INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

TELEVATIVE INC.
(CLAIMANT)

AND

GOVERNMENT OF THE REPUBLIC OF BERISTAN
(RESPONDENT)

MEMORANDUM FOR RESPONDENT

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INDEX OF AUTHORITIES

1) Abby Cohen Smutny *State Responsibility and Attribution. When Is a State Responsible for the Acts of State Enterprises? Emilio Agustin Maffezini v The Kingdom of Spain* in Tod Weiler *International Investment Law and Arbitration: leading cases from the ICSID, NAFTA, Bilatteral Treaties and Customary International Law*;

2) Andrew Newcombe, Lluis Paradell *Law and practice of international treaties: standards of treatment*, Kluwer Law International (2009);

3) American Law Institute, *Restatement (2nd) of Contracts* (1981);

4) August Reinisch. *Standards of Investment Protection*, Oxford University Press (2005);

5) *Black's Law Dictionary* 409 (Rev. 4th Ed. 1968);

6) Campbell Mclachlan QC, Laurence Shore & Matthew Weiniger *International Investment Arbitration* (2007);

7) Ch. Schreuer *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, dated 7 February 2006, available at: http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf;

8) Ch. Schreuer *The Concept of Expropriation under the ETC and the Investment Protection Treaties*, Revised (20 May 2005);

9) Ch. Schreuer *The ICSID Convention: A Commentary*, Cambridge University Press (2001)

10) Ch. Schreuer *Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road*, Journal of World Investment & Trade, Vol. 5, 2004;

11) *Commentaries to the Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001);

12) Davis Joseph *Jurisdiction and arbitration agreements*, Thomson Sweet & Maxwell (2005);

13) Francisco Orrega Vicuna *Of Contracts and Treaties in Global Market*, Max Planck UNYB 8 (2004);

14) *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001);

15) *Eureko v Poland*, Dissenting Opinion of arbitrator Rajski;

16) *Gordon A. Christenson The Doctrine of Attribution in State Responsibility, in State Responsibility for Injuries to Aliens* / Richard Lillich ed.;

17) Ian Brownlie *Public International Law*, Oxford University Press, 6th Edition (2003);

18) *International Investment Law: a Changing Landscape. A Companion Volume to International Investment Perspectives*, OECD Publishing (2005);

19) Ioana Tudor *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008);

20) Lord McNair *The Law of Treaties* (1961);

21) Mahnaz Malik *Fair and Equitable treatment. International Institute for Sustainable Development*, September 2009;

22) Malgosia Fitzmaurice *Third Parties and the Law of Treaties*, Max Planck Yearbook of United Nations Law, Volume 6 (2002);

23) Matthew Wendlandt SGS v Philippines *and the Role of ICSID Tribunals in Investor-State Contract Disputes,* Texas International Law Journal, Vol. 43 (2008);

24) M.Sornarajah *The International Law on Foreign Investment,* 2nd edition, Cambridge University Press (2008);

25) N. Rubins and N.S. Kinsella *International Investment, Political Risk and Dispute Resolution.* A Practitioner's Guide (2005);

26) *OECD Working Papers on International Investment Number* 2006/3. Interpretation of the Umbrella Clause in Investment Agreements, October 2006;

27) Prosper Weil *Recueil des Cours*, Vol. III (1969);

28) Samuel Porteous *Commentary No. 46: Economic Espionage (II),* Canadian Security Intelligence Service, www.csis.gc.ca;

29) *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4 (Emmanuel Gaillard and J. Younan eds., Juris Publishing, 2008);

30) Tod Weiler *International Investment Law and Arbitration: leading cases from the ICSID, NAFTA, Bilatteral Treaties and Customary International Law*;

31) Tomas Wälde *The 'Umbrella' (or Sanctity of Contract/*Pacta Sunt Servanda*) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, Transnational Dispute Management, Volume 1, Issue #04, October 2004;

32) *Umbrella Clauses* / by Prof. Dr. August Reinisch, Seminar on International Investment Protection (2006/2007), available at: http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf, at p. 5;

33) *Webster's Online Dictionary*, http://www.websters-dictionary-online.org.

INDEX OF LEGAL SOURCES

1) *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 23 May 1969;
2) *ICC Uniform Rules for Demand Guarantees*, Edition 1992;
3) Restatement (3rd) of the Foreign Relations Law of the United States;
4) Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v Republic of Indonesia, ICSID Case No. ARB/81/1, Award in the Resubmitted Case of 5 June 1990 ("*Amco*");
5) *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001 ("*Autopista*");
6) *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 ("*Azurix*");
7) *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Ad hoc Tribunal, UNCITRAL Rules, Award on Jurisdiction and Liability, 27 October 1989 ("*Biloune*");
8) *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 ("*BIVAC*");
9) *Chattin*, UNRIAA, vol. IV (Sales No. 1951.V.1), at pp. 285-286 (1927);
10) *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003 ("*CMS*");
11) *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No.ARB/97/3, Decision on Application for Annulment, 3 July 2002 ("*Vivendi Annulment*");
12) *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005 ("*LESI*");
13) *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001 ("*Consortium RFCC*");
14) *EDF (Services) Ltd v Romania*, ICSID Case No.ARB/05/13, Award, 8 October 2009 ("*EDF*");
15) *Eureko B.V. v. Poland*, Ad hoc Tribunal, UNCITRAL Rules, Partial Award of 19 August 2005 ("*Eureko*");

16) *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 ("*El Paso*");
17) *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000 ("*Maffezini*");
18) *Foremost Tehran, Inc. v Government of the Islamic Republic of Iran*, Award No. 220-37231-1, 11 April 1986, 10 Iran-US CTR 228;
19) *German Interests in Polish Upper Silesia Case*, PCIJ (German v. Poland, 1926);
20) *International Thunderbird Gaming Corporation v Mexico*, Award, Ad hoc UNCITRAL Arbitration Rules, IIC 136 (2006);
21) *James and Others*, Judgment, 21 February 1986, ECHR, Series A, No. 98;
22) *Joy Mining Machinery Limited v Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 ("*Joy Mining*");
23) ICC Case No. 6262, *Two European Companies v. African State*, 24 June 1992, Partial Award;
24) ICC Case No. 8357, *Consortium of two foreign companies and a national company v. Public corporation of State X*, 14 June 1997, Final Award;
25) *Lauder v. Czech Republic*, NAFTA/UNCITRAL Rules, Final Award, 3 September 2001 ("*Lauder*");
26) *Metalctad Corporation v. United Mexican States*, ICSID Case No. ARB (AF)/97/1), Award, 30 August 2000 ("*Metalctad*");
27) *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002 ("*Mondev*");
28) *Noble Ventures Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 ("*Noble Ventures*");
29) *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award on jurisdiction and merits, 14 August 2007 ("*Parkerings*");
30) *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10;
31) *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008 ("Rumeli");

32) *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision of the Tribunal on Jurisdiction, 29 November 2004 ("*Salini v Jordan*");

33) *Saluka v. Czech Republic*, Partial Award, 17 March 2006 ("*Saluka*");

34) *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010 ("*Sempra Annulment*");

35) *Siemens A.G. v. Argentine Republic*, ICSID Case No.ARB/02/8, Decision on Jurisdiction, 3 August 2004 ("*Siemens*");

36) *S.D. Myers v. Canada*, UNCITRAL, First Partial Award, 13 November 2000 ("*SD Myers*");

37) *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 ("*SGS v Pakistan*");

38) *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Award on Jurisdiction, 29 January 2004 ("*SGS v Philippines*");

39) *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("*Tecmed*");

40) *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No.ARB/94/2, Decision on Jurisdiction, 24 December 1996, ("*Tradex*");

41) *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3;

42) *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("*Waste Management*");

43) Zeevi Holdings v Bulgaria and The Privatization Agency of Bulgaria, Final award, UNCITRAL Case No UNC 39/DK, 25 October 2006.

