TELEVATIVE INC.
[CLAIMANT]

vs.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
[RESPONDENT]

(ICSID Case No. ARB/X/X)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS :

Art.	Article
BIT	Beristan-Opulentia Bilateral Investment Treaty
e.g.	exempli gratia
Ibidem	in the same place
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session in 2001
JV	Joint Venture
pp.	pages
p.	page
para.	paragraph
paras	paragraphs
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

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I. STATEMENT OF FACTS

1. On 1 January 1997, BIT between the Republic of Beristan (**hereinafter Respondent**) and the United Federation of Opulentia became effective.[1] Subsequently, in March 2007, Televative Inc (**hereinafter Claimant**) a company incorporated in Opulentia, entered into joint venture agreement (**hereinafter JV Agreement**) with Beritech (owned by Respondent) and established Sat-Connect S.A.[2]

2. The purpose of starting Sat-Connect was to develop and deploy operative satellite network.[3] Corporated offices of Sat-Connect are located in the capital city of Beristan.[4] Primarly, Claimant owned a 40% minority share in Sat-Connect. While Beritech, owned a 60% interest.[5] Respondent co-signed the JV Agreement as guarantor of Beritech's obligation.[6]

3. Beritech is owned by Respondent, nevertheless Beritech was not mentioned in the Telecommunication Act specifically.[7] Moreover, there is no evidence of any direct relationship between the Beristian government official and Beritech.[8] Similarly, no board members of Sat-Connect were appointed by the government of Beristan directly.[9]

4. On 12 August 2009, the leak of information from Sat-Connect (disclosure of encryption ciphers, keys, and pads to national security services) was revealed in The Beristan Times.[10] Consequently, Beritech exercised lawful buyout provision of JV Agreement.[11] With

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[1] Response to request No. 174.

[2] Uncontested facts No. 1.

[3] Uncontested facts No. 5.

[4] Uncontested facts No. 3.

[5] Uncontested facts No. 4.

[6] Uncontested facts No. 3, see also: Response to request No. 152.

[7] Response to request No. 266.

[8] Response to request No. 162.

[9] Response to request No. 266

[10] Response to request No. 178

[11] Uncontested facts No.10 and Response to request No. 244.

an assistance of the Civil Works Force, Sat-Connect's personnel associated with Claimant were instructed to leave the project sites.[12]

5. Beritech has paid US $47 million into an escrow account, which has been made available for Claimant and is being held pending the decision in this arbitration.[13] Claimant has refused to accept this payment and has refused to respond to Beritech's arbitration request in front of Beristan Arbitration Tribunal.[14]

6. The Arbitration Act of Beristan was amended in February 2007 to conform to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[15] Moreover, under laws of Respondent, the outcome of a material breach of JV Agreement is allowing the aggrieved party to terminate the contract and claim damages, including loss of profit.[16] In addition, the Beristan Constitution states that private property shall not be taken for public use without just compensation and due process.[17]

7. Nevertheless, Claimant decided not to initiate the arbitration under dispute settlement clause established in JV Agreement (Beristan Arbitration Tribunal) and decided to initiate settlement in accordance with ICISD rules.[18] Claimant notified Respondent about his intent on 12 September 2009.[19] Subsequently, Claimant filed a requested for ICSID arbitration on 28 October 2009.[20]

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[12] Uncontested facts No. 11.

[13] Uncontested facto No. 13.

[14] Ibidem.

[15] Response to request No. 130.

[16] Response to request No. 215.

[17] Response to request No. 118.

[18] Response to request No. 256 and Uncontested facts No. 14.

[19] Response to request No. 133.

[20] Uncontested facts No. 14.

II. SUMMARY OF ARGUMENTS

8. Claimant cannot be able to seek protection under the BIT because the essential basis of Claimant's submission, is asserting a breach of the JV Agreement. The jurisdiction of the present Tribunal could not be expanded by virtue of umbrella clause in Article 10 of BIT, as well as general reference to investments in Article 11 of BIT. In accordance to the exclusive choice of forum, Clause 17 of JV Agreement, the Respondent requests present Tribunal to declare that exclusive jurisdiction over dispute at stake falls under the Beristan Arbitration Tribunal.

9. Alternatively, should the Tribunal decide it has jurisdiction to hear current dispute, Respondent respectfully submits that it did not, in any event, materially breach the JV Agreement, neither by preventing Claimant from completing its contractual duties, nor by improperly invoking Clause 8 (Buyout) of the JV Agreement, since (1.1.) actions of Beritech are not attributable to Beristan, since, further and in the alternative, (1.2.) actions of Beritech did not amount to a breach of the JV Agreement was entitled to rely on Clause 8 (Buyout) of the JV Agreement as a consequence of breaching Clause 4 (Confidentiality provision) of the JV Agreement by Claimant and did not breach Beristan corporate law, since (1.3.) Respondent's obligations as the guarantor of Beritech's obligations under the JV Agreement are not applicable. In further submission Respondent asks the Tribunal to decide that it did not, in any event, violate any terms of the Beristan-Opulentia BIT, nor did otherwise violate general international law or applicable treaties. At this point, should the Tribunal decide actions of Beritech are not attributable to Respondent, Respondent submits that it neither breached Article 10 (Umbrella Clause) of the Beristan-Opulentia BIT, nor did it fail to afford Claimant fair and equitable treatment. However, if the Tribunal decides actions of Beritech are attributable to Respondent, Respondent neither expropriated Claimant's interest, nor did it fail to afford Claimant fair and equitable treatment. Finally, Respondent respectfully asserts, that it is entitled to rely on Article 9 of the Beristan-Opulentia BIT as a defence to Claimants claims, since Respondent's essential security was breached or at least jeopardized.

III. JURISDICTION

1. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR CURRENT DISPUTE

10. Respondent respectfully challenges the jurisdiction of the present Tribunal in accordance with Rules 41(1) and 41(6) ICSID Arbitration Rules and requests it to find it lacks jurisdiction over the present dispute. Claimant has instituted the proceedings in front of the present Tribunal against Respondent on October 28, 2009,[21] on the basis of Respondent's offer to arbitrate under Article 11 of the Beristan-Opulentia BIT.[22] Respondent however will demonstrate that the case at hand falls outside both of ICSID jurisdiction and of the competence of the present Tribunal.

11. In order for the Centre to have jurisdiction over a dispute, the following conditions must be met (i) the investor must be a national of a Contracting State other than the State party to the dispute, or a national of the Contracting State party to the dispute if there is both foreign control and an agreement setting foreign control (*ratione personae*); (ii) the object of the dispute must be a protected investment under both the applicable BIT and the Convention (*ratione materiae*); (iii) both parties must have agreed on ICSID jurisdiction (*ratione voluntatis*); and (iv) the acts or omissions complained of must have occurred after the date of the investor's purported investment (*ratione temporis*).[23]

12. When analyzing these requirements, the Tribunal must consider both the applicable BIT, the Convention and the other relevant agreements signed by either party to the dispute at stake. This analysis leads to the conclusion that the Tribunal does not have jurisdiction to hear this dispute.

13. Respondent invokes the lack of jurisdiction of the Tribunal with regard to two of the requirements of Article 25 of the Convention. Respondent argues that Claimant does not satisfy the *ratione materiae* and *ratione voluntatis* requirements for ICSID jurisdiction.

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[21] Uncontested facts No. 13.

[22] Uncontested facts No. 14.

[23] *Phoenix v Czech Republic*, A., p. 57, *Dolzer*, p. 230.

