I. Alleged "Material Breach" of the JV Agreement

a. *For Art. 10 of the BIT, so-called "umbrella clause," to be applicable there must be undertakings assumed by Respondent* ***[ATTRIBUTION...doplnit]***

b. *Umbrella clause as a separate substantive treaty-standard*

i. The Claims are inadmissible as their essential basis lies with the alleged breach of the JV Agreement

1. In the present context the Tribunal shall hold the Claimant´s pretensions inadmissible, in the case it affirms its jurisdiction. As stated in Vivendi Annulment decision, "[i]n a case where 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."[1] Respondent contents that the "essentials basis" of the claims is based on the question whether the Sat-Connect´s decision on buy-out was properly rendered. According to the Vivendi Award, the scope and extent of State´s contractual obligations is first to be determined by the contractual forum before the BIT tribunal can consider whether a breach of any obligations duly determined exists.[2]

2. In SGS v. Pakistan was forwarded an interpretation of an umbrella clause, to which Respondent adheres. In this award tribunal opined that, unless expressly stated, an umbrella clause does not derogate from the widely accepted international law principle that a contract breach is not by itself a violation of international law, particularly if such contract had a valid forum selection clause.[3]

ii. No State interference violating an international standard

3. As to the meaning and effects of umbrella clause, it is submitted that not every breach of contract can constitute a breach of a treaty. Although there is no general agreement about the

[1] Vivendi I Annulment, para. 98

[2] Vivendi award

[3] SGS v. Pakistan, para. 165-70.

effects of umbrella clauses, Respondent contents that when the Tribunal views Art. 10 as providing any substantive standard, its proper content shall mean that State is obliged not to interfere into the contract by the use of its sovereign powers, e. g. by changes in the host State law.[4]

4. "The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect."[5] This seems way more plausible interpretation of the umbrella clause than the one equating a mere breach of contract with a breach of treaty and it is supported by other authorities.[6]

5. The state interference reaching the threshold of a breach of umbrella clause did not take place in the present case as Respondent only enforced the decision of Sat-Connect in the situation when no objection was raised by the Claimant. Respondent did not put any obstacles in the Claimant´s possibility of arbitrating its dispute.[7] Rather Claimant did not opt to do so, even the Televative´s staff who still remained seconded to the Project on 11 September 2009 left without protesting after the arrival of the CWF.[8] In that time, Claimant had not expressed any disagreement with the buy-out process. Respondent at all times respected the original bargain as the decision-making process of the Board of directors was contractually agreed to.

6. Furthermore, the action of the CWF cannot be deemed as an unlawful interference into the contract, as it was based on the threat to the essential State security. Detailed argumentation is provided in the respective section of the memorial.

c. *Umbrella clause as an instrument elevating a breach of contract to the level of a breach of treaty*

[4] McLachlan, Shore, Weiniger, p. 117.

[5] Sempra v. Argentina, Award, para. 310; further see Impregilo v. Pakistan, Dec. on Jurisdiction, para. 260

[6] McLachlan, Shore, Weiniger, International Investment Arbitration, 2007, p. 117; further see El Paso Energy v. Argentina, para. 81, Sempra v. Argentina, Award, para. 310.

[7] Impregilo v. Pakistan, para. 260.

[8] Responses, 2nd, Cl. No. 248.

7. Some commentaries suggest that umbrella clauses protect an investor´s contractual rights against "any interference which might be caused by either a simple breach of contract or by administrative or legislative acts."[9] However, Respondent strongly recommends to the Tribunal that this conclusion shall not be accepted by the reference to the other facts of the case, especially when the contract has a valid choice of forum clause (Cl. 17 of the JV Agreement). Respondent suggests to give a way to the interpretation referred to in the previous section.

i. <u>In the case that the Tribunal finds the Claims admissible, alleged breach must be determined by the proper law of the JV Agreement, being the law of Beristan</u>

8. Nevertheless, if the Tribunal would be to make a conclusion, that umbrella clause also covers mere breaches of contract, Respondent must point out to the law applicable to this question.
9. Respondent is well aware that the alleged breach of an international obligation must be judged in the terms of international law. In the MTD case was stated that to establish the facts of the breach of the contract the municipal law must be taken into account.[10] Respondent contents that in international investment disputes the domestic law is a part of the applicable law and is not to be treated as a fact.[11]

10. Some commentators criticised various ICSID tribunals for not paying proper attention to the relevant provisions of domestic law.[12] If the present tribunal would be deciding the issue of alleged breach of umbrella clause on merits, it shall not do so without a thorough analysis of the relevant provisions of the law of Beristan.

---

[9] Dolzer, Stevens, 1995, p. 82.

[10] MTD Equity v. Chile, para. 204.

[11] ICSID, Art. 42; Newcombe, Paradell, p. 95-97.; Douglas. Investment Claims, pp. 90-4; CMS v. Argentina.

[12] Newcombe, Paradell, p. 96; Douglas, „Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex," 2006, 22 Arbitration International 27, at 38 et seq.; Dissenting opinion by arbitrator J. Rajski in Eureko v. Poland.

11. Claimant may argue that the law of Beristan shall apply within the framework and in the context of international law. This is indeed correct, but the principles as "pacta sunt servanda," the principle of good faith and other commonly accepted principles of contract law are as well recognized by the law of Beristan.[13] As was stated in the Adriano Gardella case, issues of breach of contract must be viewed in terms of the proper law of the contract, as general international law can provide little guidance on the issue of "material breach of the contract" or other specific questions of contract law.[14]

12. In Cl. 17 of the JV Agreement, the parties to the contract agreed that "[t]he agreement shall be governed in *all* respects by the laws of the Republic of Beristan."[15] They as well, waived "any objection which [they] may have now or hereafter to such arbitration proceeding [...]"[16] commenced under the respective clause. Therefore, by virtue of the first sentence of Art. 42(1) of the ICSID Convention, Claimant agreed that the dispute shall be decided in accordance with these agreed rules. Respondent emphasizes, however, that this shall apply only in the case when the Tribunal accepts its jurisdiction and holds the acts of Beritech attributable to Respondent.

13. Claimant may submit, that to the matter of the "material breach of the JV Agreement" international law shall be applied, namely the BIT. Respondent rebuts this submission by arguing that in general international law, nor in the BIT, no guidance can be found on the particular issue. "This may be treated by the tribunal as an ´absence of agreement´ on the applicable law concerning that question."[17] In this case the Tribunal is called to the application of the second sentence of the ICSID Convention, and therefore the law of Beristan. This must be an inevitable step, as "[t]he Tribunal may not bring in a finding of *non*

[13] Responses, 1st, Cl. No. 136.

[14] Adriano Gardella S.p.A. v. Ivory Coast, 1993, ICSID Rep. 283, p. 287., further see Douglas, Investment Claims, p. 91-2.

[15] Annex 3, Cl. 17 of the JV Agreement.

[16] Ibid.

[17] Kreindler, R.H. The Law Applicable to International Investment Disputes (2004) In: Horn, N. (eds.) Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects. Kluwer Law International, pp. 401-424, p. 406., further see ELSI Case, para. 62; CME, paras. 400-11.; Schreuer, C. The ICSID Convention: A Commentary. 2001. Cambridge University Press, note 23 on Art. 42.

liquet on the ground of silence or obscurity of the law."[18] The resort to a conclusion of "absence of agreement [...] is the sole or even best solution for such circumstances."[19]

i. Analysis under the applicable law

14. As Respondent submitted hereinbefore, there was no breach of the JV Agreement attributable to it. First of all, contractually agreed procedure of buy-out clause was invoked as a decision of the Sat-Connect´s Board of directors. The requirement of quorum under the JV Agreement and under the national law was satisfied as 6 members were present and Televative was provided with 14 days to hand over possession of all Sat-Connect site, facilities and equipment and remove its personnel. All these steps were in conformity with the Beristan law and Sat-Connect bylaws.[20]

15. Claimant within this period did not resort to the contractually agreed arbitration, although nothing prevented him from doing so. Therefore, there was no legal hindrance for Sat-Connect to request Respondent to enforce Sat-Connect´s own decision, appropriately made in accordance with its internal decision-making mechanism. Consequently, there was no legal obligation on the part of Respondent which would preclude it from enforcing the decision. As there was no dispute at that very time, there was no obligation to resort to the judicial or arbitral proceedings. Televative did not impugn the board decision within 14 days which it had been provided with.

16. Moreover, the acts of Beristani CWF were justified by the national security concerns, as argued hereinafter.

I. The acts of Respondent in any event amounted to the breach of fair and equitable treatment

[18] ICSID Convention, Art. 42(3).

[19] Kreindler, R.H. The Law Applicable to International Investment Disputes (2004) In: Horn, N. (eds.) Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects. Kluwer Law International, pp. 401-424, p. 406.

[20] Response, 2nd…

17. Respondent submits that it did not breach the standard of fair and equitable treatment owed to the Claimant at any time.

18. As the precise content of the FET standard is not entirely clear[21] and as the literal interpretation of the BIT provision suggests ("treatment in accordance with customary international law, including fair and equitable treatment"[22]), respondent argues that only the substantive standard of treatment that is generally accepted and consistently applied for certain period of time as a legal rule[23] with respect to the aliens and their property shall be considered as applicable under the present BIT.

19. Respondent therefore submits that FET comprises only of protection against destruction or violence by non-state actors, protection against denial of justice, due process of law and compensation for expropriation.[24]

20. Claimant may argue, that a due process was not complied with. In Genin v. Estonia the tribunal stated that FET to be violated "needs acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[25] It went on and opined that "any procedural irregularities that may have been present would have to amount to bad faith, wilful disregard of due process of law or an extreme insufficiency of action."[26] Neither of these occurred in the present case. Notably, Respondent at all times acted in good faith. National security concerns cannot be confused with bad faith.

---

[21] Sornarajah, Newcombe, Subedi – jen doplnit citace z obecné části k FET, Ronald Lauder v. Czech Republic, para. 291.

[22] The BIT, Art. 2.2.

[23] Shaw, M. International Law, 6th Ed., 2008, p. 72-75., further see Congyan, C. International Investment Treaties and Application, Formation and Transformation of Customary International Law rule, 2008, CJIL, Vol. 7, No. 3, p. 659-679.

[24] Sornarajah, p. 330; further see Newcombe, pp. 258-262; US-Uruguay BIT, 2005, Art. 5(2)a.

[25] Genin v. Estonia, para. 367, further see Saluka v. Czech Republic, Partial Award, para. 290; Brownlie, Principles, 5th Ed., p. 527-531.

[26] Genin, para. 371.

21. The standard rather scrutinizes a State´s conduct than its effect on the investment. This ought to be understood in a way, that the fact that investment was negatively affected does not mean by itself that the standard has been violated, as this can happen for various reasons.[27] Claimant could have suffered a loss only by his own contribution and conduct, namely violating a confidentiality of the matters connected to Sat-Connect. Furthermore, he did not challenge the Beritech´s action in arbitration, although he clearly had an opportunity.

22. Claimant has the burden of proof that a violation of FET did take place. He must as well establish that the negative impact on investment was in a clear link of causation with the State´s acts or omissions.[28] In the present case, the Claimant has not proved that there would be any sort of Respondent´s conduct which would fall short of this international law standard. Particularly Claimant failed to proof that the conduct of state "shocked a sense of judicial propriety"[29] or reached a level of "extreme insufficiency."[30] Leaving the Project without a slightest objection at the time rather points to the conclusion that Claimant agreed with the steps of Beritech and subsequently of the State.

23. Alternatively, acting through State´s executive organs instead of judicial ones, which Respondent does not view as contrary to its international obligations for the reasons submitted hereinbefore, was justified by invocation of essential security defence. This will be addressed in the respective section of the memorial. When the Tribunal is not convinced by the aforementioned argumentation, Respondent would then argue that his steps where perfectly justified and reasonable in the view of the present danger to its vital security interests.

---

[27] Lauder, para. 291.

[28] Tudor, I. Fair and Equitable Treatment Standard in International Law of Foreign Investment, 2008, Oxford Univ. Press, p. 138.

[29] ELSI, para. 128.

[30] Genin, para. 371.

a. Respondent at any event did not unlawfully interfered with Claimant´s legitimate expectations

24. Firstly, State is under the obligation to protect investor´s legitimate expectations, whether in the context of expropriation or in the one of FET, "based on specific undertakings or representations upon which the investor has reasonably relied."[31]

25. As a specific undertaking in the present case can only be viewed the Respondent´s assumed role of guarantor. This role, however, mean nothing less and nothing more than that Beristan would assume the obligations of Beritech under the JV Agreement upon Beritech´s default.[32] No breach of these expectations took place as Claimant never called upon Respondent to perform this undertaken role. Given the current factual matrix, there was no such assurances "in reliance upon which investor was induced to invest" which has been interfered with.[33]

26. Respondent does not challenge that legitimate expectations may arise as well of commitments of more general nature, e.g. from the State´s legal framework at the time of investment.[34] Then a subsequent change in the regulatory framework relied upon may constitute a violation of legitimate expectation. In the present case Claimant does not argue that any such change took place, in comparison with the cases like Saluka[35] or LG&E.[36]

---

[31] Paulsson, J., Douglas, Z. Indirect expropriations in Investment Treaty Arbitration In: Arbitrating Foreign Investment Disputes, 2004, Horn, N. (eds.), p. 137.

[32] Responses to Requests for Clarifications, 1st Round, Q.No. 152.

[33] CME v. Czech rep., para.

[34] Dolzer & Schreuer, p. 104.

[35] Saluka, Partial award, para. 306.

[36] LG&E, para. 130.

27. FET standard requires State to act consistently, that is mainly with respect to the hereinbefore mentioned regulatory framework.[37] There was no inconsistency which would negatively affect the Claimant´s investment.

28. Claimant may argue that there were unreasonable acts towards its seconded personnel, or harassment from the State organs. Pointing out to the Eureko award, Respondent contents that for harassment to occur it must be "repeated and sustained"[38] As is clear from the undisputed facts, the staff left right after it was asked to do to so. At any point the employees has not suffered from "fear for their safety or well being."[39] The expulsion was furthermore justified on the basis on essential security.

II. No Respondent´s measures were unjustified or discriminatory

29. The BIT in its Art. 2.3. prohibits to subject "the management, maintenance, enjoyment, transformation, cessation and liquidation of investment" to the "unjustified or discriminatory measures."

30. The term unjustified measures is not defined by the treaty, therefore the Tribunal must interpret it. Many arbitral tribunals faced this task, however, in most cases they dealt with interpreting the term "unreasonable" or "arbitrary."[40] Respondent argues, that the term "unjustified" is a narrower one. The ordinary meaning interpretation[41] suggests that to satisfy this requirement a justification of some sort must be provided. The plain meaning does subject this justification to any other criteria, e.g. the criteria of reasonableness or arbitrariness. That the two terms have a different content suggests, with respect to discrimination, e.g. Art. XX of GATT, which speaks about "arbitrary or unjustifiable discrimination." There can be hardly any reason for putting into a treaty two terms of the same content next to each other connected by disjunction. In

[37] TECMED, para. 154

[38] Eureko, para. 237.

[39] Responses, 2nd, Cl. No. 248.

[40] Lauder, para. 232; Genin, para. 370-1;

[41] VCLT, Art. 31.1., further see LG&E lability, para. 156.

US-Gasoline WTO Appellate body stated that "'[a]rbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another."[42] This proves that the terms, although related concepts, do not have the entirely same content.

31. The Respondent´s acts were justified, first of all, by the fact that Sat-Connect delivered its internal decision and this was not challenged by anyone, and secondly by the clear and present threat to the national security. This justification, in the Respondent´s opinion, even satisfy the stricter scrutiny of reasonableness, the standard not present in the applicable BIT.

32. The acts to be reasonable must have rationale or justification which has "a reasonable (or rational) relationship [to] [...] a legitimate governmental policy."[43] Requirement of this link was reaffirmed by the Saluka award[44] or the LG&E award.[45] Such a legitimate policy is represented by the national defence policy.

33. In the Genin case was stated that an arbitrary measure even requires an element of bad faith.[46] There cannot be inferred a bad faith from the Respondent´s acts as they were properly based on the facts posing a threat to national security.

34. When the Tribunal would view the term "unjustified" as an equivalent to "arbitrary," Respondent did not breach this standard either, as his acts fall short of such an intensity. Arbitrariness, as a term of art, was evaluated by various tribunals.[47] In the Azurix case it was defined in line with the hereinbefore mentioned ELSI case as "a

[42] WTO *Appellate Body Report on US - Gasoline*, *p. 25.*

[43] Heiskanen, V. (2008) In: Reinisch, p. 104.

[44] Saluka, para. 461.

[45] LG&E, para. 156-8.

[46] Genin, para.371.

[47] ELSI, para. 128, Lauder, para. 232.

wilful disregard of law."[48] The tribunal in Genin concluded that license withdrawal done with some procedural irregularities in the environment of transforming economy did not violated a "sense of judicial propriety" or posed "an extreme insufficiency of action."[49] The CWF, supported by the internal decision of Sat-Connect on the buy-out and the executive order, were acting in a situation when the national security was endangered. The motivation aimed to eliminate a threat to the State´s vital security interests is entirely reasonable and it cannot be deemed as arbitrary whatsoever.

35. Discrimination can be by no means invoked by the Claimant, as this is a relative standard.[50] For finding a discrimination there must be a comparator identified (by which meant is an individual or entity in like circumstances), then there must be found a different treatment and finally, the different treatment is not able to be justified.[51]

36. It is impossible to deduce an appropriate comparator from the given factual background. Beritech is not such a comparator, although it is the other shareholder in Sat-Connect, as it was not alleged of the leak of sensitive information to a foreign government. Alternatively, this difference would be reasonable and justified as a basis for differential treatment.

III. The acts of Beristan are by no means in violation of Art. 4 of the BIT, Nationalization and Expropriation

37. Respondent views the Claimant´s expropriation pretension as lacking any basis in facts whatsoever. The Tribunal shall dismiss the claim at hand, as the facts do not satisfy the very basic principle establishing an expropriation. Expropriation is always characterized as an *involuntary* taking of property. Claimant agreed with the buy-out clause by concluding the JV Agreement. He was given 14 days to withdraw the personnel and hand-over the premises of Sat-Connect, the employees who remained

[48] Azurix, para. 392.

[49] Genin, para. 371.

[50] Heiskanen, p. 87, Saluka, para. 461.

[51] Pope & Talbot Interim, para. 78-104; S. D. Myers v. Canada, para. 251

thereafter left without protesting when asked, no complaint was filed until Beritech sought a relief in arbitration. All of these steps took place without any explicit or implicit manifestation of disagreement. The conclusion to be made is that Claimant rather agreed with the invocation of buy-out and Respondent was not given a hint not to think so.

38. Alternatively, Respondent submits that the interpretation of the Art. 4.1.(1) of the BIT, especially of the words "...Courts or Tribunals having jurisdiction," cannot be construed restrictively as including state´s Judicial bodies exclusively.[52]

39. Executive organs normally are allowed to make a decision which can affect property rights and if they would not be, the application and enforceability of the State´s law would be very limited. The crucial requirement is that administrative decisions affecting rights and duties of individuals to be reviewable by judicial organs. Claimant has had an option of resorting to the contractually agreed arbitration forum, for which he did not opted.

a. The Claimant´s right under the contract were not expropriated, at most a mere breach of contract committed by Beritech could have taken place

40. The Claimant argues that his rights under the contract were expropriated by the acts of Beristan. It is the Respondent´s submission that, according to the Perkerings Compangniet case, there has to be three cumulative conditions fulfilled for expropriation of a contract to be found. Firstly, there must be use of sovereign powers to breach a contract. Secondly, investor has to be prevented from bringing its claim and finally, breach of contract must cause substantial decrease of investment´s value.[53] The use of sovereign grounds had a lawful and reasonable basis (internal Sat-Connect decision, executive order, threat to national security). And most importantly, Respondent did not reject to entertain the Televative´s claims. It was Televative who decided not to use host State´s judicial/arbitral avenues to redress his alleged losses. In Waste Management case the tribunal stated that "the loss of benefits or expectations is

[52] Doplnit např. judikaturu ESLP.Golder v. UK, paras. 34-35.

[53] Parkerings Compagniet, paras. 443-456., further see Azurix, para. 314.

not a sufficient criterion for an expropriation, even if it is a necessary one."[54] Noteworthy finding of this tribunal was making a clear distinction of expropriation of a right of a contract and a mere failure to comply with a contract.[55]

41. Furthermore, Claimant cannot argue that the facts point to its total loss of his investment as the only actual result is that the contractually agreed amount of compensation for buy-out is held escrow pending the decision of the commercial arbitration tribunal. It is as well possible that the proceedings would deem the Beritech´s acts unlawful and Televative would be able to continue in his performance of the Contract.

42. Claimant expressed his will, that in a case of breaching a confidentiality of the Project matters, Beritech would be entitled to buy-out his interest and required to pay the contractually agreed amount of money. An agreed consequence of a breach of the contract cannot be deemed as an expropriation. Additionally, the whole monetary investment will be paid pack to Claimant as agreed in the JV Agreement and therefore a threshold of "effective neutralization"[56] or "substantial deprivation"[57] is not met.

43. „The distinction between an (ordinary) breach of contract and an expropriatory action directed against contractual property rights is sometimes also addressed in terms of whether a contract breach may amount to a violation of international law. The ILC has referred to this issue in its Commentary to the Articles on State Responsibility confirming that: the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party."[58] Denial of justice cannot be deemed as taking place in

[54] Waste Management, para. 159., Similar holding in CMS v. Argentina

[55] Waste Management, para. 176-7.

[56] TECMED, para. 107.

[57] Pope & Talbot Interim, para. 102

[58] Reinisch in Muchlinski, Ortino, Schreuer, p. 419, citations ommitted.

the current situation. Claimant at any time has not chosen for turning to the State Courts or to the contractually agreed forum.