

FDI Moot 2010 Clarification Requests (4 June) Responses

181

[Sat-Connect Chair Appointment](#)

Who appointed the Chairman of the Sat-Connect board under the terms of the JV agreement?

The Chairman is elected by a majority of the board of directors.

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[Sat-Connect Chair's Privileges](#)

What additional privileges did the Chairman of Sat-Connect have?

The chairman presides over board of director meetings and may set the agenda for meetings.

178

[Beristan Times Article](#)

May a copy of the Beristan Times article be made available?

Except from "Space - Beristan's New Frontier: Securing the Border" from The Beristan Times, 12 August 2009: August 2009: "...The Government's new high-tech take on defense is not limited to satellite surveillance, positioning and targeting systems. The armed services are already looking at upgrading their communications systems with powerful satellite and ground systems using encrypted communications. One project likely to supply the military in the coming years is being developed by Sat-Connect. Sat-Connect is a Beristan company established as a joint venture with the Opulentian technology leader, Televative. Sat-Connect spokespersons say, "the system will provide secure extensible telecommunications services for both civilian and military uses at better quality and lower cost while providing greater geographic coverage than anything currently available." Still, questions have been raised about the suitability of the system for military purposes. A government defense analyst, speaking off the record, noted that there are more and more foreign laws compelling disclosure of encryption ciphers, keys, and pads to national security services. Most of these are anti-terrorist measures, but the same analyst pointed out that many are blunt instruments, and that foreign personnel are in fact seconded to the Sat-Connect project. Most surprisingly, the analyst indicated that there have been leaks not only involving encryption technology, but also concerning the technology, systems, and intellectual property of the Sat-Connect project. Earlier this year, Televative was one of three Opulentian technology firms from which the Opulentian government authorities are alleged to have received access to civilian encryption keys. Televative acknowledged receiving requests, but has denied permitting unlawful access. Opulentian legal scholars are divided on whether legislation enacted in the fallout of the allegations will stop abuses or simply give them legal cover ..."

177

[Essential Security in Other BITs](#)

Is Beristan a party to another bilateral investment treaty (with a third party) that lacks an essential security clause? If so, could the contents of that treaty be made available?

Beristan has concluded numerous treaties, some of which have essential security clauses with slightly varying formulations.

176

[Provision of Agenda in Advance of Board Meeting](#)

Does Beristan law require that prior notice concerning a proposed agenda be provided to participants of a board meeting for a company incorporated in Beristan?

Beristan Law requires 24 hours prior notice for all board meetings.

175

[Notice of Arbitration](#)

Did Beritech give notice to Televative of its intention to commence arbitration prior to filing a request for arbitration? If so, when?

Beritech served notice on 11 September of their desire to settle amicably, and failing that, to proceed with arbitration.

174

[Elias 8. - the BIT](#)

When did the BIT become effective [Annex1, 15]?

The BIT became effective on 1 January 1997. Neither party has given notice of its termination.

173

[Elias 7. - Intellectual property protection](#)

Are there any other treaties, especially treaties on the protection of intellectual property, to which Beristan and/or Opulentia are parties?

Both countries are members of the WTO.

172

[Elias 6. - validity of Buy-out clause](#)

Is the Buy-out Clause, especially the agreement on the value of Televative's interest, in JV Contract [Annex3, 8] valid under the law of Beristan?

This question asks for a legal (not factual) conclusion.

171

[Pinto 8 - Televative personnel](#)

How long did it take to replace the Televative seconded personnel with local Beristan personnel and what were the credentials of the replacement personnel?

Beritech moved expeditiously to hire replacement personnel from among individuals with relevant expertise in the Beristan labor market.

170

[Pinto 7 - arbitration request](#)

What is the content of the arbitration request (request for relief) in the arbitration proceedings, initiated by Beritech - what are the governing arbitration rules? Where is the seat of arbitration?

Beritech sought declaratory relief that it properly exercised its rights under the JV Agreement and damages against Televative. The seat of the arbitration is Beristan, Beristan.

169

[Pinto 6 - records of 21 August 2009 meeting](#)

Are there any records of the August 21, 2009 meeting? Were any other board meetings between the publication of the article (12.08) and the board meeting (21.08)?

The minutes from the August 21, 2009 meeting of the board of directors reflect that the chairman of the board made a presentation concerning the August 12th article in The Beristan Times, that one director raised the potential relevance of clause 8 of the JV Agreement, and that there was discussion among those present. There were no other board meetings between 12 and 21 August.

168

[Pinto 5 - Beristan Times](#)

Is the Beristan Times an independent journal? Does the Respondent state have any shares in it?

