ALVAREZ

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TELEVATIVE INC.

Claimant

vs.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

Respondent

MEMORANDUM FOR RESPONDENT

Table of Content

LIST OF AUTHORITIES

1. Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic ICSID Case No. ARB/03/19
2. US-Venezuela Claims Protocol, 17 February 1903: 101 BFSP 646, 2 Malloy 1870, in SGS v. Philippines case
3. German Settlers in Poland, 1923, P.C.I.J., Series B
4. Emilio Augustín Maffezini v. The Kingdom of Spain
5. Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, ICSID Review—Foreign Investment Law Journal
6. OECD, Indirect Expropriation and the Right to Regulate in International Investment Law, 3 (Sept. 2004), http://www.oecd.org/dataoecd/22/54/ 33776546.pdf
7. Ronald S. Lauder v. Czech Republic UNCITRAL, Award of September 3, 2001
8. See MTD Equity, ICSID Case No. ARB/01/7, where the Tribunal referred to The Concise Oxford Dictionary of Current English (5th ed.)
9. Beristan-Opulentian Bilateral Invetment Treaty – BIT
10. Ronald S. Lauder v. Czech Republic UNCITRAL, Award of September 3, 2001
11. Saluka Investments BV (The Netherlands) v. Czech Republic UNCITRAL, Partial Award of March 17, 2006
12. Consortium RFCC v. Kingdom of Morocco, ICSID, ARB/00/6, Award of December 22, 2003
13. Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004
14. Eureko BV v. Republic of Poland, Ad-hoc Tribunal, Partial Award of August 19, 2005
15. U.S. v. Italy (Elettronica Sicula Spa [ELSI] case), 1989 ICJ Reports 15 (July 20, 1989)
16. Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5 Award (26 Jul. 2001).
17. Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2 Award (29 Apr. 1999)

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19. Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9 Award (16 Sept. 2003, 44 I.L.M. 404 (2005).

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1. ARON BROCHES: "THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES: SOME OBSERVATIONS ON JURISDICTION", *COLUMBIA JOURNAL OF INTERNATIONAL LAW*
2. P. MAYER, "LA NEUTRALISATION DU POUVOIR NORMATIF DE L'ÉTAT EN MATIÈRE DE CONTRATS D'ÉTAT" *JDI*
3. T. WÄLDE, *THE JOURNAL OF WORLD INVESTMENT AND TRADE, VOL. 6 NO 2*, APRIL 2005, GENEVA.
4. OECD, INDIRECT EXPROPRIATION AND THE RIGHT TO REGULATE IN INTERNATIONALINVESTMENT LAW
5. THE PROTECTION OF NATIONAL SECURITY IN IIAS, UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT 2009
6. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY
7. IOANA TUDOR, THE FAIR & EQUITABLE TREATMENT STANDARD IN INTERNATIONAL LAW OF FOREIGN INVESTMENT (2008)
8. "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, SEPTEMBER 2004

STATEMENT OF FACTS

JOINT VENTURE

1. Respondent, the Government of Beristan established a state-owned company, Beritech S.A., in March 2007. The Beristian government owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors.

2. Claimant, Televative Inc., is a successful multinational enterprise that specializes in satellite communications technology and systems. It is a leading developer of new technologies in this field. Televative is a privately held company that was incorporated in Opulentia on 30 January 1995.

3. Beritech and Televative signed a joint venture agreement (the "JV Agreement") on 18 October 2007 to establish the joint venture company, Sat-Connect S.A., under Beristian law. The Government of Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations. Sat-Connect's corporate offices are located in Beristal, the capital city of Beristan.

4. Televative owns a 40% share in Sat-Connect, while Beritech owns a 60% majority stake. Of the nine members of Sat-Connect's board of directors, Beritech has the right to appoint 5 directors, while Televative can appoint 4. A quorum of the board of directors is obtained with the presence of 6 members.

5. Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia. Euphonia is a region encompassing almost one-fifth of the world's surface, which includes Beristan, six other countries, and the Euphonian Ocean.

6. The satellite and communications technology that Sat-Connect will deploy can be used for civilian or military purposes. Several segments of the Beristian armed forces will use the Sat-Connect system.

BREACH OF CONFIDENTIALITY AND BUY OUT

7. On August 12, 2009, The Beristan Times, an independent newspaper, published an article in which a highly reliable defense analyst raised national security concerns by revealing that the

Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The analyst indicated that there have been leaks not only involving encryption technology, but also concerning the technology, systems, and intellectual property of the Sat-Connect project. Earlier this year, Televative was one of three Opulentian technology firms from which the Opulentian government authorities are alleged to have received access to civilian encryption keys.

