FOREIGN DIRECT INVESTMENT

INTERNATIONAL MOOT COMPETITION

2010

TEAM MOSLER

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

TELEVATIVE INC. [Claimant]

vs.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN [Respondent]

(ICSID Case No. ARB/X/X)

MEMORANDUM FOR RESPONDENT

TABLE OF CONTENTS

LIST OF AUTHORITIES

Books, Reports and Articles

Akyüz	A. Sule Akyüz, *"The Jurisdiction of the International Centre for Settlement of Investment Disputes-ICSID",* University of Ankara- Faculty of Law Review, 333; 2003
Christina Binder	Christina Binder, *Changed Circumstances in International Law: Interfaces Between the Law of the Treaties and the Law of State Responsibility with a Special Focus on Argentinine Crisis*, International Investment Law for the 21st Century ,Essays in Honour of Christoph Schreuer, Oxford University Press, 2009
Crawford	James Crawford, *The International Law Commission Articles on State Responsibility, Introduction, Text and Commentaries*, 2002
Douglas	Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration,* (2003) 74 British YB Intl L 152
ILC Report	Report of the International Law Commission on the work of its fifty-third session
International Investment Arbitration	Campbell McLachlan QC, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, Aug 2007
Investor-State Arbitration	Christopher Dugan, Noah D. Rubins, Don Wallace and Borzu Sabahi, *Investor-State Arbitration*, Oxford University Press, 2008
OECD Report 2007	*Essential Security Interests under International Investment Law*, International Investment Perspectives: Freedom of Investment in a Changing World, OECD, 2007
OECD Working Paper on FET	*Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/3, September 2004
Oppenheim	*Oppenheim's International Law*, 9th ed., London: Longman, 1992.
Report of the Executive Directors	Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Schreuer	Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge University Press, 2001
The Scope and Effect of Umbrella Clauses	Mihir C. Naniwadekar, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference*? Trade, Law and Development, Vol 2, No 1 (2010)
Tudor Ioana	Tudor Ioana, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford Monographs in International Law, Oxford University Press, 2008
UNCTAD Report 2009	*The Protection of National Security in IIAs, UNCTAD Series on International Investment Policies for Development*, UNCTAD Series on International Investment Policies for Development, UN, New York and Geneva, 2009

Treaties and Laws

Brussels Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Beristan – Opulentia BIT	Treaty Between the Republic of Beristan and the United Federation of Opulentia Concerning the Encouragement and Reciprocal Protection of Investments
Draft ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, Report of the ILC, 53rd Sess., GAOR., 56th sess., Supp. No. 10, UN Doc A/56/10 (2001), Chapter IV. E.1.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
ICSID Arbitration Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GPA	Agreement on Government Procurement
VCLT	Vienna Convention on the Law of Treaties
1987 Restatement (Third) of Foreign Relations Law	Restatement of the Law, Third, Foreign Relations Law of the United States, 1987

LIST OF LEGAL SOURCES

ADF v US	ADF Group Inc v United States, Award, ICSID Case No ARB(AF)/00/1; IIC 2 (2003), 9 January 2003
Azurix v Argentina	Azurix Corp v Argentine Republic (Award) ICSID Case ARB/01/12, 23 June 2006
Bayindir v Pakistan	Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan, Award, ICSID Case No ARB/03/29; IIC 387 (2009) , 24 August 2009
Bayindir v Pakistan, Decision on Jurisdiction	Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan, Decision on Jurisdiction, ICSID Case No ARB/03/29; IIC 27 (2005), 14 November 2005
CGE v Argentina, *Decision on Annulment*	Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina, Decision on Annulment, ICSID Case No ARB/97/3, IIC 70 (2002), July 2002
CMS v Argentina, Decision on Application for Annulment	CMS Gas Transmission Company v Argentina, Decision on Application for Annulment, ICSID Case No ARB/01/8; IIC 303 (2007), 21 August 2001
CMS v Argentina	CMS Gas Transmission Company v Argentina, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 25 May 2005
Continental Casualty v Argentina	Continental Casualty Company v Argentina, Award, ICSID Case No ARB/03/9; IIC 336 (2008), 5 September 2008
EDF v Romania	EDF (Services) Ltd v Romania, Award, ICSID Case No ARB/05/13; IIC 392 (2009), 2 October 2009
Eudoro v Paraguay	Eudoro Armando Olguin v Republic of Paraguay (Award) ICSID Case No ARB/98/5, 26 July 2001
Impregilo v Pakistan	Impregilo SpA v Pakistan, Decision on Jurisdiction, ICSID Case No ARB/03/3; IIC 133 (2005), 22 April 2005
LG&E v Argentina	LG&E Energy Corp and ors v Argentina, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36, 3 October 2006
Neer Case	Neer v. Mexico case (1929) R.I.A.A.
Oscar Chinn Case	Oscar Chinn Case (1934) PCIJ Rep Series A/B No 63
SGS v Philippins	SGS Société Générale de Surveillance SA v Philippines, Decision on Objections to Jurisdiction and Separate

	Declaration, ICSID Case No ARB/02/6, IIC 224 (2004), 29 January 2004
Tradex v Albania	Tradex Hellas SA v Albania (Award), ICSID case ARB/94/2, 24 December 1996
Sempra v Argentina	Sempra Energy International v Argentina, Award, ICSID Case No ARB/02/16; IIC 304 (2007) , 18 September 2007
Suez and ors v Argentina	Suez and ors v Argentina, Decision on Liability, ICSID Case No ARB/03/17; IIC 442 (2010), 30 July 2010
United States v. Venezuela	United States v. Venezuela, Report of International Arbitral Awards, vol IX, p.213. American-Venezuelan Claims Commission

I. STATEMENT OF FACTS

1. Treaties. The Republic of Beristan ("Respondent") and the United Federation of Opulentia ("Opulentia") are ICSID Contracting States and have ratified the ICSID Convention. Respondent and Opulentia entered into a Treaty Concerning the Encouragement and Reciprocal Protection of Investments in 1996.

2. Companies. Sat-Connect S.A. ("Sat-Connect") is a joint venture company established in and under the laws of Beristan on 18 October 2007. Claimant, Televative Inc. ("Televative"), an Opulentia incorporated company, holds a 40% share in Sat-Connect. The other 60% of the shares is held by Beritech S.A. ("Beritech"), a mixed capital state-owned company incorporated in Beristan. Respondent is guarantor of Beritech's obligations under the Joint-Venture Agreement (the "JV Agreement"). Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that would provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia. Euphonia is a region encompassing almost one-fifth of the world's surface, which includes Beristan and Opulentia, five other countries and the Euphonian Ocean. Several segments of the Beristian armed forces will use the Sat-Connect system.

3. Buyout. In view that information of the Sat-Connect Project had been leaked to the Government of Opulentia by Claimant's personnel seconded to the Project, Beritech, at the August 27, 2009 Sat-Connect Board meeting, invoked Clause 8 of the JV Agreement to buyout Claimant's shares in Sat-Connect. The buyout was approved by the majority of Sat-Connect's board of directors. Six members of the board were present and a quorum had been satisfied in accordance to the Sat-Connect's bylaw. Beritech then served notice on Claimant 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.

4. Given the leak of information of the Project and that the technology will be for military use, Respondent considers the leak threatens its essential security. Out of this concern, on September 11, 2009, staffs from the Civil Works Force ("CWF"), the civil engineering section of the Baristian army were sent to secure the sites and facilities of

the Sat-Connect project. Those personnel of the project who were associated with Claimant were instructed to leave the project sites and facilities immediately. However, by that time, the 14 days deadline for removal had passed and Claimant's personnel should have been withdrawn from the Project.

5. Arbitration Proceedings. On September 11, 2009, Beritech served notice to Claimant of its desire to settle amicably. However, the day after, Claimant submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT.

