GROS

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

In Proceedings between:

TELEVATIVE INC.

(Claimant)

v.

THE REPUBLIC OF BERISTAN

(Respondent)

ICSID Case No. ARB/X/X

MEMORIAL FOR RESPONDENT

2010

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The Protection of National Security in IIAs

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STATEMENT OF FACTS

1. In 1996, the Republic of Beristan and the United Ferderation of Opulentia, two countries situated in the region of Euphonia, concluded a Billeteral Investment Treaty (BIT) in order to improve economic co-operation. The same year Beristan passed a Telecommunications Act in view of privatization of telecommunications services. In 2007, Beristan established a telecommunications services provider, Beritech S.A., as a partially state-owned company. Half a year later, Beritech and Televative Inc., a privately held multinational enterprise incorporated in Opulentia, signed a Joint Venture Agreement (JVA) by which they established the joint venture company, Sat-Connect S.A., under Beristian law. Beristan co-signed the JVA as guarantor of Beritech's obligations.
2. Ownership structure of Sat-Connect is comprised of a 60% Beritech share and a 40% share of Televative. Sat-Connect's board of directors consists of 9 directors, 5 of which are appointed by Beritech, and 4 by Televative. A quorum is obtained with the presence of 6 members. The purpose of Sat-Connect's establishment is to develop and deploy a satellite network and accompanying terrestrial systems that will provide connectivity throughout the region and will be used by the Beristian army.
3. In 2009, a Beristian government official raised national security concerns that the Sat-Connect project had been compromised due to leaks by personnel seconded to the project by Televative. In an article in an independent newspaper, he revealed that critical information from the Sat-Connect project, confidential by virtue of Clause 4 of the JVA, had been passed to the Government of Opulentia.
4. These allegations were discussed, on August 21, 2009, at the Sat-Connect board of directors meeting. Subsequently, on August 27, 2009, the majority of Sat-Connect's board of directors supported the decision of Beritech to compel a buyout of Televative's interest in the Sat-Connect project through Clause 8 of the JVA, with six board members present at the meeting and one of them leaving before its end.

5. Beritech then served notice on Televative on August 28, requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and remove all seconded personnel from the project, who subsequently left Beristan. On September 11, 2009, the Civil Works Force secured all facilities of the Sat-Connect project.
6. The same day, September 11, 2009, Beritech served notice of their desire to settle amicably, and failing that, to proceed with arbitration, pursuant to provisions on dispute settlement from JV Agreement. The following day, Televative submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT, in which it notified Beristan of their desire to settle amicably, and failing that, to proceed with arbitration under the BIT.
7. On October 19, Beritech filed a request for arbitration against Televative under Clause 17 of the JVA. in it sought declaratory relief that it properly exercised its rights under the JVA and damages against Televative. Beritech paid US$47 million, Televative's total monetary investment in the Sat-Connect project, into an escrow account, which has been made available for Televative. Televative refused to accept this payment and to respond to Beritech's request. On October 28, 2009, Televative requested arbitration under the ICSID Convention and notified Beristan. On November 1, 2009, the ICSID Secretary General registered the dispute brought. Both Beristan and Opulentia have ratified the ICSID Convention and Vienna Convention on the Law of Treaties.

ARGUMENTS

I TELEVATIVE'S CLAIMS SHOULD BE DISMISSED IN THE PRELIMINARY PHASE

A. THE ICSID TRIBUNAL LACKS JURISDUCTION TO ADJUDICATE TELEVATIVE'S CLAIMS

8. When resorting to arbitration as a dispute settlement mechanism, parties entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits.[1]
9. In order for an ICSID Tribunal to have jurisdiction over a claim, several cumulative conditions must be satisfied: a) the dispute needs to be of a legal nature, b) the dispute needs to arise directly out of an investment, c) the non-State party to the dispute needs to be a national of another Contracting State and d) consent to submit the dispute to ICSID needs to be granted by both parties in writing.[2] It shall be proven *infra* by Respondent that two of these cumulative conditions have not been fulfilled - namely that there is no legal dispute between the parties, nor is there consent by the parties to resolve the dispute before ICSID. Therefore, it is clear that the Tribunal does not have jurisdiction to hear Televative's claims.

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[1] *Gulf of Maine case*, para. 23; *Arbitral Award of 31 July* , para 49.

[2] ICSID Convention, Art. 25 para. 1; Garcia-Bolivar, *Special Report on ICSID Jurisdiction*, 2008, p. 1.

1) THERE IS NO DISPUTE BETWEEN TELEVATIVE AND BERISTAN - THE REAL DISPUTE EXISTS BETWEEN TWO PRIVATE ENTITIES, TELEVATIVE INC. AND BERITECH S.A.

10. The jurisdiction of ICSID over a dispute requires existence of a legal dispute... between a State Party to the ICSID Convention and a national of another State Party to the Convention.[3] Therefore, the Centre lacks jurisdiction to arbitrate disputes between two private entities.[4] As the present dispute pertains to the acts carried out by Beritech S.A. and not by Beristan, and since those act are not attributable to Beristan, it is evident that the requirements of Article 25 of the Convention have not been met.

a) BERITECSH'S ACTS ARE NOT ATTRIBUTABLE TO BERISTAN

i) BERITECH IS NOT AN ORGAN OF THE BERISTIAN STATE

11. The conduct of any State organ shall be considered an act of that State under international law.[5] To determine whether an entity is a State organ, one must first look to domestic law,[6] as an organ includes any person or entity which has that status in accordance with the internal law of the State[7]. Since, Beritech does not have the status of an organ of the Beristian state under Beristian law and since it

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[3] ICSID Convention, Art. 25 para.1; Schreuer, *The Dynamic Evolution of the ICSID System*, p.4.

[4] ,*Maffezini award*, para. 74.

[5] Articles on State Responsibility, Art.4; *Salvador Commercial Company case*, p. 477 (1902); *Finnish Shipowners case*, p. 1501; *Difference Relating to Immunity* , para. 62.

[6] *Jan de Nul v. Egypt*, para 160.

[7] Articles on State Responsibility, Art. 4.1.

possesses separate legal personality, it is evident that its acts cannot be attributed to Beristan on this behalf.

ii) BERITECH IS NOT A PUBLIC ENTITY AUTHORIZED TO EXERCISE GOVERNMENTAL AUTHORITY

12. Acts of entities which are not state organs shall be attributable to the state only if those entities (i) are empowered to exercise elements of governmental authority and (ii) if they performed such authority in that particular case.[8] Regarding the first part of the definition, the fact that an entity is partially state-owned is not decisive for the attribution of its acts to the state; what is of paramount importance is that the subject is empowered to exercise elements of governmental authority.[9] There is no evidence whatsoever to suggest that Beritech was empowered to exercise such authority.
13. When determining whether the second condition is fulfilled, the functional test set forth by the tribunals in the *Maffezini*[10] and *CSOB*[11] awards should be applied.[12] The functional test examines the nature and character of the entity's acts, i.e. whether they are commercial or governmental by nature.[13] Beritech's acts (the exercise of its rights under Clause 8 of the JVA, in particular, its decision to buyout Televative's interests in the Sat-Connect project) are those of performance of a commercial contract, which by nature do not fall within the scope of governmental authority.[14] Therefore it is evident that neither of the cumulative

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[8] *Ibid,* Art. 5; *Jan de Nul v. Egypt,* para 163.

[9] *Jan de Nul v. Egypt,* para 165; *CSOB case*, paras 18-20; Articles on State Responsibility with commentaries, page 43.

[10] *Maffezini award,* para 52.

[11] *CSOB case*, paras. 18 and 20.

[12] *Jan de Nul v. Egypt,* para 168.

[13] *Maffezini award,* para. 52.

[14] *Jan de Nul v. Egypt,* para. 171.

conditions is fulfilled and that, for this reason, Beritech's acts cannot be attributed to Beristan on this basis.

iii) BERITECH DID NOT ACT ON THE INSTRUCTION NOR UNDER THE CONTROL OF BERISTAN

14. The conduct of a person shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.[15] The jurisprudence on this matter is very demanding, as the link between the person and the State has to satisfy the "effective control" test.[16] Since there is no record of any kind of instructions or directions having been given to Beritech, it is evident that Beritech was not state controlled. This is a crucial distinction from cases, such as the *Maffezini* award,[17] where it was found that a private entity's acts were attributable to the state, since they were carried out under the directions of the government.
15. The fact that the Minister of Telecommunications of Beristan is a member of the board of Beritech[18] has no barring on the issue, since the appointment of a board member is a common exercise of prerogatives by a major shareholder.[19]

iv) CLAIMANT ITSELF CONSIDERED BERITECH A SEPARATE ENTITY NOT ACTING ON BEHALF OF BERISTAN

16. Finally, the fact that it was required of the Republic of Beristan to co-sign the JVA as guarantor[20] clearly illustrates that Claimant itself considered Beritech a

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[15] Articles on State Responsibility, Art 8.

[16] *Jan de Nul v. Egypt*, para. 173; *Case of Nicaragua v. USA*, paras. 113-115.

[17] *Maffezini award*, para. 52.

[18] Clarifications 1, Question 135.

[19] Hitt, p. 284; Emerson, p. 360; Kraakman, Hansmann, p. 34.

distinct entity from Respondent. If Televative had considered Beritech a state entity of Beristan exercising governmental functions it would not have been necessary for Beristan to co-sign the Agreement since it would have been responsible for Beritech's acts *ipso jure.*

17. Therefore, it must be concluded that Beritech's actions are not attributable to Beristan and that therefore the true party to the dispute is Beritech S.A., a private company, which renders the Tribunal void of jurisdiction to adjudicate Televative's claims.

b) BERISTAN'S SIGNING OF THE JVA AS GUARANTOR DOES NOT MAKE IT RESPONSIBLE FOR BERITECH'S ACTIONS

18. The Government of Beristan co-signed the JVA as guarantor of Beritech's obligations[21] and would assume responsibility for the obligations of Beritech only upon Beritech's default.[22] Hence, in order to invoke the responsibility of Beristan as guarantor, Beritech's default has to be established first. As that is not the case, it is clear that Beristan's obligations as guarantor of the JVA cannot be invoked to establish Beristan's responsibility for Beritech's acts. However, even if the Tribunal finds that Respondent's obligations as guarantor were activated due to Beritech's (supposed) default, which Respondent strongly opposes, that would not have any effect on the nature of those obligations, which would remain commercial in character, and therefore, could not trigger the application of the BIT.

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[20] FDI Moot Problem 2010, Uncontested facts, para. 3.

[21] FDI Moot Problem 2010, Uncontested facts, para. 3.

[22] Clarifications 1, Question 152.

2) ALTERNATIVELY, THERE IS NO CONSENT BY THE PARTIES TO SUBMIT THE DISPUTE TO ICSID

19. Reciprocal and mutual[23] consent of the parties is the cornerstone of the jurisdiction of the Centre.[24] Hence, the absence of consent by one of the parties shall render the Centre void of jurisdiction.
20. It is Respondent's claim that Beristan has withdrawn its consent. Once the parties to a dispute give their consent to submit the dispute to the Centre, no party may withdraw its consent unilaterally.[25] However, the irrevocability of consent operates only after the consent has been perfected,[26] *i.e.* upon the acceptance of the offer to submit the dispute to ICSID.[27] Consequently, consent must be perfected through an acceptance by the investor before the date of the denunciation in order to preserve rights and obligations under the ICSID Convention.[28] The offer to submit disputes between Beristan and the nationals of Opulentia was made by Beristan in the BIT in 1996.[29] However, Claimant made no activity regarding the offer until it instituted the present proceeding on October 28, 2009.[30]
21. Therefore, Beristan had rightfully withdrawn its consent with respect to Televative through Clause 17 of the JVA, in which it is stated that disputes between the parties of that Agreement would be solved *only* by arbitration under

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[23] ICSID Convention, Preamble, para 6; Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, p.357.

[24] *Report of the Executive Directors on ICSID*, para. 23.

[25] ICSID Convention, Art. 25.1.

[26] *Dispute Settlement*, UNCTAD, p.37; Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, p. 363.

[27] Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, p.358.

[28] *Ibid*, p. 361; UNCTAD, *Dispute Settlement*, p. 37.

[29] FDI Moot Problem 2010, Annex 1, Art. 11.

[30] FDI Moot Problem 2010, Uncontested facts, para. 14.

the Arbitration Act of Beristan.[31] It is evident that such formulation excludes all other dispute resolution mechanisms, including ICSID, and represents an obvious withdrawal of consent by Respondent.

3) CLAIMANT'S SUBMISSIONS ARE CONTRACTUAL IN NATURE AND TELEVATIVE HAS IMPROPERLY REFORMULATED THEM AS CLAIMS ARISING UNDER THE BERISTAN-OPULENTIA BIT

a) THE BIT DISPUTE SETTLEMENT CLAUSE DOES NOT CONFER JURISDICTION TO THE CENTRE REGARDING CONTRACTUAL CLAIMS

22. Article 11 para. 1 of the Opulentia-Beristan BIT states that:

> "For the purpose of resolving disputes... that concern an obligation of the former under this Agreement."[32]

It is obvious from the wording that it was the intention of the Parties to establish the dispute settlement mechanism solely for the breaches of the substantive provisions of the BIT and not for purely contractual claims.

23. Unlike the *Salini v. Morocco*[33] and *Vivendi I annulment* [34] awards, the wording of Art. 11 of the Beristan-Opulentia BIT is not broad enough to encompass contract based claims, but refers strictly to obligations established by the Treaty itself.

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[31] FDI Moot Problem 2010, Annex 3, Clause 17.

[32] FDI Moot Problem 2010, Annex 1, Art. 11.1.

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

[34] *Vivendi II*, para. 55.

Thus, the Tribunal, much like tribunals in the *SGS v. Pakistan*[35] and *Joy Mining v. Egypt*[36] cases, lacks jurisdiction.

24. The distinction between contract and treaty claims is well recognized in investment treaty arbitration[37] and is independent from Claimant's characterization of the claim. The test of jurisdiction is an objective one [38] and Claimant may not formulate a claim in a way which is manifestly unsound.[39] In order for the Centre to have jurisdiction over the claim, it must satisfy the "essential basis test" set out by the *ad hoc* committee in the *Vivendi I annulment award*.[40]
25. The "essential basis test" provides that the nature of a claim should be determined accordingly to the fact whether the "essential basis" of a claim is a breach of contract or of independent standards set out in the treaty.[41] The essential basis of all of Televative's claims lies solely on one factual and legal foundation – whether Clause 8 of the JVA was properly invoked or not.
26. The *crux of the matter* of the whole dispute is whether a single clause in a commercial contract was adequately executed. It is evident that such a question is of purely contractual character and has no legal basis in the Opulentia-Beristan BIT.
27. In any event, it is not enough to assert the existence of a dispute as to fair and equitable treatment or expropriation;[42] Claimant has to make a tenable case to that

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[35] *SGS v. Pakistan*, para. 150.

[36] *Joy Mining v. Egypt*, para. 75.

[37] Gaillard, p.328; *SGS v. Pakistan*, para. 148.

[38] *SGS v. Philippines*, para 157.

[39] *Joy Mining v. Egypt*, para. 78; *Occidental v. Ecuador*, para.80.

[40] *Vivend II* , paras. 98-101.

[41] *Ibid.*

[42] *SGS v. Philippines*, para 157.

end.[43] Televative's claims are *prima facie* unfounded, since Claimant has based its assertions on an alleged "conspiracy" on behalf of Respondent, without any solid support for such claims. Additionally, it is obvious that the legal foundation of these claims lies within the JVA and not the BIT, since the buyout is regulated by the Agreement, and hence Televative's claims do not have any basis in the BIT and subsequently do not fall within the jurisdiction of ICSID.

b) ALTERNATIVELY, THE FORUM SELECTION CLAUSE IN THE JVA (CLAUSE 17) BARS THE TRIBUNALS JURISDICTION WITH REGARD TO CLAIMANT'S CONTRACT CLAIMS

28. Article 26 of the ICSID Convention provides that:

> '' Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy",[44]

which confirms, as established in a number of awards,[45] the freedom of the parties to select a forum.[46]

29. It is a well established rule of international law that a valid forum selection clause in a contract shall have the effect of excluding the Tribunal's jurisdiction regarding purely contractual claims.[47] Where the essential basis of a claim

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[43] Gaillard, p.320; *Telenor Mobile case*, para 68.

[44] ICSID Convention, Art. 26.

[45] *Vivendi II*, paras. 98-100; *SGS v. Pakistan*, paras. 161-2.

[46] Curtin, Nollkaemper, p. 34.

[47] *Vivendi II*, para. 98; *SGS v. Pakistan*, paras. 161-2; *Joy Mining v. Egypt*, paras 89-99; *SGS v. Philippines*, para 150; *North American Dredging case*, p. 26-35; *Woodruff Case*, p. 213-223; *Salini v. Jordan*, paras. 97-101.

brought before an international tribunal is a breach of a contract, the tribunal will give effect to any valid choice of forum clause in the contract.[48]

30. The JVA regulates dispute resolution between Televative Inc. and Beritech (and subsequently Beristan, which co-signed the Agreement as guarantor), whereas the Opulentia-Beristan BIT regulates the dispute resolution between Beristan and any investor which is a national of Opulentia, which renders the JVA a *lex specialis* with respect to the BIT. Furthermore, since the JVA was concluded more than 10 years after the BIT,[49] it is also a *lex posterior*. Hence, under the universally recognized principles of law of *lex specialis derogat legi generali*[50] and *lex posterior derogat legi priori*,[51] the provisions of the JVA and not the BIT are to be applied with respect to dispute resolution between Beristan and Televative Inc.
31. The existence of the dispute settlement mechanism of the BIT and its provisions was well known to the parties at the time of the conclusion of the JVA and they were fully aware of the effects Clause 17 of the Agreement would have on the jurisdiction of the Centre. Therefore, Televative is bound, through the principle of *pacta sunt servanda*,[52] by the dispute resolution mechanism provided for by the JVA.
32. The intent of the parties to exclude the Jurisdiction of ICSID is evident from the wording of Clause 17 of the JVA which provides that in the event of a dispute arising out of or referring to the JVA, "the dispute shall then be resolved only by arbitration under the 1959 Arbitration Act of Beristan".[53]

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[48] *Vivendi II* , para. 98; *Joy Mining v. Egypt*, para. 90; Shany, *Contract Claims vs. Treaty Claims*, p. 839; Schreuer, V*ivendi I*, p. 315.

[49] FDI Moot Problem 2010, Annex 1 and Annex 2, para. 3.

[50] Shaw, page 116; Boczek, p. 27.

[51] Boczek, page 27.

[52] UNIDROIT Principles, Art. 1.3; Brownlie, p.620; Vienna Convention, Preamble and Art. 26.

[53] FDI Moot Problem 2010, Annex 3, Clause 17.

33. Moreover, the intent of the parties to resolve the dispute only under the Arbitration Act of Beristan is made even more obvious by the fact that each party waived any objections which it may have to such proceedings and irrevocably submitted to the jurisdiction of the tribunal constituted under such rules.[54]

34. Respondent would hereby like to emphasize that Televative has in no way, by renouncing its rights under Art. 11 of the BIT, exceeded its powers. Televative did not relinquish the rights of other nationals of Opulentia or those of the State itself arising out of the BIT; Televative only renounced its own right to activate the mechanism set out in the BIT, which it is free to do under international law.[55]

c) CLAUSE 10 OF THE OPULENTIA-BERISTAN BIT DOES NOT HAVE THE EFFECT OF MAKING EVERY BREACH OF CONTRACT *IPSO JURE* A BREACH OF THE BIT

35. A mere breach of contractual obligation does not by itself constitute a breach of treaty.[56] Although an umbrella clause may have the effect of elevating a breach of contract to the level of a treaty violation,[57] the precise impact of the clause depends on the characteristics of each particular case; mainly, on the precise (i) wording of the clause,[58] its (ii) placement within the treaty[59] and the (iii) intent of the parties.[60]

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[54] FDI Moot Problem 2010, Annex 3, Clause 17.

[55] *North American Dredging case*, p.34.

[56] *TOTO case,* para. 103; Bishop, Crawford, Reisman, p.1008; Schreuer, *Traveling the BIT Route*,p. 250.

[57] Bishop, Crawford and Reisman, p. 1008; *SGS v. Philippines*, para. 128.

[58] *Interpretation of the Umbrella Clause in Investment Agreements*, OECD, October 2006, p. 22;: Dimsey, p.61; *SGS v. Pakistan*, para. 171.

[59] *SGS v. Pakistan*, paras. 169-170; *Joy Mining v. Egypt*, para. 81; Schreuer, *Traveling the BIT Route*, p. 253.

[60] *SGS v. Pakistan*, para. 167.

36. Firstly, due to the diversity in which umbrella clauses are formulated in different investment agreements, as the arbitral jurisprudence and doctrine illustrate, the wording of each clause is crucial for its scope and effect.[61] Art. 10 of the Beristan-Opulentia BIT states that:

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

37. The wording of Art. 10 is of a very general nature and thus requires a narrow interpretation.[62] This formulation is identical to that in the *SGS v. Pakistan case,* and very similar to that in the *Salini v. Jordan case,* in both of which the Tribunals found that the "umbrella clause" did not have the "elevation" effect.[63] Moreover, tribunals have rejected such effects of the "umbrella clause" even in cases where the wording of the clause was much more specific and explicit than it is in the Opulentia-Beristan BIT.[64]

38. Secondly, Article 10 of the BIT is placed apart from the substantive provisions of the BIT, at the end of it. The separation of Art. 10 from the other substantive provisions of the BIT is indicative of the fact that Art. 10 was not meant to project a substantive obligation; had the parties intended for it do to so, they would have logically placed it amongst the substantive provisions.[65] Even tribunals which have adopted a more broad interpretation of the "umbrella clause" have stressed

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[61] Dimsey, p. 61; *Interpretation of the Umbrella Clause in Investment Agreements*, OECD, p. 22.

[62] *Interpretation of the Umbrella Clause in Investment Agreements*, OECD, p. 22.

[63] *SGS v. Pakistan*, para. 173; *Salini v. Jordan*, para. 130.

[64] *Pan American Energy v. Argentina*, para. 115; *El Paso case*, para. 82.

[65] *SGS v. Pakistan*, para. 170.

the significance of the placement of such a clause in the BIT,[66] and so has the legal doctrine.[67]

39. Thirdly, when interpreting an "umbrella clause", great importance is given to the intent of the parties. Since the "umbrella clause" is an exception from the general rule of international law (which states that the breach of contract is not *ipso jure* a breach of treaty) it should be interpreted restrictively,[68] due to the far reaching consequences the clause could have.[69] Therefore, clear and convincing evidence that it was the shared intent of the parties that the "umbrella clause" will have an "elevating" effect is needed.[70] In the present case, not only is there an absence of such evidence, there is evidence to the contrary. Specifically, the dispute resolution clause of the Opulentia-Beristan BIT states that the dispute resolution mechanism of the BIT will only be open to disputes regarding "obligations under this agreement",[71] which clearly demonstrates that it was the intent of the parties only to allow breaches of the BIT to be brought before this tribunal.

40. Therefore, since none of the elements relevant for the interpretation of the "umbrella clause" support the notion that Art. 10 of the BIT makes breaches of the JVA *ipso jure* breaches of the BIT it must be concluded that Art. 10 of the BIT does not have the effect of elevating mere breaches of contract to the status of breaches of the BIT.

d) THE EXCLUSSIVE FORUM SELECTION CLAUSE EXCLUDES THE TRIBUNAL'S JURISDICTION EVEN FOR TREATY BASED CLAIMS

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[66] *SGS v. Philippines*, para, 124.

[67] Schreuer, *Traveling the BIT Route*, p. 253.

[68] *SGS v. Pakistan*, para. 167.

[69] *Ibid.*

[70] *Ibid.*

[71] FDI Moot Problem 2010, Annex 1, Art. 11, para. 1.

41. Even if the Tribunal should find that Televative's claims are treaty based, or that they are given such an effect by virtue of Art. 10 of the BIT, the Tribunal still lacks jurisdiction over those claims, since the exclusive forum selection clause in the JVA is broad enough to encompass treaty based claims as well. The parties in an investment agreement can, *inter partes*, decide not to submit treaty based claims stemming from the contract to ICSID, so long as there is a clear intent to that end on the behalf of the parties in question.[72]

42. It is clear that a "dispute arising out of or relating to the JVA" [73] includes also a dispute encompassing treaty claims which pertain to the BIT, if its origins lie in the Agreement, as is the case in the present dispute. Therefore, it was the intent of the parties not only to exclude the jurisdiction of ICSID for contract based claims, but for treaty based claims as well. Consequently, the present dispute is subject to the exclusive jurisdiction of the tribunal established under the JVA, regardless of the fact whether it includes treaty based claims or not.

e) EVEN IF THE TRIBUNAL FINDS THAT IT POSSESSES JURISDICTION OVER ALL OR SOME OF CLAIMANT'S CLAIMS, IT SHOULD STILL STAY THE PROCEEDINGS

43. Should the Tribunal decide that it does possess jurisdiction over Claimant's claims, the Tribunal should, as was done in the *SGS v. Philippines case* and the *MOX Plant case,*[74] stay the proceedings, due to the fact that the Tribunal's decision is subject to "the factual predicate of a determination"[75] by the Tribunal constituted in Beristal of whether the buyout clause in the JVA was properly invoked.

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[72] *Vivendi II*, para. 76.

[73] FDI Moot Problem 2010, Annex 3, Clause 17.

[74] *The MOX Plant Case*, p. 1199 .

[75] *SGS v. Philippines*, para. 174.

44. This question is of crucial importance to the issues put forward by Claimant, since it is evident that there can be no breaches of the BIT if the buyout clause was properly invoked. As the question of the lawfulness of those actions is a matter of the exclusive jurisdiction of the tribunal in Beristal, and since that tribunal has already been properly constituted[76] with both parties having waived their objections to those proceedings,[77] the Tribunal in the present case should, by ivoking Art. 44 of the Convention[78] stay the proceedings until this "first order" question is resolved by the tribunal in Beristal.
45. Furthermore, there is no room for doubt as to the competence and impartiality of the Beristal tribunal, since the proceedings will be conducted under the Arbitration Act of Beristan, which is in conformity with UNCITRAL Model Law on International Commercial Arbitration.[79]

C. TELEVATIVE'S CLAIMS ARE INADMISSABLE

1) CLAIMANT FAILED TO FULFILL THE NECESSARY PRECONDITIONS FOR ACTIVATING THE DISPUTE SETTLEMENT MECHANISM

46. Even if the Tribunal should find that it does have jurisdiction under the BIT, the claims by Televative Inc. are inadmissible, since there was no attempt by Claimant to settle the dispute amicably, nor has the required period of time for the amicable settlement lapsed since the crystallization of the dispute.

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[76] Clarifications 1, Question 118.

[77] FDI Moot Problem 2010, Annex 3, Clause 17.

[78] ICSID Convention, Art. 44; *SGS v. Philippines*, para. 173.

[79] Clarifications 1, Question 130.

a) THERE WAS NO ATTEMPT BY CLAIMANT TO SETTLE THE DISPUTE AMICABLY

47. It is a common condition for the institution of proceedings before ICSID that amicable settlement has been attempted through consultations or negotiations.[80] The BIT between Opulentia and Beristan contains such a requirement in Article 11.[81] Therefore, Televative had an obligation to attempt to settle the dispute amicably with Respondent before requesting arbitration.

48. This standard clause can be found in numerous BITs.[82] It triggers the obligation of the requesting party to attempt to resolve dispute directly before instituting the arbitral proceeding. This is a good faith precondition for a valid seizure of arbitral tribunal,[83] as was confirmed by the Tribunals in the *Enron v. Argentina*[84] and *Goetz v. Burundi*[85] awards. Therefore, the negotiation period represents a necessary jurisdictional and not simply a procedural requirement and the failure to comply with the said period results in a determination of lack of jurisdiction.[86]

49. In the *Azurix v. Argentina* case, the Tribunal was only satisfied that the good faith attempt has been fulfilled after repeated attempts by Azurix to settle the dispute and the denial of the Argentinean government of the existence of the dispute.[87] Similarly, in *Tradex v. Albania*, the Tribunal concluded that five letters sent by

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[80] Schreuer, *The ICSID Convention: a Commentary*, p. 239, para.358; *Dispute Settlement*, p. 32.

[81] FDI Moot Problem 2010, Annex 1, Article 11.1.

[82] Benin and Ghana BIT (2001), Art. 9, Chile and Netherlands BIT (1998), Art. 8, Australia and India BIT (1999), Art. 12, found in: BIT 95-06, UNCTAD, p.106.

[83] Schreuer, *The ICSID Convention: A Commentary*, p. 239, para. 358; BIT 95-06, UNCTAD, p. 32.

[84] *Enron award*, para. 88.

[85] *Goetz v. Burundi*, paras. 91-92.

[86] *Enron award*, para. 88.

[87] *Azurix v. Argentina*, para. 55.

Tradex to the Albanian government were sufficient to satisfy this requirement[88] and in *AMT v. Zaire* serious negotiation attempts were required by the Tribunal.[89]

50. Therefore, the mere notice by Televative to Respondent[90] cannot be construed as to mean a good faith attempt at resolving the dispute. Moreover, in that notice, Claimant itself took the position that it would proceed with arbitration only after the failure of the negotiation process.[91] Respondent would like to emphasize that the negotiations had not even begun, nor had Respondent refused to participate in them. Therefore, Televative has failed to comply with its obligation under Article 11 of the BIT, which is a necessary precondition for instituting proceeding before this Tribunal.

51. Moreover, the fact that Beritech has filed a request for arbitration against Televative under the JVA[92] is of no impact on Televative's failure to fulfill the amicable settlement precondition. Televative had an obligation to attempt to settle the dispute amicably with Beristan and not Beritech. Therefore, Beritech's actions have no bearing on the negotiations between Televative and Beristan. The fact that Beristan is the major shareholder in Beritech does not automatically shift the responsibility for Beritech's actions,[93] nor are Beritech's acts attributable to Beristan. Therefore, Televative's obligation to try and settle the dispute with Beristan amicably is in no way precluded.

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[88] *Tradex Hellas v. Albania*, p. 184.

[89] *American Manufacturing v Zaire*, p. 1547 (1997).

[90] Clarifications 1, Question 133.

[91] *Ibid.*

[92] FDI Moot Problem 2010, Uncontested facts, para. 13.

[93] *Maffezini award*, para. 84; *CSOB case*, paras. 17-18.

b) ALTERNATIVELY, CLAIMANT HAS VIOLATED THE 6 MONTH WAITING PERIOD SET OUT IN THE OPULENTIA-BERISTAN BIT

52. Even if the Tribunal decides that Claimant's actions do constitute an attempt to resolve the dispute amicably, Respondent submits that Claimant failed to respect the waiting period of six months established by Article 11 of the Opulentia-Beristan BIT.[94] The BIT clearly states that the negotiation period must last at least for six months from the date of a written application aimed at settling the dispute, which in the present case would be the date of Televative's notice to Beristan on September 12, 2009.[95] However, Televative requested arbitration on October 28th 2009,[96] a mere month and a half after its notice to Beristan. Since this period represents only a quarter of the time necessary, envisaged by the Opulentia-Beristan BIT, it is obvious that Televative has failed to fulfill the necessary preconditions under Article 11 of the BIT for instituting the proceedings before an ICSID Tribunal.

53. Furthermore, Claimant's disregard for the amicable settlement clause of the Opulentia-Beristan BIT should not be excused by the Tribunal. In some instances it is possible for the Tribunal to disregard the violation of the waiting period by Claimant.[97] However, this leniency by the Tribunal can only occur when there are exceptional circumstances which strongly indicate that the negotiations would have been futile and without any prospect of an amicable settlement.[98] In any event, in such cases claimants were nonetheless reprimanded for initiating the proceeding prematurely,[99] which is a clear indication that the decision would have been different, had there not been for the inevitability of the outcome of the

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[94] FDI Moot Problem 2010, Annex 1, Article 11.1.

[95] Clarifications 1, Question 133.

[96] FDI Moot Problem 2010, Uncontested facts, para. 14.

[97] *Ethyl Corp. v. Canada*, paras. 74-88; *Lauder case*, paras. 188-9.

[98] *Ethyl Corp. v. Canada*, para. 77; *SGS v. Pakistan*, para. 184.

[99] *Ethyl Corp. v. Canada*, paras. 87-8.

negotiations.[100] Hence, it is clear that that such reasoning is not applicable to the present dispute, since there are no indications whatsoever that the parties would not have been able to settle the dispute through peaceful means. The outcome of the negotiations was not inevitable; it is safe to say that a solution could have been reached without resorting to arbitration, had Televative made a sincere attempt to settle the dispute amicably.

54. The fact that the necessary six month period for negotiations has meanwhile passed does not in any way affect the admissibility of Televative's claims. The parties are required to take positive steps to seek a resolution that may avert the need for arbitration.[101] Therefore, it would not suffice if Claimant was simply to re-file the application; Televative must first complete the entire six month period reserved for amicable settlement during which it must make a sincere effort at reaching an amicable solution. Only after such actions for amicable settlement are exhausted may Televative's claim be admissible.

CONCLUSION ON JURSIDICTION

55. The Tribunal does not have jurisdiction to hear this dispute because the jurisdictional requirements of Article 25 (1) of the ICSID Convention are not fulfilled. Firstly, the dispute is not between a State and a national of another State, but between two private companies. Secondly, there is no consent by the parties to confer the dispute to the Centre. The Claimant's claims are contractual in nature and, as such, are not covered by the dispute settlement mechanism of the BIT. Alternatively, the jurisdiction of the Centre regarding contractual claims is excluded through the exclusive forum selection clause of the JVA. Finally, the claims put forward by the Claimant are inadmissible, since the six month waiting period envisaged by the BIT was not observed.

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[100] *Lauder v. Czech Republic* , paras. 188-9; *Ethyl v. Canada*, para. 84.

[101] Schreuer, *Traveling the BIT Route*, p. 238.

II RESPONDENT WAS ENTITLED TO RELY ON CLAUSE 8 OF THE JVA BECAUSE CLAIMANT BREACHED THE CONFIDENTIALITY PROVISION OF THAT AGREEMENT (CLAUSE 4)

56. Respondent respectfully submits that it shall discuss relevant issues in the merits without prejudice to its argument regarding admissibility and jurisdiction. Nothing in this pleading should be understood as acceptance of any of the allegations raised by Claimant.

A. TELEVATIVE COMMITTED A MATERIAL BREACH OF CONTRACT

1) TELEVATIVE BREACHED CLAUSE 4 OF THE JVA

a) TELEVATIVE UNLAWFULLY REVEALED CONFIDENTIAL INFORMATION TO THE GOVERNMENT OF OPULENTIA

57. Pursuant to Clause 4 of the JVA, both parties to the Agreement had an obligation to treat all confidential information, as defined by Clause 4, para. 2 of the Agreement, relating to the Agreement as confidential[102] and to refrain from disclosing such information to anyone unauthorized under the Agreement without prior written approval from the Sat-Connect board of directors. [103]
58. Televative leaked information pertaining to the Sat-Connect project without such approval to the Opulentian Government.[104] The disclosed information include encryption technology, systems, intellectual property and technology,[105] all

[102] FDI Moot Problem 2010, Annex3, Clause 4.1.

[103] FDI Moot Problem 2010, Annex3, Clause 4.1.

[104] Clarifications 1, Question 178; FDI Moot Problem 2010, Annex 2, para. 8.

[105] Clarifications 1, Question 178.

classified as confidential through the 2nd paragraph of Clause 4. Therefore, Televative's disclosure of such information represents a breach of Clause 4 of the JVA.

b) TELEVATIVE'S RESPONSIBILITY FOR THE BREACH OF THE AGREEMENT IS NOT PRECLUDED

59. Under Clause 4 of the Agreement, the dissemination of Confidential information is allowed if (i) the information properly comes into the public domain, (ii) it is required by law, or (iii) is necessary to enforce the terms hereof.[106] Respondent submits that none of the said conditions were fulfilled and that Televative is thus not relieved of its responsibility for revealing such information.
60. Firstly, it cannot be contended that the information regarding the encryption technology, systems and intellectual property had properly come into the public domain. Regardless of the fact that some of the information relating to the project had become publicly known,[107] it cannot be assumed that this was the case with all information relating to the project, even more so when it comes to confidential information. The principal reason for classifying certain information is to prevent such information from becoming disclosed. Therefore, it cannot be assumed that such information came into public domain without evidence to the contrary.
61. Secondly, it cannot be argued that Televative was required by law to reveal such information to the Government of Opulentia. The only applicable law to the JVA, and therefore to Clause 4, is the law of Beristan[108] and there is no such requirement under Beristian law. Therefore, any similar requirement by any other law, including that of Opulentia, is irrelevant to the lawfulness of Televative's actions.

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[106] FDI Moot Problem 2010, Annex 3, Clause 4.1.

[107] Clarifications 1, Question 148.

[108] FDI Moot Problem 2010, Annex3, Clause 17.

62. Thirdly, an argument that the disclosure of confidential information was necessary to enforce the terms of the Agreement is inherently unsound, since such information was made confidential in order to enable the performance of the contract in the first place.

63. Since it is clear that none of the exceptional conditions under which the dissemination of information would have been allowed are present, it is evident that Televative cannot be exonerated for revealing confidential information to the Government of Opulentia.

2) A BREACH OF CLAUSE 4 IS *IPSO JURE* A MATERIAL BREACH OF THE AGREEMENT

64. A material breach of contract exists with a provision which is of essential importance to the performance to the contract is breached. [109] It is evident that the observance of Clause 4 of the JVA was of essential value to the parties due to the fact that they themselves unequivocally determined that any breach of Clause 4 would be a material breach of the Agreement.[110] Moreover, Clause 4 is an active clause, since the conditions set out in contract for its termination (the passage of 3 years after the expiration or termination of the contract)[111] have not been fulfilled. Consequently, Televative's breach of Clause 4 is *ipso jure* a material breach of the JVA.

B. A MATERIAL BREACH BY TELEVATIVE ENTITLES BERITECH TO INVOKE THE BUYOUT CLAUSE

65. Clause 8 of the JVA provides that:

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[109] Vienna Convention, Art. 60, para. 3(b); UNIDROIT Principles, Art. 7.3.(1).

[110] FDI Moot Problem 2010, Annex3, Clause 4.4.

[111] FDI Moot Problem 2010, Annex3, Clause 4.4.

> "Beritech shall be entitled to purchase all of Televative's interest in the Agreement if at any time Televative commits a material breach of any provision of the Agreement."[112]

66. Since Televative materially breached Clause 4 of the Agreement by disclosing confidential information, Beritech had the right to invoke Clause 8 and buy out all of Televative's interest in the Sat-Connect project. That is precisely what Beritech did[113] and it therefore properly exercised its rights under the JVA.[114]

C. THE VALUE OF TELEVATIVE'S INTEREST IN THE AGREEMENT WAS PROPERLY DETERMINED

67. Under the universally accepted principle of freedom of contract,[115] the parties are free to determine the price at which one party is to purchase the interest of the other party in a project. In the present case, Televative and Beritech explicitly stipulated that in case Televative commits a material breach of contract its interest in the Sat-Connect project shall be valued as its monetary investment in the project during the period of time from the execution of the Agreement until the date of the buyout.[116] As agreed by both parties, Televative's total monetary investment in the project stands at US $47 million.[117] The exact amount has already been paid by Beritech into an escrow account and made available to

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[112] FDI Moot Problem 2010, Annex3, Clause 8.

[113] FDI Moot Problem 2010, Annex 2, para. 10.

[114] *Autopista v. Venezuela*, para. 234.

[115] UNIDROIT Principles, Art. 1.1.

[116] FDI Moot Problem 2010, Annex3, Clause 8.

[117] FDI Moot Problem 2010, Annex 2, para 12.

Televative.[118] Therefore, it is evident that Beritech has properly determined Claimant's interest in the Agreement and has already fulfilled its obligations regarding the payment of the agreed sum.

68. On the other hand, Claimant is precluded from demanding compensation for potential future profits and for the intellectual property, since it already agreed on the valuation of its interest in the Agreement. As a result, Televative is bound by such an agreement under the principle of *pacta sunt servanda,*[119] and cannot change its position without the consent of Beritech. The validity of a contract provision which bars a party from claiming lost profits was confirmed in the *Autopista v. Venezuela award.*[120] Moreover, it was stipulated in the JVA that all the intellectual property rights which were transferred by Televative to the project were to belong and be exploited by Sat-Connect.[121] Hence, Televative is not entitled to any rights to the intellectual property pertaining to the project.
69. Furthermore, the provisions of the Opulentia-Beristan BIT which deem to determine the value of an investment are irrelevant to the issued at hand. Those provisions pertain to the cases of expropriation and nationalization, and not to a situation of a buyout resulting from a breach of contract, as is the case here.

D. THE BUYOUT PROCEDURE WAS PROPERLY CONDUCTED

70. Clause 8 of the JVA provides that in case Televative commits a material breach of contract Beritech would be entitled to purchase Televative's interest in the project.[122] Therefore, the decision of whether the buyout clause would be invoked

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[118] FDI Moot Problem 2010, Annex 2, para 13.

[119] UNIDROIT Principles, Art. 1.3; Brownlie, p.620; *Gabcikovo-Nagymaros case*, para. 114.

[120] *Autopista v. Venezuela*, paras. 310-313.

[121] Clarifications 2, Question 269

[122] FDI Moot Problem 2010, Annex3, Clause 8.

was given to Beritech, subject to the consent of the SAT Connect Board of Directors[123] The buyout procedure set forth by the JVA, which is in conformity with Beristian law,[124] was properly conducted and the necessary consent was given by the Board of Directors.

71. Claimant's contention that the decision to buy out its interest in the project was without prior notice and without an opportunity to respond to the charges is unfounded.

72. Firstly, the buyout provision of the JVA did not require Beritech to make such a notification and, therefore, Beritech was not obliged to do so. Secondly, even if the Tribunal finds that a prior notice was required, it simply is not true that it was not given. All nine board members (including Alice Sharpeton) were present at the August 21 meeting[125] at which the president of the board made a presentation to the directors regarding the leak of information by Televative[126] and the question of relevance of Clause 8 was raised.[127] Thus, it cannot be argued that the proposed agenda for the August 27 meeting was not known and that Claimant did not have an opportunity to respond, since all directors were present during the discussion,[128] and since prior notice was given a full six days before the meeting, which is much earlier than the 24 hours required by Beristian law.[129]

73. The question of whether the support by the Sat Connect board was properly given raises two issues: the issue of quorum and the issue of notification of the meeting agenda to the directors. As it has already been proven that all directors who participated in the August 27 meeting, including Alice Sharpeton, where given notice about the agenda, the only remaining question is that of quorum.

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[123] Clarifications 2, Question 242

[124] Clarifications 2, Question 244

[125] Clarifications 1, Question 140 and 127.

[126] FDI Moot Problem 2010, Annex 2, para. 9.

[127] Clarifications 1, Question 169.

[128] *Ibid.*

[129] Clarifications 1, Question 176.

74. A quorum of the Sat-Connect board of directors is obtained with the presence of 6 members,[130] as was the case on the meeting of August 27, when the buyout decision was supported.[131] The fact that one board member did not participate in the voting[132] is irrelevant, since the quorum refers to the number of directors present and not the number of those who actually participate in the voting.[133] Also, it is irrelevant that Ms. Sharpeton left the meeting before its end;[134] what is relevant is that the quorum was properly established. Moreover, as five of the six present board members supported Beritech's decision[135] it is evident that the voting majority requirement was fulfilled as well, since under Sat-Connect's bylaws all decisions taken by the board can be by simple majority.[136] Therefore, it must be concluded that all formal rules of procedure were observed when invoking the buyout clause of the JVA.

III RESPONDENT COMMITTED NEITHER A BREACH OF THE BERISTAN-OPULENTIA BIT, NOR OF GENERAL INTERNATIONAL LAW

A. There was no violation of the fair and equitable treatment

75. Pursuant to the Beristan-Opulentia BIT, each Party has to provide foreign investors and investments a treatment, in accordance with customary international law, which includes *fair and equitable treatment.*[137]

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[130] FDI Moot Problem 2010, Annex 2, para. 4.

[131] FDI Moot Problem 2010, Annex 2, para. 4.

[132] Clarifications 1, Question 156.

[133] Cromwell, p. 85.

[134] FDI Moot Problem 2010, Annex 2, para. 10.

[135] FDI Moot Problem 2010, Annex 2, para. 10.

[136] Clarifications 1, Question 149.

[137] Annex I, Article 2.

76. Firstly, it is necessary to determine the scope of the *fair and equitable* standard, as it, "vague as can be",[138] has no universally accepted definition.[139] The FET standard, however, cannot vary among states and nations, as though the protection guaranteed would have no minimum.[140] The minimum standard of treatment is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.[141] Hence, a breach must be based upon objective criteria that apply equally among States and between investors.
77. According to the *Methanex v. US Award*, in order to breach the FET standard, the investment state would have to engage in a conduct considered "grossly unfair."[142] This consequently means that, in international case law, the threshold for a breach of *fair and equitable treatment* remains a high one.[143]
78. By analyzing the excessive state practice regarding the said treatment, it can be deduced that it includes transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.[144]
79. Respondent respectfully firstly submits that the necessary transparency was present, since all signatories of the JVA, including the guarantor, i.e. Beristan, were aware of the consequences of the material breach.
80. Respondent further claims that Televative cannot maintain that Beristan violated FET by not protecting its legitimate expectations.[145] As was stated by the Tribunal in the *Thunderbird Gaming v. Mexico* Award, the concept of legitimate expectations relates to the situation where the conduct of the host state creates

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[138] *Saluka case*, para 284.

[139] BIT 1995-2006, p.28.

[140] *Glamis Gold, award*, para 616.

[141] *Ibid*, para 619.

[142] *Methanex v. USA*, para 98.

[143] *Thunderbird v. Mexico*, para. 194.

[144] Dolzer, Schreuer, p. 133-147.

[145] *Tecmed v. Mexico*, para. 154.

"reasonable expectations on the behalf of the investor to act in reliance to the said conduct",[146] which causes him to suffer damage in case of failure of honoring said expectations. In order to receive protection, legitimate expectations need to be a result of a promise made by the host government at the time of the investment.[147] Except where specific assurances or representations are made by the state to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy.[148] This is precisely why the threshold for violation of this aspect of FET principle may vary – it is dependant on the nature of breach and circumstances of each case.[149]

81. In the present case, Claimant was fully aware of the possible consequences in the event of a material breach of the JVA, as these consequences were embedded in Clause 8 of the said Agreement. Since Claimant received no guarantees,[150] and since it was familiar with the consequences of the potential breach, there was no room for the creation of legitimate expectations.

82. Furthermore, the actions taken by Respondent were not done in a discriminative manner. In order to breach the FET principle, the conduct of a state needs to be discriminatory and expose Claimant to "sectional or racial prejudice."[151] The basis of making the decision of invoking Clause 8 of the JVA was not founded on Televative's nationality, but on Televative's violation of Clause 4 of the same Agreement. Therefore, when applying the definition set forth in the *Saluka*[152] decision – that a conduct is discriminatory if similar cases are treated differently,

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[146] *Thunderbird v. Mexico*, para. 147.

[147] *Duke v. Ecuador*, para.340; *Tecmed v. Mexico*, para. 154; *Occidental v. Ecuador*, para.185; *LG&E*. v. *Argentina*, para. 127.

[148] *EDF v. Romania*, para. 217; *Waste Management award*, para. 98; *Methanex v. USA*, Part IV, Chapter D, para. 8; *PSEG v. Turkey*, para. 241.

[149] *Thunderbird v. Mexico*, para.148.

[150] Clarification 2, Question 253

[151] *Waste managemen award*, para. 98; *Methanex v. USA*, para. 26.

[152] *Saluka case*, para 313.

without reasonable justification – it is clear that consequences of material breach of the JVA are objective ones, leaving no room for discriminatory judgments.

83. In connection to the previously argued, Respondent would like to point out that the buyout was not arbitrary,[153] and thus, not a breach of Article 2.2 of the BIT. Arbitrariness is regarded as opposition to the rule of law,[154] and it appalls the sense of juridical propriety.[155] The buyout, on the other hand, was envisaged in the provisions of the JVA, and thus is governed by law's of Beristan.
84. The concept of the FET is necessarily connected with the principle of good faith.[156] Because good faith has long been a core principle of international law,[157] it can also serve as a standard for reviewing states' behavior.
85. That being said, it can clearly be deduced that actions undertaken by the Republic of Bersitan do not constitute a violation of the fair and equitable treatment.

B. Respondent did not expropriate Claimants assets

86. It is Respondent's standpoint that all steps taken in connection to the Sat-Connect joint venture company are legitimate and lawful, since they are in compliance with the special agreements between Claimant and Respondent as well as international law.

1) Respondent acted in accordance with the JVA

87. As argued above, Respondent acted in accordance with Clause 8 of the JVA, and thus, by no means breached the Beristan-Opulentia BIT. Due to the relevance of

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[153] *Pantechniki v. Albania*, para 87.

[154] *Asylum* Case, p. 284.

[155] *ELSI case*, para. 128.

[156] *Waguih v. Egypt*, para. 450.

[157] Draft Declaration on Rights and Duties of States, Annex Art. 13.

confidential data envisaged in Clause 4, to the strategic relevance of the Sat Connect project and to the seriousness of leaking of the information, Clause 8 states that if at any time Televative should commit a material breach of the JVA, Beritech shall be entitled to purchase all of Televative's interests in the said agreement.[158]

88. Taking into consideration everything stated above, the buyout cannot be viewed as a measure tantamount to expropriation.

89. In order to claim that expropriation has taken place, Claimant would have to illustrate the seizure of the property by authorities of the Republic of Beristan, as it is necessarily a governmental taking or modification of an individual's property rights, especially by eminent domain.[159] Taking of property is generally connected to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the taking.[160] Since the decision to buy out Televative's shares was made by Beritech,[161] and bearing in mind that it was of a purely commercial character and without any element of govermental authority, as elaborated *supra*, Claimant cannot maintain that Respondent expropriated its property.

90. Claimant can argue neither direct nor creeping expropriation, for it would have to prove a significant degree of deprivation of fundamental rights of ownership.[162] Restrictions imposed by the state, "in a manner that effectively freezes or blights the possibility" for the owner reasonably to use the economic potential of the property, can be identified as the actual act of taking.[163]

91. Since Beritech lawfully invoked the buyout clause, Claimant cannot assert that the Respondent state expropriated its property.

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[158] FDI Moot Court Problem 2010, Annex 3, Clause 8.

[159] Black's Law Dictionary.

[160] *S. D. Myers v. Canada*, para. 280.

[161] Clarifications 1, question 138.

[162] *Pope & Talbot case*, paras. 96-98.

[163] *Santa Elena case*, para. 76.

C. Alternatively, Respondent acted in accordance with the Beristan-Opulentia BIT

92. If the Tribunal rejects the previous Respondent's argument and decides that the said buyout can be equated with taking in the context of indirect expropriation, it is Respondent's claim that such expropriation is legal.
93. Pursuant to the BIT, expropriation will be rendered lawful, if the following elements are present: (i) taking of the investment must be done for a public purpose, (ii), in a non-discriminatory manner and (iii) followed by prompt, adequate and effective compensation.[164]
94. The said provision sets forth conditions for the condoning of the parties in terms of legal expropriation. In order to show that the actions taken are in compliance with the Beristan-Opulentia BIT, Respondent will analyze the above definition.

1) The taking of the investment was done for a public purpose

95. In the event of the expropriation of a foreign investor's assets, the seizure must be done for a public purpose.[165] Since there is no definition of public interest in international law,[166] it is upon upon the state to determine it.[167] The existence of margin of appreciation[168] allows states' greater freedom in determining whether

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[164] FDI Moot Problem 2010Annex 1, Article 4; OECD, *Indirect expropriation*, p.7; UNCTAD, *Taking of property*, p.24.

[165] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1.

[166] *Amoco v Iran*, p.189.

[167] *Lithgow v. UK*, para. 122.

[168] Burke-White, von Staden, p.305.

or not a measure is taken in a public interest,[169] providing it is followed by an immediate, full and effective compensation.[170]

96. Respondent behaved in accordance with public interest, since the disclosure of confidential information regarding encryption technology could have a disastrous outcome.

2) Respondent's actions have not been taken in a discriminative manner

97. The nationality or affiliation of Televative did not in any way play a role in the subsequent decision of the buyout itself; it was the threat of a possible and rather devastating information leak. Rule on the prohibition of discrimination is significant[171] and can be considered a part of customary international law.[172] The evaluation whether or not the intent to discriminate is present, in the government's decision to expropriate, is a key factor in proving unlawful expropriation. The intent of the government to discriminate a particular person or group is alone relevant[173] and not the subjects that the expropriation effects.
98. Respondent's actions did not contain a discriminative factor. Beristan was in need to protect its national interests, considering the seriousness of the potential results of the breach of confidentiality provisions, as stated above.

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[169] Christie, p. 307-33.

[170] *Goetz v. Burundi*, para. 126; *Broniowski v. Poland*, para. 149.

[171] Bishop, Crawford, Reisman,.1089.

[172] Maniruzzaman, p. 57.

[173] Brownlie, p. 521.

3) Claimant was fully, promptly and adequately compensated

99. It has been contended that a lawful expropriation dictates that a full compensation sums to be equivalent to the real market value of the investment.[174] The compensation is one of the cumulative conditions for the legality of the expropriation,[175] and it is a well recognized rule of international law that property of an alien cannot be seized without adequate compensation.[176] It is most often determined by the rules of the Hull formula,[177] i.e. the payment has to be prompt, adequate and effective. Considering that Respondent's actions are in line with the above stated criteria, Respondent claims that the immediate, full and effective compensation has been paid in the form of US$47 million which has been transfered into an escrow account. This amount represents the total investment of Televative in the Sat-Connect project in the moment of the decision of the buyout. This account has been made available to Televative, however the said company has for unknown reason refused to accept it. Respondent argues that the adequate compensation would in this case be best expressed through the *actual investment value*[178] of Claimants assets in the Sat-Connect project.

100. In the event of Claimant seeking compensation for lost profit on the basis of legitimate expectation, Respondent would like to point out that it has been contended that the remedy of damages compensates only the value of the party's

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[174] FDI Moot Problem 2010, Annex 1, Art. 4.3.

[175] *Certain GermanInterest case,* p.46-47.

[176] UN Resolution on Permanent , para 4; Charter of Economic Rights and Duties of States, 12. December 1974, (XXIX), A/RES/29/3281, Article 2.(c); *Lithgow v. UK*, paras. 121-2; *Norwegian Shipowners' Claims* , p.28; *Chorzow Factory*, p. 47; *German Settlers in Poland case*, p.38; *the Petar Pazmany University*, p. 243; *Phelps Dodge case*, para. 22.

[177] Note form US Secretary of State to Mexican Government, 22th August 1938; *Taking of property*, UNCTAD, p.28; *Indirect Expropriation*, OECD, p.2.

[178] *Metalclad v. Mexico*, para. 121; *Wena Hotels case*, paras. 124-125.

reliance and not his failed expectation from the contract itself.[179] In addition, the frequent method of calculating the amount of the future profit is the Discounted Cash Flow, i.e. the DFC method. However, this method cannot be applied in the present case since the investment lasted for merely two years. The tribunal in the *Tecmed v. Mexico* case, in which the investment lasted for exactly that period of time, determined "the non-relevance of the brief history of operation"[180] and has disregarded the DFC method. Similarly, the Tribunal rejected this method in the *Metalcald v. Mexico* Award[181] since the company had not operated for a sufficiently long time in order to establish a performance record.[182]

101. Respondent denies that it expropriated assets of Televative. However if the Tribunal should come to a conclusion that the buyout could amount to expropriation, Respondent submits that it has proven that even in the said event, its actions were lawful on the basis that all of the criteria for a legal expropriation were fulfilled in the present case.

102. In conclusion, Respondent argues that there has been no violation of the Opulentia-Beristan BIT, nor was there a breach of general international law. Consequently, Claimant is not entitled to compensation of any kind, and Respondent respectfully urges the Tribunal to deny any request for damages by Claimant.

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[179] *East v Maurer*

[180] *Tecmed v. Mexico*, para. 186.

[181] *Metalcald v. Mexico*, para 121.

[182] *Ibid*, para 120.

IV RESPONDENT ACTED IN PROTECTION OF ESSENTIAL SECURITY INTEREST OF THE STATE

A. Respondent was entitled to protect its national security under the Beristan-Opulentia BIT

103. Even if the Tribunal establishes a breach of either the *fair and equitable treatment* clause or Article 4 of the BIT, without prejudice to the previously claimed, Respondent argues that Beristan is exculpated for adopting any measures that may be considered a violation of the BIT provisions, under Article 9 of the said Treaty.

1) Article 9 represents a self-judging clause

104. Article 9 of the Beristan-Opulentia BIT states that nothing precludes a party of the treaty from applying measures that it considers necessary for the protection of its own essential security interests. Such a formulation is not rare in international law and is referred to as the self-judging clause.[183]

105. This kind of clause represents an exception from applicability of treaty provisions. It is included in a large number of BITs[184] in order to protect states' national security, thus showing that in fact public interest of a state overrides the contractual obligations, should it find that it is necessary to react to a threat. It is the first and foremost for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in such contexts.[185]

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[183] *The Protection of National Security in IIAs*, p.39.

[184] BIT 95-06, UNCTAD, p.83.

[185] Burke-White, von Staden , p.305; Friedman, p.141; *Goetz v. Burundi*, para. 126.

106. Under the self-judging clause, it is an exclusive prerogative of the host country authorities to assess whether the intended investment poses a threat to national security, and how to react to this threat.[186] Because of their knowledge of their society and of its needs, the national authorities are in principle better positioned than the international judge to appreciate what is "in the public interest", therefore national authorities, accordingly, enjoy a certain margin of appreciation.[187] A State acting in good faith may impose restrictions which incidentally lead to non-enforceability of certain contractual rights; therefore it would be difficult to treat such actions as illegal on international plane.[188]

2) Beristan is entitled to safeguard its essential interest

107. Regardless whether Article 9 is a self-judging clause, and subsequently whether Beristan's assessment is subject to good faith review, Beristan was entitled to invoke Article 9 in order to protect its essential interests.

108. While the wording of the clause may vary, substantive meaning remains unchanged: the protection of essential security interests applies in situations where a state needs to safeguard itself.[189] As stated by the *CMS* annulment committee, this treaty provision covers measures "necessary for the maintenance of public order or the protection of each Party's own essential security interests",[190] without qualifying such measures.

109. While there may not be a consensus on what essential interest specifically enumerates, it is more than clear that disclosure of confidential information that could pose a threat to the military due to its strategic role, represent a peril to

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[186] *The Protection of National Security in IIAs,* p.39.

[187] *Jahn v. Germany*.

[188] Brownlie, p. 547.

[189] BIT 95-06, p.84.

[190] *CMS Gas v. Argentina,* para. 130; Bjorklund, p.463.

national interest, even more so, since tribunals have found that essential interest encompasses even the cases of economic crises.[191]

110. Respondent submits that, in the present case, there was a justified concern that Claimant leaked the information from the Sat-Connect Project, which grossly endangered the national security of Respondent due to the fact that the said project included systems and encription keys to be used by the Beristan army. Therefore, it is considered a "strategic" enterprise by Respondent inasmuch that in the absence of an international consensus on the meaning and scope of this term, every country defines on its own what it understands by "strategic" enterprises or industries.[192]

111. The wording of Article 9 of the Beristan-Opulentia BIT, which reads that nothing in the Treaty shall be construed to:

> „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",[193]

allows a Party to invoke a general exception in situations where compliance with the agreement would impede maintenance of state's security.[194] This construction can also be found in the 2004 Canadian Model BIT,[195] in Article 18 of the US Model BIT,[196] and consequently in almost every BIT that United States of America have concluded,[197] as well as in the TRIPS Agreement.[198]

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[191] *LG&E v Argentina*, para. 226; *Sempra award*, para. 374.

[192] *TheProtection of National Security in IIAs*, p. 15.

[193] FDI Moot Problem 2010, Annex I, Art. 9.

[194] BIT 95-06, UNCTAD, p.85.

[195] DFA (2004) Canada Model BIT, Article 10 (4); Japan-Singapore Economic Partnership Agreement, Article 4.

[196] US Model BIT, Article 18.

[197] BIT 95-06, UNCTAD, p.85.

[198] TRIPS Agreement, Art 73 (b).

112. The critical information was disclosed in The Beristan Times of the 12th of August 2009 edition. The article quoted that there a growing number of foreign laws compelling disclosure of encryption ciphers, keys, and pads to national security services and indicated that

> "there have been leaks not only involving encryption technology, but also concerning the technology, systems, and intellectual property of the Sat-Connect project".[199]

Considering that, earlier this year, Televative was one of three Opulentian technology firms from which the Opulentian government authorities are alleged to have received access to civilian encryption keys it was no surprise that the said article subsequently led to a discussion in the board of directors of Sat-Connect started by its chairman, Mr. Michael Smithworth.

113. According to Clause 4 of the JVA, all data relating to the said Agreement shall be confidential and parties are bound to keep them secret.[200] Therefore, as argued above, due to the material breach of the JVA and subsequently, to the endangerment of the state's national security, Respondent had the right to engage in subsequent actions including the buyout and the dislocation of Televative personnel from the Sat-Connect facilities.

114. Should Claimant contend that there have been no evidence provided to support the allegations of the said leak, Respondent argues that even a doubt of such crucial information leaking to another state could do irreparable damage to the national security of Beristan. Even a possibility of a leak constitutes a threat to the national interest of Respondent inasmuch that it would, should the threat prove itself credible, allow for a foreign state integration in confidential military communication information.

115. National security concerns can be assumed to generally override the interests of foreign investors as regards receiving investment protection in international

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[199] Clarifications I, question 178.

[200] FDI Moot Problem 2010, Annex3, Clause 4.

investment agreements.[201] Bearing in mind that the transfer of data, and other forms of information opens opportunities for electronic theft, and in the worst case scenario, system disruption via electronic assault upon the economic, political, and social stability and well-being of a state,[202] it could have been clearly concluded that action had to be taken in order to prevent Opulentia from gaining a possible military leverage.

116. As the actions taken by Respondent were required for protection of the public interest, they do not amount to a violation of Respondent's obligations under the Beristan-Opulentia BIT, since exactly this Treaty gave the right to the Parties to enforce measures necessary to protect their respective national interests. Military involvement in the dislocation of the staff from the Sat-Connect project that were associated with Televative was a necessity to ensure that the said company would act in accordance with the notice of eviction that was served on the 28th of August 2009. Such action was required in the sense of the national security question of Beristan and was not based on *mala fides*. Whether or not such an objective assessment must contain a significant margin of appreciation for the State applying the particular measure was best expressed in the decision of the ICSID Tribunal in the *Continental Casualty v. Argentina case*:

> "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight".[203]

117. Considering everything stated *supra*, Respondent argues that Article 9 of the BIT was properly and lawfully invoked, and that, consequently, the Tribunal should find no breach of the BIT.[204]

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[201] *Th Protection of National Security in IIAs*, p. 25.

[202] Alberts, *Defensive Information Warfare*, p. 23-32.

[203] *Continental Casualty award*, para. 181.

[204] *Oil Platforms case*, para 34; *CMS Gas award*, para. 133.

B. Respondent was entitled to safeguard its security under the customary international law

118. Even in the absence of the exception clause in the bilateral investment treaty, the host country can nevertheless justify its measure under the rules of customary international law.[205]

119. National security or moreover essential security interest is deemed as a key objective of every state, perhaps even the primary *raison d'être*.[206] National security refers to the protection of a state, its territories, and its peoples from physical assault by an external force, as well as the protection of important state economic, political, military, social, cultural interests from attacks emanating from foreign or domestic sources which may undermine, erode, or eliminate these interests, thereby threatening the survival of the state. Such protection may be pursued by military or nonmilitary means.[207] Therefore, it cannot be doubted that national security interests have "the right of way" to the contractual obligations of a state[208] in the event of a threat to its national security, and therefore it has the right to act in protection of its essential interest or more specifically to protect itself from threats to its security in the effort to maintain a peaceful domestic order.[209]

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[205] *The Protection of National Security in IIAs*, p.34

[206] Alberts, Papp, p. 6.

[207] Hays, p. 8-16; Jordan, p.3-23; Hartmann, Frederick and Wendzel, p. 3-25.

[208] *The Protection of National Security in IIAs*, UNCTAD, p. 25.

[209] *Continental Casualty award*, paras. 175-176.

1) Leakage of critical information resulted in Respondents state of necessity

120. In case the Tribunal finds that Respondent cannot rely on Article 9 of the Beristan-Opulentia BIT, Beristan argues that its measures were in conformity with customary international law.

121. According to the ILC's Draft Articles on State Responsibility, which reflects have arguably achieved the status of customary international law,[210] there are certain circumstances under which states may not be held responsible for breaching their international obligations.[211] These circumstances which justify an otherwise wrongful act by the state include consent, self-defense, countermeasures, force *majeure*, distress and state of necessity.

122. Although it has been contended that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril,[212] a broader interpretation of the term has found its way into recent arbitral decisions.[213] The *Continental Casualty*[214] arbitration implemented a less constrictive test by whether or not necessity excluded illegality of the actions taken by Argentina. Firstly, as it was stated, it must be shown that the measures taken by a state contributed to a legitimate aim and, secondly, the tribunal must determine whether there were reasonably available alternatives.

123. In the present case, Respondent claims that the actions taken were in fact done in a national security interest, and have certainly been effective to a degree where the said national security peril does not exist any more. Thus, Respondent feels that any other course of action would have not been sufficiently effective to resolve such a pressing matter. It has been stated by the International Court of Justice that such a limitation does not exclude that a 'peril' appearing in the long

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[210] Bjorklund, p.488.

[211] Articles on State Responsibility, Articles 20-25.

[212] *Essential Security Interests Under International Investment Law*, OECD, p.100.

[213] Burke-White, von Staden , p. 324.

[214] *Continental Casualty. award*, para. 160.

term might be held to be 'imminent' only when it is established because the realization of the peril, however far off it might be, is not any less certain and inevitable.[215] Therefore, in the present case it is clear that the actions taken by Respondent are done purely out of necessity and as such cannot be viewed as a breach of the treaty. Military viability is by all means an important aspect of a country and a leak of crucial information about its infrastructure can be viewed as a grave peril, thus automatically triggering necessity as a reason for Respondent to deny fulfilling its contractual obligations.

124. As for the impairment of the interest of the State towards which the obligation exist, Respondent feels that it had already adequately compensated Claimant.

125. Respondent rests upon the point that international law, as well as the BIT and the JVA, support the supremacy of national interest over the contractual obligations in the event that Respondent feels that a serious threat has been made to the said interest, which undoubtedly occurred in the present case.

CONCLUSION ON THE MERITS OF THE CLAIM

126. Respondent has properly invoked the buyout clause since Claimant committed a material breach of the JV Agreement. Respondent has not breached its international obligations arising from the BIT since it did not expropriate Claimant's assets, nor did it act in an arbitrary and discriminatory manner, breach fair and equitable treatment, full protection and security, and transparency.

[215] *Gabcikovo-Nagymaros case*, para 54.

PRAYER FOR RELIEF

127. In light of all previously mentioned, the Respondent respectfully requests that the Tribunal adjudge and declare that:

(1) it lacks jurisdiction to adjudicate on Televative's claims and/or that the claims are inadmissible;

Or, in the alternative, that:

(2) Beritech properly invoked Clause 8 of the JV Agreement (buyout);

(3) Respondent committed neither a breach of the Beristan-Opulentia BIT, nor of general international law;

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

Respectfully submitted on 19 September, 2010 by

GROS

On behalf of Respondent

THE REPUBLIC OF BERISTAN