2. THE TRIBUNAL HAS NO JURISDICTION AS CLAIMANT SUBMITTED A CONTRACTUAL CLAIM

14. In the present matter, Claimant submitted a purely contractual claim. The essential basis of the allegation is linked to the buyout of Claimant's interest in the Sat-Connect project. This procedure was effected by Beritech under the provisions of the JV Agreement.[24] As a result, Beritech paid US $47 million into an escrow account, which has been available to Claimant.[25] Moreover, with the assistance of Responent's Civil Works Force, the personnel associated with Claimant were instructed to leave the Sat-Connects project sites.[26] Respondent refused to accept payment and requested the present arbitration against Respondent.[27]

15. Claimant invokes collectively invokes a breach of BIT and JV Agreement. Nevertheless, according to the circumstances, it is crystal clear that present the claims put before the Tribunal consist of a mere breach of JV agreement. Therefore, the *ratione materiae* requirement to the ICSID jurisdiction of the Tribunal is not fulfilled.

2.1 THE NECESSITY OF TESTING THE SCOPE OF CLAIM ON THE JURISDICTIONAL STAGE OF PROCEEDINGS

16. Claimants's own categorization of the legal basis of its claims cannot be conclusive because the ICSID tribunal is not a court of general jurisdiction to resolve any disputes between investors and states. The necessity of testing the scope of claim in the jurisdictional phase of proceedings is generally accepted by ICJ precedents and the investment treaty case law.[28]

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[24] Uncontested facts No. 10.

[25] Uncontested facts No. 13.

[26] Uncontested facts No. 11 .

[27] Uncontested facts No.13, 14, See also: Statement of facts.

[28] *Douglas*, p.263-265.

17. The tribunal's decision on jurisdiction in *SGS v Philippines* case[29], relied on the standpoint that the assessment of jurisdiction is objective and its resolution may require the definitive interpretation to the treaty provisions which is relied on. Similar approach was represented by *Pan American Energy v Argentina* case[30] in which it was highligthed that the tribunal could not be dependent on characterizations made by claimant only. This was followed by several tribunals, for instance, in *UPS v Canada* case,[31] *Salini v Jordan* case.[32]

2.2 THE VINDICATION OF CONTRACTUAL RIGHTS ARISING OUT OF INVESTMENT AGREEMENT

18. In the present case, Respondent submits that claims formulated by Claimant are all fundamentally rooted in, or based on allegations of violations of the JV Agreement. Particularly important is the question of whether there was an information technology leak and whether the buyout and consequent action against Claimant were proper and justifiable according by reference to JV Agreement.

19. ICSID tribunals were not designed to resolve problematical contention with respect to national commercial companies codes. The current dispute has a fundamentally contractual character, therefore the law of JV Agreement could be jeopardized by the Tribunal either by unawareness or misinterpretation. In the context of NAFTA's scope, the tribunal in *Azinian v. Mexico* case, dismissed the possibility of elevating a multitude of ordinary transactions into potential international disputes.[33]

20. In addition, the tribunal in *El Paso v Argentina* case has rejected its jurisdiction *ratione materiae* over contractual claims.[34] A similar decision was delivered in *LESI v Algeria*

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[29] *SGS v Philippines* case, P. O., para. 157.

[30] *Pan American Energy v Argentina* case , P. O. para. 50.

[31] *UPS v Canada* case., P.O. paras. 33-34.

[32] *Salini v Jordan* case, P. O., para. 163.

[33] *Azinian v. Mexico* case, A., para. 87.

[34] *El Paso Energy v Argentina* , P.O., para. 65.

case.[35] Furthermore, it was accurately acknowledged in *TSA Sectrum* case by Georges Abi-Saab that:

21. It is Respondent's contention that

> "Thus, where what is contended in the treaty claim is mainly that the contract has been violated and that this violation constitutes in turn and by another name (figuring in the treaty) a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim"[36]

22. Respondent requests the Tribunal not to confine itself to the formulation by the Claimant when determining the subject of the dispute. It is undisputable, that the object of the current claim is the vindication of contractual rights arising out of JV Agreement, thus the tribunal should decline its jurisdiction.

3. THE TRIBUNAL HAS NO JURISDICTION AS CLAIMANT IRREVOCABLLY ELECTED ANOTHER DISPUTE FORUM

23. Respondents asks the Tribunal to observe a choice of forum clause accepted by the Claimant in the JV Agreement. At this point, the following circumstances should be invoked. BIT became effective on 1 January 1997.[37] Article 11 of BIT comprises settlement of dispute clause (between investor and the contracting parties). According to this provision, the investor in question may, in writing, submit the dispute to one of the three alternative forums: the contracting party's court, an ad hoc UNCITRAL Arbitration Tribunal or ICSID Arbitration.

24. After BIT became effective, on 18 October 2007, Claimant and Beritech signed a JV Agreement[38]. The invoked contract comprised the following dispute settlement clause:

25. Respondent pleads that

> "(…)In the case of any dispute arising out of or relating to this Agreement, any party may give notice to the other party of its intention to commence arbitration(…) The dispute shall then be

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[35] *LESI v Algeria* case, P.O., para. 25.

[36] *TSA Sectrum* case, C. O. of G. Abi-Saab, para. 5.

[37] Response to request No. 174.

[38] Uncontested facts No. 3.

> 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."[39]

26. On the facts of case at stake, in accordance to Article 11 of BIT, by virtue of JV Agreement Claimant elected Beristan Arbitration Tribunal as an exclusive forum for resolving the present dispute. In addition, Claimant's choice is irrevocable, decision on Beristan Arbitration estops him from subsequently invoking ICSID tribunal's jurisdiction.

3.1 THE FOUNDATION OF INVOKING THE JV AGREEMENT PROVISIONS

27. Claimant's consent to Beristan Arbitration was given at the time of contracting to Beritech. Respondent is a guarantor of Beritech and therefore could rely on the dispute settlement provisions of the JV Agreement.[40] Nevertheless, Respondent reserves that Beritech's actions are not attributable to Respondent. It is important to emphasize that Respondent remained objectively passive during Beritech's commencement of buyout procedure.[41] Thus, Respondent cannot be identified with Beritech.

28. The guarantee was made merely on the commercial basis and Respondent is only a secondary party to JV Agreement. As guarantor, Beristan would assume the obligations of Beritech under JV Agreement upon Beritech's default.[42] These relation could be considered as privity of interest.

3.2 THE STATE OF PARALLEL PROCEEDINGS

29. Therefore, it could be concluded that the present dispute and the dispute between Claimant and Beritech commenced before Beristan Arbitration Tribunal[43] are in fact between

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[39] Clause 17 of JV Agreement, p. 13.

[40] Uncontested facts No.3.

[41] Response to request No. 162.

[42] Response to request No. 152.

[43] Uncontested facts No. 13, p. 16, Response to request No. 118.

the corresponding parties, have the same object and are founded upon the same cause of action.

30. According to *McLachlan* commentary, when two claims are being pursued at the same time, the issue is categorized as one of *lis pendens*.[44] Parallel litigation, in both civil and common law countries, is viewed generally as a non-acceptable litigation tactic and is subject to rules remedying the situation.[45] Thus, *lis pendens* principle prevents the initiation of new proceedings on a matter if there is already a case pending before a court or tribunal.[46]
Claim splitting to parallel proceedings by separate forums is uneconomical and contrary to the goal of reaching final and comprehensive resolutions of disputes. Accordingly, *Reinisch* noted as follows:

31. *"If litigated to the end, multiple proceedings may even result in divergent outcomes which may contribute to the (actual or perceived) - fragmentation of international law or, even worse, may weaken the coherence and credibility of the law as such."*[47]

32. Another important feature relating to the present case, is the prospect of the double recovery in respect of the same prejudice by Claimant. Respondent challenges the jurisdiction of the present Tribunal for the reason that a parallel proceeding is pending in front of Beristan Arbitration Tribunal. Thus, on the grounds of *lis pendens* principle, Respondent asks the Tribunal to deny its jurisdiction, otherwise, the claim would unfairly privilege the Claimant due to the multiplicity of actions.

