FOREIGN DIRECT INVESTMENT
INTERNATIONAL MOOT COMPETITION 2010

MEMORIAL FOR RESPONDENT

ON BEHALF OF:
Televative Inc. [CLAIMANT]

AGAINST:
The Government of the Republic of Beristan [RESPONDENT]

TEAM:
Visscher

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GATT	General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159
ILC Draft Articles	International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10 (2001)
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STATEMENT OF FACTS

1. The United Federation of Opulentia and The Republic of Beristan (Beristan) entered into a bilateral treaty (Beristan-Opulentia BIT) to encourage and reciprocate protection of investments on March 20, 1996.[1]

2. Both countries are located in Euphonia. Euphonia is a region stretching over almost a fifth of the world's surface. Euphonia consists of six countries, including Opulentia and Beristan, as well as the Euphonic Ocean.[2]

3. Televative Inc. (Claimant) is a privately held multinational company incorporated in Opulentia in January 1995. Claimant specializes in satellite communications technology and systems.[3]

4. Beristan established a state-owned company, Beritech S.A. ("Beritech"), in March 2007. Beristan owns a 75% majority share of Beritech, and the remaining 25% is owned by Beristian citizens.[4]

5. Both Opulentia and Beristan are ICSID Contracting States and have ratified the ICSID Convention. Both countries have also ratified the Vienna Convention on the Law of Treaties.[5]

6. On October 18, 2007 Beritech and Claimant signed a joint venture agreement (JVA) to establish Sat-Connect S.A. (Sat-Connect), a joint venture company, under Beristian Law. Beristan cosigned the JVA as guarantor of Beritech's obligations. Beritech owns a majority 60% share, while Claimant owns the remaining 40%.[6]

7. Sat-Connect had nine board members, 5 appointed by Beritech, 4 by Claimant. Quorum was obtained with the presence of 6 members.[7]

8. Sat-Connect's purpose was to develop and deploy a satellite network and accompanying terrestrial systems and gateways that would provide connectivity and communications for users of this system anywhere in Euphonia. The system

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[1] Beristan-Opulentia BIT.
[2] Annex 2, ¶ 5.
[3] *Id.* ¶ 1.
[4] *Id.* ¶ 2.
[5] *Id.* ¶ 15.
[6] *Id.* ¶¶ 3-4.
[7] *Id.* ¶ 4.

would be used for both civilian and military purposes.[8] The system was being developed with the public's knowledge and Sat-Connect planned on selling services and licensing technology to other companies and governments in the region.

9. On August 12, 2009, The Beristan Times, an independent paper, reported the statement of a highly placed government analyst that information had come to light that Claimant had given access to Opulentia of Sat-Connect civilian encryption keys and other confidential information. Beritech claims this is a violation of the Confidentiality Clause of the JVA. Claimant acknowledges Opulentia requested information but denies giving unlawful access.[9]

10. On August 21, 2009, the chairman of the Sat-Connect board, Michael Smithworth, presented to the board the allegations appearing in the Beristan Times' article. All board members were in attendance at this meeting, and a board member mentioned the implication of the confidentiality violation in regard to the buyout clause.[10]

11. On August 27, 2009, another Sat-Connect board meeting was held. Beristian Corporate law requires only 24-hour advance notice of a board meeting. A quorum of 6 board members existed at the beginning of the meeting. Alice Sharpeton was the only Claimant-appointed board member in attendance. She refused to participate upon discovery that the purpose of the meeting was the invocation of the buyout clause in response to the alleged violation of the Confidentiality Clause. A majority vote resulted in the invocation of the buyout provision in accordance with the JVA.[11]

12. The JVA's buyout clause requires the approval of Sat-Connects board, evidenced by a majority vote after a properly formed quorum.[12]

13. The following day, August 28, Beritech requested that Claimant hand over possession of all Sat-Connect facilities within 14 days and remove all seconded

[8] *Id.* ¶¶ 5-6.
[9] *Id.* ¶ 8.
[10] *Id.* ¶ 9.
[11] *Id.* ¶ 9.
[12] Annex 3, cl. 8.

personnel from the project. Claimant failed to remove all personnel with 14 days.[13]

14. On September 11, 2009, Beristan's Civil Works Force (CWF) secured all Sat-Connect sites and requested that Claimant's remaining personnel depart.[14]

15. The next day, September 12, Beritech moved for an amicable arbitral solution to the situation.[15]

16. Beritech filed a request for arbitration against Claimant under Clause 17 of the JVA on October 19, 2009, and placed US $47 million into an escrow account, representing Claimant's total monetary investment in the Sat-Connect project in accordance with the JVA's buyout clause.[16]

17. On October 28, 2009, Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan.[17]

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[13] Annex 2, ¶ 10.
[14] *Id.* ¶ 11.
[15] Clarification 275.
[16] *Id.* ¶ 13.
[17] *Id.* ¶ 14.

SUMMARY OF ARGUMENT

1. The Tribunal has no jurisdiction because Beristan did not consent to ICSID jurisdiction in a separate expressed writing. Claimant's claims are breach of contract claims under the JV Agreement and thus should be adjudicated under the chosen forum according to the JV Agreement. Also, the Claimant did not wait six months before submitting the claim to ICSID, which is a violation of procedural order. The so-called umbrella clause does not elevate all contract claims to the level of treaty breaches because a broad interpretation would have catastrophic effect on national sovereignty by sweeping up all the national and municipal laws of each Contracting State. For the above reasons, ICSID jurisdiction must be denied.
2. Beritech and Respondent did not wrongfully prevent Claimant from completing its contractual obligations in the JVA. As a result of the material breach, due to a Confidentiality Clause violation based upon sufficient evidence, Beritech properly invoked the buyout clause by majority vote of the board of directors of SatConnect whose meeting had an established quorum. At no point did Beritech or Respondent treat the Claimant unfairly or inequitably as required by international customary law. Beritech and Respondent did not violate the contract. On the other hand, Claimant's actions did. The Tribunal must rule as such.
3. Beritech justifiably invoked the buyout provision of the JVA and Beristan is not liable under the Beristan-Opulentia BIT for Claimant's allegations of expropriation and breach of fair and equitable treatment. Furthermore, pursuant to the JVA, Claimant has been adequately compensated for the buyout by receiving the equivalent of its paid-in investment.
4. Respondent invoked Article 9 (essential security) because the expropriation is necessary to protect its essential security interests. Claimant's breach of the confidentiality agreement with Beritech threatens the essential security interest of the Republic of Beristan. The tribunal should interpret essentially security interests broadly because Sat-Connect technology is used by the Beristian Army

and claimant's breach of confidentiality is a threat to the national security of Beristan. The BIT is the specific law governing the measure taken by Beristan and the tribunal's analysis should follow the language of Article 9 and not the principle of Necessity. The self-judging clause of Article 9 prevents the Tribunal from reviewing the determination of essential security interests by Respondent. Therefore, the Tribunal should defer to Respondent's assessment of essential security interests and dismiss the claimant's claims.

