ELIAS

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding Between

TELEVATIVE INCORPORATED
(CLAIMANT)

AND

THE GOVERNMENT OF THE
REPUBLIC OF BERISTAN
(RESPONDENT)

Case No. ARB/X/X

* * *

MEMORANDUM FOR RESPONDENT

Representing the Claimant	Representing the Respondent
Brownlie & Partners	Wälde Associates LLP

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Italy-Pakistan BIT	*Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments,* signed 19 July 1997	
Switzerland-Philippines BIT	*Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments,* signed on 31 March 1997	
New York Convention	*Convention for the Recognition and Enforcement of Foreign Arbitral Awards,* 1958	
Mutual Assistance Convention	*Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic,* 1986	
ICSID Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965	
ECT	*Energy Charter Treaty*, 1991	
China-Chile FTA	*Free Trade Agreement between The Government of the People´s Republic of China and the Government of the Republic of Chile*, 2005	
EFTA-Lebanon FTA	*FTA between the European Free Trade Association States and Lebanon,* 2004	
GATT	*General Agreement on Tariffs and Trade*, 1994	
India-Singapore CECA	*India-Singapore Comprehensive Economic Cooperation Agreement ,* 2005	
NAFTA	*North American Free Trade Agreement,* signed on 17 December 1992	
US-Uruguay BIT	*Treaty between the Government of the United States of America and the Oriental Republic of Ururguay Concerning the Encouragement and Reciprocal Protection of Investment*, signed on November 2005	
VCLT	*Vienna Convention of the Laws of Treaties,* opened for signature on 23 May 1969	

STATEMENT OF FACTS

1. In October 2007, the joint venture company – Sat-Connect S.A. – was established pursuant to the laws of Beristan. The company has two shareholders – Televative Inc. (40 %) and Beritech S.A (60 %). The former being Claimant in the present case is a multinational enterprise which specializes in developing of new technologies in satellite communication systems. Claimant is privately held and incorporated in Opulentia. The latter is a company incorporated in Beristan, a private telecommunications services provider in Beristan, which activities deal with related fields of business. Beristan owns 75 % of shares of Beritech, while the remaining stake is held by private investors, mostly Beristian nationals. Beritech does not exercise any governmental or similar functions. Respondent, which is not a party to the JV Agreement, co-signed it as guarantor of Beritech´s obligations, no other obligations under the Agreement arose for Respondent.

2. The Sat-Connect project was established for the purposes of developing and deploying a satellite system network accompanied by terrestrial systems and gateways for providing connectivity for users of the system within the Euphonia region. The system is to be used by the Beristian army, as well as by civilians.

3. The Sat-Connect´s board of directors is composed of nine members, five of which are appointed by Beritech and four by Televative. A quorum is obtained with the presence of 6 members. Decisions are to be made by a simple majority.

4. According to the JV Agreement, the matters relating to the Sat-Connect are to be treated as confidential, mostly because the project is dealing with the secret encryption technologies and keys. Therefore, once Televative materially breaches this provision, Beritech shall be entitled to buy-out its interest in the Project, which is to be valued as monetary investment from the commencement of the Project until the date of buy-out.

5. On August 12, 2009, in The Beristan Times article, a leak by Televative of confidential information regarding a secret encryption keys to the Opulentian government was indicated. This concern was shared by Beristian military officials. Opulentian

government recently introduced anti-terrorist laws compelling disclosure of such information to the national security services. Televative confirmed receiving requests from Opulentian government.

6. Subsequently, the Sat-Connect´s board of directors, invoked a buy-out provision of the JV Agreement as a result of the leak of information and provided Televative with 14 days to hand over the possession of all Project´s facilities, equipment and to remove its seconded personnel. After this period, the rest of the personnel was asked to leave by Beristian Civil Work Forces (CWF), which were deployed on a basis of executive order, in order to secure that no threat to the Beristian national security would materialize. The remaining personnel left voluntarily and Televative had not challenged the process. At the same time Beritech served notice of its desire to settle amicably before seeking a relief from the arbitral tribunal. Televative did not react.

7. Later on, Beritech requested for a declaratory relief from the arbitral tribunal and paid Televative´s monetary investment of US $47 million into an escrow account, pending the decision. Televative once again refused to respond to Beritech´s request.

8. Only afterwards, Televative commenced an arbitration proceedings before ICSID claiming a breach of JV Agreement by Respondent, in defiance of the terms of the JV Agreement.

JURISDICTION

A. The ICSID Tribunal has no jurisdiction over the Claimant's contract-based claims arising under the JV Agreement, especially in the view of Clause 17 (Dispute Settlement) of the JV Agreement

9. Respondent contends that all of the Claimant's claims are contractual in nature, notwithstanding the manner in which these claims were formulated in the Claimant's Case. The ICSID Tribunal is not competent to decide on such contract claims because Respondent did not express its consent in writing thereto.

10. The absence of Respondent's consent in writing – as required by Article 25(1) ICSID Convention – is inferred from a narrow scope of the dispute settlement clause in the BIT, where Respondent consented to arbitrate exclusively such disputes *"that concern an obligation of the former [Respondent] under this Agreement [the BIT] in relation to an investment of the latter [Opulentia]"*.

A.1. Respondent's consent to arbitrate Claimant's contract-based claims was not given

11. Consent of the parties to the dispute before the ICSID Tribunal is an essential precondition to establish Tribunal's jurisdiction, however, the consent must be given within objective limits.[1] Respondent asserts that the Tribunal lacks jurisdiction to the substance of the dispute as well as with regard to the parties to the dispute.

A.1.(i) Claimant's claims must be characterized as contract-based according to objective criteria; Claimant's characterization of his claims as treaty-based does not suffice to establish jurisdiction of the ICSID Tribunal

12. Respondent contends that Claimant's claims are contractual in nature and that there are no independent treaty-based claims upon which Claimant could rely. If there were any claims arising under the BIT, they would be *prima facie* implausible, as Claimant has only improperly reformulated its contract-based claims.

13. As Respondent will argue in a greater detail hereinafter, Claimant's treaty-based claims would be *prima facie* implausible, particularly for the following reasons:

1 Schreuer: ICSID Commentary, p. 90, § 6

- none of the alleged breaches of the JV Agreement ware committed by Respondent for all of the alleged breaches could have been committed at most by Beritech, a legal entity distinct from Respondent;

- there was no taking of property, because the ownership of the stake in Sat-Connect S.A is subject to pending arbitration commenced pursuant to the JV Agreement; before the decision of the JV Agreement arbitrator, Claimant is not able to set certain that it suffered any loss;

- according to the principle *volenti non fit iniuria,*[2] Claimant's rights could not have been infringed by invoking the terms of the JV Agreement which Claimant previously accepted; there is no unfair or inequitable treatment or expropriation where the interests of Claimant are seized with his own voluntary consent conceived in a contract, therefore there is no violation of law;

- it is solely a question of interpretation and application of the JV Agreement in terms of its own proper law – being the law of Beristan – whether there was any breach of the JV Agreement; the Claimant's allegations of facts do not exceed the presumption that the BIT was violated because the JV Agreement was violated; if there is no breach of the JV Agreement, Claimant's hands would remain empty because Claimant cannot rise any breach of the BIT which would be independent from a breach of the JV Agreement;

- if there were any breaches, all of them were compensated in value agreed in the JV Agreement.

