ELIAS

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

TELEVATIVE INCORPORATED
(CLAIMANT)

AND

THE GOVERNMENT OF THE
REPUBLIC OF BERISTAN
(RESPONDENT)

Case No. ARB/X/X

* * *

MEMORANDUM FOR CLAIMANT

Representing the Claimant
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LIST OF LEGAL SOURCES

International Treaties and Covenants

Abbreviation	Full Citation
Argentina-France BIT	*Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments,* signed on 3 July 1991
Dutch-Polish BIT	*Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments,* signed on 7 September 1992
ICJ Statute	*Statute of the International Court of Justice,* annexed to the UN Charter
India-Singapore CECA	*India-Singapore Comprehensive Economic Cooperation Agreement ,* 2005
Mutual Assistance Convetion	*Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic,* 1986
NAFTA	*North American Free Trade Agreement,* signed on 17 December 1992
Switzerland-Philippines BIT	*Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments,* signed on 31 March 1997
UN Charter	*The Charter of the United Nations*
US-Uruguay BIT	*Treaty between the Government of the United States of America and the Oriental Republic of Ururguay Concerning the Encouragement and Reciprocal Protection of Investment,* signed on November 2005
VCLT	*Vienna Convention of the Laws of Treaties,* opened for signature on 23 May 1969

STATEMENT OF FACTS

1. On October 18, 2007, Televative Inc. and Beritech S.A signed a joint venture agreement (hereinafter the "JV Agreement") in order to establish a joint venture company – Sat-Connect S.A. – pursuant to the laws of Beristan. Televative owns 40 % and Beritech 60 % of the shares in the Sat-Connect.

2. Televative – being Claimant in the present case – is a multinational enterprise which specializes in developing of new technologies in satellite communication systems. Claimant is privately held and incorporated in Opulentia. Beritech is a state-owned company incorporated in Beristan, a private telecommunications services provider in Beristan, which activities touch related fields of business. Beristan owns 75 % of shares in Beritech, while the remaining shares are held by private investors, mostly Beristian nationals. Respondent, co-signed the JV Agreement as guarantor of the Beritech's obligations.

3. The Sat-Connect project was established for the purposes of developing and deploying a satellite system network accompanied by terrestrial systems and gateways for providing connectivity for users of the system within the Euphonia region. Televative's contribution to the project involves – in addition to the monetary investment of USD 47 million – intellectual property and know-how in value exceeding USD 100 million. Although the system can be used by army, it will be used chiefly by civilians.

4. The Sat-Connect´s board of directors is composed of nine members, five of which are appointed by Beritech and the rest by Televative. A quorum is obtained with the presence of 6 members at the moment of voting. Decisions are to be made by a simple majority.

5. According to the JV Agreement, the matters relating to the Sat-Connect project are to be treated as confidential. Therefore, once Televative breaches this provision, Beritech

will be entitled to buy-out its interest in the Project, which is to be valued as monetary investment from the commencement of the Project until the date of buy-out.

6. On 12 August 2009, highly placed Beristian governmental official indicated in the newspaper that the Sat-Connect project had been compromised due to leaks of information by Televative´s seconded personnel to the government of Opulentia. No other details were published, and both Televative and Government of Opulentia have made statements denying this published story.

7. On 27 August 2009, Beritech, with support of the five Sat-Connect´s board members who were appointed by it, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project. It is highly doubtful that the quorum was established, since Alice Sharpeton – a director appointed by Televative – refused to participate and left the meeting before the voting begun, and protested that she had no prior notice concerning the proposed agenda for the meeting.

8. Despite it, Beritech invoked a buy-out provision of the JV Agreement and provided Televative with 14 days to hand over the possession of all Project´s facilities, equipment and to remove its seconded personnel. After this period, the rest of the personnel was ordered to leave by Beristian Civil Work Forces (CWF), the civil engineering section of the Beristian army, deployed on a basis of the executive order.

9. On 19 October 2009, Beritech requested for a declaratory relief from the arbitral tribunal established under the Clause 17 of the JV Agreement and paid Televative´s monetary investment of US $47 million into an escrow account, pending the decision.

10. Televative commenced ICSID arbitration on 28 October 2009. On 1 November 2009, the ICSID Secretary General registered for arbitration this dispute brought by Televative against the Government of Beristan.

JURISDICTION

A. The Tribunal has jurisdiction over the Claimant's claims and its jurisdiction is not ousted by Clause 17 (Dispute Settlement) of the JV Agreement

11. Claimant contends that the ICSID Tribunal has jurisdiction to decide on all of his claims, properly formulated as claims based on violation of the BIT, notwithstanding whether their factual background lies in violation of the JV Agreement. Dispute Settlement Clause of JV Agreement does not preclude the jurisdiction of the Tribunal and cannot be regarded as a waiver of right to arbitrate before the ICSID Tribunal.

A.1. The jurisdiction of the ICSID Tribunal was properly established under the applicable international law

12. The jurisdiction of the ICSID Tribunal stems from Article 25 of ICSID Convention which states that *"[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."* This clause has to be read together with Article 11 of the BIT where Respondent offered to arbitrate any *"disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter."*

13. Claimant contends that all the conditions necessary to establish jurisdiction of the Tribunal are met. Namely, (1) the present dispute is of legal nature; (2) it stems directly out of investment; (3) it occurred between a state party and a national of another state and both states are parties to the ICSID Convention; and (4) both parties to the present dispute consented in writing to submit the dispute to the Centre. This criterion includes also the scope of the jurisdictional offer in Article 11 of the BIT.

A.1.(i) The dispute is of a legal nature arises directly out of the investment, between Contracting State and a national of another Contracting State to ICSID Convention

14. Claimant – as it is clear from its initial pleadings[1] – argues that Respondent breached its obligations under the applicable BIT. The BIT is a source of international law[2] and the obligations arising under the BIT are hence obligations of legal nature. Claimant also seeks a legal remedy for the alleged breaches. A dispute can be considered as legal *"if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed;"*[3] or if *"the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and [if the dispute] is more than a mere 'conflict of interest'."*[4] Therefore, if Claimant formulates its claims in legal terms and on the basis of existent law, and Respondent answers in terms of law,[5] there is a dispute of legal nature.[6]

15. Whether the dispute arises directly out of an investment is both question of whether the Claimant made an investment covered by the BIT, and what the relationship between the investment and the dispute is.[7] The joint-venture project can be qualified as an investment both under the BIT and as well under the ICSID Convention. The present dispute relates directly to the investment, mainly because the actions complained of has led to the termination of the Claimant's investment in the Sat-Connect project.

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1 *Minutes of the First Session of the Arbitral Tribunal* (ICSID Case No. ARB/X/X), held in Malibu, California, on 15 March 2010 [Minutes], § 15, Claimant, sub-paragraph 4

2 *ICJ Statute,* Article 38(1)(a)

3 Schreuer: ICSID Commentary, p. 105, § 42; cf. *East Timor Case*, § 22; *Mavrommatis Palestine Concession,* p. 11; *Azurix,* § 58

4 *Executive Directors' Report,* § 26

5 *Minutes,* § 15

6 *El Paso,* § 62

7 Schreuer: ICSID Commentary, p. 105, § 42

16. The present dispute arises directly out of an investment according to the *Salini test*[8] and the broad definition of investment in the BIT, since the right of Claimant under the JV Agreements and the subsequent Claimant's 40 % share on Sat-Connect may be qualified as an investment. Claimant asserts that both investment tests are met, hence the jurisdiction of the tribunal is established.[9]

17. The concept of investment is defined in Article 1(1) of the BIT as including *inter alia "[b)] shares [… d)] patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets [… e)] any right of a financial nature accruing […] by contract […]"*. Claimant contends that its share in Sat-Connect project, intellectual property rights provided to the project and rights arising out of the JV Agreement qualifies as an investment covered by the BIT.

