TEAM CASTRO

THE 2010 FOREIGN DIRECT INVESTMENT INTERNATIONAL

MOOT COMPETITION

22 – 24 OCTOBER, 2010

IN

THE INTERNATIONAL CENTRE FOR

SETTLEMENT OF INVESTMENT DISPUTES

AT

THE PEPPERDINE UNIVERSITY SCHOOL OF LAW, MALIBU, CALIFORNIA

ICSID CASE No.ARB/X/X

TELEVATIVE INC.

CLAIMANT

VERSUS

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

RESPONDENT

MEMORIAL FOR RESPONDENT

(As Submitted to the Tribunal on 18th September, 2010)

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STATEMENT OF FACTS

1. **Televative Inc. ("Claimant")** is a privately held multinational enterprise incorporated in The United Federation of Opulentia (hereinafter "Opulentia") and specializes in satellite communication technology and systems.

2. Beritech S.A. is a state owned company established by **the Government of the Republic of Beristan (hereinafter "the Respondent")** in March 2007.

3. On **18 October 2007,** Beritech and Televative signed a **Joint Venture agreement (hereinafter "JVA")** to establish Sat-Connect S.A., a joint venture company, under the Beristian laws. The Respondent had co-signed the JVA as a guarantor of Beritech's obligations.

4. Beritech owns a majority 60% share in Sat-connect while the remaining 40% is held by the Claimant. The purpose of Sat-Connect is to develop and deploy satellite network systems and communication technology in Euphonia, a vast region encompassing Beristan and six other countries. This technology was also supposed to be used for civilian and military purposes as well as by the Beristian armed forces. Beritech enjoys the right to appoint 5 out of 9 Directors in Sat-Connect's Board of Directors.

5. On **12 August 2009**, a highly ranked Berisian government official's article was published in The Beristian Times. It raised national security concerns while believing that the Claimant's personnel had compromised the Sat-Connect project and was involved in leaking extremely critical information from Sat-Connect project to the Government of Opulentia.

6. On **21 August 2009**, the Chairman of the Sat-Connect's Board of Directors, Michael Smithworth made a presentation to the Directors to discuss the allegations published in The Beristian Times. Subsequently, **six days later**, majority of the Sat-Connect's Board

of Directors invoked Clause 8 of the JVA that empowered Beritech to buyout Claimant's interest in Sat-Connect.

7. Beritech then served a notice upon the Claimant **the very next day** to vacate Beristan within the following 14 days. On **11 September 2009,** the Civil Works Force (hereinafter "CWF") - the civil engineering section of the Beristian Army- instructed the Claimant's personnel to leave the Sat-Connect project sites.

8. On **19 October 2009**, Beritech filed a request for arbitration against the Claimant under Clause 17 of JVA and even agreed to deposit US $47 million – an equivalent of the Claimant's total monetary investment in Sat-Connect project as on that date- in an escrow account pending the decision of the arbitration. Claimant not only refused to entertain Beritech's request but instead, on **28 October 2009**, it notified the Respondent to initiate arbitration proceedings under the ICSID by invoking Article 11 of the Beristan-Opulentia BIT (hereinafter "the BIT").

9. On **1 November 2009**, the ICSID Secretary General registered for arbitration the above dispute between the Claimant and the Respondent. Both Beristan and Opulentia have signed and ratified the ICSID Convention as well as the Vienna Convention on the Law of Treaties.

ARGUMENTS

PRELIMINARY OBJECTIONS

I. The Opulentia-Beristan Bilateral Investment Treaty ("the BIT") in any case does not apply to the Joint-Venture Agreement ("JVA")

10. Pursuant to Article 41(2) of the ICSID Convention,[1] Respondent challenges the jurisdiction or competence of this Tribunal for reasons submitted hereunder and it is requested that the same may be dealt with as a preliminary question by the Tribunal. It is requested that shall the Tribunal wish to proceed beyond this stage of the proceedings, the preliminary question raised hereunder is without any prejudice to the usage of the term "*investment*" for the purpose of the arguments advanced on behalf of the Respondent in the following sections.

11. Articles 1-14 of the BIT respectively are subject to Article 16 of the BIT. Article 16 of the BIT deals with the 'duration and expiry date' of the BIT.[2] It is submitted that ICSID jurisdiction cannot be established by virtue of Article 10 of the BIT because the BIT as a whole does not apply to the JVA or Sat-Connect in any case. This is because (A) the BIT is applicable to only those investments effected prior to 31st December 2006 and (B) Article 16(2) of the BIT categorically expels its scope with regard to investments effected after 31st December 2006.

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[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 (1965) [*hereinafter* ICSID Convention], [Article 41(2)]

[2] *Treaty Between The Republic of Beristan and The United Federation of Opulentia concerning the encouragement and reciprocal protection of Investments*, Annex.1 [*hereinafter* the BIT], [Article 14, Article 16]

A. The BIT is applicable to only those investments effected prior to 31st December 2006

12. Article 16(1) of the BIT states that the BIT shall remain effective for 10 years from the date of notification of the same by each Contracting Party to the other (sic). The BIT had become effective on 1 January 1997.[3] Thus, the BIT was meant to be effective for a period of 10 years from this date onwards and was primarily supposed to come to end on December 31, 2006.

13. It is not doubted that the BIT was to be '*tacitly renewed*' for another 5 years after the '*first expiry date*', i.e. December 31, 2006 unless either State intended to terminate it. Such termination, if at all it did occur, would thereby render the BIT void and the date of such termination by both the Contracting States shall be considered as the '*final expiry date*' of the BIT.

14. Article 16(2) further clarifies that there does exist a concept of '*first expiry date*' because of Article 16(1) by using the words 'investments effected prior to *the expiry dates of the present Agreement*, as provided in Article 16'.

15. Thus, both the Parties had full knowledge of and had consented to the fact that the minimum time period for which the present BIT was intended to be in effect was 10 years and there onwards, it was open for either party to terminate it. Thus, the only certainty about an expiry date was 31st December 2006 and the obligations taken under Article 16(2) with respect to investments were in context of this expiry date only. It is submitted that neither of the Contracting States could have intended to take a chance or a risk regarding the uncertainty involved with the concept of '*expiry date*' of the BIT.

[3] *FDI Moot 2010 Clarification Requests (4 June) Responses* [*hereinafter* Clarification(I)], #174

16. The JVA was signed on 18 October 2007, nearly 10 months after the '*first expiry date*'. Article 16(2) states that provisions of Articles 1-14 of the BIT respectively shall remain effective for those investments which were effected prior to '*expiry date of the present Agreement*.' Thus, the JVA in any case ceases to be covered by the present BIT.

B. Article 16(2) of the BIT categorically expels its scope with regard to investments effected after 31st December 2006

17. Article 16(2) of the BIT does not expressly or explicitly mention that the provisions of Articles 1-14 of the BIT respectively will even apply to those investments which are effected after the '*expiry dates of the present Agreement.*' Had it been an intention of the Contracting States to the BIT to do so, they should have expressed so and cleared all the doubts whatsoever. It does make it clear that the JVA is well outside the purview of the BIT.

PART ONE: JURISDICTION

I. The Tribunal does not have jurisdiction over Claimant's contract-based claims arising under the JVA by virtue of Article 10 of the Beristan-Opulentia BIT ("the BIT") because:

18. Article 10 of the BIT states that:

> "Each Contracting Party shall constantly guarantee the observance of any obligation […] with regard to investments in its territory by investors of the other Contracting Party"[4]

[4] *The BIT*, Article 10

19. ICSID Tribunal's jurisdiction is precluded because (A) ICSID cannot entertain Claimant's purely commercial claims even by virtue of Article 10 of the BIT and (B) ICSID's jurisdictional requirements under Article 25(1) of the ICSID Convention are not fulfilled.

A. ICSID cannot entertain Claimant's purely commercial claims even by virtue of Article 10 of the BIT

20. The threshold to establish that a breach of contract constitutes a breach of a treaty is a very high one.[5] ICSID Tribunals have held time and again that breaches of contract are not automatically treated as breaches of international treaty by virtue of umbrella clauses such as Article 10 of the BIT[6] despite the breadth of these clauses.[7] Such notion can be quite destructive of the distinction between national and international legal order[8] as, every breach of contract does not necessarily amount to breach of treaty.[9]

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[5] *Impregilo SpA v Pakistan*, Decision on Jurisdiction, ICSID Case No.ARB/03/3 [*hereinafter* Impregilo-Jurisdiction], paras.267 (22 April 2005)

[6] *Société Générale de Surveillance SA v Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No.ARB/01/13 [*hereinafter* SGS/Pakistan-Jurisdiction], paras.165-166 (6 August 2003); *Joy Mining Machinery Limited v Egypt*, Award on Jurisdiction, ICSID Case No.ARB/03/11 [*hereinafter* Joy-Mining-Jurisdiction], para.81 (6 August 2004); *Toto Costruzioni Generali SpA v Lebanon*, Decision on Jurisdiction, ICSID Case No.ARB/07/12, paras.200-201 (11 September 2009)

[7] *El Paso Energy International Company v Argentina*, Decision on Jurisdiction, ICSID Case No.ARB/03/15 [*hereinafter* El Paso-Jurisdiction], paras.66-86 (27 April 2006); *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, Decision on Preliminary Objections, ICSID Case No.ARB/03/13, paras.92-115 (27 July 2006)

[8] *El Paso-Jurisdiction*, para.82; *Salini Costruttori SpA and Italstrade SpA v Jordan*, Decision on Jurisdiction, ICSID Case No.ARB/02/13 [*hereinafter* Salini/Jordan-Jurisdiction], para.126 (29

21. ICSID practice shows that the use of words "*shall guarantee the observance*", as present in Article 10, requires the narrowest of interpretations and doesn't automatically elevate contractual claims to treaty claims.