INDEX OF ABBREVIATIONS

Corp.	Corporation
CWF	Civil Work Force
e.g.	exempli gratia (for example)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
i.e.	id est (that means)
MFN	Most-Favoured Nation
No.	Number
p.	page
para	paragraph
PCIJ	Permanent Court of International Justice
pp.	pages
v.	versus
Vol.	Volume

STATEMENT OF FACTS

1. In 1996, the Republic of Beristan (the "Respondent") entered into the Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the encouragement and reciprocal protection of investments (effective as of 1 January 1997).

2. On 18 October 2007, Televative Inc. (the "Claimant") entered into a Joint Venture Agreement ("JVA") with Beritech S.A., a Beristanian company by 75% held by the Respondent. Under the JVA a joint venture company - Sat-Connect – was established. Its purpose was the development and deploying of a satellite network and accompanying terrestrial systems and gateways to provide connectivity and communications for users within Euphonia. Those networks were also intended to be used by the military in Beristan. The Respondent co-signed the JVA in the capacity of a guarantor.

3. The Claimant is a privately-held company incorporated in Opulentia and is considered a leading developer of new technologies in the field of satellite communication support. It received 40% minority share in Sat-Connect as well as the authority to appoint 4 out of 9 members of its Board of Directors.

4. On 12 August 2009, *The Beristan Times* published an article in which a high Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks of crucial information on the Sat-Connect project by the Claimant's personnel in the joint project. The alleged destinator was the Government of Opulentia, with whom Beristan holds polite but tense relations. The Claimant and the Government of Opulentia both have made statements to deny this published story.

5. On 21 August 2009, the chairman of the Sat-Connect Board of Directors, made a presentation to the directors in which he discussed the allegations of 12 August 2009.

6. On 27 August 2009, Beritech, with the support of the majority of Sat-Connect's Board of Directors, invoked Clause 8 of the JVA to compel a buy-out of the Claimant's share in Sat-Connect. Six directors were present at the meeting, one director appointed by the Claimant later filed a protest that she had no prior notice concerning the proposed agenda for the meeting and had left the meeting before the voting.

7. On 28 August 2009, Beritech served notice on the Claimant requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

8. On 11 September 2009, staff from the Civil Works Force, the civil engineering section of the Beristian army, pursuant to an executive order secured all sites and facilities of the Sat-Connect project.

9. On 19 October 2009, Beritech filed a request for arbitration against the Claimant under the JVA after paying a lump sum of US$47 million into an escrow account amounting to the upfront price of the Claimant's share. The Claimant has refused both to accept this payment and to respond to Beritech's arbitration request.

10. On 28 October 2009, the Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings against the Respondent, party to the ICSID Convention, and notified the Government of Beristan.

11. On 1 November 2009, the ICSID Secretary General registered this dispute for arbitration.

ARGUMENT

A. THE ICSID TRIBUNAL HAS NO JURISDICTION OVER THE PRESENT CASE IN THE VIEW OF CLAUSE 17 OF THE JOINT VENTURE AGREEMENT ("JVA")

12. Simple as it sounds not all investment disputes may be entertained before the ICSID.

13. It is an established rule that for the dispute to be accepted to the merits by an ICSID Tribunal it must necessarily be based on treaty claims whether separable or inseparable from contractual ones[1]. Consequently, "*just as the [ICSID] has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities*"[2].

14. In the present case, the Claimant seeks to vindicate the Respondent for actions taken by a private-law company Beritech where the latter holds 75% of shares. In the opinion of the Respondent, such pretensions seem be deprived of any positive standing in terms of the Tribunal's jurisdiction.

I. The essential claims of the Claimant arise out of the dispute on the application of the JVA

1. <u>The fundamental basis of the Claimant's claims is the JVA.</u>

15. The Claimant seeks remedies for a series of actions that had an impact on its investment in the Sat-Connect project[3] incorporated in Beristan in 2007 pursuant to the Joint Venture Agreement (hereinafter referred to as the "JVA").

16. First of all, the Respondent does not contest that there is a legal dispute arising out of investment whose object is the procedure of the buyout invoked in connection with the discovery of facts assuming Claimant's engagement in illegal leak of information on the project to a third party[4].

17. However, the Respondent in the present proceedings strongly denies the opposability of such claims against itself. It is a core position of Beristan that the conflicting

[1] *CMS*, para 80; See also *Azurix*, para 89; *Eureko*, para 112; *Vivendi Annulment*, para 112.
[2] *Maffezini*, para 74.
[3] First Meeting, item 15.
[4] Annex 2, item 10.

situation described by the Claimant is not more than a private dispute to be adjudicated in the relevant forum, in particular under Clause 17 of the JVA.

2. The jurisdiction clause in the JVA shall be respected by the Tribunal.

18. The JVA is a private law contract executed by two private-law companies, Televative Inc., privately held and incorporated in Opulentia on 30 January 1995[5], and Beritech S.A., state-run by 75% and incorporated in Beristan in March 2007[6].

19. Among others, the JVA comprises a forum-selection clause which prescribes that disputes arising out of or relating thereto should be settled in the commercial arbitration under the laws of Beristan[7].

20. No contentions were raised by the Claimant as regards invalidity of Clause 17 of the JVA. In any case, there is no evidence in the present case that the arbitration agreement contained therein would be invalid under the applicable law. Neither is there any proof that the award delivered as a result of such proceedings would be impossible to enforce. Moreover, its enforceability is guaranteed by the operation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which both Beristan and Opulentia are parties[8].

21. It addition, Beritech S.A. have already instituted proceedings under Clause 17 of the JVA[9] while placing US$47 million on an escrow account amounting to the price of Claimant's investment in the Sat-Connect project.

22. The Respondent submits that the present Tribunal shall either stay its proceedings or rule that it holds no jurisdiction over the present dispute based on the operation of Clause 17 of the JVA.

23. It is generally accepted in the international arbitration practice that a dispute resolution clause in the BIT is not of such effect as to override the agreement of parties in a private contract to adjudicate their controversy elsewhere[10]. As a general rule the

[5] Annex 2, Item 1.
[6] Annex 2, Item 2.
[7] Annex 3, Clause 17.
[8] Clarification 1, question 142.
[9] Annex 2, item 13.
[10] *SGS v Philippines*, para 141; Ch. Schreuer *The ICSID Convention: A Commentary*, Cambridge University Press (2001), at p. 362.

Tribunal should give up jurisdiction in the view of a valid forum-selection clause in the contract[11].

24. The proposed decision would serve both the interests of justice (as long as determination of a contract breach should be made in accordance with the applicable law[12]) and the intention of the parties to the contract.

3. The actions of Respondent's authorities as such do not give grounds for the ICSID jurisdiction.

25. In the opinion of the Respondent, at present proceedings the Claimant has sought to establish unfathomable and illusive connections between self-standing occurrences in the case record. It is the position of the Respondent, that the events both prior and after the buyout procedure should be reasonably viewed as individual and must for the purposes of both jurisdiction and merits be considered separately.

26. One of such issues is the securing of premises of the Sat-Connect project by the Civil Works Force ("CWF") of Beristan. Whereas the Claimant may contend that those actions were taken in pursuance of the purported malice of Beristan to expel the foreign investor out of its former business, they clearly fall within the well-recognized police power of the State.

27. Although fully attributable to the State of Beristan, such conduct would not in any case be within the jurisdiction of the ICSID for the reason that such actions did not rise directly out of the Claimant's investment as is required by Article 25(1) but rather out of the public function of the State to ensure enforcement and compliance with the rules on its territory.

II. The essential claims of the Claimant are limited to the dispute on the application of the JVA

28. As was stated in *Consortium RFCC v Kingdom of Morocco*, "*[i]n order that the alleged breach of contract may constitute unfair or inequitable treatment within the*

[11] *Vivendi Annulment*, para 98; *Joy Mining*, para 75; Francisco Orrega Vicuna *Of Contracts and Treaties in Global Market*, Max Planck UNYB 8 (2004), at p. 350.
[12] Davis Joseph *Jurisdiction and arbitration agreements*, Thomson Sweet & Maxwell (2005), at p. 132.

meaning of the [BIT], it must be the result of behavior going beyond that which an ordinary contracting party could adopt [emphasis added]"[13].

