LADREIT

INTERNATIONAL CENTRE FOR SETTLEMENT OF

INVESTMENT DISPUTES

In the Proceedings Between

TELEVATIVE INC.

Claimant

and

THE GOVERNMENT OF

THE REPUBLIC OF BERISTAN

Respondent

ICSID Case No. ARB/X/X

MEMORIAL FOR RESPONDENT

2010

PART ONE: ARGUMENTS ON JURISDICTION

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Statements of Facts

1. Claimant, **Televative Inc.**, is a private company incorporated in Opulentia, it specializes in satellite communications technology and systems.

2. Respondent is **the Beristan Republic**. The Government of Beristan established a state-owned company, Beritech S.A., in March 2007. The Beristian owns a 75% interest in Beritech and 25% of Beritech is owned by the Beristian investors.

3. Beristan and Opulentia have ratified the ICSID Convention and the Vienna Convention on the Law of Treaties.

4. Beritech and Televative signed a Joint Venture Agreement (*hereinafter* the "JV Agreement") on **18 October 2007** to establish the joint venture company, Sat-Connect S.A., under Beristian law. Beritech owns a 60% majority stake in Sat-Connect, and Televative owns a 40% minority shake. Accordingly, Beritech has the right to appoint 5 directors of the Sat-Connect Board of Directors, while Televative can appoint 4. A quorum of the board of directors is obtained with the presence of 6 members. Televative's total monetary investment in the Sat-Connect project stands at US $47 million. Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations.

5. On **12August 2009** The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia. Both Televative and the Government of Opulentia have made statements to deny this published story.

6. On **21 August 2009** the chairman of the Sat-Connect board of directors, made a presentation to the directors in which he discussed the allegations that had appeared in The Beristan Times.

7. On **27 August 2009** Beritech, with the support of the majority of Sat-Connect's board of directors, invoked the buyout clause of the JV Agreement. Six directors were present at this meeting and one director, Alice Sharpeton, appointed by Televative, refused to

participate and left the meeting before its end. Beritech then served notice on Televative on **28 August 2009** requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

8. On **11 September 2009** the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

9. On **12 September 2009** Televative submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT, in which Televative notified Beristan their desire to settle amicably, and failing that, to proceed with arbitration pursuant to Article 11 of the BIT.

10. On **19 October 2009** Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request.

11. On **28 October 2009** Televative requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan.

12. On **1 November 2009** the ICSID Secretary General registered for arbitration this dispute brought by Televative against the Government of Beristan.

PART ONE: ARGUMENTS ON JURISDICTION

13. The tribunal does not have jurisdiction to hear that case since the requirements of (I) the ICSID Convention and of (II) the BIT are not met.

I. JURISDICTION UNDER THE ICSID CONVENTION

14. Article 25 (1) of the ICSID Convention sets three criteria for jurisdiction: (A) a dispute is to be legal in nature and arise directly out of an investment, *i.e. ratione materiae* jurisdiction; (B) the parties to the dispute should be a Contractual State or any of its designated constituent subdivision or agency on one side and a national of the other Contractual State on the other side, *i.e. ratione personae* jurisdiction; (C) the parties of the dispute have consented in writing to the ICSID jurisdiction over the dispute, *i.e. ratione voluntaris* jurisdiction.

A. *Ratione materiae* jurisdiction

15. The subject-matter jurisdiction of the ICSID under Art. 25(1) is defined as 'any legal dispute arising out of an investment'. Therefore, one has to demonstrate that there is (1) a legal dispute; (2) this dispute arises directly out of an underlying transaction; and (3) that underlying transaction is qualified as an investment.

1. A legal dispute

16. Dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties.'[1]To establish that a dispute exists 'it must be shown that the claim of one party is positively opposed by the other' [2] or that there is 'an actual controversy involving a conflict of legal interests between the parties.'[3] The ICSID tribunals upheld

[1] *Mavrommatis case*, at 11-12.
[2] *South West Africa case*, pp. 319, 328.
[3] *Northern Cameroons case*, pp. 15, 33-34.

to similar definitions of a 'dispute.'[4] Dispute is legal if it 'concerns the existence or scope of a legal right or obligation.'[5]

17. In the current case a legal dispute indeed exits since there is a controversy as to whether the contract was breached. However, Respondent submits that the legal dispute at hand falls within the scope of the contractual obligations under the JV Agreement and is not anyhow connected with the treaty claims.

2. The dispute arises directly out of an underlying transaction

18. The requirement of directness means that a dispute must be 'reasonably closely connected' to a transaction (investment).[6] In the case at hand Televative's claims are in close relation to the JV Agreement, i.e. to the investment of Televative.
19. Consequently, the dispute at hand arises directly out of an underlying transaction.

3. The underlying transaction is qualified as an investment

20. According to the third requirement one must demonstrate that the transaction is qualified as an investment. In determining whether the Tribunal has jurisdiction to consider merits of the claim a two-fold or double-barrelled test is to be applied: whether the dispute arises out of an investment within the meaning of the ICSID Convention and whether it relates to an investment as defined under the relevant BIT. [7]Respondent does not contest that the participation of Televative in the Sat-Connect JV Agreement does fall under the criteria of investment as enshrined into the BIT. However, Respondent contends that the transaction at hand does not fall under the criteria as elaborated by the practice of the ICSID Tribunal.

21. The Washington convention *per se* does not contain the precise definition of the investment. However, it can be deduced from the case law and doctrine. Thus, Schreuer provides five characteristics which can be used as a guide in establishing whether a

[4] *Mafezzini v. Spain*, paras. 93,95; *Tokios Tokeles v. Ukraine*, paras. 106-107, *Lucchetti v. Per*, para. 48; *Impergilo v. Pakistan*, paras. 302-303; *El Paso v. Argentina*, para. 61; *Suez et al. v. Argentina*, para. 29.
[5] Report of the Executive Directors to the ICSID Convention, para. 26.
[6] C. H. Schreuer, *The ICSID Convention: A Commentary, Article 25*, para. 88; *CSOB v. Slovakia*, paras. 275-76.
[7] N. Rubins, *The Notion of 'Investment' in International Investment Arbitration* in N. Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, p.307; *CSOB v. Slovakia*, para. 68; *Salini v. Morocco*, paras. 44, 52; *MHS v. Malaysia*, para. 55.

particular dispute may be considered an 'investment dispute.'[8] These characteristics are cumulatively referred to as *Salini* test and include: (a) a certain duration, (b) an element of risk for both sides, (c) an investment should be significant for the host state's development. Moreover, investments should also have a certain regularity of profit and return, and constitute a substantial commitment or contribution to the economy. Some of ICSID tribunals appear to have adopted some of these factors in reviewing the nature of transactions for jurisdictional purposes.[9] However, not all of these requirements are present in the case at hand.

22. Respondent does not argue that Claimant's participation in the Sat-Connect project meets some of the aforementioned requirements, namely Sat-Connect displays a certain regularity of profit and return and the contribution made by Claimant could be considered as substantial.

23. Nevertheless, the other requirements lack.

a. The underlying transaction did not have the minimum duration

24. Investment projects tend to have an extended duration. The required duration seems to vary according to the nature of the involved activity.[10] In *Salini v. Morocco,* which involved a construction project for building a highway, the tribunal held that 'the minimum length of time for an investment "according to a doctrine" is from two to five years.'[11]

25. In *Saipem v. Bangladesh* the tribunal held that the proper duration was for the 'entire or overall operation', including the contract period, actual construction and the warranty period on the work. [12] Thus, in cases where a contract period was extended or prolonged by additional period of time amounting to two or more years the tribunals deem to constitute that such overall periods satisfy the minimum duration observed by the doctrine.[13]

[8] C. H. Schreuer, *The ICSID Convention: A Commentary, Article 25*, para. 153.
[9] *Salini v. Morocco*, para. 53-58; *Fedax v. Venezuela*, para. 43; *MHS v. Malaysia*, para. 108; *Saipem v. Bangladesh*, paras. 99-102; *Patrick Mitchell v. DRC*, paras. 23-48; *Joy Mining v. Egypt*, paras. 53-63; *Consortium R.F.C.C. v. Morocco*, para. 61; *SGS v. Pakistan*, para. 133.
[10] C. F. Dugan *et.al*, *Investor – State Arbitration*, p. 267.
[11] *Salini v. Morocco*, para. 54.
[12] *Saipem v. Bangladesh*, para. 110.
[13] *Consortium R.F.C.C. v. Morocco*, para. 62; *Saipem v. Bangladesh*, para. 110.

