THIRD ANNUAL FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION 2010

TEAM ALFARO

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB/X/X

BETWEEN

TELEVATIVE INC.	**THE GOVERNMENT OF THE REPUBLIC OF BERISTAN**
CLAIMANT/ INVESTOR	**RESPONDENT/ PARTY**

MEMORIAL FOR RESPONDENT

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INDEX OF ABBREVIATIONS

Art	Article
Claimant	Televative Inc
ed(s)	Editors(s) *or* Edition(s)
et al	And others
ICCPR	International Covenant on Civil and Political Rights
ICSID	International centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other states
ICSID Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings
Moot Problem	Third Annual Foreign Direct Investment International Moot Competition Problem
No.	Number
Para.	Paragraph
Pub.	Publisher
Respondent	Republic of Beristan
Vol.	Volume

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- A v United Kingdom [2009] ECHR 301
- Aksoy v. Turkey (1997) 23 EHRR 553
- Ireland v United Kingdom
- Brannigan and McBride v United Kingdom
- Azinian v United Mexican states

TREATIES AND LAWS

1) Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and Reciprocal Protection of Investments, dated 1 January 1997.
2) Excerpt from Joint Venture Agreement between Beritech S.A. and Televative INC, dated 18 October 2007.
3) International Centre for Settlement of Investment Disputes (ICSID), dated 14 October 1966
4) International Covenant on Civil and Political Rights (ICCPR), dated 23 March 1976.
5) United Nations Commission on International Trade Law (UNCITRAL), dated 17 December 1966.
6) New York Convention, dated 7 June 1959.
7) International Institute for the Unification of Private Law (UNIDROIT) Principles of Transnational Civil Procedure, dated April 2004.
8) Vienna Convention on Law of Treaties, dated 23 May 1969.
9) International Covenant on Economic, Social and Cultural Rights(ICESCR), dated 3 January 1976
10) European Convention on Human Rights, dated 3 September 1953.
11) Universal Declaration of Human Rights, dated 10 December 1948

STATEMENT OF FACTS

A. The Investment

On 18 October 2007, Beritech and Televative(Claimant) signed a joint venture agreement (the "JV Agreement") to establish the joint venture company, Sat-Connect S.A., under Beristian law. The Government of Beristan(Respondent) has co-signed the JV Agreement as guarantor of Beritech's obligations. Televative's total monetary investment in the Sat-Connect project stands at US $47 million. Sat-Connect's corporate offices are located in Beristal, the capital city of Beristan.

B. The Claimant

The Claimant 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.

C. The 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, who have close ties to the Beristian government.

D. Capital structure of Sat-Connect

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. The claimant held 40% of the shares of Sat-connect and 60% of the shares were held by the Beritech. The Respondent owns a 75% interest in Beritech.

E. The Dispute

On August 12, 2009, The Beristan Times published an article in which a highly placed Beristian government official 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 official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia. Both Televative and the Government of Opulentia have made statements to deny this published story.

On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project.

On August 28, 2009 Beritech then served notice on Televative, 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.

F. Climate of Hostility

On September 11, 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

G. Request for Arbitration

On October 19, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request.

Later On October 28, 2009, Televative requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan

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

ARGUMENTS

Part One:

This Tribunal Lacks Jurisdiction to Hear this Dispute.

1. The ICSID tribunal lacks jurisdiction in this case as there are a lot of issues which are contrary to the basic principles on ICSID arbitration. The Beristan-Oputentia Bilateral Investment Treaty had been signed by the two states on 12th, march, 1996. The joint Venture agreement had been signed by Beritech and Telivative on 18th, November, 2007. The respondent in this present issue contends that the tribunal lacks jurisdiction to take up this case as Beritan is not a party to the dispute.

1.1 Beristan is not a party to this Dispute.

2. The Joint Venture agreement had been entered between Beritech and Telivative. The republic of Beristan acted as a guarantor for any non compliance of the provisions of the JV agreement. The guarantor is liable only in case non compliance of the Joint Venture Agreement by the defendant and if the defendant is not financially strong to repay the damages caused to the Claimant. An ICSID panel has observed, a host state's promise to accord foreign investment such protection is not an "absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host state."[1] A

[1] AAPL v. Srilanka. ICSID Case No.ARB/87/3, at 545 (1990).

host state "is not an insurer or guarantor… it does not, and could hardly be asked to, accept absolute responsibility for all injuries to foreign investments.[2]

3. In the present case the buyout clause had been initiated by Beritech and the respondents made $47 million in an escrow account, which is made available for the Claimants to utilize it. After repaying the monetary investment Beritech offered for arbitration and settle the dispute amicably, for which the claimants didn't reply. As a result Beritech had made all the necessary efforts and steps to resolve the dispute and pay adequate compensation to the Claimants but they weren't interested.

4. The respondent is party to the claims under the Joint venture agreement only as a guarantor for the acts done by beritech. The gurantor can be held liable when beritech defaults the obligations under Venture agreement and when beritech is not in a position to pay compensation. In the present case Beritech offered to settle the dispute which arose out of the Joint Venture Agreement. Beristan could have been held liable only in a situation where beritech refuses to compensate. Even if the respondent is a party to this dispute, this tribunal does not have Jurisdiction over the contractual claim' arising out of the JV agreement because the claimant had waived his right (dispute settlement) under the Article 11 of Beristan – Opulentia BIT by signing a specific contract(JV agreement) which contains the dispute resolution clause[3].

[2] AAPL v. Sri Lanka, at 546 (quoting Alwyn V. Freeman, Responsibility of states for Unlawful Acts of Their Armed Forces, 14 (1957).