6. Being aware that this dispute is one solely arising out of the JV Agreement and after having failed to reach amicable settlement with Claimant, Beritech, according to Clause 17 of the JV Agreement, on October 19, 2009 filed a request for arbitration against Claimant. Beritech has paid US$47 million – the amount of Claimant's total monetary investment in the Sat-Connect project – into an escrow account, which has been made available for Claimant and is being held pending the decision in the arbitration. However, despite all of Beritech's intention to resolve and settle the dispute, Claimant has refused to accept this payment or to honor its obligation under the JV Agreement to respond to Beritech's arbitration request. Yet, on October 28, 2009, it requested arbitration under the ICSID Convention.

II. JURISDICTION

A. Jurisdiction under the ICSID Convention

7. Article 25 of the ICSID Convention sets out jurisdiction of the Centre. It requires four elements in order to have jurisdiction over a case as follows: [1]

> 1) a written consent of the parties to the jurisdiction of the Centre;
> 2) the dispute must arise out of an investment;
> 3) the dispute in question needs to be a legal dispute; and
> 4) one party must be a "Contracting State" (or one of its constituent subdivisions or agencies) and the other party must be a foreign "National of another Contracting State".

8. Claimant's Treaty claims against Respondent were based on 1) the alleged forcible removal of its personnel by members of the Beristan military; and 2) the allegedly improper buyout of its interest in Sat-Connect. Respondent submit that neither of them, either taken separately or in the aggregate, satisfies the jurisdiction requirement provided under Article 25 of the ICSID Convention as above.

(1) Buyout

9. The dispute is a contract dispute between Claimant and Beritech, not one between a state and a national. The basis of Claimant's claims is the alleged breach of the JV Agreement. The only rights which Claimant claimed have been violated are rights which derived from the JV Agreement. The treaty-based claims under both Article 2 (fair and equitable treatment) and Article 4 (expropriation) of the BIT are centred on whether Beritech has rightly exercised Clause 8 (buyout) of the JV Agreement; and its claim under Article 10 (umbrella clause) is in itself a Contract claim arising from the JV Agreement. Since the JV Agreement at issue is a contract between Claimant and Beritech, the dispute is between Claimant and Beritech, two enterprises, rather than a state and national as required under Article 25 of the BIT. [2]

10. The fact that Beritech is a state owned enterprise does not change the nature of the dispute. The Agreement is governed in all respects by the laws of Beristan and

[1] *Akyuz*, 338 at University of Ankara- Faculty of Law Review 2003

[2] *See* element 4) in para. 7

Beritech by law of Beristan is an enterprise, an independent legal entity distinct from Respondent. According to the ILC Report,

> The fact that the State initially establishes a corporate entity is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State. [3]

Therefore the ownership arrangement of Beritech does not change that the dispute is between two enterprises. [4]

11. The fact that Respondent is guarantor does not change the nature of the dispute. Respondent assumes its responsibility as guarantor of the JV Agreement. As guarantor, Beristan would only assume the obligations of Beritech under the JV Agreement upon Beritech's default, no more, no less. [5] However, since no default has been established on the part of Beritech, at this stage, Respondent has nothing to do with the JV Agreement and therefore is in no way related to the dispute.

12. Since this dispute is a dispute between two enterprises, not *"a Contracting State and a national of another Contracting State"* under the meaning of Article 25 of the BIT, this Tribunal should refrain from exercising jurisdiction.

(2) Effort by CWF

13. The CWF was acting under Executive Order of Beristan.[6] However, this fact does not confer jurisdiction over the dispute since it is not a "legal dispute arising directly out of an investment" under the meaning of Article 25 of the ICSID Convention. [7]

14. The CWF did not interfere with investment by Claimant. The ICSID Convention does not define "investment" and it is subject to the Parties' consent. [8] Therefore

[3] ILC Report, 48

[4] *See also* reasoning on Attribution in paras. 44-58

[5] Clarification No. 152

[6] Clarification No. 155

[7] Article 25 (1), ICSID Convention

[8] Report of the Executive Directors, para.27

Respondent relies on the definition given in the *Beristan-Opulentia* BIT. By the time CWF secured the sites and facilities of the Sat-Connect Project, Claimant's interest in the Sat-Connect Project had already been bought out by Beritech and the 14 days deadline for Claimant to hand over possession of all Sat-Connect site, facilities and equipment and to remove all seconded personnel from the project had passed. According to Article 1of the *Beristan – Opulentia* BIT, the investment under protection shall be construed to mean any kind of property "in conformity with the laws and regulations" of the host state. [9] The buyout decision was made according to the JV Agreement which is in conformity with the law of Beristan.[10] Therefore by the time the CWF took action, no "investment" under the meaning of Article 1 of the BIT existed.

15. The claim based on CWF's acts is of no legal nature. In addition to the existence of "investment", Article 25 of the ICSID Convention also requires the dispute to be "legal". [11] The Report of the Executive Directors explains as follows:

> The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation. [12]

16. As reasoned in the previous paragraph, by the time the CWF was sent, there was literally no legal right left for Claimant to claim and hence no conflict of rights existed. What can be evidenced here is merely conflict of interest: on the one hand, Respondent has a role to protect its own citizens from a national security threat; while on the other hand Claimant indented to illegally keep its personnel in the Project. Since there is no legal dispute, the Tribunal shall deny jurisdiction over Claimant's claim concerning CWF's acts to remove Claimant's personnel from the Project.

17. There is no evidence of coordinated effort between the buyout decision and the acts of the CWF. Actually whether the efforts are coordinated or not is irrelevant here

[9] Article 1.1, *Beristan – Opulentia* BIT

[10] Clarification No. 149 & 244.

[11] See element 3) of para.7

[12] *Report of the Executive Directors*, para.26

since it does not change the termination of Claimant's rights and obligations under the JV Agreement.

18. In conclusion, it is submitted that this Tribunal should refuse to exercise jurisdiction to hear this dispute in light of Article 25 of the BIT.

B. Jurisdiction in view of Clause 17 of the JV Agreement

19. Even if the claims passed the jurisdiction test under Article 25 of the ICSID Convention, the Tribunal has no jurisdiction in view of Clause 17 (Dispute Settlement) of the JV Agreement.

20. Clause 17 of the JV Agreement provides:

> The Agreement shall be governed in all respects by the laws of the Republic of Beristan. In the case of *any dispute arising out of or relating to this Agreement*, any party may give notice to the other party of its intention to commence arbitration. … *Each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute*. (*emphasis added*)

21. Firstly, by agreeing to this JV Agreement, both Parties perfected the arbitration agreement provided for under Clause 17. Clause 17 is an exclusive dispute settlement provision that applies to "any dispute arising out of or relating to this Agreement". By signing on the JV Agreement, Claimant "irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute." Claimant is a Party to the JV Agreement and should be bound by this exclusive arbitration clause for disputes arising out of or relating to the JV Agreement.

22. Secondly, all claims that Claimant pursued under the BIT are either arising out of or related to the JV Agreement under the meaning of Clause 17 of the Agreement. As reasoned in an earlier paragraph,[13] the buyout-related claims, despite Claimant's effort to frame them as treaty claims, are by their very nature contract based claims arising out of the JV contract. The claims related to the conduct of CWF are also related to the JV Agreement since the leak of information, the cause of CWF's action, in itself is a breach

[13] *See* para. 9

the JV Agreement. Therefore, these claims clearly fall into the scope of jurisdiction of arbitration proceedings under Clause 17 of the JV Agreement.

