THIRD ANNUAL FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION 2010

TEAM FITZMAURICE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/X/X

BETWEEN:

TELEVATIVE INC.	THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
CLAIMANT/INVESTOR	**RESPONDENT/STATE**

MEMORIAL FOR THE RESPONDENT

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Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

International Covenant on Civil and Political Rights, 16 December 1996

Vienna Convention on the Law of Treaties, 23 May 1969

STATEMENT OF FACTS

1. The Investment

1. The dispute concerns the **Sat-Connect Joint Venture**, a commercial enterprise formed to provide satellite communications services to the region of Euphonia. In order to provide these services, the Sat-Connect Joint Venture was to launch and operate satellites, operate associated terrestrial infrastructure, and supply handheld and desktop communication devices to end users.

2. This claim is brought by Televative, Inc (**TELEVATIVE**), a developer and operator of satellite communications systems. It is a successful multinational enterprise, and has been recognised as a leader in its field since 1994. TELEVATIVE is a privately owned company domiciled in Opulentia.

3. In March 2007, the Government of the Republic of Beristan (**BERISTAN**) established Beritech SA (**Beritech**). BERISTAN holds 75% of the capital stock in Beritech, while the remaining 25% is held by Beristian investors.

4. On 18 October 2007, TELEVATIVE and Beritech executed an agreement to establish the Sat-Connect Joint Venture (**JV Agreement**). Pursuant to the JV Agreement, the operating entity for the Sat-Connect Joint Venture, Sat-Connect SA (**Sat-Connect**), was incorporated under the laws of Beristan. Sat-Connect's capital stock was held 40% by TELEVATIVE and 60% by Beritech.

2. Breach of confidentiality

5. BERISTAN alleges (and TELEVATIVE denies) that TELEVATIVE leaked confidential information about the Sat-Connect Joint Venture to the government of Opulentia, including information relating to Sat-Connect technology, systems, intellectual property and encryption.

6. This constituted a material breach of Clause 4 JV Agreement, relating to confidentiality (**Confidentiality Clause**). Under Clause 8 JV Agreement (**Buyout Clause**), this gave Beritech the right to purchase TELEVATIVE’s capital stock in Sat-Connect, with the purchase price calculated according to TELEVATIVE’s monetary

investment in the project, being US $47 million.

3. Buyout

7. On 27 August 2009, Beritech exercised the Buyout Clause, and TELEVATIVE's stock in Sat-Connect was transferred to Beritech. On 28 August 2009, Beritech notified TELEVATIVE that it was required to hand over possession of all Sat-Connect sites and facilities, and remove all of its seconded personnel from the project, within 14 days.

8. On 11 September 2009, the Beristan Civil Works Force secured all Sat-Connect sites. Personnel associated with TELEVATIVE were instructed to leave the sites, and were subsequently evacuated from Beristan.

4. The Arbitral Proceedings

9. On 19 October 2009, Beritech filed a request for arbitration under Clause 17 JV Agreement (**Commercial Arbitration Agreement**). The arbitral proceedings constituted under this agreement (**Commercial Arbitration**) are situated in Beristan.

10. Beritech placed US$47 million (representing TELEVATIVE's capital contribution to the Sat-Connect Joint Venture), and subsequently TELEVATIVE's stock in Sat-Connect, into an escrow account being held pending the decision of this arbitration.

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ARGUMENTS

PART ONE:

THE COMMERCIAL ARBITRATION AGREEMENT PRECLUDES THIS TRIBUNAL'S JURISDICTION

11. Article 41(2) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**) obliges the Tribunal to consider objections raised by a party that "the dispute is not within the jurisdiction of the Centre [International Centre for Settlement of Investment Disputes]."

12. In paragraph 15 of the Minutes of the First Session of the Arbitral Tribunal, BERISTAN objected to the Tribunal's jurisdiction in view of Clause 17 of the Joint Venture Agreement (**Commercial Arbitration Agreement**).

13. The Commercial Arbitration Agreement stipulates that "any party may give notice to the other party of its intention to commence arbitration" in respect of "any dispute arising out of or relating to" the JV Agreement. If the dispute is not resolved within 60 days:

> "The dispute shall then be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended. 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."

14. TELEVATIVE has submitted a dispute to ICSID arbitration under Article 11(1)(c) of the Treaty between the Republic of Beristan and the United Federation of Opulentia Concerning the Encouragement and Reciprocal Protection of Investments (**Beristan-Opulentia BIT**) (**ICSID Arbitration Clause**), which allows TELEVATIVE to "in writing submit the dispute...for settlement to...the International Centre for the Settlement of Investment Disputes".

15. TELEVATIVE contends that the Commercial Arbitration Agreement precludes this

tribunal's jurisdiction because (A) BERISTAN has withdrawn its consent to ICSID arbitration; and (B) alternatively, this tribunal should decline jurisdiction in favour of the Commercial Arbitration tribunal.

A. BERISTAN HAS WITHDRAWN ITS CONSENT TO ICSID ARBITRATION

16. Article 25(1) ICSID Convention states that "the jurisdiction of the Centre shall extend to any legal dispute...which the parties to the dispute ***consent*** in writing to submit to the Centre."

17. BERISTAN has withdrawn its consent to ICSID arbitration because (1) BERISTAN is a party to the Commercial Arbitration Agreement; (2) the Commercial Arbitration Agreement is a withdrawal of consent; and (3) the withdrawal of consent extends to claims under the Beristan-Opulentia BIT.

1. BERISTAN is a party to the Commercial Arbitration Agreement

18. BERISTAN argues that it is a party to the Commercial Arbitration Agreement in that (i) it entered into the Commercial Arbitration Agreement; and (ii) alternatively, BERISTAN is bound by the Commercial Arbitration Agreement under the group of companies doctrine.

i. BERISTAN entered into the Commercial Arbitration Agreement

19. An arbitral tribunal derives its authority from the parties' consent to the arbitral process. In the absence of consent, the tribunal does not have jurisdiction.[1] The parties' consent may be evidenced by the parties' signature. Article 2(2) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) provides that the requirement for an arbitration "agreement in writing" is satisfied by "an arbitral clause in a contract...signed by the parties..." By executing the JV Agreement, BERISTAN gave its consent to the terms of the Commercial Arbitration Agreement.[2]

[1] *First Options v Kaplan*, Park, 947; Reuben, page 880

[2] Facts, page 16. Uncontested Facts, paragraph 3.

