Foreign Direct Investment International Moot Competition
22 October to 24 October 2010

TELEVATIVE INC.
Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
Respondent

Memorandum for Respondent

Respectfully Submitted,

Team Mo

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STATEMENT OF FACTS

1. On 18 October 2007, Televative, Inc. (Claimant), a privately held Opulentian company, entered into a joint-venture agreement ("JVA") with Beritech S.A., a company owned by Beristan (Respondent), to establish the joint-venture company, Sat-Connect S.A. Sat-Connect was established for the purpose of developing and deploying a satellite network for the Euphonian continent, which includes both Opulentia and Beritech.

2. The JVA defined a material breach to include unauthorized disclosure of any matter related to the agreement not otherwise authorized by law or already properly within the public domain. Clause 8 of the JVA entitled Beritech to purchase all of Televative's interest in the Sat-Connect project in the event that the latter committed a material breach.

3. On 12 August 2009, The Beristan Times, an independent publication, quoted a highly-placed Beristan official warning that the Sat-Connect project had been compromised due to leaks by Televative personnel. Rumors in military circles also indicated that Televative personnel had compromised the Sate-Connect project's confidentiality.[1]

4. On 21 August 2009, the Sat-Connect board of directors convened so that its chair could discuss the 12 August article in The Beristan Times. The board met again on 27 August, and while all of Sat-Connect's board members were made aware of the meeting in advance,[2] several of Televative representatives, cognizant that the board would likely discuss Clause 8 of the JVA, decided to avoid the meeting in order to deprive its participants of reaching a quorum of six.[3] Nevertheless, one of Televative's board members, Alice Sharpeton, did attend the meeting, enabling the board to proceed. It first approved the buyout under Clause 8, and then voted to suspend Televative's shares in the

[1] Clarification 231
[2] Clarification 208
[3] Clarification 208

Sat-Connect joint venture.[4] The following day Beritech served notice on Televative, requiring it to hand over possession of the Sat-Connect facilities and remove its personnel within 14 days.

5. Fourteen days later, on 11 September 2009, civil engineer staff from Beristan's Civil Works Force escorted Televative personnel from the Sat-Connect premises. None of Televative's personnel at any point feared for their safety or well-being.[5]

6. On 19 October 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JVA, which requires that any dispute arising out of or relating to the agreement be resolved exclusively through arbitration in accordance with the laws of Beristan. Ignoring this request as well as the terms of the JVA, Televative requested ICSID arbitration on 28 October 2009.

SUMMARY OF ARGUMENT

JURISDICTION: This Tribunal lacks jurisdiction over the present dispute. First, Claimant's arguments are barred as contractual claims under the Umbrella Clause because Beristan was not a signatory to the Sat-Connect agreement, and therefore cannot be held accountable for a breach of that agreement; one of Televative's core contract claims should not be elevated to international law because it lacks direct ties to the investment; and Beristan's invocation of the essential security clause forecloses Televative from bringing any claim under the BIT, even one arising under an umbrella clause. Second, even if Claimant's contractual claims fall under the BIT, they are neither tenable nor persuasive because Respondent did, in fact, attempt to purchase shares from Claimant; the burden of proof is on Claimant to show that no breach occurred, and yet Claimant has presented no such evidence; and no authority prohibits Respondent from relying on self-help to cure a contractual breach. Third, Beritech's actions cannot be attributed to Beristan under the BIT nor under customary international law because because Beritech is not an organ of the State; Beritech is not empowered by the law of

[4] Clarification 138
[5] Clarification 248

Beristan to exercise elements of governmental authority; and Beritech was not acting on the instructions of or under the direction or control of the State. Fourth, the Tribunal should invoke lis pendens because identity of parties, identity of causes of action, and indentity of remedies is present between the present case and the case before the Beristan Tribunal. Fifth, the Tribunal should estop Claimant from bringing its claims, because Beristan reasonably relied on Clause 17 of the JVA; there was no clear indication that Clause 17 no longer applied; and as a matter of comity, this Tribunal should stay its proceedings pending resolution in the Beristan Tribunal. Sixth, Claimant failed to exhaust local remedies prior to bringing these claims both procedurally and substantively. Finally, Claimant failed to wait the required amount of time prior to bringing its claims under the BIT.

MERITS OF THE CLAIM: This Tribunal should find for Respondent on the merits of the dispute. First, Claimant breached Article 4.1 of the JVA by disclosing confidential information, or by acting in such a way that caused Respondent to believe that its essential security was threatened. Second, because Respondent believed its essential security to be at risk, Respondent was justified in invoking Article 9.1 of the BIT. This Article is self-judging and both elements of a good faith test are met. Third, because there was no breach of the BIT, the Tribunal need not reach the question of whether the breach was excused by the customary international law doctrine of necessity. Finally, even if the Tribunal were to rule that the clause is non-self-judging, Respondent was justified in its actions under the customary international law doctrine of necessity because there grave and imminent danger to national security; no harm was done to the interest of another state; and this was the only way to protect the interest in danger.

ARGUMENT

PART ONE: JURISDICTION

I. THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE

7. The Tribunal lacks jurisdiction over the dispute because (A) Claimant's arguments are barred as contractual claims under the Umbrella Clause, (B) even if Claimant's contractual claims fall under the BIT, they are neither tenable nor persuasive, and (C)

because Beritech's actions cannot be attributed to Beristan. The Tribunal should (D) invoke lis pendens or (E) estop Claimant from bringing its claims, because Claimant (F) failed to exhaust local remedies prior to bringing these claims and (G) failed to wait the required amount of time prior to bringing its claims under the BIT.

(A) Claimants Arguments are Barred As Contractual Claims

8. Article 10 cannot elevate Televative's contract claims to treaty claims because (1) Beristan was not a signatory to the Sat-Connect agreement, and therefore cannot be held accountable for a breach of that agreement, (2) one of Televative's core contract claims should not be elevated to international law because it lacks direct ties to the investment, and (3) Beristan's invocation of the essential security clause forecloses Televative from bringing any claim under the BIT, even one arising under an umbrella clause.

1. Beristan Was Not a Signatory to the Sat-Connect Agreement, and Therefore Cannot be Held Accountable for a Breach of That Agreement

9. Beristan's absence from the Sat-Connect agreement precludes an assignment of liability for the alleged breach by Beritech. This reasoning was relied upon in *Impreglio v. Pakistan* and can serve as persuasive authority because its facts are similar to those in the present dispute. The dispute in *Impreglio* arose out of a joint-venture arrangement between Impreglio, an Italian investor, and the Pakistani Water and Power Development Authority (WAPDA). Impreglio argued that the actions of WAPDA were attributable to Pakistan, and therefore that Pakistan violated the BIT by breaching the joint-venture agreement.[6] While the tribunal agreed with Impreglio that WAPDA's actions were, in fact, attributable to Pakistan,[7] it disagreed that a finding of attribution necessarily resulted in liability. Instead, the tribunal held that, because Pakistan was not party to the original contract between Impreglio and WAPDA, it could not be found liable for any breach.[8]

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[6] Id. at ¶ 190
[7] Id. at ¶ 209
[8] Id. at ¶ 210

10. Similarly, in the present case, Beristan was not party to the joint-venture agreement between Televative and Beritech, and should therefore not be held accountable for any breach found on Beritech's part— even should this Tribunal find Beritech's conduct to be attributable to Beristan. While Televative submits that Beristan's status as guarantor to Beritech necessarily results in it being party to the joint-venture agreement, this position conflates a financial guarantee with status as a signatory. Further, it fails to acknowledge the conditional nature of the guarantee on Beritech's default;[9] an unsatisfied condition precedent which, having not been met, renders Beristan no more liable than had it not provided a fiduciary guarantee in the first place. The analogous facts and sound reasoning of *Impreglio* provide this Tribunal useful guidance in assessing the viability of Televative's umbrella clause claim.

11. Televative contends that jurisprudence contrary to *Impreglio* exists, thereby depriving it of its persuasive authority. While it is true that tribunals have diverged on whether a State can be held liable for a contract to which it is not party, contrary jurisprudence tends to place considerable weight on the strength of attribution between a contracting party and its state.[10] In one such decision, *Noble Ventures v. Romania*, the tribunal faced a set of facts meaningfully different than those here. There, the agency responsible for expropriation had been empowered to exercise governmental authority such that the tribunal found it to represent the state "in *all* of [its] actions and omissions."[11] In contrast, the relationship between Beritech and Beristan is tenuous at best, and even should some degree of attribution be found it does not rise to such a level that Beritech could be described to represent Beristan in all of its actions, whether authorized or not.