18. In the terms of the ICSID Convention, four criteria determine the existence of an investment: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host State's development.[10] Claimant asserts that all of these criteria are met, because Claimant expended at least monetary investment of USD 47 million[11] and established a joint-venture with unlimited duration.[12] Development of Sat-Connect project can be considered as both assumption of business risks and contribution to the development of Beristian economy. Notably, Claimant transferred innovative technologies to Beristan – as a leading developer of new technologies in satellite communications business.[13]

8 *Salini v. Morocco,* § 52 – 57

9 *Fedax*, §§ 18 – 20

10 *Salini v. Morocco,* § 52 – 57

11 Annex 2 to the Minutes (Uncontested Facts), § 12

12 Ibid., § 3

13 Ibid., § 1

19. Both Respondent and Opulentia, which is the state where Claimant is incorporated,[14] are Parties to ICSID Convention. According to rule of incorporation, widely recognized as the rule determining nationality of corporations,[15] Claimant is a national of Opulentia.

A.1.(ii) Claimant properly formulated its claims as treaty-based

20. It is a well-settled case law which asserts that it is up to Claimant to formulate its claims,[16] and *"if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT […], the Claimant should be able to have them considered on their merits"*.[17] Claimant does not accept a foreseeable Respondent's contention that Claimant's claims are to be characterized as contract-based. There is no clear-cut border line between so called treaty-based and contract-based claims.[18] All of the Claimant's claims are to be regarded as treaty claims in the sense that they are brought before the ICSID Tribunal on the basis of the BIT. There is no such thing as an improper reformulation of contractual claims as treaty-based.

21. It is necessary to ask, what the treaty claims and what the contract claims are. It seems that every claim which has its background in a breach of a contract shall be considered as contract-based. However, the distinction cannot be drawn in such a simplified manner. The same factual basis may give rise both to the breach of a contract and to the breach of a treaty, because the qualification of a conduct as unlawful in municipal and in the international law is rather independent.[19]

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14 Ibid.

15 *ELSI Case,* § 70; *SOABI*, § 29; *Autopista*, § 107

16 *Vivendi Award,* § 53; *Vivendi Annulment,* § 74; *Salini v. Morocco,* § 62 – 63; *Wena Hotels,* p. 890; *SGS v. Pakistan,* §§ 144 – 145; *Siemens Jurisdiction*, § 180

17 *SGS v. Pakistan,* § 145

18 *Siemens Award*, § 206; *Noble Ventures,* § 82

19 *Vivendi Annulment,* § 95; *ELSI Case,* §§ 73, 124; ILC Articles on Responsibility, Article 3

22. It is obvious from the Minutes that Claimant does not urge the ICSID Tribunal to hold Respondent liable to laws of Beristan as a proper law of the JV Agreement.[20] Claimant seeks to prove that the complex of Respondent's acts and omissions, including the false allegations of the highly placed Beristian government official[21] and expulsion of seconded personnel by CWF,[22] caused the termination of Claimant's investment in the Sat-Connect project and led to violation of substantive standards of the BIT.

23. As Claimant argues in parts C and D of this memorandum [§§ 56 – 129], Respondent's acts and omissions were clearly capable to constitute uncompensated expropriation, unfair and inequitable treatment, unjustified measures and a breach of the umbrella clause. These acts also incited and supported Beritech to invoke material breach of the JV Agreement. The ICSID Tribunal is not precluded to take into account the terms of the JV Agreement, because *"it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 [fair and equitable treatment] of the BIT."*[23]

A.1.(iii) Respondent consented in writing to arbitrate Claimant's claims

24. Respondent gave its jurisdictional offer to arbitrate the dispute before the ICSID Tribunal in writing – which is an accepted practice[24] – through Article 11(2)(a) of the BIT. Claimant did so by submitting the request for arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and by notifying the Government of Beristan.[25] If state offers more

20 Minutes, § 15; Annex 3 to the Minutes, Clause 17

21 Annex 2 to the Minutes (Uncontested Facts), § 8

22 Ibid, § 11

23 *Vivendi Annulment,* § 105; cf. Argentina-France BIT, Article 3

24 Schreuer: ICSID Commentary, p. 210, § 286

25 Annex 2 to the Minutes (Uncontested facts), § 14

options to the investors in a BIT – as Respondent did in the applicable BIT – the choice of particular forum is up to the investor.[26]

25. When the existence of consent of the both parties to the dispute is recognized, it is appropriate to proceed with the second step and consider what is the scope of the established consent, both *ratione personae* and *ratione materie.* Claimant recalls that Respondent consented to arbitrate *"disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter."* Regarding the personal jurisdiction, there has to be dispute between a state and a foreign investor. Regarding the subject-matter of the dispute, it has to concern (1) investment and (2) obligation of the state party arising out of the BIT.

26. Respondent might argue that most of action which led to the end of Claimant's investment in the Sat-Connect project was committed by Beritech, a separate legal entity under the municipal law of Beristan. However, Claimant emphasizes that significant portion of action was *prima facie* committed by Respondent itself [§ 22]. Further, separate legal personality of Beritech under municipal law of Beristan does not preclude international responsibility of Respondent for actions which are attributable thereto. As it is more comprehensively argued in the part dealing with the merits [§§ 57 – 65], (1) actions of Beritech are attributabl*e to the* Respondent and (2) rules of attribution are operable because international obligations – particularly the umbrella clause – are allegedly breached.[27]

27. It might be Respondent's contention that claims submitted by Claimant to the ICSID Tribunal are contractual in nature and therefore the jurisdictional offer in the Article 11 of the BIT is too narrow to encompass such claims. (Let us say that the keyhole is too small to insert the key.) However, claimant formulated its claims as arising out of violation of the BIT. As it was stated above [§§ 20 – 23], the tribunal has to accept

26 Schreuer: ICSID Commentary, p. 215, § 295

27 *Noble Ventures*, §§ 82 – 86; *Eureko*, §§ 132, 134, 250

these claims as they are and cannot subject them to a too strict scrutiny. Then the Claimant's key gets easily into the keyhole.

28. Even if the tribunal classifies the Claimant's claims as based on the JV Agreement, Claimant asserts that the jurisdiction of the ICSID Tribunal is not limited to the breaches of the BIT itself. The tribunal is authorized and indeed required to decide on such claims due to the BIT's umbrella clause. The effect of the umbrella clause is, that it makes a non-performance or a breach of the contract a breach of the BIT.[28] It is Respondent's obligation under Article 10 of the BIT to *"constantly guarantee the observance of any obligation it has assumed with regard to investments"*. Therefore, every obligation arising out of the JV Agreement is an "*obligation [...] under this Agreement [the BIT] in relation to an investment of the latter"* according to Article 11 of the BIT.