[3] Lanco int'l, Ince. V. Argentine Republic (ICSID Case No. ARB/97/6) (Prelim. Decision on jurisdiction)

1.2 Beristan is not to be made liable under the BIT for the acts done by Beritech and Sat Connect.

5. The respondents didn't play any role in expropriating the Claimants investment from the state of Beristan. The only reason why the claimants claim that their investment is expropriated was because the respondent's CWF forces made the Telivative personal vacate all the facilities of the Sat Connect project. The CWF forces acted on an executive order from the government of Beristan. The Executive gave the order as they have to follow the due process of law which is prevailing in the state of Beristan at that particular time.

1.3 Beritech has a separate legal entity.

6. The involvement of a state party may raise problems in relation to the existence and interpretation of arbitration agreements. States often use a number of separate entities for their activities; they may be subdivisions of the state's organizational structure or have separate legal personality. In the former case the question can arise whether the person who agreed on arbitration had the power to bind the state. If the state entity has its own legal personality it may be difficult to determine whether an arbitration agreement also binds the state which is only a guarantor of the Joint Venture agreement.

7. Often parties contracting with a state entity will seek to include the state itself in the arbitration proceedings although the state has not signed arbitration agreement. Usually this will be because the state entity has in sufficient funds to meet the claim, those funds may not be as easily accessible as the assets of the state, or a set-off option may only exist in relation to the state itself.[4] This

[4] See US Supreme court, National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 US 611 (1983).

is what exactly is happening in this particular case. But Beritech is ready to pay the compensation amount under the buy-out clause of the JV agreement. It had already made the payment of $47 million as the monetary investment under the buy-out clause and also invited the Televative company to come for an amicable settlement or arbitration under the Beristan arbitration law, so that the payments can be made. This act of Beritech itself shows the intention and capacity of it to pay adequate compensation to telivative. “There may also be a coercive element of causing embarrassment by involving a government or a state as a party”.

8. The Principle argument made by the Claimant’s for involving the state at the outset is that the state entity did not have a separate legal personality but was merely a subdivision of the state administration. Thus, under well established principles of state responsibility, the entity may have no power to bind the state in any way. By making the state, and not the state entity, a party to the arbitration agreement this possibility is eliminated. Frequently, however, the state entity has its own legal personality(as in the present case) so that it and not the state becomes party to the arbitration agreement. In those cases a state which has not signed the arbitration agreement as the main party to the dispute, then it can only be made a party if it can be shown that the state nevertheless submitted to arbitration or cannot rely on the separate legal personality of its state owned entity.

9. Irrespective of whether a stricter approach should be taken, the mere face that the state is the owner of the entity and exercises a certain control over it is not sufficient to justify an extension of the arbitration agreement. It follows from the separate legal personality of the entity that additional requirements must be fulfilled before the state can be considered to be bound by the arbitration

agreement.[5] The rule must be to respect the legal separation between state and the state entity with presumption that when a state has not signed an arbitration agreement, the entity which signed it should be regarded as the sole party to the arbitration. Prior or subsequent approval by state representatives are in general insufficient to make the state a party to an arbitration agreement.

10. Those principles underline Article 7 Institute of International Law 1989 Resolution. This provides

    "Agreement by a state enterprise to arbitrate does not in itself imply conset by the State to be a party to the arbitration"[6]

11. These rules can be derived from the decision of the Swiss and French courts in the two famous cases dealing with state contracts.[7] In general national courts have rejected applications by private parties to attach the property of a state owned entity with a separate legal personality when made in an effort to enforce an award against the state. Unless the separate legal entity has only been set up to avoid emforcement or the state has intervened in the daily

[5] See, e.g., Cour de cassation, 15 july, 1999, Dumez GTM v. Etat irakien et autres, Clunet 45 (2000) 46 with note Consnard; Cour d'appel Rouen, 20 June 1996, Societe Bec Freres v. Office des cereals de Tunisie, Rev Arb 263 (1997) with note Gaillard.

[6] Resolution on arbitration between states, state enterprises or State Entities, and Foreign Enterprises, adopted in Santiago de Compostela, 12 September 1989, XVI YBCA 236 (1991).

[7] Westland Helicopters Ltd v. Arab Organization for Industrialization and others, 23 ILM 1071 (1984) 1084. SPP v. EGOTH award of 11 march 1983, IX YBCA 111(1984) 115; Para 46, 22 ILM 752 (1983).

course of business courts have respected the separate legal personality of the state owned entities.[8]

12. In general, Separate legal entities established by the state, should be treated as separate and independent entities, However, the

"the presumption of separate legal status may be overcome in two ways, (1) where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created or (2) where recognition of the instrumentality as an entity separate from the state 'would work fraud or injustice'[9]

In a claim is brought against the State by reference to the acts of the State entity, the rules of arbitration as established by international law will apply to the determination of a claim for breach of the investment treaty standard and, in particular, whether the State is responsible for the acts of its provincial authorities. By contrast, as a matter of the applicable national law. A State will not generally be responsible for the acts of an entity with separate legal personality.[10]

[8] Cour de cassation, 15 July 1999, Dumez GTM v. Etat irakien et autres, 127 Clunet 45 (2000) 46 with note Cosnard; Cour d'appeal Rouen, 20 June 1996, Societe Bec Freres v. Office des cereals de Tunisie, Rev Arb 263 (1997) with note Gaillard.

[9] S & Davis International Inc. v. The Republic of Yemen 218 F3d 1292, XXVI YBCA 978 (2001), 980 para 5.

[10] Vivendi v. Argentina at page 96

1.4 Beristan is a party to the JV agreement only as a Guarantor.

13. The role of a guarantor in this particular case is that he secures the monetary payments to be done by Beritech. Respondent signed the JV agreement as a guarantor and that the guarantor will on demand from Claimant take whatever measures may be necessary to secure the payment of obligations of Beritech under the JV agreement and will indemnify and keep indemnified Beritech as if the guarantor was the original obligor.

