf of the family of Paul Neer, an American citizen who had been killed in Mexico. The Commission awarded damages to compensate the family for suffering caused by the Mexican government's lack of diligence in prosecuting the culprits. However, the Commission found that the failure of Mexican authorities to apprehend and prosecute the culprits did not per se violate the international minimum standard on the treatment of aliens. The Commission expressed what has become the classic formulation of the international minimum standard [L.F.H. Neer and Pauline Neer (USA) v. Mexico, 4 R.I.A.A. 60 (1926)].

from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial

Waste Management, Inc. v United Mexican States[11]

The tribunal in Waste Management defined "unfair and inequitable conduct" as that which is: arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.

The tribunal in Waste Management, interpreting the minimum standard provision of NAFTA, concluded that "it is relevant that the treatment is in breach of representations made by the host State which was reasonably relied on by the claimant.[12]

International Thunderbird Gaming Corporation v United Mexican States[13]

The tribunal in International Thunderbird Gaming, while finding that the content of the minimum standard under NAFTA should reflect evolving international customary law, observed that: Notwithstanding the evolution of customary law since decisions such as the Neer claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[14]

Técnicas Medioambientales Tecmed S.A. v. Mexico.[15]

The Arbitral Tribunal considers that this provision of the [BIT], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to

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[11] In 1998, USA Waste Services, Inc. (now Waste Management, Inc.), a U.S. waste disposal company, filed claims against Mexico under the ICSID Additional Facility Rules alleging breaches of NAFTA Articles 1105 and 1110. The notice of arbitration asserted that the State of Guerrero and the municipality of Acapulco granted a 15-year concession to USA Waste's Mexican subsidiary, Acaverde, in 1995 for public waste management services (street cleaning, landfilling, etc.), but failed to comply with payment and other obligations set forth in the concession agreement despite full performance by Acaverde. It also asserted that Banobras, a Mexican bank that had issued an unconditional guarantee for the payment, arbitrarily refused to honor the payment guarantee. Waste Management claimed damages of US$60 million [http://www.state.gov/s/l/c3753.htm Waste Management, Inc. v Mexico].

[12] Waste Management, Inc. v Mexico, ICSID No. ARB (AF)/00/03, Award of 30 April 2004, ¶ 98.

[13] International Thunderbird Gaming Corporation ("Thunderbird"), a Canadian company that owns and operates gaming and entertainment facilities, has submitted a notice of arbitration under the UNCITRAL rules against Mexico. Thunderbird seeks damages for alleged injuries resulting from the regulation and closure of its gaming facilities by the Mexican government agency that has jurisdiction over gaming activity and enforcement. Thunderbird claims that Mexico's regulation and closure of its gaming facilities violate the national treatment obligation under Article 1102; the most-favored-nation treatment obligation under Article 1103; the Article 1104 obligation to accord the better of the treatment required under Articles 1102 and 1103; under Article 1105(1), the obligation to provide treatment in accordance with international law; and the Article 1110 prohibition on expropriation. Thunderbird seeks damages of $100 million [http://www.state.gov/s/l/c7666.htm International Thunderbird Gaming Corporation v. Mexico].

[14] International Thunderbird Gaming Corporation v. Mexico, UNCITRAL Case, Award of 26 January 2006, ¶ 194 (emphasis added; footnotes omitted).

[15] *"Tecmed"* Tecmed, a Spanish company with two Mexican subsidiaries, brought a claim against Mexico alleging several violations of the Spain-Mexico BIT. These violations concerned Tecmed's investment in a waste landfill acquired in 1996. Tecmed alleged to have lost the landfill in 1998 as a result of the non-renewal, by Mexican authorities, of a license necessary to operate the landfill. Tecmed argued that as a result of this arbitrary and non-substantiated decision of Mexico, the investment was completely lost, as it ceased to represent any economic value as an ongoing business. This, in Tecmed's view, constituted expropriation. Tecmed also alleged a number of other BIT violations, in particular, of BIT rules on fair and equitable treatment and on full protection and security. The Tribunal found that Mexico's actions indeed constituted expropriation and also violated its 'fair and equitable treatment' obligation [http://www.biicl.org/files/3917_2003_tecmed_v_mexico.pdf Técnicas Medioambientales Tecmed, S.A. v Mexico].

be able to plan its investment and comply with such regulations. Govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[16]

c) Analysis

Claimant will argue that Respondent breached Art. 2§2 of the BIT regarding fair and equitable treatment. Claimant will argue that Respondent's expulsion of Claimant's personnel was arbitrary and violated international law. Claimant may also argue that the representations of the host state and the basic expectations of a foreign investor, in light of respondent's actions, give rise to a claim of unfair and inequitable treatment. Respondent will argue that claimant has not met the high threshold for finding a violation of the minimum standard. Claimant's allegations, respondent will argue, do not "amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards" as stated by the *International Thunderbird* tribunal.

a. Contract Issues

Discussion of Issues

(c) Whether Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement;

C. Contractual Matters

Overview

For Claimant to prove that Respondent breached the Joint Venture Agreement claimant must first establish four points:

a) That a joint venture agreement existed.

b) That Claimant complied with the terms of the joint venture agreement.

c) That the Respondent violated the terms of the joint venture agreement

d) That Claimant suffered damages as a result of the breach of the agreement.