26. In this particular case, Televative and Beritech interned into the Joint Venture Agreement on 18 October 2007[14] and this agreement was terminated on 11 August 2009[15] in full compliance with JV Agreement on the ground of Claimant's material breach of its provisions. This agreement had never been extended by additional time. Thus the period of 'entire or overall operation' is 22 months. Therefore, as the duration constitutes a factor of a paramount importance, 'which distinguishes investments from ordinary commercial transaction'[16] and as the minimum duration requirement is not met in the case the first characteristic of investment lacks.

b. The underlying transaction does not involve an element of risk for both sides

27. With regard to the assumption of risk case law provides that the risks must be 'other than normal commercial risks.'[17] The mere presence of risk in the project does not mean that the risk was inherent in investment being special feature of that project. There must be more than just a 'superficial satisfaction'[18] of this condition. In this particular case Claimant and Beritech faced ordinary commercial risks, which were inherent in the business transaction; this type of risk cannot be considered as a special feature of the investment project.

c. The Sat-Connect project does not contribute to Beristan's development

28. The contribution to economic development of the host State is an overwhelmingly important factor especially in the light of the Preamble of the Washington Convention. It stipulates that 'economic development' of the host states through private investments is one of the goals of the Convention. Delaume has suggested with this respect that the state's viewpoint should in fact be the dominating one for purposes of defining investment.[19] The requirement of contribution to the host state development is regarded to be not merely a characteristic but a requirement, [20] which is to be met on the mandatory basis.

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[14] Uncontested facts, para. 3.
[15] Uncontested facts, para. 10.
[16] *Bayindir v. Pakistan*, para. 73.
[17] *MHS v. Malasia*, para. 112.
[18] *Ibid*.
[19] G. R. Delaume, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, p. 70.
[20] *Patrick Mitchel v. DRC*, para. 39.

29. Thus, in such cases as *Patrick Mitchell v. DRC* and *MHS v. Malaysia* the respective claims were dismissed for the failure of the investment to contribute to Host State's Development. In *Patrick Mitchell v. DRC* the Annulment Committee held that in order to be determined as owning an investment the company through its know-how or by other means should have concretely assisted to the host state.[21] Consequently, the mere transfer of funds and rights even if assessable financially does not necessarily imply that there is a contribution to the host state economy.

30. In the case at hand Televative contributed monetary investment worth US $47 million[22] having ensured that all intellectual property rights belong to Sat-Connect.[23]

31. The facts of the case do not bestow the Tribunal with any conclusive evidence, that Televative, as distinct from Sat-Connect, has facilitated to the development of telecommunication technologies. The Respondent submits that Televative merely transferred its financial recourses and personnel to Sat-Connect, but the whole development of telecommunication technologies was exercised by Sat-Connect, a private company incorporated in Beristan.

32. Consequently, that is not Televative but Sat-Connect which virtually contributed to the development of Beristan, as a host state.

33. Therefore *ratione materiae* requirement of ICSID jurisdiction is not met since the underlying transaction does not fall under the criteria of investment as elaborated by the ICSID tribunal.

B. *Ratione personae* jurisdiction

34. Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State. Thus if the dispute arises between two private parties ICSID lacks jurisdiction to arbitrate. [24]

35. In addition to the term 'Contracting State', Article 25(1) also refers to 'any constituent subdivision or agency of a Contracting State.' Beristan had never designated Beritech S.A. to the Centre as such.

[21] *Patrick Mitchel v. DRC*, para. 73.
[22] Uncontested facts, para. 12.
[23] Clarification No. 269.
[24] M. Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, p. 144; *Salini v. Morocco*, paras. 60-62.

36. Neither can Beritech be regarded as an 'agency' as the term 'agency' is determined functionally rather than structurally.[25] Whether the 'agency' is a corporation, whether and to what extent it is government-owned and whether it has separate legal personality are matters of secondary importance. What is of the paramount significance is whether an entity performs public functions on behalf of the Contracting State.[26]

37. In *Ceskoslovenka Obchodni Banka, A.S. v. The Slovak Republic* the Tribunal held that mere state ownership of capital shares of an entity does not alone prohibit a determination that such entity was a national of a Contracting State, so long as such entity's activities were 'essentially commercial rather than governmental in nature.'[27] Citing this very case in *Maffezini v. Spain* the Tribunal came to the conclusion that:

> '[a] private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts.'[28]

38. Beristech S.A. is a legal entity incorporated under Berestian law which does not carry out any public functions. It is merely a commercial telecommunication service provider in Beristan.[29] The partial ownership of Beritech by the Government of Beristan neither alters Beritech's private nature nor makes it an agency of Beristan.

39. In the case at hand the Claimant's allegation that Respondent was behind the buyout decision is incorrect for the following reasons. Firstly, all these actions were taken by Beritech in its absolute discretion and independently. Secondly, by taking such actions Beritech did not carry out any public functions delegated to it by Beristan. And thirdly, these actions are purely commercial and lie within the scope of the JV Agreement provisions.

40. As a result Beritech should not be regarded as an arm or agency of Beristan and the case fails to comply with *ratione personae* requirement of Article 25 (1) of the ICSID Convention.

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[25] C. H. Schreuer, *The ICSID Convention: A Commentary, Article 25*, para. 243; I. Brownlie, *System of the Law of Nations: State Responsibility*, p. 136.
[26] Amerasinghe, *Jurisdiction Ratione Personae*, pp. 233-234; Amerasinghe, *The Jurisdiction of the International Centre* pp. 185-186; R. Dolzer and C. H. Schreuer, *Principles of International Investment Law*, p. 234.
[27] *CSOB v. Slovakia*, para.20.
[28] *Maffezini v. Spain*, para. 80.
[29] Clarification No. 161.

C. *Ratione voluntaris* jurisdiction

41. Respondent does not argue that it has given it consent for the ICSID arbitration in advance by virtue of Article 11(2) of the Beristan-Opulentia BIT. However, this consent was given in respect of the possible treaty claims that might arise. In this particular case Televative submitted claims which arise out of the JV Agreement and which concerns the might-be acts or omissions of Beritech S.A. Consequently, the consent given by Beristan covers only treaty claims not contract claims.

II. JURISDICTION UNDER THE BERITAN-OPULENTIA BIT

A. The tribunal does not have jurisdiction to consider Televative's claims

42. Respondent contends that Televative's allegations that the ICSID tribunal has jurisdiction over treaty and contract claims are unsubstantiated since (1) all claims are contractual in nature and Claimant improperly reformulated them as treaty claim arising out of the BIT, and (2) the Tribunal does not have jurisdiction over contract-based claims by virtue of Article 10 of the BIT.

1. All claims submitted by Televative are contractual in nature

43. The ad hoc ICSID annulment committee in *Vivendi II case* emphasized the independent existence of the contract and the treaty claims:

> '95. As to the relation between breach of the contract and breach of treaty in the present case, it must be stressed that Article 3 and 5 of the BIT do not relate directly to breach of a municipal contract . Rather, they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa…
>
> 96. Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract...' [30]

[30] *Vivendi II*, paras. 95- 96.

44. Other tribunals as well as the doctrine[31], have also articulated the crucial importance between contact and treaty claims such as *SGS v. Pakitstan,*[32] *Siemens v. Argentina,*[33] *Sempra Energy v. Argentina,*[34] *AES v. Argentina,*[35] *and Jan de Nul v. Egypt.* [36]

45. The doctrine has elaborated several criteria that serve to distinguish a treaty claim based on treaty rights, from a contract claim arising in the context of the same dispute. These are: (a) the source of the right, (a) the parties of the claim and (c) the applicable law.[37]

a. The source of the right

46. The most fundamental distinction between treaty and contract claims is the source of the right on which the claim is based .The basis (or a 'cause of action') of a treaty claim is a right established and defined in an investment treaty, while the basis of a contract claim is a right created and defined in a contract.[38]

47. In the present case the cause of action of Televative's claims is the JV Agreement only. Claimant's assertions are based on one single event: the invocation of a buyout clause by Beritech, a company, which is legally distinct from Beristan. The buyout clause was invoked and conducted in full compliance with the contract.

48. Consequently, the source of the right is of a purely commercial nature and lies within the sphere of municipal contract law and is not anyhow connected with the BIT.

b. The parties of the claim

49. The parties for treaty claim are always investor of the home State and the host State.

50. In this particular case the relevant parties are Televative and Beritech which are the parties to the JV Agreement. As it was demonstrated above Beristan is not responsible

[31]C. H. Shreuer, *Travelling the Bit Route – of Waiting Periods, Umbrella Clauses and Forks in the Road*; J. Crawford, *Treaty and Contract in Investment Arbitration*; OESD, World Paper on International Investment , *Interpretation of the Umbrella Clause in Investment Agreements*; M. C. Naniwadekar, *The Scope and Effect of Umbrella Clause: The Need for a Theory of Difference*?; M. Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*; J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breach of Contract, Treaty Violation, and the Divide Between Developing and the Developed Countries in Foreign Investment Disputes.*
[32] *SGS v. Pakitstan,* paras. 44-45.
[33] *Siemens v. Argentina*, para. 180.
[34] *Sempra Energy v. Argentina*, Decision on Jurisdiction, paras. 95-99.
[35] *AES v. Argentina*, para. 90.
[36] *Jan de Nul v. Egypt,* paras. 79-80.
[37] B. M. Cremades and D. J. A. Cairns, *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes* in N. Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, pp. 327-332.
[38] *Ibid*. pp. 327-329; McLachlan QC *et al.*, *International Investment Arbitration*, p. 102.

for the conduct of Beritech and thus it should not be considered as a proper Respondent to the Televative's claims.

c. The applicable law

51. Applicable law under the BIT usually includes provisions of the BIT itself, the domestic law of the host state and general international law.[39] In contrast, contracts are normally subject to the domestic law of the host State. According to the Clause 17 of the JV Agreement the contract between the Claimant and Beritech shall be governed in all respects by the laws of the Republic of Beristan.[40] Thus, the parties have agreed on the contract level that the applicable law shall be the law of the host state.