14. In Cypriot v. Qatari the Supreme Court of Switzerland found that the mere fact of a party issuing a guarantee did not bind it to the arbitration clause contained in the principal contract between the creditor and the obligor.

1.5 Specific contract over rides General contract.

15. It is a general rule in the contract law that the Specific contract over rides the general contract. In this present dispute two kinds of contracts had been signed (a). a specific contract(Joint Venture Agreement) and (b). General Contract(Beristan-Opulentia BIT). The contention of the Respondents is that when the claimant signed the Joint Venture agreement which contains a separate dispute resolution clause then they are bound to follow the dispute settlement clause as accepted earlier. The Claimant waived his right for dispute settlement under Article 11 of the Beristan-Opulentia BIT by signing a subsequent Joint Venture Agreement with a different dispute settlement clause.
16. By signing the Joint Venture agreement the claimant wait his right of the choice of dispute settlement provided in the BIT. In the case of SGS v.

Pakistan there had been similar situation where SGS had agreed for a dispute settlement under the contact signed by it. Pakistan contended that SGS lost its right of choice of law under the BIT by signing a subsequent contract. When SGS filed case in its domestic court of Switzerland. The Lower court of First Instance rejected SGS's claim, principally on the ground that both the parties had already agreed to the arbitration of any disputes arising out of the Agreement rather than to submit to the courts of any country and on the ground that as a sovereign State it was immune to the legal process of the Swiss courts.

17. SGS went on an appeal to the 2 appellate courts in Switzerland and both the appeals were rejected and upheld the judgment of the lower court.

18. The respondents feel that this particular case should be split. If the Claimant has any contract based claims then they have to honor the Joint Venture agreement and appear in front of the arbitration tribunal established under the Beristan arbitration law. In case the Claimant's have any BIT based claims then they can come before the ICSID tribunal and seek a remedy. The respondents are not against the treaty based claims be instituted in the ICSID tribunal. The respondents contend that there are numerous judgment in which the courts and tribunals have clearly stated that the specific contract(which is the Joint Venture Agreement) is applicable over the General contract(BIT). So the forum selection clause under the Beristan-Opulentia BIT is not valid when it comes to the claims under the violation of the joint venture agreement which has a dispute resolution clause accepted by both the parties.

19. The question now is the exclusive jurisdiction clause overridden by BIT or the ICSID Convention? Accordingly, face with an exclusive jurisdiction clause in

these terms, the first question must be whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under BIT disregarding the contractually chosen forum.

20. One possibility is that this right is conferred by Article 11 of the BIT itself, which gives the investor a choice to submit the dispute "either to the national jurisdiction of the Contracting party in whose territory the investment has been made or to international arbitration", and in the latter case, a further choice between ICSID and UNCITRAL arbitration. The question whether Article 11 was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.
21. The above question had been answered in SGS v. Republic of Philippines. The tribunal in this present case gave a negative answer to this question.[11] The first consideration involves the maxim *generalia specialibus non derogant*. Article 11 is a general provision, applicable to investment arrangements whether concluded "prior to or after the entry into force of the Agreement" The BIT itself was not concluded with specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties. As Schreuer says, "A 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."[12] The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and

[11] SGS v. Republic of Philippines, Professor Crivellaro would give an affirmative answer, at least with respect to BITs which post-date the relevant contract.

[12] Schreuer, 362.

supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.

22. It is suggested that, while BIT provision for investor-state artitration do not override exclusive jurisdiction clauses in later investment contracts, at least they have that effect for earlier contracts, by application of the *maxim lex posterior derogate legi priori*.[13] But there is no textual basis in the BIT for drawing such a distinction. The distinction would tend to operate in an arbitrary way: in the present case, for example, the BIT is renewal after 10 years and thereafter every five years; the Joint Venture Agreement itself was renewed in the same terms as to dispute settlement on several occasions. In such circumstances, which is the prior agreement and which is the subsequent one? But the decisive point is that the *lex posterior* principle only applies as between instruments of the same legal character. By contrast what we have here is a bilateral treaty, which provides the public international law framework for investments between the two States, and a specific contract governed by national law. It must be presumed that whatever effect the BIT has on contracts it has on a continuing basis, as new contracts are concluded and new investments admitted. A distinction between earlier and later exclusive jurisdiction clauses in contracts cannot therefore be accepted – unless expressly provided for, which is not the case with the BIT which the tribunal has to interpret.

23. For these reasons, the respondent contends that, the BIT did not purpot to override the exclusive jurisdiction clause in the Joint Venture Agreement, or to give the Claimant an alternative route fot the resolution of contractual claims which it was bound to submit to arbitration under the Beristan arbitration law.

[13] See, e.g, the discussion in Lanco International, Inc. v. Argentine Republic, (1998) 5 ICSID Reports.

1.6 The arbitration proceeding which is initiated by Beritech is pending in Beristan.

24. On September 12, 2009, Telivative submitted a written notice to the Respondent of a dispute under the Beristan-Opulentia BIT, in which Telivative notified Beristan their desire to settle Amicably, and failing that, to proceed with arbitration pursuant to Article 11 of the BIT. Beritech filed a request for arbitration against Telivative under Clause 17 of the Joint Venture Agreement, October 19, 2009.

25. The written notice which was sent by Telivative to the Respondent on September 12, 2009 clearly states that the claimant wanted to initiate proceeding in the ICSID convention for the violation of the BIT[14]. It is clear that the claimant wanted only BIT based claims from the ICSID tribunal. But when the proceeding were started the Claimant combined both the contractual and the BIT claims and had come before this tribunal. The claimant used the "umbrella clause"(Article 10 of the Beristan-Opulentia BIT) to bring in the contract based claims in front of this tribunal.