29. The *Eureko* Tribunal based its jurisdiction on similarly narrow jurisdictional offer in the Dutch-Polish BIT as the one drafted in Article 11 of the BIT. The relevant provision of the Dutch-Polish BIT stated that an investor could subject to the arbitration *"dispute [...] relating to the effects of a measure taken by the [state party]with respect to the essential aspects pertaining to the conduct of its business, such as the measures mentioned in Article 5 of this Agreement [...]".*[29] Despite narrow drafting of the Polish jurisdictional offer, the tribunal did not agree with the responding party´s objection to jurisdiction which was based on a contractual nature of the claims[30] and even accepted jurisdiction over contract-based claims through operative effect of the umbrella clause.[31] Claimant urges the tribunal to follow the teachings of this tribunal.

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28 *SGS v. Phillipines,* § 128; Newcombe & Paradell, p. 436

29 Dutch-Polish BIT, Article 8

30 *Eureko,* § 112

31 Ibid, § 250

A.1.(iv) Jurisdiction of the ICSID Tribunal is not affected by non-compliance with the waiting period, which is merely a procedural requirement

30. Claimant does not oppose that it was obliged to conform with requirement to settle the dispute *"amicably within six months of the date of a written application"* (within the so-called "waiting period") pursuant to Article 11(1) of the BIT before it submits the dispute to the ICSID Tribunal. However, it is a well-settled case law – relying on the arguments developed by PCIJ and ICJ[32] – that the waiting period is a mere procedural, and not jurisdictional requirement.[33]

31. Claimant is not obliged to wait and attempt to negotiate before submitting its case to the tribunal, where the prospect to amicable settlement is elusive.[34] Respondent clearly manifested its refusal to negotiate by the use of CWF against Claimant's seconded personnel.[35] Furthermore, strict interpretation of the waiting period clause would contravene the principle of orderly and cost-effective procedure.[36] Therefore, it may be concluded, that the jurisdiction of the ICSID Tribunal is not affected by non-compliance of Claimant with the waiting period.

A.2. Jurisdiction of the ICSID Tribunal, properly established under the ICSID Convention and the BIT, is not superseded by municipal agreement of the parties

32. There are mainly two reasons for the conclusion that the jurisdiction of the ICSID Tribunal is not affected by the existence of Settlement of Dispute Clause 17 in the JV Agreement and the pending arbitration commenced on a basis of the JV Agreement. Firstly, the treaty cause of action is to be distinguished from contract cause of action.

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32 *Certain German Interests,* p. 14; *Nicaragua Case,* pp. 427 – 429

33 *Ethyl v. Canada,* § 74 – 88; *Lauder,* § 187; *SGS v. Pakistan,* § 184

34 *Lauder,* §§ 188 – 189

35 Annex 2 to the Minutes (Uncontested Facts), § 11

36 *SGS v. Pakistan,* § 184

Secondly, the JV Agreement arbitrator is not authorized to decide on obligations arising out of the BIT.

A.2.(i) Treaty-based claims exist independently from any claims arising out of the contract

33. It is a well-settled case law, that dispute settlement clauses in contracts do not oust jurisdiction of the international investment tribunals.[37] The *ad hoc* committee in *Vivendi Annulment* stated that

> *"where the 'fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard."*[38]

34. Furthermore, the tribunal – relying on Article 3 of ILC Articles on Responsibility – observed that the Respondent cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty.[39] The fundamental principle is that same set of facts can give rise to different claims grounded on differing legal orders.[40]

35. Respondent will probably rely on the conclusions of *Vivendi Annulment* – at the first sight opposing to the arguments presented above [§§ 33 – 34] – that *"[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.*[41] However, this argument has to be rejected because (1) Claimant

37 *Vivendi Annulment,* § 95; *SGS v. Pakistan,* §§ 147, 154; *SGS v. Philippines,* § 155; *Noble Ventures,* § 53; *Eureko,* § 112 – 113

38 *Vivendi Annulment,* § 105

39 Ibid, § 103

40 *SGS v. Pakistan,* § 147; *ELSI Case,* §§ 73, 124

41 *Vivendi Annulment,* § 98

properly formulated its claims as treaty-based [§§ 20 – 23] and the umbrella clause has the effect of changing the breach of a contract to the breach of the BIT [§ 43]; and (2) the essential basis test has to be read with reference to the other parts of the *Vivendi Annulment* decision.

36. The *essential basis* test was objected by Government of Poland in *Eureko*. The *Eureko* Tribunal rejected the objections and held, that the essential basis test was a mere *obiter dictum*.[42] Furthermore, the tribunal stated that if Claimant advances claims for breaches of the BIT *"decisicion of* ad hoc *Committee in Vivendi […] authorizes, and indeed, requires, this Tribunal to consider whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum [the relevant contracts], constitute breaches of the Treaty."*[43] Claimant asserts that facts of this case require the Tribunal to refuse Respondent's objections and recognize jurisdiction, notwithstanding Clause 17 of the JV Agreement.

A.2.(ii) The JV Agreement arbitration is not a competing jurisdiction, because it is not empowered to decide on the BIT claims

37. Claimant asserts that there is no competing jurisdiction conferred to the JV Agreement arbitrator. In article 11(2) of the BIT, Respondent offered three options for settlement of investment disputes: (1) domestic courts; (2) UNCITRAL ad hoc international arbitration; and (3) ICSID arbitration. Claimant decided for the third option.[44] It might be Respondent's contention, that the JV Agreement arbitration was commenced within the second option, so that Claimant's decision is too late to have any legal consequences.

38. However, terms *"dispute arising out of or relating to this Agreement"* used in Clause 17 of the JV Agreement cannot encompass claims based on violation of the BIT, as a source of international law, because the JV Agreement is a municipal agreement. The

42 *Eureko,* § 103

43 Ibid., § 112

44 Annex 2 to the Minutes (Uncontested Facts), § 14

parties to municipal agreement could not reasonably intended the dispute resolution clause as involving claims arising out of the BIT.[45]

39. Secondly, the investment dispute within the meaning of the BIT may be commenced merely by the investor. Article 11(1) of the BIT clearly states that *"the investor in question may in writing submit the dispute*;" not the state party or a national thereof. If the international investment practice significantly limits the admissibility of counterclaims,[46] it could be hardy contended, that the host state is allowed to commence an investment dispute.

40. Thirdly, the JV Agreement arbitration is not bound by Arbitration Rules of the UN Commission on International Trade Law as the BIT requires. The arbitrator is bound by 1959 Arbitration Act of Beristan which remains – albeit it incorporates 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 [47] – a source of municipal law with its own methods of interpretation and application. Moreover, Arbitration Rules of the UN Commission on International Trade Law[48] are not to be confused with 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[49]

41. Fourthly, the waiting period in Clause 17 of the JV Agreement is of specific wording and orders the parties – after the notice of arbitration – to *"attempt to settle the dispute amicably and, unless they agree otherwise, cannot commence arbitration until 60 days after the notice of intention to commence arbitration. [emphasis added]"*. Beritech did not complied with the waiting period.[50] The strict prohibition to commence arbitration differs substantially from the standard of drafting the waiting period in the BIT, which is not prohibitive but rather sets an additional condition to general possibility to

45 *SGS v. Pakistan,* § 153

46 *Saluka Counterclaim,* §§ 60 – 61, 76; *Klökner,* p. 165

47 Clarification Requests (4 June) Responses, § 130

48 General Assembly resolution 31/98 (15 December 1976)

49 General Assembly resolution 40/72 (1985); General Assembly resolution 61/33 (2006)

50 Annex 2 to the Minutes (Uncontested Facts), §§ 10, 13

commence arbitration. Therefore – unlike in the BIT – the JV arbitration lacks jurisdiction if the Settlement of Dispute Clause is invoked before the waiting period expires.