23. Thirdly, the binding nature of the dispute settlement clause in the JV Agreement "in relation to any dispute arising out of or related to this Agreement" is not to be undermined by a general provision in a treaty extending a number of dispute resolution options to investors of two States generally. Under international law, the maxim of *lex generalis non derogat lex specialis* entails that a general provision cannot override a specific provision. According to Article 42 of the ICSID Convention, a Tribunal, absent the Parties' consent on applicable law, "shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[14] In light of this, the BIT's dispute settlement clause shall be interpreted according to international law. As such, the BIT mechanism cannot override the contractual mechanism for the maxim of *lex specialis* embodied in international law. [15] As 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. [16]

24. In addition, as the tribunal hearing *SGS v Philippines* noted while commenting on umbrella clause, the character of an investment protection agreement is a framework treaty, 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.[17] The binding nature of Clause 17 of the JV Agreement in relation to "any dispute arising out of or relating to [the JV] Agreement" is not to be undermined by a general provision in the BIT extending a number of dispute resolution options to investors of two States generally.

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[14] Article 42 (1), ICSID Convention

[15] *Mihir C. Naniwadekar*, The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?

[16] *Schreuer*, 362

[17] *SGS v Philippins* para.141

25. Fourthly, in view of Article II of the New York Convention 1958, this Tribunal is advised to refrain from exercising jurisdiction. Arbitral awards rendered by the JV Agreement dispute settlement mechanism are 'foreign' or 'commercial' awards for the purposes of the New York Convention 1958. In the absence of evidence to the contrary, Clause 17 of the JV Agreement represents a consensus *ad idem* between the Parties as to the arrangement for the resolution of any disputes. A valid choice of arbitration will be enforceable to exclude the jurisdiction of courts under Article II of the New York Convention. As both Beristan and Opulentia have ratified the "New York Convention",[18] both have the obligation to respect and to enforce a private arbitration agreement. According to Article 31.3 of the Vienna Convention on the Law of Treaties, while interpreting a treaty there shall be taken into account, together with the context. among other things, "any relevant rules of international law applicable in the relations between the parties". In addition, under most systems of private international law, a valid exclusive jurisdiction clause will be effective to oust the jurisdiction of otherwise competent courts.[19] In view of the above, Respondent invites this Tribunal to construe the jurisdiction conferred by the BIT in light of the New York Convention, refraining from exercising jurisdiction over this dispute.

26. Fifthly, should this Tribunal exercise jurisdiction over this dispute, there would be potential risk of double recovery for a single loss. Treaty tribunals have considered potential overlap in the jurisdiction of different courts and tribunals over elements of investment disputes. These tribunals saw it as a problem relating to the quantum of damages in the sense of maintaining the prohibition against double recovery for a single loss.[20] However, the situation here is different in the sense that: 1) the current proceeding under Clause 17 of the JV Agreement was initiated by Beritech, the local JV partner, not the foreign "investor"; 2) Respondent is not a party to the ongoing arbitration under the JV Agreement; and 3) in this proceeding, Beritech sought declaratory relief that it properly exercised its rights under the JV Agreement and damages against Claimant. Beritech has paid US$47 million into an escrow account,

[18] Clarification No. 142

[19] Article 23, Brussels Regulation

[20] *Z. Douglas*, The Hybrid Foundations of Investment Treaty Arbitration, (2003) 74 British YB Intl L 152

which has been made available for Claimant and is being held pending the decision in the arbitration. [21] These differences have significant bearings in this case as these mean that Claimant can recover its monetary investment irrespective of any arbitration proceeding. To get payment from buyout is one of Claimant's rights under the JV Agreement and is well protected by the law of Beristan. As this amount is of different nature from compensation for loss, which will be decided by this Tribunal if any, Claimant could receive more than double the payment due to the single "buyout" decision.

27. Therefore this Tribunal should refrain from exercising jurisdiction in view of the one initiated by Beritech under Clause 17 of the JV Agreement.

C. Jurisdiction over contract-based claims by virtue of Article 10 of the BIT

28. Claimant also asserted that Respondent breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking the buyout clause in the JV Agreement. Claimant argues that it can assert these contract claims by virtue of Article 10 of the Beristan-Opulentia BIT.

29. Article 10 of the BIT provides:

> 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.

30. First of all, Respondent is not a Party to the JV Agreement and thus does not assume any obligation regarding Claimant's investment. The prerequisite for application of Article 10 of the BIT is that the State assumes certain obligations with regard to investment directly. The JV Agreement, that Claimant alleged to be in breach of, is between Beritech and Claimant. The only way that Respondent is related to the JV Agreement is its role as guarantor of Beritech's obligations. As guarantor, Beristan would assume the obligations of Beritech under the JV Agreement upon Beritech's default. Since no default has been established so far on the part of Beritech, Respondent should assume no obligations whatsoever under the JV Agreement. Since Respondent

[21] Clarification No. 170

assumes no obligation with regard to Claimant's investment, the umbrella clause is not applicable.

31. This position was supported by the Tribunal dealing with a similar situation in *EDF v Romania*. In that case, EDF's investment in Romania consisted of its participation in two joint venture companies with Romanian entities owned by the Romania, E.D.F. ASRO S.R.L. ("ASRO") and SKY SERVICES (ROMANIA) S.R.L. ("SKY"). In its claim, EDF invoked the umbrella clause in the BIT for its JV-Contract based claims. The tribunal held as follows:

> Claimant's position is untenable since it is based on a misconception of the provision of Article 2 (2) of the BIT [umbrella clause]. This provision, when applied to the present case, clearly refers to obligations entered into by Romania with regard to Claimant's investments. … The references made in this context to the ASRO Contract and the SKY Contract are evidence of Claimant's misconstruction of the umbrella clause. The "obligations entered into," to which Article 2(2) of the BIT refers, are obligations assumed by the Romanian State. The breach of contractual obligations by a party entails such party's responsibility at the contractual level. There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked.[22]

32. Secondly, even if Beritech's actions were attributable to Respondent, the umbrella clause in the BIT does not change the extent and content of the obligations arising under the JV Agreement nor can it make Respondent a party to the Agreement.

33. Still in *EDF v Romania*, the Tribunal observed as follows:

> It is unclear whether Claimant relies on the attribution to the State of certain acts and conduct of AIBO and TAROM on the assumption of their being in breach of the ASRO Contract or the SKY Contract in order to impute to the State the responsibility for such breach. If so, this construction of the umbrella clause would be incorrect since the attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause. … Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, [*footnote:* As held by the *ad hoc* Committee in *CMS v. Argentina*: "The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the person bound by it and entitled

[22] *EDF v Romania*, paras. 316, 317

> to rely on it) are likewise not changed by reason of the umbrella clause" (Decision of September 25, 2007, para. 95(c), emphasis in the text).], nor does it make Romania party to such contracts. …[23]

34. Thirdly, the enforcement of an obligation to observe undertakings actually requires the Tribunal to hold both parties to their contractual bargain, which includes the choice of forum. If Claimant wishes to enforce its Contract, it must do so in accordance with its terms, including the dispute settlement clause under Clause 17 of the JV Agreement. The Annulment Committee in *CGE* reasoned so[24] by citing *Woodruff*, in which the American – Venezuelan Mixed Commission of 1903 had dismissed a claim under a contract with an exclusive jurisdiction clause in favour of Venezuelan courts on the ground that "by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of the Commission".[25]

35. Therefore, the Tribunal has no jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the *Beristan-Opulentia* BIT.

D. Stay Proceedings

36. It is submitted in *arguendo* that even if the Tribunal had jurisdiction to determine the Treaty Claims, because of their intrinsic contractual nature, the current proceedings should be stayed until the arbitral tribunal provided in the JV Agreement has determined the contractual issues.