26. In investment protection agreements, when investor – State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under national law), this is stated ecpressly. A well-known example is Chapter 11 of the North American Free

[14] 1st Clarification not 133.

Trade Agreement (NAFTA), under which investors may only bring claims for breaches of specified provisions of Chapter 11 itself.[15]

27. The Respondent claims that the jurisdiction clause which is mutually agreed in the Joint Venture Agreement is valid and that the claimant has to participate in the arbitration proceedings instituted by beritech in Beristan.

28. As noted already, Clause 17 of the Joint Venture Agreement provides that:

"The Agreement shall be governed in all respects by the laws of the Republic of Beristan. 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 parties must then 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. The dispute shall then be resolved only by arbitration undet the rules and provisions of the 1959 Arbitration Act of Beristan, as amended. 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".[16]

29. *Prima facie* Clause 17 is a binding obligation, incumbent on both parties, to resort exclusively to Arbitration under the Arbitration act of Beristan in order

[15] To similar effect see e.g., the Vivendi Annulment decision, (2002) 6 ICSID Reports 340, 356 (para.55). The issue there was slightly different one, Viz., whether in pursuing ICSID arbitration rather than local proceedings for breach of contract the investor had taken the "fork in the road" under the BIT. Bit it involved the interpretation of similar general language in the BIT.

[16] Moot Problem, Page 19, Annex 3.

to resolve any dispute in connection with the obligations of either party to this agreement. It is clear that the contractual claims which the claimants claim clearly come under clause 17 of the Joint Venture Agreement.

30. It has been suggested that in come legal systems, a clause referring to national courts or tribunals may be legally in effective to confer or affect that jurisdiction, and should be construed as a mere acknowledgement of a jurisdiction already existing by virtue of the non-derogable law of the host State. This was suggested of the law of Argentina in the Lanco case[17]. But this tribunal shouldn't not interpret Clause 17 of the Joint Venture Agreement as a mere acknowledgement which does not impose a contractual obligation upon the Claimant as to the use of the Beristan Arbitration tribunal to resolve contractual disputes.

31. In accordance with the general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exteriore*, i.e., by some other law, not to do so. Moreover it should not matter whether the contractually-agreed forum is a municipal court or domestic arbitration[18] (as here) or some other form of arbitration, e.g. pursuant to the UNICITRAL or ICC rules. The basic principle in each case is that a

[17] Lanco International, Inc v. Argentine Republic, (1998) 5 ICSID Reports 367, 378 (para.25).

[18] Lanco International, Inc v. Argentine Republic, (1998) 5 ICSID Reports 367, 378 (para.26). The Tribunal would observe, however that the mere fact that "administrative jurisdiction cannot be selected by mutual agreement" doesnot prevent the investor agreeing by contract not to resort to any other forum.

binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.[19]

[19] SGS v. Pakistan. " For an express provision see Article II(1) of the Claims Settlement Declaration, 19 January 1981, Which expressly overrides exclusive jurisdiction clauses except for those relating to Iranian courts: 1 Iran-US CTR 9.

Part Two:

The Respondent does not materially breached the JV agreement by preventing the claimant its contractual duties and improperly invoking Clause 8(Buyout) of the JV agreement

32. Board of Directors of Sat – Connect project consist of nine members. Of the nine members of Sat-Connect's board of directors, Beritech has the right to appoint five directors, while Televative can appoint four. A quorum of the Board of directors is obtained with the presence of six members.

2.1 Prior notice regarding the board meeting was to be given to the Claimant

33. The minutes from the August 21, 2009 meeting of the board of directors reflect that the chairman of the board made a presentation concerning the August 12th article in The Beristan Times. The Beristan Times published an article in which Beristian government official raised national security concerns. It was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia by Telivative. All nine board members were present, and that one director raised the potential relevance of clause 8 of the JV Agreement, and that there was discussion among those present. All the directors of Sat Connect were informed about the date of the next meeting. No agenda was distributed among them. 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.

34. On August 27th, 2009 Beritech conducted a meeting with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project. Six directors were present at this meeting and one director, Alice Sharpeton, who had been appointed by Televative was also present, refused to participate and left the meeting before its end. She later filed a protest that she had no prior notice concerning the proposed agenda for the meeting. It is to note that Alice Sharpeton knowing that notice was not given did not object it immediately nor did she leave meeting immediately. She left the meeting only after knowing that buyout clause was going to be invoked. From this it is clear that members Televative who are part of the Sat-Connect board of directors were well aware of the meeting that was to be conducted on the 27th August 2009. They absented themselves to avoid buyout clause from being invoked.

35. Notice of a meeting need not be given to any director who submits a waiver of notice whether before or after the meeting or who attends the meeting without protesting prior thereto or at its commencement, the lack of notice to him or her has waived his or his right to notice[20]. In Eisenberg (formerly Walton) v. Bank of Nova Scota and Ridout[21] court stated that, by attending and participating in the meeting without raising objection member are deemed to have waived notice.The notice requirements for board meeting differ from those applicable to meeting of shareholders because directors are expected to be more closely involved in affairs of the company than shareholder and board meeting are held more regularly than meeting of shareholder.[22]

[20] Piedmont Venture Partners, LP v. Deloitte & Touche LLP (N.C. Super. Ct. Mar 5,2007); Trietsch v. Circle Design Group, Inc (868 N.E.2d, 812.818); Endres Floral Co. v. Endres (651 N.E.2d 950)

