TEAM NAME: BENGZON

No. ARB/X/X

IN THE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ICSID

TELEVATIVE, INC.,

CLAIMANT,

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN,

RESPONDENT.

MEMORIAL FOR RESPONDENT

WÄLDE ASSOCIATES, LLP
Attorneys for Respondent

ORAL ARGUMENT REQUESTED

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LIST OF ABBREVIATIONS

	DESCRIPTION	ABBREVIATION
1	Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and Reciprocal Protection of Investments	Beristan-Opulentia BIT
2	Bilateral Investment Treaty(ies)	BIT or BITs
3	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention, Washington Convention or the Convention
4	Fair and Equitable Treatment Standard	FET
5	Full Protection and Security Standard	FPS
6	International Centre for Settlement of Investment Disputes	ICSID or the Centre
7	International Court of Justice	ICJ
8	Most Favored Nation Standard	MFN
9	National Treatment Standard	NT
10	Subject Matter Jurisdiction	SMJ

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ISSUES PRESENTED

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

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

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

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

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

STATEMENT OF FACTS

6.- On March 20, 1996, the Republic of Beristan ("Beristan") and the United Federation of Opulentia ("Opulentia") entered into a Treaty Concerning the Encouragement and Reciprocal Protection of Investments ("Beristan-Opulentia BIT") setting forth the promotion and protection of investments between nationals of the two nations.

7.- Beristan established Beritech S.A. ("Beritech") in March 2007. Beristan owns a seventy-five percent (75%) interest in Beritech with the remaining twenty-five percent (25%) owned by a group of private Beristan investors.

8.- Beritech and Televative Inc. ("Televative"), a privately held corporation incorporated in Opulentia, entered into a joint venture agreement on October 18, 2007 ("JV Agreement"). Televative is a multinational enterprise that specializes in satellite communications technology and systems.

9.- The joint venture company, Sat-Connect S.A. ("Sat-Connect"), was organized under Beristan law and 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 within the region of Euphonia, which includes Beristan. The satellite and communications technology that Sat-Connect deployed was to be used for dual-purposes: civilian and military. As a result, numerous segments of Beristan's armed forces would use the Sat-Connect system, making this project vital to Beristan's national security operations.

10.- Beritech owned a sixty percent (60%) majority stake while Televative owned a forty percent (40%) share in Sat-Connect. Additionally, Beristan co-signed the JV Agreement as a guarantor of Beritech's obligations. Sat-Connect's board of directors, composed of nine (9) members, five (5) appointed by Beritech and the remaining four (4) were appointed by Televative. Six (6) members of the board were needed in order to have a quorum.

11.- For nearly two years, the parties worked with good relations and had almost completed the development of the technology required from the project. However, confidentiality issues regarding the project were raised. On August 12, 2009, Beristan's concerns regarding national security affecting the Sat-Connect project came to surface. It was Beristan's firm belief that critical information from the Sat-Connect project - including information about technology, systems, intellectual property, encryption to be used, and other trade secrets – had been passed to the Government of Opulentia by Televative's personnel in breach of the confidentiality clause of the JV Agreement between Televative and Beritech.

12.- On August 21, 2009, the chairman of Sat-Connect's board of directors conducted a meeting in which the board of directors discussed the allegation against Televative. Soon

thereafter on August 28th, in a separate meeting of the board of directors, the majority of the board, with a quorum present, voted to compel a buyout of Televative's interest in the joint venture pursuant to the buyout clause of the JV Agreement.

13.- Pursuant to rights retained under the Beristan-Opulentia BIT and out of concerns for potential threats to national security, Beristan moved on September 11, 2009 to secure all sites and facilities of the Sat-Connect project. As a practical security concern, all personnel of the project associated with Televative were instructed to leave the project sites and facilities immediately.

14.- On October 21, 2009, Beritech filed a request for arbitration against Televative pursuant to the arbitration clause of the JV Agreement. Beritech is seeking to pay Televative its total monetary investment in the project (US$47 million), which is currently being held in escrow pending a decision from this arbitration. This amount represents Televative's total investment from the time of the execution of the JV Agreement to the time of the buyout.

15.- Rather than settling the dispute amicably under the terms of the JV Agreement, Televative requested arbitration in accordance with the Beristan-Opulentia BIT and ICSID's Rule of Procedure for the Institution of Conciliation and Arbitration Proceedings, and alleges ICSID jurisdiction under the Beristan-Opulentia BIT.

SUMMARY OF THE ARGUMENT

16.- The Tribunal does not have jurisdiction over the dispute pursuant to Article 25 of the Convention. Subject matter jurisdiction (SMJ) and personal jurisdiction has not been met for the Tribunal to have jurisdiction in this dispute. Further, the timing requirements have not been satisfied and the jurisdictional limitations of the Beristan-Opulentia BIT apply.

17.- The Tribunal does not have SMJ because this dispute is not legal in nature and does not arise directly out of an investment. Neither does the Tribunal have personal jurisdiction because this dispute did not arise between a contracting state and a national of another contracting state

(Televative). Beritech's is not a state-entity for the purposes of determining jurisdiction nor are Beritech's actions attributable to Beristan. The Convention's and the Beristan-Opulentia BIT's timing requirements were not satisfied. The BIT's six-month amicable settlement period was not honored; therefore, barring the claims.

18.- Further, the umbrella clause of the BIT does not apply and Televative cannot use it to elevate their purely contractual claims into treaty-based claims in order for the Tribunal to have jurisdiction. Likewise, because Televative's claims are commercial and completely contractual, they need to be brought under the JV Agreement pursuant to the exclusive jurisdiction provision of Clause 17.

19.- Beristan has not violated its international obligations by discriminating against Claimant. This discrimination is abundantly proved. The evidence does not show that Sat-Connect's board deliberately concealed the agenda of the August 27, 2009 meeting. Beritech's actions have not deprived Claimant of a fair opportunity to perform its contractual duties by permitting the seizure of the Sat-Connect through military action; Respondent has not violated any established international law standards. The evidence does not show that Beristan violated the Fair and Equitable Treatment standard (FET) as well as the National Treatment standard (NT).

20.- The evidence fails to show that Respondent failed to comply with the Full Protection and Security standard (FPS) *vis-à-vis* Televative and its investors. Respondent exercised the proper due diligence to adequately protect Televative's property and investment. Beristan did not fail to detain the military seizure of Sat-Connect and is fully liable for the damages sustained by Claimant.

