FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION
22-24 OCTOBER 2010

MEMORANDUM FOR RESPONDENT

GEORGIAN TECHNICAL UNIVERSITY

TELEVATIVE INC.
CLAIMANT

VS.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
RESPONDENT

Counsels:

KOBA CHIKHLADZE ❋ KETEVAN TSINTSADZE
DAVIT CHITAISHVILI ❋ GIORGI MTIULISHVILI

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STATEMENT OF FACTS

1 **CLAIMANT** – Televative Inc is a successful multinational enterprise that specializes in satellite communications technology and systems. It is a privately held company that was incorporated in Opulentia on 30 January 1995.[1]

2 **RESPONDENT** – The Republic of Beristan; Respondent established a state-owned company, Beritech S.A., in March 2007. The Beristan government owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristan investors, who have close ties to the Beristan government.[2]

3 The government of Beristan and the United Federation of Opulentia entered into an Agreement on the encouragement and reciprocal protection of Investments (Beristan-Opulentia BIT).

4 Beritech and Televative signed a joint venture agreement (the "JV Agreement") on 18 October 2007 to establish the joint venture company, Sat-Connect S.A., under Beristan law. The Government of Beristan has co-signed the JV Agreement as guarantor of Beritech's obligations. Sat-Connect's corporate offices are located in Beristal, the capital city of Beristan.

5 Televative owns a 40% minority share in Sat-Connect, while Beritech owns a 60% majority stake. Of the nine members of Sat-Connect's board of directors, Beritech has the right to appoint 5 directors, while Televative can appoint 4. A quorum of the board of directors is obtained with the presence of 6 members.[3]

6 On August 12 Beristan Times published an article in which a highly placed Beristan government official raised national security concerns by revealing that Televative was leaking confidential information to Opulentia.[4]

7 On August 21, 2009, the chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that

[1] *See* Annex 2 of the Record, para 1, p. 16
[2] *See* Annex 2 of the Record, p. 16
[3] *See* Annex 2 of the Record, p. 16
[4] *See* Annex 2 of the Record, para 8, p. 17

had appeared in the August 12th article in The Beristan Times[5]. Satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristan armed forces, directly implicate the national security of Beristan.

8 On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project.[6]

9 Beritech then served notice on Televative on August 28, 2009, requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project. On September 11, 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristan army, secured all sites and facilities of the Sat-Connect project. [7]

10 Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration.[8] However, the value of the intellectual property over the life of the technology would be in excess of US$ 100 million.[9]

11 Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request.[10] This arbitration was filled by Beritech under Clause 17 of JV Agreement in local arbitration of Beristan, which is not authorized to hear this dispute.

12 On October 28, 2009, Televative requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan.[11] The ICSID Secretary General registered the dispute for arbitration on 1 November.

[5] Uncontested facts, pg. 17
[6] Uncontested facts, pg. 17
[7] Uncontested facts, pg. 17
[8] Annex 2 of the Record, pg. 18;
[9] First clarification, q. 165;
[10] Annex 2 of the Record, pg 18;
[11] Annex 2 of the Record, pg. 18

ARGUMENTS:

PART ONE: OBJECTION TO THE JURISDICTION

A. TRIBUNAL DOES NOT HAVE A JURISDICTION TO HEAR THE CASE IN VIEW OF CLAUSE 17 OF THE JVA?

13 Article 25(1) of the ICSID Convention lists all the necessary requirements that need to be met cumulatively in order to establish jurisdiction of the Tribunal under the convention. According to Article 25 the Tribunal is the Centre's jurisdiction extends only to legal disputes between a Contracting State and a national of another Contracting State subject to the requirements of nationality, scope and consent.[12] It states:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[13]

14 For establishing the ICSID jurisdiction both parties need to have written consent, as it is provided in above mentioned Article. Republic of Beristan, which is Respondent in current case, has given its written consent to submit all treaty-based claims which investors may have to ICSID jurisdiction.[14]

15 However, this consent is not given to claims, which derive from Joint Venture Agreement (JV Agreement). Thus, due to lack of consent from Contracting States of the BIT, the ICSID tribunal cannot hear the contractual claims. Respondent will demonstrate that Tribunal does not have a jurisdiction in view of Clause 17 of JV Agreement, since parties do not meet the Nationality test of Article 25(1) ICSID Convention **(I);** And Clause 17 of the JV Agreement is an exclusive choice to settle disputes that are essentially based on the breach of contract **(II).**

I. There is a dispute between Televative and Beritech, not between Televative and Beristan.

[12] *Emilio Augustín Maffezini v. The Kingdom of Spain p. 27, para. 74,*
[13] Article 25(1) of the ICSID Convention
[14] Article 11.2 of Beristan-Opulentia BIT

16 One of the tests provided in Article 25(1) ICSID Convention is that dispute should exist "between a Contracting State and a national of another Contracting State." Therefore, dispute should have been between Beristan and Televative Inc., while in the current case there is dispute of contractual character, involving JV Agreement. To settle the disputes under JV Agreement parties agreed to valid arbitration under Beristan laws.[15]

17 In *Maffezini* case ICSID tribunal stated that: "The Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.[16]

i. There is not a legal dispute between Respondent and Claimant.