B. The ICSID's jurisdictional requirements under Article 25 haven't been fulfilled

22. Article 25(1) of the ICSID Convention categorically extends the Centre's jurisdiction to

> "[…] any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."[10]

23. Thus, ICSID Tribunal's jurisdiction is *prima facie* precluded because (1) Beritech does not satisfy the *ratione personae* requirements (2) Claimant is not an "Investor" within the meaning of the term under Article 1(2) of the BIT and (3) the present dispute does not satisfy *ratione materiae* requirements.

November 2004); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Decision on Annulment, ICSID Case No.ARB/97/3 [*hereinafter* Vivendi-Annulment], para.96 (3 July 2002) STEPHEN M. SCHWEBEL, '*International Arbitration: Three Salient Problems*' [Cambridge University Press 1987], p. 111

[9] *Consortium Groupement LESI - DIPENTA v Algeria* , Award, ICSID Case No.ARB/03/8, para.25 (10 January 2005); C. SCHREUER, '*Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*', 5 Journal of World Investment & Trade 231 at p.255 (2004)

[10] *ICSID Convention*, [Article 25(1)]

1. Beritech does not satisfy the *ratione personae* requirement due to lack of designation

24. Beritech is certainly not a Contracting State and thus, lacks the capacity to sign and ratify the ICSID Convention. Hence, this vitiates the absolute cardinal requirement of establishing the ICSID jurisdiction in the first place.[11]

25. Respondent is a Contracting State to the ICSID Convention however; it is not a party to the JVA *per se*. Only Claimant and Beritech have signed the JVA as parties to a commercial contract. ICSID's jurisdiction to arbitrate over a dispute arising out of JVA is precluded because Beritech is neither a constituent subdivision nor an agency of Beristan designated to the ICSID by the Respondent. There is nothing to suggest that Beritstan even requested to register Beritech as its agency for fulfilling the requirements of Article 25 of the ICSID Convention or if ICSID registered Beritech in its Register of Designation for that matter.[12] Hence, Beritech's actions cannot be attributed to Respondent for purpose of initiating ICSID arbitration proceedings.

26. The requirements of designation and consent as under Articles 25(1) and (3), of the ICSID Convention, respectively need to be strictly met.[13] The ICSID Tribunals have

[11] Analysis of Documents Concerning the Origin and the Formulation of the [ICSID] Convention (1970) [*hereinafter* History Vol.I], pp.110-118; CHRISTOPH H. SCHREUER, '*The ICSID Convention: A Commentary*' [2nd ed. Cambridge University Press 2009] [*hereinafter* SCHREUER], p.144 paras.211-212

[12] SCHREUR, p.156 para.253; Document ICSID/8-C, '*Contracting States And Measures Taken By Them for the Purpose of The Convention*' (April 2008) at (http://icsid.worldbank.org/ICSID/ICSID/DocumentsMain.jsp#)

[13] *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, Final Award, ICSID Case No.ARB/98/8, para.13 (12 July 2001); *Government of the Province of East*

declared that they lack jurisdiction in the absence of the formal designation required by Article 25(1) of the ICSID Convention.[14] There must be at least some form of communication by the Contracting State to the ICSID regarding designation of a State entity to the ICSID even if such designation is *ad-hoc*.[15]

27. Beritech doesn't have the capacity to designate itself to the ICSID[16] and Respondent has never intended to do such act of designation in the future either. Respondent has merely co-signed the JVA as the guarantor of Beritech's obligations arising out of JVA. Respondent would assume the obligations of Beritech under the JVA only upon latter's default.[17] Since Beritech has not defaulted yet, there arises no question of Respondent being party to a dispute which solely arises between Claimant and Beritech.

Kalimantan v. PT Kaltim Prima Coal and others, Award, ICSID Case No.ARB/07/3 (December 28, 2009)

[14] *Cable Television of Nevis Ltd and Cable Television of Nevis Holdings Limited v Federation of St Kitts and Nevis*, Award of 13 January 1997, ICSID Case No.ARB/95/2, 13 ICSID Review–FILJ 328 at pp.345-352,363-365,391 (1998); *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, Decision on Jurisdiction of 24 October 1984, 2 ICSID Reports 354ff.

[15] ICSID Convention, Regulations and Rules, '*Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings*' [*hereinafter* Institution Rules], ICSID/15/Rev.1, p.73 (January 2003), [Rule 2 p.76]; C.F. AMERASINGHE, '*The Jurisdiction of the International Centre for the Settlement of Investment Disputes*', 19 Indian Journal of International Law 166 at pp.187-189 (1979); SCHREUER, para.252 p.156, para.255 p.157; *Attorney-General v. Mobil Oil NZ Ltd.*, High Court Wellington of 1 July 1987, 2 NZLR 649 at p.655 (1989)

[16] SCHREUR, para.252 p.156

[17] *Clarification(I)*, #152

2. Claimant is not an "Investor" within the meaning of the term under Article 1(2) of the BIT

28. The term "*Investor*" as defined in Article 1(2) of the BIT is subject to that Investor's own conduct only. Claimant couldn't be assumed to be protected under the BIT since it has knowingly and expressly waived off its right to seek BIT's protection by entering into a subsequent and specific legal instrument, such as the JVA. The form of waiver is not relevant as long as the intention to do so clearly results from the act of Claimant.[18] Article 26 of the ICSID Convention incorporates the words "*unless otherwise stated*" for typically these kind of situations only.[19]

3. The present dispute does not satisfy *ratione materiae* requirement of Article 25 of the ICSID Convention

29. According to Article 14(1) of the BIT, when there exists an issue which is governed both by the BIT as well as by another International Agreement to which both Beristan and Opulentia are parties (such as the ICSID Convention) or by general international law, then the 'most favorable provisions, case by case' shall be applied to the Contracting Parties and their investors. As a result, the present issue shall be governed by the ICSID Convention as well as principles of general international law because there is no express supremacy of BIT as the applicable law in this case.

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[18] *Temple of Preah Vihar Case* (*Cambodia v. Thailand*), ICJ Reports 6 at pp.17,31 (1962); *Nuclear Tests Case* (*Australia v. France*), ICJ Reports 253 at paras.45-46 (1974); ISABEL FEICHTNER, '*Waiver*' [Max Planck Encyclopedia of Public International Law (October 2006)]

[19] *ICSID Convention*, [Article 26]; SCHREUR, p.355 para.17

30. The present commercial dispute doesn't satisfy '*ratione materiae*' requirement because even if it is conceded that JVA is an '*investment*' under the BIT, yet it doesn't particularly satisfy the essentials required by Article 25(1) of the ICSID Convention.[20] Hence, the present dispute cannot be said to be '*arising directly out of investment*'.

31. According to Article 1(1) of the BIT, "*investment*" means one effected "before or after entry into force" of the BIT. However, JVA was signed in 2007 when the BIT itself had ceased to be in force. The "investments" as defined in the BIT were limited to the extent of only those investments which were invested either before 1st January 1997 or till 31st December 2006.