ARGUMENT

I. THE PROCEDURAL FORMALITIES REQUIRED IN ARTICLE 25 OF THE ICSID CONVENTION WERE NOT SATISFIED, THEREFORE THE TRIBUNAL SHOULD DENY JURISDICTION OVER THIS MATTER

18. Foreign direct investments (FDIs) are a driving force in the global economy. FDI as defined by the WTO Secretariat "occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset."[18] Bilateral investment treaties (BITs) set rules that will govern the investment activities from nationals of both states in each other's territories.[19] Many of these disputes fall under the purview of the ICSID Convention, which was created to meet the need of international economic development through private means.[20]

19. The Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter "ICSID Convention") and bilateral investment treaties between countries set forth the standards that determines the instances where international arbitration is appropriate.

20. The three criteria for determining the ICSID Tribunal's jurisdiction over a dispute are: A) the legal dispute must arise out of an investment, B) the parties to the dispute must be a Contracting State or its designated constituent or agent and a national of another Contracting State, and C) that the parties consented to ICSID arbitration in writing.[21]

21. The first element is not in dispute here. the dispute is a legal dipute arising out of an investment as stated in Article 25 of the ICSID Convention and satisfies the definition of an investment in Article1.1 of the Beristan-Opulentia BIT.[22]

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[18] WTO Secretariat, Trade and Foreign direct Investment, PRESS/57 (October 9, 1996) at 6, available at: http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (last visited September 4, 2010).
[19] SORNARAJAH, at 205.
[20] SORNARAJAH, at 217.
[21] Friedland at 33.
[22] Beristan-Opulentia BIT, art. 1(1).

A. The Parties to the Dispute are not Proper as Stated in Article 25 of the ICSID Convention because Respondent is not a Party to the JVA, which was an Investment Contract Signed Between Two Companies, Beritech and Televative

22. While ICSID tribunals have shown that its jurisdiction is not without limits. ICSID tribunals have consistently found that the disputes must be regarding international investment and have diverse nationalities between parties.

23. For the Tribunal to have jurisdiction on this matter it must be proven that the dispute is between Respondent and a national of Opulentia (as defined by the ICSID Convention and the Beristan-Opulentia BIT).[23]

24. The parties are not proper parties to ICSID arbitration because the dispute is between two corporations, Beritech and Claimant. The JVA is the basis for the investment, and Beritech and Claimant are the only two parties to the JVA. Therefore, Respondent was improperly invoked as a party and the Tribunal does not have jurisdiction over a dispute between two corporations.

B. The Tribunal Does Not Have Jurisdiction over the Contract Claims Arising out of the JVA. ICSID Tribunals Have Held that the Umbrella Clause Found in the Contracting States' BIT Does Not Elevate Contract Claims to the Level of Treaty Claims.[24] This Would Preclude the Tribunal of Jurisdiction over Matters of Local Law. Respondent Did Not Consent to Submit Contract Claims to ICSID Arbitration Because in Order to Consent to ICSID Arbitration Both Parties Must Show Express Consent and Respondent Failed to Do This

25. Article 25 of the ICSID Convetion requires that both parties consent in writing to the Centre in order to arbitrate a claim.[25]

26. Article 11(1) of the Beristan-Opulentia BIT provides that "each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration."[26]

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[23] *Total S.A.*.
[24] *SGS v. Pakistan*, ¶ 161.
[25] ICSID Convention, art. 25.
[26] Beristan-Opulentia BIT, art. 11(1).

27. Respondent did not consent to ICSID jurisdiction when it signed the Beristan-Opulentia BIT. Respondent merely agreed that ICSID could be a potential forum to settle disputes, but in order for Respondent to consent to ICSID arbitration it must acknowledge that it has a dispute with a foreign investor and then consent to the forum in a separate writing.

28. The Tribunal should find that without such express consent to submit contract claims to ICSID, Respondent did not expressly consent to ICSID arbitration and that the Tribunal lacks jurisdiction over this dispute.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS IN THIS DISPUTE BECAUSE A) BOTH PARTIES WAIVED THEIR RIGHT TO ICSID JURISDICTION BY AGREEING TO SETTLE DISPUTES UNDER IN BERISTAN ARBITRATION UNDER CLAUSE 17 OF THE JVA, AND B) THE UMBRELLA CLAUSE IN ARICLE 10 OF THE BERISTAN-OPULENTIA BIT DOES NOT RAISE CONTRACT CLAIMS TO THE LEVEL OF TREATY CLAIMS

29. The Tribunal should find that both parties effectively waived jurisdiction when they signed the JVA because Clause 17 (Dispute Settlement) states that any investment dispute shall be settled in before a Beristan arbitration proceeding. Also, the Tribunal should find that the Article 10 (Umbrella Clause) of the Beristan-Opulentia BIT does not raise the contract claims to the level of treaty claims.

A. The Tribunal Should Deny Jurisdiction because Both Parties Waived their Right to Settle their Disputes before an ICSID Arbitral Tribunal upon Signing JVA, which Obliges Both Parties to Settle their Disputes Before a Beristian Arbitral Tribunal under Clause 17

30. In this case, the ICSID Tribunal should follow "[t]he basic principle . . . that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[27] The forum selection clause, Clause 17 of the JVA, reads, in relevant part, as follows:

> The Agreement shall be governed in all respects by the laws of the Republic of Beristan. In the case of *any dispute arising out of or relating to this Agreement*, any party may give notice to the other party of its intention to commence arbitration . . . . The dispute shall then be resolved *only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan* . . . . Each party *waives any objection* which it may have now or hereafter to such arbitration proceedings and *irrevocably submits* to the jurisdiction of the arbitral tribunal for any such dispute.[28]

[27] *SGS v. Philippines*.
[28] JVA, cl. 17 (emphasis added).