18 Respondent Submits that the dispute at hand is of purely contractual nature, since it exists between two private companies; Televative and Beritech. The facts of the dispute are following: Claimant breached its contractual obligation by leaking confidential information to the state where it is incorporated – Opulentia.[17] This obligation of claimant as well as for Beritech, which is Televative's JV partner, is contractual obligation and its abrogation causes dispute of purely contractual character.

19 Clause 4(4) of the JV Agreement stats that, any breach of confidentiality clause should be deemed as a material breach of the CONTRACT. Following Clause 8 of JV Agreement gives Beritech right to purchase all of Televative's interest in this agreement, if Televative commits a material breach of any provision of this agreement. Since Respondent argues that there was a breach of confidentiality clause, which will be demonstrated in merits part of the case, Beritech, NOT RESPONDENT with support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project.[18]

20 Respondent submits that the existing dispute is a purely contractual dispute between Televative Inc and Beritech, and exclusive forum selection Clause 17 of the JV Agreement

[15] *See* Annex 3 of the case
[16] Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", *Columbia Journal of International Law*, Vol. 5, 1966, 263, at 265.
[17] *See* the summary of the parties contentions
[18] *See* Annex 2, Uncontested Facts, para 10

should be applied. Beritech has invoked arbitration under Clause 17 of JV Agreement and if Claimant considers that buyout was not proper, it should have responded to that arbitration, which despite Televative's refusal to participate had constituted and determined the seat of arbitration.[19]

21 For above mentioned reasons there is not a legal dispute between Claimant and Respondent and this Tribunal does not have a jurisdiction.

ii. Beritech's actions are not attributable to Respondent

22 As stated above in order the Tribunal to acquire a jurisdiction over the dispute, it is necessary the dispute to exist between a national of the Contracting State and another Contracting State. Respondent submits that the fact that the Beritech is partially state-owned does not automatically mean that this entity is an arm of the state for jurisdiction purposes and actions of Beritech are not attributed to Beristan.

23 In support of it argumentation Respondent invokes some case law from ICSID Tribunal. In *Tradex v. Republic of Albania* ICSID tribunal had to decide whether wholly state owned company *T.B Torovitsa* was a party to the dispute or Republic of Albania itself.[20] Tribunal found no evidence that Albania either directly or indirectly expropriated the investment or played any role in commercial difficulties which led to the liquidation of the joint venture. Accordingly, any claim raised against *T.B. Torovitsa* related to obligations arising from the joint venture agreement would be outside its jurisdiction.[21]

24 However, in *Tradex* case ICSID tribunal found that it was the dispute between Tradex and Albania, only because *T.B. Torovitsa* was wholly state owned entity. For this reason tribunal decided that "failure to act by the state of Albania itself have to be considered as an expropriation."[22] The facts of the current case should be however distinguished from the facts of the *Tradex* case. Specifically, *Tradex* Tribunal found to be crucial the fact that *T.B. Torovitsa* was a state owned entity, that lead the tribunal to find that Albania was obliged to intervene and prevent *Torovitsa* from expropriating *Tradex's* investment. Therefore, *Tradex* Tribunal considered the dispute to exist between investor and State Party.

[19] Request for Clarification, 118
[20] Tradex Hellas S.A. vs. Republic of Albania, ICSID Arb/94/2
[21] *Id.* At 20.
[22] *Id.* At 21.

25 However, in the case on behalf of this Tribunal we have a dispute between two private companies and their obligations are regulated by JV Agreement, thus it is a contractual dispute and ICSID Tribunal does not have a jurisdiction.

II. Clause 17 of JVA is an exclusive choice of forum selection.

26 As a general principle, binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.[23] In the current case the dispute between Beritech and Televative is purely contractual and should b resolved by valid and applicable dispute settlement provision Clause 17 of JV Agreement. It was exclusively chosen for resolving disputes 'arising out of or relating to [JV] agreement."[24] Therefore, as an exclusive choice made by including Claimant Clause 17 of JV Agreement cannot be overridden by the BIT **(i)** and according to arbitration practice and "essential basis" test this Tribunal does not have a jurisdiction in view of it **(ii).**

i. Exclusive jurisdiction is not overridden by the BIT

27 In this regard Respondent submits that exclusive jurisdiction to arbitrate contractual claims under Beristan laws cannot be overridden by the BIT. Televative and Beritech has expressly chosen and agreed that the disputes that arise out of JV Agreement should be subject to exclusive jurisdiction of arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan.[25]

28 To support its argumentation Respondent would like to invoke *SGS v Philippines* case, where the Tribunal had to decide the similar issue.[26] In that case Tribunal stated that there is one possibility which might confer investor's right to pursue contractual claims under the BIT disregarding the contractually chosen forum. This is the case when investor is entitled under the corresponding BIT to submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration.

