

LACHS

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

In the Proceeding Between

**TELEVATIVE INC.
(CLAIMANT)**

AND

**THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
(RESPONDENT)**

MEMORANDUM FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

LIST OF LEGAL SOURCES.....vii

STATEMENT OF FACTS 1

PART I : ARGUMENTS ON JURISDICTION..... 2

**I. THE ISSUE SHOULD BE RESOLVED PURSUANT TO THE DISPUTE SETTLEMENT
CLAUSE IN THE JOINT VENTURE AGREEMENT..... 2**

**A. Clause 17 of the Joint Venture agreement refers future contractual disputes to the
exclusive jurisdiction of domestic courts of Beristan..... 2**

**B. Arbitration under Beristan – Opulentia BIT was precluded owing to submission of the
dispute to the domestic courts of Beristan..... 7**

**C. Alternatively, the Tribunals jurisdiction is precluded by a requirement to pursue
amicable settlement. 9**

**II. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER ARTICLE 10 OF THE
BERISTAN – OPULENTIA BIT..... 11**

**A. Claimant’s claims are contractual in nature and, therefore, are not governed by the
Beristan - Opulentia BIT. 11**

**B. The umbrella clause in the BIT does not provide protection from contractual obligations.
14**

CONCLUSIONS ON JURISDICTION 22

PART II – ARGUMENTS ON MERITS 23

**I. RESPONDENT DID NOT MATERIALLY BREACH THE JOINT VENTURE
AGREEMENT 23**

A. Respondent did not prevent Claimant from completing its contractual duties. 23

B. The Buyout Clause was invoked in a proper manner. 24

C. All actions taken by the Respondent were in accordance with the JV Agreement. 26

**II. THE RESPONDENT IS NOT LIABLE SINCE THE ACTS OF BERITECH CANNOT
BE ATTRIBUTED TO BERISTAN 27**

**III. RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INTEREST IN SAT-
CONNECT..... 29**

**A. Respondent’s acts do not amount to expropriation due to the fact that Respondent acted
as a private party..... 30**

**B. Even if this Tribunal decides that the expropriation has occurred, it should be deemed
lawful..... 31**

**C. If the Tribunal decides that expropriation has occurred and it was unlawful, the
Respondent submits that it paid the appropriate compensation. 31**

IV. RESPONDENT DID NOT BREACH FAIR AND EQUITABLE TREATMENT STANDARD.....	32
A. Respondent did not deprive Claimant of its legitimate expectations.....	33
B. Transparency of Respondent’s actions is not necessary.....	34
C. Respondent acted in good faith without the intention to treat Claimant in an inappropriate way.	35
V. RESPONDENT DID NOT TREAT CLAIMANT IN AN ARBITRARY OR DISCRIMINATORY MANNER.....	35
A. Respondent’s actions were not arbitrary.....	35
B. The measures undertaken by Respondent were not discriminatory.	36
VI. RESPONDENT DID NOT FAIL TO PROVIDE CLAIMANT’S INVESTMENT WITH FULL PROTECTION AND SECURITY	36
A. Respondent ensured physical protection to the Claimant’s investment.	36
B. Respondent was not obliged to provide Claimant with other kinds of protection than the physical protection.	37
VII. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9(2) OF BERISTAN-OPULENTIA BIT AS A DEFENCE TO CLAIMANT’S CLAIMS DUE TO THE SELF-JUDGING CHARACTER OF THIS CLAUSE.....	38
A. The analysis of Article 9(2) shows that it is a self-judging provision.....	38
B. If the Tribunal considers the argument of contextual interpretation of Article 9 as insufficient, Article 9 shall be interpreted in the light of in dubio mitius principle.....	40
C. Even if the Tribunal finds that Article 9 is not self-judging, the Respondent is still entitled to rely on Art. 9 since it is a non-precluded measures provision.....	41
CONCLUSION ON MERITS	43

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STATEMENT OF FACTS

1. **October 18, 2007** – Televative Inc., a privately held company incorporated in Opulentia, and Beritech S.A., a state-owned company from Beristan, signed a Joint Venture Agreement to establish a joint venture company – Sat-Connect S.A. The Government of Opulentia co-signed the Joint Venture Agreement as a guarantor of Beritech's obligations.
2. **August 12, 2007** - the Beristan Times published the article in which the Televative's personnel was accused of leaking some confidential information relating to the Sat-Connect's technology and systems to the Government of Opulentia. Both Televative and the Government of Opulentia made statements to deny those allegations.
3. **August 21, 2009** – the board of directors of Sat-Connect discussed the abovementioned article. The content of this meeting is disputed by Claimant.
4. **August 27, 2009** – the board of directors of Sat-Connect invoked clause 8 of the Joint Venture Agreement and Beritech bought-out Televative's interest in Sat-Connect.
5. **August 28, 2009** – Beritech served a notice on Televative requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment and to remove its personnel seconded to Sat-Connect project.
6. **September 11, 2009** – The Civil Works Force, the section of the Beristan army, secured all sites and facilities of Sat-Connect project. Televative's personnel was eventually evacuated from Beristan.
7. **October 19, 2009** – Beritech filed a request for arbitration against Televative according to the clause 17 of the Joint Venture Agreement. The amount of \$47,000,000 (Televative's total monetary investment in Sat-Connect) was paid into an escrow account by Beristan. Televative refused to accept the payment and to respond to Beritech's request for arbitration.
8. **October 28, 2009** – Televative filed arbitration request in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
9. **November 1, 2009** – the ICSID Secretary General registered the dispute between Televative and the Government of Beristan for arbitration.

PART I: ARGUMENTS ON JURISDICTION

I. THE ISSUE SHOULD BE RESOLVED PURSUANT TO THE DISPUTE SETTLEMENT CLAUSE IN THE JOINT VENTURE AGREEMENT.

1. Claimant contends that the dispute settlement clause in the Joint Venture Agreement does not apply in the case in question because the present claims are brought under the BIT and are distinct from contractual claims and, consequently, the Tribunal has jurisdiction to hear the case.

2. In response to these arguments the Respondent contends that ICSID and this Tribunal lack jurisdiction to hear this dispute. In support of its position the Respondent advances three distinct objections. These are: A) Clause 17 of the Joint Venture agreement refers future contractual disputes to the exclusive jurisdiction of domestic courts of Beristan; B) Arbitration under Beristan – Opulentia BIT was precluded owing to submission of the dispute to the domestic courts of Beristan; C) Alternatively, the Tribunal's jurisdiction is precluded by a requirement to pursue amicable settlement.

A. Clause 17 of the Joint Venture agreement refers future contractual disputes to the exclusive jurisdiction of domestic courts of Beristan.

1. Contract claims should be governed by the law of the host state.

3. According to the ordinary techniques of the conflict of laws, it is necessary to infer the law applicable to the agreement by looking at the state with which the contract had its closest connection.¹ This leads to a conclusion that the law applicable to the agreement is the law of the host state.

¹ Sornarajah, p. 290

4. This principle has been confirmed by Tribunals in numerous awards. In *Qatar* arbitration the arbitrator stated that the subject matter of the contract made Islamic law applicable to the contract.² A similar conclusion was reached in the *Abu Dhabi* arbitration.³

5. Also in *Aramco* arbitration, the arbitrator noted that in private international law the sovereign state is presumed, unless the contrary is proven, to have subjected its undertakings to its own legal system.⁴ This principle was confirmed in the *Serbian Loans* case, where the PCIJ had ruled that any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.⁵

6. In an instant case the law applicable to the contract should be the law of Beristan, because the contract is wholly performed in Beristan. Nonetheless, even if the Tribunal does not take into account the principle referred to above, the parties to the Joint Venture Agreement have also explicitly stated that it is the law of Beristan that shall govern any dispute relating to the performance of the agreement.

2. The Joint Venture Agreement involved an express choice-of-law clause.

7. The parties to the JV Agreement have explicitly chosen the forum - they agreed that the disputes relating to the contract should be governed by the laws of the Republic of Beristan.⁶ Moreover, they also waived any objections they might have to such arbitration proceedings.

8. Contract claims are settled through the mechanisms agreed upon by the parties in their contracts, as the case may be. It was the issue in *Vivendi I*, *Olguin v Paraguay*, *Genin v Estonia*, *CMS v Argentina*. The Tribunal in *Bayindir* explicitly stated that in a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.⁷ Also in *AGIP v Congo* the Tribunal concluded that the nationalization measures in question must be

² Qatar arbitration, p. 545

³ Abu Dhabi, p. 144

⁴ Aramco, p. 117

⁵ Dolzer, Schreuer, p. 154

⁶ Annex 3, Clause 17, p. 19

⁷ Bayindir ¶ 149

considered first of all in relation to the Congolese law,⁸ because that is what the parties agreed on.

9. It is generally regarded that an agreement to arbitrate only arises if it is clear and unambiguous.⁹ It has been confirmed by the tribunals in *Plama* and *Berschader*¹⁰.

10. Also the appropriate principle of interpretation of such agreements was stated by the tribunal in *Amco v Indonesia*.¹¹ It noted that an agreement to arbitrate

“is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law”.¹²

11. In our case there are no doubts as to the intention of the parties to the JV agreement – the agreement to arbitrate was clear and raises no doubts. The parties agreed to submit all the issues relating to the Joint Venture agreement to the arbitration tribunals of Beristan. Therefore, Claimant’s allegations that the dispute settlement clause in a JV agreement is irrelevant should be dismissed by this Tribunal.