20. The fact that BERISTAN signed in the capacity of guarantor does not affect the validity of its consent. A party that has signed an agreement in the capacity of a guarantor is bound by the terms of any arbitration clause within the contract.[3] Indeed, a guarantor will be bound by an arbitration clause even if they are party to a separate contract of guarantee, but not the original contract. The guarantor is "bound by the arbitration clause in the main agreement when the undertakings of the debtor and the guarantor were identical or equivalent."[4]

21. Consequently, BERISTAN is bound by the Commercial Arbitration Agreement because it has signed the agreement as guarantor.

ii. Alternatively, BERISTAN is bound by the Commercial Arbitration Agreement under the group of companies doctrine

22. Alternatively, the Commercial Arbitration Agreement binds BERISTAN by virtue of the group of companies doctrine. This doctrine binds non-parties to an arbitration agreement if two requirements are satisfied. First, the non-party must be a member of a group of companies that also contains a party to the relevant contract.[5] Second, the non-party must participate in the conclusion and performance of the contract.[6]

23. In *Dow Chemical, ICC,* the tribunal held that a parent company was bound by an arbitration agreement entered into by one of its subsidiaries because the parent company had "exercised absolute control over its subsidiaries, having either signed the relevant contracts or effectively and individually participated in their conclusion, performance or termination."[7] This decision was subsequently upheld by the Cour

[3] *Development Bank of the Philippines v Chemtex Fibers Inc*

[4] *The A Company and The B Company v The Former Soviet Republic*

[5] *Ferrario,* pages 666-667; See also *Hanotiau,* paragraphs 105-110

[6] *Ibid*

[7] *Dow Chemical, ICC,* page 135.

d'Appel.[8] According to Zuberbuhler, the Dow Chemical cases are the "cornerstone" of the group of companies doctrine.[9]

24. In *Société Sponsor A.B v Lestrade*, the Pau Court of Appeal extended the arbitration clause to a parent company because the parent had played a significant role in the conclusion of the contract.[10] Similarly, in *Klöckner v Cameroon* the ICSID tribunal extended a joint venture agreement to a non-signatory investor because the investor had played an active role in the negotiating and concluding the agreement. Although the agreement was formally signed by the local company, it "reflected a contractual relationship between the foreign investor, acting through a local company, and the host country of this foreign investment."[11]

25. It is evident from the fact that BERISTAN has signed the JV Agreement that BERISTAN played a role in concluding the agreement.[12] Further, the JV Agreement was concluded only 7 months after BERISTAN incorporated Beritech.[13] It is to be inferred from this limited amount of time that BERISTAN incorporated Beritech with a view to it participating in the Sat-Connect Joint Venture. In TELEVATIVE's argument, this demonstrates BERISTAN's participation in the conclusion of the JV Agreement. In accordance with the group of companies doctrine, BERISTAN is bound by the terms of the Commercial Arbitration Agreement.

2. The Commercial Arbitration Agreement is a withdrawal of consent to ICSID arbitration

26. A reference to ICSID in a BIT dispute resolution clause does not in itself constitute

[8] *Dow Chemical, Cour d'Appl*

[9] *P*age 24

[10] *Sponsor A.B v Lestrade*

[11] *Klöckner v Cameroon*

[12] *Ibid*

[13] Agreed facts, paragraphs 2-3

consent for the purposes of the Convention.[14] An "ICSID arbitration provision in a BIT is merely an offer by the respective State that requires acceptance by the other party. That offer may be accepted by a national of the other State party to the BIT."[15] In the present case BERISTAN expressed its offer to consent to ICSID's jurisdiction through the Beristan-Opulentia BIT on 26 March 1996.[16]

27. It is only once the host state's standing offer is accepted by the investor that consent is "perfected."[17] Without such an acceptance by the investor, there cannot be "any satisfaction of the requirement of 'consent' as expressed in Article 25(1) of the Convention."[18]

28. A state's "offer" to submit disputes to ICSID that has not been accepted does not bind the state to arbitrate, because "a mere unilateral offer could always be withdrawn." Although an "investor may accept the offer of consent simply by instituting proceedings before the Centre...the offer may be withdrawn at any time before then."[19]

29. A representation that is inconsistent with a prior offer to submit to ICSID's jurisdiction is a withdrawal of the offer (except if the offer has already been accepted).[20] On 18 October 2007,[21] the parties executed the Commercial Arbitration Agreement in which they instead agreed that "any disputes arising out of or relating to" the JV Agreement shall "be resolved *only by arbitration* under the rules and provisions of the 1959

[14] *Sornarajah,* page 251

[15] *Schreuer, C,* page 7

[16] Facts, page 16. Beristan-Opulentia BIT, Article 16 (2)

[17] *Schreuer,* page 1285

[18] *Ibid*

[19] *Ibid,* page 253

[20] *Nolan,* page 19

[21] Facts, page 16. Uncontested Facts, paragraph 3

Arbitration Act of Beristan".[22] In agreeing to this clause, the BERISTAN has expressly excluded fora other than the Commercial Arbitration tribunal. This is inconsistent with BERISTAN's original standing offer of ICSID arbitration, and was two years before TELEVATIVE's purported acceptance. Therefore, Therefore, the Commercial Arbitration Agreement is a withdrawal of BERISTAN's consent to ICSID arbitration.

30. BERISTAN's consent was then non-existent, and could not be "perfected" by TELEVATIVE's request for arbitration. Accordingly, this tribunal has no jurisdiction because the parties have not satisfied the requirement of consent embodied in Article 25(1) of the ICSID Convention.

3. The withdrawal of consent extends to claims under the Beristan-Opulentia BIT

31. In agreeing to the Commercial Arbitration Agreement, BERISTAN has withdrawn its consent to submit disputes of any kind to ICSID. In particular, BERISTAN has withdrawn its consent to submit claims under the Beristan-Opulentia BIT to ICSID. Instead, BERISTAN has agreed that such claims will be submitted to the Commercial Arbitration tribunal.

32. The Commercial Arbitration tribunal has jurisdiction over the BIT claims because (i) it has jurisdiction over BIT claims; and (ii) they are within the scope of the Commercial Arbitration Agreement.

i. <u>The Commercial Arbitration tribunal has jurisdiction over BIT claims</u>

33. While the parties have agreed that Beristan law governs the contract, any BIT claims are necessarily governed by international law, not domestic law. Therefore, in specifying that Beristan law governs the contract, the parties have not removed the Commercial Arbitration tribunal's jurisdiction over BIT claims.

34. Parties to a contract are free to choose the law applicable to their contract.[23] Under the *Beristan Arbitration Act*, "the arbitral tribunal shall decide the dispute in accordance

[22] Facts, page 19. JV Agreement, Clause 17, emphasis added.

[23] *Ibid*

with such rules of law as are chosen by the parties as applicable to the substance of the dispute."[24] In "pure contractual claims, the law applicable to the substance of the dispute will be the contract and the law governing the contract."[25] The parties have expressly agreed that "The [JV] Agreement shall be governed in all respects by the laws of the Republic of Beristan."[26]

35. Although Beristan law governs the contract, the question of which law governs the BIT claims is a separate question. According to Redfern and Hunter,

> "where an investor relies on rights conferred directly by the BIT (ie: fair and equitable treatment, expropriation…) the applicable law is composite. In addition to the municipal law under which the investment was made, and any underlying contract, the applicable law includes first and foremost, the BIT itself and general international law as the proper law of the BIT."[27]

36. In *Vivendi,* the annulment panel noted that:

> "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words [domestic law]."[28]

37. This is consistent with Article 31(a) of the *Vienna Convention on the Law of Treaties* (**VCLT**), which states that, in interpreting a treaty, "There shall be taken into account, together with the context…any relevant rules of international law applicable in the

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[24] Article 28(1) Model Law. The *Beristan Arbitration Act* is consistent with the Model Law: Clarification 130.

[25] *Newcombe/Paradell,* page 77

[26] Facts, page 19. JV Agreement, Clause 17.

[27] *Redfern/Hunter,* page 77

[28] Paragraph 96

relations between the parties." In determining a BIT dispute, the tribunal must necessarily apply international law.