12. *Noble Ventures* is also apt because its tribunal accepted that traditionally contract claims fall within the domestic jurisdiction of the Contracting State, and that an umbrella clause creates a legal exception to a valid principle of international law. Therefore, as

[9] Clarification 152
[10] Kaj Hober, STATE RESPONSIBILITY AND ATTRIBUTION, at 578-579.
[11] *Noble Ventures v. Romania*, at ¶ 80 (emphasis added).

decided by the ELSI case,[12] the tribunal concluded that such a clause has to be interpreted strictly or at least restrictively.[13]

2. One of Televative's Core Contract Claims Should not be Elevated to International Law Because it Lacks Direct Ties to the Investment

13. One of Televative's core contract claims should not be advanced to international law because it lacks direct ties to the investment. This reasoning is expanded upon in *El Paso International Company v. Argentina*, whose tribunal narrowly interpreted the umbrella clause in Article II(2)(c) of the Argentina-United States BIT, which reads: "[e]ach Party shall observe any obligation it may have entered into with regard to investments."[14] Criticizing the decision of *SGS v. Philippines*, the *El Paso* tribunal argued that elevating *all* contractual claims to the international level will deprive the entire BIT of its significance. In such a situation, the violation of any legal obligation of a State (and not only the violation of a contractual obligation with respect to investment) would become a violation of the Treaty irrespective of its source and gravity. If the violation of any contractual obligation *ipso facto* becomes a violation of the Treaty, then substantive protections like "Fair and Equitable Treatment" and "Full Protection and Security" would lose their meaning and value.[15]

14. The *El Paso* tribunal went on to distinguish between the role of the State as a sovereign and the State as a merchant. Relying on the decision of Vivendi II,[16] it held that only where contract claims arise out of an investment agreement *stricto sensu* where the State is acting as a sovereign, should international recourse be available.[17] All other contracts signed with the State or one of its entities will be deprived of this special protection. In this the tribunal draws support from Article 24(1)(a) of the 2004 US Model

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[12] *Elettronica Secula Spa-ELSI-United States v. Italy* (1989) ICJ 15, at 42.
[13] *Noble Ventures*, at ¶ 53.
[14] Article II(2)(c) of the Argentina-United States BIT
[15] *El Paso v. Argentina*, at ¶¶ 75-76
[16] *Vivendi Universal v. Argentine Republic*, Decision on Annulment of 3 July 2002, ILM, Vol. 41, 2002, at 1135, ¶ 96, quoted in *El Paso*, supra n. 10 at ¶ 79
[17] *El Paso*, at ¶ 79

BIT, which restricts the scope of what kinds of contract claims can be asserted against a Contracting State to a substantive protection, an investment authorization or an investment agreement.[18] The tribunal held that allowing even the most minor contractual claims to become treaty claims has its own dangers, and that the investors are not likely to show any restraint in bringing before the ICSID even the most trivial disputes, after being allowed such a remedy. In other words, the tribunal argued, the national and international legal order would completely break down.

15. When applying the *El Paso* tribunal's reasoning in the present dispute, the viability of Televative's claim—that it was guaranteed due process *before* the buy-out—becomes suspect. As is noted below, there is neither a contractual nor a domestically-based legal guarantee that Beritech had to complete some kind of judicial or arbitral proceeding before initiating the buy-out. While Televative may argue that its claim is nevertheless related to the investment in a general sense, this abstraction is insufficient to meet the standard championed by the *El Paso* tribunal, whose analysis was based on the text of its BIT and the accompanying investment agreement—both of which, in the present case, do not support Televative's claim.

3. Beristan's Invocation of the Essential Security Clause Forecloses Televative from Bringing Any Claim Under the BIT, Even One Arising from Under an Umbrella Clause

16. Third, Beristan's invocation of the essential security clause in Article 9 of the Opulentia-Beristan BIT forecloses any claim arising under it, even one introduced under the umbrella clause. The text of Article 9 is clear, stating that "*nothing* in [the BIT] shall be construed … to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations,"[19] with no mention of an exception to the rule. The persuasiveness of this position, of course, rests on whether this Tribunal considers proper Beristan's invocation of Article 9, an issue addressed in more detail later this memorial.

[18] Article 24(1)(a), 2004 US Model BIT
[19] Article 9, BIT (emphasis added)

(B) Even if Claimant's Contractual Claims Fall Under the BIT, They Are Neither Tenable nor Persuasive

17. Televative's contract claims, should they be found to fall within the aegis of the BIT, are neither tenable nor persuasive. As is demonstrated below, there are three specific claims advanced by Televative, each with its own factual and legal deficiencies: (1) Respondent did, in fact, attempt to purchase shares from Claimant, (2) the burden of proof is on Claimant to show that no breach occurred, and yet Claimant has presented no such evidence, and (3) no authority prohibits Respondent from relying on self-help to cure a contractual breach.

18. Before assessing the contract claims in question, however, the applicable law must first be established. Unlike the sources of law which should guide this Tribunal in evaluating the substantive protections afforded by other Articles of the BIT, an umbrella clause is evaluated based on the law selected in the contract in question—in this case, the law of Beristan. [20] Further, while the record provides little insight into the specific provisions of the relevant laws and regulations, it does indicate that the UNIDROIT principles of contract law are incorporated within Beristan law.[21] These principles, addressed in detail below, provide the tribunal a crucial standard on which it may conclude that Beristan complied with its own law.

1. Respondent Attempted to Purchase shares from Claimant

19. Claimant argues that Beritech failed to comply with Clause 8 of the Sat-Connect agreement by not purchasing from Televative its shares, valued as its paid-in investment at the time. The record, however, suggests otherwise, stating that the funds were made "available" to Televative, who turned them down.[22] And though it is somewhat

[20] Taida Begie, *Applicable Law in International Investment Disputes* (2005); *see also* Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (2010), at 154, 164.
[21] Clarification 136
[22] Record ¶13, p. 18.

ambiguous as to whether their availability was contingent on Televative's response to the domestic arbitration proceedings, the context of the passage indicates that Televative turned down readily available funds:

20. 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.[23]

21. Since Televative refused $47 million in available funds, the record supports Beristan's position that it satisfied the requirements of Clause 8. Given the lack of convincing evidence to the contrary, and that Televative carries the burden of proof in asserting this claim, this Tribunal should find in favor of Beristan.

2. The Burden of Proof is on Claimant, and Claimant has Provided no Evidence of Breach

22. Claimant submits that Beritech materially breached the Sat-Connect agreement because it improperly bought out Televative's interest in the project. At its core, Televative's argument is a factual one: that it did not unlawfully disclose information on Sat-Connect to a third party. But Televative's narrow focus on the facts betrays an ignorance of which party has the burden of proof—the party making the claim.. This is problematic for Televative, as the record lacks a single objective iota of evidence that supports Televative's claim that it did *not* unlawfully disclose information on Sat-Connect. Ironically, this lack of evidence is demonstrative of the relative value of the domestic arbitration proceedings, whose tribunal is likely empowered by domestic law with more authority to require discovery and crucial evidentiary documents than this one. Yet Televative inexplicably continues to shun and ignore the domestic proceedings.

3. No Authority Prohibits Respondent from Relying on Self-Help to Cure a Contractual Breach

[23] Record, ¶13, p. 18.

23. Claimant argues that the UNIDROIT principles, which are incorporated into Beristan's legal system, disallow Beritech's actions because Beritech did not first initiate a legal proceeding to rule on the merits of the buy-out. This claim, however, mistakes silence for consent. The UNIDROIT principles do not in any way expressly or implicitly forbid reliance on self-help as a basis to cure a fundamental breach. Televative argues to the contrary because the principles do identify possible use of self-help in certain, limited situations, not including ones in which an aggrieved party takes steps to purchase property as made possible by a legally-binding contract. This point, however, appears to assume that the UNIDROIT commentary is capable of envisaging every possible contractual dispute and, even more, speaking to whether self-help is permitted, a task well beyond the mandate of the UNIDROIT committee.As Televative lacks a meritorious basis on which to assert a violation of the umbrella clause, its claim that Beristan breached Article 10 of the Opulentia-Beristan BIT should be dismissed.