3. The Beristan – Opulentia BIT does not override the exclusive forum selection clause from a contract.

12. The parties to the JV Agreement agreed for the disputes relating to the contract to be solved by the Beristan tribunals and it was an ‘exclusive’ choice.¹³

13. The Tribunal in *SGS v Philippines* stated that a binding exclusive jurisdiction clause in a contract should be respected, unless it is overridden by another valid provision.¹⁴ The Tribunal in the mentioned case decided to stay the proceedings until the Philippine court decided on the contractual claims.¹⁵ The ICSID panel in the present dispute should do the

⁸ AGIP v Congo ¶ 322

⁹ Newcombe/Paradell, p. 217

¹⁰ Berschader ¶177

¹¹ Newcombe/Paradell, p.217

¹² Amco v Indonesia I ¶ 377

¹³ Annex 3, Clause 17

¹⁴ SGS v Philippines ¶ 77

¹⁵ Ibid. ¶ 175

same, i.e. stay the proceedings until the Beristian tribunal determines the resolution of the dispute.

14. In concluding that the BIT did not override the contract clause, the *SGS v Philippines* Tribunal presented two arguments. Firstly, the BIT in which the parties give their consent to arbitration is drafted in a general language, which negates the presumption that it has the effect of overriding specific provisions of particular contracts, which are freely negotiated between parties.¹⁶ And secondly, the purpose of negotiating BITs is to encourage and protect investment contracts, so the BIT's effect cannot be to replace in substance those same contracts.¹⁷

15. The tribunal also underlined that it cannot be accepted that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.¹⁸ To support this conclusion the arbitrators followed the *Vivendi* decision.

16. In *SGS v Pakistan* different interpretation was presented, but the majority reached a similar conclusion. The arbitrators acknowledged that, on a literal view, both BIT claims and contract claims could be described as 'disputes with respect to investments' within the scope the dispute resolution clause in the BIT. However, the tribunal had no hesitation in rejecting the suggestion that this clause conferred upon it jurisdiction to determine contractual claims such as those under the PSI Agreement. The tribunal could not see anything in the umbrella clause provision or in any other provisions of the BIT that could be read as vesting the Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.¹⁹ Therefore, the contract clause was a valid forum selection agreement.²⁰

17. The question of a relationship between compromissory clauses in contracts and BITs was also addressed by the Tribunals in *Joy Mining* and *Salini*. The panel in the former decision,

¹⁶ Ibid. ¶ 141

¹⁷ Wendlandt, p. 547

¹⁸ *SGS v Philippines* ¶ 153

¹⁹ *SGS v Pakistan* ¶ 161

²⁰ Ibid. ¶ 161

following *SGS v Pakistan*, held that the contractual compromissory clause would have overridden the BIT compromissory clause in any event.²¹

18. In *Salini* the ICSID panel once again upheld the overriding nature of the contractual clauses which in that case provided for the exclusive jurisdiction of Jordanian courts over the contract claims.²²

19. According to the facts of the case, the parties agreed that contractual claims be resolved in accordance with the law of Beristan.²³ The exclusive forum selection clause in the Joint Venture Agreement was freely negotiated by the parties to the contract and, consequently, Claimant should respect its application in the present dispute.

4. Alternatively, due to the fact that the contract postdated the JV Agreement, the consent to arbitration in the BIT was surpassed by the contractual agreement.

20. Providing the Tribunal does not find the abovementioned submission convincing, the Respondent contends that the BIT's dispute settlement provision does not apply in the case in question because the BIT predated the contract.

21. A contractual compromissory clause constitutes *lex specialis*. According to the maxim *generalia specialibus non derogant*,²⁴ the general provision must yield to the special provision. That was the case in *SPP v Egypt* where the tribunal concluded that a contractual forum selection clause which postdated the BIT should have precedence over the dispute resolution clause in a BIT.²⁵

22. By agreeing to have their disputes arbitrated under the Beristan law, Claimant forfeited its right to have the dispute arbitrated under the ICSID auspices. The Beristan – Opulentia BIT became effective on 1 January 1997,²⁶ whereas the JV Agreement is dated 18 October 2007.²⁷

²¹ Joy Mining ¶ 91

²² Shany, p.843; *Salini v Jordan* ¶ 96

²³ Annex 3, Clause 17

²⁴ Wong, p. 153

²⁵ *SPP v Egypt* ¶ 244

²⁶ First Clarifications, No. 174

By agreeing to have their disputes arbitrated under the Beristan law, Claimant forfeited its right to have the dispute arbitrated under the ICSID auspices.

B. Arbitration under Beristan – Opulentia BIT was precluded owing to submission of the dispute to the domestic courts of Beristan.

30. The arbitration regarding the dispute in question was first commenced by Beritech. Despite Televative’s refusal to participate, the tribunal has been constituted and determined the seat of arbitration, namely Beristan.²⁸ Televative filed its request for arbitration only on October 28, 2009.²⁹

1. The litigation instituted by Beritech should be an obstacle to ICSID arbitration.

31. The fact that the arbitration proceeding were already instituted in the domestic tribunal should bar Claimant from instituting the proceeding based on the same facts.

32. The applicability of multiple jurisdictions would cause a significant problem and could encourage the so-called forum shopping, that is the situation under which the Claimant chooses a forum which is more sympathetic to it.³⁰ Such an understanding of the clause could detract from the predictability of international investment transactions and would limit the contractual freedoms of the parties.³¹

33. The Tribunal in *Waste Management* found that the investor had failed to satisfy the waiver requirements of NAFTA Article 1121. It stated that:

“when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in the light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages”.³²

²⁷ Annex 3, Excerpt from JV Agreement

²⁸ First Clarifications, No. 118

²⁹ Annex 2, ¶ 14

³⁰ Sornarajah, p. 327

³¹ Wong, p. 536

³² Waste Management ¶ 26

34. Claimant does not want to agree for the jurisdiction of the Beristian tribunal because, as may be assumed, it is afraid that the result of such proceedings may be less satisfactory than recourse to international arbitration. However, the Beristian tribunals are, as stated in the facts of the case, arbitrating according to the highest possible international standards and there should be no fear on part of the Claimant in submitting any dispute for resolution to those tribunals.

2. The fork-in-the-road provision in a BIT precludes the jurisdiction of the ICSID panel.

35. The Beristan-Opulentia BIT contains the so-called ‘fork in the road’ provision, that is, the stipulation that if the investor submits a dispute to the local courts of the host state, or to any other agreed dispute settlement procedures, it loses the right to submit it to arbitration.³³ In other words the choice of forum the investor makes is final.³⁴

36. The ad hoc committee in *Vivendi* disagreed with the initial finding of the *Vivendi* tribunal and stated that turning to domestic courts would have affected the Claimant’s ability to go to arbitration.³⁵ In the Committee’s view a claim for breach of a contract, which is brought before the contentious administrative courts of Tucuman, would constitute a final choice of forum providing the claim was coextensive with a dispute relating to investments made under the BIT.³⁶

37. This ‘coextensive standard’ shall be favored by the Tribunal because it protects States from repetitive litigation³⁷ and removes artificial distinction between contract and treaty claims which forces the investor into a false choice between international and domestic protection.³⁸

³³ Newcombe/ Paradell, p.70; MCI Power Group v Ecuador ¶ 172

³⁴ Weiler, 301

³⁵ Ibid., 303

³⁶ Vivendi II ¶ 36

³⁷ Occidental ¶ 54

³⁸ Ibid. ¶ 53

38. The dispute relating the JV Agreement has already been commenced in the domestic tribunals of Beristan and, consequently, Claimant was aware that it had no right of choice at that time.

39. For all these reasons, jurisdiction is barred by the fork-in-the-road provision of the Beristan-Opulentia BIT.

C. Alternatively, the Tribunals jurisdiction is precluded by a requirement to pursue amicable settlement.

40. Providing the Tribunal does not find the Respondent's earlier submissions convincing, the Respondent submits that the jurisdiction of this Tribunal is precluded because Claimant did not satisfy the requirement to pursue amicable settlement.

41. Typically BIT dispute resolution clauses establish the conditions that must be fulfilled before such arbitration may be commenced.³⁹ These can vary widely from treaty to treaty but usually include a negotiation or consultation period (also called a waiting period), usually between three to six months from the date the dispute arose or was formally notified by the investor the host State.⁴⁰ Only upon expiry of the negotiation period an arbitration may be instituted.⁴¹

1. Teleivative did not satisfy the prerequisites for jurisdiction from the BIT.

42. Article 11 of the Beristan – Opulentia BIT provides that:

“if the dispute cannot be settled amicably within six months of the date of a written application, the investor in question may in writing submit the dispute for settlement”.⁴²

³⁹ Newcombe/Paradell, p. 71

⁴⁰ Horn, p. 343

⁴¹ Newcombe/Paradell, p. 71

⁴² BIT, Article 11

43. According to the facts of the case, on September 12, 2009, Televative submitted a written notice to the Respondent of a dispute under the BIT and that it desired to settle amicably.⁴³ It did not, however, wait for the six months before requesting arbitration. Claimant requested arbitration in accordance with ICSID rules on October 28, 2009, that is one and a half month after it produced a notice of a dispute. Consequently, Claimant did not comply with this requirement and that is why the Tribunal cannot judge the case.

1.1 Claimant should wait for six months before submitting its claim to the ICSID tribunal.

44. The Tribunals in *Goetz*⁴⁴ and *Enron*⁴⁵ were of the opinion that amicable settlement provisions are prerequisites to jurisdiction. The same conclusion can be drawn from the language of the dispute settlement provision in the BIT which states that the dispute cannot be settled without a six -month amicable settlement period.

