

**FOREIGN DIRECT INVESTMENT MOOT  
22-24 OCTOBER 2010**

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**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**In the Proceeding Between**

**TELEVATIVE INC.**  
[Claimant]

**vs.**

**THE GOVERNMENT OF THE REPUBLIC OF  
BERISTAN**  
[Respondent]

**MEMORIAL FOR RESPONDENT**

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## LIST OF ABBREVIATIONS

[ ]	Paragraph
<b>BIT</b>	Bilateral Investment Treaty
<b>Convention</b>	ICSID Convention
<b>e.g.</b>	Exempli gratia
<b>ed.</b>	Edition
<b>et al.</b>	<i>Et alia</i> (and others)
<b>et seq.</b>	Et sequens (and the following ones)
<b>FET</b>	Fair and equitable treatment
<b>i.e.</b>	<i>Id est</i> (that is)
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	Convention on the Settlement of Investment Disputes between states and Nationals of other States
<b>ILC</b>	International Law Commission
<b>Sat-Connect</b>	Sat-Connect SA
<b>NAFTA</b>	North American Free Trade Agreement
<b>No.</b>	Number
<b>p./pp.</b>	Page/ pages
<b>SCC</b>	Stockholm Chamber of Commerce
<b>v</b>	Versus
<b>VCLT</b>	Vienna Convention of the Law of Treaties
<b>Vol.</b>	Volume

## STATEMENT OF FACTS

1. On **1 January 1997**, Beristan (“Respondent”) and Opulentia entered into a Bilateral Investment Treaty (BIT).<sup>1</sup> Both countries are ICSID Contracting States and have ratified the ICSID Convention.<sup>2</sup>
2. On **30 January 1995**, Televative (“Claimant”), a privately held company, was incorporated in Opulentia.<sup>3</sup>
3. In **March 2007** Respondent established a state-owned company, called Beritech. Respondent owns 75% interest in the company. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors, who have close ties to the Respondent.<sup>4</sup>
4. On **18 October 2007** Beritech and Claimant signed a joint venture agreement (the “JV Agreement”) and establish Sat-Connect S.A. Respondent co-signed the JV Agreement as guarantor of Beritech’s obligations.<sup>5</sup>
5. On **12 August 2009**, the Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Claimant personnel who had been seconded to the project.<sup>6</sup>
6. On **27 August 2009** the majority of Sat-Connect’s board of directors invoked the buyout clause (Clause 8) JV Agreement on the basis of the confidentiality provision in the JV Agreement (Clause 4).
7. On **28 August 2009**, Beritech served notice on Claimant requiring the latter to hand over possession of all Sat-Connect sites within 14 days.<sup>7</sup>

A. \_\_\_\_\_  
B.

<sup>1</sup> Clarifications 174.

<sup>2</sup> Record, Annex 2, [15].

<sup>3</sup> Record, Annex 2, 16 [1].

<sup>4</sup> Record, Annex 2, 16 [2].

<sup>5</sup> Record, Annex 2, 16 [3].

<sup>6</sup> Record, Annex2, 17 [8].

<sup>7</sup> Record, Annex 2, 17 [10].

8. On **11 September 2009**, on the basis of an executive order,<sup>8</sup> staff from the Civil Work Force (“CWF”) secured all sites and facilities of the Sat-Connect project.<sup>9</sup>
9. On **19 October 2009**, Beritech filed a request for arbitration against Claimant under Clause 17 of the JV Agreement. Beritech has paid US\$47 million into an escrow account.<sup>10</sup> Claimant has refused to accept this payment and has refused to respond to Beritech’s arbitration request.<sup>11</sup>
10. On **28 October 2009**, Claimant requested arbitration in accordance with ICSID.<sup>12</sup>
11. On **1 November 2009**, the ICSID Secretary General registered for arbitration this dispute brought by Claimant against Respondent.<sup>13</sup>

A. \_\_\_\_\_  
B.

<sup>8</sup> Clarifications 155.

<sup>9</sup> Record, Annex 2, 17 [11].

<sup>10</sup> Record, Annex 2, 18 [13].

<sup>11</sup> Record, Annex 2, 18 [13].

<sup>12</sup> Record, Annex 2, 18 [14].

<sup>13</sup> Record, Annex 2, 18 [16].

## **SUMMARY OF ARGUMENTS**

12. **JURISDICTION:** Respondent requests this Tribunal to decline jurisdiction over the presented claims. First, the claims submitted before this Tribunal should be resolved under Clause 17 JV Agreement and have been mischaracterised as treaty claims. Second, the existence of Article 10 BIT does not by itself permit this Tribunal to assume jurisdiction over the present claims. The context, vague wording of the provision and commercial nature of the contract claims excludes the possibility of jurisdiction over these claims. Third, the claims are inadmissible.
13. **MERITS:** First, Respondent has not materially breached the JV Agreement. The buyout was a justified decision by the board of directors of Sat-Connect on the basis of Clause 8 and 4 JV Agreement. Respondent as a State was obliged to secure Beritech's contractual rights. Second, Claimant's investment not been expropriated through the buyout and the removal of Claimant from the Sat-Connect project. Claimant is still owner of the shares and the removal was a legitimate action of the Respondent state. Alternatively, the expropriation was lawful. Respondent took no discriminatory actions against Claimant and treated it in accordance with customary international law. Third, Respondent is entitled to rely on Article 9 as a defence to Claimant's claims.

## ARGUMENTS

### PART ONE: JURISDICTION

14. Respondent respectfully challenges the jurisdiction of the present Tribunal in accordance with Rules 41(1) and 41(6) ICSID Arbitration Rules and requests it to decline jurisdiction over the present dispute. Claimant instituted the proceedings before this Tribunal on 28 October 2009 in accordance with ICSID Rules.<sup>14</sup> Respondent, however, will demonstrate that this case falls outside ICSID jurisdiction and is inadmissible.
15. The Tribunal may rule on its competence, under Article 41 ICSID Convention, in accordance with the universally accepted principle of *Kompetenz-Kompetenz*. Registration of the dispute does not affect the competence of this Tribunal or preclude the possibility of submitting jurisdictional objections by any party.
16. Respondent challenges jurisdiction of this Tribunal due to the purely contractual nature of claims. The alleged claims have to be referred to the competent forum under Clause 17 JV Agreement<sup>15</sup> and have been improperly formulated as claims arising under the Beristan-Opulentia Bilateral Investment Treaty [BIT].
17. Respondent submits that this Tribunal lacks jurisdiction in view of Clause 17 JV Agreement (I). It also maintains this in the context of Article 10 BIT (II), and in any event the contract claims are inadmissible and need to be dismissed (III).

#### **I. THIS TRIBUNAL HAS NO JURISDICTION IN VIEW OF CLAUSE 17 JV AGREEMENT.**

18. Respondent argues that clause 17 JV Agreement is the appropriate forum for the presented contract claims (A); the narrow wording of Article 11 BIT does not encompass contractual claims presented by Claimant (B); in any event, Respondent is only guarantor and not party to the JV Agreement with Claimant, thereby creating no BIT obligations (C).

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<sup>14</sup> Record, Annex 2, 18,[14].

<sup>15</sup> Record, Annex 3,19.

Alternatively, if this Tribunal assumes that presented claims constitute treaty claims, Respondent submits that the acts at issue are not attributable to the State as no “measure” by Respondent is alleged and Beritech is not a State organ (**D**). Finally, jurisdiction needs to be rejected because Claimant has not fulfilled the waiting period requirements under Article 11 BIT (**E**).

**A. Clause 17 JV Agreement is an exclusive choice of forum clause, which must be given priority.**

19. Clause 17 JV Agreement contains the obligation to resort exclusively to the 1959 Beristan Arbitration Act, as it requires that disputes “arising out of or relating to this agreement”<sup>16</sup> be referred to the arbitration under the laws of Beristan. The substance of all claims against Respondent is invocation of the buyout clause and the subsequent deployment of the CWF to enforce the buyout. The invocation of the buyout clause is a dispute arising directly out of the JV Agreement. The sending of the CWF which constitutes an enforcement of the buyout is an issue “relating” to the JV Agreement.

20. As signatory, Respondent is a party to the dispute resolution clause in the JV Agreement.<sup>17</sup> Respondent, having co-signed the agreement, “may be deemed to have assumed obligations to arbitrate”<sup>18</sup> under the contract it guarantees. Any liability for contract claims arising out of the JV Agreement can only be resolved under Clause 17 therein.

21. Clause 17 is an exclusive forum selection clause providing for arbitration under the 1959 Beristan Arbitration Act.<sup>19</sup> The Law of Beristan, which governs the JV Agreement, incorporates the UNIDROIT Principles.<sup>20</sup> Article 4.1 UNIDROIT Principles requires the intention of the parties to be given effect. Clause 17 explicitly states that both parties waive any objection to arbitration proceedings and “irrevocably submits to the jurisdiction

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<sup>16</sup> Record, Annex 3, 19.

<sup>17</sup> *Development Bank of Philippines v Chemtex Fibres*.

<sup>18</sup> Born, 670.

<sup>19</sup> Record, Annex 3, 19.

<sup>20</sup> Clarifications 136.

of the arbitral tribunal constituted for any such purpose”<sup>21</sup>. Thus, the intention of the parties to arbitrate disputes under the JV Agreement exclusively in accordance with Clause 17 is clear.

22. In addition, Article 4.5 UNIDROIT Principles requires that terms of contracts be interpreted such as to make them effective. Hence, Clause 17 JV Agreement should be interpreted such as to prevent redundancy.

23. The use of the term “may” in the second sentence of the clause only refers to the serving of notice.<sup>22</sup> Article 4.4 UNIDROIT Principles requires that terms be interpreted having regard to the entirety of the statement. The clause states that “any party may give notice”.<sup>23</sup> The option applies only to the service of notice to the other party. The latter part of Clause 17 JV Agreement requiring arbitration to the exclusion of any other remedy remains unaffected.

24. To avoid negative consequences, Respondent emphasises the significance of giving effect to the common intention of the parties, apparent in Clause 17 JV Agreement. Not enforcing this explicit agreement would render Clause 17 redundant, contrary to the law of Beristan according to which the clause is effective and binding on the parties. By assuming jurisdiction over disputes subject to Clause 17, the Tribunal would erode contractual certainty.<sup>24</sup> Claimant could also abuse its rights by engaging in forum shopping. Finally, multilateral conventions like the New York Convention, supporting forum selection clauses, would be compromised. If forum selection clauses are denied efficacy, a clash with other international instruments preserving the sanctity of choice of forum agreements may be inevitable.