8. On August 21, 2009, the chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the August 12th article in The Beristan Times.

9. All the directors of Sat Connect were informed about the date of the next meeting on August 27, 2009. Some directors appointed by Televative speculated that the buyout would be discussed and decided not to attend the meeting and thus deprive it of the necessary quorum.

10. On August 27, 2009, Six directors were present at this meeting, included Alice Sharpeton, who had been appointed by Televative. Therefore quorum was obtained. Majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement upon leak of confidential information resulting in material breach of agreement by Televative , to compel a buyout of Televative's interest in the Sat-Connect project. Buy out decision was concluded under conformity of JVA and bylaws of Beristan.

11. Beritech then served notice on Televative on August 28, 2009, requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

12. Beritech then served notice on Televative on August 28, 2009, requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

13. After expiration of 14 days, on September 11, 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, upon executive order secured all sites and facilities of the Sat-Connect project. Televative's seconded personnel were asked to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

14. Beritech in effort to cooperate with claimant to resolve and settle any existing problems served notice on 11 September of their desire to settle amicably, and failing that, to proceed with

arbitration. On October 19, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Televative's total monetary investment in the Sat-Connect project stands at US $47 million. Beritech has paid US$47 million into an escrow account, which has been made available for Televative

15. Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request.

16. Despite all efforts of Respodent to work with the Claimant to resolve and settle any existing problems, the Claimant requested arbitration proceedings at the International Centre for Settlement of Investment Disputes (ICSID) on November 1, 2009.

SUMMARY OF ARGUMENT

JURISDICTION. The Tribunal does not have jurisdiction to hear the case at hand on three gounds: Firstly, in view of Clause 17 (Dispute Settlement) of the JVA, Clause 17 constitutes the lex specialis to the case and the tribunal constituted in accordance with Clause 17, aquires exclusive jurisdiction over the dispute; Secondly, the actions of Beritech is not attributable to Respondent; and Lastly, Article 10 of the BIT – umbrella clause, does not provide the ground for jurisdiction of the Tribunal.

MERITS. The Tribunal should not find Respondent in breach of its BIT obligations on four grounds: Firstly, Respondent properly invoked buyout clause; Secondly, Respondent did not fail to provide fair and equitable treatment to Claimant's investment; Thirdly, Respondent did not expropriate Claimant's Investment; and Lastly, Respondent can rely on Essential Security Clause.

A. The Tribunal does not have a jurisdiction to hear the case in view of Clause 17 of the JVA

1. Respondent Respectfully submits that, even though it was the guarantor of the Joint Venture Agreement (JVA), the Tribunal does not have a jurisdiction to hear the case at hand in view of Clause 17 of the JVA which is the governing provision and constitutes the lex specialis to the case at hand (1) and only the tribunal constituted in accordance with Clause 17, aquires exclusive jurisdiction over the dispute (2).

1. Clause 17 is a lex specialis to the case at hand

2. BIT is a general law applicable to investment arrangements if it is not concluded with any specific investment or contract in view.[1] Which is the case regarding Beristan-Opulentia BIT. Furthermore, as stated in SGS v Philippines case Investment protection agreements as framework treaties are intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.[2] Thus the document, containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application.[3]

3. The Beristan-Opulentia BIT is a general agreement between Beristan and Opulentia which is very clearly envisaged in the preamble of the BIT:

> "The Republic of Beristan and the United Federation of Opulentia (hereinafter referred to as the "Contracting Parties") desiring to establish favorable 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...."

4. The Dispute Settlement clause of the BIT under Art. 11, is also very general and states that,

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[1] SGS v Philippines, para. 140
[2] supranote para. 141
[3] Schreuer, 362.

> "For the purpose of resolving 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 [...] shall be submitted to [...]the International Centre for the Settlement of Investment Disputes."

5. Therefore, as stated in article 11 of the BIT the Tribunal has a jurisdiction only if the dispute arose 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, i.e. BIT.

6. However the dispute at hand did not arise in connection with an obligation of the Respondent under BIT, but rather it arose when Beritech, with the support of the majority of Sat-Connect' board of directors, conducted a buyout of Televative's shares in the Sat-Connect S.A. under Clause 8 of the JVA, concluded between Televative and Beritech, and guaranteed by the Respondent.