21.- Claimant's investment was not expropriated by Beristan's unlawful interference in using military action to remove Claimant's personnel from the Sat-Connect project on grounds of an alleged "leak" without foundation to support such an allegation. Moreover, Respondent's actions were not discriminatory and applied disproportionately.

22.- Finally, Beristan is not liable for their actions because Article 9 of the Beristan–Opulentia BIT is a self-judging clause and Beristan considered it necessary to act as they did—in good faith—to ensure its essential security. In the alternative, if Article 9 is not a self-judging clause, Beristan is not liable to Televative because Beristan's actions were objectively necessary under the totality of the facts and circumstances.

ARGUMENTS

PART I: ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE.

23.- In order to retain jurisdiction, the Tribunal must have personal jurisdiction over the parties, subject matter jurisdiction over the dispute, and the timing requirements must be satisfied. Pursuant to Article 25 of the Convention, the Tribunal does not have jurisdiction over this dispute. Article 25 provides that the Centre shall only have jurisdiction over "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."[1] Here, all elements are not met and therefore the Tribunal cannot exercise jurisdiction.

A. THE TRIBUNAL DOES NOT HAVE PERSONAL JURISDICTION OVER THE DISPUTE.

24.- The Tribunal lacks personal jurisdiction over this dispute and therefore cannot adjudicate the matter. In order for there to be personal jurisdiction, the Convention sets forth that the dispute must arise between "between a Contracting State … and a national of another Contracting State."[2] The Convention further includes a "constituent subdivision or agency of a Contracting State designated to the Centre by that State."[3] Here, Beristan and Opulentia are contracting states to the Beristan-Opulentia BIT and it is undisputed that Televative is a national of Opulentia.

[1] Article 25(1) of the ICSID Convention.
[2] *Id*.
[3] *Id*.

25.- However, Televative's claim against Beristan fails because Beritech is not a state entity, thus not a contracting party, and it did not act under the color of authority of the Beristan government. Beritech has also not been designated by Beristan to the Centre. Thus, Televative's claims are against Beritech, not Beristan, and there is no personal jurisdiction over the dispute.

1. Beritech is not a state entity for the purpose of establishing personal jurisdiction.

26.- Beritech is an independent entity that does not perform public functions. In order to determine if an entity is a state body, the Tribunal in *Emilio Augustín Maffezini v. the Kingdom of Spain* used a structural test that examined factor such as "ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken."[4] Further, the *Maffezini* Tribunal found that the structural test alone might not be sufficient for determining whether an entity is an organ of the state or if the entity's actions are imputable to the state.[5] In that case, the Tribunal used a functional test where it looked "to the functions of or role to be performed by the entity."[6] However, under the *Maffezini* test a finding that an entity is owned or controlled by the state – either directly or indirectly – creates only a rebuttable presumption that it is a State agency.[7]

27.- Beritech is a commercial enterprise that provides telecommunications services.[8] Furthermore, it was not established as a government entity and Beristan does not allow Beritech to exercise governmental powers or functions. Beritech is also partially privately owned and its powers to act as part of Sat-Connect were limited to its powers as shareholders.[9] As well, Beritech was established after Beristan passed the Telecommunications Act of 1996, which was intended to privatize telecommunications services in Beristan.[10]

28.- For these reasons, the presumption that Beritech is a state-entity has been rebutted and Televative's claims of such cannot stand.

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[4] *Maffezini*, at 28, ¶ 76.
[5] *Id*.
[6] *Id*. at 29, ¶ 79.
[7] *Id*. at 28, ¶77.
[8] First Clarification, Q. 161.
[9] Record, at 16 (Uncontested Facts ¶¶ 2-4).
[10] First Clarification, Q. 164.

2. Beritech's actions are not imputable to Beristan.

29.- Beritech is not an agent for the Beristan government and Beritech's actions are not attributable to Beristan. In determining whether an action can be attributed to the State, the Tribunal in *AMCO Asia Corporation v. Republic of Indonesia* looked at whether the act occurred on behalf of or at the instigation of the government.[11] In that case, the Tribunal found that even though there was overt military assistance in seizing the hotel, the actions could not be attributed to the government.[12] The Tribunal found insufficient evidence to show that the seizure was done on behalf of, or instigated by, the government; however the Tribunal found sufficient evidence to show the decision was made by the private entity on their behalf.[13]

30.- In addition, the Tribunal in *Tradex Hellas S.A. v. Republic of Albania* found that acts that even may have been encouraged by the government are not sufficient to prove government action.[14] In *Tradex*, Albanian villagers occupied a farm owned by a joint-venture that was partly owned by a foreign investor.[15] The Tribunal found that the actions of the villagers were not attributable to the State because the villagers had not acted upon the direction of the Albanian government. Rather, the Tribunal found that the villagers were acting upon their own private interests.[16]

31.- Here there is insufficient evidence to show that Beristan had any involvement in the actions of Beritech or that Beritech's action can be imputed to Beristan. Beritech acted pursuant to their majority shareholder status in Sat-Connect. On August 27, 2009, the majority of the Sat-Connect board members voted to invoke the buyout provision (Clause 8) of the JV Agreement in accordance with the terms of the Agreement.[17] This was not the action of Beritech or Beristan. The company acted on behalf of its own best interest and to protect the company and shareholders. Specifically, the board members acted in response to security concerns and a

[11] *AMCO*, at 159.
[12] *Id*.
[13] *Id*.
[14] *See Tradex*, at ¶¶ 169 -170.
[15] *Id*. at ¶¶ 158-170.
[16] *Id*.
[17] Record, at 17 (Uncontested Facts ¶10).

reasonable belief that the Sat-Connect project had been compromised.[18] There is no evidence that the Beristan government had any influence or direct involvement with the decision of the board members. Even if Televative could show some influence by Beristan, Tribunals have held that more must be shown to prove government action. Additionally, Televative cannot use the fact that the Beristan Civil Works Force aided in the expulsion of Televative employees as conclusive evidence of government action. Such evidence being rejected in the above-mentioned cases.[19]

32.- Consequently, the Tribunal has no personal jurisdiction under the Convention or the Beristan-Opulentia BIT.

B. THE TRIBUNAL DOES NOT HAVE SUBJECT MATTER OVER THIS DISPUTE.

33.- In order for the tribunal to have subject matter jurisdiction (*ratione materiae*) over the dispute, three requirements must be satisfied. Article 25(1) of the Convention requires that there be 1) a legal dispute, 2) arising directly out of an underlying transaction, and 3) a qualifying investment.[20] All three elements are not met; therefore, the Tribunal cannot have jurisdiction over this dispute.