[23] Iran-US CTR 9.
[24] Clause 17 of JVA
[25] *See* Annex 3 of, p. 19
[26] SGS v Philippines, para 139

29 However, SGS v Philippines Tribunal stated that the question here is to whether BITs are intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.[27]

30 Tribunal made reference to the doctrine of *generalia specialibus non derogant,* according to which BIT is a general law applicable to investment arrangements whether concluded "before or after the entry into force of the Agreement" (Art 1(1) of Beristan-Opulentia BIT) and it is not concluded with any specific investment or contract in view.[28] Schreuer says: "[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application."[29] Therefore, Tribunal concluded that investment protection agreements as framework treaties are intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.[30]

31 The same is in the current case, where the BIT between the states contains choice between the Contracting Parties' Courts and International Arbitration[31] and the Joint Venture Agreement exclusively makes choice to arbitrate contractual claims "only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan."[32]

32 According to the doctrine of *generalia specialibus non derogant,* and the ICSID case law this Tribunal should find that Beristan-Opulentia BIT cannot override the exclusive jurisdiction of arbitration under Beristan laws which was agreed in the JV Agreement. Even more, the last sentence of Clause 17 of JVA strictly confirms the jurisdiction of arbitral tribunal constituted for any contractual dispute by stating that "each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to [its] jurisdiction".[33]

33 Thus, Respondent submits that exclusive jurisdiction is not overridden by the Beristan-Opulentia BIT.

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[27] *Id*, para 140
[28] *Id.*
[29] Schreuer, 362.
[30] SGS v Philippines, para 141
[31] Art 11.1 Berista-Opulentia BIT
[32] Clause 17 of Joint Venture Agreement
[33] Clause 17 of JVA, last sentence

ii. According to "Essential basis" test and arbitral practice of exclusive jurisdiction clauses this Tribunal does not have a jurisdiction in view of Clause 17 of JVA

34 To farther strengthen its argument that Tribunal does not have a jurisdiction to hear this case Respondent submits that arbitral practice proves that Clause 17 of JV Agreement is an exclusive jurisdiction to decide contractual disputes.[34]

35 Respondent invokes *Woodruff* case, where United States-Venezuela Mixed Commission had jurisdiction over "all claims owned by citizens of the United States of America against the Republic of Venezuela", such claims to be decided "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation".[35] It was rejected that the Protocol of 1903 overrode exclusive claims clause in the contract: "the judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not consider a contract that the parties themselves did not make…"[36] Thus, Commission decided that claimant by his own voluntary waiver has disabled himself from Commissions jurisdiction.

36 The same situation is in current case, where claimant agreed and concluded agreement with Beritech that all contractual disputes shall be resolved only by local arbitration in Beristan. Moreover, it voluntarily waived any objection that it might have at any time to such jurisdiction and made an irrevocable submission to jurisdiction of the arbitral tribunal constituted for any such reason.[37]

37 The similar approach was taken by The United States-Mexico General Claims Commission in the North American Dredging Company of Texas case. The Commission said: "each case involving the application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits." The Commission farther submitted: "[...] where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then willfully ignores them by applying in

[34] *See* US-Venezuela Claims Protocol 17 February 1903; Vivendi case
[35] *See* US-Venezuela Claims Protocol, 17 February 1903: 101 BFSP 646, 2 Malloy 1870, in SGS v. Philippines case
[36] (1903) 9 RIAA 213, 222.
[37] *See* Clause 17 of JVA

such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim."[38]

38 Tribunal should take into consideration all above argumentation, which was farther supported by the ad hoc Committee in the Vivendi case, which said: "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".

39 Thus, Tribunal does not have a jurisdiction in view of Clause 17 of JV Agreement.

B. TRIBUNAL DOES NOT HAVE A JURISDICTION OVER CLAIMANT'S CONTRACT-BASED CLAIMS ARISING UNDER THE JV AGREEMENT BY VIRTUE OF ARTICLE 10 OF THE BERISTAN-OPULENTIA BIT.

40 Alternatively, Respondent submits that the Tribunal does not have jurisdiction over Claimant's contract-based claims arising under JV Agreement. Whether there was misuse of buyout provision of JVA is contractual dispute by its nature and this Tribunal is not authorized to hear the dispute for below reasons: the legal characteristics of treaty and contract violations are of different nature and arises different kind of responsibilities **(I)**. Thus, as general practice shows ICSID tribunals do not have a jurisdiction over contractual or municipal claims **(II)**.

I. BIT claims and contract claims are reasonably distinct in principle.

41 Respondent submits that as a matter of general principle the same set of facts can give rise to different claims grounded on different legal orders: the municipal and international legal orders.[39] However, it is matter of interpretation and should be analyzed on case-by-case basis.

42 Respondent would like to invoke *Vivendi Annulment* decision in support of its submission that this Tribunal should distinguish between treaty-based and contract-based claims and found that it does not have a jurisdiction over Televative's contract-based claims. Annulment Committee in *Vivendi* said: "...BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract and vice versa". The point is clearly made in Article 3 of the ILC Articles, which

[38] (1926) 20 AJIL 800, 808 (para. 23); 3 ILR 292, 293, in SGS v. Philippines case
[39] SGS vs. Pakistan, para 147

states:

> "*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law*."

