THIRD ANNUAL FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION 2010

TEAM (C_KOO)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/X/X

BETWEEN:

TELEVATIVE INC.

CLAIMANT/INVESTOR

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

RESPONDENT/STATE

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

LIST OF AUTHORITIES……………………………………………..v

LIST OF LEGAL SOURCES……..…………………………………vii

STATEMENT OF FACTS………..……………………………………1

ARGUMENTS…………..…………………………………………...4

PART ONE:

RESPONDENT OBJECTS TO JURISDICTION……………………………………………………………4

A. CONTRACT CLAIMS BROUGHT BY CLAIMANT ARE INADMISSIBLE IN LIGHT OF CLAUSE 17 OF THE JV AGREEMENT……………………………………………5

I. ARTICLE 11 OF THE BIT IS A GENERAL PROVISION SUBJECT TO MODIFICATION BY THE PARTIES TO AN UNDERLYING CONTRACT………………7

II. CONTRACTUAL CLAIMS ARISING OUT OF THE JV AGREEMENT ARE INADMISSIBLE……………………………………………….9

B. ARTICLE 10 OF THE BIT DOES NOT PERMIT ELEVATION OF CONTRACTUAL CLAIMS TO TREATY CLAIMS……………………………………………..13

I. ARTICLE 10 OF THE BIT REQUIRES A RESTRICTIVE INTERPRETATION…………….14

II. THE OBJECT AND PURPOSE OF THE BIT IS TO PROVIDE A LEGAL FRAMEWORK FOR INVESTMENT ACTIVITY……………………………….17

PART TWO:

BERISTAN DID NOT IMPROPERLY INVOKE THE BUYOUT CLAUSE OF THE JOINT VENTURE AGREEMENT, NOR DID IT BREACH THE AGREEMENT BY ITS ACTIONS.............................. 19

A. BERITECH IS A PRIVATE CORPORATION UNDER INTERNATIONAL LAW AND ITS ACTIONS ARE NOT ATTRIBUTABLE TO BERISTAN...19

i. BERITECH IS NOT AN ORGAN OF THE STATE 20

ii. BERITECH HAS NOT BEEN EMPOWERED TO EXERCISE ANY ELEMENTS OF GOVERNMENT AUTHORITY...23

PART THREE:

BERISTAN HAS NOT EXPROPRIATED TELEVATIVE'S INVESTMENT..26

A. BERITECH'S ACTIONS ARE NOT ATTRIBUTABLE TO BERISTAN, AND THEREFORE ITS ACTIONS CANNOT CONSTITUTE EXPROPRIATION..26

B. TELEVATIVE'S ALLEGATIONS OF IMPROPER BREACH OF THE JV AGREEMENT DO NOT QUALIFY AS EXPROPRIATION UNDER INTERNATIONAL LAW...................................27

i. BERITECH EXERCISED NO SOVEREIGN AUTHORITY IN EXECUTING THE BUYOUT CLAUSE...28

ii. BERISTAN DID NOT DEPRIVE TELEVATIVE FROM SEEKING REMEDY OF THE ALLEGED BREACH IN STATE COURT………..29

C. IN THE ALTERNATIVE, BERITECH'S EXERCISE OF THE BUYOUT CLAUSE IS LEGALLY JUSTIFIED UNDER THE TREATY..31

i. BERISTAN TOOK MEASURES TO PROTECT THE PUBLIC INTEREST AND NATIONAL SECURITY..32

ii. BERISTAN'S MEASURES ARE NOT DISCRIMINATORY………………………………33

iii. BERISTAN'S ACTIONS WERE IN ACCORDANCE WITH DUE PROCESS OF LAW...33

iv. BERISTAN OFFERED TELEVATIVE IMMEDIATE FULL AND EFFECTIVE COMPENSATION...34

PART FOUR:

BERISTAN'S ACTIONS HAVE NOT VIOLATED CUSTOMARY STANDARDS OF INTERNATIONAL LAW....... 36

A. BERISTAN AFFORDED TELEVATIVE FAIR AND EQUITABLE TREATMENT OF ITS INVESTMENT 37

i. BERISTAN DID NOT DENY JUSTICE OR PROPER DUE PROCESS TO TELEVATIVE.......38

ii. BERISTAN ACTED IN A REASONABLE MANNER AND DID NOT VIOLATE TELEVATIVE'S LEGITIMATE INVESTMENT EXPECTATIONS.......40

B. BERISTAN'S ACTIONS DID NOT VIOLATE THE STANDARD OF FULL PROTECTION AND SECURITY UNDER CUSTOMARY INTERNATIONAL LAW....... 41

C. BERISTAN DID NOT SUBJECT TELEVATIVE'S INVESTMENT TO UNJUSTIFIED OR DISCRIMINATORY MEASURES....... 42

PART FIVE:

BERISTAN IS ENTITLED TO RELY ON ARTICLE 9 OF THE BERISTAN-OPULENTIA BIT AS A DEFENSE....... 44

A. ARTICLE 9 IS INHERENTLY SELF-JUDGING....... 44

B. THE CLAUSE GRANTS BROAD DISCRETION TO BERISTAN TO PROTECT ITS ESSENTIAL SECURITY INTERESTS....... 46

C. BERISTAN INVOKED ARTICLE 9 IN GOOD FAITH....... 48

LIST OF AUTHORITIES

BOOKS

Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, (1990) (hereinafter: Brownlie)

Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (1st Ed. 2008) (hereinafter: Dolzer & Schreuer)

R. Jennings & A. Watts, OPPENHEIM'S INTERNATIONAL LAW, (9th Ed. 1992) (hereinafter: Jennings & Watts)

C. McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (1st Ed. 2007) (hereinafter: McLachlan)

M.L. Moses, THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION (2008) (hereinafter: Moses)

Peter Muchlinski, MULTINATIONAL ENTERPRISES AND THE LAW (1995) (hereinafter: Muchlinksi)

Andrew Newcombe & Lluis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES, (1st Ed., 2009) (hereinafter: Newcombe & Paradell)

Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES, (2010) (hereinafter: Salacuse)

Monique Sasson, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION, (2010) (hereinafter: Sasson)

Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION (2010) (hereinafter: Vandevelde)

Katia Yannaca-Small (ed.), ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS (1st Ed. 2010) (hereinafter: Yannaca-Small)

INTERNATIONAL TREATISES

A.H. Roth, *The International Minimum Standard*, (Leiden, 1949) (hereinafter: AH Roth)

UNCTAD, Most Favored Nation Treatment, UNCTAD/ITE/IIT/10 (Vol. III) (1999) (hereinafter: Most Favored Nation Treatment)

UNCTAD, Indirect Expropriation and the Right to Regulate in International Investment Law, 2004/4 Working Papers on International Investment (2004) (hereinafter: UNCTAD Indirect Expropriation)

UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (2007). (hereinafter: UNCTAD Bilateral Investment Treaties)

JOURNALS

Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l Law 365 (2003) (hereinafter: Akande & Williams)

William Burke-White & Andreas von Staden, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l 365 (2003) (hereinafter: Burke-White & von Staden)

Michael Hahn, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558 (1991) (hereinafter: Hahn)

Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 Am. J. Int'l Law 424 (1999) (hereinafter: Schloemann & Ohlhoff)

Yuval Shany, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 European J. Int'l Law 907 (2005) (hereinafter: Shany)

OTHER SOURCES

Robyn Briese & Stephan Schill, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, Australian National University (2009) (hereinafter: Briese & Schill)

ILC Second Reading Commentary, Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ILC Second Reading Commentary)

NAFTA Free Trade Commission, Interpretation of Article 1105(1) (2001) (hereinafter: NAFTA Free Trade Commission)

Olivier de Schutter, *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights*, Center for Human Rights and Global Justice Working Paper (2005) (hereinafter: De Schutter)

Restatement Third of the Foreign Relations Laws of the United States (hereinafter: Restatement of Foreign Relations)

LIST OF LEGAL SOURCES

ICJ Decisions

Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 ICJ Reports (4 June 2008) (hereinafter: *Djibouti*)

Case Concerning Elettronica Sicula S.p.A. (United States v. Italy), 1989 ICJ Reports (20 July 1989) (hereinafter: *ELSI*)

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits) 1984 ICJ Reports (10 May 1984) (hereinafter: *Military and Paramilitary Activities*)

UNCITRAL Decisions

Eastern Sugar v. Czech Republic, (Partial Award) (27 March 2007) (hereinafter: *Eastern Sugar*)

Ronald Lauder v. The Czech Republic, (Final Award) (3 September 2001) (hereinafter: *Lauder*)

Saluka Investment BV (Netherlands) v. The Czech Republic, (Partial Award) (17 March 2006) (hereinafter: *Saluka*)

Himpurna California Energy Ltd. v. Republic of Indonesia, (Interim Award) (26 September 1999) (hereinafter: *Himpurna California Energy*)

NAFTA Decisions

Int'l Thunderbird Gaming Corp. v. United Mexican States, (Award) (26 January 2006) (hereinafter: *Thunderbird*)

Metalclad Corp v. United Mexican States (Award) (30 August 2000) (hereinafter: *Metalclad*)

SD Myers v. Canada, (Partial Award) (21 October 2002) (hereinafter: *SD Myers*)

ICSID Decisions

ADC Affiliate Ltd. and ADC & ADMC Management Ltd v. Republic of Hungary, ICSID Case No. ARB/03/16 (Award) (2 October 2006) (hereinafter: *ADC Affiliate*)

Alex Genin, Eastern Credit Ltd. Inc. & AS Baltoil (US) v. Republic of Estonia, ICSID Case No. ARB/99/2 (Award) (25 June 2001) (hereinafter: *Alex Genin*)

Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia, ICSID Case No. ARB/81/1 (Merits) (10 May 1988) (hereinafter: *Amco Asia*)

Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3 (Final Award) (27 June 1990) (hereinafter: *AAPL*)

Azurix v. Argentine Republic, ICSID Case No. ARB/01/12 (23 June 2006) (hereinafter: *Azurix*)

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (Award) (24 July 2008) (hereinafter: *Biwater*)

CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 (12 May 2005) (hereinafter: *CMS Gas*)

Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (Award) (22 May 2007) (hereinafter: *Enron*)

Feldman v. United Mexican States, ICSID Case No. Arb(AF)/99/1 (19 December 2002) (hereinafter: *Feldman*)

Helnan Int'l Hotels A/S v. Islamic Republic of Egypt, ICSID Case No. ARB/05/19 (Jurisdiction) (17 October 2006)

Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 (Jurisdiction) (22 April 2005) (hereinafter: *Impregilo*)

Jan de Nul NV and Dredging Int'l NV v. Egypt, ICSID Case No. ARB/04/13 (Merits) (6 November 2008) (hereinafter: *Jan de Nul*)

LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3 (Merits) (12 November 2008) (hereinafter: *LESI*)

LG&E Energy Corp v. Argentine Republic, ICSID Case No. ARB/02/1 (Decision on Liability) (3 October 2006) (hereinafter: *LG&E*)