38. The same principle is reflected in the award in *Wena Hotels v Egypt Ltd*. The tribunal held that a contractual choice of law clause specifying Egyptian law did not govern the BIT claim. The tribunal found that as the case turned on an alleged violation by Egypt of the BIT, the BIT was the primary source of applicable law.[29]

39. As the parties have only designated the law governing the JV Agreement itself, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."[30] For BIT claims, the applicable law "includes first and foremost, the BIT itself and general international law." [31] Accordingly, the arbitral tribunal has the jurisdiction to apply Beristian law as the proper law of the JV Agreement, and also international law as the proper law of the BIT.

ii. <u>The claims are within the scope of the Commercial Arbitration Agreement</u>

40. In BERISTAN's argument, TELEVATIVE's claims fall within the scope of the Commercial Arbitration Agreement.

41. It is "a fundamental principle of law that the scope of an arbitrator's jurisdiction and powers in a given case depend fundamentally upon the words of the arbitration agreement."[32] Clause 17 JV Agreement expressly applies to "any dispute arising out of or relating to this Agreement."

42. The words "arising out of or relating to" are words of wide amplitude and are widely considered to capture any and all disputes touching on the contract in question, regardless of whether they sound in contract, tort, statute or treaty.[33] The words

[29] *Wena Hotels v Egypt*

[30] Article 28(2) Model Law

[31] *Redfern/Hunter,* page 77

[32] *Ashville Investments v Elmer* per May LJ at 75

[33] *The Playa Larga* per Ackner LJ at 183; *Ethiopian Oilseeds* per Hirst J at 95; *Comandate*

'arising out of' are "very wide words indeed," giving the tribunal "jurisdiction in about as wide terms as can be drafted."[34] The wording of Clause 17 is to analogous to the formula 'arising in connection with', which "must be construed to encompass a broad scope of arbitral issues [embracing] every dispute between the parties having a significant relationship to the contract *regardless of the legal label* attached to the dispute."[35]

43. Thus, the broad arbitration clause requires the parties to bring all of the present disputes to the commercial tribunal, regardless of whether the claims are legally labelled as contract or treaty claims. The Commercial Arbitration tribunal has the jurisdiction to adjudicate upon all of TELEVATIVE'S claims in order to give effect to the parties' agreement to arbitrate.

B. ALTERNATIVELY, THIS TRIBUNAL SHOULD DECLINE JURISDICTION IN FAVOUR OF THE COMMERCIAL ARBITRATION TRIBUNAL

44. Alternatively, this tribunal should decline jurisdiction in favour of the Commercial Arbitration tribunal because (1) the Commercial Arbitration tribunal is a more convenient forum; and (2) the Commercial Arbitration Agreement is more specific.

1. The Commercial Arbitration tribunal is a more convenient forum

45. A tribunal should refuse to exercise its jurisdiction when a different court or tribunal is clearly more appropriate to decide the dispute.[36] In *SGS v Philippines* the ICSID tribunal declined jurisdiction over a contract-based claim in favour of a contractually agreed forum. The tribunal held that "for it to decide on the dispute in isolation from

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per Allsop J at 88

[34] *Mantovani v Carapelli* per Lawton LJ at 381; see also *Mitsubishi Motors Corp v Soler Chrysler-Plymouth*, at 626

[35] *JJ Ryan & Son* at 321, emphasis added; see also *Mitsubishi v Soler Chrysler-Plymouth Inc* at 622

[36] *Vicuna*, page 7

decision by the chosen forum under the contract was inappropriate and premature."[37] It considered that while it could decide on the contract issues by applying municipal law, it was more appropriate to permit the forum more specific to the parties and the dispute to determine those issues.

46. TELEVATIVE's claim for breach of the Buyout Clause under the JV Agreement is "governed in all respects by the laws of the Republic of Beristan."[38] It follows that the commercial tribunal in Beristan is best placed to interpret and apply the law of Beristan. Moreover, "common sense dictates that an international tribunal which is less well placed to determine questions of national law should be slow to displace the jurisdiction of tribunals expressly selected by the parties to the agreement in question."[39]

47. In TELEVATIVE's argument, this tribunal should decline jurisdiction in favour of the Commercial Arbitration tribunal because it is a more appropriate forum.

2. The Commercial Arbitration Agreement is more specific

48. The general ICSID arbitration clause must give way to the more specific Commercial Arbitration Agreement. In resolving competition between different arbitral fora, it is relevant to consider the "trite canon of construction that the general should give way to the specific."[40] Schreuer states that "a document with a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application such as the BIT."[41]

49. In *SPP v Egypt* the ICSID tribunal applied this principle, stating that the maxim

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[37] *SGS v Philippines,* paragraph 162

[38] Facts, page 19. JV Agreement, Clause 17.

[39] *SGS v Philippines,* paragraph 78

[40] *Transocean Case* per Ang J at 25

[41] *Schreuer,* page 362

generalia specialibus non derogant[42] requriedthat "a specific agreement between the parties to a dispute must naturally take precedence with respect to a bilateral treaty between the investor's State and a particular sovereign."[43]

50. The ICSID tribunal in *SGS v Philippines* embraced this approach, holding that "the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself."[44] The tribunal in *SGS v Pakistan* also expressed doubts that the general language in the BIT could "supersede and set at naught all otherwise valid non-ICSID forum selection clauses."[45]

51. The Beristan-Opulentia BIT was not concluded with any specific investment or contract in view. The BIT arbitration clause was merely a standing offer extended to numerous investors throughout the world. Such a general provision cannot be taken to nthe specific Commercial Arbitration Agreement, which was freely negotiated between the parties and specifically tailored to the parties' particular business venture.

52. In BERISTAN's argument, this tribunal lacks jurisdiction, as the specific Commercial Arbitration Agreement must be given precedence over the more general provisions of the Beristan-Opulentia BIT. Accordingly, this tribunal should decline jurisdiction in favour of the Commercial Arbitration tribunal.

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[42] *'General words do not derogate from special words'*

[43] *SPP v Egypt*

[44] *SGS v Philippines,* paragraph 134

[45] *SGS v Pakistan* paragraph 161

PART TWO:

THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER TELEVATIVE'S CONTRACT-BASED CLAIMS

53. In Part One of this memorial, BERISTAN has requested that this tribunal find that BERITECH and Beristan are, in essence, the same entity. As outlined in Part One, in BERISTAN's argument, the legal effect of this is to deprive this tribunal of jurisdiction. In the remainder of this memorial, BERISTAN proceeds on the basis that the tribunal has found (contrary to BERISTAN's position) that BERISTAN and Beritech are separate entities. Therefore, BERISTAN will adopt the alternative position that BERISTAN and Beritech are distinct and separate entities.

54. TELEVATIVE's claims arising out of the JV Agreement are contractual in nature. As BERISTAN and Beritech are separate entities, this tribunal does not have jurisdiction over TELEVATIVE's contract-based claims. In particular, (A) the conduct of Beritech is not attributable to BERISTAN; and (B) BERISTAN's obligations under the JV Agreement are not international obligations.