14. Although a certain number of investment tribunals[3] has held that it is up to Claimant to formulate its claims, and *"if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT [...], the Claimant should be able to have them considered on their merits"*,[4] Respondent urges that it is a well-settled case law

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2 *ILC Articles on Responsibility,* Article 20

3 *Vivendi Award*, § 53; *Vivendi Annulment*, § 74; *Salini v. Morocco*, § 62 – 63; *Wena Hotels v. Egypt,* p. 890; *SGS v. Pakistan*, §§ 144 – 145; *Siemens*, § 180

4 *SGS v. Pakistan*, § 145

that the tribunals are authorized and also obliged to decide whether Claimant's claims are *prima facie* inadmissible according to objective criteria.[5] The review of plausibility of the claims is to be employed, elsewhere the doubts regarding admissibility of Claimant's claims would arise; and the tribunal is empowered to go into the merits of the case.[6]

15. Respondent also emphasizes that tribunals which were not willing to apply too strict scrutiny to Claimant's claims in jurisdictional phase of proceedings argued by a specific nature of jurisdictional phase where claimants are not obliged to set out extensive allegations of facts.[7] However, if the jurisdictional phase and the phase concerning the merits of proceedings are merged – as in the present case[8] – Claimant must not hesitate to set out allegations of facts upon which the Tribunal can assess the nature of Claimant's claims in their full extent .

16. Firstly, Respondent asserts that Claimant primarily formulated its claims as contract-based before the tribunal as may be read from Minutes of the First Session of the Arbitral Tribunal:

> *"The Parties and the Tribunal have agreed on a procedure to the effect that at this stage the Tribunal shall only address the following: […] (b) whether the Tribunal has jurisdiction over Claimant's contract-based claims arising under the JV Agreement […]"*[9]

> *"Claimant also asserts that Respondent breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking the buyout clause in the JV Agreement."*[10]

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5 *SGS v. Philippines*, § 157; *Amco* , §§ 125 – 127; *Occidental*, §§ 80, 92; *Joy Mining*, § 78; *Azurix*, § 76; *Enron*, § 67

6 Schreuer. Jurisdiction over Contract Claims In: Weiler, p. 322

7 *e. g. SGS v. Pakistan,* § 145, footnote 165 *in fine*

8 *Minutes of the First Session of the Arbitral Tribunal* (ICSID Case No. ARB/X/X), held in Malibu, California, on 15 March 2010 [Minutes], §§ 14, 16

9 Minutes, § 14

10 Minutes, § 15, Claimant, sub-paragraph 7

17. Therefore, Claimant is estopped from reformulating its claims as contract based in a further stage of the proceedings, namely in the Claimant's memorial, because *"in international arbitration a Claimant must state its claim in its initial application, and wholly new claims cannot thereafter be added during the pleadings."*[11]

18. Even if the Tribunal disregards these Claimant´s assertions and accepts that Claimant was not prevented from re-labeling its claims as based on a violation of the BIT, the tribunal ought to – as early as in the jurisdictional phase – look behind the Claimant's claims and decide whether their characterization provided by Claimant as treaty-based is plausible.[12] As the tribunal in *SGS v. Philippines* stated: *"[...]it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on."*[13] Notably, the tribunal in the *SGS v. Philippines* held that claims to expropriation are inadmissible.[14]

19. Conclusions of the SGS v. Phillipines tribunal were then affirmed by tribunals in the *Occidental*, *Joy Mining*, *Azurix* and *Enron* cases. All these tribunals addressed the issue of plausibility of Claimant's claims.[15] Respondent emphasizes that conclusions of the aforesaid tribunals are to be preferred to the tribunals which did not address the issue of plausibility at all. Where concerns about plausibility occurred tribunals did not hesitate to employ a test based on objective criteria.

20. Accordingly, Respondent asserts that all Claimant's treaty-claims – including breaches of Articles 2, 4 and 10 of the BIT – are *prima facie* implausible and hence the tribunal lacks jurisdiction over them.

21. If the treaty-based claims are implausible, only their contractual basis remains. Respondent then relies on widely respected conclusions of *ad hoc* Committee in *Viviendi Annulment,* which stated: *"In a case where the essential basis of a claim*

11 *SGS v. Philippines*, § 157; *Certain Phosphate Lands in Nauru*, §§ 64 – 70

12 *UPS v. Canada*, § 37; *Oil Platforms*, § 16

13 *SGS v. Philippines*, § 157

14 Ibid., § 161

15 *Occidental*, §§ 80, 92; *Joy Mining*, § 78; *Azurix*, § 76; *Enron*, § 67

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."[16] Accordingly, the ICSID Tribunal should honor Clause 17 of the JV Agreement and dismiss all of the Claimant's claims.

A.1.(ii) Settlement of Disputes Clause in the BIT is not broad enough to encompass claims based on violation of the JV Agreement which cannot be confused with claims based on violation of the BIT

22. Claimant will probably rely on the case law where the tribunals found themselves competent to decide both on treaty-based and on contract-based claims. Respondent seeks to prove that, unlike in certain number of cases where the tribunals accepted their jurisdiction over contract-based claims,[17] Claimant's claims have to be treated differently, mainly due to the narrow Dispute Settlement Clause in the BIT. The BIT allows an investor to submit solely claims concerning a breach of the BIT as such.

23. Claimant will probably employ as its principal authority decision on jurisdiction in *SGS v. Philippines* where the tribunal stated that it had jurisdiction over Claimant's contract-based claims,[18] noting that the dispute resolution clause in the BIT

> *"is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term "disputes with respect to investments" [...] is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation [...] would be a "dispute with respect to investments"; so too would a dispute arising from an investment contract [...]"*[19]

24. However, this conclusion was based on Article 8 of the Switzerland-Philippines BIT[20] where the wording *"disputes with respect to investments"* allows to encompass much broader scope of disputes than the wording *"disputes with respect to investments [...]*

16 *Vivendi Annulment*, § 98

17 *SGS v. Philippines,* § 130 – 135; *Vivendi Annulment,* § 55; *Salini v. Morocco*, § 59 – 61

18 *SGS v. Philippines*, §§ 130 – 135

19 Ibid., § 131

20 Switzerland-Philippines BIT

that concern an obligation [...] *under this Agreement [emphasis added]"* in Article 11 of the BIT. Such a language confines arbitrability to those disputes to the disputes which concern the performance of the BIT itself, and it excludes – according to ordinary meaning of the terms used[21] – any contractual dispute from the scope of the present dispute settlement clause. This exclusion applies equally to the dispute regarding performance of the JV Agreement.

25. Notably, the *SGS v. Philippines* tribunal argued that if the parties to the BIT intended to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT they would use more specific terms in the dispute settlement clause, such as *"[d]isputes [...] regarding the interpretation or application of the provisions of this Agreement"* used in an interstate arbitration clause in the Switzerland-Philippines BIT.[22] The broad dispute settlement clause in Switzerland-Philippines BIT was also contrasted with Chapter 11 of NAFTA[23] which allows investors to bring before the tribunal only claims for breaches of specified provisions of Chapter 11 itself.[24] In NAFTA arbitral practice, this also rendered contract-based claims inadmissible; as the tribunal in *Azinian v. Mexico* held:

> *"foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. [emphasis in original]"*[25]

26. *Vivendi Annulment* decision followed the same line of argumentation as the tribunal in *SGS v. Philippines* and addressed broad scope of jurisdictional offer of the host state as allowing the investor to bring purely contract-based claims before the ICSID Tribunal.[26] However, these conclusions stemmed from the Argentina-France BIT[27]

21 VCLT, Article 31(1)

22 *SGS v. Philippines,* §§ 132(b)

23 NAFTA, Article 1126, 1127

24 *SGS v. Philippines,* §§ 132(e)

25 *Azinian v. Mexico*, § 83

26 *Vivendi Annulment*, § 55

27 Argentina-France BIT

which stated that "*all disputes with respect to investments according to present Agreement"*[28] are subject to international arbitration. Therefore the *Vivendi Annulment* decision is inapplicable as an authority with regards to establishing jurisdiction of this tribunal which has to rely on much narrower scope of Article 11 of the Beristan-Opulentia BIT.

