Erskine

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INTERNATIONAL CENTRE FOR SETTLEMENT OF

INVESTMENT DISPUTES

In Proceeding Between

TELEVATIVE INC.

(Claimant)

vs.

THE GOVERNMENT OF THE REPUBIC OF BERISTAN

(Respondent)

MEMORIAL FOR RESPONDENT

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2. International Center for Settlement of Investment Disputes Convention, 10 April 2006

3. International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001

4. Vienna Convention on the Law if Treaties, 23 May 1969, 1155 UNTS 331

LIST OF ABBREVIATIONS

[]	Paragraph
Art. / Arts.	Article / Articles
Beritech	Beritech S.A.
BIT	Bilateral Investment Treaty
CWF	Civil Works Force
ed.	Edition
et al.	*Et alia* (and others)
FET	Fair and Equitable Treatment
i.e.	*Id est* (that is)
ibid	Ibidem
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ILC	International Law Commission
JV Agreement	Joint Venture Agreement
NAFTA	North American Free Trade Agreement
p. / pp.	Page / Pages
Televative	Televative Inc.
v	Versus
VCLT	Vienna Convention of the Law of Treaties
vol.	Volume
Sat-Connect	Sat-Connect S.A.

STATEMENT OF FACTS

1. On 30 January 1995, Claimant, Televative Inc. was incorporated in Opulentia. Televative specializes in satellite communications technology and systems.[1]

2. On 20 March 1996, Opulentia and Beristan entered into a bilateral investment treaty (BIT).[2]
3. On 1 January 1997, the BIT became effective.[3]

4. In March 2007, the Government of Beristan established a state owned company, Beritech S.A.. The Beristan government owns 75% interest in Beritech and the remaining 25% of Beritech is owned by a small group of wealthy Beristan investors.[4]

5. On 18 October 2007, Beritech and Televative signed a joint venture agreement to establish the joint-venture company, Sat-Connect S.A., under Beristan law. Sat-Connect was established in order to develop and deploy a satellite network and accompanying terrestrial systems and gateways. The system was planned to be used for civilian and military purposes. The Government of Beristan has co-signed the JV Agreement as a guarantor.[5]

6. On 12 August 2009, The Beristan Times published an article that included a comment by a highly placed Beristan government official that raised national security concerns by revealing that seconded Televative personnel to the project leaked critical information to the Government of Opulentia.[6]

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[1] Annex2, [1]

[2] Annex1

[3] 1st Clarification, 174.

[4] Annex2, [2]

[5] Annex2, [3],[5],[6]

[6] Annex2, [8], 1st Clarification, 178.

7. On 21 August 2009, board meeting of the Sat-Connect was held and the chairman of the board made a representation to the directors about the allegations that had appeared on the Beristan Times.[7] All board members were present at this meeting.[8]

8. On 27 August 2009, the Sat-Connect held a board meeting and decided to buyout all Televative's interests in the Sat-Connect project on the basis of Clasue 8 of the JV Agreement, with the support of majority of the board of directors. The date of the meeting was informed to the directors but the proposed agenda was not provided as a formal notice to the directors. The four directors appointed by Televative, did not participate in the voting.[9]

9. On 28 August 2009, Beritech noticed Televative to hand over possession of all Sat-Connect site, facilities and equipment within fourteen days and to remove all seconded personnel from the project.[10]

10. On 11 September 2009, Beristan sent in CWF("Civil Works Force"), a section of Beristan army to secure the project sites and facilities on the basis of an executive order. The seconded Televative personnel were instructed to leave the project sites immediately, and were eventually evacuated from Beristan.[11]

11. On 12 September 2009, Televative submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT in which Televative notified its desire to settle amicably. In case it fails to settle, it was supposed to proceed with arbitration pursuant to Art. 11 of the BIT.[12]

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[7] Annex2, [9]

[8] 1st Clarifiation, 127.

[9] Annex2, [10], 2nd Clarification, 229.

[10] Annex2, [10]

[11] Annex2, [11], 2nd Clarification 208, 1st Clarification 139.

[12] 1st Clarification, 113.

12. On 19 October 2009, Beritech filed a request for arbitration against Televative under the JV Agreement and paid US $47million into an escrow account. Televative has refused to accept the payment and to respond to Beritech's arbitration request.[13]
13. On 28 October 2009, Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.[14]
14. On 1 November, the dispute brought by Televative against Beristan Government was registered for arbitration.[15]

[13] Annex2, [13]

[14] Annex2, [14]

[15] Annex2, [16]

SUMMARY OF ARGUMENTS

ARGUMENTS FOR JURISDICTION

16. Jurisdictional requirements are satisfied under Art. 25(1) ICSID Convention: the parties' consent to arbitration under ICSID, and the requirements *raione personae* and *ratione materiae*. The main arguments for jurisdiction are related with the relations between treaty claims and contract claims. First, whether the treaty-based tribunal has jurisdiction over contractual claims by virtue of "Umbrella Clause". Second, whether the parties of the BIT intended to cover contractual claims in the jurisdictional clause of BIT. Third, whether the forum selection clause of Clause 17 of the JV Agreement affects the tribunal's jurisdiction. And Fourth, whether the parallel proceedings are relevant in the present case.

MERITS OF THE CLAIM

17. First, whether Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 of the JV Agreement. Second, whether Respondent has breached its treaty obligations with regard to fair and equitable treatment, national treatment, and expropriation. Third, whether the breach cannot be justified by Respondent's assertion on essential security. Fourth, whether Respondent's actions or omissions amount to expropriation, discrimination, a violation of fair and equitable treatment, or otherwise violate general international law or applicable treaties. Fifth, whether Respondent breached its obligations to observe any obligations assumed with regard to investments.

ARGUMENTS

PART ONE: JURISDICTION

I. BERITECH S.A. HAS SEPARATE LEGAL PERSONALITY FROM BERISTAN

18. Beritech S.A. has separate legal personality from its national state, Beristan, even though it is a state-owned company. For this reason, Respondent contends that it is not a proper party to be sued in relation to an alleged breach of the JV Agreement (1), and the fact that Respondent has no responsibility it has assumed with regard to investments as a guarantor of the JV Agreement substantiates Respondent's argument (2).