32. Alternatively, ICSID's jurisdiction is precluded due to non-fulfillment of mandatory requirements regarding "*investments*"[21] because (a) JVA has no specific duration; (b) Risks involved in the JVA are merely commercial and not substantial for purpose of international investments and (c) its contribution to Host State's development is doubtful.[22]

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[20] *Mitchell v The Democratic Republic of the Congo*, Decision on the Application for Annulment of the Award, ICSID Case No.ARB/99/7 [*hereinafter* Mitchell/Congo-Annulment], para.31 (1 November 2006)

[21] *Joy-Mining-Jurisdiction*, para.53; *Malaysian Historical Salvors Sdn Bhd v Malaysia*, Award on Jurisdiction, ICSID Case No.ARB/05/10 [*hereinafter* MHS-Jurisdiction], paras.69-72,105 (17 May 2007)

[22] *Salini Costruttori SpA and Italstrade SpA v Morocco*, Decision on Jurisdiction, ICSID Case No.ARB/00/4 [*hereinafter* Salini/Morocco-Jurisdiction], paras.39,52 (23 July 2001); *Fedax NV v Venezuela*, Decision on Objections to Jurisdiction, ICSID Case No.ARB/96/3 [*hereinafter* Fedax/Venezuela-Jurisdiction], para.43 (11 July 1997)

a. JVA has no specific duration

33. Duration for at least a certain period of time, ranging from 2-5 years, has been considered a quintessential pre-requisite by Tribunals while deciding the question of an activity qualifying as an "*investment*."[23] There is no indication in the present case about the duration of the JVA and Sat-Connect project whatsoever.

b. Risks involved are merely commercial in nature

34. Risk criterion must be met in qualitative sense rather than quantitative and shall involve risks other than "mere ordinary or normal commercial risks."[24] A risk which is ordinarily inherent in a commercial transaction such as the JVA and not a special feature of the project that may affect the investor's decision to invest is nothing but a mere "*superficial satisfaction*" of the risk requirement. Risks arising out of JVA were part of the commercial transaction only, to which Claimant had knowingly consented to. As a result, the dispute became one arising out of an ordinary commercial contract and thus, beyond ICSID's jurisdiction.[25]

[23] *Salini/Morocco-Jurisdiction*, para.54; *Consortium RFCC v Morocco*, Decision on Jurisdiction, ICSID Case No.ARB/00/6 [*hereinafter* RFCC/Morocco-Jurisdiction], para.62 (16 July 2001); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, Decision on Jurisdiction, ICSID Case No.ARB/03/29 [*hereinafter* Bayindir-Jurisdiction], paras.132-133 (14 November 2005); *Saipem SpA v Bangladesh*, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No.ARB/05/7, paras.101-110 (21 March 2007)

[24] *MHS-Jurisdiction*, para.112

[25] I.F.I. SHIHATA AND A. PARRA, '*The Experience of the International Centre for Settlement of Investment Disputes*', 14 ICSID Review—FILJ 299 (1999) at p.308; *Joy-Mining-Jurisdiction*, paras.58-60

c. Contribution to Host-State's development is doubtful

35. The requirement of contribution to Respondent's development is the most controversial one[26] as many investments have been found lacking on this touchstone when it comes to contributing to the Host-State's economic development.[27]

36. Claimant's investment is not capable of surviving the test of holistic approach of ICSID as what Claimant is trying to prove is that such test is a mere formality. Every foreign investment is after all effected so as to derive certain benefits for the Host-State but only a few of those investments having a significant impact on State's economy pass the test of 'contribution to Host-State's economic development'. There is no indication in the facts if the economic development or GDP of Beristan was intended to or significantly going to benefit from Claimant's commercial activities.

II. The Tribunal has no jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement ("JVA")

37. JVA was signed on 18 October 2007 between the Claimant and Beritech in order to establish Sat-Connect under the Beristian laws. ICSID's jurisdiction is precluded in view of Clause 17 of the JVA because (A) Claimant's claims are inadmissible at the ICSID as Clause 17 of the JVA is an exclusive jurisdiction clause, (B) Claimant itself has given irrevocable consent to settle the present dispute in accordance with Beristian laws and (C)

[26] SCHREUR para.164 p.131

[27] *Mitchell/Congo-Annulment*, paras.23,39; *MHS-Jurisdiction*, paras.125,131-132

Claimant has failed its duty regarding amicable settlement of dispute under Clause 17 of JVA.

A. Claimant's claims are inadmissible at the ICSID as Clause 17 of the JVA is an exclusive jurisdiction clause

38. Clause 17 of the JVA categorically states 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* […] the dispute shall then be *resolved only by arbitration* under […] the *1959 Arbitration Act of Beristan* […] each *party waives any objection* which it may have *now or hereafter* […] and *irrevocably submits to jurisdiction of the arbitral Tribunal* constituted for any such dispute."[28]

39. The irrevocable and absolute consent given by Claimant under Clause 17 of JVA is wide and binding enough to encompass the present dispute. The present case must be distinguished from *Vivendi* annulment decision[29], *LANCO*[30] and *Salini* decisions[31], respectively where jurisdiction was established on the basis of very narrowly constructed

[28] *Excerpt from Joint Venture Agreement between Beritech S.A. and Televative Inc.* (18 October 2007), Annex.3 [*hereinafter* JVA], [Clause 17]

[29] *Vivendi-Annulment*, para.119

[30] *Lanco International Incorporated v Argentina*, Preliminary Decision on Jurisdiction, ICSID Case No.ARB/97/6 [*hereinafter* LANCO-Jurisdiction], para.49 (8 December 1998)

[31] *Salini/Jordan-Jurisdiction*, para.179

dispute settlement clauses in respective concession contracts which stated: "*for purposes of interpretation and application of this Contract the parties submit themselves to the [local courts]*." Those clauses are in contrast with the broad wordings of Clause 17 in JVA because it is not limited to mere "*interpretation and application*" of JVA but extends to any and all claims "*arising out of or relating*" to JVA.

40. The principle of '*generalia specialibus non derogant*' ("general words do not derogate from special words") makes specific agreement take precedence over any general agreement.[32] An instrument with a dispute settlement clause which is more specific to the nature of dispute should be given precedence over a document of more general application such as the BIT.[33]

41. Clearly, Claimant and Beritech very well knowingly and intentionally irrevocably consented to the provisions of Clause 17. There was a clear understanding how such a broad meaning of provisions therein will prevent the Claimant's commercial claims not

[32] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's counter-claim [*hereinafter* Saluka-Jurisdiction], paras.47-48,52,54-58 (7 May 2004); *SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No.ARB/02/6 [*hereinafter* SGS/Philippines-Jurisdiction], paras.137,139-148 (January 29, 2004)

[33] SCHREUER, p.582 paras.100-103; *Southern Pacific Properties (Middle East) Limited v Egypt*, Decision on Jurisdiction and Dissenting Opinion of 14 April 1988, ICSID Case No.ARB/84/3 [*hereinafter* SPP/Egypt-Jurisdiction], 3 ICSID Reports 131 at pp.149-150 para.83 (1995); *Zhinvali Development Limited v Republic of Georgia*, Award, ICSID Case No.ARB/00/1, paras.335-342 (24 January 2003); *Maritime International Nominees Establishment v Guinea*, Decision on Partial Annulment of the Award, ICSID Case No.ARB/84/4, paras.6.3--6.4 (22 December 1989)

only from being admissible at the ICSID under the BIT but also not falling under ICSID's jurisdiction.[34]

42. Thus, an explicit waiver of its rights with respect to settlement of 'any dispute arising out of or relating to' the JVA by the Claimant clearly precludes it from pursuing ICSID proceedings while attempting to re-assert its position as an "*investor*" under the BIT.

B. Claimant has itself given irrevocable consent to settle the present dispute in accordance with Beristian laws

43. When the dispute arose on 11 September 2009, Beritech served a notice upon Claimant and expressed its intention to arbitrate under Clause 17 of the JVA. Beritech also filed a request for arbitration under Beristian arbitration rules on 19 October 2009 but Claimant refused to accept it.

44. Both Claimant and Beritech have agreed that the JVA shall be governed in '*all respects*' by Beristian law which further shows that the intention of the parties in this context was undoubtedly crystal clear.[35] Beristian law incorporates UNIDROIT or other commonly accepted principles of contract law.[36] Clause 17 of JVA puts a limitation on party

[34] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay*, Decision on Objection to Jurisdiction, ICSID Case No.ARB/07/9, paras.143-160 (29 May 2009); *Burlington Resources Inc v Ecuador*, Decision on Jurisdiction, ICSID Case No.ARB/08/5, para.340 (2 June 2010)

[35] UNIDROIT, '*Principles of International Commercial Contracts*', [International Institute for the Unification of Private Law (Unidroit), Rome 1994] [*hereinafter* UNIDROIT], [Article 4.1(1) p.90]

[36] *Clarification(I)*, #136

autonomy, *i.e.* once the parties indicate the law to which their contract is subject to, a mandatory rule then applicable to that contract cannot be evaded by resorting to a choice of law technique.[37] Such an obligation is binding upon the Claimant (*pacta sunt servanda*) [38]as a mandatory obligation and as a fundamental principle of international commercial law.[39]

45. An exclusive jurisdiction clause in an agreement that is worded such as "*any dispute arising out of or relating to [that Agreement]*" must be broadly construed to encompass every dispute that has a significant relationship to the contract regardless of the label attached to the dispute.[40] The use of words "*arising out of*" as well as "*relating to*" together in Clause 17 of the JVA embraces all disputes between the parties having a

[37] R. DOAK BISHOP, JAMES CRAWFORD, WILLIAM MICHAEL REISMAN, '*Foreign investment disputes: cases, materials, and commentary*' [Kluwer Law International 2005], p.257; *cf.* SORNARAJAH, 'The *Settlement* of Foreign Investment Disputes' [Kluwer Law International 2000], Chapter 2-3.1

[38] UNIDROIT, [Article 1.3 p.9]

[39] UNIDROIT, [Article 1.7 para.3 p.19]