43 In accordance with general principle, whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper and applicable law – in the case of the BIT, by international law; in the case of the [...] contract, by the proper law of the contract.[40]

44 The similar situation is on behalf of this Tribunal, because Televative's contract-based claims do not in itself amount to breach of Beristan's obligations under the BIT. Respondent further argues, that the *essential basis* of a claim brought by Televative before this Tribunal is alleged breach of the JV Agreement and Tribunal should "give effect any valid choice of forum clause in the contract", particularly arbitration under JV Agreement Clause 17.

II. Thus, this Tribunal does not have a jurisdiction to determine Claimant's contract-based claims arising under the JVA.

45 Article 11 of the Beristan-Opulentia BIT concerning the Settlement of disputes between investors and the Contracting States proclaims that only disputes between Contracting Party and investor are the matter of ICSID jurisdiction. It is an agreement of two sovereign states and it should be respected by this Tribunal. If parties wished to extend the jurisdiction of this Tribunal to other kinds of disputes they would have done so by expressly stating in the BIT.

46 However, Contracting Parties of the BIT limited ICSID tribunal's jurisdiction to the disputes "between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this agreement in relation of the investment of the latter".[41] Thus, Tribunal does not have a jurisdiction over the existing dispute since JV Agreement is out of scope of ICSID's jurisdiction **(i)**, the actions of Beritech is not attributed to the Republic of Beristan **(ii)** and Article 10 of Beristan-Opulentia BIT does not provide a ground for the Tribunal's jurisdiction **(iii)**.

[40] *Vivendi Annulment* decision, para 95
[41] *See* art 11 of the BIT

i. Alleged breach of JV Agreement is out of scope of ICSID's jurisdiction

47 Respondent submits that the BIT between Government of Beristan and Opulentia guarantees the protection of investors and their investment in their respective territories. However the government of Beristan has never agreed to assume contractual obligations of private companies, i.e. the Televative and Beritech. As Article 31(1) of Vienna Convention on the Law of the Treaties states:

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

48 Applying this principle it is to be noted that Article 11 of the BIT does not refer to disputes based on claimed violations of JV Agreement between Televative and Beritech, but it relates to the disputes between Contracting Party and investors of another Contracting Party. Furthermore, the ICSID Convention and the practice of ICSID tribunals stipulate that the jurisdiction of the tribunal exists only in cases of investor-state disputes in relation of the investments of the former in the territory of the latter.

49 As it was already mentioned, the claimed dispute is contract-based and it is out of ICSID tribunal's scope, since neither case law of ICSID nor the agreement of Contracting States of BIT foresees this Tribunal's jurisdiction over claims basis of which are purely contractual. Thus, those claims are out of ICSID's jurisdiction and Tribunal should respect and give effect to valid choice of forum selection Clause 17 of JV Agreement.

ii. The actions of Beritech is not attributed to the Republic of Beristan

50 Respondent also submits that the fact that Beritech is partially state-owned entity does not automatically mean that it is an arm of the state for jurisdiction purposes. As the ICSID tribunals have established in their case law, there are Structural and Functional tests to determine whether the actions or omissions of the entity are attributable to the contracting state.[42] The Structural test concerns whether entity is owned by state, directly or indirectly, what law and who created it,[43] while the Functional test looks at the functions of or role to be

[42] *Maffezini v. Spain, paras* 70-77; *see* also Brownlie *System of the Law of Nations. State Responsibility. Part I*, 1983, at 136

[43] *Maffezini v. Spain, para 77*

performed by the entity, degree of state control over the entity and whether the actions of the entity are "commercial rather than governmental in nature."[44]

51 ICSID tribunal in *Maffezini case* cited leading authority of ICSID Convention Aron Broches, who stats that: "a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function".[45]

52 As provided in Annex II para 2 of the case at hand Beritech was only partially owned by the Beristan, and all its business, including the buyout with the Claimant, was purely contractual by nature, which was expressly envisaged in the JV Agreement between the parties.[46] In support of its argument Respondent cites one ICSID tribunal, which held, that: "the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "essentially commercial rather than governmental in nature".[47]

53 Thus, mere fact that Respondent owned 75% of shares in Beritech does not qualify latter as a state agency; taking into consideration the fact that it was not established by the governmental decree and the actions of the company were "essentially commercial rather than governmental in nature." Furthermore, Beritech operates under its own direction in the private sector by its own board of directors.

54 Also Claimant failed to demonstrate that intention of the Beristan in respect of Beritech was to establish an agency which would carry governmental functions or it tried to escape responsibility for wrongful acts or omissions by "hiding behind a private corporate veil." For all these reasons, by failing the functional test, the commercial actions of Beritech are not attributable to the state.

[44] Brownlie in *Maffezini, para 79*
[45] Broches in *Maffezini, para 79*
[46] Annex 3 of the Case, Clause 8, p.19
[47] *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*, ICSID Case No. ARB/97/ 4, Decision on Objections to Jurisdiction, May 24, 1999, *ICSID Review—Foreign Investment Law Journal,* Vol. 14, 1999, para 20, p. 250.

iii. "Umbrella Clause" of Beristan-Opulentia BIT does not provide ground for the jurisdiction of ICSID Tribunal.