(C) Beritech's Actions Cannot be Attributed to Beristan

24. The Tribunal lacks jurisdiction to hear this dispute because Article 25 of the ICSID Convention expressly limits jurisdiction to legal disputes "between a Contracting State . . . and a national of another Contracting State."[24] Claimant's plea for relief arises out of a contractual dispute with Beritech, a private company, and not out of an international dispute with the Republic of Beristan. Beristan is not responsible for the conduct of Beritech and the Tribunal therefore lacks jurisdiction over this dispute.

1. Beristan is Not Responsible for the Conduct of Beritech Under the BIT

25. Beristan is not internationally responsible for alleged misconduct of Beritech because Beritech's actions are not attributable to Beristan under international law.[25] The Beristan-Opulentia Bilateral Investment Treaty does not contain any provision on State attribution

[24] ICSID Convention, art. 25(1).
[25] *See* ILC Articles, art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.")

that would displace customary international rules on attribution.[26] Therefore, the customary international law on attribution is the only means by which Claimant can assert that Beristan is responsible for the actions of Beritech.

2. Beristan is not Responsible for the Conduct of Beritech Under Customary International Law

26. The leading reflection on the law of attribution in customary international law is the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles").[27]

27. The provisions of the ILC Articles that set out the guidelines for attribution are animated by the principle that state responsibility is limited to "conduct which engages the State as an organization."[28] The ILC Articles expressly avoid attributing to the State the conduct of "all human beings, corporations, or collectivities linked to the State by nationality."[29] Because Beritech is a private company, Claimant may not seek redress against Beristan by virtue of Beritech's nationality.

28. Attribution is established if: (a) Beritech is an organ of the State, (b) Beritech is empowered by the law of Beristan to exercise elements of governmental authority, or (c)

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[26] *See* ILC Articles, art. 55 (These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."); *see also* Sasson at 3 ("ILC Articles 4 and 5 on State Responsibility have a 'residual character'. Under ILC Article 55, Articles 4 and 5 are applied only in the absence of a *lex specialis*.").

[27] *See* Kaj Hober, *State Responsibility and Attribution*, in P. Muchlinksi et al., eds., THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 550 (2008) ("It is generally accepted that the rules on state responsibility form part of customary international law. The law of state responsibility is, to a large part, reflected in the work of the International Law Commission (ILC) of the United Nations. . . . Commentators seem to agree that this is currently the most authoritative document on the law of state responsibility.").

[28] ILC Articles, ch. II ¶ 2.

[29] *Ibid*.

Beritech was acting on the instructions of or under the direction or control of the State.[30] The facts of this case support none of the three foregoing bases of attribution.

a. Beritech is not an Organ of the Republic of Beristan

29. Beritech is not an organ of the Republic of Beristan and its actions are therefore not attributable to Beristan. Article 4 of the ILC Articles provides that:

> (1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.[31]

30. Under Beristan law, Beritech is a private company and is not an organ of the State based on Beristan law.[32] Article 4(2) emphasizes the primacy of municipal law in determining whether or not an entity is an organ of the State.[33] Beritech is a private telecommunications provider and under Beristan law is not an organ of the State.

31. Even if the Tribunal should overlook the clear language of Article 4(2) of the ILC Articles and look beyond Beristan municipal law in determining whether or not Beritech is an organ of the State, Claimants are unable to make the exceptional findings necessary to demonstrate that Beritech is an organ of the State. In the *Genocide* case, the ICJ held that if an entity is not a *de jure* organ of the State, a finding that an entity is a *de facto*

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[30] *See generally* ILC Articles, arts. 4, 5, and 8.
[31] ILC Articles, art. 4
[32] *See* Record at 16 ("the Government of Beristan established a state-owned company, Beritech S.A., in March 2007."); *see also* Clarification 161 ("Beritech is a telecommunications services provider in Beristan.").
[33] *See Eureko v. Poland*, Dissenting Opinion of Prof. Jerzy Rajski, ¶ 8 ("It is beyond any doubt that the State Treasury as an autonomous juridical person being a subject of civil– and commercial law relationships is not an organ of the State — even in the widest possible meaning of the word. It also follows from the very nature of this specific juridical person created by law that it cannot be authorized to exercise any public or regulatory functions.").

organ "requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as complete dependence."[34]

32. The Record in this case does not offer any evidence to suggest that Beristan exercised control over Beritech that amounted to a relationship in which Beritech was completely dependent on Beristan. Because Claimants are unable to make such a showing, and because Beritech is not a State organ under municipal law, the Tribunal should find that Beritech is not a State organ for the purposes of attribution.

b. Beritech Does Not Exercise Elements of Government Authority

33. The conduct of Beritech is not attributable to Beristan because nothing in the record suggests that Beritech is empowered to, and in fact does, exercise elements of governmental authority. Article 5 of the ILC Articles provides:

34. The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular circumstances.[35]

35. Article 5 clearly states the attribution can only be found under the article if it is "empowered by the law of that State to exercise elements of governmental authority." The Commentary to Article 5 explicitly declares that "[t]he formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise elements of governmental authority."[36]

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[34] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 Feb. 2007, 140.
[35] ILC Articles, art. 5.
[36] *Ibid*. art. 5 ¶ 7.

36. Not only does the Record lack any evidence of domestic legislation that empowers Beritech to act in a governmental capacity, but Beritech's activities are strictly commercial. Beristan is a telecommunications service provider[37] and as a partner in the Sat-Connect project is in the business of providing "connectivity and communications for users . . . anywhere within the vast expanses of Euphonia."[38] It is true that the Beristan military will be a subscriber to the service, but the activity is primarily commercial in nature and will serve both civilian and military purposes within and beyond the borders of Beristan.

37. The absence of domestic legislation empowering Beritech to exercise elements of governmental authority, coupled with the fact that Beritech's activities are commercial in nature compel the conclusion that its actions are not attributable to Beristan under Article 5 of the ILC Articles.

c. Beritech is not Directed or Controlled by Beristan

38. There is no evidence in the Record to suggest that the actions of Beritech are attributable to Beristan by virtue of Beristan directing of controlling Beritech. Article 8 provides:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[39]

39. The Commentary to Article 5 clearly states that:

> [t]he fact that the State initially established a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[40]

40. In *SEDCO, Inc. v. National Iranian Oil Company*, the Iran-U.S. Claims Tribunal did not attribute the seizure of property by a State-owned oil company to the State because

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[37] Clarification 161.
[38] Record 16.
[39] ILC Articles, art. 5.
[40] *Ibid*. ¶ 6.

there was "no proof that the State used its ownership interest as a vehicle for directing the company to seize the property."[41]

41. As in *SEDCO*, there is no evidence in the Record to suggest that Beristan used its ownership interest to direct Beritech in its activities. In the absence of such evidence, the Tribunal should not find that the conduct of Beritech is attributable to Beristan under Article 8 of the ILC Articles on State Responsibility.

42. Beritech is a private company that has a distinct legal personality from the Republic of Beristan. Claimant has attempted to gain access to ICSID arbitration by reformulating its contractual dispute with Beritech as an international dispute with Beristan. In order to do so, Claimant must establish that the conduct of Beritech is attributable to Beristan under customary international law. The Record is devoid of facts that could support such a conclusion. Therefore, because Article 25 of the ICSID Convention limits jurisdiction to disputes between States and nationals of another contracting State, the Tribunal should not assert its jurisdiction over this dispute.

(D) This Tribunal Should Invoke Lis Pendens to Either Deny Jurisdiction or Stay Proceedings, Pending a Domestic Determination

43. This Tribunal should determine that the parallel proceedings share (1) identities of parties, (2) identity of causes of action, and (3) identity of relief. Tribunals have used the "triple identity test"[42] in assessing whether parallel proceedings overlap in a manner that may be wasteful of resources, susceptible to contradictory or duplicative awards, or otherwise infringing on the legal rights of the parties.[43] Tribunals take a flexible approach and often will also consider whether parties or causes of action are substantially similar such that *lis pendens* should apply. Here, the triple identity test is satisfied.