52. As a result, all claims submitted by Televative should be recognized as contractual in nature and Claimant improperly reformulated them as claims arising under the Beritan-Opulentia BIT.

2. The Tribunal does not have jurisdiction to consider contract-based claims by virtue of Article 10 of the Beristan-Opulentia BIT

53. Article 10 of the Beristan-Opulentia BIT contains an umbrella clause, which states:

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

54. This clause neither embraces (a) contractual obligations of private companies incorporated in the host state (b) nor does it embrace alleged contractual obligations of Beristan.

a. The Tribunal has no jurisdiction to consider contractual obligations of Beritech

55. Article 10 of the BIT contains a term 'obligation', which should be interpreted as referring only to those commitments, which were made by any of the contracting

[39] Y. Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, pp. 836- 837.
[40] Beritech –Televetive Joint Veture Agreement, Clause 17, [*hereinafter* JV Agreement].

states.[41] Thus, where the investor enters into a contract with a local company, this provision does not apply to its contractual obligations.[42]

56. For instance, in *Impregilo v. Pakistan* the claimant wanted to benefit from an umbrella clause by reference to the MFN clause contained in the BIT between Italy and Pakistan. The tribunal pointed out that an umbrella clause, even if it could be invoked on the basis of a MFN rule, could under the circumstances have no effect because the alleged contractual violation did not concern a contract with between claimant and Pakistan.[43]

57. In the present case Claimant and Beritech are private entities with separate legal personalities and, therefore, Respondent asserts that despite the wording of the article 10 the Tribunal does not have jurisdiction over contract-based claims.

b. The Tribunal does not have jurisdiction to consider alleged contractual obligation of Beristan

58. If the tribunal were to decide that Beristan is an appropriate respondent in this arbitration, Respondent contends that all the claims alleged by Televative are inadmissible by virtue of umbrella clause of the BIT.

59. This position was upheld in *SGS v. Pakistan*, where the Tribunal faced the similar situation. A Swiss company (SGS) brought a claim before the ICSID Tribunal under the Pakistan-Switzerland BIT. The tribunal rejected SGS's argument and concluded that umbrella clause of the BIT did not 'elevate' claims grounded solely on breach of a contract to claims grounded on the investment treaty, and thus held that it lacked jurisdiction over the breach of contract claims.[44] Several other Tribunals followed this reasoning such as *El Paso Energy v. Argentina,*[45] *Noble Ventures v. Romania,*[46] and *Joy Mining Machinery v. Egypt*.[47]

60. Moreover, there are several cases indicating that:

[41] R. Dolzer and M. Stevens , *Bilateral Investment Treaties*, p.82.
[42] F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, p. 246.
[43] *Impregilo v. Pakistan*, para. 223.
[44] *SGS v. Pakistan*, para. 165.
[45] *El Paso v. Argentina*, para. 82.
[46] *Noble Ventures v. Romania*, para. 53.
[47] *Joy Mining v. Egypt*, para. 81.

> '[p]urely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.'[48]

61. In other words if a state did not act as a sovereign but as a merchant the umbrella clause contained in the relevant BIT could not transform any contract claims into a treaty claims, 'as this would necessarily imply that any commitments of the state in respect to investments, even the most minor ones, would be transformed into a treaty claim.'[49]

62. Thus, the treaty-based arbitration should be grounded on acts of a State in its sovereign capacity, not its commercial capacity.

63. In the present case Beristan acted as a merchant and in accordance with JV Agreement and therefore Claimant's contract-based claims should not be elevated to the international level.

B. Effect of the Clause 17 of the JV Agreement

64. If the Tribunal were to decide that Beritech's conduct is attributable to Beristan Respondent contends that the Tribunal does not have jurisdiction in view of Clause 17 of the JV Agreement.

65. Claimant having signed the contact with Beritech and thus having given consent to arbitration under the rules of the 1959 Arbitration Act of Beristan cannot ignore the procedure set forth by a contract dispute resolution clause.

66. Speculating on the issue of contractual jurisdictional clause the *Vivendi II* Annulment Committee stated:

> '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.'[50]

67. In the present case Respondent assumes that the fundamental basis of Telavative's claims, i.e. alleged improper buyout of its interest in the Sat-Connect project and forcible removal of its personnel, is merely a JV Agreement, and therefore the Tribunal should give effect to Clause 17.

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[48] *CMS v. Argentina*,Award, para. 299; *Pan America v. Argentina*, para. 108; *Salini v. Jordan*, para. 155.
[49] *El Paso v. Argentina*, paras. 79-82.
[50] *Vivendi II*, para. 99.

68. Other tribunals such as *SGS v. Pakistan*,[51] *Joy Miming v. Egypt*,[52] and *Azinian v Mexican* [53] effectively adhered to Vivendi Annulment Committee's view and came to the same decision.

69. The BIT arbitration cannot affect on the contract dispute resolution clause. This approach was supported by a well-known decision, *SGS v Phillipines,* where the ICSID tribunal opined that the relevant BIT was not 'intended to override an exclusive jurisdiction clause in a contract, so far contractual claims are involved.'[54] Thus, the Beristan-Opulentia BIT should be designed to 'support and supplement, not to override or replace, the actually negotiated investment arrangements'[55] made between Beritech and Televative.

70. Notably, in *SGS v. Philippines* the Tribunal accepted the investor's broad construction of the umbrella clause as encompassing an obligation to fulfill contractual obligations.[56] However, it still adhered to the position that a contractual arbitration clause constitutes *lex specialis* and overrides interstate jurisdictional arrangements. As a result, it ruled that the Tribunal 'should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved (...).'[57] The tribunal furthermore decided to stay the ICSID arbitral proceedings until the contract claim was sorted out.[58]

71. Therefore, even if the Tribunal finds that umbrella clause of Beritan-Opulentia BIT encompasses claims based on the investment agreement Respondent requests the Tribunal to stay proceedings until contract claim are resolved in accordance with the JV Agreement.

72. Not only ICSID case law supports aforementioned position but also other international tribunals. For example, in *Saluka Investments v. Czech Republic* the tribunal instituted under the UNCITRAL rules concluded that the essential basis of the counterclaims

[51] *SGS v. Pakistan*, paras. 163-164.
[52] *Joy Miming v. Egypt*, para. 89.
[53] *Azinian v. Mexican*, para. 83.
[54] *SGS v. Phillipines*, para. 143.
[55] *Ibid.* para. 141.
[56] *Ibid.* paras.115-116.
[57] *Ibid.* para. 155.
[58] *Ibid.* para. 175.

brought by Czech Republic was breach of the contract, and hence they had to be resolved according to the forum selection contract clause.[59]

73. Therefore, Respondent requests the Tribunal to decline its jurisdiction since parties have already consented to arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan. Respondent also urges that Televative in this regard should respond to Beritech's notice of arbitration commenced in accordance with JV Agreement.

C. The Tribunal lacks jurisdiction since requirement of Article 11 of the BIT had not been fulfilled

74. If the Tribunal were to decide that Beritech's conduct is attributable to Beristan the tribunal still does not have jurisdiction since six-month waiting period, as established by Article 11 of the BIT, had not expired.

75. The article 11 (1) of the BIT sets forth that a party may submit an investment dispute to the ICSID Tribunal 'if the dispute cannot be settled amicably within six month of the date of a written application.'[60]

76. On September 12, 2009 Beristan received a written notice in which Televative expressed its desire to settle amicably, and failing that, to proceed with the arbitration pursuant to Article 11 of the BIT. However, afterwards Telavative did not seem to seek amicable settlement, but instead, submitted the dispute to the ICSID Tribunal, leaving no time for Respondent to prepare to the arbitration.

77. Under the practice of investment disputes adjudication the obligation to comply with the waiting period as enshrined into the BIT is not subject to derogations. It constitutes one of the jurisdictional requirements and a failure to fulfill such preconditions may even result in registration being rejected by the ICSID Secretariat.[61] In this regard Respondent seeks to establish that requirement of Article 11 of the BIT has not been fulfilled and, therefore, the Tribunal has no jurisdiction.

78. Case law also provides that waiting period is regarded as a jurisdictional requirement. Thus, in *Enron v. Argentina* case the ICSID Tribunal held:

[59] *Saluka Investments v. Czech Republic*, Decision on Jurisdictin, paras. 47-48.
[60] The Beristan-Opulentia BIT, Article 11(1).
[61] N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, p. 480.

> 'The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.'[62]

79. The similar approach was adopted in *Generation Ukraine Inc. v Ukraine* case, where the ICSID Tribunal held that interpretation of such a clear provision of the BIT as a procedural rather than a condition precedent for the vesting of jurisdiction would be superfluous.[63] Thus, Respondent pleads for plain interpretation of the waiting period provision.