1. Televative has made an investment in Beristan.

34.- While Article 25 of the Convention provides no definition of what constitutes an investment for purposes of jurisdiction, several tribunals have identified elements and factors for determining whether or not there is an investment.[21] The Tribunal in *Phoenix Action, Ltd. v. The Czech Republic* identified the following elements as being pertinent to an investment: "(1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; and (6) assets invested *bona fide*."[22] The tribunal further identified factors for determining whether there is a bona fide investment that qualifies

[18] Record, at 17 (Uncontested Facts ¶¶ 8-10).
[19] *See AMCO* and *Tradex*.
[20] Articled 25(1) of the ICSID Convention.
[21] *See Salini v. Jordan*; *Phoenix Action*;
[22] *Phoenix Action*, at ¶ 114.

for protection under the BIT.[23] These factors include the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation.[24]

35.- It is undisputed that Televative's participation in the JV Agreement constitutes an investment under the Convention. The nature of Televative's involvement with Sat-Connect, along with the purpose and objective of the project, is evidence of significant economic activity and development in Beristan. Likewise, the project was ongoing and had been for over two years and there are undeniable risks that Televative took when it made the foreign investment. As a result, the requirements for an investment have been met through the joint venture project.

2. The dispute between Televative and Beristan is not a "legal" dispute.

36.- While Televative does have a qualifying investment, there is no legal dispute between the parties. The Report of the Executive Directors explains that disputes "must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[25] Further, it is well settled that conflicts of rights are within the Centre's jurisdiction, "mere conflicts of interests are not."[26]

37.- The dispute between Televative and Beristan is nothing more than a conflict of interest. On the one hand, Beristan had an interest in protecting national security from leaks of information to the Government of Opulentia. On the other hand, Televative is solely interested in its investment and the furtherance of developing and deploying the satellite network that Sat-Connect was working on. Accordingly, the dispute does not rise to level of a "legal" dispute as required for jurisdiction under the Convention.

[23] *Id*. at ¶ 135.
[24] *Id*. at ¶¶ 135-140.
[25] *Report*, at ¶ 26.
[26] *Id*.

C. TELEVATIVE FAILED TO MEET THE TIME REQUIREMENT FOR BRINGING A CLAIM UNDER THE BIT.

38.- Under the Beristan-Opulentia BIT, two requirements must be met before a party can bring a claim. First, the parties must try to amicably settle the dispute.[27] Second, in the event the matter cannot be settled amicably, the complaining party must allow six (6) months before the party can submit the dispute to the tribunal of his choosing.[28] Televative failed to meet these requirements and such violation should not be waived for the purpose of maintaining jurisdiction.

39.- The Beristan-Opulentia BIT specifically states that "[f]or the purpose of resolving disputes with respect to investments … if the dispute cannot be settled amicably within six months … the investor in question may in writing submit the dispute…"[29] One tribunal made specific note that the amicable settlement period is not merely procedural and is in fact a jurisdictional requirement.[30] The Tribunal further held that "[a] failure to comply with that requirement would result in a determination of lack of jurisdiction."[31]

40.- While Televative attempted to enter amicable settlement negotiations, they failed to wait the six months required before submitting this dispute. In fact, Televative waited little more than one month before initiating arbitration proceedings.[32] Therefore, Televative's failure to comply with the requirements set forth in the Beristan-Opulentia BIT should bar the Tribunal's jurisdiction.

II. CLAIMANT'S CONTRACT-BASED CLAIMS ARE NOT UNDER THE TRIBUNAL'S JURISDICTION PURSUANT TO ARTICLE 10 OF THE BIT

41.- In order for the Tribunal to have jurisdiction over Televative's claims, the claims must be treaty-based and not merely contractual. Here, Televative asserts that their claims are treaty-based by virtue of the umbrella clause (Article 10) of the Beristan-Opulentia BIT. The Tribunal

[27] Article 11(1) of the Beristan-Opulentia BIT.
[28] *Id*.
[29] *Id*.
[30] *Enron*, at ¶ 88.
[31] *Id*.
[32] First Clarification, Q Record, at 18 (Uncontested Facts ¶14)

should find for a more narrow interpretation of the umbrella clause and reject Televative's broad reading of the clause.

A. THE BIT'S UMBRELLA CLAUSE DOES NOT ELEVATE TELEVATIVE'S CONTRACT CLAIMS TO TREATY CLAIMS.

42.- Article 10 of the Beristan-Opulentia does not apply to this dispute or Televative's contractual claims. Article 10 (the "umbrella clause") requires that the Contracting Parties observe their obligations "with regard to investments in its territory by investors of the other Contracting Party."[33] Two ICSID cases dealing with the application of umbrella clauses are *SGS v. Pakistan* and *SGS v. Philippines*. In those cases, both Tribunals looked at the text of the umbrella clause, the intent of the parties in light of the purpose and objective of the BIT, and the location of the clause within the framework of the BIT.[34] While the Tribunal in *SGS v. Philippines* found that the umbrella clause applied to the claims, the Tribunal in *SGS v. Pakistan* found that the umbrella clause was vague and overbroad and there was no evidence to support that the parties intended it to be a binding obligation.[35] This case can be differentiated from *SGS v. Philippines* and the issue here should be decided along with *SGS v. Pakistan*.

1. The Text of the Umbrella Clause is vague and ambiguous.

43.- When examining the words used in the Swiss-Pakistan BIT, the Tribunal in *SGS v. Pakistan* viewed the words "ascribing to them their ordinary meaning in their context and in the light of the object and purpose of [the umbrella] clause … and of that Treaty as a whole."[36] Further, the Tribunal found that the vague language of the clause, "while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion."[37] Likewise, the Tribunal in *El Paso v. Argentina* reasoned that applying a literal interpretation to "any obligation" and not merely to contractual commitments, would be an overbroad interpretation and that applying such would render all substantive standards of protection "useless."[38] Further,

[33] Article 10 of the Beristan-Opulentia BIT.
[34] *See SGS v. Pakistan*; *SGS v. Philippines*.
[35] *Id*.
[36] *SGS v. Pakistan*, ¶ 164.
[37] *SGS v. Pakistan*, at ¶ 166.
[38] *See El Paso*, at ¶¶ 70-73; *See also* Malik, at 10.

the *El Paso* Tribunal agreed that States can decide to make violations of any obligation a violation of the treaty, but only if the parties do so "clearly and unambiguously."[39]

44.- The reasoning set out in *SGS v. Pakistan* and *El Paso v. Argentina* should be followed in this case. The language in the Beristan-Opulentia BIT is vague and unambiguous and could lead to an expansive interpretation of what a treaty obligation or violation is. The words in this treaty need to be given a fair reading in light of the treaty as a whole and its purpose. Beristan does not argue that the purpose of the treaty is to protect the investments of foreign nationals; however, there is no convincing evidence that the parties intended to elevate all claims into treaty violations with such ambiguous language.