31. As similarly decided in *SGS v. Phillippines*, *Joy Mining*, and noted in *Vivendi II*, ICSID should deny jurisdiction because of the existence of a binding forum selection clause. The case is even stronger when dealing with contract claims. "[W]here the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."[29]

32. Here, the essential basis of the claim is a breach of contract, and there is no other overriding valid provision of the JVA that would give this ICSID Tribunal jurisdiction. In fact, according to Clause 17, the parties explicitly waived their objections to submit to the jurisdiction of a domestic arbitral tribunal under the laws of Beristan. The parties agreed to submit any dispute arising out of or relating to the JVA to the domestic arbitral tribunal.

33. Further, the JVA was concluded subsequent to the conclusion of the BIT.[30] Therefore both parties contemplated—or should have contemplated—the dispute resolution clause of Article 11 in the Beristan-Opulentia BIT, which gave the parties the right to select other fora to resolve their disputes.

34. The Tribunal should find that upon signing the JVA, both parties effectively waived their right to resolve their contract claims before an ICSID tribunal.

35. Therefore, the Tribunal should defer to the forum selected in the JVA and find that it does not have jurisdiction over any claims arising out of this investment.

1. <u>The Tribunal should deny jurisdiction because claimant did not wait the required six months before filing its claim with the Centre as stated in Article 11 of the Beristan-Opulentia BIT</u>

36. Article 11 of the Beristan-Opulentia BIT requires that the parties make attempt to resolve their dispute amicably within six months after a breach. If a settlement is not reached within six months, then parties may file a claim to arbitrate or litigate.

37. Here, here the alleged breach happened on August 27, 2009 and Claimaint filed for ICSID arbitration on October 28, 2009.[31] The Claimant did not wait the

[29] *Vivendi*.
[30] *Id.*
[31] Annex 2, ¶¶ 10, 14.

requisite amount of time before submitting the claim to ICSID. Consequently, the Tribunal cannot exercise jurisdiction since Claimant did not properly follow the procedural order as provided in the Beristan-Opulentia BIT.

38. The Tribunal should deny jurisdiction because Claimant did not waited the requisite time before filing a claim to the Centre.

B. The Tribunal Should Find that the Umbrella Clause Does Not Elevate the Contract Claims to the Level of Treaty Claims Because These Are Claims that Are Governed by the National Law of the Host State and Doing Such Would Have a Sweeping Effect and Encompass All National and Municipal Laws

39. While the BIT is created to promote foreign investment by giving the investors and States rights and obligations, it is too vague of an agreement to adequately address the specificities involved in an individual investment. Consequently, foreign investors enter into investment agreements with the host State, in order to agree to terms for a specific investment. Often times, these investment contracts will give the foreign investor and host State more rights and obligations than provided in the BIT.

1. The umbrella clause does not elevate the contract claims to the level of treaty claims because it is susceptible to almost indefinite expansion to include a State's local laws

40. The Tribunal should find that the umbrella clause found in Article 10 of the Beristan-Opulentia BIT does not elevate the contract claims of the JVA into treaty claims.

41. In *SGS v. Pakistan*, the tribunal found that "a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law."[32]

42. ICSID tribunals have held that the umbrella clause found in the Contracting States' BIT, does not elevate contract claims to the level of treaty claims.[33] This

[32] *SGS v. Pakistan*, ¶ 167.

would preclude the Tribunal of jurisdiction over matters that are contractual in nature.

43. In *SGS v. Pakistan*, the tribunal noted that elevating a contract claim to that of a treaty claim could be "susceptible of almost indefinite expansion."[34] The tribunal found the legal consequences

> so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party that clear and convincing evidence must be adduced by the Claimant . . . that such was indeed the shared intent of the Contracting Parties . . . [of the BIT].[35]

The tribunal found no such evidence.[36] The tribunal suggested that interpreting the umbrella clause to elevate the contract claims to the level of treaty claims could allow an ICSID tribunal to encompass all manner of State actions.[37] This could result in a slippery slope effect which could cause major instability in the dispute resolution process. If an international arbitration tribunal is scrutinizing a State's national or municipal law, this could be a violation of public policy and a potential ground to vacate an arbitral award.

44. The *Pakistan* tribunal characterized that a broad interpretation of the umbrella clause as involving a full-scale of internationalization of domestic contracts whereby all investment contracts are immediately "transubstanti[ated] into treaties."[38]

45. Even the *Philippines* tribunal which determined that it had jurisdiction over the contract claims via the umbrella clause, declined to decide the merits of the contract dispute.[39] The Philippines tribunal found that it was most appropriate

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[33] *See SGS v. Pakistan*; *Vivendi*.
[34] *SGS v. Pakistan*, ¶ 165.
[35] *Id.* ¶ 167.
[36] *Id.* ¶ 173.
[37] *Id.*
[38] *Id.* ¶ 172.
[39] *SGS v. Philippines*, ¶ 152.

that the local remedies should be exhausted, as provided by the forum selection clause in the investor-host State contract, before adjudicating the matter.[40]

46. In *CMS v. Argentina*, the tribunal found the umbrella clause to distinguish between "commercial disputes" and those "disputes arising from the breach of treaty standards and their respective causes of action."[41] According to the tribunal, the umbrella clause applied only to the latter, which likely included situations involving "significant interference by government or public agencies with the rights of the investors."[42]

47. The *Vivendi* tribunal noted that breaches of contract and breaches of treaty ultimately relate to independent standards, and that a tribunal's task in the face of a dispute that implicates both was to determine if "the fundamental basis of the claim" is the contract or the treaty.[43] Where the claim's fundamental basis was determined to be a contract, any exclusive forum selection clause in the contract controlled the dispute.[44]

48. The fundamental basis of the claim here dealt with contract claims that arose from the JVA. Beritech invoked Clause 8 of the JVA which was the buyout clause.[45] A buyout clause is a matter of national law, not treaty law because it was created in the JVA and not the Beristan-Opulentia BIT. The JVA is governed by the national laws of Beristan, where it was created,whereas a BIT is governed by international law standards and principles. The way in which the Board of Directors decided to vote on the matter of the buyout is also a matter of national law. Whether a quorum was met,[46] is an issue that should be decided under Beristan law in a Beristian forum. Also, Clause 17 of the JVA is a forum selection clause which states that investment disputes arising from the JVA should be decided before a Beristian arbitral tribunal.

