



The Asian Law Students' Association

MEMORANDUM FOR CLAIMANT

THE CASE CONCERNING INVESTMENT SETTLEMENT DISPUTE
OF
STEEL MILL INDUSTRY

ICSID Arbitration No. 00/2014

On Behalf Of
Admantium Steel, Ltd
Peachberry 1100
2401 Villa la Costa
Republic of Valiant
- CLAIMANT -

Against
Dastan Logam Ltd.
1010 Nerfitiri
Republic of Validatu
- RESPONDENT -

THE TABLE OF CONTENTS

THE LIST OF ABBREVIATIONS	iv
THE INDEX OF AUTHORITIES	v
THE STATEMENT OF FACTS	1
THE SUMMARY OF ARGUMENTS	3
THE ARGUMENTS ADVANCED	5
I. WHETHER THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE CONCERNING INVESTMENT SETTLEMENT?	5
<u>SUBMISSION (A)</u>	
<u>JURISDICTION UNDER BIT & JVA</u>	5
<u>SUBMISSION (B)</u>	
<u>JURISDICTION UNDER ART. 25 OF ICSID:</u>	9
II. WHETHER THERE IS A BREACH OF CONTRACT?	12
<u>SUBMISSION (A)</u>	
<u>UNILATERAL AGREEMENT</u>	12
<u>SUBMISSION (B)</u>	
<u>CONTRACTUAL BREACH</u>	12
III. WHETHER THE RESPONDENT CAN BE ORDERED TO TERMINATE THE JVA BETWEEN THEM AND RMC?	15
<u>SUBMISSION (A)</u>	
<u>NEED FOR TERMINATION</u>	15

IV. WHETHER THE CLAIMS FOR COMPENSATION IS APPROPRIATE?	17
<u>SUBMISSION (A)</u>	
<u>RESPONDENT'S LIABILITY TO COMPENSATE:</u>	17
THE PRAYER	vii

THE LIST OF ABBREVIATIONS

&	-	And
ARB	-	Arbitration
Art.	-	Article
AS	-	Adamantium Steel Ltd.
AS-DL JVA	-	Joint Venture Agreement Between Adamantium Steel and Dastan
BIT	-	Bilateral Investment Treaty
CUP	-	Cambridge University Press
DA	-	Dastan Adamantium
DCFR	-	Draft Common Frame of Reference
DL	-	Dastan Logam Ltd.
DL-RMC JVA	-	Joint Venture Agreement Between Dastan Logam and Ruberia Metal Corporation
DRC	-	Dastan Ruberia Corporation
Edn.	-	Edition
i.e.	-	That is
ICSID	-	International Centre For Settlement of Investment Dispute
JVA	-	Joint Venture Agreement
JVC	-	Joint Venture Company
LLC	-	Limited Liability Corporation
		Logam
Ltd.	-	Limited
No.	-	Number
OUP	-	Oxford University Press
Para	-	Paragraph
PECL	-	Principles of European Contract Law
RMC	-	Ruberia Metal Corporation
U.S.	-	United States
v.	-	Versus
Vol.	-	Volume

THE INDEX OF AUTHORITIES

AGREEMENTS & CONVENTIONS

- U.S. Model Bilateral Investment Treaty 2012
- Vienna Convention on the Law of Treaties
- United Nations Convention on Contracts for the International Sale of Goods
- Principles of European Contract Law
- Draft Common Frame of Reference
- Convention on the Settlement of Investment Disputes between states and National of Other States
- Institutional Rules of ICSID