3.3 THE EFFICACY OF EXCLUSIVE CHOICE OF FORUM CLAUSE

33. Claimant should not be allowed to evade Clause 17 of JV Agreement. Claimant's investment was established by virtue of written contract, then the present Tribunal should give effect to an exclusive jurisdiction clause in relation to any claims within its scope.

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[44] *McLachlan*, p. 81.

[45] *Muchlinski*, p. 1021.

[46] *Mistelis*, p. 338.

[47] *Reinisch*, p. 1.

34. Exclusive choice of Beristan Arbitration Tribunal precluded resort to the present Tribunal under the principle of *electa una via*. As it is explained in *Black's Law Directory*, these term signifies that "*when one way has been chosen, no recourse is given to another*".[48] This principle is recognized by notable scholar *McLachlan* [49] and its basis for application to the present dispute are general principles of law, applied as a source for the interpretation of the treaty pursuant to VCLT.[50] It also comes to be known also as a "*fork in the road*".[51]

35. It was confirmed by international jurisprudence that the exclusivity of contractual choice of forum clauses should be preserved. This approach was expressed for instance in *North American Dredging* case:

36. Respondent argues that

> "The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if [dispute settlement clause] of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use."[52]

37. Claimant could not plead a breach of some JV Agreement's provisions and the non-applicability of another. Equivalent approach were represented by contemporary authorities. It was provided in landmark *Vivendi v Argentina* case , that:

38. Respondent pleads that

> "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"*[53]*

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[48] *Black's Law Dictionary*, p. 1716.

[49] *McLachlan*, p. 95.

[50] Article 31(3)(c) of VCLT

[51] *Rubins*, p. 275.

[52] *North American Dredging* case, para. 31.

[53] *Vivendi v Argentina* case, (No. I Annulment), para. 98.

39. This standpoint was represented by *Klockner v Cameroon* case.[54] It is also consistent with the reasoning in *Saluka v Czech Republic* case.[55] The tribunal assessed the contractual dispute settlement clause which provided that *"[a]ll or any disputes or differences arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with*" the UNCITRAL Rules, *the seat of that arbitration being in Zurich*." According to that provision, the tribunal decided that this was a mandatory term.

40. Respondent contends that if Clause 17 of JV Agreement could be avoided simply by pleading different types of causes of action, then it will be construed to nonexistent. Aforementioned exclusive choice of forum provision is conferring jurisdiction in relation to "*arising out of or relating to this Agreement*" as merely denoting the factual subject-matter of the claims, and not their legal basis.

3.4 THE INEFFICACY OF UMBRELLA CLAUSE

41. On the facts of present case, the umbrella clause established in Article 10 of BIT is ineffective and could not elevate contractual claims within the scope of ICSID tribunal. Respondent submits that in principle, umbrella clause could not elevate contractual claims within the scope of ICSID tribunal. What is more, umbrella clause is overridden by virtue of exclusive choice of forum clause established in Clause 17 of JV Agreement. In that contract, Claimant expressly and irrevocably submitted itself to the jurisdiction of Beristan Arbitration Tribunal in case a dipute in relation to present investment arises.

42. According to *Douglas's* commentary, the general principles of law: *generalia specialibus non derogant*, *prior tempore potior jure* and *pacta sund servanda* provide the doctrinal basis for sorting out conflicts between overlapping jurisdictions.[56] All of these principles are applicable to the present dispute, JV Agreement was signed by Claimant after

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[54] *Klockner v Cameroon* case. (Merits) (Annulment), para. 13.

[55] *Saluka v Czech Republic* case, P.O., paras. 52, 54.

[56] *Douglas*, p. 380.

BIT came into force[57]and the scope of JV Agreement is significantly narrower than capacity of the investment treaty.

43. Respondent's standpoint is generously supported by the relevant ICSID case law. In SPP v Egypt case it was determined that:

44. It is Respondent's contention that

> "A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and *Egypt*, while such a bilateral treaty would in turn prevail with respect to a multilateral treaty such as the Washington Convention. [The clause] thus reflects the maxim "generalia specialibus non derogant …"[58]

45. The purpose of Clause 17 of JV Agreement was to create a climate of legal certainty and avoid litigation over the proper forum for the resolution of disputes and the potential risk of multiple proceedings. On the phase of negotiating JV Agreement, it was open to Claimant to restrict the *ratione materiae* of Beristan Arbitration Tribunal. Claimant chose to sign the contract in the present form .

46. The nature of an investment protection as a BIT framework treaty, was designed to support and complement, not to override or substitute, the voluntarily approved JV Agreement. It was acknowledged in *Dolzer* commentary, as follows: "*[a] document containing 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.*"[59] Analogous attitude was represented in *Douglas* commentary.[60]

47. It is worth noting that, article II of the New York Convention on Recognition and Enforcement of Arbitral Awards obliges the contracting states to observe the choice of forum

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[57] Response to request No. 174 and Uncontested facts No.3, p.16.

[58] *SPP v Egypt case* (No 1), P.O., para. 83.

[59] *Dolzer*, p. 362.

[60] *Douglas*, p. 392.

agreements for the settlement of civil and commercial disputes within their legal systems. A further landmark case, *SGS v Philipines*, found that:

48. Respondent submits that

> "the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively"[61]

49. Respondent's standpoint is in accord to the Tribunal's reasoning in *SGS v. Pakistan* case, where it was ruled that an umbrella clause could not elevate contractual claims to the ICSID jurisdiction. Thus, it was concluded that a violation of contract entered into by a State with an investor of another state was not itself a violation of international law.[62]

50. It should be highlighted that both of the *SGS* decisions[63] resulted in excluding the contractual claims from ICSID jurisdiction. This was done despite the existence of broad jurisdiction and umbrella clauses in the relevant treaties.[64]

51. Furthermore, JV agreements does not contain a contractual stabilization clause and the umbrella clause could not operate even in the absence of the exclusive jurisdiction of the Beristan Arbitration Tribunal.[65]

52. The availability of investment arbitration for contractual disputes under umbrella clause and standing consent given by the host State by treaty to submit to arbitration all disputes relating to investments may be precluded by a contractual clause submitting such disputes to another forum.[66]

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[61] *SGS v Philipines* case, P.O., para. 155.

[62] *SGS v. Pakistan* case, P.O., paras. 43-47.

[63] Ibidem and *SGS v Philipines* case, P.O., para. 155.

[64] *McLachlan*, p. 115.

[65] *El Paso Energy v Argentina* , P.O., para. 81.

[66] *McLachlan*, p. 129.

53. The umbrella clause could not independently confer jurisdiction over contractual claims upon the present Tribunal. The cause of action would at all times have to be established elsewhere: in the provisions of the contract itself.[67] On the facts in the present case, provisions of JV Agreement cannot be used to trigger umbrella clause. Therefore, the Tribunal should decline its jurisdiction in favor of a forum chosen in the JV Agreement.