[40] *Id.*
[41] *CMS*, ¶ 300.
[42] *Id.* ¶ 299. *See also Joy Mining v. Egypt*.
[43] *Vivendi*, ¶ 98.
[44] *Id.* ¶ 101.
[45] Annex 2, ¶ 10.
[46] *Id.*

49. The Tribunal should find that the umbrella clause found in Article 10 of the Beristan-Opulentia BIT does not elevate the contract claims of the JVA into treaty claims.

50. The Tribunal should find that the fundamental basis of the claim is the contract. Therefore the forum selection of Clause 17 of the JVA should govern and this matter should be heard before a Beristian arbitral tribunal.

2. The Tribunal does not have jurisdiction under Article 26 of the ICSID Convention which requires the parties to exhaust local remedies because in this case the Beristan-Opulentia BIT and the JVA provide for settlement of disputes in Beristian judicial proceedings

51. Article 26 of the ICSID Convention provides that "[a] Contracting State may require exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[47] This second sentence of Article 26 makes it clear that a State may make the exhaustion of local remedies a condition of consent to arbitration.[48]

52. Professor Schreuer suggests that while the exhaustion of local remedies may not be a requirement under the ICSID Convention, it may be a requirement of the host State.[49] Further, Aron Broches explains that "parties are entirely free to require the exhaustion of local remedies."[50]

53. The condition of exhaustion of local remedies prior going to ICSID arbitration may be expressed in a BIT, in national legislation, or in a direct agreement with the investor containing an ICSID arbitration clause.[51] In the instant case, this condition was expressed in Clause 17 of the JVA. Clause 17 provides a dispute shall be resolved under Beristian judicial proceedings, specifically, Beristian arbitration.[52]

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[47] ICSID Convention, art. 26.
[48] SCHREUER, at 388.
[49] *Id.* at 363.
[50] *Id.* at 389.
[51] *Id.* at 390.
[52] Annex 3.

54. Another recurrent clause in BITs gives the investor a choice between domestic proceedings and international arbitration, including ICSID. Professor Schreuer suggests that opting for domestic courts would preclude ICSID arbitration and vice versa.[53] The Beristan-Opulentia BIT provides that any dispute can be resolved in each Contracting State's domestic courts. In this case the dispute was first submitted to Beristian arbitration, which would preclude submission to the Centre.

55. On October 19, 2009, Beritech filed a request for arbitration against Claimant under Clause 17 of the JVA.[54] Beritech has US $47 million in an escrow account which is being held pending this arbitration.[55] Claimant has refused to accept this payment and has refused to respond to Beritech's arbitration reuquest.[56]

56. The Tribunal ought to find that Claimant agreed to the condition of exhaustion of local remedies by signing the JVA. The Tribunal should find that the contract claims of quorum and confidentiality are matters local in nature because they are an issue of Beristian corporate law and should most appropriately be decided by a Beristian judicial proceeding. Further, since the contract claims have been adjudicated in accordance to Clause 17 of the JVA, the Tribunal should find that it does not have jurisdiction over the matter.

i. The parties have established contrary intent to ICSID jurisdiction by signing the JVA and have elected to plead their contract claims before a Beristian arbitral tribunal

57. One of the function of Article 26 of the ICSID Convention is to create a rule of priority vis-à-vis other systems of adjudication in order to avoid contradictory decisions and to preserve the principle of *ne bis in idem* (no legal action can be instituted twice for the same cause).[57] The general rule is that a non-ICSID tribunal should decline jurisdiction in the face of a valid submission to ICSID

[53] SCHREUER, at 364.
[54] Annex 2, ¶ 13.
[55] *Id.*
[56] *Id.*
[57] SCHREUER, at 369.

arbitration.[58] However, this can be preempted if a contrary intent of the parties can be established. Also, a respondent to a non-ICSID tribunal is well advised to make a timely appearance and to point out ICSID's exclusive jurisdiction.[59]

58. In *MINE v. Guinea*, MINE filed a claim for arbitration with the American Arbitration Association (AAA) which rendered an award in its favor.[60] This award turned out to be invalid in view of ICSID's exclusive jurisdiction.[61] However, Guinea failed to appear in the AAA proceedings as well as before an American court in the proceedings to compel arbitration.[62] Guinea was at a disadvantage in this case. . Before the ICSID Tribunal, it was found that Guinea failed to timely voice an objection.[63]

59. In the instant case, (1) ICSID does not have exclusive jurisdiction because Article 11 (Settle of Disputes) of the Beristan-Opulentia BIT also allows the parties to select Contracting States' national courts or also ad hoc arbitration; and (2) the parties signed the JVA which under Clause 17, the parties consented to Beristian arbitral proceedings.

60. Additionally, the Claimant never objected to the Beristian arbitral proceeding. Even if Claimant were to object now, almost an entire year has passed from the time that the claim was filed before the Beristan arbitral tribunal.

61. The Tribunal should find that ICSID did not have exclusive jurisdiction. Also, the Tribunal should find that, since the JVA was signed subsequent to the Beristan-Opulentia BIT, the parties intended to settle their disputes before a Beristian arbitral tribunal. The Tribunal should find that this is evidence of contrary intent and should preempt ICSID's jurisdiction. Last, the Tribunal should conclude that Claimant failed to object to the Beristian arbitral proceeding and that at this time, any objection made would be untimely.

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[58] *Id.*
[59] *Id.*
[60] 4 ICSID Reports 76/7.
[61] *Id.*
[62] *Id.*
[63] *Id.*

III. RESPONDENT DID NOT VIOLATE THE JVA BY DISALLOWING CLAIMANT FROM COMPLETING THEIR CONTRACTUAL DUTIES BECAUSE BERITECH RIGHTFULLY INVOKED THE BUYOUT CLAUSE AFTER CLAIMANT MATERIALLY BREACHED THE CONFIDENTIALITY CLAUSE IN THE AGREEMENT

62. Beritech did not allow Claimant to fulfill its contractual duties because Claimant violated the Confidentiality Clause of the JVA, which was a material breach of the agreement. Beritch then appropriately invoked the Buyout Clause in accordance with the Agreement, Sat-Connects by-laws, and Beristian corporate law. The Confidentiality Clause states "[a]ll matters relating to this Agreement and the Sat-Connect project. . . shall be treated by each of the parties. . . as confidential."[64] "Any breach of this Clause 4 shall be deemed a material breach of the agreement."[65] Beritech has met its burden of proof requirement to evidence that Claimant in fact violated the Confidentiality Clause and as such materially breached the JVA.