27. The same manner of interpretation of dispute settlement clause was employed in *Salini v. Morocco*,[29] and mutatis mutandis in other part of the *Vivendi Annulment* decision where the *ad hoc* Committee – deciding whether the investor has taken the *fork in the road* – stated that the dispute settlement clause in the Argentine-France BIT *"does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself"*.[30]

28. According to the aforesaid case law, the conclusion must be drawn that the narrow wording of the Article 11 of the BIT gives the investor an option to claim for breaches of the BIT itself and not to bring a contract-based claim before the investment tribunal. Since all of Claimant's claims are contractual in nature, the tribunal does not have any jurisdiction to hear any of these claims.

A.1.(iii) Even if the ICSID Tribunal has jurisdiction *ratione materiae,* there is no jurisdiction *ratione personae,* because Respondent's consent to arbitrate does not encompass claims *vis-á-vis* entities distinct from Respondent itself

29. Respondent contends that its jurisdiction offer contained in Article 11 of the BIT does not encompass an offer to arbitrate claims arising out of the contract entered into by Beritech, a separate legal entity. Respondent relies on the case law of tribunals which have held principles of attribution inapplicable with regard to contracts,[31] for there is

28 Ibid. Article 8(1)

29 *Salini v. Morocco,* § 59 – 61

30 *Vivendi Annulment,* § 55

31 *Impregilo,* § 214; *Nagel v. Czech Republic*, §§ 162 – 163; *Salini v. Morocco,* § 59 – 61; *Consortium RFCC Jurisdiction*, §§ 68 – 69; *Consortium RFCC Award*, § 32 – 35; *Cable Television of Nevis,* § 2.22

no question of attribution concerning jurisdiction; the question is about the interpretation and scope of the jurisdiction offer.[32]

30. This applies since the question of attribution is indeed that of international law.[33] However, the JV Agreement is governed by the law of Beristan, pursuant to the choice expressed by the parties in Clause 17 of the JV Agreement, and cannot be governed by international law in accordance with the well known principle developed by Permanent Court of International Justice that *"[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on municipal law of some country"*.[34]

31. This strict difference between treaties and contracts has never been abandoned by international judicial practice, even in arbitrations concerning breaches of oil concessions contracts.[35] The arbitrators recognized international responsibility stemming from the breaches of *pacta sunt servanda* principle, however, never applied public international law as a law governing a contract.[36]

32. Notably, the tribunal in *Impregilo v. Pakistan* – applying Italy-Pakistan BIT which allowed in relevant part to arbitrate *"disputes arising <u>between a Contracting Party and the investors</u> of the other [emphasize added]"*[37] – stated that *"the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party."*[38]

33. Whether there is a separate legal personality is a question of municipal law.[39] Beritech is a company incorporated pursuant to the law of Beristan with a complex

32 Crawford. Treaty and Contract, pp. 363, 369

33 Shaw. *Intenational Law,* p. 785; *ILC Articles on Responsibility*, Articles 4 – 9; *Immunity by Special Rapporteur*, §§ 62, 87; *Genocide Convention Case*, § 385

34 *Serbian Loans*, p. 41

35 *e.g. Aramco*, p. 168; *Texaco,* § 72

36 Schwebel: On Whether the Breach, p. 434

37 Italy-Pakistan BIT. Article 8

38 *Impregilo*, § 214

39 *Impregilo*, § 199 – 210; *Salini v. Morocco*, § 60;

shareholder’s structure, own capacity to enter into contracts, to own property and with capacity to commence proceedings,[40] therefore possessing an independent legal personality. If Beritech has an independent legal personality under the law of Beristan, Respondent could not have consented to arbitrate violations of the JV Agreement upon which Claimant relies.

34. Accordingly, the *ad hoc* Committee in *Vivendi Annulment* held significantly:

> *“whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. […] For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the State […] is internationally responsible for the acts of its provincial authorities. By contrast, the State […] is not liable for the performance of contracts entered into by Tucumán, which possesses a separate legal personality under its own law and is responsible for the performance of its own contracts [emphasis added].”*[41]

35. Furthermore, Respondent recalls that international law principles of attribution are not operative in cases of contractual claims, and no provision in the BIT – including the umbrella clauses – are capable to transform the municipal obligation arising out of a contract to obligation governed by international law and change parties thereto.[42]

36. For the above mentioned reasons, Respondent contends that its jurisdiction offer contained in Article 11 of the BIT does not encompass the offer to arbitrate claims arising out of contract entered into by Beritech, as a separate legal entity.

A.2.(iv) Claimant could not properly commence ICSID arbitration before the end of the waiting period pursuant to Article 11(1) of the BIT

37. Pursuant to Article 11(1) of the BIT, Claimant is allowed to submit the dispute to arbitration, only if it *“cannot be settled amicably within six months of the date of a written application.”* Claimant did not make any attempt to settle the dispute

40 Annex 2 to the Minutes (Uncontested Facts), §§ 2 – 4, 13

41 *Vivendi Annulment*, § 98

42 *CMS Annulment*, § 95(c); SGS v. Philippines, § 126; Crawford: Treaty and Contract, p. 370

concerning interpretation and application of the Buy-out Clause in the JV Agreement by consultations or negotiations with Beritech, after the Clause was invoked on 27 August 2009.[43] Instead, on 28 October 2009, Claimant just requested arbitration before the ICSID Tribunal.[44]

38. Respondent recalls findings of tribunal in *Enron v. Argentina* which stated that *"[s]uch a requirement [the waiting period] is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."*[45] Since there was no six months period of negotiation and – strictly speaking – there were no attempts by Claimant to settle the dispute amicably, the claims have to be dismissed on a jurisdictional basis.[46]

39. It may be objected that other tribunals did not consider the waiting period to be a jurisdictional condition and rather treated it as a procedural requirement. These tribunals, however, were always concerned with futility of negotiations which would not probably lead to any settlement.[47] Respondent contends that it is not the case in the present situation. If Claimant did not seek for settlement anyhow and it cannot be concluded that the settlement was impossible.[48]

A.2. Alternatively, generic Dispute Settlement clause in the JV Agreement ousts jurisdiction of the ICSID Tribunal and renders Claimant's claims inadmissible

40. Even if the Tribunal rejects Respondent's objections against jurisdiction of the Tribunal over the Claimant's contract based claims and thus affirms that (a) Claimant's claims are properly formulated as treaty-based; and/or (b) the narrow Settlement of Disputes Clause in the BIT does not bar Claimant to bring its contract-based claims before this tribunal; and (c) jurisdictional offer given by Respondent through Article 11 of the BIT may be extended to breaches of the JV Agreement allegedly committed

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43 Annex 2 to the Minutes (Uncontested Facts), § 10

44 Ibid., § 14

45 *Enron,* § 88

46 *cf. Goetz v. Burundi,* §§ 90 – 93

47 *Ethyl v. Canada,* § 84; *Lauder v. Czech Republic,* §§ 188 – 189; *SGS v. Pakistan,* §§ 130 – 131

48 *Ethyl v. Canada,* § 87 – 88

by Beritech; the selection of forum, agreed in Clause 17 of the JV Agreement, ousts jurisdiction of the ICSID Tribunal.