45. Consistent with Article 31 of the Vienna Convention which states that a dispute has to be interpreted in accordance with its ordinary meaning and in the light of its object and purpose,⁴⁶ no doubts should arise as to the fact that amicable settlement provision from Art. 11 of the BIT is a prerequisite to jurisdiction.

46. The alternative approach, namely that the amicable settlement provision is not a prerequisite to jurisdiction but only a procedural matter that can easily be dispensed with, totally nullifies the importance and purpose of this provision.

47. Claimant in an instant case gave notice of the dispute but did not pursue amicable settlement. It initiated arbitration only 1,5 month after the notice of the dispute and no information as to the actual trial to settle can be found in the facts of the case.

⁴³ First Clarifications, No. 133

⁴⁴ *Goetz* ¶ 91

⁴⁵ *Enron* ¶88

⁴⁶ VCLT, Art. 31

48. Claimant treated the amicable settlement as purely amicable matter which does not have to be complied with. It ignored this provision and it should not benefit from this non-compliance.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER ARTICLE 10 OF THE BERISTAN – OPULENTIA BIT.

49. Article 10 of the Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the encouragement and reciprocal protection of investments (the BIT) provides that:

“Each Contracting Party shall constantly guarantee the observance of any obligations it has assumed with regard to investments in its territory by investors of the other Contracting Party”.⁴⁷

50. A clause of this type is called the “umbrella clause”, because by signing it both parties agree to bring the obligations undertaken by the host state under the umbrella of protection of the treaty.⁴⁸ In other words, the clause imposes a duty on a the state to observe obligations into which it has entered.⁴⁹

51. However, for the Tribunal to have jurisdiction over the dispute under such a clause, a number of requirements must be satisfied, none of which have been satisfied by the Claimant in this case. Contrary to Claimants assertions, the Respondent contends that ICSID and this Tribunal lack jurisdiction to hear this dispute under Article 10 of the BIT. In support of this position the Respondent submits that: A) Claimant’s claims are contractual in nature and, therefore, are not governed by the Beristan- Opulentia BIT; B) The umbrella clause in BIT does not provide protection from contractual obligations.

A. Claimant’s claims are contractual in nature and, therefore, are not governed by the Beristan - Opulentia BIT.

⁴⁷ Art. 10 of the BIT, p. 13

⁴⁸ Newcombe/Paradell, p. 437

⁴⁹ Feit, p. 13

1. Claimant's claims have purely contractual basis.

52. According to the facts of the case Claimant asserts that Beritech was unlawfully buying-out Claimant's interests in the joint venture agreement under Clause 8 of this agreement,⁵⁰ which deprived Claimant of money it would receive if the interests were sold to an arms-length buyer.⁵¹ These claims are based solely on the joint venture agreement concluded between Televative and Beritech.

53. The Tribunal in *SGS v Pakistan* has noted that BIT claims and contract claims appear reasonably distinct in principle.⁵² It has been also emphasized in *Vivendi* annulment decision that the contract and treaty claims exist independently.⁵³

54. Thus, a state may breach a treaty, without breaching a contract, and vice versa.

“Whether there has been a breach of the BIT and whether there has been a breach of contract are independent questions”.⁵⁴

55. In other words, a mere breach of contract does not constitute a violation of international law.⁵⁵ Additionally, it has been noted that each of these claims will be determined by reference to its own proper or applicable law – in case of the BIT, by treaty law, and in case of a contract – by law chosen by the parties to this contract.

56. Tracing back to the abovementioned *Vivendi* decision, the tribunal in *Bayindir v Pakistan* held that treaty claims are juridically distinct from claims for breach of contract, even when they arise out of the same facts.⁵⁶ The Tribunal also underlined the distinction between treaty and contract claims is now well-established.⁵⁷ Such distinction was also noticed by Tribunals in other decisions, including: *Salini, Toto Costruzioni* or the recent *Burlington v Ecuador*.

⁵⁰ Summary of Parties Contentions, p. 6

⁵¹ Summary of Parties Contentions, p. 6

⁵² *SGS v Pakistan* ¶ 149

⁵³ *Vivendi II* ¶ 262

⁵⁴ *Ibid.*, ¶ 101

⁵⁵ Ribeiro, p. 205

⁵⁶ *Bayindir* ¶ 148

⁵⁷ *Ibid.*, ¶ 148

57. Consequently, to use the language of the award in *Vivendi Annulment*, the essential basis of Televative's claims is purely contractual and, therefore, the dispute should be resolved according to the dispute resolution clause in the JV Agreement, that is the law chosen by the parties to the contract.

2. The breaches of contract do not automatically equal to breaches of international treaty law.

58. The Tribunals in *CMS v Argentina* and *Joy Mining* directly addressed the issue of the relationship between contract and treaty claims. In *CMS* the Tribunal explicitly stated that 'not all contract breaches result in breaches of the treaty' and that the standard of a treaty protection is engaged only when there is a breach of the treaty right or obligations.⁵⁸ In *Joy Mining*, on the other hand, the Tribunal speaks of violations of a contract of such magnitude as to trigger the protection of the Treaty.⁵⁹

59. The Tribunal in *SGS v Pakistan* stated that 'clear and convincing' evidence is necessary to decide whether or not the parties to the dispute intended to elevate the breaches of contract to the level of a breach of treaty.⁶⁰ Similarly, in *Pan American Energy* the Tribunal observed that it would be strange if the acceptance of a BIT by a State entailed an international liability going far beyond the obligation to respect the standards embodied in the treaty.⁶¹

60. As a consequence, contract claims can be elevated to breaches of international law only with explicit evidence that the parties had such an intention. If not - the nature of the inter pares relationship remains unchanged and only the interstate relationship is subject to international law.

61. Without the explicit evidence of the parties' intention to equal contract and treaty breaches, the implications of expansive interpretation of the clause would include, above all,

⁵⁸ *CMS v Argentina* ¶ 299

⁵⁹ *Joy Mining* ¶ 81

⁶⁰ *SGS v Pakistan* ¶

⁶¹ *Pan American* ¶ 110

the risk of elevating a multitude of ordinary commercial transactions into international disputes.⁶²

62. What follows from the abovementioned decisions is that Televative's contract claims are not automatically elevated to treaty claims. The breach of a contract is not enough to trigger the protection of a bilateral treaty. Therefore, Claimant should agree to resolve the dispute according to its contractual commitments.

B. The umbrella clause in the BIT does not provide protection from contractual obligations.

1. The aim of the umbrella clauses speak for the narrow interpretation of such clauses.

63. According to the Tribunal in *SGS v Pakistan* the umbrella clause should be interpreted narrowly, so as to provide protection when the treaty obligations are violated, but not when an independent contractor breaches its contractual obligations.⁶³ A similar interpretation was presented in the *Joy Mining* case, where it was stated that:

“it could not be held that an umbrella clause inserted in a treaty (...) could have the effect of transforming all contract disputes into investment disputes under the treaty”.⁶⁴

64. Also, the broad interpretation would have, as stated in *El Paso*, far reaching consequences which could be quite destructive of the distinction between national legal order and the international legal order.⁶⁵ The narrow interpretation of the clause has been also

⁶² Newcombe/Paradell, p. 438

⁶³ *SGS v Pakistan* ¶ 167

⁶⁴ *Joy Mining* ¶ 81

⁶⁵ *El Paso* ¶ 62

acknowledged by the Tribunal in other cases, including *Pan American Energy*,⁶⁶ *Impregilo*⁶⁷ or *Waste Management*.⁶⁸

65. In order to guarantee that the umbrella clause serves its purposes, it has to be interpreted narrowly. Otherwise, it may create uncertainty in the global marketplace and unfairly penalize the contracting state.⁶⁹ Broad interpretation of observance of undertakings clauses makes the contractual protections void.

2. Alternatively, the scope and effect of the umbrella clause has to be interpreted in terms of its specifying wording.

66. The specific wording of an umbrella clause and the structure of the treaty at issue⁷⁰ is crucial to its scope and effect.⁷¹ To put it differently, everything depends in the actual language of the clause.⁷² Specifically, the tribunals have agreed that the scope of obligations and commitments which are protected by the clause depends on what the clause in question actually contains or does not contain.

2.1 The clause has to be interpreted *in dubio mitius*.

67. The Tribunal in *SGS v Pakistan* found that the proper mode of interpretation of a BIT is ‘in the case of doubt for the restrictive view’ (*in dubio mitius*).⁷³ The legal consequences of the conventional approach to the umbrella clause would be according to the Tribunal “so far reaching in scope, and so automatic (...) and so burdensome”⁷⁴ in their potential impact upon

⁶⁶ Pan American ¶ 110

⁶⁷ Impregilo ¶ 254

⁶⁸ Waste Management ¶ 73

⁶⁹ Wong, p. 3

⁷⁰ Newcombe/Paradell, p. 438

⁷¹ OECD Umbrella clause, p. 9

⁷² Crawford, p. 17

⁷³ Dolzer, Schreuer, p. 157

⁷⁴ *SGS v Pakistan* ¶ 167

a Contracting Party. Thus, no presumptions should be allowed in the absence of a clear expression of a corresponding will by the parties.⁷⁵

68. The Tribunal cited the pronouncement by the WTO Appellate Body in the *EC Measures Concerning Meat and Meat Products (Hormones)* that treaties are to be subject to restrictive interpretation⁷⁶:

“We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation”.⁷⁷

69. According to the *SGS v Pakistan* Tribunal, the application of the conventional view would also cover non-contractual obligations arising under the laws of the host state which would lead to a flood of lawsuits before international tribunals and would obviate the meaning of other guarantees contained in the BIT.⁷⁸ In other words, if any simple breach of a contract sufficed to bring the BIT into play, other substantive BIT standards such as fair and equitable treatment, MFN or full protection and security would be simply superfluous.⁷⁹ These arguments were later confirmed by the tribunals in *El Paso* and *Pan American*.