29. In the present case, there is no substantial evidence that anyone but Beritech S.A. engaged in ruining – lawfully or not - the contractual bond established by the JVA. Thus, the Respondent submits that the Claimant's claims are critically limited to its contentions on the JVA breach.

30. However, only the disputes pivoting around the State's own actions or omissions purportedly affecting the rights and interests of an investor may be accepted to the merits[14].

1. There are no free-standing treaty claims in the dispute.

31. For the purposes of separating contract and treaty claims the so-called "triple-identity" test was designed in the international jurisprudence[15]. It implies that the difference in parties, object and cause of action should allow hearing cases based on the same circumstances in different dispute settlement forums – under domestic and international law.

32. In the case at hand all the three requirements are substantially neglected. In the view of the afore-stated object of the Claimant's submission, the parties and cause of action designated by the Claimant are crucially different from those which are underlying the Claimant's contentions in reality.

33. In particular, for a treaty cause of action there must be "*a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard*"[16]. As is evidenced from the above-mentioned decisions, this threshold is rather high and can not be met by the Claimant with its present contentions.

34. The absence of free-standing treaty-based claims in the Claimant's submission should justify the Tribunal's finding on its lack of jurisdiction in the present case[17].

2. Contract-based claims may elevate to treaty claims only in certain circumstances.

[13] *Consortium RFCC*, para 51.
[14] Tod Weiler *International Investment Law and Arbitration: leading cases from the ICSID, NAFTA, Bilatteral Treaties and Customary International Law*, at p. 17, 18.
[15] *Lauder*, paras 161, 163; *Joy Mining*, para 75.
[16] *Vivendi Annulment*, para 113.
[17] *Joy Mining*, para 82.

35. In any event, it is still possible that a simple contract claim may elevate to a treaty claim in the event that "*contentious […] tribunals […] denied Claimants justice, substantively or procedurally*"[18].

36. Apparently, such possibility may not be used in the present case: the Claimant did not contest the actions of Beritech S.A. in the national courts of Beristan.

[18] *Vivendi Annulment*, para 104.

B. THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMANT'S CONTRACT-BASED CLAIMS ARISING UNDER THE JVA BY VIRTUE OF ARTICLE 10 OF THE BERISTAN-OPULENTIA BIT

37. By virtue of Article 10 of the BIT the Contracting Parties undertook to "*constantly guarantee the observance of any obligation [either of them] has assumed with regard to investments in its territory by investors of the other Contracting Party*"[19].

38. In the international practice the obligations of such kind are commonly referred to as "umbrella clauses"[20]. Their aim is to provide investors with additional protection against the arbitrary use of its governmental authority by the host State[21]. The scope of State's undertakings under the "umbrella clause" is never uniform[22] and naturally depends on the due interpretation of a relevant treaty (in the present case, of the Beristan-Opulentia BIT).

I. Article 10 does not give protection against the JVA breach.

39. The Claimant argues that the JVA was materially breached by the Respondent and that by virtue of the "umbrella clause" in the BIT the latter shall be held liable under international law.

40. This is undisputable that sometimes States agree that a breach of its contractual commitments by the host State should amount to violations of a BIT[23].

41. However, the Respondent submits that this never took place in the present case. The due interpretation of Article 10 in the BIT implies that no consent in terms of *rationae materiae* jurisdiction of ICSID was given to hear pure contract-based claims, even under the guise of the "umbrella clause"[24].

42. Alternatively, even if such consent was given – it refers solely and exclusively to state contracts where immediate parties are the host State and a foreign investor.

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[19] BIT, Article 10.
[20] *OECD Working Papers on International Investment Number* 2006/3. Interpretation of the Umbrella Clause in Investment Agreements, October 2006, at p. 3.
[21] Tomas Wälde *The 'Umbrella' (or Sanctity of Contract/*Pacta Sunt Servanda*) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, Transnational Dispute Management, Volume 1, Issue #04, October 2004.
[22] *OECD Working Papers on International Investment Number* 2006/3. Interpretation of the Umbrella Clause in Investment Agreements, October 2006, at p. 3; *SGS v Philippines*, para 97; Ch. Schreuer *The ICSID Convention: A Commentary*, Cambridge University Press (2001), at p. 1082.
[23] Prosper Weil *Recueil des Cours*, Vol. III (1969), at *pp. 132 et seq.*
[24] *SGS v Pakistan*, para 173.

43. In any occasion the Respondent can in principle breach the JVA only by default of the main contractor - Beritech S.A. Therefore, should the Tribunal decide that it has jurisdiction over the present dispute it would be substantially exceeding its powers.

1. The Respondent undertook but to ensure compliance with obligations it assumed.

44. Article 10 of the BIT shall be interpreted through generally recognized treaty interpretation tool codified in the Vienna Convention on the Law of Treaties[25].

i. Literal interpretation

45. To begin with, the literal interpretation of the text of the Article 10 in the context of the BIT[26] implies that the Contracting State shall take measures or ensure the observance of all obligations it has assumed with regard to investments. The Article does not expressly state that the State shall observe the obligations itself.

46. Almost identical "umbrella clause" was under consideration in SGS v Pakistan[27], a case which the Respondent calls for using as benchmark. In its opinion, jurisdictional findings in that case strongly adhere to the principles of justice and fully reflect the specific intention of the parties to the BIT while providing a well-grounded reasoning for its opinion[28].

ii. Object and purpose

47. Although the object and purpose of the BIT – as presented in the treaty preamble[29] - in fact serves the "*encouragement and mutual protection*"[30] of foreign investments, the way to pursue such goal as opted for by the parties is through *"establish[ing] favorable conditions for improved economic cooperation*"[31] between them. In other words, it may be said that the intention of the parties was clearly "*to create favorable conditions for investments and to stimulate private initiative*"[32].

[25] *BIVAC*, para 59; *Mondev*, para. 43; Ch. Schreuer *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, dated 7 February 2006, available at: http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf.
[26] *SGS v Pakistan*, para 64.
[27] *SGS v Pakistan*.
[28] *SGS v Pakistan*, paras 164-173.
[29] *Vivendi Annulment*, para 7.4.4.
[30] BIT, Preamble.
[31] BIT, Preamble.
[32] *Siemens*, para 81.

48. It is noticeable that the purpose agreed upon by the Contracting States was not to grant any possible protection to foreign investors[33], but to build-up a consistent system of state governance and adequate legislation to enable the persistence of foreign direct investments.

49. The Respondent insists that Article 10 should be interpreted in the light of such expressly formulated purpose. In terms of the "umbrella clause" it means that the undertaking to "constantly guarantee the observance of" should be construed as to oblige the host State not to take any actions in its public capacity to hinder the existence of investor's business in its territory or to disable the application of other treaty standards. As was properly noted in SGS v Pakistan, "*[t]he modes by which a Contracting Party may "constantly guarantee the observance of*" its contractual or statutory or administrative municipal law commitments with respect to investments are not necessarily exhausted by the instant transubstantiation of contract claims into BIT claims posited by the Claimant"[34].

iii. Consent to ICSID arbitration

50. ICSID tribunals acknowledged that the expression of consent to ICSID arbitration as required by Article 25(2)(b) of the ICSID Convention must be sought in the applicable BIT[35], i.e. in Article 11 of the Beristan-Opulentia BIT. Specifically, it entitles a foreign investor to resort to the ICSID dispute resolution forum for "*disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under [the BIT] in relation to an investment of the latter*"[36]. Those are exclusively the disputes which the Respondent consented to be entertained by the ICSID.

51. The wording of Article 11 enshrines the cornerstone of the ICSID jurisdiction[37]. It is obvious that by virtue of its provisions the scope of disputes between the host State and a foreign investor susceptible to be heard by ICSID tribunals effectively limited.