41. The absence of jurisdiction of the ICSID Tribunal is inferred from the following: (1) Wide scope of Article 17 of the JV Agreement allows the contract tribunal to decide on violations of the BIT as *ad hoc* Arbitration Tribunal according to Article 11(2)(b) of the BIT; (2) therefore pending proceedings before the JV Agreement tribunal constitutes a *lis pendens.*

A.2.(i) Wide scope of Article 17 of the JV Agreement allows the contract tribunal to decide on violations of the BIT, because the dispute concerning violations of the BIT is a dispute relating to the JV Agreement

42. In alternative, when the ICSID tribunal – in order to preliminary establish its jurisdiction – would conclude that Respondent's jurisdictional offer in Article 11 of the BIT encompasses claims *vis-á-vis* Beritech, a separate legal entity, and thus accepting that Beritech is an entity identical with Respondent.

43. Assuming that Respondent – via Beritech – entered into the JV Agreement itself, the jurisdiction of the ICSID tribunal, preliminary established on Respondent's consent given in Article 11 of the BIT, is superseded by Clause 17 of the JV Agreement which is a *lex specialis* to the consent based on the BIT and subsequent Claimant's acceptance.

44. The specific agreement takes precedence over the general agreement in the BIT.[49] As the tribunal in *SPP v. Egypt* held *"[a] specific agreement between parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and [the host State, i.e.] Egypt."*[50]

45. Clause 17 of the JV Agreement has closer relationship to Claimant's investment *ratione materiae* than Article 11 of the BIT. The jurisdictional offer in the BIT encompasses unlimited number of investment disputes while the JV Agreement – as a

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49 *SGS v. Philippines,* § 140 – 141; *SPP v. Egypt,* § 83; *Lanco,* §§ 27 – 28; *Salini v. Morocco,* § 27; Schreuer: ICSID Commentary*,* p. 362, § 34

50 *SPP v. Egypt,* § 83

basic precondition for Claimant to make an investment in the territory of Beristan[51] – concerns only one specific investment, the Sat-Connect Project. The principle of *generalia specialibus non derogant*[52] should hence apply.

46. Furthermore, the Settlement of Dispute Clause in the JV Agreement is wide enough to encompass all prospective treaty-based claims relating to the investment which was made through the JV Agreement and Sat-Connect Project. The relevant part of the JV Agreement states that the notice of intention to commence arbitration may be given *"[i]n the case of any dispute arising out of or relating to this Agreement [emphasis added]."*[53] Clauses drafted in such a broad manner are in practice of various arbitration tribunals and courts treated as covering any and all disputes touching on the contract in question regardless of whether they sound in contract, tort, statute or treaty, regardless of the label attached to the dispute.[54]

47. Respondent acknowledges that argument employed by the responding party to the dispute in *SGS v. Pakistan* was not accepted.[55] However, the *SGS v. Pakistan* tribunal based it decision chiefly on two reasons: (1) the contract with dispute resolution clause was entered into by the parties before the Switzerland-Pakistan BIT was signed, therefore the parties could have not reasonably drafted the dispute resolution clause as involving claims arising out of the BIT;[56] (2) because the contract arbitrator was prohibited to apply provisions of the BIT by decision o Supreme Court of Pakistan.[57]

48. Neither of these reasons is relevant to present dispute. (1) The JV Agreement had been signed more than 10 years after the BIT became effective.[58] The parties to the Clause 17 of the JV Agreement were or should have been well aware of the prospective

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51 *Mihaly,* §§ 59 – 61

52 *SGS v. Philippines,* § 141;

53 Annex 3 to the Minutes. Clause 17

54 *SGS v. Pakistan,* § 66; *Pennzoil*; *Ryan v. Rhone Poulenc Textile*

55 *SGS v. Pakistan,* § 155

56 Ibid, § 153

57 Ibid, § 154

58 Annex 2 to the Minutes (Uncontested Facts), § 3; Clarification Requests (4 June) Responses, § 174

claims arising out of the BIT. (2) The 1959 Arbitration Act of Beristan, applicable to the dispute according to Clause 17 of the BIT, was amended in February 2007 to conform to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[59] Article 28 of UNCITRAL Model Law states that *"the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable [emphasis added]."*[60] Nothing therefore precludes the JV Agreement tribunal from applying the BIT.

49. Even though the JV Agreement tribunal could not be considered as an *ad hoc* UNCITRAL Tribunal according to Article 11(2)(b) of the BIT, it is a tribunal established upon common consent of Claimant and Respondent. Respondent is not barred from extending its jurisdictional offer of Article 11 of the BIT for specific investments – such as the Sat-Connect project.

50. Because the Clause 17 of the JV Agreement takes precedence over Article 11 of the BIT when (1) parties to the clauses are identical; and (2) the subject-matter consented by the parties to be dealt with by arbitrators is the same; the proper tribunal to decide on Claimant's claims whatever their nature could be is the tribunal constituted pursuant to the JV Agreement.

A.2.(ii) The ICSID Tribunal has to dismiss Claimant's claims, as requires the *lis pendens* doctrine due to the pending proceedings before the JV Agreement Tribunal

51. Respondent contends that there is an overlap between two pending proceedings.[61] In order to render the doctrine of *lis pendens* applicable, the parties to the dispute and the cause of action has to be identical,[62] for which we argued in the previous paragraphs.

52. Subsequently, the proceeding commenced prior supersedes the proceeding commenced later on. Therefore, the ICSID Tribunal ought to dismiss all Claimant's claims. Otherwise, all the decisions of the present tribunal may be annulled for serious

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59 Clarification Requests (4 June) Responses, § 130

60 GA Resolution 40/72, GA Resolution 61/33, Article 28(2)

61 Annex 2 to the Minutes (Uncontested Facts), §§ 13 – 14

62 Douglas: Investment Claims, pp. 308 – 309

departure from a fundamental rule of procedure according to Article 52(1)(d) of the ICSID Convention.

B. The ICSID Tribunal has no jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 (Umbrella Clause) of the BIT

53. Article 10 of the BIT does not change contract claims into treaty claims and does not serve as an additional basis for establishing jurisdiction of the Tribunal. Claimant cannot rely on Article 10 of the BIT to elevate its contract-based claims onto the international plane and to make the performance of the JV Agreement – a municipal contract – enforceable under the international law.

54. Even if umbrella clause is able to change the question of performance of the contract into a question of international responsibility, obligations arising from the JV Agreement are not covered by the umbrella clause, because these obligations were not assumed by Respondent.