CASES REFERRED

- *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (2007) Case No. ARB/97/3 (ICSID)
- *Cable TV v. St. Kitts & Nevis* (1996) Case No. ARB19512 (ICSID)
- *SOABI v. Republic of Senegal* (1988) Case No. ARB/82/1 (ICSID)
- *Micula v. Romania* (2013) Case No. ARB/05/20 (ICSID)
- *LETCO v. Liberia* (1986) Case No. ARB/83/2 (ICSID)
- *Klockner v. Cameroon* (1983) Case No. ARB/81/2 (ICSID)
- *Tanzania Electric V. IPTL* (2001) Case No. ARB/98/8 (ICSID)
- *Hadley v. Baxendale*, (1854) 23 LJEx 179, 18 Jur
- *Victoria Laundry v. Newman Industries* (1949) 2 KB 528
- *Joy Mining Machinery Limited v The Arab Republic of Egypt* (2004) Case No. ARB/03/11 (ICSID)
- *SGS Societe General de Surveillance S.A. v Islamic Republic of Pakistan* (2003) Case No. ARB/01/13 (ICSID)
- *Autopista v. Venezuela* (2001) Case No. ARB/00/5 (ICSID)
- *Vacuum Salt v. Ghana* (1994) Case No. ARB/92/1 (ICSID)
- *Saba Fakes v. Republic of Turkey* (2010) Case No. ARB/07/20 (ICSID)

BOOKS REFERRED

- James Crawford, Karen Lee, 'ICSID Reports' (Vol.6, CUP, 2004)
- Christoph H. Schreuer, 'The ICSID Convention: A Commentary' (4th edn., CUP, 2013)
- Andrea M. Steingruber, 'Consent in International Arbitration' (1ST edn., OUP, 2012)
- Chittharanjan Felix Amerasinghe, 'Jurisdiction of Specific International Tribunals' (1st edn. Martinus Nijhoff Publishers, 2009)
- Julian Lew, 'Contemporary Problems in International Arbitration' (2nd edn., Springer Science & Business Media, 1987)

ONLINE ARTICLES & WEBSITES REFERRED

- Jarrod Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes' (2006) Vol. 14:1
- Ebrahim Shoarian , Roya Shirin Beig Pour, 'The effects of intentional breach of contract with emphasis on international instruments' (2013) Vol. 3, No.2
- <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>
- www.spilmumbai.com/
- www.iareporter.com/.../bulgaria-is-hit-with-energy-related-icsid-claim
- <http://www.onealsteel.com/carbon-and-alloy-steel.html>
- <http://metalsupermarkets.com/blog/difference-between-hot-rolled-steel-and-cold-rolled-steel/>
- http://www.technologystudent.com/equip_flsh/galv1.html

THE STATEMENT OF FACTS

1. The country of Validatu has been emerging on its steel industry. Through several diplomation Validatu has succeeded in inviting the government of Valiant, a nation known for its activity and the process management of steel, to help support through an Investment in the steel industry of Validatu.
2. On 31 December 1998, Country of Validatu and country of Valiant entered into BIT to enhance investment between both countries. **DL & AS** are limited liability companies duly established under the law of Validatu & Valiant respectively, which engages in steel industry.
3. On 4 August 2010, a joint venture company ("**JVA DL-AS**"), namely **DA** was established. The joint venture is to support the production of steel in the country of **Validatu**.
4. On 5 August 2011 the government of Validatu announces the further projection of the industry in its country to supply the demand for the automotive market in
5. Asia. Consequently, the government also announced that any treaty made that is not pursuant to this goal would be terminated.
6. **RMC** is a company duly established under the law of Rodega. On 3 January 2012 DL and RMC entered into JVA to establish a joint venture company, namely **DRC**.
7. AS was of the view that DL had violated the Non-compete provision of JVA DL-AS. AS invited DL to have a meeting as to discuss the aforementioned dispute between the parties. However, DL did not attend such meeting. Subsequently, AS sent summon letter to DL stating its intention to terminate the JVA DL-RMC. After certain period, AS sent another summon letter to DL as DL had not responded the first summon letter. AS decided to settle the dispute by arbitration.
8. **Hence, this case.**

Important Dates:

- | | |
|------------------------------|--|
| 9. 31 st Dec 1998 | Valiant – Validatu BIT |
| 10. 2 nd Dec 2009 | MoA between DL & AS |
| 11. 4 th Aug 2010 | JVA between DL & AS |
| 12. 4 th Oct 2010 | Establishment of Joint Venture Company (AS to hold 70% of the shares and DL to hold 30% of shares) |
| 13. 5 th Oct 2011 | Validatu announces further projection of the industry in the |

- company
14. 25th Aug 2011 Validatu has more ambitious projects towards its steel exploitation
 15. 27th Sep 2011 President of Validatu issues the President's Regulating upon the development of automotive industry
 16. 3rd Jan 2012 DL entered into a new JVA with RMC
 17. 26th Aug 2012 Email sent by AS to DL (notifying a possible breach of contract)
 18. 24th Jan 2013 Email sent by AS to AL stating that there is a breach of contract and the new JVA should be terminated
AS notified Validatu's ministry of Foreign affairs
 19. 20th Apr 2014 Respondent had declined negotiations
 20. 20th Apr 2014 Request for Arbitration
 21. 2nd Nov 2014 Reply by the Registrar
 22. 5th Nov 2014 Response to request for Arbitration by DL
 23. 21st Dec 2014 Appointment of Arbitrators
 24. 28th Dec 2014 Conference call between AS and DL with ICSID
 25. 15th Jan 2015

THE SUMMARY OF ARGUMENTS

I. WHETHER THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE CONCERNING INVESTMENT SETTLEMENT?**SUBMISSION (A)****JURISDICTION UNDER BIT & JVA**

26. A BIT serves to attract foreign investment and they allow investment settlement disputes to be resolved by ICSID. Here, the new JVA of DL-RMC is of competing nature which the respondent has entered into without obtaining a written consent from the claimant as required by Art.16of the JVA. Owing to this, the claimant has suffered loss. The claimant can approach the Tribunal under Art.27 of the JVA and under Art.8 of the BIT. Thus ICSID has jurisdiction.

SUBMISSION (B)**JURISDICTION UNDER ART. 25 OF ICSID:**

27. This Article extends to any ‘legal dispute arising directly out of an investment’ and the party should be a ‘juridical person which because of foreign control has agreed to be treated as a national of another contracting state.’ The foreign control may even be an implied agreement. In this case, the claimant company holds 70% of the total shares of the JVA thus implying the foreign control. Thus the Tribunal has jurisdiction under Art.25 of ICSID.

II. WHETHER THERE IS A BREACH OF CONTRACT?**SUBMISSION (A)****UNILATERAL AGREEMENT**

28. The respondent has entered into a new JVA with RMC the business of which is of competing nature, i.e., production of steel, without obtaining a ‘prior written consent’ as necessitated by Art.16 of the JVA. The claimant never gave his consent to such a joint venture. Moreover, the respondent also did not reply to the emails sent by the claimant. This proves the intention of the respondent to enter into a unilateral agreement.

SUBMISSION (B)**CONTRACTUAL BREACH**

29. An umbrella clause is a treaty provision which requires the contracting state to follow all investment obligations it has assumed. In this case, Art.2(3) of the BIT contains the umbrella clause. It is said that a breach of contract is deemed to be a breach of treaty. The very fact that a written consent was not obtained from the claimant proves that they have intentionally breached the provision of the contract.

III. WHETHER THE RESPONDENT CAN BE ORDERED TO TERMINATE THE JVA BETWEEN THEM AND RMC?**SUBMISSION (A)****NEED FOR TERMINATION**

30. The claimant has invested a huge amount in this JVA. The respondent has entered into a new JVA with RMC which is of a competing nature without obtaining the claimant's consent. The main purpose of both JVA is to produce steel. The claimant has suffered great loss as evidenced in Schedule 4-7 after the respondent entered into another JVA. Thus the respondent can be ordered to terminate the new JVA.