[40] *SGS/Pakistan-Jurisdiction*, para.66; *Prima Paint Corp., v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 at pp.397-398 (1967); *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160 (5th Cir.) at pp.164-165 (1998)

significant relationship to the contract regardless of the label attached to the dispute.[41] The present dispute has clearly arisen out of "*or*" is, at the least, relating to the JVA and the Sat-Connect Project. Adjudicatory bodies, in line with the principle of '*ut res magis valeat quam pereat*', have interpreted contract provisions, in particular, arbitration clauses to give them effective meaning rather that to render the clauses totally ineffective or violative of "common sense".[42]

C. Claimant has failed its duty regarding amicable settlement of dispute under Clause 17 of JVA

46. A requirement for amicable settlement has been interpreted as being a jurisdictional one by various Tribunals.[43] The only time Tribunals have considered such a requirement as

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[41] *J.J. Ryan & Sons v. Rhone Poulenc Textile*, 863 F.2d 315 (4th Cir.) at p.321 (1988); *Miller v. Flume*, 139 F.3d 1130 (7th Cir.) at p.1136 (1998); *Pennzoil Exploration And Production Company V. Ramco Energy Limited*, No.96-20497 of May 13, 1998 (5th Cir.) available at (http://caselaw.findlaw.com/us-5th-circuit/1285984.html)

[42] PIERRE LALIVE, '*The First 'World Bank' Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*', 51 BYBIL 123ff. (1980); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (Second Phase), ICJ Reports 221 at p.229 (18 July 1950); *Acquisition of Polish Nationality*, Advisory Opinion, PCIJ Series-B No.7, pp.16-17 (1923)

[43] *Goetz and Five Belgian shareholders of AFFIMET v Burundi*, Award, ICSID Case No.ARB/95/3 [*hereinafter* Goetz-Award], paras.90-93 (10 February 1999); *Enron Corporation and Ponderosa Assets LP v Argentina*, Decision on Jurisdiction, ICSID Case No.ARB/01/3 [*hereinafter* Enron-Jurisdiction], para.88 (14 January 2004)

directory rather than mandatory is when the negotiations or the attempt to settle the dispute amicably would have been totally futile.[44]

47. In the present case, Claimant has failed to settle the dispute amicably with Beritech under the JVA. Instead, it has served a notice upon the Respondent in an attempt to internationalize a commercial dispute. There is no indication how an amicable settlement of dispute with Beritech would have been futile provided that Beritech had itself served a notice upon Claimant and was willing to settle the dispute amicably.[45]

CONCLUSION ON JURISDICTION

48. In light of the foregoing submissions and arguments advanced, it is humbly submitted that the ICSID Tribunal lacks jurisdiction in view of Clause 17 of the JVA as well as by virtue of Article 10 of the BIT to hear the Claimant's claims.

[44] *SGS/Pakistan-Jurisdiction*, para.184

[45] *Clarification(I)*, #175

PART TWO: MERITS

III. Respondent has not materially breached the JVA by allegedly preventing the Claimant from completing its contractual duties and invoking Clause 8 (Buyout) of the JVA

49. The present dispute is with regard to the JVA and Sat-Connect project and hence, Claimant's claims are against Beritech only. Claimant cannot enforce its claims against the Respondent directly under the BIT because (A) Actions of Beritech and Sat-Connect are not attributable to the Respondent in international law, (B) Clause 8 (Buyout) of the JVA has been properly invoked by Beritech and that does not prevent the Claimant from performing its contractual obligations under the JVA and (C) in the alternative, even if *arguendo*, Beritech has committed a breach of JVA, then such breach cannot constitute a 'material breach'.

A. Actions of Beritech and Sat-Connect are not attributable to the Respondent in international law

50. Beritech and Sat-Connect are separate legal entities from their respective shareholders in international law.[46] Merely because Beritech is State-owned doesn't *ipso facto* mean that it is abusing its separate legal personality as a cloak of formality which can be removed any time for the purpose of attribution of its commercial conduct to Beristan.[47] Unless

[46] *Case concerning the Barcelona Traction Light and Power Company Limited* (*Belgium v Spain*), Second Phase, Judgment, ICJ Reports, p.7 [*hereinafter* Barcelona-Traction] paras.38-41 (1970)

[47] *Noble Ventures Incorporated v Romania*, Award, ICSID Case No.ARB/01/11 [*hereinafter* Noble-Ventures-Award], para.82 (12 October 2005); *Tokios Tokelės v Ukraine*, Decision on Jurisdiction and Dissenting Opinion, ICSID Case No.ARB/02/18, paras.54-56 (29 April 2004); ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with

there is concrete proof to show that Beritech was used as a "puppet or vehicle" by the Respondent to purposely commit fraud against Claimant[48] and that too under "*exceptional circumstances*"[49], such "*corporate veil*" shall not be lifted.

51. The degree of control which must be exercised by the State is the key to establish State attribution.[50] Respondent doesn't really exercise effective control over Beritech's activities merely by the virtue of owning majority shares therein.[51] Beritech's dependence on Respondent for planning, direction and support is absent as there is no evidence that it sought support from Respondent to discharge essential duties under the JVA.[52]

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commentaries, 2 YBILC Part-II (2001) (Report of the 53rd Session ILC, UNGA 56th Session, Doc A/56/10) [*hereinafter* State-Responsibility-Articles], [Article 5 para.(3)]

[48] *Wallersteiner v Moir*, 1 WLR 991 at p.1013 (1974); *Bridas SAPIC and ors v Turkmenistan and ors.*, Appeal Judgment, 447 F.3d 411 (5th Cir. 2006), paras.10-15 (21 April 2006)

[49] *Barcelona-Traction*, paras.56-58; *CME Czech Republic BV v Czech Republic*, Final Award on Damages and Separate Opinion, UNCITRAL, para.436 (14 March 2003); *Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538 at p.545 (Ohio 2008); *Calvert v. Huckins*, 875 F.Supp.674 at p.678 (E.D. Cal. 1995)

[50] *State-Responsibility-Articles*, [Article 8 para.(4)]; *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, Award, ICSID Case No.ARB/03/29 [*hereinafter* Bayindir-Award], paras.119-123 (27 August 2009)

[51] *Aguas del Tunari v Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No.ARB/02/3, para.40 (21 October 2005); *Vacuum Salt Products Limited v Ghana*, Final Award, ICSID Case No.ARB/92/1, para.43 (16 February 1994)

[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/USA)*, Merits, Judgment, ICJ Reports p.14 [*hereinafter* Nicaragua-Merits] at paras.86,109,115 (1986)

52. Sat-Connect lacks any involvement whatsoever from the Respondent directly. None of its BOD member is elected by the Respondent.[53]

B. Clause 8 (Buyout) of the JVA has been properly invoked by Beritech and that des not prevent the Claimant from performing its contractual duties

53. Clause 8 of the JVA states *inter alia* that if at any time,

> "[…] Televative (the Claimant) *commits a material breach* of *any provision* of this Agreement; *Beritech shall be entitled to purchase all of Televative's interest* in this Agreement […]"[54]

54. The Claimant has not been prevented from performing its contractual duties because (1) Clause 8 of JVA has been lawfully invoked as Claimant committed a material breach of JVA, (2) Beritech has complied with all procedural formalities under Beristian Laws while invoking Clause 8 of the JVA and (3)

1. Clause 8 of JVA has been lawfully invoked as Claimant committed a material breach of JVA

55. In order to lawfully invoke the Clause 8 (Buyout) of the JVA, all that Beritech requires is to establish that the Claimant did commit a breach of Clause 4 (Confidentiality) of the

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[53] *FDI Moot 2010 Clarification Requests (23 August) Responses* [*hereinafter* Clarification(II)], #268

[54] *JVA*, [Clause 8]

JVA. Such breach would *per se* constitute a material breach of the Agreement by virtue of Clause 4(4) of the JVA which categorically states so.[55]

56. Opulentia has export control laws that require Opulentian companies to obtain licenses from the Opulentian government in order to export and re-export certain technologies, goods, and/or services to Beristan.[56] In international investment law, since the Claimant is contributing in military or dual-use sectors in Beristan, it must conform to and understand the constraints of Beristian Laws relating to such goods/technologies.[57] In consonance with the practice adopted by China[58], the EU[59], France[60], India, the UK[61] and

[55] *JVA*, [Clause 4(4)]

[56] *Clarification(I)*, #145

[57] YANN AUBIN and ARNAUD IDIART, '*Export Control Laws and Regulations Handbook: A Practical Guide to Military and Dual-Use Goods, Trade Restrictions and Compliance*' [Kluwer Law International 2007] [*hereinafter* Export-Control Handbook], p.14

[58] Decree No.346 of the State's Council of the People's Republic of China on February 11, 2002 and effective as of April 1, 2002 (http://www.gov.cn/english/laws/2005-07/25/content_16873.htm)

[59] Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *Official Journal L 159 , 30/06/2000 P.0001 – 0215*

[60] Monetary and Financial Code [Part V (FINANCIAL DEALING WITH FOREIGN COUNTRIES)], [Articles L 151-1 to 153-1] (March 20, 2006)(http://195.83.177.9/upl/pdf/code_25.pdf)

the USA[62], the Export control laws of Opulentia regarding such goods/technologies cannot be considered paramount when relatively compared to the danger caused by them to the national security of Beristan.[63]