55 Article 10 of Beristan-Opulentia BIT reads: "Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."

56 This provision should be interpreted according to the Vienna Convention. *SGS vs. Pakistan* Tribunal first time had to interpret such clause and it applied familiar norms of customary international law on treaty interpretation,[48] and found that it could not transform contractual claims into the treaty claims, since the purpose of such an "umbrella clause" cannot be so far reaching.[49]

57 Respondent argues that Article 10 of Beristan-Opulentia BIT cannot transform contractual claims into treaty claims, since if we give ordinary meaning to the words used in Article Contracting Parties have only guaranteed the full protection of investments in their territories in accordance with their internal legislation. Thus if the Beristan did not like the buyout conducted by Beritech, it should have appealed it to the competent court or arbitration as provided in JV agreement and only in case of the denial of fair trail Televative could go to ICSID.

58 Therefore, Respondent respectfully submits that this Tribunal is not authorized to decide the case at hand.

CONCLUSION ON JURISDICTION

59 In conclusion Respondent respectfully submits that this honorable Tribunal does not have a jurisdiction over the dispute between Televative and Beritech. It further submits that this not a legal dispute between investor and Contract State; thus, requirements of Article 25 of the Convention is not satisfied. In the JV Agreement parties have made a special forum selection clause, which is *lex specialis* in this current case and all contractual disputes should be arbitrated under the Beristan laws and provisions as stipulated by Clause 17 of JV Agreement.

[48] Art 31 of Vienna Convention
[49] SGS vs. Pakistan decision, para167

60 This tribunal would have had an authority to hear the Claimant's treaty-based claims only, which is not a case at a hand. Current dispute is a contractual claim between two private companies and Clause 17 not the BIT is applicable.

PART TWO: MERITS OF THE CASE

61 Without prejudice to its prior submission to the jurisdiction of the Tribunal, Respondent, alternatively, states that it did not breach any of its obligations neither towards Claimant nor international obligations.

C. RESPONDENT DID NOT PREVENT CLAIMANT FROM FULFILLING ITS CONTRACTUAL OBLIGATIONS, SINCE IT HAS NO BREACHED THE JV AGREEMENT AND CLAUSE 8 WAS NOT INVOKED ILLEGALLY

62 Respondent submits that its organs and agents, has not breached a number of its obligations under the Beristan-Opulentia BIT. The fact that Beritech removed Televative from Sat-Connect by buying out its interests was not attributable to Respondent **(I)**. Furthermore, Respondent contends that Beritech validly applied Clause 8 of JV Agreement and lawfully expelled Claimant from the Sat-Connect **(II).**

I. The acts and omissions of Beritech is not attributable to Respondent

63 Under the Article 3 of Articles on State Responsibility the main prerequisite of international wrongful act is its attribution to the state under international law which constitutes a breach of an international obligation of the state[50].

64 The Articles on State Responsibility provide the international law standard on when actions are attributable to a state. Actions are attributable to the state only if it's made by a state organ.[51] Since the Beritech isn't state organ, its action is not attributable to Beristan.

65 The Beritech is not part of the state infrastructure, nor does it act on behalf of Beristan. Rather, the Beritech operates under its own direction in the private sector, on behalf of investors rather than the state as a whole. Thus, the Beritech should not be considered a state organ for purposes of attribution.

66 In support of its argumentation Respondent invokes *Metalclad Corporation vs. Mexico* tribunal, which defined indirect expropriation as an interference which "has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to-be-expected

[50] Art. 3, Articles on State Responsibility;
[51] Article 4(1), Articles on State Responsibility ;

economic benefit of property."[52] Even though the Beritech is an entity owned by the Beristan it does not implicitly mean that it functions as a constituent subdivision or agency of Beristan government. Sat-connect was not government controlled and the Beritech did not exercise its rights as a shareholder or depository as a means to implement government policy.

67 *LG&E v. Argentine Republic* tribunal further defined indirect expropriation as government measures that "effectively neutralize[d] the benefit of property of the foreign owner."[53] Such neutralized benefit occurs through loss of control of the investment, or inability to direct the day-to-day control of the investment, and can occur gradually over time[54]. In considering the loss of control, the *LG&E* tribunal looked to the impact of the measures on control of the investment, plus the duration of the measure.[55]

68 In *Amco Asia case*, the tribunal held that seizure of a hotel by the state army and police could not be attributable to the Indonesian government.[56] Under the *Amco Asia* standard, the Beritech's actions are not attributable to Beristan due to the lack of link between the state and the entity.

69 Thus, this Tribunal should find that the Beritech's actions fall outside the scope of a state organ and its actions should not be attributed to Beristan.

II. Beritech was entitled to rely on Clause 8 of the JV Agreement

70 Respondent states that Beritech was entitled to rely on Clause 8 of the JV Agreement (buyout) because Claimant breached the Confidentiality provision of that Agreement (Clause 4) by leaking the confidential information about the Sat-Connect project – including information about the technology, systems, intellectual property and encryption to be used and other trade secrets – to the Government of Opulentia **(i)**, therefore Beritech validly invoked Clause 8 of JV Agreement **(ii).**

i. Claimant breached the JV Agreement

71 Clause 4 of the JV Agreement provides that all matters relating to this Agreement and the

[52] *Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001);*
[53] *LG&E, ICSID Case No. ARB/02/1, para 188.*
[54] *Ibid;*
[55] *Ibid.*
[56] AMCO Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983

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.[57]

72 Clause 4(4) of the JV agreement any breach of this Clause 4 shall be deemed as a material breach of the Agreement.[58] So Respondent submits that Claimant by leaking about the Sat-Connect project materially breached the JV agreement.

ii. Beritech validly invoked Clause 8 (Buyout) of JV Agreement

73 Clause 8 of the JV Agreement states that 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. 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.[59]

74 Respondent asserts that the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristan armed forces, directly implicate the national security of Beristan.