80. The existence of a definite waiting period may add gravity to the investor's demands, as the state is made aware that negotiation can only be drawn out so long, after which arbitration will begin.[64] In the present case Respondent reasonably relied on a treaty provision of six-month waiting period, and its expectations were unjustly not satisfied.

81. Claimant may allege that it submitted a request for arbitration under ICSID rules since it considered that the further negotiations would be futile. This position is groundless for the following reasons: firstly, Claimant did not made any attempt to negotiate with Respondent after written application or at least to communicate with government of Beristan to conclude that amicable negotiations would be futile, and secondly, Respondent is eager to resolve any potential dispute to retain polite relations between Beristan and Opulentia.

82. Consequently, the Tribunal lacks jurisdiction on the ground that the waiting period requirement of the BIT has not been properly fulfilled.

[62] *Enron v. Argentine*, Decision on Jurisdiction para. 88.
[63] *Generation Ukraine v. Ukraine*, para. 14.3.
[64] C. F. Dugan *et al*., *Investor – State Arbitration*, p.118.

PART TWO: ARGUMENTS ON THE MERITS

III. CONDUCT OF BERITECH IS NOT ATTRIBUTABLE TO BERISTAN

83. Respondent contends that it is not responsible for the conduct of Beritech.

84. A state can only be held liable for acts of its entities if such conduct is attributable to the state.[65] If the act cannot be attributed to the state, it has no responsibility towards the investor.

85. The relevant rules on attribution for the purpose of state responsibility under international law are enshrined in the Articles on Responsibility of States for Internationally Wrongful Acts [*hereinafter* 'ILC Articles']. These articles have been consistently used by international investment tribunals, for instance, in *Maffezini,*[66] *Noble Ventures v. Romania,*[67] and *Eureko v. Poland.*[68]

86. A certain act can be attributed to state based either on article 4, 5 or 8 of ILC Articles. Thus, to attribute a conduct that constitutes a breach of international law to the state, it is sufficient if one of the elements as enshrined in these respective articles is present: the entity is an organ of the state or; it is empowered to 'exercise elements of the governmental authority.'

87. Respondent in this regards contends that conduct of Beritech is not attributable to Beristan since (A) Beritech is not an organ of Beristan; (B) it was not delegated to exercise any element of the governmental authority; (C) and Beritech is not controlled by Beristan.

A. Beritech is not an organ of Beristan

88. Article 4 of the Articles on State Responsibility confirms a well-established principle of international law that the state is responsible for the acts of its organs acting in the

[65] Articles on Responsibility of States for Internationally Wrongful Acts [*hereinafter* 'ILC Articles'], Article 2.
[66] *Maffezini v. Spain*, para. 75.
[67] *Noble Ventures v. Romania*, paras. 69-70.
[68] *Eureko v. Poland*, paras. 33-34.

capacity of the state. However it does not provide a definition of 'state organ', thus, it is to be understood in the more general sense[69] and this article should be applied to organs of all levels and regardless of its position in the state's administrative organization. The state responsibility extends to all branches of government, that is, to the executive, the legislature, and to the judiciary.[70]

89. In the present case Beritech does not fall within the structure of government of Beristan and it does not exercise legislative, executive, judicial functions, thus should not be recognized as a state organ.

B. Beritech was not delegated to exercise governmental authority

90. Article 5 of the ILC Articles deals with the conduct of entities which are not state organs, but which are empowered by the law of that State to exercise elements of governmental authority.[71] Under this article the ultimate test is function carried out by an entity irrespective of its organization or structural status.

91. The examination conducted by the tribunal in well-known *Maffezini v. The Kingdom of Spain* aptly shows that the functional test of Article 5 of the ILC Articles must be applied on a case-by-case basis. [72] However, the key prerequisite for the application of this article is that it is clearly limited to entities which are empowered by internal law to exercise governmental authority.[73] The Commentary to the ILC Articles expressly addresses the point: 'The internal law in question must specifically authorize the conduct as involving the exercise of public authority'[74] The Commentary also provides that:

> 'Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.'[75]

[69] J. Crawford, The *International Law Commission's Articles on State Responsibility*, p. 94; K. Hober, *State Responsibility and Attribution* in P. Muchlinski *et al*., *The Oxford Handbook of International Investment Law*, p. 554.
[70] ILC Articles, Article 4.
[71] Commentary to the ILC Articles p. 42, para. 1.
[72] M. Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, p. 150; *Maffezini v. Spain*, para. 52.
[73] ILC Articles, Article 5.
[74] Commentary to the ILC Articles p. 43, para. 7.
[75] *Ibid.* p. 43, para. 3.

92. Beritech constitutes an entity with a separate legal personality. It has never been empowered by laws or regulations of Beristan to exercise any element of governmental authority. The mere fact of state participation in the stock capital and its extent are irrelevant for the purposes of attribution.[76]

93. Moreover, under the international law acts of individuals acting on the basis of their subjective view cannot be held attributable to state. [77] With this respect Respondent submits that the directors appointed by Beritech to the Sat-Connect Board of directors acted in their private capacity. Directors while taking the buyout decision were acting independently and according to their subjective view.

94. Furthermore, the buyout decision was approved by the Sat-Connect Board of Directors. Approval of Sat-Connect was the requirement of the buyout.[78] Televative, being founder of the Sat-Connect project, may have raised any objections during the Sat-Connect's Board of Directors concerning the Televative's decision. And since Televative did not object Sat-Connect gave an approval. Therefore, if Claimant alleges that acts or omissions of Beritech is attributable to Beristran and in particular the buyout decision itself it also alleges that Televative's acts are also attributable to Beristan, since Televative's conduct partially leaded to buyout decision-making.

95. Thus, the acts of Beritech may not be attributed to Respondent by virtue of the article 5 of the ILC Articles.

C. Beritech is not controlled by Beristan

96. It is a general principle, that 'the conduct of private persons or entities is not attributable to the State under international law.'[79] The conduct of such entities is prima facie not attributable to state. However, under the article 8 a conduct of a private entity may be attributable to state either if it acts on the instructions of the State in carrying out the wrongful conduct or where private persons act under the State's direction or control. In both cases a real link must be established between the person or group performing the act and the State machinery.[80]

[76] Commentary to the ILC Articles p. 43, para. 6.
[77] *Tradex v. Albania*, para. 169-170.
[78] Clarification No. 242.
[79] Commentary to the ILC Articles p. 47, para. 1.
[80] *Ibid.* p. 47, para. 1.

97. A conduct performed "under the direction or control" of a State will be attributable to the State only if it directed or controlled the conduct in question. The degree of control was addressed to in the *Nicaragua v. United States*, where it was held by the Court that even though USA was responsible for the "planning, direction and support" of *contras*, general control is not enough to attribute the conduct of certain group of individuals, but that is effective control which is required.[81]

98. Under the practice of the investment adjudication the mere fact that a state initially establishes certain entity is insufficient for the attribution to the State of the subsequent conduct of that entity.[82] Thus, for instance, the *de facto* seizure of assets by a state-owned corporation, in a case where there was no evidence of usage by the state of its ownership interest was not considered to be attributable to state.[83]

99. In the case at hand there is no evidence of control, whether entire or partial, exercised by Beristan with respect to acts of Beritech. Neither there is any evidence of any use of Beristan's significant interest in stock capital of Beritech or any other influence of the host state on the policy of the company.

100. Thus, the conduct of Beritech may not be attributed to Beristan under the Article 8 of the ILC Articles.

101. Consequently, as neither of the pertinent grounds for the attribution of conduct of a private entity is present in the case, the acts of Beritech, including the invocation of buyout clause, cannot be deemed attributable to Beristan.

IV. CLAIMANT MATERIALLY BREACHED THE JOINT VENTURE AGREEMENT

102. The clause 8 of the JV Agreement states:

> 'If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement.'[84]

[81] *Nicaragua v. United States*, p. 51, para. 86.
[82] *Schering v. Iran*, p. 361; *Otis Elevator* v. *Iran*, p. 283.
[83] *Flexi-Van Leasing*, v. *Iran*, p. 349 (1986).
[84] JV Agreement , Clause 8.

103. Therefore to demonstrate that buyout clause was properly applied by Beritech, Respondent is to show (A) that Claimant committed a material breach of the JV Agreement and (B) that Beritech respected buyout procedure.

A. Claimant violated the confidentiality clause of the Joint Venture Agreement

104. Claimant violated confidentiality clause of the JV Agreement through its seconded personnel.

105. In accordance with clause 4(1) of the JV Agreement, all information relating the JV Agreement and Sat-Connect shall be treated as confidential.[85]

106. On August 21, 2009 The Beristan Times, the independent journal, published interview with a highly placed Beristian government official.[86] Being government defense analyst, the official marked out that there were leaks of encryption codes, technology, systems, and intellectual property of the Sat-Connect project through Televative's seconded personnel.[87] The reveal of the abovementioned information falls within the scope of the clause 4(2) of the JV Agreement.[88]

107. Claimant bears responsibility for its seconded personnel disclosure of confidential information. Therefore, Claimant violated the confidentiality clause of the JV Agreement.

