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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID Case No. ARB/X/X)

TELEVATIVE, INC.,

Claimant,

v.

The Government of the Republic of BERISTAN,

Respondent

MEMORIAL FOR RESPONDENT

Counsel for Respondent
Team Lauterpacht

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STATEMENT OF FACTS

1. Claimant, Televative Inc., is a leading satellite communications technology developer, privately held and incorporated in Opulentia.

2. Beritech S.A., a state owned company, was established by the Respondent, the Government of Beristan, which retains a 75% interest in the company. The remaining 25% of Beritech S.A. is owned by wealthy Beristian investors, all of whom have close ties to the Beristian government.

3. Claimant and Beritech signed a joint-venture agreement (hereinafter the JV Agreement), establishing a joint-venture company, Sat-Connect S.A. on October 18, 2007, under Beristan law. The corporate offices of the joint-venture company Sat-Connect were established in the capital city of Beristan. Respondent co-signed the JV Agreement as Beritech's guarantor.

4. The ownership of the joint-venture company Sat-Connect is as follows: Claimant owns 40%, Beritech owns 60%. Claimant's total monetary investment in Sat-Connect is $47 million U.S. Claimant may appoint four members to the board of directors, while Beritech may appoint five. A quorum of the board is obtained with six members present.

5. Sat-Connect was created by Claimant and Beritech to develop satellite and communications technology that will be used by both civilians and military units, including the Beristan armed forces.

6. On August 12, 2009, a highly placed Beristan government official raised "national security concerns," in The Beristan Times, revealing publicly that Claimant had compromised the joint-venture project due to leaks by Claimant's personnel who worked on the project. This government official indicated that it was believed that

crucial information for the project had been passed by Claimant to the Government of Opulentia. Claimant denies this story.

7. On August 27, 2009, Beritech invoked Clause 8, the buyout clause, of the JV Agreement, compelling a buyout of Claimant's interest in Sat-Connect. There were six directors present at the board meeting where it was decided to buy out Claimant, though one director refused to participate and left the meeting early. That director later filed a protest that there had been no prior notice concerning the meeting's agenda.

8. Beritech served notice to Claimant on August 28, 2009 that it required Claimant to hand over possession of all Sat-Connect material within fourteen days and that it must remove all personnel from Sat-Connect sites.

9. On September 11, 2009, the Civil Works Force, a segment of the Beristian army, secured Sat-Connect sites and instructed Claimant's personnel to leave the sites immediately.

10. On October 19, 2009, Beritech filed for arbitration against Claimant under Clause 17 (hereinafter the forum-selection clause) of the JV Agreement. Claimant however, has refused to respond to this request and has refused to accept the $47 million that Beritech made available to Claimant pending the arbitration decision.

11. On October 28, 2009, Claimant filed for arbitration in accordance with ICSID's Rules of Procedure and notified Respondent. Both Claimant and Respondent are ICSID Contracting States and have ratified the ICSID Convention as well as the Vienna Convention on the Law of Treaties.

13. Claimant contends that its expulsion from the joint-venture project, the forcible removal of its personnel by members of Respondent's military, and the improper buyout of its interest in Sat-Connect were a product of a conspiracy against Claimant.

Claimant alleges that these actions violated it's rights under general international law and under Articles 2, 4 and 10 of the Beristan-Opulentia BIT.

14. Claimant states that Respondent illegally expropriated its interest in Sat-Connect, that Respondent breached the fair and equitable treatment standard to which Claimant is entitled under the Beristan-Opulentia BIT, and that Respondent breached the JV Agreement by preventing Claimant from completing its own contractual duties and by improperly invoking the buyout clause in the agreement. Claimant argues that the contractual claims are properly brought to this ICSID tribunal by virtue of Article 10 of the Beristan-Opulentia BIT.

15. Claimant also contends that jurisdiction is proper under ICSID because the present claims are brought under the Beristan-Opulentia BIT and are distinct from contractual claims.

16. Respondent responded that Claimant's claims are inadmissible and that the Tribunal lacks jurisdiction because the claims are contractual in nature and don't arise under the Beristan-Opulentia BIT. Respondent also claims that it was entitled to rely on the buyout clause in the JV Agreement because Claimant breached the confidentiality provision of the Agreement. Respondent denies that it violated any terms of the BIT or other international law and asserts that Claimant is not entitled to any remedies.