7. The JVA in clause 17 implied the dispute settlement clause which states the following:

> "In the case of any dispute arising out of or relating to this Agreement, any party may give notice to the other party of its intention to commence arbitration. [...] The dispute shall then be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended."

8. As the ad hoc Committee in the Vivendi case stated that,

> "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".[4]

9. Therefore the dispute at hand is subject to the jurisdiction of the arbitral tribunal constituted in accordance with Clause 17 of JVA, as it is a lex specialis over the BIT and Art. 11 thereto, and essential basis of a claim on which the dispute arose is derived from the JVA.

2. Arbitration tribunal constitute in accordance with clause 17 has an exclusive jurisdiction to decide the case at hand

10. In Woodruff case, where US-Venezuela Mixed Commission had jurisdiction over "all claims owned by citizens of the U.S. against the Republic of Venezuela". Such claims were to be

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[4] Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic ICSID Case No. ARB/03/19

examined "without regard to objections of a technical nature, or of the provisions of local legislation".[5] However, the Commission refused to override the contract and stated that claimant by his own voluntary waiver has disabled himself from Commissions jurisdiction.[6]

11. In the subsequent sentence, Clause 17, in order to better demonstrate the willingness of the parties to resolve any of their disputes regarding the JVA, by arbitration, constituted in accordance with Beristan law, also provided:

> "Each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute.

12. Hence, deriving from the analyses of the above mentioned case law and the last sentence of the Clause 17, it can be concluded that the Claimant disabled himself from ICSID jurisdiction when signed the JVA which implies exclusive jurisdiction clause in the private arbitration constituted in accordance with Clause 17.

B. The Tribunal does not have a jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT.

13. Respondent respectfully submits that the Tribunal Does not have a jurisdiction to decide the case at hand as Beritech is a private party and its actions are not attributable to the state of Beristan (1) and Article 10 of the BIT does not provide any ground for jurisdiction of the Tribunal (2).

1. Attributability of the actions and ommissions of Beritech to the Respondent

14. Respondent respectfully requests the Tribunal find that, it does not have a jurisdiction to decide the case at hand, as actions of Beristan are not attributable to the state of Beristan, since it is a private company for the purposes of Structural (a) and Functional tests (b).

15. Art. 25(1) of the ICSID Convention states: The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of

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[5] *See* US-Venezuela Claims Protocol, 17 February 1903: 101 BFSP 646, 2 Malloy 1870, in SGS v. Philippines case

[6] (1903) 9 RIAA 213, 222.

another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

16. Deriving from the content of Art. 25 (1), the Centre lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.[7] In order the Tribunal to establish its jurisdiction over the dispute it is necessary the action or ommission which became a basis of the dispute, to be conducted by an entity actions of which are attributable to the state. Otherwise the state would have been responsible for all contractual disputes on its territory.

> "The state is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. [...] States can act only by and through their agents and representatives." [8]

17. The fact that an entity is state-created and partially stat-owned does not automatically mean that this entity is an arm of the state for jurisdiction purposes. "A mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function".[9]

18. As the Tribunal established in its case law, there are Structural and Functional tests to determine weather the actions or ommisions of the entity is attributable to the contracting state for the jurisdictional purposes of the Tribunal.[10]

a. Structural Test

19. The Structural test concerns how and under what law entity was created. Under Structural test actions of the entity will be attributable to the state if the former was created as government or semi-governmental agency and not a private company.[11]

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[7] Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", *Columbia Journal of International Law*, Vol. 5, 1966, 263, at 265.
[8] German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6, at p. 22.
[9] Aron Broches: "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", *Recueil des Cours de l'Academie de Droit International,* 1972, at 355.
[10] supranote 70-77
[11] *Emilio Augustín Maffezini v. The Kingdom of Spain p. 28 para. 70-76*

20. Thus, Beritech fails the test as it is created as a private company, operates under private law and is only partially owned by the state of Beristan

b. Functional Test

21. As for the Functional test, it has been applied, in respect of the definition of a national of a Contracting State, in the decision of an ICSID Tribunal on objections to jurisdiction in the case of Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic. Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "essentially commercial rather than governmental in nature".[12]

22. Similar approach was taken by the Tribunal in Emilio Augustín Maffezini v. The Kingdom of Spain, where it was held that, the actions of the entity is attributable to the state

> "if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals."[13]

23. In this regard the functional test is also in conformity with Art. 5 of ASR, according to which, the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

24. As provided in Annex II para. 2 of the case at hand Beritech was only partially owned by the Respondent and all its business, including the buyout with the Claimant, was purely contractual by nature, which was expressly envisaged in the joint venture agreement between the parties.[14] Thus it must be concluded that Beritech does not meet the functional test nor the test set out in Article 5 of the ARS.