A. THE CONDUCT OF BERITECH IS NOT ATTRIBUTABLE TO BERISTAN

55. If the acts of Beritech cannot be attributed to BERISTAN, this ICSID tribunal does not have jurisdiction.[46] Beritech's conduct is not attributable to BERISTAN because (1) Beritech and BERISTAN are distinct legal entities; and (2) the exercise of the Buyout Clause was essentially commercial in nature.

1. Beritech and BERISTAN are distinct legal entities

56. Beritech is a private legal entity that maintains legal personality entirely separate from BERISTAN.

57. International law acknowledges "the corporate entity as an institution"[47] and recognises the "firm distinction between the separate entity of the company and that of

[46] *Maffezini v Spain, Award of 25 January 2000,* paragraph 75.

[47] *Barcelona Traction,* page 3, paragraph 38

the shareholder."[48] This distinction is maintained even though the corporation may be owned by or subject to the control of a state. The mere fact that a state initially established a corporate entity or has a majority shareholding in the company is not sufficient to attribute the conduct of that entity to the State.[49]

58. Accordingly, Beritech maintains a distinct legal identity separate from BERISTAN notwithstanding the fact that BERISTAN established Beritech and owns shares in the company. Therefore, the acts of Beritech cannot be attributable to BERISTAN.

2. The exercise of the Buyout Clause was entirely commercial in nature

59. The acts of a exercising elements of governmental authority are attributable to the state. It is the Respondent's position that the exercise of the Buyout Clause was entirely commercial in nature and in no way governmental.

60. The functional test is central in determining State liability for the wrongful actions of private entities.[50] In *Československá Obchodní Banka v the Slovak Republic*, the tribunal held that state ownership of the shares of a commercial entity was not sufficient to determine whether the conduct of the private entity was attributable to that State. For the functional test to be satisfied the specific activities of the company must "essentially be governmental rather than commercial in nature."[51] This approach has been more recently adopted by ICSID Tribunals in *Maffezini v Spain* and *Salini v Morocco*.

61. In *Salini v Morocco* the private enterprise had the role and function of construction, maintenance and operation of the highways.[52] The tribunal held that as the private entity was exercising elements of governmental authority the actions of the private

[48] *Barcelona Traction*, page 3, paragraph 41

[49] *Schering v Iran*; *Otis v Iran*; *Kodak v Iran*

[50] *Crawford*, page 112

[51] *Československá Obchodní Banka v the Slovak Republic*

[52] *Salini v Morocco*, paragraph 31

entity were attributed to the State.

62. Beritech's principal activity is to participate in the development of satellite telecommunications services throughout the region of Euphonia, which encompasses both BERISTAN and several other states. While the provision of telecommunications services within its own territory might be considered to be of governmental function or authority, providing services within the territory of other states is certainly not. In this context, BERISTAN concludes that Beritech's purpose was to function as a profit-making enterprise, rather than to function as a government instrumentality.

63. Further, Beritech's invocation of the Buyout Clause was essentially commercial in nature. Clause 8 of the Joint Venture Agreement states:

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

64. The effect of TELEVATIVE breaching the Confidentiality Clause was to grant Beritech an option to purchase TELEVATIVE's stock in Sat-Connect. As TELEVATIVE notes, this option is highly valuable to Beritech, as Beritech is required only to pay an amount equal to TELEVATIVE's financial investment, with no payment for the value of potential future profits, intellectual property and know-how.[53] In effect, Beristan has a contractual right to acquire TELEVATIVE's share of these assets free of charge.

65. As such, it would be extremely uncommercial for Beritech to waive its rights under the Buyout Clause. Indeed, had the board of Beritech failed to exercise the Buyout Clause, would arguably be in breach of their duties to shareholders. In this context, the exercise of the Buyout Clause was dictated by commercial common sense, and was in no way governmental in nature. Accordingly, BERISTAN concludes that the exercise of the Buyout Clause was not attributable to BERISTAN.

[53] Minutes of the First Session of the Tribunal, paragraph 15

B. BERISTAN'S OBLIGATIONS UNDER THE JV AGREEMENT ARE NOT INTERNATIONAL OBLIGATIONS

66. Beritech's purely contractual obligations under the JV Agreement are not transformed into international obligations by virtue of Article 10 Beristan-Opulentia BIT (**Umbrella Clause**). Article 10 Beristan-Opulentia BIT states:

> "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."

67. A breach of contract is not, by itself, a violation of international law.[54] In *SGS v Pakistan* the ICSID tribunal held that a clause in similar terms did not give it jurisdiction over contractual claims. The tribunal held that failing "clear and convincing evidence," the parties cannot have intended to afford the clause the "far-reaching", "unqualified", "sweeping" and "burdensome" legal consequences of treating a breach of contract as a breach of the BIT. The tribunal refused to support a broad interpretation of the clause because:

> "the investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice."

68. The ICSID tribunal in *Joy Mining* also held that such a clause in similar terms to the Umbrella Clause did not create international responsibility for commercial breaches of contract. International responsibility for a breach would only arise if the breach was "a clear violation of the Treaty rights and obligations or a violation of contract rights of such magnitude as to trigger the Treaty protection, which is not the case."[55]

69. Similarly, in this case, the umbrella clause does not have the effect of elevating a contract claim to a treaty claim under international law. A consequence of accepting

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[54] *Happ*, page 346; *Walde*, page185; *SGS v Pakistan*, paragraph 99

[55] *Joy Mining*, paragraph 81

the Claimant's interpretation of the clause would be to render any freely negotiated dispute settlement clause in a contract meaningless. In BERISTAN's argument, such a result would be entirely divorced from commercial reality, and should not be supported by this tribunal.

CONCLUSION ON THE JURISDICTION OF THE TRIBUNAL

70. BERISTAN's primary argument is that Beritech and BERISTAN are, in essence, the same entity. In Part One of this Memorial, BERISTAN has argued that, as a consequence, it has withdrawn its consent to ICSID arbitration by instead agreeing to resolve disputes under the Commercial Arbitration Agreement. In the alternative, BERISTAN has requested that this tribunal decline jurisdiction in favour of the Commercial Arbitration tribunal.

71. In Part Two of this Memorial, BERISTAN has proceeded on the basis that this tribunal has not accepted that Beritech and BERISTAN are, in essence, the same entity. BERISTAN asserts that, even if it is considered a separate entity from Beristan, this tribunal does not have jurisdiction because the acts of Beritech cannot be attributed to BERISTAN at international law. Further, this tribunal does not have jurisdiction over TELEVATIVE's contractual claims as they are not based upon international obligations of BERISTAN. The domestic character of the obligations is not changed by the Umbrella Clause.

PART THREE:

BERISTAN DID NOT MATERIALLY BREACH THE JV AGREEMENT

72. The Buyout Clause in the JV Agreement entitled BERITECH to purchase all of TELEVATIVE's interest in the Sat-Connect project if TELEVATIVE committed a material breach of any provision of the JV Agreement. Beritech complied with the requirements of the Buyout Clause because (A) TELEVATIVE breached the confidentiality clause; (B) alternatively, TELEVATIVE bears the burden of proving that the Buyout Clause was improperly exercised; (C) TELEVATIVE's failure to adduce evidence supports an inference of a breach of confidentiality; and (D) therefore Beritech properly invoked the Buyout Clause.