(a) Joint Venture

Initially Claimant can argue that although there is a joint venture agreement, the joint venture itself does not yet exist. Claimant can argue that the joint venture begins when Sat-Connect is established which occurs once the deployment of the satellite network and accompanying terrestrial systems provide connectivity and communications. Claimant can argue that at this point they have provided a capital contribution, materials, development, technology and labor.

Respondent will argue that the joint venture began upon the signing of the joint venture agreement. Respondent will argue that the purpose of the joint venture agreement was to establish Sat-Connect which includes development of technology, training of personnel, deployment and connection of satellite technology.

(b) Claimant complied with terms of JV Agreement

Claimant will argue that if a joint venture does exist that it has complied with the terms of the JV agreement. Claimant will argue that it had nearly completed the development of the Sat-Connect project, the only portion left to complete the project was deployment of the system and ensuring the network was operational. Claimant will assert they have complied with the terms of the JV agreement and even if full compliance has not occurred since deployment and system networking is not finalized, they have substantially complied with the agreement and the remaining aspects are impossible to comply with since Claimant's personnel have been removed from the facilities.

Claimant will argue that if Respondent contends that Claimant's seconded personnel leaked information of the Sat-Connect project to the Government of Opulentia that Claimant has denied these leaks, as has the Government of Opulentia. Claimant can further argue that even if Respondent could prove that information was leaked by Claimant's seconded personnel that Claimant was not

[16] Técnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/02, Award ¶ 154 (29 May 2003).

responsible for the personnel under an agency relationship. An agency relationship argument would be a weak and speculative argument since the facts are silent as to who is in control of the personnel at the facilities; the facts imply Claimant controls Claimant's personnel.

Claimant can argue that the closer to completion the Sat-Connect project was the more risk of information being leaked to varying parties. The facts are silent as to what measures were taken to protect information leaks and/or what Respondent required as assurances that information was protected. Claimant can argue that information leaks were foreseeable and that Respondent was in a better position to protect the security of the information since the facilities were in Respondent's country and Respondent had a higher national security concern.

Respondent has a weak argument trying to state that Claimant has not complied with the majority of the terms of the JV Agreement. Respondent's only potential argument is that Claimant violated the confidentiality aspects of the JV Agreement. Here Respondent must be able to provide sufficient evidence that Claimant was directly responsible for leaking information to the Government of Opulentia. Respondent will have to deal with evidentiary problems and allegations that information being leaked was foreseeable and that Respondent should have taken measures to protect its national security concerns.

(c) Breach

Claimant will argue that Respondent breached its obligations under either a strict contract analysis or if there is a joint venture when Claimant's personnel were removed from the Sat-Connect facilities and Claimant was made incapable of finishing the deployment and communication networking. Claimant will argue that Respondent prevented the completion and implementation of the technology for the Sat-Connect project, frustrating Claimant's ability to realize the expected profit of the joint venture. Claimant will argue that because Respondent expropriated Sat-Connect, Respondent breached the JV Agreement and is not entitled to invoke the buyout provision.

Respondent will argue that Claimant breached the JV Agreement when information was leaked regarding the Sat-Connect project. Respondent will argue that the leaked information necessitated the removal of Claimant's personnel from the Sat-Connect facilities. Thus, Respondent will argue that it was Claimant's noncompliance, rather than any breach by Respondent, that caused the failure of the joint venture.

(d) Loss and Compensation

Claimant will argue that its loss is its capital contribution, the technology completed to date, overall research and development, intellectual property aspects associated with the R&D, trade secrets, the training and know-how conveyed to training personnel. Claimant will return to the initial argument that if the joint venture has not commenced then the buyout provision is not applicable. Claimant will then ask for the return of their capital contribution and compensatory damages that are minimally fair market value. But, if the joint venture has commenced, then Claimant will argue they have paid more than just a capital contribution and at this point in the development the expectancy of compensation, based on market pricing, is higher than the buyout clause has provided. Claimant can argue that because there is a fair market value for their efforts and that the expectation of profits are past the point of speculative damages, they can be defined and measured, thus Claimant would compensation in the amount of the expected investment in the fully running venture.

Respondent will argue that if the joint venture does not exist all Claimant can recover is the value of the contract damages. Since the JV Agreement is comparable to a contract, Respondent can argue that the buyout clause is the correct tool to measure what the contract damages would be. Respondent will contend that the joint venture is in existence and that the buyout clause is thus the correct means of determining compensation. Respondent will re-state that Claimant breached the JV Agreement, particularly the confidentiality provision, triggering the buyout clause. Because the buyout clause was negotiated in good faith between Claimant and Respondent, Respondent will argue that it provides adequate compensation to Claimant.