52. The Respondent submits that the reference to obligations under the BIT encompasses but compliance with substantial standards of investment protection[38]. This is grounded

[33] *Noble Ventures,* para 52.
[34] *SGS v Pakistan*, para 172.
[35] *Sempra,* para 100.
[36] Article 11(1) of the BIT.
[37] *Autopista*, para 48.
[38] *El Paso*, para 81.

both in the purpose of the Treaty (as elaborated above) and in the peculiar language of the Article. In particular, the ICSID Tribunal in SGS v Philippines[39] while discovering the meaning of a BIT dispute settlement clause noted that "*[t]he general term "disputes with respect to investments*" *may be contrasted with the more specific term "[d]isputes… regarding the interpretation or application of the provisions of this Agreement" in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language*"[40].

53. Apparently, this was the intention of the Parties to the present BIT. The "umbrella clause" in its specific implied "elevating" capacity does not amount to a substantial standard of treatment under the BIT[41].

54. Therefore, the present Tribunal will not have jurisdiction over a dispute based exclusively on the alleged breach of the Article 10. The material breach of a private contract – in which the Respondent is not even a party – which is alleged by the Claimant, can not be adjudicated by the Tribunal since it does not fall within the scope of Respondent's consent to ICSID arbitration.

2. Alternatively, the scope of private law "obligations" under Article 10 is limited.

55. If the Tribunal finds that despite the above-reasoning Article 11 allows adjudication in case of breaches of private law obligations, the Respondent submits that those could only be commitments assumed under direct host State-foreign investor contracts (hereinafter referred to as "state contracts").

56. It was already mentioned that the "umbrella clauses" are aimed at securing better protection for foreign investors. An authoritative source expressly refers to "*investment agreements that host countries frequently conclude with foreign investors*"[42]. It is not a case with a contract between two private-law parties to be covered by the "umbrella clause" protection.

57. Such interpretation goes in line with the principle of *effet utile*[43]: the undue expansion of the range of claims to be regarded as arising under the treaty may lead to an absurd

[39] *SGS v Philippines*.
[40] *SGS v Philippines*, para 132 (b).
[41] *Joy Machinery,* para 81.
[42] *OECD Working Papers on International Investment Number* 2006/3. Interpretation of the Umbrella Clause in Investment Agreements, October 2006, at p. 3.
[43] *Noble Ventures*, para 50; *SGS v Philippines*, para 116; *Salini v Jordan*, para 95.

outcome in terms of investment protection[44]. On the other hand, it follows from the original source of the "umbrella clause", also labeled as *pacta sunt servanda* principle[45] (due parties should comply with their contractual undertakings).

58. International jurisprudence also supports these contentions. In cases where The ICSID Tribunal was to decide on claims brought under the "umbrella clause"[46] the underlying contract was an agreement entered into by an investor and the host State directly (through its Ministry or a designated body).

59. On the other hand, a strong call against superfluously broad interpretation of the "umbrella clause" has been launched by certain arbitrators[47].

60. All the foregoing factors should bring the Tribunal to conclude that based on the allegations of the Claimant no jurisdiction may possibly be granted in the present case.

3. The Respondent's liability under the JVA is reduced to the one of a guarantor.

61. If the Tribunal still decides to apply a wide approach to the "umbrella clause" the only case when claims under the JVA may be raised before the present Tribunal will be a case of default of Beritech S.A.

62. This is the only obligation assumed by the Respondent in respect of the JVA[48]. It is generally recognized that a guarantor can not be by any means bound by the underlying contracts[49], thus it may not be held liable for its non-performance as such.

63. So far no allegations of such default were made by the Claimant. Moreover, there are clearly no grounds to state that Beritech S.A. was deficient on any of its contractual undertakings. In contrast, it lodged a required sum of US $47 million on the escrow account while initiating arbitration under the JVA[50].

II. The actions of Beritech S.A. can not be attributable to the Respondent.

[44] *El Paso*, para 76.
[45] Umbrella Clauses / by Prof. Dr. August Reinisch, Seminar on International Investment Protection (2006/2007), available at: http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf, at p. 5.
[46] *SGS v Pakistan*; *SGS v Philippines*; *LESI*.
[47] *Eureko v Poland*, Dissenting Opinion of arbitrator Rajski, para 11; *Noble Ventures*, para 55; Ch. Schreuer *The Concept of Expropriation under the ETC and the Investment Protection Treaties*, Revised (20 May 2005), at p. 255.
[48] Clarifications 1, question 152.
[49] ICC Uniform Rules for Demand Guarantees, Edition 1992.
[50] Annex 2, item 12.

64. The Claimant may argue that for the sake of Article 10 of the BIT the Respondent could be imputed with the actions of Beritech S.A. as if the latter were a state body.

65. Under general international law the alleged treaty breach to be opposed to the State must be necessarily attributable thereto[51]. The same applies to violations of the "umbrella clause" through contractual or unilateral undertakings[52].

66. One of the underlying principles of state attribution is that private and public actions must be necessarily separated[53]. The single reliance on corporate control is unacceptable[54].

67. The ICSID jurisprudence – in line with rules of customary international law – "*sets out structural, functional and control tests for determining whether an act or conduct by an entity should be attributed to the State*"[55].

1. Beritech S.A. is not a state body.

68. Beritech S.A. can not be considered a state body under the so-called structural test as under ILC Article 4. It, in particular, requires that under national law an entity shall constitute an element of the organizational structure of a state[56]. Beritech S.A. is not a governmental body and its actions do not represent the actions of the State of Beristan. Beritech S.A. is a legal entity duly registered under the laws of the Republic of Beristan and it never exercised any elements of governmental authority.

69. Government-owned companies like Beritech S.A. should be differentiated from governmental agencies established with the aim of exercising the state authority and pursuing the activity within the interest of the particular state. Such enterprises should not be identified with a state. As the record shows that Beritech S.A. was not in any

[51] *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), Article 2; See also Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3, at p. 29, para.56.

[52] Andrew Newcombe, Lluis Paradell *Law and practice of international treaties: standards of treatment*, Kluwer Law International (2009), at p. 461.

[53] Gordon A. Christenson *The Doctrine of Attribution in State Responsibility*, in *State Responsibility for Injuries to Aliens /* Richard Lillich ed., at p. 327.

[54] Commentaries to the Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), at p. 47; Gordon A. Christenson The Doctrine of Attribution in State Responsibility, in State Responsibility for Injuries to Aliens / Richard Lillich ed., at p. 327; Tod Weiler *International Investment Law and Arbitration: leading cases from the ICSID, NAFTA, Bilatteral Treaties and Customary International Law*, at p. 43.

[55] *EDF*, para 187; See also *Maffezini*, para 75.

[56] Commentaries to the Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), at pp. 40,42.

way designated by the laws of Beristan to perform any kind of legislative, executive or moreover judicial function of the state[57].

70. In public international law, the mere "paternity" of the State is not a sufficient basis on which to attribute to it the acts of the State's instrumentalities[58]. The organic link (*i.e.*, its existence as part of the State's broad apparatus) is only sufficient for *de jure* organs[59]. If the State instrumentality is not a *de jure* organ, the act of the instrumentality can only be attributed to the State if it is shown that the entity in question exercises elements of governmental authority or is controlled and directed by the State. Any other view would be inconsistent with the principles of international law[60].

71. In the circumstances of the dispute at hand, Beritech was not a *de jure* organ of Beristan, neither was it fully *"controlled and directed by the State"*[61]and it definitely did not exercise any governmental authority within the scope of its competence and a line should be drawn between discharging governmental functions and carrying out commercial activity.

2. Beritech S.A. does not exercise any governmental authority.

72. The functional test implies that a private law company or any other entity should be assigned by the internal law of the State to exercise certain governmental authority and while acting in this delegated capacity should have engaged in the unlawful conduct[62].

73. While the essential element of such test is the actual empowerment by the State, other ICSID Tribunals took into account the decision-making procedure in the company itself[63].

[57] *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), at pp. 285-286 (1927).
[58] *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4(Emmanuel Gaillard and J. Younan eds., Juris Publishing, 2008), at p.35.
[59] *Noble Ventures*, para. 69 et seq.
[60] *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4(Emmanuel Gaillard and J. Younan eds., Juris Publishing, 2008), at p.35.
[61] *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4(Emmanuel Gaillard and J. Younan eds., Juris Publishing, 2008), p.35.
[62] *EDF*, para 191.
[63] *EDF*, para 195.