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[12] *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*, ICSID Case No. ARB/97/ 4, Decision on Objections to Jurisdiction, May 24, 1999, *ICSID Review—Foreign Investment Law Journal,* Vol. 14, 1999, at 250.
[13] *Emilio Augustín Maffezini v. The Kingdom of Spain p. 28para. 77*
[14] Annex 3 of the Case

25. Deriving from the analyses of the case law, doctrines and the factual background of the case it must be concluded that Beritech is a private company and its actions or ommissions are by no means attributable to the state of Beristan for jurisdictional purposes.

2. Article 10 of the BIT does not provide any ground for jurisdiction of the Tribunal

26. Respondent respectfully asks the Tribunal to find that it does not have jurisdiction to hear the case at, as the respondent has never consented to ICSID arbitration when became the guarantor of the JVA (a) and Art. 10 of the BIT have no relevance to the case at hand for jurisdictional purposes (b).

a. The Respondent never consented to ICSID arbitration when became the guarantor of the JVA

27. Article 25(1) of the ICSID Convention creates scope and consent pre-requisite for a tribunal to establish its jurisdiction. Specifically, Article 25(1) states that, the 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.

28. Respondent respectfully suggests that it has never agreed on ICSID arbitration in case of private contract but when became the guarantor of the Sat-Connect JVA, it only consented to dispute resolution clause under Clause 17 and therefore the Tribunal is respectfully requested to deny the jurisdiction on the matter.

b. Art. 10 of the BIT cannot be invoked as a ground for Tribunals Jurisdiction.

29. The inter pares relationship remains unchanged and is subject to the lex contractus and not the subject to international law.[15]

> ”If the core or centre of gravity of a dispute is not about the exercise of governmental powers ...but about “normal” contract disputes, then the BIT and the umbrella clause has no role”[16]

30. Similar approach was upheld by the Tribunal in SGS v. Pakistan case, where the Tribunal rejected SGS’s contention that the umbrella close, which stated that Contracting state “shall

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[15] P. Mayer, “La neutralisation du pouvoir normatif de l’État en matière de contrats d’État” *JDI, 1986* pp. 36-37.
[16] T. Wälde, *The Journal of World Investment and Trade, Vol. 6 No 2*, April 2005, Geneva.

constantly guarantee the observance of the commitments", elevated breaches of a contract to breaches of the treaty. The Tribunal held that, "The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law."

31. In Joy Mining Machinery Limited v. The Arabic Republic of Egypt the Tribunal interpreted the "umbrella clause" in a way similar to the SGS v. Pakistan tribunal, and held that:"[i]n the is context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of Treaty rights and obligations.[...]

32. Article 10 of Beristan-Opulentia BIT provides, "Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."

33. According to Art. 31 para. 1 of Vienna Convention on the Law of Treaties provides, "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."

34. Thus the ordinary meaning of Art. 10 BIT is that Beristan should have guaranteed Televative full protection in accordance with its internal legislation, as required by BIT. Thus if the Beristan did not like the buyout conducted by Beritech, it should have appealed it to the competent court or arbitration as provided in JV agreement and only in case of the denial of fair trail as provided in article 14 of the ICCPR, Televative could go to ICSID, as this would constitute violation of BIT and expropriation of investment by Beristan against the Claimant and the claimant would have a proper ius standi.

35. In the absence of all above mentioned the Claimant can not rely on Arti. 10 of the BIT to argument the existence of Tribunal's jurisdiction to the case at hand.

C. Respondent did not materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement

1. Confidentiality according to the JV Agreement Clause 4 and breach

36. Clause 4 of the JVA obliged the Claimant not to disclose any confidential information regarding the project and stated that in case of such disclosure this would constitute a material breach of JVA.

37. On August 12, 2009, The Beristan Times published an article in which Beristian government official on the conditions of anonymity indicated that, "critical information from the Sat-Connect project had been passed to the Government of Opulentia".[17]

38. Even though it was the only time when the information about the leak was disclosed, it must be concluded that Clause 4 was material breached by the Claimant, and under the essential security clause the Respondent should not be requested to disclose any further information in this regard, as it might compromise the national security of the Respondent.