2. The Contracting Parties did not intend for the umbrella clause to be binding.

45.- There is no convincing evidence here that Beristan and Opulentia intended for the umbrella clause to be incorporated as a substantive obligation provision. The Tribunal in *SGS v. Pakistan* reasoned that in order to overcome widely accepted international principles and implement such a far-reaching interpretation of the umbrella clause, the Claimant must show clear and convincing evidence that "such was indeed the shared intent of the Contracting Parties."[40]

(a) The Parties did not intend for the umbrella clause to have such overbroad consequences.

46.- In its analysis of the parties' intent, the Tribunal in *SGS v. Pakistan* viewed the probable consequences of interpreting the umbrella clause in a manner that would elevate contractual claims into treaty-based claims.[41] First, the Tribunal found that by accepting the Claimant's arguments, the umbrella clause "would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments" and that "[a]ny alleged violation of those contracts and other instruments would be treated as a breach of the BIT."[42] Further, the Tribunal noted that such an interpretation would

[39] *El Paso*, at ¶ 74; *See also* Malik at 10.
[40] *Id*. at ¶ 167.
[41] *See SGS v. Pakistan*.
[42] *Id*., at ¶ 168.

render the substantive obligations articles of the treaty "substantially superfluous" since "a simple breach of contract … would suffice to constitute a treaty violation."[43]

47.- The Tribunal in *Joy Mining v. Egypt* followed this line of reasoning when they found that

> 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 the Treaty rights and obligations or a violation of contract rights of such magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.[44]

48.- In that case, the Tribunal found that Joy Mining's claims were completely contractual because the claims were purely commercial and thus the umbrella clause could not elevate the claims to treaty-based violations.[45]

49.- In light of the absence of any expressive or clear language to indicate that the parties intended the umbrella clause to have to broad and overreaching powers, it does not follow that this Tribunal should interpret it as such. The provision is intended to protect investments made in the territories of the Contracting States; however, Televative cannot convincingly show that the parties intended the clause to elevate wholly contractual claims into treaty-based claims. The ambiguous and equivocal language should only be interpreted considering the treaty as a whole and should not be given a meaning that would lead to such expansive consequences.

(b) The parties did not place the umbrella clause within the substantive obligations articles.

50.- Although not decisive, the location of the umbrella clause within the framework of the treaty is a factor for determining the Parties intent. The *SGS v. Pakistan* Tribunal found that, in addition to other indications of the parties intent, if the parties had intended for the umbrella clause to impose substantive obligations "they would logically have placed [it] among the

[43] *Id.*
[44] *Joy Mining*, at ¶ 81.
[45] *See Joy Mining*.

substantive 'first order' obligations."[46] It was concluded that subrogation clause and dispute settlement provisions marked the separation of the substantive "first order" obligations from the other provisions and because the umbrella clause was placed after those provisions it could not be seen as being a substantive "first order" obligation.[47]

51.- Here, Beristan and Opulentia placed the umbrella clause (Article 10) outside the framework of the substantive obligation provisions. Similar to *SGS v. Pakistan*, the umbrella clause in the Beristan-Opulentia BIT is located after the subrogation clause as well as after provisions regarding transfer procedures and essential security. While not definitive, the placement of the clause supports the contention that the parties did not intend for the umbrella clause to have to overarching powers and to be a substantive obligation.

52.- Accordingly, the Tribunal should reject Televative's argument that the umbrella clause applies and that it allows them to bring all of their claims under the Beristan-Opulentia BIT. The parties did not intend for such a far-reaching result. In the absence of clear evidence proving otherwise, or unambiguous language allowing such, this Tribunal should follow the line of cases that follow a more narrow interpretation of the umbrella clause.[48] The narrow approach maintains the purpose, soundness, and reliability of the BITs intact. On the contrary, following the broader approach taken by other tribunals[49] renders parts of the BIT useless and would open the gates for all dissatisfied investors to bring any type of claim before an ICSID tribunal.

III. THE FORUM SELECTION CLAUSE OF THE JV AGREEMENT SHOULD BE ENFORCED.

A. TELEVATIVE'S CLAIMS ARE CONTRACTUAL AND ARE REQUIRED TO BE BROUGHT UNDER CLAUSE 17 OF THE JV AGREEMENT.

53.- Televative's claims are contractual in nature and should be brought under Clause 17 of the JV Agreement against Beritech. Because Televative's claims arise out of the JV Agreement, Televative must bring this action pursuant to the contract.

[46] *Id*., at 365, ¶170.
[47] *SGS v. Pakistan*, at 364, ¶ 169.
[48] *See generally SGS v. Pakistan*, *Joy Mining*, and *El Paso*.
[49] *See generally SGS v. Philippines*, *Eureko v. Poland*, and *Noble Ventures v. Romania*.

1. The Essential Basis of Televative's Claim is Contractual.

54.- It is well settled that investors cannot couch their contractual claims in allegations of treaty violations in order meet the Tribunal's jurisdictional requirements. After the *Vivendi* annulment decision, investors cannot "dress their contract claims as treaty claims to circumvent the dispute resolution mechanism in the contract."[50] Further, if the Tribunal finds that the claims are contractually based, the "dispute mechanism of the contract will apply."[51]

55.- The *Joy Mining* Tribunal found that "[a] purely contractual claim … will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction." That Tribunal further reasoned that a "basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved."[52] The tribunal found that a bank guarantee was "clearly" a commercial aspect of the contract and that a non-release of the guarantee could not constitute a violation of the BIT.[53]

56.- The joint venture project between Beritech and Televative is a completely commercial venture. As argued above, Beritech is not a state-entity and as such Beritech's actions are not attributable to the government of Beristan. Televative's claims arise out of the fact that the board members of Sat-Connect moved to invoke the buy-out provision of the JV Agreement in response to security concerns. They did so in accordance with the rules of the corporation and through a voting process of the board of directors. Beristan had no direct or indirect action or influence on this decision and procedure. Thereby making Televative's claims contractual in nature. The claims rest on disputes over the JV Agreement and whether Beritech followed proper protocol. Further, Beritech attempted to settle amicably with Televative and initiated arbitration proceedings under the JV Agreement before Televative initiated proceeding under the BIT.[54]

[50] Malik, at 5.
[51] *Id*.
[52] *Joy Mining*, at ¶ 72.
[53] *Id*., at ¶ 78.
[54] *See* Record, at 18 (Uncontested Facts); *See also* First and Second Clarification.