25. In light of the above, Clause 17 JV Agreement has been established as the exclusive forum for resolution of this dispute. Additionally, the claims presented before this Tribunal are all contractual (1) and the efficacy of exclusive forum selection clause is accepted by several internationally accepted principles (2).

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<sup>21</sup> Record, Annex 3, 19.

<sup>22</sup> Record, Annex 3, 19.

<sup>23</sup> Record, Annex 3, 19

<sup>24</sup> Douglas, 365.



**1. The claims are contractual in nature and therefore need to be referred to the exclusive choice of forum clause.**

26. Exclusive jurisdiction under Clause 17 JV Agreement is not overridden by Article 11 BIT<sup>25</sup> because the presented claims are contractual in nature. It is common practice in international investment arbitration that contractual forum selection be honoured in cases where contract claims are asserted.<sup>26</sup> The leading case for distinction between treaty and contract claims is the Annulment decision in *Vivendi*. The committee acknowledged that when the fundamental basis of a claim is a contractual breach, the choice of dispute settlement made by the parties in their contract should be honoured.<sup>27</sup> This means that a forum selection clause ousts the competence of a treaty tribunal over alleged contract claims. Subsequently, the differentiation of treaty and contract claims was adopted by a number of other tribunals and can be regarded as common practice.<sup>28</sup>

27. Respondent submits that no violation of international law occurred through the invocation of the buyout clause (Clause 8 JV Agreement<sup>29</sup>) and removal of Claimant from the Sat-Connect sites. This Tribunal is kindly requested to scrutinise the claims on an objective basis and establish at this stage whether the presented claims are contractual in nature or involve international law breaches.<sup>30</sup> Claimant's mere assertions of the existence of Treaty breaches will not suffice to reach a determination on jurisdiction. Claimant also must establish that the claims in fact constitute a breach of the BIT.

28. Respondent will illustrate that the alleged claims are contractual in nature. There is no general definition of what constitutes an international breach. Relevant in this respect are the findings of a "breach" of international law under ILC. The finding of a breach depend

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<sup>25</sup> Record, Annex 1, 13.

<sup>26</sup> *Vivendi v Argentina*, Annulment Decision; *Azurix v Argentina*, Decision on Jurisdiction; *SGS v Pakistan*, Decision on Jurisdiction; *Impregilo v Pakistan*, Decision on Jurisdiction; *Bayindir v Pakistan*, Decision on Jurisdiction; *CMS v Argentina*, Decision on Jurisdiction.

<sup>27</sup> *Vivendi v Argentina*, Annulment Decision [98].

<sup>28</sup> *CMS v Argentina*, Decision on Jurisdiction, [70-73], *SGS v Pakistan*, Decision on Jurisdiction, [146-174] *Azurix v Argentina*, Decision on Jurisdiction [75-85], *Enron v Argentina*, Decision on Jurisdiction [89-94]; *Siemen v Argentina*, Decision on Jurisdiction [174-180]; Schreuer, "Calvo's Grandchildren", 8.

<sup>29</sup> Record, Annex 3, 19.

<sup>30</sup> *SGS v Philippines*, Decision on Jurisdiction [157]; *Occidental v Ecuador* [80]; *Noble Energy v Ecuador* [151]; *Impregilo*, [237-254]; *Bayindir*, [197].

solely on what the State is obliged to do or refrain from doing, and whether it complied with that obligation.<sup>31</sup> The ILC commentary states in Article 4 that a breach of a contract by a State clearly does not result in a breach of international law. Something further is required before international law becomes relevant.<sup>32</sup>

29. Guidance can also be found in the Annulment decision of *Vivendi*.<sup>33</sup> The ad hoc committee held that a breach of the BIT must be considered by reference to international law, whereas a contract breach must be determined by reference to the *lex contractus*.<sup>34</sup> Furthermore, a treaty cause of action requires a clear showing of conduct which is contrary to the relevant treaty standard.<sup>35</sup>

30. Applying these principles, the invocation of the buyout clause and the sending of the CWF do not amount to a breach of the BIT. The invocation of the buyout by the board of directors of a private entity is an exercise of contractual rights contained in the JV Agreement. Since the logical consequence of an invocation of a buyout clause is its enforcement, Claimant cannot recast the termination of its participation in the joint venture as an unlawful expropriation, discrimination and breach of fair and equitable treatment.

31. As a signatory of the JV Agreement, Claimant was well aware that a breach of the confidentiality clause (Clause 4 JV Agreement<sup>36</sup>) would result in a buyout of interests under Clause 8 JV Agreement. Respondent as a State was under an obligation to secure the sites and facilities in order to safeguard the decision of a buyout. This supportive measure was linked to the buyout and is therefore also a matter that needs to be resolved under Clause 17 JV Agreement. The allegations of Claimant that the conduct of Respondent breached the full protection and security provision ignores the fact that States are under an obligation to enforce contractual rights in their territories by virtue of national security grounds. Consequently, the claims that the buyout clause was improperly

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<sup>31</sup> ILC Commentary [6] to Article 4.

<sup>32</sup> ILC Commentary [6] to Article 4.

<sup>33</sup> *Vivendi v Argentina*, Annulment Decision.

<sup>34</sup> *Vivendi v Argentina*, Annulment Decision [95-96].

<sup>35</sup> *Vivendi v Argentina*, Annulment Decision [113].

<sup>36</sup> Record, Annex 3, 18.

invoked and enforced are purely contractual matters and do not amount to an independent breach of the BIT.

32. Although Claimant refers to a number of provisions such as expropriation, lack of full protection and security, discrimination and a violation of the fair and equitable treatment standards that it alleges were breached under the BIT, the only intention of Claimant is a compensation of the paid-in investments and an compensation for potential future profits as well as for intellectual property, know-how and trade secrets. The question of the amount of compensation falls purely under the JV Agreement and has to be determined by the relevant contractual forum. Claimant cannot disguise the real nature of the claim by reformulating them as a treaty breach to establish the competence of this Tribunal to hear the claim. The real issue is the amount of compensation owed under the JV Agreement. Therefore, the contractual basis of the claims requires them to be referred to the competent forum provided in Clause 17 JV Agreement.

**2. Giving exclusivity to Clause 17 JV Agreement is in accordance with general principles of international law.**

33. Having co-signed the JV Agreement, Respondent is entitled to claim that the special forum therein be given effect. The principle of *generalia specialibus non derogant* suggests that the current contractual disputes should be referred to the forum agreed in the JV Agreement.<sup>37</sup> This maxim stipulates that a document containing a dispute settlement clause which is more specific to the dispute should be given primacy over a document of more general application.<sup>38</sup> Respondent's offer to arbitrate is contained in general terms in Article 11 BIT. In contrast, Clause 17 JV Agreement refers specifically to disputes "arising out or relating" to the JV Agreement. It is therefore more specific to the question of improper invocation of the buyout clause and the linked sending of the CWF. In *SGS v Philippines*<sup>39</sup> it was held that general BIT principles could not be expected to override specific provisions such as the dispute resolution clause in an investment contract.<sup>40</sup> The

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<sup>37</sup> *SGS v Philippines*, Decision on Jurisdiction [141].

<sup>38</sup> Schreuer, 362 [34].

<sup>39</sup> *SGS v Philippines*, Decision on Jurisdiction.

<sup>40</sup> *SGS v Philippines*, Decision on Jurisdiction [141].

tribunal also held that the character of an investment treaty is to “support and supplement, not to override or replace”<sup>41</sup> contractual agreements which have been negotiated.

34. Additionally, Respondent relies on the maxim *lex posterior derogat legi priori* which states that a later agreement overrules an earlier one. The JV Agreement was signed on 18 October 2007;<sup>42</sup> ten years after the BIT became effective on 1 January 1997.<sup>43</sup> Despite knowledge of the existence of the BIT, Claimant contracted to exclusively arbitrate under the 1959 Arbitration Act of Beristan. The parties were free to agree that these obligations were without prejudice to any rights under the BIT. The fact that they have not done so indicates the intention to agree to the exclusive jurisdiction of Clause 17 JV Agreement. A similar position was adopted in *Bureau Veritas v. Paraguay*.<sup>44</sup>

35. International tribunals have consistently endorsed the ability of parties to contract out of any recourse they may have to international dispute resolution mechanisms.<sup>45</sup> In the *Woodruff case*<sup>46</sup> Chairman Barge noted that nothing in international law prevents any party from contracting out of seeking international remedies. Denying private entities such rights would be contrary to developments in international law and “does not tend to promote good will among nations.”<sup>47</sup>

36. In keeping with international principles, this Tribunal is therefore respectfully requested to give effect to the specialist forum agreed to in the JV Agreement and the waiver of international dispute resolution mechanisms. Jurisdiction should be declined for presented contract claims in view of Clause 17 JV Agreement.

**B. The wording of Article 11 BIT excludes contract claims.**

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<sup>41</sup> *SGS v Philippines*, Decision on Jurisdiction [141].

<sup>42</sup> Record, Annex 2, 16 [3].

<sup>43</sup> Clarification 174.

<sup>44</sup> *Bureau Veritas, v Paraguay*, Decision on Jurisdiction [145-146].

<sup>45</sup> Chairman, Woodruff Case; North American Dredging Company.

<sup>46</sup> Chairman, Woodruff Case, 11.

<sup>47</sup> *North American Dredging Company*, 28 [7]; Spiermann, 208.

37. Apart from the fact that Clause 17 JV Agreement is the relevant forum selection clause for contract claims, Respondent submits that Article 11 BIT is so narrowly worded that it excludes contract claims.
38. In interpreting Article 11 of the BIT,<sup>48</sup> reference needs to be made to Article 31(1) of the VCLT. The VCLT is part of customary international law and has been ratified by Opulentia and Beristan.<sup>49</sup> The essence of Article 31(1) VCLT is that interpretation of a treaty provision should focus on the text having regard to its context and purpose since this is presumed in international law to be the most faithful expression of the common intention of the parties.<sup>50</sup>
39. In the present case, Article 11 BIT is narrowly worded and restricts disputes to those falling within the ambit of the BIT. Reference is made only to disputes that concern an obligation of the host State “...under this Agreement [the BIT] in relation to an investment ...” of the investor.<sup>51</sup> The words “under this agreement” expressly point to the requirement that the dispute in question must concern an obligation under the BIT. As already illustrated, the basis of the presented claims is the JV Agreement rather than any substantive violation of the BIT. If the parties to the BIT intended to include contractual claims they would have refrained from using the phrase “under this agreement” or incorporated for example the phrase “disputes arising out of or relating to an investment agreement”.<sup>52</sup> Since there is no offer in the BIT with regard to contract claims, Claimant cannot refer its claims to this Tribunal.
40. When reading Article 11 BIT in the context of the other provisions of the BIT the most logical conclusion is to exclude contract claims. The provisions in Articles 2–4 BIT deal exclusively with international law obligations. Since the substantive content of the BIT specifies the legal rights that are covered by Article 11 BIT, it is inappropriate to read Article 11 BIT separately from the remainder of the Treaty in the manner of a commercial

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<sup>48</sup> Record, Annex 1, 13 *et seq.*

<sup>49</sup> Record, Annex 2, 18 [15].