63. Due to the material breach, Beritech proceeded to invoke the Buyout Clause of the JVA. Clause 8 of the JVA states "[i]f 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."[66] Beritech fulfilled all legal procedural necessities when buying out Claimant's interest in the Sat-Connect project. Sat-Connect's board of directors, after establishing quorum as required, invoked the buyout clause by majority vote in accordance with Beristian corporate law, Sat-Connect's by-laws, and International Standards.

64. When analyzing this contract dispute, the Tribunal should apply the laws of Beristan. "The Agreement shall be governed in all respects by the laws of the Republic of Beristan."[67] Respondent had no interactions in this contract dispute with Claimant, except during the removal of Claimant's personnel from Sat-Connect sites for trespassing. Even if this Tribunal finds that Beritech was indeed an arm of Respondent, the actions by Respondent do not rise to the level of

[64] JVA, cl. 4(4).
[65] JVA, cl. 4(4).
[66] JVA, cl. 8.
[67] JVA, cl. 17.

international claims and should be interpreted as contract claims. "The principle of international law that *pacta sunt servanda* does not entail the consequence that a breach by a State of a contract that the State has entered into with an investor is in itself necessarily a breach of international law."[68] The actions by Respondent do not violate the BIT, or raise to the level of international law violation, and, in accordance with the JVA, Beristian law should be applied. For the purposes for this Tribunal, if it rules that international law indeed applies, the contract claims made by Claimant shall be analyzed under general principles of international law.

A. Claimant Violated the Confidentiality Agreement, Which Constitutes a Material Breach of the JVA

65. The JVA provides that "[a]ll matters relating to this Agreement and the Sat-Connect project . . . shall be treated by each of the parties . . . as confidential."[69] A breach of this clause is considered a material breach. The evidence of this breach is sufficient in accordance with the standards of international law. Although there are no international rules of evidence, "a party making an allegation of fact has an obligation to demonstrate that fact with sufficient evidence."[70] Although a party cannot make completely unsubstantiated allegations the arbitral tribunal "must decide the case on the strength of the evidence produced by both parties."[71] An ICSID tribunal notes, in making its decision, that it is perfectly appropriate of a tribunal to take "into account the failure of [a] respondent Government to introduce evidence rebutting that offered by the claimant."[72] When a party makes a claim of fact, as Respondent does here, "[i]f that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[73]

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[68] *Noble Ventures* ¶ 84.
[69] JVA, cl. 4.
[70] BISHOP, at 1446.
[71] *Id.*
[72] *Id.*
[73] *Marvin Feldmen*, ¶ 177.

66. Beritech has provided sufficient evidence to raise a presumption that Claimant violated the Confidentiality Clause. Beritech received the notice of the leak of confidential information in an independent newspaper reporting the statement of a government defense analyst. Further, in the same article, both Claimant and Opulentia admit that Opulentia has made requests seeking this information regarding the Sat-Connect Project. Also, Claimant stated that it had not permitted "unlawful access."[74] This raises the question as to what Claimant considers "unlawful" in light of the JVA that bans all releases of information and only provides for very limited exceptions. Taken as a whole, the evidence provided by Beritech and Respondent—at the minimum—permitsa presumption that what it claims is true, leaving it up to the Claimant to rebut this presumption. Besides a blanket denial, Claimant has offered zero evidence that a Confidentiality Clause violation has not occurred.. This is not sufficient to overcome Respondent's evidence, and this Tribunal must rule that a violation by the Claimant of the Confidentiality Clause did in fact occur.

B. Quorum was Established by Sat-Connect's Board of Directors when the Majority Vote Was Taken According to Beristian Corporate Law and the Bylaws of Sat-Connect, Thus the Vote to Invoke the Buyout Clause Was Legitimate

67. After the Claimant violated the Confidentiality Clause, a material breach, the Sat-Connect board of directors voted a majority after establishing quorum to invoke the buyout in accordance with Clause 8 of the JVA. Decisions of the board of directors, such as the buyout clause, of Sat-Connect were to be approved by a majority vote after quorum was established.[75] According to Beristian law, a decision of the board of directors of a company issued in violation of the company's bylaws is null and void.[76] The quorum is required at the moment of voting.[77] Neither Beristian law nor Sat-Connect's bylaws govern the loss of

[74] Clarification 178.
[75] Clarification 149.
[76] Clarification 200.
[77] *Id.*

quorum once established.[78] When considering BIT's and interactions between investors and foreign States, tribunals have applied the 'fair and equitable treatment' international customary norm in analyzing the actions of the State.[79] This standard is a broad one, to give tribunals a wide berth, but some general principles exist: a State must act transparently, in good faith, cannot be arbitrary or unjust, and must respect due process.[80] "The precise scope of the standard is therefore left to the determination of the Tribunal which "*will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable*.""[81]

68. Respondent cannot be considered to have acted unfairly or inequitably towards Claimant regarding the establishment of the quorum. Six members of the board of directors attended the Sat-Connect board meeting on August 27, 2009, which was the number needed to satisfy the quorum. Sharpeton's presence at the meeting established quorum, and her lack of participation in the meeting and vote does not change that fact. If her intentions were to simply not establish quorum, she should not have attended at all, and it is unfair to punish Respondent for the mistakes of Claimant's director. Respondent followed the necessary procedures for the meeting, and was transparent, was just, and accorded all proper due process, legally and contractually, in invoking the Buyout Clause. By attending the meeting Sharpeton satisfied the quorum requirement and the majority vote by the board of directors was a legitimate invocation of the buyout clause.

C. Alice Sharpeton's Formal Complaint Regarding the Lack of Notice of the Agenda of the Meeting that Resulted in the Buyout is an Illegitimate Complaint as She Was Reasonably on Notice About the Subject of the Meeting

69. Alice Sharpeton's formal complaint—that her appearance at the August 27, 2009 meeting, which satisfied Sat-Connect's quorum requirement, would not have

[78] Clarification 255.
[79] *Rumeli Telekom*, ¶¶ 581, 583.
[80] *Id*. at 583.
[81] *Id*. at 610.

occurred had she received a notice of the agenda—is simply an excuse for her accidental establishment of a proper quorum. The Sat-Connect bylaws, agreed to by Beritech and Claimant, do not require any sort of notice of an agenda. The only requirement is that the board members receive 24 hours prior notice before any meeting, and this requirement was satisfied.[82] Claimant's and Beritech's right to contract should not be interfered with. Claimant is a sophisticated entity that contracted with Beritech to form Sat-Connect, and any complaints about unfair notice requirements for board meetings must fall on deaf ears.