B.1. The umbrella clause does not change a general principle of international law that the breach of contract by a state is not a breach of international law

55. Respondent relies on conclusions of the tribunal in *SGS v. Pakistan* that the obligation to *"constantly guarantee the observance of commitments [...] with respect to investments"*[63] – drafted almost identically as in the Beristan-Opulentia BIT – does not convert breaches of investor-State contracts into breaches of the BIT.[64]

56. That Tribunal properly begun with interpreting the umbrella clause in the BIT according to its ordinary meaning in the light of the object and purpose of the BIT itself.[65] Thereafter, concerned with far-reaching impact of extensive interpretation of the umbrella clause which could not have been intended by the contracting States,[66] the tribunal employed interpretation according to principle *in dubio mitius.*[67] The tribunal added that if the umbrella clause changes every breach of contract to a breach

63 Switzerland-Pakistan BIT. Article 9

64 *SGS v. Pakistan*, §§ 166, 173

65 VCLT, Article 31(1)

66 *SGS v. Pakistan*, § 163; VCLT, Article 31(3)(c)

of treaty, the sense of other standards incorporated in the BIT would be blurred and this would lead to evasion of dispute settlement clauses in investor-State contracts.[68] This also corresponds with rule of international law that breach of contract is not *per se* an internationally wrongful act.[69]

57. Respondent considers this interpretative approach appropriate and urges the present tribunal to follow the teaching of *SGS v. Pakistan*, although there was some portion of criticism, particularly based on objection that the tribunal omitted to address the standard modes of treaty interpretation including the principle of *effet utile.*[70]

58. However, when the *SGS v. Pakistan* decision is read carefully, it addresses both the question of canons of interpretation set out by the VCLT and the question of whether the umbrella clause is not deprived of its meaning.[71] It cannot be also overlooked that both decisions concerning investments of SGS in Pakistan and Philippines – although considerably distinct in reasoning on scope and effect of the umbrella clause – led to the same conclusion: disputes arising out of investment contract shall be decided before municipal forum notwithstanding presence of the umbrella clause.[72]

B.2. Even if the umbrella clause could elevate the breach of the JV Agreement to a breach of international law, obligations arising from the JV Agreement are not covered by the umbrella clause in the present BIT

59. Even if the umbrella clause was intended by the parties to the BIT to make the performance of an investment contract – such as the JV Agreement – enforceable as an internationally wrongful act, the performance of the JV Agreement cannot be enforced in such a manner because (1) it arises no commitments which was “assumed by” Respondent; (2) there was no sovereign involvements in the contractual relationship

67 *SGS v. Pakistan,* § 171; *Loewen*, §§ 160 – 164; *WTO EC Measures Concerning Meat*, §§ 154, 163 – 165

68 *SGS v. Pakistan*, § 168

69 Schwebel: On Whether the Breach, pp. 434 – 435; *Oppenheim's International Law,* p. 927

70 *SGS v. Philippines,* § 115; Noble Ventures, § 50

71 *SGS v. Pakistan*, §§ 165 – 166, 172

72 Crawford: Treaty and Contract, p. 353

between Claimant and Beritech; and alternatively (3) if there was such an involvement, it is not able to trigger the BIT protection.

B.2.(i) The umbrella clause covers only commitment assumed by Respondent itself and cannot be extended to cover commitments assumed by an independent legal entity

60. Respondent once more relies on the case law of tribunals which held principles of attribution inapplicable with regard to contracts.[73] It is not the effect of an umbrella clause to change the scope or parties to the municipal agreement.[74] Only Beritech and Televative remain the party to the JV Agreement.

61. Therefore, there was no assumption by Respondent of commitment vis-á-vis Claimant as it is required by the umbrella clause. The commitments arising out of the JV Agreement were assumed by its proper party, Beritech. It is true, that Respondent co-signed the JV Agreement as a guarantor of Beritech's obligations, however it does not render Respondent to be a party to the JV Agreement.

B.2.(ii) The umbrella clause covers merely contracts which the host state concludes within its sovereign powers or where it exercises its sovereign powers to involve into the contractual relationship

62. Alternatively, if the umbrella clause may be extended to obligations assumed by Beritech through the JV Agreement, Respondent urges the tribunal to restrict the scope of the umbrella clause to commitment concerning certain governmental or sovereign implications.[75] It is Respondent's contention, that the JV Agreement is the common commercial contract which could be entered into by any enterprise, conferring no special authorities to the Claimant.

63. In *Joy Mining*, the tribunal stated: *"A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some*

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73 *Impregilo,* § 260; *Vivendi Annulment,* § 96; *Nagel v. Czech Republic,* §§ 162 – 163; *Salini v. Morocco,* § 59 – 61; *Consortium RFCC Jurisdiction*, §§ 68 – 69; *Consortium RFCC Award*, § 32 – 35; *Cable Television of Nevis*, § 2.22

74 *CMS Annulment,* § 95(c); SGS v. Phillipines, § 126

75 *El Paso*, §§ 77 – 88; *Pan American*, §§ 108 – 115; *Texaco,* § 72

forms of State interference with the operation of the contract involved."[76] This distinction was later confirmed by both *El Paso v. Argentina* and *Pan American v. Argentina* tribunals.[77] Both tribunals based their decisions on the Argentina-USA BIT with a similarly narrow dispute settlement clause as the Beristan-Opulentia BIT provides. Therefore Respondent considers these decisions appropriate as authorities for this case.

64. The *El Paso* Tribunal noted significantly that:

> *"[...] the umbrella clause in Article II of the [Argentine-USA] BIT, read in conjunction with Article VII [narrow dispute settlement clause in the Argentine-USA BIT], will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by State or a State-owned entity but will cover additional investment protections [...] such as stabilization clause [...]"*[78]

65. As the Beristan-Opulentia BIT also restricts the scope of the investment disputes to disputes concerning interpretation and application of the BIT itself, Respondent Contends that the umbrella clause is not applicable to ordinary commercial contracts. The JV Agreement does not contain stabilization clause or any other clause which would require exercise of sovereign powers of the state. Therefore, the Article 10 does not extend the scope of Tribunal's jurisdiction pursuant to Article 11 of the BIT.

76 *Joy Mining,* § 72

77 *El Paso*, §§ 77; *Pan American,* § 108

78 *El Paso,* § 81

MERITS

C. Respondent did not committed alleged "material breach" of the JV Agreement

C.1. The acts of Beritech cannot be attributed to Respondent for the purpose of Article 10 of the BIT, so-called "umbrella clause," to be applicable

66. For the purposes of breach of the umbrella clause, Respondent argues that international rules on attribution should not apply, as the JV Agreement is a municipal contract, the arguments were provided hereinbefore in the jurisdictional section.

67. However, if the Tribunal decides otherwise, Respondent alternatively argues that international rules on attribution do not render it responsible. Beritech does not exercise any governmental or equivalent function[79] and the State´s 75% stake can serve purely for commercial purposes. Beritech does not make up the organization of State neither acts on its behalf.[80]

68. Furthermore, Respondent acted as a guarantor, which supports the conclusion, that it is a distinct entity from the State, as Respondent purported to assume only a guarantor´s role, which was not called into effect at any time. According to the international rules of attribution, for the purposes of the umbrella clause, Respondent can be only held liable for an infringement with respect to its undertaken role of guarantor. Guarantor´s obligations were not challenged nor they were breached.

C.2. Umbrella clause as a separate substantive treaty-standard

C.2.(i) The Claims are inadmissible as their essential basis lies with the alleged breach of the JV Agreement

69. In the present context it is suggested that the Tribunal holds the Claimant´s claims inadmissible, in the case it affirms 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*

79 *ILC Articles on Responsibility*, Article 4

80 Ibid. Comment 1

choice of forum clause in the contract.“[81] Respondent contents that the “*essentials basis*“ of the claims rests on the question whether the Sat-Connect´s decision on buy-out was properly rendered. According to the *SGS v. Philippines*, 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.[82]

70. 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.[83]

C.2.(ii) No State interference violating an international standard

71. As to the meaning and effects of umbrella clause, it is submitted that not every breach of contract can constitute a breach of the standard. Although there is no general agreement about the effects of umbrella clauses, Respondent contends, that when the Tribunal perceives Article 10 as providing any substantive standard, its proper content shall mean that State is obliged to refrain from any interference into the contract by the use of its sovereign powers, e. g. by changes in the host State law.[84]

72. “*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.”*[85] This interpretation of the umbrella clause supported by other

81 *Vivendi Annulment*, § 98

82 *SGS v Philippines,* § 155

83 *SGS v. Pakistan*, §§ 165-70

84 McLachlan, Shore, Weiniger, p. 117

85 *Sempra*, § 310; further see *Impregilo*, § 260

authorities[86] seems way more plausible than the one equating a mere breach of contract with a breach of treaty.