Beritech also placed the disputed amount owed in a trust account for Televative pending the decision of the Tribunal.[55]

57.- Televative's claims are based on dealings with Beritech under the JV Agreement. There is no evidence presented that could support Televative's treaty claims. Televative should not be allowed to cloak their claims as treaty-based in order to choose a different forum. Doing so would undermine the integrity and purpose of the JV Agreement and allow investors to avoid contractual obligations in order to do as they please. Because Beritech's actions are not attributable to Beristan and Beritech is not a state-entity, Televative cannot argue that Beristan violated any treaty obligations.

2. Article 17 of the JV Agreement precludes Televative from bringing the claim under the BIT.

58.- Clause 17 of the JV Agreement provides that "any dispute arising out of or relating to the Agreement … shall then be resolved only by arbitration under the rules and provision of the 1959 Arbitration Act of Beristan."[56] The Tribunal in *Vivendi* expressly stated "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."[57]

59.- An exclusive jurisdiction clause in a contract is *prima facie* a binding contractual obligation. Further, the Tribunal in *SGS v. Philippines* found that "[i]n accordance with general principle[s], 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."[58] Moreover, the Tribunal stressed that "a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[59] In reaching their conclusion, the Tribunal focused on two considerations. First the Tribunal looked to the effect of general provisions found in BITs and concluded that is should "not to be presumed that such a general

[55] Record, at 18 (Uncontested Facts ¶ 13).
[56] Record, at 19 (JV Agreement Clause 17).
[57] *Vivendi*, at ¶ 98.
[58] *SGS v. Philippines*, at ¶ 138.
[59] *Id*.

provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties."[60] Likewise, "[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."[61] The second consideration that the Tribunal looked at was the intent of the Contracting States to "support and supplement, not to override or replace" the negotiated contract provisions.[62] Finally, the Tribunal examined the nature and purpose of the BIT and found that is illogical to believe that forum selection clauses in BITs were meant to continually override contract provisions of current contracts as well as contracts that will be entered into in the future.[63]

60.- Following such rationale, this Tribunal should give full, force, and effect to the exclusive jurisdiction provision in the JV Agreement. Beritech and Televative specifically negotiated the contact and both parties agreed to the inclusion of such provision. They also did this separate from, and with knowledge of, the Beristan-Opulentia BIT. There is no evidence in the BIT or the JV Agreement that would suggest that the BIT forum provision was meant to override the JV Agreement provision or that a Contracting Party could chose between the forums for the settlement of their contractual disputes.

61.- Consequently, this Tribunal should enforce the exclusive jurisdiction provision of the JV Agreement and should not exercise jurisdiction over Televative's contractual claims. Furthermore, Televative should be required to honor the contractual obligations it made when entering the JV Agreement. If Televative is claiming breaches of contract, they should in turn be compelled to resolve the dispute pursuant to the provisions of that same contract.

IV. CONCLUSION ON JURISDICTION.

62.- The Tribunal does not have personal jurisdiction over this dispute because Beritech is not a state-entity and Beritech's actions cannot be attributed to Beristan for purposes of establishing

[60] *Id*., at ¶ 141.
[61] *Id*. (quoting *Schreuer I* at 362).
[62] *Id*.
[63] *Id*., at ¶ 142.

jurisdiction. Televative's claims are against Beritech and the Centre cannot exercise jurisdiction over Beritech.

63.- Additionally, the Tribunal does not have subject matter jurisdiction over Televative's claim because all requirements of the Article 25 of the Convention have not been met. While it is undisputed that Televative made a qualifying investment in Beristan, the dispute does not arise directly from this investment, nor is it a legal dispute meeting the requirements of the Convention. Further, Televative violated the amicable settlement period, which precludes the Centre's jurisdiction.

64.- Further, Televative's claims are contractual and cannot be brought under the BIT by virtue of Clause 17 of the JV Agreement. Clause 17 precludes that Televative's contractual claims from being brought under ICSID jurisdiction and dictate rather that the claim be brought under the 1959 Arbitration Act of Beristan.

65.- Finally, Article 10 of the Beristan-Opulentia BIT does not apply to Televative's claims. Because Televative' claims are contractually based, the Tribunal should find that the umbrella clause does not apply to these claims deny jurisdiction under the BIT.

PART II: ARGUMENTS ON THE MERITS

I. CLAIMANT MATERIALLY BREACHED THE JV AGREEMENT.

66.- The JV Agreement between Beritech and Televative expressly defines material breach of the Agreement as the unauthorized dissemination of confidential information by either party in connection with the Sat-Connect project. Televative leaked critical information regarding the Sat-Connect project. Therefore, Televative committed a material breach of the Agreement.