3.5 THE INAPPLICABILITY OF DENIAL OF JUSTICE CLAIM

54. Due to the fact that the claim in the present case is inseparably joined to the JV Agreement, any further allegations by Claimant that Respondent's actions amounted to denial of justice should be treated as outside the scope of ICSID jurisdiction, due to the fact that the Claimant has not asserted their rights in proceedings before Beristan national courts.

55. According to the facts in the case at stake, Claimant refused to participate in the settlement proceedings commenced before Beritech in front of Beristan Arbitration Tribunal.[68] Moreover, it is uncontested that Claimant intentionally resigned from exhausting domestic remedies.[69] As it was formulated by notable scholar *Rubin* , "*justice cannot be presumed to have been denied until it has been sought, and thus there must be an 'exhaustion of local remedies*".[70]

56. The burden of proving a denial of justice is placed on Claimant. According to circumstances, it was not demonstrated that the procedure of Beristan Arbitration does not provide appropriate quality of justice. Respondent submits that national legislation of Beristan grants protection of equivalent standard to safeguards established in foreign investment regime.

57. The Arbitration Act of Beristan was amended in February 2007 to conform to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[71]

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[67] Ibidem, p. 110.

[68] Response to request No. 118.

[69] Response to request No. 256.

[70] *Rubin*

[71] Response to request No. 130.

Moreover, under the laws of Respondent, the outcome of a material breach of JV Agreement is allowing the aggrieved party to terminate the contract and claim damages, including loss of profit.[72] Finally, the Beristan Constitution states that "*private property shall not be taken for public use without just compensation and due process*".[73]

58. Considering the excellent quality of procedural and substantive legal protection that could be awarded to Claimant by virtue of Beristan Arbitration Tribunal, there is no reasonable justification for Claimant's avoidance of this forum.

59. According to case of *Loewen v. United States,* even if a violation attributable to the State occurred, then the State should have an opportunity to "*redress it by its own means, within the framework of its own domestic legal system.*"[74] Analogical reasoning was applied in *Vivendi v Argentina* case:

60. Respondent submits that

> "… because of the crucial connection in this *case* between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively."[75]

61. Distinguished *Crawford* reported that, "*an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act*."[76] This conclusion supportive to the tribunal ruling in *Generation Ukraine v Ukraine* case:

62. It is to be stressed that

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[72] Response to request No. 215.

[73] Response to request No. 118.

74 *Loewen v. United States,* P.O., para. 71.

75 *Vivendi v Argentina*, (No. I A.), para. 78.

[76] *Crawford*, Raport to ILC, 498.

> "… the failure to seek redress from national authorities disqualifies the *international* claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction"[77]

63. According to the fact that Claimant is unjustifiable obstructing the settlement in front of Beristan Arbitration Tribunal, Respondent requests that Claimant's allegation about a denial of justice should be outside the jurisdiction of the present Tribunal.

4. THE TRIBUNAL HAS NO JURISDICTION AS CLAIMANT FAILED TO FULFILL THE PRECONDITIONS TO ARBITRATION

64. Respondent submits that Claimant failed to comply with a prescribed period of time calling for amicable negotiations prior to submitting a request for ICSID arbitration. Article 11 of BIT provides for the cooling off period lasting six months after the date of a written application. On the facts of the case at stake, Claimant notified Respondent on 12 September 2009.[78] Subsequently, Claimant filed a requested for ICSID arbitration on 28 October 2009.[79] Consequently, the BIT provision of jurisdictional nature was ignored by Claimant.

4.1. COOLING OFF PERIOD IS AN ENFORCEABLE AND BINDING PRECONDITION TO ARBITRATION

65. Respondents insists that inobservance of cooling off period entitles the Tribunal to deny its jurisdiction in the present case. Following tribunals have interpreted similar provisions as enforceable and binding precondition to arbitration*: Biloune v Ghana* case[80], *Goetz v Burundi* case.[81]

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[77] *Generation Ukraine v Ukraine,* A., para. 20.30.

[78] Response to request No.133.

[79] Uncontested facts No.14.

[80] *Biloune v Ghana* case, para. 2.

[81] *Goetz v Burundi* case, para. 90-93.

5. CONSEQUENTLY, THE TRIBUNAL HAS NO JURISDICTION TO HEAR THE MERITS OF THE DISPUTE

66. In conclusion, the essential basis of Claimant's submission is alleging a breach of the JV Agreement and therefore is subject to the choice of forum clause that provides exclusive jurisdiction of the arbitral tribunal constituted pursuant to that agreement. The respondent asks the Tribunal to deny the jurisdiction over a purely contractual claim based on the general reference to "*disputes with respect to investments*" in Article 11 of BIT. Moreover, the umbrella clause in the BIT could not elevate Claimant's contractual claims into claims grounded on alleged breach of the BIT. In addition, Claimant failed to comply with the prescribed cooling off period.

IV. MERITS OF THE DISPUTE

1. RESPONDENT DID NOT, IN ANY EVENT, MATERIALLY BREACH THE JV AGREEMENT, NEITHER BY PREVENTING CLAIMANT FROM COMPLETING ITS CONTRACTUAL DUTIES, NOR BY IMPROPERLY INVOKING CLAUSE 8 (BUYOUT) OF THE JV AGREEMENT.

67. Respondent respectfully submits that it did not, in any event, materially breach the *JV Agreement*, neither by preventing Claimant from completing its contractual duties, nor by improperly invoking Clause 8 (Buyout) of the *JV Agreement*, since (1.1.) actions of Beritech are not attributable to Beristan, since, further and in the alternative, (1.2.) actions of Beritech did not amount to a breach of the JV Agreement was entitled to rely on Clause 8 (Buyout) of the JV Agreement as a consequence of breaching Clause 4 (Confidentiality provision) of the JV Agreement by Claimant and did not breach Beristan corporate law, since (1.3.) Respondent's obligations as the guarantor of Beritech's obligations under the JV Agreement are not applicable.

1.1 INABILITY TO ATTRIBUTE ACTIONS OF BERITECH TO RESPONDENT

68. Respondent contends that actions of Beritech are not attributable to Respondent.

69. Firstly, Respondent is not a principal party to the JV Agreement. It is uncontested that the JV Agreement was signed by Claimant - Televative and Beritech, on 18 October 2007, in order to establish a joint venture company, Sat-Connect S.A.[82] By guaranteeing Beritech's obligations[83], Respondent became secondary obliged, as it is uncontested that it would assume Beritech's obligations only upon default of the latter.[84] Therefore, the principal contracting parties to the JV Agreement are Televative and Beritech, not Beristan, as it is argued by Claimant. As a consequence, not Beristan, but Beritech is primary obliged under this contract.

[82] Uncontested facts, para. 3.

[83] Uncontested facts, para. 3.

[84] Response to request no. 152.

70. Secondly, Beritech, as a legal person, is a separate entity from the state of Beristan. When signing the JV Agreement, it acted on its own behalf.

71. Respondent does not negate that it established Beritech, that the Beristan Government owns a 75% interest in Beritech and that the remaining 25% if Beritech is owned by a small group of wealthy Beristan investors, who have close ties to the Beristan Government.[85] Nor Respondent denies that The Minister of Telecommunications of Beristan is a member of the Board of Directors of Beritech[86]. However it is Respondent's contention that the aforementioned facts do not prejudge that actions of Beritech are attributable to Beristan.