Loewen Group, Inc. & Raymond L. Loewen v. United States, ICSID Case no. ARB(AF)/98/3 (23 June 2003) (hereinafter: *Loewen Group*)

Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Award) (11 October 2002) (hereinafter: *Mondev*)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador, ICSID Case No ARB/06/11 (Jurisdiction) (29 September 2008) (hereinafter: *Occidental*)

Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 (Merits) (11 September 2007) (hereinafter: *Parkerings-Compagniet*)

Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7 (Jurisdiction) (30 June 2009)

Sempra Energy Int'l v. The Argentine Republic, ICSID Case No. ARB/02/16 (Award) (28 September 2007) (hereinafter: *Sempra Energy*)

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID CASE No. ARB/01/13 (6 August 2003) (hereinafter: Pakistan)

SGS Société Générale de Surveillance S.A v. Republic of the Philippines, ICSID CASE No. ARB/02/6 (29 January 2004) (hereinafter: Philippines)

Siemens AG v. The Argentine Republic, ICSID Case No. ARB/02/8 (Jurisdiction) (3 August 2004) (hereinafter: *Siemens*)

Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3 (Merits) (20 May 1992) (hereinafter: *Southern Pacific*)

Tecnicas Medioambientales Tecmed, SA v. United Mexican States, ICSID Case No ARB(AF)/00/2 (Award) (29 May 2003) (hereinafter: *Tecmed*)

TOTO Costruzioni Generali S.p.A. v. Lebanon, ICSID Case No. ARB/07/12 (Jurisdiction) (11 September 2009) (hereinafter: *TOTO Costruzioni*)

Waste Management Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3. (30 April 2004) (hereinafter: *Waste Management*)

Wena Hotels v. Egypt, ICSID Case No. ARB/98/4 (Partial Award) (8 December 2000) (hereinafter: *Wena Hotels*)

OTHER DECISIONS

Eureko B.V. v. Republic of Poland, Ad Hoc Proceeding (Partial Award) (19 August 2005 (hereinafter: *Eureko*)

TREATIES AND LAWS

BILATERAL INVESTMENT TREATIES

Canada Model Foreign Investment Protection and Promotion Agreement (hereinafter: *2004 Canadian Model FIPA)*

United States-Chile Free Trade Agreement (2004) (hereinafter: *US-Chile FTA*)

United States-Uruguay Free Trade Agreement (2005) (hereinafter: *US-Uruguay FTA*)

United States-Peru Free Trade Agreement (hereinafter: *US-Peru FTA*)

United States-Colombia Free Trade Agreement (hereinafter: *US-Colombia FTA*)

United States 2004 Model Bilateral Investment Treaty (2004) (hereinafter: US Model BIT)

MULTILATERAL TREATIES

General Agreement on Trade and Tariffs (30 October 1947) (hereinafter: *GATT*)

Energy Charter Treaty (17 December 1991) (hereinafter: *Energy Charter Treaty*)

ICSID Convention, Regulations and Rules (2006) (hereinafter: *ICSID Convention*)

North American Free Trade Agreement (1994) (hereinafter: *NAFTA*)

Dominican Republic-Central America Free Trade Agreement (2004) (hereinafter: *CAFTA*)

UN Convention on the Law of the Sea, 1833 UNTS 3 (10 December 1982) (hereinafter: *Law of the Sea*)

ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UN GA Res 56/83, [2001-II-1 Y.B.I.L.C. 30] (2001) (hereinafter: *Responsibility of States*)

Vienna Convention on the Law of Treaties (27 January 1980) (hereinafter: *Vienna Convention*)

STATEMENT OF FACTS

1. The Government of the Republic of Beristan ("Beristan" or "Respondent") and the Government of the United Federation of Opulentia ("Opulentia") entered into a bilateral investment treaty ("BIT") on March 20, 1996.

2. The BIT was designed to improve economic cooperation between the countries aiming to establish mutual protection of investments based on international agreements.

3. Televative Inc. ("Claimant" or "Televative") is a multinational enterprise specializing in satellite technology. Televative is incorporated in Opulentia. Beritech S.A. ("Beritech") is a government owned corporation established under the laws of Beristan. On October 18, 2007, Beritech and Televative established Sat-Connect, S.A. ("Sat-Connect") by entering into a joint venture agreement ("JV Agreement).

4. The purpose of Sat-Connect was to develop and deploy a satellite network to be used for civilian and military purposes in the region encompassing Beristan.

5. Confidentiality was of importance to the Sat-Connect project, as the Beristan military would employ the system. As a result, an extensive provision in regard to confidentiality was inserted into the JV Agreement.

6. It was agreed between the parties that any breach of confidentiality under Clause 4 would be deemed a material breach of the JV Agreement.

7. On August 12, 2009 an independent report stated that confidential information about Sat-Connect had been relayed to the Government of Opulentia, in violation of the confidentiality provision. This breach of confidentiality constituted a material breach of the JV Agreement.

8. Beritech and Televative consented to a buyout clause contained in the JV Agreement, by which Beritech would be entitled to purchase Televative's interest in Sat-Connect in the event of material breach.

9. Following the information leak, the Sat-Connect board of directors discussed allegations of breach of confidentiality at a meeting of the board of directors on August 21, 2009. All nine board members were present at the meeting, including the four board members elected by Televative.

10. The buyout provision of the JV Agreement was also discussed at the August 21 board of directors meeting in the presence of all nine board members.

11. On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked the buyout clause contained in Clause 8 of the JV Agreement. Following acknowledgment of a quorum present for the meeting, a vote was held to determine whether the buyout clause would be invoked.

12. Following the decision of a majority of the quorum Beritech notified Televative that they would purchase Televative's interest in Sat-Connect pursuant to the terms of the JV Agreement.

13. On September 11, 2009, staff from the civil engineering section of the Beristan army assisted Beritech in ensuring that the Sat-Connect facilities were turned over pursuant to the buyout clause invoked in the JV Agreement.

14. The JV Agreement contained an exclusive forum selection clause, Clause 17, which was freely consented to by the parties to the contract.

15. Clause 17 stipulates that the parties irrevocably submit to arbitration under the laws of Beristan, and waive all objections to such arbitration, in the event of any dispute arising out of or relating to the JV Agreement.

16. In conformity with Clause 17 and the terms of the JV Agreement, Beritech filed a request for arbitration on October 19, 2009.

17. On October 28, 2009, Televative requested Arbitration in accordance with ICSID's Rules of Procedure, and notified Beristan. Televative states that jurisdiction is established by the BIT between Beristan and Opulentia, and because both countries are contracting states to the ICSID Convention.

PART I:

RESPONDENT OBJECTS TO JURISDICTION

CLAIMANT'S CLAIMS ARE INADMISSIBLE AND THE TRIBUNAL LACKS JURISDICTION

1. On October 19, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement.[1] Both Beritech and Televative allege breach of contract under the JV Agreement; Beritech, alleging breach of the Clause 4 Confidentiality Provision, and Televative, alleging breach of the Clause 8 Buyout provision.[2]

2. Televative's allegations of breach of the Beristan-Opulentia BIT arise directly out of the alleged breach of the JV Agreement Buyout provision, claiming that Respondent was behind the decision to invoke Clause 8, and that Respondent's actions subsequent to buyout interfered with Televative's contractual rights.[3]

3. The JV Agreement was negotiated and entered into by Beritech and Televative; the agreement contains an exclusive forum selection provisions, Clause 17, pursuant to which Beritech has commenced arbitration[4], and under which Televative has waived any objections to the arbitration procedures set-forth in that Clause.[5]

4. Claimant's refusal to respond to the dispute settlement terms irrevocably submitted to in the JV Agreement constitutes breach of the Agreement, as all claims alleged by Claimant against Respondent in these proceedings arise out of alleged improper invocation of the Buyout provision contained the JV Agreement, and Respondent's actions subsequent to Beritech's invocation of that clause. Clause 17 (Dispute Settlement) of the JV Agreement governs all claims brought by Claimant in the present dispute, and Claimant is should respond to the already commenced arbitration procedures initiated under the dispute settlement clause.

[1] Record, Annex 2, ¶ 16
[2] Record, Minutes, ¶ 15
[3] *Id.*
[4] Record, Annex 2, ¶ 13
[5] Record, Annex 3, Clause 17

5. It is acknowledged in the record that a period of nearly two years of good relations existed between Beritech and Claimant.[6] No dispute arose between the parties until the breach of Clause 4 of the JV Agreement, which did not come to light until August 12, 2009.

6. Subsequent to that breach of contract, Beritech, independent of Respondent, invoked the buyout clause of the JV Agreement on August 27, 2009, and on October 19, 2009, requested arbitration pursuant to the terms of the JV Agreement.

7. All claims brought by Claimant in the present proceedings arise out of their disputed interpretation of and allegations surrounding invocation of the buyout clause contained in the JV Agreement, and should be settled pursuant to that agreement.

8. Claimant improperly brings these claims before the present Tribunal on the basis of Respondent's consent to ICSID jurisdiction found in the Beristan-Opulentia BIT. Respondent will demonstrate that Article 11 of the BIT is not sufficient to override the exclusive forum selection clause contracted to in the JV Agreement.

9. Respondent will further demonstrate that Article 10 of the BIT should be interpreted restrictively, and contractual allegations arising out of the JV Agreement should not be elevated to treaty claims purporting to allege violations of substantive standards contained in the BIT. Furthermore, where the party to the contract is an entity distinct from the state, the umbrella clause will not apply.[7]

A. CONTRACT CLAIMS BROUGHT BY CLAIMANT ARE INADMISSIBLE IN LIGHT OF CLAUSE 17 OF THE JV AGREEMENT

1. ICSID Arbitral Tribunals have confronted objections to jurisdiction in prior disputes. The Tribunals presiding over *SGS v. Pakistan* ("*Pakistan")* and *SGS v. Philippines* ("*Philippines*") dealt with similar claims regarding the introduction of contract claims to international treaty arbitration. Respondent submits that the present dispute requires an

---

[6] Record, Minutes, ¶ 15
[7] *Yannica-Small*, 499

analysis and determination consonant with the decisions reach by the *Pakistan and Philippines* Tribunals.

2. SGS was the claimant in both the *Philippines* and *Pakistan* proceedings, and attempted to bring contractual claims before ICSID Tribunals despite valid, exclusive forum selection clauses contained in the underlying agreements at issue in those disputes. In both cases, SGS based ICSID jurisdiction primarily on the bases of investment treaty provisions. The first, a dispute settlement provision contained in the relevant BIT submitting the parties to ICSID jurisdiction, and the second, an umbrella clause which SGS claimed was broad enough to bring contract claims within the reach of ICSID jurisdiction.

3. Both the Tribunal in *Pakistan* and that in *Philippines* ultimately decided that they would not address claims brought before them that are subject to exclusive forum selection clauses, whether or not jurisdiction over those claims could be generally established.

