TEAM: FORSTER

2nd ANNUAL FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT, 2010

IN THE MATTER OF AN ARBITRATION HELD UNDER THE ICSID ARBITRATION RULES

MEMORANDUM *for* RESPONDENT

TELEVATIVE INC. [Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN [Respondent]

(ICSID Case No ARB/X/X)

Malibu, California, 15 March 2010

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STATEMENT OF ISSUES

JURISDICTION

Whether The Tribunal Has Jurisdiction under the JV Agreement? **[Issue-I]**

Whether The Tribunal Has Jurisdiction Under The Beristan-Opulentia BIT **[Issue-II]**

MERITS OF THE CLAIM

Whether the RESPONDENT's company has materially breached the contract? **[Issue-III]**

Whether the measures adopted by the RESPONDENT amounts to "expropriation"? **[Issue-IV]**

Whether the RESPONDENT can claim the "essential security" defense? **[Issue-V]**

SYNOPSIS OF FACTS

CLAIMANT: Televative Inc. [hereinafter "CLAIMANT"] is successful multinational enterprise that specializes in satellite communications technology and systems. It is a leading developer of new technologies in this field. Televative is a privately held company that was incorporated in Opulentia on 30 January 1995.

RESPONDENT: Beritech S.A. [hereinafter "RESPONDENT"] is a state owned company. The Beristian government owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors, who have close ties to the Beristan government.

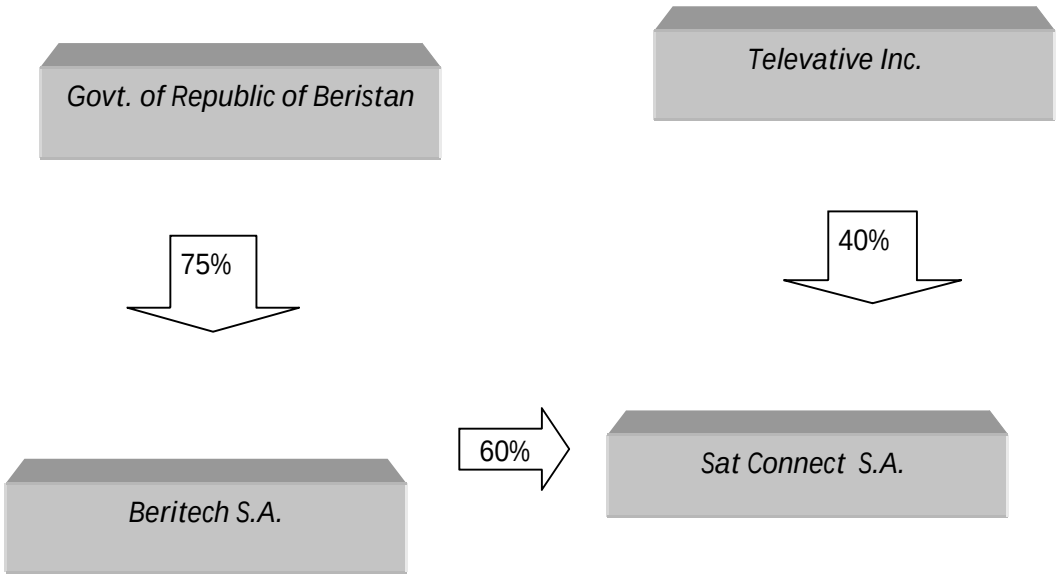
30 January 1995: Claimant, Televative Inc., is a successful multinational enterprise that specializes in satellite communications technology and systems. It is a leading developer of new technologies in this field. Televative is a privately held company that was incorporated in Opulentia on 2. The Government of Beristan established a state-owned company, Beritech S.A. (¶ 1)

March, 2007: The Government of Beristan established a state-owned company, Beritech S.A., in. The Beristian government owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors, who have close ties to the Beristan government. (¶ 2)

18 October 2007: Beritech and Televative signed a joint venture agreement (the "JV Agreement") to establish the joint venture

company, Sat-Connect S.A.,under Beristian law. The Government of Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations. Sat-Connect's corporate offices are located in Beristal, the capital city of Beristan. (¶ 3)

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



Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia. Euphonia is a region encompassing almost one-fifth of the world's surface, which includes Beristan, six other countries, and the Euphonian Ocean. The satellite and communications technology that Sat-Connect will deploy can be used for civilian or military purposes. Several segments of the Beristian armed forces will use the Sat-Connect system. (¶ 5)

12 August 2009:	The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia. Both Televative and the Government of Opulentia have made statements to deny this published story. (¶ 6)
21 August 2009:	The chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the August 12th article in The Beristan Times. The content of this meeting is disputed by Claimant (¶ 7)
27 August 2009:	Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project. Six directors were present at this meeting and one director, Alice Sharpeton, who had been appointed by Televative, refused to participate and left the meeting before its end. She later filed a protest that she had no prior notice concerning the proposed agenda for the meeting. (¶ 8)
28 August 2009:	Served notice on Televative to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project. (¶ 9)

11 September 2009:	Staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan. (¶ 10) [Televative's total monetary investment in the Sat-Connect project stands at US $47 million. (¶ 11)]
19 October 2009:	Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request. (¶ 12)
28 October 2009:	Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan. In its request for arbitration, Claimant states that jurisdiction is established by the BIT between Beristan and Opulentia (Annex 1) and because both countries are contracting states to the ICSID Convention. Beristan and Opulentia are ICSID Contracting States and have ratified the ICSID Convention. Beristan and Opulentia have also ratified the Vienna Convention on the Law of Treaties. Beristan and Opulentia have long had polite yet tense relations. (¶ 13)
1 November 2009:	The ICSID Secretary General registered for arbitration this dispute brought by Claimant Televative against the Government of Beristan. (¶ 14)

JURISDICTION

I. WHETHER THE TRIBUNAL HAS VALID JURISDICTION UNDER CLAUSE 17 OF THE JV AGREEMENT

1. It is the submission of the RESPONDENT that the present ICSID tribunal does not have jurisdiction under the Beristan-Opulentia BIT. RESPONDENT respectfully challenges the jurisdiction of the present Tribunal and requests it to find it lacks jurisdiction over the present dispute. CLAIMANT has instituted the proceedings in front of the present Tribunal against RESPONDENT on 1 November 2009[1]. RESPONDENT however will demonstrate that the case at hand falls outside both of ICSID jurisdiction and of the competence of the present Tribunal because (A) *firstly*, the Parties intended to resolve disputes by the valid arbitration agreement. (B) *Secondly,* JV agreement's compromissory clause constitutes "*lex specialis*" (C) *thirdly,* the Govt. of Beristan has not breached any obligation provided in the treaty.

(A) THE PARTIES INTENDED TO RESOLVE DISPUTES BY THE VALID ARBITRATION AGREEMENT

(a) The parties have irrevocably submitted to the Clause 17 of the JV Agreement

2. Beristan and Televative are parties to the JV Agreement.[2] Clause 17 of the Agreement expressly provides a dispute settlement clause where the parties provides with there express consent to resolve disputes by the laws of the Republic of Beristan.[3] Clause 17 clearly at the end states that[4]:

[1] Record, Annex 2, ¶ 16 of the Uncontested Facts.

[2] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[3] Record, Annex 3, Clause 17 of the JV Agreement.

[4] Record, Annex 3, Clause 17 of the JV Agreement.

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.

3. To respect the agreements entered into is an established principle of international law enshrined in ` *pacta sunt servanda.*[5] The parties here have agreed with the intention of resolving the disputes under clause 17. The fundamental and the key source[6] of arbitration remains the intention of the parties.[7]

4. Beristan follows the principles of contract as laid down in the UNDROIT.[8]According to UNIDROIT principles once, entered the contract is considered binding over the parties.[9] Moreover, the word "***irrevocably"*** clearly indicates the intention of the parties to respect the agreement in case of any dispute and hence, clause 17 reserves jurisdiction on any dispute arising out of this JV Agreement or relating to this[10].

(b) To respect arbitration agreement of a contract is an established principle in international commercial arbitration

5. It is already stated that Beristan and Televative are parties to the JV Agreement[11] and Clause 17 of the Agreement expressly provides a dispute settlement clause where the parties provides with there express consent to resolve disputes by the laws of the Republic of Beristan.[12] The parties agreed to refer any dispute arising out of the contract to arbitration subject to the procedure specified in the JV Agreement.[13] It is an accepted notion that the parties' agreement on

[5] *Shaw* 49.

[6] *Mauro* 56.

[7] *Mauro* 56.

[8] Request 136, 1st Requests for Clarifications.

[9] Article 1.3 of UNIDROIT.

[10] Record, Annex 3, Clause 17 of the JV Agreement.

[11] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[12] Record, Annex 3, Clause 17 of the JV Agreement.

[13] Record, Annex 3, Clause 17 of the JV Agreement.

arbitration is the *primary source* of the arbitral tribunal's jurisdiction[14] and is the "***only***" source from which jurisdiction can come.[15] By signing the contract containing an arbitration clause, the parties to that agreement are deemed to have agreed on arbitration and are bound to submit to arbitration.[16] This means that if a party wishes to pursue its claim, it must honor the agreement it has made and do so by arbitration clause.[17]

(1) Govt. can be a party to the Arbitration proceedings under the JV Agreement as a guarantor.

6. Here, the CLAIMANT and Beritech agreed and consented to the jurisdiction of tribunal constituted under Clause 17.[18] Govt. of Beristan has co-signed the agreement as a guarantor[19] to all Beritechs obligations under the Agreement.[20] A suit against the surety without even impleading the principal has been held to be maintainable.[21] Moreover, it is clearly stated in the agreement[22] that ***"any"*** party may give notice to the other party of its intention to commence arbitration.[23] As Govt. has co-signed the agreement as a guarantor to Beritech[24], it makes it a party to the same and hence, arbitration proceedings can very well be initiated against it.