IV. WHETHER THE CLAIMS FOR COMPENSATION IS APPROPRIATE?**SUBMISSION (A)****RESPONDENT'S LIABILITY TO COMPENSATE:**

31. It is widely accepted that the non-performing party is liable for the losses which he foresaw or ought to have foreseen at the time of conclusion of the contract. In this case the claimant has invested a lot in the JVA and has suffered a great loss in various production fields as the respondent entered into another JVA by violating Art. 16 of the AS-DL JVA. This loss can be seen in Schedule 4-7. Thus the respondent has to bear the loss and the expenses incurred by the claimant on these proceedings.

THE ARGUMENTS ADVANCED

I. WHETHER THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE CONCERNING INVESTMENT SETTLEMENT?**JURISDICTION UNDER BIT & JVA:**

32. “A BIT serves to attract foreign investment by granting broad investment rights to investors and creating flexibility in the resolution of investment disputes. This flexibility typically includes allowing for any investment dispute to be resolved by international arbitration, most often under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)”¹

33. In this case the claimant approaches the ICSID Tribunal to settle the investment settlement dispute. The claimant had entered into JVA with the respondent company on 4th October 2010.

34. The purpose of AS-DL JVA as given under Art. 5 is:

5. Purpose of Joint Venture.

The main purpose of the joint venture formed by the Parties under this Agreement shall consist of:

- a. the development, engineering, financing, construction, ownership, operation and maintenance of an integrated steel mill and associated structures and facilities to be located in Krimera, Koyto Province, Validatu . with an estimated a nnuual production capacity of 6,000,000 Metric Tons*
- b. ...*
- c. the procurement of raw materials and sub materials required for the production of steel products produced at the Plant;*

¹ Jarrod Wong, ‘Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes’ (2006) Vol. 14:1 accessed on 25 June 2015.

35. In the same JVA Art. 16 expounds:

16. Non-Compete:

- a. ...
- b. *During this term of agreement DL shall obtain prior written consent of AS to make any investment whether in the form of Joint Venture or otherwise, in a Validatu carbon steel manufacturing company which is or will be in competition with the Company or (ii) make any investment into Valiant which is or will be in competition with AS or any of its Affiliates.*

36. In the present case DL entered into another JVA with RMC on 3rd January 2012 without obtaining a prior written consent as necessitated in the non-compete clause and the same JVA was in competition with AS-DL JVA.

37. The purpose of JVA between DL-RMC as given Art. 13 of the same is:

13. The JVC's business of manufacturing and sale of the Products includes:

- a) *The JVC would use DL cold-rolled full-hard substrate with the aim of maximizing use of DL cold-rolled full –hard substrate;*
- b) *RMC would provide the DL technical assistance (on a non-exclusive basis) necessary for DL to produce cold-rolled full-hard substrate which would be required by the JVC;*

38. Para 16 of the case study

Purpose of DL-RMC JVA:

“...cold-rolled and galvanized steel for the automotive market.”

COLD-ROLLED FULL-HARD SUBSTRATE :

Cold rolled steel is the steel which is processed further in cold reduction mills, where the material is cooled (at room temperature) followed by annealing and/or tempers rolling.²

GALVANIZED STEEL

Galvanized steel is steel that has been coated with zinc in order to prevent rusting / corrosion.³

39. While in the JVA between AS and DL they produce steel, in the JVA between DL and RMC steel is first produced which is converted into cold rolled full hard subtract. Thus in both JVAs they produce steel.

40. Generally when parties enter into JVA, they have mutual obligation to support each other and enhance their project which is also mentioned in Art. 9 of the JVA between AS-DL:

9.Mutual Obligations: *Obligations that should be embed by the Parties in light of the Joint Venture Agreement. Each Party shall:*

a. in an agreed manner, support the Company by using its resources and capacity to enhance the efficient operation and competitiveness of the Company;

41. In this case, by entering into another JVA, the respondent indirectly inhibits the business growth of the existing company which resulted in loss for the claimant. This loss can also be seen in the yearly turnover given in *schedule 4-7*. The turnover has tremendously decreased in the year 2013 after DL entered into a JVA with RMC in the year 2012.