74. Yet, in both cases the activities of Beritech S.A. are essentially separated from the Respondent. No evidence was produced by the Claimant to the contrary. Thus, Beritech S.A. should be deemed as constituting an ordinary private company.

3. <u>For the purposes of state attribution Beritech S.A. is not under the direction or control of the Respondent.</u>

75. As a general rule the conduct of a state-owned company is presumably a private conduct[64]. Such conduct may be imputed to the state in case the latter "directed or controlled the specific operation and the conduct complained of was an integral part of that operation"[65].

76. It is noticeable that ICSID tribunals ruled affirmatively on the state attribution in circumstances where the disputable companies undertook certain public functions and thus acted as entities of state[66]. In contrast, they were not satisfied with jurisdiction in cases where the immediate perpetrators of an alleged breach were merely "encouraged" by the State[67].

77. In addition, there are no grounds to believe that members of the Board of Directors nominated by Beritech S.A. and present at the meeting of 27 August 2009[68] acted in such a way as to exceed "*legitimate exercise […] of their right to manage the company's affairs in what they perceived to be its best interests*"[69].

78. Therefore, the conduct of Beritech S.A. lacks definite features to qualify as the one of the host state, and does not allow invoking the international responsibility of the Respondent in the present case.

III. In any occasion there is a lack of practical grounds to apply the "umbrella clause".

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[64] Abby Cohen Smutny *State Responsibility and Attribution. When Is a State Responsible for the Acts of State Enterprises? Emilio Agustin Maffezini v The Kingdom of Spain* in Tod Weiler *International Investment Law and Arbitration: leading cases from the ICSID, NAFTA, Bilatteral Treaties and Customary International Law,* at p. 43.

[65] Commentaries to the Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), at p. 47.

[66] *Maffezini*, para 89; *EDF*, paras 201-205.

[67] *Tradex*, paras 165, 169-170; *Amco*, at para 455.

[68] Annex 2, 10.

[69] *Foremost Tehran, Inc. v Government of the Islamic republic of Iran*, Award No. 220-37231-1, 11 April 1986, 10 Iran-US CTR 228.

79. The Respondent contends that even if the Tribunal finds that it holds jurisdiction over the alleged material breach of the JVA by virtue of Article 10 of the BIT it should still find the case inadmissible, at least until the final award is rendered by the arbitration tribunal under Clause 17 of the JVA.

80. It was stated in *SGS v Philippines* that "*[the umbrella clause] d[id] not convert the issue of the extent or content of such obligations into an issue of international law*"[70]. Following this reasoning the Tribunal decided to stay its own proceedings pending a judgment of competent national court. It is worth reminding that the mentioned decision is considered to have formulated a drastically different approach to interpretation of the "umbrella clause"[71] from the one in *SGS v Pakistan*, which the Respondent deems of particular avail in the case at hand.

81. Minding such dichotomy the Respondent is of the opinion that provided its contentions of restrictive interpretation of Article 10 are rejected the Tribunal's decision should follow the lines of the tribunal in *SGS v Philippines*.

82. Similarly, other relevant cases before the ICSID were preceded by proceedings in pertinent jurisdictions[72].

83. Thus, the fact that a breach of contract is to be ascertained in accordance with domestic law of the host State[73] implies that the present Tribunal will be deprived of the opportunity to rule on the merits until the existence of such breach is determined in the appropriate forum (constituted under Clause 17 of the JVA).

[70] *SGS v Philippines*, para 128.
[71] Matthew Wendlandt SGS v Philippines *and the Role of ICSID Tribunals in Investor-State Contract Disputes,* Texas International Law Journal, Vol. 43, 2008, at p. 546.
[72] *Eureko*, para 45.
[73] Davis Joseph *Jurisdiction and arbitration agreements*, Thomson Sweet & Maxwell (2005), at p. 132.

C. THE REPUBLIC OF BERISTAN DID NOT MATERIALLY BREACH OF THE JVA

84. Claimant alleges that the Republic of Beristan committed a material breach of the JVA. In response to these contentions Beristan submits that it could not have breached the JVA as it has never been a party thereto (I). Alternatively, if this Tribunal finds that the Republic of Beristan assumed any rights and/or obligations under the JVA, the procedure of buyout of Claimant's interest in Sat-Connect was conducted properly (II).

I. Beristan could not have materially breached the JVA as Beristan has not been a party thereto.

85. The Republic of Beristan is not a party to the JVA and it is not involved in the underlying dispute, which, in fact, is a dispute between private parties as to the ownership of Sat-Connect and the Claimant's claims are of purely contractual nature and, therefore, Claimant's allegations against the Republic of Beristan are irrelevant in their entirety to the case at hand.

86. The parties having rights and bearing obligations under the JVA are Beritech S.A. and Televative Inc. The Republic of Beristan was a third party to this agreement, and signing of a contract as a guarantor does not lead to becoming a party thereto.

1. <u>The Republic of Beristan as a third party could not have breached the JVA</u>.

87. Beritech S.A. and Claimant are parties to the JVA and bear rights and obligations thereunder.

88. The Republic of Beristan did not sign the JVA as a party and does not bear the obligations of a party under the JVA. Pursuant to the doctrine of privity of contract, only those involved in striking a bargain would have standing to enforce it[74].

89. As discussed in Section B(II)(i) above, Beritech S.A., despite being a partially government-owned company is not a governmental body and its actions do not constitute the actions of the State of Beristan. Beritech S.A. is a legal entity duly

[74] Webster's Online Dictionary. http://www.websters-dictionary-online.org

registered under the laws of the Republic of Beristan. It has never exercised any elements of governmental authority. Therefore, the Republic of Beristan should not be responsible for any actions of Beritech S.A.

90. The relationship between third parties and agreements is defined by a general formula *pacta tertiis nec nocent nec prosunt.*[75] This principle has been recognised in states' practice as fundamental, and its existence has never been questioned.[76] For states that are not parties to the treaty, the treaty is *res inter alios acta*[77], that is to say, it does not create rights and obligations for them. It has been reflected in numerous cases before the ICJ. For example, in *German Interests in Polish Upper Silesia* case, the PCIJ observed that : "*[a] treaty only creates law as between States which are parties to it".*[78]

91. The general principle of law applied to private contracts (such as the JVA) is similar, which means that agreements must be executed on subjective basis, *i.e.* by relevant parties. No third party can be deemed to have entered into a contract or agreement without its explicit consent.

92. Therefore, the JVA may not impose obligations for a third party without its explicit consent. Beristan has never consented to become a party to the JVA. Thus, it could not assume any obligations under the JVA.

2. <u>The status of a guarantor does not amount to the status of a party.</u>

93. The Republic of Beristan was a guarantor, not a party to the JVA. As a guarantor, it could assume obligations under the JVA only in case of Beritech S.A.'s default, which has never taken place.

94. The Republic of Beristan did not assume any obligations under the JVA, and could not even potentially breach it. Furthermore, as discussed above, the State of Beristan did not control the actions of Beritech S.A. and did not in any other way assume rights and duties under the JVA.

95. The actions of the CWF are the only ones attributable to the State of Beristan as a subject of public law. These actions were carried out in full compliance with the

[75] "Agreements do not create rights and obligations for the third parties". Malgosia Fitzmaurice *Third Parties and the Law of Treaties*, Max Planck Yearbook of United Nations Law, Volume 6 (2002), at p.38
[76] Lord McNair *The Law of Treaties* (1961), at p. 309;
[77] "A thing done between others".
[78] *German Interests in Polish Upper Silesia Case*, PCIJ (German v. Poland, 1926) at paras. 28-29.

Beristian laws and did not contradict the BIT since they were taken for a public purpose and on a non-discriminatory basis.

96. In several cases parties have also argued that the state is liable for the conduct of one of its instrumentalities[79] where the state has contractually agreed to guarantee the instrumentality's obligations under a contract that the instrumentality entered into with a private company.[80] But there is no case law supporting such point of view. As explained in the Black's Law dictionary, *"if the instrumentality in question is in substance and in form a corporation, it must be considered legally separate and distinct from the government that it serves"*[81].