75 Respondent submits that since Claimant has breached Clause 4 of the JV Agreement, its removal from the Sat-Connect project was justified under both JV Agreement and BIT.

76 Respondent would like to invoke Article 4 (2) of the Beristan-Opulentia BIT which states that investors' investments "shall not be directly or indirectly nationalized, expropriated or subjected to any other measures having similar effects...[60]

77 The term "discriminatory" is not defined in the BIT, but different tribunals provide a standard for what constitutes a discriminatory measure. In *Elettronica Sicula S.p.A. (ELSI)* case,

[57] Article 4(1), JV agreement;
[58] Article 4(4), JV agreement;
[59] Clause 8, JV Agreement;
[60] Beristan-Opulentia BIT, art. 4 (2);

tribunal created a framework for determining when a measure is discriminatory and in violation of investment protection language of a BIT.[61] The tribunal in *LG&E v. Argentine Republic* summarized and applied the *ELSI* rule as requiring: "(i) intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national."[62]

78 In *Pope & Talbot, Inc. v. Government of Canada*, the tribunal created a three-prong test to identify discriminatory treatment under national treatment language of a treaty.[63] First, the tribunal identified a group of others in similar circumstances.[64] Second, the tribunal considered whether the identified group of comparators received like treatment.[65] Third, the tribunal considered the existence of any factors which might justify differences in standards of treatment between the two groups.[66] The *Pope & Talbot* established a standard which has been mirrored by other tribunals.[67]

79 Applying those standards to the present case, it is clear that the Beristan did not enact discriminatory measures against Opulentia investors. The reason of Televative's removal from the project was not any of above mentioned, rather Televative's default; the leaking of confidential information.

80 Therefore, Tribunals should find that Respondent has not violated any terms of the Beristan-Opulentia BIT, or otherwise violated general international law or applicable treaties. Rather, Beritech lawfully expelled Claimant from Sat-Connect and for this reason, Claimant is not entitled to compensation or any other remedies.

D. RESPONDENT DID NOT BREACH THE BERISTAN-OPULENTIA BIT NEITHER IT HAD VIOLATED ANY APPLICABLE TREATIES OR GENERAL INTERNATIONAL LAW

81 Respondent submits that it performed its undertakings and did not violate any terms of the Beristan-Opulentia BIT. It has neither violated any other applicable treaty or general international law. Respondent's actions were in accordance with the BIT **(I)**. Furthermore,

[61] Elettronica Sicula S.p.A. (ELSI), 28 ILM 1109;
[62] LG&E, ICSID Case No. ARB/02/1, pg.146;
[63] Pope & Talbot, Inc. v. Government of Canada, NAFTA/UNCITRAL;
[64] Ibid. pg. 83-104;
[65] Ibid;
[66] Ibid;
[67]. Myers, Inc. v. Government of Canada, NAFTA/UNCITRAL, Award on Damages, October 21, 2002; United States – In the Matter of Cross-Border Trucking Services, Panel Report ;

Respondent argues that the advanced satellite and telecommunications technology of the Sat-Connection project, which included systems, were to be used by the Beristan armed forces. Claimant's failure to perform its obligations directly implicated the national security interest of Beristan. Thus, Claimant's removal from the Sat-Connect project was justified and was in full accordance with all relevant contracts in force between the parties **(II)**.

I. The actions performed by Respondent were in accordance with the Beristan-Opulentia BIT

82 The republic of Beristan recognizes its obligation before the Claimant taken by BIT that "The investments to which this agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by courts or tribunals having jurisdiction.[68]

83 The BIT strictly defines the conditions for expropriation of the inventor's investment and they are: public purposes, or national interest – "Investments of investors of one of the contracting parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other contracting party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures."[69]

84 The BIT provides that Contracting States should guarantee Fair and Equitable treatment to investors from another Contracting Party[70] and should not take measures that are discriminatory.[71]

85 Respondent submits that the fact that advanced satellite and telecommunications technology of the Sat-Connect project, were to be used by the Beristan armed forces, directly implicate the national security of Beristan.[72] Therefore, abovementioned fact gave the right to expropriate Claimant's property. Respondent further states, that the expropriation is the legal

[68] Beristan-Opulentia BIT. Article 4
[69] Ibid, Article 4
[70] Beristan-Opulentia BIT, Article 3
[71] Beristan-Opulentia BIT, Article 4
[72] Televative INC vs. Beristan; para 15

term, when the conditions determined by the law to exercise it is satisfied. In the current case agreement between states stipulates, that Contracting Parties, while expropriating the investment, should not breach fair and equitable treatment standard **(i)** and should not take measures that are discriminatory **(ii)**.

i. Respondent's actions did not breach Fair and Equitable Treatment standard and thus did not violate Article 2(2) of Beristan-Opulentia BIT

86 The fair and equitable treatment Clause, located in Article 2(2) of the Beristan-Opulentia BIT, guarantees "fair and equitable treatment" of investors' investments "at all times."[73] The Claimant has the burden of proof to show that Beristan has violated Article 2(2).