<sup>50</sup> Gardiner, 79.

<sup>51</sup> Record, Annex 1, 13.

<sup>52</sup> Art. IX(1) of the El Salvador – United States BIT (1999).

arbitration clause.<sup>53</sup> It would be contrary to treaty arbitration to interpret Article 11 BIT as creating a jurisdictional basis for cases distinct from the substantive provisions that it was called upon to apply.<sup>54</sup>

41. Several tribunals have declined jurisdiction over contract claims under the dispute settlement provision in the relevant BIT.<sup>55</sup> The dispute settlement provisions in those decisions were broader than Article 11 BIT and were nonetheless interpreted as excluding contract claims. In *SGS v Pakistan*, this tribunal in interpreting Article 9(1) of the Swiss-Pakistan BIT, which provided “For the purpose of solving disputes with respect to investments...”, saw nothing that could be read as vesting the tribunal with jurisdiction over contract claims.<sup>56</sup> Recently, the tribunal in *Pantechniki v. Albania*,<sup>57</sup> with Jan Paulsson as the sole arbitrator, decided that treaty arbitration cannot proceed on a contractual basis because ICSID jurisdiction must be founded on the Treaty.<sup>58</sup>

42. Respondent is aware that there are tribunals that have adopted a broad interpretation of dispute settlement provisions.<sup>59</sup> However, even in those decisions the tribunals did not assume jurisdiction over contract claims despite having a more broadly worded dispute resolution clause in the BIT.<sup>60</sup> Therefore, the wording of Art. 11 BIT is not sufficient to justify the jurisdiction of this Tribunal over contractual claims.

### **C. Respondent is not a party to the JV Agreement.**

43. Even in the absence of an exclusive jurisdiction clause and in the event that this Tribunal finds that Article 11 BIT covers contractual claims, Claimant still cannot refer claims arising out of the JV Agreement to this Tribunal under Article 11 BIT.

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<sup>53</sup> Griebel, 310.

<sup>54</sup> Gaillard, (Ed. Weiler), 336.

<sup>55</sup> *SGS v Pakistan*, Decision on Jurisdiction [161-162]; *L.E.S.I.-DIPENTA v Algeria* [25]; *Joy Mining v Egypt*, Decision on Jurisdiction, [82]; *Pantechniki v Albania*, [64].

<sup>56</sup> *SGS v Pakistan*, Decision on Jurisdiction [161].

<sup>57</sup> *Pantechniki v Albania*.

<sup>58</sup> *Pantechniki v Albania*, [64].

<sup>59</sup> *Salini v Morocco*, Decision on Jurisdiction [59-61]; *SGS v Philippines*, Decision on Jurisdiction [131-135].

<sup>60</sup> Gaillard, ‘*Treaty-Based Jurisdiction*’, 2.

44. The JV Agreement has not been concluded with Respondent, but with Beritech as an independent legal person. The offer to arbitrate in Article 11 BIT refers only to obligations of the host State itself and not to obligations of third parties towards foreign investors. Since the jurisdictional offer in Article 11 BIT does not expressly address contracts to which the host State is not a direct party, it has to be assumed that it was not the intention of the parties to the BIT to give it such a broad scope. Claimant cannot argue that Beritech could be identified with Respondent and thereby applying rules of attribution from ILC. Those rules of attribution have no application to the question whether a State has entered into a contractual obligation.<sup>61</sup>
45. Treaty tribunals have commonly considered that even the widest offer to arbitrate under the BIT cannot encompass contractual disputes between the investor and third parties related to the host State but enjoying separate legal personality.<sup>62</sup> The tribunal in *Impregilo v Pakistan* refused to read the offer to arbitrate in that BIT as extending to contractual claims against a legal person distinct from the State.<sup>63</sup> It held that if it had been the intention of the parties to extend each Contractual Party's jurisdiction offer in this way, the language of the settlement provision in the BIT would have been so crafted.<sup>64</sup>
46. The guarantee provided by Respondent is only with respect to the JV Agreement. This is a guarantee to assume the obligations of Beritech under the JV Agreement upon Beritech's default.<sup>65</sup> Since Beritech has no obligations under the BIT and the contractual obligations are not attributable, Respondent is not guaranteeing any obligations that may arise in the context of the BIT. It therefore cannot be held liable under this forum for treaty breaches. Furthermore, Respondent itself did not breach the guarantee agreement by sending the CWF in order to enforce the buyout. Respondent as a State is under the obligation to secure the contractual rights of Beritech and safeguard the national security

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<sup>61</sup> *Vivendi*, Annulment Decision [96]; *Impregilo v Pakistan*, Decision on Jurisdiction [210].

<sup>62</sup> *Salini v Morocco*, Decision on Jurisdiction [60-62]; *Consortium RFCC v Morocco*, Decision on Jurisdiction, [67-69]; *Impregilo v Pakistan*, Decision on Jurisdiction [198-219]; *Salini v Jordan*, Decision on Jurisdiction[100]; *Siemens v Argentina* [205].

<sup>63</sup> *Impregilo v Pakistan*, Decision on Jurisdiction [198-216].

<sup>64</sup> *Impregilo v Pakistan*, Decision on Jurisdiction [214].

<sup>65</sup> Clarifications 148.

interests. Thus, any claims as to the improper invocation of the buyout clause and its enforcement should be directed against Beritech and not Respondent.

**D. The acts in question are not directly attributable to Respondent.**

47. Even if this Tribunal finds that alleged claims constitute a breach of the BIT, those claims are not attributable to Respondent. Claimant needs to prove that the cause of action is a “measure” of the contracting host state, even if the dispute resolution clause does not mention the word, it is implied.<sup>66</sup> However, no unilateral<sup>67</sup> measure of Respondent has resulted in a loss to Claimant. A nexus then needs to be proved between the “measure” of the host state and its effect on the investment.<sup>68</sup> This has not been established by Claimant. The CWF were deployed in furtherance of the decision of the majority at the Board meeting of Sat-Connect where the buyout of Claimant’s share was voted upon.<sup>69</sup> Hence, there is no direct nexus between the act of the state and the impact on the investment.

48. Furthermore, Beritech is an entity separate and distinct from the State. Its actions are not controlled or governed by the Respondent. Ownership of shares in a company will not suffice to hold the State liable for acts of that company.<sup>70</sup> Since Respondent has not otherwise influenced the functioning of Beritech, ownership of shares in Beritech is therefore an insufficient basis for holding the Respondent responsible.<sup>71</sup> Hence, no action can be brought against Respondent in an international tribunal such as ICSID. Respondent urges that this Tribunal decline jurisdiction, as a treaty claim may only be entertained if acts are attributable to the state.

**E. Claimant has not complied with the waiting period.**

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- B.

<sup>66</sup> Douglas, 240.

<sup>67</sup> See *Fisheries Jurisdiction*, Decision on Jurisdiction

<sup>68</sup> Douglas, 242; *Methanex Corporation v United States of America* (Aug 2002 Award) para127-.147

<sup>69</sup> Record, Annex 2, 17.

<sup>70</sup> ILC, Commentary, Para 7 to Article 8.

<sup>71</sup> ILC Commentary; See also *Military and Paramilitary Activities in and against Nicaragua*, merits [86].



49. The BIT indicates that the parties must make an attempt for amicable settlement for six months prior to approaching the Tribunal. On 12 September 2009, Claimant submitted a written notice to Respondent of a dispute under the BIT, in which Claimant notified Respondent of its intention to settle the dispute amicably.<sup>72</sup> Claimant requested arbitration before this Tribunal on 28 October 2009 – prior to the exhaustion of the stipulated period of six months.<sup>73</sup> This Tribunal is invited to give effect to and prevent redundancy of the provision.

50. In *Goetz v Burundi* the Tribunal held that non-compliance with the waiting period amounted to a bar to institution of certain claims. Furthermore, waiting periods need to be considered when violated in bad faith.<sup>74</sup> Claimant has invoked the jurisdiction of this Tribunal in bad faith by not waiting for a response from Respondent. Hence, Respondent requests that Claimant be directed to attempt to settle the dispute amicably.

## **II. THIS TRIBUNAL LACKS JURISDICTION OVER CONTRACT-BASED CLAIMS NOTWITHSTANDING ARTICLE 10 BIT.**

51. This Tribunal lacks jurisdiction over contract claims despite the existence of Article 10 BIT.<sup>75</sup> The wording and context of Article 10 BIT excludes contract claims **(A)**. Alternatively, even if contract claims fall within the scope of Article 10 BIT, this provision does not refer to contract claims with third parties **(B)**. Furthermore, Respondents acts are of commercial nature **(C)** and covered by Clause 17 JV Agreement **(D)**.

### **A. Article 10 BIT is not intended to cover contract claims.**

52. Respondent submits that this tribunal lacks jurisdiction because the presented claims are purely contractual and do not qualify as rights protected by the BIT. The fact that the BIT contains Article 10 does not lead to a different result.

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B.

<sup>72</sup> Clarifications 133.

<sup>73</sup> Clarifications 133; Record, Annex 2, 18, [14].

<sup>74</sup> Schreuer, 'Travelling the BIT Route', 239.

<sup>75</sup> Record, Annex 1, 13

53. In order to determine the effect of Article 10 BIT<sup>76</sup>, this provision needs to be analysed on its own terms. Article 10 of the BIT reads as follows:

OBSERVANCE OF COMMITMENTS

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

54. This provision is labelled as a so-called “umbrella clause” because it imposes a requirement on each Contracting State Party to the Treaty to observe any commitments entered into with investors from the other contracting State.<sup>77</sup> The effect of the umbrella clause depends on its wording. When interpreting Article 10 BIT, reference has to be made to Article 31(1) of the VCLT.<sup>78</sup> Respondent submits that the effect of Article 10 BIT cannot be to elevate contract into treaty claims. This is evident already when analyzing the heading of the clause which refers to “commitments”. There is no limitation to only contractual commitments, as the notion of “commitments” is broad and encompasses all forms of measures. It implies an indefinite expansion since all claims based on any commitment in legislative or administrative or other unilateral acts of the State would be considered as treaty claims.