57. By virtue of Clause 4(1) of the JVA, "*all matters relating to*" the JVA and Sat-Connect project are to be treated as "*Confidential*". Licensing systems involve the approving of 'to be' exported technologies/goods by the designated department of the Government dealing in such functions.[64] However, such exported goods by Claimant include technologies, trade secrets, data and know-how *inter alia* which are listed under Clause 4(2) of the JVA as "*Confidential Information*". Furthermore, the additional requirement of Export licenses for "*Re-Exporting*" the goods/technologies as mentioned in Clause 4(2) of JVA, *per se* proves that Claimant was bound to disclose "*other information developed during Sat-Connect project*" to Opulentia.[65] This is contrary to Clause 4(1) of the JVA according

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[61] Enterprise Act of 2002 [Sections 23, 42 and 59] (http://www.legislation.gov.uk/ukpga/2002/40/contents)

[62] Defense Production Act of 1950 [Section 721], 50 USC App 2170 (d) and (e)

[63] EXPORT-CONTROL HANDBOOK, pp.14-17

[64] South Asian Strategic Stability Institute, London, '*China's Export Control System and the Role of MOFCOM*', Research Report 23, p.5 (January 2009) (http://www.sassi.org/pdfs/Report-23.pdf); BIS, US Department of Commerce, '*Introduction to Commerce Department Export Controls*' (http://www.bis.doc.gov/licensing/exportingbasics.htm)

[65] *JVA*, Clause 4(2)

to which the Claimant will neither directly disclose "*any matter relating to the JVA*" nor allows such act to be done indirectly.[66]

58. Thus, the Export Control Regime of Opulentia (*hereinafter* "ECR") is a misused state measure that forces the Claimant to disclose critical information "relating to" Sat-Connect project, in some form or the other, to the Government of Opulentia. ECR is an alternative to the otherwise unsuccessful attempts made by Opulentia to "coerce"[67] the Claimant in providing unlawful access to civilian encryption keys and Intellectual Property of the Sat-Connect project. Such approaches by Opulentian Government have been made on several occasions to various Opulentian technology firms and even the Claimant fully agrees with this fact.[68]

59. Such conduct by Opulentia is more than sufficient to establish that Claimant did leak confidential information relating to the JVA and Sat-Connect project to it. The concern raised by high ranking Beristian Government official only adds weight to such deduction.

2. Beritech has complied with all procedural formalities under Beristian Laws while invoking Clause 8 of the JVA

60. Beritech was well aware of the existing ECR of Opulentia and did not ever raise the issue of leak of Confidential Information prior to the BOD meeting held on August 21, 2009. The rationale behind such a practice adopted by Beritech is that there existed no concrete

[66] *JVA*, Clause 4(1)

[67] CHRISTOPHER C. JOYNER, '*Coercion*' [Max Planck Encyclopedia of Public International Law (December 2006)]

[68] *Clarification(I)*, #178

proof of such leak prior to August 21, 2009 and it could not possibly give a reasonable justification of invoking Clause 8 of the JVA unless the chain of events, as shown above, could establish that the Claimant did actually commit a material breach of JVA. Thus, Beritech has sincerely and lawfully performed all its contractual obligations under the JVA with *bona fide* intentions and in good faith.

61. As a further evidence of good faith on the part of Beritech, it did not immediately jump to conclusions after The Beristan Times Article was published. In fact, during the August 21, 2009 BOD meeting, Chairman of the Sat-Connect's BOD discussed the allegations appearing in the Newspaper Article[69] in presence of all the 9 Directors[70] wherein one of the Directors raised the potential relevance of Clause 8 of the JVA[71].

62. All the 9 Directors present during August 21, 2009 BOD meeting were informed about the August 27, 2009 BOD meeting. Some directors appointed by Televative speculated that the buyout would be discussed therein and henceforth, they decided not to attend the meeting and thus deprive it of the necessary quorum.[72] Upon being lucidly asked the question whether an official agenda of such meeting was also supposed to be provided subsequently, the answer that the clarification provided is that Beristan Law requires 24 hours prior notice for all board meetings.[73] The disregard of the importance of 'agenda'

[69] *Uncontested Facts*, para.9

[70] *Clarification(I)*, #127

[71] *Clarification(I)*, #169

[72] *Clarification(II)*, #208

[73] *Clarification(I)*, #176

in the Clarification per se shows that no procedural requirement existed regarding the same. Furthermore, the fact that Chairman of Sat-Connect enjoyed the privilege to set the agenda for a meeting and in the absence of any such agenda, could be possibly believed to have done exactly so during the August 21, 2009 BOD meeting, itself shows that there was no requirement of annexing the agenda of the meeting along with the Notice of the same.

63. The quorum is required at the moment of voting,[74] which means no more no less. Neither Beristan law not Sat Connect's bylaws regulate the loss of quorum once established.[75] The quorum was established when the voting began since Alice Sharpeton only refused to take part in the voting and left it before its end.[76] This means, the quorum as required by Sat-Connect's by laws did stand established "*at the moment of voting*". Majority of the BOD (5 out of 9) voted to invoke Clause 8 (Buyout) of the JVA in conformity with Sat-Connect's procedural requirements and by laws.

C. In the alternative, even if *arguendo* Beritech has committed a breach of JVA, then such breach cannot constitute a 'material breach'

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[74] *Clarification(II)*, #200

[75] *Clarification(II)*, #255

[76] *Uncontested Facts*, para.10

64. A breach is said to be material if it frustrates the very object & purpose of an agreement[77] or if it jeopardizes one party's ability to comply with the terms of the contract to such an extent that it cannot be reasonably required of that party to continue the contractual relationship.[78]

65. Clause 8 (Buyout) of the JVA is not such a fundamental clause the breach of which would devoid the whole Agreement of its object & purpose or which if improperly invoked will jeopardize Claimant's ability to perform its obligations under the JVA. This is because of two reasons.

66. *Firstly*, the object & purpose of the JVA is to establish the JV Company named Sat-Connect which shall develop and deploy satellite communication technology *inter alia* in the region of Euphonia. Invoking Clause 8 of the JVA merely "*entitles*" Beritech to purchase Claimant's entire share in Sat-Connect and only provides a mechanism to evaluate such share of the Claimant.[79] It does nothing more than granting a legal right to Beritech which it may or may not exercise.[80] Thus, to assume or anticipate a fundamental

[77] *Autopista Concesionada de Venezuela CA (Aucoven) v Venezuela*, Award, ICSID Case No.ARB/00/5, para.317 (23 September 2003)

[78] *BRIDAS SAPIC and ors v Turkmenistan*, First Partial Award and Dissent, ICC Case No.9058/FMS/KGA (Dissenting Opinion of Hans Smit, Arbitrator), para.35 (24 June 1999); *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, (1884) 9 App Cas 434 at p.443; UNIDROIT, [Article 7.3.1.(1), p.182]

[79] *JVA*, [Clause 8]

[80] BLACK'S LAW DICTIONARY, p.612

breach based on an improper invocation of Clause 8 would be contrary to the object & purpose of the JVA itself.

67. *Secondly*, and most importantly, an improper invocation of Clause 8 of the JVA neither frustrates the object & purpose of the Agreement nor does it jeopardize Claimant's position. This is by virtue of Clause 17 (Dispute Settlement) of the JVA. Clause 17 of the JVA provides a mechanism for the settlement of '*any dispute arising out of or relating to*' the JVA in accordance with Beristian Laws.[81] Thus, if at all, Claimant were to believe that Beritech has improperly invoked Clause 8 (Buyout) of the JVA, it shall have the legal right to commence arbitration against Beritech in accordance with the mechanism provided under Clause 17 of the JVA.

68. In order to understand why improperly invoking Clause 8 of the JVA in any case does not constitute a 'material breach' *per se*, it is important to understand and analyze what do the Claimant and Beritech consider a 'material breach' as. A breach of Clause 4 (Confidentiality) of the JVA is an example of 'material breach' because it frustrates the very spirit of the Agreement and it would simply render the whole purpose of Sat-Connect useless if the Confidential Information was leaked even for once. That is the reason why the JVA contains explicit details of and explanations to the relevant terms of Clause 4 and even mentions that any breach of that Clause shall constitute a material breach of JVA.

69. However, it is difficult to find such a strictness or stringency present in the provisions of Clause 8 of the JVA. Improper invocation of Clause 8 of the JVA, at the most, gives Claimant a legal right to settle the dispute against Beritech in accordance with the procedure as provided under Clause 17 of the JVA. However, what Claimant has "*strategically*" chosen to do is to internationalize its claims by demanding a 'material

[81] *JVA*, [Clause 17]

breach' of the JVA[82] so that it may terminate it and claim damages, including loss of profit.[83] The strategic move is inspired by the fear that under the JVA, Claimant's interest in Sat-Connect only evaluates Claimant's monetary investments till date, *viz.* US $ 47 million whereas by internationalizing its claims, the Claimant ends up '*with a chance*' to receive US $ 100 million as compensation.