B. In addition, 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

42. According to Article 10 of the BIT, the Respondent is obliged to observe any obligations it has assumed with regard to Claimant´s investment in its territory. This clause, in turn, gives the ICSID Tribunal jurisdiction over alleged breaches of the JV Agreement which become, by the same token, the breaches of the BIT itself. This applies even if these breaches were committed by Beritech, because actions of Beritech are imputable to the Respondent. Furthermore, the scope of the umbrella clause is wide enough to encompass the breaches of the JV Agreement.

B.1. The effect of the umbrella clause is to make the host state internationally responsible for the breaches of contracts

43. The principal question of the tribunal when considering the application of the umbrella clauses was what effect should be given to such clauses. Claimant asserts that Article 10 of the BIT makes it a breach of the BIT to fail to observe binding commitments, including contractual commitments, which Respondent has assumed with regard to the specific investment.[51] This conclusion is supported by actual wording of the Article

51 *SGS v. Phillipines,* § 128; Newcombe & Paradell, p. 436; Weil: Contrats passés entre un Etat et un particullier, p. 130

and by the principle of *effet utile* which requires to interpret the treaty provisions to be rather effective than ineffective.[52]

44. Therefore, contractual arrangements between the investor and the host State – or any other entity, acts of which are attributable to the host State – are subjected to the jurisdiction of the tribunal, as they become the breaches of the BIT itself.[53] This conclusion can be also supported by reference to the wide definition of investment according to Article 1(1)(e) of the BIT which includes *"any right of a financial nature accruing […] by contract"*.

45. It is a well-known fact that this effect of the umbrella clause was not recognized by some tribunals.[54] However, the arguments presented mainly in these decisions which made the umbrella clause rather ineffective ought to be rejected.

46. Firstly, the tribunal in *SGS v. Pakistan* feared the indefinite expansion of claims based on the violation of the umbrella clause.[55] However, the scope of application of the umbrella clause is limited to *"obligations with regard to investments"* and the floodgate argument is easy to reject by the standard floodgate responses concerning the high costs.[56]

47. Secondly, the general principle of international law that *"a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law"*[57] was used to support the restrictive mode of interpretation.[58]

52 *SGS v. Philippines,* § 115; *Noble Ventures,* § 50 – 53; *Salini v. Jordan,* § 95

53 *Eureko,* § 250

54 *SGS v. Pakistan,* § 163 – 174; *Joy Mining,* §§ 80 – 81

55 *SGS v. Pakistan,* § 166

56 Crawford: Treaty and Contract, p. 369

57 Schwebel: On Whether the Breach, pp. 434 – 435

58 *SGS v. Pakistan,* § 167

However, it is obvious, that a rule of customary international law can be derogated from by a treaty unless the customary law rule is peremptory.[59]

48. Thirdly, the tribunal expressed its concern that the effect of a broad interpretation would be, *inter alia,* to override dispute settlement clauses negotiated in particular contracts.[60] However, the purpose of the umbrella clause is not to replace the JV Arbitration with the ICSID Tribunal; this purpose is to make the performance of the JV Agreement enforceable under the BIT.[61] Claimant also recalls that the exercise of the contractual jurisdiction has to be distinguished from the application of the terms of a contract in order to determine whether there has been a breach of the BIT.[62]

49. Claimant urges the Tribunal to prefer the interpretation which renders the umbrella clause effective as other tribunals did.[63] Schreuer also considers the reasoning of *SGS v. Philippines* clearly preferable to the one in *SGS v. Pakistan,* because *"[i]t does justice to a clause that is evidently designed to add extra protection for the investor."*[64]

B.2. The jurisdiction of the ICSID Tribunal is to be extended to the obligations assumed by entities which acts are attributable to Respondent

50. The issue of attribution is elaborated in respective parts of this memorandum [§§ 57 – 65]. However, the obligation arising out of Article 10 of the BIT is international obligation, therefore, the principles of attribution are operative.[65]

51. Accordingly, the tribunal in *Nykomb v. Latvia* declared – by virtue of the umbrella clause in Article 10(1) of the ECT – its jurisdiction over a breach of contract between

59 VCLT, Article 53; cf. *Noble Ventures,* § 55

60 *SGS v. Pakistan,* § 168

61 *SGS v. Philippines,* § 126

62 *Vivendi Annulment,* § 105

63 *Eureko,* §§ 244 – 260; *Noble Ventures,* §§ 46 – 62; *Fedax,* § 29

64 Schreuer: Travelling the BIT Route, p. 255

65 Shaw: International Law, p. 785; ILC Articles on Responsibility, Articles 4 – 9; *Immunity of Special Rapporteur,* §§ 62, 87; *Genocide Convention Case*, § 385

the investor and a wholly owned state enterprise.[66] In *Eureko,* independent legal personality of Polish State Treasury did not preclude the tribunal´s competence to hold the host State responsible for the breach of the umbrella clause.[67] Similarly, the tribunal in *Noble Ventures* stated that

> *"this Tribunal cannot do otherwise than conclude that the respective contracts […] were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of [the umbrella clause]."*[68]

B.3. The scope of the umbrella clause is wide enough to encompass the breach of the JV Agreements

52. Article 10 of the BIT is imperative and Claimant asserts that the wording *"any obligation with regard to investment"* obliges Respondent to honor all legal commitments it has assumed with regard to the investment. As the tribunal in *SGS v. Philippines* stated the term *"any obligation,"* used in applicable Switzerland-Philippines BIT[69] as well as in the Beristan-Opulenta BIT, *"is capable of applying to obligations arising under national law, e.g. those arising from a contract."*[70] The scope of application of the umbrella is not restricted to obligations of a specific kind,[71] as the state practice also shows.[72]

53. Although some tribunals proposed that the scope of umbrella clause should be limited only to sovereign acts of the host state (*administrative contracts*), whereas purely commercial obligations are not covered,[73] or it should be limited to significant

66 *Nykomb v. Latvia,* p. 31, § 4.1

67 *Eureko,* § 260

68 *Noble Ventures,* § 86

69 Switzerland-Philippines BIT, Article X(2)

70 SGS v. Philippines, § 115

71 SGS v. Philippines, § 118; Noble Ventures, § 51; Eureko, §§ 257 – 258

72 Note of German Government to Parliament concerning 1959 BIT between Germany and Pakistani; cited in Alenfeld: Investitionsförderungsverträge der BRD, p. 97

73 *SGS v. Pakistan,* § 172; *Joy Mining,* §§ 78 – 79

interference of government or public agencies[74], this opinion is not preferable.[75] The umbrella clause may be applied both to obligations of administrate nature and to obligations of commercial nature. The BIT expressly states that the state has a duty to observe *any obligation* it assumed.

54. Distinction between obligations of administrative and commercial nature – although sometimes recognized – has no basis in the relevant texts of BITs and, as remarked the tribunal in *Noble Ventures*, distinction between commercial and sovereign acts of the host state is not manageable in practice, therefore should have only a little relevance.[76] Also the tribunal in *Siemens v. Argentina* rejected distinction between different types of investment contracts since it found no basis for such a distinction in wording "*any obligations"* and in the definition of investment.[77]

55. Claimant suggests to the Tribunal to refrain from restricting the scope of the umbrella clause. References to abstract concepts, such as distinction between *acta iure imperii* and *acta iure gestionis,* has no methodological power of persuasion for it has no basis in modes of interpretation according to Article 31 of VCLT.[78] The jurisdiction of the tribunal to decide whether the umbrella clause was violated is not affected by the nature of the breached contract or intention of the party in breach.