SUMMARY OF ARGUMENTS

17. Claimant contends that ICSID should have jurisdiction over its claims, arguing that they arise under the BIT. However, Claimant improperly brings these claims to the ICSID Tribunal as BIT claims, when in fact, Respondent will show that they are contractual claims. Claimant also contends that the Tribunal should exercise jurisdiction notwithstanding the forum-selection clause, Clause 17, of the JV Agreement. Firstly, it would be incorrect to do this because the fundamental basis of Claimant's claims are contractual, and thus are governed by the JV Agreement rather than the BIT. It would also be incorrect because the JV Agreement is a binding exclusive contract that must be respected unless it is overridden by another valid provision, which it is not. Thus, this Tribunal should find that it does not have jurisdiction over the claims in this case.

18. Claimant materially breached the JV Agreement by leaking confidential information in direct violation of Clause 4 of the JV Agreement. This breach entitled Beritech to invoke Clause 8 of the JV Agreement, allowing it to buyout Claimant's investment in Sat-Connect. Any actions taken by Beritech are those of a company, not of the State. Therefore, Beristan is not liable for any actions that Beritech may or may not have taken. Beritech offered full and effective compensation to Televative in the amount agreed upon in the JV Agreement. At all times, Beritech and Beristan acted in a fair and equitable manner toward Televative. In the alternative, any actions by Beristan are authorized by Clause 9 of the Beristan-Opulentia BIT, which allows for no other measures in the BIT to preclude Beristan from applying measures necessary for its essential security. The threat to the nation of Beristan was a threat allowing for Beristan to take action to defend its security.

PART I: JURISDICTION

I. CLAIMANT'S CLAIMS ARISING UNDER ARTICLE 10 OF THE BIT ARE CONTRACTUAL CLAIMS AND ARE NOT GOVERNED BY THE BIT

19. In recent years, international investment dispute has taken off.[1] More recently however, investors have tried to bring a wider range of claims before ICSID tribunals by arguing that an "umbrella clause" inserted into the BIT covers any contractual claims that an investor has against a state by requiring the state to "observe all of its obligations" to investors.[2] However, Respondent will show that in this case, ICSID does not have jurisdiction over Claimant's claims because they arise directly out of a contract, rather than out of the BIT itself.

20. According to Article 41 of the ICSID Convention, an ICSIDI "[t]ribunal shall be the judge of its own competence."[3]

> This provision is consistent with the well-known rule in . . . commercial international arbitration that each judicial body is invested with the authority to determine the scope of its own jurisdiction.[4]

Thus, here, this Tribunal has the power to decide for itself whether jurisdiction over Claimant's allegations is proper.

21. International Centre for Settlement of Investment Disputes (hereinafter "ICSID") jurisdiction is governed by Article 25(1) of the ICSID Convention, which both Beristan and Opulentia have adopted. Article 25(1) sets out four conditions that must be met in order for an ICSID tribunal to properly hear a case: (1) the dispute must be a legal dispute, (2) the dispute must arise directly out of an investment under both the ICSID Convention and the applicable Bilateral Investment Treaty (BIT), (3) the dispute must be

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[1] *See Rogers,* pg. xxvii
[2] *Nolan*, pg. 1
[3] ICSID Convention, Article 41
[4] *Hirsch*, p. 45

between a Contracting State and a national of another Contracting State, and (4) the parties to the dispute must have consented in writing to submit the dispute to ICSID.[5]

22. Respondent concedes that conditions (1),(2) and(3) are met, namely, that the dispute is a legal one, arising out of an investment under the ICSID Convention and the Beristan-Opulentia BIT, and that the dispute is between a Contracting State, Respondent, and a national of another Contracting State, Claimant. Requirement (4) however is not met by Claimant's contractual claim, thus this ICSID tribunal does not have jurisdiction over this dispute.