A. TELEVATIVE BREACHED THE CONFIDENTIALITY CLAUSE

73. The Confidentiality Clause provides:[56]

> "All matters relating to this Agreement and the Sat-Connect project, including all Confidential Information, shall be treated by each of the parties...as confidential."

74. BERISTAN contends that TELEVATIVE committed a material breach of the JV Agreement when its seconded personnel leaked confidential information about the Sat-Connect project to the Government of Opulentia. The burden of proving this breach lies with BERISTAN, as the party asserting the fact. Article 21.1 of the UNIDROIT Principles of Transnational Civil Procedure (**UNIDROIT Procedure Principles**) states that "each party has the burden to prove all the material facts that are the basis of that party's case." This principle has been applied consistently by ICSID Tribunals[57] and is in accordance with national and international practice and academic

[56] Clause 4(1)

[57] *AAPL v Sri Lanka,* paragraph 56; *Marvin Feldman v Mexico,* paragraph 117

consensus.[58]

75. A breach of the Confidentiality Clause is "considered proven when the [tribunal] is reasonably convinced of [its] truth."[59] This is "in substance that applied in most legal systems", including the "preponderance of the evidence" in United States law[60] and the "balance of probabilities" in other common law jurisdictions.

76. BERISTAN contends that the evidence establishes to a *prima facie* standard that TELEVATIVE leaked confidential information to the Government of Opulentia. The evidence is a newspaper article from the Beristan Times, in which a defence analyst indicated that "there [had] been leaks not only involving encryption technology, but also concerning the technology, systems and intellectual property of the Sat-Connect project."[61] This information was of a "critical nature", compromising the Sat-Connect project.[62] This is information of a kind protected by the Confidentiality Clause, which extends to "all trade secrets, data, know-how…systems, structures…and other information developed during the Sat-Connect project."[63]

77. Once BERISTAN "adduces some evidence which *prima facie* supports [its] allegation, the burden of proof shifts to [TELEVATIVE]".[64] Further, the tribunal may "be satisfied with less conclusive proof, i.e., *prima facie* evidence", in "cases where proof of a fact presents extreme difficulty."[65] In BERISTAN's argument, this is such a case,

[58] *Schreuer,* Page 669 – 670.

[59] UNIDROIT Procedure Principles provides persuasive guidance on the standard of proof to be applied. Article 21.2 states that

[60] *UNIDROIT Procedural Rules,* paragraph P-21B

[61] Clarification 178

[62] Clarification 178

[63] Clause 4(2)

[64] *AAPL v Sri Lanka,* paragraph 56; *Zhinvali v Georgia*, paragraph 309

[65] *APPL v Sri Lanka* paragraph 56, page 549; see also *Zhinvali v Georgia*, paragraph 309

given that it is obviously impossible to provide evidence of this tribunal as to the espionage activities of Opulentia. Accordingly, this tribunal should accept that the Confidentiality Clause has been breached based upon the *prima facie* evidence outlined above.

78. Any breach of the Confidentiality Clause "shall be deemed a material breach of the Agreement."[66] Accordingly, TELEVATIVE breached the Confidentiality Clause, thereby committing a material breach of the JV Agreement.

B. ALTERNATIVELY, TELEVATIVE BEARS THE BURDEN OF PROVING THE BUYOUT CLAUSE WAS IMPROPERLY EXERCISED

79. If this tribunal is not satisfied that there is sufficient evidence to show a *prima facie* breach of the Confidentiality Clause, BERISTAN alternatively contends that TELEVATIVE bears the burden of proof.

80. As TELEVATIVE is "alleging a violation of international law giving rise to international responsibility", it "has the burden of proving the allegation."[67] In the present context, TELEVATIVE must establish all the factual elements necessary to support its claim. One necessary element of the claim is that the Sat-Connect stock that is the subject of the present dispute is rightfully the property of TELEVATIVE.

81. On the face of it, BERISTAN has acquired the shares by operation of the Buyout Clause. TELEVATIVE's allegation that the exercise of the Buyout Clause is internationally wrongful "is not presumed" [68], and must be established through evidence. If the tribunal finds that there is insufficient evidence as to whether there has been a breach of the Confidentiality Clause, BERISTAN contends that TELEVATIVE has not discharged its burden of proof. Accordingly, its claim must fail.

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[66] Facts, page 19.

[67] *AAPL v Sri Lanka,* paragraph 56; *Marvin Feldman v Mexico,* paragraph 117

[68] *AAPL v Sri Lanka,* paragraph 56; *Marvin Feldman v Mexico,* paragraph 117

C. TELEVATIVE'S FAILURE TO ADDUCE EVIDENCE SUPPORTS AN INFERENCE OF A BREACH OF CONFIDENTIALITY

82. BERISTAN argues that TELEVATIVE's failure to adduce evidence supports an inference of a breach of confidentiality.

83. The only evidence available to BERISTAN is an article from the Beristan Times newspaper. It was Beritech, not BERISTAN, that decided to exercise the buyout clause. Although Sat-Connect and Beritech might possess records supporting the allegation of a breach of confidentiality, BERISTAN has no right as a shareholder to access those entities' records.

84. The factual issue for determination centres around the conduct of employees of and personnel associated with TELEVATIVE. If there are any records in existence that are relevant to that conduct, it is likely to be in TELEVATIVE's possession. TELEVATIVE has provided no evidence of its security procedures, internal investigations in relation to the alleged breach, surveillance footage, or records of ingoing and outgoing communications.

85. It is a widely recognised rule of national and international law that an adverse inference can be drawn from a party's failure to produce evidence.[69] Judge Charles Bower of the Iran–US Claims Tribunal states:

> "When it reasonably should be expected that certain evidence exists and that it is in the control of a party, the failure of that party to produce such evidence gives rise to a justifiable inference that such evidence, if produced, would be adverse to that party."[70]

86. BERISTAN contends that an adverse inference can be drawn from TELEVATIVE's failure to adduce any evidence whatsoever to support its contention that it has not breached the Confidentiality Clause. It has failed to provide any evidence to contradict the Beristan Times newspaper article. Accordingly, the tribunal should be reasonably

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[69] *UNIDROIT Procedure Rules* 18.2 & 21.3; *IBA Rules of Evidence,* Articles 9.4 & 9.5

[70] *Brower,* page 151

convinced that TELEVATIVE breached of the Confidentiality Clause, and thereby materially breached the JV Agreement.

D. BERITECH PROPERLY INVOKED THE BUYOUT CLAUSE

87. After TELEVATIVE materially breached the JV Agreement by leaking confidential information, Beritech exercised its contractual right under the Buyout Clause to purchase all of TELEVATIVE's interest in the Sat-Connect project.

88. The Buyout Clause provides that "if at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement." Accordingly, because of the material breach, Beritech became entitled to initiate the buyout.

89. In light of TELEVATIVE's material breach of the Confidentiality Clause, BERISTAN concludes that Beritech properly invoked the Buyout Clause, and therefore did not breach the JV Agreement.

PART FOUR:

BERISTAN'S CONDUCT IS LAWFUL UNDER INTERNATIONAL LAW

90. BERISTAN's conduct is lawful under international law because (A) BERISTAN's exercise of the buyout clause does not amount to an expropriation; and (B) BERISTAN has afforded TELEVATIVE fair and equitable treatment.

