FABELA

Memorandum for Respondent

TELEVATIVE INC.

CLAIMANT

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

RESPONDENT

III Annual Foreign Direct Investment International Moot Competition

International Center for Settlement of Investment Disputes

ICSID Case No. ARB/X/X

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LIST OF ABBREVIATIONS

Art./Arts.	Article/Articles
BIT	Bilateral Investment Treaty
Beristan-Opulentia BIT	Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and Reciprocal Protection of Investments
Claimant	Televative Inc.
Co.	Company
Corp.	Corporation
e.g.	Exempli gratia (for example)
ed.	Edition
Ed.	Editor
emph. add.	Emphasis added
et seq.	Et sequentes (and following)
etc.	Et cetera (and so on)
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
i.e.	Id est (that means)
Inc.	Incorporated
inter alia	Among other things
LCIA	London Court of International Arbitration
Ltd.	Limited

Minutes	Minutes of the First Session of the Arbitral Tribunal
NAFTA	North American Free Trade Agreement
No./Nos.	Number/s
OECD	Organisation for Economic Co-operation and Development
p./pp.	Page/pages
Prof.	Professor
Respondent	The Government of the Republic of Beristan
UNCITRAL	United Nations Commission on International Trade Law
Uncontested facts	Annex 2 of the Minutes of the First Session of the Arbitral Tribunal
UNCTAD	United Nations Conference on Trade and Development
Vol.	Volume
v.	Versus
&	And
para./paras.	Paragraph/Paragraphs

INDEX OF AUTHORITIES

McLACHLAN, Shore
WEINIGER, Reinsch
International investment arbitration, Substantive principles,
Oxford, 2007
(cited as: McLachlan/Weiniger)

REINISCH, August
Expropriation
in The Oxford Handbook of International Investment Law, Oxford University Press, Oxford, 2008
(cited as: Reinisch)

Legality of Expropriations in Standards of Investment Protection,
Oxford University Press, Oxford, 2008
(cited as: Reinisch2)

SASSON, Monique
Umbrella Clauses: When a Breach of Contract May Become a Breach of Treaty
Substantive Law in Investment Treaty Arbitration, (Kluwer Law International 2010) pp. 173 – 194
Available at:
http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1030011-n
(cited as: Monique Sasson)

SCHREUER, Christoph. H
Fair and Equitable Treatment (FET): Interactions with other Standards,
Transnational Dispute Management, Vol. 4, Issue 5, September 2007
(cited as: Schreuer)

SINCLAIR, Anthony C.
The Origins of the Umbrella Clause in the International Law of Investment Protection,
Arbitration International,
Kluwer Law International 2004 Volume 20 Issue 4, p. 411-434
Available at:
http://www.kluwerarbitration.com
(cited as: Sinclair)

VAN HAERSOLTE-VAN HOF, Jakomijn; HOFFMANN, Anne K.
The Relationship Between International Tribunals And Domestic Courts
The Oxford Handbook of International Investment Law, edited by P. Muchlinski, F. Ortino, C. Schreuer, pp. 963,964
(cited as: J.J. Van Haersolte-Van Hof/A.K. Hoffmann)

VÁRADY, Tibor
Waiver in Arbitral Proceedings and

Limitations on Waiver
Belgrade Law Review, Year LVII, 2009, No. 3
(cited as: Tibor Várady)

WONG, Jarrod

Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes, p.136
Available at:
http://www.georgemasonlawreview.org/doc/14-1_Wong.pdf
(cited as: Jarrod Wong)

INDEX OF CASES

docId=DC602_En&caseId=C186
(cited as: Tecmed v. Mexico)

Joy Mining Machinery Limited v. Arab Republic of Egypt
ICSID Case No. ARB/03/11 Award, August 6, 2004 19 ICSID Rev.—FILJ 486 (2004)
Available at:
http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf
(cited as: Joy Mining v. Egypt)

Metalclad Corporation v. United Mexian States,
ICSID Case No. ARB(AF)/97/1
Award of August 30, 2000 in ICSID Reports, Vol. 5, 212,
Available at:
http://icsid.worldbank.org (search for Case No. ARB(AF)/97/1) at 91-92, para 103
(cited as: Metalclad v. Mexico)

Emilio Agustín Maffezini v. The Kingdom of Spain
ICSID case No. ARB/97/7
Available at:
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163
(cited as: Maffezini v. Spain)

***El Paso Energy International Company v. Argentina*,**
ICSID Case No. Arb/03/3
Available at:
http://www.kluwerarbitration.com/default.aspx
(cited as: El Paso v. Argentina)

AAPL v. Sri Lanka,
ICSID Case No. ARB/87/3 Award of 27 June 1990
Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka
Published in: (1991) 30 International Legal Material 577
(cited as : AAPL v. Sri Lanka)

***Pan American Energy LLC and BP Argentina Exploration Company v. Argentina*,**

ICSID Case Arb/03/13
Available at:
http://www.kluwerarbitration.com/default.aspx
(cited as: Pan American Energy v. Argentina)

CMS Gas Transmission Company v. Argentina,
ICSID case Arb/01/8
42 ILM 788 (2003)
Available at:
http://www.kluwerarbitration.com/default.aspx
(cited as: CMS Gas v. Argentina)

Compania de aguas de aconquija SA and Vivendi Universal v. Agentine Republic
*I*CSID Case ARB/97/3
Decision annulment 3 July 2002
Available at:
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC550_En&caseId=C159
(cited as: Vivendi v. Argentina)

INTERNATIONAL COURT OF JUSTICE

Bosnia and Herzegovina v. Serbia,
Merits, ICJ Report 2007, p. 142-148
Available at:
http://www.icj-cij.org/docket/index.php?p1=3&case=122&code=ybh&p3=4
(cited as: Bosnia and Herzegovina v. Serbia)

Nicaragua v. United States of America
Merits, ICJ Reports 1986, p.14.
Military and Paramilitary Activities in and against Nicaragua
Available at:
http://www.icj-cij.org/docket/?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5
(cited as: Nicaragua v. United States of America)

CME Czech Republic BV(The Netherlands) v Czech Republic
issued in Stockholm, Sweden,
on September 2001
Available at:
http://www.biicl.org/files/3919_2003_cme_v_czech_republic.pdf
(cited as: CME Czech Republic BV(The

Netherlands) v Czech Republic)

STOCKHOLM CHAMBER OF COMMERCE

Israeli companies A & B v. The Former Soviet Republic (1997)
Stockholm Chamber of Commerce
Jurisdictional Award in case no. 38/1997
(cited as: Israeli companies A & B v. The Former Soviet Republic)

Israeli companies A & B v. The Former Soviet Republic (1997)
Stockholm Chamber of Commerce
Jurisdictional Award in case no. 39/1997
(cited as: Israeli companies A & B v. The Former Soviet Republic No. 2)

UK COURTS

Occidental Exploration and Production Co. v. Republic of Ecuador
Final Award
London Court of International Arbitration
Administered Case No UN3467 Arbitral Tribunal 1 July 2004
Available at:
http://www.biicl.org/files/3914_2004_occidental_v_ecuador.pdf
(cited as: Occidental v. Ecuador)

US COURTS

J.A. Jones Inc., Kvaener ASA v. The Bank of Tokyo-Mitsubishi Ltd. et al.
902. C No. 308. New York Branch, US District Court
(cited as: J.A. Jones Inc., Kvaener ASA v. The Bank of Tokyo-Mitsubishi Ltd. et al.)

In re Hidrocarburos y Derivados*,*
CA, 453 F. Supp . 160 (S.D.N.Y. 1977)
United States 2nd Circuit Court of Appeals
Available at:
http://www.loislaw.com/advsrny/doclink.htp?alias=F2CASE&cite=815+F.2d+840
(cited as: In re Hidrocarburos y Derivados)

Development Bank of the Philippines v. Chemtex Fibers Inc.
617 F.Supp. 55 (S.D.N.Y. 1985)
(cited as: Development Bank of the Philippines v. Chemtex Fibers Inc.)

Wells Fargo Bank v. London SS Owners' Mutual Ins.**,**
408 F.Supp. 626 (S.D.N.Y. 1976);

United States Court of Appeals,
Sixth Circuit
Available at:
http://ftp.resource.org/courts.gov/c/F3/95/95.F3d.400.94-3883.94-3881.html
(cited as: Wells Fargo Bank v. London SS Owners' Mutual Ins.)

Griffin v. Semperit of America, Inc.,
414 F.Supp. 1384 (S.D.N.Y. 1976)
Available at:
http://ftp.resource.org/courts.gov/c/F3/95/95.F3d.400.94-3883.94-3881.html
(cited as: Griffin v. Semperit of America, Inc)

INDEX OF LEGAL ACTS, MODEL LAWS AND OTHER SOURCES

Model Law	*United Nations Commission On International Trade Law Model Law on International Commercial Arbitration (amendments from 2006)* *Available at:* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
ICSID Convention	*International Center for Settlement of Investment Disputes Convention, Regulations and Rules* Entered into force on October 14, 1966 *Available at:* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf
International Law Commission, Report on the work of its 53 session	*International Law Commission, Report on the work of its 53 session (2001)*, General Assembly, Official Records, Fifty-Sixth Session Supplement No. 10 (A/56/10), p. 43 *Available at:* http://www.un.org/ga/56/document.htm
OECD F&E	*OECD Fair and Equitable Treatment Standard in International Investment Law OECD,* Working Papers on International Investment, No. 2004/3 September 2004 *Available at:* http://www.oecd.org/dataoecd/22/53/33776498.pdf
UNCTAD F&E	*Fair and Equitable Treatment* *UNCTAD Series on issues in international investment agreements, 1999* *UNCTAD/ITE/IIT/11(Vol. III)* *Available at:* http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf
UNCTAD Investor-State Disputes arising from Investment Treaties	*United Nations Conference on Trade and Development Investor-State Disputes arising from Investment Treaties* *Available at:* http://www.unctad.org/en/docs/iteiit20054_en.pdf

UNCTAD security	*The protection of national security in IIAs,* UNCTAD Series on International Investment Policies for Development *Available at:* www.unctad.org
Vienna Convention on the Law of Treaties	*Vienna Convention on the Law of Treaties* 1969 *Available at:* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

STATEMENT OF FACTS

March 2007	Beritech was established as the state-owned company by the Government of Beristan, with Respondent owning 75% of interest and a small group of wealthy Beristian investors, closely tied to the Government, owning remaining 25% of interest.
18/10/2007	Claimant and Beritech entered into a JV Agreement, establishing the joint venture company Sat-Connect S.A. Beritech owns a majority stake of 60%, while Claimant owns the remaining 40%. Respondent co-signed the JV Agreement in the capacity of the guarantor for the obligations of Beritech. Sat-Connect was envisaged as a regional satellite network project to be used for both civilian and military purposes, providing connectivity and communications for user anywhere within the vast expanses of Euphonia, a region spreading over one fifth of the world's surface, including Beristan, six other countries and Euphonian Ocean. Claimant's overall monetary investment in the Sat-Connect was US$47 million.
12/08/2009	An article was published in The Beristan Times in which a highly placed Beristian government official revealed that Sat-Connect project had been compromised due to a leak of information originating from Claimant's personnel. The article also raised national security concerns in connection to the leaks of information that were allegedly passed to the government of Opulentia.
21/08/2009	Meeting of the members of the Sat-Connect's board of directors regarding the allegations that had been raised in the newspaper article from August 12 2009.
27/08/2009	A buy-out of the Claimant's stake in Sat-Connect, by virtue of the Clause 8 of the JV Agreement, was conducted by Beritech, with a support from the majority of the Sat-Connect's board of directors. Out of six directors initially present at the meeting, only five remained to vote on the decision.

28/08/2009	The notice requiring hand-over of all possessions in Sat-Connect, in the period of 14 days, was served to Claimant.
11/09/2009	Civil Works Force staff, within the Beristian army, was engaged to secure all sites and facilities of the Sat-Connect, instructing Claimant's personnel to immediately leave the premises. The persons working on the site associated with Claimant were subsequently evacuated from Beristan. On the same day, Beritech notified Claimant of its desire to settle amicable, or failing that, to pursue with arbitration in accordance with the clause 17 of the JV Agreement.
12/09/2009	On the following day, Claimant notified Respondent of a dispute arising under the Beristan-Opulentia BIT, expressing its will to settle amicable, of failing that, pursue with arbitral proceedings under the Article 11 of the Beristan-Opulentia BIT.
19/10/2009	Beritech filed a request for arbitration against Claimant hereto.
28/10/2009	Claimant filed the request for arbitration before ICSID, against Respondent.
01/11/2009	ICSID Secretary General registered the pending dispute between Claimant and Respondent for arbitration.
15/03/2010	The ICSID Tribunal was properly constituted.

PART ONE: TRIBUNAL DOES NOT HAVE JURISDICTION TO RULE IN THE PRESENT CASE

1. Contrary to Claimant's assertions, both the factual background to this dispute as well as applicable legal standards derived from international jurisprudence and the body of transnational legal rules provide for conclusion that Tribunal is precluded from hearing the dispute at hand. Thus, Respondent respectfully objects to the jurisdiction of this Tribunal, since Claimant's contract-based claims under the JV Agreement are to be regarded as inadmissible before this Tribunal (I.) and the Clause 17 of the JV Agreement precludes Claimant from instituting arbitral proceedings under the Article 11 of the Beristan-Opulentia BIT (II.)

I. CLAIMANT'S CONTRACT-BASED CLAIMS UNDER THE JV AGREEMENT ARE INADMISSIBLE BEFORE THIS TRIBUNAL

2. Respondent contends that Claimant is not to be entitled to bring this dispute before the Tribunal, due to the fact that firstly, its claims are purely contractual in nature and cannot be construed as Respondent's breach of obligations under the Beristan-Opulentia BIT (**1.**), secondly that umbrella clause from the Article 10 of the Beristan-Opulentia BIT does not encompass the contract-based claims of Claimant (**2.**), and finally, even if the Tribunal finds that Article 10 of the Beristan-Opulentia BIT encompasses contract-based claims of the Claimant, it is Respondent's contention that there was no breach of JV Agreement (**3.**).

1. Claimant's contentions are purely contractual in nature and cannot be construed as Respondent's breach of obligations under the Beristan-Opulentia BIT

3. Contrary to Claimant's allegations, its contentions raised before the Tribunal are of purely contractual nature, relating solely to alleged breaches of the JV Agreement. As it will be shown below, according to the facts of the case, all Claimant's claims before this Tribunal lack the substance that refers to the actual existence of the breach of the BIT obligations – an element that is essential for a claim made by the investor, if the protection is sough before an ICSID tribunal. Furthermore, the essence of the investment arbitration mechanism enshrined in the Article 11 of the Beristan-Opulentia BIT would be seriously undermined if the Tribunal was to find that it has jurisdiction to hear the case at hand.

4. Respondent entered into a BIT with the government of Opulentia for the purposes of mutually enhancing the standards of foreign direct investment on the territories of the party to the BIT. The dispute settlement mechanism under the Beristan-Opulentia BIT provide for, among others, settlement of "investor-state" disputes by the ICSID center, under the auspices of the ICSID convention. International obligations undertaken by the parties to the Beristan-Opulentia BIT, and the possible breaches thereto, affecting investors as private parties give rise to applicability of the ICSID dispute resolution mechanism. This is to say that the core of the "investor-state" arbitral proceedings is to revolve around the breach of the BIT obligation. The foregoing principle was restated in both practice and doctrine, being the landmark of the investment arbitration evolution.[1]

5. Moreover, as to the specifics of the case at hand, the clear and unambiguous wording of the Article 11 of the Beristan-Opulentia BIT provides that the disputes suitable for settlement by the ICSID center are disputes that concern an obligation of the Contracting Party under the BIT in relation to an investment made by the investor.2 Accordingly, the standing of Claimant before this Tribunal is confined to a dispute that is concerned only with Respondent's obligations under the Beristan-Opulentia BIT.

6. Contrary to the above said, Claimant's allegations revolve around the alleged breaches of the JV Agreement on the side of Beritech – a company that is not and cannot be the respondent in the instant proceedings. In Claimant's own words, the basis for bringing a claim before this Tribunal lies in "its expulsion from the Sat-Connect project"[3] and "the improper buyout of its interest in Sat-Connect"[4] all of which is based on "allegations that Claimant leaked

[1] J. J. Van Haersolte – Van Hof, A.K. Hoffmann, pp. 963-964

[2] Article 11 of the Beristan-Opulentia BIT

[3] Record, p. 6

[4] Ibid, p. 6

information about Sat-Connect's technology and systems to the Government of Opulentia."[5] All the previously cited refers to the obligations stipulated under the JV Agreement, namely Clauses 4 (Confidentiality) and 8 (Buy-out procedure) and the legality of the measures taken by Beritech in that regard, falling therefore within the boundaries of the joint venture contract, and not the BIT.

7. It is clear from the facts of the case that the claims put forward by Claimant are of purely contractual nature. Conversely, the intention of the parties to the Beristan-Opulentia BIT, while stipulating the Article 11 thereto, was to provide the investors with a possibility to seek protection of its rights guaranteed under the BIT, i.e. to bring claims before ICSID center based on possible breaches of the parties' obligation stemming from the BIT. Accordingly, Respondent urges the Tribunal to find Claimant's contentions as inadmissible, and consequently find that it has no jurisdiction in the case at hand.

2. Furthermore, umbrella clause from the Article 10 of the Beristan-Opulentia BIT does not encompass the contract-based claims of the Claimant

8. Claimant has argued that the scope of the umbrella clause contained in the Beristan-Opulentia BIT is construed in such a manner as to elevate the Claimant's contract-based contentions to the level of its treaty-based ones. Respondent disagrees with the preceding line of argumentation due to inexistence of a general rule in international investment law providing for such an interpretation, as well as ambiguous jurisprudence on the matter, and suggest to the Tribunal to reject the arguments raised by the Claimant in that regard due to the following reasons:

a.) There are no uniform standards in interpretation of the umbrella clauses applicable hereto

9. By definition, umbrella clause is a treaty provision found in many BITs that requires each Contracting State to observe all investment obligations it has assumed with respect to

[5] Ibid, p. 6

investors from the other Contracting State.6 The foregoing definition of the umbrella clause was occasionally interpreted in such a manner that the obligations of the Contracting State under the BIT also encompass the obligations specified in particular investment contracts entered into by and between the investor, host state and other legal entity from the host state. However, even the authors supporting the latter interpretation do admit that umbrella clauses are regarded as one of the most controversial issues that have arisen in arbitration lately.7

10. The fact that the practice regarding the interpretation of the umbrella clauses is scarce and incomplete and that the interpretation of the umbrella clauses as to elevate contract-based claims on the level of treaty based ones, is not set on internationally accepted standards was also articulated in the recent practice of the ICSID tribunals.[8] In the light of the foregoing, it is clear that no consistent practice whatsoever exists in interpretation of the umbrella clauses. Accordingly, since the interpretation of the umbrella clause proposed by the Claimant is more of an exception than a rule, Respondent suggests that Tribunal conforms to internationally accepted standards of interpretation and apply a principle of exceptiones non sunt extendendae.

b.) Prevailing practice of the ICSID tribunals conveys a narrower interpretation of the umbrella clause, restricting elevation of the contract-based claims to the level of treaty-based claims

11. Despite the fact that no uniform practice in interpretation of the umbrella clauses is set in jurisprudence of international tribunals, certain trends can be traced in that regard. Contrary to the assertions made by Claimant, the standards applied in the case load from different ICSID tribunals, similar to the case at hand, purports a narrower interpretation of the umbrella clause. As suggested by Professor A. Sinclair, "careful attention must be paid to the particular language of each clause and the structure of the relevant treaty, including the presence of compulsory dispute settlement provisions to discern the true intention of the

[6] Gill et al., p. 403

[7] Jarood Wong, p.136; Monique Sasson, p.173

[8] *SGS v. Pakistan*

Contracting States." [9] Finding the true intention of the parties to the Beristan-Opulentia BIT in drafting of the Article 10 thereto requires application of several standards deriving from the previously mentioned practice.

12. The first tribunal to examine the issue of interpretation of an umbrella clause, regarding its scope, was an ICSID tribunal in SGS v. Pakistan.[10] Noting that a "treaty interpreter must of course seek to give effect to the object and purpose projected by [the umbrella clause] and by the BIT as a whole"[11], and while "applying these familiar norms of customary international law on treaty interpretation"[12] the tribunal concluded that the said umbrella clause does not elevate the contract-based claims to a level of treaty-based ones.[13]

13. In explaining the reasoning behind the said conclusion, the tribunal stressed that a liberal interpretation of the clause might potentially lead to an infinite number of proceedings initiated by private investors involving every possible State contract, while at the same time this reading of the clause would render the substantive provisions of the BIT effectively superfluous.[14] Moreover, the tribunal emphasized that the placing of the umbrella clause outside of the first order substantive obligations in the BIT, clearly demonstrates the contracting parties' intention not to project a substantive obligation through this clause.[15] The similar pattern in restrictive interpretation of umbrella clauses was also followed by other

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[9] Sinclair, p. 412

[10] *SGS. v. Pakistan*

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

[12] Ibid. para. 165

[13] Ibid, para 165-166

[14] Ibid, paras. 167-168

[15] Ibid, para. 170

ICSID tribunals in cases Joy Mining v. Egypt[16], El Paso v. Argentina[17] and Pan American Energy LLC v. Argentina[18], giving a rise to a trend in interpretation in line with the maxime exceptiones non sunt extendenda.

14. Having in mind the factual similarities between the cited cases and the case at hand, especially regarding the wording of the umbrella clause (its ambiguity relating to the exact scope of Respondents' obligations), its position in the Beristan-Opulentia BIT (being outside the first order substantive obligations under the BIT), the title of the Article 10 thereto ("Observance of Commitments") as well as the fact that its broad interpretation would result in undermining the essence of other substantive provision in the Beristan-Opulentia BIT, Respondent contends that for all the foregoing reasons, this Tribunal should reject the Claimant's proposal for interpretation and narrowly read the disputed Article 10 of the BIT.

3. Even if Tribunal finds that Article 10 of the Beristan-Opulentia BIT encompasses contract-based claims of Claimant, Respondent contends that there was no breach of JV Agreement

15. In case the Tribunal decides not to follow the line of argumentation delineated in the preceding paragraphs, Respondent submits there was no breach of the JV Agreement, on the side of either Beritech or Respondent.

16. Contrary to Claimant's assertions, the Clause 8 of the JV Agreement, calling for the specific conditions of the buy-out procedure, was fully complied with by Beritech. Namely, due to the fact that Claimant materially breached the JV Agreement in Clause 4 by leaking confidential information regarding the Sat-Connect project, causing the threat to national security of Respondent, Beritech was allowed to carry out the buy-out as specified in the Clause 8 of the JV Agreement. Since the JV Agreement was breached by Claimant, providing legitimate

[16] *Joy Mining v. Egypt*

[17] *El Paso v. Argentina*

[18] *Pan American Energy v. Argentina*

grounds for performed buy-out, Beritech's actions and Respondent's standing in that regard were in line with the provisions of the JV Agreement.

17. Having in mind that these issues form a part of the argumentation presented in substantive part of Respondent's pleading, namely paras. 36-39, the Respondent will not further engage in detailed explanation of the issues hereby.

II THE CLAUSE 17 OF THE JV AGREEMENT PRECLUDES CLAIMANT FROM INSTITUTING ARBITRAL PROCEEDINGS UNDER THE ARTICLE 11 OF THE BERISTAN-OPULENTIA BIT

18. Respondent contends that Claimant is precluded from instituting proceedings before the ICSID center, and in line with the Article 11 of the Beristan-Opulentia BIT, due to the existence of a valid arbitration agreement contained in the Clause 17 of the JV Agreement. Namely, having co-signed the JV Agreement, in the capacity of the guarantor19, Respondent has become a signatory thereto. Moreover, as a guarantor, Respondent is to assume the obligations of Beritech under the JV Agreement, upon Beritech's default.[20] In that regard, assuming obligations of Beritech as a contractual party and co-signing the JV Agreement, Respondent is to be regarded as bound by the dispute settlement mechanism contained in the Clause 17.

19. The case law supporting the preceding contention can be found in the practice of the US courts.[21] Namely, as it was delineated by the US Court of Appeals in the case Development Bank of the Philippines v. Chemtex Fibers Inc.[22] the guarantor as the signatory to the main

[19] Uncontested facts, Annex 2, para. 1

[20] 1st Request for Clarifications, Request no. 152

[21] *In re Hidrocarburos y Derivados; Griffin v. Semperit of America, Inc*; *Wells Fargo Bank v. London SS Owners' Mutual Ins*

[22] *Development Bank of the Philippines v. Chemtex Fibers In.*

contract is approving the contents of the contract and is therefore bound by the arbitration clause contained therein. Even when the guarantor has not signed the main contract, certain arbitral and court practice has shown that in the case where the obligations of the guarantor and the debtor are similar or identical, guarantor was perceived as bound by the arbitration clause.[23]

20. In line with the standing of the prevailing practice on the matter and the fact that Respondent co-signed the JV Agreement as a guarantor, assuming Beritech's obligations upon its default, it is clear that Respondent hereto is bound by the arbitration clause contained in JV Agreement.

21. What is more, as it was clearly delineated by the ICSID ad hoc Annulment Committee in the Vivendi Universal v. Argentina Annulment Proceedings, in a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.[24] The JV Agreement, as a contract to which both the Claimant and the Respondent are parties, in the Clause 17 contains such a choice of forum clause.

22. Thus, Respondent further submits that Claimant is barred from instituting proceedings under the Article 11 of the Beristan-Opulentia BIT due to following reasons: firstly, the Clause 17 of the JV Agreement provides for exclusive jurisdiction of the arbitral tribunal constituted under the 1959 Arbitration Act of Beristan (1.); secondly, dispute settlement mechanism under the Clause 17 of the JV Agreement was properly triggered prior to commencement of proceedings hereto (2.); and finally, Claimant waived its right to object to the jurisdiction of the arbitral tribunal constituted under the 1959 Arbitration Act of Beristan (3.).

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[23] *Israeli companies A & B v. The Former Soviet Republic* ; *Israeli companies A & B v. The Former Soviet Republic No. 2*; *J.A. Jones Inc., Kvaener ASA v. The Bank of Tokyo-Mitsubishi Ltd. et al.*

[24] *Vivendi v. Argentina*, para. 98

1. Clause 17 of the JV Agreement provides for exclusive jurisdiction of the arbitral tribunal constituted under the 1959 Arbitration Act of Beristan

23. The Clause 17 of the JV Agreement is a dispute settlement clause allowing the parties to reach for arbitration in the case of any dispute arising out of or relating to the JV Agreement.[25] Furthermore, the Clause 17, with Claimant and Respondent as the parties to it, stipulates that, failing the amicable settlement, the dispute shall be resolved only by arbitration under the rules of the 1959 Arbitration Act of Beristan[26]. In that regard, the reading of the Clause 17 is that it unambiguously provides for exclusive jurisdiction of the arbitral tribunal constituted in accordance with the rules stipulated therein, when disputes arising out of or in relation to the JV Agreement are at hand.

24. The intention of the parties, as to the meaning of the said arbitration clause is unequivocal – no other forum is to have jurisdiction for disputes encompassed by the Clause 17, apart from the one delineated therein. Since the contentions brought by Claimant before this Tribunal are of purely contractual nature (despite the fact the Claimant has tried to enshrine its contentions in a "BIT-breach-of-obligations-coating", stating that the breaches of the JV Agreement are to be regarded as the breaches of the Beristan-Opulentia BIT), the arbitral tribunal constituted under the provisions of the Clause 17 of the JV Agreement would be the only competent forum to hear the dispute at hand.

2. Dispute settlement mechanism under the Clause 17 of the JV Agreement was properly triggered prior to commencement of proceedings hereto

25. Furthermore, Beritech has filed the request for arbitration, under the auspices of the 1959 Arbitration Act of Beristan, in full compliance with the provisions of the Clause 17 to the JV Agreement, initiating the arbitral proceedings on 19 October 2009 against Claimant.27

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[25] Record, Annex 3, p. 19

[26] Ibid. p. 19

[27] Uncontested facts, Annex 2, para. 13

Claimant has refused to respond to Beritech's request for arbitration and subsequently filed the requested for arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, notifying Respondent about the request.