A. Respondent Has Not Consented to Arbitrate Contractual Claims Under the Umbrella Clause

23. The ICSID Convention requires, as noted above, that for jurisdiction to be proper, both parties must have *consented in writing* to ICSID jurisdiction. Article 11 of the Beristan-Opulentia BIT states that

> For the purpose of resolving disputes with respect to investments between a Contracting party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter, . . . the investor in question may in writing submit the dispute at his discretion for settlement to [ICSID].[6]

24. Further, Article 11(2) states that each Contracting Party consents to ICSID jurisdiction in accordance with the Article 11(1), and that this satisfies requirement (4), written consent of the parties for purposes of the ICSID Convention.

25. While Respondent has expressly consented to ICSID jurisdiction over claims arising under the Beristan-Opulentia BIT, it has not consented in writing to ICSID jurisdiction over private contractual claims between itself and an investor of Opulentia per the Beristan-Opulentia BIT. Claimant incorrectly argues that its contractual claim is elevated

[5] ICSID Convention, Article 25(1)
[6] Beristan-Opulentia BIT, Article 11

to a BIT claim under Article 10 of the BIT. Instead, this contractual claim is governed by the JV Agreement out of which it arises.

i. Article 10 Should Be Read Narrowly Because To Interpret It Otherwise Would Open Article 10 To Infinite Claims

26. If the tribunal were to read Article 10 of the Beristan-Opulentia BIT as broadly as Claimant urges, it would open up Respondent to an infinite number of claims that fundamentally do not arise under the BIT, but arise under a private contract instead. Every year, countries and states enter into private contracts with private companies, many of which are "foreign nationals." If every time a private investor wanted to even allege breach of contract or any other contract related claim, he could bring it to an ICSID tribunal, it would open a floodgate of cases to international arbitration, that otherwise would likely be settled swiftly through domestic dispute resolution.

27. According to the ICSID tribunal in *El Paso v. Argentina,* a narrow reading of umbrella clauses is not just preferable to a broad reading but is actually also necessary in order to prevent a state's minor commitments being transformed into international treaty obligations.[7] That tribunal expressed its doubt as to whether investors would be able to restrain themselves from bringing any and all contractual claims against the State to arbitration if the clause was read too broadly.

28. Here, there was a complicated joint-venture agreement between Claimant, Respondent and Beritech, Inc, in which respondent owns seventy-five percent.[8] It wouldn't take much for Claimant to be able to come up with something that in his eyes was a breach of that agreement, and to bring it to an ICSID panel every time he felt that he had a problem to resolve with Respondent.

[7] *El Paso,* ¶71-72
[8] Uncontested Facts, ¶2

ii. Even if Read broadly, The Umbrella Clause Only Covers Contractual Claims in "exceptional circumstances"

29. The ICSID tribunal in *Joy Mining v. Egypt* acknowledged in dicta that an umbrella clause could not have the effect of transforming every contract dispute into an investment dispute under the applicable BIT,

> unless there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection.[9]

30. In this case, Claimant contends that Respondent breached the JV agreement by preventing Claimant from completing its own contractual duties.[10] This kind of breach of contract claim is not going to rise easily to the kind of magnitude that the tribunal in *Joy Mining* speaks of. If Claimant was able to show that Respondent intentionally, blatantly breached its contractual duties and that the consequences of that breach were exceptionally bad, then he would have an easier time making a case for "exceptional circumstances." Here, however, Claimant has not made the requisite showing that his breach of contract claims would be a violation of contract rights of large enough magnitude to trigger the protections of the Beristan-Opulentia BIT.

II. THE FORUM-SELECTION CLAUSE OF THE BIT PRECLUDES ICSID FROM EXERCISING JURISDICTION OVER THIS DISPUTE

31. In the recent case of *SGS v. Pakistan*, the ICSID tribunal held that

> [it could not] accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.[11]

This case is sufficiently similar to *Philippines*, which has been followed by a number of ICSID tribunals since, and thus the binding exclusive contract that Claimant and

[9] *Joy Mining,* ¶81
[10] Minutes of the First Session of the Arbitral Tribunal, ¶15
[11] *Philippines*, ¶ 153

Respondent entered into should be respected unless it is proven to be overridden by a separate valid provision.