A. BERISTAN'S EXERCISE OF THE BUYOUT CLAUSE DOES NOT AMOUNT TO AN EXPROPRIATION

91. TELEVATIVE argues that BERISTAN's exercise of the buyout clause violates Article 4(2) Beristan-Opulentia BIT, which states that:

> "Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalised, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party."

92. BERISTAN contends that it has not expropriated TELEVATIVE's investment because (1) Beritech's exercise of the buyout clause is not of permanent character; (2) BERISTAN did not directly expropriate TELEVATIVE's investment; and (3) BERISTAN did not indirectly expropriate TELEVATIVE's investment. Alternatively, BERISTAN argues that (4) Article 4(2) Beristan-Opulentia BIT excludes BERISTAN's exercise of the buyout clause from being treated as an expropriation.

1. Beritech's exercise of the buyout clause is not of permanent character

93. The duration of a government measure is a key requirement to be fulfilled in establishing a direct or indirect expropriation.[71] Only a measure which has an effect which is of a 'permanent' character or 'not merely ephemeral' will substantiate a claim for expropriation.[72]

[71] *Schreuer,* page 112

[72] *LG&E v Argentina*; *Wena Hotels v Egypt, Award of 31 October 2005*; *TECMED v Mexico,* paragraph 116

94. In *SD Myers v Canada* the Tribunal determined that a government measure lasting 18 months was of a 'temporary nature' and that this was a key factor in declining to characterise the measure as an expropriation.[73]

95. Similarly, the Tribunals in *LG&E v Argentina* and *Hauer v Land Rheinland-Pfalz* determined that government measures which lasted for four and three years respectively were only transitory, and there was no finding of expropriation.[74]

96. In the present case, the effect of the buyout can only be characterised as temporary. The buyout occurred on 27 August 2009 – merely 14 months prior to the present proceedings. This is a minute duration compared with the measures in *SD Myers* and *LG&E* which were deemed to be 'temporary,' and in which the Tribunals ultimately found that no expropriation had occurred.

97. Accordingly, Beritech's exercise of the buyout clause was not of a permanent nature, and therefore does not amount to an expropriation.

2. BERISTAN did not directly expropriate TELEVATIVE'S investment

98. Direct expropriation occurs when a state takes concrete action, resulting in an investor's loss of control of its property,[75] and permanent transfer of its property's legal title to the government of the host state.[76]

99. BERISTAN contends that there can be no finding of direct expropriation, because there has been no transfer of property or benefit to BERISTAN. In *SD Myers v Canada,* the tribunal determined that, in order for there to be an expropriation, there must be a direct transfer of property or benefit from the investor to the host state.[77]

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[73] *S D Myers v Canada*, paragraph 220.

[74] *LG&E v Argentina*, paragraphs 193, 200

[75] *Santa Elena*

[76] *Starett v Iran*, at page 154; *Newcombe*, page 8

[77] *S D Myers v Canada*, paragraph 221

100. This cannot be said of TELEVATIVE's investment: exercising the Buyout Clause has not resulted in the transfer of any benefit or title to BERISTAN. TELEVATIVE's stock in Sat-Connect is not in the possession of BERISTAN, but has been paid "into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration."[78] BERISTAN therefore gains no benefit or property from the exercise of the Buyout Clause.

3. BERISTAN did not indirectly expropriate TELEVATIVE'S investment

101. BERISTAN argues that it did not indirectly expropriate TELEVATIVE's investment in that BERISTAN's exercise of the buyout clause (i) does not amount to a substantial interference; and (ii) does not interfere with TELEVATIVE's legitimate expectations.

i. BERISTAN's exercise of the buyout clause does not amount to a substantial interference

102. Governmental interference amounts to expropriation when the measures taken interfere with the investor's control, use and benefit of its investment so substantially that it renders the investment useless, "as if the rights related thereto – such as the income or benefits…had ceased to exist."[79]

103. A finding of expropriation requires an 'unreasonable' level of interference, and one that makes "any form of exploitation of the property disappear."[80] Factors considered include the magnitude and severity of the effect of the measure.[81]

104. The Respondent contends that there has been no substantial interference in the present case because the Claimant has not been deprived of its use, benefit and control of its investment so as to render it useless. In particular, there has been no loss of (a) control rights; (b) profits; or (c) a right to sell the stock in Sat-Connect.

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[78] Facts, page 18.

[79] *TECMED v Mexico*, paragraph 115.

[80] *Fortier/Drymer,* page 305

[81] *Pope & Talbot v Canada*, paragraph 96.

a. TELEVATIVE has not been deprived of control rights

105. In *PSEG Global v Turkey*, the Tribunal held that in order for there to be an expropriation, - "there must be some form of deprivation of the investor in the control of the investment [or] the management of day-to-day-operations of the company".[82]

106. TELEVATIVE's degree of control over the investment has not been altered by the buyout. Prior to the buyout, TELEVATIVE was only entitled to four out of the nine positions on Sat-Connect's board of directors, and only held a 40% minority shareholding in the company.[83] TELEVATIVE therefore did not have the right to control Sat-Connect or its operations to begin with, so has not been deprived of any degree of control as a consequence of the buyout.

b. TELEVATIVE has not been deprived of profits

107. TELEVATIVE has not been deprived of any profits from the Sat-Connect project because the company was not yet generating profits. The Sat-Connect project is not yet operational. Systems deployment is not yet underway, being "the next step" in developing the project.[84] As Sat-Connect is not yet able to provide telecommunications services, it could not as yet have declared a dividend to shareholders.

108. Accordingly, TELEVATIVE has not suffered any deprivation of profits since the exercise of the Buyout Clause. Although it is expected that Sat-Connect will generate a profit in the future, TELEVATIVE's right to share in those profits is subject to the determination of the Commercial Arbitration tribunal.

c. TELEVATIVE has not been deprived of a right to sell

109. TELEVATIVE has not been deprived of a right to sell its stock in Sat-Connect, because in reality it has never had the ability to do so. In order to dispose of the stock, it would have been necessary for TELEVATIVE to disclose information relating to

[82] *PSEG Global v Turkey*, paragraph 278

[83] Facts, page 16.

[84] Facts, page 6.

Sat-Connect to potential purchasers. Unless Beritech consented to such a disclosure, this would constitute a breach of the Confidentiality Clause.[85]

110. The effect of this is that TELEVATIVE could only ever have sold its stock with the agreement of Beritech. In respect of the right to sell stock, Beritech's exercise of the Buyout Clause is no different in effect to Beritech insisting on the confidentiality of Sat-Connect information. Therefore, TELEVATIVE has not been deprived of a right to sell its investment.

ii. BERISTAN's exercise of the buyout clause does not interfere with TELEVATIVE legitimate expectations

111. In assessing whether a host state has expropriated an investment, it is relevant to consider the legitimate expectations of an investor. A legitimate expectation is a reasonable, investment-backed expectation held by the investor.[86] In order to establish a breach of legitimate expectation, the investor must prove to an objective standard[87] that the measures imposed by the state were outside the state of affairs on which the investment was based.

112. In the present case, the JV Agreement contemplated the possibility that Beritech would acquire TELEVATIVE's stock in Sat-Connect. Through the Buyout Clause, TELEVATIVE expressly agreed that if it committed a material breach of the JV Agreement - which included any breach of the Confidentiality Clause - it would forfeit its interest in the joint venture upon payment of its paid-in capital.