87 According to *Tudor* the burden falls on the Claimant to prove that the host state's acts or omissions "had a direct negative impact" on its investments, as well as establishing a clear link of causation between the two.[74] In addition, the Claimant must establish that the host state's actions were "willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."[75]

88 Respondent respectfully submits that contrary to the Claimant's assertions, Beristan did not act arbitrarily, grossly unfairly, unjustly, in a discriminatory manner, expose the Claimant "to sectional or racial prejudice, or deny the Claimant due process."[76] Any actions involving the Claimant's personnel were taken in the interest of the state's security.

89 Furthermore, fair and equitable treatment involves respect towards "legitimate and reasonable expectations" of investor. Applying this standard, the Beristan army had a legitimate regulatory interest in terminating the project with the Claimant on the grounds of leaking information, which threatened national security. Clearly, such a tip would require a sincere effort by the government to protect the country.

90 As *TECMED* tribunal stated the investor expects the host state to act consistently.[77] Beristan

[73] Beristan-Opulentia BIT. Article 2(2);
[74] Ioana Tudor, The fair and equitable treatment standard in international law of foreign investment 138 (2008)
[75] *Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, para 290.
[76] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004, para 98.
[77] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States ("Tecmed")*, ICSID Case No. ARB(AF)/00/2,

government did not act inconsistently over the term of the investment. There had been no change in Beristan's economic policy or laws that affected the investment environment or the Claimant's investment. The Claimant assumed the risk that the breach of its obligations under BIT in such a manner would result the expropriation, since the threat caused by its action directly affected national security of Beristan.

91 Finally, as the host state stated in *Lauder v. Czech Republic*, there is no exact definition of the fair and equitable treatment obligation.[78] Because the obligation is concerned with the state's conduct rather than the result of the investment, the fact that the investor loses money does not indicate a breach of obligation.[79]

92 Applying this framework to the facts of the case, it becomes clear that the Claimant has failed to carry its burden of proof of showing causality between the state's action or omission and the harm to its investment, as well as showing that the state's actions were unreasonable. Therefore, this Tribunal should dismiss Claimant's claims under Article 2(2) of the Beristan-Opulentia BIT and find that Respondent did not violate fair and equitable treatment provision of the BIT.

ii. Beristan's did not take discriminatory measures towards Televative

93 Article 2(3) Beristan-Opulentia BIT states that "Contracting Parties shall ensure that management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way subject to unjustified or discriminatory measures.

94 Beristan adhered to and met its obligations under Article 2(3) by providing egalitarian and non-arbitrary treatment to investors.

95 The term "arbitrary" is also undefined in the BIT, leaving plain meaning and international law standards as the best guidance available. Under international law, the term "arbitrary" has

[78] *Ronald S. Lauder v. Czech Republic* UNCITRAL, Award of September 3, 2001, ¶ 291.
[79] *Id.*

been defined as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[80]

96 The Tribunal in *Lauder vs. Czech Republic* further expounded on the term "arbitrary" by stating it is something "founded on prejudice or preference rather than on reason or fact."[81]

97 As the leaking of the security information represents the interest of the state and it is the justification for intervening into the right to the property, actions carried out by Beristan was justified.

98 Like the other key terms in Article 2(3), the term "discriminatory" is undefined in the BIT. However, decisions of past tribunals provide a standard for what constitutes a discriminatory measure. In *Elettronica Sicula S.p.A. (ELSI),* also referred to as *United States of America v. Italy*, the tribunal created a framework for determining when a measure is discriminatory and in violation of investment protection language of a BIT.

99 The tribunal in *LG&E v. Argentine Republic* summarized and applied the *ELSI* rule as requiring: (i) intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national. According to above-mentioned respondent posits, that the actions taken by it was not grounded on national or other kind of discriminatory element and Beristan would do the same with other investors if its national security would face any kind of danger.

100 Therefore, applying this framework to the case at hand, Tribunal should find that Respondent did not take any discriminatory measures towards Televative's investment and thus did not breach its obligations.

II. Claimant's removal from the Sat-Connect project was justified

101 Respondent submits that taking into consideration the fact that Beristan government did not breach fair and equitable treatment standard, neither had it taken discriminatory measures towards Claimant's investment this Tribunal should find that Claimant's removal from the project was justified.

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[80] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, 28 ILM 1109 (1989), ¶ 128.

[81] *Ronald S. Lauder v. The Czech Republic,* UNCITRAL, Final Award of September 3, 2001, ¶ 221. ;

102 It will be demonstrated bellow that Essential Security Article of the BIT allowed Respondent to remove Claimant from the project. Furthermore, Claimant breached its obligations and it cannot allege now that Respondent prevented Televative from fulfilling its contractual obligations. Claimant breached confidentiality Clause 4 of JV Agreement and thus, Respondent's right to buyout Claimant's interest from Sat-Connect arose.[82]

E. BERISTAN WAS ENTITLED TO RELY ON ARTICLE OF THE BIT AS A DEFENSE TO CLAIMANT'S CLAIMS

103 Respondent asserts that the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristan armed forces, directly implicate the national security of Beristan. Respondent argues that Claimant's removal from the Sat-Connect project was justified on national security grounds, since several segments of Beristan armed forces will use the Sat-connect system.