37. This approach has been adopted in the *SGS v Philippines* case. Faced with the situation where the Philippines' responsibility under the BIT — a matter which did fall within its jurisdiction — was subject to "the factual predicate of a determination" by the Regional Trial Court of the total amount owing by the respondent, the tribunal held that:

> That being so, justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by

[23] *EDF v Romania*, paras. 318, 319

[24] *CGE v Argentina*, Decision on Annulment, para. 98

[25] *Cited*, International Investment Arbitration, para. 4.72

agreement between the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.[26]

38. The view that an ICSID tribunal has the power to stay proceedings awaiting the determination by some other competent forum, of an issue relevant to its own decision, explicit in *SGS v Philippines*, is also present, though impliedly, in the discussion in *SGS v Pakistan*. It should be reminded that despite their seemingly diametrically opposing views, the result of both *SGS* cases were to remit the contract claims for adjudication by the contractual fora, and to exclude those claims, at least initially, from the purview of the ICSID Tribunal. This was so despite the existence of far-reaching dispute settlement provisions and umbrella clauses in the relevant treaties.[27]

39. In the present case, all claims depend on whether Beritech has properly exercised the buyout clause under the JV Agreement, which falls purely into the jurisdiction of the Tribunal under Clause 17 of the JV Agreement, which Beritech has initiated before this Tribunal was constituted. In view that the arbitration proceedings under the JV Agreement will decide whether Beritech has properly exercised the buyout provision, this Tribunal should stay proceedings awaiting the ruling of that Tribunal.

CONCLUSION ON JURISDICTION

40. The tribunal does not have jurisdiction to hear this dispute. This is a dispute arising out of and in all respects related exclusively to the JV Agreement where Beritech and Claimant are Parties. Beritech's acts cannot be attributed to Respondent nor did Respondent assume any obligation under the JV Agreement as guarantor, given that no default by Beritech has been established. Therefore, in essence, this is a dispute between two enterprises and does not satisfy Article 25 of the ICSID Convention. Also, according to the same Article, since the dispute over CWF's act is without "legal nature", it is out of the scope of jurisdiction of this Tribunal.

41. In light of the fact that all claims either arose out of or related to the JV Agreement, this Tribunal is invited to refrain from exercising jurisdiction in view of Clause 17 of the JV Agreement, which set out a valid arbitration agreement and an

[26] *SGS v Philippines,* para. 175

[27] *SGS v Philippines,* para.138

exclusive jurisdiction "in the case of any dispute arising out of or relating to" the JV Agreement. This is not to be undermined by a general provision in the BIT.

42. Furthermore, the Tribunal has no jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the BIT because Respondent assumed no direct obligation with respect to Claimant's investment. Respondent is not a Party to the JV Agreement nor can attribution of Beritech's acts, if any, change the nature of rights and obligation under the JV Agreement. If Claimant wishes to enforce its alleged contract rights, it must do so in accordance with its terms including its dispute settlement clause.

43. Finally in case the Tribunal decides to exercise jurisdiction hearing this dispute, it should stay the current proceeding until the arbitral tribunal established under Clause 17 of the JV Agreement has determined if Beritech had properly exercised the buyout provision, which is the fundamental fact that all claims depend on.

III. MERITS OF THE CLAIM

A. Attribution

44. Claimant's claims on merits are mainly based on the assumption that Beritech's act is attributable to the State. However, this is not true for the following reasons: 1) Beritech is not an organ of the State within the meaning of Article 4 of the ILC Articles; 2) Beritech is not an entity exercising governmental authority within the meaning of Article 5 of the ILC Articles; and 3) Beritech is not acting under the control or direction of Respondent within the meaning of Article 8 of the ILC Articles.

45. The foregoing Articles from the ILC Draft Articles on State Responsibility set out respectively structural, functional and control tests for determining whether an act or conduct by an entity should be attributable to the State. These Articles have frequently been applied by courts and arbitral tribunals as declaratory of customary international law.[28]

(1) Beritech is not an organ of the State

46. Article 4 of the ILC Articles reads as follows:

> Article 4 Conduct of organs of a State
>
> 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 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.

47. In the 2002 Commentary to the ILC Articles it is specified:

> Paragraph 1 of article 4 states the first principle of attribution for the purpose of State responsibility in international law — that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity

[28] *EDF v Romania*, para.187

within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.[29]

48. As stated in ILC Article 4 (2), the State internal law determines whether an entity is a State organ. Beritech is a state-owned company established under Beristan law, enjoying separate and distinct legal personality from that of the State. As there is no law granting Beritech the status of a body of the State, it cannot not be considered as such within the meaning provided by ILC Article 4.

(2) Beritech is not an entity exercising governmental authority

49. Article 5 of the ILC Articles reads as follows:

> Article 5 Conduct of persons or entities exercising elements of governmental authority.
>
> 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 instance.

50. The test to determine when an entity falls within the scope of application of ILC Article 5 is a functional one. As *Crawford* put it,

> [t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that is not subject to executive control — *these are not decisive criteria for the purpose of attribution of the entity's conduct to the State*. Instead, article 5 refers to the *true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority*."[30] (*emphasis* added)

51. Therefore, for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority.

52. In the instant case, firstly there is no evidence that internal law of Beristan had empowered Beritech to exercise any element of governmental authority.

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[29] Crawford, 194

[30] *Crawford*, 100, para.3

53. Secondly, the service provided by Beritech cannot be considered as a service supplied in the exercise of governmental authority under international law. Under the GATS, to which both Respondent and Opulentia are parties (both are members of the WTO[31]), "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers".[32] This GATS provision becomes relevant for interpretation purposes, as Article 31 of the VCLT recommends reference to "any relevant rules of international law applicable in the relations between the parties". When Beritech was established, the Telecommunication sector of Beristan had been privatized for more than 10 years.[33] There is no evidence to believe that Beritech was not competing with other service suppliers or operating on a commercial basis, since the very purpose for every country to initiate privatization is to enhance efficiency of the sector by encouraging profit-seeking private companies. Beritech takes decisions within its own corporate bodies as any other commercial company operating in Beristan. Therefore, according to the GATS definition, it is not supplying service in the exercise of governmental authority.

(3) Beritech is not acting under the control nor direction of Respondent

54. Article 8 of the ILC Articles reads as follows:

> Article 8 Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or the group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.

55. The ILC Commentary makes clear that such attribution is exceptional.

> The fact that the State initially establishes 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. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental

[31] Clarification No. 173

[32] Article I.3 (c), GATS

[33] Clarification No. 166

> authority within the meaning of Article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or *that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State*.[34]

56. Claimant alleges that Respondent was behind the buyout decision. However, there is no proof that Respondent had used its ownership interest to instruct Beritech to carry out the buyout. As a matter of fact, the buyout decision at dispute was allowed by the board of directors of the Joint-Venture at the board meeting where quorum of the board of directors was properly satisfied. Given that Claimant is also a Party to the JV, Respondent could hardly be behind any decision taken by the JV as Claimant always had a say there.

57. Respondent is not attributable as guarantor. As reasoned before,[35] as guarantor Respondent only assumes the obligations of Beritech under the JV Agreement upon Beritech's default, no more no less. Absent Beritech's default, Respondent has nothing to do with the JV Agreement. Also, the fact that Respondent is guarantor to the JV Agreement further proves that Beritech is an independent market player. Otherwise there would have been no need for Respondent to be a guarantor for Beritech's default, as an entity with governmental authority is not supposed to fail. In fact, Beritech was incorporated in March 2007, just a few months before the establishment of Sat-Connect, precisely to leave the State out of the contractual relationship once engaging in the project. This further evidences that the State no longer wishes to play an active role in this sector or in this specific Project.

58. Considering the above, the conduct of Beritech is not attributable to Respondent.

B. Breach of the JV Agreement

59. Claimant alleged that Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement. Firstly we recall the reasoning above that

[34] Crawford, 112–113

[35] *See* para. 11

Beritech's acts are not attributable to Respondent. But in case the Tribunal would find otherwise, Respondent will establish that (1) Beritech did not beach the JV Agreement; and (2) even if Beritech had breached the JV Agreement, Respondent cannot be held liable thereunder.