113. In this context, TELEVATIVE was always aware of the possibility of Beritech exercising the buyout clause. Accordingly, TELEVATIVE could not have had a legitimate expectation that BERISTAN would not exercise the buyout clause. BERISTAN's conduct has not caused any detriment to TELEVATIVE's legitimate expectations, and this militates against any claim of expropriation of TELEVATIVE's

[85] Clause 4(1) JV Agreement,

[86] *Yannaca-Small*, page 19.

[87] *Saluka v Czech Republic*, paragraph 304.

investment.

4. Alternatively, Article 4(2) Beristan-Opulentia BIT excludes BERISTAN's exercise of the buyout clause from being treated as an expropriation

114. BERISTAN contends that Article 4(2) Beristan-Opulentia BIT excludes BERISTAN's exercise of the buyout clause from being treated as an expropriation. Article 4(2) Beristan-Opulentia BIT states that:

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

115. Article 4(2) Beristan-Opulentia BIT requires several prerequisites for an expropriation or nationalisation of an investor's investments to be lawful. BERISTAN argues that its exercise of the buyout clause was (i) for a public purpose and in the national interest; (ii) against full and effective compensation; and, (iii) non-discriminatory.

i. BERISTAN's exercise of the buyout clause was for public purpose and in the national interest

116. The Beristan-Opulentia BIT does not specify what constitutes a "public purpose" or the "national interest". In *ADC v Hungary*, the tribunal held that the treaty requirement of "public interest" requires some genuine public interest.[88] In the present matter, BERISTAN contends that its national security was at stake, and that a threat to national security satisfies the test laid down in *ADC v Hungary* of a genuine public interest.

117. BERISTAN contends that the sole reason for its exercise of the buyout clause was because TELEVATIVE had been leaking information about the Sat-Connect project, including information about the technology systems, intellectual property, trade secrets

[88] *ADC v Hungary*, paragraph. 429

and encryption to be used, to the Government of Opulentia. The satellite and communications deployed by the Sat-Connect project was to be used for civilian and military purposes[89], which includes the civilians and military of BERISTAN.[90] The leak endangers BERISTAN's national security and justifies BERISTAN's exercise of the buyout clause.

ii. BERISTAN's exercise of the buyout clause was against full and effective compensation

118. Article 4(3) Beristan-Opulentia BIT further states that:

> "The full and effective compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to nationalise or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards".

119. However, Beritech and TELEVATIVE have agreed on a valuation process to apply in the event that Beritech exercises the Buyout Clause. The Buyout Clause stipulates that:

> "Under such circumstances, Televative's interest in the Agreement shall be valued as its monetary investment in the Sat-Connect project during the period from the execution of this Agreement until the day of the buyout".

120. As the parties have contemplated a specific valuation method for the stock in Sat-Connect, the tribunal is relieved of any inquiry into the nebulous standard of "internationally acknowledged evaluation standards" referred to in Article 4(3) Beristan-Opulentia BIT. Using the agreed valuation principles, the value of the Sat-Connect stock is US$47 million.[91] By 19 October 2009, this amount had "been made available for Televative",[92] however TELEVATIVE has refused to accept it.[93] The

[89] Uncontested Facts, paragraph 6

[90] Uncontested Facts, paragraph 5

[91] Uncontested Facts, paragraph 12

[92] Uncontested Facts, paragraph 13

funds were subsequently paid into escrow pending the decision of the Commercial Arbitration Tribunal.[94]

121. Immediately after exercising the Buyout Clause, Beritech attempted to pay TELEVATIVE the value of the Sat-Connect stock in accordance with the agreed valuation principles. This amount was not accepted by TELEVATIVE. BERISTAN concludes TELEVATIVE has been provided immediate, full and effective compensation for the Sat-Connect stock.

iii. BERISTAN's exercise of the buyout clause was non-discriminatory

122. BERISTAN contends that the exercise of the buyout clause is non-discriminatory. Discrimination is treating differently, without an objective and reasonable justification, persons in 'relatively similar situations.[95] Proceeding upon the basis that TELEVATIVE accepts that BERISTAN and Beritech are the same entity, BERISTAN'S exercise of the buyout clause was based upon grounds of national security and not discrimination.

123. The sole reason for BERISTAN's exercise of the buyout clause was because TELEVATIVE had been leaking information about the Sat-Connect project, including information about the technology systems, intellectual property, trade secrets and encryption to be used, to the Government of Opulentia. The satellite and communications deployed by the Sat-Connect project was to be used for civilian and military purposes[96] within the region of Euphonia, which includes the civilians and military of BERISTAN.[97] The leak therefore endangered BERISTAN's national security. Invoking the buyout clause and removing TELEVATIVE's personnel from

[93] *Ibid*

[94] Facts, page 18. Uncontested Facts, paragraph 13.

[95] *CME v Czech Republic*, paragraph 612; *CMS v Argentina*, paragraph 293; *Fredin v Sweden*, paragraph 60; *Goetz v Burundi*, paragraph 21

[96] Facts, page 17. Uncontested Facts, paragraph 6

[97] Facts, page 16. Uncontested Facts, paragraph 5

the sites was BERISTAN's only reasonable method to protect against further breaches of confidentiality which could compromise BERISTAN's national security.

124. Accordingly, the exercise of the buyout clause was not discriminatory because it was based on national security concerns, not grounds of treating TELEVATIVE differently to BERISTAN nationals.

B. BERISTAN AFFORDED TELEVATIVE FAIR AND EQUITABLE TREATMENT

125. BERISTAN is obliged under Article 2(2) of the Beristan-Opulentia BIT to accord fair and equitable treatment to TELEVATIVE. Fair and equitable treatment prohibits conduct which is arbitrary, involves a lack of due process, or displays a lack of transparency and honesty in the decision making process.[98]

126. BERISTAN has accorded fair and equitable treatment to TELEVATIVE because (1) the exercise of the buyout clause was not arbitrary, grossly unfair, unjust or idiosyncratic; (2) the exercise of the buyout clause was transparent; and, (3) the CWF's takeover of Sat-Connect's sites and facilities does not amount to a failure to accord due process.

1. The exercise of the buyout clause was not arbitrary, grossly unfair, unjust or idiosyncratic

127. BERISTAN'S exercise of the buyout clause was not arbitrary, grossly unfair, unjust or idiosyncratic because it followed fair and proper procedures. The day after the buyout, Beritech gave TELEVATIVE two weeks notice to hand over possession of the Sat-Connect sites, and remove its seconded personnel.[99] In spite of this notice, TELEVATIVE did not hand over possession of the premises, and its personnel remained on site until the two weeks expired. On this date the Civil Works Force, which is in effect a police force,[100] secured the sites and instructed TELEVATIVE's personnel to leave.

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[98] *Waste Management v Mexico*, paragraph 98; *SD Myers v Canada* paragraph 263

[99] Facts, page 17

[100] Clarification 187

128. TELEVATIVE was given ample notice to peacefully leave the Sat-Connect sites, and as a consequence of ignoring this notice, was politely removed by the CWF. The removed staff did not fear for their safety and were merely 'asked' to leave.[101] BERISTAN's conduct is therefore not arbitrary, grossly unfair, unjust or idiosyncratic.