A. A binding Exclusive Contract between parties should be respected unless overridden by a separate valid provision

i. The BIT Does Not Override Clause 17 in the JV Agreement

32. In this case, Claimant relies on Article 26 of the ICSID Convention, which reads in relevant part

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.[12]

33. Claimant would have the tribunal read this article as giving the BIT the power to override any contract entered into by a Contracting Party and a foreign national. This would have the effect of invalidating any dispute resolution clauses in private contracts where both parties have expressly agreed to the clause. Reading the article this way would result in consequences that were not intended by ICSID or by the writers of the Beristan-Opulentia BIT.

1. Article 26 was intended as a rule of interpretation not a mandatory rule

34. First, according to Schreuer,

> the provision merely created a rule of interpretation, that is, a presumption that arbitration was intended to be the sole remedy . . . .[13]

The tribunal in *SGS v. Philippines*, agreed that Article 26 was intended as a rule of interpretation, not a mandatory rule.[14]

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[12] ICSID Convention, Article 26
[13] *Schreuer*, p. 389
[14] *Philippines,* ¶ 146

35. With this interpretation of Article 26, there is a presumption that the Contracting States intended for arbitration to be the sole remedy for disputes between themselves and foreign investors. However, the JV Agreement expressly states that disputes will be resolved under the 1959 Act of Beristan.[15] This dispute resolution clause that both parties expressly agreed to rebuts the presumption that arbitration under the Beristan-Opulentia BIT is the sole remedy available to the parties. In fact, it expressly states that the only remedy available for disputes arising out of the agreement is to submit the case for arbitration in accordance with the Act of Beristan, and NOT through ICSID.

2. 25 provides that consent to ICSID shall unless otherwise stated be ...to the exclusion of any other remedy

36. The first sentence of Article 26 is also key because it allows the parties to contract out of the BIT agreement to arbitrate if they so choose.

> [The] exclusive remedy rule of Art. 26 is subject to modification by the parties. The words 'unless otherwise stated' in the first sentence give the parties the option to deviate from [ICSID arbitration] by agreement.[16]

37. In this case, the Claimant and Respondent both expressly agreed when they signed the contract, that any disputes involving the joint-venture would be arbitrated in accordance with the 1959 Act of Beristan. This express consent to submit claims in accordance with the 1959 Act of Beristan clearly falls under into a category where parties have "otherwise stated" what tribunal or court shall have jurisdiction over claims arising out of an agreement. Thus, the consent given to arbitrate under ICSID does not apply to Claimant's contractual claims, because it is otherwise stated, and overridden by the express consent of both parties to bring their claims elsewhere.

ii. <u>The "Fundamental Basis" of the claims is in the JV Agreement and not the BIT</u>

[15] JV Agreement, Clause 17
[16] *Schreuer*, p. 347

38. The annulment committee in *Vivendi v. Argentina*, similarly to this tribunal, dealt with the question of how to deal with a concession contract with a forum-selection clause in view of the applicable BIT.[17] The committee decided that whether or not ICSID had jurisdiction over the claim depended on the "fundamental basis" or the "essence" of the claim.[18] In particular the committee noted that whether a claim was ultimately a BIT claim or a contract claim was derived from the "fundamental basis" of the claim.[19]

39. In *SGS v. Pakistan*, which followed the *Vivendi* decision, the ICSID tribunal noted that

> [e]ven though a claim for breach of contract and a claim for violation of the BIT may be based on similar or identical facts, they rely on fundamentally different legal bases and are assessed according to different standards.[20]

The tribunal then stated that

> [i]n 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.[21]

While Claimant may argue that the *Pakistan* tribunal misapplied the *Vivendi* test, there is simply no relevant evidence to indicate that that is true.

40. In *SGS v. Philippines*, an ICSID tribunal also expressly followed *Vivendi*, holding that "[the contractual claim] cannot hide its origins."[22] This case has a strikingly similar, and as noted in the next semester, there is no getting around the fact that Claimant's claims originate in a contract, and should be subject.

41. Although *Vivendi* did not involve an umbrella clause like Article 10, there is nothing to show that the fundamental basis test cannot apply equally as well to contractual claims and BIT claims when an umbrella clause exists in the BIT.