73. The State´s 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 hamper the Claimant´s possibility of arbitrating its dispute.[87] 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.[88] 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.

74. 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. DAn arumentation is provided in more detail in the respective section of the memorial.

C.3. Umbrella clause as an instrument elevating a breach of contract to the level of a breach of treaty

75. Some commentators suggest that umbrella clauses protect the investor´s contractual rights against "*any interference which might be caused by either a simple breach of contract or by administrative or legislative acts.*"[89] However, Respondent suggests to the Tribunal that this conclusion should not be accepted by the reference to the other facts of the case, namely that 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 section C.2.

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86 McLachlan, Shore, Weiniger, p. 117; further see *El Paso*, § 81; *Sempra*, § 310

87 *Impregilo,* § 260

88 Second Clarification Requests (6 August 2010) Responses, § 248

89 Dolzer, Stevens, p. 82

C.3.(i) 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

76. Nevertheless, if the Tribunal makes a conclusion, that the umbrella clause also covers mere breaches of contract, Respondent must point out to the law applicable to this question.

77. Respondent is well aware that the alleged breach of an international obligation must be judged in the terms of international law. It was stated in the *MTD* case that to establish the facts of the breach of the contract, the municipal law must be taken into account.[90] There is no doubt that in international investment disputes the domestic law forms a part of the applicable law and is not to be therefore treated as a fact.[91]

78. Some commentators criticized various ICSID tribunals for not paying a proper attention to the relevant provisions of domestic law.[92] If the present tribunal is deciding the issue of alleged breach of the umbrella clause on merits, it should not do so without a thorough analysis of the relevant provisions of the law of Beristan.

79. Claimant may argue that the law of Beristan ought to 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.[93] As was stated in the *Adriano Gardella* case, issues of breach of contract must be viewed in the light of the proper law of the contract, as general international law can provide only little guidance on the issue of *material breach of the contract* or other specific questions of contract law.[94]

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90 *MTD v. Chile*, § 204

91 ICSID Convention, Article 42; Newcombe, Paradell, p. 95 – 97; Douglas: Investment Claims, pp. 90 – 94; *CMS Jurisdiction*, § 88

92 Newcombe, Paradell, p. 96; Douglas: Nothing if Not Critical; *Eureko,* Dissenting opinion by arbitrator Rajski

93 Clarification Requests (4 June) Responses, § 136

94 *Adriano Gardella*, p. 287; further see Douglas: Investment Claims, p. 91 – 92

80. In Clause 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.*" They waived also "*any objection which [they] may have now or hereafter to such arbitration proceeding […]*" commenced under the respective clause. Therefore, by virtue of the first sentence of Article 42(1) of the ICSID Convention, Claimant agreed that the dispute will be decided in accordance with these agreed rules. Respondent emphasizes, however, that this should apply only in the case when the Tribunal accepts its jurisdiction and holds the acts of Beritech attributable to Respondent in respect of the umbrella clause.

81. Claimant may submit, that to the matter of *material breach of the contract* international law shall be applied, namely the BIT. Respondent rebuts this submission by arguing that no guidance may be found on the particular issue in general international law, or in the BIT,. "*This may be treated by the tribunal as an ´absence of agreement´ on the applicable law concerning that question.*"[95] In this case the Tribunal is called to the application of the second sentence of the ICSID Convention, and therefore apply the law of Beristan. This must be an inevitable step, as "*[t]he Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.*"[96] The resort to a conclusion of "*absence of agreement […] is the sole or even best solution for such circumstances.*"[97]

C.3.(ii) Analysis under the applicable law

82. As Respondent submitted hereinbefore, there was no breach of the JV Agreement itself. First of all, contractually agreed procedure of buy-out clause was commenced as a decision of the Sat-Connect´s Board of directors. The requirement of quorum 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

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95 Schindler, p. 406., further see *ELSI Case*, § 62; *CME*, §§ 400 – 411; Schreuer: ICSID Commentary, p. 564, § 23

96 ICSID Convention, Article 42(3)

97 Kreindler, p. 406

personnel. All these steps were in conformity with the Beristian law and Sat-Connect bylaws.[98]

83. Claimant did not resort to the contractually agreed arbitration within this period , although nothing prevented it 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. There being 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 the period of 14 days which it had been provided with.

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

D. The measures of Respondent in any event had not amounted to a breach of the substantive standards of the BIT, nor had violated any other substantive rule of international law

D.1. Respondent did not violate standard of "fair and equitable treatment"

85. Respondent submits that it did not breach the standard of fair and equitable treatment ("FET") owed to the Claimant at any time.

86. As the precise content of the FET standard is not entirely clear[99] and as the literal interpretation of Article 2(2) of the BIT provision suggests ("*treatment in accordance with customary international law, including fair and equitable treatment*"), 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[100] with respect to the aliens and their property shall be considered as applicable under the present BIT.

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98 Second Clarification Requests (6 August 2010) Responses, § 244

99 Sornarajah, p. 332 – 339; Newcombe, Paradell, p. 261; Subedi, p. 63; *Lauder v. Czech Republic*, § 291

100 Shaw: International Law, p. 72 – 75; further see Congyan, p. 659 – 679

87. 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.[101]

88. 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.*"[102] 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.*"[103] 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.

89. 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.[104] 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, it did not challenge the Beritech´s action in arbitration, although it clearly had an opportunity.

90. Claimant has the burden of proof that a violation of FET took place. He must also establish that the negative impact on investment was in a clear link of causation with the State´s acts or omissions.[105] In the present case, the Claimant has not proved that there would be any sort of Respondent´s conduct which would fall short of the international standard. Particularly, Claimant failed to prove that the conduct of state "*shocked a sense of judicial propriety*"[106] or reached a level of "*extreme*

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101 Sornarajah, p. 330; Newcombe, Paradell, pp. 258 – 262; US-Uruguay BIT, Article 5(2)(a)

102 *Genin*, § 367, further see *Saluka*, § 290; Brownlie: Principles, p. 527 – 531

103 *Genin*, § 371

104 *Lauder v. Czech Republic*, § 291

105 Tudor. FET, p. 138

106 *ELSI cas*e, § 128

insufficiency."[107] 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.

91. The facts of not complaining of any of the acts of Respondent (or Beritech) which could have constituted breaches of its obligations is to be emphasized. This was held highly relevant in bringing a claim of infringement of FET in the *Waste Management II* case.

> *"[T]he availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as [FET] have been complied with by the State. Were it not so, Chapter 11 would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose."*[108]

92. This reasoning is entirely applicable to the present case, as the claims concern contractual breaches and Article 1105(1) of NAFTA is of the virtually same wording as Article 2(2) of the BIT.

93. 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 yet submitted, was justified by invocation of essential security defense. When the Tribunal is not convinced by the aforementioned argumentation, Respondent will then argue that its steps where perfectly justified and reasonable in the light of the present danger to its vital security interests.

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107 *Genin*, § 371

108 *Waste Management II*, § 116

D.1.(i) Respondent at any event did not unlawfully interfered with Claimant´s legitimate expectations

94. 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.*"[109]

95. As a specific undertaking in the present case can be seen only 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.[110] No breach of these expectations took place as Claimant has never called upon Respondent to perform this undertaken role. Given the current factual matrix, there were no such assurances "*in reliance upon which investor was induced to invest*" which has been interfered with.[111]

96. 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.[112] 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*[113] or *LG&E*.[114]

97. FET standard requires State to act consistently, i. e. mainly with respect to the above-mentioned regulatory framework.[115] There was no inconsistency which would negatively affect the Claimant´s investment.