4. Televative, in the present dispute, brings contractual claims before the Arbitral Tribunal despite the freely negotiated, valid, and exclusive forum selection clause contracted to in the underlying JV Agreement.

5. Televative, like SGS, Claimant also bases jurisdiction on the general legal framework created by the dispute settlement and umbrella clause provisions in the Beristan-Opulentia BIT.

6. The reasoning employed in the *Pakistan* and *Philippines* decisions is helpful as Respondent will demonstrate that the present Arbitral Tribunal is not empowered to decide claims brought by Televative that are subject to the exclusive jurisdiction provision in the underlying joint venture agreement.

I. ARTICLE 11 OF THE BIT IS A GENERAL PROVISION SUBJECT TO MODIFICATION BY PARTIES TO AN UNDERLYING CONTRACT

7. Article 25(1) of the ICSID Convention establishes jurisdiction over BIT claims derived from consent to ICSID Arbitration provided within the BIT between the contracting parties.[8] It is clear by the language of the BIT between Beristan and Opulentia that Respondent intended to consent to arbitration arising out of allegations of substantive treatment violations arising from the BIT and assumed by Respondent directly. The language of the BIT follows:

> "For the purpose of resolving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter"[9]

The consent to jurisdiction established in that provision is limited in scope to "investments… under this Agreement."

8. There is no language in Article 11 or any other article of the Beristan-Opulentia BIT to imply that Respondent intended to consent to ICSID Arbitration for alleged breaches of contract governed by a dispute settlement provision containing an exclusive forum selection clause in a separate agreement distinct from the BIT and entered into by a party distinct from Respondent.

9. Respondent submits that such claims are inadmissible, as they arise not from the BIT but from the JV Agreement, and are governed by the dispute settlement provision contained in Clause 17. The *Philippines* Tribunal's analysis provides guidance for analysis of Article 11 of the Beristan-Opulentia BIT.

10. In the *Philippines* case, SGS contracted to carry out pre-shipment inspection services in Respondent's ports.[10] The agreement contracted to by SGS contained an exclusive forum selection clause, similar to that in the JV Agreement between Beritech and Televative.

---

[8] *ICSID Convention, Article 25*
[9] Record, Annex 1, Article 11
[10] *Philippines*, ¶ 19

The forum selection clause provided that the entire agreement would be governed by the laws of the Philippines, and that all disputes in connection with either party to the agreement be filed at the host country's courts.[11]

11. Both the Beristan-Opulentia BIT and the Switzerland BIT referenced in *Philippines* provided for settlement of "disputes with respect to investments".[12] In *Philippines*, SGS alleged claims for unpaid monies provided for in the underlying contract.[13] Televative alleges breach of the JV Agreement for improper invocation of the buyout clause.[14]

12. The Tribunal in *Philippines* determined that jurisdiction over contract a claim is established in broadly interpreted dispute settlement provisions in investment treaties. While such claims may be relevant to BIT standards, they are inadmissible due to deference to the underlying exclusive forum selection clause.[15]

13. The Tribunal in *Philippines* determined that the dispute settlement provision in the BIT is *prima facie*, a "general provision" encompassing disputes arising from alleged BIT violations as well as those allegations arising from underlying contracts.[16]

14. Going forward, the *Philippines* Tribunal relied the Tribunal in the *Pakistan* case, given the similar terminology contained in the relevant provisions.[17]

15. The *Pakistan* Tribunal found that the language, "disputes with respect to investments," was descriptive of the factual subject matter of the dispute, but does not necessarily relate to the legal basis or cause of action with respect to claims brought before the Tribunal based in contract.[18]

[11] *Philippines* ¶ 22
[12] *Philippines*, ¶ 130; Record, Annex 1, Article 11
[13] *Philippines*, ¶ 15
[14] Record, Minutes, ¶ 15
[15] *Philippines*, ¶ 177
[16] *Id*, ¶ 131
[17] *Id*, ¶ 133
[18] *Pakistan*, ¶ 161

16. While factual allegations surrounding the contractual dispute could be relative to an analysis of breach of treaty allegations, the Tribunal held that without more specific language, no implication arises that both BIT claims and contract claims were intended to be encompassed by the dispute settlement provision of the BIT, nor that such language could be construed to override otherwise valid non-ICSID forum selection clauses.[19]

17. In the present dispute, the language of Article 11 of the Beristan-Opulentia BIT is a general provision, and there is no language contained in the BIT to imply that its terms should override freely negotiated exclusive forum selection clauses entered in to by the parties to the underlying contract.[20]

18. Analysis of the dispute settlement provisions above may be contrasted from that in the *Lanco v. Argentina* case, where the Tribunal interpreted the dispute settlement provision in the underlying contract to be a mere acknowledgement of administrative jurisdiction, rather than a binding obligation of the parties.[21]

19. Unlike the dispute settlement provision relevant to the contract in the *Lanco* case, the JV Agreement in the present case is a *prima facie* binding obligation on parties to the contract, like those in *Pakistan* and *Philippines*.[22]

II. DESPITE GENERAL ICSID JURISDICTION ARISING OUT OF RESPONDENT'S CONSENT TO THE BIT, CONTRACTUAL CLAIMS ARE INADMISSIBLE

20. The Tribunal in the *Philippines* case referred to the characterization of investment protection agreements as framework treaties, intended by the State Parties to "support and supplement, not to override or replace," negotiated investment contracts.[23]

---

[19] *Id.*
[20] Record, Annex 1, Article 11
[21] *Philippines,* ¶ 138
[22] *Id.*, ¶ 137; *Pakistan* ¶ 161

21. The Beristan-Opulentia BIT was established as a framework for foreign investment, and to supplement investment procedures where more specific agreements fail to afford justice to the investors or where the State itself is a direct party to the contract. The JV Agreement entered into by distinct parties, subsequent to the creation of the BIT, contains specific and binding provision in regard to dispute settlement.[24]

22. Article 26 of the ICSID Convention provides in pertinent part:

> "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."[25]

Article 11 of the Beristan-Opulentia BIT establishes Respondent's consent to ICSID Arbitration; however, given the language "unless otherwise stated," Article 26 of the ICSID Convention does not purport to override exclusive jurisdiction clauses providing for dispute settlement procedures otherwise agreed to by the parties to the contract.

23. While the Respondent did consented to ICSID Arbitration in general terms as far as Respondent's direct obligations were concerned, the parties to the underlying contract (Beritech and Televative) negotiated alternative dispute settlement procedures pursuant to their agreement.

24. The Tribunal in *Philippines* referred to the maxim *generalia specialibus non derogant*[26] to show that general dispute resolution provisions in a BIT are not concluded with any specific investment or contract in view, and cannot override specific provisions of particular contracts, freely negotiated by the parties to those contracts.[27]

---

[23] *Id.* ¶ 141
[24] Record, Annex 3, Clause 17
[25] *ICSID Convention, Article 26*
[26] "General words do not derogate from special words"
[27] *Philippines*, ¶ 141

25. The *Philippines* Tribunal found the language "unless otherwise stated," in Article 26 of the ICSID Convention permits contrary statements or agreements by the parties to the contract that supersede the general consent provided in a BIT.[28]

26. The Tribunal found that in prior arbitral decisions, BIT provisions were sufficient to override contractual forum selection clauses only where there was a provision in the BIT explicitly overriding forum selection clauses contained in the underlying agreement.[29]

27. Citing commentator Christopher Schreuer, the Tribunal stated:

> "This exclusive remedy rule of Art. 26 is subject to modification by the parties. The words 'unless otherwise stated' in the first sentence give the parties the option to deviate from it by agreement… Explicit reference to domestic courts means that the exclusive remedy rule of Art. 26 does not apply since the parties have stated otherwise."[30]

Taken together, the language of Article 26 of the ICSID Convention, the general language contained in the BIT, and the specific language contained in the JV Agreement evidence intent to provide for alternative dispute settlement procedures as far as disputes arising out of the specific agreement is concerned.

28. With regard to the language of the JV Agreement between Beritech and Televative, the exclusive dispute settlement provision compels Claimant to irrevocably submit to arbitration procedures provided therein, and to waive any objection to said arbitration.[31] Clause 17 of the JV Agreement is sufficient to fall within the "unless otherwise stated" language in Article 26 of the ICSID Convention.

29. Article 11 of the Beristan-Opulentia BIT contains no provision that could be interpreted as overriding exclusive forum selection clauses in underlying agreements.[32] In fact, ICSID Arbitration does not appear as recourse for dispute settlement until subsection (3), whereas subsection (1) provides for dispute settlement within the Contracting Party's

[28] *Philippines*, ¶ 147
[29] *Id.* ¶ 152
[30] *Philippines*, ¶ 147
[31] Record, Annex 3, Clause 17
[32] Record, Annex 1, Article 11

Court having territorial jurisdiction.[33] This first resort to the judicial system of the Contracting Party is in conformity with dispute settlement procedures set out in the JV Agreement, which is also governed by the laws of Beristan.[34]

30. The Tribunal in *Philippines* found that contractual claims brought in breach of an exclusive jurisdiction clause are inadmissible where they are not overridden by Article 26 of the ICSID Convention, and where they are not overridden by terms of the BIT.[35]

31. In the event the Tribunal finds jurisdiction over certain contractual claims by virtue of their relation to treaty claims, such claims will be inadmissible in light of the underlying contractual dispute settlement provisions, which, as a matter of international law, must be respect by the Tribunal.[36]

32. *Prima facie*, Clause 17 is a binding obligation, incumbent on both parties to resort exclusively to the arbitral tribunal constituted under the laws of Beristan. It is clear that the substance of Claimant's claims, viz., improper invocation of a provision contained in the JV Agreement, falls within the scope of Clause 17, as do any BIT claims that arise out of or relate to the JV Agreement.[37]

33. Conscious of the dispute settlement provisions in Article 11 of the BIT as applied to Respondent, the parties to the JV Agreement would not have freely negotiated an exclusive dispute settlement clause in the contract, entered into subsequent to the creation of the BIT, unless it was their clear intention that disputes arising out of the provisions of the contract, such as the buyout provision, be settled pursuant to the dispute settlement clause contained therein.

34. The Tribunal in the *Philippines* case found that the Tribunal should not exercise jurisdiction over a contract claim when the parties have agreed on how such a claim is to be exclusively resolved by the procedure stipulated in the contract.[38]

---

[33] *Id.*
[34] Record, Annex 3, Clause 17
[35] *Philippines*, ¶ 169
[36] See *Philippines*, ¶ 169; *Pakistan*, ¶ 161
[37] See *Philippines*, ¶ 137
[38] *Philippines*, ¶ 155

35. In the present dispute, a determination of whether or not Respondent failed to observe obligations arising under the BIT depend on whether or not the buyout clause invoked pursuant to the JV Agreement had been invoked improperly by Beritech. There is no evidence in the record to show that Beristan controlled or elected Beritech directors or influenced their votes with respect to the buyout provision.