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[17] *Wendlandt*, pp. 535-36
[18] *Wendlandt, p.* 537
[19] *Vivendi, ¶¶* 98-101
[20] *Pakistan*, ¶ 92
[21] *Pakistan*, ¶44
[22] *Wendlandt, p.* 549

1. *Claimant's Expropriation and Breach of Fair and Equitable Treatment Claims Arise Directly Out Of The JV Agreement*

42. Claimant claims that Respondent illegally expropriated its interest in Sat-Connect, by acquiring all of Claimant's capital contributions to the joint-venture.[23] Following the fundamental basis test from *Vivendi*, it is clear that the essence of this claim lies in contract, as it is the Claimant's interest in the joint-venture company that it argues the Respondent has expropriated. Claimant also alleges that Respondent breached the fair and equitable treatment standard that the Beristan-Opulentia BIT affords to investors.[24] Claimant argues that Respondent breached this standard through its "arbitrary and unfair expulsion" of Claimant and through the exercise of Clause 8 by Beritech.[25] However, even these claims arise solely out of the contract, because it is the validity of Respondent's actions relating to the JV Agreement that caused Claimant to bring its claims in the first place. It would thus be incorrect to exercise jurisdiction over these two claims has Claimant would have this tribunal do.

2. *Claimant's Contractual Claims Arise Directly Out Of The JV Agreement*

43. In this case, Claimant alleges that Respondent prevented Claimant from completing its own duties under the contract, and thus has materially breached that contract.[26] The very essence of this claim is that Respondent had certain duties in regards to the JV Agreement. Claimant alleges that Respondent has not followed through on those duties. The entire claim is based on the JV Agreement between Claimant and Beritech Corp, which Respondent acted as guarantor for.[27]

[23] Minutes of the First Session of the Arbitral Tribunal, ¶15
[24] Minutes of the First Session of the Arbitral Tribunal, ¶15
[25] Minutes of the First Session of the Arbitral Tribunal, ¶15
[26] Minutes of the First Session of the Arbitral Tribunal, ¶15
[27] Uncontested Facts, ¶ 3

44. Claimant then further alleges that although the breach of contract claim arises out of the JV Agreement, that it is "elevated" to a BIT claim by Article 10.[28] But if that is the case, even Claimant is admitting that it arises directly out of the contract, and that the fundamental basis of the claim is essentially in the contract.

45. It is uncontested that the joint-venture company Sat-Connect S.A. that was created by Beritech and Claimant is governed by Beristan law. Thus, since Claimant's claims arise under the JV Agreement creating the joint-venture company under Beristan law, it is Beristan law that should govern the breach of this contract, rather than the Beristan-Opulentia BIT.

iii. Claimant Cannot Try To Enforce A Contract Whil Not Complying With That Same Contract Itself

46. The tribunal in *SGS v. Philippines*, in not exercising jurisdiction over Claimant's contractual claims, relied on the foundational contract principle that a party cannot claim breach of contract while not complying with that same contract itself, absent "good reasons."[29] In this case, Claimant is claiming breach of the JV Agreement, but by refusing to respond to Respondent's request for arbitration in compliance with the JV Agreement and instead bringing its own claim on the contract to ICSID.[30] Following *Philippines* lead, this tribunal should refuse to exercise jurisdiction over Claimant's claims because they arise under a contract, and Claimant should have brought his claims to an arbitration tribunal in accordance with the JV Agreement rather than to ICSID.

[28] Minutes of the First Session of the Arbitral Tribunal, ¶15
[29] *Philippines*, ¶ 154
[30] Uncontested Facts, ¶¶ 13-14

PART II: MERITS OF THE CASE

I. CLAIMANT MATERIALLY BREACHED BY VIOLATING THE CONFIDENTIALITY CLAUSE OF THE JOINT VENTURE AGREEMENT.

47. The relevant parts of the Joint Venture (JV) Agreement are Clauses 4 and 8. Clause 4, Paragraph 4 of the JV Agreement between Beritech and Claimant states, "Any breach of this Clause 4 shall be deemed a material breach of the Agreement."

48. Clause 8 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.

49. Put simply, a dissemination of confidential information is a material breach. Upon a material breach by Claimant, Beritech has the right to buy out Televative's interest in the Joint Venture. This breach occurred, and Beritech acted within its contractual rights in deciding to buyout Claimant.

50. On August 12, 2009, it came to the attention of the Board of Directors that a Beristan government official believed that the Sat-Connect project had been compromised due to leaks by Televative personnel. This official believed that critical information was given to the Government of Opulentia.[31] Of course, both Televative and Opulentia denied any wrongdoing.

51. The source for these beliefs was the Beristan Times, an independent and impartial newspaper with a primary subscriber base residing in the country of Beristan. In response to the Times' inquiry, Televative admitted that it received requests from the Opulentian government for civilian encryption keys.[32] At the same time, Televative denied permitting "unlawful" access.

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[31] Uncontested Facts, ¶ 8.

[32] Clarifications 1, ¶178.

52. However, even lawful access would be a dissemination of Confidential Information under Clause 4, ¶ 3 of the JV Agreement. Under Clause 4, ¶ 4 of the JV Agreement this was a material breach on the part of Televative.

53. Based on these facts, the Board of Directors met and concluded that a material breach by Claimant had occurred. As a result of the material breach, the Board voted to enact Clause 8 and allow Beritech to buyout Claimant.

II. BERITECH IS NOT AN ORGAN OF THE BERISTAN NATION, THEREFORE BERISTAN IS NOT RESPONSIBLE FOR ANY ACTIONS TAKEN BY BERITECH.

54. States are only held accountable for their own actions. The actions of individuals who happen to be natives of that state are not attributed to the state unless the individual was an "organ of the state."[33] The following factors from *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, award of November 13, 2000 affect whether an entity is a State organ:

> whether an entity is classified as a public entity pursuant to the State's laws, whether the State participates in funding the entity's activities, whether the entity performs public functions and whether the State regularly controls the entity's activities.[34]

Furthermore, State ownership, while being a factor, is not sufficient to constitute a State organ.[35]

55. Beritech is a private entity under Beristan law. It was never established as a public utility or entity, instead it is incorporate as a private corporation. Beritech is an independent company started by Beristan to jump-start the privatization of the communications industry. Beritech performs no public functions. Beritech was initially funded by the State, and Beristan owns 75% of Beritech. Beristan does not control Beritech's activities.

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[33] ILC

[34] *Weiler*. p. 35

[35] *Id.*

56. While Beristan military personnel did ensure that all property and secrets remained in the hands of Beristan citizens, the military moved out of the Sat-Connect facility as soon as Beritech was able to replace the personnel lost to Claimant's exit.

57. Weighing all of the factors, it is clear that Beritech is not a "State organ" of Beristan, and therefore Beristan is not responsible for its actions.

III. ANY FORCED EXPROPRIATION OF CLAIMANT'S INVESTMENT WAS OFFSET BY THE FULL AND EFFECTIVE COMPENSATION OFFERED TO CLAIMANT.

58. Article 4 of the BIT, ¶2 holds that investments shall not be expropriated

> except for public purposes, or national interest, against immediate full and effective compensation…

Beritech offered Claimant an amount equal to their total monetary investment in the Sat-Connect project, $47 million.[36] This amount is the agreed upon measure in the JV Agreement. Therefore, it is the full amount that both parties agreed upon at the time of the JV Agreement.

59. Clause 8 of the JV Agreement states,

> Under such circumstances, Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period from the execution of this Agreement until the date of the buyout.[37]

60. There is nothing unjust, unreasonable, or inequitable about following a contract that both parties agreed to during an arm's length deal. Beritech was entitled to buyout Claimant's interest in the venture at the agreed upon value, and did so according to a vote by the Board of Directors.

61. Therefore, any supposed "expropriation" that took place was done so by following both the JV Agreement *and* the Beristan-Opulentia BIT.

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[36] Uncontested Facts, ¶ 12.

[37] Sat-Connect Joint Venture Agreement, Clause 8.

IV. ANY EXPROPRIATION OF CLAIMANT'S INVESTMENT WAS FAIR AND EQUITABLE.

62. "Fair and equitable treatment" has been found to be treatment that is free from bias, fraud or injustice and is also reasonable.[38] The actions of Beritech were at all times fair and equitable.