109 Paulsson, Douglas, p. 137

110 Clarification Requests (4 June) Responses, § 152

111 *CME*, § 611

112 Dolzer, Schreuer, p. 104

113 *Saluka*, § 306

114 *LG&E*, § 130

115 *TECMED*, § 154

98. Claimant may argue that there were unreasonable acts towards its seconded personnel. As is clear from the facts, the staff left right after it had been asked to do to so. At any point the employees has not suffered from "*fear for their safety or well being.*"[116]

D.2. No Respondent´s measures were unjustified or discriminatory

99. The BIT in its Article 2(3) prohibits to subject "*the management, maintenance, enjoyment, transformation, cessation and liquidation of investment*" to the "*unjustified or discriminatory measures.*"

100. The term *unjustified measures* is not defined by the treaty, therefore the Tribunal must interpret it. Many arbitral tribunals have faced this task, however, in most cases they dealt with interpreting the term *unreasonable* or *arbitrary*.[117] Respondent argues, that the term *unjustified* is a narrower one. The ordinary meaning interpretation[118] 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. Article XX of GATT, which speaks about "*arbitrary or unjustifiable discrimination.*" Hardly can be there any reason for putting into a treaty two terms of the same content next to each other connected by disjunction. In *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."*[119]

101. This proves that the terms, although related concepts, do not have the exactly same content. The BIT prohibits only unjustified measures and not unreasonable or arbitrary measures.

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116 Second Clarification Requests (6 August 2010) Responses, § 248

117 *Lauder v. Czech Republic*, § 232; *Genin,* § 370 – 371

118 VCLT, Article 31(1); further see *LG&E*, § 156

119 *WTO US - Gasoline,* p. 25

102. The Respondent´s acts were justified, first of all, by the fact that Sat-Connect made 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 satisfies the stricter scrutiny of reasonableness, the standard not present in the applicable BIT.

103. The acts to be reasonable must have rationale or justification which has "*a reasonable (or rational) relationship [to] […] a legitimate governmental policy.*"[120] Requirement of this link was reaffirmed by the *Saluka* award[121] or the *LG&E* award.[122] Such a legitimate policy is represented by the national defence policy.

104. In the *Genin* case was stated that an arbitrary measure even requires an element of bad faith.[123] There cannot be inferred a bad faith from the Respondent´s acts as they were properly based on the facts posing a threat to the national security.

105. When the Tribunal would view the term *unjustified* as an equivalent to *arbitrary*, Respondent did not breach this standard either, as its acts fall short of such an intensity. Arbitrariness, as a term of art, was evaluated by various tribunals.[124] In the *Azurix* case it was defined in line with the hereinbefore mentioned ELSI case as "*a wilful disregard of law*."[125] The tribunal in *Genin* concluded that license withdrawal done with some procedural irregularities in the environment of transforming economy did not violate a "*sense of judicial propriety*" or posed "*an extreme insufficiency of action.*"[126] 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 perfectly reasonable and it cannot be deemed as arbitrary whatsoever.

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120 Heiskanen, p. 104

121 *Saluka*, § 461

122 *LG&E*, § 156 – 158

123 *Genin*, § 371

124 *ELSI case*, § 128, *Lauder v. Czech Republic*, § 232

125 *Azurix*, § 392

126 *Genin*, § 371

106. Discrimination can be by no means invoked by the Claimant, as this is a relative standard.[127] In order to find that there is a discrimination, there must be a comparator identified, then there must be found a different treatment and finally, the different treatment is not able to be justified.[128]

107. 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 suspected of the leak of sensitive information to a foreign government. Alternatively, this difference would be reasonable and justified as a basis for differential treatment.

D.3. The acts or omissions of Beristan are by no means in violation of Article 4 of the BIT, Nationalization and Expropriation clause

108. Respondent views the Claimant´s expropriation claim as lacking any basis in facts whatsoever. The Tribunal ought to dismiss the claim at hand, since 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 thereafter left voluntarily 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.

109. Alternatively, Respondent submits that the interpretation of the Article 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.[129]

110. Executive organs are normally allowed to make a decision which can affect property rights and if they are not , the application and enforceability of the State´s law would

127 Heiskanen, p. 87, *Saluka*, § 461

128 *Pope & Talbot Interim*, § 78 – 104; *S. D. Myers First Partial*, § 251

129 See e.g. *Golder v. UK*, §§ 34 – 35

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 it did not opt.

D.3.(i) The Claimant´s right under the contract were not expropriated, at most a mere breach of contract committed by Beritech could have taken place

111. It is the Respondent´s submission that, according to the *Parkerings Compangniet* case, there be three cumulative conditions fulfilled for expropriation of a contract. Firstly, there must be use of sovereign powers to breach a contract. Secondly, investor has to be prevented from bringing its claim Finally, breach of contract must cause substantial decrease of investment´s value.[130] The use of sovereign powers has 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 II* case the tribunal stated that "*the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one.*"[131] Noteworthy finding of this tribunal lies in making a clear distinction of expropriation of a right under a contract and a mere failure to comply with the contract.[132]

112. 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 contract arbitration tribunal.

113. Claimant expressed his will, that in a case of breaching a confidentiality of the Project matters, Beritech would be entitled to buy-out its 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

130 *Parkerings Compagniet*, §§ 443 – 456, further see *Azurix*, § 314

131 *Waste Management II,* § 159; *CMS Award,* § 260 – 265

132 *Waste Management II*, § 176 – 177

investment will be paid back to Claimant as agreed in the JV Agreement and therefore a threshold of "*effective neutralization*"[133] or "*substantial deprivation*"[134] is not met.

114. As Reinisch explained:

> *„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. [citations omitted]"*[135]

115. Denial of justice cannot be deemed as taking place in the current situation. Claimant at any time has not chosen for turning to the State Courts or to the contractually agreed forum.

D.3.(ii) The Claimant´s claim is disqualified by the fact that it did not seek any redress from national authorities

116. Respondent does not intend to introduce a requirement of exhaustion of local remedies to the present international treaty arbitration at all, as it cannot be inferred from any of the BIT´s provisions. Respondent, however, calls the Tribunal to pay adequate attention to the fact that Claimant did not give any opportunity to the State to remedy any of the alleged failures whatsoever.

117. In respect of expropriation claims, this was held persuasively by the *Generation Ukraine* tribunal:

133 *TECMED*, § 107.

134 *Pope & Talbot Interim*, § 102

135 Reinisch: Expropriation, p. 419

> *"[A]n international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction."*[136]

118. As stated earlier, Claimant was not prevented from seeking redress in the contractually agreed forum.

119. The *Generation Ukraine* reasoning echoes previously arbitrated case of *Lauder v. Czech Republic*, which opined in the following terms:

> *„This failure [not complaining of any action of Media Council] by the Claimant to invoke the Treaty or to advance any violation of the obligations of the Czech Republic when the now disputed actions were taken, tends to show that no violations of his property rights were committed at that time."*[137]

E. Respondent can rely on the essential security defense in Article 9 of the BIT

120. Respondent was authorized to invoke Essential security clause (Article 9 of the BIT) after receiving an information that Claimant disclosed certain classified information regarding the Sat-Connect project to the government of Opulentia. Respondent arguments are as the following:

- The Essential security clause in the BIT is self-judging and therefore it is in a sole discretion of Beristan when and how to use this clause when addressing essential security issues.