70. The principle *in dubio mitius* has been underlined also by other decisions, including *Loewen Group*,⁸⁰ the ICJ judgment in *Nuclear Tests Case*⁸¹ or the PCIJ decision in *Access of Polish War Vessels to the Port of Danzig*.⁸²

71. Because Article 10 of the Beristan – Opulentia BIT does not provide with a definite answer as to the actual scope of the protection of the contractual commitments by Beristan, a restrictive view should be favored. The parties to the treaty did not expressly stated their will in that regard. From the facts of the case we know that the Respondent did not agree for such an understanding of Article 10 of the treaty which would cover both contract and treaty claims.

⁷⁵ Dolzer, Schreuer, p. 157

⁷⁶ Law for the 21st century, p. 486

⁷⁷ Hormones ¶ 165

⁷⁸ Dolzer Schreuer, p. 158; *SGS v Pakistan* ¶ 166

⁷⁹ Wong, p.9

⁸⁰ *Loewen Group* ¶ 162

⁸¹ *Nuclear Tests* ¶ 44

⁸² *Polish War Vessels to the Port of Danzig*, p. 142

72. Also, to use the wording of *SGS v Pakistan*, Article 10 of the BIT would have to be “considerably more specifically worded” before it can reasonably be read in such an expansive manner as submitted by the Claimant. A less restrictive interpretation of the clause in question would be to the detriment of the Respondent.

2.2 Art. 10 of the Beristan - Opulentia BIT lacks mandatory wording.

73. The umbrella clause in Beristan – Opulentia BIT reads as follows: “Each contracting party shall constantly guarantee the observance in its territory...”. Most BITs contain the clauses which are clear and straightforward: “shall observe”,⁸³ “shall respect”.⁸⁴ The wording “shall constantly guarantee the observance” (as is the case of Switzerland – Pakistan BIT) is not mandatory⁸⁵ and, therefore, leaves room for non-mandatory interpretations.

74. The phrase ‘constantly to guarantee the observance’ does not necessarily signal the creation and acceptance of a new international law obligation on the part of the Contracting Party.⁸⁶ It also provides a less indirect duty⁸⁷ and is regarded to be less strict than the phrase “shall observe”.⁸⁸

75. Taking into account the abovementioned observations, it is clear that the wording of the umbrella clause in the treaty between Beristan and Opulentia is not mandatory. Therefore, there is no basis for claims that all breaches of contract are under the scope of this clause.

2.3 The umbrella clause in the Beristan – Opulentia BIT is placed at the end of the treaty.

⁸³ Austria Model BIT, Denmark Model BIT, Switzerland Model BIT, UK Model BIT

⁸⁴ Greece-Serbia and Montenegro BIT, 1997

⁸⁵ Newcombe/ Paradell, p. 445

⁸⁶ *SGS v Pakistan* ¶ 101

⁸⁷ *Salini v Jordan* ¶ 126

⁸⁸ Newcombe/Paradell, p. 191

76. The location of the umbrella clause in a treaty is regarded to have an effect on the interpretation of the clause as such.⁸⁹ In particular when placed within the initial treatment provisions there is strong evidence that the intention of the contracting parties was to impose substantial international obligations.⁹⁰

77. The Tribunal in *SGS v Pakistan* stated that the location of the umbrella clause in Article 11 of the BIT, i.e. near the end of the treaty, was an indication of an intention not to provide the substantive obligation.⁹¹ It was noted that the substantive standards in the Swiss-Pakistan BIT were marked of by the principle of subrogation,⁹² just as is the case in the dispute in question. Thus, umbrella clause was not a “first order” standard obligation.⁹³

78. Even if the Tribunal does not consider the location of the clause in question as a decisive factor, still it may be “entitled to some weight”, as stated in *SGS v Philippines*.⁹⁴

79. The observance of undertakings clause in the BIT in question is located in Article 10 of the treaty, i.e. after all the substantive obligations: fair and equitable treatment and full protection and security in Article 2, national treatment and MFN clause in Article 3, prohibition of expropriation in Article 4.⁹⁵ Therefore, it may be assumed that the parties did not wish for the umbrella clause to be a ‘first order’ standard obligation. The clause was not meant to be among the substantive obligations of the Contracting States.

3. The acts of the private entities can only be attributed to the state if it acted as a sovereign.

80. In *El Paso* the tribunal underlined the necessity of distinguishing the State as a merchant, from the State as a sovereign, i.e. between “commercial” and “sovereign acts”.⁹⁶ Consequently, if the umbrella clause does not extend treaty protection to breaches of an

⁸⁹ OECD Umbrella Clause, p. 9; Newcombe/Paradell, p. 444

⁹⁰ Newcombe/Paradell, p. 445

⁹¹ *SGS v Pakistan* ¶169

⁹² *Ibid.* ¶ 169

⁹³ *Ibid.* ¶170

⁹⁴ *SGS v Philippines* ¶ 124

⁹⁵ *Beristan – Opulentia BIT*, Articles 2-4

⁹⁶ Dolzer, Schreuer, p. 160

ordinary commercial contract, still it covers additional protection contractually agreed to by the State. As will be proven later,⁹⁷ that is not the issue in our case.

81. Wälde was of the opinion that the principle of international law would only protect breaches and interferences with contracts made with governments or subject to government powers, if the government exercised its particular sovereign prerogatives to escape from its contractual commitments or to interfere in a substantial way with such commitments.⁹⁸

“If the core or centre of gravity of a dispute is not about the exercise of governmental powers ... but “normal” contract disputes, then the BIT and the umbrella clause has no role”.⁹⁹

3.1 The acts of Beritech cannot be attributed to Beristan.

82. The question of the attribution in connection with an umbrella clause was addressed by the Tribunals in *Impregilo v Pakistan* and *Azurix v Argentina* cases. In *Impregilo* the claimant entered into a contract with a separate legal entity of a Pakistani State. In *Azurix* the contract was concluded between Azurix acting through a subsidiary and one of the provinces of Argentina. In both cases the Tribunals did not attribute contracts to the states. Also in the more recent *AMTO v Ukraine* the Tribunal concluded that the umbrella clause has no direct application when the contractual obligations are undertaken by a separate legal entity.¹⁰⁰

83. The Respondent did not interfere with the contract in any way and, therefore, cannot be liable for the acts of Beritech.

84. The question of attribution was addressed above all in *Mafezzini*, *CMS v Argentina*, *SGS v Philippines*, *Salini v Jordan* or *UPS v Canada*.¹⁰¹ This issue however will be further elaborated on in Part II of this memorial.¹⁰²

⁹⁷ *Infra*, Part II

⁹⁸ OECD Umbrella Clause, p. 8

⁹⁹ Walde, p. 19

¹⁰⁰ *AMTO v Ukraine* ¶ 110

¹⁰¹ *Feit*, p. 3

¹⁰² *Infra*, Part II

3.2 Beristan was not a party to the contract.

85. In *EDF v Romania* the tribunal underlined that a breach of contractual obligations by a party entails such party's responsibility at contractual level.¹⁰³ At the same time the Tribunal stated that there is in principle no responsibility by the State for such breach when the State is not a party to the contract and has not directly assumed the contractual obligations the breach of which is invoked.¹⁰⁴

86. The Tribunals in *EnCana*¹⁰⁵ and *Duke Energy*¹⁰⁶ also underlined that the contracts in question were not signed by all the parties and as a result no obligations were assumed by them under those contracts.

87. The facts of the case leave no doubt as to the actual parties do the Joint Venture Agreement. The agreement was entered into by Televative on one side and Beritech on the other. Beristan was not a party to this agreement and should not be treated as such.

3.3 Alternatively, Beristan did not act as a sovereign.

88. Even if the Tribunal does not find the Respondent's previous submission convincing, still Beristan was not acting as a sovereign in performing the contract, but rather as a "merchant".

89. The Tribunal in *Impregilo* introduced the so –called 'puissance publique' test, according to which only a state in the exercise of its sovereign authority and not as a contracting party may have breached obligations assumed under the BIT. The Tribunal stated that the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behavior of the Host State acting in breach of the obligations it has assumed under the treaty.¹⁰⁷ In *CMS v Argentina* it was concluded that purely commercial aspects might not be protected by a treaty but

¹⁰³ *EDF v Romania* ¶ 317

¹⁰⁴ *Ibid.* ¶ 317

¹⁰⁵ *EnCana* ¶ 40

¹⁰⁶ *Duke Energy* ¶ 36

¹⁰⁷ *Impregilo* ¶ 85

“the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor”.¹⁰⁸

89. This was later confirmed in the *Bayindir* case.¹⁰⁹

90. In our case, all the allegations which make up Televative’s claim for breach of treaty concern the conduct of Beritech, which just like the conduct of NHA in abovementioned award in *Bayindir v Pakistan*, was contractual and sovereign in character.¹¹⁰

91. The Tribunal in *Bayidnir* case which facts resemble the facts in our case has noted that the question whether the actions of the host State amount to sovereign acts of ‘puissance publique’ is a question to be resolved on merits.¹¹¹

92. The records of our case show no exercise of sovereign power on behalf of Beristan. It is true that the Respondent co-signed the JV Agreement as a guarantor¹¹² which meant Beristan would assume the obligations of Beritech under the JV agreement upon Beritech’s default.¹¹³ The facts do not, however, give any evidence that it was acting as a sovereign in this regard.