2. The exercise of the buyout clause was transparent

129. BERISTAN is obliged to ensure a transparent and predictable framework for foreign investment.[102]

130. The satellite and communications deployed by the Sat-Connect project was to be used for civilian and military purposes[103] within Euphonia, which includes the civilians and military of BERISTAN.[104] The leak breaches the confidentiality provision in the JV Agreement. On 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.[105] On 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. At no point in time was TELEVATIVE not informed of the reasons behind the buyout. The process leading up to the exercise of the buyout clause was, at all times, transparent.

3. The CWF's takeover of Sat-Connect's sites and facilities does not amount to a failure to accord due process

131. A breach of due process requires an outcome which "shocks or at least surprises" a

[101] Clarification 248

[102] *Metalclad v Mexico*, paragraph 99.

[103] Facts, page 17. Uncontested Facts, paragraph 6.

[104] Facts, page 16. Uncontested Facts, paragraph 5.

[105] Facts, page 17. Uncontested Facts, paragraph 9.

sense of judicial propriety.[106] To purchase all of TELEVATIVE'S interest in Sat-Connect under grounds of breaching confidence yet still allowing TELEVATIVE'S employees to operate Sat-Connect's sites and facilities would be nonsensical. Furthermore, the CWF is in essence a police force. BERISTAN therefore contends that the CWF's takeover of Sat-Connect's sites and facilities does not amount to a failure to accord due process.

[106] *Case concerning ELSI,* paragraph 128

PART FIVE:

BERISTAN'S CONDUCT WAS JUSTIFIED UPON GROUNDS OF ESSENTIAL SECURITY

132. BERISTAN argues that Beritech's exercise of the Buyout Clause was justified on the basis of essential security. Article 9(2) Beristan-Opulentia BIT states that:

> "Nothing in the Treaty shall be construed to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to...the protection of its own essential security interests."

133. In the present case, BERISTAN's essential security was at risk because TELEVATIVE leaked information regarding technology and systems which were to be used by the Beristan military, compromising BERISTAN's national security. BERISTAN contends that (A) BERISTAN's national security is an essential security interest and (B) BERISTAN acted out of necessity, therefore (C) The exercise of the buyout clause is justified under Article 9(2) Beristan-Opulentia BIT.

A. BERISTAN'S NATIONAL SECURITY IS AN ESSENTIAL SECURITY INTEREST

134. National security goes to the core of the principle of "essential security". A state's right to act to protect "essential security interests" reflects "the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security..."[107]

135. This is reflected in numerous international instruments that specify supply of a military as an essential security concern. For example, Article 2102(1) of the North American Free Trade Agreement (**NAFTA**) contains an essential security that states:

> "…nothing in this Agreement shall be construed…to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly **for the**

[107] *Continental Casualty Company v Argentina*

> **purpose of supplying a military or other security establishment**."

136. Similarly, the Article 24 of the *Energy Charter Treaty* stipulates that:

> "The provisions of this Treaty…shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary: (a) for the protection of its essential security interests including those (i) relating to the supply of **Energy Materials and Products to a military establishment**."

137. Article XIV of the *General Agreement on Trade in Services* also provides an essential security exception related goods and services for the purpose of supplying a military establishment.

138. These international instruments illustrate that national security, and more particularly the supply of military technology, is at the core of the principle of essential security interests. The breach of the Confidentiality Clause relate to the supply of technology to the military of BERISTAN. Accordingly, BERISTAN contends that preventing the disclosure of confidential information relating to the Sat-Connect project constitutes an essential security interest.

B. BERISTAN ACTED OUT OF NECESSITY

139. A state may justify an otherwise wrongful act on the grounds of protecting its essential security interest on the grounds of necessity. Articles 20-25 of the International Law Commission's *Draft Articles on State Responsibility* provide for some circumstances where states may not be held responsible for breaching their international obligations, including necessity. According to Article 25:

> "Necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."

140. Necessity may therefore be invoked to safeguard an essential interest if it is (1) from a grave and imminent peril and (2) does not impair essential interests of other states or

the international community. BERISTAN contends that the present circumstances satisfy both these requirements.

1. BERISTAN's essential security interest was facing a grave and imminent peril

141. The ILC Committee of experts on State Responsibility has stated that an essential security interest must facing a vital situation such as "political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc."[108]

142. In *CMS v Argentina* and *Enron v Argentine Republic*,[109] the ICSID tribunals concluded the economic crisis in question was "severe but did not result in total economic and social collapse," and declined to excuse the host state's actions on this basis.

143. In contrast, the content that TELEVATIVE leaked to the Government of Opulentia was of a 'critical' nature[110] and involved encryption technology, systems and intellectual property which was to be supplied to and used by the Beristan military for defence.[111] Disclosure of the encryption methods to a foreign government would render Sat-Connect insufficiently secure for military purposes.

144. The fact these possibilities may be a number of years away does not affect the requirement of imminence. In *Gabcikovo-Nagymaros Project*, the International Court of Justice said:

> "a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established…that the realisation of the peril, however far off it might be, is

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[108] *Documents of the Thirty-Second Session* (1980), 2 Y.B. Int'l L. Comm'n 14, U.N. Doc. A/CN. 4/SER. A/1980/Add.1 (Part 1)

[109] *Enron v Argentine, Award of 22 May 2007*

[110] Facts, page 17

[111] Clarification 178

not thereby any less certain and inevitable."[112]

145. BERISTAN concludes that there was a grave and imminent to its essential security. Exercising the buyout clause and removing TELEVATIVE's seconded personnel was an act of necessity to protect against any further leaks of information to the government of Opulentia.

2. BERISTAN's acts do not impair the interests of other states or the international community

146. It is a requirement that the essential security interest of the host state outweighs all other considerations and does not impair the competing essential interests of another state or offend the international community.[113]

147. In the present case, BERISTAN's conduct did not seriously impair any essential interest of Opulentia, or of the international community as a whole. The danger to BERISTAN's national security alone outweighs any interests of Opulentia, and the conduct did not affect or offend the international community.

C. THE EXERCISE OF THE BUYOUT CLAUSE IS JUSTIFIED UNDER ARTICLE 9(2) BERISTAN-OPULENTIA BIT

148. Because the national security of Beristan can be properly characterised as an essential security interest, BERISTAN's exercise of the buyout clause is justified by Article 9(2) Beristan-Opulentia BIT, because it constitutes a measure taken out of necessity to protect its essential security from a grave and imminent peril.

[112] *Hungary v the Slovak Republic*

[113] *Yannaca-Small*, page 101

CONCLUSION ON MERITS OF THE DISPUTE

149. As outlined in this Memorial, BERISTAN has not expropriated TELEVATIVE's investment, nor failed to afford TELEVATIVE fair and equitable treatment, nor discriminated against TELEVATIVE.

150. This Memorial has also demonstrated that BERISTAN has afforded TELEVATIVE and its investment protection and security in accordance with the Beristan-Opulentia BIT and customary international law. Additionally this memorial has established that, in any event, the acts of BERISTAN are justified on the grounds of essential security.

151. BERISTAN commends the arguments in this Memorial to the Arbitral Tribunal to achieve "a just and effective resolution" of the dispute.[114]

[114] *IBA Rules*, Article 1