72. Rules on attribution of conduct to states form a part of the law of state responsibility. It is generally accepted that the standards on responsibility of states emerged under customary international law.[87] It is also commonly recognized that currently the most authoritative document on the law of state responsibility are the ILC Articles on Responsibility of States for Internationally Wrongful Acts[88] (hereinafter ILC Articles).[89]

73. Rules on attribution enshrined in the ILC Articles are far-reaching, however they are limited to actions of so-called state agents. As it was explained by the ILC in the Commentaries to Artiles:

> "In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under

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[85] Uncontested facts, para. 2.

[86] Response to request no. 135.

[87] Hobér K., *State responsibility and attribution*, in: Muchlinski, p. 550.

[88] *Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission at its fifty-third session in 2001.

[89] Hobér K., *State responsibility and attribution*, in: Muchlinski. p. 550.

> the direction, instigation or control of those organs, i.e. as agents of the State."[90]

74. This very basic rule was affirmed already in the 1987 by the Iran-United States Claims Tribunal: "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State."[91]

75. The central provision in the ILC Articles with respect to attribution is contained in Article 4, which reads:

> "Conduct of organs of a State
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

76. This provision mirrors the well-established principle of international law that a state is responsible for the acts of its own organs.[92]

77. It is Respondent's submission that in reference to the facts of the instant case, it is more than clear that Beritech may be regarded as an organ of Beristan. This legal person does not exercise legislative, executive, judicial nor any other function, nor holds any position in the organization of the State. Nor there is any information that it is defined as a state organ under Beristan law.

78. The rules on attribution of conduct of persons or entities which are not organs of the state, but which are empowered by municipal legislation to exercise elements of governmental authority, are not applicable either. They are set forth in ICL Article 5:

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[90] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, text adopted by the International Law Commission at its fifty-third session, in 2001, *general commentary on Chapter Two – Attribution of conduct to a state*, para. 2.

[91] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

[92] Hobér K., *State responsibility and attribution*, in: Muchlinski, p. 554.

> "*Conduct of persons or entities exercising elements of governmental authority*
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

79. Relying on the text of this provision, Respondent asserts that Beritech may not be regarded as such a person or entity, since, according to the facts of the case, it does not exercise any governmental authority[93], therefore, it is not possible to attribute its actions to Beristan.

80. Further, Respondent also denies that the conduct of Beritech is neither directed nor controlled by Beristan. ILC Article 8 reads:

> "Conduct directed or controlled by a State
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

81. None of the members of the Board of Directors of Sat-Connect is appointed by Beristan.[94] Also, the Sat-Connect's Chairman is elected by a majority of the whole Board of Directors of Sat-Connect.[95]

82. What is probably the most worth stressing out is that the ILC Articles to not contain any rules, under which it would be possible to attribute conduct to a state solely on the basis that an entity is state-created, state-owned or that a state owns a majority interest in such an entity. Quite the opposite, the Commentaries on the ILC Articles are clear on this:

> "The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the

[93] Response to request no. 161.

[94] Response to request no. 268.

[95] Response to request no. 181.

> ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority."[96]

83. For all the above causes, Respondent claims that acts of Beritech are not attributable to Beristan.

1.2 ALTERNATIVELY, IF THE TRIBUNAL FINDS ACTIONS OF BERITECH ATTRIBUTABLE TO RESPONDENT, THESE ACTIONS DID NOT AMOUNT TO A BREACH OF THE JV AGREEMENT.

1.2.1 BERITECH WAS ENTITLED TO RELY ON CLAUSE 8 (BUYOUT) OF THE JV AGREEMENT, BECAUSE CLAIMANT BREACHED CLAUSE 4 (CONFIDENTIALITY PROVISION) OF THE JV AGREEMENT BY LEAKING INFORMATION ABOUT THE SAT-CONNECT PROJECT.

84. Clause 4 (1) of the JV Agreement states:

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

85. According to the facts of the case, Claimant did not request the approval of the Sat-Connect Board of Directors to disclose any of the confidential matters. Additionally, none of the exceptions from the obligation to obtain the written approval enumerated in Clause 4 was met. The disclosing of the information was not required by law, nor was necessary to enforce

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[96] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* text adopted by the International Law Commission at its fifty-third session, in 2001, commentary on Article 5, para. 3.

the terms of the agreement and nor the information was to properly come into the public domain, since not all information about the Sat-Connect project is in the public domain.[97]

86. Respondent claims that Televative's personnel unlawfully disclosed fundamental information about the Sat-Connect project to the Government of Opulentia.
The information leaked concerned the technology, systems, intellectual property, the encryption to be used and other trade secrets[98] - issues that are especially protected under paragraph 2 of Confidentiality Clause, which reads:

> "Confidential Information shall include all trade secrets, data, know-how, materials, products, technology, formulae, computer programs, specifications, compositions, improvements, inventions, discoveries, current and planned research and development, systems, structures, architectures, manuals, business plans, software, marketing plans, financial information, and other information developed during the Sat-Connect project, or disclosed or submitted, orally, in writing, or by any other media, to the Sat-Connect project by one of the parties. The parties shall not use any of the Confidential Information for any purpose other than for or in connection with the purposes of this Agreement."

87. News of the leak were not only a subject of discussions in Beristan millitary circles[99], but, most importantly, they were confirmed by a highly placed Beristan Government official, a Government defence analyst. According to his testimony, contained in the interview published by "The Beristan Times" on August 12, 2009, there have been leaks of critical information from the Sat-Connect to the Government of Opulentia, not only involving encryption technology, but also concerning the technology, systems, and intellectual property.[100]

88. Respondent submits that such a declaration made by a highly placed representative of Beristan Government, who, in addition, has, as a Government defence analyst, specialized knowledge of the subject, constitutes without any doubts a reliable source of information, since individual public servants represent a state.

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[97] Response to request no. 126.

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

[99] Response to request no. 231.

[100] Uncontested facts para. 8; Response to request no. 178.

89. Needless to say, a representative of a government is considered an organ of a state. The term 'state organ' is to be understood broadly.[101] Such a contention follows from the language of the ILC Article 4, which concerns an organ whether it "exercise legislative, executive, judicial or any other functions" and "whatever position it holds in the organization of the State". Paragraph 2 of Article 4 would seem to restrict the scope of this formulation, by stating that "An organ includes any person or entity which has that status in accordance with the internal law of the State." Nevertheless, even a narrow definition contained in domestic legal order or the lack of such e definition, would not provide an explanation.[102] Such a reasoning is a simple consequence of the well-established rule that a state cannot avoid responsibility under international law by referring to its internal law, enshrined in Article 27 of the Vienna Convention on the Law of Treaties (hereinafter VCLT).[103] State responsibility for conduct of its organs is of such a great importance, that it extends even to *ultra vires* actions.[104]

90. Because of the fact that states are abstract legal persons, they can act only through their agencies, institutions, officials, and employees, who are collectively referred to as state organs.[105]

91. Furthermore, being interviewed may be certainly regarded as a public comment, which is foreseeable to flow to the community at large. Therefore, it cannot be considered as acting in a private capacity, especially if the interviewed representative has not made such a fact clear to the audience. Only upon such unquestionable assertion the Beristan Government official's acts can be acknowledged as in unofficial capacity. By way of example, the French-Mexican

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[101] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, text adopted by the International Law Commission at its fifty-third session, in 2001, c*ommentary on Article* 4, para. 6; *Certain German Interests in Polish Upper Silesia,* Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, at p. 19; Hobér K., *State responsibility and attribution*, in: Muchlinski, p. 554.

[102] Crawford, *Articles*, p. 98.

[103] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

[104] ILC Article 7.