A. Beritech S.A. is a Separate and Autonomous Legal Entity

19. Beritech S.A. is a state-owned company whose 75% interest is owned by the Beristan government and the remaining 25% of Beritech is owned by a small group of wealthy Beristan investors who have close ties to the Beristan government.[16] Regardless its character, a state-owned company, Beritech S.A. is a separate and autonomous company acting in its own name to produce profits, so it has responsibility to observe commitments guaranteed by itself, not by its national state, Beristan. This undermines Claimant's argument that Beritech S.A. is attributable to Respondent.

20. The jurisprudence of tribunals also supports Respondent's argument. There are basically two strands concerning this; one strand of cases is rules of attribution apply to determine whether the undertakings of contract signed by an entity with tis own personality in domestic law can be imputable to the state, and the other strand

[16] Record, Annex 2, [2].

of cases is legal personality of the state-entity is distinct from that of the state.[17] Respondent contends based on the latter view of tribunals including *Salini v Morocco, RFCC v Morocco and Salini v Jordan* in particular.

21. In the decision of *Salini v Jordan*, the tribunal discussed whether the contract with the state can be said to bind the state as a party and answered in that questions negative on the basis that "the contract at issue was entered into between the claimants and the [state-entity at issue in the case], which under the [laws of home state at issue in the case] governing the contract, has a legal personality distinct from that of the [home state]; accordingly, it cannot be ruled out that [home state at issue in the case] might not be held responsible for [state-entity's at issue in the case] breaches of contract."[18]

22. For these reasons, Respondent asserts that Beritech S.A. is not attributable to Respondent because of their distinct legal personality, and the present tribunal based on the Beristan-Opulentia BIT should stay or dismiss the treaty arbitration since Claimant misunderstood the party concerned in the present dispute.

B. Argument about Respondent's Liability as a Guarantor of the JV Agreement is unnecessary since there is not Default at all

23. On 18 October 2007, Respondent has co-signed the JV Agreement as a guarantor of Beritech's obligations, so when Beritech defaults its obligations against Claimant, Beristan should assume responsibility on it as a guarantor which has legal implication.

24. Respondent, however, will not bear any responsibility arose from the concerned dispute because of the reasons described here: first, Beritech abide by the JV Agreement with sincerity, so there is not any default which can create Respondent's

[17] Katia Yannaca-Small (2010), p. 322.

[18] *Salini v Jordan*, para. 100.

responsibility as a guarantor of the contract. Second, the buyout procedure conducted by the Sat-Connect board of directors was based on the reasonable judgment to hold responsibility to Claimant for information leak.

25. Therefore, there is no evidence to argue about Respondent's liability as a guarantor under the JV Agreement because there is not any default taken by Beritech. This strengthens that Respondent does not need to be a concerned party to the contract-based arbitration.

II. CONTRACT CLAIMS BASED ON THE JV AGREEMENT SHALL PRCLUDES ICSID JURISDICTION

26. On October 19, 2009, Respondent filed a request for arbitration against Claimant under Clause 17 of the JV Agreement[19] and the tribunal has been constituted and determined that the seat of the arbitration shall be Beristal, the capital of Beristan.[20] Respondent has urged Claimant to respond, but it refused to participate and submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT on September 12, 2009.[21]

27. Claimant can hesitate to bring the suit before Beristan national court suspecting its fairness, justice and equity, however, treaty-based tribunal which was brought before ICSID by Claimant lacks jurisdiction since there is no matter related to a breach of treaty in the present case **(1)**, and Art. 10 of the Beristan-Opulentia BIT does not have effect to elevate contractual claims to treaty claims **(2)**. Additionally, Art. 11 of the Beristan-Opulentia BIT does not encompass disputes arose from the contract **(3)**.

A. Breach of Treaty is Irrelevant in the Present Case

[19] Annex 2, [13].

[20] 1st Clarification, [118].

[21] 1st Clarification, [133].

28. To bring the dispute to international arbitration, there should be material or substantial breach of treaty, but there is no explicit evidence to prove Respondent breached the Beristan-Opulentia BIT, or otherwise violated general international law or applicable treaties as Respondent consistently stated. Also, deployment of the CWF by executive order to secure all sites and facilities of the Sat-Connect project and to instruct those personnel associated with Televative to leave the project sites and facilities was for national security of Beristan, so that was justified on that ground.[22]

29. In this respect, Respondent asserts that Claimant should respond to the separate arbitration proceedings that Respondent has already commenced pursuant to the dispute settlement clause in the JV Agreement if Claimant wants to resolve the dispute concerned.

B. Umbrella Clause does not have Effect to "Elevate" Contractual Claims to Treaty Claims

30. Many investment treaties include clauses so-called "Umbrella Clause" demanding the states to observe any obligations or commitments it has entered into with investors. BIT between Beristan and Opulentia also included such provision in Art. 10 "Observance of Commitments" which reads as follows:

> " Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."[23]

31. In respect of the scope of umbrella clause, a number of tribunals have confronted the question "whether the umbrella clause 'elevates' contractual breaches to the level of treaty breaches and, therefore, confers upon treaty-based tribunal

[22] Annex 1, [15].

[23] Annex1, Opulentia-Beristan BIT Art. 10.

jurisdiction to decide contractual claims."[24]

32. The first case dealt with the scope and effect of umbrella clause was *SGS v Pakistan*. The tribunal held that it cannot find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect to "elevate" its claims grounded solely in a contract to claims grounded on the BIT, and thus the tribunal lacked jurisdiction over the breach of contract claims.[25]

33. The argument that the umbrella clause has significance was left more open in *SGS v Philippines* reached the opposite conclusion. The eventual result in the award was inconclusive on this point, however, *SGS v Philippines* decision cannot be decisive because of the reasons here. First, as the award in *SGS v Pakistan* points out, if such an extensive meaning was to be given to the clause, it would render the carefully negotiated provisions of the investment treaty nugatory.[26] Second, even though the developing trend is to follow the *SGS v Philippines* reasoning and allow claims for contractual obligations pursuant to an umbrella clause, not all tribunals have followed this trend and the fact that there is no principle of precedent in the international investment law means that Respondent's argument is meaningful whether it is majority or not.