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[41] *Ibid*.
[42] F. de Ly and A. Sheppard, *ILA Final Report on Lis Pendens and Arbitration* (2009); 1 Arbitration International 3, 32 (para 5.8) (ILA Final Report on Lis Pendens).
[43] *See* Hansen, Robin F., PARALLEL PROCEEDINGS IN INVESTOR-STATE TREATY ARBITRATION: RESPONSES FOR TREATY-DRAFTERS, ARBITRATORS AND PARTIES, *The Modern Law Review*, Volume 73, July 2010, at 528-29.

1. Identity of Parties

44. *Lis pendens* requires that both domestic and international arbitration involve identical parties or "those of the same constructive identity."[44] If the Tribunal determines that Beritech's actions are attributable to Beristan, thereby making the government either indirectly, or directly culpable, then the parties in both proceedings would satisfy this prong.

45. In response, Claimant may argue that though actions are partially attributable to Beristan, Beritech acted as a separate legal entity when becoming Claimant in domestic proceedings, and is not even a party in this action. However, Tribunals have taken a less formalistic approach to this, and have allowed

2. Identity of Causes of Action

46. *Lis pendens* likewise requires identical or substantially similar causes of action. [45] At present both proceedings are adjudicating the rights of the same parties in terms of economic interests arising from a JVA.

47. The JVA should be construed to encompass BIT-related claims because it covers "any dispute arising out of or relating to" the Agreement. Such expansive language can include all disputes touching on the contract, including claims under contract, tort, statute, or treaty.[46] In *SGS v. Pakistan*, the Tribunal evaluated similar language in a contract but decided to split the claims, in essence deferring to domestic proceedings any claims from contract that did not rise to treaty breaches. Of course, there was no umbrella clause in that BIT.

48. The instant case is also distinguishable from *SGS v. Pakistan*, because there it was clear that domestic courts could not enforce a BIT-related award because the BIT was not ratified and the Supreme Court itself issued a statement to that effect, but here the BIT

[44] *Ibid*. at 532
[45] *Supra* at 1
[46] *SGS v. Pakistan*, at ¶66 (footnotes omitted)

has been ratified by Beristan[47] and the laws of Beristan incorporate a "Takings Clause" which allow for remedies associated with a successful expropriation claim.[48] These key differences allow the domestic Tribunal to properly address both contract and treaty claims arising from the dispute. Accordingly, the Tribunal should give deference to the clearly stated intent of the contracting parties. To do otherwise would render moot all contract dispute resolution clauses and give investors a backdoor by which to expand protections beyond those explicitly contracted for.

3. Identity of Remedies

49. In both proceedings, Claimant would allege material breach of the contract, thereby praying for relief amounting to its capital investment, intellectual property rights, and damages including potential future profits.[49] Whether Respondent or Beritech, the prayer of relief will involve a declaratory judgment and monetary damages. Accordingly there is identity of remedies.

50. Because there exists identity of parties, causes of action, and identities, parallel proceedings would be duplicative and this tribunal should therefore exercise its discretion and deny jurisdiction.

E. THIS TRIBUNAL SHOULD ESTOP CLAIMANT

51. Claimant should be estopped from pursuing ICSID arbitration because Clause 17's reference to settle the dispute only by Beristan arbitration should prevent Claimant from seeking redress elsewhere. , and because the elements of estoppel are satisfied: (1) Beristan reasonably relied on Clause 17, (2) there was no clear indication that Clause 17 no longer applied, and (1) as a matter of comity, this Tribunal should stay its proceedings pending resolution in the Beristan Tribunal.

1. Beristan Reasonably Relied on Clause 17

[47] Clarification 144
[48] Clarification 120
[49] Clarification 197 (discussing Claimant's request for relief under ICSID arbitration)

52. The principle of estoppel protects parties when the other party takes action that is inconsistent with its previous position and this previous position was relied upon. The doctrine of estoppel is well established in national court systems and has been applied in a variety of circumstances in international arbitration.[50] Here, Beristan relied on Claimant's position that any disputes would be brought to Beristan arbitration as stated by Clause 17. Once a dispute did arise, Beristan deposited money in an escrow account and instead of adhering to Clause 17, Claimant sought relief before an ICSID tribunal. Allowing the claims to be estopped would prevent injustice because Claimant is circumventing its obligation in Clause 17 to resolve the dispute through Beristan arbitration.

53. Beristan reasonably relied on Clause 17. As the Tribunal in *Duke v Peru* emphasized, estoppel need not involve any wrongful behavior but can be sufficiently met by conduct that induces reliance as to the State's position.[51] As the Tribunal held, the "decisive element for estoppel is the reasonable appearance" of an organ that is competent to make certain representations.[52] In *Duke*, the Tribunal held that one could reasonably have had confidence in an organ's statements which lacked the competence to make them.[53] Here, however, Televative had the competence to sign a contract. Thus, when Televative signed Clause 17 it gave the reasonable appearance that it would comply with it and forego seeking resolution of the dispute through ICSID because the clause stated that redress would only be sought in Beristan arbitral tribunals. It was reasonable for Beristan to assume that a clause that says a dispute shall only be covered by Beristan law is in fact only covered by Beristan law. Hence, the JVA induced reliance so that Beristan reasonably expected that the dispute would be covered exclusively by Beristan law since

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[50] See, e.g. *Language v Argentina* (applied estoppel doctrine when Argentina did not abide by its own legislation); *Revere Cooper v OPIC* (actions taken contrary to assurances given in good faith allow the application of the estoppel doctrine)
[51] *Duke Energy International Peru Investments No 1, Ltd v Peru*, Award and Partial Dissenting Opinions: ICSID Case No ARB/03/28; IIC 334 (2008) (§245-7)
[52] *Id*. at §247
[53] *Id*.

Clause 17 explicitly stated such.

2. There was no Clear Indication that Clause 17 no Longer Applied

54. Claimant is estopped because there was a clear indication that the BIT provision did not apply any longer. When a party represents that obligations are no longer treated as extant, the doctrine of estoppel applies.[54] In *Desert Line v Yemen* the Tribunal held that the doctrine of estoppel served as a shield because there had been a clear and unmistakable representation that obligations were no longer treated as extant.[55] Similarly, there was a clear and unmistakable representation in Clause 17 that there was no intent to seek ICSID jurisdiction. Thus, the doctrine of estoppel should apply.

3. As a matter of comity, this Tribunal should stay its proceedings pending resolution in the Beristan Tribunal

55. Further, when there is a conflict between two tribunals both having jurisdiction one of them should refer to the other as a matter of comity. In *SPP v Egypt* the tribunal said that in instances in which jurisdiction can be had by two unrelated and independent tribunals the tribeunal should decide as a matter of comity to stay the exercise of its jurisdiction and wait for the decision by the other tribunal. This is exactly what the tribunal in *SPP v Egypt* proceeded to do. Similarly, since proceedings have been initiated in Beristan arbitral tribunals, the ICSID tribunal should as a matter of comity also allow the Beristan proceeding to go forward and not apply notions of estoppel.

56. Beristan meets the main elements to bring an estoppel claim. First, Claimant unequivocally represented to Beristan that it was willing to submit any disputes to Beristan arbitration by agreeing to Clause 17 of the JVA. Second, the common assumption of the contractual provision was that it would be. Third, Beristan did in fact rely on the clause because it immediately initiated proceedings before the Beristan tribunal once the dispute arose.

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[54] Desert Line Projects LLC v Yemen, Award, ICSID Case No ARB05/17; IIC 319 (2008) (§224)
[55] Id. at §224

F. The ICSID Tribunal May Not Exercise Jurisdiction Because Claimant Failed to Exhaust Local Remedies

1. Claimant was Procedurally Required to Exhaust Local Remedies

57. The ICSID Tribunal does not have jurisdiction because Claimant should have sought local remedies before resorting to an ICSID Tribunal. It is a longstanding custom of international law that local remedies must be exhausted before redress is sought in an international forum.

58. The "unless otherwise stated" clause in Article 26 of the ICSID Convention was purposefully inserted to give states the option to require prior exhaustion of local remedies.[56] Art. 11.1 of the Beristan-Opulentia BIT sets out three options that investors may pursue: a) "the Contracting Party's Court", b) "an ad hoc Arbitration Tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law", or c) "the International Centre for the Settlement of Investment Disputes, for the application of the arbitration procedures provided by the Washington Convention of 18th March 1965 on the Settlement of Investment Disputes between States and Nationals of other States". The words of Clause 17 of the JVA state that "the dispute shall then be resolved only by arbitration" effectively constitute a choice for b) and not c) of Art. 11.1 of the BIT. The fact that Clause 17 states that the agreement should be governed only by Beristan rules and provisions means that it should not be governed by ICSID rules and provisions and therefore that the investor chose against 11.1 c). In effect, ICSID should not have jurisdiction.