(1) Beritech did not breach the JV Agreement

60. Firstly, Claimant broke the Confidentiality clause under Clause 4 of the JV Agreement by leaking information to the Opulentian government. This fact was indicated by an article published by the Beristan Times on August 12, 2009, in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. It should be emphasized here that the newspaper article did not serve as basis of the buyout decision although it correctly pointed out the facts. The evidence of the leak shall not be made public as it would be contrary to Beristan's essential security interest. As provided by Article 9 of the BIT:

> nothing in this 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…(*emphasis* added).

61. As will be argued in detail later, the phrase "it considers" bears self-judging nature and it is at the State's discretion to decide whether the disclosure of information is contrary to its essential security interest. Respondent therefore has full right to refuse to disclose the evidence of leak. However, should the Tribunal request so, Beristan would make its best effort to assist the Tribunal provided confidential policy be agreed and observed.

62. Secondly, Beritech is eligible to invoke the buyout clause according to Clause 8 of the JV Agreement. Clause 8 of the JV Agreement provides:

> 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...

63. Furthermore, Clause 4 (4) of the JV Agreements defines material breach of the Agreement as "any breach of this Clause 4 (Confidentiality clause)". Since Claimant breached Clause 4 of the JV Agreement, it is a material breach under the meaning of

Clause 8 and therefore Beritech was entitled to invoke the buyout clause under Clause 8 of the JV Agreement.

64. Thirdly, Beritech was following due procedure to invoke the buyout clause. The buyout decision was made at the board meeting on August 27, 2009. Six directors were present at this meeting. According the Sat-Connect's bylaw which was in conformity with Beristan law,[36] quorum of the board of directors was obtained.[37] The buyout decision was approved by majority of Sat-Connect's board of directors.[38]According to Beristian corporate law, decisions taken by a board of directors can be made by majority, subject to meeting the company's quorum requirement.[39] Therefore Beritech was in full compliance with due process required under the governing Beristian law as well as with Sat-Connect's bylaw.

(2) Respondent cannot be held liable under the JV Agreement

65. Even if Beritech had breached the JV Agreement and Respondent were attributable for such breach, Respondent cannot be held liable under the JV Agreement, to which it is not a party. As previously reasoned, the attribution itself does not render Respondent directly bound by the JV Agreement as it does not change the extent and content of the obligations arising under the JV Agreement.[40]

66. Furthermore, State's responsibility for conducts of an entity that violate a contract cannot be confused with attribution of an entity's wrongdoing which breached Respondent's international obligations. In *Impregilo v Pakistan*, the Tribunal distinguished between governmental acts violating BIT and simple breaches of contract as follows:

> A clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (e.g. a breach of Treaty), and the

[36] Clarification No. 244

[37] Facts 4

[38] Facts 10

[39] Clarification No. 149

[40] *See* para. 32-33

responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e. Impregilo's Contract Claims).[41]

67. Given the different nature of responsibility when a separate entity is responsible for the contractual breach, the State cannot be held directly liable for the breach of the treaty, since its obligation derives from a different source of law, not contractual. Therefore, Respondent, not being a Party to the JV Agreement, shall not be held liable for contract breaches of Beritech. Attribution under international law and liability under a contract for breaches of a separate entity are different standards that must not be confused.

68. Therefore, it cannot be established that Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties. Further, Respondent has nothing to do with Beritech's use of Clause 8 (Buyout) of the JV Agreement. Respondent at this point is outside the contractual relationship. No breach on the part of Beritech was established by the competent forum and therefore Respondent's obligations as guarantor rest dormant.

C. Expropriation

69. Claimant asserted Respondent illegally expropriated its interest in Sat-Connect, because the company now has all of Claimant's contributions of capital, research and development to the Sat-Connect project and did not pay Claimant market-based prices for its interest in Sat-Connect. Claimant's allegation of illegal expropriation was based on a mere transfer of legal title over these assets. Indeed, after the buyout decision, Claimant's interest in the JV Agreement was transferred to Beritech, but not to Respondent. Claimant ignored that *mere transfer of title is not sufficient to establish that expropriation has occurred* for the following reasons: 1) the buyout was not undertaken by Respondent; 2) even if Beritech had improperly exercised the buyout and the State is attributable either for its acts directly or for omission, it does not amount to expropriation.

70. Article 4.1 (2) of the Treaty provides:

[41] *Impregilo v Pakistan*, para. 210

> 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.

71. Like many other BITs, it does not define the term of expropriation and nationalization. Nevertheless the current state of the customary law on expropriation is arguably reflected in the 1987 Restatement (Third) of Foreign Relations Law as follows:

> A state is responsible under international law for injury resulting from:
> (1) a taking by the state of the property of a national of another state that
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provision for just compensation;… [42]

(1) Claimant's property was not taken by the State

72. The first and foremost element of an expropriation is that the property must be taken "by the State". In present case, the buyout which resulted in the interference with Claimant's property rights at issue was not undertaken by Respondent but by a commercial entity completely independent of the State.

73. Firstly, the buyout decision was made by Sat-Connect, the independent joint-venture to which Claimant was a party. It was approved according to Sat-Connect's bylaw which is in conformity with the Beristian law;

74. Secondly, that Beritech invoked the buyout clause under the JV Agreement is irrelevant since even if Beritech had improperly invoked the buyout clause, as reasoned before, Claimant has not presented sufficient evidence to support that Respondent is attributable for Beritech's conduct.[43]

75. In fact, all property rights of Claimant were actually fully maintained until the contractual relationship under the JV Agreement was terminated due to the wrongdoing by Claimant.

(2) Omissions are not sufficient to establish expropriation

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[42] Investor-State Arbitration, 437

[43] *See* paras. 44 - 58

76. Absent evidence that Respondent was behind Beritech's initiative, even if Respondent could be held liable for its omission, as several tribunals have emphasized, "omissions" are not sufficient to establish expropriation. The Tribunal hearing *Eudoro Armando Olguin v Republic of Paraguay* says:

> …For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property. Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place. [44]

77. In the present case, even assuming that the actions taken by Beritech had the effect of depriving Claimant of his property rights, such actions would not amount to an appropriation — or the equivalent — by the State, since it did not benefit Respondent, and was not taken for any public purpose. It only benefited Beritech, an independent entity, which took into account only its contractual concerns.

(3) Expropriation cannot be established for consented take-over

78. Even assuming that Respondent is attributable, the buyout which was reached based upon previous consent cannot be regarded as "expropriation" because Claimant has never been the subject of a compulsory measure. As the *Tradex* Tribunal held:

> As expropriation by definition is a "compulsory" transfer of property rights… and agreement reached in consent with the foreign investor and signed by it … can hardly be seen as an act of expropriation in itself." [45]

79. Once signed the JV Agreement, Claimant had agreed with Beritech not only on the buy-out clause, but also on the related procedures provided by the JV's bylaws. Therefore, once conditions were met, the buyout would be carried out under both Parties' consent endorsed in the Agreement. In this sense, since Beritech was correctly

[44] Eudoro Armando Olguin v Republic of Paraguay (Award) ICSID Case No ARB/98/5 (ICSID, 2001, Oreamuno Blanco P, Rezek & Alvarado), cited in International Investment Arbitration, Para. 8.72

[45] Tradex Hellas SA v Albania (Award), ICSID case ARB/94/2, (ICSID 1999, Bockstiegel P, Fielding & Giardina) cited in International Investment Arbitration, Para. 8.74

excising the buy-out provision upon Claimant's wrongdoing and in accordance with mutually agreed clause, there is no compulsory measure taken by neither Beritech nor Respondent. Hence, no expropriation could be established.