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

70. Claimant's contends that provided attribution to the Respondent is admitted, the conduct complained of shall constitute an internationally wrongful act to hold Respondent liable. In reply and for that matter, in any case *arguendo*, Respondent has not violated any of its obligations which it has undertaken under Articles 2, 3 and 4 of the BIT by virtue of Article 10 of the BIT.

A. Respondent has not violated '*Fair and equitable*' treatment standard under Article 2 of the BIT

71. Under Article 2(2) of the BIT, Respondent "*shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the [Claimant's] investments*".

[82] *Clarification(II)*, #256

[83] *Clarification(II)*, #215

72. The standard of "*fair and equitable treatment*" has to be evaluated on the threshold set by a specific treaty (*lex specialis*) which contains such clause.[84] The clear use of the words '*customary international law*' and nothing else means the Parties didn't require treatment in addition to or beyond that which is required by the customary international law.[85] The precise intention of the Parties is apparent in the present BIT unlike many others cases adjudged by former Arbitral Tribunals.[86] Such intention is further substantiated by appending the word "*including*" in the same provision. "*Including*" shall be given its

[84] *Suez and ors v Argentina*, Decision on Liability, ICSID Case No.ARB/03/17 [*hereinafter* Suez/Argentina-Liability], paras.148,177-178 (30 July 2010); *Saluka Investments BV v. Czech Republic*, UNCITRAL Partial Award [*hereinafter* Saluka-Award], paras.286-295 (March 17, 2006); *Biwater Gauff (Tanzania) Limited v Tanzania*, Award, ICSID Case No.ARB/05/22 [*hereinafter* Biwater Gauff-Award], paras.586-593 (24 July 2008); STEPHEN VASCIANNIE, '*The Fair and Equitable Treatment Standard in International Investment Law and Practice*', 70 BYBIL 99 (1999)

[85] NAFTA Free Trade Commission, '*Notes of Interpretation of Certain Chapter 11 Provisions*', [Minimum Standard of Treatment in Accordance with International Law: para.2(2)] (July 31, 2001) (http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en); Canadian Statement of Implementation for NAFTA, Canada Gazette, Part I, (Jan.1 1994) at p.149 (http://www.naftaclaims.com/Papers/Canadian%20Stmt%20of%20Implementation.pdf)

[86] *Biwater Gauff-Award*, para.593

ordinary meaning, *viz.* '*containing*' or '*comprising*'[87] rather than an additive interpretation.[88]

73. Moreover, while disregarding all earlier decisions in *Metalclad*, *S.D. Myers* and *Pope & Talbott*, the *Loewen* Tribunal held that Host-State's obligations exist only to the extent they are recognized by and consistent with customary international law and not as free-standing obligations under the BIT.[89]

1. Respondent's conduct is not arbitrary

74. Conduct is arbitrary if there is an abuse of discretionary authority (*abuse de droit*) for the sole purpose of causing injury to another,[90] and such conduct is based upon prejudice or

[87] WHARTON'S LAW LEXICON [15th ed. Universal Publishers 2009], p.841; Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) [*hereinafter* VCLOT], [Article 31]

[88] *United Parcel Service of America Incorporated v Canada*, Award on Jurisdiction, UNCITRAL, para.96 (22 November 2002); *Glamis Gold Limited v United States*, Award, UNCITRAL [*hereinafter* Glamis-Award], para.617 (8 June 2009)

[89] *Loewen Group Incorporated and Loewen v United States*, Award, ICSID Case No.ARB(AF)/98/3, para.128 (26 June 2003); OECD: WORKING PAPERS ON INTERNATIONAL INVESTMENT, '*Fair and Equitable Standard in International Investment Law*', Number 2004/3 [*hereinafter* OECD-Fair and Equitable], p.23 (September 2004)

[90] BIN CHENG, '*General Principles of Law as Applied by International Courts and Tribunals*' [Cambridge University Press 2007], pp.122,132-134; GEORG SCHWARZENBERGER, '*International Law and Order*' [London, Stevens, 1971] pp.89–90,99–100

preference rather than reason or fact.[91] An arbitrary action by any organ of the Host-State shocks or at least surprises a sense of juridical propriety on part of foreign investor.[92]

75. On the contrary, Executive order has been passed by Respondent in pursuance of Beritech's notice served upon the Claimant on August 28, 2009. After 14 days of such notice, Respondent directed the CWF to peacefully expel only those Televative-employees who hadn't yet left Beristan.[93] There is no arbitrariness as the legal basis for passing such order was Claimant's material breach of JVA by leaking confidential information related to Sat-Connect project and protection of Respondent's essential security interests.

2. Respondent has not violated Good faith and Legitimate expectations of Claimant

76. Contractual breaches, in any case, have been held to be non-violative of the legitimate expectations of a foreign investor.[94] Still, however, the legitimate expectations are

[91] *Occidental Exploration and Production Company v Ecuador*, Final Award, LCIA Case No.UN3467 [*hereinafter* Occidental-Award], paras.162-163 (1 July 2004)

[92] *Waste Management, Inc v. United Mexican States (II)*, Award, ICSID Case No.ARB(AF)/00/3 [*hereinafter* Waste-Management(II)-Award], para.98 (30 April 2004)

[93] *Clarification(II)*, #248

[94] *Glamis-Award*, para.620; *Azinian and ors v Mexico*, Award on Jurisdiction and Merits, ICSID Case No.ARB(AF)/97/2, para.87 (1 November 1999); *Methanex Corporation v USA*, Final Award on Jurisdiction and Merits, UNCITRAL [*hereinafter* Methanex-Award], Part IV Chapter D para.7 (3 August 2005)

breached only when Investor relies on misleading representations or false assurances made by Host-State regarding protection of its investments.[95]

77. Respondent had never made any assurances to the Claimant regarding the latter's investments.[96] Claimant's own actions had compelled the Respondent to act in a legitimate way so as to protect its essential security interests and by no means can the Claimant be allowed to take the benefit of its own wrong.[97]

78. Clause 8 of JVA was an onerous and one-sided obligation Claimant 'knowingly and willingly' undertook wherein only Beritech had the right to buyout Claimant's interest in Sat-Connect an not *vice-versa*. Hence, Claimant was well aware of what may arise out of its own illegal actions and by no means can the Claimant complain now that the Respondent failed to provide a stable business framework all of a sudden after nearly 2 years since the signing of JVA.

3. Respondent has not violated Due process of law

[95] *ADF Group Inc. v. USA*, Award, ICSID Case No.ARB(AF)/00/1 [*hereinafter* ADF/USA-Award], para.189 (9 January 2003); *Wena Hotels Limited v Egypt*, Award, ICSID Case No.ARB/98/4, paras.85-87 (8 December 2000)

[96] *Clarification(II)*, #253

[97] *Suez/Argentina-Liability*, para.207; *Saluka-Award*, paras.301-306; *Goetz-Award*, para.126

79. Tribunals have interpreted the concept of 'denial of justice' as one where the acts of Host-State amount to procedural irregularity, willful neglect of its duty, bad faith or an extreme insufficiency of action.[98]

80. None of the actions on part of Respondent show that any procedural aspect of law was violated when Clause 8 of JVA was invoked. Respondent not only requested for amicable settlement of dispute which the Claimant vehemently rejected but also made sure it submitted such dispute in accordance with Beristian laws to arbitration under Clause 17 of JVA.

81. Further, Respondent never acted in bad faith since the meeting wherein Clause 8 was invoked, the presence of Alice Sharpton is strongly indicative of the fact that Claimant did know about the agenda of the meeting. The only requirement under Beristian laws was 24 hours prior notice for all board meetings and there is nothing to suggest if such notice should have bore a specific agenda.[99]

82. In any case, Michael Smithworth, the Chairman of Sat-Connect's BoD, enjoyed the privilege of setting the agenda of any meeting which the Claimant's Directors in the Board certainly knew of.[100] As a matter of fact, there is nothing to suggest that the agenda for the August 21, 2009 BOD meeting was discussed prior to the meeting yet all the Claimant's four Directors attended it. Had the Claimant wished to act sincerely, which it

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[98] *Genin and ors v Estonia*, Award, ICSID Case No.ARB/99/2 [*hereinafter* Genin-Award], para.367 (25 June 2001)

[99] *Clarification(I)*, #176

[100] *Clarification(I)*, #180-181

purposely refrained from doing,[101] all their Directors would have attended the meeting and shown their objection. Instead, their only Director present decided to absent herself from voting so as to later claim that such resolution was unlawful.

4. Respondent has maintained Transparency in its dealings

83. Respondent has operated in an open transparent manner; be it the free mode of expression of its high-rank official whose article was published in the newspaper or the notice to vacate Sat-Connect sites served upon the Claimant pursuant to the buyout.