74 *CMS Award,* §§ 302 – 303

75 Schreuer: Travelling the BIT Route, p. 255; Wälde: The Umbrella Clause, p. 225

76 *Noble Ventures,* § 82

77 *Siemens Award,* § 206

78 Dolzer & Schreuer, p. 161

MERITS

C. Respondent committed material breach of the JV Agreement and therefore violated its international obligations

56. In order to hold a State responsible for a breach of contract on the international plane by virtue of so-called umbrella clause, there must be a contract between the foreign investor and the State.

C.1. Contract with Beritech – the JV Agreement – can be deemed as a contract with State, therefore covered by "umbrella clause"

57. 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.

58. Article 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 <u>any other functions</u>* [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.'*" The Commentary follows that *"these functions may involve, e.g. the giving of administrative guidance to the private sector;"*[79] and that *"[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as acta iure gestionis."*[80]

59. Acts of Beritech are attributable to Beristan especially by virtue of Article 8 as Respondent owns 75 % of shares in Beritech which renders him a controlling entity which is able to determine actions of controlled Beritech independently from the fragmented minority. Commentary to Article 8, referring to the principle of

79 ILC Articles on Responsibility, p. 41, § 6, fn.110

80 Ibid., p. 41, § 7

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.*"[81] 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.*"[82] It is the Claimant´s contention that Beritech was guided by Respondent to achieve buy-out of the Televative´s interest against the terms of the JV Agreement.

60. Due to the attribution rule, the tribunal in *Nykomb v. Latvia*[83] 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.[84] The way in which each state chooses to divide the work between its subdivisions is without relevance, as was affirmed in *SwemBalt v. Latvia*.[85] These tribunals interpreted the umbrella clause without any limitation.

61. 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.[86]

62. 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.*"[87]

81 Ibid., p. 47

82 Ibid, p. 48

83 *Nykomb v. Latvia*, pp. 29 -31, § 4.2

84 *Eureko*, §§ 115 – 134

85 *SwemBalt*, § 37

86 *EnCana*, §§ 154, 158

87 *SGS v. Pakistan*, § 166

63. As stated in *Consortium 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.[88] 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.[89]

64. Respondent may argue that domestic rules on separate personality should apply. Claimant argues, however, 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.*"[90] In the latter cases the international rules on attribution would apply.[91]

C.2. Respondent violated the BIT as it has unlawfully prevented Claimant from peaceful completion of his contractual duties

65. 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 deployment of the Sat-Connect project. The Claimant has invested in the Project with an expectation of a large-scale profit and expected to valorize its know-how and experience. Completion of the project was of its highest interest.

66. 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

88 *Consortium L.E.S.I.-DIPENTA,* § 19

89 Annex 2 to the Minutes (Uncontested Facts), § 3

90 Newcombe & Paradell, p. 465

91 Newcombe & Paradell, p. 465; further see *Maffezini Jurisdiction*, §§ 71 – 89; *Maffezini Award*, §§ 46 – 57; *Consortium RFCC*, §§ 34 – 40

ensuring that disputes would be settled and alleged breaches would be equitably investigated and, in case of finding a violation, redressed.

C.2.(i) Breach of State Contracts entered into with foreigners under Customary International Law

67. 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 internationally wrongful act. Sir Gerald Fitzmaurice citing from the unpublished United Kingdom counter-pleading in the arbitral (third) phase of the *Ambatielos case* 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]."*[92]

68. 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.

69. A position that only certain breaches of contracts can hold a State responsible is also espoused by other authorities. US Foreign Relations Law Restatement (Third) – for instance - 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."*[93] 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 […]*"[94]

92 Cited from Fitzmaurice: Scholar as Judge, pp. 64 – 65

93 Restatement (Third), § 712

94 Schwebel: On Whether the Breach, p. 429

70. 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.[95]

71. 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.[96]

72. 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.*"[97] Beristan acted in an arbitrary way and, as argued hereinafter [§§ 87-128], has violated not only general international law, but especially its obligations under the BIT.

C.2.(ii) Umbrella clause operate on the two distinct levels, beside a jurisdictional role, it provides a substantive standard

73. It is submitted that so-called umbrella clause operates on the two distinct levels. First, it confers a jurisdiction upon the tribunal [§§ 42-55]. 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.*"[98]

74. The Tribunal in Sempra addressed the issue with utmost clarity:

> *"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*

95 ILC Articles on Responsibility, p. 36

96 *Shufeldt*; *Orinoco Case*; *International Fisheries case*; *Texaco v. Libya*; *Revere Copper; Aramco*

97 Schwebel: On Whether the Breach, p. 434

98 McLachlan, Shore & Weiniger, p. 117; further see *El Paso*, § 81; *Sempra Award*, § 310

of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect."[99]

75. 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.*"[100] UNCTAD Series privide that, „*[s]uch 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."*[101] For a reasons submitted above [§§ 43-55], Claimant adheres to this interpretation.

76. 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 Article 10 of the BIT, constitutes a violation of the BIT. The existence of the umbrella clause 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."*[102] As stated hereinbefore [§§ 68 – 73], 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.2.(iii) Respondent committed a breach of Article 10 of the BIT by assisting to Beritech with its unreasonable invocation of Article 8 of the JV Agreement

77. First of all, Beristan acting in its sovereign power used military force ("CWF") against Claimant.[103] 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

99 *Sempra Award*, § 310; further see *Impregilo*, § 260

100 Dolzer & Stevens, p. 82

101 UNCTAD Series, State Contracts, p. 19

102 Dolzer & Schreuer. p. 155

103 Annex 2 to the Minutes (Uncontested facts), § 11

connected with a substantial future profit, notwithstanding whether the Beritech´s claim under the Clause 8 of the JV Agreement was valid or not.

78. For the reasons mentioned above [§§ 57 – 65], Claimant contents that the Article 10 of the BIT is applicable, and was infringed. When Claimant did not agree with the invocation of Clause 8 the matter should have been resolved by the means prescribed by the JV Agreement. Beristan was under the obligation to refrain from action 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 Article 8 in the way contrary to its international legal obligation, because under Article 10 of the BIT Respondent "*shall constantly guarantee any obligations it has assumed with respect [...]*" to this investment. The cause of action is founded exclusively on the dispute settlement mechanism of the BIT, independently from whether there is another dispute concerning the JV Agreement.

79. 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 [...]*."[104] 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.*"[105]

80. Moreover, 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 the use of military. This makes the Televative´s claims utterly treaty-based.

104 Annex 1 to the Minutes (The BIT), Preamble

105 *SGS v. Phillipines,* § 166

C.2.(iv) Applicability of domestic law to the breach of Article 10 of the BIT in the view of Article 14 of the BIT

81. Claimant is aware, in the language of the *Vivendi Annulment* decision, 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.*"[106]

82. However, Claimant submits that the Article 14 of the BIT, so-called preservation of rights clause, "*does not permit (a contrario) application of less favorable provisions of the host state domestic law.*"[107] Article 42(1) first sentence of the *ICSID Convention* requires the application of rules of law agreed by the parties. The Article 14 can be then deemed as such an agreement.[108] Only in the absence of such an agreement the Tribunal can turn to the second sentence of Article 42(1) of the ICSID Convention.

83. Furthermore, notwithstanding the proper law of the contract, Claimant submits that the breach of Article 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.