42. The claimant had sent two emails to the respondent dated 26th August, 2012 & 24th January, 2013 for which there was no reply.

² 'Difference Between Hot Rolled Steel and Cold Rolled Steel' <<http://metalsupermarkets.com/blog/difference-between-hot-rolled-steel-and-cold-rolled-steel/>> accessed on 21 June 2015

³ V. Ryan, 'Galvanising Steel And Iron – 1' <http://www.technologystudent.com/equip_flsh/galv1.html> accessed on 10 July 2015.

27. **Referral to Arbitration:**

a. *If a Dispute occurs and is not resolved within thirty (30) days, then the dispute shall be settled by arbitration under the arbitration rules of the International Center for Settlement of Investment Disputes (“ICSID”).*

...

43. Thus the claimant approaches the Tribunal as given under Art.27 of the JVA.

44. In the Case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*⁴ it was held that, “Once established, Jurisdiction cannot be defeated. It simply is not affected by subsequent events.”

45. Art.8 of the BIT deals with investment disputes...

Article 8:

“Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute”.

46. The term investment is defined in Art.1 of the BIT:

Article 1:

Definitions

For the purposes of this Agreement:

1. The term "investment" shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the

⁴ (2007) Case No. ARB/97/3 (ICSID)

other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively:

(a) ...

(b) shares, stocks and debentures of companies or any other form of participation in a company;

47. In our case the claimant has invested \$931,000,000 in the JVA & holds 70% of shares if the JVC (as given under Art. 7 of JVA). Thus, there is an investment as required under Art.8 of BIT.

48. Art. 8(1) prescribes that a dispute connected to investment ‘shall be settled, if possible, by negotiations...’ It also says if the dispute cannot be settled in 6 months, ICSID can be approached (Art. 8(2)(b)). The claimant claims that he requested the respondent for negotiations but the latter failed to respond the same. It can be safely said that the negotiation is a step in procedure and cannot affect the arbitrability of the dispute. It is not mandatory as Art. 8(1) mentions “if possible” and since the respondent failed to negotiate, the claimant approached ICSID.

49. Thus the dispute relates to an investment. The claimant would be interested in safeguarding his business. A competing business would amount to cutting into the earnings of the claimant. Thus this result in a dispute of investment and the Tribunal has jurisdiction.

JURISDICTION UNDER ART.25 OF ICSID:

50. Art. 25(2)(b) defines “*National of another contracting state*” as any juridical person which had the nationality of the contracting state party to the dispute, and which because of foreign control, the parties have agreed should be treated as a national of another contracting state. Hence locally incorporated companies may agree to ICSID arbitration subject to two requirements:

- The parties have agreed to treat the said company as a national of another contracting state
- The said company is subject to foreign control.

51. The convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state as a national of another contracting state because of foreign control.⁵
52. Further, Art. 25(2)(b) does not define nationality and there is no requirement for the agreement on nationality to be in writing. This would indicate that the standard of formality is somewhat lower for the agreement for nationality than consent.
53. The practice of ICSID Tribunals shows an increasing readiness to accept an implicit agreement to treat a juridical person as a foreign national because of foreign control.⁶
54. In the case of *Cable TV v. St. Kitts & Nevis*⁷ the Tribunal found that there was no expressed or implied or agreement on consent with the respondent. But it indicated that recognition as a national of another state could be inferred from the granting of privileges that are reserved to foreign investors.
55. The drafters of ICSID decided to give the parties wide discretion to determine under what circumstances a company could be treated as a national of another contracting state because of foreign control the concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights etc.⁸
56. In another case the Tribunal searched for real control and went one step further to second-tier control, which is to the majority shareholders of the company holding the share of the locally incorporated entity.⁹
57. A number of bilateral investment treaties provided that companies constituted in one state but controlled by the nationals of the other state shall be treated as nationals of the other state for the purpose of Art. 25(2)(b).¹⁰
58. In another case of *LETCO v. Liberia*¹¹, it was held “when a contracting state signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the contracting state and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat the