36. The Tribunal in *SGS v. Philippines* found that parties to a contract should not be allowed to rely on a contract as the basis for a claim "when the contract itself refers that claim exclusively to another forum."[39] This reasoning is especially useful in the present case. Both Beritech and Claimant allege breach of the JV Agreement, however, only Beritech is in compliance with the recourse provided in the JV Agreement for alleged breach, as Beritech has commenced arbitration proceedings pursuant to that agreement. The aforementioned Tribunal concludes the subject of admissibility versus jurisdiction with the opinion that "a party to a contract cannot claim on that contract without itself complying with it."[40]

B. ARTICLE 10 OF THE BIT DOES NOT PERMIT ICSID TO ELEVATE CLAIMS BASED ON CONTRACTUAL OBLIGATIONS TO TREATY CLAIMS

37. Respondent again draws upon the Arbitral Tribunals' decisions in the *Philippines* and *Pakistan* cases in order to demonstrate that Article 10 of the BIT ("umbrella clause") requires a restrictive interpretation, and does not purport to provide ICSID with jurisdiction over all possible claims arising out of contractual obligations.

38. Article 10 of the BIT requires a restrictive interpretation in light of the potential negative consequences to international investment, which would result in the event of a broad interpretation as proffered by Claimant.

39. A close reading of Article 10 of the BIT will show that its object and purpose should be construed as a general legal framework to supplement, not replace, freely contracted agreements between parties to an investment contract such as the JV Agreement.

[39] *Philippines*, ¶ 154
[40] *Philippines*, ¶ 158

40. Article 10 can only apply to a dispute before the Arbitral Tribunal if the Respondent is a direct contracting party to the underlying contract.

I. ARTICLE 10 OF THE BIT REQUIRES A RESTRICTIVE INTERPRETATION

41. The Tribunal in *Pakistan* established the requirement for "[c]lear and convincing evidence" that parties to a BIT intended that the BIT to have a broad and burdensome scope so that all contractual disputes could be elevated to treaty claims despite validly executed, exclusive forum selection clauses.[41]

42. The purpose of umbrella clauses such as Article 10 in the Beristan-Opulentia BIT is not to elevate contract claims to treaty claims, rather, they provide for an extra or supplemental means of contract enforcement in the event remedies are unavailable or a BIT term not covered in the underlying contract is breached.[42]

43. The Tribunal in *Philippines* referred to the characterization of investment protection agreements (such as the present BIT) as framework treaties, "intended by the State Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State."[43]

44. The *Pakistan* Tribunal discussed at length the negative consequences of an expansive interpretation of a sparsely worded umbrella clause such as Article 10 of the JV Agreement in the present dispute.[44]

45. The negative consequence discussed in the *Pakistan* decision of most relevance to the present proceeding, is that under the broad interpretation encouraged by Claimant, investors would be in a position of unjust advantage. The option to forgo dispute settlement provisions in contract is equated to the power to nullify freely negotiated terms

[41] *Id.* ¶ 167
[42] *Sasson*, 194
[43] *Philippines*, ¶ 141
[44] *Pakistan*, ¶ 168

unilaterally, such as Clause 17, despite the mutual assent reached as to such clauses in negotiation of the underlying contract.[45]

46. The inherent unfairness in this result is logically clear: the State, and not the investor, is a party to the BIT containing the umbrella clause, the investor would have the opportunity to defeat invocations of dispute settlement provisions in underlying contracts by pointing to the general consent provided in the BIT, while the State would be subject to the dispute settlement procedure desired by the investor, whether founded in the BIT or the contract.[46]

47. While the Tribunal in the *Philippines* case expressed equal concern for such a result,[47] they were not as concerned with the issue given their ultimate treatment of contract claims in that dispute.

48. The result in *Philippines* should not be misconstrued as to submit that nullification of valid dispute settlement clauses is not a potential consequence of the broad interpretation of umbrella clauses proposed by Claimant.

49. Rather, the Tribunal in that dispute determined that the contract claims jeopardized by such an interpretation must still be determined by the underlying contract, and could only be determined by reference to the terms of that contract.[48] The reach proposed by SGS, and that encouraged by Televative, was not one that the *Philippines* Tribunal was willing to take, ultimately finding that ICSID proceedings should be stayed pending a decision pursuant to the terms of the underlying contract.[49]

[45] *Id.*
[46] *Id.*
[47] *Philippines*, ¶ 123
[48] *Id.* ¶ 126
[49] *Id.* ¶ 177

50. The *Philippines* Tribunal continued on this matter in order to distinguish between the scope of the commitments entered into under an umbrella clause and the performance of those obligations referred to in the clause.[50]

51. That analysis is useful in the present case; the Tribunal found that the umbrella clause "does not convert questions of contract law into questions of treaty law."[51] Rather, the umbrella clause contained in the relevant BIT merely provided assurances to investors with regard to obligations of the host State to secure the rule of law in relation to investment protection.[52]

52. Based on the plain language of the Beristan-Opulentia BIT, and the negative consequences that would result from an overly broad interpretation of Article 10, the present Tribunal should apply a restrictive interpretation of the provision and defer to the terms contracted to by the parties to the JV Agreement.

53. A restrictive interpretation does not remove Article 10's import to international investment, as it provides a backdrop for investment activity established between investors who enter into contracts directly with Respondent. Based on the present facts, the Dispute Settlement provision of the JV Agreement is more specifically worded than Article 10, and would be robbed of all significance if superseded by the broad terms of the BIT.

[50] *Id.* ¶ 126
[51] *Id.*
[52] *Id.*

II. THE OBJECT AND PURPOSE OF THE BIT IS TO PROVIDE A LEGAL FRAMEWORK FOR INVESTMENT ACTIVITY

53. Article 31 of the Vienna Convention on the Law of Treaties provides in pertinent part:

> "[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[53]

While the terms of the treaty hold special significance, the context surrounding the treaty is taken into consideration in the course of interpretation. Respondent cannot be compelled to arbitration for every breach of separate contracts alleged by foreign investors in their territory, unless there is clear evidence of Respondent's intention to expose itself to such arbitration.[54] There is no clear evidence of such intent anywhere in the BIT.

54. In the present case, "context," as referred to in the Vienna Convention, is evidenced by an alternative and exclusive dispute settlement provision, freely contracted to in the underlying agreement. As discussed above, Article 26 of the ICSID Convention allows parties to otherwise state their intentions with regard to consent. Given the contextual consideration required in interpretation of the BIT, it would be an overreach of jurisdiction for a BIT tribunal to fail to observe the underlying contract's dispute resolution terms.[55]

55. Applying the same reasoning as affects Article 11 of the BIT, Article 10 cannot operate to supersede freely negotiated dispute settlement provisions contained in the JV Agreement. The Beristan-Opulentia BIT is a legal framework consented to by

[53] *Vienna Convention, Article 31*
[54] See *Pakistan*, ¶ 167
[55] *Sasson*, 194

Respondent in order to support and supplement the negotiated investment arrangements entered into by investors directly with host State.[56]

56. The umbrella clause in the *Pakistan* case is sufficiently similar to the Article 10 in the Beristan-Opulentia BIT for the purpose of drawing comparison. Both provisions provide that the Contracting Party "shall constantly guarantee the observance of commitments."[57]

57. The Tribunal in Pakistan found that in order to construe Article 10 as broadly as urged by the Claimants, the Article of the BIT "would have to be considerably more specifically worded".[58] Referring to the maxim "*in dubio mitius,*" the Tribunal ultimately held that where language and intent is in doubt, a narrow interpretation is accorded.[59]

58. Such is the case in the present dispute, where there is no evidence in the record that the parties to the BIT indented for an interpretation of Article 10 that is so broad, it would in effect limit the right of parties to freely negotiate dispute settlement provisions into contracts.

59. In the *Impreglio v. Pakistan* case ("*Impreglio*"), Impreglio pursued ICSID arbitration based on the umbrella clause in the Switzerland-Pakistan BIT through a most favored nation clause in Italy's own BIT with Pakistan.[60] The Tribunal held that the host State must be a contracting party to the underlying contract as a precondition for invoking an umbrella clause in an attempt to raise contract claims in treaty arbitration.[61]

[56] *Philippines*, ¶ 141
[57] *Pakistan*, ¶ 119
[58] *Pakistan*, ¶ 171
[59] *Id.* ¶ 172
[60] *Impreglio*, ¶ 84
[61] *Yannica-Small*, 499

PART II:

BERISTAN DID NOT IMPROPERLY INVOKE THE BUYOUT CLAUSE OF THE JOINT VENTURE AGREEMENT, NOR DID IT BREACH THE AGREEMENT BY ITS ACTIONS.

1. CLAIMANT claims that BERISTAN improperly invoked Clause 8 of the JV Agreement, which entitled Beritech to purchase all of CLAIMANT's interest in Sat-Connect upon breach of the JV agreement's confidentiality provisions.

2. Clause 8 of the JV agreement states:[62]

   > "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."

3. BERISTAN contends that Beritech's actions of invoking the buyout clause constitute the actions of a private corporation under customary international law. Actions of a private corporation therefore cannot be attributed to BERISTAN under international law.

A. BERITECH IS A PRIVATE CORPORATION UNDER INTERNATIONAL LAW AND ITS ACTIONS ARE NOT ATTRIBUTABLE TO BERISTAN.

4. Rules of attribution determine whether the state can be liable for actions of entities deemed "organs of the state" or other entities exercising elements of governmental authority.[63] Responsibility for a wrongful act arises when the act is both attributable to the state and in breach of obligations of the state set forth in treaties or customary international law.[64]

[62] Record, Annex 3, Clause 17.
[63] Yannaca-Small, 287-321.
[64] *Id*. at 287.

5. Attribution prevents states from being assigned obligations that are not its responsibility, including a duty to ensure that any person or entity within their borders involved in certain activities will comply with certain standards.[65] International investment treaties, such as Beristan-Opulentia BIT, contain no special obligations or standards specifically governing attribution under the treaty.[66] Instead, all applicable rules and laws pertaining to attribution must be read in light of customary international law.[67]

6. In the present case, BERISTAN contends that the actions of Beritech are not attributable to BERISTAN under international law standards, because; (i) Beritech is not an organ of the state; and (ii) Beritech has not been empowered to exercise any elements of governmental authority.

i. BERITECH IS NOT AN ORGAN OF THE STATE.

7. Article 4(1) of the ILC's *Responsibility of States* asserts:[68]

> "Conduct of any state organ shall be considered an act of that state under international law, whether the state exercises legislative, judicial, executive or any other functions, whatever position it holds in the organization of the state, and whatever character as an organ of the central government or of a territorial unit within the state."

8. Article 4(2) of the Articles states that: [69]

> "An organ includes any person or entity which has that status according to the internal law of the state.