C.2.(v.) Analysis of the breach under the domestic law

84. Alternatively, even when the Tribunal decides to apply the national law, Claimant must point out that in the course of invoking the buy-out clause, the provisions of Beristian law were also violated.

85. Beristian law requires that a decision of the board of directors of the company issued in violation of company´s bylaws is null and void.[109] In the Sat-Connect´s board of

106 *Vivendi Annulment,* § 96

107 *Middle East Cemen*t, § 87; *Goetz v. Burundi*, §§ 95, 99

108 Ibid.

109 Second Clarification Requests (6 August 2010) Responses, § 200

directors, a quorum is obtained with the presence of 6 members.[110] With respect to the requirement of quorum, it must be complied with it at the moment of voting.[111] From the uncontested facts is evident that Alice Sharpeton left the meeting when informed about the invocation of buy-out clause and refused to participate.[112] Therefore, the quorum was not satisfied at the time of voting and the board´s decision on buy-out should be held null and void.

D. Respondent violated its obligations under the international law, especially the substantive standards of protection under the BIT

D.1. Respondent violated fair and equitable treatment standard

86. According to Article 2(2) of the BIT 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.[113] Others agree with possible overlaps with other standards, but distinguish it from relative standards, such as e.g. national treatment.[114]

D.1.(i) Respondent did not satisfy the prescription of the customary international law of the standard of due process

87. 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*,[115] which was not complied with.

110 Annex 2 to the Minutes (Uncotested Facts), § 4

111 Second Clarification Requests (6 August 2010) Responses, § 200

112 Annex 2 to the Minutes (Uncotested Facts), § 10

113 Mann: British Treaties, p. 241, further see 1992 World Bank Guidelines

114 Vasciannie: Fair and Equitable Treatment, p. 99

115 Sornarajah, p. 329 – 330; Newcombe & Paradell, p. 243-5 ; Dolzer & Schreuer, p. 142-144; Weiler & Laird, p. 265-6

88. Claimant did not have an opportunity to react on or defend himself against the action of CWF, nor the allegations of the leaks were discussed with it. 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.[116] It applies to all forms of government decision making in which host state decisions affect the rights of the investor.[117] 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[118] or with the situation when government failed to notify of the seizure of property.[119] In all these cases tribunals found a breach of fair and equitable treatment.

89. 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 the false charges.

90. But what strikes the due process principle the most, is the fact that the executive order, cannot be appealed.[120] Therefore Claimant had no legal protection available whatsoever under the law of Beristan.

D.1.(ii) Respondent´s acts amount to arbitrariness prohibited under general international law with respect to the aliens and their property

91. 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 Article 2(2) of the BIT.

116 *TECMED*, §§ 92 – 94

117 Newcombe & Paradell, p. 244

118 *Metalclad* , § 91

119 *Middle East Cement*, § 143

120 Second Clarification Requests (6 August 2010) Responses, § 228

92. Arbitrariness falls within the concept of abuse of rights and this concept is an expression of the principle of good faith,[121] codified in Article 26 of *VCLT* and accepted by many authorities.[122] In connection with property it is explicitly expressed in Article 17(2) of *the Universal Declaration of Human Rights*, which – being considered as a part of customary international law[123] – provides that *"no one shall be arbitrarily deprived of his property [emphasis added]."*

93. 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.*"[124] In connection with investment treaty arbitration, jurisprudence to date confirmed that a State´s conduct arbitrary under international law is a breach of FET.[125] 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.*"[126]

D.1.(iii) Respondent has violated Claimant´s legitimate investment-backed expectations as it had acted contrary to its contractual undertakings and its international legal obligations

94. Claimant 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

121 Newcombe & Paradell, p. 247

122 Charter of United Nations, Article 2(2); *ELSI Case,* § 124, 128; *U.S. Nationals in Morocco,* p. 212; ILC Expulsion of Aliens, §§ 227-239; Lauterpacht, p. 298; Nuclear Tests case, § 46

123 GA resolution 1514, Article 7; GA resolution 1904, Article 11; Montreal Statement of the Assembly of Human Rights, p. 95

124 *ELSI Case*, § 128

125 *Waste Managemen*t, § 98

126 *CMS v. Argentina,* § 290

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.[127]

> *"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 […]. "*[128]

95. In the present case both explicit and general undertakings took place on the part of Beristan.

96. Legitimate expectations is closely connected with the good faith principle of customary international law, enshrined among others in the Article 26 and 31(1) of the *VCLT*. The imperative not to violate legitimate expectation form a crucial part of FET standard. "*[T]he close parallels between the requirement to fulfil ´legitimate expectations´ and the requirement to accord ´treatment´ that is ´fair and equitable´ in nature are particularly evident."*[129]

D.1.(iv) Breach of FET does not require impairment of the investment

97. Last but not least, Claimant submits that for a breach of FET to be found no requirement of impairment exists.[130] 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.*"[131]

127 *Metalclad*, § 107

128 Dolzer & Schreuer, p. 104

129 Fietta: Legitimate Expectations, p. 378

130 Newcombe & Paradell, p. 262

131 *Pope & Talbot*, § 181

D.2. Respondent violated so-called "non-impairment standard" according to Article 2(3) of the BIT

98. The Claimant further contents that its personnel was subjected to "*unjustified or discriminatory measures.*" prohibited by Article 2(3) of the BIT. 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 memorandum [§§ 130 – 153], Claimant contends that there was no ground for such an invocation.

99. 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.[132] The management, maintenance and enjoyment of the Claimant´s investment was unreasonably impaired by the acts of CWF and the subsequent expulsion of the personnel without an objective justification. "*Unjustified measures*" shall be interpreted as equivalent to "*unreasonable*" as they both point to the measures which are "*not founded on reason or fact, nor on the law.*"[133] It is further argued, that the term is in close relation with the general concept of arbitrariness referred to hereinbefore [§§ 93 – 95]. 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."*[134] An information from a project for civilian purposes, used partly by a military, can be hardly a threat to a national security. Furthermore, there are still doubts about the suitability of the system for military purposes.[135] Notwithstanding, that the leak of information was a mere unsubstantiated allegation.

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132 Heiskanen: Arbitrary Measures, p. 99; further see *Lauder*, § 219

133 *Lauder*, § 232

134 Heiskanen: Arbitrary Measures, p. 104; cf. *Saluka Partial Award,* § 461; *LG&E*, § 158

135 Clarification Requests (4 June) Responses, § 178

100. As to the relation of the standard of the non-impairment standard to FET standard, it is submitted that they do not "*differ substantially.*"[136] "*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."*[137] In the similar vein, *CMS tribunal* concluded any breach of the non-impairment standard "*is in itself contrary to fair and equitable treatment.*"[138]

101. 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 is needed to be found, contrary to the latter.

D.3. Respondent had unlawfully expropriated Claimant´s investment by forcible buy-out which did not satisfied the due process requirement

D.3.(i) Respondent violated its obligation under the Article 4.1 as it has subjected the Claimant´s investment to the measures which temporarily limited its joined right of ownership, control and enjoyment.

102. Respondent assumed the international legal obligation under the Article 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."*

103. *VCLT*, by which Beristan is bound, sets in its Articles 31 and 32 rules for interpretation of international treaties. According to Article 31(1), which must be "*the point of reference,*"[139] "*[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]*."