108. The information presented in The Beristan Times is to be regarded as proper and sufficient evidence of Televative's violation. In this respect Respondent would like to draw the Tribunal's attention to the fact that there was no sign that any directors of Sat-Connect contested that article. Furthermore, neither Televative nor Opulentia, except in their public denial of the published story,[89] did not try to oblige The Beristan Times, through judicial bodies, to publish official denial of the "libel" in its article, as it commonly would have been done by one who has been slandered. Therefore, neither Televative nor Opulentia took any effective steps to refute the aforementioned article.

[85] JV Agreement, Clause 4(1).
[86] Uncontested facts, para. 8.
[87] Clarification No. 178.
[88] JV Agreement, Clause 4(2).
[89] Uncontested facts, para. 8.

109. Moreover, after the meeting of August 21, 2009, all the directors of Sat-Connect could reasonably assume that the agenda of the next meeting would be the application of the buyout clause,[90] as there were vast speculations concerning the article in The Berestan Times.

110. However, Televative's appointed directors seemed to show their serious treatment by avoiding the meeting to disrupt the voting and postpone unavoidable implementation of the buyout clause.[91] Such behavior showed that Televative's appointed directors seemed to know about wrongdoing of Televative's personnel.

111. Therefore, Respondent requests the Tribunal to hold that sufficient evidence was presented to demonstrate that Claimant caused material breach of the JV Agreement in accordance with the clause 4(4).[92]

B. Beritech properly applied the buyout provision

112. The buyout clause of the JV Agreement states that if Televative commits material breach of the JV Agreement, Beritech shall be entitled to purchase Televative's interest in the Sat-Connect project.[93]

113. The prerequisite to the buyout clause is material breach of the confidential clause of the JV Agreement[94] and it has already been demonstrated that such breach has indeed occurred. Respondent submits that the Board of Directors' meeting of Sat-Connect was conducted in accordance with Berestian law and company's bylaw.

114. There are two main arguments to support this position: (1) firstly, the Sat-Connect directors were properly notified and (2) secondly, Beritech received sufficient approval from the Sat-Connect's Board of Directors.

[90] Clarification No. 208.
[91] Clarification No. 208.
[92] JV Agreement, Clause 4(4).
[93] JV Agreement, Clause 8.
[94] JV Agreement, Clause 4.

1. The directors were properly notified

115. Beritech initiated the buyout procedure and to accomplish it, Beritech needed the Sat-Connect's Board of Directors' approval.[95] Claimant contends that the directors were improperly notified about the meeting, where the application of the buyout clause should be approved. Respondent respectfully denies these allegations.

116. Beristian law recognizes two types of prior notification: twenty four hours prior notice about time of the meeting and agenda[96] or announcement of the following meeting at the current meeting, while all the directors are present.[97]

117. Under the facts of the case the participation of all of the directors of the Sat-Connect's Board of Directors constitutes a prior notice. [98] On the meeting held on August 21, 2009 all of the directors were present.[99] Consequently, the proper prior notice had been provided.

2. Beritech received sufficient approval from the Sat-Connect Board of Directors

118. Accomplishment of the buyout procedure requires approval of the majority of Sat-Connect' directors.[100] Under the Berestian company law the meeting is quorate if the sufficient number of directors is present at the moment of voting.[101] Being aware about it Claimant's appointed directors that appeared to be eager to frustrate the voting. Respondent provides two examples of bad faith actions made by these directors.

119. First of all, some of the directors appointed by Televative speculated that the buyout would be discussed and decided not to attend the meeting and thus deprive it of the necessary quorum.[102]

120. Secondly, Alice Sharpeton, director appointed by Televative, seemed to join the meeting "by accident", and had left it just before the voting started.[103] Consequently,

[95] Clarification No. 242.
[96] Clarification No. 176.
[97] Clarification No. 140.
[98] Clarification No. 140.
[99] Clarification No. 140.
[100] Clarification No. 242.
[101] Clarification No. 200.
[102] Clarification No. 208.
[103] Uncontested facts, para. 10; Clarification No. 156.

she also deprived it of the necessary quorum. Despite these *mala fides* actions, Beritech received approval of five out of nine directors, the majority as required.[104]

121. Finally, Beritech was ready to refund monetary investments to Claimant[105] for proper completion of the buyout procedure in accordance with the JV Agreement.[106]

122. Therefore, Respondent contends that the buyout procedure was conducted in accordance with Beristian law, company bylaws and the JV Agreement, and that Claimant is to accept its monetary investment and to relinquish its claims in respect of the Sat-Connect project.

V. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT IN THE SAT-CONNECT PROJECT

123. Article 4 of the BIT enshrines that investments of the Contracting Parties investors shall not be directly or indirectly expropriated, except for public purpose on conditions of due process, non-discriminatory basis, against full compensation.[107]

A. Respondent did not expropriate Claimant's investment directly

124. Claimant alleges that Respondent unlawfully expropriated its investment in the Sat-Connect project. However, these claims are substantiated neither by law, nor by facts of the case.

125. International investment law recognizes two types of expropriation: direct and indirect.[108] Direct expropriation is an expropriation in its traditional meaning. The crucial element of direct expropriation is that property must be 'taken' by State authorities.[109] Thus, the official governmental act of expropriation is required.[110] In the

[104] Clarification No. 229.
[105] Uncontested facts para. 13.
[106] JV Agreement, Clause 8.
[107] The Beristan-Opulentia BIT, Article 4.
[108] R. Dolzer and C. H. Schreuer, *Principles of International Investment Law*, p. 92.
[109] C. McLachlan QC *at al., international Investment Arbitration*, p. 290.
[110] R. Dolzer and C. H. Schreuer, *Principles of International Investment Law*, p. 92.

case at hand there was no official governmental act that constituted expropriation. Therefore, direct expropriation did not occur.

B. Respondent did not indirectly expropriate Claimant's investment

126. According to international law indirect exploitation constitutes measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he or she may retain nominal ownership of the respective rights.[111]

127. The requirements of Indirect expropriation include: (1) indirect expropriatory measures must be governmental and (2)significant interference with company's property rights.[112]

1. Indirect expropriatory measure must be governmental

128. Indirect expropriation may occur when governmental act does not constitute expropriation of investor's property *per se*, but rather results in the effective loss of management, use of control, or significant depreciation of the value, of the assets of a foreign investor.[113] Thus, the first prerequisite of the indirect expropriation is existence of governmental regulatory measure, which deprived claimants of the control over their investments.

129. For example in *Goetz v Burundi*[114] where the revocation of the Minister for Industry and Commerce of free zone certification was found by the tribunal as measure having similar effect to expropriation. There are numerous cases of the same nature.[115] However, the undoubtful fact can be underlined that indirect expropriation requires measures which deprive party of the use of its investments and such measures *should be governmental.* Precise study of the facts shows, that in the present case there was implementation of the buyout clause, which deprived Claimant from title and control of

[111] *S.D. Myers v. Canada*, para. 229; *Feldman v. Mexico*, para, 100; *Pope v. Canada,* para. 96; NAFTA Treaty (1992), Art. 1110; Draft Convention on the Protection of Foreign Property (1967), OECD, Art. 3; *Metalclad v. Mexico*, para. 103; R. Dolzer, *Indirect Expropriation of Alien Property*, pp. 41-59.
[112] *Middle East v. Egypt*, para. 107; Sohn & Baxter, *Harvard Draft Convention on the International Responsibility of States for injuries to Aliens*, pp. 533–54.
[113] UNCTAD, *Taking of property*, at 36;
[114] *Goetz v. Burundi*, para. 124.
[115] *Metalclad v. Mexico*, para. 103*; Middle East Cement v. Egypt*, para 107. [115]

its investments thereof. Therefore, Respondent contends that indirect expropriation had not taken place in the current case.

2. The Executive Order lacked degree of interference, which is needed under indirect expropriation requirement

130. The interference with investor's property rights should be regarded sufficient to constitute an indirect expropriation when there is a significant depreciation in the commercial value of company's property[116] or when a company is deprived of the owner's 'fundamental rights of ownership'[117] including rights to benefit of property and the ability to dispose it.[118]

131. In this regard, Respondent would like to draw the Tribunal's attention to the fact, that when the Executive Order was exercised, Claimant had already lost the title to investments due to the buyout decision.

132. Therefore, the Executive Order *per se* did not interfere with any property rights of Televative. Thus, neither of the major elements of indirect expropriation are present in the case.

C. If the Tribunal were to decide that Respondent's action amounts to indirect expropriation, Respondent requests the Tribunal to find that expropriation was lawful and no compensation is to be paid

133. Assuming arguendo the Executive Order did fall under the criteria of indirect expropriation, the exceptions as enshrined into the Article 4(2) of the BIT[119] preclude the responsibility of Respondent under the BIT.

134. Article 4(2) of the BIT stipulates that the expropriation is legal if the following requirements of the governmental measure are met:

1. The measure must serve public purpose.

2. The measure must not be discriminatory

[116] *Harvard Draft Convention on International Responsibility for Injuries to Aliens,* Art. 10.
[117] *Tippett*, para. 225.
[118] *Pope v. Canada*, para. 102; *Metalclad v. Mexico*, para. 103; *Restatement Third of Foreign Relations Law of the United States*, para. 712.
[119] The Beristan-Opulentia BIT, Article 4(2).

3. Due process must be observed.

4. Compensation is to be paid.

135. This set of criteria is also substantiated by the case law and doctrine. [120]

136. In the case at hand there was the only governmental act, namely the Executive Order, which allegedly constituted indirect expropriation of Claimants investments. Thus, this act is to be examined for the conformity to the abovementioned criteria.

1. The Executive Order served public purpose of Beristan

a. State is to decide what the public interest is, within its sovereignty

137. Public purpose is the first criterion which should be met for the indirect expropriation to be lawful. It is necessary to understand, who has the authority to asses actions, whether they were taken to serve public purpose or not.

138. Legal doctrine establishes that state is the one who has the authority to decide whether its public interest is in danger or not.[121] Case-law also supports this approach.

139. Thus, In *Shufeldt Claim* the arbitrator stated in respect of the state expropriation act:

> 'it [was] perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this tribunal.'[122]

140. In *Libyan Oil Concessions* award was formulated that:

> ' motives are indifferent to international law, each State being free to judge for itself what it considers useful or necessary for the public good'[123]

And even that:

> '[…] the public utility principle is not necessary requisite for the legality of a nationalization'[124]

[120] R. Dolzer and C. H. Schreuer, *Principles of International Investment Law*, p. 91.
[121] A. Reinisch, *Standards of investment protection*, p. 179.
[122] *Shufeldt Claim*, the arbitrator's statement.
[123] *Liamco v. Lybia*, para. 194.
[124] *Ibid.* para. 195.

141. The European Court of Human Rights formulated a general principle that state's view on expropriation or any other type of taking must not be questioned if it was made in the public interest. The Court also stated that a broad discretion of states to determine for themselves what is in their 'public interest' corresponds to the Court's doctrine of a 'margin of appreciation' left to Member States.[125]

142. Thus, under the international law the concept of 'public purpose' is broad and subjected to host state's discretion. [126] That is essentially for the state to adjudge what is the scope of its public interests.[127]

b. The Executive Order served the public purpose requirements

143. Respondent submits that the Executive Order as empowered the conduct of the CWF pursued two major public interests.

144. Respondent acted to protect its national defense interest and to establish lawful execution of the Berestian company law which is considered as proper public purpose under international practice.[128]

145. Firstly, Respondent replaced Televative's seconded personal to prevent further disclosure of information. As contemporary relations between Beristan and Opulentia are rather tense,[129] even a risk of such disclosure could endanger the national security of Beristan. Besides, Respondent had sufficient evidences of Claimant's disclosure of information, however these evidences cannot be disclosed in accordance with the Article 9(1) of the BIT.[130] More precisely reasons for non-reveal of evidences would be discussed below. Thus, Beristan had to take all measures at his disposal to prevent an opportunity of leak of its encryption codes.

146. Secondly, Respondent's executive order was pursuing the purpose of facilitation of normal administration of justice. CWF as an organ of Respondent ensured the leaving of Televative's seconded personnel from the premises of Sat-Connect, since according

[125] *Brumarescu v. Romania*, para. 79.
[126] A. Reinisch, *Standards of investment protection*, p. 182.
[127] *Ibid.*
[128] A.Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 370.
[129] Uncontested facts, para. 15.
[130] The Beristan-Opulentia BIT, Article 9(1).

to Televative's contractual obligations and Berestian municipal law Claimant was to remove its personnel within the reasonable time, but failed to do so.[131]

147. Moreover, as there were no pending disputes between Claimant and Beritech concerning legality of that very directors' decision Respondent was obliged to execute the buyout clause and thus implement its internal law.

148. Therefore, Respondent had significant justification grounded in the protection of public purpose considerations while issuing the Executive Order.

2. The Executive Order was not discriminatory

149. Discriminatory expropriation is forbidden both under customary international law and treaty provisions addressing the legality of expropriation.[132]

150. Within the frame of expropriation a conclusion that a certain act is discriminatory would arise if the *ratione* behind the governmental act in question is predominant political interest or any other unreasonable distinction based upon nationality of investor.[133]

151. However, the evidence of such political motivation in such distinction is to be persuasive.

152. Thus, in *Aminoil case* the tribunal held that there were adequate reasons for the distinction made between American and Arabian company. Moreover, it has also been pinpointed that the Decree of law, though it was applied to American company only cannot be reasonably construed as grounded solely on corporate nationality.[134]

153. Furthermore, the Iran-US Tribunal in *Amoco case* stated that the expropriation of a concern cannot be held discriminatory solely on the basis that another concern in the same economic branch was not expropriated.[135]

154. In the case at hand, there no credible evidence that the Executive Order was issued on the basis of unreasonable distinction. The Order was in full compliance with Beristan

[131] Uncontested facts, para.11.
[132] A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*.
[133] *BP v. Libya*, para. 329; *Liamco v. Lybia*, para. 195; *ADC v. Hungary*, para.443.
[134] *Kuwait v Aminoil*, para. 87.
[135] *Amoco v. Iran*, para. 142.

law. Moreover, Beristan also referred to the protection of its essential security, which at all times cannot be considered as unreasonable.

3. Respondent observed the due process requirement

155. The criteria of due process were defined *in ADC*:

1. Notice in advance.
2. Access to justice.
3. Fair hearing and unbiased and impartial adjudicator.[136]

156. Thus, the first criterion of due process is a notice in advance. It was fully complies with in the case at hand.

157. On August 28, 2009 Beritech served such notice on Televative, requiring the latter to 'hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove seconded personnel from the project'.[137]

158. Thus, Claimant, should it be a reasonable and prudent person, could have foreseen that non-compliance with the lawful buyout decision would entail appropriate measures. It could have also been foreseen by Claimant, that State being a guarantor of law and order would exercise its executive powers to ensure the compliance with local laws.

159. Moreover, Claimant had 14 days to raise any objections to these measures. Inasmuch as Claimant failed to do so, assessment of the other criteria of denial of justice including fair hearing and an unbiased and impartial adjudication.

160. Respondent would also like to draw tribunal's attention to the fact that there is no evidence that Claimant would have been treated in violation of the abovementioned principles of due process.

161. Consequently, Respondent did not violate due process requirement either acting as State or as Beritech if tribunal would accept Claimant's allegations on attribution.

[136] *ADC v. Hungary*, para. 345.
[137] Uncontested facts, para.11.

4. Respondent measures should be recognized as non-compensable

162. Respondent requests the tribunal to apply *Methanex* and *Saluka* approach to define that Executive order was non-compensable measure.

163. *In Methanex v. USA* the tribunal stated:

> '[…] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.'[138]

164. Non-discrimination, public purpose and due process criteria have been demonstrated. Moreover, no specific commitments had been given to Claimant by Respondent to compensate.

165. In *Saluka v. Czech Republic* the tribunal applied the same approach.[139]

166. Thus Respondent's actions should be recognized as exercise of regulatory power, adopted in full compliance with criteria which were marked out in the abovementioned cases. Besides, if the Tribunal were to decide that Beritech actions were attributable to Beristan and amounted to indirect expropriation, Respondent requests the Tribunal to find that Berestian actions through Beritech were lawful expropriation for the very same reasons as in case of the Executive Order. Consequently, in accordance with case-law no compensation is to be paid neither in respect of the Executive Order nor in respect of Beritech actions.

VI. RESPONDENT DID NOT VIOLATE FAIR AND EQUITABLE TREATMENT STANDARD

167. Conception of fair and equitable treatment is broad and difficult to be determined by certain criteria. However, tribunals have identified a certain number of recurrent

[138] *Methanex v. USA*, para.7.
[139] *Saluka Investments v. Czech Republic*, Partial Award, para. 255.

elements which they consider as constituting the normative content of the fair and equitable treatment standard.[140] These elements can be analyzed in four categories:

A. Obligation of vigilance and protection.

B. Due process and non-denial of justice.

C. Lack of arbitrariness and non-discrimination.

D. Transparency and stability, including the respect of the investors' reasonable expectations.[141]

168. Respondent's observance of these elements is fully and precisely examined below.

A. Respondent did not violate obligation of vigilance and protection

169. The obligation of a host state to remain vigilant while according investments on its territory full protection and security is considered to be part of fair and equitable standard.[142]

170. Thus, the tribunal in the *AMT* case determined the full protection and security as an obligation of a state to ensure the full enjoyment of protection and security of investments and not to permit the invocation of its own legislation to detract from any such obligation.'[143]

171. Under the case law of investment adjudication this element of fair and equitable treatment refers to the impairment of investment's physical integrity only, but fails to extend beyond the mere physical safety.[144]

172. Physical safety enshrines obligation of a state to protect investments on its territory from excessive interference, whether caused by the state itself or by third parties.[145] Under this standard a state is under a due diligence obligation to take reasonable

[140] A. Reinisch, *Standards of Investment Protection*, p. 118.
[141] A. Reinisch, *Standards of Investment Protection,* p. 118.
[142] *Occidental Exploration v. Ecuador*, para. 187; *Wena Hotels v. Egypt*, paras. 84, 95; *CSOB v. Slovakia*, para. 161.
[143] I. Tudor, *The fair and equitable Treatment Standard in International Law of Foreign Investment*, p.156.
[144] *Saluka Investments v. Czech Republic*, Partial Award, para. 484; *Tecmed v. Mexico*, paras. 163-164; *PSEG v. Turkey*, para. 259; *Eureko v. Poland*, para. 240.
[145] A. Reinisch, *Standards of Investment Protection*, p. 138.

measures of protection of foreign investments, which well-administered government could exercise under similar circumstances.[146] However, it was expressly pinpointed that in case if the state behavior was not totally unjustifiable, but was reasonably connected to some rational legal policy, there would be no breach of obligation of vigilance and protection.

173. In the case at hand the Executive Order constituted a part of Beristan's rational legal policy of implementation of lawful buyout decision and thus it cannot be considered as a violation of vigilance and protection obligation.

B. Due process requirement was observed by Respondent

174. The requirement of compliance with due process is another element of fair and equitable treatment.[147]

175. The pertinent case law demonstrates that the due process requirement is generally violated by virtue of denial of justice.[148] Thus, in *Loewen v. USA* the tribunal held that 'manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety' is sufficient to identify a breach of fair and equitable treatment.[149] It was also noted that the violation of fair and equitable treatment may arise if certain conduct equates to 'bad faith, a willful disregard of due process of law or an extreme insufficiency of action'.[150]

176. The standard as to be used to demonstrate the 'denial of justice' is relatively high: what is required is 'gross unfairness'[151], 'manifest injustice; 'flagrant and inexcusable violation.'[152] Denial of justice may also mean 'an improper administration of civil or criminal justice as regards an alien'[153]

[146] *Ronald S. Lauder v. Czech Republic*, para. 308; *Occidental Exploration v. Ecuador*, para. 186; *AAPL v. Sri Lanka*, para. 77.
[147] *Waste Management v. Mexico*, para 98; *Mondev v. USA*, para. 96; *Loewen v. USA*, para. 132; *Thunderbird v. Mexico*
[148] *S.D. Myers v. Canada.*
[149] *Loewen v. USA*, para. 132.
[150] *Genin and others v. Estonia*, para 397.
[151] J.W. Garner, *International Responsibility of States for Judgements of Courts and Verdicts of Juries Amounting to Denial of Justice*.
[152] E.J. Arechaga, *International Law in the past Third of a Century*.
[153] A.O. Adede, *A Fresh Look at the meaning of the Doctrine of Denial of Justice under International Law*.

177. Respondent does admit that the Executive Order was issued by Berestian authorities was not subject to appeal. However, this fact *per se* does not entail a conclusion that the 'denial of justice' has occurred. The Executive Order was a mere implementation of lawful buyout decision of the Sat-Connect's Board of Directors. That is the decision of board of directors, but not the Executive Order which could have been appealed by Televative.

178. Moreover, under the clause 17 of the JV Agreement any dispute 'arising out of or relating to this Agreement' shall be resolved in accordance with 1959 Arbitration Act of Beristan. The parties to this agreement have made an express choice of *fora* and thus the municipal courts of Beristan had no other option other than to decline jurisdiction.

179. Consequently, as there can be no 'denial of justice' claimed if the Claimant has itself chosen not to submit disputes to local courts, this element of fair and equitable treatment was complied with.

C. The Executive Order could have been reasonably expected

180. Protection of investor's legitimate expectations is an integral part of fair and equitable treatment.[154]

181. If 'Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct', the failure of a Party to honor these expectations may entail a violation of fair and equitable treatment.[155]

182. Legitimate expectations are thus held to be breached by 'evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.'[156]Reversal of prior approvals can be another instance of a breach.[157]

[154] *Generation Ukraine v. Ukraine*, para. 20.37; *Tecmed v. Mexico*, para. 154; *CME v. Czech Republic*, para. 611; *Eureko v. Poland*, para. 232.
[155] *Thunderbird v. Mexico*, para. 147.
[156] *CME v. Czech Republic*, para. 155.
[157] *LG&E v. Argentina*, para. 133; *S.D. Myers v. Canada*, para. 290.

183. However, investor's legitimate expectations should at all times be balanced with host state's regulatory interest.[158] A State is entitled to exercise its policy powers, if reasonable regulatory interest requires so.[159]

184. In the case at hand, the issuance of Executive Order could have been foreseen by the Claimant as it was conducted in full compliance with laws and regulations of Beristan. That is an inherent obligation of every state to ensure the supremacy of law on its territory. Under the municipal law of Beristan the state has to ensure *inter alia* that the decisions made within corporate structure are complied with.

185. As it was demonstrated above, Beritech has lawfully invoked the buyout clause of the JV Agreement. However, Televative refused to comply with in due course of time. This triggered a state to interfere with the Executive Order, ensuring that the exercise of law in Beristan.

186. Consequently, Respondent's actions did not violate Claimants legitimate expectations.

D. Respondent did not apply arbitrary or discriminatory measures

187. Under the Article 2 of the Beristan-Opulentia BIT foreign investments on the territory of the host state 'shall in no way be subject to unjustified or discriminatory measures'.[160]

188. Discrimination is typically invoked if foreign national in question is exposed to an unreasonable distinction on the basis of a specific racial, religious, cultural, ethnic or national group.[161]

189. Discriminative measures with respect to foreign investor imply that the treatment has also been arbitrary.[162] It has been underlined that the protection from arbitrariness is an inseparable element of the fair and equitable treatment.[163] Thus, for instance, in *Waste Management case*, the tribunal concluded that fair and equitable treatment is breached if:

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[158] *Saluka Investments v. Czech Republic*, Partial Award, para. 306.
[159] *Ibid.*
[160] The Beristan-Opulentia BIT, Article 2(3).
[161] *ELSI case*, paras. 72-73.
[162] *Ronald S. Lauder v. Czech Republic*, para. 219.
[163] S. Vascannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*; C. H. Schreuer, *Fair and equitable treatment (FET): Interaction with Other Standards*; *CMS v. Argentine*, Award, para. 290.

> '[t]he conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice.[164]

190. It was also pinpointed in *Lauder v. Czech Republic* that arbitrary or discriminatory measures may include actions that are 'founded on prejudice or preference rather than the reason or fact.'[165]

191. In *Saluka* case the tribunal laid down three major conditions of discriminatory treatment: 'if (i) similar cases are (ii) treated differently and (iii) without reasonable justification'.[166] Moreover, in *LG&E* case the tribunal emphasized that another principal criterion of discrimination is discriminative intent.[167]

192. In this particular case neither of the abovementioned elements of arbitrary and discriminative treatment is present.

193. Claimant alleges that its personnel were discriminated by expulsion from the Sat-Connect project. However, these allegations are unsubstantiated, as the reason of removal of Televative's personnel was the lawful invocation of the contractual buyout clause. There is no evidence, that acts of CWF were anyhow connected with the race, religion, culture or any other criterion. The personnel of Televative was a multinational company, having personnel of different nationality.[168] Thus, it cannot be reasonably construed that Beristan had an intent to discriminate or discriminated Televative or its personnel on any basis.

194. Consequently Respondent did not violated fair and equitable treatment by applying arbitrary or discriminatory measures.

[164] *Waste Management v. Mexico*, para. 98.
[165] *Lauder v. Czech Republic,* para. 221.
[166] *Saluka Investments v. Czech Republic*, Partal Award, para. 313.
[167] *LG&E v. Argentina,* para. 146.
[168] Clarification No. 236.

VII. ALTERNATIVELY, IF THE TRIBUNAL WERE TO DECIDE THAT THE EXECUTIVE ORDER DID AMOUNT TO THE BREACH OF THE BIT, RESPONDENT MAY RELY ON THE 'ESSENTIAL SECURITY' EXCEPTION AS ENSHRINED IN THE ARTICLE 9 OF THE BIT OR ON CUSTOMARY RULES OF INTERNATIONAL LAW

A. Respondent may rely on the 'essential security' exception as enshrined in the Article 9 of the BIT

195. The Article 9 of the BIT states that nothing in the treaty shall be construed:

> '1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests.'

196. Respondent argues that in accordance with the Article 9: (1) firstly, that Respondent is precluded from the responsibility under the BIT, (2) secondly, that Respondent is not obliged to disclose evidence of the confidentiality breach.

1. Respondent is precluded from the responsibility under the BIT by virtue of the 'essential security' provision

197. Under the practice of investment dispute resolution the BIT 'essential security clause' constitutes a separate defense, as invoked to exclude the responsibility under the treaty.[169] Thus, the Annulment Committee in CMS has underlined that the 'essential security' provision is a

> 'threshold requirement: if it applies, the substantive obligations under the treaty do not apply. By contrast, Article 25 [of the ILC Articles] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.'[170]

[169] *LG&E v. Argentina*, para. 245; *CMS v. Argentina*, Annulment Decision, para. 130.
[170] *CMS v. Argentina*, Annulment Decision, para. 129.