[105] Hobér K., *State responsibility and attribution*, in: Muchlinski, p. 554.

Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connection with the official function and was, in fact, merely the act of a private individual".[106].

92. Regarding the above-mentioned arguments, Respondent represents the position that the term "highly placed Beristan Government official"[107] should be understood as an organ of Beristan, therefore the official's testimony should be regarded as testimony of a state organ, and as such constitute a trustworthy source of information, upon which the public opinion may rely.

93. For this reason, Respondent further submits that Beritech's concerns about the future and safety of the project are fully understandable on such grounds. Therefore Beritech was fully entitled to make use of its right guaranteed in the Buyout Clause.

94. An additional information, which contributed to Beritech's fears, concerned revelations that earlier in 2009, Claimant was one of three Opulentian technology firms from which the Opulentian government authorities are alleged to have received access to civilian encryption keys.[108]

95. What is more, even Opulentian legal scholars pointed at the existing problem of abuses in this field.[109]

96. The aforesaid facts, undoubtedly, constitutes efficient justification for Beritech's decision on buyout of Claimant's interest.

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[106] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* text adopted by the International Law Commission at its fifty-third session, in 2001, c*ommentary on Article* 4, para. 13, citing the French-Mexican Claims Commission in the *Caire* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929).

[107] Uncontested facts para. 8; Response to request no. 178.

[108] Response to request no. 162.

[109] Response to request no. 162.

97. In this context it is certainly worth emphasizing that there is no evidence of any direct relationship between the Beristan Government official and Beritech, therefore there is no reason to believe that his purpose was to falsely accuse Claimant.[110] Additionally, neither Respondent nor Beritech owns any shares in the Beristan Times and it is considered "independent".[111]

98. For all the aforesaid reasons, Respondent asserts that Beritech was fully entitled to rely on Clause 8 (Buyout) of the JV Agreement.

99. In the context of the reason of buyout, Respondent would also like to underline once again that it is Beristan arbitral tribunal that should decide whether there is enough evidence or not. The parties to the JV Agreement placed in it a forum selection clause, which expresses their will that the contract shall be governed in all respects by the laws of the Republic of Beristan and that any dispute shall be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended.[112]

100. As a concluding remark at this point, it should be stressed that in fact it was the Claimant to breach the JV Agreement, not only by leaking information about the Sat-Connect project, but also by not conforming to the executive order and by not responding to Beritech's notice of the desire to settle amicably the dispute and not responding to Beritech's request for arbitration under Clause 17 of JV Agreement.

1.2.2 BERISTAN CORPORATE LAW WAS NOT VIOLATED AND THE DECISION REGARDING BUYOUT IS IN FORCE.

1.2.2.1 THE RIGHT TO PURCHASE CLAIMANTS INTEREST WAS GRANTED TO BERITECH.

101. At this point Respondent asks the Tribunal to decide that the decision regarding buyout of Claimant's interest was not to be made by Sat-Connect, but solely by Beritech.

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[110] Response to request no. 162.

[111] Response to request no. 168.

[112] Clause 17 of JV Agreement.

102. This conclusion follows from the very language of the JV Agreement. Clause 8 (Buyout Clause) states:

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

103. This provision expressly entitles Beritech to purchase Televative's interest.

104. Moreover, the same conclusion results from the comparison of the language of the above provision to the language of Clause 4 of the JV Agreement (Confidentiality Clause), it is evident that the parties intended to make a sharp distinction between issues to fall under the competence of Sat-Connect Board of Directors and issues falling under the competence of Beritech exclusively. Clause 4 para. 1 reads as follows:

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

105. It is a foregone conclusion at this point that in contrast to the right to approve the disclosure of information, granted to Sat-Connect Board of Directors, the right to decide about the buyout was granted entirely to Beritech.

106. Therefore, it is Respondent's position that Beritech was entitled to apply the buyout provision directly and consequently, the discussion whether the procedure of buyout was conducted in accordance with Beristan corporate law is irrelevant.

1.2.2.2 BERITECH ENTIRELY FULFILLED ITS OBLIGATIONS UNDER THE JV AGREEMENT.

107. Clause 8 (Buyout Clause) requires that:

> "(…) Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period from the execution of this Agreement until the date of the buyout."

108. It is Respondent's contention that Beritech met the obligation to value Televative's interest as its monetary investment.

109. It is uncontested that Televative's total monetary investment in the Sat-Connect project stands at US $47 million.[113]

110. On October 19, 2009, Beritech, filed a request for arbitration against Televative under Clause 17 of the JV Agreement and consequently paid US $47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration.[114]

111. Therefore, Beritech, by paying a sum of US $47 million on the escrow account as a consequence of invoking its right to purchase Televative's interest, fulfilled its duty to compensate the buyout in accordance with the JV Agreement.

112. Regarding the foresaid reasons, Respondent asks the Tribunal to decide that Beristan corporate law was not violated and that the decision of buyout is in force.

1.3. INAPPLICABILITY OF RESPONDENT'S OBLIGATIONS AS THE GUARANTOR OF BERITECH'S OBLIGATIONS UNDER THE JV AGREEMENT

113. It is Respondent's position that its obligations as the guarantor of Beritech's obligations under the JV Agreement are not applicable.

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[113] Uncontested Facts, para. 12.

[114] Uncontested Facts, para 13, Response to request no. 138.

114. Respondent does not question the existence of Respondent's obligations under the JV Agreement, since the Government of Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations.[115] However Respondent submits, that these obligations may not be invoked by Claimant in the instant case.

115. Recalling facts of the present case, Respondent, as guarantor, would assume the obligations of Beritech under the JV Agreement only upon Beritech's default[116], that is upon Beritech's failure to perform its obligations vis-à-vis Claimant. It is Respondent's strong assertion that this formulation should be interpreted in a manner consistent with previously-mentioned and self-evident fact that it is Beritech, not Beristan, to be obliged under the JV Agreement, since it is the one and only party to it.

116. Such understanding of the very nature of the guarantee is confirmed by plain English meaning of the term. The verb guarantee means "to pledge or agree to be responsible for another's debt or contractual performance if that other person does not pay or perform".[117] The noun guarantee stands for "a promise to pay another's debt or fulfil contract obligations if that party fails to pay or perform".[118] A guarantor is "a person or entity that agrees to be responsible for another's debt or performance under a contract, if the other fails to pay or perform".[119] A Law Dictionary, adapted to the Constitution and Laws of the United States, states, that "the guarantor is bound to fulfil the engagement he has entered into, provided the principal debtor does not".[120] The dictionary also states, that "he is bound only to the extent that the debtor is, and any payment made by the latter, or release of him by the creditor, will operate as a release of the guarantor."[121] The Law Dictionary makes a sharp distinction

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[115] Uncontested facts, para. 3; Response to request no. 153.

[116] Response to request no. 152.

[117] *The People's Law Dictionary,* Copyright © 1981-2005, by Gerald N. Hill and Kathleen T. Hill. All rights reserved.

[118] Ibidem

[119] Ibidem

[120] *A Law Dictionary, adapted to the Constitution and Laws of the United States*, by John Bouvier. Published 1856.

[121] Ibidem

between obligations resulting from the guarantee and those resulting from a surety, by reading that "a guarantor differs from a surety in this, that the former cannot be sued until a failure on the part of the principal, when sued; while the latter may be sued at the same time with the principal. According to Black's Law Dictionary a guarantor is "a person who becomes secondarily liable for another's debt or performance in contrast to a strict surety who is primarily liable with the principal debtor. One who promises to answer for a debt, default or miscarriage of another."[122] Respondent would like to stress the word "secondary" in the above definition. Synonyms of this adjective are as follows: accessory, ancillary, auxiliary, collateral, minor, less important, following, inferior, subordinate, subsidiary, substitute.[123]

117. Having demonstrated all the above grounds, Respondent contends that its obligations as guarantor may not be invoked.