⁵ James Crawford, Karen Lee, *ICSID Reports* (Vol.6, CUP, 2004)

⁶ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (4th edn., CUP, 2013)

⁷ (1996) Case No. ARB19512 (ICSID)

⁸ Aron Broches, *The convention on the settlement investment disputes between states and nationals of other states* (2nd edn, 1972)

⁹ *SOABI v. Republic of Senegal* (1988) Case No. ARB/82/1 (ICSID)

¹⁰ *Micula v. Romania* (2013) Case No. ARB/05/20 (ICSID)

¹¹ (1986) Case No. ARB/83/2 (ICSID)

company as a juridical person of another contracting state, the contracting state would be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the contracting state's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.”

59. In the case of *Klockner v. Cameroon*¹², the foreign investor held 51% of the shares of the JVC while the country held 49% of the shares. The Tribunal held that the company was under foreign control and thus could be made subject to ICSID's jurisdiction. Similarly, in the case of *Tanzania Electric V. IPTL*¹³, it was held that it was sufficient that the parties had agreed to treat IPTL as a foreign controlled entity unless the amount of voting stock in IPTL held by non-Tanzanian investors should decrease to less than 50%.

60. In the present case, the claimant holds 70% of the total shares of the JVA (given in Art. 7 of the JVA). This proves that the company is under foreign control and thus the claimant has jurisdiction to approach ICSID under Art. 25(2)(b).

¹² (1983) Case No.ARB/81/2 (ICSID)

¹³ (2001) Case No. ARB/98/8 (ICSID)

II. WHETHER THERE IS A BREACH OF CONTRACT?

UNILATERAL AGREEMENT

61. The claimant entered into a JVA with the respondent on 4th October 2010 to produce steel in the country of Validatu. The respondent entered into another JVA with RMC on 3rd January 2012 to produce cold-rolled and galvanized steel for automotive market. (Para 16 of the case study)
62. In this case, the respondent's action is definitely unilateral. It would have been bilateral if the claimant had agreed to the new JVA entered into by the respondent. But that was not the case here. Moreover, the respondent entered into a business of competing nature and further did not obtain a prior written consent from the claimant as required by the 'non-compete' clause of the JVA under Art. 16.

16. Non Compete:

- a. ...
- b. *During this term of agreement DL shall obtain prior written consent of AS to make any investment whether in the form of Joint Venture or otherwise, in a Validatu carbon steel manufacturing company which is or will be in competition with the Company or (ii) make any investment into Valiant which is or will be in competition with AS or any of its Affiliates.*

63. Such an act by the respondent has led to huge amount of loss for the claimant. The claimant had also sent the respondent two email transcripts dated 26th August 2012 and 24th January 2013 enquiring about the new JVA of the respondent, both of which did not receive any reply.
64. This clearly proves the intention of the respondent to enter into a unilateral agreement.

CONTRACTUAL BREACH

65. A BIT is an agreement between two countries that governs the treatment of investments made in the territory of each state by individuals or companies from the other state. The umbrella clause is a treaty provision found in many BITs that requires each Contracting

State to observe all investment obligations it has assumed with respect to investors from the other Contracting State.¹⁴

66. A better interpretation is that an umbrella clause enables a BIT Tribunal to exercise jurisdiction over claims concerning such breach of contract, which are also BIT violations under the clause.¹⁵

67. The first umbrella clause can be traced back to 1954 where the settlement agreement involved the Iranian Oil Nationalization Company's (AIOC) claims regarding Iran's oil nationalization program. In this, it was felt that 'a breach of contract or settlement shall be *ipso facto* deemed to be a breach of the treaty.