34. Even in the *SGS v. Philippines* case, there is no supremacy between contract claims and treaty claims,[27] so, in this respect, Respondent asserts that Claimant should respond to the contract claim because it arose earlier than the treaty based tribunal and the present case is substantially based on the JV Agreement not the BIT itself.

C. The "Dispute" described in Art. 11 of the Beristan-Opulentia BIT does not encompass Disputes arose from the JV Agreement

[24] Katia Yannaca-Small (2010), p. 329.

[25] *SGS v Pakistan*, para 165.

[26] Sornarajah(2010), p.304.

[27] Campbell Mclachlan(2007), p. 115.

35. Most investment treaties include dispute resolution clause which is one of the mechanisms internationalizing contract claims. In the Beristan-Opulentia BIT, Art. 11 is such clause providing settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party."[28] In interpretation of such clause, there are mainly two approaches, restrictive and wider, and the restrictive approach denying the dispute resolution clause encompasses contract claims is more persuasive to adopt to the case here.

36. The *Salini v Morocco* tribunal restricted its jurisdiction to only such contractual claims that arose out of a "breach of contract that binds the State directly"[29] and the tribunal of *Impregilo v Parkistan* relied on *Salini* which held about the scope of the treaty's dispute resolution provision is "limited to disputes between the entities or persons concerned".[30] Another notable decision supporting a restrictive approach is *SGS v Pakistan*. That tribunal concluded that, despite the ordinary meaning, "we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract," and, therefore, "without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9."[31] As the tribunal of *SGS v Pakistan* held in its decision, a broad dispute resolution clause in a BIT does not provide sufficient basis for a treaty-based tribunal to have jurisdiction over purely contractual claims which was emphasized again in the decision rendered by the arbitral tribunal in *LESI-Dipenta v. Algeria*.[32]

37. Besides the jurisprudence of tribunals supporting Respondent's argument, here are

[28] Annex1, Beristan-Opulentia BIT Art. 11.

[29] *Salini v Morocco*, para. 61.

[30] *Impregilo v Pakistan*, para. 211.

[31] *SGS v Pakistan*, para. 161.

[32] *LESI-Dipenta v Algeria*, para. 25.

two more logical reasoning. First, in the absence of an express provision, a phrase such as "all disputes", in and of itself, cannot provide a basis for the jurisdiction of a treaty-based tribunal over purely contractual claims.[33] Second, if the parties intended to extend its jurisdiction to contractual claims, the language of the dispute resolution provision would be so crafted such as Art. 24 of the U.S. Model BIT but they didn't.

38. In this respect, Respondent contends that the present tribunal doesn't have jurisdiction over contract claims, so Claimant should respond to the Respondent's notice of arbitration of national arbitration proceedings to settle dispute concerned.

III. "FORUM SELECTION CLAUSE" OF THE JV AGREEMENT AND "PARALLEL PROCEEDINGS" RECOGNIZES THE JURISDICTION OF CONTRACT-BASED TRIBUNAL

39. Besides umbrella clause and jurisdictional clause, there are two other issues, "Forum Selection Clause" of the JV Agreement and "Parallel Proceedings", which can affect the treaty-based tribunal's jurisdiction brought before ICSID by Claimant.

40. Respondent asserts that forum selection clause of the JV Agreement substantiates the contract-based arbitration tribunal's jurisdiction **(1)**, and the existence of parallel proceedings will support Respondent's contention, the contract claims tribunal is enough to resolve the present case without using any other fora, ICSID in particular **(2)**.

A. Exclusive "Forum Selection Clause" of the JV Agreement shows the Parties' Intention giving Priority to the Contract Claims

41. While a number of tribunals have been concluded that a contractual "Forum Selection Clause" will not divest the treaty-based tribunals' jurisdiction, the effect

[33] Emmanuel Gaillard

of a contractual forum selection clause, however, may be different when the question is whether a treaty-based tribunal has jurisdiction over contract claims.[34] So, the question arose here is whether a treaty-based tribunal, which may otherwise have jurisdiction over "purely" contractual claims and claims where "the basis of the claim" is a contract, or the "essential basis" for the claims is a breach of contract, can exercise jurisdiction in the presence of an exclusive contractual forum selection clause.

42. Most tribunals including *Joy Mining v Egypt*[35], *Vivendi I* annulment committee[36] and *SGS v Philippines* have held that an exclusive contractual forum selection clause deprives a treaty-based tribunal of jurisdiction over contract claims. In particular, *SGS v Philippines* and *Vivendi I* annulment committee's decisions held that the contractual forum selection clause even precludes a treaty-based tribunal's jurisdiction.

> "The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract."[37]

43. As Respondent has consistently contended, the essential basis for the claim is a breach of a contract since Respondent did not breach any terms of the Beristan-Opulentia BIT, general international law or applicable treaties, and all the conflicts concerned between Claimant and Respondent had begun when the buyout procedure was commenced by the Sat-Connect board of directors based on the alleged charge of information leak. The jurisprudence of tribunals also supports Respondent's argument.

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[34] Katia Yannaca-Small(2010), p. 345.

[35] *Joy Mining v Egypt*, para. 89.

[36] *Vivendi I* Annulment, para. 98.

[37] *SGS v Philippines*, para. 154.