118. Firstly, Claimant failed to make any effort to resolve the dispute existing between the parties to the JV Agreement.

119. It is known that it was Beritech to be the first to serve a notice of the desire to settle amicably the dispute, and failing that, to proceed with arbitration.[124] Later, Beritech sent an arbitration request, in which it sought declaratory relief that it properly exercised its rights under the JV Agreement and damages against Televative.[125] As stated in the dispute settlement provision of the JV Agreement: "each party is obliged to waive any objection which it may have to arbitration proceedings commenced by another party in accordance with this provision and it should irrevocably submit to the jurisdiction of the arbitral tribunal constituted for the dispute".[126]

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[122] *Black's Law Dictionary*, 1573 (6th ed. 1990).

[123] *Burton's Legal Thesaurus*, 4E.

[124] Response to request no. 175.

[125] Uncontested facts para. 13, Response to request no. 170.

[126] JV Agreement, Clause 17.

120. According to the facts of the case, Televative not only failed to raise any possible objections regarding the contested legality of buyout, but also has refused to respond to Beritech's arbitration request.[127]

121. Respondent does not contest that the guarantee given by Beristan was meant to provide the investor a broader protection, however it may not be invoked independently and directly. It does not entitle Televative to freely choose whether to raise its contractual claims against Beritech or whether against Beristan. Respondent firmly declines to involve the Government in what is merely an internal shareholder dispute.

122. Secondly, despite Claimant did not aim at solving the disagreement with Beritech, the latter entirely fulfilled its obligations set forth in the Buyout Clause anyway, as it was already discussed in the previous submission. Therefore, Claimant may not invoke Respondent's obligations relying upon Beritech's alleged default.

123. Respondent presents the position that Claimant's intention was to avoid submitting to jurisdiction of the tribunal constituted in accordance with the forum selection clause of the JV Agreement, containing the method set forth mutually by Claimant and Beritech, and to engage Respondent into the dispute in order to obtain prospectively higher compensation. Instead of that, Claimant ignored all Beritech's efforts to resolve and settle the existing problems, and requested arbitration proceedings at the ICSID on October 28, 2009[128], only 47/46 days after giving the notice of its desire to commence arbitration under the Article 11 of the Beristan-Opulentia BIT (on September 12, 2009).[129]

124. For the above multiple reasons, Respondent declares that it cannot be held responsible under the JV Agreement by virtue of the guarantee granted to Televative.

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[127] Uncontested facts, para. 13, Response to request no. 234.

[128] Uncontested facts, para. 14.

[129] Response to request no. 133.

2. ALTERNATIVELY, RESPONDENT DID NOT, IN ANY EVENT, VIOLATE ANY TERMS OF THE BERISTAN-OPULENTIA BIT, NOR DID OTHERWISE VIOLATE GENERAL INTERNATIONAL LAW OR APPLICABLE TREATIES.

2.1 SHOULD THE TRIBUNAL DECIDE ACTIONS OF BERITECH ARE NOT ATTRIBUTABLE TO RESPONDENT, RESPONDENT NEITHER BREACH ARTICLE 10 (UMBRELLA CLAUSE) OF THE BERISTAN-OPULENTIA BIT, NOR DID IT FAIL TO AFFORD CLAIMANT FAIR AND EQUITABLE TREATMENT.

2.1.1 RESPONDENT DID NOT BREACH ARTICLE 10 (UMBRELLA CLAUSE) OF THE BERISTAN-OPULENTIA BIT.

125. Article 10 of the 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."

126. The above provision contains the umbrella clause, which appears in most of the modern BITs.[130]

127. Respondent does no contest that this provision was designed to grant the investors the protection at the level of international law against breaches of contracts by the host states[131]. Nor Respondent questions that a breach of obligation covered by the umbrella clause imposes on the host state responsibility under the internal law of the host state and international responsibility under the umbrella clause. Further, Respondent does agree that the action or omission which amounts to breach of contractual obligation might also violate other provisions of international law, e.g. fair and equitable treatment standard[132] or expropriation

130 *Reinisch, Umbrella Clauses,* p. 5.

131 *Reinisch, Umbrella Clauses,* p. 5-6.

132 *Schreuer* p. 140-141; *Mondev*, para. 134; *Noble Ventures*, para. 182.

clause[133]. Application of an umbrella clause results in granting to the investor a standing both in domestic and international arbitration.

128. However the starting point of any considerations regarding the umbrella clause is to determine, whether the breach of the contract was committed by the host state.

129. In order to apply the umbrella clause it is first necessary to establish that a state ("each contracting party"), did not observe an "obligation it has assumed". Clearly, a state itself has to be the signatory of the obligations in question. Such view was confirmed by numerous decisions.[134]

130. As it was already proved by Respondent in point 1.1. of the memorial, Respondent cannot be held liable for actions of Beritech. Also, as it was presented in point 1.3. of the memorial, obligations resulting from the JV Agreement may not be invoked by Claimant.
131. Therefore Respondent respectfully submits that Respondent did not breach Article 10 (Umbrella Clause) of the Beristan-Opulentia BIT.

2.1.2 RESPONDENT DID NOT FAIL TO AFFORD CLAIMANT FAIR AND EQUITABLE TREATMENT SINCE IT DID NOT FAIL TO OBSERVE ITS DUTIES UNDER JV AGREEMENT.

132. Article 2 para. 2 of the Beristan-Opulentia BIT obliges both Contracting Parties to ensure, at all times, "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party".

133. Claimant has the burden of proof that Respondent failed to comply with this obligation.

134. Respondent does not deny that the fair and equitable treatment standard comprises observance of contractual obligations assumed by the host state.[135]

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133 *Reinisch, Umbrella Clauses*, p. 11-12; *TECMED* paras. 90, 95-151.

134 *Impregilo v. Pakistan*, para. 223., *Azurix v. Argentina*., *Noble Ventures*, paras. 82 et seq.

135 *Mondev*, para. 134, *Noble Ventures*, para. 182, *SGS v. Philippines*, para. 162.

135. However, for the same reasons that were presented in the previous point 2.1.1. of the memorial, Respondent submits that the violation of fair and equitable treatment may not be attributed to Respondent.

2.2 SHOULD THE TRIBUNAL DECIDE ACTIONS OF BERITECH ARE ATTRIBUTABLE TO RESPONDENT, RESPONDENT NEITHER EXPROPRIATED CLAIMANT'S INTEREST, NOR DID IT FAIL TO AFFORD CLAIMANT FAIR AND EQUITABLE TREATMENT.

2.2.1 LACK OF EXPROPRIATION

136. The expropriation clause contained in the Beristan-Opulentia BIT reads for its part:

> "Article 4
> NATIONALIZATION OR EXPROPRIATION
> 1. (1) The Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction."

It is Respondent's submission that this provision provides an exception, under which action of Respondent will not be regarded expropriation. Therefore, Claimant's removal from the Sat-Connect project on the basis of the executive order, which was necessary to execute Beritech's decision regarding buyout, follows under that exception and subsequently, may not be regarded expropriation. Respondent would also like to underline that by not accepting the sum paid by Beritech on the escrow, Claimant contributed to its loss.