2. Buyout was properly conducted

39. Clause 8 of the JVA stated that if at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement.

40. On this ground Beritech has gathered the board of directors and conducted the buyout, in accordance with JVA.

41. Claimant might allege that some procedures were not met when buyout was conducted, such as the prior notification to the directors (a) and that the sixth director, left the meeting before the voting (b).

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[17] Annex 2 para. 8

a. Notification

42. According to the factual background, the director's appointed by Televative already knew about the agenda of the meeting, i.e. that the meeting was about the buyout of Televative's shares, and they refused to participate. Therefore, the absence of notification has no practical relevance to the case at hand

b. Quorum

43. According to JVA for the quorum to establish 6 members of the board of directors must be present. When buyout was conducted there were six directors present, however one of them left the meeting without expressing its position during the voting procedure.

44. Despite of this fact, the buyout was properly conducted as all five directors voted in favor and even the six director would vote against, still the decision would have been considered properly passed, as majority of the board of directors (5 out of 9) supported the buy out.[18]

45. Hence, in light of all above mentioned, it must be considered that Respondent did not materially breached the JV Agreement by preventing Claimant from completing its contractual duties and invoking Clause 8 (Buyout) of the JV Agreement.

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

46. International law does not preclude signatories of bilateral investment treaties from expropriating foreign investments provided that the following conditions are met: (1) the taking of the investment is for a public purpose as provided by law, (2) the taking is made in a non-discriminatory manner, and (3) and the taking is made with just compensation [19]. Beristan-Opulentia BIT is a precise reflection of this custom[20].

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[18] Annex 2, para. 10
[19] OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, 3 (Sept. 2004), http://www.oecd.org/dataoecd/22/54/ 33776546.pdf
[20] Beristan-Opulentia BIT art. 4

47. Not all state actions amount to expropriation 4. Non-discriminatory takings related to national security, consumer protection, securities, environmental protection, and land planning are often viewed as non-compensable takings which are essential to the functioning of a sovereign nation. However for there to be a viable claim for direct or indirect expropriation, there must be both evidence that Beritech or it's affiliated board members were actual state actors of Beristan and that their respective state actions constituted expropriation, improperly invoking buy-out provision of JV agreement, targeted discrimination of Televatives's personnel, violation of fair and equal treatment and other provisions of BIT as well.

48. Respodent will establish myriads of ways showing that Beristan treated claimant's investments adequately, under conformity of BIT and international law. Specifically, Beristan will assert the following responses to the Claimant's claims:

1. Compliance with fair and equitable treatment provision
2. Lack of discrimination
3. Lack of expropriation

1. FAIR & EQUITABLE TREATMENT (FET)

49. Beristan treated Televative's investment fairly and equitably, and therefore, did not violate Article 2(2) of the Beristan-Opulentia BIT.

50. The fair and equitable treatment clause, located in Article 2(2) of the Beristan-Opulentia BIT, guarantees "fair and equitable treatment" of investors' investments "at all times."[21] The Claimant has the burden of proof to show that Beristan has violated Article 2(2).

51. As in all other investment treaties, there is no definition in the BIT of "fair and equitable treatment" (FET), What is fair and equitable is to be determined on the basis of the facts in each individual case. Anyway, this obligation is concerned with the conduct of the State, not with the

[21] Beristan-Opulentia BIT 2(2)

results of the investments. Therefore, the fact that the investor loses money does not indicate that the State has breached the obligation to provide fair and equitable treatment[22].

52. The "ordinary meaning" of the "fair and equitable treatment" standard can only be defined by terms of almost equal vagueness. In MTD, the tribunal stated that:

In their ordinary meaning, the terms "fair" and "equitable" [...] mean "just","evenhanded","unbiased","legitimate"[23].

53. Claimant must establish that the host state's actions were:

"willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."[24] Further more, demonstrate that Beristan state actions or omissions caused harms to claimant's investment and these actions were unreasonable, intended to ignore investor's legal expectations.

a. FET to contractual claims

54. Claimant's attempt to bring its contractual claims under BIT 2(2) lack legal basis and standard of fair and equal treatment should not be applied. Contractual claims are distinct from treaty claims, and Article 2(2) of the BIT should not be manipulated as an umbrella clause to advance non-treaty claims.