44. Even in the case of assuming the present dispute arose not only from the JV Agreement but also the Beristan-Opulentia BIT following the Claimant's arguments, there is a possible exception of the tribunals' consistent refusal to abrogate treaty jurisdiction in the face of a contractual form selection clause which reads as follows:

45. 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…Each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute.[38]

46. If a forum selection clause such as Clause 17 of the JV Agreement in this case constitutes an explicit waiver or other specific indications of the common intention of the parties, it would appear that an investor could waive its rights to an international treaty-based arbitration.[39] The tribunals of *Aguas del Tunari* and *Occidental* substantiated it and held that "assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective."[40]

47. In the present case, Clause 17 of the JV Agreement describing "waiver" is an evidence which can verify the parties intended to waive any other forum including ICSID besides arbitration under Beristan's national law. The fact that it is scarce to put waiver in an investment contract a provision which is unfavourable to investor also shows that there was a specific implication to waive its right to an international treaty-based arbitration.

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[38] Annex3, JV Agreement, Clause 17.

[39] Katia Yannaca-Small, (2010), p. 345.

[40] See *Aguas del Tunari*, paras. 118~119, and *Occidental Petroleum v Ecuador*, paras. 71~73.

48. Therefore, Respondent contends that the present tribunal should stay until the contract-based tribunal reaches an award, or the national arbitration will preclude the international arbitration because of the forum selection clause.

B. Requirements for Parallel Proceedings are satisfied

49. Respondent urges that Claimant should respond to Beritech's notice of arbitration in the separate arbitration proceedings that Respondent has already commenced pursuant to the dispute settlement clause in the JV Agreement.[41] On the part of Respondent, parties and causes of action in the present case are identical to those of arbitration which Beritech has already commenced.

50. Furthermore if the ICSID Tribunal is to decide that it has jurisdiction to hear this case, the parallel proceedings could happen resulting in undermining a legal stability and predictability. Thus respondent submits that Televative should respond arbitration pending in Beristan.

C. Parties are identical

51. Respondent argues that claimant has improperly reformulated them as claims arising under the Beristan-Opulentia BIT,[42] so bringing the case to the ICSID proceedings *per se* is unsuitable. Disputes at issue here are against Beritech *de facto* and pursuant to Clause 17 of the JV Agreement any disputes arising out of or relating to this Agreement shall be resolved by only arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan. Beritech already commenced arbitration according to the JV Agreement on October 19, 2009. However, claimant did not respond and exercised its right to initiate arbitration under the BIT. Thus, respondent asserts that parties under the JV Agreement and under the BIT is identical in terms of substance in claim.

[41] Minutes of the First Session of the Arbitral Tribunal, [15].

[42] Minutes of the First Session of the Arbitral Tribunal, [15].

D. Causes of action are identical

52. Claimant who is respondent in previous proceedings Beritech pursued, initiated ICSID arbitration in reliance on breaches of treaty by the respondent. However, respondent reiterates arguments that claimant misunderstands the nature of claims and repackages contract claims as treaty claims. Causes of action that claimant brought to ICSID arbitration are based on contract breaches in substance and these causes of action are also the grounds for domestic arbitration that Beritech commenced.
53. Respondent therefore insists that both parties and causes of action in this international investment arbitration are identical to those in pending domestic arbitration in quality. On the basis of reasons above, identity of the parties and causes of action in fact, respondent submits parallel proceedings will exist if the present tribunal accept claimant claims, which may cause conflicting results.

IV. COOLING OFF PERIOD IS A JURISDICTIONAL REQUIREMENT RATHER THAN PROCEDURAL ONE

54. The Republic of the Opulentia also argues that Televative did not comply with the six-month waiting period set out in the BIT before arbitration proceedings were initiated. Respondent submits this cooling off period provision which is provided for facilitating pre-arbitration settlement between parties is a jurisdictional requirement and ICSID tribunal therefore lacks jurisdiction over this claims.

55. Respondent asserts that Art. 11(1) of the BIT conditions requiring 6 months negotiation or consultation period should be observed and before elapse of prescribed period investors cannot commence international arbitration proceedings. Respondent contends that Televative submitted this matter to ICSID one month and sixteen days after the written notification. Respondent submits that six months did not pass, and ICSID tribunal therefore does not have jurisdiction over this case.

56. In *Goets v Burundi* (1999), the tribunal found that non-compliance with a waiting period constituted a bar to part of the claim.[43] The tribunal rendered that the waiting period set out in the BIT had been satisfied with respect to the investor's primary claim but not withrespect to certain supplementary claims put forward by the Claimant. So the tribunal held that the dispute on which the tribunal is called to give an award related exclusively to the primary claims.[44]

57. It deserves to note that *Generation Ukraine Inc v Ukraine* (2003) tribunal's interpretation in this respect. The tribunal expressed reluctance to interpret cooling off provision as a mere procedural rule, rather than as a jurisdictional requirement. It also stated that an explicit treaty provision should not be interpreted in such a way as to render it superfluous.[45]

58. As asserted in an *obiter dictum* of *Enron Case* (2004), the requirement of a waiting period is a jurisdictional one and that failure to comply with that requirement would result in a determination of lack jurisdiction.[46]

V. THE CONCLUSIONS OVER JURISDICTION CONCERNING THE PRESENT DISPUTE

59. For the reasons given above, Claimant concludes as follows:

(1) Beritech S.A. has separate legal personality from Beristan

(2) Argument about respondent's liability as a guarantor of the JV Agreement is unnecessary since there is not default at all

(3) Umbrella Clause does not have effect to 'elevate' contractual claims to treaty claims

(4) The "dispute" described in Art. 11 of the Beristan-Opulentia BIT does not encompass disputes arose from the JV Agreement

[43] *Goetz and ors v Burundi*, (1999), paras. 90-93.

[44] *Goetz and ors v Burundi*, (1999), para. 93.

[45] *Generation Ukraine, Inc v Ukraine*,

[46] *Enron Corporation and Ponderosa Assets LP v Argentina*, (2004), para. 88.