2.2.2 LACK OF UNLAWFUL EXPROPRIATION

137. Article 4 1.(2) of the expropriation clause provided in the Beristan-Opulentia BIT states:

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

> other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures."

This provision sets forth certain requirements, under which expropriation is regarded lawful. It is Respondent's contention that it did comply with all these requirements. Buying out of the Claimant's interest was for the public purpose, or national interest, as it is proved by Respondent in point 1.2.1. and 3.1. of the memorial. This action was also taken on a non-discriminatory basis. Respondent provided immediate, full and effective compensation.
Also, due to the fact that neither under due process of law nor under the denial of justice hat there is no established rule that the right to appeal must be afforded, Respondent contests that measures undertaken by it stand in conformity with all legal provisions and procedures.

2.2.3 COMPLIANCE WITH FAIR AND EQUITABLE TREATMENT

138. The elements of the fair and equitable standard comprise transparency, stability and protection of the investor's legitimate expectations in terms of legal framework of the host state[136], procedural propriety and due process[137], as well as good faith[138].

139. Claimant has the burden to prove that the host state's acts or omissions "had a direct negative impact" on its investments, as well it has to establish a clear link of causation between the two.[139] In addition, Claimant has to show that the host state's actions were "willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."[140]

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[136] *TECMED*, para. 133.

[137] *Waste Management v. Mexico*, para. 98.

[138] *TECMED*, para. 153, *Saluka v. Czech Republic*, para. 307.

[139] Tudor J., *The fair and equitable treatment standard in international law of foreign investment* (2008), p.138.

[140] *Saluka v. Czech Republic*, p. 290.

138. The elements of the fair and equitable standard comprise transparency, stability and protection of the investor's legitimate expectations in terms of legal framework of the host state[141], procedural propriety and due process[142], as well as good faith[143].

139. Claimant has the burden to prove that the host state's acts or omissions "had a direct negative impact" on its investments, as well it has to establish a clear link of causation between the two.[144] In addition, Claimant has to show that the host state's actions were "willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."[145]

140. Respondent submits that Claimant failed to prove that action of Respondent were unreasonable, willfully wrong and malicious, since Respondent was legally entitled to issue the executive order as a consequence of non-conforming by the Claimant with a lawful decision concerning buyout, in order to assure this decision will be executed.

141. Also for the above reason, Respondent's conduct did not constitute a violation of fair and equitable treatment neither by failure to afford Claimant the due process of law and nor by the denial of justice. It s uncontested that Televative personnel was first given 14 days to withdraw its seconded staff from all Sat Connect facilities. Those Televative employees who still remained thereafter were asked by the Civil Works Force to leave the facilities immediately on 11 September 2009. Also, it is known that Televative's seconded staff at any point did not fear for their safety or well-being.[146] Therefore Respondent submits that fair and equitable standard was afforded, since peaceful and lawful evacuation may not be regarded a forcible and, all the more, violent expulsion. For the above reasons, Respondent respectfully submits that the tribunal should dismiss its claims under Article 2 of the Beristan-Opulentia BIT against Beristan.

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[141] *TECMED*, para. 133.

[142] *Waste Management*, para. 98.

[143] *TECMED*, para. 153, *Saluka v. Czech Republic*, para. 307.

[144] *Tudor J., The fair and equitable treatment standard in international law of foreign investment (2008), p.138.*

[145] *Saluka Investments*, p. 290.

[146] Response to request no. 248.

3. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9 (ESSENTIAL SECURITY) OF THE BERISTAN-OPULENTIA BIT AS A DEFENCE TO CLAIMANTS CLAIMS.

3.1 RESPONDENT'S ESSENTIAL SECURITY WAS BREACHED OR AT LEAST JEOPARDIZED.

142. The practice of containing in the treaties for the protection of foreign investments the express exceptions for measures necessary for national security or the protection of essential security interests (security exceptions) is not common all over the world. The US, however, has a consistent practice of including essential security interest exceptions in its BITs and similar provisions occur in the BITs of some other states, as well recent Canadian BITs also incorporate an express security exception.[147]

143. The very purpose of concluding treaties with such provisions is to retain sufficient legal flexibility in dealing with extraordinary situations without incurring any liability towards the foreign investor.[148] This practice is said to be necessary due to the fact, that such situations are likely to arise, especially during long term investment projects.[149]

144. As it was proved by Respondent in point 1.2.1. of the memorial, Claimant leaked information regarding the technology, systems, intellectual property, the encryption to be used and other trade secrets[150].

145. Respondent submits that the leak of the information not only contributed to breach of Clause 4 (Confidentiality provision) by Claimant, but also breached, or at least jeopardized, the essential security of Beristan. This state emerged due to the following reasons:

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[147] *Newcombe*, p. 489., *Schreuer*, p. 167.

[148] *Schreuer*, p. 166.

[149] *Schreuer*, p. 166.

[150] *Minutes of the First Session of the Arbitral Tribunal*, para. 15.

1) the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristan armed forces, directly implicate the national security of Beristan;[151]
2) not all information concerning the Sat-Connect project is in the public domain and due to this fact it should be protected by all means;[152]
3) it was known that several segments of the Beristian armed forces will use the system being developed by Sat-Connect project.[153]

146. Respondent submits that the leak of the information being critical for the accomplishment of the Sat-Connect project and the efficiency of its systems, alarmed the national security and threatened the safety of Beristan and its residents. Therefore Claimant's removal from the Sat-Connect project was justified on national security grounds.

147. The right to invoke above ground to remove Televative from the project expressly follows from Article 9 of the BIT:

> "ESSENTIAL SECURITY
> Nothing in this Treaty shall be construed:
> 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
> 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests."

148. Respondent would like to stress the words "(…) measures that it considers necessary (…)".

149. Respondent asserts that such a formulation extends the the scope of the provision so significantly, that it is said to constitute a "self-judging" security exception and that such

[151] *Minutes of the First Session of the Arbitral Tribunal*, para. 15.

[152] Response to request no. 126.

[153] Uncontested facts, para. 3.

broad understanding of this provision has been applied in multiple decisions in contemporary practice. [154]

150. For the aforesaid reasons, Respondent asks the Tribunal to adjudge that removing Claimant from the Sat-Connect project was essential to defend essential security of Beristan, and on such grounds Respondent is entitled to rely on Clause 9 (Essential Security) of the Beristan-Opulentia BIT as a defense to Claimant's claims.

[154] *Newcombe*, p. 492., *Sempra Energy Int'l v. Argentina*, No. ARB/02/16 (ICSID ad hoc annulment committee June 29, 2010) (Sempra II)

PRAYER FOR RELIEF

For the reasons stated in this Memorandum, Counsel respectfully requests the honorable Tribunal to declare that:

1. Tribunal has no jurisdiction in this dispute. Subject to valid exclusive choice of forum, the vindication of contractual rights arising out of JV Agreement are not within the scope of ICSID arbitration.

2. If the Tribunal decides to hear the dispute, it should find that Respondent did not, in any event, materially breach the JV Agreement, neither by preventing Claimant from completing its contractual duties, nor by improperly invoking Clause 8 (Buyout) of the JV Agreement, and that it did not, in any event, violate any terms of the Beristan-Opulentia BIT, nor did otherwise violate general international law or applicable treaties. Finally, Respondent respectfully asserts, that it is entitled to rely on Article 9 of the Beristan-Opulentia BIT as a defence to Claimants claims.

Respectfully submitted on 19th September 2010, by

_____/s/_____

Team Guerrero

on behalf of Respondent, The Government of the Republic of Beristan