4. Even if the Tribunal is in favor of the broad interpretation of the umbrella clause, still it does not preclude the initial pursue of remedies in local courts.

93. The Tribunal in *SGS v Philippines* stated that the umbrella clause

“makes it a breach of the BIT to fail to observe binding commitments, including contractual commitments (...) but it does not convert the issue of the extent or content of such obligations into an issue of international law”.¹¹⁴

94. The tribunal further explained that allowing investors the choice of forum in an agreement is consistent with the aims of the BIT¹¹⁵ and that binding exclusive jurisdiction clause in a

¹⁰⁸ CMS v Argentina ¶ 299

¹⁰⁹ Bayindir ¶ 180

¹¹⁰ Ibid. ¶ 181

¹¹¹ Ibid. ¶183

¹¹² First Clarifications, No. 153

¹¹³ Ibid., No. 152

¹¹⁴ SGS v Philippines ¶ 128

¹¹⁵ Ibid. ¶ 132

contract should be respected.¹¹⁶ Consequently, a recourse to international arbitration is possible only when the local remedies are exhausted.

95. The ICJ in the *Elsi* case stated that the exhaustion-of-local-remedies rule cannot be tacitly dispensed with and it can block interstate claims that are bound up with the investment claims it covers.¹¹⁷ Also the tribunal in *SGS v Pakistan* explicitly stated that the BIT does not preclude Claimant from resorting to other remedies in respect of contract claims prior to the exercise of the BIT right.¹¹⁸

96. The parties to the JV Agreement selected an exclusive forum. This agreement is still binding and, therefore, the parties should refer to the local remedies before turning to international arbitration. The Claimants decision to submit the dispute to the tribunal was premature and inappropriate. Televative should have waited for the national courts of Beristan to judge the case.

CONCLUSIONS ON JURISDICTION

97. The ICSID Tribunal does not have jurisdiction over this dispute because it should be resolved pursuant to the forum selection clause of the JV Agreement. This clause refers future contractual disputes to the exclusive jurisdiction of domestic courts of Beristan. Claimant's claims are contractual in nature, which means they cannot be governed by the BIT and are not protected by the umbrella clause. Also, ICSID arbitration is precluded by the requirement to pursue amicable settlement. Moreover, this Tribunal lacks jurisdiction because a domestic remedy under the JV Agreement has already been chosen.

¹¹⁶ Ibid. ¶ 138

¹¹⁷ *Elsi* ¶ 50

¹¹⁸ *SGS v Pakistan* ¶ 177

PART II – ARGUMENTS ON MERITS

I. RESPONDENT DID NOT MATERIALLY BREACH THE JOINT VENTURE AGREEMENT

98. The facts of the case clearly prove that the Respondent’s actions were in accordance with the JV Agreement. Televative submits that Respondent prevented Claimant from completing its contractual duties and that the buyout clause was not invoked in a proper manner. These assertions contradict the truth.

A. Respondent did not prevent Claimant from completing its contractual duties.

99. The JV Agreement contains a provision the aim of which was to protect confidentiality of all information regarding Sat-Connect S.A. Both parties agreed that:

“it will keep confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person or entity not authorized under this Agreement, without the prior written approval of the Sat-Connect board of directors”.¹¹⁹

1. Art. 4(1) of the JV Agreement is an obligation of result.

100. The words “will not allow to be disclosed” are crucial to the interpretation of the abovementioned provision. They indicate that this provision constitutes an obligation of result. In particular, in a case at hand this obligation consisted in preventing the leakage of any information regarding Sat-Connect. Thus, in the light of the information in the Beristan Times it becomes clear that by disclosing confidential information Claimant violated this obligation.

2. In alternative, Art. 4 (1) was the due diligence obligation.

¹¹⁹ Annex 3, art. 4 (1).

101. Alternatively, if the Tribunal finds that Art. 4(1) did not constitute an obligation of result, the Respondent submits it was a due diligence obligation.

102. The standard of due diligence has been expressed by Alwyn Freeman as: “nothing more nor less than the reasonable measures of prevention”.¹²⁰ Due diligence principle is State’s duty to conduct in accordance with the requirements of the circumstances.¹²¹ Due diligence required in this case was to protect Sat-Connect from the leakage of important information. However, Claimant did not act in accordance with this requirement.

103. As outlined above, the crucial contractual obligation was to protect the confidentiality of information regarding Sat-Connect. Claimant did not comply with this obligation and, consequently, it compromised the whole project.¹²²

B. The Buyout Clause was invoked in a proper manner.

104. Respondent invoked the buyout clause in a proper manner. All the requirements for invoking this clause were satisfied, including the material breach criterion.

1. Article 8 of the JV Agreement created the Respondent’s buyout right.

105. The interpretation of the scope of article 8 of JV Agreement – in particular the words:

“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”

– may lead to the conclusion that this provision clearly creates the right to buy out Claimants interests in case of a material breach of a contract by Televative . According to Art. 8, it is only Beritech that is entitled to invoke this right. Thus, there are no doubts that Respondent invoked the buyout clause on a proper legal basis.

¹²⁰ Freeman, supra note 395 at 277-278

¹²¹ Ibid.

¹²² Uncontested facts, p.8

106. What is more, the only requirement for invocation of the buyout clause is a material breach of the agreement committed by Televative. The understanding of what constitutes a material breach in this agreement is crucial; that is why it will be examined below.

2. Article 4(4) shall be regarded as self-judging.

107. According to Art.4 (4) of the JV Agreement any breach of confidentiality clause “shall be deemed a material breach”.¹²³ It is indispensable to interpret the words used in this provision. According to Merriam Webster dictionary “any” means “every”, it is used as indicator without restriction. The definition of the word “deem” is “to come to think or judge, consider”. Thus, the wording analysis of this provision exposes its self – judging nature.

108. What follows is that the actions of Claimant, which were in breach of the JV Agreement, constitute a material breach of this agreement. The most significant consequence of this conclusion is that the material breach gives legal basis for invoking the buyout provision. Hence, the invocation of the buyout clause by the Respondent was consistent with the JV Agreement.

3. Respondent met the requirements necessary for the invocation of the Buyout Clause.

109. Firstly, there was a leakage of information from Televative’s personnel confirmed by an independent source.¹²⁴ That leakage indicates that Claimant did not keep sufficient precautions in carrying out the obligation of confidentiality which, consequently, constitutes a breach of the confidentiality clause. Secondly, any breach of confidentiality clause as stipulated in Art. 4(4) is a material breach of the JV Agreement. Without a doubt, the material breach have occurred in this case. Thirdly, according the abovementioned provision, in case Televative commits a material breach of the contract which in fact did happen, Beritech is entitled to buy all of Televative’s interests. Thus, Beritech used the buyout provision on a proper legal basis. Finally, Televative’s interest was valued “as its monetary investment in the

¹²³ Annex 3, art. 4(4)

¹²⁴ First Clarifications No. 168

Sat-Connect Project”¹²⁵ and such an amount was paid by the Respondent.¹²⁶ Hence, the abovementioned circumstances clearly confirm that Respondent was entitled to invoke the buyout clause and by invoking it – acted lawfully.

C. All actions taken by the Respondent were in accordance with the JV Agreement.

110. The construction of Art. 4 of the contract clearly demonstrates the will of the parties to safeguard the confidentiality of any information connected with Sat-Connect. Thus, the information in an independent magazine¹²⁷ according to which “the Sat-Connect project had been compromised due to leaks by Televative personnel”¹²⁸ proves that Televative did not comply with the obligation of confidentiality.

111. Furthermore, the actions of Televative’s personnel did not fall under any of the three exceptions from the confidentiality clause.¹²⁹ Firstly, the information was not proclaimed by Sat-Connect authorities, so it did not properly come into the public domain.¹³⁰ Secondly, there was no regulation demanding the disclosure of any information regarding Sat-Connect; thus, it was not required by law.¹³¹ Finally, it was not necessary to enforce the terms of the JV Agreement.¹³²

112. As a consequence, the leakage of information cannot be regarded as an exception to Art. 4 of the JV Agreement. Therefore, it constitutes a breach of the confidentiality clause. The result is that it was Claimant and not the Respondent that materially breached the JV Agreement.

¹²⁵ Annex 3, art. 8

¹²⁶ Uncontested facts, p. 13

¹²⁷ First Clarifications No. 168

¹²⁸ Uncontested facts, p.8

¹²⁹ Annex 3, art. 4(1)

¹³⁰ Annex 3, art. 4(1)(i)

¹³¹ Annex 3, art. 4(1)(ii)

¹³² Annex 3, art.4(1)(iii)

II. THE RESPONDENT IS NOT LIABLE SINCE THE ACTS OF BERITECH CANNOT BE ATTRIBUTED TO BERISTAN

113. In the present case the actions that led to the alleged breach of the Beristan-Opulentia BIT were undertaken by Beritech. Even though Beritech is partially a state-owned company, its acts cannot be attributed to the Respondent.

114. It is a general rule of international law that the conduct of the private individual cannot be attributed to the state.¹³³ However, international customary law, as exemplified in the ILC Articles, provides some exceptions to this rule (Art. 5 and Art. 8). In accordance with the established principles of international law, the conduct of a private entity is attributable to the state where it is shown that this entity was exercising governmental authority or acted on the instructions of, or under the direction or control of, the State in carrying out the conduct.¹³⁴ Beritech does not fall within the scope of any of the abovementioned Articles - it neither exercises the governmental authority (Art. 5) nor acts under the control, direction or instructions of Respondent (Art. 8).