A. THE EXPRESS TERMS OF THE CONTRACT MUST BE HONORED.

67.- *Pacta sunt servanda* ("agreements must be kept") is an internationally recognized principle of general contract law, which is applicable to the JV Agreement between Televative and Beritech. This fundamental principle of contract requires that parties that make promises

through bargained for exchanges be bound by the contractual duties that these promises engender.[64] In *AMCO v. Indonesia*, the tribunal recognized this principle as "basic to this institution [ICSID]".[65] The tribunal noted the embodiment of *pacta sunt servanda* as a general principle of law "common to all legal systems in which the institution of contract is known."[66] The principle is incorporated in bodies of international contract law including article 38 of the Statute of the International Court of Justice and article 26 of the Vienna Convention. The principle is embraced in common law systems, civil law systems and traditional Islamic law.[67]

68.- In sum, the Tribunal recognized that the principle of *pacta sunt servanda* is fundamental to any society that recognizes the institution of contract:

> "Contract as a principle of ordering rests on the proposition that individuals and legal entities, make for their own accounts and their own responsibility significant decisions respecting resource utilization and allocation. The form of order which a society seeks to achieve by accepting the institution of contract thus depends upon the recognition that, in principle, *pacta sunt servanda*. It follows that the binding force of contractual duties for parties to a contract or agreement is recognized in every legal order that utilizes the institution of contract."[68]

B. *PACTA SUNT SERVANDA* APPLIES TO THE JV AGREEMENT.

69.- A joint venture is based upon a contract, whether it is formed as a contractual or equity joint venture.[69] For equity joint ventures, the subsequent incorporation of the company does not end the original joint venture contract, even though the objective of the contract is the formation of the joint venture company.[70] The original contract rules the manner that the joint venture company is run, including its termination, as agreed by the parties.[71]

70.- In *AMCO v. Indonesia*, the joint venture was extinguished due to one party's violation of the capitalization requirements imposed by the original joint venture contract. Here, the joint

[64] *See* Farnsworth, at 578.
[65] *AMCO*, at ¶ 248.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] Sornarajah, at 37.
[70] *Id*.
[71] *Id*.

venture was between AMCO, a foreign investor and an Indonesian corporation, controlled by an army pension fund. The joint venture was established to build a tourist facility in Indonesia. Upon near completion of the facility, the Indonesian military occupied the building at the behest of the Indonesian party to the joint venture. The foreign investor had their foreign investment license revoked on allegations that the joint venture was improperly capitalized. In Indonesia, a foreign investment license required that a joint venture be capitalized according to certain conditions. The original contract that formed the joint venture set out terms of capitalization in compliance with the conditions required to obtain and hold the license. The dispute was brought before ICSID and the tribunal held that Indonesia committed a breach of contract. It reasoned that the foreign investment license was a contract that must be performed under the principle of *pacta sunt servanda*. Basically, the State granted the foreign investor the right to do business and the foreign investor, in exchange, promised to do so under certain conditions. This case illustrates the applicability of *pacta sunt servanda* to joint ventures as foreign investment enterprises, even with the State as a party although Beristan was not a party.

C. THE AGREEMENT EXPRESSLY DEFINES MATERIAL BREACH.

71.- In the present case, the parties formed an equity joint venture governed by the Agreement. The Agreement unambiguously defines a material breach. Clause 4(4) of the Agreement provides that "any breach of this Clause 4 *shall* be deemed a material breach of the Agreement."[72] Clause 4 defines confidentiality and provides two broad categories of information that must not be disclosed: (1) all matters related to the Sat-Connect project; and (2) information developed during the project.[73] The parties further agreed, by the express terms of Clause 4, not to disclose any confidential matter or information without obtaining written approval from the Sat-Connect board of directors.[74]

[72] Record, at 19 (JV Agreement) (emphasis added).
[73] Record, at 18-19 (JV Agreement).
[74] *See* Record, at 18-19 (JV Agreement).

72.- According to Clause 4(1), the parties agreed that "all matters relating to this Agreement and the Sat-Connect project … shall be treated by each of the parties … as confidential." This provision creates a covenant for each party to keep all matters of the joint venture confidential.[75]

73.- Clause 4(1) further defines confidentiality to include "confidential information" which is defined in the subsequent section, Clause 4(2).[76] "Confidential Information" is defined with a litany of various forms of intellectual property that may be developed from the joint venture operation.[77] Clause 4(3) forms the covenant that "any dissemination of Confidential Information shall be only with written prior approval."[78] Thus, the release of information relating to any matter of the Sat-Connect project or any confidential information developed from the project shall constitute a breach. And, according to the express term of the contract, a breach of a promise in Clause 4 is a material breach.

74.- In sum, from the outset, both parties agreed to form a joint venture company where confidentiality of its operations was of the utmost importance. Evidence of its importance is manifest in the wide breadth of matters and information deemed confidential and the treatment of any breach of confidentiality as a material breach of the Agreement.

D. TELEVATIVE MATERIALLY BREACHED THE AGREEMENT.

75.- Televative divulged confidential matters and confidential information related to the Sat-Connect project without written approval and thereby committed a material breach as defined by the Agreement. On August 12, 2009, the Beristan Times published an article that reported Televative personnel leaked confidential information regarding the Sat-Connect project to the Opulentia government. [79]

76.- Similar to *AMCO*, the joint venture agreement contained a condition whereby its violation provided grounds for termination of the other's interest in the joint venture. The

[75] *Id*.
[76] *Id*.
[77] *See Id*.
[78] *Id*.
[79] Record, at 17, (Uncontested Facts ¶ 8).

justification for the breach of contract is governed by the principle of *pacta sunt servanda*. In *AMCO*, the capitalization of the joint venture was deemed essential to fulfill the Indonesian requirements to obtain a foreign investment license. The administrative regulations for the license were designed to protect its economy, while still encouraging foreign investment. Therefore, the express terms of the joint venture contract mandated capitalization in accordance with the administrative regulations of Indonesia.

77.- Here, while the confidentiality clause of the Agreement was not made to comply with a foreign investment license as in *AMCO*, it was required to protect the national security of Beristan. Both parties were aware of the secretive nature of the project and the dire consequences of a breach in confidentiality. As such, they expressly agreed that any breach of confidentiality would allow either party to buyout the other according to the Clause 8, the buyout provision.

E. RESPONDENT REVOKED THE JOINT VENTURE AGREEMENT ACCORDING TO THE TERMS OF THE AGREEMENT.

78.- Clause 8 of the Agreement provides Beritech with the authority to purchase Televative's interest in the event of a material breach.[80] On August 21, 2009, the Chairman of the Sat-Connect's Board of Directors made a presentation on the allegations of the breach of confidentiality.[81] On August 27, 2009, a majority of the Board of Directors voted to buyout Televative's interest according to Clause 8. [82]

79.- Unlike *AMCO*, where the Tribunal determined that the State stripped the foreign investor of their license through procedural irregularities in the determination of compliance with the capitalization requirements, the procedures for termination in this case were followed as required by the Agreement. In any case, regardless of the compliance with the procedures for termination, the violation of the underlying contractual duties of confidentiality as set out in the joint venture agreement determine the validity of the termination.

[80] Record, at 19 (JV Agreement).
[81] Record, at 17, (Uncontested Facts ¶ 9).
[82] Record, at 17, (Uncontested Facts ¶ 10).