(5) "Forum Selection Clause" of the JV Agreement and "Parallel Proceedings" recognizes the jurisdiction of contract-based tribunal

(6) Cooling off period is a jurisdictional requirement rather than procedural one

ARGUMENTS
PART TWO: MERITS OF THE CLAIM

I. RESPONDENT HAS AFFORDED FAIR AND EQUITABLE TREATMENT

61. Art. 2(2) of the Beristan-Opulentia BIT puts Respondent under an obligation to provide Opulentian investors fair and equitable treatment by stating that :

> "Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party"

62. The concept of "fair and equitable" is frequently discussed in international investment arbitration.[47] One of the major issues is whether the concept of "fair and equitable treatment" should be interpreted as same as the minimum standard of treatment in customary international law for the treatment of aliens.[48] However in the present case, it is explicitly expressed that the treatment shall be "in accordance with customary international law" and thus FET standard should be interpreted as including the minimum standard of treatment as well.

63. The *Neer v Mexico* claim shows the typical content of the minimum standard of treatment in customary international law:

> " the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[49]

64. Claimant asserts that Respondent breached the fair and equitable standard of the BIT in three aspects. It argues that forcible buyout and expulsion was based on reasons unrelated to Claimant and was a product of a conspiracy against Claimant.

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[47] Rudolf Dolzer *et al.* (2008), 119.

[48] *Mondev International Ltd v United States*, (2002), para 125.

[49] *L.F.H. Neer and Pauline Neer v Mexico*, (1926).

Claimant also argues that it was not provided necessary opportunities to respond to the false charges. However, Respondent contends that its actions that have been argued by Claimant as breach of "fair and equitable" standards, were taken as a lawful exercise of contractual right(A), and also in due process of law(B). In addition, Respondent protests that all its actions were done in good faith that and in accordance with minimum standard of treatment in customary international law(C).

A. Buyout was based on Confidentiality and Buyout Clause of the JV Agreement

1. Information leak of the project conform material breach of the JV Agreement

65. In the JV agreement between Beritech S.A. and Televative, parties agreed on a confidentiality clause with regard to the performance of the contract and that violation of that particular clause would be considered a material breach. In Clause 4 of the JV Agreement, it is stated that:

> (1) " All matters relating to this Agreement and the Sat-Connect project, including all confidential Information, shall be treated by each of the parties, including the JV company Sat-Connect as confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person or entity not authorized under this agreement, without the prior written approval of the Sat-Connect board of directors except (i) where the information properly comes into the public domain, (ii) as required by law, or (iii) as may be necessary to enforce the terms hereof.
> (4) "Any breach of this Clause 4 shall be deemed a material breach of the Agreement."

66. Televative, as a contracting party of this agreement, has the obligation to keep confidentiality and violation of this stipulation was to be deemed as a material breach. However, a highly placed government official mentioned in a newspaper article that there was leak of information by Televative seconded personnel to Opulentian government.[50] Televative argues that this was a false charge and there was no evidence that the information was leaked. In Respondent's view, it is

[50] Annex2, para 8; 1st Clarification 178.

difficult to believe that this official's comment was a pure fabrication, and also that Beristan Times printed this story if it had doubts on the authenticity.

67. There might not be physical evidence of the leakage as Claimant asserts, but a highly placed government official's comment can be considered as positive, verbal evidence. The government official who mentioned the information leak did not have any direct relationship with Beritech and being a high-ranked official, he would not have officially spread false information. In addition to that, Beristan Times is an independent press[51] and it seems unlikely that the allegation was a false charge under these circumstances.

68. Even if the allegation were not true, it is important the fact that Beritech had lost faith in its partner, Televative. Opulentia and Beristan are both located within Euphonia[52], and it was a publicly known fact that the services and licensing technology of the developing system were about to be sold to other companies and governments in the region.[53] Therefore, even a small possibility of information leak can be a serious threat of financial damage to Sat-Connect and Beritech and by creating such possibility it should be considered tantamount to a breach of the confidentiality clause.

2. Commitment of material breach entitles Bertech S.A. to buyout all of Televative's interests

69. Clause 8 of the JV Agreement states that :

> " If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement."

70. According to Clause 8 of the JV Agreement, Beritech is entitled to purchase all of

[51] 1st Clarification, 168, 162.

[52] 1st Clarification,141

[53] 1st Clarification,148

Televative's interest in the Agreement in case of Televative committing a material breach of the Agreement.

71. As previously considered, Respondent deemed that there is credible evidence on the information leak by Televative personnel. Based on this fact, it can be concluded that Claimant breached the confidentiality clause, and also committed material breach of the JV Agreement according to Clause 4(4). In conclusion, Beritech have obtained the authority to buy all of Televative's interests. Therefore, the buyout of Televative's interests was not an arbitrary decision of Beritech, but was clearly a rightful decision under the JV Agreement.

B. Buyout was decided in Due Process

72. Despite the different views, many investment arbitration tribunals accepted that guarantee of due process in administrative decisions constitutes an important part of fair and equitable treatment.[54] In the present case, Claimant asserts that Respondent had breached its obligations to provide due process in making administrative decision to expel Televative personnel from Beristan. However, Respondent protests that the expulsion was carried out in accordance to due process and all necessary steps were taken.

73. First of all, Claimant asserts that there was no prior notice concerning the proposed agenda of the board of directors meeting that took place on 27th of August. It is true that there wasn't a separate, formal notice on the agenda,[55] but there was a presentation made by the president of the board about the allegations that had appeared on the newspaper article, at the meeting on the 21st of August. Every single member of the board was present at this meeting[56] and it is apparent from

[54] *Metalclad Corp v Mexico*, (2000); *Middle East Cement Shipping and Handling Co SA v Egypt*(2002)

[55] 2nd Clarification, 208

[56] 1st Clarification, 127.

the records that one of the directors raised potential relevance of Clause 8 of the JV Agreement and there was discussion among the members.[57] From that meeting, board members should have anticipated that the proposed agenda was related to the further actions on the allegation issue, since the next meeting was held within such a short period of time. Therefore, the previously held meeting should be considered as prior notice of the agenda.