(B) JV AGREEMENT'S COMPROMISSORY CLAUSE CONSTITUTES "LEX SPECIALIS"

7. Compromissory clause is the dispute settlement clause of a contract which lays down the procedure to be followed in case of dispute. *In* ***SGS v. Philippines***[25] the majority held that a contractual compromissory clause constitutes ***lex specialis*** and overrides interstate jurisdictional

[14] *Redfern & Hunter* 8, ¶ 1-13.

[15] *Redfern & Hunter* 8, ¶ 1-13.

[16] Art II of New York Convention.

[17] *Redfern & Hunter* 8, ¶ 1-12.

[18] Record, Annex 3, Clause 17 of the JV Agreement.

[19] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[20] Request 152, 1st Requests for Clarifications.

[21] *Avtar Singh* 605.

[22] Record, Annex 3, Clause 17 of the JV Agreement.

[23] Record, Annex 3, Clause 17 of the JV Agreement.

[24] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[25] *Société Général de Surveillance S. A. v Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 [Hereinafter *SGS v. Philippines*].

arrangements.[26] Where a claimant has expressly agreed in writing that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then willfully ignores them by applying in such matters [for remedies under broadly applicable treaties], he will be held bound by his contract.[27] Here, Televative has entered in a JV agreement with Beritech with Govt. as its guarantor.[28] They have expressly agreed in writing that in ***any dispute regarding and relating to the agreement***[29] the tribunal constituted under Clause 17 will have jurisdiction. Now, the CLAIMANT has willfully ignored the same contract for remedies under BIT[30] which is against the principle laid down in *SGS v Philliphines.*

8. In *vivendi*[31]*,* the tribunal had held against CGE that the claimant has to assert their rights in proceedings *before courts of Tucuman as required under article 16.4 of the contract* and having been denied their rights can they hold the state of Argentina liable.[32] ***Recourse to ICSID would have been allowed only if it were alleged that proceedings before local courts had failed to meet international standards.***[33] Similarly, before holding the State of Beristan liable, they have to exhaust the remedy provided under Clause 17 of the JV agreement and having been denied rights there in, procedurally or substantively can they start arbitration proceedings under the BIT.

Here in the CLAIMANT having agreed in the contract, expressly and explicitly, to submit to the arbitration panel formed under laws of Beristan, are bound by the same.

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[26] *SGS v. Philippines* ¶ 139-43.

[27] *SGS v. Philippines* ¶ 141.

[28] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[29] Record, Annex 3, Clause 17 of the JV Agreement.

[30] Record, Annex 2, ¶ 16 of the Uncontested Facts.

[31] *Compañía de Aguas del Aconquija S.A.* & Vivendi Universal *v. Argentine* Republic ICSID Case No. ARB/97/3 [Hereinafter Vivendi I].

[32] *Campbell Mclachlan, Laurence Shore, And Matthew Weiniger* 102

[33] Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims,* 99 am. j. int'l l. 835

(C) THE INTERNATIONALLY ACCEPTED PRINCIPLE OF "*EXHAUSTION OF LOCAL REMEDIES*" IS DISPENSED WITH

9. It was held in *ELSI case*[34] it was held that the local remedies rule is a fundamental principle of international law that it cannot be excluded except by express words to that effect. It is unable to accept that an important principle of customary internationally law should be held to have been dispensed with, in absence of any words making clear an intention to do so.

Clause 17 of the JV agreement does not specify exclusion of the principle of exhaustion of local remedies and hence, it is the duty of the investor to comply with the principle.

(D) THE GOVT. OF BERISTAN HAS NOT BREACHED ANY OBLIGATION PROVIDED IN THE TREATY

10. Beirtect along with the board directors decided to invoke the buy out clause due to breach of JV contract by Televative (CLAIMANT). There is no action performed by the Govt. which has breached any obligation under the Beristan-Opulentia BIT.[35] Rather, all the actions were carried out in pursuance of the JV Agreement and all the obligations there in were fulfilled.

Hence, the tribunal cannot have jurisdiction under the Beristan-Opulentia BIT, but under jurisdiction pursuant to the Clause 17 of the JV Agreement.

[34] Elettronica Sicula S.p.A. (*ELSI*) (United States of America v. Italy) ICSID Case No. ARB/01/12.

[35] *Infra*, Part II, Issue (4).

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMANT'S CONTRACT BASED CLAIMS ARISING UNDER THE JV AGREEMENT

11. It is the respectful submission of the RESPONDENT that the present ICSID tribunal lacks jurisdiction over any contract based claims arising out of the JV Agreement. It is the submission of the RESPONDENT that the tribunal does not have jurisdiction over the contract claims because (A) *firstly*, Umbrella Clause has to be interpreted restrictively (B) *Secondly; principle of "Generalia specialibus non derogant" is applicable* (C) Thirdly, BIT has not been violated in any case

(A) "*UMBRELLA CLAUSE*" HAS A RESTRICTIVE INTERPRETATION

12. Umbrella Clauses are generally the commitment clauses which are enshrined in a treaty to protect interest of the investors.[36] Beristan-Opluentia BIT is the investment treaty singed between the two states.[37] It states that

"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."[38]

13. Respondent contends that Claimant's claims are inadmissible and the Tribunal lacks jurisdiction because Claimant's claims are contractual in nature and Claimant has improperly reformulated them as claims arising under the Beristan-Opulentia BIT.

(a) Umbrella Clause has no effect of elevating contract claims to treaty claims

14. The umbrella clause is claimed by the claimant to have the effect of "*elevating contract claims to the level of treaty claims*"[39] or of "*transforming contract claims into treaty claims*".[40] The

[36] *Dolzer & Schreuer* 153.

[37] Record, Annex I, Beristan-Opluentia Bilateral Investement Treaty,

[38] Record, Annex I, Beristan-Opluentia Bilateral Investement Treaty, Article 10.

existence of the umbrella clause in the BIT is seen, by the claimant, as one of several circumstances that can make an international tribunal competent to hear contract claims. Neither of these views is covered by the wording of the umbrella clause and that the umbrella clause can thus *by no means have these effects.* It was held in ***SGS v Pakistan***[41]*,* that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Umbrella clauses.

15. The contractual claim always remains; the umbrella clause simply constitutes for the investor a second legal provision, a BIT provision, he can base a different claim on, a treaty or "umbrella clause" claim. That responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other.[42] Therefore, if the claimant alleges that the umbrella clause makes a treaty claim out of a contractual one, the tribunal should decidedly reject this view and hold that the umbrella clause does not "elevate", "transform" or "turn" contract claims into treaty claims. Indeed, the umbrella clause should be seen as a separate, ordinary BIT standard of protiection to which the same rules as to other such standards apply. BIT compromissory clause was intended only to cover disputes over application of BIT standards, whereas contract claims were governed by the contractual compromissory clause.[43]

Similarly, it held that the BIT umbrella clause (Article 10) could not be reasonably construed to encompass contract claims despite its broad language.[44]

(B) PRINCIPLE OF "*GENERALIA SPECIALIBUS NON DEROGANT*" IS APPLICABLE

16. *Generalia specialibus non derogant* means that special provisions derogate from general.[45] Where a deed contains provisions of a general nature and another document with a clause of

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[39] *Société Général de Surveillance S. A. v. Pakistan*, ¶ 156 Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/01/13 (2003) [Hereinafter *SGS v. Pakistan*].

[40] *SGS v. Pakistan*, ¶ 160.

[41] *SGS v. Pakistan*, ¶ 160.

[42] *Noble Ventures v. Romania* ¶ 53 (ICSID Case No. ARB/01/11.

[43] *SGS v. Pakistan* ¶ 154.

[44] Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims,* 99 am. j. int'l l. 835

special nature then the latter may limit the applicability of the former.[46]This refers that the exclusive contract dispute settlement clause bars the availability of umbrella clause. Herein, clause 17 of the agreement[47] bars the availability of article 10 of the BIT.[48]

17. ***SGS v. Pakistan***[49] determined that a BIT tribunal does not have jurisdiction over contractual claims on the ground that umbrella clauses do not in general extend to such claims, whereas ***SGS v. Philippines***[50], though deciding to the contrary that a BIT tribunal in fact has such jurisdiction, went on to determine that it should not exercise this jurisdiction where the contract contains an exclusive forum selection clause designating a different forum for resolving disputes arising under the contract. The Tribunal concluded that an umbrella clause in a BIT does not override, and is thus inoperative in the presence of an exclusive forum selection clause in a contract.[51]

In the present case, going by the ratio laid down by both the cases it can be concluded that this tribunal cannot have jurisdiction over contract based claims. Tribunal constituted under clause 17 of the JV agreement will have exclusive jurisdiction over all contract based claims.

(a) Contract compromissory clause has overriding effect on BIT in view of contract claims

18. Clause 17 is the Dispute settlement clause of JV agreement.[52] It is contended that in view of claims arising out of contracts, the tribunal constituted under the same will have exclusive jurisdiction. It was held in ***Joy Mining***[53] that the contractual compromissory clause would have overridden the BIT compromissory clause in any event. In ***Salini v. Jordan***, an ICSID panel

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[45] *Trayners* 235.

[46] *Trayners* 235.

[47] Record, Annex 3, Clause 17 of the JV Agreement.

[48] Record, Annex I, Beristan-Opluentia Bilateral Investement Treaty, Article 10.

[49] *SGS v. Pakistan.*

[50] *SGS v. Philippines.*

[51] *SGS v. Philippines.*

[52] Record, Annex 3, Clause 17.of the JV Agreement.

[53] *Joy Mining* Machinery Limited and. The Arab Republic of Egypt. ¶ 89-91, ICSID *Case* No. ARB/03/11.

once again upheld the overriding nature of a contractual compromissory clause that provided for the exclusive jurisdiction of domestic Jordanian courts over contract claims. [54]

19. Notwithstanding its open-ended text, the BIT compromissory clause (Article 11) and Umbrella clause was intended only to cover disputes over application of BIT standards, whereas contract claims were governed by the contractual compromissory clause.[55]

20. In ***Compañía de Aquas del Aconquija, S.A. v. Argentina***[56], it was observed that the Tucumán claim, by virtue of the contractual compromissory clause, should have been litigated before the local Tucumán courts. Recourse to ICSID would have been allowed only if it were alleged that proceedings before local courts had failed to meet international standards.[57] Here in this case essential basis of a claim brought before this international tribunal is a breach of contract and hence, the compromissory clause of the contract has to be applicable.[58]

Hence, in this case, this tribunal does not have jurisdiction over contract claim as it tribunal constituted in view of Clause 17 of the JV agreement has exclusive jurisdiction over it.

[54] *Salini v. Jordan* ¶ 93-96 ICSID Case no. ARB/02/13.

[55] *SGS v. Pakistan* ¶ 154.

[56] Vivendi I ¶ 78.

[57] Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims,* 99 am. j. int'l l. 835

[58] Vivendi I

III. RESPONDENT DID NOT MATERIALLY BREACHED THE JV AGREEMENT BY IMPROPERLY INVOKING CLAUSE 8 OF THE AGREEMENT

21. Owing to the breach of confidentiality under Clause 4 of the JV Agreement, on 27th August 2009, Beritech along with the majority of the directors of the Sat connect decided to invoke clause 8 of the agreement and buy out the interest of the CLAIMANT.[59] Respondent did not materially breach the JV agreement or stopped the CLAIMANT to complete its contractual duties by improperly invoking clause 8 of the agreement because (A) *firstly,* all duties were duly complied with by the directors and the Govt of Beristan (B) *secondly,* the decision was taken with *bonafide* intentions

(D) ALL DUTIES WERE DULY COMPLIED WITH BY THE DIRECTORS AND THE GOVT OF BERISTAN

(a) There was a "material breach" of clause 4 of the JV agreement

22. Clause 8 specifically deals with breach of clause 4 of the Agreement to invoke the former.[60] The CLAIMANT has breached the JV agreement. It was clearly stated by the Beristan Times Article that a government defense analyst indicated that there have been leaks not only involving encryption technology, but also concerning the technology, systems, and intellectual property of the Sat-Connect project.[61] Earlier this year, Televative was one of three Opulentian technology firms from which the Opulentian government authorities are alleged to have received access to civilian encryption keys.[62] *Opulentian legal scholars are divided on whether legislation enacted in the fallout of the allegations will stop abuses or simply give them legal cover …"*[63]

[59] Record, Annex 2, ¶10 of the Uncontested Facts.

[60] Record, Annex 3, Clause 8 of the JV Agreement.

[61] Request 178, 1st Requests for Clarifications.

[62] Request 178, 1st Requests for Clarifications.

[63] Request 178, 1st Requests for Clarifications.

23. Clause 4 *mentions that the parties shall not use any of the Confidential Information for any purpose other than for or in connection with the purposes of this Agreement. Any dissemination of Confidential Information shall be only with written prior approval and in connection with the purposes of this Agreement, and shall be only to the employees, agents or affiliates who have a need to know said Confidential Information in order to carry out proper purposes and responsibilities related to this Agreement and the Sat-Connect project.*[64]

24. In this case, the encryptions and the technology have been leaked to individuals or entities that have no need to know the information at all for the purpose and responsibilities related to the agreement. Moreover, it is specifically mentioned in the article that a legislation has been enacted which will give the authority to the Opluetian Govt. to ask for some information[65] which is certainly confidential[66] within the meaning of the JV agreement[67]. Now, if such a legislation is enacted it is *prima facie* that the Govt. would have asked Televative for the information which had to be provided considering it's the local law of the state in which it was incorporated[68].

25. Newspapers and periodicals also are self- authenticating.[69] The self-authenticating nature of these types of documents is important because, in certain circumstances, a court can take judicial notice of statements contained in them.[70] Beristan Time article, being a established newspaper article is self-authenticated. If writing qualifies for self- authentication, no extrinsic evidence of authenticity is required as a condition of admissibility.[71] These writings include domestic public documents under seal, certified copies of public records, acknowledged documents, official publications, newspapers and periodicals, trade inscriptions, and commercial paper.[72]

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[64] Record, Annex 3, Clause 4 of the JV Agreement.

[65] Request 178, 1st Requests for Clarifications.

[66] Record, Annex 3, Clause 4(2) of the JV Agreement.

[67] Record, Annex 3, Clause 4(3) of the JV Agreement.

[68] Record, Annex 2, ¶1 of the Uncontested Facts.

[69] Fotios M. Burtzos, *Authentication*, 25-Sep Colo. Law. 55.

[70] Fotios M. Burtzos, *Authentication*, 25-Sep Colo. Law. 55.

[71] Miguel A. Méndez, *Authentication And The Best And Secondary Evidence Rule,* 41 U.S.F. L. Rev. 1.

[72] Miguel A. Méndez, *Authentication And The Best And Secondary Evidence Rule,* 41 U.S.F. L. Rev. 1. Fed. R. Evid. 902.

Hence, to rely on the article in order to invoke clause 8(Buy out) is very much acceptable. Therefore, the pre-conditions to invoke clause 8 are fulfilled and hence, the decision to do the same cannot be held invalid. Now, the respondent will move on to prove that the decision of the Board directors was valid.

(b) Agenda was provided and fair opportunity to hear was provided

26. On August 21, 2009, the chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the August 12th article in The Beristan Times.[73] This means that a fair opportunity was provided to the CLAIMANT to put forth there side of story. On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project.[74] Six directors were present at this meeting and one director, Alice Sharpeton, who had been appointed by Televative, refused to participate and left the meeting before its end.[75] She later filed a protest that she had no prior notice concerning the proposed agenda for the meeting.[76]

27. The argument is totally baseless according to the RESPONDENTS. It is a normal practice that an agenda is provided with where an important decision has to be taken.[77] It is a general practice in common law to provide with the notice specifying the statement of the business to be transacted thereat.[78] It is a customary practice[79] to send the agenda to the directors along with the notice.[80] Beristan laws require a 24hours prior notice of the meeting[81] and it is a normal practice to

[73] Record, Annex 2, ¶ 9 of the Uncontested Facts.

[74] Record, Annex 2, ¶ 10 of the Uncontested Facts.

[75] Record, Annex 2, ¶10 of the Uncontested Facts.

[76] Record, Annex 2, ¶10 of the Uncontested Facts.

[77] *Singh* 341.

[78] *Shanbhogue* 58.

[79] *Shanbhogue* 61.

[80] *Shanbhogue* 60.

[81] Request 176, 1st Requests for Clarifications.

provide with agendas when a matter of importance in to be discussed.[82] Therefore, claiming that the agenda was not given before is a baseless argument.

(a) Arguendo, even if Agenda was not provided beforehand, the business can be held valid

28. According to common law principles[83] it is legally not necessary to specify in the notice of the meeting the nature of the business to be transacted.[84] Omission to forward the agenda does not invalidate the resolution passed at the meeting.[85] The board of Directors can transact business even without formal agenda.[86]

29. Moreover, the inaction of the CLAIMANTS directors to participate cannot be held as arbitrariness on the part of the respondent. Meeting was conducted on 21st August, 2009 to discuss the same issue and then the meeting was called on 27th August 2009[87] i.e. the directors of Sat-Connect knew about the agenda to be discussed in the meeting. A fair chance of voting against the notion was provided to the RESPONDENT. When a director does not choose to attend the meeting, knowing about it, he is bound by the resolution passed by the majority.[88]

Alice Sharpenton, director appointed by the CLAIMANT did arrive at the meeting and left before its end. That evidently shows that she was aware of the agenda to be discussed in the board meeting.

(E) THE DECISION WAS TAKEN WITH *BONA FIDE* INTENTION.

30. In this case, CLAIMANT has leaked confidential information which can hamper the national security.[89] RESPONDENT further asserts that the advanced satellite and telecommunications

[82] *Shanta Genevieve Pommeret v Sakal Papers* (P) Ltd. (1990) 69 Comp Cas 65 Bom.

[83] *Shanbhogue* 60.

[84] *Campaigne de Mayville v Whitely* (1896)

[85] *Iyer* 444.

[86] *Iyer* 445.

[87] Record, Annex 2, ¶ 10 of the Uncontested Facts.

[88] *Iyer* 61.

[89] *Infra,* Part II, Issue (5)

technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces[90], directly implicate the national security of Beristan.

31. Moreover, neither Beristan law not Sat Connect's bylaws regulate the loss of quorum once established.[91] Alice Sharpenton had initially arrived at the meeting,[92] which lead to the formation of the quorum at the beginning. In addition to this, all the directors of Sat Connect were informed about the date of the meeting.[93] Some directors appointed by Televative speculated that the buyout would be discussed and decided not to attend the meeting and thus deprive it of the necessary quorum.[94]

(a) Leave from the meeting by Alice Sharpenton results in abuse of quorum provision

32. The courts generally cannot allow the minority to abuse the quorum provisions and so frustrate the legitimate will of the majority.[95] It may order a meeting with a quorum as low as one.[96] The grounds upon which the CLAIMANT is arguing that the decision is invalid due to lack of quorum and agenda, is itself objectionable[97] and hence, in such situations it lead to abuse of process.

33. Moreover, leave from meeting in between after knowing about the agenda clearly shows *malafide* intentions on the part of CLAIMANTS as it was evident that the decision would be against there interest. Forming of quorum would have resulted into a decision against them. If such a act of CLAIMANT is held valid, then the minority shareholders will get a right to abuse the provision of quorum and would leave off the meeting every time the decision is likely to be against there interest.

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[90] Record, Annex 2, ¶ 6 of the Uncontested Facts.

[91] Request 255, 2nd Requests for Clarifications.

[92] Record, Annex 2, ¶ 10 of the Uncontested Facts.

[93] Request 208, 2nd Requests for Clarifications.

[94] Request 208, 2nd Requests for Clarifications.

[95] *Palmers* 7099, ¶ 7.617.

[96] *Palmers* 7099, ¶ 7.617.

[97] *Palmers* 8280 ¶ 8.3905.

IV. WHETHER RESPONDENT'S ACTIONS OR OMISSIONS AMOUNT TO EXPROPRIATION, DISCRIMINATION, A VIOLATION OF FAIR AND EQUITABLE TREATMENT, OR OTHERWISE VIOLATE GENERAL INTERNATIONAL LAW

(A) THE RESPONDENT'S ACTIONS DO NOT AMOUNT TO EXPROPRIATION

34. The argument to demonstrate that Claimant's property has not been expropriated will be made in three parts. **(1)** *Firstly*, Respondent argues that Claimant's property has not been directly expropriated. **(2)** *Secondly*, Respondent will demonstrate that there has been no indirect expropriation of Claimant's property (**3**) *Thirdly,* Respondent submits that even if the Tribunal finds that Claimant's property was expropriated, the expropriation was lawful.

1. *The actions of the respondent do not amount to direct expropriation*

35. While Claimant may argue that Respondent directly expropriated its investment when it issued the compulsory license, this cannot be considered a direct expropriation. Direct expropriation involves the *de jure* transfer of title and physical possession of the property from an investor to the state.[98] The investor is deprived of its property rights and the state acquires these rights.[99] Direct takings are characterized by the transfer of title over property, depriving the former owner of ant rights toward the expropriated investment[100]

36. In the instant case, there is no transfer of title and physical possession of the property from the investor to the state. Infact, Televative's stake in the Sat- Connect project was bought out as a result of the buyout clause enshrined in the JV Agremment signed by the parties, by the directors of Sat-Connect and not by the Government of Beristan.[101] Further, these rights are not transferred to the Government of Beristan, but continues to be under the control of the Sat-Connect. Therefore, there is clearly no case of direct expropriation.

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[98] *Dolzer and Schreur* p.92.

[99] *Newcombe* 324.

[100] UNCTAD Taking of Property, p.11-12.

[101] Record, Annex 2, ¶ 10 of the Uncontested Facts.

2. *The actions of the respondent do not amount to indirect expropriation*

37. It is undisputed in doctrine that there is no precise definition of indirect expropriation.[102] Therefore, there is a wide consensus that the best approach is the case-by-case approach. All circumstances of the case, observed together, are relevant when determining whether indirect expropriation occurred or not.[103] The respondent shall contend in the following arguments that: (1) ***Firstly***, the investment made by Televative was concluded purely as a result of a business problem encountered by Sat-Connect as a result of the breach of the confidentiality clause of the JV agreement and cannot be attributed to the respondent.(**2**) ***Secondly***, the intention to expropriate the investor's share in the Sat-connect project by the Respondent is absent.(3) ***Thirdly***, there is no unjust enrichment of the Respondent government as a result of the alleged expropriation of the Claimant.(4) ***Fourthly***, the actions of the Claimant resulted in their removal from the Sat-Connect project.

a. Termination of the investment cannot be attributed to the respondent

38. The tribunal held in *Feldman*, "not every business problem experienced by a foreign investor is an indirect ...expropriation nor does the protection under the treaty cover commercial risks."[104] The actions of the government of Beristan however, was only after the buyout clause was invoked by the directors of Sat-Connect. The directors of the Sat-Connect project invoked the buyout clause of the Joint venture agreement between the parties, which deprived them of their property rights.[105] It is not contended that the buyout clause was invoked by the directors of Sat-Connect. Therefore, the buyout of Televative can be considered to be a commercial risk, for which the government of Beristan should not be held liable . The *Azinian* tribunal observed, "It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities… It may be safely assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction…".[106] To

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[102] *Horn & Kroll* 146.

[103] *Bishop, Crawford And Reisman* 1110-17.

[104] *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award and Dissenting Opinion of December 16, 2002, 18 ICSID Rev.—FILJ 488 (2003); 42 ILM 625 (2003); 7 ICSID Rep. 341 (2005).

[105] Record, Annex 2, ¶ 10 of the Uncontested Facts.

[106] *Robert Azinian and Others v. The United Mexican States*, Award, November 1, 1999, para. 83, 14 ICSID Review. FILJ 2, 1999.

paraphrase *Azinian,* not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue. Further, the actions of the Government of Beristan were prompted by the national security compromise which had been achieved as a result of the claimant's leak of certain information vital to the national security of the Government of Beristan.[107]

b. There was no intention on behalf of Respondent to expropriate Claimant's assets

39. The intention of the respondent government to expropriate the property of the investor is sometimes observed as a relevant fact regarding expropriations.[108] Measures which are wrongly regarded by Claimant as expropriation, are performed only as legal and legitimate actions by the majority of directors of Sat-Connect as a result of a material breach of the confidentiality clause of the Joint venture agreement.[109] Moreover, a state is the only entity that can exercise expropriation. It is undisputed between the parties that all actions which allegedly deprived Claimant's rights were done by the directors of Sat-Connect , which is not a government held corporation.

c. There is no unjust enrichment of the Respondent government as a result of the alleged expropriation of the Claimant.

40. The existence of the enrichment of the host State is another commonly accepted principle for the determination of indirect expropriation. [110] In the instant case, the government of Beristan was in no way unjustly enriched as a consequence of the removal of Televative from the Sat-Connect

[107] Record, Annex 2, ¶ 8 of the Uncontested Facts.

[108] *Bishop, Crawford, And Reisman* 1110-17.

[109] *Infra,* Part II, Issue (3).

[110] *August Reinisch 156-164.*

project. The interest of the government of Beristan was limited to the removal of risk that has arisen as a consequence of the leak in confidential information by the Televative personnel.[111] This however, may be justified under the Article 9 of the Bilateral investment treaty between Opulentia and Beristan, as the government was not barred from carrying on any action that may affect its essential security interests(as has been demonstrated in issue 5, the government of Beristan cannot be barred from using the same as a defence).

d. Actions of the claimant resulted in their removal from the Sat-Connect project

41. The United states federal law defines expropriation as:

The term expropriation includes, but is not limited to, any abrogation, repudiation or impairment by a foreign government, a political subdivision of a foreign government, or a corporation owned or controlled by a foreign government, of its own contract with an investor with respect to a project, where such abrogation, repudiation or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.[112]

Following from the above definition, in order for the expropriation to occur, the corporation necessarily requires to be government owned or a government controlled. Televative owns a 40% minority share in Sat-Connect, while Beritech owns a 60% majority stake.[113] The Beristian government owns a 75% interest in Beritech[114]. Therefore, the total interest of the Beristan government in the Sat-Connect project is merely 75 percent of the 60 percent majority stake owned by Beritech, i.e. 45 percent. Therefore, the government of Beristan is merely possessing a minority stake in the Sat-Connect project, and it cannot be held to be a government held corporation.

42. Secondly, the abovesaid definition requires the government to be a party to the contract with the investor. However, in the instant case, the government of Beristan did not enter into any sort of

[111] Record, Annex 2, ¶ 8 of the Uncontested Facts.

[112] 22 USC para. 2198(b), obtained from Bishop, Crawford and Riesman.

[113] Record, Annex 2, ¶ 4 of the Uncontested Facts.

[114] Record, Annex 2, ¶ 4 of the Uncontested Facts.

contract with Televative. The contract existed between Televative and Beritech,[115] and Sat-Connect project could not be terminated by the government of Beristan.

43. Thirdly, the repudiation of the contract should not have been caused by the investor's own fault or misconduct. In the instant case, the contract was terminated as a result of the breach of confidentiality of the Claimant, Televative, which resulted in material breach of the contract, thereby leading to its termination.[116] Therefore, since the breach of contract was caused as a result of the Claimant's misconduct, the government of Beristan cannot be held liable for expropriation.

44. Furthermore, the decision to terminate the contract with the Claimant was purely a Corporate decision, and cannot be attributed to the Respondent, since the decision to expropriate was one which was taken by the Directors of Sat-Connect, without any interference by the government of Bersitan.

45. The tribunal in *Tecmed v. Mexico*[117] held that:

> *To establish whether the Resolution is a measure equivalent to expropriation under the terms of Section 5(1) of the Agreement, it must be first determined if the Claimant, due to the resolution, was radically deprived of the economical use and enjoyment of of its investments, as if the rights related thereto- such as the income and benefits related to the Landfill or its exploitation- had ceased to exist. In other words,* ***if due to the actions of the respondent****, the assets involved have lost their value, or economic use for their holder, and the extent of the loss.*

46. The abovesaid stipulates clearly that the actions of the respondent should have deprived the investor of the economical use and enjoyment of its investments, as if the rights related thereto. However, there were no such actions carried out by the Respondent, which led to such a consequence. The decision to terminate the contract with Televative was made by Beritech, as a consequence of Televative's misconduct, leading to the material breach of the contract,[118] and was in no way controlled by the Respondent. Therefore, the definition of expropriation, as laid down in *Tecmed v. Mexico* does not come into effect in the instant case.

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[115] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[116] Record, Annex 2, ¶ 3 of the Uncontested Facts.

[117] *Técnicas Medioambientales Tecmed S.A v. United Mexican States*, Award, 29 May 2003, para 115.

[118] Record, Annex 2, ¶ 10 of the Uncontested Facts.

In light of all the abovesaid arguments, it is clear that there has been no indirect expropriation of the Claimant's property by the respondent.

3. *Even if the actions of the respondent are considered to be expropriatory, the said expropriation is legal*

47. It has been proved that the actions of the respondent do not amount to expropriation. It is further the contention of the Claimant that the action of the respondent of removing the Televative personnel from the site of the Sat Connect project also amounted to illegal expropriation. It is contended that the action of the respondent does not amount to expropriation. However, even in the event that the actions of the respondent be construed as expropriation, the same can be considered to be legal expropriation.

48. Article 1110 of ***NAFTA*** protects against the expropriation of foreign investments with the following language:

1.No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or *take a measure tantamount to* nationalisation or expropriation of such an investment, except:

a) for a public purpose;

b) on a non-discriminatory basis;

c) in accordance with due process of law and Article 1105(1);[119] and

d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment]. ---- from substantial deprivation article

49. Therefore, in accordance with the provisions of the BIT, it is submitted that the respondent shall prove that, (A) ***Firstly***, the actions of the respondent are in pursuance of a public purpose. (B) ***Secondly,*** Immediate and effective compensation has been paid to the Claimant. (C) ***Thirdly***, it has been done in a non-discriminatory manner.

[119] Article 1105(1) provides: "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

(a) The actions of the respondent have been done in pursuance of public purpose.

50. The need of a public purpose or a public interest in case of expropriation has long been considered as a part of customary international law.[120] The public purpose requirement was also reaffirmed in article 4 of the 1962 General Assembly resolution no. 1803 on Permanent Sovereignty over Natural Resources which referred to ' grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests'.[121]

51. In the 1921 *Norwegian Shipowners Claims* case,[122] the arbitral tribunal examined whether the taking of foreign property was 'justified by public needs'.[123] Though it expressly tested the legality of the US taking of contractual rights of Norwegian citizens on the basis of US law, ie the takings clause enshrined in the constitution's fifth amendment, it emphasized that the

> '*power of a sovereign state to expropriate, take, or authorize the taking of any property within its jurisdiction which may be required for public good or for the general welfare*'.[124]

52. In the *German Interests in Polish Upper Silesia* case[125], the PCIJ found that 'expropriation for reasons of public utility, judicial liquidation and similar measures' were not prohibited by the Geneva Convention.[126] In the *INA corp case*, the Iran Us claims tribunal asserted

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[120] Malanczuk at 235; Garcia Amador, Fourth Report on State responsibility, 'Responsibility of the State for injuries caused in its territory to the person or property of aliens- measures affecting acquired rights', UN Doc. A/CN.4/119, para 58. Hobér at *38.*

[121] UNGA resolution no. 1803 (XVII), above n.5.

[122] *Norwegian Shipowners Claims (Norway v. US)*, Award, 30 June 1921, 1 UNRIAA 307,332.

[123] *Id.*

[124] *Id.*

[125] Case concerning Certain *German Interests in Polish Upper Silesia(Germany v.Poland),*Judgement, 25 May 1926

[126] Id.

that '[...] it has been long acknowledged that expropriations for a public purpose [...] are not per se unlawful'. [127]

53. ICSID tribunals have largely endorsed the 'public purpose' requirement. For instance, the tribunal in the *AMCO v. Indonesia* case considered that, as a matter of general international law,

> *[...]the right to nationalise or expropriate supposes that the act by which the state purports to have exercised it, is a true nationalization or expropriation, namely a taking of property or contractual rights which aims to protect or promote the public interest.*[128]

54. Also, tribunal in the *Santa Elena case clearly stated that* 'international law permits the government of costa rica to expropriate foreign owned property within its territory for a public purpose [...]'.[129]

55. Article 3 of the ***1967 OECD Draft Convention on the Protection of Foreign Property***,[130] states that "no Party shall take any measures depriving, directly or indirectly, of his property a national of another party…" unless four conditions are met according to recognised rules of international law. An accompanying note on the nature of obligation and its scope states the duty to compensate in a broad way:

> *"Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognised by international law – its political and social existence."*

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[127] *INA Corp v. Government of Islamic Republic of Iran,* Award no. 184-161-1, 13 August 1985, 8 Iran-US CTR (1985) 373, 378.

[128] *AMCO Asia Corporation v. Republic of Indonesia,* ICSID case no. ARB/81/1, award, 20 November 1984, 1 ICSID Reports 413, 466.

[129] *Compańia del Desarrollo de Santa Elena, SA v. Republic of Costa Rica,* ICSID Case no. ARB/96/1, Award, 17 February 2000,para. 71.

[130] OECD Draft Convention on Foreign Property, 12 October 1967, p. 23-25.

56. In the instant case, the actions of Beritech was in response to the Claimants breach of the confidentiality provision of that Agreement (Clause 4) by leaking information about the Sat-Connect project—including information about the technology, systems, intellectual property and encryption to be used and other trade secrets—to the Government of Opulentia. The advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces, directly implicate the national security of Beristan. It is contended that Claimant's removal from the Sat-Connect project was justified on national security grounds.

(b) The compensation paid to the claimant is adequate.

57. It is the contended that the compensation paid to the Claimant transferred by Beritech into an escrow amount is adequate, and the Claimant cannot raise the claim under the provisions of the BIT.

1. The procedure of compensation laid down under the JV agreement has been followed.

58. It has already been proved earlier that in case of the instant dispute, the applicable law is that which has been provided under the JV agreement, and not the law as laid down under the treaty. The compensation has been paid to the Claimant in accordance with the principle laid down under the JV agreement ie. Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period +time from the execution of this Agreement until the date of the buyout.[131] In pursuance of this clause, Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. By signing the contract containing a buyout clause, the parties to that agreement are deemed to have agreed on the buyout and are bound to submit to the buyout under the agreement. It has already been proved that if a party wishes to pursue its claim, it must honour the agreement it has made.[132]

[131] Record, Annex 3, Clause 8 of the JV Agreement.

[132] *Redfern and Hunter* 8.

59. Moreover, the aim of entering into a contract will get disrupted if the investors are provided with the freedom of choosing to enforce the provisions of the BITs over the provisions of the contract. Therefore, the provision of the contract dealing with the Buyout clause is applicable in the instant matter and not the provisions of the treaty.

2. The compensation paid towards the escrow account is sufficient to fulfill the legality requirement

60. A number of investment tribunals have dealt with the question whether the compensation requirement demands that compensation has actually been paid. In this context, tribunals have consistently held that an offer of compensation or other provision for compensation , in particular where the exact amount may still be in controversy, is enough to satisfy the legality requirement.[133]

61. In the case of *BP v. Libya*, the arbitrator concluded that "the fact that no offer of compensation had been made indicated that the taking was also confiscatory."[134] The implication is clearly that an offer of compensation is sufficient to fulfil the legality requirement.

62. There need not be a specific offer as long as the possibility to obtain compensation exists. This approach was confirmed by the Iran- US claims tribunal which held in the *Amoco case* that the fact that there was an administrative procedure according to which former owners could claim compensation was sufficient to render an expropriation lawful even though no compensation had actually been paid.[135]

63. Thus the mere fact that the compensation has not yet been paid does not render an expropriation illegal. This was endorsed by the tribunal in the Goetz case which held that "the applicable treaty required an adequate and effective indemnity; unlike certain domestic rights as regards expropriation, it does not require prior compensation."[136]

64. In the instant case, an amount of $ 47 million had been paid by Beritech into an escrow account, which has been made available for Televative and is being held pending the decision in this

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[133] *August Reinisch* 198.

[134] *British petroleum v. Libya, Award*, 10 Ocotber 1973 and 1 August 1974; 53 ILR 297, 329.

[135] *Amoco international finance corp v. Iran*,15 Iran US CTR(1987) 189, 233, para.138.

[136] *Goetz and others v.Republic of Burundi*, ICSID case No. ARB/95/3, 2 September 1998, 44, para.130.

arbitration.[137] This clearly indicates that there is an offer of payment of compensation by Beritech, and therefore, even in the event of expropriation, the actions were legal.

(c) The actions of the Respondent were not discriminatory

65. Discriminatory taking is one which singles out a particular person of group of people without a reasonable basis.[138] Since discrimination is regarded as 'unreasonable distinction', expropriations of certain persons may not be unlawful if such distinction is 'rationally related to the state's security or economic policies might not be unreasonable'.[139] The buyout clause was invoked by Beritech, and the Claimants interests in the Sat connect project was taken over by the company. On September 11, 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

66. For an act to constitute discrimination in the sense that it is prohibited by international law, two conditions must be met.

First, the measure must result in the actual injury to the alien.

Second, the act must be done with the intention to harm the aggrieved alien.[140]

In the instant case, it is clear that the act was not done by the government of Beristan with an intention to harm the Claimant, but was rather done for the purpose of the protection of its essential security interests.

67. Discrimination may have taken place if the measure is directed against an alien or a group of aliens on account of their nationality and this results in prejudice to their interests[141]In the instant case, it is extremely clear that the measure was directed against the claimant as a result of the

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[137] Record, Annex 2, ¶ 13 of the Uncontested Facts.

[138] N.Rubins and N.S. Kinsella, *International investment , Political Risk and Dispute resolutions. A Practitioners Guide* (2005) 177 et seq.

[139] *American Law Institute (ed.), Restatement (Third) of the foreign Relations law of the United States,* para 712 (1987), Comment (f).

[140] *Bishop, Crawford, and Riesman* 1094.

[141] *Id.*

leak of confidential information by the Claimant, and had nothing to do with the nationality of the Claimant.

(a) The Government of Beristan had the right to evacuate the televative personnel from the sat-connect site

68. Criminal trespass may be defined as any unauthorized entry on the land of another or unlawfully remaining on the premises of another is a trespass for which the law provides a civil remedy.[142] Trespass statutes criminalizing refusal to leave another's property when ordered to do so.[143]For the offence of criminal trespass to be established the following ingredients need to be established.

69. Firtsly, there must be an intrusion required for the crime of criminal trespass. It must be that of entering of or remaining within the specified premises in circumstances where such action is in fact contrary to the law.[144] As for the "remains"(or fails to leave) alternative, it is necessary for the defendent to have first enetered, for otherwise he can hardly remain of fail to leave."Leave" and "enter" and temporarily exclusive concepts.[145]

Further, it is necessary for the act be done in violation of the law, which is not established merely by defendent's intention to commit some crime on the property.[146]

Secondly, criminal trespass can be committed only on protected property. IT covers the full array of real property.[147]

Thirdly, there is a common requirement that the actor must be aware of the fact that he is making an unwarranted intrusion, which serves "to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express of implied permission to enter or remain." [148]

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[142] *People v. Goduto,* 21 Ill.2d 605, 174 N.E.2d 385(1961). See eg. *Dildy v. State,* 103 Ark. 431,147 S.W.91(1912); *Roberts v. People*, 78 Colo. 555, 243 P. 544 (1926); *Miller v Harless*, 153 Va. 228, 149 S.E 619 (1929)

[143] *People v. Goduto,* 21 Ill.2d 605, 174 N.E.2d 385(1961)

[144] Model penal code, S. 221.2.See also, *Goodpastor v. State,* 273 Ind. 170, 402 N.E.2d 1238 (1989); *State v. Wolverton*, 193 Wis.2d 234, 533 N.W.2d 167(1995).

[145] *State v. Collins*, 179 Or.App.384, 39 P.3d 925 (2002).

[146] *Turney v. State*, 224 Ga.App. 524, 481 .E.2d 259 (1997).

[147] Model Penal Code, S.221.2.

[148] *Warfield v. State*, 315 Md. 474, 554 A.2d 1238 (1989).

70. In the instant case, once the buyout clause was invoked, the claimant did not have the right to stay on the premises any further, and therefore, the claimant failed to leave. Secondly, the property was real property as it belonged to the Sat-Connect project. Thirdly, the Claimant was well aware that the buyout provision had been invoked as notice had been served upon them, and therefore, were well aware that they were staying in the land unlawfully.

Therefore, it is clear that the claimant has committed criminal trespass, and therefore, the state was justified in removal the claimant from the Sat-Connect project site.

71. In the instant case, the Claimant was not allowed to remain in the facility after the buyout clause was invoked by the respondent.. This was done knowing well that the claimant did not have the right to remain on the premises any longer. Therefore, it is clear that the claimant is guilty of criminal trespass and therefore, can be evacuated from the premises.

(b) The Government of Beristan had the right to expel the personnel from its territory

72. The state may expel an alien from its boundaries, but there is a requirement that the state must give convincing reasons for the same.[149] In the *Boffolo* case[150], which concerned an Italian expelled from Venezuela, it was held that the states possess a general right of expulsion, but it could be resorted to in extreme circumstances and accomplished in a manner least injurious to the person affected. In the instant case, the Claimants did not have the authorization to continue working in the site for the Sat connect project once the buyout clause had been invoked. There was a threat to the national security of Beristan, as the Claimants had leaked vital information regarding the project to the government of Opulentia, which would compromise the security of Beristan. Further, this expulsion was done pursuant to the payment of compensation to Televative, once the buyout clause was invoked, and therefore, in conformity with all accepted principles of international law. Therefore, the government of Beristan was acting in the exercise of its right to expel an alien from its territory.

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[149] *Malcolm Shaw* 736.

[150] 10 RIAA, p.528 (1903). See also, Dr. Breger's case, Whiteman, Digest, vol. VIII, p.861; R.Plender, *International Migration Law,* 2nd Edn., Dordrecht, 1988, and G.Goodwin-Gill, *International law and the movement of persons between states,* Oxford, 1978.

73. Article 13 of the International Covenant on Civil and political rights stipulates that an alien lawfully in the territory of a state party to the convention

May be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except when compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by and be represented for the purpose before the competent authority.

74. The decision taken by the government of Beristan was reached in accordance with law. The decision to buyout the shares of Televative from the Sat connect project was purely a corporate decision. Therefore, the Government of Beristan has the right to expel the Televative personnel from Beristan.

75. Further, the burden of proving the wrongfulness of the expelling state's actions falls upon the claimant alleging expulsion and relevant rules apply where, even though there is no law or regulation forcing the alien to leave, his continued presence in that state is made impossible because of conditions generated by wrongful acts of the state or attributable to it.[151]

76. It is the contention of the claimant that the arbitrary and unfair expulsion of Claimant for motives unrelated to Claimant's performance of the JV Agreement, through the abusive exercise of Beritech's rights under Clause 8 of the JV Agreement to buyout Claimant, and the discriminatory efforts to favour local Beristian personnel, who ultimately replaced Claimant's seconded personnel. It has been shown previously that the actions of the Claimants had resulted in the formation of a threat to the Government of Beristan. Therefore, the Government of Beristan had the right to evacuate the personnel from the site and nation of Beristan.

77. Therefore, in light of the above said arguments, it is clear that

a. The actions of the respondent were taken in pursuance of public purpose.

b. Adequate compensation has been paid and;

c. There has been no discrimination against the Claimant.

[151] See Rankin v. The Islamic Republic of Iran 17 Iran-US CTR, pp.135,142; 82 ILR, pp.204,214. See also Goodwin Gill, *International Law and the Movement of Persons;* Brownlie, *Principles,* p.522, and M. Pellonpaa, *Expulsion in International law,* 1984.

Therefore, the respondent respectfully submits that the provisions of Article 4(2) of the Beristan Opulentia BIT have been complied with, and hold that the expropriation was legal.

(B)THE ACTIONS OF THE RESPONDENT ARE IN CONFORMITY WITH FAIR AND EQUITABLE TREATMENT STANDARDS

78. Article 2(2) of the Opulentia Beristan BIT provides form Fair and Equitable treatment standard:

79. In ***MTD v. Chile***, Fair and equitable treatment standard has been defined as follows:

"…fair and equitable treatment should be understood to be treatment in an even handed and just manner, conduced to fostering the promotion of foreign investment."

In a number of cases the tribunals have tried to give a more specific meaning to the FET standards by formulating general definitions or descriptions.

80. ***Genin v. Estonia***[152] concerned with the withdrawal of a banking license. The tribunal stated that acts violating the fair and equitable standard '….would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.'[153]Since there were ample grounds for the action taken by the Estonian authorities, the tribunal did not find that the violation of the fair and equitable standard had occurred.

81. The tribunals generally use three factors to evaluate a claim of fair and equitable treatment, thus providing full and constant protection and security. They are: (1) whether the purported conduct was arbitrary;[154] (2) whether the actions of the State frustrated an investor's reasonable business expectations[155]; and (3) whether the host State ensured reasonable level of administrative transparency[156].

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[152] *Genin v. Estonia,* Award, 25 June 2001, 17 ICSID Review-FILJ (2002) 395

[153] Id. At par 367.

[154] *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/98/2, NAFTA Award of 25 June 2003.See also, Dugan C. Wallace, Jr. D. Rubins N., "*Investor-State Arbitration*" (Oxford University Press: 2008)

[155] *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130 at 510

[156] *Metalclad Corp v Mexico,* Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000),; *Maffezini v Spain*, Award, ICSID Case No ARB/97/7, IIC 86 (2000), signed 11 November 2000; *Pope & Talbot Inc v Canada,* Award on the Merits of Phase 2, Ad hoc—UNCITRAL Arbitration Rules, IIC 193 (2001), signed 10 April 2001;

82. The respondent shall prove that the Fair and /equitable treatment standards have been complied with by the taking the following line of argument. Firstly, it shall be proved that the actions of the respondent were not arbitrary. Secondly, it shall be proved that the actions of the state did not frustrate the reasonable business expectations of Televative and thirdly, that host State ensured the reasonable level of administrative transparency. Fourthly, that there was no wilful neglect of duty by the respondent. Fifthly, that the international minimum standards shave been complied with and Finally, that there was no element of subjective bad faith.

(a) The actions of the government were not arbitrary.

83. Conduct that is an unreasonable or unfair exercise of governmental authority amounts to a claim of arbitrariness and a breach of equitable treatment, as well as full protection and security.[157] The Claimant suggests that arbitrary conduct of Beristan breached the standard of fair and equitable treatment thus failing to provide full protection and security as provided for in the Opulentia-Beristan BIT. Specifically, the Claimant alleges that Beristan's conduct rose to the level of arbitrariness through,

1. Improper buyout of the Claimant's shares in the Sat-Connect project through abusive exercise of Beritech's rights under clause 8 of the JV agreement.
2. Provision of inadequate compensation for the buyout of claimant' shares.
3. Forcible removal of Televative personnel from the Sat-Connect project site.

84. It is already been established that the buyout procedure followed during the board meeting was legal and non-arbitary, and consequently, the decision taken by the majority of directors resulted in the invoking of the buyout clause.[158] Further, the compensation paid into the escrow account is in accordance with the terms of the Clause 8 of the JV agreement, and the claimant is not entitled to claim for compensation in excess of what has already been agreed upon.

85. The removal of Televative personnel was not arbitary as a notice was served upon them on 28 August 2009, requiring them to hand over possession of all sat connect sites , facilities and equipment within 14 days and to remove all seconded personnel from the project.[159] However,

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[157] *Metalclad Corp v Mexico*, Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000) ¶ 526.

[158] Record, Annex 2, ¶ 10 of the Uncontested Facts.

[159] Record, Annex 2, ¶ 10 of the Uncontested Facts.

Televative failed to comply with the said notice, consequently trespassing upon the private property of Beritech. Thereafter, on September 11 2009 staff from the civil works force of the the civl engineering section of the Beristan army, secured all sites and facilities of the Sat Connect project.[160] The Respondent was compelled to take such measures as a consequence of the threat posed by Televative's actions, which threatened to compromise the national security of Beristan.

In light of the abovesaid arguments, we respectfully request the tribunal to find that the measure taken by the respondent were not arbitary.

(b) That host State ensured the reasonable level of administrative transparency

86. Transparency and the protection of the investor's legitimate expectations are closely related. Transparency means that the legal framework for the investors operations is readily apparent and that any decisions affecting the investor can be traced into that legal framework.[161] Both the requirement of transparency and the protection of legitimate expectations are by now firmly rooted in arbitral practice. The legal framework on which the investor is entitled to rely will consist of legislation and treaties, of assurances contained in decrees, licences and similar executive assurances as well as in contractual undertakings. A reversal of assurances by the host state that have led to legitimate expectations will violate the principle of fair and equitable treatment.[162]

87. It is already been established that the buyout procedure followed during the board meeting was in compliance with the procedure laid down under the JV agreement, and consequently, the decision taken by the majority of directors resulted in the invoking of the buyout clause[163].

[160]Record, Annex 2, ¶ 11 of the Uncontested Facts.

[161] UNCTAD Series on ssues in International Investment Agreements, *Fair and Equitable Treatment* (1999) 51.

[162] *Rudolf*. See also, WM Reisman and MH Arsanjani, '*The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes'* (2004) 19 ICSID Review-FILJ 328; ; S Vasciannie, '*Fair and Equitable Treatment Standard in International Investment Law and Practice*' (1999) 70 British Yearbook on International Law 99,146-147

[163] Record, Annex 2, ¶ 10 of the Uncontested Facts.

Further, the compensation paid into the escrow account is in accordance with the terms of the Clause 8 of the JV agreement[164], and the claimant is not entitled to claim for compensation in excess of what has already been agreed upon.

88. The removal of Televative personnel was tremendously transparent as a notice was served upon them on 28 August 2009, requiring them to hand over possession of all sat connect sites , facilities and equipment within 14 days and to remove all seconded personnel from the project. However, Televative failed to act in accordance with the said notice, consequently trespassing upon the private property of Beritech. Thereafter, on September 11 2009 staff from the civil works force of the the civl engineering section of the Beristan army, secured all sites and facilities of the Sat Connect project in pursuance of an executive order. The Respondent was compelled to take such measures as a consequence of the threat posed by Televative's actions, which threatened to compromise the national security of Beristan. Such measures were taking in accordance with article 9 of the Opulentia Beristan BIT.

In light of the abovesaid arguments, we respectfully request the tribunal to adjudge that the measure taken by the respondent was transparent.

(c) International minimum standards have been complied with

89. The principle of fair and equitable treatment should be interpreted as protecting procedural fairness as provided by the international minimum standard.

In *Azinian v United Mexican States*[165] the tribunal required claimants to show a denial of justice or a 'clear and malicious misapplication of the law' (at para. 103) in order to show a violation of NAFTA Art. 1105's minimum standard. In *SD Myers, Inc v Government of Canada*[166] the tribunal stated that a breach of the minimum standard only occurs 'when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective' (at para. 263), with deference given to the right domestic authorities to regulate foreign investment within their borders.

[164] Record, Annex 2, ¶ 13 of the Uncontested Facts.

[165] *Azinian v. Mexico*, Award, 1 November 1999, 5 ICSID Reports 269. 39 ILM (2000) 537.

[166] *SD Myers v. Canada*, Award on Liability,13 November 2000, 8 ICSID Reports 18.

In the instant matter it has already been demonstrated that arbitrary or unjust actions were not inflicted upon the Claimant. All the procedure so followed were according to the BIT and the JV agreement. Therefore it is submitted that there has been clear application of law and has not been any malicious misapplication of the same. The Claimant have not alleged of any malicious misapplication of law, which need to be established as a prerequisite for minimum international standard.

90. In *Pope & Talbot, Inc v Government of Canada*[167], the tribunal ('*Pope & Talbot* tribunal') noted that the fairness elements included in Art. 1105 NAFTA are additive to the minimum standard rather than included within it (at para. 111). In an effort to restrict the meaning of Art. 1105 NAFTA, Free Trade Commission subsequently issued Notes of Interpretation of Certain Chapter 11 Provisions stating that *fair and equitable treatment* and *full protection and security* are included within the international minimum standard (at B2), contrary to the conclusion of the *Pope & Talbot* tribunal. Subsequent tribunals have followed this interpretation.

(d) Legitimate expectations of the investor have not been frustrated

91. Recent jurisprudence has emphasized that the legitimate expectations of the investor will be grounded, inter alia, in the legal order of the host state as it stands at the time when the investor acquires the investment.[168] GAMI v. Mexico ruled categorically: 'To repeat: NAFTA arbitrations have no mandate to evaluate laws and regulations that predate the decision of a foreign investor to invest.'[169] In SD Myers, Inc v Government of Canada, the tribunal made the same point when it stated that the parties acted on the basis of the law as it appeared to exist at the same time of the investments.[170] Also, Feldman v. Mexico reflects the same principle by explaining that a regulation had existed at all times relevant to the investor and that no de jure change had been made.[171]

[167] *Pope& Talbot v. Canada*, Award on Merits, 10 April 2001, 7 ICSID Reports 102, 122 ILR (2002) 352.

[168] Rudolf

[169] *GAMI v. Mexico,* Award, 15 November 2004, 44 ILM (2005), at para 93.

[170] *SD Myers v. Canada*, Second Partial Award, 21 October 2002.

[171] *Feldman v. Mexico,* Award, 16 December 2002, 18 ICSID Review-FILJ (2003), 388, para 128.

92. In its Award, the *LG&E*[172] tribunal usefully summarized the features of the legitimate expectation element of fair and equitable treatment as follows:

It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.

93. It is already been established that the buyout procedure followed during the board meeting was in compliance with the procedure laid down under the JV agreement, and consequently, the decision taken by the majority of directors resulted in the invoking of the buyout clause. Further, the compensation paid into the escrow account is in accordance with the terms of the Clause 8 of the JV agreement[173]. All actions taken regarding buyout and compensation are well within the agreements so signed at the time of investment and the laws so stated then have been complied with and there has been no change in the same. Thereby, living upto the legitimate expectations of Televative, when the investment commenced.

94. A notice was served upon Televative, as a result of the meeting, on 28 August 2009, requiring them to hand over possession of all sat connect sites , facilities and equipment within 14 days and to remove all seconded personnel from the project.[174] Even in the removal of the Televative personal all the rules and procedure was followed thereby not compromising on the legitimate expectations of the investor.

It is humbly contended that by following all the agreements and treaties, the legitimate expectations of the investor has not been frustrated by the Respondent.

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[172] *LG&E International Inc v Argentine Republic* (*LG&E*), Decision on Liability, 3 October 2006 (ICSID Case No. ARB/02/1).

[173] Record, Annex 2, ¶ 13 of the Uncontested Facts.

[174] Record, Annex 2, ¶ 10 of the Uncontested Facts.

(e) Absence of bad faith on the part of the respondent

95. As recognized by commentators and recent tribunals, a unifying theme in understanding the regulatory floor available to all foreign investors under the minimum standard of fair and equitable treatment is the international law principle of good faith.[175] From this fundamental principle of international law, three theories of liability emerge—all of which can be seen in the major legal systems of the world, but none of which appears to be integrated wholesale from any particular domestic one. The three theories of liability are: (1) detrimental reliance upon legitimate expectation; (2) regulatory transparency; and (3) freedom from arbitrariness or caprice in discretionary decision-making, or in short, 'abuse of authority'. The abovesaid three requirements have already been shown to have been fulfilled while showing that the FET standards have been complied with.

96. And as the ICJ noted in the *Anglo-Norwegian Fisheries* case:

The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.[176] The exercise of the right to remove the Televative personnel from the project site was only as a consequence of Televative's own misconduct. The actions taken were for protecting the national security interests of the State of Beristan, and been justified earlier. Further, the government of Beristan has made every effort possible to honour the contractual obligations

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[175] C Schreuer, '*Fair and Equitable Treatment in Arbitral Practice*', 6 JWIT 357 (2005) 384: 'Arbitral Tribunals have confirmed that good faith is inherent in fair and equitable treatment'; R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 Int'l Law 87 (2005) at 91: 'Indeed, the substance of the standard of fair and equitable treatment will in large part overlap with the meaning of a good faith clause in its broader setting, with one significant aspect embracing the related notions of *venire contra factum proprium* and estoppel'. A number of recent awards have recognized the good faith element of fair and equitable treatment, including: *Tecnicas Medioambientales Tecmed, SA v Mexico* , Award, 29 May 2003 (ICSID Case No. ARB (AF)/00/2), 43 ILM 133 (2004), (Tecmed) at paras 153–4, *Waste Management, Inc v Mexico (No. 2)* , Award, 30 April 2004 (ICSID Case No. ARB (AF)/00/3), 43 ILM 967 (2004) at para 138, *MTD Equity Sdn Bhd & MTD Chile SA v Chile (Republic of)*, Award, 25 May 2004 (ICSID Case No. ARB/01/7) 44 ILM 91 (2005)at para 109, *Saluka BV v Czech Republic* UNCITRAL Rules Partial Award Permanent Court of Arbitration 17 March 2006 available at http://www.ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf at para 303.

[176] *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116 at 142.

undertaken in the JV agreement. It is clear from the above arguments that all the actions of the government were in consonance with the minimum standards required under the treaty(FET standards) and therefore, the principles of good faith have been complied with.

97. The fair and equitable treatment standard is vague and indeterminate; the only consensus reached is that it is irrelevant whether the host state acted in bad faith and that the standard is independent from the domestic legal order.[177]

Applying this framework to the facts of the case, it becomes clear that the Claimant has failed to carry its burden of proof of showing causality between the state's action or omission and the harm to its investment, as well as showing that the state's actions were unreasonable.

(f) There is presence of willful neglect

98. Blacks' law dictionary defined neglect as : The omission of proper attention to a person or thing whether inadvertent, negligent or wilful; the act or condition of disregard.[178] Wilful neglect has been defined as intentional neglect or deliberate neglect.[179] It is clear that the Claimant has been unable to show any wilful neglect of duty, and therefore there has been no wilful neglect of duty.

(F) GENERAL PRINCIPLES OF INTERNATIONAL LAW HAVE NOT BEEN VIOLATED

a) Principle of good faith has been adhered with

99. The three broad theories of liability are: (1) detrimental reliance upon legitimate expectation; (2) regulatory transparency; and (3) freedom from arbitrariness or caprice in discretionary decision-making, or in short, 'abuse of authority'. The abovesaid three requirements have already been shown to have been fulfilled while showing that the FET standards have been complied with. It has already been shown that the abovesaid three requirements have been fulfilled while

[177] Stephan Schill, "Fair and Equitable Treatment" as an Embodiment of the Rule of Law, in Hoffman and Tams,31 (2007).

[178] Blacks law dictionary 1055.

[179] *Id.*

establishing the fair and equitable standard of treatment provided. Therefore it is clear that the international principle of good faith has been adhered to.

(b) *Principle of Audi alteram Partem has been followed*

100. It has been has a long established rule that no one is to be condemned, punished or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard.[180]

101. On August 21, 2009, the chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the August 12th article in The Beristan Times.[181] Further, notice for the meeting on August 27, 2009 was given, however, only Ms. Alice Sharpeton attended the said meeting, who eventually refused to participate and left the meeting before its end. It is clear that on 2 occasions, opportunity was provided to the directors of Televative in order to clarify their stand on the issue. The directors appointed by Televative collectively did not participate in the second meeting held on 27 august, 2009, with the sole intention of preventing the directors appointed Beritech from taking decision regarding the breach on clause 4 of the JV agreement. However, it was purely due to considerations of essential security of the State of Beristan was the said decision taken. IT is clear therefore, that all decisions regarding the buyout were taken only after opportunity was given to the other side to present their version. Therefore, the respondent respectfully requests the tribunal to find that the principle of audi alteram partem has been followed.

(c) Actions of the Respondent does not violate Applicable treaties

102. Claimant contends that its expulsion from the Sat-Connect project, the forcible removal of its personnel by members of the Beristian military, and the improper buyout of its interest in Sat-

[180] Per Parke B, in Re Hammersmith Rent charge, 4 Ex. 87 at p.97; Per Lord Campbell in R v. Archbishop of Canterbury, 1 E & E. 533, at p. 559; per Lord Kenyon in Harper v. Carr, 7 TR 270, at p. 275, and in R v. Benn, 6 Id. 194, at p.198; Per Bayley B in Capel v. Child, in 2 Cr. & J. 558, at p. 579 (See Daniel v. Morton, 16 Q.B. 198); Bagg's case, 11 Rep. 93 b; R v. Chancellor of the University of Cambridge, 1 Str. 557, at p.566; R v.Gaskin, 8 T.R. 209; R v. Saddlers Co., 10 HL Cas. 404 at p.459; R v. Housing Tribunal, [1920] 3 KB 334; Errington v. Minister of Health[1935] 1 KB 249; Re Two Solicitors, (1937) 4 All ER 451.

[181] Record, Annex 2, ¶ 9 of the Uncontested Facts.

Connect were the product of a conspiracy against Claimant and violate Claimant's rights under applicable treaties, in particular Articles 2, 4 and 10 of the Beristan-Opulentia BIT.

V. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9 (ESSENTIAL SECURITY) OF THE BERISTAN-OPULENTIA BIT AS A DEFENCE TO CLAIMANT'S CLAIM

103. It is a common feature in international agreements to recognise the rights of sovereign nations to take measures, notwithstanding the obligations undertaken in a particular agreement, to protect their essential security interests. There is no internationally recognised definition of essential security interests and "general exception" articles sometimes also provide for measures taken to preserve or maintain "public order" and/or "international peace and security ". [182] What is an essential interest of the case depends on the facts of each case,[183] but it is acknowledged that it is not limited to matters relating to the very survival of the State such as a military invasion, but also threats to its economic, ecological, or other vital interests.[184]

104. The extent to which a given interest is essential depends on the circumstances and cannot be prejudged. It extends to particular interests of the State and its people, as well as of international community of its own. Whatever the interest maybe, however, it is only when it is threatened by a grave and imminent peril that necessity can be invoked.[185]

105. The Oxford English Dictionary defines the term as the"safety of a nation and its people, institutions, etc., especially from military threat or from espionage, terrorism, etc." This definition is neither exhaustive concerning the object of protection nor concerning the origin of the threat but talks of direct danger to security only.

106. In an award rendered on September 5, 2008, an arbitral tribunal has dismissed all but one of the claims brought by an American investor, Continental Casualty, against the government of Argentina. Argentina was found liable for damages of US$ 2.8 million plus interest: a fraction of the US$ 112 million sought by the claimant. The dispute—one of a number that stem from

[182] National Security measures, Negotiating Group on Multilateral Agreement on Investment,21st November 1995,OECD (Note by the Chairman). Available at http://www1.oecd.org/daf/mai/pdf/ng/ng957e.pdf accessed on 19th August 2010.

[183] *CMS v. Argentina* para 252

[184] *Gabcikovo-Nagymaros Project*, para 53; *Semra v. Argentina*, para. 374.

[185] *Gabcikovo-Nagymaros Project*, para 53

Argentina's response to its financial crisis—concerned an Illinois-based firm's investment in an Argentinean insurance company, CNA ART. CNA saw its portfolio of low-risk assets, such as cash accounts, treasury bills and government bonds, plunge in value as financial instruments in U.S. dollars were forcibly converted to pesos and asset transfers out of Argentina were restricted. In its claim, registered with ICSID in 2003, Continental Casualty charged that Argentina had breached four provisions in the US-Argentina BIT: (i) the requirement to observe contractual obligations; (ii) the requirement to provide compensation following an expropriation; (iii) the requirement to treat an investment fairly and equitably; (iiii) and finally, the requirement to protect the free transfer of assets. Argentina commenced its defense by portraying the scale of the economic depression that gripped the country in 2001-2002, in which the government says it "faced a terminal situation and had to forcibly change the economic plan of the country as a result of the devaluation of the local currency." As it has argued in other cases, Argentina maintained that the measures it implemented to rein in the crisis were "proportional to the situation".

107. In this case, the tribunal was persuaded that a severe economic crisis, of the sort experienced by Argentina, qualified as an "essential security interest". Moreover, the Government's measures to combat the crisis were, for the most part, deemed "necessary".[186] Under Article 25(1) of the ILC Articles, the measures adopted by a State invoking necessity have to constitute the 'Only way' or only means for that State to protect its interest.[187]

108. It is contended that the Claimant breached the confidentiality provision of that Agreement (Clause 4) by leaking information about the Sat-Connect project—including information about the technology, systems, intellectual property and encryption to be used and other trade secrets—to the Government of Opulentia. According to the facts of the instant case, the sat connect project dealt with matters concerning the military capability of the Government of Beristan, alongwith other civilian needs.[188] It is contended that the claimant leaked information concerning

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[186] *Continental Casualty Company v. the Argentine Republic*, Available at http://www.investmenttreatynews.org/cms/news/archive/2008/09/10/award-continental-casualty-company-v-the-argentine-republic-argentina-emerges-largely-victorious-in-dispute-related-to-country-s-financial-crisis.aspx, accessed on 19th August 2010.

[187] August Reinisch 219.

[188] Record, Annex 2, ¶ 6 of the Uncontested Facts..

the Sat connect project to the government of Opeulentia. Such a leakage by the Cliamant can compromise on the essential interest of Beristan, and can therefore lead to a direct threat to the national security of Beristan.

109. It is further asserted that the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces,[189] directly implicate the national security of Beristan.

Article 9 of the Opulentia-Beristan BIT reads as under:

Nothing in this Treaty shall be construed:

1. 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 interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests.[190]

110. It has been established that the essential security of the Government of Beristan had a possibility of breach , therefore for the purpose of national security, the defence of essential security under Article 9 of the BIT can be exercised as a valid defence to the claimant's claim. It is argued that Claimant's removal from the Sat-Connect project was justified on national security grounds and Article 9 of the BIT can be taken as a defence to the actions of the Respondent.

[189] Record, Annex 2, ¶ 6 of the Uncontested Facts.

[190]Record, Annex 1, Beristan-Opluentia Bilateral Investment Treaty, Article 9.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of the RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Tribunal to declare that:

- The Tribunal does have jurisdiction under the JV Agreement. **[FIRST ISSUE]**
- The tribunal does NOT have jurisdiction under the BIT. **[SECOND ISSUE]**
- The RESPONDENT's company did NOT materially breached the contract. **[THIRD ISSUE]**
- The measures adopted by the RESPONDENT does NOT amount to expropriation. **[FOURTH ISSUE]**
- The RESPONDENT CAN claim the "essential security" defense. **[FIFTH ISSUE]**

(Signed)

/s/ Chhavi Agarwal /s/ Vandana Iyer /s/ Aishwarya Nathan /s/ Ruchira Singh

Chhavi Agarwal Vandana Iyer Aishwarya Nathan Ruchira Singh

/s/ Debajyoti Das

Debajyoti Das (Coach)