68. The umbrella clause can be found in many BITs. The 1959 Germany-Pakistan BIT, Article 8(2) of which is an umbrella clause with substantially similar language: "Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party."

69. The U.S. Model BIT of 1983 also contains an umbrella clause providing that "each Party shall observe any obligation it may have entered into with regard to investors or nationals or companies of the other Party."

70. In the present case, Art. 2(3) of the BIT contains the umbrella cause:

Article 2:

Promotion and Protection of Investments

...

(3) Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

71. Also, in this case, the respondent failed to follow the non-compete clause and entered into another JVA which is of similar nature and thus competing with the business of the claimant; that is, both JVA involves in the production of steel.

¹⁴Jarrod Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes' (2006) Vol. 14:1 accessed on 21 June 2015

¹⁵Jarrod Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes' (2006) Vol. 14:1 accessed on 21 June 2015.

72. The claimant had also called for negotiation with the respondent and had also sent two email transcripts enquiring about the competing business, neither of which received a reply. This clearly shows a wilful default on the part of the respondent.
73. It has been suggested that wilful act requires intent to injure, that is, both an intentional act and an intentional injury.¹⁶ So, briefly we can define intentional breach as one in which the breaching party intent to do damages to non-breaching party or to take advantage of breach which requires both an intentional act and an intentional injury.
74. Breaching the contract intentionally is among other factors which may be used in determining whether the non-performance was fundamental or not. A breach may conduct as fundamental if there is an indication of intentionality that gives the aggrieved party a reason to believe that he cannot rely on the other party's future performance.¹⁷
75. Here, the breach committed by the respondent is fundamental as he has intentionally violated Art. 16 of the JVA which necessitates a prior written consent from the claimant before entering into a competing business and by also intentionally ignoring the two email transcripts by which the claimant enquired the respondent about the competing business.
76. Thus the respondent has made a breach of contract which has also become a breach of treaty by virtue of the umbrella clause contained in the BIT.

¹⁶Wong (n14)

¹⁷Ebrahim Shoarian , Roya Shirin Beig Pour, 'The effects of intentional breach of contract with emphasis on international instruments' (2013) Vol. 3, No.2 accessed on 10 July 2015.

III. WHETHER THE RESPONDENT CAN BE ORDERED TO TERMINATE THE JVA BETWEEN THEM AND RMC?

NEED FOR TERMINATION

77. The respondent has entered into a new JVA which is of a competing nature to the JVA entered into by the claimant and the respondent.

Schedule 8-1

Purpose of AS-DL JVA:

to exploit the steel resources in Validatu, this is used for producing slabs thicker and wider plate materials that are imported by the Validatu market. These products are also for meeting the need of the shipping and marine construction industry and construction industry.

Para 16 of the case study

Purpose of DL-RMC JVA:

“...cold-rolled and galvanized steel for the automotive market.”

78. The new JVA between DL-RMC caused great loss to the claimant which is evident in the annual turnover of AS-DL JVA (schedule 4-7). After the respondent entered into the JVA with RMC in 3rd January 2012, the annual turnover has drastically decreased not only for the steel production but for other sectors as well.

3

(Million USD)

					2010	2011	2012	2013
	2 660	1,293	785	582	327	380	1,284	668
	2 108	1,293	668	146	113	247	1,188	560
Iron making	960	570	323	67	55	112	545	248
Steel making	387	246	114	27	25	39	223	99
Plate Mill	401	257	116	28	27	39	231	104
Utility/ AUX ¹	360	220	116	25	6	56	189	109
	287	0	116	171	182	105		
	265	0	0	265	32	29	97	108

49%	30%	22%	12%	14%	48%	25%
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79. As stated in Para 12 and 13 of the case study, the President, on 5th August 2011, announced all projects to focus on the production of steel for the automotive industry and he ordered that any treaty not pursuant to those goals should be terminated.