55. Similarly, the word “obligation” in the clause has to be understood as synonymous to “commitments” and is interchangeable. The tribunal in *SGS v Pakistan* interpreted the phrase “commitment” in the same manner.<sup>79</sup> The formulation “constantly guarantee the observance” of statutory, administrative or contractual commitments cannot be understood as to create a new international obligation on behalf of the host state, where there was none before. The legal consequences of “commitments” are so far-reaching that it cannot be intended by the parties to give this provision this far reaching effect when including Article 10 in the BIT.

A. \_\_\_\_\_  
B.

<sup>76</sup> Record, Annex 1, 13.

<sup>77</sup> Wong, 136; Schreuer, (ed. Weiler) 299.

<sup>78</sup> See I. B. [38].

<sup>79</sup> *SGS v Pakistan*, Decision on Jurisdiction [166].

56. The placement of an umbrella clause also gives evidence of its intended scope and effect. When the clause is placed alone, apart from the substantive provisions, there is strong evidence that the clause was not intended to impose substantial international obligations.<sup>80</sup> At present Article 10 BIT is not placed together with the other substantive obligations under Articles 2–4 undertaken by the contracting parties in the BIT, which proves that it was not intended to embody a substantive protection in Articles 10 BIT.

57. Furthermore, Article 10 would make the substantive protections of the BIT superfluous as any violation of any commitments of Respondent would be a violation of the Treaty.<sup>81</sup> This was expressly pointed out by the Tribunal in *El Paso v Argentina*.<sup>82</sup>

58. Other concerns of a broad interpretation of umbrella clauses are practical consequences.<sup>83</sup> Investors could refer any trivial dispute, for instance the non-payment of a receipt for the delivery of cement when building a nuclear plant for the host State, to ICSID arbitration, which is not designed to deal with every minor contractual breach.<sup>84</sup> This would lead to an overload of cases to the Centre.

59. Several tribunals have given similar worded clauses to Article 10 BIT a restrictive effect and excluded contract breaches from the scope.<sup>85</sup> The first case in which a tribunal discussed the meaning of an umbrella clause and excluded contract claims from its scope was *SGS v Pakistan*<sup>86</sup>. The wording of the relevant clause (Article 11 Swiss-Pakistan BIT) was very similar to Article 10 BIT and provided that

“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the Investors of the other Contracting Party”.

A. \_\_\_\_\_  
B.

<sup>80</sup> *SGS v Pakistan*, Decision on jurisdiction, [169].

<sup>81</sup> *SGS v Pakistan*, Decision on jurisdiction [168].

<sup>82</sup> *El Paso v Argentina* Decision on Jurisdiction [76].

<sup>83</sup> *El Paso v Argentina*, Decision on Jurisdiction,[81]; *Pan America v Argentina* [110].

<sup>84</sup> *SGS v Pakistan*, Decision on Jurisdiction [168]; Schreuer, ‘*Travelling the BIT Route*’, 255.

<sup>85</sup> *El Paso v Argentina* Decision on Jurisdiction; *Joy Mining v Egypt*, Decision on Jurisdiction [81]; *Salini v Jordan*, Decision on Jurisdiction, [126] *et seq.*; *SGS v Pakistan*, Decision on Jurisdiction; *Pan America v Argentina* Decision on Jurisdiction.

<sup>86</sup> *SGS v Pakistan*, Decision on Jurisdiction.

60. The tribunal found that Article 11 Swiss-Pakistan BIT does not automatically elevate a breach of contract to the level of a breach of international law. A broad interpretation would be “susceptible of almost indefinite expansion”.<sup>87</sup> Due to the vague wording which could not give clear and unambiguous evidence that such was the shared intention of the parties to give it such far reaching effect,<sup>88</sup> the tribunal held that an umbrella clause cannot have the consequences of incorporating contract claims and so jurisdiction was rejected.

61. The general approach that the wording of an umbrella clause leads to a narrow interpretation is further approved in *Salini v Jordan*<sup>89</sup> and *Joy Machinery Ltd. v Arab Republic of Egypt*<sup>90</sup>. Respondent invites this Tribunal to follow this convincing line of reasoning, so widely represented by the ICSID tribunals in the past.

**B. Respondent is not a party to the JV agreement; therefore, Article 10 BIT does not protect contractual breaches.**

62. Even if this Tribunal finds that Article 10 BIT applies to contract claims, it does not have the effect Claimant alleged because Respondent is not a party to the JV agreement. Article 10 BIT does not refer to contracts between investors and third-party legal entities. The clause refers to “any obligations it [the state itself] has assumed with regard to investments”. Since Respondent is not a party to the JV agreement, the respective investment contract is not covered by Article 10 BIT.<sup>91</sup> This result is confirmed by the tribunals in *Impregilo v Pakistan*<sup>92</sup>, *Azurix v Argentina*<sup>93</sup> and *Nagel v Czech Republic*.<sup>94</sup>

63. The guarantee agreement covers secondary obligations and only on Beritech’s default. Beritech acted lawfully and did not breach the JV agreement; thus, the liability of Respondent under the guarantee agreement is not revived.

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<sup>87</sup> *SGS v Pakistan*, Decision on Jurisdiction, [166].

<sup>88</sup> *SGS v Pakistan*, Decision on Jurisdiction [166].

<sup>89</sup> *Salini v Jordan*, Decision on Jurisdiction, [126 *et seq.*].

<sup>90</sup> *Joy Mining v Egypt*, Award on Jurisdiction, 6 [81].

<sup>91</sup> See I. C.

<sup>92</sup> *Impregilo v Pakistan*, Decision on Jurisdiction, [223].

<sup>93</sup> *Azurix v Argentina* [384].

<sup>94</sup> *Nagel v Czech Republic* [162].

**C. Respondent's acts are of a commercial nature and are excluded from the scope of Article 10 BIT.**

64. Alternatively, even if this Tribunal finds that Article 10 BIT covers contract claims and is applicable to breaches of the JV Agreement, this Tribunal lacks jurisdiction because Respondent's acts are of a commercial nature. In two decisions, *Pan America v Argentina*<sup>95</sup> and *El Paso v Argentina*<sup>96</sup>, the concept of distinguishing acts committed by the host State as a merchant from those committed by the State as a sovereign has emerged. Only the latter type of act would fall under BIT protection.

65. The alleged contract breaches in the present case are merely contractual. The JV Agreement was an ordinary commercial contract, and the invocation of the buyout clause was a decision of the board of Sat-Connect and by no means based on sovereign conduct. Similarly, the enforcement of such through the Respondent was linked to the buyout and did not result in an abuse of governmental power. Assuming, but not conceding, that the invocation of the buyout clause was improper, such action would lead only to a simple contractual breach which cannot be referred to Treaty arbitration.

66. Consequently, Article 10 BIT does not extend the jurisdiction of this Tribunal over contract claims, as they stem from the breach of the JV agreement and do not involve any sovereign conduct of Respondent.

**D. No jurisdiction exists due to the forum selection clause in the JV Agreement.**

67. Even if this Tribunal finds that Article 10 BIT covers contract claims, Respondent submits that jurisdiction needs to be rejected because of Clause 17 JV Agreement.<sup>97</sup> The fact that the BIT contains Article 10 does not affect the exclusivity of Clause 17. Claimant is under the obligation to observe Clause 17 and should respond to the notice of arbitration in the separate arbitration proceeding under the Beristan Arbitration Act. Claimant cannot claim a breach of the JV agreement without itself complying with it.

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<sup>95</sup> *Pan America v Argentina*, Decision on Jurisdiction.

<sup>96</sup> *El Paso v Argentina*, Decision on Jurisdiction.

<sup>97</sup> See I. A.

68. The principle this Tribunal is asked to follow has been set by Tribunals in *SGS v Pakistan*<sup>98</sup> and recently by *Toto v Lebanon*.<sup>99</sup> The latter tribunal rejected jurisdiction notwithstanding an umbrella clause because of the existence of a valid forum selection clause which referred all disputes to the Lebanese courts. It was held that the contract-based claims remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement.<sup>100</sup> Thus, the Tribunal lacks competence to consider the contract claims because Claimant is bound by Clause 17 JV Agreement notwithstanding Article 10 BIT.

### III. THE ALLEGED CONTRACT CLAIMS ARE INADMISSIBLE.

69. Even if the Tribunal assumes jurisdiction under the treaty to hear Claimant's claims, these claims are inadmissible because the dispute is governed by the contract and subject to Clause 17 JV Agreement. The difference between jurisdiction and admissibility is that "jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it".<sup>101</sup>

70. Respondent relies on two ICSID decisions, *SGS v Philippines*<sup>102</sup> and *Bureau Veritas v Paraguay*<sup>103</sup>, where the tribunals found that the claims were inadmissible because of exclusive forum selection clauses in the investor-State contracts. The tribunal in *SGS v Philippines* found that it had jurisdiction over the claim under the umbrella clause, but decided to stay the proceedings on the grounds that the claim was premature. The tribunal held that BIT dispute settlement provisions do not automatically override binding contractual forum selection clauses and that the investors have to refer their contract claims to the selected forum.<sup>104</sup>

71. The question of admissibility in cases where a contractual forum selection exists was reviewed in *Bureau Veritas v Paraguay*. It was concluded that although the tribunal had

- A. \_\_\_\_\_
- B.

<sup>98</sup> *SGS v Pakistan*, Decision on Jurisdiction, [161].

<sup>99</sup> *Toto v Lebanon*, Decision on Jurisdiction, [202].

<sup>100</sup> *Toto v Lebanon*, Decision on Jurisdiction [202].

<sup>101</sup> Keith Highet, *Waste Management*, dissent [38].

<sup>102</sup> *SGS v Philippines*, Decision on Jurisdiction.

<sup>103</sup> *Bureau Veritas v Paraguay*, Decision on Jurisdiction.