55. A contract between the investor and host state must exist in order to allow a claim for violation of contractual rights.[25] State of Beristan cosigned JV agreement as guarantor and as guarantor, Beristan would assume the obligations of Beritech under the JV Agreement upon Beritech's default.[26]

56. Buy out decision by the Board of directors of Sat-Connect was purely private corporate act and as we have discussed above about attribution of Beritech's actions to state of Beristan

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[22] *Ronald S. Lauder v. Czech Republic* UNCITRAL, Award of September 3, 2001, pg 67, para 297

[23] *See MTD Equity*, ICSID Case No. ARB/01/7, para. 113, where the Tribunal referred to The Concise Oxford

Dictionary of Current English (5th ed.).

[24] *Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, pg 62, para 290

[25] TUDOR, *supra* note 31, at 197

[26] Response to clarification 152

doesn't have any legal grounds, therefore this action can not be attributed to the state of Beristan. In response to claimant's allegations regarding to unfair and abusive exercise of buy out clause of JVA, procedure of buy out was under conformity of Beristan bylaws and legality of this act can not be questioned, therefore Beristan's obligation to act in capacity of guarantor wouldn't come into force, due to absence of Beritech's default.

57. The fair and equitable treatment obligation may not be interpreted as
"imposing on the State the observance, on the basis of the treaty, of all the contractual obligations, when the investment has a contractual nature."[27]

b. FET – favoring Beristian Personnel

58. Beristan did not act arbitrarily, grossly unfairly, unjustly, in a discriminatory manner, expose the Claimant "to sectional or racial prejudice, or deny the Claimant due process."[28]

59. Removal of Televative's seconded personnel from Sat-Connect's sites by Civil Work Forces (CWF) and replacing them by Beristian personnel is an act justified on national security grounds.

60. FET standard established in Saluka case, states following: this process involves balancing the investors "legitimate and reasonable expectations" with the host state's "legitimate regulatory interests."[29] As for what constitutes a reasonable expectation, the Saluka tribunal indicated that it is not reasonable to expect circumstances "prevailing at the time the investment is made remain totally unchanged" and to not take into account the host states' legitimate right to regulate domestic matters. In addition, it is not reasonable to ignore parameters such as risks of business or industry patterns.

61. Applying this standard, the Beristan CWF had a legitimate regulatory interest in removal of Televative's seconded personnel from project. Legal basis for removal of seconded personnel was executive order enacted bylaw of Beristan. According to reliable sources of information, there has been continuous leak of information about Sat-Connect project by Seconded personnel of Televative, information included systems that are being used by the Beristian armed forces, directly implicate the national security of Beristan.

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[27] *Consortium RFCC v. Kingdom of Morocco*, ICSID, ARB/00/6, Award of December 22, 2003
[28] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004
[29] *Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, pg 66, para 306

62. Furthermore, the investor expects the host state to act consistently. Contrary to the Claimant's assertions, the Beristian government has not acted inconsistently over the term of the investment. There had been no change in Beristans's economic policy or laws that affected the investment environment or the Claimant's investment.

63. There has been no "repeated and sustained"[30] harassment of claimant's personnel, executive order of removal considered 14 days prior notice to seconded personnel to remove from facilities and this requirement was diligently upheld in practice, removal occurred only after this waiting period has passed.

64. Attendance of Televative's affiliated board members to last board meetings is precise proof of lawful treatment from Beritech to foreign investor's management.

65. Beristan's actions were under conformity of BIT 2(2) and removal of personnel was done for national security reasons, thereby, in an attempt to make the country safer for others, including foreign investors. Therefore, for all of the reasons above, the tribunal should dismiss the Claimant's claims relating to the breach of the fair and equitable treatment standard based on the government's administrative and regulatory decisions.

66. Once again, the tribunal should examine the investors' legitimate expectations. Given customary standards in international law, the Claimant cannot viably argue it expected the government to step in because of decisions the joint venture's Board of Directors was making. That would amount to government intervention or interference in private business affairs.

2. Discriminatory Measures

67. Beristan-Opulentia BIT treaty, article 2(3):

> "Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, an well as the companies and

[30] *Eureko BV v. Republic of Poland*, Ad-hoc Tribunal, Partial Award of August 19, 2005,

firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures".[31]

68. The measures enacted by the Beritech are egalitarian and supported by sound policy justifications. Like the other key terms in Article 2(3), the term "discriminatory" is undefined in the BIT. However, decisions of past tribunals provide a standard for what constitutes a discriminatory measure. The tribunal in LG&E v. Argentine Republic summarized and applied the ELSI rule as requiring:
"(i) intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national."[32]

69. Applying the ELSI standard to the present facts, it is clear that the Beristan did not enact discriminatory measures against Opulentian investors.