97. In ICC Case No. 8357 of 1997 the tribunal stated that: *"[…] the ratification of the contract by the statute was aimed mainly at assuring the foreign contracting parties that the obligations arising out of the contract would be respected and duly performed by the State."*[82]

98. Applying these principles to the case at hand, the Republic of Beristan may only emphasize once again the fact that it had no obligations under the JVA and had nothing to perform pursuant to it. As a host state it did not interfere into the activities of Sat-Connect and duly respected the rights of the Claimant.

99. It can be concluded that the present dispute has arisen between Beritech S.A. and Claimant, since they are parties to the JVA. The Republic of Beristan had no obligations under the JVA since it was not a party to it. Its status of the guarantor under the JVA does not amount to the party status.

II. If the Tribunal finds that the Republic of Beristan has assumed rights and duties under the JVA, the buyout procedure of Claimant's interest in Sat-Connect was proper.

100. Even if this Tribunal finds that the Republic of Beristan has assumed obligations under the BIT, it submits that the buyout of Claimant's interest in Sat-Connect was carried out properly.

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[79] *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4(Emmanuel Gaillard and J. Younan eds., Juris Publishing, 2008), p.53.
[80] ICC Case No. 6262, *Two European Companies v. African State*, June 24, 1992 Partial Award, unpublished, at para.92.
[81] *Black's Law Dictionary* 409 (Rev. 4th Ed. 1968).
[82] ICC Case No. 8357, *Consortium of two foreign companies and a national company v. Public corporation of State X*, 14 June 1997, Final Award, at para. 13

101. Claimant materially breached the confidentiality provision of the JVA through leaking the information to the Opulentian Government. Such a breach constituted a violation of the essential relationship between the parties and entitled Beritech S.A. to expel Claimant from the functioning of Sat-Connect project to prevent further damages.

1. The buyout clause was triggered by the breach of the confidentiality clause.

102. Under Clause 4(4) of the JVA concerning confidentiality and non-disclosure of information (including all trade secrets, data, know-how, materials etc. developed during the Sat-Connect project, or submitted to the it by one of the parties) "*any breach of this Clause 4 shall be deemed a material breach of the Agreement*". Claimant disclosed information that was critical for the Sat-Connect project to the Opulentian Government. The investment was part of a large-scale fraud with a view to giving information to the Opulentian Government and was therefore illegal and was made in violation of the principle of good faith. Thus, Claimant committed a material breach of the JVA in the meaning of its Clause 4.

103. Under Clause 8 of the JVA Beritech S.A. was entitled to purchase all Claimant's interest in Sat-Connect project in case the latter materially breaches the JVA. As demonstrated above, this pre-condition was met. Therefore, Beritech S.A. only reacted properly to Claimant's material breach and exercised its right under Clause 8 in good faith, as Beritech S.A. was fully entitled to invoke the Buyout Clause.

2. The buyout procedure was in conformity with the Beristan law.

104. The buyout was completed with due process in accordance with Beristian law. On 27August 2009, Beritech S.A. invoked Clause 8 of the JVA to compel a buyout of Claimant's interest in the Sat-Connect project, and this was approved by the majority of Sat-Connect's Board of Directors.

105. Beritech S.A. then served notice to Claimant on 28 August 2009 requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project. The Executive Order was issued to remove Claimant's personnel and only thereafter, on 11 September 2009, the staff from the CWF secured all sites and facilities of the Sat-Connect project.

106. Therefore, the actions of the CWF as well as the actions of Beritech were in full conformity with the Berisran law (the expulsion of Claimant was voted for at the meeting of the board of directors of Sat-Connect. Therefore, the buyout was conducted properly.

3. The actions of Beritech S.A. did not amount to a material breach of the JVA.

107. Even if the Tribunal finds that Beritech S.A. could not invoke Clause 8 of the JVA or that the buyout procedure was not proper, neither the actions of the Republic of Beristan, nor the actions of Beritech S.A. amount to material breach of the JVA.

108. The following circumstances are important to determine whether a failure to render or to offer performance is material: *"(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing*"[83]. Applying the above-listed criteria to the case at hand, Beristan submits that neither its own actions, not the ones of Beritech S.A. reach the level of a material breach.

109. First of all, Claimant was not deprived of any benefit he could reasonably expect since the leak of confidential information critical for Sat-Connect deprived the project of its economic purpose and the Claimant could not reasonable expect further benefits.

110. Second, the sum of 47 million US dollars was placed into an escrow account, which has been made available for Claimant and is being held pending the decision in the arbitration initiated by Beritech S.A. under the dispute resolution Clause of the JVA. Claimant refused to accept this payment and to respond to Beritech S.A.'s arbitration request filed on 19 October 2009. Claimant's total monetary investment in the Sat-Connect project stands at 47 million US dollars[84]. Under Clause 8 of the JVA in case

[83] American Law Institute, *Restatement (2nd) of Contracts*, at para. 241 (1981).

[84] Annex 2, item 13

of a buyout of its interest Claimant's investment shall be valued only as its monetary investment in Sat-Connect, *i.e.* the amount of 47 million US dollars.

111. Third, Beritech S.A. (as well as the whole Sat-Connect project) will definitely suffer forfeiture since Claimant will not be able to fulfil its obligations pursuant to JVA and, therefore, the completion of the project will be withdrawn. But this result is due only to Claimant's wrongful behavior. If Claimant's conduct would have acted *bona fide* and would not have caused the leak of information to Opulentian Government, Beritech S.A. would have continued their cooperation.

112. Forth, if it is found that the actions of Beritech S.A. were the "failure", the latter in any case, as mentioned above, placed Claimant's monetary investment into the escrow account with a view to cure the alleged "failure".

113. Finally, all the actions of Beritech S.A. were in full compliance with the standards of good faith and fair dealing, since the buyout provision was invoked as a response to leaking information critical for the project. Moreover, Beritech S.A. offered quick and adequate compensation. Besides, both Beritech S.A. and the State of Beristan acted in accordance with Beristian laws.

114. As demonstrated above, the actions of Beritech S.A. in no way amount to the material breach of the JVA.

115. In view of the above arguments and the facts of the case the Republic of Beristan requests the Tribunal to find the following. First, the fact that Beristan co-signed the JVA as a guarantor did not entail the assumption of any obligations under the JVA by Beristan. Second, Beritech S.A.'s actions should not be confused with the actions of Beristan as the former is a company having no governmental authority. Third, Beritech S.A. was entitled to invoke the buyout Clause of the JVA due to a material breach by Claimant. Finally, both Beritech S.A. and the State of Beristan acted in full conformity with international law and national legislation of Beristan with a view to protect national security, in compliance with due process of law, and the principles of good faith and fair dealing.

D. RESPONDENT'S ACTIONS DID NOT VIOLATE ANY RULES OF APPLICABLE TREATIES AND GENERAL INTERNATIONAL LAW.

116. Claimant alleges that Respondent by its actions violated applicable treaties, namely the Beristan-Opulentia BIT, and the rules of general international law. In particular, Claimant's accusations comprise expropriation, discrimination and failure to meet the standard of fair and equitable treatment of investments. Respondent denies these allegations in their entirety. The Republic of Beristan will further demonstrate that its actions did not amount to expropriation, and in any case were in line with Beristan-Opulentia BIT requirements (I); did not discriminate Claimant (II); and fulfilled its obligation to afford fair and equitable treatment to Claimant's investment (III).

I. The actions of Beristan did not amount to expropriation, and in any case were in line with Beristan-Opulentia BIT requirements.

117. Claimant accuses the Republic of Beristan in expropriation of Claimant's interest in Sat-Connect. Beristan submits that it has never expropriated any Claimant's rights of property (i), and in any case its actions were always in conformity with the requirements of Beristan-Opulentia BIT (ii).

1. <u>The Republic of Beristan has never expropriated any Claimant's rights or property.</u>

118. In response to Claimant's allegations that Beristan expropriated its interest in Sat-Connect Beristan submits that it has never taken a decision on the buyout of this interest (i). All the actions that may be attributable to the Republic of Beristan (namely, the actions of the CWF) were in strict conformity with the applicable law (ii).