136 *Saluka Partial Award*, § 461

137 Ibid.

138 *CMS Award*, § 290

139 *Sempra Annulment*, § 188

104. It is evident by ordinary meaning, that both conditions prescribed in the Article 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.

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

106. 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 Article 31(1) of the VCLT seems entirely sufficient in this context because it gives an unequivocal content to the term *courts/tribunals having jurisdiction.*

107. The executive order[140] 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 Article 4(1)(1) were effectively neutralized and Claimant has no control over them anymore.

108. This argument is even more convincing when the executive order could not be appealed.[141] Therefore the requirement in Article 4(1)(1) was not satisfied even if the Tribunal espouses the interpretation that *courts/tribunals having jurisdiction* includes executive or administrative organs of State as well with requirement of judicial review to be available.

109. 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.*"[142]

140 Clarification Requests (4 June) Responses, § 155

141 Second Clarification Requests (6 August 2010) Responses, § 228

142 Clarification Requests (4 June) Responses, § 170

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.

D.3.(ii) Scope of protected rights is defined by the Article 1(1) of the BIT and covers shareholders rights, intellectual property, know how, movables and immovables

110. 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.[143] Shareholders are protected no matter if they are majority or minority.[144]

111. 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.

112. 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.*"[145]

D.3.(iii) The BIT prohibits all measures tantamount to expropriation

113. Articles 4(1)(2) and 4(1)(3) of the BIT prohibit all measures having similar effects as expropriation, nationalization or requisition unless they satisfy the conditions there stated. It is evident that the compensation provided was not according the rule prescribed in Article 4(1)(3).

114. 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

143 *Genin*, § 324; *Eureko*, § 145

144 *Enron Jurisdiction,* § 39; *CMS Jurisdiction,* § 51

145 Clarification Requests (4 June) Responses, § 165

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

115. Due to the acts attributable to the government of Beristan [§§ 57 – 65] 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.*"[146]

116. For the expropriation to be found, the effect of the State measure are more important than the intent behind those measures.[147] This view is supported by the ordinary meaning of the term "*measures having similar effect,*" used in Article 4(1)(2) of the BIT. The *Siemens* tribunal opined 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."*[148]

117. The tribunal in Starret Housing stated:

> *"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 […]."*[149]

118. 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*

146 *Nykomb,* § 120

147 Subedi, p. 121; *TECMED,* § 116; *Azurix,* §§ 310-11*; Siemens,* § 270*; Santa Elena v. Costa Rica,* § 77

148 *Siemens*, § 270

149 *Starrett Housing*, cited from Subedi, p. 123

reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[150]

119. 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 when Televative did not agree, 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.3.(iv) The facts amount to the expropriation of contractual rights not only to a breach of contract

120. As to the possibility of contractual rights to be expropriated, Reinisch opines:

"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 public power or authority."[151]

121. This conclusion is supported by various arbitral awards rendered to date.[152]

122. In this vein, it is important to note, that expropriation is always an "*inherently governmental act"*[153] and it must be distinguished from a mere failure to pay a debt or a simple breach of a contractual obligation.

150 *Metalclad*, § 103

151 Reinish: Expropriation, p. 418

152 *Phillips v. Iran*, § 75; *Waste Management, §§* 160, 174; *Azurix,* § 315; *Shufeldt*

153 *Waste Management,* § 168

123. In the current case, Claimant argues that it was expropriated by the acts of CWF and Respondent´s failure to protect Claimant´s rights. 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.

124. The cumulative effect of the Government´s acts (actions of CWS) and omissions (failure of properly investigate the Beritech´s buy-out claim and to hear Claimant in accordance with due process) "*de facto expropriated corporate shares in the [.] company.*"[154]

D.3.(v) Respondent has violated Claimant´s legitimate investment-backed expectations as it had acted contrary to its contractual undertakings and international legal obligations

125. According to the UNCTAD Series from 2007, "*investment-backed expectations of the investor constitute another factor in considering whether the degree of interference with rights of ownership is substantial enough to amount to an indirect expropriation."*[155]

126. Legitimate expectations plays a crucial role as a guiding principle in recognizing expropriation cases. This was held by several investment awards.[156] Claimant does not contend that violation of *investment-backed expectation* shall be a sole basis for

154 *Benvenuti and Bonfant v. Congo*, § 758

155 UNCTAD Series, Investment Rulemaking, p. 58

156 *Thunderbird Gaming,* § 147; *Azurix*, §§ 316-322, *CME,* § 601, Metaldclad, §§ 103, 107

finding of expropriation, however, when accompanied by effective neutralization of the investment it should lead the Tribunal to such finding.[157]

127. Investor´s legitimate expectation, in respect of expropriation, were breached by a complete lack of foreseeability of the acts of State and by the unlawful assistance to the State-controlled entity, which was arguably used as an instrument to expropriate Claimant´s interest.

E. Respondent cannot rely on the essential security defense (Article 9 of the BIT) as the allegation of leak of information was not substantiated to any extent

128. Essential security exception, as a subgroup of general exceptions is used increasingly among treaties and serves as a way for a state to protect its own essential security issues.[158]

E.1.Although Article 9 of the BIT is self-judging, it does not exclude any kind of scrutiny

129. From the formulation of Article 9 of the BIT, we can establish that this is a self-judging type of exception clause. Wording of Article 9 uses the same language and exactly same formulation as 2005 *USA-Uruguay BIT*[159] which stipulates that:

> *„Nothing in this Treaty shall be construed:*
>
> *1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
>
> *2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."*

157 *TECMED,* §§ 149 – 150; *Metalclad*, §§ 103, 107

158 Newcombe & Paradell, pp. 488 – 499

159 US-Uruguay BIT, Article 18

130. In type of language used, it also resembles to an Article XXI of GATT, specifically Article XXIb which states:

> *„Nothing in this Agreement shall be construed:*
>
> *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests [.]"*

131. The crucial identification sign of self-judging clause is a use of wording *"it considers*"[160] or *"it determines*" or *"the . State considers*"[161] relating to the phrase *"necessary for the protection of its essential security interests"*.

132. The discourse whether the self-judging clause is a valid legal instrument can be traced back to 1959 to the *Norwegian Loans Case* in which Judge Hersch Lauterpacht considered that a self-judging exception to a declaration under Article 36(2) ICJ Statute (the so-called Optional Declaration) was in his words:

> *"invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation. [.] It is not a legal instrument. It is a declaration of a political principle and purpose."*[162]

133. But since the consent is the fundamental basis for the binding nature of international law, we can hardly view self-judging clauses as invalid, and this BIT, both parties displayed consent with the wording of treaty.

134. It could be argued that an interpretation of Article 9 having regard only to the ordinary meaning of the phrase *"it considers"* would seem to reserve to the State invoking the exception the whole discretion to decide whether the criteria of it are met. However, when taking into account the object and purpose of the BIT it is obvious that any

160 Compare to *Canada Model BIT,* Article 10; *US Model BIT Treaty ,* Article 18

161 Compare to Mutual Assistence Convention, Article 2(c)

162 Lauterpacht in *Norwegian Loans case*, pp. 44, 48

interpretation of this exception must also take into account the effect that an exception such as Article 9 has on investor and his rights guaranteed by the BIT.