70. After removal of seconded personnel, Beritech moved expeditiously to hire replacement personnel from among individuals with relevant expertise in the Beristan labor market.[33] This was fully decision-making process of Beritech as an private entity and demonstrates proper management of corporation to hire suitable personnel, rather than any proof of giving preference to local Beristian Personnel and in this way discriminating claimant's staff.

71. A measure is discriminatory when it provides "the foreign investment with a treatment less favorable than domestic investment."[34]

72. Claimant's asserted claims concerning to discrimination fails with regard to demonstrate evidences showing Respondent's unfair, unreasonable and discriminating measures with foreign investment.

73. Televative, a foreign investor, had instruments to participate in Sat-Connects decision making process by appointed Directors, facts demonstrate that claimant's affiliated board members were present to board meetings and they had voting power, thus they weren't discriminated and could exercise their power like any other director appointed by Beritech S.A.

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[31] Beristan-Opulentia BIT, 2(3)
[32] *LG&E*, ICSID Case No. ARB/02/1
[33] Response to clarification 170
[34] *U.S. v. Italy (Elettronica Sicula Spa [ELSI]* case), 1989 ICJ Reports 15 (July 20, 1989), para. 128

74. After invoking buy out provision of JVA, it was reasonable and justified from Government to issue an executive order for removal of Televative's seconded personnel, this action was urgent and could not be deferred. Leak of confidential information which was active threat to State gives legitimacy of Executive order and hence discriminatory measures can not be even set under question, due to absence of any kind of intention to favor local personnel, neither to favor any other investments than Opulentian, Beristan did not intend to take mentioned measures against Televative, this could happen to any other foreign investment in such circumstances.

Therefore, Claimants assertions are meritless.

3. Expropriation

75. Article 4 of Beristan-Opulentia BIT states:

"Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures".[35]

76.This case clearly falls into the category of public interest because of the essential nature to the state of the infrastructure provided by Sat-Connect.

77. Beristan has not violated Article 4 as the Beritech S.A. is not an arm of the state and it has not directly or indirectly expropriated Televatives's investment in Sat-Connect. The Respondent urges this Tribunal to use a two part test to further establish that the Respondent did not expropriate the Claimant's investment in Sat-Connect. First, "[f]or an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property."[36] Second, "there is always a second condition to such a taking to qualify as an

[35] Beristan-Opulentia BIT 4(2)
[36] Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5 at para. 84, Award (26 Jul. 2001).

expropriation: the attributability to the State."[37] In applying the facts to this test, the Tribunal must be mindful that "not every business problem experienced by a foreign investor is an expropriation"[38] and that "control of the corporate vehicle for the investment remained in the hands of the claimant, with the „apparent right to pursue its activities."[39]

78. A focus on the effects of expropriation provides only a one-sided analysis. If the party claiming expropriation experiences the effects, or burdens, of expropriation then the State should experience some effects, or benefits, as well. The Respondent does not benefit or experience the effects of what the Claimant alleges.

79. In LG&E v. Argentine Republic, the tribunal further defines indirect expropriation as government measures that "effectively neutralize[d] the benefit of property of the foreign owner."

80. Even though Beritech S.A is a mostly state-owned entity, Sat-Connect was not government controlled and the Beritech did not exercise its rights as a shareholder or depository as a means to implement government policy. Majority share ownership by individual government entities does not alter the private character of a company and must be distinguished from expropriation.

81. Decision of Board of directors of buy out was purely corporate act and doesn't have any involvement from state's side, this is the sole result of Beritech actions and decision-making.. Claimant's appointed directors could use corporate vehicle in such manner that could avoid loss of their share. Passive attitude could not be justification of foregoing assertions. Until this decision Televative was not deprived or restricted to use, enjoy and possess it's property and even after buy out Claimant was granted with adequate compensation upon enforcing this decision, all invested monetary value was put on claimant's escrow account.

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[37] Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2 at para. 135, Award (29 Apr. 1999)
[38] Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1 at para. 111, Award (16 Dec. 2002), 42 I.L.M. 625 (2003).
[39] Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9 at para. 20.34, Award (16 Sept. 2003, 44 I.L.M. 404 (2005).