198. The 'essential security' provision therefore constitutes *lex specialis,* which having been applied first would obviate the need to engage in a customary international law.[171]

199. It has been also noted that the treaty provision covers measures 'necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures.'[172]

200. The Beristan-Opulentia BIT contains the formula stipulating that a state may resort to measures '*that it considers necessary'* to maintain 'international peace and security' or its 'essential security interests.' The very same formula is enshrined into a number of investment treaties, including the Model BIT [173]

201. The wording as enshrined in these treaties is considered to be self-judging that is the treaty itself entitles a host state to adjudge what constitutes 'essential security.'[174] Thus, as the Beristan-Opulentia BIT contains the very same formula, that is for Beristan to decide what it considers 'essential security' interest.

202. Respondent submits that it was its essential interest to ensure the compliance with municipal and to protect its encryption security.

203. Claimant for further disclosure of the confidential information of encryption codes, which could have made Respondent defenseless in case of any kind of armed conflict. Moreover, Respondent would like to draw the tribunals attention that safety of one's state defense communication system can prevent another State from interference and thus to maintain international peace and security.

204. Therefore, Respondent was entitled to rely on the self-judging 'essential security clause' to escape responsibility under the treaty.

2. Respondent is not to disclose evidence in accordance with the Article 9 of the BIT

205. Under the essential security clause Respondent is entitled not to grant access to the information, the disclosure of which would be contrary to its essential security interests.

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[171] *Ibid.* para. 134.
[172] *Ibid.* para. 130
[173] Art. 22.2, US-Peru Trade Promotion Agreement (2006); Art. 22.2, US-Colombia (2006); Art. 23.2, US Chile BIT (2003); Art. 21.2 US-CAFTA-DR FTA (2004); Art. 6.12 India-Singapore CECA; Art. 24 ECT.
[174] *Nicaragua v. United States*, para 222; A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 493.

206. Thus, Respondent may retain information concerning the evidence of disclosure of confidential information by Claimant's personnel. Inasmuch as the disclosure of evidence could put in danger the "source" of information and would impair Respondent's ability to receive further information from this source, Respondent contends that it would be contrary its essential security interest.

207. Therefore, Respondent requests the tribunal to find that protection of privacy of evidence is Berestian 'essential security' interests.

B. If the Tribunal were to decide that essential security provision is inapplicable in the case at hand, Respondent requests the tribunal to find that Beristan acted in conformity with international customary law

208. When the international tribunal declines to apply essential security clause, Respondent may alternatively rely on the rules of customary international law, i.e. necessity. [175]

209. The defense of necessity is a part of customary international law. Thus, in *Gabcikovo – Nagymaros Project*, The ICJ recognized that the state of necessity defense is part of customary international law as reflected by the Article 25 of the ILC Articles.[176] The same conclusion was made by the ICSID Tribunal in such cases as *Enron*[177] and *Sempra*[178].

210. Article 25 of the ILC Articles defines four criteria of necessity: (1)essential interest, (2)grave and imminent peril, (3)that taken measures was the only way, (4)that there was no impairment of the other State's interest.

211. Respondent shall now demonstrate that all of these requirements are present in the case.

1. Respondent acted preserving its essential interest

212. Professor Ago and the Committee gave the definition of 'essential interest' as a criterion, which allows the State to breach its obligation must be a vital interest, such as

[175] *CMS v. Argentina,* Annulment Decision, para. 133.
[176] *Gabcikovo-Nagymaros, case*, para. 40.
[177] *Enron v. Argentine*, Award, para. 303
[178] *Sempra Energy v. Argentina*, Award, para. 344

political or economic survival,[179] that such danger would include threats to a state's 'political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population…',[180] *In LG&E* tribunal came to the same conclusion.[181]

213. Moreover, in the ILC Commentary on Article 25 states that essential interest depends on the circumstances and cannot be prejudged.[182]

214. In the present case, the essential interest of Beristan was prevention of disclosure of confidential information, which would impair the maintenance of internal peace as well as external, since Beristan would have become vulnerable for Opulentia and it may have led to armed conflict.

215. Consequently, the requirement of 'essential interest' is present.

2. Grave and imminent peril was observed by Claimant

216. *In Enron* case the tribunal noted that government had a duty to prevent the worsening of the situation, but state should prove that the events are out of control or unmanageable.[183] Same position was expressed *in Sempra* case.[184] Therefore, the two elements of grave and imminent peril could be deduced: state must prevent the worsening of situation and the reasonable evidence of losing control over situation must exist.

217. In the case at hand Claimant disclosed confidential information which fell within the scope of essential interest. When the buyout decision was invoked and Claimant was to leave the Sat-Connect project and failed to do so, the situation would have become worse if Respondent had not issued the Executive Order to ensure that Claimant had no longer access to the information for further disclosure. Thus, the first element was observed.

[179] R. Ago, *Eighth report on State Responsibility*, at 19.
[180] *Ibid.*
[181] *LG&E v. Argentina*, para 251.
[182] J. Crawford, *The International Law Commission's Articles on State Responsibility*, 183.
[183] *Enron v. Argentine*, Award, para 307.
[184] *Sempra Energy v. Argentina*, Award, para 349.

218. The standard requires that the peril must be established by evidence reasonably available at the time.[185] Respondent contends that it was highly probable that Claimant was not going to leave the Sat-Connect project. Therefore, Respondent having at its disposal the evidence of the hazardous confidentiality breach did not hesitate to invoke the provisions of its national legislation to ensure the compliance with the buyout clause.

219. Therefore, the second requirement is present in the case.

3. The measures taken constituted the only way to preclude the wrong

220. The third element is that a state must have no means to guard its vital interest other than breaching its international obligation.[186] However, if the other steps are available, even if they are more costly or difficult, state should use the others ways. *In CMS*,[187] *Enron*[188] and *Sempra*[189] cases tribunals stated that another steps could have been taken. However, these three decisions are criticized for being too general as it becomes a simple way to defeat any necessity defense by merely showing that other 'steps could have been taken'. This illustrates that criteria of element are still not precisely defined and are to be measured by tribunal in each case.

221. In the present case Respondent took the only reasonable measure to prevent further violations. Claimant's personnel had been asked to leave the Sat-Connect project on the ground of the board of directors' decision, however this request was ignored. Thus Respondent issued the Executive Order authorizing the forcible personnel removal.

222. Respondent contends that the forcible buyout was the 'only means' to preserve the encryption security and thus the third requirement of necessity is fulfilled.

4. Respondent did not impair essential interest of other states

223. Impairment of Essential Interests of other States presupposes that 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting

[185] J. Crawford, *The International Law Commission's Articles on State Responsibility*, 184.
[186] *Ibid.*
[187] *CMS v. Argentina*, Award, para 324.
[188] *Enron v. Argentine*, Award, para 307.
[189] *Sempra Energy v. Argentina*, Award, para 350.

state but on reasonable assessment of the competing interests, whether these are individual or collective.'[190]

224. In *CMS v. Argentina* the tribunal expressly noted that the important interest in question was that of protection of investors further having underlined that the impairment of treaty obligations towards foreign investors is unlikely to breach the obligations towards international community.[191] The tribunal further noted that interests of investors are to be regarded as essential for investor, however investors interests is not equal to State's and there was no violation of the USA essential interest thereof. The very same approach was followed in *Sempra, Enron* and *LG&E* tribunals.[192] Therefore, in the present case, while Claimants interest as an investor might have been violated, the interest of Opulentia or any third state was not.

225. Consequently, Respondent did not impair any third state's essential interest.

226. Thus, as all the pertinent requirements of the state of necessity are present, Beristan may invoke the necessity defense.

227. Moreover, Respondent contends that no compensation should be paid. Under the customary international law the compensation is to be paid only for the period the state of necessity is effective. [193]

228. However, in the case at hand Beristan's necessity is practically permanent since the restitution of Televative is inadmissible and improper. Firstly, that is not Beristan that invoked a buyout clause. Secondly, should the exercise of buyout clause be reversed Televative could still facilitate the leaks of essential information to third states. Thus, as the state of necessity is practically permanent, the issue of damages and compensation cannot be claimed.

[190] J. Crawford, *The International Law Commission's Articles on State Responsibility*, 184.
[191] *CMS v. Argentina*, Award, para. 357.
[192] *LG&E v. Argentina, para. 257.*
[193] . Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p.512.

VIII. PRAYER FOR RELIEF

229. In the course of the submission as presented above, Respondent respectfully requests the Tribunal to adjudge and declare:

1. That the Tribunal has no jurisdiction over this dispute in view of Clause 17 of the JV Agreement;
2. That the Tribunal has no jurisdiction over Claimant's contractual claims arising under the JV Agreement by virtue of Article 10 of the Berestian-Opulentia BIT;
3. That Respondent did not breach the JV Agreement by preventing Claimant from completing its contractual duties and that Beritech properly invoked the buyout clause of the JV Agreement;
4. That Respondent's actions and omissions did not amount to expropriation, discrimination or to violation of fair and equitable treatment, or to violation of general international law or applicable treaties.
5. That Respondent is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a defense to Claimant's claim.

RESPECTFULLY SUBMITTED ON SEPTEMBER 19, 2010.