E.1.(i) Self-judging clauses are reviewable by the principle of good faith

135. Also Article 31(1) of the VCLT, stipulates that all treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. VCLT also stipulates that, *"every treaty in force is binding upon the parties to it and must be performed by them in good faith"*[163]

136. Therefore even the self-judging clause is reviewable under the principle of good faith. To date there is no case that stood before ICSID regarding the self-judging clauses. Claimant argues, that *CMS Annulment decision*, nor *Sempra Annulment* cannot be applied here, as they reflect the entirely different essential security clause, which lacks the "*it considers"* language, although the responding State made submissions regarding self-judging nature of the Article XI of the US-Argentine BIT.[164] At the same time, we can infer from the cases concerning Argentine crisis, that self-judging clauses are at least reviewable by the good faith test.[165] There is a wide consent that a self-judging clause itself is not a bar to a jurisdiction, rather it limits the standard of review.[166]

137. Among commentators several types of standard by the principle of good faith exist. Hahn considers that the principle of good faith "*requires parties who are in a special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue*

163 VCLT, Article 26

164 *CMS Annulment*, § 112

165 *CMS Annulment*, §§ 122 – 123; *Sempra Annulment*, § 168 – 170; *LG&E*, § 214; *Enron*, § 339

166 Hahn: GATT´s Security Exception; Schloemann, Ohlhoff: Constitutionalization and WTO; Akande, Williams: International Adjudication on National Security, pp. 399 - 402; Reiterer: National Security Exception, pp. 201 – 202; *WTO Cuban Liberty Act; Nicaragua-Colombia Territorial and Maritime Dispute*

advantage of another".[167] He considers the principle to be closely related to the principle of *abuse of rights*, which provides that the exercise of a right for the sole purpose of evading an obligation or of causing injury is unlawful.

138. Schloemann & Ohlehoff take the view that:

> *"A requirement of a minimum degree of proportionality between the threatened individual security interest and the impact of the measure taken on the common interest in the functioning of the multilateral system can be deduced from both the term 'essential' and, more generally, the function of Article XXI in the WTO system as a remedy for serious hardships emanating from outside the WTO's immediate regulatory realm."*[168]

139. In realm of ICJ, similar test as that of Hahn is being proposed in a separate declaration in *Djibouti vs France*[169] The majority judgment found that the appropriate standard of review to apply to self-judging clauses was that of good faith.[170] In his declaration, Judge Keith found the appropriate standard of review to be based on the related concepts of good faith, abuse of rights and misuse of power. Claimant also points out that in *Gabčíkovo-Nagymaros Project* was opined that the good faith obligation in Article 26 of the *VCLT* "*obliges the parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized*."[171]

E.1.(ii) The interpretation arguing for impossibility of review is against the object and purpose of the BIT

140. Claimant believes that the self-judging clause itself is an object of cognizance of Tribunal. The interpretation of self-judging clause that it cannot be reviewed would create a legal mechanism of extreme uncertainty between parties and potential

167 Hahn: GATT´s Security Exception, p. 558

168 Schloemann & Ohlhoff: Constitutionalization and WTO, p. 424

169 Judge Keith in *Djibouti v. France*

170 See *Djibouti v. France*, § 205

171 *Gabčíkovo-Nagymaros Project*, § 142

investors, therefore defeating the purpose and object of treaty regime. This can be compared to a vehicle which breaks are so big, that they impede the movement of such vehicle, or a ship which lifeboats that are so heavy, that they make the ship sink to the ocean floor.

141. Opulentia-Beristan BIT does contain a self-judging language, but it does not contain an additional formulation use for example in *India-Singapore CECA* which provides that any such security measure taken on the discretion on Party is non-justiciable.[172] Therefore even if this provision of treaty is self-judging, the Party invoking the Article 9 must still act in good faith and this good faith is subject to cognizance of tribunal.

142. In *LG&E*, suggested that good faith review would not differ significantly from the substantive review undertaken by the Tribunal in the context of the non-self judging clause in Article XI of the United States-Argentine BIT.[173]

143. Self-judging clause is not a sort of escape tunnel, opt-out, exit-valve or break. It exist so that a Party to a treaty have an option to not to fulfil its obligations that would (potentially) harm its essential interests, in our case the protection of its own essential security interests.

144. It does not make sense to believe that under wide interpretation this clause would not frustrate the object and purpose of investment treaty, which is 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 Contracting Party; and acknowledging that offering encouragement and mutual protection to such investments based on international agreements will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties.*[174]

172 India-Singapore CECA, Annex 5

173 *LG&E*, § 214

174 Annex 1 to the Minutes (The BIT), Preamble

145. Wide and extended interpretation of self-judging clause will have detrimental effects on motivation of state to fulfil its duties under any BIT. Exceptions to investment treaty obligations shall be interpreted narrowly and this is consistent with their object and purpose. This opinion was upheld by tribunals in *Canfor Corporation et al. case*, referring to the GATT,[175] and especially in *Enron case,* where was taught, that "*any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory."*[176]

E.1.(iii) The actual facts cannot justify an actual existence of a threat to essential security

146. In our case, we can hardly consider a newspaper interview with Beristian governmental official to be a fully-potent stimuli capable of launching invocation of essential security treaty exception.

147. Claimant agrees the state has the discretion to determine the measures to be taken to combat or alleviate the conditions endangering its own essential security. However this discretion is subject to some limitations. Firstly and most importantly the State must act in good faith.[177]

148. In this case, Claimant holds belief that the act of invoking Article 9 of the BIT was unjustified and Respondent acted in bad faith and commit abuse of rights chiefly because of these reasons:

149. Leak of information was not substantiated to any extent, no ther evidence beside the newspaper article, and moreover the source for this information was that of Beristian origin. This puts the whole authority and verity of such information into question.

175 *Canfor Corporation Case*, § 187

176 *Enron Award*, § 331

177 VCLT, Article 26

150. Involvement of the CWF[178] rather than police forces in the process of the expropriation and the clearing of the premises of the Sat-Connect project which was based on executive order which cannot be appealed, raises suspicion that Respondent did so to evade a due process of law. Also, there is question whether the sole removal of personal was adequate measure to counter alleged threat to essential security. By compelling the buy-out (via controlling share in Beritech) Respondent seems to let its economic motives trump the essential security of Beristan.

151. Last but not least, suitability of the system for the military purposes is still doubtful.[179] The system shall be used mainly for civilian purposes[180] and no particular portion is designed to be used exclusively for army.[181] Therefore it is difficult to reasonably infer any threat to national security, even if the alleged leak had taken place. Notwithstanding the existence of the confidentiality clause in the JV Agreement. This clause has an economic rationale, common to regular commercial contracts, it has not a national security purpose. not Also Respondent didn't even try to carry out investigation into matter and abide with and acted on the sole newspaper Article

178 Annex 2 to the Minutes (Uncontested facts), § 11

179 Clarification Requests (4 June) Responses, § 178

180 Ibid.

181 Clarification Requests (4 June) Responses, § 121

PRAYERS FOR RELIEF

152. For the reasons stated above, Claimant asks the Tribunal to declare that:

A The tribunal has jurisdiction over Claimant's claims, properly formulated as claims based on violation of the BIT, and that jurisdiction is not ousted by Clause 17 of the JV Agreement.

B. The tribunal has jurisdiction over Claimant's claims arising under the JV Agreement by virtue of Article 10 of the BIT.

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

D. Respondent's actions or omissions amounted to violation of fair and equitable treatment standard and non-impairment standard, and as well amounted to expropriation and breach of Claimant's legitimate expectations.

E. Respondent is not entitled to rely on Article 9 of the BIT as a defence to Claimant's claims.

Respectfully submitted, on September 19, 2010

Brownlie & Partners, representing the Claimant