[21] (1965) S.C.R. 68

[22] Company Secretary's Answer Book by Cynthia M. Krus

36. Sec 8.23 (b) of Model Business Cooperation Act, a directors attendance at or participation in a meeting waives any required notice to the director of the meeting, unless the director at the beginning of the meeting (or promptly upon arrival) object to holding of the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. Section 8.23(b) recognizes that the function of notice is to inform director of a meeting. If a director actually appears at the meeting the director has probably had notice of it and generally should not be able to raise a technical objection that he or she was not given notice. In this case concern, Alice Sharpeton, who had been appointed by Televative refused to participate and left the meeting before its end. She then later filed a protest that she had no prior notice concerning the proposed agenda for the meeting, if she wanted to object she should have done at beginning of the meeting itself. This clearly proves that she brought about the protest of notice only after knowing that buyout clause is going to be invoked, so that she can dissolve the meeting as quorum wouldn’t be achieved without her presence.

37. Article 1.10 of UNIDROIT Principles states the conditions for a Notice
    (1) Where notice is required it may be given by any means appropriate to the circumstances.
    (2) A notice is effective when it reaches the person to whom it is given.
    (3) For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address.
    (4) For the purpose of this article "notice" includes a declaration, demand, request or any other communication of intention.

a. From this it is clearly understood the term notice includes communication of intention, in the present case board of directors were aware from 21st August, 2009 itself that the buyout clause going to be invoked soon. They were also informed about the date of the meeting, but no agenda was distributed among them.

38. In Re Oxted Motor CO. Ltd[23] court held that by attending and participating in the meeting without raising objection, members are deemed to have waived notice.[24]In Adams v. Meyer[25], depending on their circumstances presented failure to raise lack of notice in a timely manner may result in the right to object being waived. In Wiltse v. Boarder Financial Service Inc.[26], a challenge to the adequacy of the notice can be preserved by objecting prior to or contemporaneously with the shareholder's participation in the meeting.

2.2 The quorum is to be achieved for a valid meeting and voting

39. Once a quorum has been established at a meeting the subsequent withdrawal of members so as to reduce the Voting Percentage entitled to vote at the meeting below the amount required for a quorum, shall not affect the validity of all action taken at the meeting or an adjournment of the meeting[27]. In

[23] (1921)3 K.B. 32

[24] Re Express Engineering Work Ltd.(1920)1 Ch. 466; Wenlock(Baroness) v. River Dee Co.(1887)36 Ch.D 674; Machell v. Nevinson(1724)11 East. 84n, 103E.R. 936; Re British Sugar Refining Co.(1857)3K. of J. 408, 69 E.R. 1168

[25] 620 N.E.2d 1298(111 ct. App. 1993)

[26] Minn. App. Apr. 13,2004

[27] Raising Capital by J. Robert Brown, Jr., Herbert B. Max

Lumbers v. Fretz[28], if quorum is present at the opening of a meeting, unless the by-laws otherwise provide, the members present may continue with a meeting notwithstanding the loss of a quorum. The same as been mentioned in Hendeson V. Louttit & Co, Ltd.[29] and in Giannotti v. Wellington Enterprises Ltd.[30].

40. In Deffy v. Loft In[31], the court brought out that the US position is that a quorum present at a meeting cannot be broken by withdrawal.[32] Furthermore, one as to understand that meeting was called on emergency situation to deal with news paper article which tarnished the Beristian Government on national security concern, thus one cannot be expected to give notice of meeting in such a situation. Moreover, on August 21, 2009 itself date of the meeting and details of buyout clause was decided only the actually notice was not passed on to the members. And Alice Sharpeton, left the meeting only after knowing that buyout clause was going to be invoked so that she can dissolve the meeting as quorum wouldn't be achieved without her presence.

41. Thus, this brings about a question. If the quorum was never going to be achieved in board of directors meeting, since the members of Televative, were all well aware that buyout clause was to be invoke and decided not to appear for any of the meeting on such grounds. In such a situation, how long before will the board have to wait to make a call?

[28] (1928)4 D.L.R. 269

[29] (1894)31 Sc. L.R. 555

[30] (1997)O.J. 574

[31] (1930)152 A.849 (Del)

[32] Nathan's Company Meeting Including Rule of Order by Hartley R. Nathan

2.3 Due Process of law have been followed

42. Under international law and jurisprudence, state of emergency, and limitation or derogation of rights in times of emergency, must be of an exceptional and temporary nature. It is by definition, a temporary legal response to an exceptional and grave threat to the nation. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) which states that "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

43. Although Article 4 of the ICCPR recognizes that State may take measures derogation from their obligations under the Covenant, it also explicitly prescribed that no derogation from the following article may be made: Article 6, 7, 8,11,15,16 and 18. The United Nations Human Rights Committee has pointed out that "the absolute nature of these prohibitions, even in time of emergency, is justified by their status as norms of general international law[33]. The universal declaration of 1948 names some of the rights that are non derogables, mainly the ones listed under the International Covenant for Civil and Political Rights (ICCPR), that are excluded from any intervention from the state, and so did the European Convention for Human Rights, known as "the Convention", under its article 15, where it sets aside Article 2(life),

[33] Human Right Committee, General Comment No.29, State of Emergency (Aricle 4),. CCPR/C/21/Rev.1/Add.11,31August2001,para.13(b)

except in respect of deaths resulting from lawful acts of war, or from Articles 3(torture), Article 4 (paragraph 1)(slaver) and Article 7 (punishment without law), from any derogation, providing unconditional protection at all time to those rights.