II. BERISTAN NEVER DISCRIMINATED AGAINST NOR FAILED TO GRANT TELEVATIVE THE FET AND FPS REQUIRED BY INTERNATIONAL LAW.

80.- Beristan submits that no discrimination existed against Televative. The evidence demonstrates that Beristan strictly complied with international law, particularly the International Minimum Standard for the Treatment of Aliens (MSTA) and others.

A. BERISTAN DID NOT DISCRIMINATE AGAINST TELEVATIVE.

1. Shareholders' and Board of Directors' Actions cannot be Imputed to Beristan.

81.- Beritech's actions taken as Sat-Connect's shareholder or as a member of Sat-Connect's board cannot be imputed to Beristan. Though Beritech is a state agency predominantly owned by Beristan,[83] in this case it acted exclusively as the majority shareholder in Sat-Connect. Beritech's actions had no component of government authority and had no intention of furthering any government policy.[84]

(a) Beritech as a Shareholder is Entitled to Seek its Own Benefit.

82.- Beritech, as 65% shareholder of Sat-Connect, is entitled to seek its own benefit and the protection of its investment. Its actions in the shareholder's meeting were aimed such result upon Beritech learning that a breach of confidentiality occurred.[85] The allegations were raised in a reputable publication, with the source being a highly ranked Beristan government official, and were not to be taken lightly.[86] The August 27, 2009 Board meeting to compel the buyout of Televative's share in Sat-Connect was a measure taken by Beritech for its own benefit and for the protection of its investment.

[83] Record at 16.
[84] *Id., ¶5* .
[85] Record, at 17.
[86] *Id.*

(b) As a Board Member, Beritech Must Seek the Corporation's Benefit.

83.- The basic corporate idea rests on the premise that the corporation conducts business with a view to enhance profits and shareholder gain.[87] With that in mind, shareholders elect a board of directors, vested with the "supreme authority in matters of … regular management" and particularly in "determining the dividend payments, financing and capital changes."[88]

84.- Here, Beritech successfully maximized Sat-Connect's wealth by compelling the minority share buyout. The company obtained complete control of Sat-Connect. The decision to buy out Televative's equity share was a reponse to a material breach of the JV Agreement and done to protect the best interests of the Sat-Connect and its shareholders. It was independently made by the board on grounds of sound business judgment.

85.- The beliefs of those directors who participated in the vote to compel the minority share buyout for Sat-Connect do not necessarily reflect the views of Beristan. There were no irregularities in the conduct of the board and there is no government actions sufficient justify imputing liability to Beristan. Responsibility for such decisions and fall only on Sat-Connect. These are claims between shareholders of a company which is and remains an independent, private corporation. The current dispute arises solely from minority shareholders' dissatisfaction with the board's actions and the majority shareholders' exercise of their legitimate rights. The proper forum for bringing these grievances is the Beristan court system, not an ICSID Tribunal.

(c) At no point did Beritech Act Under Color of Authority.

86.- Beritech acted here only in its shareholder and board member capacities, legitimately exercising its private, contractually-based rights. These facts of the case at bar resemble those of *Maffezini*, where, the Tribunal evaluated whether SODIGA was a state entity for the purpose of jurisdictional analysis.[89] After the Tribunal cited the International Law Commission's Draft Articles on State Responsibility, it found that:

[87] *Bainbridge*, at 417 (citing the [U.S.] National Association of Corporate Directors, Report of the NACD Blue Ribbon Commission on Director Compensation: Purposes, Principles, and Best Practices (1995)).
[88] *Cox* at 149.
[89] *See generally, Maffezini*.

> "The conduct of … [an]entity which is not part of the formal structure of the State … but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State …, provided the organ was acting in such capacity in the case in question."[90]

In fact, a rebuttable presumption that arises when there is state ownership of the entity. Here, the presumption cannot stand[91] because the evidence shows that Beritech's actions were purely commercial and contractual in nature. Beritech did not act under Respondent's authority.[92]

2. Sat-Connect's Beristann Directors Acted Individually.

87.- Beristan acknowledges that the CWF's purpose is to participate in the government's civil engineering projects and maintain the public order.[93] Nevertheless, it is worth noting that CWF is deployed only when necessary. In addition, the evidence demonstrates that as a branch of the military, the CWF exists to protect Beristan's national interests and security. The CWF was not deployed to the Sat-Connect site until the 14 day grace period granted to Televative to vacate had expired.

88.- This, however, does not imply governmental support for Beritech's decision to take complete control of Sat-Connect. These Sat-Connect directors, individually and without any authority from the Beristann government, furthered their own ideas and what they thought to be their country's interests. The directors allowed Televative fourteen days to vacate and did not resort to government intervention until the grace period had elapsed. The CWF arrived on the Sat-Connect site after receiving word that Televative's personnel had not left Beritech's property in contravention of the corporate resolution approving the compelled buyout.

[90] *Maffezini,* at 414, ¶ 78.
[91] *Id.* at 413, ¶ 77.
[92] *See id.* at 416, ¶ 89 (explaining that "[w]hether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case.").
[93] Record at 17.

(i) Although These Directors Represented Beritech they did not have Authority to Decide as they did.

89.- Beritech acted as Sat-Connect's shareholder and not as a government entity. Therefore, the actions of Beritech's appointed directors in Sat-Connect reflected their individual views on business judgments. At no point did Beristan authorize them to act or decide as they did in voting to compel the buyout of Televative's equity interest in Sat-Connect.

III. ARTICLE 9 OF THE BIT PRECLUDES BERISTAN FROM LIABILITY

90.- Article 9 of the BIT allows a party to the agreement to take actions it considers necessary to ensure essential security. The language of the clause is expressly self-judging, precluding review of Beristan's actions, other than for a showing of good faith, by the tribunal. In the alternative, if the clause is found to not be self-judging, Beristan's actions were necessary according to customary international law and the facts and circumstances of this case.

A. ARTICLE 9 OF THE BIT IS SELF-JUDGING.

91.- The language of Article 9 is expressly written to be self-judging and should be given its ordinary meaning. Article 9 states in part that a party can take actions "it considers necessary" in order to protect "its own essential security interests."[94] Both the ICJ and ICSID have interpreted treaty clauses that contain the language "it considers necessary" to be self-judging clauses.