82. Even if tribunal finds that there has been expropriation, all actions taken by Beritech fulfils the requirement of due, full and effective compensation and is take in non-discriminatory manner.

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

83. Article 9 of Beristan-Opulentia States:

> "Nothing in this Treaty shall be construed: 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 for the protection of its own essential security interests. "[40]

84. Host countries and foreign investors have potentially conflicting interests when it comes to national security considerations in respect of foreign investment. Host countries have the right to regulate, and tend to seek a maximum of freedom to react to a perceived threat to their national security. Foreign investors, by contrast, want the highest possible level of protection and predictability when making an investment in a host country.[41]

85. If national security concerns are reflected in FDIs in the form of an exception clause, the treaty becomes the main yardstick against which to assess whether a host country's measures aimed at restricting foreign investment for national security reasons have been legal or not. However, even in the absence of any national security exception in the FDI, the host country may nevertheless be able to justify its measure under the rules of customary international law. Customary international law provides States with some legal flexibility in exceptional circumstances. Among these situations are force majeure, distress, and necessity, each of which can relieve a State from international responsibility. Force majeure can be invoked where "acts of God" outside a State's control occur and make it impossible for the State to fulfill its legal obligations. Distress happens when a State has no other way to safeguard a life in its care than to

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[40] Beristan-Opulentia BIT 9(2)
[41] The protection of national security in IIAs, UNCTAD Series on International Investment Policies for Development 2009

violate a legal rule. Necessity arises when a State has no other means available to safeguard an essential interest and can do so without harming an essential interest of another[42]. It is the latter defense that is of particular relevance in the present context.

86. It is important to note that the customary defense of necessity only applies within narrow limits. According to the International Law Commission (ILC), the action taken must be "the only way for the State to safeguard an essential interest against a grave and imminent peril", and it is essential that that action "does not seriously impair an essential interest" of another State According to the International Law Commission's (ILC) Draft Articles on State Responsibility

(Articles 20-25), there are some circumstances under which states may not be held responsible for breaching their international obligations. These circumstances which justify an otherwise wrongful act by the state include consent (Article 20), self-defense (Article 21),14 countermeasures (Article 22),force majeure (Article 23), distress (Article 24) and necessity (Article 25).[43]

87. According to Article 25:

"1. Necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity."

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[42] StateBurke-White and von Staden, 2007

[43] International Law Commission, Draft Articles on State Responsibility, Commentary (2) to Article 25 in *http:/untreaty.un.org.ilc/texts/instruments/English/commentaries/9_6_2001.pdf*.

88. The ILC in its comments makes clear that "the plea for necessity arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the state invoking necessity on the other".

89. The right to protect essential security interests of the state, as an exception to treaty commitments, has been well established in treaty practice.

90. State of Beristan is fully entitled to Essential Security provision to defend himself from claimant's assertions for the following circumstances:

91. There is reliable information approving leak of information by claimant's seconded personnel. This information is not just a regular data about on-going project, however it mostly covers all know-how planned to be used by Military army of Beristan. Even from JV agreement affection, it was established how crucial was for contracting parties to assure confidentiality of information about project.

92. Dissemination of information which is highly confidential for national security of Beristan undoubtfuly means breach of confidentiality of agreement and grants State of Beristan to invoke essential security clause and therefore defend himself from any allegations from Claimant.

93. Leak of information about project directly connected to state military plans presents a clear and direct threat to national security of Beristan. Strategic interests of Beritian were highly ignored and stability of country was questioned.

94. Essential security measures are lawful when they do not carry self-judging character, As the CMS tribunal asked, is the state adopting the measures the only judge of the legality of the invocation of essential security interests, or is that invocation "subject to some form of judicial review"[44]

96. The CMS tribunal stated that "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly".

97. Along these lines, the Enron tribunal stated that "truly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent, as

[44] Essential Security Interests under International Investment Law, OECD

otherwise there can well be a presumption about not having that meaning in view of its exceptional nature"

98.Evidences in this case regarding the understanding of the Parties at the time the Treaty was signed, its obvious that the provision is not self-judging.

99. Therefore, State of Beristan is entitled Essential Security of the BIT as a defense from claimant's claims.

F. Conclusion

100. In light of all above mentioned the Tribunal is respectfully asked to find that:

A. Tribunal does not have a jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement ("JV Agreement");

B. The Tribunal does not have a jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT.

C. Respondent did not materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement

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

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