74. Claimant also asserts that no opportunity was given to respond to false charges involving the allegations that Televative staff leaked information about the project. Such claim is unreasonable in a few aspects. As previously examined, there was a meeting of board of directors on the 21st of August, where all members were present and four directors appointed by Televative had a chance to clear away the doubts. They also had a second chance to respond at the meeting on the 27th of August, but three of the Televative directors did not attend the meeting and one other director, Alice Sharpeton at first attended, but left the meeting before voting. If Televative had a strong will to clear the suspicions, the four directors should have tried persistently to persuade other directors, rather than trying to nullify the decision by intentionally not attending the meeting. Therefore, it seems that Televative was given sufficient opportunities to verify its innocence but it did not make the best use of them.

75. There could be an argument whether there was enough number of people to satisfy the quorum at the time of the buyout decision. The quorum of the board of directors is obtained with presence of six members and quorum is required at the moment of voting. It is manifest that six members were present at the beginning of the meeting[58] but one of the members, Alice Sharpeton did not participate in the voting [59]and left the meeting before its end. However, it is evident that all members knew about the date of the meeting and some directors appointed by Televative

[57] 1st Clarification, 169.

[58] Annex 2, [4], [10]

[59] 1st Clarification, 156.

speculated that the buyout would be discussed and decided not to attend the meeting in order to deprive it of the necessary quorum.[60] Such deliberate abuse of the quorum should not be admitted and therefore the validity of the board's decision should not be questioned.

76. In conclusion, the buyout decision was made in due process and opportunities were given to prove Claimant's innocence, but the directors appointed by Televative did not make good effort to prevent the buyout during the process. Therefore Claimant's assertion about lack of due process should be declined.

C. Respondent did not Violate the Obligation to Act in Good Faith

77. According to the Art.2(2) of the Beristan-Opulentia BIT, fair and equitable treatment should be in accordance with customary international law and as mentioned above, customary international law obliges the state to treat foreign investors in good faith.

78. Claimant suspects that the expulsion and the buyout were products of conspiracy between Beritech and Beristan but such suspicion is preposterous that not a single evidence was put forward to support the idea. Though the expulsion and the buyout was implemented in a hasty manner, it was not because the decisions were prearranged but because the allegations against Claimant was closely related to national security issues and thus prompt action was required.

79. Therefore, Respondent did not fail to act in good faith with regard to the conspiracy issue and did not violate customary international law to afford the minimum standard of treatment.

II. EXPULSION WAS TAKEN AS A MEASURE TO PROTECT ESSENTIAL SECURITY OF BERISTAN

[60] 2nd Clarification, 208.

A. Sat-Connect S.A. Project is closely related to Beristan's Essential Security

80. In the present case, Respondent asserts that the Sat-Connect project directly implicates the national security of Beristan. The satellite and communications technology system of Sat-Connect can be used for civilian or military purposes and several segments of the Beristan armed forces were planned to use the Sat-Connect system.[61] Since the system covers the whole region of Euphonia - which includes Opulentia, Beristan and five other countries, it would be a serious threat to national security on the part of Beristan if Opulentia gains access to the system. Obtaining access to the system means that there is a possibility that it can also obtain crucial military information of Beristan. Therefore, any chance of information leak that enables access to the system constitutes a substantial threat to Beristan's national security.

81. Claimant asserts that there wasn't any information leak of the Sat-Connect project and mere allegations and rumors cannot be a basis for the buyout and the expulsion but even if its assertion is true, any small possibility can be a threat to Beristan's national security. Besides, with regard to national security, a state should be allowed to take precautionary measures since it would not be effective to take measures once the crucial information had been revealed.

B. Beristan's Measures for the sake of National Security can be Justified by the Art. 9 of the BIT

82. Art. 9 of the Beristan-Opulentia BIT states that :

"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 security interest; or
to preclude a Party from applying measures that it considers necessary for the

[61] Annex2, [6]

fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for protection of its own essential security interests."

83. This article of the BIT explicitly allows the contracting state to take necessary measures for protection of its essential security. Such articles are referred to as non-precluded measures(NPM) clauses due to the wording.[62] In applying the NPM clause to exempt the contracting state from the treaty obligations, it is frequently discussed whether the national security provision is self-judging(B.1), and what the relationship is between the security exception and necessity as a ground for precluding responsibility under customary international law(B.2).[63]

1. Beristan is authorized to determine threat to national security by Art.9 of the BIT

84. According to the Art. 9(2) of the BIT, Beristan is entitled to take measures "that it considers necessary" for its own security interests. Similar clauses are found in 2003 US and 2004 Canadian Model BITs, using the subjective appreciation of national security. From the wording the BIT adopted, the article can be classified as a "self-judging" exception clause. As long as Beristan had serious concerns on the security issue, it can decide whether there is need for a specific measure or which measure it should take for the sake of national security. Objectiveness of the appreciation is not a criterion under the self-judging clause, thus the appreciation does not have to be based on substantial evidence.

2. Art. 9 of the BIT should not be interpreted as same as the term of "necessity"

85. The meaning of "necessary for" in Art. 9 of the BIT has a significant difference from the term "necessity" in customary international law. It is widely accepted that Art. 25 of the ILC Draft articles on State Responsibility reflects the term of necessity in customary international law.[64] The article states that a state's action

[62] Andrew Newcombe (2009), p.482.

[63] *Ibid*., p. 491.

[64] Rudolf Dolzer *et al.*(2008), 168.

can be considered "necessary" if it "is the only way to safeguard an essential interest against a grave and imminent peril" and "does not seriously impair an essential interest of the other state".[65] In a series of cases under Argentina-US(1991), Argentina had defended its measures based on the BIT and necessity under customary international law. The tribunals of *CMS, Enron and Sempra*[66] declined Argentina's defense in terms of the customary international law principles on necessity but this was improper as the annulment committee in *CMS* pointed out.[67] What matters more is how the BIT acknowledges essential security because it is the *lex specialis* to customary international law. The annulment committee in *CMS* decided that:

> "if state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law — and this was the position taken by the ILC."[68]

86. Therefore, Respondent does not necessarily need to satisfy all the strict criteria stated in the ILC Draft Articles on State Responsibility if its actions can be interpreted as a security measure under the Beristan-Opulentia BIT. In the present case, it is not apparent that grave and imminent peril existed at the time of the buyout and the expulsion but since Respondent decided that these measures were necessary, its actions could be justified under Art. 9 of the BIT.