104 Under article 9 (essential security) of the Beristan-Opulentia BIT, the Treaty shall be construed to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 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.[83]

105 The concept of "national security" is broad and potentially ambiguous. The Oxford English Dictionary defines the term as the "safety of a nation and its people, institutions, etc., especially from military threat or from espionage, terrorism, etc."[84]

106 Under many international agreements, states have negotiated language which provides that even when states have entered into treaty commitments, such commitments do not prevent them from taking measures in order to protect their essential security interests.[85]

107 If applying the customary rules of treaty interpretation, the ordinary meaning of the language

[82] *See*, Clause 4 of JV Agreement

[83] Beristan-Opulentia BIT, art. 9

84 United Nations Conference on Trade and Development THE PROTECTION OF NATIONAL SECURITY IN IIAs;

85 International Investment Perspectives: Freedom of Investment in a Changing World 2007 Edition © OECD 2007, pg. 94;

used, together with the object and purpose of the provision clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either "for the maintenance of the public order" or for "the protection of essential security interests" of the party adopting such measures.[86]

108 Respondent will demonstrate that national security of Beristan was concerned in the current case **(I)** and thus, Respondent had right to remove Claimant from the project **(II).**

I. By leaking the confidential information Claimant endangered Respondent's national security interest

109 Respondent submits that the breach of confidentiality clause of JV Agreement endangered Beristan's national security interest. The new telecommunications technology of the Sat-Connect project included systems that are being used by the Beristan armed forces. The fact that the information was leaking directly implicated the national security of Beristan, since this new system is to be used within the vast expanses of Euphonia, which covers one-fifth of the world's surface and six other countries, including Opulentia.[87]

110 Therefore, Beristan's national security was in danger, since the other countries would have an access to Beristan's military secrecy. This is a situation, where Article 9 of the BIT is applicable and gives Contracting Parties rights to take measures that it considers necessary to protect its own essential security, to restore international peace and security.

II. Respondent had right to invoke Article 9 and remove Claimant from the project

111 Respondent argues that essential security concerns give states right to derogate from the treaty use all necessary measures to protect its interests as well as internally as in international relations. In support of this argumentation Respondent invokes CMS Tribunal, which discussed the same issue and developed important practice in this regard.

112 *CMS v. Argentina* tribunal stated that if essential security article of the treaty is applicable, then the treaty is inapplicable to such measure.[88] On the other hand, if a State is forced by

[86] ICSID case CMS v. Argentina, pg.71;
[87] Annex 2, para 5, p. 16 of the record
[88] CMS vs Argentian

necessity to resort to a measure in breach of an international obligation but complying with the requirements listed in Art. 25 ILC, the State escapes from the responsibility that would otherwise derive from that breach.[89]

113 "The ordinary meaning of 'security' is safety from external threats;" the Respondent considers the adjective "essential" as meaning nothing less than indispensable, and it concludes "[t]he essential security interest of a country are, therefore, interest indispensable to keeping the country safe from external threats."[90]

114 As to "essential security interests," it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order.

115 It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population.[91]

116 The Preamble to the Charter of the United Nations points out that a just and durable system of international peace requires freedom from fear, from hunger and from want, and "a decent standard of living for all individual men and women and children in all nations." more relevant for the present case, that of the International Monetary Fund support this approach.[92]

117 As noted by the International Law Commission, States have invoked necessity "to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."[93]

118 Therefore, Respondent was entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a defense of Claimant's claims, since information which leaked by the claimant directly implicated the national security of Beristan.

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[89] ICSID case CMS v. Argentina, CMS Annulment Decision, para. 129;
[90] Ibid, pg. 75;
[91] Ibid, pg. 76;
[92] ICSID case CMS v. Argentina, pg. 76-77;
[93] International Investment Perspectives: Freedom of Investment in a Changing World 2007 Edition © OECD 2007, pg. 100;

CONCLUSION ON MERIT OF THE CASE

118 Respondent did not breach any of its international or contractual obligations. Claimant was validly removed from the Sat-Connect project; there was a justification of this removal. By leaking of confidential information to the government of Opulentia, Claimant breached its contractual undertaking and Beritech had right to enact buyout provisions of JV Agreement.

PART THREE: REQUEST FOR RELIEF:

1. The Tribunal does not have a jurisdiction to decide the case
2. Respondent did not breach JV Agreement
3. Respondent did not breach its international obligations neither under the BIT nor otherwise violated general international law
4. Claimant materially breached the contract and it should not be granted compensation or any other remedy
5. Claimant should cover all the procedural costs

19 September 2010

(Signed)

---------- **Koba Chikladze**

---------- **Davit Chitaishvili**

---------- **Giorgi Mtiulishvili**

---------- **Ketevan Tsintsadze**