70. Alice Sharpeton was reasonably on notice that the content of the meeting would concern the invocation of the buyout provision. On August 21, 2009, Sat-Connect's board of directors met and the subject of the confidentiality breach was raised. All nine members of the board, including Sharpeton, were present and one member raised the issue of the legitimacy of the invocation of the buyout provision based upon the material breach of the Confidentiality Clause. Although Claimant disputes the content of this meeting, two factors appear to show that the buyout was indeed discussed. The article in which the accusations of the confidentiality breach occurred on August 12, 2009. The board did not meet between the publish date and the meeting on the 21st. It is quite reasonable to infer that the content of that article, which alleged an issue of such magnitude, would at least be mentioned at a meeting of the board members. Further, at the meeting on the 27th , the other three Claimant-appointed board members were not in attendance. Some speculated that the purpose of the meeting was to discuss the buyout and their absence was explained as the assertion of their right to not attend and prevent a lack of quorum at the board meeting. Clearly the Claimant members of the board were aware that the buyout provision would at least be discussed at the August 27 meeting. Sharpeton, despite the fact that notice was unnecessary, was on constructive notice of the agenda of the meeting on the 27th. The Tribunal must not disallow the vote by the board to invoke the Buyout Clause, on the basis of a lack of quorum or otherwise, because doing so would

[82] Clarification 176.

allow Claimant to make a bad faith complaint after establishing quorum. Claimant made a mistake, and Beritech should not have to pay for it.

71. Beritech and Respondent did not wrongfully prevent Claimant from completing its contractual obligations in the JVA. As a result of the material breach, due to a Confidentiality Clause violation based upon sufficient evidence, Beritech properly invoked the buyout clause by majority vote of the board of directors of Sat-Connect whose meeting had an established quorum. At no point has Beritech or Respondent treating the Claimant unfairly or inequitably. Beritech and Respondent did not violate the contract. On the other hand, Claimant's actions did. The Tribunal must rule as such.

IV. CLAIMANT'S ALLEGATIONS OF EXPROPRIATION AND VIOLATION OF FAIR AND EQUITABLE TREATMENT FAIL BECAUSE BERISTAN IS NOT LIABLE UNDER THE BERISTAN-OPULENTIA BIT

A. Respondent Has Complied with Article 4 of the Beristan-Opulentia BIT

72. Claimant seeks to hold Beristan liable under the Beristan-Opulentia BIT for expropriation. In the event the Tribunal seeks to hear the merits of this dispute, it is because the BIT has been rendered applicable.

73. The first paragraph of Article 4 of the BIT states that "Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction."[83]

74. Article 4(2) of the BIT provides that "[i]nvestments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting party, except for public purposes, or national interest . . . ."[84]

75. However, Clause 8 of the JVA provides a remedy for Beritech in the case of a "material breach" of any of the provisions of said agreement: "Beritech shall be entitled to purchase all of Televative's interest in this Agreement."[85]

76. Given the particular facts of this case, including the confidential nature of the subject matter and the publicized disclosure of highly secretive information, Beritech was justified in invoking Clause 8 of the JVA.[86]

[83] Beristan-Opulentia BIT, art. 4(1).
[84] *Id.*, art. 4(2).
[85] Annex 3, cl. 8.
[86] Annex 3.

1. Respondent has exercised its affirmative contractual rights and the actions taken were unrelated to the Beristan-Opulentia BIT

77. Respondent Beristan has not engaged in an expropriation of Claimant's property interest. As previously stated, the measures taken were justified on grounds breach of confidentiality in accordance with the JVA between Beritech and Claimant.[87] The measures taken were contractual in nature, pursuant to the contract, outside the scope of the Beristan-Opulentia BIT, and therefore not tantamount to an expropriation.

2. Claimant has received adequate compensation

78. The JVA speaks to the amount Beritech must pay Claimant in the event of a buyout: "[u]nder such circumstances, Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period from the execution of this Agreement until the date of the buyout."[88]

79. As the monetary investment of Claimant amounts to US $47 million, that is the amount, pursuant to the JVA, that Beritech was required to pay.[89] Therefore, adequate compensation has been provided.

3. In the event the Tribunal found there was an expropriation, Respondent's actions would be justified because they were subject to an exception provided for in the BIT

80. Certain measures amounting to expropriation are justifiable in the event an exception applies. Of the utmost importance here is language in Article 4(2), stating that investments may not be subject to expropriation "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."[90]

[87] *See id.*, cl. 8.
[88] Annex 3, cl. 8.
[89] Annex 2, ¶ 12.
[90] Beristan-Opulentia BIT, art. 4(2).

81. "[T]he prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertakings or representations by the Host State upon which the investor has reasonably relied."[91] In this case, the BIT speaks to the representations of both states. The preamble itself discusses the importance of promoting investment and economic growth, as do other provisions throughout the BIT. Nonetheless, the BIT also contains specific provisions, such as Article 9 and the exceptions found in Article 4, that serve to protect the host country from purported actions on the part of the investor. Thus, the Claimant must have known not only that the investment would be protected pursuant to this mutual agreement but also that certain measures could be taken in the event that it acted contrary to the interest of the Respondent.

82. Exceptions to the prohibition against expropriation exist to justify certain actions subject to the principle of proportionality. In *Tecmed v. Mexico*, the tribunal reasoned that the weighing of "a serious urgent situation, crisis, need or social emergency . . . against the deprivation or neutralisation of the economic or commercial value of the Claimant's investment" would allow for the determination that a regulation could be considered a justifiable expropriation.[92]

83. Here, the Tribunal should find that the measures taken were to protect the essential security of Beristan. This is an affirmative defense found in Article 9 of the Beristan-Opulentia BIT.[93] As a precautionary measure, Respondent was justified in repossessing Claimant's property interest and did so by transparent means.