115. From the structural point of view Beritech is a state-owned company – Respondent owns a 75% interest. However, the mere fact that a state established a company cannot automatically result in attribution of the subsequent conduct of this entity.¹³⁵

What is worth noticing is that in the *AMTO* dispute, which was similar to this case, the Tribunal emphasized the close links between the State and the private entity. In the abovementioned case the president, the first vice-president and the vice-president of the company were appointed and dismissed by the Cabinet of Ministers of Ukraine and the board members were appointed and discharged from their responsibilities by the Ministry of Fuel and Energy.¹³⁶

116. In the present case we have no evidence of such a strong relationship between Beritech and the Respondent's authorities. Therefore, the functional test should be applied at this point.

¹³³ Oxford Handbook p. 557

¹³⁴ AMTO ¶ 102

¹³⁵ Oxford Handbook p. 557; Schering Corp. ¶ 361

¹³⁶ AMTO ¶ 101

In *Maffezini* the Tribunal held that the crucial question in deciding whether a particular conduct is attributable to a state or not is determining its character, namely, whether this act is a commercial or governmental in nature. Only the latter can be attributed to the state.¹³⁷ In *Lauder* the termination of the agreement was decided to be a commercial measure taken by one private entity in relation to another private entity, thus without any interference by the state.¹³⁸ In the present case all of the actions undertaken by Beritech were simply an exercise of the company's contractual rights under the Joint Venture Agreement. Claimant committed a material breach of contract and, as a consequence, Beritech invoked a buy-out provision. It cannot be considered as an activity beyond that of an ordinary contracting party.¹³⁹

117. As regards attribution under Article 8, this article deals with two situations, namely when a private entity is under the control or direction of the state or is on the instructions of the State in carrying out the wrongful act.¹⁴⁰

118. It was emphasized in the *Tradex* case that Article 8 requires Claimant to prove the existence of any instructions, direction or control as well as their extent and relevance, because instructions, direction or control must relate to the conduct that is said to amount to a wrongful act.¹⁴¹ In that case Claimant's submission regarding attribution was dismissed due to the fact that he failed to prove that the Albanian authorities encouraged the villagers to invade the land.¹⁴² The Tribunal also pointed out that Claimant did not provide any evidence that state authorities refused to grant the protection after being called for.¹⁴³

119. In the present case Claimant did not provide the Tribunal with any evidence that the Respondent influenced Beritech in any way. It should be emphasized that "control" under Art. 8 requires relatively high involvement into the functioning of an entity. The ICJ found that "planning, direction and support" given by the United States to Nicaraguan operatives was not sufficient to decide that they were under the control of the United States.¹⁴⁴

120. The ILC Commentary further explains that Art. 8 applies where there is a "a real link between the person or group performing the act and the State machinery".¹⁴⁵ There was no

¹³⁷ Maffezini ¶ 52

¹³⁸ Lauder ¶ 234

¹³⁹ Impregilo ¶ 266

¹⁴⁰ ILC Commentary p. 46

¹⁴¹ Oxford Handbook p. 563; ILC Commentaries p. 49

¹⁴² Tradex ¶ 147

¹⁴³ Ibid., ¶ 169

¹⁴⁴ Nicaragua v. US ¶ 86; Tadic ¶ 145

¹⁴⁵ ILC Commentary p. 46

such link between Respondent and Beritech. The latter undertook all its actions as a private entrepreneur. It acted in his own interest. It is true that the actions of Beritech were followed by the intervention of the Civil Works Force. However, under Article 8 it is not sufficient to show only “incidentally association” of the conduct and the State’s direction, control or instructions.¹⁴⁶

121. The fact that Beritech was exercising its contractual right may also lead to another consequence. The attribution under ILC Articles can occur if there is a breach of international obligation of the State. According to Art. 2:

“There is an internationally wrongful act of a State when conduct consisting of an action or omission: [...] (b) constitutes a breach of an international obligation of the State.”

122. *A contrario*, a State cannot be deemed responsible for a breach of contract committed by a state-owned entity. Thus, even if the invocation of a buy-out provision was found unlawful under the contract, the state would still not be responsible under international law since this inappropriateness would constitute only a breach of Joint Venture Agreement, when acting in private capacity.

123. For all of the reasons presented above, the acts of Beritech cannot be attributed to the Respondent.

124. Alternatively, if the Tribunal decides that these acts were attributable to the Respondent, it will bear no responsibility due to the following reasons: (III) Respondent did not expropriate Claimant’s interest in Sat-Connect; (IV) Respondent did not breach the fair and equitable treatment standard; (V) Respondent did not treat Claimant in an arbitrary or discriminatory manner and (VI) Respondent did not fail to provide the Claimant’s investment with full protection and security.

III. RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INTEREST IN SAT-CONNECT

¹⁴⁶ Ibid., 47

A. Respondent's acts do not amount to expropriation due to the fact that Respondent acted as a private party.

125. It is commonly agreed by both scholars and jurisprudence that a distinction should be made between an expropriation and a breach of contract. The latter can be committed by anyone while the former can be committed only by a state.¹⁴⁷ As prof. Herz pointed out:

“the subject of expropriation is the state as such, acting, according to its laws, through its organs, authorities, officials, or other persons for whom it is considered to be directly responsible”.¹⁴⁸

126. In the present case the alleged expropriation occurred as a result of invocation of a buy-out clause from the Joint Venture Agreement. According to this clause Beritech shall be entitled to purchase all of the Claimant's interests in the joint venture in case of a material breach of the agreement committed by Claimant. Clause 4 (4) of the Joint Venture Agreement states that leaking any matters relating to the agreement and Sat-Connect should be deemed a material breach of the Agreement.

127. What Respondent did was to exercise its contractual right. It relied on the contractual provision and used a measure that would be available to any other potential party to this contract. It cannot be said that Respondent exercised its sovereign authority (“*puissance publique*”); thus, it cannot be responsible for the breach of its obligations under the BIT.¹⁴⁹ The Respondent did not act *de iure imperii*.

128. Even if the Respondent invoked Clause 8 of Joint Venture Agreement improperly, it would be responsible for a breach of contract before domestic courts since:

“A clear distinction exists between the responsibility of a state for the conduct of an entity that violates international law (e.g. a breach of treaty) and the responsibility of a State for the conduct of an entity that breaches a municipal law contract”.¹⁵⁰

129. In case of a breach of contract the investor should make a complaint to the domestic courts.

¹⁴⁷ Waste Management ¶ 8

¹⁴⁸ Herz p. 247

¹⁴⁹ Impregilo ¶ 210

¹⁵⁰ Feit p. 155

B. Even if this Tribunal decides that the expropriation has occurred, it should be deemed lawful.

130. Expropriation is not always unlawful. In some cases the State is permitted to take the property of private individuals. It can do so if it is in the public interest or for a public purpose and is conducted in a non-discriminatory way and in conformity with the principle of due process. As emphasized in *Saluka*

“[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”¹⁵¹

131. As will be proven below, Respondent can rely on Article 9 of the Beristan-Opulentia BIT as a defense to Claimant’s claims.

132. All the actions undertaken by the Respondent were motivated by the desire to ensure the protection of its security interest. The alleged expropriation of Claimant’s property was not discriminatory since buying out Claimant’s interest in the joint venture and the expulsion of its personnel was based on a valid reason, namely, the allegation of the leakage of confidential information. All of Respondent’s action were undertaken for a public purpose. The Respondent wanted to ensure the protection of the security interests of the State of Beristan. The requirements of due process have also been met since all of the Respondent’s action were transparent and Claimant did not provide the Tribunal with the evidence that it was deprived of an opportunity to protect its rights before the national courts of Beristan.

C. If the Tribunal decides that expropriation has occurred and it was unlawful, the Respondent submits that it paid the appropriate compensation.

133. The parties to the present dispute have stipulated an amount of compensation that should be paid. By virtue of clause 8 of the Joint Venture Agreement, in case of exercising the buy-

¹⁵¹ Saluka ¶ 255; Methanex part IV chapter D ¶ 7

out, the Respondent should pay Claimant the value of its monetary invest in Sat-Connect. The Claimant's total monetary investment in Sat-Connect stands for US \$ 47 million.¹⁵² Such an amount of money was paid by the Respondent into an escrow account, which has been made available for Claimant.¹⁵³ Therefore, Claimant cannot now argue that the compensation has not been paid.

IV. RESPONDENT DID NOT BREACH FAIR AND EQUITABLE TREATMENT STANDARD

134. The Respondent's obligation to ensure Claimant fair and equitable treatment is contained in art. 2 (2) of the Beristan-Opulentia BIT:

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

135. A lot of doubts arose as regards the definition of the fair and equitable treatment. Tribunals have especially considered the relationship between fair and equitable treatment and the minimum standard of treatment.

136. The wording of Art. 2(2) of the Beristan-Opulentia BIT manifests that FET reflects the minimum standard of treatment.¹⁵⁴ Therefore, the conduct that breaches fair and equitable treatment is nowadays defined as a conduct that exhibits

“a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons”.¹⁵⁵

¹⁵² Uncontested facts ¶ 12

¹⁵³ Ibid., ¶ 13

¹⁵⁴ Genin ¶ 69, Glamis Gold ¶ 616

¹⁵⁵ Glamis Gold ¶¶ 23, 616

137. In *Glamis Gold* the investor's claims of breach of NAFTA article 1105 (fair and equitable treatment) were dismissed due to the fact that the investor failed to establish these prerequisites.¹⁵⁶

The burden of proof of the breach of fair and equitable treatment is placed on Claimant.