9. Interpretation of international law illustrates that state organs show little institutional separateness from the state itself: such organs are created by the state, and the functions

[65] *Id*. at 288.
[66] *Id*.
[67] *See id*.
[68] *Responsibility of States,* Art. 4(1).
[69] *Responsibility of States*, Art. 4(2).

assigned to the entity are those normally assigned to the state.[70] While the examination is predominantly fact-driven, some overarching principles do impact analysis, including:[71]

- Whether the entity's functions are controlled by law, or possess freedom of contract;
- Whether it is subject to government oversight or judicial review;
- Whether it can exercise authority that private individuals cannot exercise; and
- Whether it is fully funded by the state.

10. In contrast, entities that maintain separate legal personalities, such as corporations organized under private law and with a commercial purpose, should in principle be regarded as distinct entities. These entities' actions are not attributable to the state, so long as the entity pursues its own interests independent of the state's public interest.[72]

11. The presumption of independence and separation for corporations in this context is rebuttable under some conditions, such as:

- If the corporation has an overwhelming government purpose, with considerable non-commercial functions;[73]
- If the corporation maintains no separation under domestic law and is treated as part of the state;[74]
- If the corporation's management controls, such as the Board of Directors, are insufficient to establish independent decision-making authority;[75]
- If the corporation's primary purpose is to administer public-sector contracts approved by the government;[76]
- If the corporation is under specific control of the state, is completely dependent on the state, or if the state is in a position of legal authority to control the corporation.[77]

12. In the present case, the Respondent contends that Beritech maintains sufficient institutional separateness so that Beritech's actions are not attributable to Beristan. Beritech was organized under Beristian private law governing corporations.[78] Beritech's

---

[70] Yannaca-Small, 296. *See also* De Schutter, 5.
[71] Yannaca-Small, 296.
[72] Yannaca-Small, 296. *See* ILC 2nd Reading Commentary, Art. 8, ¶ 6. *See also* AMCO Asia, ¶ 162-63.
[73] Yannaca-Small, 297.
[74] Yannaca-Small, 297; *See Saipem S.p.A.*, ¶ 145-46.
[75] Yannaca-Small, 297; *See Jan de Nul*, ¶ 161.
[76] Yannaca-Small 297; *See LESI*, ¶ 107-109.
[77] Yannaca-Small, 298; *See Himpurna California Energy*, ¶ 118.
[78] Record, Annex 2, ¶ 2..

initial funding came from both private investors and Respondent, and it is not wholly owned by BERISTAN.[79]

13. Beritech's corporate purpose is to provide telecommunication services in Beristan.[80] Its mission statement and bylaws show a broader corporate purpose than simply participation in the JV agreement.[81] Control of Beritech does not fall solely to the Respondent, and the corporation has the freedom to contract with whomever it chooses.[82]

14. Beritech possesses no exclusive powers of conduct or contract unavailable to private citizens under international law. Prior to the JV agreement, Beritech conducted business within the telecommunications industry in Beristan, a privatized industry for over ten years in which any private developer can offer its products and services.[83] Similarly, the project represents a private investment in technology and services to be sold throughout an extended region, and such an investment is not restricted to investors that act as state organs.[84]

15. Further, the facts do not prove any reasonable rebuttals to the presumption in international law that corporations organized under private law and possess a clear commercial purpose, such as Beritech, are in principle regarded as separate and unattributable entities. The Claimant can point to no instances that establish Beritech is under the strict control of, and completely dependent upon, the Respondent.

16. Beritech was created not with an overwhelming public purpose, but rather to deliver services within the privatized telecommunications industry in Beristan.[85] While the Sat-Connect project does incorporate a military aspect crucial to the Respondent, the

[79] *Id*.
[80] Clarification Requests 161.
[81] *See id*.
[82] Record, Annex 2, ¶ 3.
[83] Clarification Requests, 166.
[84] Record, Annex 2, ¶ 5.
[85] Clarification Request, 166.

predominant purpose is to develop a private commercial network and infrastructure for telecommunications within the greater Euphonia region.[86]

17. In addition, Beritech was incorporated under the laws governing private commercial enterprises in Beristan, and receives no specific treatment under domestic law as part of the state. Beristian law governing corporate actions and governance applies to Beritech.[87] Beritech maintains sufficient independent controls of its management and corporate strategy under an independent Board of Directors.[88]

II. BERITECH HAS NOT BEEN EMPOWERED TO EXERCISE ANY ELEMENTS OF GOVERNMENT AUTHORITY.

18. Article 5 of the *Responsibility of States* maintains: [89]

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

19. While this language usually implicates entities whose authority impacts "core" state functions, such as the privatization of state-controlled assets, international law has also recognized that such authority can encompass other non-core functions of the government's authority, such as telecommunications and education.[90]

20. For the entity's conduct to be attributable to the state, the conduct must be specifically authorized under internal law as the exercise of government authority.[91] The focus is on the act itself, and not the context in which the act took place.[92] Parties seeking to

[86] Record, Annex 2, ¶ 5.
[87] Record, Annex 2, ¶ 2.
[88] Record, Annex 2, ¶ 4.
[89] *Responsibility of States*, Art. 5.
[90] Yannaca-Small, 303.
[91] ILC Second Reading Commentary, Art. 5, ¶ 7.
[92] Yannaca-Small, 304.

attribute conduct to a state must show that the entity's particular act was only made possible due to special prerogatives of power granted it by the state.[93]

21. The tribunal in *Impregilo* held that the typical threshold for such an inquiry involves activity beyond that of an ordinary contracting party.[94] This inquiry finds support in the *Jan de Nul* tribunal, where the actions of the Suez Canal Authority were not attributed to Egypt as the authority acted as any investor might in an infrastructure contract.[95] Similarly, the tribunal in *Biwater* held that the withdrawal of a negotiated tax exemption from a foreign investor had no reasonable foundation in Tanzanian private law rights and therefore exceeded the normal cause of conduct for due to its political motivations.[96]

22. Contrary to the actions implicated in *Biwater*, the conduct of Beritech in this case reflects actions that derive no special authority from a grant of power from the Respondent. The exercise of a buyout clause in contractual proceedings requires no special public authority granted to a private company by the government. Rather, buyout clauses are common provisions in contracts among investing parties. The buyout clause, and the authority to exercise it, is not activity beyond that of any ordinary contracting party to a contract.

23. The exercise of the buyout clause was predicated upon the breach of the confidentiality clause of the JV agreement, which prohibited either party form disseminating any confidential information related to the Sat-Connect project to third parties.[97] The terms "confidential information" in the JV agreement is sufficiently broad to incorporate any information developed for the project as a whole, not developed solely its military aspects.[98] Beritech's actions were motivated by the attempt of the Opulentian government

---

[93] Yannaca-Small, 304; *See Jan de Nul*, ¶ 170.
[94] *Impregilo*, ¶ 266(b).
[95] *Jan de Nul*, ¶ 169.
[96] *Biwater*, ¶ 460.
[97] *See* Record, Annex 3, Clause 4(1)-(4).
[98] *See* Record, Annex 3, Clause 4(2).

to access civilian encryption keys associated with the Sat-Connect project, not specific military aspects.[99]

24. Other tribunals have focused on the specific grant of authority from the state to the entity. The specific grant of authority, in cases of attributable conduct, empowers the entity to take such actions as part of its government-created functions.[100] The tribunal in *Helnan* attributed conduct of a private corporation to the Egyptian government because the corporation was formed to direct the privatization of hotels within Egypt.[101] The grant of government authority exclusively authorized the corporation to undertake specific actions related to the privatization of the industry.[102]

25. Unlike such cases, Beritech's actions in both entering the JV agreement and its exercise of the buyout clause derive themselves not from any public authority granted to it by the Respondent, but the power conferred to it by its incorporation under Beristian private law and the JV agreement. Private law dictated the freedom to contract to Beritech, which it chose to exercise in entering into the JV agreement.

---

[99] *See* Clarification Request 178.
[100] *See TOTO Costruzioni*, ¶ 59.
[101] *See Helnan*, ¶ 93.
[102] *See id*.

PART III:

BERISTAN HAS NOT EXPROPRIATED TELEVATIVE'S INVESTMENT.

26. Article 4(2) of the Beristan-Opulentia BIT protects foreign investments from expropriation by host states by stating:

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

27. The Respondent contends that its actions do not constitute expropriation because: (i) Beritech's actions are not attributable to the Respondent, and (ii) the Claimant's breach of contract claim does not qualify as expropriation. Alternatively, the Respondent also contends that (iii) the exercise of the buyout clause constitutes lawful expropriation.

A. BERITECH'S ACTIONS ARE NOT ATTRIBUTABLE TO BERISTAN.

28. International law and international treat provisions regarding expropriations are aimed t limiting unlawful expropriations by states.[103] Such provisions do not target actions by private persons or businesses.[104] Therefore, any actions an investor claims as expropriation must be attributable to a contracting state to the treaty.[105]

29. The Respondent contends that, for reasons previously stipulated, the actions of Beritech represent those of a private corporation governed by private law. Beritech is neither an organ of the Respondent, nor was it empowered to exercise any elements of government

[103] Salacuse, 289.
[104] *Id*.
[105] *Id*.

authority. Therefore, any actions of Beritech cannot be attributed to the Respondent. Consequently, exercise of the buyout clause and subsequent impairment of Claimant's investment cannot amount to an expropriation.

30. Further, the Claimant's arguments that the executive order and subsequent actions of the CWF expropriated its investment also fail. At the time the Respondent issued the executive order and the CWF removed the Claimant's personnel from the facility, Sat-Connect's Board of Directors had legally severed the Claimant's investment.[106] No investment remained to expropriate. In addition, all intellectual property and other intangible property developed for Sat-Connect were the property of Sat-Connect, not the Claimant.[107] The JV agreement transferred all legal title and control of such investments to Sat-Connect,[108] and therefore cannot qualify as an investment for expropriation purposes.

B. TELEVATIVE'S ALLEGATIONS OF IMPROPER BREACH OF THE JV AGREEMENT DO NOT QUALIFY AS EXPROPRIATION UNDER INTERNATIONAL LAW.

31. Under international law, allegations of breach of contract between state entities and foreign investors do not usually qualify for protection under applicable investment treaties.[109] While repudiation of a contract by a host state constitutes expropriation, mere breach of contract does not.[110] A host state repudiates a contract when it effectively declares its contractual obligations no longer exist.[111] Contractual breaches arise where the host state violates contractual obligations but offers the investor a remedy in local courts.[112]

---

[106] Record, Annex 2, ¶ 10.
[107] Clarification Requests, 269.
[108] *Id*.
[109] Vandevelde, 303.
[110] *See id*.
[111] *See id*.
[112] *See id*.

32. Without prejudice to the preceding argument concerning attribution, the Respondent argues that any allegations of a breach of contractual rights in Sat-Connect do not amount to expropriation because: (i) Beritech exercised no sovereign authority in exercising the buyout clause, and (ii) the Respondent did not deprive the Claimant from seeking remedy for the alleged breach in local courts.

I. BERITECH EXERCISED NO SOVEREIGN AUTHORITY IN EXECUTING THE BUYOUT CLAUSE.

33. General international law asserts that a state's actions repudiation of contractual obligations are actionable under international law. States repudiate contractual obligations, and expropriate investments, only if the breach involves an exercise of the state's sovereign authority.[113] Only sovereign authority grants the state power to eliminate contractual obligations, and therefore a repudiating state acts in ways only a state, and not a private party, can act.[114] Breaches of contractual obligations by state authorities do not constitute expropriation if it involves no exercise of sovereign power.[115]

34. In contrast, breaches of contracts involve a state acting in ways that any private investor in a contract could act.[116] Actions by state authorities that involve no sovereign authority, but an exercise of authority equal to any private party, do not constitute expropriation under international law.[117]

35. The tribunal in *Parkerings-Compagniet* held that the city of Vilnius' termination of a contract based upon a material breach of the contract by the foreign investor did not constitute expropriation.[118] The tribunal reasoned that termination because of a breach

---

[113] Vandevelde, 303. *See Parkerings-Compagniet,* ¶ 443.
[114] Vandevelde, 303.
[115] *Id*. *See also Parkerings-Compagniet*, ¶ 443.
[116] Vandevelde, 303.
[117] Vandevelde, 303. *See Azurix*, ¶ 444.
[118] *Parkerings-Champagniet*, ¶ 447.

did not involve the city acting under any sovereign authority; rather, the city acted no differently than any other contracting party.[119]

36. The tribunal in *Southern Pacific* held that Egypt's cancellation of a contract with a private investor to build a hotel constituted expropriation because the state exercised its sovereign authority to repudiate the contract due to political pressure, but offered no compensation.[120] Similarly, the tribunal in *Siemens* held that Argentina's actions constituted expropriation due to Argentina's reliance on the political structure of the state to cancel the contract.[121]

37. In the present case, the Respondent contends that Beritech's exercise of the buyout clause involved no exercise of sovereign authority, but only authority granted to any contracting party under such a contract. Buyout clauses based upon material breaches are not provisions given exclusively to states, and exercise of such provisions requires no sovereign authority. Further, the confidentiality provision upon which the buyout clause relied invoked no special authority or information available only under state contracts. Any contracting parties developing sensitive products or services can insert similar clauses into contract to protect a project's privacy. Therefore, the Respondent acted only in ways that any other party to a similar transaction would act, and as such, its actions cannot constitute expropriation.

II. BERISTAN DID NOT DEPRIVE TELEVATIVE FROM SEEKING REMEDY OF THE ALLEGED BREACH IN STATE COURT.

38. When a state breaches contractual obligations, but does not repudiate the contract, the remedy for the breach lies in state courts and not pursuant to judicial remedies under the investment treaty.[122] As a general rule, investors suffering from a state's contractual

[119] *Id*. at ¶ 445.
[120] *Southern Pacific*, ¶ 160-62.
[121] *Siemens*, ¶ 248.
[122] Vandevelde, 303.

breach should seek adjudication of the claim in the appropriate forum to remedy the breach under state law.[123]

39. A contract breach does not qualify as an expropriation unless the state has left the investor no proper ways to seek redress for the breach.[124] Deprivation by legal or practical means of the investor's right to seek remedy before the appropriate state court does constitute expropriation under international law.[125]

40. The tribunal in *Azinian* held that, unless the claimants alleged a denial of justice from improper access to state courts to seek a remedy, access to the tribunal under the treaty should be denied.[126] The tribunal in *Encana* held that challenges to contractual obligations do not amount to a repudiation so long as the state submits its actions to judicial review in good faith, and honor the decision of the court in performing the review.[127] The tribunal in *Generation Ukraine* held that the failure by the investor to seek redress from state-level courts could disqualify an international claim, because the investor could not allege expropriation in the absence of any reasonable efforts to obtain redress in Ukrainian courts.[128]

41. In the present case, the Respondent contends it has not denied the Claimant due process or justice. The JV agreement stipulated the forum contractually chosen for the settlement of any disputes, including breach, under the agreement.[129] The arbitral tribunal under state law gives the Claimant the ability to raise any objections to Beritech's action and seek proper remedy for any breach. There is no reason to question the validity of the arbitration tribunal under clause 17. The Claimant can point to no facts that would show the tribunal would act unfairly or in a biased fashion. Any allegations of breach of the JV

[123] *Parkerings-Compagniet*, ¶ 448.
[124] *Waste Management*, ¶ 175.
[125] *Parkerings-Compagniet*, ¶ 448.
[126] *Azinian*, ¶ 100.
[127] *Encana*, ¶ 192-94.
[128] *Generation Ukraine*, ¶ 91.
[129] Record, Annex 2, Clause 17.

agreement must first be brought before the BERISTAN arbitration panel under the rules of international law.

C. IN THE ALTERNATIVE, BERITECH'S EXERCISE OF THE BUYOUT CLAUSE IS LEGALLY JUSTIFIED UNDER THE TREATY.

42. Under international law, states maintain the right to expropriate property of foreign nationals for public purposes. This right is recognized under international law even with the existence of anti-expropriation provisions in treaties.[130] The fundamental purpose of the state is to protect and preserve the public interest and security of its citizens, and the state must be free to properly safeguard such interests, even if it results in the expropriation of foreign investments.[131]

43. Article 4 of the Beristan-Opulentia BIT, reflecting customary international law,[132] allows for permissible expropriation under four conditions. It must be done:[133]

- For a public purpose;
- On a non-discriminatory basis;
- In accordance with all legal provisions and procedures; and
- On payment of immediate full and effective compensation.

44. Without prejudice to the preceding arguments, BERISTAN argues that the exercise of the buyout clause by Beritech and the Sat-Connect Board were justified under Article 4(2) of the Beristan-Opulentia BIT because: (i) the measure was taken to protect the public interest and security; (ii) the measure was not discriminatory; (iii) the measure was taken in accordance with all legal provisions and procedures; and (iv) Beritech offered immediate full and effective compensation.

I. BERISTAN TOOK MEASURES TO PROTECT THE PUBLIC INTEREST AND NATIONAL SECURITY.

---

[130] Salacuse, 288.
[131] Salacuse, 288; Dolzer & Scheuer, 89.
[132] *See* NAFTA, Art. 1110; Restatement of Foreign Relations, § 185.
[133] Beristan-Opulentia BIT, Art. 4(2).

45. Virtually all investment treaties adopt the international law requirement that lawful expropriation of a foreign investment must be done for a public purpose. The concept and scope of the term "public purpose" is intentionally broad and grants states significant power to justify any expropriatory actions.[134]The nature and character of the government's actions in a particular case must be measured in light of the public interests at stake.[135]

46. The tribunal in *ADC Affiliate* held that states invoking the public purpose requirement must show some genuine interest of the public that must be protected.[136] Assessment of the public purpose falls to the state, and such assessments can justify even compulsory transfers of investments from one party to another under international law.[137]

47. In the present case, the Respondent contends that the actions of both itself and Beritech are justified to protect vital national security interests. Opulentia had requested access to encryption keys essential to maintaining the security and integrity of the communication system to be used by the Beristan military.[138] These encryption keys and other measures protect the system from interference and espionage of other states, and provide crucial access to privileged communications that could implicate threats to the Respondent's national security and territorial sovereignty. The Respondent cannot allow such instruments to fall into the control of other states and risk jeopardizing vital national security interests that could threaten the its military or citizens.

---

[134] Salacuse, 320.
[135] McLachlan, 287.
[136] *ADC Affiliate*, ¶ 432.
[137] *See* OECD Indirect Expropriation, 14.
[138] Clarification Request, 178.

II. BERISTAN'S MEASURES ARE NOT DISCRIMINATORY.

48. BERISTAN contends that its treatment of CLAIMANT was not discriminatory. States discriminate against foreign investments when it treats those investments less favorably than domestic investments or others in like circumstances.[139] However, international law provides exceptions for such treatment if the state has an objective and reasonable justification.[140]

49. Tribunals such as *Saluka* and *Feldman* have upheld the right of host states to provide differential treatment between investments of foreign investors and those of domestic companies, so long as the host states provide a reasonable basis for their actions.[141]

50. In the present case, the Respondent acted reasonably to protect its own national security interests.[142] In comparing the differentiated treatment given to Beritech and the Claimant, the actions of the Opulentian government create reasonable and objective justifications for the Respondent's actions. The Claimant admitted that Opulentia had requested access to the encryption keys for the Sat-Connect project, and Opulentia had received similar access in other projects.[143] Access to these keys would jeopardize the network's security and grant Opulentia access to classified military intelligence and communications of the highest importance to the Respondent. This risk shows the Respondent acted reasonably to sever any potential access Opulentia would have to the network.

III. BERISTAN'S ACTIONS WERE IN ACCORDANCE WITH DUE PROCESS OF LAW.

51. International law requires that any legal expropriation by a state must respect proper due process of law.[144] The expropriation must conform to all processes and procedures under

[139] Newcombe & Paradell, 162.
[140] Vandevelde, 273.
[141] *Saluka*, ¶ 313; *Feldman*, ¶ 72.
[142] *See supra* notes (insert note #s) and accompanying text).
[143] Clarification Requests, 178.
[144] Salacuse, 322.

domestic internal law.[145] These obligations require host states to provide foreign investors with an adequate opportunity to challenge the expropriation under host-state law, and denial of judicial review amounts to a denial of justice.[146]

52. The tribunal in *ADC Affiliate* defined the principle as:[147]

> "[Demanding] an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it... The legal procedure must be of a nature to grant an affected investor a reasonable chance to be heard."

53. In the present case, the Respondent contends it followed all due process requirements in lawfully expropriating the Claimant's investment. The JV agreement and Beristian corporate law provide the Claimant with unbiased and substantive legal procedures for adjudicating its challenges to the expropriation of its investment.[148] Clause 17 of the JV agreement establishes clear legal procedures under the 1959 Arbitration Act for adjudication of the dispute.[149] The arbitration panel provides the Claimant with a fair opportunity to have its claims heard within a reasonable period of time. Therefore, all necessary procedural due process has been followed by BERISTAN.

IV. BERISTAN OFFERED TELEVATIVE IMMEDIATE FULL AND EFFECTIVE COMPENSATION.

54. Article 4(2) of the Beristan-Opulentia BIT requires either Contracting Party must pay immediate full and effective compensation for the expropriated investment protected by the treaty.

55. The Respondent contends that the two parties previously agreed upon the value of full compensation in the terms of the JV agreement. Clause 8 states that the Claimant's

---

[145] Vandevelde, 273.
[146] *Id*. *See also Austria-Georgia BIT*, Art. 5(3).
[147] *ADC Affiliate*, 435.
[148] *See* Record, Annex 3, Clause 17.
[149] *Id*.

investment in Sat-Connect was valued as the monetary investment in Sat-Connect made during the time between signing the agreement and the exercise of the buyout clause.[150] The Claimant agrees that $48 million, the amount Beritech has placed in escrow, represents the Claimant's total paid-in investment at the time of the buyout. The Claimant's requests regarding intellectual property developed for the project are null and void, as the Claimant retains no legal title or control over such investments, and therefore the value of the investments cannot be included in a determination of fair compensation.[151]

[150] Record, Annex 3, Clause 8.
[151] *See id*.