B. Respondent Accorded Claimant Treatment in Compliance with Articles 2 and 3 of the Beristan-Opulentia BIT

84. Article 2(2) of the Beristan-Opulentia BIT provides for both states to "at all times ensure treatment in accordance with customary international law, including fair

[91] HORN, at 156.
[92] *Tecmed*.
[93] *See* Beristan-Opulentia BIT, art. 9.

and equitable treatment and full protection and security of the investments of investors of the other Contracting Party."[94]

85. In addition, Article 3 dictates that both states, within their borders, "shall offer investments effected by . . . investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to its own nationals or investors of Third States."[95]

86. Claims of expropriation brought under NAFTA have been widespread in the last decade. Clarifications of the NAFTA Free Trade Commission have provided insight into their interpretation of the "Minimum Standard of Treatment in Accordance with International Law" under NAFTA Article 1105, which is substantially similar to the provisions in the Beristan-Opulentia BIT regarding minimum standards of treatment. This opinion states that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Subsequently, tribunals have reiterated this standard applied to "fair and equitable treatment" in interpreting Article 1105.[96]

87. Therefore, "fair and equitable treatment" is not a greater standard than that of the minimum standard treatment recognized under customary international law, which is minimum standard of treatment including national and Most Favored Nation (MFN) treatment. The language of Article 2(2) is such that "fair and equitable treatment" fits within the framework of customary international law.

88. Whatever the case, the Tribunal should find that the Respondent accorded the Claimant's investment the same treatment as it would have given investments from investors of its own country. There is no evidence of bias, unfairness, or preference of one investor's investment over another.

89. In addition, other elements attached to fair and equitable treatment and thus customary international law are "due process, due diligence and the protection of

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[94] Beristan-Opulentia BIT, art. 2(2).
[95] Beristan-Opulentia BIT, art. 3.
[96] *See ADF Group Inc*; *Mondev*.

legitimate expectations, [which] are manifestations of the more general principle of good faith."[97]

90. Respondent has acted in good faith. First, the buyout procedure was transparent and in compliance with the Beritech-Claimant JVA, the bylaws of Sat-Connect, and the corporate law of Beristan.[98] A majority of Sat-Connect's board of directors voted to invoke the buyout provision.[99] Notice was served to Claimant.[100]

91. Again, the buyout was performed by Beritech pursuant to the JVA. The Republic of Beristan, in its capacity as a sovereign state, was not involved in this procedure, therefore these actions do not fall under the BIT.

92. In any case, Beritech acted to protect the legitimate needs of Beristan in maintaining its security. This Tribunal should consider, as part of its analysis, the "balancing process between the investor's legitimate expectation and the state's legitimate needs to develop its policies." Claimant's admission that the government of Opulentia had requested information about the Sat-Connect project, coupled with the Beristan Times' article, demonstrate the legitimate and heightened need for measures to be taken that would ensure the confidentiality of the project and the security of the state.

93. In *Eastern Sugar*, the tribunal found that the Czech Republic had violated the fair and equitable treatment standard absent a "rational explanation" for promulgating a regulation that "unfairly and inequitably targeted" the claimant.[101] Here, a rational explanation exists for invoking the buyout provision: the belief that Claimant has committed a material breach of the Beritech-Claimant JVA.[102] Respondent has the utmost duty to take measures that will ensure national safety, security, and protection.

94. For the aforementioned reasons, Respondent has complied with Articles 2 and 3 of the Beristan-Opulentia BIT by according Claimant fair and equitable treatment.

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[97] NEWCOMBE, at 276.
[98] *See* Annex 3, cl. 8; clarification 149.
[99] Annex 2, ¶ 10.
[100] Annex 2, ¶ 11.
[101] *Eastern Sugar*.
[102] *See* Annex 3, cl. 4.

V. BERISTAN MAY INVOKE ARTICLE 9 (ESSENTIAL SECURITY) BECAUSE THE BREACH OF CONFIDENTIALITY THREATENS ITS ESSENTIAL SECURITY INTERESTS AND THE TRIBUNAL SHOULD DISMISS CLAIMANT'S CLAIMS

95. The executive order to secure the facility and site of the Sat-Connect project was taken in accord with the permissible objectives of Article 9. A measure taken to protect essential security interests does not constitute breach of the Beristan's treaty obligation, dismissing any liability under the BIT.[103]

96. Article 9 is a non-precluded measure clause (NPM), a type of provision that has been used in over two hundred bilateral investment treaties.[104] Such NPM clauses allow states to take actions inconsistent with BITs when they deem the actions necessary for protection of their essential security interests. [105]

97. Article 9 of the Beristan-Opulentia BIT provides that a contracting state is not precluded from "applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests."[106]

A. The Assistance Provided by the Civil Workers Force to Beritech After the Breach of Confidentiality by Claimant was Necessary to Protect Essential Security interests of Beristan

98. The tribunal should find that measures taken by Beristan to secure the Sat-Connect facilities and site were necessary to protect its essential security interests and dismiss claimant's claims. An ICSID tribunal recently found invocation of a BIT's NPM clause valid, concluding that Argentina was not liable for damage to investors caused by drastic regulatory measures promulgated as a necessary response to the economic crisis of 2001.[107] The claimant's assertions included failure to provide fair and equitable treatment and that Argentina's actions

[103] Burke-White, at 312.
[104] Desierto, at 832.
[105] U.S.-Argentina BIT, art XI.
[106] Beristan-Opulentia BIT, art. 9.
[107] *Continental Casualty*.

amounted to expropriation.[108] The tribunal agreed with Argentina's defense that the Emergency Law, which abolished dollar-peso convertibility and froze investor accounts, was necessary in light of the economic crisis.[109] The tribunal did not find a breach of the treaty because the language in the agreement does not preclude the contracting states from taking measures "necessary for the maintenance of public order . . . or the protection of its own essential security interests."[110] Moreover, an Annulment Committee under the ICSID Convention reviewed a previous award holding Argentina liable for investor harm despite the NPM and decided that the award contained errors of law.[111]

99. The breach of the JVA's Confidentiality Agreement by Claimant affects the essential security interest of the Republic of Beristan. Beritech invoked the buyout agreement found in Article 8 of the Joint Venture agreement because Claimant personnel seconded on the Sat-Connect project transferred information to the government of Opulentia. The information transferred to Opulentia directly implicates the national security of Beristan because the Sat-Connect system's advanced satellite and telecommunications systems are being used by the Beristian armed forces. The executive order and subsequent entry of the staff from the Civil Workers Force in securing the sites and facilities of Sat-Connect was necessary to protect the national security of Beristan. Therefore, the Tribunal should find that The Republic of Beristan's obligations under the treaty are inapplicable.