A. Respondent did not deprive Claimant of its legitimate expectations.

138. The recognition of the protection of investor's legitimate expectations as a key element of the fair and equitable treatment standard cannot be disputed. However, it is crucial to bear in mind the limitations of this protection. According to the jurisprudence the host state is under the obligation to protect only those expectations that are reasonable and legitimate.¹⁵⁷ In *Duke* the Tribunal held that

“[t]he assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest”.¹⁵⁸

139. As the *Saluka* tribunal stated,

“[t]he determination of a breach of Article 3.1 by the Czech Republic [which required fair and equitable treatment of investors] therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.”¹⁵⁹

140. An upset of expectations requires “something greater than mere disappointment”.¹⁶⁰

141. In the present case Claimant could have expected that he would be allowed to conduct his business in the host state. However, it was not reasonable for him to expect that after it breached the Joint Venture Agreement. Claimant was aware that any leaking of the

¹⁵⁶ Ibid. ¶ 824

¹⁵⁷ Occidental ¶ 181, Rumeli ¶ 609

¹⁵⁸ Duke ¶ 340

¹⁵⁹ Saluka ¶ 306

¹⁶⁰ Glamis Gold ¶ 779

confidential information would cause far-reaching consequences, namely the buy-out of his interest and the expulsion of his personnel from Sat-Connect.

B. Transparency of Respondent's actions is not necessary.

142. The Respondent submits that it is not obliged to ensure the transparency of its actions. As was held by the Supreme Court of British Columbia in *Metalclad*, the requirement of transparency is not an element of the international minimum standard and applies to a particular case only if it is explicitly included in the BIT.¹⁶¹ In the present case there is no such provision in the BIT and, thus, the Respondent is not obliged to ensure the transparency.

Even if the Tribunal decides that the transparency was required, the Respondent submits that the invocation of the buy-out provision from the Joint Venture Agreement as well as the issuance of an executive order should be deemed transparent.

143. The relevant standard for the transparency is the determination whether the host State's conduct "exhibits a complete lack of due process."¹⁶² In the present case it cannot be said that the decision to invoke the buy-out provision was taken in such a manner. All members of the board of directors of SatConnect were informed about the meeting of August 27.¹⁶³ What is more, the article accusing Claimant of leaking confidential information was discussed on the meeting of August 21. The facts clearly state that all members of the board of directors were present on that meeting¹⁶⁴ and one of them raised the issue of the potential application of the buy-out provision.¹⁶⁵ The directors appointed by Claimant cannot now claim that they were not informed about the agenda of the meeting of August 27, due to the fact that in the view of the abovementioned they expected that the buyout would be discussed and they chose not to participate in the meeting and, as a result, deprive it of the necessary quorum.¹⁶⁶ Claimant voluntarily gave up the opportunity to present his arguments and take active part in deciding on invoking the buy-out provision. The facts of the case do not provide any information that the executive order was issued in an improper manner. Therefore, the requirement of transparency of Respondent's actions was not breached.

¹⁶¹ *Metalclad* ¶¶ 71-72

¹⁶² *Ibid.*, ¶ 770

¹⁶³ 2nd clarification, No.208

¹⁶⁴ Clarification no. 127, 140

¹⁶⁵ *Ibid.*, No. 169

¹⁶⁶ 2nd Clarification, No. 208

C. Respondent acted in good faith without the intention to treat Claimant in an inappropriate way.

144. In *Glamis Gold* the Tribunal held that it cannot decide whether State's conduct breached fair and equitable treatment or not without a finding of intent.¹⁶⁷ In the present case the Respondent's intention was the protection of its security interest. The actions that were undertaken were necessary to achieve this goal. Therefore, it cannot be disputed that Respondent acted in good faith with the intent to protect its interest.

V. RESPONDENT DID NOT TREAT CLAIMANT IN AN ARBITRARY OR DISCRIMINATORY MANNER

A. Respondent's actions were not arbitrary.

145. It is necessary to begin with the plain definition of "arbitrary". In Black's Law Dictionary it is held to mean

“depending on individual discretion [...] founded on prejudice or preference rather than reason or fact”.

146. According to the Tribunals, arbitrary measure is a measure that exhibits “a manifest lack of reason”¹⁶⁸ and amounts to a

“gross denial of justice or manifest arbitrariness falling below acceptable international standards.”¹⁶⁹

147. In the case at hand the Respondent can easily justify its acts targeted at Claimant. There was a real and imminent threat that the latter could have revealed confidential information regarding the security issues. Respondent had to act immediately by preventing Claimant from leaking further information.

¹⁶⁷ *Glamis Gold* ¶ 826

¹⁶⁸ *Ibid.*, ¶ 764

¹⁶⁹ *Ibid.* ¶ 803; *Feldman* ¶ 625; *Thunderbird* ¶ 194

148. Respondent firmly believed that he undertook actions that were the most appropriate under the circumstances of the case. He also ensured the transparency of those actions. Claimant voluntarily deprived himself of the opportunity to participate in the process of making the decision regarding the buy-out and by doing that, lost the chance to be heard. Therefore, it cannot be said that there was a “manifest lack of reasons” for Respondent’s actions or

“a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”.¹⁷⁰

149. What is more, one should bear in mind the Respondent’s necessity to protect its interest. In *ELSI* the ICJ refused to recognize Palermo’s actions as “unreasonable or capricious exercise of authority” after taking into account the situation in Palermo, namely the threat of “sudden unemployment of some 800 workers at one factory”.¹⁷¹

B. The measures undertaken by Respondent were not discriminatory.

150. Respondent’s actions cannot be considered as discriminatory. They met the standard of non-discrimination expressed in *Rumeli* and *Saluka*, namely, a requirement of “a rational justification of any differential treatment of a foreign investor”.¹⁷² As was proven in point I, Respondent has a sufficient justification for a different treatment. Respondent had no intent to discriminate Claimant since he acted in good faith. Thus, Respondent’s actions do not “exhibit blatant unfairness or evident discrimination to this particular investor” and for this reason, similarly as in *Glamis Gold*, cannot be found discriminatory.¹⁷³

VI. RESPONDENT DID NOT FAIL TO PROVIDE CLAIMANT’S INVESTMENT WITH FULL PROTECTION AND SECURITY

A. Respondent ensured physical protection to the Claimant’s investment.

¹⁷⁰ *Glamis Gold* ¶ 805; similar in: *ELSI* ¶ 128

¹⁷¹ *ELSI* ¶ 129

¹⁷² *Rumeli* ¶ 679; *Saluka* ¶ 460

¹⁷³ *Glamis Gold* ¶ 765

151. First of all, it is necessary to emphasize that “constant protection and security” guarantee does not provide a “warranty that property shall never in any circumstances be occupied or disturbed”.¹⁷⁴

152. The standard that applies in relation to the governmental intervention is an objective standard. In *Suez* case the Tribunal referred in this regard to the statement of Professor A.V. Freeman in his lectures at the Hague Academy of International Law:

“The ‘due diligence’ is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.”¹⁷⁵

153. The standard of due diligence is widely accepted in the jurisprudence.¹⁷⁶

154. In the present case Respondent faced the situation of the threat to its security. Claimant revealed information that were crucial from the point of view of the national security of Beristan. Every reasonable government put in the Respondent’s position would do the same, namely, immediately prevented the Claimant from revealing further information. The most reasonable way to so was to exclude Claimant from the participation in Sat-Connect.

B. Respondent was not obliged to provide Claimant with other kinds of protection than the physical protection.

155. Some commentators argue that under the full protection and security clause the host state is obliged to ensure Claimant not only physical protection but also other kinds of protection. However, in various arbitral awards such a broad concept was dismissed. In *Enron* the Tribunal held that this broad understanding of full protection and security would result in inability to distinguish the breach of this standard from the breach of fair and equitable treatment or even from some forms of expropriation.¹⁷⁷ The Tribunal also emphasized that

¹⁷⁴ ELSI ¶ 108

¹⁷⁵ *Suez* ¶ 157

¹⁷⁶ AMT ¶ 1534, *Wena* ¶ 84

¹⁷⁷ *Enron* ¶ 276

such an overlap is neither necessary nor desirable. It is in line with the *Saluka* Tribunal’s view that the full protection and security

“is not meant to cover just any kind of impairment of an investor’s investment but to protect more specifically the physical integrity”.¹⁷⁸

156. This approach was also presented for instance in *BP, Rumeli* and *PSEG*.¹⁷⁹

157. As was explained in point A, the Respondent did not fail to provide Claimant with physical protection. Therefore, in view of the fact that full protection and security does not require the host state to ensure other kinds of protection, the Respondent did not fail to provide Claimant with full protection and security.

VII. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9(2) OF BERISTAN-OPULENTIA BIT AS A DEFENCE TO CLAIMANT’S CLAIMS DUE TO THE SELF-JUDGING CHARACTER OF THIS CLAUSE.

158. At the most general level, self-judging clauses allow states to reserve themselves a right of non-compliance with international legal obligations in certain circumstances and leave it to the discretion of the Contracting Parties to determine when there is a threat to their national security and how to react to it.¹⁸⁰

A. The analysis of Article 9(2) shows that it is a self-judging provision.

159. It is widely accepted that self judging provisions must be expressly drafted to reflect that intent.¹⁸¹ In this part it will be proven that Article 9(2) employs the language which leads to a conclusion of its self-judging nature.

¹⁷⁸ *Saluka* ¶ 484

¹⁷⁹ *BP* ¶¶ 323-328; *Rumeli* ¶ 669; *PSEG* ¶¶ 258-259

¹⁸⁰ *Self-Judging Clauses*, p.4; *The Protection Of National Security In IIAs*, p.31; *Self-Judging Clauses Before The ICJ*, p.309.