59. The existence of the word "only" excludes the ICSID Tribunal from also having jurisdiction because it signifies that the investor has chosen option b) and not option c). Thus, Clause 17 of the JVA permits Claimant to seek remedies under UNCITRAL ad hoc arbitration or Beristan courts and constitutes a contractual choice by the investor to exclude ICSID jurisdiction. Thus, Clause 17 effectively means that Article 11.1 c) of the BIT cannot apply and constitutes an election by the investor to seek remedies under

[56] See *Executive Report of the ILC*

UNCITRAL law rather than in front of ICSID.

60. Such an interpretation of the BIT and JV Clause is sensible from a policy standpoint in its encouragement of local tribunals. First, local tribunals will be more familiar with Beristian laws. Second, it will avoid giving foreign investors an advantage over local investors who are unable to use ICSID as a remedy. Third, the faith in domestic tribunals through international approval will give them more clout.

2. Claimant was Substantively Required to Exhaust Local Remedies

61. Even if the local remedies requirement does not apply procedurally, Claimant still had a substantive requirement to exhaust local remedies. Claimant could not have suffered a recognizable injury without having at least made an attempt to seek redress in front of Beristan arbitral tribunals. The facts do not indicate that Beristan lacked such a procedure and there is no reason to believe that Claimant could not recover from an administrative agency for the losses that occurred when the Beristan's Civil Works Force stepped in.

62. In *Loewen v. USA* the tribunal held that Claimant had a substantive requirement to exhaust remedies which were effective, adequate and reasonably available to the complainant in the circumstances in which it was situated.[57] As the tribunal held, "the complainant is bound to exhaust any remedy which is adequate and effective...so long as the remedy is not 'obviously futile'".[58] There is no evidence to support the fact that Beristan's courts or agencies were inadequate or not reasonably available and Claimant should have at least made the effort to take advantage of the possibility of obtaining remedies through Beristan courts or agencies.

63. This approach of requiring a substantive exhaustion of local remedies has been applied by other tribunals in a variety of contexts.[59] In the NAFTA context it was applied

[57] *Loewen v. USA* (AF), Award, 26 June 2003, para. 168
[58] *Loewen* para. 164
[59] *See, e.g., Waste Management v. Mexico II (AF),* Award, 30 April 2004, paras. 97, 116

in *Feldman v. Mexico* where the tribunal concluded that administrative remedies should have been pursued by the claimant.[60] The tribunal found that the investors had failed to make use of available local remedies and should have at least sought an administrative ruling. Although the tribunal eventually held that expropriation had not occurred, it still indicated that the investors' substantive failure to exhaust local remedies deprived the tribunal of jurisdiction. As the tribunal held, "the Claimant would have been wise to seek an administrative ruling...and court review" and that "regardless of the result of the ruling process the Claimant would have been better off."[61] Thus, the tribunal indicated its approval of a substantive exhaustion of a local remedies requirement. Similarly, Televative should have also sought some administrative ruling of the alleged unlawfulness of Beristan's actions.

64. This approach of requiring substantive exhaustion has been applied for expropriation claims in front of ICSID tribunals. In *Generation Ukraine v Ukraine* the tribunal held that the claimant should have at least attempted to pursue some form of local remedies before complaining of indirect expropriation in front of an ICSID Tribunal. The Tribunal said that claimant should have attempted to bring a claim before domestic courts and that "a reasonable—not necessarily exhaustive—effort by the investor to obtain correction" should have been undertaken.[62] The tribunal thought it was impossible to determine whether expropriation had actually occurred without the claimant seeking redress in a local administrative court. Likewise, Televative should have at least attempted to pursue compensation for its damages and given Beristan the chance to recompense Claimant for any of its losses. If Beristan had a procedure by which any harm caused by the buyout was compensated for, it would have been unnecessary to seek redress in an ICSID Tribunal. After all, the idea behind local exhaustion is to provide the local national legal system an opportunity to produce a legally acceptable result before the allegedly injured party seeks recourse for breach of international law. Here, Beristan was never granted an opportunity to remedy a situation in which it had to act upon an executive order.

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[60] *Feldman v. Mexico*, at §75
[61] *Feldman v. Mexico*, at §134
[62] *Generation Ukraine v. Ukraine* §20.30

G. Claimant Failed to Wait the Prescribed Period Under the BIT, Which is Grounds to Deny Jurisdiction to this Tribunal

65. Despite Respondent's good faith effort to settle amicably under the JV, Claimant prematurely initiated ICSID arbitration, in contravention of BIT Article 11(1).

66. Article 11(1) of the Opulentia-Beristan BIT permits arbitration only "if the dispute cannot be settled amicably within six months of the date of a written application."

67. On September 11, Beritech filed written request to settle amicably or alternatively to initiate domestic arbitration pursuant to the JVA. Just one day later, on September 12, Claimant filed similar notice under the Opulentia-Beristan BIT.

68. Claimant then made no effort to communicate with Respondent for over one month, prompting Respondent to invoke arbitration proceedings on October 19, a full thirty eight days after its initial request for amicable settlement.

69. Claimant erroneously asserts that Respondent's efforts were somehow evidence that amicable settlement would be futile and therefore Claimant was correct in prematurely requesting ICSID arbitration. But Claimant is essentially arguing that amicable settlement provisions carry no force in the minds of this Tribunal.

70. Claimant fails because (1) Amicable waiting periods are jurisdictional in the absence of clear showing of futility, and (2) Claimant flouted its obligation under the JVA.

1. Claimant's Failure to Observe the Relevant Waiting Period is Grounds to Deny this Tribunal Jurisdiction

71. Claimant's failure to observe the amicable settlement period should bar jurisdiction in

the absence of a clear showing of futility.[63] Claimant advances no material evidence that negotiations would have been futile, and this Tribunal should therefore deny itself jurisdiction on the basis of that failing.

72. The *Enron & Ponderosa* Tribunal viewed the pertinent six-month negotiation period as "very much a jurisdictional one," going on to say that "a failure to comply with that requirement would result in a determination of lack of jurisdiction."[64] In fact, it is the view of at least one prominent Swedish scholar that Tribunals ruling along the lines of *Ethyl* only do so when presented with a clear showing that settlement would have been futile.[65]

73. Rather than negotiate in good faith, Claimant summarily submitted its own notice for settlement proceedings under the BIT,[66] and flatly denied any wrongdoing. Many Tribunals have held that some evidence of communication and lack of reciprocity is evidence of futility,[67] but here there is no such evidence and futility should not be assumed.

74. By initiating ICSID arbitration, Claimant flouted its obligations under the JV Clause 17, which mandates that a party "irrevocably submit" to the jurisdiction "of the arbitral tribunal constituted for any such dispute" and that any dispute shall then be resolved only by arbitration" under the rules and provisions of the Arbitration Act of Beristan. Said tribunal was constituted in Beristan, and as a matter of the application of good faith in international law, Claimant should not be permitted to bypass what was agreed upon under the JVA. To decide otherwise would render moot any such dispute resolution clause, and would routinely create a means by which investors could "forum shop."

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[63] *See Burlington v. Ecuador*, at ¶314
[64] *Enron & Ponderosa*, at ¶88
[65] Schreuer, *Traveling the BIT Route*, at 238
[66] Clarification 133
[67] *Azurik*, at ¶55, *Tradex*, at ¶69

75. Moreover, Beritech acted in a manner befitting the situation, where waiting an inordinate period of time would simply increase risk and uncertainty for both parties without any discernable benefit. Parties routinely continue deliberations throughout the arbitration process, and so there is no colorable claim that initiating arbitration closed the door on alternative conciliation.

76. Claimant will argue that the requested removal of seconded personnel and the early request for arbitration under the JV is evidence that negotiations were futile, but this simply is not the case. Those actions were taken in light of Beritech's business interests as well as Respondent's essential security interests.. A breach of confidentiality and the ensuing risks to the civilians of Beristan and the potential users of Opulentia created considerable need for a speedy determination on the dispute in question, and at no time did Beritech or Beristan act in a manner inconsistent with a desire to settle amicably.