5. Respondent has maintained '*full protection and security*' standards

84. '*Full protection and security*' standard is however assumed in customary law to be violated when the foreign investment has been affected by civil strife and physical violence.[102] Also, full protection and security of property doesn't mean that property shall never in any circumstances be occupied or disturbed.[103]

85. There is no extreme situation such as a strife or violence from which Claimant ought to claim protection and security. Claimant's own wrongful acts resulted in Respondent to

[101] *Clarification(II)*, #208

[102] *Saluka-Award*, paras.483-484; OECD-Fair and Equitable, p.26

[103] *Elettronica Sicula S.P.A. case (USA/Italy)*, Judgment, ICJ Reports p.15 [*hereinafter* ELSI] at para.108 (1989)

use measures 'according to a legal procedure' by duly issuing Executive Orders so as to expel them from Beristan.[104]

6. Respondent's conduct was not discriminatory

86. Discrimination in customary international law results in an intentionally caused injury to the alien. [105] A state action is non-discriminatory if there is a reasonable justification for any seemingly differential treatment.[106] Respondent's actions are non-discriminatory as there is a reasonable nexus between the regulatory powers inherent to Respondent as a sovereign State to protect its own essential security interests and the use of such powers by Respondent owing to Claimant's unlawful conduct.

87. Further, Respondent has expelled all of the Claimant's personnel irrespective of their nationality[107] which shows lack of discriminatory intent.

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[104] *Goetz-Award*, para.127

[105] *Amoco International Finance Corporation v Iran and ors*, Partial Award, Award No 310-56-3, (1987) 15 Iran-US CTR 189 [*hereinafter* AMOCO-Award], para.140 (14 July 1987); R. DOLZER & M. STEVENS, '*Bilateral Investment Treaties*' [The Hague: Martinus Nijhoff Publishers 1995] [*hereinafter* Dolzer/Stevens], p.98; *World Bank Guidelines*, 31 ILM 1376 (1992) [*hereinafter* World Bank Guidelines], [Section IV(I)]

[106] *Saluka-Award*, para.313; *Oscar Chinn Case* (*United Kingdom v Belgium*), Judgment of 12 December 1934, PCIJ Series A/B No.63, p.92 (DISSENTING OPINION OF JUDGE ALTAMIRA); '*Restatement (Third) of the Foreign Relations Law of the United States*' [1 American Law Institute (June 1986)] [*hereinafter* Third-Restatement], §711; *International Covenant on Civil and Political Rights*, 999 UNTS 171 (1966), [Article 26]

[107] *Clarification(II)*, #236

B. Respondent's conduct has not amounted to breach of National treatment standards under Article 4 of the BIT

88. Host-State's conduct is discriminatory in the sense of breaching national treatment standards when "*similar cases are treated differently and without reasonable justification.*" Thus, a breach of national treatment has not occurred because (1) Claimant and Beritech weren't in "like circumstances" and (2) in any case, there was a reasonable justification for Respondent's conduct.

1. Claimant and Beritech were not in "*like circumstances*"

89. The interpretation and application of "*like*" has to be done in context and circumstances of a given case as it is neither precise nor absolute in definition.[108] Thus, "*likeness*" test is bound to fail when there is an imbalance between the Claimant and Beritech in context of offers or rights in a given venture.[109] For instance, difference in the degree of risk involved in a particular transaction itself shows that there was a difference in objectives which Claimant and Beritech had set out to achieve from JVA.

90. Claimant's risks were clearly more under JVA to which they had knowingly agreed. Further, Claimant and Beritech were not competitors but were instead working under a JVA with a motive of mutual benefit and prosperity. While Beritech's objectives were to

[108] *SD Myers Incorporated v Canada*, First Partial Award on the Merits and Separate Opinion, UNCITRAL [*hereinafter* SD Myers-Award], para.244 (13 November 2000); Japan-Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R [DSR 1996: I, 97], pp.20-22 paras.8.5—8.6 (1 November 1996)

[109] *Consortium RFCC v Morocco*, Award, ICSID Case No.ARB/00/6, para.75 (22 December 2003); *Parkerings-Compagniet AS v Lithuania*, Award on jurisdiction and merits, ICSID Case No.ARB/05/8, para.396 (11 September 2007)

deploy the technology provided by Claimant, Claimant's interest in the JVA was purely fiscal. Hence, circumstances were not even close to being "*like*" as far as the dispute is concerned.

2. There was a reasonable justification for Respondent's conduct

91. Respondent's actions were motivated by its essential security concerns. The presence of a reasonable and justified nexus between the measures taken and the non-discriminatory regulatory policy of Respondent establishes *prima facie* that it didn't violate its obligations with regard to national treatment.[110] Even if "*like circumstances*" existed *ex hypothesis*, the reasonable nexus still justified the Respondent's actions because of Claimant's own wrongful acts which left Respondent with no other choice but to pass those Executive Orders.

C. Respondent's conduct has not amounted to breach of Article 4 of the BIT

92. Claimant's claims under Article 4 of the BIT are primarily based on the allegation that Respondent has illegally expropriated its interest in Sat-Connect through invoking the Buyout (Clause 17) in the JVA. ICSID Tribunals have openly rejected the idea that an expropriation may take place via omissions so an allegation of having '*not acted*' on the part of Respondent, no matter how egregious it may be, is ruled out of contention to constitute expropriation and need not be pursued.[111]

[110] *Pope & Talbot Incorporated v Canada*, Award on the Merits of Phase 2, UNCITRAL [*hereinafter* Pope-Talbot-Award], paras.77-79 (10 April 2001)

[111] *Eureko BV v Republic of Poland*, Partial Award and Dissenting Opinion, para.186 (19 August 2005)

93. It is submitted that there is a difference between "*invoking*" a Buyout Clause and "*giving effect*" to it. According to the eye-opening clarification,[112] "*on August 27, 2009, Sat-Connect's BOD upon approving the buyout, voted to '<u>suspend</u>'* [emphasis added] *Claimant's shares in the Sat-Connect JV*." Such a suspension is an obvious result of a *bona fide* action taken by Sat-Connect's BOD after having simply "*invoked*" Clause 8 of JVA. Subsequently, these suspended shares were submitted to be held in an escrow, along with the $47 million submitted by Beritech, pending the decision of the arbitral tribunal which had been constituted for settlement of present dispute pursuant to Beritech's exercise of its contractual rights under Clause 17 of JVA.

94. Alternatively, Respondent already owns 65% majority shareholding interest in Sat-Connect and there's no reason why it would '*deliberately*' discriminate against Claimant.[113] Respondent from the very inception of JVA had an upper hand as far as its financial interest in JVA was concerned and all this was done through legitimate, peaceful, transparent and consensual dealings with Claimant.

95. In any case, no expropriation ever took place since merely '*invoking*' a Buyout Clause didn't amount to significant interference with Claimant's interest in Sat-Connect.[114] Claimant's interest remained very much in existence and under its ownership only.[115]

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[112] *Clarification(I)*, #138

[113] *Lauder v The Czech Republic*, Final Award, UNCITRAL [*hereinafter* Lauder-Award], para.198 (3 September 2001); *SD Myers-Award*, para.285

[114] *Feldman Karpa v Mexico*, Award and Dissenting Opinion, ICSID Case No.ARB(AF)/99/1, paras.100,152(16 December 2002); *ELSI*, para.119

[115] *CMS Gas Transmission Company v Argentina*, Award, ICSID Case No.ARB/01/8 [*hereinafter* CMS-Award], para.263 (May 12 2005); *Sea-Land Service Incorporated v Iran and*

There are no signs of unjust enrichment on part of Respondent or any indication whether Respondent has suddenly assumed control or started reaping the fruits of Claimant's property.[116]

96. The regulatory action was merely ephemeral and was supposed to remain in effect only till the outcome of arbitral proceedings under Clause 17 of JVA was reached.[117] Claimant itself had consented to arbitration under Beristian laws by virtue of Clause 17 and it'll be a scapegoat tactic or an absurd defence rather for it to take at this crucial juncture pleading that there are chances such proceedings may be biased against its interest or will take time immemorial to conclude.

97. There is, in any case, a widespread practice that legitimate Regulatory measures or police powers are outside the scope of expropriation and when adopted by Host-State in *bona fide* manner directed at general welfare, don't give rise to the liability of compensation in

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Ports and Shipping Organization of Iran, Final Award No.135-33-1, 6 Iran-US CTR 149 at p.167 (1984)

[116] *Olguín v Paraguay*, Award, ICSID Case No.ARB/98/5, para.84 (26 July 2001); *Lauder-Award*, para.203; *Nykomb Synergetics Technology Holding, AB, Stockholder v. Republic of Latvia, Riga*, Award, SCC [*hereinafter* Nykomb], para.4.3.1 (16 December 2003)

[117] *Starrett Housing v Iran*, Interlocutory Award, Award No.ITL 32-24-1, 4 Iran-US CTR 122 at p.154 (19 December 1983); NEWCOMBE, '*Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid*' (1999) (ita.law.uvic.ca/documents/RegulatoryExpropriation.pdf), p.60; GC CHRISTIE, '*What Constitutes a Taking Under International Law*', 33 BYIL 307 at pp.333-334,337 (1962)

international law.[118] Breach of Clause 4 of JVA didn't just amount to a material breach of JVA but was in fact a clear danger to 'national interest' of Beristan.