¹⁸¹ *Nicaragua case*, p.14 ¶¶222, 282; *Nicaragua case – Jurisdiction* p.392, ¶83; *Oil Platforms case* ¶ 43; *CMS Award* ¶ 339; *Sempra Award* ¶379-385; *Enron Award* ¶336; *Continental Casualty Award* ¶92; *Yukos Award* p.27, ¶33.

160. It stays beyond doubt that the duty of a treaty interpreter is to examine the words of the treaty in order to determine the intentions of the parties.¹⁸² Hence, it is necessary to begin with the textual interpretation of Article 9. According to Article 31 (1) of the VCLT,¹⁸³ the ordinary meaning of the terms shall be the starting point of any analysis.¹⁸⁴ Thus, it is indispensable to analyze the wording of Art. 9 (2) of the BIT which states:

“Nothing in this Treaty shall be construed: [...] 2.to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests.”

161. The exploration, based on the Cambridge Dictionary, of the dictionary meaning¹⁸⁵ of the words reveals their subjectivism: “measure” means a way of achieving something, or a method for dealing with a situation; “consider” – “to believe something to be”; “necessary” - needed in order to achieve a particular result; “own” - belonging to a particular State in this context. Moreover:

“self-judging clauses can usually be identified by the inclusion of language such as 'if the state considers', which confers discretion on a state to determine that, in particular circumstances, the state is not obliged to comply with certain obligations it has accepted under a particular international agreement.”¹⁸⁶

162. The inclusion of Art. 9 (2) into the BIT shows that both Parties accorded that each State had the exclusive right to decide whether its own measures were covered by this Article. Without a doubt all measures taken by the Respondent were regarded as necessary by the Respondent for the protection of its essential security interest. Thus, as such these measures were embraced with the disposition of Art. 9 (2).

Furthermore, one should notice that the expression “its own security interests implies that a margin of appreciation shall be afforded to the Party that claims that the interests addressed by

¹⁸² EC Hormones ¶181; India - Patents (US) ¶45; US - Shrimp, ¶114; Argentina - Footwear (EC), ¶ 91; US - Line Pipe ¶ 251.

¹⁸³ VCLT, art.31 (1).

¹⁸⁴ Reuter, Introduction..., p. 96; Newcombe/Paradell, p.110.

¹⁸⁵ US — Softwood Lumber IV, paras. 58-59 ; US — Gambling, ¶ 164 .

¹⁸⁶ Self- judging clauses before ICJ, p. 1.

the measure are essential security interests at stake.¹⁸⁷ Thus, the Respondent enjoyed such margin of appreciation in applying Art. 9 (2).

163. The wording of the phrase “that it considers necessary” reflects the self-judging nature of the BIT exception.¹⁸⁸ Therefore, the Respondent has absolute discretion to invoke it.

Moreover, “there is no supplied test of means-end inquiry in the BIT exception” regarding the essential security interest clause¹⁸⁹ and “essential security interest are not limited to physical threats to national or military invasions”.¹⁹⁰ Thus, Respondent’s actions shall be regarded as actions within the scope of the BIT exception.

164. The measures taken by the Respondent were necessary for the protection of the Respondent’s essential security interest, in particular its national security endangered by the actions of the Claimant,¹⁹¹ thus Art. 9 (2) is applicable. Consequently, the invocation of Art. 9 by the Respondent should be sufficient for the Tribunal to dismiss the claim made by the Claimant under this BIT.

B. If the Tribunal considers the argument of contextual interpretation of Article 9 as insufficient, Article 9 shall be interpreted in the light of in dubio mitius principle.

165. As already explained in Part I of this memorial, the principle in *dubio mitius* is widely recognized as a means of interpretation whereby defense is accorded to the sovereignty of the States, especially when the meaning of a stipulation is ambiguous.¹⁹² In accordance with this principle the restrictions upon the independence of the states cannot be presumed,¹⁹³ due to the fact that it is impossible to assume that sovereign states will impose upon themselves the

¹⁸⁷ Continental Casualty Award, footnote 266, p.80; The Protection Of National Security In IIAs, p.96

¹⁸⁸ Newcombe/Paradell, p.489; Nicaragua case, para.222; Continental Casualty Award, para.186; Self-Judging Clauses in International Dispute Settlement, p.6-7

¹⁸⁹ Adjudging the Exceptional, p.21

¹⁹⁰ CMS Award, ¶ 359-361

¹⁹¹ Uncontested facts, 6 and 8

¹⁹² Loewen Award, ¶160; ELSI case, ¶50; Oppenheim, International Law; EC Hormones, footnote 154, p.68; Jennings&Watts, p.1278; Nuclear Tests Case, p.267; Access of Polish War Vessels to the Port of Danzig, p.142; Brownlie, Principles..., p. 631; In the Name of Sovereignty, p.5

¹⁹³ S. S. Lotus Case, p.18; S. S. Wimbledon Case, p. 24

more onerous obligation.¹⁹⁴ Furthermore, the arbitral tribunal in *USA – France Air Transport Services Arbitration* stated that:

“of two possible interpretations, the choice of that involves less extensive obligations for the obligated Party seems to be especially justified”.¹⁹⁵

166. The exclusion of the application of Art. 9 as a self-judging clause would, in fact, result in a reduction of the Respondent’s sovereign rights. Therefore, in the light of *in dubio mitius* any uncertainties related to interpretation of Art. 9(2) should be interpreted in favor of the sovereign. Thus, in this particular case Art. 9 (2) should be deemed a self-judging clause.

C. Even if the Tribunal finds that Article 9 is not self-judging, the Respondent is still entitled to rely on Art. 9 since it is a non-precluded measures provision.

167. The Respondent submits that the measures taken were non-precluded and necessary to protect its essential security interest.

168. BITs¹⁹⁶ contain provisions which limit the applicability of investor protection standards in the exceptional circumstances, such as protection of the essential security.¹⁹⁷ Limiting provisions, the so called non-precluded measures, allow states to take actions otherwise inconsistent with the treaty.¹⁹⁸ Such provisions, relating to the international peace or security and essential security interests, were also contained in Art. 9 of the *Beristan – Opulentia BIT*.

1. The criteria for the application of Art. 9 of the BIT as a non-precluded measures clause were satisfied.

169. First, non-precluded measures clauses require a link between the measures adopted by the host state that might breach the treaty and the permissible objectives stated in the

¹⁹⁴ EC Hormones, p.68; EC Sardines ¶7.82

¹⁹⁵ USA – France Air Transport Services Arbitration, p. 182

¹⁹⁶ Art. XI of US – Argentina BIT, Art. XXI of US-Nicaragua FCN Treaties and Art. XX of US-Iran Treaty of Amity

¹⁹⁷ Investment Protection in Extraordinary Times, p.311

¹⁹⁸ LG&E Decision on Liability ¶¶226, 266

provision - the ‘nexus requirement’.¹⁹⁹ The ‘nexus’ in Beristan – Opulentia BIT requires that measures must be “considered as necessary” by either Party for the attainment of one of the permissible objectives.

170. Second, non-precluded measures clauses specify their scope of applicability, and they either apply to an entire BIT²⁰⁰ or can be written in a more limited form so that they apply only to a subset of the treaty’s substantive provisions.²⁰¹ Art. 9 of the Beristan – Opulentia BIT provides that: “nothing in this Treaty shall be construed” which indicates that the application of the specified measures refers to the entire BIT. As a result, the successful invocation of the non-precluded measures clause precludes the existence of a violation with respect to any and all substantive treaty provisions.

171. Finally, non-precluded measures clauses establish a list of permissible objectives toward which a state’s actions must be directed if they are to be covered by the exception provided for by the non-precluded measure clause. The permissible objectives of such clauses in the BITs are: security, international peace and security, public order, public health. The Beristan – Opulentia BIT specifies the following permissible objectives: maintenance or restoration of international peace or security, protection of essential security interest.

2. All measures taken by the Respondent were necessary.

172. What has to be underlined is that the meaning of the word “necessary” is not limited to that which is indispensable, of absolute necessity or inevitable.²⁰² This term refers to a range of degrees of necessity, ranging from the necessity understood as “indispensable” to necessary taken to mean as “making contribution to”.²⁰³ The essential security interests and the concept of the security of States in the Post World War II international order was intended to cover political, military and economic security of States and of their population.²⁰⁴

173. After the Respondent’s essential security interests were endangered, it took an appropriate action in order to preserve them. The protection of the confidentiality of

¹⁹⁹ Investment Protection in Extraordinary Times, p.329-330; State Liability Under BITs, p.7-8

²⁰⁰ US-Argentina BIT, Art. XI

²⁰¹ State Liability Under BITs, p.9

²⁰² Adjudging the Exceptional, p.16

²⁰³ Korea – Measures Affecting Imports ¶161

²⁰⁴ Continental Casualty Award, p.76; Necessity and supplementary means of interpretation, p.21; Adjudging the Exceptional, p.40; The Argentine Crisis, p.14.

information regarding the satellite communications technology and systems,²⁰⁵ which can be used for military purposes, should be considered as falling within the ambit of protection of essential security interest. Accordingly, the Respondent's actions taken in response to the threat to its national security were justified and as such any violation of the BIT is excluded.

CONCLUSION ON MERITS

174. In light of the submissions made above, Respondent respectfully asks this Tribunal to find:

- (1) that Respondent did not breached the Joint-Venture Agreement;
- (2) that Respondent did not violated its obligations under the Beristan-Opulentia BIT,
- (3) Respondent can rely on the art. 9(2) of the Beristan Opulentia BIT.

RESPECTFULLY SUBMITTED ON SEPTEMBER 19, 2010

LACHS

²⁰⁵ JV Agreement, Art.4.