PART TWO: MERITS OF THE CLAIM

I. RESPONDENT PROPERLY INVOKED ARTICLE 9.2 OF THE BIT TO PROTECT ITS ESSENTIAL SECURITY

77. The evidence presented and the language of the BIT and JVA show that Respondent properly acted to safeguard its essential security interests, and that Claimant is attempting to use international law and this Tribunal to rewrite its agreements and add protections for which it did not negotiate.

78. Article 4.1 of the JVA provides:

> All matters relating to this Agreement and the Sat-Connect project, including all Confidential Information, shall be treated by each of the parties, including the JV company Sat-Connect, as confidential. Each of the parties and Sat-Connect agree that it will keep confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person or entity not authorized under this Agreement, without the prior written approval of the Sat-Connect board of directors except (i) where the information properly comes into the public domain, (ii) as required by law, or (iii) as may be necessary

to enforce the terms hereof.

79. Article 9.2 of the BIT provides:

> Nothing in this Treaty shall be construed 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.

80. Claimant (1) breached Article 4.1 of the JVA by disclosing confidential information, or by acting in such a way that caused Respondent to believe that its essential security was threatened. (2) Because Respondent believed its essential security to be at risk, Respondent was justified in invoking Article 9.2 of the BIT, which is self-judging. (3) Because there was no breach of the BIT, the Tribunal need not reach the question of whether the breach was excused by the customary international law doctrine of necessity. However, (4) even if the Tribunal were to rule that the clause is non-self-judging, Respondent was justified in its actions under the customary international law doctrine of necessity.

A. Claimant Breached Article 4.1 of the JVA by Disclosing Confidential Information

81. The Sat-Connect project was intended to develop a dual-use technology, meant to be used by Beristan for both military and civilian purposes. Claimant was aware that the Sat-Connect project would have a military use upon completion.[68]

82. On August 12, 2009, an article appeared in the Beristan Times alleging that Claimant's employees had disclosed confidential information relating to the Sat-Connect project to the Government of Opulentia.[69]

83. Just nine days later, on August 21, 2009, the chairman of the Sat-Connect Board of Directors made a presentation about the allegations to the full Board of Directors.[70]

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[68] Record ¶6, Problem p. 17.
[69] Record ¶8, p. 17.
[70] Record ¶9, p. 17.

84. On August 27, 2009, having had almost a week to discuss and think over the legitimacy of the allegations and the severity of the threat to essential security, the Board of Directors voted to compel a buy-out of Claimant's share in the project. Notice was properly served on Claimant to hand over the Sat-Connect site, facilities, and equipment within 14 days and to remove all of its personnel from the project site.[71]

85. Because of the national security interest at stake, when Claimant did not comply with the notice from Sat-Connect's Board of Directors, a branch of Respondent's military entered and secured the premises of the Sat-Connect project, instructing and instructed Claimant's personnel to leave.[72] This action came 30 days after the leak became known, giving ample time for Respondent and the Sat-Connect Board of Directors to evaluate the risk to essential security posed by the leak.

86. Claimant stated that the risk of a disclosure like this one was foreseeable because Opulentia laws require a license for companies to export certain technologies and services to Respondent.[73] However, there is no evidence that obtaining such a license from the Government of Opulentia would require the disclosure of *confidential* information, making a breach of the Joint Venture Agreement via disclosure of that information unforeseeable and a breach of the Agreement.

B. Article 9.1 of the BIT is Self-Judging, and this Tribunal Should Not Evaluate Substantive Decision to Invoke it

87. Even if there is not absolute certainty that confidential information was disclosed by Claimant, the essential security clause of the BIT is self-judging.

88. An essential security clause is deemed to be self-judging if it contains the phrase "measures that it considers necessary," which renders the assessment of the risk to

[71] Record ¶10, p. 17.
[72] Record ¶11, pp. 17-18.
[73] Clarification 145; Summary of the Claimant's Contentions, p.

essential security by the state to be determinative.[74] In other words, the Respondent's determination that there was a risk to essential security is not reviewable by this (or any) tribunal.

89. Some scholars argue that a self-judging clause is still not absolutely self-judging, and that the substantive decision by the state must still conform to the customary international law standard of good faith. Even if this is true, Respondent satisfies the good faith requirement.

90. A two-part standard for evaluating good faith has been proposed by many scholars for tribunals to evaluate the propriety of invoking self-judging essential security clauses: first, that the State acted in the spirit of honesty and fair dealing, and second, that the state's basis for invoking essential security was rational.[75] However, there is no binding authority on how a tribunal should evaluate the presence or absence of good faith.

91. As to the first element of the test, the burden of proving bad faith is on the Claimant in this case, and the record does not show any factual evidence to prove the contention that Respondent did not act in the spirit of honesty and fair dealing.

92. As to the second element of the test, Respondent has relied on information from a source in the Beristan government, thereby satisfying the more objective reasonability standard.

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[74] OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations, the National Treatment Instrument of the OECD Declaration on International Investment and Multinational Enterprises, NAFTA Chapter XXI, The Energy Charter Treaty Article 24, and the GATS Article XIVbis. Kristi Yannaca-Small, Essential Security Interests Under International Investment Law, Chapter 1.5 in International Investment Perspectives: Freedom of Investment in a Changing World. 2007. Pp. 95-96; *The Protection of National Security in IIAs by UNCTAD*. UNCTAD Series on International Investment Policies for Development in Transnational Dispute Management (TDM). Vol. 7, Issue 1, ISSN 1875-4120. April 2010. P. 39.

[75] UNCTAD 40, citing Burke-White and von Staden, 2007.

93. The OECD Guidance offers a set of guidelines for states to abide by in order to maintain propriety and good faith as well. These guidelines include (a) making narrowly-focused and tailored protective measures, (b) making changes to the investment environment only as a last resort, (c) maintaining accountability for the officials who make investment policy decisions (through elections or oversight), (d) avoiding costly arbitration when possible, (e) giving appropriate deference to state national security needs, (f) responding proportionately to national security crises, (g) applying non-discriminatory investment policies, (h) codifying, publishing, and giving prior notice of changes to investment environments, (i) consulting with investors prior to making investment policy changes, and (j) ensuring that those with appropriate expertise make high-level investment policy decisions.

94. Respondent has met each of these guidelines to the extent possible in this situation.[76] It (a) targeted only the company accused of breach, rather than passing a law to affect all companies involved in sensitive military projects, thereby keeping the protective measures narrow and tailored; it (b) implemented the buy-out only after a month of consultation by the JV's Board of Directors; (c)[77];); it (d) attempted to avoid arbitration by resolving the conflict through a buy-out, as set forth in the JVA; it (e) gave priority to what Respondent believed was an essential security threat; it (f) responded proportionately by removing those alleged to have breached confidentiality from the vicinity in which they might have access to more confidential information; it (g) applied the measure non-discriminatorily in that it targeted only those responsible for the leak, (h) gave 14 days of notice to Claimant of the buy-out, as well as the chance to present its side of the story at multiple Board of Directors meetings (at which four of the ten Directors were appointed by Claimant), and it (i and j) allowed the Board of Directors to make its expert decision about what would happen to the JV prior to taking Government action.

[76] We do not, from the facts have any information on Respondent's election process or form of government, and thus lack the information necessary to assess whether Guideline C is met.
[77] *Supra* n.9.

95. Therefore, because the essential security clause in the BIT is self-judging, this tribunal should not review the substantive decision to invoke Article 9.1. Even if the clause is not entirely self-judging, great weight should be given to Respondent's decision because of the clause's relation to national security, because there is no factual evidence to show that the decision was made in bad faith, and because there was a rational basis for the decision.

C. Because There was No Breach of the BIT, the Question of Whether There has been a Violation of the Customary International Law for Necessity Need Not be Reached

96. The BIT Essential Security clause and the customary international law rules on necessity represent two different standards meant to answer two different legal questions.[78]

97. The BIT is first applied in order to ascertain whether there has been a breach of the state's treaty obligations; in other words, the question is whether the state has correctly invoked the essential security clause.[79] If it is found that the state has properly invoked the essential security clause, then the inquiry ends. If it is found that the state has not properly invoked the essential security clause and has breached the BIT, then the customary international law standard is applied in order to determine whether the state's breach of its treaty obligations is excused by necessity; in other words, the question is whether the state was justified in breaching its treaty obligations.