80. Art. 13 of the BIT deals with termination of the BIT:

Article 13:

Entry into Force, Duration and Termination

- a. This Agreement shall enter into force on the date of the last written notification through diplomatic channels of the fulfillment by the Contracting Parties of all the necessary internal procedures for bringing this Agreement into force.*
- b. This Agreement shall remain in force for a period of five. Thereafter, it shall remain in force until the expiration of a twelve month period from the date either Contracting Party notifies the other in writing of its intention to terminate the Agreement.*
- c. In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of five years from the date of its termination.*

81. Thus this BIT will be in force only till the end of 2016.

82. Moreover, the BIT guarantees the investor “Promotion and Protection of Investments” (Art. 2 of the BIT) and also “National and Most Favoured Nation Treatment” (Art. 3 of the BIT)

83. The JVA between AS-DL was set for two phases wherein the claimant had invested \$ 931,000,000 for the Phase I itself.

84. If the BIT gets terminated before the completion of the second phase, he not only loses the immunities set forth in Art. 2 and Art. 3, but also incurs a great amount of loss.

85. On consideration of this great loss incurred by the claimant due to the JVA entered into by the respondent with RMC, and on account of moral obligations of the respondent to fulfill the agenda set under the AS-DL JVA (to finish phase II), the respondent can be ordered to terminate the JVA between him and RMC.

IV. WHETHER THE CLAIMS FOR COMPENSATION IS APPROPRIATE?

RESPONDENT'S LIABILITY TO COMPENSATE:

86. It is widely accepted that the non-performing party is liable for losses which he foresaw or ought to have foreseen at the time of the conclusion of the contract.¹⁸ This principle can be traced back to the days of Roman law. Much later it was established in the Code Napoleon. This rule has also been adopted by a number of legal systems and by the common law.

87. Some of the international conventions like the PECL and DCFR lay down that the liability is not limited to the foreseeability rule and the full damage has to be compensated even if it is not foreseeable.

88. The claimant has invested \$931,000,000 into just the Phase I of the JVA. In this case, the claimant has suffered a great loss due to the willful default of the respondent who entered into a new JVA of competing nature without seeking prior written consent from the claimant as required by Art.16 of the JVA.

16. Non-Compete:

a. ...

b. *During this term of agreement DL shall obtain prior written consent of AS to make any investment whether in the form of Joint Venture or otherwise, in a Validatu carbon steel manufacturing company which is or will be in competition with the Company or (ii) make any investment into Valiant which is or will be in competition with AS or any of its Affiliates.*

89. The annual turnover chart of AS-DL JVA (as specified under schedule 4-7) shows that the company's turnover has decreased invariably in various fields after the respondent entered into a JVA with RMC in the year 2012

¹⁸Hadley v. Baxendale, (1854) 23 LJEx 179, 18 Jur; Victoria Laundry v. Newman Industries (1949) 2 KB 528

90. Thus, for all the losses incurred, the claimant claims the respondent to bear the cost of the losses incurred by them, the cost of the arbitration proceedings, the Tribunal fees and the fees paid to the expert council Professor Eishen Simatupang.

91. By virtue of Art.61(2) of ICSID Convention, the claimant requests the Tribunal to make cost orders as it deems appropriate.

THE RELIEF SOUGHT

In the light of the above submissions, Counsel(s) for Claimant respectfully requests the Tribunal:

1. To find that the Tribunal has Jurisdiction to settle this investment dispute.
2. Declare that Respondent is liable for the violations of the joint venture agreement that has been made between both parties.
3. Order Respondent to terminate the agreement made between Dastan Logam and Ruberia Metal Corporation.
4. To find that Claimant is entitled to restitution by Respondent of all costs related to these proceedings.

And pass any other order to meet the ends of Justice, Equity and Good Conscience.

Respectfully Submitted,

X_____

Counsel(s) on behalf of the Claimants