III. RESPONDENT HAS NOT BREACHED THE NATIONAL TREATMENT OBLIGATIONS

87. Respondent opposes the National Treatment claim arguing that Claimant's contentions do not amount to a National Treatment claim, and that Claimant has not shown enough to get the tribunal across threshold to establish a breach. Respondent

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65 ILC Draft Artcles, Art. 25

66 *CMS v Argentina*(2003); *Enron v Argentina* (2007) ; *Sempra Energy v Argentina* (2007).

67 M. Sornorajah(2010), p. 461.

68 *CMS v Argentina Annulment* (2007), paras 133-134.

asserts that Claimant breached Clause 4 (Confidentiality) of the JV agreement by leaking information about the Sat-Connect project to the Government of Opulentia and Claimant's removal from the Sat-Connect project is justified on national security grounds.

88. Respondent submits that Claimant's claim under Art. 3(2) requires a showing of intent, since Claimant alleges that its expulsion from the Project was intended to benefit a group of local Beristan personnel, which necessarily comprises intent.

89. Claimant suspects that the expulsion was a product of intent to favour individuals with relevant expertise in the Beristan labor market but such suspicion is unfounded that not a single evidence was put forward to prove the intent. Though the expulsion was implemented in a hasty manner, it was not because the decisions were prearranged based on the intent of local favouritism but because the absence of management could damage the Sat-Connect project enormously and thus prompt action was required. In conclusion, Respondent has not breached the national treatment obligations.

IV. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S PROPERTY

90. Respondent contends that the buyout of Claimant's interest in the Sat-Connect project does not violate Claimant's rights under Art. 4 of the Beristan-Opulentia BIT (A). Respondent asserts that Claimant's property is not taken by the organ of the Respondent (A.1) and the implementation of buyout procedure is not forcible and in conformity with provisions of the JV Agreement (A.2). Also, the reliance on Clause 8 (Buyout) of the JV Agreement does not constitute an expropriation of Claimant's contractual rights (A.3).

91. In the alternative, the expropriation of Claimant's property is legally justified under Art. 4(2) of the Beristan-Opulentia BIT (B). Respondent contends that Claimant's removal from the Sat-Connect project was vindicated on national security grounds (B.1) and Claimant is not entitled to compensation or any other remedies (B.2).

A. The Buyout of Claimant's Interest in the Sat-Connect Project Does not Violate Claimant's Rights under Art. 4 of the Beristan-Opulentia BIT

1. Claimant's property is not taken by the organ of the Respondent

92. The international law position on whether a measure has been taken by an organ of the State is expressed in Art. 4 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001:

93. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government of a territorial unit of the State.

94. An organ includes any person or entity which has that status in accordance with the internal law of the State.[69]

95. In *Eureko v Poland*[70], there was a divided tribunal on the issue of whether the disputes arising out of the contractual relations between the foreign (Dutch) investor and the State Treasury of Poland were attributable to the State. The majority stated that the 'crystal clear' text of Art. 4 compelled the conclusion that the State Treasury constituted an organ of the Republic of Poland. However, Professor Rajska opined that the majority's conclusion was inconsistent with this text, even broadly construed. Professor Rajska commented that the State Treasury was exclusively liable for its obligations and was a juridical person separate from the State (i.e. an autonomous juridical person that could not exercise any public or regulatory functions). He further observed that under Art. 4(2), since the State

[69] J.Crawford(2002), p.94.

[70] *Eureko v Poland* (2005).

Treasury did not have the status of a State organ in accordance with Polish law, its conduct should not be considered an action of the State. That is, Professor Rajska read sub-article 2 as limiting sub-paragraph 1.

96. Since Beritech did not have the status of a State organ in accordance with Beristan law, its conduct associated with the buyout process should not be considered an action of Respondent. Beritech is exclusively liable for its obligations and is a juridical person separate from Respondent. Thus, Claimant's property is not expropriated by the organ of the Respondent and the legal issues derived from the buyout procedure should be dealt with by Claimant and Beritech.

2. The implementation of buyout procedure is not forcible and in conformity with provisions of the JV Agreement

97. Respondent claims that Beritech had proper entitlement to invoke Clause 8 of the JV Agreement because Claimant violated Clause 4 (Confidentiality) of the Agreement, which states that:

> "(1) All matters relating to this Agreement and the Sat-Connect project, including all Confidential Information, shall be treated by each of the parties, including the JV company Sat-Connect, as confidential. Each of the parties and Sat-Connect agree that it will keep confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person or entity not authorized under this Agreement, without the prior written approval of the Sat-Connect board of directors except (i) where the information properly comes into the public domain, (ii) as required by law, or (iii) as may be necessary to enforce the terms hereof."
>
> (4) Any breach of this Clause 4 shall be deemed a material breach of the Agreement. This Clause will survive for 3 years after the expiration or termination of this Agreement or dissolution of the Sat-Connect project."

98. As a contracting party of this agreement, Claimant has the obligation to keep confidentiality and violation of this stipulation was to be deemed as a material breach. However, a highly placed government official mentioned in a newspaper article that there was leak of information ―including information about the

technology, systems, intellectual property and encryption to be used and other trade secrets—by Claimant seconded personnel to Government of Opulentia.[71] A highly placed government official's comment can be considered as positive, verbal evidence. The government official who mentioned the information leak did not have any direct relationship with Beritech and being a high-ranked official, he would not have officially spread false information. In addition to that, Beristan Times is an independent press[72] and it seems unlikely that the allegation was a false charge under these circumstances.

99. In this respect, Beritech was entitled to rely on Clause 8 of the JV Agreement, which states that:

100. "If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement."