98. William Burke-White has been the strongest proponent of this analytical approach,[80] which is applied by the Tribunals in the *Continental* case, in the *CMS* Annulment

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[78] *See Sempra Annulment Decision* at para. 131 ("The Tribunal should have undertaken an examination of the requirements of the state of necessity as a ground for precluding wrongfulness only if Article XI of the BIT was held not to apply, and a violation under that BIT had been established."

[79] Kurtz 40

[80] "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (2008). Scholarship at Penn Law. Paper 202. http://lsr.nellco.org/upenn_wps/202. This method of analysis

Award,[81] and in the *LG&E* tribunal,[82] and in the Case Concerning the Gabcikovo-Nagymaros Project.[83]

99. In the *CMS* Annulment Award, the Tribunal ruled that the original Tribunal had mistakenly replaced the language of the BIT with the language of the ILC Articles, thereby conflating the two standards when they actually should have evaluated the BIT language separately from the CIL standard.[84]

100. Because, in the present case, the threshold question of whether there has been a breach of the BIT via an improper invocation of Article 9.1 is answered in the negative, the Tribunal should not reach the question of whether a breach is excused by necessity: instead, there is simply no breach.

D. Even if Article 9.1 of the BIT is Non-Self-Judging, if the Tribunal Applies the Customary International Law Standard of Necessity to Determine Whether Respondent was Justified in Invoking Article 9.1, it Should Find that Respondent was Justified in so Doing

101. Even if it is determined that Article 9.1 is non-self-judging, the Tribunal may also choose to evaluate the substantive decision of Respondent by using customary international law to provide a standard where the BIT is silent on what would constitute essential security.[85]

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[81] "Article XI [the essential security clause] is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations." At para 129 (CMS Annulment Award.

[82] (analyzing violation of the BIT first and separately from CIL, then turns to CIL to fill in the legal standards where the BIT is silent).

[83] (Hungary v. Slovenia), 1997 I.C.J. 7 (Sep. 25) (ICJ ruled that a necessity defense was only applicable to the case at hand if it had already been established that a treaty violation had occurred).

[84] At ¶353(f).

[85] This method of analysis has been used in the *CMS, Sempra,* and *Enron* tribunals, but the latter two decisions have been annulled on grounds that the essential security analysis was incorrect.

102. The Tribunal may merge customary international law and the BIT into a single standard with the customary requirements for necessity acting as the content filler for the BIT. This allows the BIT to govern when it is on point, but fills in the blanks with customary international law when there is no explicit standard enunciated in the BIT.[86]

103. This method was employed by the tribunal in the *CMS* case, the *Enron* case, and the *Sempra* case.[87] Versions of this method are also employed by the tribunals in *Case Concerning Oil Platforms*[88] and *United Postal Service of America, Inc. v. Canada*.[89]

104. Because the BIT does not provide a definition of essential security or its legal elements the Tribunal must utilize existing and widely accepted standards to define the term.[90]

105. According to the ILC Draft Articles on State Responsibility, Article 25:

> necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of the state unless the act: (a) is the only way for the state to safeguard an essential interest against a grave and imminent peril; (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

106. In other words, there are three main criteria that must be satisfied in order for a tribunal to find that necessity was properly invoked, under the ILC.[91]

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[86] Kurtz 22.
[87] However, since then, both the *Enron* case and the *Sempra* case have been annulled.
[88] (Iran v. U.S.A.), 2003 I.C.J. No. 90 (Nov. 6) (ICJ ruled that a Treaty is lex specialis exception to CIL and takes precedence over CIL on any point of conflict, but that CIL essentially fills in the blanks and applies where the treaty is silent).
[89] ICSID Arbitration, Award on the Merits (May 24, 2007) (Ruling that NAFTA Articles that addressed monopolies and state enterprises displaced CIL on the topic, as codified in ILC Articles 4 and 5, as an update to the existing CIL).
[90] *Sempra*, at para 378
[91] Although the ILC Articles are not binding authority, they are widely recognized as representative of customary international law. *See Sempra Annulment Decision* at para 111.

1. There is Grave and Imminent Peril

107. There must be grave and imminent peril. In the *Gabcikovo-Nagymaros* case, the ICJ acknowledged that an environmental concern can satisfy this element, showing that more than mere political conflicts can lead to grave and imminent peril.[92] This opened the door for concerns beyond those of imminent military invasion to satisfy the grave and imminent peril requirement.

108. A doctrine has begun to develop in recent years, which classifies particular industries and interests that do not have direct impact on military or political security as "strategic industries" that nonetheless have national security ramifications. These may include "oil, gas and other mining, information and communication technology, and other infrastructure services."[93]

109. The Sat-Connect system is a strategic industry because it is analogous to an oil or gas industry in that Respondent's military-industrial complex depends upon it in a similar way. In the same way that a modern military cannot run without oil or gas to transport troops, power tanks, airplanes, and other military vehicles, and power factories that manufacture arms, the modern military cannot function without the ability to communicate efficiently over large distances. Although Respondent's military has functioned up to this point without the Sat-Connect technology, over the past two years it has been making military plans on the assumption that such technology would be available and functional in the near future. Without it, it is likely that many of their current military plans and procedures would become dangerously obsolete, leaving the military without appropriate guidance or means to execute the plans given to them.

2. There is no Damage to the Interest of Another State

110. There must be no damage to the interest of another state. There is no such damage by Respondent's actions here, as the Government of Opulentia does not have (nor does any other state) an interest in protecting private citizens who breach their contracts.

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[92] Yannaca-Small p. 101.
[93] UNCTAD 11

3. Respondent's Action was the Only Way to Protect the State's Interest

111. The state's chosen course of action must be the only way to protect the interest in danger.[94] The *LG&E* tribunal ruled that the Government of Argentina properly acted under the doctrine of necessity, because the essential security clause of the BIT at issue

> refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests.[95]

112. Under this reasoning, just because there may have been alternatives to the method in which the state chose to act does not mean that the way in which it chose to respond to the crisis was not valid. In the present case, this was the most narrow and proportional response to the crisis: Respondent gave Claimant ample time to respond convincingly to allegations of breach, and there was no way to ensure that no further breaches occurred except to prevent those suspected of leaking information from accessing further information about the system. Furthermore, Respondent's response was limited to Sat-Connect, and did not affect any projects or industries beyond it.

113. Therefore, because Sat-Connect is a strategic industry, there is no damage to another state, and there was no less drastic measure to be taken to deal with the crisis, Respondent acted properly under the customary international law standard of necessity.

114. Furthermore, the term "essential security" in the BIT should be construed in light of the fact that both Respondent and Opulentia are parties to the WTO. In the GATS Exceptions, "essential security" is defined as including anything "relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military

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[94] In the *Gabcikovo* case, the ICJ ruled that although there was an essential security interest at stake, the method adopted by the state for addressing the threat was not the only option and the state could have "resorted to other means in order to respond to the dangers that it apprehended."

[95] At ¶239.

establishment."[96] The Sat-Connect system clearly falls within this definition, which both parties have signed and agreed to be contained within the concept of essential security.

115. Thus, because Respondent acted properly under the essential security clause of the BIT and under customary international law, Claimant is not entitled to any payment other than that provided for under the buy-out clause of the JVA, which has already been placed in escrow by Respondent.

II. . RESPONDENT UPEHLD ITS DUTY TO PROVIDE FAIR AND EQUITABLE TREATMENT

116. Beristan treated Claimant appropriately under the fair and equitable treatment standard. Article 2(2) of the of the Beristan-Opulentia BIT provides fair and equitable treatment to investors by stating that "[b]oth Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment …"[97]

117. Beritech's exercise of the buyout clause under the Joint Venture agreement in no way reflects Beristan's treatment of Claimant. Furthermore, even if Beritech's actions could be attributed to Beristan, these actions would still not amount to a violation of fair and equitable treatment under customary international law.