B. The Tribunal Should Interpret Essential Security Interests Broadly Because the Principle of Necessity Does Not Apply to Article 9

100. The tribunal can comfortably find that protecting the interest of the national army falls squarely within the permissible objectives of article 9 and is more justifiable than protection of economic interests.

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[108] *Id.* at ¶ 20.
[109] *Id.* at ¶ 63.
[110] U.S.-Argentina BIT, art. XI; *see Continental Casualty*, ¶ 75.
[111] *CMS*, ¶ 136.

101. NPM clauses "remove a broader array of state actions from the protections of a particular treaty than would be excused after the fact by the relatively narrow group of ex-post defenses provided for in customary law" like necessity [112] NPM clauses arise from the language of a treaty while defenses like necessity come from customary international law. Thus, NPM clauses constitute the *lex specialis* (law governing a specific subject matter) in force between two states party to a BIT. The law of necessity is inapplicable to the Beristan-Opulentia BIT because "the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[113] The tribunal should decide the case with the special rule of international law present in the instant case, Article 9 of the Beristan-Opulentia BIT.

102. This Tribunal should not equate Article 9 with the defense of necessity in recognition of the distinction between treaty and custom law and in view of upholding the principle of effectiveness in treaty interpretation. The ICJ has confirmed that "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence."[114] The ICJ repeated the distinction between the "necessary for" language and the principle of necessity defense in customary law in a case examining a NPM clause in the U.S.-Iran FCN treaty.[115] Such distinctions are important because NPM clauses afford broader state freedom in taking measures for protecting against threats to essential security interests.

103. The ICJ has suggested a broad interpretation of "essential security" in the Iran-U.S. FCN Treaty, observing that "the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to

[112] Burke-White, at 321.
[113] ILC Draft Articles, art. 24(14).
[114] *See Nicaragua v. United States*, at 95.
[115] Oil Platforms, at 196-7.

very broad interpretations in the past."[116] The ICJ, in its 2003 decision in the Oil Platforms case, broadly interpreted "essential security interests" to include the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf as reasonable security interests of the United States. [117] Thus, "essential security" encompasses many types of threats to a state's security, including economic, that go beyond the boundaries of military threat.[118]

104. Exceptions based on a party's safeguard of essential security interests are also provided under GATT.[119] Academic commentary on GATT Article XXI contend that any policy interest of a certain intensity may be legitimately protected under Article XXI and that "panels dealing with such issues will have to defer to the government concerned in that regard."[120]

105. Recent examinations of the "essential security interest" in the ICSID Arbitration against Argentina confirm the broad reading by including economic exigencies within permissible objectives.[121] The LG&E Tribunal explained that "when a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[122] Likewise, allowing access to the communications and satellite systems of the Beristan Army is a threat to national army and its competence of protecting the citizens of Beristan.

106. The tribunal should follow the broad reading of essential security in Beristan's invocation of Article 9 of the BIT. Although the ICJ has confirmed the inclusion of many threats to a state's security, including economic, the tribunal does not need to beyond the traditional "boundaries of military threat" to find that essential security interests are at stake in the Sat-Connect project. Beritech invoked the buyout provision of the joint venture agreement because confidential information was leaked to the Government of Opulentia. The technology of the Sat-Connect project is used by the military of Beristan and any information leaked to Opulentia has military implications that are within the broad interpretation of

[116] *See Nicaragua v. United States*, at 116.
[117] *Oil Platforms*, at 196.
[118] Burke-White, at 351.
[119] GATT, art. XX(b).
[120] *See*SCHLOEMANN, at 450.
[121] *LG&E*, ¶ 203; *CMS*, ¶ 340; *Enron*, ¶ 332.
[122] *LG&E*, ¶ 238.

essential security interest. The Tribunal should find that securing the Sat-Connect facility, wholly owned by Beritech per the buyout provision, is a necessary measure taken by the government of Beristan not precluded by Article 9 of the BIT for safeguarding essential security interests.

C. The Self-judging Language of Article 9 Bars a Tribunal from Reviewing Measures Taken by the Republic of Beristan to Protect Essential Security Interests

107. The Tribunal must determine whether Article 9 of the Beristan-Opulentia BIT is self-judging and bars arbitral review of measures taken pursuant to the provision. Non-Precluded measures in a BIT become self-judging when they contain language indicating that the parties to the BIT intended to serve as an absolute bar to arbitral review on their actions.[123] For instance, the U.S. – Bahrain BIT provides that "[t]his treaty shall not preclude a party from applying measures which it considers necessary for the fulfillment of its obligations with respect to international peace and security or the protection of its own essential security interests."[124] The "considers necessary" language transforms the provision and limits the scope of arbitral review.[125]

108. The Beristan-Opulentia BIT is explicitly self-judging and seeks to limit an arbitral tribunal's scope of review. The self-judging clause provides that nothing in the treaty will "preclude a party from applying measures that it considers necessary for the fulfillment of its obligations with respect to maintenance or restoration of international peace and security or the protection of its own essential security interests." The "considers necessary" language in the NPM clause should be read as an absolute bar to arbitral or judicial review because disputes involving the political questions inherent in permissible objectives are non-justiciable and exempt from review by international courts and tribunals. [126]

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[123] Burke-White, at 376.
[124] *See, e.g.*, U.S.-Bahrian BIT, art 14.
[125] Burke-White, at 376.
[126] BODIE; LAUTERPACHT, at 6-48.

109. Thus, the tribunal should defer to Beristan's assessment of essential security interest because it is doubtful whether any tribunal acting judicially can override the assertion of a state that a dispute affects its security."[127]

[127] LAUTERPACHT, at 188.

CONCLUSION

110. For the foregoing reasons, Respondent respectfully requests that this Tribunal deny jurisdiction because Beristan has not expressed its consent, and furthermore, the claims arise out of actions taken pursuant to the JVA and not the Beristan-Opulentia BIT.

111. However, should this Tribunal take jurisdiction over this dispute, Respondent requests it find that Beritech rightfully invoked the buyout provision of the JVA due to Claimant's material breach. As such, the prohibition of expropriation and standards of fair and equitable treatment of the Beristan-Opulentia BIT do not apply. Furthermore, Respondent did not expropriate, and Claimant has received adequate compensation. Lastly, this Tribunal should find that Claimant's breach of the confidentiality agreement with Beritech threatens the essential security interest of the Republic of Beristan.