(4) No sovereign authority was engaged in the buyout decision

80. Last but not least, no sovereign authority was engaged in the buyout decision. Even assuming that Beritech had improperly invoked the buyout clause and that Respondent is attributable, it is merely a question of whether Beritech had correctly exercised its rights under the JV Agreement. As the award in *Azurix v Argentina* says:

> Contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract.[46]

81. Since no sovereign authority was engaged throughout the buyout decision, no expropriation shall be found.

D. Fair and Equitable Treatment

82. Claimant alleges that Respondent also breached the fair and equitable treatment standard to which Claimant is entitled under the *Beristan-Opulentia* BIT by reason of the arbitrary and unfair expulsion of Claimant for motives unrelated to Claimant's performance of the JV Agreement, through the abusive exercise of Beritech's rights under Clause 8 of the JV Agreement to buy Claimant out, and the discriminatory efforts to favour local Beristian personnel, who ultimately replaced Claimant's seconded personnel.

(1) Claimant failed to satisfy its burden of proof

83. According to Article 2.2 of the Treaty, investment and investors shall be accorded treatment according to "international customary law" including "fair and equitable treatment" and "full protection and security". However, the burden of proof falls upon Claimant if it is to allege that Respondent failed to accord treatment according to "international customary law".

[46] *Azurix v Argentina,* cited in International Investment Arbitration, para 8.99

84. In *ADF vs. US*, the Tribunal held that:

> The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts…[47]

85. According to *Ioana Tudor*, Four elements appeared fundamental for a FET based claim, namely 1) the action of the host State; 2) the damage to the investor; 3) the causality between these two; and 4) solid factual proof of those to be brought by the investor. Existing case law shows that the arbitral tribunals verify the presence of these four elements on a regular basis. But even in the absence of a clear obligation to fulfill these conditions, a parallel can be drawn with Article 25 of the ICSID Convention. [48]

86. The first element required for a FET claim is an act or omission of the State that allegedly produced damage to the Investor. The act that Claimant was targeting was the expulsion of Claimant through buyout and discriminatory efforts to favor local Beristan personnel. It is not clear to Respondent what are the "discriminatory efforts" that Claimant was referring to. Nevertheless, Respondent will later prove that none of its conducts were discriminatory. Even presuming that Claimant identified the acts as the buyout and CWF's acts, as we reasoned earlier, 1) Respondent is not attributable for Beritech's invoking of the buyout provision;[49] and 2) CWF's acts fall outside the Tribunal's jurisdiction. [50]

87. Secondly, Claimant failed to demonstrate the existence of loss or damage to its investment or a breach of its right. Actually, before its shares were bought out, Claimant enjoyed full fruit of its investment. Respondent points out that it is not clear in Claimant's contentions what are the rights that were allegedly expropriated. As an illustration, Claimant makes reference to "intellectual property rights" and "know-how". However, under the terms of the JV Agreement, these were all assigned to Sat-Connect. Claimant did not have legal title over them anymore. It is of no surprise that Claimant

[47] ADF v US, Para.154

[48] *Tudor Ioana*, 134

[49] *See* paras. 44-58 on Attribution

[50] *See* paras. 13-17

can hardly raise such an expropriation claim, since all these rights go with the interest in Sat-Connect.

88. Thirdly, Claimant failed to establish a direct causal link between the act or omission attributable to the State and the damage alleged by the investor. As Claimant failed to establish attribution of the buyout decision, which directly resulted in transfer of Claimant's property, to Respondent; and as the removal of Claimant's personnel by CWF happened only after the transfer of property, there is no casual link between Respondent's act and the alleged damage.

(2) Respondent treated Claimant and Claimant's investment fairly and equitably in accordance with customary international law

i. Customary international law

89. Article 2.2 of the BIT provides:

> Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, *including* fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party.(*emphasis* added)

90. By using the word "including" after "customary international law", Article 2.2 of the BIT specifies that the fair and equitable treatment guaranteed under the Treaty is part of customary international law. Under customary law, foreign investors are entitled to a certain level of treatment, and any treatment which falls short of this level, gives rise to responsibility on the part of the State. Fair and equitable has been identified as one of the elements of the minimum standard of treatment of foreigners and of their property, required by international law, the content of which is embodied in the *Neer* case. [51] According to the *Neer* case, for the FET obligation to be breached, the tribunal has to find that:

> The governmental action in question was willfully wrong, actually malicious, or so far beyond the pale that it cannot be defended among reasonable members of the international community.

91. As reasoned before, Beritech's buyout initiative cannot be attributed to Respondent and it was not Respondent's intention to interfere with any rights of

[51] OECD Working Paper on FET, 8

Claimant under the JV Agreement. In addition, as will be argued below, all Respondent's actions are based on good faith and can all be justified under the essential security exception.

92. Even adopting an evolutionary view of fair and equitable treatment under customary international law, Respondent is still in compliance with its requirements.

ii. Beritech was following due process to exercise the buyout right and Claimant was not subject to arbitrary treatment or denial of justice

93. Independently of the threshold at which the FET standard is applied in a determined case, the breach of FET occurs when it is shown that an Investor has been treated in such an unjust and arbitrary manner "that the treatment rises to the level that is unacceptable from the international perspective".[52]

94. Under the present case, firstly, Beritech's conduct to resort to certain contractual remedies was not, as such, subject to procedural requirements. The main contractual mechanisms which eventually led to the expulsion of Claimant cannot to be subject to procedure review under the Treaty. This was confirmed by the Tribunal hearing *Bayindir v Pakistan* in a similar situation as follows:

> This said, the Tribunal considers that, under the present circumstances, the decision of NHA, in consultation with the government, to resort to certain contractual remedies and the related preparatory discussions and assessments were not as such subject to procedural requirements other than those contractually agreed. In this connection, the Tribunal has concluded … that the main contractual mechanisms which eventually led to the expulsion of Bayindir … had not been used in a manner that amounts to a breach of the Treaty …[53]

95. More importantly, even assuming for the sake of the analysis that due process and procedural fairness govern the internal processes underlying the exercise of contractual rights, Claimant was indeed given the opportunity to present its position on numerous occasions throughout the relevant period. The directors appointed by Claimant were well informed to attend the board meeting on 21 and 27 of August 2009, where the leak of information and buyout were discussed. In addition, Beritech filed a

[52] Tudor Ioana, 152

[53] Bayindir v Pakistan, Para.346

request for arbitration under Clause 17 of the JV Agreement, where Claimant could have its "day in court", with the opportunity to present its claims and make its case. Also, as mentioned before, Beritech was following due process while invoking the buyout clause.[54]

96. Last but not least, it was Claimant who acted in bad faith against Beritech since: 1) some directors appointed by Claimant speculated that the buyout would be discussed at the August 27, 2009 meeting and decided not to attend the meeting and thus deprive it of the necessary quorum;[55] and 2) it was Claimant's strategic decision not to respond to the arbitration request under Clause 17 of the JVA out of fear to lose its standing in ICSID.[56] Therefore it was Claimant who attempted to bar the functioning of due process.

iii. Claimant must take Beristan's law as Claimant finds it

97. It is for the host State to decide for itself the legal framework which it will apply to foreign investments in its territory. It follows that, in the absence of some specific representation to the contrary, the investor is bound by host State law at the date of the investment, and cannot bring a complaint of unfair treatment for a subsequent faithful application of it.[57] The Permanent Court of International Justice (PCIJ) in the *Oscar Chinn* case made it clear that the investor must take the conditions of the host State as it finds them. It cannot make a subsequent complaint if its investment fails merely because of laws, policies or practices which were in place at the time of investment, and which were, or ought to have been, well known to the investor before making the investment.