118. The fair and equitable treatment standard under customary international law is derived from minimum standards of treatment.[98] This standard provides 'minimal' protection to an investor. Tribunals articulate the threshold for violation of the standard as conduct amounting to "outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency."[99]

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[96] Article XIVbis(b)(i)
[97] Beristan Opulentia BIT, Article 2(2)
[98] Biwater Gauff v. Tanzania ¶592; Accord Dugan, Investor-State Arbitration, pg 494-495
[99] Neer, ¶4

119. Article 1105 of the North American Free Trade Agreement uses language that is remarkably similar to the fair and equitable treatment clause in the Beristan-Opulentia BIT. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." However, the Beristan-Opulentia BIT adds the word 'customary' in front of international law. The addition of the word 'customary' indicates that the standard should be limited to the minimum standard of treatment under customary international law.

120. The Free Trade Commission interpreted Article 1105 of the North American Free Trade Agreement in its Notes of Interpretation in 2001. This interpretation makes clear that the standard of treatment under customary international law remains the minimum standard of treatment of aliens.[100]

121. Furthermore, customary international law is defined by *opinio juris* and state practice.[101] *Opinio juris* is the belief of States that they are legally obligated to act in a certain manner. When three significant economic powers (Canada, Mexico, and the United States) agree that the standard comes from *Neer v. Mexico*, then it is not possible that the standard is higher because these states have declared that they do not and have not held themselves to a higher standard. Thus, *opinio juris* for any standard higher than *Neer* is not met.

122. Here, Respondent's actions do not violate the *Neer* standard. Beristan sent the Civil Works Force who asked the Claimant's seconded employees to leave Sat-Connect's premises.[102] The Civil Works Force undertook this action without violence and the Claimant's employees did not have any concerns about their safety.[103] Beristan undertook these actions because of concerns for its national security. These actions are not

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[100] NAFTA Notes of Interpretation on Certain Chapter 11 Provisions, 2(1)
[101] Statute of the International Court of Justice Article 38(1)
[102] Clarification 248
[103] Id.

outrageous, they were not undertaken in bad faith, they do not amount to a willful neglect of duty, and they are definitely not so far short of international standards that every reasonable and impartial man would recognize their insufficiency.

123. Additionally, *S.D. Myers* states that the fair and equitable treatment standard does not generate an "open-ended mandate to second-guess government decision-making."[104] Claimant is requesting exactly that. It is attempting to use international law to rectify poor choices it made in the Joint Venture agreement.

124. A State only breaches legitimate expectation where a State makes specific representations that could be reasonably relied upon to an investor.[105] Here, the state made no such representations to Claimant.[106] Therefore, Claimant has no valid reason for an expectation on which it can rely.

125. Furthermore, legitimate expectation cannot rely solely on the subjective expectations of the investor.[107] Here, there is no evidence of anything that justifies the Televative's claim that Beristan violated its legitimate expectations.

126. In the alternative, if legitimate expectation also includes reliance on the laws of the state at the time of investment, then Respondent still has not breached legitimate expectation. An investor may only rely on laws where the State enacts particular laws in order to encourage investment.[108] In *LG & E v. Argentina*, the tribunal held that Argentina breached claimant's legitimate expectation because they enacted the Gas Law and other regulations, and advertised these to attract foreign capital.[109] Enactment for the purpose of investment and advertising are what created the legitimate expectations. In contrast, Televative is not relying on Beristan's general corporate laws, not any laws that

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[104] *SD Myers, ¶261*
[105] *Waste Management,* ¶98
[106] Clarification 253
[107] *EDF v. Romania*, ¶219.
[108] *See LG&E v. Argentina*, ¶175
[109] Id.

were enacted for the sole purpose of attracting investment. Televative is trying to create obligations for Beristan which did not previously exist.

III. RESPONDENT PROVIDED CLAIMANT WITH FULL PROTECTION AND SECURITY

127. The full protection and security clause ensures that the State acts to prevent physical harm and damage to the investor's investment by a third party or the State.[110] Here, no third party has attacked the investment. In fact, the investment has not suffered any physical damage at all. It is completely intact and the Beristan arbitration placed Claimant's share of the company in escrow.[111] Beristan did send in the members of the army; however, it sent in the Civil Works Force, the civil engineering section of the Beristan army to ask Televative's personnel to leave. Beritech had already served notice on Televative two weeks prior to that date, and Televative registered no complaint or objection to that notice.[112]

128. Even if full protection and security extends beyond physical security and includes legal security, Respondent still has not violated the standard. An autonomous standard of full protection and security is not appropriate here because the BIT text includes an explicit reference to customary international law.[113] Beristan has not taken away Televative's ability to use the court system, nor has it in anyway prevented the Televative from fulfilling its obligation to arbitrate under the JVA. Televative chose to sign a Joint Venture agreement which included an arbitration clause and now it does not wish to uphold that agreement. Therefore, Televative's legal security has not been violated and the Respondent's responsibility to provide full protection and security under customary international law has been and continues to be fulfilled.

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[110] *Saluka v. Czech Republic*, at ¶¶483, 484; *Eastern Sugar v. Czech Republic*, at ¶203; Biwater Gauff, ¶730

[111] Clarification 138

[112] Clarification 133 (says that the attempt at amicable settlement came on September 12)

[113] Schreur, Journal of International Dispute Settlement, Full Protection and Security, at 17

IV. BERISTAN DID NOT ILLEGALLY EXPROPRAITE TELEVATIVE'S INVESTMENT

131. Beristan did not expropriate Claimant's investment because the conduct of which Claimant complains arises out of its contractual relationship with Beritech. Even if the Tribunal finds that the conduct of Beritech is attributable to Beristan, the deprivation complained of does not amount to an expropriation because the deprivation is not irreversible. Even if the Tribunal finds that Beristan expropriated claimant's property, the provision of $47 million is sufficient compensation, therefore precluding a finding of illegal expropriation.

A. Beristan did not Expropriate Claimant's Investment Because the Deprivation of Claimant's Investment was not Irreversible

132. Beristan did not expropriate Claimant's property because the deprivation of Claimant's property is not irreversible. A present prevailing trend on the law of expropriation is for tribunals to evaluate the duration[114] and permanence[115] of the alleged deprivation. The ICSID tribunal in *Saipem v. Bangladesh* noted that in order to find that an investment has been expropriated, the deprivation must be irreversible.

133. In *Saipem*, the tribunal found that claimant had been deprived of the benefit of an ICC award because the Bangladeshi Supreme Court ruled that the award was a nullity.[116] Unlike in *Saipem*, the rights of Televative with regard to its investment are still pending adjudication. The Beristan tribunal has yet to rule as to whether or not Beritech properly exercised its rights under the JVA.[117] Therefore, the deprivation of Claimant's interest in

[114] *See Glamis Gold Limited v United States*, Award, IIC 380 (2009), 14th May 2009, despatched 8th June 2009, 356.
[115] See *Saipem SpA v Bangladesh*, Award, ICSID Case No ARB/05/7, IIC 378 (2009), 20th June 2009, dispatched 30th June 2009, ICSID, at 127 (" . . . any interference with the exercise of property (or "expropriable" rights), however defined, can amount to an expropriation, including indirect and de facto expropriation, provided that the deprivation is irreversible.").
[116] *Ibid*. 129.
[117] Clarification 170.

the joint venture is not irreversible. Accordingly, the Tribunal should find that Claimant's property has not been expropriated.

B. The Compensation Furnished to Claimant was Sufficient

134. Even if the Tribunal finds that Beristan is responsible for the expropriation of Claimant's property, the compensation furnished to Claimant was adequate. The actions of Beritech, the Beristan executive, and the CWF were justified by Beristan's essential security interests. Professor Brownlie has suggested that an exception to the "full compensation" rule exists when a State acts:

> under treaty provisions; as a legitimate exercise of police power, including measures of defense against external threats . . . [118]

135. Beristan actions were a legitimate exercise of police power and were properly exercised under Article 9 of the Beristan-Opulentia BIT. Therefore, Beristan is excused from furnishing Televative with full compensation.

CONCLUSION

136. Respondent, through its agents and organs, has acted properly under its international agreements, and has acted to preserve its essential security by lawfully invoking the buy-out clause of its JVA in response to a breach of confidentiality by Claimant.

RELIEF REQUESTED

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

> A. that this Tribunal does not have jurisdiction over this dispute; or alternatively
> B. that if the Tribunal does have jurisdiction over the dispute, that Respondent acted properly under Article 9.2 of the Beristan-Opulentia BIT;

[118] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 511-12 (6th ed. 2003)

C. and that this arbitration should proceed to the Quantification of Damages Phase.