PART IV:

BERISTAN HAS PROVIDED TREATMENT IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW.

56. Article 2(2) of the Beristan-Opulentia BIT guarantees both contracting parties will treat investors pursuant to standards of customary international law by stating:

> "Both Contracting Parties shall at all times ensure in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party."

57. Article 2(3) of the Beristan-Opulentia BIT requires that both Contracting Parties must ensure that each investment made within its respective territory by investors of the other Contracting Party not be subjected to unjustified or discriminatory measures.

58. Many international treaties,[152] bilateral treaties,[153] arbitral decisions,[154] and commentary[155] generally concur that a state's obligations to foreign investments under customary international law includes certain inviolable standards of treatment. These include fair and equitable treatment, full protection and security, and nondiscriminatory behavior. Past arbitral tribunals have held that such standards of treatment are not freestanding obligations due each investor, but rather are obligations to the extent the standards are recognized under customary international law.[156]

59. In the present case, the Respondent contends that its actions do not amount to a violation of its obligations under Article 2(2) of the Beristan-Opulentia BIT because it never failed to provide treatment to the Claimant that was inconsistent with its obligations pursuant to

[152] *NAFTA*, Art. 1105(1); *CAFTA*, Art. 10(5)(1); *Transnational Corporations*, Art. 48.
[153] US Model BIT, Art. 5; US-Chile BIT, Art. 10.
[154] *Mondev*, ¶ 125; *Alex Genin*, ¶ 144.
[155] *See* Newcombe & Paradell, 234-35; Yannaca-Small, 394-410; UNCTAD Bilateral Investment Treaties, 28-33.
[156] *Loewen Group*, ¶ 128.

customary international legal standards of: (A) fair and equitable treatment of the Claimant's investment; (B) full protection and security of the Claimant's investment; and (C) nondiscriminatory treatment of the Claimant.

A. BERISTAN'S ACTIONS DID NOT VIOLATE THE STANDARD OF FAIR AND EQUITABLE TREATMENT.

60. Article 2(2) of the Beristan-Opulentia BIT guarantees fair and equitable treatment of investors by stating:

> "Both Contracting Parties shall at all times ensure in accordance with customary international law, including fair and equitable treatment... of the investments of investors of the other Contracting Party."

61. In the present case, the Respondent contends that its action to remove the Claimant's personnel from the Sat-Connect facilities is not in breach of Article 2(2) of the Beristan-Opulentia BIT because the Respondent did not offer unfair or inequitable treatment to the Claimant.

62. Fair and equitable treatment indicates a state's willingness to accommodate foreign capital on terms that account for foreign investors' interest in fairness and equity[157] As such, a state must provide a reasonably stable investment environment for foreign investors consistent with investors' expectations.[158]

63. General consensus among arbitral tribunals[159] and international instruments[160] shows that the interpretation of the fair and equitable treatment standard equates requisite state guarantees with the minimum standard required by customary international law.[161] These tribunals and instruments have generally rejected any interpretation of fair and equitable

[157] Salacuse, 218.
[158] Moses, 230.
[159] *See Alex Genin*, ¶ 367; *Occidental,* ¶ 188, 190; *Saluka*, ¶ 291;
[160] *See* NAFTA Free Trade Commission, Interpretation of Article 1105(1); *2004 Canadian Model FIPA*, Art. 1, Notes and Comments, 13-15 (1967).
[161] *See* Brownlie, 502-505; Jennings & Watts, 903-39; Muchlinski, 625; Newcombe & Paradell, 234; Roth, 127;

treatment that mandates greater substantive protections for investors than those included under customary international law.[162]

64. While a tribunal's determination of possible violations of fair and equitable treatment depends on the facts presented in a particular case,[163] some general principles have emerged among arbitral awards regarding how tribunals determine violations of the standard. In determining whether a host state's actions constitute a denial of due process or justice, and whether a host state violated an investor's legitimate expectations.[164]

65. The Respondent contends that there can be no finding of a violation of the fair and equitable treatment standard because: (i) it did not deny justice or proper due process to the Claimant; and (ii) it acted in a reasonable manner and did not violate the Claimant's legitimate investment expectations.

i. BERISTAN DID NOT DENY JUSTICE OR PROPER DUE PROCESS TO TELEVATIVE.

66. Procedural fairness is a basic requirement of customary international law and a fundamental element of fair and equitable treatment.[165] Failure to respect procedural fairness is deemed a denial of justice under treaty obligations.[166] The *Restatement of Foreign Relations* defines "denial of justice" as:

> "An injury consisting of or resulting from denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil."[167]

67. Many international instruments clarify that the fair and equitable treatment standard protects against denials of justice and guarantees procedural due process for all foreign investors.[168]

---

[162] *U.S. Model BIT*, Article 5(2).
[163] *Mondev*, ¶ 118; Dugan, 506.
[164] Dugan, 507-531; Salacuse, 228-231;Vandevelde, 202-203.
[165] Salacuse, 241.
[166] *See id*.
[167] *Restatement of Foreign Relations,* §711, comm. a.

68. In *Alex Genin*, the tribunal held that violations of this minimum standard would constitute willful neglect of duty and not meet international standards of justice and due process.[169] Such acts must lead to an outcome that offends a sense of judicial propriety stemming from a manifest failure of justice in a state's judicial proceedings.[170]

69. Similarly, the tribunal in *ELSI* held that arbitrary conduct of the host state would violate the fair and equitable treatment standard if the conduct displayed a willful disregard of due process of the law that "shocks, or at least surprises, a sense of judicial propriety."[171] The procedural irregularities in the state judicial decisions must be so arbitrary in nature that they represent a willful disregard of due process by the host state.[172]

70. In the present case, courts of local jurisdiction within Beristan have yet to take any actions subsequent to the dispute between Beritech and The Claimant. The Claimant therefore can claim no denial of justice or breach of procedural due process for Beritech's actions, as Beritech has presented it with the opportunity to arbitrate this contractual dispute pursuant to the jurisdiction established in the JV agreement.[173] At no point did the Respondent deny the Claimant access to the courts of jurisdiction over this dispute or adequate procedures to challenge the exercise of the buyout clause.

[168] *See U.S. Model BIT*, Article 5(2)(a); *U.S.-Chile FTA*, art. 10.4(2)(a).
[169] *Alex Genin*, ¶ 367.
[170] *Loewen Group*, ¶ 132; *Waste Management*, ¶ 98.
[171] *ELSI*, ¶ 128.
[172] *Alex Genin*, ¶ 371.
[173] Record, Annex 3, Clause 17.

ii. BERISTAN ACTED IN A REASONABLE MANNER AND DID NOT VIOLATE TELEVATIVE'S LEGITIMATE INVESTMENT EXPECTATIONS.

71. The fair and equitable treatment standard requires host states to provide a transparent and predictable framework for foreign investment.[174] This obligation requires states to take necessary measures to ensure investors' expectations that they will be able to enjoy their investments.[175]

72. In assessing fair and equitable treatment, tribunals examine whether a host state or agency made representations, gave assurances, or took some other actions upon which the foreign investor materially relied in making the investment.[176] Violation of the standard occurs when the host state changes its position in a way that frustrates the investor's resulting expectations from the state's initial representation.[177]

73. When host state actions are based upon legitimate policy concerns and not other arbitrary or discriminatory measures, tribunals tend to find the conduct reasonable under the circumstances.[178] The tribunal in *Saluka* held that the determination of a breach of fair and equitable treatment requires balancing the investor's legitimate and reasonable expectations against the state's legitimate and reasonable interests in furthering some aspect of public policy.[179] A measure of the reasonableness of the state's actions requires that the host state's conduct bear a reasonable relationship to some rational policy.[180]

74. Conversely, tribunals in *Eureko*[181] and *Biwater*[182] deemed state actions to be violations of the fair and equitable treatment standard when the actions were motivated by political

[174] *Metalclad*, ¶ 185.
[175] *Id*.
[176] Dugan, 510.
[177] *Id*. at 510-11.
[178] Vandevelde, 204.
[179] *Saluka*, ¶ 306.
[180] *Id*. at ¶ 307.
[181] *Eureko*, ¶ 233.

and nationalistic considerations instead of legitimate public purposes. Such behavior failed to constitute reasonable actions and inherently interfered with investors' expectations subsequent to the applicable treaty.

75. In the present case, the Respondent has not interfered with the Claimant's legitimate expectations as the Respondent's actions were reasonably related to protecting vital national security interests. The respondent acted reasonably to prevent possible acces to the encrypted military communications network and future leaks of confidential information regarding the network. Allowing Opulentia access would jeopardize the Respondent's national security interests, and it is reasonable for a state to take actions to limit such threats.

B. BERISTAN'S ACTIONS DID NOT VIOLATE THE STANDARD OF FULL PROTECTION AND SECURITY UNDER CUSTOMARY INTERNATIONAL LAW.

76. Article 2(2) of the Beristan-Opulentia BIT guarantees fair and equitable treatment of investors by stating:

> "Both Contracting Parties shall at all times ensure in accordance with customary international law, including . . . full protection and security of the investments of investors of the other Contracting Party."

77. The standard of full protection and security requires host countries to utilize due diligence to protect foreign investors from physical injury to their persons or property, whether by government bodies or independent third parties.[183] Evaluation of the due diligence standard lacks rigid principles and instead relies upon the facts in individual cases for determination.[184] Any notion that the full protection and security standard confers strict liability upon states for any impacts upon investments has been summarily rejected.[185]

---

[182] *Biwater*, ¶ 500.
[183] *See* Salacuse, 209; *United States-Uruguay BIT,* Art. 5(2)(B) (2005).
[184] *See* Brownlie, 454.
[185] *See AAPL*, ¶ 53; *Tecmed*, ¶ 177; *ELSI*, ¶ 108.

78. In *Saluka*, the tribunal held that the full protection and security standard applied in cases where civil strife and physical violence in a host state impacted foreign investment.[186] The tribunal explained that the standard exists to protect the physical integrity of investments against interference by use of force.[187] In *Eastern Sugar*, the tribunal interpreted the standard in the Czech-Netherlands BIT to obligate states to ensure protection of foreign investment from physical violence perpetuated by mobs, insurgents, thugs and others.[188]

79. In the present case, the Respondent has not failed to provide full protection and security for the Claimant's investment because there were no threats of physical violence or violations of the physical integrity of the investment. At the time the CWF removed the Claimant's personnel, its investment had been legally severed by the Board of Directors.

C. BERISTAN DID NOT SUBJECT TELEVATIVE'S INVESTMENT TO UNJUSTIFIED OR DISCRIMINATORY MEASURES.

80. Article 2(3) of the Beristan-Opulentia BIT obligates both Contracting Parties to ensure that each investment made within its territory by investors of the other Contracting Party must not be subjected to unjustified or discriminatory measures.