101. As previously considered, Respondent asserts that there is credible evidence on the information leak by Claimant personnel. Based on this fact, it can be concluded that Claimant breached the confidentiality clause which is material breach of the JV Agreement according to Clause 4(4). Therefore, the buyout of Claimant's interests was not an arbitrary decision of Beritech, but was clearly a rightful decision based on the authority to buy all of Claimant's interest under the JV Agreement.

3. The reliance on Clause 8 (Buyout) of the JV Agreement does not constitute an expropriation of Claimant's contractual rights

102. Claimant argues that the enforced buyout of its interest in the Sat-Connect project violates its rights under Article 4(2) Beristan-Opulentia BIT, which states that:

[71] Annex2, [8]; 1st Clarification 178.

[72] 1st Clarification, 168, 162.

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

103. Respondent argues that there can be no expropriation of a party's contractual rights when such party is treated in accordance with the contract. Respondent further asserts that, even in the event of a breach of contract, such breach would not be sufficient to establish an expropriation. It refers to *Azinian v Mexico*, according to which:

> "The words 'confiscatory', 'destroy contractual rights as an asset', or 'repudiation' may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder- and that is not satisfactory for present purposes."[73]

104. Respondent also points to certain reasons in *Waste Management*, which read as follows:

> "The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."

105. Respondent submits that the expulsion of Claimant pursuant to the Contract cannot be considered expropriatory of Claimant's contractual rights, as such rights are limited by the Contract itself.

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[73] *Azinian v Mexico* (1999), para 90.

106. Moreover, even if there had been a breach of the Contract, such breach would not amount to expropriation. In Respondent's view, a finding of expropriation would require proof of an improper motive for the expulsion. It would also require a showing of deprivation, which is not the case given the rights which Claimant keeps under Clause 8 of the Agreement.

B. In the Alternative, the Expropriation of Claimant's Property is Legally Justified under Art. 4(2) of the Beristan-Opulentia BIT

107. Art. 4(2) of the Beristan-Opulentia BIT states four circumstances in which expropriation is lawful: for public purposes or national interest, against immediate full and effective compensation, on a non-discriminatory basis and in conformity with all legal provisions and procedures. Claimant alleges that neither the national interest requirement nor that of compensation has been satisfied. Respondent disagrees with Claimant's view. Respondent contends that Claimant's removal from the Sat-Connect project was justified on national security grounds (B.1) and Claimant is not entitled to compensation or any other remedies (B.2).

1. Claimant's removal from the Sat-Connect project was justified on national security grounds

108. The forcible buyout and the expulsion from Sat-Connect project satisfy the public purposes or national interest requirement.

109. In practice, the public purpose requirement has rarely arisen in international expropriation cases and states have been afforded a wide margin of appreciation in determining whether an expropriation serves a public purpose.[74] Besides, IIA tribunals have confirmed that states are accorded deference in determining what is

[74] *Amoco v Iran et al* (1987), para. 145.

in the public interest.[75]

110. As mentioned earlier, any small possibility of information leak by Claimant can be a threat to Respondent's national security. Furthermore, with regard to national security, a state should be afforded a wide margin of appreciation in taking precautionary measures since it would not be effective to take measures once the crucial information had been revealed.

111. According to the Art. 9(2) of the BIT, Respondent is entitled to take measures "that it considers necessary" for its own security interests. From the wording the BIT adopted, the article can be classified as a "self-judging" exception clause. As long as Beristan had serious concerns on the security issue, it can decide whether there is need for a specific measure or which measure it should take for the sake of national security. Thus, Respondent's measures for the sake of national security can be justified by the Art. 9 of the BIT.

112. In this perspective, Respondent asserts that the expulsion of Claimant from the Sat-Connect project, the removal of its personnel by the Beristian military, and the buyout of its interest in the project were justified on national security grounds.

2. Claimant is not entitled to compensation or any other remedies

113. Claimant asserts that, under the buyout provision, Claimant was paid significantly less than fair market value, because the buyout provision only returns Claimant's paid-in investment. Also, Claimant alleges that the just compensation shall be equivalent to the real market value of the investment prior to the moment in which the decision to expropriate is made public and shall be calculated based on internationally acknowledged evaluation standards according to Art. 4(3) of the Beristan-Opulentia BIT.

[75] *Goetz and ors v Burundi* (1999), para. 126

114. However, Fair market value may be determined by the investor's actual investment besides by the DCF (Discounted Cash Flow) method.[76] Tribunals often adopt this method where, as in *Metalclad*[77], the investment did not have a profit-making history[78], or in *Wena*[79], where one of the hotels had operated for eighteen months and renovations had not been completed on the other. In *Sedelmayer*, the tribunal found that actual investments included in-kind contribution of chattels to a company's capital and money spent on improvements to premises.[80] The tribunal in *Vivendi II* considered investment value as the closest proxy to eliminate the consequences of the IIA breaches.[81]

115. As in *Metalclad* case, the investment – the JV company, Sat-Connect S.A.-does not have a profit-making history. Thus, actual monetary investment value – US$47 million- could be a reasonable method to calculate the fair market value.

116. On October 19, 2009, Beritech has paid US$47 million – Claimant's actual investment – into an escrow account which has been made available for Claimant and Claimant has refused to accept this payment. Therefore, Respondent contends that Claimant is not entitled to compensation or any other remedies.

V. THE CONCLUSIONS ON THE MERITS CONCERNING THE PRESENT DISPUTE

117. Respondent has afforded fair and equitable treatment to Televative, the investor, as its actions can be justified as proper performance of the contract and necessary measures to protect the essential security. Respondent did not fail to provide national treatment to the investor and its actions did not amount to an expropriation.

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[76] *Metalclad Corp v Mexico*(2000), para. 122 citing *Phelps Dodge Corp. v Iran*, (1986)

[77] *Ibid*., paras 124-126.

[78] *Ibid*., paras 119-130.

[79] *Wena Hotels Ltd v Egypt*, (2000), paras 122-125.

[80] *Sedelmayer v Russian Federation* (1998), para. 11.

[81] *Vivendi* (2007), para. 8.3.17.