44. The principle of proportionality constitutes a general principle of international law and includes elements of severity, duration and scope[34]. It applies to Article 15 ECHR as well as to Article 4 ICCPR. Both provisions essentially require a derogating state to satisfy two tests. First, the derogating state is required to establish that exceptional circumstances of war or other public emergency threatening the life of the nation do in fact prevail (the '*designation* issue'), and second, that measures taken in consequence of such an emergency are 'strictly required by the exigencies of the situation' (the '*interference*issue')[35].

45. Under Article 15 of the ECHR, in order for derogation itself to be valid, the emergency giving rise to it must be:
    - Actual or imminent, although state do not have to wait for disasters to strike before taking preventive measure[36],
    - Involve the whole nation, although this does exclude emergencies which are confined to regions[37],
    - Threaten the continuance of the organized life of the community[38],

[34] *The European System for the Protection of Human Rights.*

[35] 'Determining the State of Exception: What Role for Parliament and the Courts?' by S Tierney (2005)68(4) *Modern Law Review* 668

[36] *A v United Kingdom* [2009] ECHR 301 para. 177

[37] *Aksoy v. Turkey* (1997) 23 EHRR 553 para 70.

[38] *Greek case* (1969) 12 YB 1 at 71-72, paras. 152-154.

- Exceptional such that measure and restriction permitted by the convention would be "plainly inadequate" to deal with the emergency.

46. The actual or imminent disaster has already taken place by leakage of the confidential information from Sat-Connect project to the Government of Opulentia by Televative personnel who seconded the project. Further it is asserted that the advanced satellite and telecommunications technology of the Sat-Connect project, which includes system that are being used by the Beristian armed forces, directly implicate the national security of Beristan. Thus removal of the claimants' from sat-Connect project is justified on national security grounds. Leakage of information is going to cause the following threat:
    i. Privacy for civilian is lost
    ii. Won't be viable to use for military purpose
    iii. Loose of client base
    iv. Company will run into loss
    v. Intellectual Property Right will go for waste
    vi. None of the six counties who were interested in buying the Sat-Connect project will come forward to but it after the leakage.

47. In the context of derogation in times of 'public emergency threatening the life of the nation', the margin of appreciation represents the discretion left to a state in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction[39].In *Ireland v United Kingdom*[40], the ECrtHR held that:

[39] 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' by T A O'Donnell

a. "it falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation."

48. In *Brannigan and McBride v United Kingdom*[41] the Court held that:

a. "it falls to each Contracting State, with its responsibility for 'the life of [its] nation,' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities".

b. Thus from this it is clear that only the sovereign state is sole authority during emergency situation.

49. Due process of law has been rightly fully followed in this case. Televative violated Clause 4 (confidentiality) of the JV agreement that was the reason for

[40] (1978) Series A No 35, [78]-[79]

[41] (1993) 17 EHRR 539, [41]

bringing out the buyout clause. The Confidentiality Clause clearly says that each of the party will keep the said information confidential and will not be allowed to disclose such information without prior written approval. If the confidential information is leaked, it shall be considered at material breach. Clause 8 (buyout) states that if Televative commits a material breach of any agreement , then Beritech shall be entitled to purchase all of Televative's interest in the agreement. From this it is clear that Breitech have followed all the procedure for a valid buyout.

50. Furthermore, Beritech severed notice on Televative on August 28, 2009, requiring the latter to handover possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all second personnel from the project. In spite of giving the notice, the Televative did not hand over the equipment and facilities to the Beritech. On the completion of 14 days, the Beritech called for Civil Work Force (CWF), the civil engineering section of the Beristian army, to help them secured all sites and facilities of the Sat-Connect project. CWF was called for only when the Televative refused to leave the project site. The CWF wouldn't have been called for if the Televativeseconded personnel left the project site by themselves. Thus from this it is clear that due process of law has been properly followed by Beritech. Moreover the Beritech handed over 47 million dollars, which is Telvative's total monetary investment in the Sat-Connect project. Thus it is clear that all the due process of law has been rightfully followed by the Beritech in this case.

Part Three

Respondent's actions or omissions not amount to expropriation, discrimination, a violation of fair and equitable treatment, or otherwise violate general international law or applicable treaties

51. Beristan did not expropriate televative personnel. As Televative personnel had leaked out confidential information Beritech wanted to invoke the buyout clause. On September 11 the televative personnel were asked to leave the site and beritech seeked the help of the government to help them evacuate the m using the Civil Works Force.

3.1 The Expropriation was done for a public purpose

52. International investment agreements almost uniformly impose a public purpose requirement for expropriation.[42]the requirement, although sometimes framed as 'public purpose'[43] appears in a variety of form including 'public interest'[44], 'public benefit'[45], 'public utility'[46], 'a purpose which is in public interest,'[47] 'public use, public interest or in the interest of national defence,'[48] 'public or national interest or security'[49] and 'legal purpose'.[50] Under

[42] An exception is Art. 3, France-Malaysia(1975). For in depth surveys of trety practice, see studies supra note 60.

[43] Art. 1110(1)(a), NAFTA; A rt. 4(1), Austria-Egypt(2001); and Art.4(1), Afganisthan- Turkey(2004).

[44] Art.5(1), Autria-Azerbaijan(2000)

[45] Art. XI, Netherlans-Sudan(1979)

[46] Art. 5(2), France-Pakisthan(1987)

[47] Art. 13(1)(a), ECT.

[48] Art. V(1) Phillippines- UK (1980)

[49] Art. 4(2), BLEU-Cameroon(1980)

customary international law, an expropriation must be for a public purpose[51]. It has been argued that the power to expropriate funds its juridical basis in the requirements of the "public good" or the "general welfare" of the community and that, although the public welfare is considered by international law to be of such overriding importance that it is allowed to derogate from the principle of respect of private rights, such derogation is conditional upon the presence of a genuine public need, and is governed by the principles of good faith. A number of decisions of international tribunals support this view [...]. the requirement that expropriation must be justified by reasons of public interest is embodied in a number of international treaties.