<sup>104</sup> *SGS v Philippines*, Decision on Jurisdiction [153].

jurisdiction over the claim under the umbrella clause, that claim was not admissible, because the parties had agreed to refer it to the exclusive jurisdiction of the national court. Instead of staying the proceedings, the tribunal found that the claim had to be dismissed.<sup>105</sup>

72. This Tribunal is respectfully requested to follow these arguments. It cannot be acceptable that Claimant can “approve and reprobate” in respect to the same contract.<sup>106</sup> If Claimant could pick parts of the JV agreement that it wishes to incorporate under Article 10 BIT, such as a breach of Clause 8, but at the same time ignore Clause 17, a discrimination against the host State would arise. Furthermore, such actions would seriously undermine contractual autonomy.<sup>107</sup> Thus, Respondent urges the Tribunal to dismiss the claim on a finding of inadmissibility.

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<sup>105</sup> *Bureau Veritas v Paraguay*, Decision on Jurisdiction [161].

<sup>106</sup> Douglas, 364; *SGS v Philippines*, Decision on Jurisdiction [155].

<sup>107</sup> *Bureau Veritas v Paraguay*, Decision on Jurisdiction [148].

## PART TWO: MERITS

### I. RESPONDENT DID NOT MATERIALLY BREACH THE JV AGREEMENT.

73. Respondent did not materially breach the JV Agreement. Rather, Claimant who breached it. Clause 8 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.”<sup>108</sup>

74. Clause 4(4) JV Agreement states that a material breach of the Agreement occurs once Clause 4 is breached.<sup>109</sup> Claimant leaked information not only involving encryption technology, but also concerning the technology systems and intellectual property of the Sat-Connect project.<sup>110</sup> This prohibition against information leaks is protected by the confidentiality clause, as stated in Clause 4(2) JV Agreement. Therefore, Claimant breached the JV Agreement and thus the invocation of Clause 8 is lawful.

75. The mere invocation did not transfer to Beritech the right to purchase the interest of Claimant; a subsequent approval of the board of directors of Sat-Connect was still needed.<sup>111</sup> However, Sat-Connect is an independent company<sup>112</sup> that has been established by the joint venture project of Beritech and Claimant,<sup>113</sup> and Beritech is an independent legal entity.<sup>114</sup> As the invocation and the approval have been done by two different legal entities, Respondent cannot be held responsible for Beritech’s and Sat-Connect’s acts.<sup>115</sup>

76. The Tribunal is asked to disregard any attempts to attribute responsibility to Respondent based on the ILC Articles on State Responsibility (“ILC”) for the following reasons: ILC

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<sup>108</sup> Record, Annex 3, Clause 8, 19.

<sup>109</sup> Clarifications 178.

<sup>110</sup> Clarifications 178.

<sup>111</sup> Clarifications 242.

<sup>112</sup> Record, Annex 2, 16 [3].

<sup>113</sup> Record, Annex 2, 16 [3].

<sup>114</sup> Record, Annex 2, 16 [2].

<sup>115</sup> ILC Commentary, [6] to Art.8 ILC Articles.



is not customary international law (A), not suitable in the context of ICSID arbitration (B), and in any case the decisive behaviour of Sat-Connect is not attributable to Respondent (C).

**A. THE ILC ARTICLES DO NOT REPRESENT CUSTOMARY INTERNATIONAL LAW.**

77. Customary international law is created by state practice and *opinio juris*.<sup>116</sup> The ILC Articles do not represent these requirements because they represent only a compendium collected by private scholars and cannot represent customary international law.

**B. The ILC Articles are not suitable for the specific context of ICSID arbitration.**

78. Furthermore, the ILC Articles “solely address responsibilities as between states.”<sup>117</sup> In investor-state context the dispute is not between two States but between an individual and a State. Claimant, a private entity, cannot rely on the ILC Articles in order to attribute responsibility to Respondent.

**C. The approval of the buyout by the board of Sat-Connect is under no circumstances attributable to Respondent.**

79. Even if the Tribunal concludes that acts of Beritech are attributable to Respondent, the decisive buyout decision was taken by the board of directors of Sat-Connect, which is independent of Respondent (1). Furthermore, Respondent did not prevent Claimant from completing Claimant’s contractual duties as Respondent was under the obligation to intervene via the CWF (2).

**1. The approval of the board of directors of Sat-Connect transferred to Beritech the right to purchase Claimant’s interests.**

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<sup>116</sup> Article 38 (1)(b) ICJ Statute; *North Sea Continental Shelf case* [77].

<sup>117</sup> Feit, 146; Hobér (Oxford Handbook), 553.

80. No contractual breach on the part of Beritech occurred; instead it only invoked a contractual provision<sup>118</sup> and appointed its representatives<sup>119</sup> which have “responsibility for supervising the management of the business”<sup>120</sup> of Sat-Connect. Thus the responsibility for the final decision of the buyout is on the board of directors. The right to purchase Claimant’s rights has been transferred by the approval of the separate legal entity, Sat-Connect.<sup>121</sup> Therefore, the outcome of the final decision has not been influenced by the shareholder Beritech.
81. The JV Agreement is governed by the laws of Respondent.<sup>122</sup> Furthermore, the UNIDROIT principles are applicable to the Agreement.<sup>123</sup> The invocation of the buyout terminates the contract.<sup>124</sup> Respondent submits that the invocation of the buyout clause<sup>125</sup> was consistent with the JV Agreement and with Article 7.3.1 UNIDROIT principles.
82. Article 7.3.1 UNIDROIT principles states that a termination is lawful where a failure of performance of a signatory amounts to a “fundamental non-performance.”<sup>126</sup> A fundamental non-performance can be assumed if the aggrieved party was able to expect its performance.<sup>127</sup> This is the case here. The JV Agreement contains a confidentiality clause.<sup>128</sup> Thus, Respondent expected Claimant to keep the information secret.
83. However, Claimant leaked information to the Government of Opulentia.<sup>129</sup> The information leak falls within the scope of the confidentiality clause, Clause 4 of the JV Agreement. Therefore, if Beritech has the right to terminate the contract then it has even more the right to invoke Clause 8, as the mere invocation does not transfer any rights.

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<sup>118</sup> Record, Annex 2, [10].

<sup>119</sup> Record, Annex 2, 16 [4].

<sup>120</sup> Hewitt, 177.

<sup>121</sup> Clarifications 242.

<sup>122</sup> Record, Annex 3, Clause 17, 19.

<sup>123</sup> Clarifications 136.

<sup>124</sup> Record, Annex 3, Clause 8, 19.

<sup>125</sup> Record, Annex 3, Clause 8, 19.

<sup>126</sup> Article 7.3.1. UNIDROIT principles.

<sup>127</sup> Article 7.3.1. (2) (a) UNIDROIT principles.

<sup>128</sup> Record, Annex 3, Clause 4.

<sup>129</sup> Record, Annex 2, 17 [8], Clarifications 178.

84. After the invocation of Clause 8 JV Agreement, it was the duty of the board of directors to decide how to handle the situation.<sup>130</sup> The majority of the directors came to the conclusion that Clause 4 was violated and therefore Clause 8 of the JV Agreement applied. It is a decision was taken by an independent organ. If any leaks endanger Beritech's interests, Beritech should be able to invoke Clause 8 JV Agreement in good faith, as information was leaked.<sup>131</sup> If confidential information is leaked the whole project is endangered, which amounts to a contractual breach on the part of Claimant.<sup>132</sup>
85. Beritech, a private shareholder, cannot be made responsible for the board's decision. Therefore, the invocation was necessary in order to protect Beritech's interests, which are dependent on the smooth running of the joint venture company. The board of directors, once one of the parties has invoked a right, has to take all the available information into consideration in order to come to its final, independent, approval. Relying on this final decision is in accordance with Beritech's good faith obligations which it has to respect as signatory.<sup>133</sup>
86. Even if the final approval of the board of director represents a breach of the JV Agreement, whether materially or procedurally, the contractual breach was not done by Respondent as the invocation of Clause 8 was approved by a separate legal entity, Sat-Connect.<sup>134</sup> Therefore, if a breach exists, it is under no circumstances attributable to Respondent, as it is not even attributable to Beritech, which owns 60% of the shares.<sup>135</sup> Thus, no material breach on the part of Beritech occurred. Instead, Claimant breached the contract and therefore the invocation of Clause 8 JV Agreement was lawful.

## **2. Respondent's intervention via the CWF was lawful.**

87. Respondent did not breach the contract by preventing the Claimant from completing its contractual duties. The JV Agreement states that

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<sup>130</sup> Hewitt, 185.

<sup>131</sup> Record, Annex 2, 17 [8], Clarifications 178.

<sup>132</sup> Record, Annex 3, Clause 4(4), 19.

<sup>133</sup> Tetly, 9.

<sup>134</sup> Clarifications 242.

<sup>135</sup> Record, Annex 2, 16 [3].

“in 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.”<sup>136</sup>

88. During the 14 days, Claimant would have been able to invoke Clause 17 in order to verify by the arbitrator whether the buyout, approved by Sat-Connect, was consistent with the JV Agreement. However, Claimant did not introduce any notice whatsoever with the intention to commence arbitration. On the contrary, it was Beritech who filed a request for arbitration against Claimant under Clause 17 on 19 October 2009.<sup>137</sup> Claimant was offered the possibility to act in consistency with Clause 17 JV Agreement. However, Claimant failed to act within these 14 days.
89. Respondent, as the enforcer of law and order was under the obligation to carry out the request of Beritech.<sup>138</sup> This is relevant, as the legal basis on which the CWF intervened was not appealable.<sup>139</sup>
90. Respondent urges the Tribunal to distinguish the facts of this case from those in *Amco v Indonesia* where the intervention of the army was considered as an international wrongful act, because the force intervened in assistance of a breach of contract by a private party.<sup>140</sup> The present case is different, as Claimant actually breached the contract.
91. The fact that Respondent was a guarantor does not change the situation. A guarantor is liable only once its debtor cannot fulfill its own debts, thus it is a secondary obligation.<sup>141</sup> Beritech, however, did not fail any of its obligations;<sup>142</sup> thus, no secondary obligation of Respondent arose. Moreover, Claimant never urged Respondent to step in for any financial failure on the part of Beritech. This is what a guarantee is about.<sup>143</sup>
92. Consequently, the intervention of the CWF was lawful and therefore lawful in regard to the JV Agreement. Respondent did not illegally prevent the Claimant from completing

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<sup>136</sup> Record, Annex 3, Clause 17, 19.

<sup>137</sup> Record, Annex 2, 18 [13].

<sup>138</sup> Skinner, 26.