98. The implication of this principle is tantamount for this case. Firstly, Claimant came to invest with acknowledgement of Respondent's law, which remains the same throughout the investment. The JVA buyout provisions and Sat Connect bylaws are in conformity with Beristan law.[58] Claimant should have foreseen the application of these

[54] See para. 64

[55] Clarification No. 208

[56] Clarification No. 256

[57] International Investment Arbitration, Para. 7.105

[58] Clarification No. 244

rules by either party. That is to say that the buyout of Claimant's share, following the buyout provision and Sat-Connect's bylaw, both in conformity with the laws of Beristan, could be foreseen and should be expected.

99. Secondly, Beristan and Opulentia have long had polite yet tense relations. Given the sensitivity of the Project, Claimant should have foreseen Respondent's reasonable action in response to any potential national security threat.

iv. Discrimination

100. Claimant accused Respondent's alleged discriminatory efforts as violations of fair and equitable treatment. Setting aside the question of which discriminatory efforts Claimant was referring to, it shall be reminded that discrimination is not *per see* prohibited by customary international law.[59] As the editors of *Oppenheim* put it,

> A degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law. [60]

101. As the fair and equitable treatment accorded by the Treaty is limited to international customary law, the burden lies with Claimant to establish a specific rule of customary international law prohibiting discrimination of the type that was complained about.

102. Even if Claimant could establish that discrimination is within the standard of fair and equitable treatment, Respondent did not apply any discriminatory measures to Claimant nor its investment. The discriminatory efforts that Claimant alleged were based on comparison between locally hired Beristian workers *vis-à-vis* Claimant's seconded personnel. However, the discriminatory measures from which investors are protected under the BIT concern "investment", not the personnel. In other words, it is at the enterprises' discretion whom to hire or not. Discrimination, if any, would be towards Claimant's personnel, not Claimant. Claimant's standing to bring such a claim on behalf of its personnel under the BIT is unattainable. Therefore, the expulsion of Claimant's personnel is irrelevant as far as discrimination is concerned.

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[59] International Investment Arbitration, Para. 7.118

[60] *Oppenheim,* 932

103. Furthermore, the so-called "expulsion" was lawful and a later development is irrelevant. Article 2.3 of the BIT provides that:

> Both Contracting Parties shall ensure that the 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 be subject to unjustified or *discriminatory measures*. (*emphasis* added)

104. Claimant cannot assert that the measure at issue is discriminatory merely based upon the effect of the measure but not the intent. In other words, the result of the expulsion, i.e., who was finally hired to replace Claimant's personnel, is irrelevant to determine whether it is a discriminatory measure falling under Article 2.3 of the BIT. It should be reminded that the non-discrimination element under FET is different from the requirement of national treatment. While the national treatment requirement focuses on whether the investor has been treated less favorably,[61] the FET standard, by using the phrase "discriminatory measure", targets at the intent of the measure.

v. Respondent was providing treatment higher than fair and equitable treatment for Claimant concerning its investment and this stance is consistent.

105. Yet Respondent was providing a higher level of treatment to Claimant. By agreeing to be a guarantor and co-signing the JV Agreement, Respondent was using its sovereign authority to provide Claimant with a guarantee against Beritech's default. An equivalent guarantee could only otherwise be obtained through commercial means at a cost. This is another evidence of Respondent's effort to improve the investment environment. However, this good faith move cannot be taken as tolerance for Claimant's own failure in performing the JV Agreement.

E. Essential Security

106. Even if Respondent is to be found liable for any breach of obligations under the BIT, it can invoke Article 9 of the BIT on Essential Security to justify any BIT non-conforming measures.

107. Article 9 of the BIT provides:

[61] Article 3 of the BIT.

> 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.

(1) Claimant's leak of information of the Sat-Connect Project threatened Beristan's essential security interests

108. Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia. Euphonia is a region encompassing almost one-fifth of the world's surface, which includes Beristan and Opulentia together with five other countries, and the Euphonian Ocean. Recently there was legislation in Opulentia compelling disclosure of encryption ciphers, keys, and pads to national security services. Claimant itself acknowledged that it had received requests for disclosure of said information from the government of Opulentia. Since the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces, directly implicate the national security of Beristan and given that Beristan and Opulentia have long had polite yet tense relations, the leak of information from Sat-Connect Project posed a national security threat.

109. The national security that Respondent aims to protect concerns safety of a nation and its people, institutions, etc., especially from military threat or from espionage, terrorism, etc. This is of essential importance for a sovereign State and therefore undisputedly belongs to "essential security interests" under the meaning of Article 9 of the BIT. In addition, it is recalled that the Agreement on Government Procurement (GPA) also contains a security exceptions provision that allows WTO members to derogate from the obligations under the GPA when it comes to **essential security interests** relating to "[. . .] procurement indispensable for national security or for national defence purposes".[62] As reasoned in Paragraph 53 *supra*, reference to WTO law for interpretation purposes is recommended by the Vienna Convention of the Law of Treaties.

(2) Respondent is entitled to self-judge the state of necessity

[62] Article XXIII:1, GPA

i. Ordinary meaning of "it considers" implies the self-judging nature of the essential security defense under the BIT

110. According to Article 31 of the Vienna Convention of the Law of Treaties:

> 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.

111. Firstly, the ordinary meaning of "*it considers*" in Article 9 of the BIT clearly indicates that Parties to the Treaty have full discretion to judge whether the measure at issue is necessary or not for the protection of its own essential security interest and that it should not be subject to second guess by the Tribunal.

112. Secondly, this interpretation is in line with the context and object and purpose of the BIT. The Preamble of the BIT demonstrate that the protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and improving the Parties' economic cooperation. This calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investment, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the whole aim of improving economic cooperation. In other words, the level of protection afforded by the BIT was counterbalanced by the State's right to self-judge matters concerning its essential security interest. Should this right be denied, the balance of the Treaty would be undermined and any State would hesitate to accept investment treaties of this kind.

ii. Jurisprudence justifies the self-judging character

113. This can be illustrated by a number of arbitral awards concerning the legality of emergency measures taken by Argentina in response to its economic crisis at the beginning of this century. It should be noted first that none of the essential security clauses in these BITs contains the phrase "it considers".

114. In these awards, the tribunals had to decide whether these emergency actions were covered by the national security exception included in the BIT between Argentina and the United States (1991). Whereas in the cases of *Suez and ors v Argentina, CMS v Argentina, Enron v Argentina* and *Sempra v Argentina* the tribunals ruled that the

exception was inapplicable, the tribunals in *LG&E v Argentina* and *Continental Casualty v Argentina* came to the opposite conclusion. However, despite this discrepancy in rulings, the fact that the language of the essential security clause under the BIT between Argentina and the US did not specify self-judgment greatly favored adverse rulings. In particular, by applying a textual approach and comparing the BIT exception with differently worded provisions such as GATT article XXI, the *CMS* tribunal observed that:

> …when States intended to create for themselves a right to unilaterally determine the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they did so expressly.[63]

115. It should be reminded that the essential security clause under the Beristan-Opulentia BIT embraced identical language as in Article XXI(b) of the GATT 1994, which prescribes that "nothing in the GATT agreement shall be construed to prevent any Contracting Party from taking any action *which it considers necessary* for the protection of its national security". (*emphasis* added)

iii. Intention of the drafters

116. The very fact that only some of the Treaties are drafted to be explicitly self-judging, while others are not, indicates the Parties' deliberate intention to self-judge when this is the case. Respondent refers to the 2004 US Model BIT and to the Canada Model FIPA as illustrations of this notion.[64].

117. In addition, the drafting history of Article XXI of the GATT 1947 where the phrase "it considers necessary" first came into being verifies the self-judging nature of this phrase.