53. Article 2of the charter of Economic Rights and the Duty of the State(12 Dec.1974), A/RES/3281(XXIX) states that:
    1. Every state has and shall freely exercise full and permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
    2. Each state has the right:
    - To regulate and exercise authority over foreign investments within its national jurisdiction in accordance with its laws and regulations and in conformity with national objectives and priorities. No state shall be obliged to grant preferential treatment to foreign investment.
    - To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and confirm with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host state. Every state should, with

[50] Art. 4(1)Bahrain-Jordan (2000)

[51] For a discussion of authorities, see A. Reinisch, 'Legality of Expropriation,' supra note 11

full regard for its sovereign rights, co-operate with other states in the exercise of the right set forth in this subparagraph.

- To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of the states and in accordance with the principle of free choice of means.

54. "Permanent sovereignty over natural resources", general assembly resolution 1803(XVII) of 14 Dec 1962 states that nationalisation, requisitioning shall be based on grounds or reasons of public utility, security or in the national interest which are recognised overriding purely individual or private interests, both domestic and foreign.

55. Case concerning the gabcikova- nagymaros project case, the following basic condition set forth in draft 33 are relevant: it must have been occasioned by an "essential interest" of the state which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means "of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the state towards which the obligation existed ; and the state which is the author of that act must not have

"contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

56. In the present case there has been a leak of confidential information by the Televative personnel to Opulentia . Beristan was called in by the beritech to take help them evacuate the Televative seconded personnel from the site. They contended that continuing the project along with the Televative seconded personnel would be a threat to their national defence. As national defence is a matter of importance, it overrides the rights of the private investors. A country cannot spare with its national defence.

3.2 The respondent violated the fair and equitable treatment standard

57. Fair and equitable treatment is a broad legal standard. While it 'does not provide a tribunal a open-ended mandate to second-guess government decision making,'[52] it does allow tribunals to assess whether state conduct was clearly unreasonable. The tribunal in the case[53] considers that the Claimants have failed to prove violation of the standards of fair and equitable treatment, including the obligation to act in good faith, or the standards of non-discriminatory or non-arbitrary treatment that the BIT requires of Ecuador as a State party. The general principles of law correspondingly recognize the rights of the state in its capacity of supreme protector of the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of

[52] Myers, S.D. Myers, Inc. V. Canada(partial award, 13 Nov. 2000) at para. 261. See also Marvin Feldman v Mexico(Award, 16 Dec. 2002) Feldman at para. 139: 'not just any denial of due process or of Fair and Equitable Treatment... constitutes a violation of international law', and quoting A zinnia, supra note 35 at para. 103, 'there must be a clear and malicious misinterpretation of the law'.

[53] M.C.I. Power Group L.C. and New Turbine Inc.v Republic of Equador

their resources, and encouraging their trend towards unification, that the future of a truly economic order in the investment field will depend.[54]

58. The Tribunal in a case emphasized that a national court's incorrect decision alone does not constitute a violation of the NAFTA. (100) "More is required; the claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end." (101) In this instance, claimants argued not that the Mexican judiciary's actions deprived them of justice, but that the Naucalpan authorities harmed their investment. (102) Claimants' failure to raise a complaint against the Mexican judiciary defeats their claim. "For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated." (103) If claimants had advanced arguments that the Mexican courts refused to hear their case, subjected them to undue delay, seriously failed to administer justice, or clearly and maliciously misapplied the law, then a denial of justice claim could have been substantiated. (104) The Tribunal concluded that the Naucalpan Ayuntamiento's annulment of the concession contract did not violate Mexico's Chapter 11 obligations to provide claimants' investment fair and equitable treatment under Article 1105. (105) [55].

59. Under U.S. substantive due process analysis and presumably under due process principles embodied in other legal systems, “government are generally free to change regulatory standards in response to changed circumstances or priorities”.

[54] Kuwait v American Independent Oil Co. (AMINOIL), Award of 24 March 1982, 21 I.L.M. 976,998 (1982)

[55] Azinian v United Mexican states

60. In this present case the respondent was no way connected with the evacuation. An executive order was passed and based on that the respondent sent its civil works force to evacuate the claimant's seconded personnel. Beritech on August 28, 2009 served a notice to the Televative personnel to hand over all the Sat Connect equipment facilities within 14 days. The 14 days was time was also given. On September 11, 2009 Beritech with the help of the Respondent and the Civil Works Force evacuated the televetive seconded personnel from the site.beritech served a notice to the claimant on the same day for amicable settlement in 60 days failing which they can go to arbitration proceedings and resolve the matter there.

3.3 The defendant is not liable to pay compensation

61. Beritech has paid an amount of $ 47 million into an escrow account and have asked the claimant to come for an amicable settlement within 60 days failing which the arbitration proceedings can be commenced based on beristan arbitration laws for which the claimant have not replied till date. When the beritech is ready to pay the compensation amount the claimant have to get the compensation from them and not ask compensation ti Beristan. Beristan in this case will step into the shoes of Beritech only if Beritech fails to pay the compensation.

62. In this present case the claimant have breached the confidentiality clause. The State has been endangered because of the leak of the confidential information. State of necessity has been invoked. The LG&E tribunal found that although Argentina would be responsible for damages for breaches of the treaty before and after the state of necessity, the damages suffered by the investor during the

state of necessity should be borne by the investor, seemingly due to the application of the treaty essential security exception rather than necessity under customary international law.[56]

63. But here Beritech is ready to pay the compensation amount and if the claimants refuse to get the compensation from them it would be a waiver of their right to get compensation and they cannot demand compensation from Beristan.