- The Tribunal has no power of review concerning the invocation and usage of self-judging clause and if under any circumstances the power of review exists, it is limited only to the test of good-faith.

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136 *Generation Ukraine*, §§ 20.30, 20.33

137 *Lauder v. Czech Republic*, § 204

- In that case, Article 9 was invoked in good faith, measures taken were necessary and proportionate to alleviate the situation and remove potential threats to essential security and again, the choice of such measures was fully in Respondent's discretion.

121. Usage of security exemption indicates that the States who have agreed to use such clause, indented to create a sort of exit-valve so that a party can enter this obligation without a fear that a *bona fidei* performance of obligation and cohesion to *pacta sunt servanda* principle can endanger the protection of its essential security interests. Therefore a State employs this clause to protect its own essential security and not abide to the stipulations of the treaty in sake, as it was in this case. This practice is widely used, as it was in case of USA-Paraguay BIT, which use the same wording as the Opulentia-Beristan BIT does.

E.1. The Essential security clause in the BIT is self-judging

122. We can identify that self-judging clause because of characteristic usage of the wording "*it considers*"[138] or "*it determines*" or "*the [...] State considers*"[139] was used and it relates to the phrase "*necessary for the protection of its essential security interests.”*

123. When compared to the self-judging clauses mentioned by commentators on the subject,[140] Article 9 of the BIT beyond any reasonable doubt shows all the necessary characteristics and attributes to be classified as a self-judging exemption. Various ISCID tribunals[141] have come to the conclusion that self-judging clauses grant a State discretion in the determination of a clause’s scope of application but these clause have to be framed explicitly. *Sempra* award states explicitly:

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138 See *Canada Model BIT, 2004,* Article 10; *US Model BIT, 2004,* Article 18

139 See Mutual Assistance Convention, Article 2(c)

140 Newcombe, Paradell, Chapter 10; further see Canada Model BIT, 2004, Article10; US Model BIT, 2004, Article 18; New York Convention, Article V(2)(b); ECT, Article 24(3); NAFTA, Article 2102; Mutual Assistance Convention, Article 17; GATT, Article XXI; India-Singapore CECA, Article 6.12; Chile-China FTA, Article 100; EFTA-Lebanon FTA, Article 22

141 *CMS Award,* §§ 366 – 373, *LG&E,* §§ 212 – 214; *Sempra,* §§ 379 – 385; *Enron,* §§ 335 – 339

"Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature."[142]

124. Security clause in BIT is drafted explicitly to be self-judging, as it wording clearly reflects such fact. Therefore Respondent believes that above mentioned facts establish assertions made infra.

125. Based upon the conclusion that the provision is self-judging, the State which is invoking it is a sole arbiter when it comes to the determination of a clause's scope of application.[143] Teleological base for the creation and inclusion of such clause is the reason that the State wishes to have a possibility to derogate from the treaty obligation under specified circumstances and in determining this, it wishes to be a sole arbiter. By the same token standard of review of such action is non-existing, or very limited. As it was provided by the ICJ in *Djibouti v. France,* the only standard of review which applies to invocation of the self-judging clause is that of good-faith.[144]

E.2. Respondent invoked the essential security defense in a good faith

126. It is so because the good faith principle as one of the leading principles of international law is binding for the interpretation of all international treaties as embodied in Article 31(1) of the VCLT, which stipulates that all treaties are to be "*interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" VCLT also stipulates that: "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*"[145]

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142 *Sempra,* § 379

143 Newcombe, Paradell, p. 484

144 *Mutual Assistance in Criminal Matters case,* §§ 145, 147 – 148

145 VCLT, Article 26

127. When drafting the BIT, inclusion of Article 9 clearly meant that it was used to protect essential security of the State in the situation when Party's essential security interests are to trump the Party's obligation stipulated under the Treaty.

128. Respondent further asserts, that the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are to be used by the Beristian army, directly implicates the national security of Beristan.

129. Evolution of information systems in last two centuries has made them crucial parts of every State's national security in its most essential form. Information warfare and gathering, in its own evolution from Enigma[146] in the WWII, through Phoenix program[147] in Vietnam to a fully automated satellite monitoring and satellite cooperation of unmanned aerial vehicle[148] usage in the operation Iraqi freedom and war in Afghanistan played a crucial role in modern generation warfare. Any such advantage gained from the synergetic co-operation and information exchange between military units is lost if the opponent has an access to the information system as it was demonstrated in Enigma case in the WWII. Therefore state must protect these systems at all costs and in many examples, state institutes governmental bodies expressly designed to do so (NSA of United States of America is a good example of this trend launched in late 50s of the previous century).

146 Miller. *The Cryptographic Mathematics of Enigma,* 2001, NSA

147 Tovo, K. E. *From the Ashes of the Phoenix: Lessons for Contemporary Counterinsurgency Operations,* 18 March 2005, U.S. Army War College

148 e.g. Predator UAV, Description, available at: http://www.ga-asi.com/products/aircraft/predator.php

E.3. Respondent was allowed to eliminate the threat posed to its national security before the actual effects would take place

130. Protection does not consist only from *ex post* removal of threat to national security or removing the damages that such threat have done upon the national security. It also consist of protective measures taken in present time, in our case for example creating the obstacles against the break into the State's information system and measures for effective use and control of such information system. Protection also consists of *pro futuro* measures aimed to increase security of such systems and protect it from any incoming threat.

131. Even if it is argued that no specific part of satellite system was used for army, rather army has been profiting from the systems as a whole. Although the character of systems is more civilian than military, the protection of such information systems is still essential security issue and the presence of army in the whole equation only escalates the importance of such a system.

132. Televative Inc. is legally bound in its country of incorporation by legislation enacted by Opulentia. This legislation requires any Opulentia-based enterprise to share its information on whatever the subject with Opulentia government to combat terrorism. The legal mechanism can be used, and it was confirmed by Televative that it was used to file a request requiring to share information on Sat-Connect project. Even if Televative alleges that it denied a request to provide a cryptographic codes and access, the chance of passing the essential information concerning cryptography of such system in future is also a potential threat to national security of Beristan, creating a sort of Sword of Damocles.

133. The idea of Opulentian government having an access to a satellite system which is to be used by great proportion of Beristian citizens and governmental entities, including the military ones is a frightful prospect. Relations between countries are still fragile and tense, and Opulentian attempt to use anti-terrorism law to gain information on Beristan is considered as a threat to national security and as the law was enacted after the signing of the treaty and also after the beginning of Sat-Connect project,

Respondent had no other choice to protect its security after the leak then to invoke Article 9 of the BIT.

134. Beristian government acted *bona fidei* when taking the measures aimed to alleviate conditions endangering its own essential security. Generally in international law a State is presumed to act in good faith[149] and Claimant has produced no evidence indicating that the state didn't act in good faith. Also as it was ruled in the *Saluka* award, state has relatively wide discretion what measure shall it use[150] if the measure itself is justifiable at least on regulatory grounds. The use of CWF of Beristian army is justifiable under the *bona fidei* belief of Respondent that a threat to essential security was imminent. Therefore Claimant's removal from the Sat-Connect project was justified on these grounds and the rationale behind the use of CWF via the executive order is that Respondent was in the need of a most swift and effective solution how to secure grounds of Sat-Connect project.

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149 Yakemtchouk: La Bonne Foi, p. 67; Fiztmaurice: Law and Procedure, p. 615

150 *Saluka,* § 490