<sup>139</sup> Clarifications 228.

<sup>140</sup> *Amco v Indonesia* [169].

<sup>141</sup> PLC Finance.

<sup>142</sup> See above under I.

<sup>143</sup> PLC Finance.

its contractual duties, as it was Respondent's duty to act on the basis of the executive order that allowed CWF to intervene.<sup>144</sup>

## **II. RESPONDENT ACTED IN ACCORDANCE WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW.**

93. Respondent contends that no violation of international law occurred through the buyout<sup>145</sup> and removal of Claimant from the Sat-Connect Sites<sup>146</sup>. In Section (A) Respondent will address the allegation of expropriation and demonstrate that it acted in accordance with Article 4 BIT.<sup>147</sup> In Section (B) Respondent will show that it provided National Treatment in accordance with Article 3 of the BIT and that Claimant's Investment was not subject to any unjustified or discriminatory measures in accordance with Article 2(3) BIT. Respondent provided Fair and Equitable Treatment (FET) and Full Protection and Security to Claimant in accordance with Art. 2(2) BIT<sup>148</sup> (C). Finally, Respondent is entitled to rely on Art. 9 BIT<sup>149</sup> as a defence to Claimant's claims (D).

### **A. Claimant's investment has not been expropriated.**

94. Respondent has not violated Art. 4 BIT<sup>150</sup>. Firstly, no expropriation of Claimant's property occurred (1). Secondly, even if the Tribunal finds that Claimant's property was expropriated, the expropriation was lawful (2).

#### **1. Respondent neither directly nor indirectly expropriated Claimant's investment.**

95. Respondent will demonstrate that no direct expropriation occurred (a), and that neither the alleged breach by Beritech (b), nor the alleged breach of the guarantor agreement (c) or the subsequent assistance of the CWF (d) amount to indirect expropriation of Claimant's investment under Article 4(1)(2) BIT.

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B.

<sup>144</sup> Clarifications 55.

<sup>145</sup> Record, Annex 2, 17 [10].

<sup>146</sup> Record, Annex 2, 17 [11].

<sup>147</sup> Record, Annex 1, 11.

<sup>148</sup> Record, Annex 1, 10.

<sup>149</sup> Record, Annex 1, 13.

<sup>150</sup> Record, Annex 1, 11.

**a) RESPONDENT DID NOT DIRECTLY EXPROPRIATE CLAIMANT’S INVESTMENT.**

96. A direct expropriation is defined as a taking of property by a governmental authority in view of transferring ownership of that property to another person.<sup>151</sup> However, Claimant still has ownership of the shares, as they are only held in an escrow account pending the decision of the arbitral tribunal in the proceedings commenced by Beritech.<sup>152</sup> An effective taking of property can therefore not have occurred. The transfer in the escrow account cannot be equated to a “compulsory transfer of the property rights” as established in *Amoco v Iran*.<sup>153</sup> Unlike the actions of the Iranian government in *Amoco*, the transfer was not sanctioned by Respondent.<sup>154</sup>

**b) THERE HAS BEEN NO INDIRECT EXPROPRIATION SINCE THE BUYOUT IS AN ACTION BY A PRIVATE ENTITY DISTINCT FROM RESPONDENT.**

97. Article 4(1)(2) BIT covers indirect expropriation and measures with similar effect. Indirect expropriation is characterised by an “erosion of rights associated with ownership by State interferences”<sup>155</sup> while the title remains with the investor. Respondent did not interfere with Claimant’s property rights “to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated” as required by *Starret Housing* and *Tippetts*.<sup>156</sup> Rather, the buyout is a simple exercise of contractual rights, contained in the JV agreement by a private entity. Beritech has, as every company, the right and even the duty to decide over its actions in the best interests of the company. Furthermore, the buyout occurred with the majority of the board of directors of Sat-Connect itself.<sup>157</sup>

i. THE INVOCATION OF THE BUYOUT CANNOT IN ANY CASE BE ATTRIBUTED TO RESPONDENT.

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<sup>151</sup> *SD Myers v Canada*, Partial Award, 58.

<sup>152</sup> Clarifications 138.

<sup>153</sup> *Amoco v Iran* [108].

<sup>154</sup> Newcombe, 325.

<sup>155</sup> UNCTAD, 20.

<sup>156</sup> *Starret Housing*, 154; *Tippetts*.

<sup>157</sup> Record, Annex 2, 17 [10].

98. The tribunal is urged to disregard any attempt to rely on the ILC Articles of State Responsibility (“ILC”) to attribute responsibility to Respondent, as the ILC Articles do not represent customary international law<sup>158</sup> and cannot be used in order to attribute Beritech’s alleged breach of contract to Respondent.
99. Alternatively, the ILC Articles are not suitable for the specific context of ICSID arbitration. Chapter II and III represent a reparation system between states and are not applicable to investor-state arbitration, as they address responsibility for a wrongful act towards another State. Although Chapter I addresses violations of international law by states in general, its application within the ICSID context is questionable.<sup>159</sup>
100. Under international investment law, in a company shareholders are not responsible for actions of the board of directors. *Amco v Indonesia* established that as consequence of the separate legal personality doctrine the acts of the company cannot be attributed to its shareholders.<sup>160</sup> *Wena Hotels v Egypt* confirmed that as long as the function of the state-owned company is commercial and not governmental its acts cannot be confused with those of the State.<sup>161</sup> Beritech is not an agent of the state and is purely a private company.<sup>162</sup> Moreover, Beritech was not mentioned in the Telecommunications Act.<sup>163</sup>
101. The same finding was made by the *Lauder v Czech Republic* tribunal, where the termination of an agreement was found to be a purely commercial measure, taken by one private entity in relation to another private entity, without any interference of the State.<sup>164</sup> The *CME v Czech Republic* tribunal, which found for expropriation, has been criticized for its finding on responsibility without any basis for the attribution.<sup>165</sup>

ii. ALTERNATIVELY, RESPONDENT’S ACTIONS DO NOT MEET THE STRICT CONDITIONS OF ARTICLE 8 ILC.

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<sup>158</sup> Merits Part I.A.

<sup>159</sup> Douglas, 97.

<sup>160</sup> *Amco v Indonesia* [163].

<sup>161</sup> *Wena v Egypt* [30].

<sup>162</sup> *Wintershall v Qatar*

<sup>163</sup> Clarifications 266.

<sup>164</sup> *Lauder v Czech Republic* [234].

<sup>165</sup> Hober, 569-570.

102. If the tribunal finds that attribution in ICSID Arbitration can be established pursuant to ILC Articles as part of customary international law, Respondent submits that the strict conditions for an attribution are not met. Article 8 of the ILC articles allow the attribution only in case where the state has directed or controlled the act in question. This requires instruction, specific control, or direction of the act in question.<sup>166</sup> Respondent is, however, only a shareholder in Beritech. Respondent has not used its shareholding to appoint the directors of Sat-Connect.<sup>167</sup> The necessary individual control<sup>168</sup> required for an attribution is therefore not met.

**c) NO EXPROPRIATION OCCURRED BY BREACH OF THE GUARANTOR AGREEMENT.**

103. Respondent further submits that Claimant's investment has not been expropriated through breach of the guarantor agreement. Respondent co-signed the JV Agreement as guarantor.<sup>169</sup> However, a guarantee is a promise to answer for the debt of another person<sup>170</sup> or a legally binding agreement to take responsibility for another person's obligation.<sup>171</sup> This does not result in a fusion of legal personalities and does not transfer the contractual obligations of Beritech to Respondent. Thus, Respondent would be liable only for the consequences of acts or omissions of Beritech in default of the JV agreement.

104. The JV agreement contained its own confidentiality agreement in clause 4,<sup>172</sup> which Claimant breached. The buyout therefore is an exercise of contractual rights contained in clause 8<sup>173</sup> of the JV agreement by Beritech. In contrast to Claimant, Beritech was not in default of its obligations, and Respondent did not need to "step in".<sup>174</sup>

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B.

<sup>166</sup> Crawford, 113[6].

<sup>167</sup> Clarifications 268.

<sup>168</sup> Dolzer/Schreuer, 201.

<sup>169</sup> Record, Annex 2, 16 [3].

<sup>170</sup> Garner, *A dictionary of modern legal usage*, OUP 1995.

<sup>171</sup> The Chambers Dictionary, Chambers Harrap Publishers Ltd Edinburgh 1998.

<sup>172</sup> Record, Annex 3, 18.

<sup>173</sup> Record, Annex 3, 19.

<sup>174</sup> See Merits, Part I.



105. Even if the tribunal comes to the conclusion that Beritech had indeed violated the JV Agreement by invoking clause 8 of the JV agreement<sup>175</sup> and thus Respondent has failed as a consequence failed to perform its obligations as a guarantor, this is still a breach of contract, and not a breach of the BIT. Every person can fail to perform a contract, but expropriation can only be made by a governmental act.<sup>176</sup> Several tribunals have considered that a State acting as a commercial partner cannot be held liable for treaty violation in case that it violates its contractual obligations towards an investor. In *RFCC v Morocco* the tribunal held that a contractual violation does not necessarily entail a treaty violation.<sup>177</sup>

106. A failure to perform a contractual obligation would give rise to a cause of action in the competent forum, which in this case is the arbitral tribunal. Where the issue at hand is not the outright repudiation of the agreement but rather a failure to perform some of the contractual obligations, a breach can only amount to an expropriation where no remedy against the breach exists.<sup>178</sup> Here Clause 17 JV agreement provides for a competent forum to address contractual claims.<sup>179</sup>

**d) THERE HAS BEEN NO EXPROPRIATION THROUGH THE ASSISTANCE OF THE CWF.**

107. Respondent submits that although the CWF secured the sites on the basis of an executive order,<sup>180</sup> this intervention does not represent an expropriation. The intervention was in line with the duties of Respondent to safeguard law and order and to protect its national security.<sup>181</sup> The involvement of CWF is therefore part of valid governmental activity and legitimate police actions.<sup>182</sup>

108. Respondent is only following its own law to enforce outstanding contractual obligations. Claimant received a notice from Beritech on 28 August 2009 to hand over possession of

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<sup>175</sup> Record, Annex 3, 19.

<sup>176</sup> *Waste Management* [174].

<sup>177</sup> *RFCC v Morocco* [38,41-42].

<sup>178</sup> *Waste Management* [175].

<sup>179</sup> Record, Annex 3, 19.

<sup>180</sup> Clarifications 155.

<sup>181</sup> Record, 7.

<sup>182</sup> *Saluka v Czech Republic*, Partial Award [254].

sites and equipment within 14 days.<sup>183</sup> Claimant, however, ignored the notice, and Respondent had to intervene in order to safeguard the contractual rights of Beritech.

109. Moreover, the intervention was necessary to safeguard Respondent's security interests.<sup>184</sup>

The independent Beristan Times<sup>185</sup> revealed that sensitive security information has been passed on to the Government of Opulentia.<sup>186</sup> This unauthorised information included encryption keys for the army communications of Respondent<sup>187</sup> and information on the satellite network and accompanying terrestrial system technology.<sup>188</sup>

110. The sole effect doctrine, which asserts state interference has only to be assessed by the effect of a governmental measure on foreign property,<sup>189</sup> is not the correct approach to adopt, because it neglects the police power exception. "Police powers" have been defined in customary international law as the legitimate power of states to regulate actions within their territory for legitimate purposes.<sup>190</sup> The legitimate purposes of governmental actions include maintenance of law and order<sup>191</sup> and other goals of social and general welfare.<sup>192</sup> The *Saluka* tribunal found that if such a legitimate action deprives an investor of its property rights, this deprivation would not amount to an expropriation.<sup>193</sup>

111. After the public declaration that the Sat-Connect Project was compromised due to leaks from Claimant's personnel<sup>194</sup> and was no longer suitable for military purposes,<sup>195</sup> Respondent had no choice but to intervene to eliminate the threat to its national security. In *Feldman v Mexico* the tribunal emphasized that the question of whether a measure is expropriatory or represents valid governmental activity needs to be considered in light of

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<sup>183</sup> Record, Annex 2, 17 [10].

<sup>184</sup> Record, 7.

<sup>185</sup> Clarifications 168.

<sup>186</sup> Record, Annex 2, 17 [8].

<sup>187</sup> Clarifications 178.

<sup>188</sup> Record, Annex 2, 16 [5].

<sup>189</sup> *Tippetts v TAMS, Metalclad v Mexico, Santa Elena v Costa Rica*.

<sup>190</sup> *Sedco v Iran*, 275; *Saluka v Czech Republic*, Partial Award [255]; Newcombe, 358; OECD (Regulation) 8; Weiner, 168.

<sup>191</sup> Newcomb, 359.

<sup>192</sup> *LG & E v Argentina*, Decision on Liability [189,195].

<sup>193</sup> *Saluka v Czech Republic*, Partial Award [254, 278].

<sup>194</sup> Record, Annex 2, 17 [8].

<sup>195</sup> Clarifications 178.

the facts of the specific case.<sup>196</sup> In *Saluka* the tribunal pointed out that for the question when a governmental activity represents an expropriation, “the context within which an impugned measure is adopted and applied is critical to the determination of its validity”.<sup>197</sup> Meanwhile, according to the *SD Myers* tribunal, it is important to look at the “real interests involved and the purpose and effect of the governmental actions.”<sup>198</sup>

112. The Sat-Connect project has a mixed operational purpose, an important part of which was the military aspects.<sup>199</sup> Any military usage of the Sat-Connect project was substantially compromised as a result of Claimant’s breach of its contractual duties.

113. Respondent’s intervention was reasonable and necessary to restore the integrity of its national security. Claimant’s continued presence at the Sat-Connect sites posed a risk of further information leaks.<sup>200</sup> The intervention of the CWF effectively stopped the leaking of information. Heiskanen and Newcomb propose that if a state adopts a measure *prima facie* for a legitimate purpose, it is on the investor has to prove that the measure was nonetheless discriminatory.<sup>201</sup> The fact that the measure also benefited a private party, Beritech, does not necessarily put its validity into question. Therefore, the intervention does not amount to an expropriation.

114. Respondent concedes that it cannot enforce its legitimate purposes in conducting an international wrongful act. However, unlike in *Amco v Indonesia* where the intervention of the army was considered as an international wrongful act, because the force intervened in assistance of a breach of contract by a private party.<sup>202</sup> Not only Beritech did not breach the contract; but it was Claimant which materially breached the confidentiality clause of the JV Agreement. Thus, Respondent has acted legitimately within the police powers to safeguard its national security. Such actions do not amount to expropriation.

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<sup>196</sup> *Feldman v Mexico* [102-103].

<sup>197</sup> *Saluka v Czech Republic*, Partial Award [264].

<sup>198</sup> *SD Myers v Canada*, First Partial Award [285].

<sup>199</sup> Record, Annex 2, 17 [6].

<sup>200</sup> Record, 7.

<sup>201</sup> Heiskanen, 185; Newcomb [7.27].

<sup>202</sup> *Amco v Indonesia* [169].

## 2. The expropriation was lawful.

115. Even if the Tribunal finds that measures undertaken by, or attributable to, Respondent, expropriated Claimant's investment, the criteria of Article 4(1)(2) BIT<sup>203</sup> for a lawful expropriation nevertheless have been met. Article 4(1)(2) provides that investments shall not be expropriated, except for public purposes or national interest (a), against immediate full and effective compensation (b), on a non-discriminatory basis (c), and in conformity with all legal provisions and procedures (d).

### a) RESPONDENT ACTED FOR A PUBLIC PURPOSE AND IN THE NATIONAL INTEREST OF BERISTAN.

116. Article 4(2) BIT<sup>204</sup> provides that an expropriation is lawful when it is made for a public purpose or in national interest of the host state. The national security of Beristan was in imminent peril due to the information leak.<sup>205</sup> A newspaper article revealed not only that this information was leaked by Claimant,<sup>206</sup> but also that the leak included secret information about systems used by the Beristian armed forces<sup>207</sup> It was therefore in Respondent's national interest to exclude Claimant from the Sat-Connect project.

117. Article 4(1)(2) BIT gives a wide base of possible justifications to Respondent and Opulentia. In *German Interests in Polish Upper Silesia* the PCIJ found that under international law, for an expropriation to be lawful, it must be made for a public purpose.<sup>208</sup> Public purpose consists of grounds or reasons of public utility, security or the national interest, recognised as overriding purely individual or private interests.<sup>209</sup> In *Oscar Chinn* the PCIJ found that the determination of what constitutes a public purpose or

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<sup>203</sup> Record, 11.

<sup>204</sup> Record, Annex 1, 11.

<sup>205</sup> Record, 7.

<sup>206</sup> Record, Annex 2, 17 [8].

<sup>207</sup> Record, 7.

<sup>208</sup> *Chorzow Factory*.

<sup>209</sup> United Nations General Assembly Resolution No. 1803 (1962) Art.4.

national interest of a country can only be accorded to the state itself.<sup>210</sup> Other international tribunals have also held that states have a considerable margin of discretion to determine what is public purpose or national interest.<sup>211</sup> Thus, the expropriation is legal.

**b) CLAIMANT IS NOT ENTITLED TO COMPENSATION.**

118. No compensation is due to Claimant.<sup>212</sup> A taking is not compensable if “it results from the action of the competent authorities of the state in maintenance of public order.”<sup>213</sup> Respondent cannot be obliged to pay compensation to Claimant, which handed over security sensitive information to the Government of Opulentia.<sup>214</sup> Respondent has only taken the necessary measures within its inherent governmental obligation to maintain public order. Therefore, Respondent’s acts are justified and represent a non-compensable taking.<sup>215</sup>

119. Even if the Tribunal should consider that Respondent unlawfully deprived Claimant of its investment, the issue of compensation does not arise at the present time. The dispute has not yet come to the stage where full and effective compensation has to be offered, as Claimant has not submitted the measures in question to judicial review in the host state. Whenever a claim has had its origin in factual situations which needed to be assessed by domestic law,<sup>216</sup> tribunals have dismissed expropriation claims on the basis that the investor had to seek relief in front of local courts.<sup>217</sup> Claimant would be entitled to immediate full and effective compensation only at the point of time that a competent forum finds for payment of compensation for expropriation

**c) RESPONDENT TOOK NO DISCRIMINATORY ACTIONS.**

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<sup>210</sup> *Oskar Chinn*, 79.

<sup>211</sup> *Liamco v Lybia*, 194; *Amoco v Iran*, 233 [145]; *Goetz v Burundi*, Decision on Liability [126]; *James v United Kingdom*, 123.

<sup>212</sup> Record, 7.

<sup>213</sup> Art. 10 (5) of the Harvard Draft Convention.

<sup>214</sup> Record, 7.

<sup>215</sup> Penner, 103.

<sup>216</sup> Spiermann, ‘Essays in honour of Schreuer’ 465.

<sup>217</sup> *Lauder v Czech Republic* [202], *Generation Ukraine v Ukraine*[20.30] *Helnan v Egypt*, *En Cana v Ecuador*, *Waste Management, Parkerings-Companiet v Lithuania*.

120. Article 4(2) BIT provides that an expropriation is legal when it was made on a non-discriminatory basis. A taking of property is discriminatory if it is directed against a particular person without a reasonable basis.<sup>218</sup> Thus, an expropriation is non-discriminatory where a person is deprived of its property through measures taken with legitimate reasons.<sup>219</sup> The *Amoco* tribunal decided that specific grounds to the expropriated investment can be a valid reason for a difference in treatment.<sup>220</sup> The criterion of non-discrimination is not an absolute standard and may be influenced by public policy considerations, which include protecting the security of Beristan. Moreover, strengthened by the rumours in military circles that Claimant leaked information to the Government of Opulentia,<sup>221</sup> Respondent had a reasonable basis to evict Claimant.

**d) RESPONDENT ACTED IN CONFORMITY WITH ALL LEGAL PROVISIONS AND PROCEDURES.**

121. Article 4(2) BIT<sup>222</sup> requires that for an expropriation to be lawful, the measures must be taken in conformity with all legal provisions and procedures. The burden of proof is on Claimant to show to this Tribunal that Respondent has not acted in accordance with its laws. Respondent is not privy to internal disagreements between private parties. An obligation to intervene by Respondent on behalf of Claimant would arise only if a *prima facie* case for such an intervention was made by Claimant. However, Claimant has not addressed Respondent proper authorities in this regard.

122. Claimant received a notice to leave the sites directly after the buyout and was given two weeks to hand over possession.<sup>223</sup> Claimant, however, did not react to this notice and did not challenge it before a competent forum. Enforcement of outstanding contractual obligations is a fundamental function of a state, and Claimant failed to show that Respondent violated such obligations.

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<sup>218</sup> Rubins and Kinsella, 177.