98. Even Article 4(1)(1) of the BIT very clearly authorized the Respondent to take regulatory measures with respect to Claimant's investments while protecting its national interest. National authorities are better placed than international Tribunals to appreciate what is in their public interest[119] and Respondent's actions must thereby be respected, especially by virtue of the Article 9 of the BIT.

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

99. Article 9 of the BIT is an Essential Security clause and drafted very vociferously in a negative language. "*Nothing in this Treaty shall be construed*" in its simplest interpretation yields that the provisions under the following clauses (1) and (2) respectively of Article 9 are strictly preventive, over-riding and moreover, expressly absolute in nature as compared to any other provision in the BIT. ICSID Tribunals have held that such BIT provision acts as a treaty-based defense and if it applies, the substantive obligations under the BIT don't apply.[120] Tribunals have even acknowledged

[118] *Saluka-Award*, paras.255,262-263; *SD Myers-Award*, para.281; *Sedco Incorporated v National Iranian Oil Company*, Interlocutory Award No.ITL 55-129-3, 9 Iran-US CTR 248 at p.275 (1985)

[119] *James v. U.K.*, 98 ECHR Series A, p.9 at p.32 (1986); *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No.ARB/02/8 [*hereinafter* Siemens-Award], para.273 (6 February 2007)

[120] *CMS Gas Transmission Company v Argentina*, Decision on Application for Annulment, ICSID Case No.ARB/01/8 [*hereinafter* CMS-Annulment], para.129 (25 September 2007)

the growing use of such explicitly self-judging clauses by the USA and are convinced that once the parties have intended to include them expressly in their agreements, then the actions taken under the defense of such clauses were beyond judicial review.[121]

100. Thus the defense to Claimant's claims is undoubtedly available to the Respondent under Article 9 of the BIT because (A) Article 9 gives absolute unquestionable right to exercise its subjective discretion to the Respondent with respect to matters concerning its essential security interest and (B) in any case, burden of proof to establish Respondent's wrongful reliance on Article 9 lies upon the Claimant.

A. Article 9 gives absolute unquestionable right to exercise its subjective discretion to the Respondent with respect to matters concerning its essential security interest

101. Article 9 limits the applicability of Investor protection under the BIT in certain circumstances[122] such as "*for the protection of its essential security interests*" by any Contracting Party. Though the the term "*essential security*" hasn't been defined in the

[121] *CMS-Award*, para.370; *Nicaragua-Merits*, para.222

[122] WILLIAM W. BURKE-WHITE & ANDREAS VON STADEN, '*Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*', 48:2 Virginia Journal of International Law 308 [*hereinafter* Burke-White/Von Staden] at p.318

present BIT yet it depends on the specific facts of each case[123] and bears a relatively wide interpretation.[124]

102. The Sat-Connect's technology was to be used for civilian and military purposes. Any abuse of responsibility undertaken by Claimant with regards to the Sat-Connect project would not only be contrary to the spirit of the JVA and particularly, Clause 4 (Confidentiality) therein but shall also ultimately cause a threat to "public security & order" and "economic & military interests" of Respondent .[125] Since general public and military were end-users of Sat-Connect's technology and Beritech had made substantial contributions to the project, thus abuse of its position by Claimant was an indubitable threat to Respondent's security interests.

103. In order to remove beyond doubt any discrepancy relating to the interpretation of the term "*essential security interests*" under Article 9 of the BIT, the words "*it considers*

[123] JAMES CRAWFORD, '*Second Report on State Responsibility: Addendum*', UN Doc. A/CN.4/498/Add.2 (http://untreaty.un.org/ilc/guide/9_6.htm) at para.281 (1999); JAMES CRAWFORD, '*The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*' [Cambridge and New York, Cambridge University Press, 2002], p.183; PETER LINDSAY, '*The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*', 52 Duke Law Journal 1277 at p.1278 (2003)

[124] *Nicaragua-Merits*, para.224

[125] *Brokdorf Judgment*, Bundesverfassungsgericht [BVerfG], Federal Constitutional Court of Germany (F.R.G.), 69 BVerfGE 315 at p.352 (May 14, 1985); Multilateral Agreement on Investment, Draft Consolidated Text, OECD Doc. DAFFE/MAI(98)7/REV1, [Chapter VI: EXCEPTIONS AND SAFEGUARDS p.76 footnote-2] (http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf) (Apr. 22, 1998); BURKE-WHITE/VON STADEN, pp.359-360

necessary" have been appended in clause (2) of the same Article. It bears an explicitly self-judging character[126] and provides an absolute bar to judicial or arbitral review.[127]

104. Respondent has taken measures in pursuance of protecting its own essential security interest which '*it considered necessary*' pursuant to Claimant's conduct. Article 9(1) further clearly states that nothing in the BIT shall require the Respondent to even furnish or allow access to '*any*' information, disclosure of which '*it determines*' to be contrary to its essential security interest.[128] Hence, the critical details relating to the identity of the Government Defense Analyst who has been cited in the August 12, 2009 Beristan Times article as well as the related information based on which the high-rank Government official based his security concerns need not be disclosed.

B. In any case, burden of proof to establish Respondent's wrongful reliance on Article 9 shall always lie upon the Claimant

105. The words "*it considers necessary*" in Article 9(2) followed by the strict language of Article 9(1) make it apparently crystal-clear that it is the subjective discretion of either Contracting Party to the BIT upon which it may apply measures to protect its own essential security interests.

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[126] Essential Security Interests under International Investment Law, '*International Investment Perspectives: Freedom of Investment in a Changing World*' [ed. OECD 2007], p.94

[127] BURKE-WHITE/VON STADEN, p.376; C. TODD PICZAK, '*The Helms-Burton Act: U.S. Foreign Policy toward Cuba, the National Security Exception of the GATT and the Political Questions Doctrine*', 61 Univ. Pittsburg Law Review 287 at pp.318–326 (1999–2000); DAPO AKANDE & SOPE WILLIAMS, '*International Adjudication of Security Issues: What Role for the WTO?*', 43 VA. J. INT'L L. 365 (2003) at pp.298,381-382

[128] *The BIT*, [Article 9(1)]

106. Furthermore, the opening words of Article 9 are "*Nothing in this Treaty shall be construed*". The word "*shall*" has a mandatory, obligatory and compulsory character[129] and coupled with the negative drafting of Article 9 of the BIT, it absolutely prohibits or prevents a dispute resolution forum (such as ICSID) from applying other principles of construction or interpretation of Article 9 of the BIT. Article 9 is an example of '*lex specialis*' and adjudicatory bodies including ICSID have, as a practice, let such specialized set of rules in a Treaty prevail over general and otherwise customary principles of international law.[130]

107. As a result, even if assuming *arguendo* that the Tribunal deems it appropriate to apply other principles of international law such as 'good faith' while adjudicating whether the Respondent has wrongfully invoked Article 9 of the BIT or not, the heavy onus to prove such wrongfulness shall still lie upon the Claimant.[131]

[129] *State v Shannon*, 185 P.3d 200 (Hawaii 2008); *Gray v Admin Dir. of the Court*, 31 P.2d 580, 592 n. 17 (1997); *Voellmy v. Broderick*, 980 P.2d 999, 1003-04 (App.1999); BLACK'S LAW DICTIONARY [9th ed. West Publisher 2009], p.1499; *Lakshmanasami Gounder vs C.I.T. Selvamani And Ors*, 1992 SCC (1) 91

[130] *Sempra Energy International v Argentina*, Award, ICSID Case No.ARB/02/16, para.378 (28 September 2007); *Enron Corporation and Ponderosa Assets, LP v Argentina*, Award, ICSID Case No.ARB/01/3, para.334 (22 May 2007)

[131] *LG&E Energy Corporation and ors v Argentina*, Decision on Liability, ICSID Case No.ARB/02/1, para.242 (October 3, 2006)

CONCLUSION ON MERITS

108. In light of the foregoing submissions and arguments advanced, it is humbly submitted that Respondent has not materially breached the JVA and its conduct does not violate any of its substantive obligations taken under the BIT. Respondent is also further entitled to rely on Article 9 (Essential Security) of the BIT as a valid defense to Claimant's claims.

PRAYER FOR RELIEF

109. In light of the submissions made above, the Respondent respectfully asks this Tribunal to find:

(1) That this Tribunal does not have the jurisdiction to hear the present dispute;

(2) That the Respondent has not materially breached the JVA and Respondent's conduct does not amount to a violation of its obligations under the BIT; and

(3) That the Respondent is entitled to rely on Article 9 of the BIT as a defense to the Claimant's claims

RESPECTFULLY SUBMITTED ON SEPTEMBER 18, 2010 BY

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TEAM CASTRO

ON BEHALF OF THE RESPONDENT

WÄLDE ASSOCIATES LLP