[56] LG&E Capital Corp., and LG&E International, Inc. V. Argentina(Decision on Liability, 3 Oct. 2006) [LG&E] at para. 264.

Part Four

Whether respondent is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a Defense to claimant's claims

64. Under many international agreements, states have negotiated language which provides that even when states have entered into treaty commitments, such commitments do not prevent them from taking measures in order to protect their essential security.[57] A number of Bilateral Investment Treaties (BIT) also contain provisions making the protection of essential security interests of the state a defence to justify an action of the state otherwise prohibited.

4.1 Determination of essential security is self-judging

65. The OECD Codes of Liberalisation of Capital Movements and Current Invisibles Operations in Article 3 stipulate that the provisions "shall not prevent a Member from taking action which it considers necessary for the "ii)... protection of its essential security interests...". The code allow each OECD member government to take measures which "it considers necessary", which means that this provision is explicitly self-judging.

[57] From the article 'Essential Security Interests under international Investment law' written by Yannaca-Small, Legal advisor.

66. NAFTA Chapter XXI Öther Provisions"[58], contain an exception essential security interests in its Article 2102. According to this Article which applies to the agreement as a whole, including the Investment Chapter:

1. Subject to Articles 607(Energy- National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this agreement shall be construed:

[...](b) to prevent any party from taking any actions that it considers necessary for the protection of its essential security interests

(i) Relating to traffic in arms,...., and transactions in other goods, materials, service and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,...

These essential security provisions have also an explicitly self-judging character.

The Energy Charter Treaty Article 24 on exceptions provides also for the protection of essential security interests of the signatories. It stipulates that:

"the provisions of this treaty other than those referred to in paragraph (1) shall not be construed to prevent any contracting party from taking any measure which it considers necessary:

(a) For the protection of its essential security interests.... this also has a self-judging character.

The General Agreement on Trade in Services, in its Articles provides that "Nothing in this Agreement shall be construed... to prevent any member from taking any action which it considers necessary for the protection of its essential security interests".

[58] See in www.dfait-maeci.gc.ca/nafta-alena/chap21-en.asp?#Article2101

Allowing a party to take measures "it considers necessary" to protect its essential security interests falls under "provisions that are explicitly self-judging.

67. In the present case the BIT between Beristan- Opulentia is explicitly self-judging. Beristan when it considers necessary that the measures taken by it are for the fulfilment 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. So when Beritech came to know that Televative personnel have leaked out confidential information and that would be a threat to the national security of the country, it sought the help of the Respondent who has the right to take action when it considers that action to be necessary for the maintenance of peace and security.

4.2 Circumstances under which the state in not held responsible

68. According to the international law commission's (ILC) Draft Articles on State Responsibility[59](Article 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-defence(Article 21),[60] countermeasures(Article 22),force majeure(Article 23), distress(Article 24) and necessity(Article 25).

[59] International Law Commission, Draft Articles on State Responsibility, Articles 20-25 in http:/untreaty.un.org.ilc/texts/instruments/English/commentaries/9_6_2001.pdf.

[60] Self defence is more evidently relevant in the areas of territorial integrity and military strategy, and in the case of an armed attack. The act constituting a lawful measure o self-defence should be taken in conformity with the charter of United Nations.

Conditions for invocation of necessity fulfilled

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 the 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 and an essential interest of the state or states towards which the obligation exists, or for the international community as a whole.

(2) In any case, necessity may not be invoked by the state as a ground for precluding wrongfulness if:

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

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

69. Necessity may only be invoked to safe guard an essential interest from a grave and imminent peril. The ILC Committe of experts on State Responsibility through its Chairman Roberto Ago, stated that the "essential state interest"that would allow the state to breach its obligation must be a vital interest, such as "political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part

thereof, etc.[61] The report by Professor Crawford, noted that "essential" cannot be defined and must depend on the specific facts of each case.[62]

70. As the element of "imminent peril", the ICJ in the Gabcikovo-Nagymaris[63] project case said that: "that does not exclude... that a 'peril'appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realisation of the peril, however far off it might be, is not thereby any less certain and inevitable".

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[61] Documents of thirty-second session(1980), 2 Y.B.Int'l L.Comm'n, 51st session, at 30, U.N.Doc. A/CN.4/SER.A/1980/Add.1(Part 1).

[62] Second report on state responsibility: Addendum, Int'l L.Comm'n, 51st session, at 30, U.N.Doc.A/CN.4/498/Add.2(1999)

[63] *Gabcikovo-Nagymaros* (Hungary v. the Slovak Republic), 1997 I.C.J. 7, 40 (Sept. 25,
1997). The object of the underlying Hungary-Slovak Republic treaty was that the countries enter into a joint investment primarily to produce hydroelectricity, improve navigation along the river, and control flooding. Implementing the treaty was problematic. In both countries, and in particular in Hungary, there was an increasing concern about the economic viability of the project and its environmental impact. Ultimately Hungary stopped work on its part of the project. By submitting the dispute to the ICJ, Hungary claimed, *inter alia*, that it had violated its treaty obligation because of a "state of ecological necessity", indicating that the large reservoir would cause unacceptable ecological risks, including artificial floods, a diminution in the quality of water, and the extinction of various flora and fauna.

71. In the present case televative had leaked the confidential information to opulentia. This has caused necessity for the state to take action against televative to safeguard itself from grave and imminent peril of the disturbance of its peace and security. The leak of information can cause the danger for national security at anytime. Beritech sought the help of the defendent. And it is defendent’s duty to secure its national security.

Prayer for Relief

For the foregoing reasons, the Respondent request that the tribunal deny jurisdiction to hear these claims, if not, find for the Respondent on the merits.

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