63. Beritech was justified in taking over Claimant's investment, under Clause 8 of the JV Agreement and Article 4 of the BIT, as described above. Following the rules previously agreed to is seen internationally as a definition of fair play. Therefore, it is difficult to see how Claimant could claim that the actions taken by Beritech, following the terms set out in the JV Agreement, were unfair.

64. Any expropriation was reasonable as well. There was a hearing, in the form of the Board of Directors meeting and vote. The meeting started with a quorum and led to a vote where the majority of Directors decided that there was a leak; that Claimant breached the contract; and that Beritech would be justified in buying out the investment. No judicial proceeding needed to take place when the company had a meeting of the Directors to decide on the matter of whether or not a breach of the JV Agreement occurred.

65. Any expropriation was also done in an equitable manner. The parties had defined what an equitable amount would be. They placed this amount in the contract, and it is this amount that Beristan is willing to allow. Inequity would be disregarding an agreement that is currently in place.

V. IN THE ALTERNATIVE, BERISTAN IS ENTITLED TO RELY ON THE ESSENTIAL SECURITY CLAUSE (ARTICLE 9) OF THE BERISTAN-OPULENTIA BIT.

66. Article 9 states that

[38] UNCTAD

> Nothing in this Treaty shall be construed … to preclude a Party from applying measures that it considers necessary… for the protection of its own essential security interests.[39]

The Oxford Handbook on International Investment Law gives four affirmative requirements for a necessity defense.[40] These are: i) Essential Interest of Invoking State, ii) 'Grave and Imminent Peril', iii) 'Only Means', iv) Impairment of Esential Interests of other States.[41]

67. First, the interest must be "absolutely of an exceptional nature".[42] Security of a nation is an exceptional interest, and is essential by any definition of the word. Furthermore, the use of the term "Essential Security Interest" to describe clause 9 shows that both parties recognized that Security is an "essential interest."

68. Second, the interest must be presently threatened.[43] This must be beyond a mere possibility. The security of Beristan was threatened by the leaking of information regarding the Sat-Connect intellectual property. The technology to be deployed will be used by several segments of the Beristan armed forces.[44] Having this technology in the hands of another country is a serious threat to the security of Beristan.

69. Third, there must be no means to guard the vital interest other than breaching its obligation.[45] There was no method to ensure a stoppage of leaks other than to remove the Televative employees from the premises. This removal also coincided with the execution of the contractual right of Beritech to buyout Televative's interest in the joint venture.

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[39] Beristan-Opulentia BIT, Article 9.

[40] Oxford, p. 476

[41] *Id.* at 476 – 485.

[42] *Id.* at 476.

[43] *Id.* at 481.

[44] Stipulated facts, ¶6.

[45] *Oxford* at 483.

70. Fourth, the invocation of necessity must not seriously impair an essential interest of another State. The actions taken by Beristan and Beritech at worst harm only Televative, which is a private company. There is no impairment of the interest of any State.

71. After looking at these factors, it is clear that Beristan acted to ensure the continued safety of its sovereignty. This is an essential security interest, and therefore Beristan was fully within its rights to take action to protect its security.

PART III: CONCLUSION

72. In view of the above arguments, this tribunal should reject jurisdiction over claimant's expropriation, violation of fair and equitable treatment, and contractual claims. Even if the tribunal finds that jurisdiction may be proper, it should not exercise jurisdiction because the forum-selection clause in the relevant contract between the parties overrides the dispute resolution clause in the Beristan-Opulentia BIT.

73. After review of the above, it is clear that Beristan committed no unjust or improper actions against Claimant. All actions taken against Claimant were a result of their breach of the Joint Venture Agreement and threat to the nation of Beristan.

PART IV: RELIEF REQUESTED

74. In regard to this case, Respondent respectfully asks that the Tribunal find:
    a. This ICSID Tribunal has no jurisdiction over Claimant's claims;
    b. That Respondent has not violated any of its obligations under the Beristan-Opulentia BIT; and
    c. That this Tribunal dismiss the claims against Respondent.

RESPECTFULLY SUBMITTED, SEPTEMBER 19, 2010

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Team Lauderpacht
on behalf of Respondent,
Government of Beristan