118. During discussions in the Geneva session of the Preparatory Committee, in response to an inquiry as to the meaning of "essential security interests", it was stated by one of the drafters of the original Draft Charter that:

> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. …We have got to have some

[63] *CMS v Argentina,* Para. 370

[64]OECD Report 2007, 99

> exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons.… [65]

119. Furthermore, during the discussion of the complaint by Czechoslovakia at the Third Session in 1949, it was stated, *inter alia*, that "*every country must be the judge in the last resort on questions relating to its own security…*".[66]

120. Therefore the drafting history and the interpretation given to the "it considers necessary" language, embedded both in the Beristan-Opulentia BIT and in the GATT, further evidence the self-judging nature of Article 9 of the Beristan-Opulentia BIT.

iv. Necessity test under Customary International Law is not applicable

121. The *CMS, Enron*, and *Sempra* tribunals considered the treaty-based emergency exception (Article XI of the Argentina-US BIT) as too imprecise and found that it had to be concretized with reference to the relevant customary law as codified in Article 25 of the ILC Draft Articles on State Responsibility, which reads as follows:

> 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 that 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.

122. However, resort to international customary law is not applicable here for the following reasons:

123. First, as reasoned above, in present case, the BIT specifically includes self-judging language to grant the Parties the right to self-judge necessity to invoke the exception under Article 9 of the BIT. Therefore, no ambiguity exists in the treaty language and customary law has no role in giving substance for its interpretation;

124. Secondly, as the Tribunal hearing *Continental Casual v Argentina* observed, in view of these differences between the situation regulated under Article 25 ILC Articles

[65]UN Document, EPCT/A/PV/33, p. 20-21 and Corr.3; *See* also EPCT/A/SR/33, p. 3.

[66]GATT Document, GATT/CP.3/SR.22, Corr. 1.

and that addressed by Article 9 of the BIT, the conditions of application are not the same:

> The strict conditions to which the ILC text subjects the invocation of the defence of necessity by a State is explained by the fact that it can be invoked in any context against any international obligation. Therefore 'it can only be accepted on an exceptional basis.' This is not necessarily the case under Art. XI according to its language and purpose under the BIT. This leads the Tribunal to the conclusion that invocation of Art. XI under this BIT, as a specific provision limiting the general investment protection obligations (of a "primary" nature) bilaterally agreed by the Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law. [67]

125. Thirdly, there is a distinction between the emergency exception in treaty law and the necessity defense under the customary law of State responsibility. The necessity defense under the law of State responsibility is considered only when a breach of the (primary) treaty obligation is established; that is, when the emergency exception in the treaty is found to be inapplicable.[68]As the *CMS* Annulment Committee observed, the ILC's position had been to consider the necessity defence under customary law as part of the secondary rules of international law and held that:

> [i]n this case, the [*CMS*] Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.[69]

(3) Respondent was acting in good faith

126. The Vienna Convention on the Law of Treaties (article 26) requires states to carry out their commitments in good faith. Despite the self-judging nature of the national security defense under the Treaty, Respondent was acting in good faith.

127. According to the UNCTAD Report 2009, it has been suggested that the good faith principle should include two elements: firstly, whether the State has engaged in honest and fair dealing, and secondly, whether there is a rational basis for the assertion

[67] *Continental Casualty vs Argentina*, Para. 167

[68] Christina Binder, 165 in International Investment Law for the 21st Centenary

[69] *CMS v Argentina* Decision on Annulment, Para.134

of the national security exception. Thus, for a national security exception to be invoked in good faith, the question a tribunal must ask is whether a reasonable person in the State's position could have concluded that there was a threat to national security sufficient to justify the measures taken.[70]

128. Firstly, Respondent did not interfere with the JV Agreement performance. By the time the CWF was sent, Claimant was already bought out following the submission by Beritech and the decision by Sat-Connect's board of directors.

129. Secondly, the CWF is a non-fighting section of the army. It is the civil engineering section of the Beristian army and was used to secure and protect the facilities on the site. Although those Claimant's employees who still remained were asked by the CWF to leave the facilities, they left Beristan voluntarily.[71]

130. Thirdly, by the time of interference, the systems and network in the Sat-Connect Project were to become operational and interference for national security reasons was grounded. Since the technology is for civil and military use as well, the deploying process might prompt the use of confidential data essentially important for national security. Setting aside the past leak, in the wake of Opulentia's new legislation compelling disclosure of encryption ciphers, keys, and pads to national security services and taking into account that Claimant was approached by the Opulentian government,[72] it is absolutely reasonable for Respondent to take precautionary measures against the possibility of leak of key information. This is to add to Respondent's contention that it knew from reliable sources that Claimant indeed leaked information of the Project. National security interest cannot be at risk and a precautionary approach is to be expected from any diligent State.

(4) Respondent's financial liability if any shall be excused

131. Since Respondent's actions are justified under Article 9 of the BIT, its financial liability for breach of its BIT obligations, if any, shall be excused.

[70] UNCTAD Report, 62

[71] Clarification No. 248 & 204

[72] Clarification No. 178

132. Firstly, the BIT does not intend to exclude any provision of the Treaty from the scope of application of the "essential security" exception. This is evidenced by the treaty language:

> "*nothing in this Treaty* shall be construed to preclude a Party from applying measures that it considers necessary … for the protection of its own essential security interests"(emphasis added),

133. Secondly, should Article 9 of the BIT be interpreted as not applying to financial liability, it will render this article meaningless. The principle of effectiveness in treaty interpretation would bar any such construction. It should be reminded that expropriation is *per se* permitted if certain conditions are satisfied, including immediate full and effective compensation. In other words, without compensation, to expropriate would be perceived as illegal under the BIT. The logic is that should the measure be justified under Article 9 of the BIT, the State should be entitled to violate the expropriation provision, which means it could expropriate without compensation. In short, if the State still had the duty to compensate, it would be complying with the requirement of the BIT expropriation provision, making the security exception a meaningless empty shell.

134. Thirdly, if the Parties did not intend to extend the exception to certain provisions, they would specify so in the Treaties. The Energy Charter Treaty (1994) is an illustration as it specifies that:

> This Article [treaty exception] shall not apply to Articles 12 (Compensation for losses), 13 (Expropriation) and 29 (Interim provisions on trade related matters).

135. Without such an express language clarifying the parties' will, the BIT shall not be interpreted deviating from its ordinary meaning, object and purpose and context.

136. Fourthly, similarly to the reasoning above,[73] customary international law as codified in Article 25 of the ILC Articles does not apply here. As opinioned by the *CMS* annulment committee:

> [the treaty exception of] Art. XI, unlike the [customary international law] defense of necessity which was only a 'secondary' rule, was a 'primary' rule that excludes all liability under the BIT.[74]

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[73] *See* paras. 121-125

[74] *CMS v Argentina*, Decision on Application for Annulment, para.160

137. Since customary international law is not applicable here, Article 9 of the BIT shall be read to excuse all liability, if any, under the BIT, including financial ones.

CONCLUSION ON MERITS

138. Respondent did not breach the JV Agreement since it was not a Party to it. The buyout decision which led to the expulsion of Claimant followed due process in accordance with the JV Agreement and was in compliance with the JV's bylaws, which are in conformity with the law of Beristan. It did not amount to expropriation under the meaning of the BIT. Respondent was acting in full compliance with international law and had accorded more than fair and equitable treatment to Claimant. Furthermore, in case Respondent be found in breach of any obligation under the BIT, its measures could be justified under Article 9 of the BIT for essential security reasons. Accordingly, Respondent shall be excused from any liability including financial ones for BIT breaches, if any.

IV. CONCLUSION

139. For the foregoing reasons, Respondent requests that the tribunal deny jurisdiction to hear these claims and, if not, find for Respondent on the merits.

* * *

Respectfully submitted on September 19, 2010 by

Team MOSLER

On behalf of Respondent

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN