TANAKA

THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

TELEVATIVE INC.
[Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN
[Respondent]

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

LIST OF LEGAL SOURCES

TREATISES AND OTHER PUBLICATIONS

1. Alan Redfern. Law and Practice of International Commercial Arbitration (2004);

2. Andrew Newcombe, Lluis Paradell. Law and Practice of investment Treaties: Standards of Treatment (2009);

3. Cristoph Schreuer. ICSID Convention: A commentary (2009);

4. James Crawford. The International Law Comission's Articles on State Responsibility. Introduction, Text, Commentaries, Cambridge University Press (2002);

5. Margaret L. Moses. The Principles and Practice of International Commercial Arbitration. (2008);

6. Mariel Dimsey. The Resolution of International Investment Disputes: challenges and situations (2008);

7. Martin Endicott. Sustainable development in world trade law (2005);

8. Thomas W. Walde. Interpreting Investment treaties: Expireiences and Examles, in International Law for 21st Century: Essays in Honour of Cristoph Schreuer (2009);

9. Todd Weiler. International Investment Law & Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties & Customary International Law (2005).

10. M. Sornarajah, "The International Law on Foreign Investment", the 3-d edition, 2010.

11. S.M. Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005).

LIST OF AUTHORITIES

1.	*ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hunguary,* ICSID Case No. ARB/03/16;	*ADC Limited case*
2.	*Amoco International Finance Corp*. v. *Islamic Republic of Iran*, USCTR 189;	*Amoco case*
3.	*Asylum Case*, ICJ, 20 November, 1950;	*Asylum case*
4.	*Autopista Concesionada de Venezuela, C.A.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/IIC 19;	*Autopista case*
5.	*BRIDAS S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures, Ltd., and Bridas Corp., Plaintiffs-Appellants* v. *GOVERNMENT OF TURKMENISTAN*, USCA Case No. 04-20842;	*BRIDAS S.A.P.I.C. case*
6.	Chorzow Factory, P.C.I.J.	*Chorzow Factory case*
7.	*CME Czech Republic B.V.* v. *Czech Republic*, UNCITRAL (The Netherlands/Czech Republic BIT);	*CME case*
8.	*CMS Gas Transmission Co.* v. *Argentina*, ICSID Case No.ARB/01/8 IIC 64;	*CMS case*
9.	*Elettronica Sicula S.p.A (ELSI) (United States of America)* v. *Italy*, ICJ, 6 February, 1987;	*Elettronica Sicula S.p.A case*
10.	Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets.	*Enron case*
11.	*Foremost Tehran Inc.* v. *Iran*;	*Foremost Tehran Inc case*
12.	Gabcíkovo-Nagymaros Project.	*Gabcíkovo-Nagymaros case*
13.	Gulf Oil Corp. v. Gilbert.	*Gulf Oil case*
14.	ICSID commentary to the Articles on Responsibility of	The ICSID

States for internationally wrongful acts (2001).	Commentaries
15. ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1968);	the ICSID Convention
16. ICSID Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, International Bank for Reconstruction and Development, March 18, 1965;	the ICISID Report
17. International Law Commission, Articles on State Responsibility (2001);	Articles on State Responsibility
18. Investment agreements in the western hemisphere: a compendium, FTAA Negotiating Group, 1999.	Investment agreements in the western hemisphere
19. *LETCO* v. *Government of Republic of Liberia*, ICSID Reports 369, 40 ILM 1129;	*LETCO case*
20. *Liberian Eastern Timber Corporation* v *Liberia*, ICSID Case No. ARB/83/2;	*Liberian Eastern Timber Corporation case*
21. *Maffezini v. Kingdom of Spain* ICSID, Case No. ARB/97/7;	*Maffezini case*
22. *Nicaragua Case*, ICJ, 27 June 1986	*Nicaragua case*
23. *Noble Ventures, Inc.* v. *Romania* ICSID Case No. ARB/01/11;	*Noble Ventures case*
24. Oil Platforms Case (Islamic Republic of Iran vs USA), ICJ , 12 December 1996;	*Oil Platforms case*
25. *Parkerings-Compagniet* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8;	*Parkerings-Compagniet case*
26. Report of the International Law Commission on the work	the Report of ILC

of its fiftieth session 20 April-12 June 1998 27 July-14 August 1998 Official Records Fifty-third Session Supplement No.10 (A/53/10).	
27. Report on International Investment Perspectives: Freedom of Invesment in a Changing World, OECD (2009);	The OECD Report
28. Report on International Investment Policies for Development, UNCTAD (2009);	the International Investments Policies Report
29. *Salini Construuttori S.p.A and Italstade S.p.A.* v. *Marocco*, ICSID Case No. ARB/00/4;	*Salini case*
30. *SGS Société Générale de Surveillance* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, IIC 222;	*SGS case*
31. *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6;	*SGS v. Philippines case*
32. TECMED v. Mexico, Award, 2006.	*TECMED case*
33. The International Law on Expropriation as Reflected in the Work of the Iran-US Claims-Tribunal (Martinus Nijhoff).	Martinus Nijhoff
34. The OECD draft Convention on the "Protection of Foreign Investment" 1967.	Convention on Protection Foreign Investment
35. The Protection of National Security in IIAs. – UNCTAD (2001).	The Protection of National Security
36. The Vienna Convention on the Law of Treaties (1969).	The Vienna Convention
37. Treaty between USA and the Argentine republic concerning the reciprocal encouragement and protection of investment.	BIT between USA and Argentina
38. U. S. - Russia Investment Treaty, June 17, 1992.	US-Russia Investment Treaty

39. U.S.-Bahrain Investment Treaty, September 19, 1999.	U.S.-Bahrain Investment Treaty
40. UNCTAD Report on the Protection of National Security in International Investment Agreements, UNCTAD *(2009).*	the UNCTAD Report
41. *Vivendi Universal* v. *Argentine Republic*, ICSID Case No. ARB/97/3;	*Vivendi case*
42. *Waste Management, Inc*. v. *United Mexican States* ICSID Case No. ARB(AF)/00/3.	*Waste Management case*
43. Working paper on international investment of the OECD.	OECD working paper
44. The General Assembly Resolution. 1803 on Permanent Sovereignty over Natural Resources	The General Assembly Resolution

STATEMENT OF FACTS

1. The Republic of Beristan ("**Respondent**") and the United Federation of Opulentia entered into a Treaty Concerning the Encouragement and Reciprocal Protection of Investments ("**the BIT**") on 15 March 2010. Both the Republic of Beristan and the United Federation of Opulentia ratified the ICSID Convention.
2. Televative Inc. ("**Claimant**") is a privately held company that was incorporated in Opulentia on 30 January 1995.
3. On 18 October 2007, Claimant concluded the Joint Venture Agreement ("the JVA") with the Beritech S.A.
4. The JVA was drafted, including the forced buyout clause. One of the trigger events is leaking of the confidential information about the technologies which pose a threat to the security of the Republic of Beristan.
5. Beritech S.A. is a company controlled by the government of Respondent which signed the JVA as guarantor of Beritech's obligations, to develop the Sat-Connect project.[1]
6. Respondent owns a 75% interest in the Beritech S.A, the remaining 25% is owned by a small group of investors, who have close ties to the Beristan government[2].
7. The Sat-Connect S.A., established by respective parties to the JVA was developing technologies connected with satellites, communicational technologies and weapons. Therefore, the Sat-Connect project was connected with certain level of the security interest of the Republic of Beristan.
8. The good – relation period extends over two years and the project was developing successfully. Claimant asserts that the success of Sat Connect S.A project was largely due to its significant efforts by providing the project with advanced technologies.
9. On 12 August 2009,[3]the Beristan Times published an article where a highly placed Beristan government official stated that information regarding the Sat-Connect project was leaked.

[1] First Clarification, Q.153

[2] Annex 2, point 2.

[3] Annex2, point 8.

10. On 21 August 2009, a presentation regarding allegations that had appeared in the Beristan Times article was made by the chairman of the Sat-Connect board of directors.[4]
11. During the meeting of Sat-Connect's board of directors, which was held on 27 August 2009, a decision was made to compel a buyout of Televative's interest in the Sat-Connect project. Claimant contends that there was no a due notice before the meeting, which is prescribed by Beristan law[5].
12. The Sat-Connect project was at final stage when the Beritech S.A. executed the right of force buyout of shares in the Sat-Connect S.A. The grounds for forced buyout are, allegedly, as follows: the Televative Inc. leaked the information about the Sat-Connect project which poses a threat to the Republic of Beristan.
13. After that the forced buyout of shares was executed the Beristan military personnel took control over the Sat-Connect facilities and driven out the employees who were the representatives of the Televative Inc. This action was based on the Executive Order of the government of Beristnan.[6]
14. Claimant states that all actions, including forced buyout and taking control over the facility, were made under the consent and control of the government of Respondent.
15. Claimant submitted a written notice to Respondent of a dispute under the BIT on 12 September 2009.
16. Beritech S.A. filed a request for arbitration against Claimant under Clause 17 of the JVA. USD 47 million was paid into an escrow account by Beritech S.A. Claimant has refused to accept this payment as well as to respond to the arbitration request.
17. Claimant respectfully filed a request to ICSID arbitration on 28 October 2009.

[4] Annex 2, point 9.

[5] First Clarification, Q. 176.

[6] First Clarification, Q.139.

ARGUMENTS

1. JURISDICTION

1. The tribunal does not have the jurisdiction over this dispute. This dispute nether meet jurisdictional requirement of neither the ICSID Convention nor those of the BIT.
2. Moreover, the Tribunal does not have jurisdiction since claims were triggered in accordance with the Dispute Settlement provision of the Joint Venture Agreement.

A. Jurisdiction under the ICSID Convention.

3. Article 25 of the ICSID Convention which stipulates as follows :

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[7]" - asks for certain criteria to be met in order to satisfy jurisdictional requirements of the tribunal: nationality, consent and scope[8].

(i) Nationality criterion

4. This dispute arises out of obligations based on the JV Agreement between Televative Inc. and Beritech S.A. Actions of Beritech S.A. is not attributable to the Government of Beristan as Beritech S.A. is a legal entity, which is independent in the process of making decisions. Buyout provision was invoked by corporate means, in which the Government of Beristan did not take part.
5. Moreover, Article 25 of the ICSID which settles the jurisdiction of the center stipulates that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent *subdivision* or *agency* of a Contracting State designated to the Centre by

[7] the ICSID Convention, Article 25(1).

[8] the ICSID Report para. 26.

that State)". Despite the fact that Beristan S.A is a state-owned company it is neither a subdivision nor an agency of the Government of Beristan. Thus, a nationality criterion of jurisdictional requirements of the ICSID is not met.

(ii) The dispute does not arise out of investment

6. The main criterion of proper investment is a substantial contribution to development of the economy of a host state. Contribution made should cause an increase in real per capita income.[9] Establishment of the Joint Venture Company could not cause such increase as activity provided by Sat-Connect S.A. was aimed only to Televative Inc. welfare gain. Thus, admitting that Sat-Connect S.A. is a Joint Venture Company in which Claimant made a substantial commitment it still could not be treated as an investment since there has been no positive contribution to the society of Beristan.

(iii) Consent to arbitration

7. Article 11 of the BIT provides consent to arbitration after filing a written application only to disputes between Contracting State and an investor.
8. Consent to arbitration given by Beristan under BIT does not extend to the dispute between Beritech S.A. and Televative Inc. as actions of Beritech S.A. are not attributable to Beristan. Thus, Article 11 of BIT could not be appliedв in view of the dispute.
9. Even if Article 11 is applicable. The Tribunal still lacks the jurisdiction since the Article prescribes six-months waiting period which was violated by Claimant. The BIT provides "if the dispute has not been settled amicably within six months of the date of the date of written application".
10. Claimant submitted a written notice to Beristan of a dispute under the BIT on September 12, 2009. The request of arbitration under the ICSID Convention was filed on October 28, 2009. Thus, Claimant violated the waiting period.

[9] *See*: Martinn Endicot

B. The Tribunal lacks jurisdiction as Claimant should respond to Respondent's notice of arbitration.

11. Respondent filed request for arbitration under Clause 17 of JVA on October 19, 2009. This choice of remedy is to be construed as one made in accordance of Article 11 of the BIT. Since the choice of remedy had been made Claimant could not chose other remedy to settle the dispute. Thus, settlement of dispute should be provided by ad hoc Arbitration Tribunal in "all respects by the laws of the Republic of Beristan".

12. If the request for arbitration under Clause 17 of JV Agreement could not be construed as the choice of remedy in accordance of Article 11 of the BIT the settlement of dispute, which arises out of contract –based obligations, should be provided in accordance with JV Agreement. According to the Agreement "the dispute shall be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act". Moreover, "each party waives any objections which it may have to such arbitration proceedings". Thus, the fact that Claimant has not respondent to the notice of arbitration bar the jurisdiction of the Tribunal.

2. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMANT'S CONTRACT-BASED CLAIMS ARISING UNDER THE JVA BY VIRTUE OF THE ARTICLE 10 OF THE BIT

13. Respondent states that commencing of the ICSID arbitration precludes the Tribunal's jurisdiction over Claimant's contract based claims. On September 11, 2009, Respondent served notice of their desire to settle amicably to Claimant, and failing that, decided to proceed with arbitration. On October 19, 2009, Respondent filed a request against Claimant under Clause 17 of the JVA and has paid USD 47 million into an escrow account. But Claimant either refused to accept this payment or to respond to Beritech's arbitration request. Respondent submits that by that act Televative refused to exhaust local remedy consisting in deciding dispute on domestic level.

14. It has been the breach of the principle of exhaustion of local remedies, which impedes treaty-based jurisdiction in the scope of the Washington Convention. The act of Claimant contradicts to art. 26 of the Washington Convention.

15. Respondent states that the impossibility of the ICSID contract-based jurisdiction is also based on the Draft Articles on Responsibility of states for Internationally Wrongful acts, adopted by the International Law Commission of the United Nations in 2001, as amended in 2006.
16. The commentary to the Draft Articles on State's responsibility say that "where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim"[10]. Not exhausting this available remedy, Claimant refused to follow the customary international rule of exhaustion of local remedies. Moreover, this rule arises out of the art. 44 (b)[11] of the Draft Articles on State's Responsibility and cannot lead to the responsibility of the State, which Claimant apply to.
17. The local remedies rule was described by a Chamber of ICJ in the ELSI case "an important principle of customary international law"[12]. Chamber defined the rule in the following terms: "for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success[13]".
18. Also the ICJ declared that exhaustion of local remedies is such a fundamental principle of international law that it cannot be excluded except by express words having this effect[14]. As the BIT is silent on this issue, "it may be assumed that the reference to the arbitration is subject to the rule"[15].

---

[10] *See*: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p.47.

[11] See: Articles on State Responsibility.

[12] I.C.J. Reports 1959, p. 6, at p. 27.

[13] I.C.J. Reports 1959, p. 6, at p. 59.

[14] M. Sornarajah, "The International Law on Foreign Investment", the 3-d edition, 2010, p.220.

15 Ibid., p.220.

3. THE UMBRELLA CLAUSE IS NOT APPLICABLE AND THE PARTIES TO THE DISPUTE CANNOT BE CHANGED

19. Beristan cannot be responsible for the actions of Beritech S.A. The ambiguous breach of the JVA cannot rise to the breach of the undertaking clause of BIT. It does not correspond to the criteria of the umbrella clause envisaged in doctrine. The Tribunal in *SGS v. Pakistan* defined umbrella clause as "breach of contractual commitment amounting to a violation of the treaty under this type of provisions"[16]. Because contractual undertaking is not covered by the umbrella clause it is not attributable to the state under the international law rules of attribution to the state[17]. The rule have been developed in the context of attributing responsibility for international law breaches which is not transposable to attributing the undertaking, i.e., the legal obligations, to the state.
20. In *Czechoslovakia-UK* (1990) the tribunal denied jurisdiction on unrelated grounds, but in *obiter dicta* indicated that the agreement was not attributable to the state, on the basis that the enterprise had separate legal personality, and that the government had not been involved in the conclusion of the contract. Thus, international law rules of attribution appear not to have been considered applicable, although even if they had it is not clear that they would have led to a different result. Since the Beritech has a separate legal personality this rule is applicable and umbrella clause is not used.
21. This view is supported by the *CMS Annulment case* (note 48 at para. 95 (c)). The Tribunal concludes that the effect of umbrella clause is no to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation are likewise not changed by reason of umbrella clause. Thus, the law applicable to the obligation cannot be changed by the umbrella clause and claims are to be equated with pure contract claims

[16] International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral treaties and Customary International Law, Todd Weiler, 2005. P. 395.

[17] S.M. Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005) 6 JWIT 499 at 510.

4. THERE IS NO NEED TO COMMENCE ARBITRATION ON INTERNATIONAL LEVEL SINCE THERE IS A MECHANISM WITH THE SAME RULE APPLICABLE ON DOMESTIC LEVEL

22. Art. 42 (1) of the Washington Convention establishes that "the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".
23. The JVA in Clause 17 regulates that "the Agreement shall be governed in all respects by the laws of the Republic of Beristan" as well as "the dispute shall be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended" (which is in conformity with the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006).
24. As there is no any agreement on applicable law besides this (no special reference to applicable law in the BIT) the law of Beristan shall be used. This law corresponds to the international standards (UNCITRAL Model Law on International Commercial Arbitration) and contains the provisions regulating the arguable validity of expropriation: the Beristan Constitution states: "Private property shall not be taken for public use without just compensation and due process". Moreover, being a party to the International Covenant on Civil and Political Rights, 1966, Beristan guarantees adequate proceedings in its territory without any discriminatory measure, ensuring effective remedy (Art. 2 (3)) and equality before the national courts (Art.14 (1)).
25. It is much more convenient to decide dispute before the domestic court than before the Tribunal, because it is more familiar with the law of Beristan which is applicable. What is more, it can encourage trust between Beristan and Opulentia investors and fully realize the principle of international cooperation enunciated in art. 56 of the UN Charter.
26. Claimant submits that the issue of the dispute cannot be regulated by the BIT. The origin of the dispute underlies in Confidentiality clause (Clause 4 of the JVA) and Buyout clause (Clause 8 of the JVA) compelling by the Sat-Connect's board of directors. It was Sat-Connect's board of directors that adopted the decision

according to which the Beritech purchases all of Televetive's interest. The Sat-Connect is a separate joint venture company established under Beristan law. Beritech cannot make decisions on its own, because the quorum demands at least one Televative appointed member to present in the meeting. That's why Beristan cannot be responsible for the actions of the board of directors since it is not under the control of Beristan.

27. The dispute arising out of the board of directors' decision of Sat-Connect is under JVA signed in order to establish joint venture company. Regulating by Beristan law this dispute is purely contract-based, but not treaty-based. "The main difference between contract rights [to arbitration] and treaty rights [to arbitration] is the legal basis. A contract claim will be based on the terms of a contract, while a treaty claim is based on the terms of a treaty". Moreover, "… treaty rights are generally generic and tend to be defined by international law"[18].
28. No generic right was abused by Respondent, because all ambiguous breaches arises out of the decision adopted by the board of directors (being independent and not under control of Beristan Sat-Connect Board of directors' decision is not attributable to the Tribunal in terms of the BIT). The dispute is regulated by JVA what directly excludes Tribunal's jurisdiction over it.

5. THERE WAS NO MATERIAL BREACH OF THE JOINT VENTURE AGREEMENT BY RESPONDENT

29. Respondent states that there was no material breach of the JVA on behalf of Respondent by invocation of the buyout of shares prescribed by respective clause of the JVA.
30. Claimant asserts that Respondent failed to fulfil necessary commitments under the JVA by unduly invoking Clause 8 of the JVA and therefore materially breached the JVA. It stipulates that "If at any time Televative Inc. (Calimant) commits material breach of the contract Beritech will be entitled to buyout all Televative's interest".

[18] The principles and practice of International Commercial Arbitration; by Margaret L. Moses, p. 234.

31. There are two types of obligation breach: *ordinary breach* and *material breach*[19]. "If the Claim is made for simple (*ordinary*) breach of the contract (*the JVA*) it does not fall under the BIT" and *material breach* of the JVA involves violation of the obligations by the state under the BIT. Therefore, the breach of the JVA entails liability of Respondent.
32. The breach is material if "[i]t involves obviously arbitrary or tortuous element" of actions made by the state. Respondent states that its' actions which resulted in the forced buyout of shares in accordance with the JVA bear neither sign of arbitrariness nor they are unlawful by their nature
33. According to the definition of the "arbitrariness" given by the ICJ in the Electtronnica Sicula case[20]: "Arbitrariness is not so much opposed to a rule of law." same idea was expressed in the Asylum Case "when it spoke of arbitrary action" substituted for the rule of law.
34. The merits of the award Electronica Siccula case established the following test in respect to the attributes of arbitrariness: (i) denial of the due process of law and (ii) the act of the seizure of property; or "[I]t is a wilful disregard of due process of law, an act which shocks or at least surprises a sense of juridical property"[21].

6. THE RIGHT OF RESPONDENT TO DUE PROCESS WAS NOT VIOLATED

35. Clause 8 of the JVA stipulates that "If at any time Televative commits material breach of the contract Beritech will be entitled to buyout all Televative's interest in the JV". However pursuant to this provision of the JVA the liability for the breach of the contract is vested only on Claimant. The JVA does not establish any measures applicable to the Beritech.
36. The decision to takeover Claimant's interest was duly ratified by the Board of Directors. As it is set in the uncontested fact the quorum for the board of directors is 6 persons. The quorum was presented. Claimant's allegations that the director who was acting on behalf of Claimant was not aware of the proposed agenda shall

[19] *Noble Ventures case* para. 75.

[20] *Electtronica Sicula case* para. 87.

[21] *Electtronica Sicula case* para. 56.

not be given any notice as all the Directors were duly informed of the proposed agenda on the 21 of August - a week before the meeting took place.

37. According to the *Republic of Lithuania case* "[t]he tribunal held that, even if the agreement had been wrongfully terminated, Claimant had failed to show that the right of its subsidiary to complain of the breach of the agreement had been denied by the Republic of Lithuania and, therefore, that its' investment had not been accorded fair and equitable treatment". Hence, the burden of proof of the fact of deliberate deprivation of due process of law is vested on the investor, *i.e.* Claimant.
38. Claimant failed to present the evidence that it was deprived of the right to address the domestic court of Beristan did it even attempt to settle the dispute in the domestic courts of Beristan.
39. Respondent submits that Claimant had all possible opportunities to defend the respective rights in the domestic court. Respondent considers the submission of the present case directly to the ICSID as abusive and therefore, the case should not be tried by the ICSID.

7. RESPONDENT ACTED IN FULL COMPLIANCE WITH ITS OBLIGATIONS UNDER THE BIT AND GENERAL INTERNATIONAL LAW

40. There is an undisputable power of the recipient state or the "sovereign power of the State" to take over the property of the aliens with regard to certain conditions. There is the minimum international standard for expropriation and in case all of the conditions are met the taking of the property is valid
41. According to the provisions which are contained in the art. 1105 of the Nafta Agreement[22] "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party: (i) for a public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process of law and (iv) on payment of compensation." The minimum international standard for expropriation is widely accepted by the vast majority of international arbitration institutions[23].
42. The BIT contains the same provisions. As it is set forth in sub sec. 2 sec. 1 Art 4 of the BIT the recipient state is empowered to take the property of the investor of one

[22] See: of the Nafta Agreement.

[23] Noble Ventures case, para. 143.

of the Contracting Party for public purpose or national interest with regard to legal procedures.

43. The expropriation of the assets of Claimant was made for the public purpose. The national security is considered to be a public purpose since it is for the benefit of the nation. At the same time the public interest usually defined on the case by case basis, Respondent claims that the public interest criteria was met, moreover it has very broad scope. Therefore the leak of confidential information concerning national security obviously falls in the category as it threatens the welfare of Respondent.
44. The refusal of Claimant to respond to the national security concerns made it impossible to resolve the situation by other means and hence the state of necessity should have been invoked. Moreover, taking over of Claimant's stock in the Sat-Connect was accompanied by the just and full compensation.
45. It is an uncontested fact that the total monetary investment of Claimant amounted to the sum of USD 47 million. The exact sum was transferred by the Beritech on 17 of October. Therefore Claimant may not claim any loss and the case with the loss of chance can not be tried by the ICSID.

8. ACTIONS OF THE MEMBERS OF THE BOARD APPOINTED ON BEHALF OF THE BERITECH ARE INATTRIBUTABLE TO RESPONDENT

46. As the Beritech presents a separate independent entity duly registered under the law of Beristan the actions of the members of the board appointed on behalf of the Beritech can not be attributed to Respondent for the following reasons.
47. Respondent is not a party to the Clause 17 of the JVA. Respondent did not undertake any obligations to submit the Case in accordance with the arbitration clause. The actions of the members of the board of the Sat-Connect appointed by the Beritech can not be attributed to Respondent. The proper respondent under the merits of the Case study is the Beritech.
48. There is no unique doctrine in the international law which enable to vest liability from the legal entity to the state. Viviendi doctrine is inapplicable to the Case study since the contract in *Viviendi case* was infringed by the local government of the

province Tucuman. Therefore the merits of Vivendi Case do not correspond to the Case study.

49. The case law does not establish degree of state control which gives for granted the actions of the entity attributive to the state.

9. RESPONDENT DID NOT VIOLATE INTERNATIONAL STANDARD FOR DIRECT EXPROPRIATION

50. There is no single international act defining the term "expropriation" and most of the international tribunals refer to the Third Restatement of the Foreign Relations Law, Section 712. This Restatement comprises certain criteria.

51. The Third Restatement sets forth:

"A state is responsible under international law for injury resulting from

(1) A taking by the state of the property of a national of another state that:

(a) is not for a public purpose

(b) is discriminatory

(c) not accompanied by provisions for just compensation".

52. The Third Restatement does not set clarification of these terms i.e. "public purpose", "discriminatory taking", "just compensation". In this matter other sources of international law shall be addressed.

53. The *Phelps Dodge Corp. vs. Iran* Case[24] follows the understanding of expropriation and it reads as follows:

"Expropriation is lawful and not inconsistent with the BITs if it is for public purpose, made with due process and made with payment of prompt and adequate compensation….Expropriation requires a substantial deprivation"

54. Respondent asserts that the concept "substantial deprivation" should be evaluated by the Tribunal as there is no legal definition of "substantial deprivation"

55. The definition of the notion "public purpose" is given in Article 4 of General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources.[25]

[24] The Phelps Dodge Corp. vs. Iran Case, para. 43

[25] The General Assembly Resolution. 1803 on Permanent Sovereignty over Natural Resources.

56. Article 4 of the Resolution stipulates that "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the *national interest*…."
57. Respondent claims that following the understanding of the Article 4 invocation of expropriation clause should be excused on the ground of presence of *essential security (national security)* interests. (the issue of *essential security interests* is detailed in part 5)
58. Respondent believes that the evident leak of information on behalf of the Televative personnel imposed grave danger to the national security of Beristan as the satellite system developed by the JV is employed for military purposes as well.
59. Respondent alleges that even the possibility of the leak of information constitutes the state of necessity as the relations between Beristan and Opulentia are constrained. That is why the Government of Beristan acted in order to mitigate the losses resulting from the leak of information to the adversary.
60. Respondent also believes that Tribunal shall take into consideration the provisions of the Charter of Economic Rights and Duties of States adopted by the General Assembly guaranteeing "the right of the State to "nationalize, expropriate or transfer ownership of private property in which the appropriate compensation should be paid by the Sate adopting such measures, taking into account relevant laws and regulations and all circumstances the State considers pertinent".
61. Respondent is convinced that in order to determine the fact whether there is a discrimination, it is essential to rely on the International Convention on the Elimination of All Forms of Racial Discrimination.
62. The definition of discrimination is set forth in the Art 1 of the Convention "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

63. Therefore, Respondent believes that there was no discrimination against Televative personnel on the grounds enumerated in the Convention and the point about discrimination is not applicable in this case.
64. Respondent contends that buy out of stock of shares belonging to Beritech pursued the sole aim of protecting national interest within the sphere of satellite communication. As it is apparent from Article 1 of the recited Convention the take over of the stock of shares bore no sign of the discrimination. Moreover the take over was accompanied by just compensation that is why it gives clear evidence that the takeover was at discrimination.
65. Respondent either submits that Respondent did not furnish the Tribunal with any evidence suggesting that the takeover was equal to expropriation.
66. Respondent alleges that the only condition which is mutual for all international acts governing expropriation is the provision for just compensation.
67. Respondent contends that the compensation provided for the takeover of Claimant's shares fulfills all international undertakings of the State as it amounted to the total monetary loss of Claimant.
68. The total monetary contribution of the Televative amounted to 47 million dollars and is deemed to be a full compensation. The sum put on the escrow account by the managing authority of Sat Connect was the same. Therefore, Respondent is fully convinced that remuneration provided for the takeover of Claimant's stock of shares was adequate as Claimant did not suffer any loss.
69. This rule was upheld by *Permanent Court of Justice in the"In re Chorzow Factor Case*[26]. This Case established the rule for remuneration for taking property. It shall be limited " the value of undertaking, plus the interest to day of payment "

10. THE PROVISIONS OF THE OPULENTIA-BERISTAN BIT AUTHORIIZE THE TAKING OF THE PROPERTY PROVIDED CERTAIN CONDITIONS ARE MET

70. The Opulentia-Beristan BIT states as follows:

"Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures

[26] Chorzow Factory case, para. 113.

having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures".

71. Respondent contends that there is a single approach to the notion of public purpose and only the Tribunal is to decide whether the purpose was public.
72. However, the recent practice of ICSID directly evidences that the definition of "public purpose" is road and it includes such objects as ancient monuments see *Jande de Nul vs Egypt Case* and there exist a threat to the public interest if chemicals dangvreous to health arte produced *Ethyl Corporation vs USA*[27].
73. In *Jande de* Nul *Case* the Government of Egypt appropriated the Duthch-Egyptian Joint Venture the project of which imposed danger on the ancient monuments within the construction site. The award rendered by the ICSID backed on the actions of Egyptian Government.

11. RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9 (ESSENTIAL SECURITY) OF THE BIT AS A DEFENSE TO CLAIMANT'S CLAIMS.

74. Respondent strongly believes that it is entitled to invoke Article 9 (Essential Security)[28] of the BIT basing on the BIT.
75. Respondent claims that Televative personnel seconded to the project, i.e. Claimant, illegally and intentionally disclosed Confidential Information about dual-use technologies[29], *i.e*. used for civilian or military purposes, in particular, civilian and military encryption keys, the technology systems of the Sat-Connect project to the Government of Opulentia by virtue of furnishing this Confidential Information to the Independent Journal "The Beristan Times". The August 12th Article of "The Beristan Times" comprised the critical information from the Sat-Connect Project. That confidential information had de facto been passed to the Government of Opulentia. Information remains confidential only so long as it keeps in secret.

[27] Ethyl Corporation v. US.

[28] *See* Article 9 (Essential Security) of the 1997 the BIT.

[29] *See* the UNCTAD Report.

76. Respondent claims that Claimant breached the confidentiality provision [30] by leaking[31] confidential information about the Sat-Connect project to the Government of Opulentia.
77. Thus, Respondent asserts that leaking of confidential information is deemed to be ipso facto a threat to essential security interests or a threat paramount to essential security interests.
78. There is no confrontation between two Contracting Parties, i.e. the Government of Opulentia and the Government of Beristan, and as of the date of arbitral procedure their relationship is friendly, but Respondent cannot rule out that their relationship might deteriorate further and it might lead to confrontation, with or without using Armed Forced including satellite technologies and military encryption keys.
79. Therefore, it was a prerequisite for Respondent to invoke Article 9 (Essential Security) which entitles "a Party to apply measures that it considers necessary[32]…for the protection of its own essential security interests".
80. Respondent claims that the object and purpose of the BIT do not exclude the right to invoke state of necessity which, under the BIT, is expressly provided for in periods of distress and emergency. The Treaty does not expressly or impliedly excludes the right to invoke state of necessity.
81. According to Article 31 (1) of the Vienna Convention on the Law of Treaties provides that "a treaty must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (emphasis added).
82. The LG&E Case[33] states the following: "the object and purpose of the Treaty[34] do not exclude the operation of necessity which are expressly provided for in periods

[30] *See* Clause 4 of the JVA.

[31] Leak is an intentional disclosure of secret information – Oxford Dictionaries.

[32] There is no a third-party bilateral investment treaty to which Respondent is a party that lacks the "it considers necessary" language found in Article 9 (2) of the BIT. - Clarification

[33] the *LG&E case* para. 98.

[34] *See* the USA and Argentina BIT.

of distress and there is nothing in the Treaty which expressly or impliedly excludes" the right to invoke state of necessity.

83. Therefore, Respondent believes that the LG&E Case, including Essential Security Interests clause of the US-Argentine BIT and Article 9 (Essential Security) of the BIT have the same issue and the same reasoning.

84. Respondent claims that Article 9 of the BIT is of an explicitly self-judging character applying to all provisions of the BIT and it provides Respondent with a sovereign right to determine and "take measures that it considers necessary".

85. Respondent follows the attitude and understanding of the point found in the 2009 UNCTAD Report:[35]

> *"Under a self-judging clause, it is the exclusive prerogative of the host country authorities to assess whether the intended investment poses a threat to national security, and how to react to this threat"*

86. In modern BITs there are two approaches towards the essence of essential security interests (non-precluded measures) clause:

    a. The first one is when Contracting Parties opt to leave the exception conditions out of the Agreement (for instance, *the BIT between Belgium-Luxembourg and Guatemala (2005)* is a case in point: "….[E]xcept for measures *required to maintain public order*…". The BIT concluded between Hungary and the Russian Federation (1995) refers to "*essential security interests*"); and

    b. the second one is when Contracting Parties choose a narrow approach whereby the parties list the conditions under which the exception can be invoked (for instance, Chapter XXI "Other Provisions" contains an exception for essential security interests in its Article 2102. This scope of this Article is limited to measures relating to arms traffic, taken in time of war or other emergency in international relations, relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons[36]").

[35] *See* e.g. the UNCTAD Report;

[36] *See* the OECD Report;

87. Thus, the Contracting Parties to the Opulentia-Beristan BIT chose the first option, an option not to enumerate those conditions under which it would be possible to invoke an essential security interest clause.
88. Since the first option is applied in the BIT, such explicitly self-judging non-precluded measures (NPM) clauses, containing the "it considers necessary" language or similar formulations should be read as an absolute bar to judicial or arbitral review.
89. Respondent follows the wording and essence of the Essential Security interests provision which has an open list of measures using the "that it considers necessary" language. In the original GATT context, "a panel could not or should not be established" when Claimant makes certain claims about the fact that "State invokes the national security exception".
90. Therefore, Respondent believes the "it considers necessary" language should be read as an absolute bar to judicial or arbitral review.
91. Even assuming the above-mentioned points are not applicable in this matter, Respondent is still entitled to invoke the essential security interests clause. Non-self-judging exception clause would not limit the Contracting Parties' sovereign right to protect their national security considerably. It would give arbitral tribunals in such a critical area as national security the right and duty to decree what a country is and is not allowed to do.
92. Respondent claims that Claimant's material breaches of confidential clause in the JVA and the umbrella clause of the BIT constitute breaches tantamount to a breach of international law and this breach caused an invocation of state of necessity in the territory of Respondent.
93. Respondent did not breach provisions of the JVA and the umbrella clause (observance of commitments) of the BIT.
94. Respondent asserts that Claimant materially breached confidentiality provision of the JVA. This breach is amount to a breach of the principle of pacta sunt servanda which is binding on Claimant pursuant to the umbrella clause BIT and the JVA "pacta sunt servanda" clause.
95. Respondent asserts that it is necessary to follow the essence of the decision in the SGS vs. Philippines Tribunal and apply in the case in question. This Tribunal held

in its decision that "the umbrella clause [i.e. in our case there is an observance of commitments clause in the BIT and pacta sunt servanda clause in the JVA] had the effect of elevating breaches of contract to breaches of international law".37

96. Therefore, Claimant's material breaches of confidential clause in the JVA and the umbrella clause of the BIT constitute breaches paramount to a breach of international law serving one of substantiated reasons for excusing an invocation of state of necessity by Respondent.

97. Respondent asserts that the Tribunal should broadly interpret and assess Article 9 of the BIT.

98. Article 9 (Essential Security) of the BIT has the same broad interpretation as the same broad interpretation about essential security interests elements was found in the LG&E Case. The LG&E Tribunal decision on liability38 found that "essential security interest element encompasses economic and political interests, as well as national military defence interests". Therefore, Article 9 of the BIT should be interpreted as Article which does encompasses economic, political interests and military defence interests.

99. Even assuming that the Tribunal should come to the conclusion that there was a breach of the Treaty Respondent should be exempted from liability in light of the existence of a state of necessity under customary international law.

12. RESPONDENT STRONGLY BELIEVES THAT IT IS ENTITLED TO INVOKE ARTICLE 9 (ESSENTIAL SECURITY)[39] OF THE BIT BASING UNDER CUSTOMARY INTERNATIONAL LAW.

100. Respondent claims:

a) "a threat to essential security interest causes a state of necessity[40]"; and

b) Respondent is entitled to refer to Article 25 of the Articles of the International Law Commission ("ILC") on State Responsibility.

---

[37] *See* SGS *case,* para. 97.

[38] *See*, *LG&E case,* para. 65.

[39] *See* Article 9 (Essential Security) of the BIT.

[40] *See* Commentary to the ILC Articles;

101. The Vivendi Annulment Committee found that "Article 25 of the Articles of the International Law Commission ("ILC") on Responsibility of States for Internationally Wrongful Acts (2001) reflects the state of customary international law on the question of necessity".

102. All criteria to invoke necessity were met:

i. The "*essential*[41] *security interest*" of Respondent *was at stake*: the national security and economic wealth of the nation, and the State itself is a judge in deciding whether the essential security interests are at stake.

103. Claimant's infringement of confidentiality clause created a risk/ threat to the host country's essential (national) security interests of Respondent.

104. Even assuming that there was no direct threat to national security from the Government of Opulentia, Respondent cannot rule out that such confidential information about military technology, i.e. encryption keys and etc, may be transferred to other countries or groups of people that will cause an indirect threat to national security. *The formulation of each individual national security exception reflects the extent of discretion that Contracting Parties wish to retain for themselves when faced with a security threat*.

105. Claimant's leak of confidential information concerning civilian and military technology, in Sat-Connect project caused economic damages to Respondent interests. Thus, the Government of Beritech applied measures that it considers necessary to protect strategic industries before any damages occur.

ii. *It was the only available means* of solving the problem of dissemination of confidential information to the Government of Opulentia after a breach of confidential clause occurred.

106. Even taking into account the ILC's comment to the effect that the plea of necessity is "excluded if there are other means available, even they may be more costly and less convenient", Respondent strongly believes that there were no *onerous* and *available*, e.g. at the time breach of confidentiality clause occurred, *ways* to deal with the situation rather than a mere applicability of expropriation of

[41] James Crawford. The International Law Comission's Articles on State Responsibility. Introduction, Text, Commentaries, Cambridge University Press, P. 342.

Claimant's investment against a full and adequate compensation and expel of Claimant's personnel from the Sat-Connect project. Therefore, in this case Respondent had no choice but to act through the invocation of Article 9 of the BIT.

iii. **The grave and imminent peril was really forthcoming, especially considering the amount of speculations and how many people took part in it**.

107. Respondent asserts that a threat to essential security interest constitutes the grave and imminent peril basing on certain objectively established evidence:

a) The Article of "the Beristan Times". This Article contained publicly available confidential information about Sat-Connect civilian and military technology;

b) An available access of Claimant's personnel, seconded to Sat-Connect project, to confidential information about Sat-Connect technology.

108. According to the Commentary [42] to the ILC Articles on State Responsibility, "*imminent" peril means a* forthcoming *peril which can occur sooner*". Thus Respondent cannot rule out that there will no grave and imminent peril from the Government of Opulentia *sooner*. Even assuming that any contribution occurred, Prof. Crawford's report indicates that "contribution must be sufficiently substantial and not merely indicated or peripheral."

109. Finally, Respondent strongly believes that it is entitled to rely on Article 9 (Essential Security) as a defense to Claimant's claims. As the Commentary to the ILC Articles states (the CMS Tribunal confirmed in its Award) that "all conditions governing necessity under Article 25 must be cumulatively satisfied". Thus, Respondent asserts that all conditions under Article 25 exist and confirm its right to invoke an "essential security interest" clause.

Submitted respectfully by

Respondent

[42] *See* the Articles on State Responsibility.