81. Under such a formulation in similar treaties, most tribunals have concluded that there is a separate national treatment provision that prohibits nationality-based discrimination against foreign investments.[189]

82. Article 3(1) and 3(2) of the Beristan-Opulentia BIT provides that contracting parties shall offer investments and activities connected with those investments treatment that is no less favorable than that accorded to domestic investments and activities, or those of a third

[186] *Saluka*, ¶ 484-84.
[187] *Id*.
[188] *Eastern Sugar*, ¶ 203.
[189] Yannaca-Small, 434; *LG&E*, ¶ 147; *Lauder*, 219-20.

country.[190] Commentators however have stipulated that some degree of discrimination in the treatment of foreign investors as compared with nationals is generally permissible as a matter of customary international law.[191]

83. Generally, the claimant must show that its investment has been treated less favorably than that of a domestic or third country comparator in like circumstances, and must also show that the host state had no legitimate reasons for structuring such differential treatment.[192] Tribunals such as *Saluka*[193] and *Feldman*[194] have held that host states can provide differential treatment between investments and activities of foreign states and those of domestic companies so long as host states provide a rational basis for their actions.

84. In the present case, the Respondent did not discriminate against the Claimant's investment because it acted rationally in according differential treatment to the investments of Beritech and the Claimant. The action of Beritech's Board of Directors extinguished the Claimant's rights in the Sat-Connect project, and therefore the Respondent had a reasonable basis to remove the Claimant's personnel from a sensitive military project with vital national security implications. The Respondent acted swiftly to preserve the future confidentiality of the project and fortify its own security interests.

[190] Beristan-Opulentia BIT, Art. 3(1), (2).
[191] Jennings & Watts, 932.
[192] Newcombe & Paradell, 162;
[193] *Saluka*, ¶ 313.
[194] *Feldman*, ¶ 72.

PART V:

BERISTAN IS ENTITLED TO RELY ON ARTICLE 9 OF THE BERISTAN-OPULENTIA BIT AS A DEFENSE.

85. CLAIMANT claims that BERISTAN is not entitled to rely on Article 9 of the Beristan-Opulentia BIT, which grants broad discretion to contracting parties to take measures necessary to protect its own essential security interests, even if those measures conflict with the state's obligations under the Beristan-Opulentia BIT.

86. Article 9 of the Beristan-Opulentia BIT states:

> "Nothing in this treaty shall be construed: [...]
> 2. to preclude a Party from applying measures that it considers necessary for ... the protection of its own essential security interests."

87. Without prejudice to the preceding arguments, the Respondent contends that it is entitled to rely on Article 9 as a defense to the Claimant's breach of treaty obligations claims because: (i) the clause is inherently a self-judging exception to the treaty obligations; (ii) the clause grants broad discretion to the Respondent to protect its essential security interests; and (iii) the Respondent acted in good faith in invoking the exception.

A. ARTICLE 9 IS INHERENTLY SELF-JUDGING.

88. Self-judging clauses in international treaties allow states to reserve the right to breach their duty of compliance with international legal obligations in certain circumstances, such as when compliance with the obligations could threaten its sovereignty, security or essential interests.[195] Such clauses permit states to undertake unilateral actions to protect such interests in breach of its bilateral or multilateral obligations.

[195] *See* Briese & Schill, 1-2; Schloemann & Ohlhoff, 426.

89. The existence of a self-judging clause in an international treaty cannot be presumed. Article 31(1) of the *Vienna Convention* requires treaties be interpreted according to its plain language meaning.[196] Interpretation of the language must be objective and not skewed by a state's subjective intentions.[197] All international treaties and obligations presuppose cooperation between states rather than unilateral actions, and such exceptions for unilateral actions must be expressly written into the language.[198]

90. Recent ICSID decisions have adopted the position that self-judging clauses must be framed explicitly in order to grant the state invoking the clause broad discretion to determine the scope of its application.[199] Other international tribunals have upheld the requirement of explicit language necessary to create a self-judging exception to international obligations.[200]

91. International instruments including essential security exceptions interpreted as self-judging follow similar construction. For example, Article XXI of *GATT* states:

> "Nothing in this agreement shall be construed...
> B) to prevent any contracting party from taking any action which *it considers necessary* for the protection of its essential security interests."[201]

92. Article 2102(1) of *NAFTA* provides that:

> "Nothing in the agreement shall be construed...
> B) to prevent any party from taking any actions that *it considers necessary* for the protection of its essential security interests.[202]

---

[196] *Vienna Convention*, Art. 31(1) ("treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose")
[197] Briese & Schill, 6.
[198] *Id*.
[199] *See CMS Gas*, ¶ 366 *et seq*.; *LG&E Energy,* ¶212 *et seq*.; *Sempra Energy*, ¶ 374-85; *Enron*, ¶ 335-39.
[200] *See Paramilitary Activities*, ¶ 221-22.
[201] *GATT*, Art. XXI (emphasis added)
[202] *NAFTA*, Art. 2102(1) (emphasis added)

93. In contrast, the ICJ held in *Paramilitary Activities* that the essential security exception in the 1956 treaty between the United States and Nicaragua was not self-judging because its language was different than Art. XXI of *GATT*.[203] The treaty's language provided:

> "The present treaty shall not preclude *the application of measures necessary* to protect (a party's) essential security interests."[204]

94. From these examples, international law requires that the self-judging nature of the clause be apparent from its reading.[205] Simple references to "measures necessary for the protection of essential security interests" differ greatly from "measures *that the state considers to be necessary* for the protection of its essential security interests." Any exceptions clause with language similar to "it considers necessary" can be clearly interpreted under the *Vienna Convention* to be self-judging and creating discretion for unilateral consideration of the scope and applicability of the provision.

95. In the present case, the Respondent contends that a plain meaning interpretation of Article 9 of the Beristan-Opulentia BIT shows that the invocation of the clause is self-judging. Similar to the language in *GATT*'s Art. XXI and *NAFTA*'s Art. 2102(1), Article 9 states that either party can take measures "*that it considers necessary"* to protect its own essential security interests. The phrase "it considers necessary" confers unilateral power upon either contracting party to invoke the exception and breach its treaty obligations. Therefore, this language is specific as to the self-judging nature of the exceptions clause in the Beristan-Opulentia BIT.

B. THE CLAUSE GRANTS BROAD DISCRETION TO BERISTAN TO PROTECT ITS ESSENTIAL SECURITY INTERESTS.

96. Self-judging exceptions grant a state broad discretion in the determination of the scope of application allowable under international law. The nature of this authority entitles the state to determine, within certain limits, the content of the exception, and any interference

[203] *Paramilitary Activities*, ¶ 222.
[204] *Id*. (emphasis added).
[205] Briese & Schill, 9.

with this determination by a third party is unlawful.[206] International courts and tribunals have traditionally exercised self-restraint regarding their legitimacy and capacity to adjudicate disputes in areas such as "security" and "essential interests," as these are considered fundamental to state sovereignty and unsuitable for judicial review.[207]

97. While such exception provisions have rarely been subject to judicial review, most commentators and international authorities agree that these exceptions clearly assign authority to determine and interpret the scope of the exception to the state concerned, and not the international tribunal.[208] While dicta in earlier cases such as *Paramilitary Activities* seemed to state that self-judging exception clauses could act as a complete bar to jurisdiction by tribunals,[209] recent decisions have not followed this.[210]

98. Some international treaties have outlined certain criteria that limit the invocation of the exceptions clause. For example, *NAFTA*'s Art. 2102(1) limits actions taken to protect essential interests in time of war or other emergency, as related to the non-proliferation of nuclear weapons, and relating to military and weapons sales.[211] Similar provisions apply under *GATT* Art. XXI. These provisions function as objective standards of satisfaction reviewable by international tribunals.[212] Tribunals can review the actions of states invoking the exception to ensure that the threat faced by the state fell within one of the exceptions.

99. In contrast, the Respondent argues that such objective review of its actions is impermissible under the plain meaning interpretation of Article 9 of the Beristan-Opulentia BIT. Both parties to the Beristan-Opulentia BIT knew of the broad scope created by self-judging clauses, and could have inserted language or mechanisms to restrict its operation. As the parties chose not to do this, the tribunal must interpret the

---

[206] Salacuse, 344.
[207] Shany, 907-15.
[208] *See New York Convention*, Art. V(2)(B); Schloemann & Ohlhoff, 446.
[209] *Paramilitary Activities*, ¶
[210] *Djibouti*, ¶ 135.
[211] *See NAFTA*, Art. 2102(1)(b)(i-iii).
[212] Schloemann & Ohlhoff, 444-46; Hahn, 584-88.

clause to allow for a broad scope of activity as permissible, even if the tribunal deems such actions as adverse to international cooperation.

C. BERISTAN INVOKED ARTICLE 9 IN GOOD FAITH.

100. Under the current interpretation in international law of broad essential security exceptions, the actions of a state are subject to judicial review to determine whether the state acted in good faith.[213] The good faith review protects the object and purpose of the treaty against acts intending to deprive it of its use.[214]

101. Recent ICSID tribunals have stated that the appropriate standard of review for self-judging clauses is one of good faith.[215] Other tribunals have upheld the right to conduct a very limited good faith review of a state's actions in such situations.[216] Although *GATT*'s Art. XXI has yet to be reviewed under a tribunal, commentators agree that any state invoking the exception must be subject to a good faith review of its actions.[217]

102. The good faith obligation in Article 26 of the *Vienna Convention* obliges parties to a treaty to apply the terms in a reasonable way and in such a manner that its purpose can be realized. The U.N. Convention on the Law of the Sea defines good faith as requiring "fairness, reasonableness, integrity, and honest in international behavior," [218]Commentators, while disagreeing on the exact degree of review for good faith, generally agree that the state must have a reasonable basis for invocation of the exception, and that the state's actions must be minimally proportional to the threat it faces.[219]

---

[213] Burke-White & von Staden, 376.
[214] Briese & Schill, 24-50.
[215] *See LG&E*, ¶ 214; *Sempra Energy*, ¶ 388; *Enron*, ¶ 339.
[216] *See Djibouti*, ¶ 147.
[217] *See* Hahn, 599-601; Schloemann & Ohlhoff, 445.
[218] Law of the Sea, Art. 300
[219] *See* Hahn, 599-601; Schloemann & Ohlhoff, 445; Akande & Williams, 392; Burke-White & von Staden, 376-382.

103. In the present case, the Respondent invoked Article 9 in good faith. As previously stated, Opulentia had attempted to gain access to encryption keys essential to the security and protection of the Sat-Connect communications system.[220] The access these keys would give Opulentia to the Respondent's military communications system would jeopardize vital national security interests and privileged communication that the Respondent must protect. As Opulentia had received similar access from other Opulentian telecommunications companies, and because foreign laws could compel the Claimant to disclose its encryption keys and ciphers to Opulentia, execution of the buyout clause is the only way the Respondent could ensure that Opulentia had no access to the military communications network. Therefore, the Respondent's actions were both reasonable in light of the circumstances and proportional to the threat facing its national security.

220