<sup>219</sup> Restatement Third of the Foreign Relations Law of the United States [712] comment (f).

<sup>220</sup> *Amoco v Iran* [142].

<sup>221</sup> Clarifications 231.

<sup>222</sup> Record, 11.

<sup>223</sup> Record, Annex 2, 17 [10].

123. Respondent's Constitution provides for due process,<sup>224</sup> and Respondent treated Claimant with due process and in accordance with all legal and procedural requirements.. Furthermore, Respondent did not expel Claimant's personnel from the country; on the contrary, they left the Respondent state voluntarily.<sup>225</sup> In *Generation Ukraine v Ukraine* the tribunal held that leaving an investment behind without a reasonable effort to seek reparation against obstacles to the enjoyment of the investment would cast doubt on the presence of expropriatory measures.<sup>226</sup> Similarly, without even the slightest effort to seek review before a competent forum against the alleged actions, Claimant failed to prove to this court that Respondent denied it due process. At every step due process was available to Claimant, but Claimant failed to benefit from this due to its own omission.

**B. Respondent has not discriminated against Claimant.**

124. Article 2(3) and Article 3 BIT<sup>227</sup> protect Claimant against discrimination. However, discrimination occurs only when similar cases are treated differently, without a reasonable basis for the distinction.<sup>228</sup> Respondent gave the order to expulse Claimant from the Sat-Connect sites because Claimant's personnel leaked information essential to Respondent's national security.<sup>229</sup> Respondent did not make any discriminatory efforts to favour local personnel; on the contrary, Respondent observed the Guidelines on Foreign Direct Investment in allowing Claimant to bring its personnel in the country.<sup>230</sup> The Beristan Times article<sup>231</sup> specifically mentioned Claimant's personnel as the source of the leak. Respondent has only acted on its legitimate concerns on its national security<sup>232</sup> and has a reasonable basis to treat Claimant differently from Beritech.

**C. Respondent has accorded Fair and Equitable Treatment and Full Protection and security to Claimant.**

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<sup>224</sup> Clarifications 120.

<sup>225</sup> Clarifications 204.

<sup>226</sup> *Generation Ukraine v Ukraine*, [20.30-20.32].

<sup>227</sup> Record, Annex 1, 10-11.

<sup>228</sup> *Saluka v Czech Republic*, Partial Award [313]; Newcombe, 305.

<sup>229</sup> Record, Annex 2, 17 [11]; Record, 7; Clarifications 155.

<sup>230</sup> Worldbank Guidelines, under III. Treatment 5b.

<sup>231</sup> Clarifications 178.

<sup>232</sup> See Part Two II A. 1. d.

125. Article 2(2) BIT<sup>233</sup> contains the obligation to ensure treatment in accordance with customary international law, including fair and equitable treatment (FET) and full protection and security toward foreign investors' investments.

126. Several tribunals have found that the standard of full protection and security only applies to protection of the physical integrity of the investment.<sup>234</sup> Its traditional scope of application concerns situations of unrest and obliges the state to exercise due diligence in the protection of the investment.<sup>235</sup> Thus, the full protection and security standard is not applicable to the present dispute.

127. Even if the tribunal follows the approach adopted in *Azurix v Argentina*<sup>236</sup> to consider an interrelationship between the two standards in the sense that full protection is a sub category of FET, Respondent nevertheless accorded Claimant the afforded treatment.

128. The demonstration that Respondent accorded FET and full protection and security to Claimant's Investment in accordance with Article 2(2) BIT will be made in two parts: (1) Respondent acted on all levels reasonably and in a non-discriminatory manner in good faith, and (2) Respondent afforded due process to Claimant.

**1. Respondent acted reasonably, with good faith and in a non-discriminatory manner.**

129. The *Neer* decision established that the minimum standard of international law is only infringed if the treatment of aliens amounts to an outrage, to bad faith, to a wilful neglect of duty to such an extent that is easily recognisable.<sup>237</sup> Respondent accorded FET to Claimant until Claimant leaked information to the Government of Opulentia. It is reasonable and comprehensible that Respondent had to take action in order to prevent its national security from harm. Thus, Respondent acted in good faith.

**2. Respondent has provided due process and access to justice to Claimant.**

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<sup>233</sup> Record, Annex 1, 10.

<sup>234</sup> *AAPL v Sri Lanka, Saluka v Czech Republic* [484].

<sup>235</sup> Dolzer/Schreuer, 149,150.

<sup>236</sup> *Azurix v Argentina* [408], Annulment Decision [138].

<sup>237</sup> *Neer v Mexico*.



130. As discussed above, Respondent has complied with providing due process and access to justice. The courts of Beristan have been always open to Claimant, but Claimant preferred not to take any action.

### **III. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9 BIT.**

131. Even if the Tribunal finds that Respondent violated its treaty obligations, such violation is nevertheless justified on the basis of Article 9 BIT. The measures taken by Respondent have been intended, and were necessary to, restore the essential security of Beristan. Respondent is entitled to rely on Article 9 BIT as a defence, as the national security of Beristan was acutely endangered because of leaked information which included secret information about systems that are being used by the Beristian armed forces.<sup>238</sup> The executive order to secure the sites was therefore essential to prevent Beristan from further harm caused by the information leak. Such a situation was provided for in Article 9(1) BIT and an intervention is especially permitted by Article 9(2) of the BIT.

#### **A. Article 9 BIT gives Respondent the right to assess the existence of a security threat on its own.**

132. The relevant parts of Article 9(2) BIT read as follows: ‘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.’<sup>239</sup> This clause uses the words “it considers” and explicitly mentions that the question of its application is to be answered by the invoking State. Article 9 BIT differs in that regard from the BIT provisions that have been recently examined by other ICSID tribunals, where the provisions only allow the contracting state to take measures necessary for the maintenance of public order.<sup>240</sup> Consequently, the *CMS* and *Enron* tribunals considered that if a state shall be the sole judge of an exemption from treaty obligations, this would have to be stated explicitly. In both cases the relevant provisions were not self-judging, and the tribunal proceeded with a

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<sup>238</sup> Record, 7.

<sup>239</sup> Record, Annex 1, 13.

<sup>240</sup> *CMS v Argentina* [332].

review.<sup>241</sup> On the contrary, Article 9 BIT is a self-judging provision, and the basis of its invocation is therefore not subject to external review.

**B. Customary international law on the state of necessity is not applicable and Respondent's defence must be assessed exclusively on the basis of Article 9 BIT.**

133. The Tribunal is obliged to interpret the BIT according to the VCLT, as the VCLT contains the rules under international law for treaty interpretation. Article 32 VCLT refers to the circumstances of the conclusion of the treaty. The context of the conclusion of the BIT and the polite but tense relations that always existed between Respondent and Opulentia<sup>242</sup> must be considered when interpreting Article 9 BIT. Article 9 BIT is construed much broader than customary international law existing on this matter as summarised by Article 25 ILC.

134. In the *Gabcikovo-Nagymaros* case the ICJ decided that the State is not the sole judge of whether conditions of necessity are present.<sup>243</sup> This decision is not applicable in the context of an investment arbitration based on a bilateral treaty which provides for a self-judging necessity clause. The two countries involved in the *Gabcikovo-Nagymaros* case had no provision of necessity or emergency measures in the disputed treaty. The decision of the ICJ therefore concerns only customary international law on necessity and not treaty law. On the contrary, Article 9 BIT provides a wide formulation which contrasts with the more restrictive approach of customary international law. The finding of the ICJ that the state of necessity has to be established according to the objective criteria is not applicable here. If the treaty provides for self-judgement, this provision prevails as *lex specialis*. The treaty standard replaces the customary international law existing on the very same matter.<sup>244</sup>

135. The conceptual difference between an express exception to a treaty obligation, like Article 9 BIT, and the corresponding principles of customary international law was also

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<sup>241</sup> *CMS v Argentina* [370]; *Enron v Argentina* [335].

<sup>242</sup> Record, Annex 2, 18 [15].

<sup>243</sup> *Gabcikovo-Nagymaros* Project [51].

<sup>244</sup> Reinisch (2006).

emphasized by the *CMS* annulment committee.<sup>245</sup> It considered the application of the ILC Articles on State responsibility, in this context, as a manifest error of law.<sup>246</sup>

136. This view was also adopted by the *LG & E* tribunal, which considered that the relevant provision to examine whether a state of necessity exists is the relevant article of the BIT.<sup>247</sup> However, the tribunal also analysed customary international law to back up its finding.<sup>248</sup> The BIT provision and customary international law differ to such an extent on the same matter that a complementary analysis is not possible.

### **C. Respondent invoked Article 9 in good faith.**

137. Respondent accepts that the Tribunal may be entitled to a good-faith review as suggested by the *CMS* and *LG&E* Tribunals.<sup>249</sup> Respondent submits that it exercised the invocation of Article 9(2) BIT in good faith. Self-defence is a fundamental right inherent to every state and acknowledged in the Charter of the United Nations.<sup>250</sup> In the abstract possibility of a threat to peace, effective self-defence for Respondent is substantially dependent on a confidential satellite and communication system. The actions of Claimant, however, represent an acute threat to the security of Beristan. The removal of Claimant was therefore strictly necessary to prevent a further aggravation of the situation through a further information leak to the Government of Opulentia.

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<sup>245</sup> *CMS v Argentina*, Annulment Decision [130].

<sup>246</sup> *CMS v Argentina*, Annulment Decision [146].

<sup>247</sup> *LG&E v Argentina*, Decision on Liability [229, 245]

<sup>248</sup> *LG&E v Argentina*, Decision on Liability [245]

<sup>249</sup> *CMS v Argentina* [374]; *LG&E v Argentina*, Decision on Liability [212,214].

<sup>250</sup> Charter of the United Nations, Chapter VII, Art.51.

## **REQUEST FOR RELIEF**

Respondent respectfully asks the Tribunal to find that:

(1) this Tribunal lacks jurisdiction as the claims are contractual and need to be resolved under Clause 17 JV Agreement;

Alternatively, the Tribunal is requested to find that:

(2) Respondent did not materially breach the JV Agreement;

(3) Respondent actions do not amount to expropriation, discrimination, violation of FET and lack of full protection and security; and

(4) Respondent is allowed to self-judge its invocation of Article 9 BIT.

**Respectfully submitted on 19 September 2010 by**

**PINTO**

**On behalf of Respondent**

**THE GOVERNMENT OF THE REPUBLIC OF BERISTAN**