INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Televative Inc.,
Claimant

v.

Government of the Republic of Beristan,
Respondent

MEMORANDUM FOR RESPONDENT

Respectfully submitted

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List of Abbreviations

BIT	Bilateral Investment Treaty
CECA	Comprehensive Economic Cooperation Agreement
Cf.	Compare
CWF	Civil Work Force
ICSID	International Centre for the Settlement of Investment Disputes
id	ibidem
ILC	International Law Commission
Inc.	Incorporated
JV Agreement	Joint Venture Agreement
LIBOR	London Interbank Offered Rate
No.	Number
p.	page
para	paragraph
paras	paragraphs
§	paragraph
S.A.	Societé Anonyme
SCC	Stockholm Chamber of Commerce
SchiedsVZ	Zeitschrift für Schiedsverfahren
UN	United Nations
US$	Dollar of the United States of America
v	versus
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

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Statement of Facts

1. Beritech S.A. and Televative Inc., two private legal entities, signed a joint venture agreement on October 18, 2007, to establish the joint venture company, Sat-Connect S.A., under Beristan Law.

2. Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia.

3. Beritech owns a 60 % majority share in Sat-Connect, while Televative only owns a 40 % minority stake. The Sat-Connect board consists of nine directors, Beritech has the right to appoint five, while Televative may appoint four directors. A quorum of the board of directors is obtained with the presence of six members.

4. On August 12, 2009, the newspaper "The Beristan Times" published an article in which a highly placed Beristan government official raised national security concerns by revealing that Televative personnel who had been seconded to the Sat-Connect project had compromised the Sat-Connect project by leaking confidential information to the Government of Opulentia.

5. According to the Beristan Times article: "..there [had] been leaks not only involving encryption technology, but also concerning the technology, systems and the intellectual property of the Sat-Connect project." Televative was one of three Opulentian technology firms from which the Opuletian government authorities are alleged to have received access to civilian encryption keys.

6. On August 21, 2009, the Chairman of Sat-Connect's board of Directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the article. All nine members of the board of directors were present

7. The minutes from the August 21, 2009 meeting of the board of directors reflect that the chairman of the board made a presentation concerning the August 12,

2009 article in the Beristan Times, that one director raised potential relevance of Clause 8 of the JV Agreement. No further board meetings have taken place between August 12 and 21, 2009.

8. On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative interest in the Sat-Connect project. Six directors were present at this meeting, achieving the necessary quorum to take this decision.

9. On August 28, 2009, Beritech served notice on Televative requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

10. On September 11, 2009, the Civil Work Force ("CWF"), the civil engineering section of the Beristan army, secured all sites and facilities of the Sat-Connect project. Personnel of the project who were associated with Televative were asked to leave the project sites and facilities.

11. Beritech served notice on September 11, 2009, of its desire to settle any controversy amicably, and failing that, to proceed with domestic arbitration as foreseen by Clause 17 of the JV Agreement.

12. On October 19, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid $47 million, the value of Televative's total monetary investment in the Sat-Connect project, into an escrow account pending the outcome of the dispute.

13. Televative has refused to accept this payment and has chosen not to respond to Beritech's request for arbitration.

Summary of Argument

14. **Jurisdiction:** This Tribunal lacks jurisdiction. First, Clause 17 of the JV Agreement deprives this Tribunal of jurisdiction over all claims raised by Claimant in favor of a domestic arbitral tribunal established under the 1959 Arbitration Act of Beristan. Furthermore, Article 10 of the Opulentia-Beristan BIT does not confer jurisdiction over Claimant's contract-based claims under the JV Agreement because the conclusion of the JV Agreement is not attributable to Beristan.

15. **Merits:** Respondent has acted in full compliance with its obligations under the Beristan-Opulentia BIT. First, even if Beritech's conduct were attributable to Respondent, it did not breach the JV Agreement by buying out Claimant's interest in the joint venture as Claimant's material breach entitled Respondent to invoke Clause 8 of the JV Agreement. Second, Respondent's invocation of the buyout clause does not amounts to an illegal expropriation in violation of Article 4 of the BIT. Third, Respondent has upheld its duty to provide Claimant's investment with "fair and equitable treatment" in compliance with Article 2 (2) of the BIT. Fourth, the evacuation of Televative's personnel does not amount to an illegal discrimination. Finally, even if this Tribunal were to find that Respondent violated a substantive standard it is entitled to rely on the essential security clause of Article 9 of the Beristan-Opulentia BIT as a defense to Claimant´s claims to justify any alleged breach.

STATEMENT OF LAW
PART ONE: JURISDICTION

16. This Tribunal lacks jurisdiction because (**A.**) The contractual dispute resolution Clause 17 of the JV Agreement deprives this Tribunal of jurisdiction in favor of domestic arbitration; as well as (**B.**) the umbrella clause Article 10 of the BIT does not transform Claimant's contract-based claims into treaty claims.

A. THE CONTRACTUAL DISPUTE RESOLUTION CLAUSE 17 OF THE JV AGREEMENT DEPRIVES THIS TRIBUNAL OF JURISDICTION IN FAVOR OF DOMESTIC ARBITRATION

17. The contractual dispute resolution Clause 17 of the JV Agreement states, in its relevant part:

> "The Agreement shall be governed in all respects by the laws of the Republic of Beristan. In the case of **any dispute arising out of or relating to this Agreement**, any party may … commence arbitration. … The dispute shall then be resolved **only** by **arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan**, as amended. Each party **waives any objection** which it may have now or hereafter to such arbitration proceedings and **irrevocably** submits to the jurisdiction of the arbitral tribunal constituted for any such dispute."[1] (emphasis added)

18. Investment jurisprudence identified two approaches of how to deal with such a forum selection clause in treaty arbitration: The first approach answers the question of such competing jurisdiction with recourse to the notion of the fundamental basis of the claim. It denies an international tribunal's jurisdiction if the fundamental basis of the claim is a contract.[2] The second approach considers that an investor must be able to derogate from its own rights under a BIT.[3] Both approaches lead to the conclusion that the contractual dispute resolution Clause

[1] Annex 3, Clause 17.

[2] See *Vivendi decision on annulment*, para 101; *Bureau Veritas v Paraguay*, para 149; See also *Schreuer*, Investment Treaty Arbitration and Jurisdiction over contract Claims – the Vivendi I Case Considered; *Schreuer*, Calvo's grandchildren, p. 8, with further references.

[3] *Hoffmann*, p. 91; *Spiermann*, p. 210.

17 of the JV-Agreement must be respected and deprives this Tribunal of jurisdiction.

19. Thus, the forum selection under Clause 17 of the JV Agreement has to be respected by this Tribunal because (**I.**) the fundamental basis of Televative's claim is the JV Agreement. In addition, (**II.**) Claimant validly waived its rights under the BIT by agreeing to Clause 17 of the JV Agreement.

I. The fundamental basis of Televative's claim is the JV Agreement

20. Principally, a distinction may be drawn between treaty and contract sphere as established by the landmark decision of the *Vivendi annulment committee*. According to this distinction, an international tribunal may only exercise jurisdiction where the fundamental basis of the claim is a treaty laying down an independent standard.[4] On the other hand, where a private law contract is the fundamental basis of an investor's claim, the contractual dispute resolution clause has to be observed and will pave the way to the contractually agreed forum.

21. Here, the matters in dispute are contractual in nature and, for this reason, the fundamental basis of the claim is the contract. It is the conclusion of the private law JV Agreement that has given rise to Televative's claim. Claimant asserts that Respondent has breached this JV Agreement by invoking Clause 8 of the JV Agreement to buyout Claimant's interest in the joint venture.[5] Furthermore, Claimant alleges that this invocation prevented Televative and its staff from fulfilling its obligations under the JV Agreement.[6] Accordingly, the matters in dispute turn on the meaning, effect and alleged breach of the JV Agreement. Any asserted violation of a substantive BIT standard would require a prior showing that a breach of the JV Agreement exists.[7] Therefore, at the end of the day, this Tribunal would have to interpret and apply the JV Agreement to determine

[4] *Vivendi decision on annulment*, para 105.

[5] Record, p. 7.

[6] Id.

[7] Cf. the reasoning in *Bureau Veritas v Paraguay*, para 149; *Occidental v Ecuador, para 85.*

whether Beristan has breached its obligations under the BIT.[8] Therefore the basis of the claim is the JV Agreement.

22. Claimant has improperly tried to reformulate its contract claims as treaty claims. However, a simple assertion that an article in a BIT should serve as the basis for Claimant's claim is insufficient to conclude that the fundamental basis of that claim is the treaty. Rather, Claimant is required to provide substantive proof to back up its assertions and failed to do so. As shown above, the matter in dispute concerns the interpretation and a potential breach of the private law JV Agreement. This indicates that the fundamental basis of the claim is the contract.

23. The contractual dispute resolution mechanism was an essential part of the bargain between Beritech and Televative. Claimant voluntarily agreed to it when it signed the contract and now cannot unilaterally rewrite the contract to substitute the contractually agreed forum for this Tribunal. Any attempt to this effect must be deemed an abuse of process of which this Tribunal should be wary.

24. For these reasons, the fundamental basis of Claimant's claim is the contractual JV Agreement. Therefore, this Tribunal should respect the dispute resolution Clause 17 of the JV Agreement and refer Claimant to the pending domestic arbitral proceedings as the proper venue to entertain its contractual claims.

II. Televative validly waived its rights under the BIT by agreeing to Clause 17 of the JV Agreement

25. The same conclusion may be reached if one followed the other mentioned approach to this problem. This approach considers that Televative must be able to validly waive its rights under the BIT by agreeing to Clause 17 of the JV Agreement.

26. Foreign investors have not only been granted rights under the BIT regime, they have also been vested with a procedural mechanism to enforce these rights.[9] Investors may, thus, claim the violation of BIT rights in their own name before

[8] *Id.*

[9] *Hoffmann*, p. 91; *Spiermann*, p. 210.

an international tribunal and are not dependent on their home State to exercise diplomatic protection on their behalf anymore.[10] As a matter of principle, if rights are granted to an investor, the investor must, in turn, be able to waive these rights. [11]

27. The very notion of freedom of contract as a basic principle of the free market economy is at stake in this discussion. Investors must be able to independently assess the risk associated with a waiver of rights under a BIT and must be allowed to consciously take this decision to achieve a better bargaining position in contractual negotiations with the host State. It, ultimately, follows that an investor must be allowed to strike a better business deal that promises larger revenues by waiving its BIT rights in return. This approach also takes appropriate account of the fact that investor nowadays often exercise a strong bargaining power vis-à-vis the host State[12] and need not be patronized by their home State anymore.

28. While a waiver is, thus, generally possible, Respondent acknowledges that tribunals have developed further requirements for a valid waiver. In the often-cited decision *Aguas del Tunari*, the tribunal ruled that an explicit waiver of ICSID jurisdiction is effective to designate a forum other than ICSID[13] only if the selection of a particular venue is explicitly exclusive and the parties have explicitly delineated the matters given to that court. [14] This approach was confirmed by the tribunal in *Occidental v Ecuador*, which emphasized that an exception of ICSID arbitration arising *under a contrac*t requires a clear language to be effective.[15] Similarly, the *Vivendi annulment committee* determined that at least a clear intention to exclude jurisdiction arising under a BIT would be required.[16]

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[10] *Hoffmann,* p. 90.

[11] *Id.*

[12] *Griebel,* p. 104.

[13] *Aguas del Tunari v Bolivia,* para 114.

[14] *Id*, para 112.

[15] *Occidental v Ecuador,* para 71.

[16] *Vivendi decision on annulment,* para 76.

29. Applying these criteria, Claimant has validly waived its rights under the BIT because **(1.)** the selection of the domestic arbitral tribunal was explicitly "exclusive" and **(2.)** the parties have explicitly delineated the matters given to the domestic arbitral tribunal by virtue of Clause 17 of the JV Agreement.

1. The selection of the domestic arbitral tribunal was explicitly "exclusive"

30. The contracting parties' selection of the domestic arbitral tribunal by virtue of Clause 17 of the JV Agreement was explicitly exclusive.

31. In order to be explicitly exclusive, the forum selection clause must clearly and unequivocally express the intention of the contracting parties to give up rights under a BIT in favour of an alternative exclusive venue.[17]. Clause 17's wording is unequivocal when it referes to "[a]ny dispute arising out of or relating to this Agreement" and provides that "[t]he dispute shall … be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan" Furthermore the parties irrevocably waive any objections to the jurisdiction of such a tribunal. This wording clearly and unequivocally provides for the exclusive jurisdiction of a domestic arbitral tribunal for all matters arising out of the JV Agreement.

32. In contrast, the tribunal in *Aquas del Tunari* denied an explicit waiver because it noted that the contractual dispute resolution clause in question did not express the intention of the parties to waive rights under the Netherlands-Bolivia BIT lacks explicitness. [18] In contrast, the respective dispute settlement clause in the concession agreement, that was at issue in the *Aguas del Tunari* arbitration, only determined that both parties "recognize the jurisdiction and competence" of the local courts.[19] Therefore, it lacked the required explicitness to form the basis of a valid waiver. In comparison, the wording of Clause 17 of the JV Agreement

[17] *Griebel*, p. 102.

[18] *Aguas del Tunari v Bolivia*, para 112.

[19] *Id.*

describes all expected aspects of a waiver and does not lack explicitness, as argued above.

33. Therefore, the selection of the domestic arbitral tribunal was explicitly "exclusive".

2. The parties have explicitly delineated the matters given to the domestic arbitral tribunal by virtue of Clause 17 of the JV Agreement.

34. The tribunal in *Aguas del Tunari* held that a contract explicitly delineates the scope of jurisdiction if it explicitly refers "all disputes arising under" and "relating to" the contract to local courts.[20] In this manner, Clause 17 of the JV Agreement delineates jurisdiction for "any" dispute arising under or "relating to" the JV Agreement.[21] It explicitly expresses the intention of the contracting parties as to which disputes they intended to be adjudicated under the 1959 Arbitration Act of Beristan.

35. For this reason, the parties have explicitly delineated the matters given to the domestic arbitral tribunal by virtue of Clause 17 of the JV Agreement.

36. Accordingly, Claimant has validly waived its rights under the BIT because the selection of the domestic arbitral tribunal was explicitly "exclusive" and the parties have explicitly delineated the matters given to the domestic arbitral tribunal by virtue of Clause 17 of the JV Agreement.

37. In summary, the contractual dispute resolution Clause 17 of the JV Agreement deprives this Tribunal of jurisdiction.

B. ARTICLE 10 OF THE BIT DOES NOT CONFER JURISDICTION OVER CLAIMANT'S CONTRACT-BASED CLAIMS UNDER THE JV AGREEMENT

38. Beritech S.A. and Televative Inc., two private corporations, signed the JV Agreement on October 18, 2007, to establish the joint venture company, Sat-

[20] *Aguas del Tunari v Bolivia*, para 112.

[21] Clause 17 of the JV Agreement.

Connect S.A., under Beristan Law.[22] As a private law contract it does not fall within the scope of the BIT according to Article 10 of the BIT that provides 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." (emphasis added)

39. Article 10 of the BIT does not confer jurisdiction over Claimant´s contract-based claims under the JV Agreement because (**I.**) the conclusion of the JV Agreement by Beritech is not attributable to Beristan for the purposes of Article 10 of the BIT; and (**II.**) even if the conclusion of the JV Agreement by Beritech were attributable to Beristan, Article 10 of the BIT does not extend the protection of the BIT to claims that arise out of the JV Agreement.

I. The conclusion of the JV Agreement by Beritech is not attributable to Beristan for the purpose of Article 10 of the BIT

40. In order to hold Beristan responsible for breaches of the umbrella clause of the BIT, Beritech's conduct would have to be attributable to Respondent, which is not the case.

41. This can be seen, because Article 10 of the 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. Prima facie, the reference to "it" only includes the signatories of the Beristan-Opulentia BIT, namely the States.[23] Contracts concluded with separate legal entities, thus, fall outside the scope of Article 10 of the BIT.[24]

[22] Uncontested Facts, para 2.

[23] *Hobér*, p. 576; *CMS v Argentina, Annulments*, para 95 (c).

[24] See *Impregilo v Pakistan*, para 214; *Azurix v Argentina, Award*, para 384; *Consortium RFCC v Morocco, Award*, paras 67-69; *Salini v Jordan*, Jurisdiction, para 100; *Happ/Rubins*, p. 363.

42. Televative and Beritech signed the JV Agreement in order to establish the Sat-Connect S.A..[25] The State of Beristan explicitly did not become party to the contract. Its conclusion by Beritech is not attributable to Beristan because (**1**.) Beritech enjoys separate legal personality under relevant domestic law and international rules of attribution are inapplicable; and (**2**.) even if international rules of attribution were applicable, Beritech's conduct is not attributable to Beristan under Article 8 ILC because Beristan does not exercise control over Beritech.

1. Beritech enjoys separate legal personality under relevant domestic law and international rules of attribution are inapplicable

43. According to the tribunal in *Impregilo v Pakistan*, the determination of whether conduct is attributable to the State depends on the national law, which governs both the contract and the status and capacity of the entity entering into the contract.[26] International rules of attribution, such as the ILC Draft Articles on State Responsibility, are not applicable to this question since they only address the responsibility as between States for internationally wrongful acts.[27] In investment arbitration, where at least one of the parties necessarily is a non-state entity, the ILC Articles cannot be relied on.[28]

44. Beritech is a separate legal entity that has been established under Beristan law.[29] Under domestic law, Beritech enjoys independent legal personality, that is Beritech is subject to legal obligations, may be sued in its own name and, most importantly, is able to enter into contracts on its own behalf.[30] Therefore, Beritech is a separate entity from Beristan under relevant domestic law. Its conduct, including the conclusion of the JV Agreement, is not attributable to Beristan. It follows that, if the conclusion of an agreement is not attributable to the State, the subsequent contractual breach cannot be attributable either. Therefore, the reference to "it" in Article 10 of the BIT only cannot be construed as to refer to Beritech.

[25] Uncontested Facts, para 2.

[26] *Impregilo v Pakistan*, paras 209, 216; see also *Happ*, p. 57.

[27] See Article 1 ILC; *Feit*, p. 146.

[28] *Hobér*, p. 552.

[29] Uncontested Facts, para 2.

[30] Uncontested Facts, para 3.

45. This result is confirmed by international law, which generally recognizes the separateness of corporate entities at the national level.[31] Therefore, the jurisdiction based on the BIT does not extend to breaches of a contract to which an entity other than the State was a party.[32]

46. This leads to the conclusion that the JV Agreement cannot be protected under Article 10 of the BIT since its conclusion is not attributable to Beristan.

47. Beritech enjoys separate legal personality under relevant domestic law and international rules of attribution are inapplicable and therefore, the conclusion of the JV Agreement by the separate legal entity Beritech is not attributable to Beristan.

2. Even if the ILC Articles on State Responsibility were applicable, Beritech's conduct is not attributable to Beristan under Article 8 ILC because Beristan does not exercise control over Beritech

48. The same result would be reached if international rules on attribution were applied. Under Article 8 ILC, Beritech´s conduct is not attributable to Beristan because Beritech acted neither under the instructions of nor under the direction or control of Beristan. Beritech´s conduct would be attributable to Beristan if "the State were using its ownership interest in or control of a cooperation specifically in order to achieve a particular result."[33] The mere "ownership interest" is insufficient to conclude attribution.[34] Rather, attribution to the State of conduct under the "direction or control" of the State requires not only that the entity is generally controlled by the State but that the individual operation in question was effectively controlled and that the act was a genuine part of that operation.[35]

[31] See eg *Barcelona Traction,* para 56-58; *Hobér*, p. 581; *Impregilo v Pakistan*, Jurisdiction, para 214; *Azurix v Argentina*, Award, para 382; *RFCC v Marocco,* Award, paras 67-69; *Salini v Jordan*, Jurisdiction, para 100; *Happ/Rubins*, p. 363.

[32] *Impregilo v Pakistan*, paras 214, 216; *Salini v Morocco*, para 61; *Consortium RCFF v Morocco,* para 68.

[33] *Crawford*, p. 112-113.

[34] *Griebel*, p. 236; *Smutny*, p. 43; see also *Bayandir v Pakistan*, para 461.

[35] *Schreuer*, Travelling the BIT Route, p. 201; *see AMTO v Ukraine*, § 31.

49. Here, Sat-Connect's independent board of directors decided on the individual operation in question, namely, the invocation of the buyout clause.[36] Claimant breached the JV Agreement and the legal consequence according to the JV Agreement is the buyout. Respondent could not effectively control the invocation since Respondent was not involoved and Respondent did not appoint any board members of Sat Connect [37] In particular, the Beristan Minister of Telecommunication's participation on Beritech's board of directors does not imply direct control of the State since the government of Beristan did not directly appoint him[38] and he served on the board in his capacity as a private person. In any event, as a single director, the Minister was not able to unilaterally take decisions on behalf of the board of directors, which consists of five members and votes by majority.[39]

50. Therefore, there is no indication that the State of Beristan controlled the invocation of the buy-out clause. This must lead to the conclusion that Beritech is an independent legal entity whose conduct is not attributable to the State of Beristan under Article 8 ILC.

51. For all these reasons, the conclusion of the JV Agreement is not attributable to Beristan under international law.

II. Even if the conclusion of the JV Agreement by Beritech were attributable to Beristan, Article 10 of the BIT does not extend the protection of the BIT to the JV Agreement

52. Even if the conclusion of the JV Agreement by Beritech were attributable to Beristan, Article 10 of the BIT does not extend the protection of the BIT to the JV Agreement because (**1**.) Article 10 of the BIT does not elevate contractual claims to treaty claims; and (**2.**) even if Article 10 of the BIT elevated contractual

[36] Uncontested Facts, para 10.

[37] Clarifications, question 268.

[38] Clarifications, question 268.

[39] Uncontested Facts, para 4.

claims to treaty claims, it would only elevate claims that arise out of investments agreements and the JV Agreement is a purely commercial contract between two private parties.

1. Article 10 of the BIT does not elevate contractual claims to treaty claims

53. There is virtual consensus that the scope of an umbrella clause will largely depend on its wording.[40] Article 10 of the BIT uses the formulation "shall constantly guarantee." For a similarly formulated provision,[41] the tribunal in *SGS v Pakistan* held that a narrow approach is to be favored that restricts the scope of the clause.[42] With reference to the rather weak language of "shall guarantee to observe" in contrast to the imperative language of "shall observe" in the *SGS v Philippines* arbitration, the tribunal in *SGS v Pakistan* ruled that the wording of the clause is not sufficiently clear to signal the creation and acceptance of a new international law obligation on the part of a Contracting Party, where there was none before.[43] This conclusion has to be applied to the similar formulated Article 10 of the BIT and therefore, the article cannot be interpreted expansively.[44]

54. In addition, a systematic interpretation of the Beristan-Opulentia BIT reveals that a broad reading of Article 10 of the BIT cannot be sustained, as it would render the BIT´s substantive provisions, such as the prohibition of unlawful expropriation or the obligation to provide fair and equitable treatment, superfluous.[45] If a simple breach of a commercial contract were sufficient to constitute a treaty violation, an investor would not need to demonstrate a violation of substantive treaty standards with significantly higher thresholds

[40] *Noble Ventures v Romania*, para 51; *SGS v Philippines*, para 164.

[41] Article 11 of the Swiss-Pakistan BIT „Either Contracting Party **shall constantly guarantee** the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party."(emphasis added).

[42] *SGS v Pakistan*, para 166.

[43] *Id*.

[44] See *id*.

[45] *Id*, para 168.

anymore[46] Systematically, such an overbroad "one clause fits all"-approach cannot have been intended.

55. Furthermore, from a systematic point of view, the location of the umbrella clause in the BIT confirms the interpretation that the clause was not intended to elevate contract claims to treaty claims. In this manner, the tribunal in *SGS v Pakistan* held that when an umbrella clause is not placed among the substantive "first order" obligations set, this separation indicates that the umbrella clause was not meant to project a substantive obligation.[47] Here, Article 10 of the BIT is located distinctively after the substantive obligations found in Article 2 to 8 of the BIT, separated from those obligations by the essential security justification clause of Article 9 of the BIT. One may assume that the specific placement of a justification provision is the result of a conscious decision in treaty drafting as to limit its scope of application to the preceding provisions. Hence, if Article 10 of the BIT were deemed to be a substantive provision, this would lead to the unlikely result that a State could not rely on Article 9 of the BIT to justify a violation thereof.

56. A systematic interpretation, thus, reveals that Article 10 of the BIT was not meant to project a substantive obligation. Therefore, the present umbrella clause was not intended to elevate contract claims to treaty claims.

57. Moreover, from a teleological point of view, a broad interpretation of Article 10 of the BIT would have far-reaching consequences. An expansive construction of the clause would lead to the incorporation of an unlimited number of State contracts, as well as other municipal legal instruments setting out obligations of the State. Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT, which, in turn, would lead to an almost unlimited possibility to raise claims under the BIT.[48] This would open the floodgates for treaty claims that were actually intended to be resolved before national courts. Article 10 of the BIT does not contain any convincing evidence

[46] *Id*; *Pan American/BP v Argentina*, para 105.

[47] *SGS v Pakistan*, para 170; see also *Joy Mining v Egypt*, para 81.

[48] *SGS v Pakistan*, para 168.

that the Contracting Parties intended to create such a sweeping and burdensome mechanism.[49] Indeed, it cannot be assumed that the State parties intended those consequences because they would be "automatic, unqualified, sweeping in their operation, and burdensome in their potential impact."[50]

58. The broad interpretation has the effect that the benefits of the dispute settlement provision of a contract with a State also a party to a BIT, would flow only to the investor.[51] The consequence would be that an investor could unilaterally nullify any freely negotiated dispute settlement clause in a State contract.[52] The investor could always defeat a State's invocation of the contractually specified forum, and render any mutually agreed dispute settlement mechanism a dead-letter.[53] While the investor would remain free to go to arbitration either under the contract or under the BIT, the State party to the contract could only proceed in the arbitral forum specified in the contract if the investor agrees.[54] This would lead to an unbalanced interpretation in favor of the investor and in the sole detriment of the State.[55]

59. Furthermore, the proposed restrictive interpretation of Article 10 of the BIT does not render the clause inutile. Article 10 of the BIT would still have function to declare that other international obligations that Beristan might have assumed with regard to the investment remain untouched by the conclusion of the BIT.[56]

60. For all these reasons, Article 10 of the BIT cannot be construed to elevate contractual claims to treaty claims.

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[49] See *id*, para 167.

[50] *Id*.

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

[52] See van *Harten*, p. 48.

[53] *SGS v Pakistan*, para 168.

[54] *Id*; see also *Joy Mining v Egypt*, para 79.

[55] *Noble Ventures v Romania*, para 52*; Pan American/BP v Argentina*, para 99.

[56] *SGS v Pakistan*, para 172; *Dimsey*, p. 55.

2. Even if Article 10 of the BIT elevated contractual claims to treaty claims, it only elevates claims that arise out of investment agreements and the JV Agreement is a purely commercial contract between two private parties

61. Even if Article 10 of the BIT were deemed to be generally capable of elevating specific contractual claims to treaty claims, a restrictive interpretation should be adopted. In interpreting whether an umbrella clause extends to contractual claims, the tribunals in *Pan American/BP v Argentina* and *El Paso v Argentina* concluded that a distinction has to be drawn between situations where the State acted as a sovereign, namely in so-called "investment agreements", and those where it acted as a mere merchant.[57] Only claims that arise out of investment agreements may be elevated by an umbrella clause.[58] Commercial contracts, on the other hand, are concluded by the State as a mere merchant, are governed exclusively by national law[59] and thus, is not subject to the application of the umbrella clause.[60]

62. A finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts.[61] Therefore, deciding on the sovereign or commercial nature of a contract, the tribunal in *El Paso* took into account the nature of the dispute settlement mechanisms provided for in the agreement.[62] While a purely commercial contract will call for domestic dispute settlement investment agreement will principally provide for an "internationally secured legal remedy."[63] Clause 17 of the JV Agreement provides for recourse to national arbitration. Therefore, the JV Agreement must be deemed to be a purely commercial contract.

[57] *Pan American/BP v Argentina*, para 108; *El Paso v Argentina*, para 79; see also *LESI v Algeria*, para 84.

[58] *Pan American/BP v Argentina*, para 113; *El Paso v Argentina*, para 77.

[59] *El Paso v Argentina*, para 77; *Perera*, p. 514.

[60] *Joy Mining v Egypt*, para 78.

[61] *Bayindir v Pakistan*, para 129.

[62] *El Paso v Argentina*, para 77.

[63] *Id*; *Pan American/BP v Argentina*, para 113.

63. Moreover, Beritech acted as a merchant in signing the contract because the development of communication facilities is not reserved to the State and may be exercised by any merchant as the field of telecommunications does not relate to sovereign power. Likewise, Televative, as the other contracting party, is also a private legal entity, which acts as a merchant and does not exercise sovereign powers. The field of telecommunications does not relate to sovereign power. For this additional reason, Beritech´s conduct in signing the JV Agreement was purely commercial.

64. Therefore, even if Article 10 of the BIT elevated contractual claims to treaty claims, it will not elevate claims that arise out of purely commercial contracts. The JV Agreement is a purely commercial contract and, thus, cannot be elevated.

65. For these reasons, Article 10 of the BIT does not extend its protection to the BIT to the JV Agreement.

Conclusion on Jurisdiction

66. This Tribunal lacks jurisdiction because Clause 17 of the JV Agreement deprives this Tribunal of jurisdiction over all claims raised by Claimant in favor of an arbitral tribunal to be established under the 1959 Arbitration Act of Beristan. Furthermore, Article 10 of the Opulentia-Beristan BIT does not confer jurisdiction over Claimant's contract-based claims under the JV Agreement because the conclusion of the JV Agreement is not attributable to Beristan.

PART TWO: MERITS

67. Respondent acted in full compliance with its obligations arising under the Beristan-Opulentia BIT. First, (**A.**) Respondent fully complied with the JV Agreement as its invocation of Clause 8 of the JV Agreement was proper and did not improperly prevent Claimant from completing its contractual duties. Second, (**B.**) Respondent's invocation of the buyout clause does not amount to an illegal expropriation in violation of Article 4 (2) of the BIT. Third, (**C.**) Respondent has upheld its duty to provide Claimant with "fair and equitable treatment" in accordance with Article 2 (2) of the BIT. Fourth, (**D.**) the evacuation of Televative's personnel does not amount to an illegal discrimination in violation of Article 2 (3) of the BIT; and (**E.**) finally, even if this Tribunal were to find that Respondent violated a substantive standard it is entitled to rely on the essential security clause of Article 9 of the Beristan-Opulentia BIT as a defense to Claimant´s claims to justify any alleged breach.

A. Respondent fully complied with the JV Agreement as its invocation of Clause 8 of the JV Agreement was proper and as it did not improperly prevent Claimant from completing its contractual duties

68. Respondent fully complied with the JV Agreement because (**I.**) Respondent's invocation of Clause 8 of the JV Agreement was exercised in full compliance with the procedures and requirements set out in Sat-Connect's bylaws and the JV Agreement; and (**II.**) Respondent did not improperly prevent Claimant from completing its contractual duties.

I. Respondent's invocation of Clause 8 of the JV Agreement was exercised in full compliance with the procedures and requirements set out in Sat-Connect's bylaws and the JV Agreement

69. Respondent did not breach the JV Agreement by invoking Clause 8 of the JV Agreement to buy out Claimant's interest in the joint venture because (**1.**) the invocation of Clause 8 of the JV Agreement complied with the procedural requirements stipulated in Sat-Connect's bylaws for a valid decision of its board of directors; and (**2.**) the material requirements of Clause 8 of the JV Agreement were fulfilled as Claimant committed a material breach of the JV Agreement by

leaking sensible information in violation of the confidentiality requirement of Clause 4 of the JV Agreement.

1. The invocation of Clause 8 of the JV Agreement complied with the procedural requirements stipulated in Sat-Connect's bylaws for a valid decision of its board of directors

70. Beristan law as well as Sat-Connect's bylaws set out procedural requirements for a valid decision of the board of directors. Beristan's invocation of Clause 8 of the JV Agreement complied with these requirements because (**a.**) all members of Sat-Connect's board of directors had proper 24 hours prior notice; and (**b.**) the necessary quorum of six out of nine directors for taking a corporate decision was met at the board meeting of August 27, 2009.

a. All members of Sat-Connect's board of directors had proper 24 hours prior notice

71. Beristan law and Sat-Connect's bylaws require that the members of Sat-Connect's board of directors have 24 hours prior notice of the topics to be discussed in an upcoming meeting.[64]

72. The notice requirement seeks to ensure that a corporation's board of directors is prepared for upcoming meetings by timely providing its members with possibly relevant information. In consideration of this purpose, the notice requirement cannot be interpreted to be a merely formalistic requirement but must rather be construed as to be satisfied once every board member is properly informed. Despite claims to the contrary made by Alice Sharpeton, all members of Sat-Connect's board of directors had access to relevant information concerning a possible buyout 24 hours prior to the August 27, 2009, board meeting. They were, thus, properly informed about the upcoming topic.

73. On August 12, 2009, The Beristan Times published a newspaper article, in which a Beristan government official disclosed the suspicion that Televative personnel had forward restricted information about the confidential Sat-Connect project to

[64] Clarifications, question 176.

the foreign State of Opulentia.[65] In the following, a heated public debate arose surrounding the circumstances of this betrayal of state secrets. Being directly concerned, it seems natural to assume that the members of Sat Connect's board of directors must have followed this debate attentively.

74. On top of that, the chairman of the board of directors explicitly confronted all nine directors with the allegations that had appeared in the newspaper article in the board meeting on August 21, 2009.[66] At this meeting, one director even raised the potential relevance of Clause 8 of the JV Agreement, which led to a discussion among the board members.[67] As no mutually agreeable conclusion was reached, every diligent board member must have expected that a topic of such paramount importance to Sat-Connect would be addressed by way of a possible vote in an upcoming meeting. Unsurprisingly, three of the four directors appointed by Televative drew this conclusion, speculated that a potential buyout would be discussed, and, for this very reason, failed to appear at the August 27, 2009, meeting in an unsuccessful attempt to deprive the board of the required quorum to vote.

75. It is hardly conceivable that Alice Sharpeton had no knowledge of the meeting's content, while her colleagues did. For all of the above reasons, her statements to the contrary are either implausible or evidence of a reckless work attitude. Either way, insistence on official prior 24 hours notice would be superfluous considering the prominence of the meeting's topic as well as all board members' obvious awareness of this prominence, and would, thus, amount to exaggerated formalism.

76. Therefore, all members of Sat-Connect's board of directors had proper 24 hours prior notice.

b. The necessary quorum of six out of nine directors for taking a corporate decision was met at the board meeting of August 27, 2009

[65] Clarifications, question 178.

[66] Clarifications, questions 169, 140.

[67] Clarifications, questions 169.

77. Sat-Connect's bylaws, in conformity with Beristan law, require that decisions of its board of directors are taken by majority subject to the quorum requirement of six out of nine directors being present.[68] At the beginning of the August 27, 2009, meeting, five directors of Sat-Connect were present. Accordingly, the quorum was established. However, in spite of her physical presence, Alice Sharpeton did not participate in the meeting and left before its end.[69] As neither Beristan law nor Sat-Connect's bylaws regulate the loss of a quorum once established,[70] the relevance of her untimely departure is a matter of interpretation of the relevant bylaws. This will lead to the conclusion that Alice Sharpeton's physical presence at the beginning of the meeting was sufficient to obtain a quorum to vote for the entire meeting, notwithstanding her later departure.

78. The wording of the relevant provision in Sat-Connect's bylaws takes recourse to mere physical "presence of six members" in order to establish the necessary quorum to vote.[71] Notably, the provision does not require present board members to actively participate in the voting or to remain in the meeting until it is dissolved. Therefore, mere physical presence must be deemed sufficient.

79. Accordingly, the fact that Alice Sharpeton refused to participate in the voting while simultaneously taking part in the board meeting did not deprive the board of the necessary quorum. Therefore, the necessary quorum of six out of nine directors for taking a corporate decision was met at the meeting of August 27, 2009.

80. In conclusion, the invocation of Clause 8 of the JV Agreement complied with the procedural requirements stipulated in Sat-Connect's bylaws for a valid decision of its board of directors.

[68] Clarifications, question 149.

[69] Uncontested Facts, para 10.

[70] Clarification, question 255.

[71] Id, question 149.

2. The material requirements of Clause 8 of the JV Agreement were fulfilled as Claimant committed a material breach of the JV Agreement by leaking sensible information in violation of the confidentiality requirement of Clause 4 of the JV Agreement

81. Clause 8 of the JV Agreement endows the right on Beritech to exercise a buyout of Televative's interest in the joint venture in case of a material breach. It stipulates in its relevant part:

> "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." (emphasis added)

82. The precondition of a material breach is elaborated on in Clause 4 of the JV Agreement. In summary, it sets out the confidentiality requirements underlying the Sat-Connect project and establishes the prohibition of unwarranted disclosure of confidential information to any unauthorized person or entity. According to its paragraph 4

> "Any breach of this Clause 4 shall be deemed a **material breach** of the Agreement." (emphasis added)

83. In accordance with these provisions, Beritech was entitled to exercise a buyout of Televative's interest in the Sat-Connect project since Televative leaked sensible information in violation of Clause 4 of the JV Agreement and, thereby, committed a material breach.

84. On August 12, 2009, The Beristan Times published an article in which a highly placed Beristan government defense analyst revealed that Televative had leaked confidential information about Sat-Connect's advanced technology, systems, intellectual property, encryption and other trade secrets to the Government of Opulentia.[72] This included highly sensible information about the advanced satellite and telecommunications technology, which comprised systems that are being used by the Beristan armed forces.[73] In this respect, it is undisputed by

[72] Record, p. 7.

[73] Record, p. 7.

Televative that Opulentian authorities requested the company to receive access to civilian encryption keys.[74] It fits well into the picture that Opulentia enacted export control laws that force Opulentian companies, such as Televative, to obtain licenses from the Opulentian government in order to export certain technologies to Beristan.[75] Therefore, even Beristan's national security may have been compromised. It is for this reason that the same concerns were voiced in Beristan military circles.[76]

85. In the light of the highly confidential nature of the Sat-Connect project both with regard to its advanced market-leading technology and its military implications, the statement made by the government official must be considered sufficient evidence to conclude that Televative committed a material breach of the confidentiality requirement of Clause 4 of the JV Agreement. Considering the potential consequences that, in the last resort, threatened the very existence of the Sat-Connect project, Beritech was left with no choice but to make use of its right under Clause 8 and purchase Televative's interest in the joint venture for its monetary value.

86. Recapitulatory, the material requirements of an invocation of Clause 8 of the JV Agreement were fulfilled as Claimant committed a material breach by leaking confidential information in violation of Clause 4 of the JV Agreement. This entitled Beritech to purchase Televative's interest in the Sat-Connect project.

87. For the above reasons, Respondent did not breach the JV Agreement because the invocation of Clause 8 of the JV Agreement was proper.

II. Respondent did not improperly prevent Claimant from completing its contractual duties.

88. Furthermore, and contrary to Claimant's explicit assertions, Respondent did not improperly prevent Claimant from completing its contractual duties. A contracting party's right to performance is not inviolable, but is lost when that

[74] Clarifications, question 178.

[75] Clarifications, question 145.

[76] Clarifications, question 231.

party breaches the contract. An elaboration on Claimant's breach of the confidentiality Clause 4 of the JV Agreement may be found above. Considering, further, that the buyout was properly exercised in accordance with all relevant procedural and material provisions, it was only consequent to require Claimant to cease its activities with regard to the Sat-Connect project and to ask Claimant's personnel to leave the facilities. Naturally, Claimant could not rely on any right to fulfill its contractual obligations anymore after its contractual breach and the properly exercised buyout. Hence, at most, Claimant prevented itself from completing its contractual duties.

89. For these reasons, Respondent did not improperly prevent Claimant from completing its contractual rights.

B. RESPONDENT'S INVOCATION OF THE BUYOUT CLAUSE DOES NOT AMOUNT TO AN ILLEGAL EXPROPRIATION IN VIOLATION OF ARTICLE 4 (2) OF THE BIT

90. It is generally acknowledged that a breach of a contract concluded by foreign investors does not automatically amount to a breach of international law.[77] An investor cannot expect to be shielded by international law against common breaches of contract, such as claims that arise out of allegedly improper performance.[78] For the same reason, Claimant cannot rely on Article 4 (2) of the BIT for an alleged expropriation of its contractual rights.

91. Article 4 (2) of the BIT provides:

> "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" (emphasis added).

92. The invocation of the buy-out clause does not amount to an illegal expropriation because (**I**.) the invocation of the buyout clause by Beritech is not attributable to Beristan; (**II**.) even if the invocation were attributable to Beristan, it does not

[77] *von Walter,* p. 185; *Schreuer,* Travelling the BIT Route, p. 249; *SGS v Pakistan*, para 167.

[78] *von Walter*, p. 185.

amount to an expropriation under Article 4 (2) of the BIT. (**III**.) In any event, the invocation of the buy-out clause satisfies the requirements of Article 4 (2) of the BIT.

I. The invocation of the buyout is not attributable to Beristan

93. Beritech, as an independent legal entity and as contracting party to the JV Agreement, invoked Clause 8 of the JV Agreement to buyout Claimant's share in the joint venture with the support of the majority of Sat-Connect's board of directors.[79] Beristan itself did not act and, as shown above,[80] Beritech's invocation of the buyout is not attributable to Beristan.

II. Even if the invocation were attributable to Beristan, it does not amount to an expropriation of contractual rights under Article 4 (2) of the BIT

94. The invocation of the buyout clause does not amount to an expropriation because the action was justified under the contract. Claimant violated the confidentiality clause of the JV Agreement and therefore, Respondent has offered a reasonable contract basis for the buyout. That does not amount to an expropriation.

95. Even if this Tribunal were to reach the conclusion that Claimant was deprived of its contractual rights, this does not constitute an expropriation because Respondent did not act in its capacity as a sovereign. A breach of contract that is not accompanied by other government measures does not amount to an expropriation.[81] According to *Consortium RFCC v Morocco*, sovereign measures are given if a law or a governmental decree was been passed or if a judgment was executed.[82] In the two very recent decisions in *Suez v Argentina*[83] and *Bayindir v Pakistan*[84], the tribunals ruled that the mere fact that there is some governmental

[79] Uncontested Facts, para 10.

[80] See supra, paras 47-50.

[81] *Azurix v Argentina*, para 314; Suez v Argentina, para 153.

[82] *Consortium RFCC v Morocco*, Award, paras 60-62, 65-69, 85-89.

[83] *Suez v Argentina*, para 153.

[84] *Bayindir v Pakistan*, para 128, 129.

involment in the events that lead to the termination of a contract does not necessarily mean that such termination is a result of exercise sovereign powers.

96. Respondent did not employ any of these means in the case at hand. To the contrary, the private contractual party, Beritech S.A. with the support of the majority of Sat-Connect´s board of directors, invoked Article 8 of the JV Agreement, to compel a buyout of Televative's interests in the Sat-Connect project.[85] No sovereign act was passed that nullified Claimant´s contractual rights and, therefore, an expropriation of Claimant's contractual rights did not occur. It follows that Claimant must proceed its claim in the contractually agreed forum, namely a domestic arbitral tribunal established under the rules and provisions of the 1959 Arbitration Act of Beristan.

97. Furthermore, the tribunal in *Waste Management II* stated that where an investor complains a breach of contract by a State, but where contractual rights have not been denied by a sovereign government and the investor is able to raise its claims in the contractually agreed forum, an expropriation has not occurred.[86] Beristan did not deny Claimant's contractual rights. Therefore, Claimant can pursue its contractual rights under the contractually agreed forum, that is arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan according to Clause 17 of the JV Agreement and therefore, an expropriation did not occur.

98. Therefore, even if the invocation were internationally attributable to Beristan, it does not amount to an expropriation under Article 4 (2) of the BIT because Respondent did not act by sovereign means and it did not deny Claimant's contractual rights.

III. In any event, the invocation of the buyout clause satisfies the requirements of Article 4 (2) of the BIT

99. Article 4 (2) of the BIT furthers provides that an expropriation is legal if it was taken

[85] Uncontested Facts, para 10.

[86] *Waste Management II,* para 175; *BIVAC v Paraguay,* para 110.

> "… 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." (emphasis added).

100. Here, the invocation of the buy-out clause satisfies the requirements of Article 4 (2) of the BIT because (**1**.) a national interest exists; (**2**.) the measures taken are non-discriminatory; and (**3**.) Respondent paid an immediate, full, and effective compensation.

1. Respondent's conduct does not amount to an illegal expropriation because a national interest exists

101. Respondent's conduct does not amount to an illegal expropriation because a national interest exists. As a preliminary matter, States have been afforded a wide margin of appreciation in determining whether an expropriation serves a national interest.[87] Beristan's national interest is to protect its military services from illegal espionage, which is directly connected to the protection of its national security.

102. There are justified concerns that Televative transmitted sensible information about the technology that is developed in the Sat-Connect project to Opulentia. This technology is also developed for military purposes for Beristan. In order to protect Beristan's national security, the buyout clause had to be invoked. Therefore, a national interest within the meaning of Article 4 (2) of the BIT was given.

2. The invocation of the buyout clause was non-discriminatory

103. Moreover, the measures taken were taken on a non-discriminatory basis. A measure is discriminatory if it were directed against persons of a particular nationality, race, religion or political affiliation.[88]

[87] *Newcombe/Paradell*, p. 371.

[88] *Brownlie*, p. 547; *Dolzer/Schreuer*, p. 176.

104. However, no evidence exists that Clause 4 of the JV Agreement was invoked to discriminate Televative or its personnel because of its nationality. Rather, the measures were taken to protect Beristan´s national security. Therefore, they were non-discriminatory.

3. Respondent paid an immediate full and effective compensation

105. According to the Article 4 (3) of the BIT the compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to expropriate is made public. The compensation of the amount of US $47 million is "full". It reflects Televative's total monetary investment in the Sat-Connect project at the time of the invocation of the buy out.[89] A full compensation requires to reimburse the market value, that is US$ 47 million. Particularly, the BIT does not envisage any obligation to include a payment of future profits. Therefore, Respondent fulfilled the requirement to pay a full compensation.

106. Respondent also paid an immediate compensation. Compensation is immediate when it is paid at the same time of or shortly after the expropriation.[90] The money was paid into an escrow account immediately after filing a request for arbitration, which has been made available to Televative and is being held pending the decision in the domestic arbitration.[91] Therefore, the compensation was paid immediately.

107. Furthermore, the compensation was effective as it was paid in a convertible currency.

108. For these reasons, the invocation of the buyout clause satisfies the requirements of Article 4 (2) of the BIT and Respondent's invocation of the buyout clause does not amounts to an illegal expropriation in violation of Article 4 of the BIT.

[89] Uncontested Facts, para 12.

[90] *Krajewski,* p. 195.

[91] Uncontested Facts, para 13.

C. Respondent has upheld its duty to provide Claimant with "fair and equitable treatment"

109. According to Article 2 (2) of the BIT, Respondent is obliged to accord Claimant's investment treatment

> "in accordance with customary international law, including fair and equitable treatment" (…)"

110. The fair and equitable treatment standard constitutes a vaguely and ambiguously defined standard, the scope of which is not precisely defined. It is for this reason that tribunals, occasionally, tend to an overbroad interpretation of the standard. However, the particularities of the present clause suggest that this Tribunal should favor a narrower approach. Article 2 (2)'s explicit reference to "customary international law" must lead to the conclusion that the standard does not extend beyond the protection accorded by the international minimum standard of treatment. In this respect, the tribunal in *Thunderbird v Mexico* held that the threshold for a breach of the fair and equitable treatment standard generally is a high one.[92]

111. Respondent upheld its duty to provide Claimant's investment with fair and equitable treatment in accordance with Article 2 (2) of the BIT because (**I.**) Respondent's proper invocation of Clause 8 of the JV Agreement does not amount a violation of Claimant's legitimate expectations; and (**II.**) the evacuation of Claimant's personnel from Sat-Connect's facilities was not arbitrary and did not constitute the exercise of illegitimate pressure and coercion on Claimant.

I. Respondent's proper invocation of Clause 8 of the JV Agreement does not amount to a violation of Claimant's legitimate expectations

112. As a preliminary matter, Respondent expresses its doubts with regard to the assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate an investor's legitimate expectations. As cogently elaborated by

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

arbitrator *Nikken* in his separate opinion in *AWG Group v The Argentine Republic*, no legal or interpretative basis for such an assertion exists.[93]

113. However, Respondent acknowledges that a majority of tribunals have adopted an interpretation that allocates the protection of an investor's legitimate expectations to the fair and equitable treatment standard.[94]

114. Respondent's proper invocation of Clause 8 of the JV Agreement does not amount to a violation of Claimant's legitimate expectations because (**1**) Respondent's invocation of Clause 8 of the JV Agreement fully complied with Sat-Connect's bylaws and the JV Agreement and, thus, does not constitute a violation of Claimant's legitimate expectations; and (**2**) even if a breach of the JV Agreement existed, such a breach would have been committed by means available to a private contractual party and not by sovereign conduct, which is a precondition for a breach of legitimate expectations in the context of a contractual breach.

1. Respondent's invocation of Clause 8 of the JV Agreement fully complied with Sat-Connect's bylaws and the JV Agreement and, thus, does not constitute a violation of Claimant's legitimate expectations

115. According to the tribunal in *Kuwait v Aminoil*, it is the text of the contract, which embodies the legitimate expectations of the parties.[95] As shown above, the Clause 8 of the JV Agreement provided for the possibility of a buyout in case of a material breach by Televative. For this reason, Claimant could not reasonably expect that the terms of the JV Agreement would not be enforced when the requirements of Clause 8 of the JV Agreement are fulfilled as was, indeed, the case here.

116. Respondent's invocation of Clause 8 was exercised in full compliance with the procedures and requirements set out in Sat-Connect's bylaws and the JV Agreement. Likewise, Respondent did not improperly prevent Claimant from

[93] *AWG v Argentina*, Separate Opinion, para 3.

[94] See instead of many *Duke Energy v Ecuador*, para 340.

[95] *Kuwait v AMINOIL*, p. 976-1053.

completing its contractual duties. Hence, the Respondent's invocation of Clause 8 of the JV Agreement was proper and does not constitute a violation of Claimant's legitimate expectations.

2. Even if a breach of the JV Agreement existed, such a breach would have been committed by means available to a private contractual party and not by sovereign power, which is a precondition for a breach of legitimate expectations in the context of a contractual breach.

117. Since a treaty violation differs from a contract breach, Claimant must establish a breach, which the State committed in the exercise of its sovereign powers. This view is consistent with a line of cases, including *RFCC v Morocco,*[96] *Waste Management*,[97] *Impregilo v Pakistan,*[98] *Duke Energy v Ecuador*,[99] and in the very recent decisions of *Bayindir v Pakistan*[100] and *Burlington v Ecuador*[101].

118. As elaborated above, the majority of Sat-Connect´s board of directors decided on the buyout of Televative's interests in the Sat-Connect project after Televative's unwarranted disclosure of confidential information in violation of Clause 4 of the JV Agreement. In doing so, it acted in full compliance with Clause 8 of the JV Agreement. The action of Sat-Connect's board of directors was, thus, taken in conformity with the private law JV Agreement, is a means typically available to an ordinary contracting party. No sovereign conduct, such as the enactment of a legislative or administrative act, was involved. Therefore, even if a breach of the JV Agreement existed, it would not have been committed by the exercise of sovereign powers. Hence, the preconditions for a violation of Claimant's legitimate expectations are not met.

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[96] *RFCC v Morocco*, paras 33-34.

[97] *Waste Management II*, para 115.

[98] *Impregilo v Pakistan*, paras 266-270.

[99] *Duke Energy v Ecuador*, para 345.

[100] *Bayindir v Pakistan*, para 180.

[101] *Burlington v Ecuador*, para 141.

119. In conclusion, Respondent's proper invocation of Clause 8 of the JV Agreement does not amount to a violation of Claimant's legitimate expectations.

II. The evacuation of Televative's personnel from Sat-Connect's facilities was not arbitrary and did not constitute the exercise of illegitimate pressure and coercion on Claimant

120. Furthermore, Respondent upheld its duty to provide Claimant's investment with fair and equitable treatment because (**1**.) the evacuation of Televative's personnel from Sat-Connect's facilities was not arbitrary and (**2**.) did not constitute the exercise of illegitimate pressure and coercion on Claimant.

1. The evacuation of Televative's personnel from Sat-Connect's facilities was not arbitrary

121. Arbitrary treatment in context to foreign investment is generally understood as not being founded on law, but on other reasons, which are not objective and fair.[102]

122. Because of Respondent's justified buyout of Claimant shares of the Sat-Connect stocks, Claimant's personnel no longer had the right to stay at the Sat-Connect facilities. Further, Respondent had to replace Claimants personnel with adequate labor force. In this respect, it should not be forgotten that Televative personnel passed on confidential information and by this gave reason to invoke the buyout. It is only comprehensible that there was no foundation of trust to keep Televative's personnel on the premise. Any allegations of conspiracy lack credibility. There is no evidence presented by Claimant which proof any collaboration between the Beristan Government and army or Beritech. For these reasons, the evacuation of Televative's personnel from Sat-Connect's facilities and their replacement by local Beristan personnel was not arbitrary.

2. The evacuation of Televative's personnel from Sat-Connect's facilities did not constitute the exercise of illegitimate pressure and coercion on Claimant

[102] *Lauder v Czech Republic*, para 222-232.

123. Lastly, Respondent did not exercise illegitimate pressure or coercion on Claimant either. Claimant was informed on August 28, 2009, to hand over possession of all Sat-Connect site, facilities and equipment subsequent to the lawful buyout of its shares in the joint venture.[103] After an adequate deadline of 14 days had passed, the part of Televative's personnel that unlawfully remained on the premises was asked to leave. [104] At no point in time, Televative staff had to fear for their safety. No intimidation or evidence of a contemporaneous complaint exists. Therefore, the evacuation of Televative's personnel from Sat-Connect's facilities did neither constitute illegitimate pressure nor coercion.

124. Summing up, Respondent upheld its duty to provide Claimant's investment with fair and equitable treatment in accordance with Article 2 (2) of the BIT in all respects.

D. THE EVACUATION OF TELEVATIVE'S PERSONNEL DOES NOT AMOUNT TO AN ILLEGAL DISCRIMINATION IN VIOLATION OF ARTICLE 2 (3) OF THE BIT

125. Respondent's measures do not amount to an illegal discrimination in violation of Article 2 (3) of the BIT because the evacuation was not taken on the basis of the nationality of Televative's personnel.

126. The actions would have been discriminatory if they were directed against persons of a particular nationality, race, religion or political affiliation.[105] The personnel that were requested to leave Beristan are employed by Televative. After breaching the confidentiality clause and the legitimate buyout, Claimant was not entitled anymore to occupy the Sat-Connect facilities and therefore, Claimant lost the right to fill jobs with its employees. Therefore, the demand to leave Beristan was due to the personnel's employment at Televative but not due to their nationality.

[103] Uncontested Facts, paras 10/11.

[104] Clarifications, question 248.

[105] *Brownlie*, p. 547; *Dolzer/Schreuer*, p. 176.

127. For these reasons, the evacuation of Televative's personnel does not amount to an illegal discrimination.

E. EVEN IF THIS TRIBUNAL WERE TO FIND THAT RESPONDENT VIOLATED A SUBSTANTIVE STANDARD IT IS ENTITLED TO RELY ON THE ESSENTIAL SECURITY CLAUSE OF ARTICLE 9 OF THE BIT AS A DEFENSE TO CLAIMANT'S CLAIMS

128. The protection granted by a BIT understandably cannot be unlimited but must necessarily be subjected to overwhelming needs of the State. Therefore, security clauses are included in BITs that provide that in certain exceptional circumstances, where the essential interests of a State are at stake, the equities of the individual situation may override the general obligation.[106] The State parties to the Beristan-Opulentia BIT recognized this general rule and agreed on Article 9 of the BIT as an essential security clause that stipulates in its relevant part that:

> "Nothing in this Treaty shall be construed:
> 1. …
> 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**." (emphasis added).

129. Respondent is entitled to rely on the essential security clause of Article 9 of the BIT as a defense to Claimant´s claims because (**I**.) Article 9 of the BIT is self-judging and, therefore, Respondent's appreciation that a situation of an essential security interest was at stake is not judicially reviewable; and (**II**.) even if Respondent's appreciation were judicially reviewable, the review would be limited to good faith and Respondent acted in good faith. (**III**.) In any event, the underlying facts support the existence of an essential security interest and therefore, Respondent may even rely on Article 9 of the BIT if it were fully judicially reviewable.

I. Article 9 of the BIT is self-judging and therefore, Respondent's appreciation that a situation of an essential security interest was at stake is not judicially reviewable

[106] *Parish*, p. 178.

130. Article 9 of the BIT is clear on its wording. The formulation "*it considers necessary"* indicates an explicitly self-judging character since it gives the right to the State to take any measures that it considers necessary for the protection of its essential security interests.[107] According to the language it is clear that the State taking action has the right to determine whether its "essential security interest" require protection.[108] Therefore, self-judging clauses allow for the subjective evaluation of a situation by the State claiming the derogation and, thus, grant it wide discretion.[109] It, accordingly, falls within Respondent's full discretion to determine whether the measures complained of concern its essential security interest.[110] The exercise of such discretion must not be second-guessed in judicial proceedings.

131. This reading was confirmed by tribunals in *CMS,*[111] *LG&E,*[112] *Enron*[113] and *Sempra*[114] which ruled that the security exception in Article XI of the Argentina-US BIT (1991)[115] is not self-judging because it does not contain the expression "it considers necessary." In the *e contrario* conclusion, Article 9 of the BIT, which incorporates this language, should be deemed self-judging.

132. Similarly, the ICJ ruled in the *Nicaragua* case that the respective essential security provision was not self-judging because it did not use the explicit

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[107] *Newcombe/Paradell*, p. 493; see also *Nicaragua v USA*, para 222.

[108] *Reinisch*, Necessity in International Investment Arbitration, p. 210.

[109] *Briese/Schill*, p. 5; *Laird*, p. 243; *Reinisch*, Necessity in International Investment Arbitration, p. 209.

[110] See *Yannaca-Small*, p. 95 *Burke-White/v Staden*, p 53; *Briese/Schill*, p. 5; *Laird*, p. 242.

[111] *CMS v Argentina*, paras 336-373.

[112] *LG&E v Argentina*, para 212.

[113] *Enron v Argentina*, paras 322-342.

[114] *Sempra v Argentina*, paras 364-391.

[115] „The treaty shall not preclude the application by either Party of measures **necessary**..."(empasis added).

language of "it considers necessary."[116] The Court, therefore, also accepted that clauses that include the phrase "it considers necessary" are self-judging. This judgment was confirmed in the *Oil Platforms* case.[117]

133. Lastly, the self-judging nature of an essential security clause may also be traced back to the political questions doctrine as a general principle in international law.[118] This doctrine states that disputes involving political questions impinging on a country's vital interest are not justiciable and exempt from review by international courts and tribunals.[119]

134. For these reasons, Article 9 of the BIT is self-judging and therefore, Respondent's appreciation that a situation of an essential security interest was given is not judicially reviewable. Hence, this Tribunal should refrain from second-guessing Beristan's reasons for invoking Article 9 of the BIT.

II. Even if Article 9 of the BIT were judicially reviewable, the review would be limited to good faith and Respondent acted in good faith

135. Even if Article 9 of the BIT were judicially reviewable, the review would be limited to the determination of whether the invocation of Article 9 of the BIT and the measures adopted were taken in good faith. The principle of good faith requires a State to refrain from dishonesty, unfairness and conduct that takes undue advantage of another party.[120] Substantive review of whether a situation threatens an essential security interest of the State exists, however, is not covered by the scope of good faith review.[121]

136. The strong likeliness that information has been passed to Opulentia serves as a rational basis for Respondent's invocation of the essential security clause.

[116] *Nicaragua v United States of America,* p. 14, para 222.

[117] *Oil Platforms,* para 73.

[118] *Burke-White/Staden,* p. 54; *Arkande/Williams,* p. 381.

[119] *Akande/Williams,* p. 381.

[120] *Hahn*, p. 599; *Briese/Schill*, p. 5.

[121] *Enron v Argentina*, para 388.

Respondent earnestly considered that a leak of such sensible military information would have had a negative impact on Beristan's national security. It acted merely in order to protect its national security. Such conduct cannot be deemed to be dishonest or unfair. Therefore, Respondent complied with the principle of good faith.

III. In any event, the underlying facts support the existence of an essential security interest and, therefore, Respondent can even rely on Article 9 of the BIT if it were fully judicially reviewable

137. Even if the clause were judicially reviewable, the underlying facts support the existence of an essential security interest. The term "essential security interest" in Article 9 of the BIT is not defined in the Beristan-Opulentia BIT.

138. Considering the highly sensitive and political nature of the term, which is directly connected to the essence of a State's sovereignty, the definition of an essential security interest must necessarily be left to the discretion of the State.[122] Respondent saw its essential security interest endangered due to foreign espionage that endangered Beristan's defense technology. This is politically legitimate concern that is covered by the term "essential security interest." Therefore, the existence of an essential security interest is given.

139. However, even if the Tribunal followed the view of the arbitral tribunals in *Sempra v Argentina*[123] and *Enron v Argentina*[124] that the term "essential security interest" takes its meaning by reference to the doctrine of necessity in Article 25 ILC Respondent can still rely on the essential security clause.

140. Article 25 ILC reads

[122] *El Paso v Argentina*, Rejoinder Slaughter/Burke-White, para 43; *Alvarez, p.* 56-57; *Laird*, p. 245; *Reinisch,* Necessity in International Investment Arbitration, p. 209.

[123] *Sempra v Argentina*, paras 375-378.

[124] *Enron v Argentina*, para 333.

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the **only way for the State to safeguard an essential interest against a grave and imminent peril**
> (b) . . . " (emphasis added).

141. Article 25 (1) (a) ILC requires that the act of the State is the only way for the State to safeguard an essential interest against a grave and imminent peril. In the present case, the underlying facts show the existence of a national security interest because (**1**.) a grave and imminent peril was given; and (**2**.) and the measures taken by Beristan were the only way to safeguard an essential interest.

1. A grave and imminent peril was given

142. The peril has to be objectively established.[125] Claimant leaked information about the Sat-Connect project – including information about the technology, systems, intellectual property and encryption to be used and other trade secrets – to the Government of Opulentia. These advanced satellite and telecommunications technology of the Sat-Connect project, which include systems that are being used by the Beristan armed forces, directly implicate the national security of Beristan.[126] Furthermore, the statement of the government defense analyst is an official and trustworthy source of information. The issues that defense analysts deal with include the detailed analysis of situations that deal directly with security policies and procedures on the national or international level. Therefore, he is professionally occupied with the detection of leaks within Beristan´s defense system. It was his duty to inform the Government about potential leaks. For these reasons, Beristan could rely on this source of information and the peril was objectively established.

143. The peril is also grave because Beristan's armed services were going to upgrade their communications systems with powerful satellite and ground systems

[125] ILC Art. 25, para 14.

[126] Uncontested Facts, para 6.

developed by Sat-Connect.[127] These systems were going to use encrypted communications. Since some encryption keys have been transmitted to Opulentia the defense mechanism is not entirely operational, which is a grave peril.

144. The peril was imminent. Encryption ciphers, keys and pads of the Sat-Connect project already have been transmitted to Opulentia[128] what compromises the entire Sat-Connect project.[129] Therefore, the peril was present and enduring what qualifies as imminent.

145. Therefore, the leak of sensible information is a grave and imminent peril for the national security.

2. The measures taken by Beristan were the only way to safeguard an essential interest

146. Furthermore, the measures taken by Beristan were the only way to safeguard an essential interest. No other measure would have been as effective. The exact source of the information leak could not be detected and there was no time to find out how the leak could have been closed. Furthermore, Opulentia enacted laws that compel disclosure of confidential information.[130] That means that Televative would have been forced to pass on information to Opulentia. The only way to make sure that a transfer of further information would not happen was to make Televative and its personell leave Beristan.

147. Hence, the requirements of Article 25 ILC are fulfilled and therefore, the underlying facts support the existence of an essential security interest.

148. For these reasons, Respondent is entitled to rely on the essential security clause of Article 9 of the BIT as a defense to Claimant´s claims.

[127] Clarifications, question 178.

[128] Clarifications, question 178.

[129] Uncontested Fact, para 8.

[130] Clarifications, question 178.

Conclusion on the Merits

149. Respondent has fulfilled its obligations with respect to refrain from violation of the JV Agreement, expropriation, fair and equitable treatment, discrimination and unlawfully relying on the essential security clause of Article 9 of the BIT.

PART THREE: RESPONDENT'S REQUESTS FOR RELIEF

In the light of the submissions above, Respondent respectfully asks that the Tribunal issue an award in favor of the Republic of Beristan and against Televative Inc.

(1.) declaring that this Tribunal lacks jurisdiction to hear this dispute;

(2.) denying and dismissing Televative's claims in their entirety; and thus

(3.) declaring that the case is without merit.

Respectfully submitted on September 19, 2010 by

_____/s/_____
Team Hackworth

on behalf of Respondent
Government of the Republic of Beristan