2. <u>The buyout was solely the result of the actions and decision-making of Sat-Connect, not the state of Beristan.</u>

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119. The Republic of Beristan has never taken any formal actions aiming at termination of Claimant's ownership of the interest in Sat-Connect.

120. There was no law or decree enacted by the Republic of Beristan attempting to take the property or rights of Claimant with a view to change the title thereto in favour of the state.

121. The decision to invoke the buyout clause (Clause 8) of the JVA was not taken by Beristan state or by any of its officials or governmental bodies. It was taken by the board of directors of Sat-Connect. The buyout was solely the result of the actions and decision-making of the Sat-Connect project.

122. All of Claimant's contributions to the Sat-Connect project are not in the state ownership now, nor are they held by any governmental bodies. They are owned by the private shareholders.

123. In *Waste Management*[85] the most exponential argument provided by the claimant in order to prove repudiation of the concession contract was the mayor's political statement that the exclusivity of the investor's services must be abolished.[86] The tribunal found that this was not an exercise of legislative public authority and therefore not tantamount to expropriation[87].

124. Even if the Tribunal considers the actions of Beritech S.A. or Sat-Connect somehow attributable to the state, this was not the exercise of legislative or any other public authority and therefore is not tantamount to expropriation.

125. *"An action or series of actions by a state cannot constitute an* expropriation *unless it interferes with a tangible or intangible property right or property interest in an investment."*[88] Beristan did not commit such interference. As such, Claimant's interest in Sat-Connect has not been directly or indirectly expropriated by any actions taken by Beristan.

3. <u>All the actions of Beristan were in strict conformity with the applicable law.</u>

126. From all the actions discussed in the case at hand only the actions of the CWF may be attributable to the Republic of Beristan. As regards these actions, the behaviour of the state was fully in line with the internal legislation of Beristan and with applicable law.

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[85] *Waste Management*.
[86] Ch. Schreuer *The Concept of Expropriation under the ETC and the Investment Protection Treaties*, Revised (20 May 2005), at p.26.
[87] *Waste Management*, para. 161.
[88] *International Investment Law: a Changing Landscape. A Companion Volume to International Investment Perspectives*, OECD Publishing (2005), at p.46.

127. The CWF completed its duty and acted in accordance with the executive order. Their actions did not constitute a violation of the applicable law, and this fact is not contested by the Claimant.

128. The representatives of Televative Inc. had 14 days to remove all seconded personnel from the project and to hand over possession of all Sat-Connect site, facilities and equipment. The CWF fulfilled its mission only afterwards. The CWF did not force any member of Claimant's staff to leave the site or facilities. All Claimant's employee's left Sat-Connect project premises voluntarily[89].

129. Therefore, all the actions of Beristan performed in its public capacity were in strict conformity with the laws of Beristan and international law.

4. Beristan shall not be liable for alleged expropriation, as its conduct was at all times in full conformity with the requirements of Beristan-Opulentia BIT.

130. Even if the Tribunal finds that the Republic of Beristan is somehow responsible for the actions of Beritech S.A., it shall not be liable for expropriation, as its actions were fully conforming to the requirements of Beristan-Opulentia BIT.

131. In general, international law does not preclude host states from lawfully expropriating foreign investments even in cases if they act in their public capacity (which is obviously not the case here), provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, with due process of law, in a non-discriminatory manner and with compensation.

132. As Brownlie has stated, "*state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. […] While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation*"[90] .

133. The Beristan-Opulentia BIT in its Article 4(2) contains a list of conditions for admissibility of expropriation. If the expropriation is carried out "*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*", it is not prohibited under the BIT.

[89] Clarifications 2, 204, 248.
[90] Ian Brownlie *Public International Law,* Oxford University Press, 6th Edition (2003), at p. 509.

134. In the case at hand all the above conditions were fulfilled, although the Republic of Beristan has never committed any actions amounting to expropriation acting in its public capacity. Therefore, the Republic of Beristan contends that the conditions of an even higher standard were met.

135. First of all, by causing the leak of information about Sat-Connect technology, systems, intellectual property and other trade secrets to the Government of Opulentia Claimant not only breached the confidentiality clause of the JVA (Article 4), but also created a threat for the national security of Beristan. Actions resulting in termination of Claimant's participation in Sat-Connect project were, among other factors, motivated by the need to prevent further leak of information to the Opulentian Government.

136. Second, Beritech S.A. offered to Claimant an amount of USD 47 million as a purchase price of the latter's interest in Sat-Connect. Claimant considers the compensation inappropriate since, in its view, this amount Claimant's paid-in investment. However, Claimant had voluntarily agreed to the particular conditions of buyout provided for in Clause 8 of the JVA. This Clause limits the value of Claimant's interest to the value of its monetary investment in the Sat-Connect. Before signing the JVA and up to the time when the dispute arose Claimant did not raise any objections as regards this provision. The Claimant is not entitled for a larger amount under the JVA, especially taking into account the trigger of the buy-out procedure –material breach of the JVA by the Claimant. Therefore, Claimant should not be entitled to any further compensation for its interest purchased by Beritech S.A.

137. Third, as discussed in Section D(II) below, Beristan has never treated Claimant in a discriminatory manner.

138. Therefore, even if the Tribunal is to find that Beristan is responsible for Beritech S.A.'s actions, the state was acting in full compliance with the BIT and international law. If the Tribunal establishes that Respondent's actions amounted to expropriation, they were undertaken for a public purpose, complied with due procedure, and were non-discriminatory. An adequate compensation was offered to Claimant. Hence, Respondent cannot be held liable for unlawful expropriation.

II. Claimant has never been treated in a discriminatory manner.

139. Beristan submits its actions were in compliance with international law, and it has never treated Claimant in a discriminatory manner.

140. Beristan agrees that it assumed obligation not to subject Claimant's investment to "*unjustified or discriminatory measures"*[91] under the Beristan-Opulentia BIT. The Respondent considers that with a view to make a claim for discrimination, the Claimant must demonstrate the actions of the host state violated the most favourable nation treatment and national treatment obligations assumed by Beristan under the BIT. In order to do it Claimant is to prove that two different investors were in the similar situation and that they were treated differently[92].

141. Illegal discrimination must usually be aimed at the foreign investors as a result of the unreasonable policies or motives including racism or political retaliation against nationals of certain states[93]. A taking is discriminatory if it "*singles out a particular person or group of people without a reasonable basis*"[94].

142. Unless the Claimant shows that a third investor or Beristan's own nationals were in the same circumstances and were treated differently, the tribunal shall dismiss the claims as regards discrimination.

143. This idea was confirmed by *Parkerings v. Lithuania* case[95], stating that with a view to establish discrimination, the circumstances of the individual cases shall be considered. Pursuant to this case, discrimination either involves issues of law, such as legislation affording different treatments as regards different citizenship, or issues of fact if state unfairly treats differently investors who are in similar circumstances."[96]

144. There is no evidence showing that Beristan treated similar investors from the third states or its own nationals in a different manner.

145. The comparison is necessary with an investor in *like circumstances*[97] that cannot be established since there were no investors in the like circumstances, *i.e.* leaking critical information to a foreign government. If the tribunal is to find differential treatment, such leak of the information is an "*objective justification"* required in each case to evaluate the exact circumstances and the context[98].

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[91] BIT, Article 2(1).
[92] *Parkerings*, para.368.
[93] August Reinisch *Standards of Investment Protection,* Oxford University Press (2005), at p.190.
[94] N. Rubins and N.S. Kinsella *International Investment, Political Risk and Dispute Resolution.* A Practitioner's Guide (2005), at p.177.
[95] *Parkerings.*
[96] *Parkerings*, para.368.
[97] *Parkerings*, para.369.
[98] *Parkerings*, para.368.

146. Since discrimination is regarded as *"unreasonable distinction*", discriminatory conduct toward certain persons may not be unlawful if such distinction is "*rationally related to the state's security or economic policies [it] might not be unreasonable*"[99].

147. Therefore, the actions of Beristan have never constituted discrimination of the Claimant's investment. Even if Tribunal is to find they seemed to be discriminatory on surface, leaking the information to the foreign government constituted objective justification and was rationally related to the state's security policy, thus were reasonable and were not discriminatory in their essence.

III. Republic of Beristan has Fulfilled its Obligation to Provide Fair and Equitable Treatment to Claimant's Investments.

148. As rightfully pointed out by Claimant, the Republic of Beristan assumed an obligation to afford fair and equitable treatment to Claimant's investment under the Beristan-Opulentia BIT. Beristan further submits that its actions in relation to Claimant complied with this obligation.

149. It is Claimant's allegation that actions attributable to the Republic of Beristan violated the minimum standard of fair and equitable treatment to which Claimant is entitled under the Beristan-Opulentia BIT.

150. Respondent denies that any of its actions breached any terms of the Beristan-Opulentia BIT, or otherwise violated general international law or applicable treaties. Beristan's treatment of Claimant's investment was fair and equitable, and therefore, did not violate Article 2(2) of the BIT.

151. The fair and equitable treatment clause of the BIT guarantees "*fair and equitable treatment*" of investors' investments "*at all times*". The Claimant is the party bearing the burden of proof to show that Beristan violated Article 2(2) of the BIT[100], that any of the actions or omissions supposedly attributable to the host state "*had a direct negative impact*" upon its investments, as well as it bears obligation to show a clear cause-and-effect relation between such actions and the effect.[101]

152. In *Glamis v. USA* the tribunal has set a rather high threshold for the breach of fair and equitable treatment standard by holding that the actions of the state should be

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[99] *Restatement (3 rd) of the Foreign Relations Law of the United States*, above n. 19, Comment (f).
[100] *Zeevi Holdings v Bulgaria and The Privatization Agency of Bulgaria*, Final award, UNCITRAL Case No UNC 39/DK; IIC 360 (2006), 25 October 2006, para.367.
[101] Ioana Tudor *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008), at p.138

"sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or manifest lack of reasons"[102].

153. According to *S.D. Meyers v. Canada*[103] case, in order for the standard to be breached, the host state must have treated the investor "*in such an unjust or arbitrary manner that [it] rises to the level that is unacceptable from the international perspective"*[104].

154. It also falls upon the Claimant to prove that Respondent's actions or failure to act were *"willfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community."*[105]

155. Applying the foregoing to the present situation, an unbiased person would see clearly that Beristan did not violate the international minimum standard of fairness and equity since the treatment of Claimant and its investment has never been egregious, shocking, arbitrary or blatantly unfair. The buyout of Claimant's interest in Sat-Connect was not invoked by the Respondent[106], and even if the Tribunal finds otherwise, such actions had a clear and manifested reason – national security concerns that were incurred by the Claimant's unfair conduct.

156. Pursuant to the host state's argument in *Ronald S. Lauder v. Czech Republic*, the exact definition of the fair and equitable treatment obligation does not exist[107]. Since such duty rather concerns the state's conduct than the outcome of the investment, even the clear fact that the investor loses money does not point out that the obligation is thus violated.[108]

157. According to the Tecmed tribunal, *"the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it".*[109]

158. If we apply the aforesaid to the facts of the case at hand, it becomes clear that the Claimant has failed to meet its duty to fulfil its burden of proof in order to demonstrate direct cause-and-effect relation between the alleged actions and omissions of Beristan and the detriment to Claimant's investment, as well as to prove that the actions of Beristan were unreasonable.

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[102] Mahnaz Malik. *Fair and Equitable treatment. International Institute for Sustainable Development.* September 2009, citing *Glamis Gold LTD v. USA* case, para.22.
[103] *SD Myers.*
[104] *SD Myers v. Canada*, para 263.
[105] *Saluka*, para 290
[106] See Arguments B, C.
[107] *Lauder*, para.291.
[108] *Ibid.*
[109] *Tecmed*, para 177.

159. Therefore, the Republic of Beristan requests this Tribunal to hold that it did not violate its obligations under the fair and equitable treatment principle and, thus, did not violate Article 2(2) of the BIT.

160. Summarizing its arguments stated in Section D above, the Republic of Beristan requests this Tribunal to find the following. Beristan that did not expropriate any Claimant's property or rights, and in any case were in line with Beristan-Opulentia BIT requirements. It did not treat Claimant and its investment in discriminatory manner, and duly fulfilled its obligation to afford fair and equitable treatment to Claimant's investment.

E. THE REPUBLIC OF BERISTAN IS ENTITLED TO RELY ON ARTICLE 9 (ESSENTIAL SECURIT) OF THE BERISTAN-OPULENTIA BIT AS A DEFENSE TO CLAIMANT'S CLAIMS

161. The Republic of Beristan submits that it has a right to use Article 9 of the BIT as a defense against the claims raised against it by Claimant in the present proceedings. Even if the Tribunal finds that Beristan has improperly taken Claimant's investment, the actions of the state shall be excused as Claimant's behaviour created the threat to Beristan's national security.

162. As we have previously emphasized, Beristan should not be responsible for the actions of Beritech S.A. But even if the Tribunal considers otherwise, all the measures of the Respondent were aimed at protecting national security.

163. Beritech S.A. was entitled to rely on Clause 8 of the JVA (buyout) because Claimant breached the confidentiality provision of that Agreement (Clause 4) by leaking information about the Sat-Connect project—including information about the technology, systems, intellectual property and encryption to be used and other trade secrets—to the Government of Opulentia.

164. The expulsion of the foreign investor will amount to a taking if the purpose of the expulsion is the taking of his property[110]. But, where national security or other sufficient grounds exist for the expulsion, this will be different. Objectively reasonable factors for the expulsion must exist if it were to be justifiable on national security grounds.[111]

165. Any leak of the information as for the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces, directly implicate the national security of Beristan. The satellite and communications technology that Sat-Connect was going to deploy could be used for civilian or military purposes. Several segments of the Beristian armed forces were expecting to use the Sat-Connect system.

166. The actions of the state fall within the legitimate scope of regulatory actions. In various cases to establish state's interest, tribunals have considered, in particular, whether there is an *"objective basis*" for the administrative decisions taken.[112]

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[110] *Biloune.*
[111] M.Sornarajah *The International Law on Foreign Investment*, 2nd edition, Cambridge University Press (2008), at p. 395.
[112] Mahnaz Malik. *Fair and Equitable treatment. International Institute for Sustainable Development*, September 2009, at p.20.

167. Such objective basis existed - it was the leak of information to the foreign government by the Claimant. It goes without saying that economic espionage is considered a threat to national security.[113] Similarly, the leak of confidential IT information used, *inter alia*, for state needs constitutes a threat to national security.

168. As a party claiming damages and alleging that there were no valid grounds to enforce the buyout clause of the JVA, the Claimant bears the burden of proof to establish that information about the leak was false or incorrect[114] if it so considers since it is a well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion[115].

169. Therefore, Claimant's removal from the Sat-Connect project was justified on national security grounds.

170. Therefore, in view of the above arguments this Tribunal should find that Beristan is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a defense to Claimant's claims.

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[113] Samuel Porteous *Commentary No. 46: Economic Espionage (II),* Canadian Security Intelligence Service, www.csis.gc.ca.

[114] *Zeevi Holdings v Bulgaria and The Privatization Agency of Bulgaria*, Final award, UNCITRAL Case No UNC 39/DK; IIC 360 (2006), 25 October 2006, para.367.

[115] *International Thunderbird Gaming Corporation v Mexico*, Award, Ad hoc UNCITRAL Arbitration Rules, IIC 136 (2006).

PRAYER FOR RELIEF

171. Taking into consideration the above mentioned, the Respondent requests the respectfully asks this Tribunal:

(1) deny jurisdiction to hear the Claimant's claims; and, if not, find

(2) that Respondent did not materially breach the JVA;

(3) that Respondent did not Violate any Rules of Applicable Treaties and General International Law; or, if this Tribunal is to find otherwise

(4) that Respondent is entitled to rely on Article 9 (Essential Security) of the Beristan-Opulentia BIT as a defense to Claimant's claims.