26. Having in mind that the 1959 Arbitration Act of Beristan was amended in 2007 so as to comply with the 1985 UNCITRAL Model Law on International Commercial Arbitration (amendments from 2006)[28], and that according to the rule contained in the Article 21 of the Model Law, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent,[29] it would be safe to conclude that the arbitral proceedings initiated in accordance with the Clause 17 of the JV Agreement were initiated prior to initiation of the arbitral proceedings before ICSID center.

27. Having in mind the aforesaid facts of the case, the internationally accepted rule of lis pendens therefore bars the Tribunal from exercising its jurisdiction in the present case, given that arbitral proceedings before a tribunal in Beristan (under the Clause 17 of the JV Agreement) have commenced prior to initiation of the instant proceedings.

3. In any event, Claimant waived its right to object to the jurisdiction of the arbitral tribunal constituted under the 1959 Arbitration Act of Beristan

28. Even if Tribunal is to find that arbitral tribunal constituted under the Clause 17 of the JV Agreement does not have the exclusive jurisdiction to hear the case at hand and that the proceedings before it do not bar the Tribunal from hearing the instant dispute, Respondent asserts that in any event, Claimant's waiver of the right to object to the jurisdiction of the arbitral tribunal precludes him from instituting the proceedings before the ICSID center.

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[28] 2nd Request for Clarifications, Request No. 130

[29] Article 21 of the Model Law

29. Waiver is defined as the voluntary relinquishment or abandonment of a legal right or advantage.[30] Furthermore, waiver is only possible with regard to norms "from which the parties may derogate".[31] Having in mind that parties are free to dispose of with their rights to object in arbitration proceedings, including the right to object to jurisdiction of the tribunal, and considering that Claimant has explicitly waived any objection which it may have to arbitration proceedings initiated in accordance with the Clause 17 of the JV Agreement irrevocably submitting to the jurisdiction of the arbitral tribunal constituted thereto, Claimant is barred from initiating arbitral proceedings under the Article 11 of the Beristan-Opulentia BIT, i.e. before the ICSID center. In that regard, since the Claimant has explicitly and irrevocably waived its right to object to the jurisdiction of the tribunal that was constituted under the Clause 17 of the JV Agreement, Respondent urges the Tribunal to declare itself without jurisdiction in the instant case.

PART TWO: RESPONDENT HAS NOT VIOLATED ITS OBLIGATIONS REGARDING CLAIMANT'S INVESTMENT

30. Having in mind that the Parties have not agreed on the applicable law in the present case, the Tribunal should reach its decision by relying on applicable rules of international law and domestic law of Beristan, to the extent that it is in compliance with international law.[32] Contrary to Claimant's allegations, it is Respondent's submission that Respondent did not violate Article 10 of the Beristan-Opulentia BIT since it is not responsible for invoking of the Buyout Clause against Claimant (I). However, even if the Tribunal were to find otherwise, Respondent's actions did not violate the principle of fair and equitable treatment (II) or expropriation (III). Lastly, Respondent is entitled to rely on Article 9 of the Beristan - Opulentia BIT as a defense to Claimant's claims (IV).

[30] Black's Law Dictionary, p.1611

[31] Tibor Varady, p.7

[32] UNCTAD Investor-State Disputes arising from Investment Treaties, p. 20

I RESPONDENT IS NOT RESPONSIBLE FOR INVOKING THE BUYOUT CLAUSE AGAINST CLAIMANT

31. Claimant contends that Respondent was behind Beritech's decision to invoke Clause 8 of the JV Agreement and compel it to sell its shares in Sat-Connect[33], thus preventing it from performing its contractual obligations.

32. Contrary to Claimant's allegations, Respondent submits that by no means it has control over the actions or business decisions of Beritech (1.). However, even if the Tribunal were to decide otherwise, Respondent submits that Beritech's decision to buy-out Claimant's shares in Sat-Connect was approved by Sat-Connect itself (2.).

1. Respondent has no control over Beritech

33. Contrary to Claimant's allegations, Respondent submits that it has no control over Beritech whatsoever, as this company is an independent entity both in structural and functional sense.

34. Beritech S.A. is a corporation established in Beristan in March 2007.[34] Admittedly, Beritech was founded by the Government of Beristan, which holds 75% of shares of its shares[35], but it does not constitute a part of the structure of Beristian State institutions over which Respondent could have influence or control. The Tribunal should note that in the sense of Article 5 of the ILC Draft Articles "the existence of a greater or lesser State participation in the capital [of the entity purported to exercise governmental authority], or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purposes of attribution of the entity's conduct to State".[36] Thus, the

[33] Record, p.6

[34] Uncontested facts, para. 2

[35] Ibid, para. 2

[36] International Law Commission, Report on the work of its 53 session, p. 43

mere fact that Respondent possesses 75% of shares in Beritech does not qualify Beritech to be considered as controlled by Respondent.

35. The functional test also shows that Beritech is not controlled by Respondent in performance of its business activities. In Maffezini v. Kingdom of Spain[37] the arbitral tribunal ruled that: "the Tribunal must again rely on the functional test that is, it must establish whether specific acts or omissions [claimed to amount the alleged expropriation] are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial act cannot be attributed to the […] State, while governmental act should be so attributed". Beritech is an entity which carries out commercial activities. The Beristian Telecommunications Act does not confer any specific powers on Beritech,[38] which puts it in an equal position with all other providers of telecommunication services which are not partially owned by the government. Even though the development and maintenance of communication networks represent an activity of public interest, this still does not mean that every operator or provider of telecommunication services has to be controlled by state.

2. Beritech's decision to buyout Claimant's shares was approved by Sat-Connect

36. Even if the Tribunal for any reason finds that Respondent exercised control over Beritech, Respondent submits that the decision to compel Claimant to sell its shares in Sat-Connect was not the exclusive, independent and self-standing decision of Beritech.

37. Namely, Beritech's decision to invoke Clause 8 of the JV Agreement in order to buy-out Claimant's shares in Sat-Connect was approved by the board of directors of Sat-Connect itself on 27 August 2009.[39] The Tribunal should note that Claimant has the right to appoint

[37] *Maffezini v. Kingdom of Spain*, para. 52

[38] 2nd Requests for Clarification, Request No. 266

[39] Uncontested facts, para. 10

four out of nine members of that board[40] while Respondent, on the other hand, does not directly appoint any of the board members.[41]

38. All the board members appointed by Claimant were present at the meeting held on 21 August 2009,[42] when the board members discussed the situation after the article accusing Claimant of passing confidential information to the Government of Beristan was released and when issue of potential relevance of Clause 8 of the JV Agreement was first raised.[43] Had Claimant really been interested in keeping the Sat-Connect project afoot, the board members appointed by it could have actively participated at the board meeting of August 27 2009. These directors could have presented proofs that there was no leak of information to the Government of Opulentia, which would presumably prevent the decision to compel Claimant to sell its shares. However, Claimant remained passive. Alice Sharpeton, the only member appointed by Claimant who came to the meeting on the critical day, left the meeting before its end.[44] The board had therefore no other possibility than to act upon the information that was known to the members at the time and to prevent Claimant from further compromising the Sat-Connect project.

39. Therefore, the Tribunal should disregard Claimant's allegations that Respondent stands behind the decision to buy-out its shares in Sat-Connect.

II RESPONDENT DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD

[40] Uncontested facts, para. 4

[41] 2nd Requests for Clarification , Request No. 268

[42] 1st Requests for Clarification, Request No. 127

[43] 1st Requests for Clarification, Request No. 169

[44] Uncontested facts, para. 10

40. Article 2(2) of the Beristan-Opulentia BIT provides that each contracting state shall at all times accord fair and equitable treatment to the investments of the investors of the other Contracting Party in its territory. Contrary to Claimant's submissions, Respondent asserts that it respected its obligations from Article 2(2) of the Beristan-Opulentia BIT and accorded fair and equitable treatment to Claimant's investment.

41. Namely, due to the abstract nature of the standard of fair and equitable treatment, there have been several interpretations thereof in scholarly writings, judicial decisions and government statements. Two main interpretations suggest that, on the one hand, this standard has the same meaning as the customary international law minimum standard (1.), and, on the other hand, that this is an autonomous, self-contained concept that is different from the customary international law minimum standard (2.).[45] Regardless of the approach that this Tribunal decides to follow, it will reach the same conclusion – that Respondent did not breach Art. 2(2) of the Beristan-Opulentia BIT.

1. Respondent's actions are in accordance with the fair and equitable treatment understood as the international minimum standard

42. The standard of fair and equitable treatment is often defined in doctrine and in practice as the minimum standard of customary international law.[46] As is aptly stated in the NAFTA Free Trade Commission's binding interpretation issued on 31st July 2001: "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond which is required by customary international law minimum standard of treatment of aliens." An indicative interpretation of the international minimum standard was given in the Neer v. Mexico case where it was found that the treatment of an alien should, in order to constitute a breach of this standard, amount: "...to an outrage, to bad faith, to willful neglect of duty, to an insufficiency of governmental action so far short of international

[45] Schreuer,

[46] *AAPL v. Sri Lanka*; Charles Leben, p.7

standards that every reasonable and impartial man would readily recognize its insufficiency. "[47]

43. The facts of the present case do not show that Respondent treated Claimant in such an egregious way.

44. Namely, the obligation of observance of due process requires the state to grant an alien access to its courts and adequate and just procedures.[48] There is nothing in the Record that indicates that Claimant was forbidden or denied access to court. On the contrary, it was Claimant's decision not to challenge the decision on buyout before arbitration in Beristan, as provided by the Clause 17 of the JV Agreement between Claimant and Beritech. What is more, Claimant is refusing to respond to Beritech's arbitration request[49] in the proceedings that Beritech initiated in order to obtain declaratory award on the validity of the decision on buy-out. Apparently, Claimant is not interested in settling the dispute with Beritech in an efficient way, but it rather seeks to shift the responsibility for its own non-compliance with the JV Agreement on Respondent, by trying to present the alleged breach committed by Beritech as Respondent's breach of Beristan-Opulentia BIT.

45. According to Article 26 of the Vienna Convention, the good faith principle is the basic principle in the performance of a treaty by the state.[50] In the field of international investment law, this principle encompasses the basic expectations of an investor to be treated by the state in a transparent, consistent, i.e. non-arbitrary manner which would not conflict with what a reasonable and unbiased observer would consider fair and equitable.[51]

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[47] *Neer v. Mexico*;

[48] OECD F&E

[49] Uncontested facts, para 12

[50] Article 26 of the Vienna Convention on the Law of Treaties

[51] *Tecmed v. Mexico*

46. Respondent has acted in accordance with Article 2.3 of the Beristan-Opulentia BIT and has not undertaken any arbitrary measure against Claimant and its investment. Claimant might argue that the issuance of an executive order and the intervention of the civil engineering force of the army of Beristan should be seen as arbitrary measure. However, this measure was taken in order to enforce the decision on buyout, which was adopted in full compliance with the requirements set by the Beristian company law.[52]

47. Having all this in mind, it is Respondent's submission that Claimant and its investment were treated in a fair and equitable manner and the Tribunal should consequently find that Respondent has not violated the standard of fair and equitable treatment with respect to Claimant's investment.

2. Alternatively, Respondent's actions are in accordance with the standard of fair and equitable treatment as an autonomous self contained concept

48. Should the Tribunal interpret the fair and equitable standard as an autonomous self contained concept, Respondent asserts that it has fulfilled its obligations encompassed by this standard.

49. The standard of the fair and equitable treatment as an autonomous concept requires "from the Contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[53] Such reasoning has been upheld in numerous decisions of the arbitral tribunals.[54] For instance, in CMS Gas Transmission Company v Argentina the Tribunal noted that fair and equitable treatment is inseparable from stability and predictability.

50. In the present case, there is nothing which can support the assertion of Claimant that its legitimate expectations were failed. In the moment of making the investment, Claimant was

[52] Requests for Clarification, Request No. 244

[53] *Tecmed v. Mexico*

[54] *Occidental v. Ecuador*; *CMS Gas Transmission v. Argentina*; *CME Czech Republic BV(The Netherlands) v Czech Republic*

well aware that any violation of the Clause 4 of the JV Agreement would automatically represent a material breach of the Agreement and entitle Beritech to exercise the right under the Clause 8 of the JV Agreement and buy-out Claimant's interests in Sat-Connect.

51. Respondent's actions in regard to the buyout procedure were not contrary to any provision of the law of Beristan or the JV Agreement. Respondent did not have any obligation to intervene and prevent the buyout since such obligation cannot be found neither in the Beristian law nor in the JV Agreement. What is more, Respondent never made any representation from which Claimant could have concluded that Respondent would prevent Beritech from exercising any of its rights under the JV Agreement. Thus, Claimant should have legitimately expected that its interest in Sat-Connect would be bought out in case of a material breach of the Agreement.

52. What is more, in the moment in which the investment was made Claimant should have legitimately expected that any protection of its rights arising out of the JV Agreement should be sought before the Arbitral Tribunal constituted pursuant to the Clause 17 of the JV Agreement. Respondent did nothing to prevent Claimant from protecting its rights in accordance with the procedure contemplated by the JV Agreement.

53. Furthermore, due process in administrative decision making constitutes one more element of the fair and equitable standard, as it is articulated in practice of various arbitral tribunals.[55] Nothing in the Record indicates that the executive order issued by Beristan authorities represents the violation of the standard in that regard. Such decision was not discriminatory, unclear and inconsistent or in some other way contrary to what is conceived as due process of law in decision making. Namely, Respondent's acts do not amount to any kind of discrimination as it is in detail explained below (see para. 64). Furthermore, Claimant was given proper notification of the executive order and left time to abide by such decision. Also, no measure which could represent coercion and harassment by State authorities was taken in regard to the Claimant's seconded personnel. Namely, they left Beristan voluntarily.[56]

[55] *SD Myers Inc v. Government of Canada*; *Saluka v. Czech Republic*; *Metalclad v. Mexico*; *Tecmed v. Mexico*

[56] 2nd Requests for Clarifications, Request No. 204

54. Taking into consideration all abovementioned, Respondent respectfully request of the Tribunal to find that its behavior was fully in compliance with Article 2 of the Beristan-Opulentia BIT and that investment of Claimant was accorded fair and equitable treatment.

III RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT

55. Respondent submits that the decision to buy-out Claimant's shares and the actions of Civil Works Force conducted to enforce that decision do not do not qualify for expropriation (1). Alternatively, even if the Tribunal for any reason finds that the acts of Respondent constitute an expropriation, it still fulfills necessary conditions for lawful expropriation (2).

1. Buyout of Claimant's shares and the acts of the Civil Works Force do not amount to expropriation

56. Claimant contends that Respondent expropriated its interest in Sat-Connect, because Beristan now has all of Claimant's contributions of capital, research and development to the Sat-Connect project and does not want to pay Claimant market-based prices for its interest in Sat-Connect.[57] In response to these allegations, Respondent will show that it did not have control over the taking of Claimant's interest in Sat-Connect (a.) and that its actions regarding the enforcement of that decision represent a legitimate and allowed state regulatory action which does not fall within the scope of expropriation (b.). However, if the Tribunal for any reason finds that the acts of Beritech with respect to the taking of Claimant's shares in Sat-Connect should be attributed to Respondent, Respondent asserts that the taking of Claimant's property does not amount to expropriation (c.).

a.) Respondent did not have control over the taking of Claimant's shares in Sat-Connect

57. Contrary to Claimant's allegations, Respondent submits that it has not initiated nor controlled the taking of Claimant's shares in Sat-Connect.

[57] Record, p.6

58. As has been discussed above in paras. 33-35, Respondent does not exercise any control over the actions of Beritech. Beritech is an independent corporation which makes its business decisions without State interference. What is more, Beritech's decision to buy-out Claimant's interest in Sat-Connect was approved by the board of directors of Beritech. Respondent draws the Tribunal's attention to the fact that none of the members of this body is directly appointed by Respondent,[58] whereas Claimant has the right to appoint four out of nine members of that board.[59]

59. Moreover, Respondent had no control over the source of information which eventually gave rise to the buyout of Claimant's shares. The information was released by The Beristan Times, an independent journal, which is not owned nor managed Respondent.[60] Consequently, The Beristan Times cannot be subjected to Respondent's control.

60. In conclusion, Respondent urges the Tribunal to find that it had no control over the taking of Claimant's shares in Sat-Connect.

b.) The acts of Civil Works Force represent a legitimate and regular state action

61. Claimant might allege that the action of the Civil Works Force carried out in order to protect the property of Sat-Connect constitutes an expropriation. However, Respondent will show that this measure represents a legitimate and regular state action.

62. As has been stated in investment case law and supported in doctrine, the general body of precedent usually does not treat regulatory action as expropriation.[61] Additionally, it has been stated in doctrine that protection of investor's expectations must be qualified by the need to

[58] 2nd Requests for Clarification , Request No. 268.

[59] Uncontested facts, para. 4.

[60] 1st Requests for Clarification, Request No. 168.

[61] *S.D. Myers, Inc. (U.S.) v. Canada*, para. 281; Reinisch, p. 432.

maintain a reasonable degree of regulatory flexibility on the part of the host State to respond to changing circumstances in the public interest.[62] More specifically, state regulatory action is not deemed expropriatory when it is carried out in a non-discriminatory manner, for a public purpose and in accordance with due process.[63]

63. As can be seen from the facts of the case at hand, the actions of Civil Works Force comply with all the abovementioned criteria.

64. An action is deemed discriminatory when it is aimed singled out persons or entities, in an arbitrary manner and without legitimate justification. In the case at hand the Civil Works Force did not single out Claimant on the basis of its nationality or any other criteria. This unit only acted pursuant to the executive order aimed at enforcing the decision on buy-out, regardless of Claimant's nationality. What is more, when removing Claimant's personnel from the premises of Sat-Connect, the Civil Works Force did not single out individuals on the basis of their nationality, since Claimant's personnel seconded to Sat-Connect included Opulentian as well as third-country nationals[64] who voluntarily decided to leave Beristan.[65] Moreover, Claimant was aware of the possibility to lose its shares in Sat-Connect in case that it breaches the JV Agreement, and it willingly accepted such provision. The action of the Civil Works Force was therefore just a means of enforcement of the contractual arrangement made between Claimant and Beritech, and certainly not a discriminatory measure that targeted Claimant on the basis of its Opulentian nationality.

65. Furthermore, the action of Civil Works Force served public purpose. The sole aim of the action was to prevent Claimant from disclosing any other information which could have hampered already endangered national interest. There was reasonable expectation that Claimant would not hesitate to continue further 'co-operation' with the Government of

[62] McLachlan/Weiniger, p. 239

[63] *Methanex v. USA*, para. 7

[64] 2nd Requests for Clarification, Request No. 236

[65] 2nd Requests for Clarification, Request No. 204

Opulentia by disclosing confidential information in regard to the Sat-Connect project. Such course of events demanded immediate action by the executive authorities of Beristan. This is more so having in mind that certain aspect of project were envisaged to be used bv the Beristan army. Public purpose requires, without any doubt, that information in regard to activities of the national army should not be compromised at any cost. Otherwise, if such information had been disclosed to the Government of the other State or had been publicly known national security would have been put at great risk. The Government of Beristan had no other choice than to prevent such unfortunate and dangerous course of the events.

66. Finally, the action of the Civil Works Force observed the due process. Prior to the intervention of the Civil Works Force, Claimant was given 14 days to withdraw its personnel from Sat-Connect.[66] When Claimant failed to comply with that deadline, it became evident that the decision on buy-out would have to be enforced against Claimant's will. However, the action of the Civil Works Force was strictly based upon and performed in compliance with an executive order[67] without using force or any other coercive measure towards Claimant's personnel.[68]

67. Consequently, the Tribunal should find that the acts of the Civil Works Force represent a legitimate and regular state action which does not amount to expropriation and which is consistent with general international law standards.

c.) In any event, the taking of Claimant's shares does not amount to expropriation

68. Even if the Tribunal for any reason finds that the acts of Beritech with respect to the taking of Claimant's shares in Sat-Connect should be attributed to Respondent, Respondent submits

[66] 2nd Requests for Clarification, Request No. 248

[67] 2nd Requests for Clarification, Request No. 217

[68] 2nd Requests for Clarification, Request No. 248

that this taking does not amount to expropriation. On the contrary, the buy-out represents the mere performance by Beritech of the contractual right conferred to it with the consent of Claimant. This provision, as well as the Sat-Connect's bylaws regulating the buyout procedure, are in accordance with Beristian law.[69] Had Claimant not wanted to assume the risk of being compelled to sell its shares in Sat-Connect in case that it materially breaches the contract, it should not have signed the JV Agreement which contains the Clause 8.

69. Clause 8 of the JV Agreement sets the material breach of the contract as a necessary prerequisite for invoking the right to buy-out Claimant's shares. This precondition was complied with, as there were persuasive indications that Claimant transferred confidential information about the Sat-Connect project to the Government of Opulentia, thus breaching the Clause 4 of the JV Agreement. This information came from a reliable source, a government defense analyst,[70] and was published in an independent journal which has no connections whatsoever with Respondent.[71] Moreover, according to the same source, Claimant never explicitly denied passing the information to the Government of Opulentia, as it only "acknowledged receiving requests, but has denied permitting unlawful access" [72](emph. added).

70. Therefore, Claimant has never offered any credible proof which could show that there was not any leaking of information to the Government of Opulentia. Had it been otherwise, the Claimant would never risk its investment in the Sat-Connect by hiding such evidence from the Sat-Connect BOD and Beritech.

2. Even if the Tribunal considers the acts of Respondent as expropriation, the conditions for lawful expropriation are fulfilled

[69] 2nd Requests for Clarification, Request No. 244.

[70] 1st Requests for Clarifications, Request No. 178

[71] 1st Requests for Clarification, Request No. 168

[72] 1st Requests for Clarifications, Request No. 178

71. If for any reason the Tribunal finds that the acts of Respondent constitute expropriation, Respondent submits that such an expropriation was nevertheless lawful. Namely, Respondent submits that states have the right to expropriate and that expropriation can be considered lawful, provided that the necessary conditions set out in applicable BITs and international law in general are fulfilled.[73] In the case at hand, the criteria for assessing lawfulness of an expropriation should be found in the applicable Beristan-Opulentia BIT, and they are the following: existence of public purpose or national interest, immediate, full and effective compensation must be paid and the measure must be taken on non-discriminatory basis.

72. In the case at hand, there was a clear national interest for removing Claimant from the Sat-Connect project. The Sat-Connect project is a highly delicate undertaking established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways.[74] The importance of this project is further evidenced by the fact that it was meant to be used by seven countries in the region of Euphonia.[75] Moreover, the project was intended not only for civilian but also for military use.[76] When the information that Claimant passed the information about the project to the Government of Opulentia appeared, a swift action towards Claimant was needed in order to remove the possibility of any further leak and thus to preserve the national security of Beristan.

73. The requirement of immediate, full and effective compensation has also been satisfied. Upon the buyout of Claimant's shares, Respondent offered to pay US$ 47 million, which is the sum that corresponds to the value of Claimant's total monetary investment in the Sat-Connect project.[77] However, Claimant refused to accept that sum, so the money was placed into an

[73] Reinisch2, p. 176.

[74] Uncontested facts, para. 5

[75] Ibid

[76] Uncontested facts, para. 6.

[77] Uncontested facts, para. 12.

escrow account.[78] Therefore, the fact that Claimant has not received compensation for its shares in Sat-Connect does not come as a consequence of Beritechs or Respondent's omission, but it is rather the decision of Claimant not to accept money from Beritech.

74. As has already been explained above in para. 53, the measures applied by Respondent were clearly taken on non-discriminatory basis. The only reason for the removal of Claimant from Sat-Connect was the preservation of national security in Beristan, and this measure was taken regardless of Claimant's nationality. Furthermore, since the removed Claimant's personnel consisted not only from Opulentian nationals but from nationals of thirds states as well, it is clear that no singling out on the basis of nationality occurred during the enforcement procedure.

75. Bearing in mind all the abovementioned, Respondent urges the Tribunal to find that the actions taked against Claimant, even if construed as expropriatory, still comply with the requirements for lawful expropriation.

IV RESPONDENT IS ENTITLED TO RELY ON ART. 9 OF THE BERISTAN - OPULENTIA BIT AS A DEFENSE TO CLAIMANT'S CLAIMS

76. It is Respondent submission that it is entitled to rely on Art. 9 of the Beristan-Opulentia BIT as a defense to Claimant's claim since and all the conditions for invoking Article 9 of the BIT were fulfilled.

77. Various agreements, including multilateral agreements and OECD investment instruments, acknowledge that each nation has the exclusive role of determining for itself whether a restriction on foreign investment is necessary to protect its essential security interests.[79]

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[78] Uncontested facts, para. 13

[79] Jackson, p. 14

78. In many BITs government of different countries have insured protection of their national interest and state security by introducing "essential security clause".[80]

79. The practice of protecting national interest with this clause if often justified by fears that by allowing foreign investments in some area of economy, in so-called strategic industries and critical infrastructure[81,] national sovereignty of country may be endangered and by state's their right to regulate foreign investment to pursue domestic policy objectives. Currently, members of the Indian government oppose foreign investment in certain sectors like telecommunications and high technology for security reasons.[82]

80. National security concerns in relation to foreign investments are nothing new and must be an issue for the most liberal country[83.] In the case at hand, Beristan and Opulentia have included such a clause as a part of their BIT. The goal was to dispense Contracting Parties from all or parts of their treaty obligations in cases where an investment poses a threat to national security.[84] Furthermore, Beristan was a party to another BITs that have essential security clauses with slightly varying formulations.[85]

81. Beritech and Claimant have signed the JV agreement on 18 October 2007 to establish the joint venture company, Sat-Connect S.A., under Beristian law 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 region of Euphonia, which includes Beristan, among other countries. In the

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[80] BITs of Canada (2004), Germany (2005), India (2003) and the United States (2004)

[81] UNCTAD security

[82] Susrut Carpenter

[83] Ibid

[84] Ibid

[85] 1st Request for Clarifications, Request No. 177

moment when the JV agreement was signed the Beristan-Opulentia BIT was in force and both Parties had to be aware of its existence and possible consequence.

82. Both parties were realizing importance of the Sat-Connect project and especially its use for military purpose. That was one of the reasons why Clause 4 that regulate strict confidentiality rule was introduced in the JV agreement. If any of the information about the project is disseminated without prior approval and in connection with the purposes of the agreement there would be a material breach of the contract. According to Clause 8 of the JV agreement any material breach will give Beritech right to purchase all Claimants' interest in the agreement.

83. Therefore, Claimant was aware of all the potential risks and its obligation deriving from the essential security clause.

84. The new high-tech project of Sat-Connect was to be used for satellite surveillance, positioning and targeting systems. The armed services of Beristan were already looking at upgrading their communications systems with powerful satellite and ground systems using encrypted communications. The system will provide secure extensible telecommunications services for both civilian and military uses at better quality and lower cost while providing greater geographic coverage than anything currently available.

85. However, on August 12, 2009, The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project.

86. A government defense official, speaking off the record, noted that there are more and more foreign laws compelling disclosure of encryption ciphers, keys, and pads to national security services. Most of these are antiterrorist measures, but the same analyst pointed out that many are blunt instruments, and that foreign personnel are in fact seconded to the Sat-Connect project. Because of the new law in Opulentia who forced Claimant to give to the Government of Opulentia access to encryption keys the official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia.

87. Bearing in mind that Claimant has breached its confidentiality obligation that caused material breach of the contract, Beritech invoked buyout clause.

88. Therefore, Claimant was the one that breached the JV agreement and Respondent can use Article 9 of the BIT as defense from Claimant's claim since it was its legitimate right to defend its national security.

REQUEST FOR RELIEF

In the light of all above submissions, Respondent respectfully request from the Tribunal to find the following:

- Tribunal does not have jurisdiction to rule in the present case

  Alternatively,

- Claimant breached Clause 4 of the Joint Venture Agreement (Confidentiality provision) and Beritech was therefore entitled to rely on Clause 8 of the JV Agreement
- Claimant was accorded the treatment in accordance with Article 2 of the Beristan-Opulentia BIT
- Respondent did not breach Article 4 of the Beristan-Opulentia BIT
- Respondent is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT

For Respondent, Government of Beristan

Signed

19 September 2010