92.- For example, In *CMS Gas Transmission Company v. Argentina* the tribunal interpreted a clause in the U.S.–Argentina BIT to not be self-judging because it was written with only the word "necessary" and not with the phrase "it considers necessary."[95] In the same opinion, the tribunal stated that an example of a self-judging clause would be Article XXI of the GATT. Article XXI of the GATT include the phrase "it considers necessary."

[94] Article 9 of the Beristan–Opulentia BIT. Article 9 states in its entirety "Nothing in this Treaty shall be construed to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential interests or; 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."
[95] *CMS Gas*, at ¶ 370.

93.- Also, the ICJ has interpreted treaty clauses to not be self-judging when the clause only contains the word "necessary" and not the phrase "it considers necessary."[96] Both the ICJ and the ICSID have made it clear that in order for a clause to be self-judging it must expressly state such intent and the way to do that is to include the phrase "it considers necessary" or comparable phrasing. The Beristan–Opulentia BIT contains the express language and is therefore self-judging.

94.- As a result of Article 9 being a self-judging clause Beristan's actions in removing Televative from the Sat-Connect project are not reviewable by this tribunal. When a clause is found to be self-judging "the State adopting the measures in question is the sole arbiter of the scope and application of that rule."[97]

95.- However, some tribunals and experts have suggested that a State's actions must be in good faith even if the clause is self-judging.[98] Beristan maintains that it acted in good faith when it conducted the buy-out and the removal of Televative personnel from the project. Beristan believed these actions were essential to its security, as Televative had leaked sensitive and confidential information regarding the project to the Opuletian government.[99] The technology employed by the project was to be used by Beristan's military and Beristan felt that Televative's removal was essential to protecting the technology from being further disseminated to foreign governments.[100] Concerns over security of the communications of their armed forces and maintaining national security were the motivations behind Beristan's actions and not a "conspiracy" against Televative as Televative claims.[101]

96.- Article 9 of the Beristan–Opulentia BIT is self-judging as its express language allows for the State to be the sole arbitrator of deciding what actions are necessary to protect the States essential security. The actions undertaken by Beristan in relation to Televative were deemed necessary to protect their armed forces and their national security. As Beristan's actions were

[96] Nicaragua, at ¶ 222.
[97] *CMS Gas*, at ¶ 366.
[98] *Gabcikovo-Nagymaros*, at 63. ¶ 109; *Sempra* annulment at ¶¶ 182, 377 (discussing the requirement of good faith extended by several experts at the original *Sempra* arbitration).
[99] Record, at 17 (Uncontested Facts).
[100] *Id*.
[101] Record, at 6.

authorized by the terms of Article 9 they were not in violation of the Treaty and are not liable to Televative as a result of the actions taken.

B. IF ARTICLE 9 IS NOT SELF-JUDGING, BERISTAN IS NOT LIABLE BECAUSE THEIR ACTIONS WERE NECESSARY AND REASONABLE.

97.- If the tribunal disagrees with the above analysis and finds Article 9 is not self-judging, Beristan should still be exempted from liability because their actions were both reasonable and necessary to protect the essential security of Beristan. While some ICSID tribunals have applied international customary law of necessity to analyze whether a State's actions were necessary when a clause is not self-judging, this application of the law is incorrect.[102]

98.- The customary international law of necessity should not be conflated with the treaty based law of non precluded measures in clauses such as Article 9.[103] The customary law of necessity should only be applied if there is a breach of the underlying treaty. It is an excuse of wrongfulness for the violation.[104] Conversely, the non precluded measures clause of Article 9 can be evoked without an underlying breach of the treaty.[105] In the *Sempra* annulment the tribunal stated, "where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful.'"[106] Article XI was a non-precluded measures clause similar in the U.S.–Argentina BIT, however Article XI was held to be non self-judging because it lacked the necessary wording of "it considers necessary." However, the *ad hoc* committee presiding over the annulment held that although the clause was not self-judging it would not necessarily follow that the law of necessity should be applied to decide if Argentina's actions were "necessary."[107]

99.- If the actions taken by a State under a self-judging clause are deemed necessary by that State's subjective belief that the are needed then it would follow that the review given to actions under a clause that is not self-judging would be one that, when viewed objectively, the actions

[102] *Sempra* annulment, at ¶ 197.
[103] Burke-White, at 322.
[104] *Sempra* annulment, at ¶ 203.
[105] *Id*. at ¶ 200.
[106] *Id*.
[107] *Id*., at ¶¶ 197–200.

were necessary. This standard would allow the tribunal to look to the facts and circumstances of the case and decide, if under the totality of the circumstances, the actions taken by the State were necessary.

100.- In the present case, the actions of Beristan were objectively necessary to ensure the safety and security of its armed forces and its national security. Televative had access to highly sensitive intellectual property, technology, and operations regarding a telecommunications system to be used for communications of the Beristan armed forces.[108] Televative personnel had already breached their confidentiality agreement with Sat-Connect by leaking sensitive information to the government of Opulentia. [109] In order to prevent Televative from leaking more information regarding the telecommunications system of the armed forces Beristan took measures to ensure that Televative would no longer have access to the project. Thus removing any further threat to Beristan's national security or their armed forces.

101.- Any government on the planet would have taken similar measures to remove a threat to a military communications system in which the government had already invested large amounts of time and capital. The actions taken by Beristan were merely to inform Sat-Connect that information had been leaked to Opulentia via Televative personnel. Then Beristan's civil work force assisted Sat-Connect from removing Televative personnel from the project site.[110] These actions by Beristan's government were a reasonable and necessary response to a legitimate threat to the security of Beristan. When viewed objectively, in light of the fact that Televative had already leaked sensitive information, the tribunal should find that Beristan acted well within its rights under Article 9 of the Beristan–Opulentia BIT.

102.- For the above-mentioned reasons, the tribunal should find that Article 9 is a self-judging clause and that Beristan acted in good faith. In the alternative, if the tribunal finds Article 9 not self-judging then they should find that Beristan's actions were necessary—under the facts and circumstances—to protect the essential security of Beristan.

[108] Record, at 16–17 (Uncontested Facts).
[109] Record, at 17 (Uncontested Facts).
[110] *Id*.

REQUEST FOR RELIEF

82.- In light of the foregoing submissions the Republic of Beristan, Respondent in these proceedings, respectfully requests the Tribunal deny jurisdiction to hear Claimant's claims, and in the alternative, to find in favor of Respondent on the merits.

Respectfully submitted on 19 September 2010 by

_____/s/_____
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