The Government does not own any shares in the Beristan Times and it is considered "independent".

167

[Pinto 4 - management of Sat-Connect](#)

What is the management of Sat-Connect? Are there any board members, appointed by the Government of Opulentia? (within the facts we only have information on property interests and JV Agreement; does Beritech have a special contract with the government or is it subject to special national legislation, military rules, etc.)

No board members are appointed by the Government of Opulentia.

166

[Pinto 3 - nature of Sat-Connect project](#)

What was the nature of the Sat-Connect project? What was its intent - who were the potential administrators, users, ...? Was it a purely military infrastructure? (in the facts it is mentioned civilian or military purposes - who is to decide and when? does the Respondent state have any national legislation dealing with the question?)

See paragraphs 5 and 6 of Annex 2, Uncontested Facts. Beristan has a Telecommunications Act of 1996, which was passed in view of the privatization of telecommunications services in Beristan.

165

[Pinto 2 - value of IP rights](#)

What was the value of the intellectual property rights, not compensated to Claimant, due to the forced buyout?

The Claimant alleges that the value of the intellectual property over the life of the technology would be in excess of US\$ 100 million.

162

[Elias 4. - Relationship of the high rank official to the Beritech](#)

What is the relationship between the Beristian high rank official who accused Televative of leak of confidential information and the Beritech?

There is no evidence of any direct relationship between the Beristian government official and Beritech.

161

[Elias 3. - Beritech's activities](#)

What are the other Beritech's business activities besides the participation in the Sat-Connect?

Beritech is a telecommunications services provider in Beristan, established a few months before establishment of the Sat-Connect JV. Its mission statement and bylaws do not restrict its scope of activities to the JV.

160

[Elias 2. - Expelled personnel](#)

Were the expelled personnel employees of the Sat-Connect? And if so, how the Beristan law deals with the termination of the labour contracts?

The expelled personnel were employees of Televative who were specifically seconded to the Sat-Connect project by Televative.

159

[Elias 1. - International Covenants](#)

Is Opulentia or Beristan a party to the International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights?

Yes

156

[Buyout procedure](#)

Did Alice Sharpeton participate in the voting?

No.

155

[CWF intervention](#)

What was the legal basis for the intervention of the Civil Works Force?

Executive Order.

154

[Sat-Connect system](#)

What companies or states other than Beristan would use the Sat-Connect system?

Prospectively, several countries in the Euphonia region.

153

[JV agreement](#)

In what capacity has the State of Beristan co-signed the JV agreement?

As Guarantor.

152

[JV agreement](#)

What were the rights and obligations of Beristan as guarantor, pursuant to the JV agreement

As guarantor, Beristan would assume the obligations of Beritech under the JV Agreement upon Beritech's default.

149

[Bengzon 6](#)

With respect to Beristan's corporate laws, what are the rules regarding board meetings and fundamental business transactions; particularly, how is a quorum established; how is notice of board meeting agenda given to the directors so they are informed, in advance, of the issues to be discussed at a meeting; is a compelled buyout of a shareholder a fundamental business transaction, and what is the voting requirement for a fundamental business transaction, i.e. simple majority of directors (50% + 1) or super-majority (66.67%)?

Sat-Connect's bylaws are in conformity with Beristan corporate law. See question 176 above. All decisions taken by a board of directors under this law can be by majority, subject to meeting the company's quorum requirement.

148

[Bengzon 5](#)

Were any of the governments of the other six countries located within Euphonia aware of, using, or contemplating the use of the Sat-Connect satellite system?

It was publicly known that the system was being developed and that Sat-Connect was interested in selling services and licensing technology to other companies and governments in the region.

147

[Bengzon 4](#)

Subsequent to the signing of the Beristan-Opulentia BIT and prior to the August 12, 2009 article, were there any changes in Beristan and Opulentia's political attitude towards each other; specifically, after the BIT became effective, did Beristan developed any negative attitudes towards foreign investment?

No

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[Bengzon 3](#)

Is Opulentia or its maritime zones, if any, located within Euphonia?

Yes

145

[Bengzon 2](#)

Does Opulentia have export control laws that require Opulentian companies to obtain licenses from the Opulentian government in order to export and re-export certain technologies, goods, and/or services to Beristan?

Yes,

144

[Bengzon 1](#)

Was the Treaty Between the Republic of Beristan and the United Federation of Opulentia Concerning the Encouragement and Reciprocal Protection of Investments ratified in accordance with Beristian constitutional procedures and has any other bilateral investment treaty or telecommunications treaty been ratified by Beristan?

The Beristan-Opulentia BIT was properly ratified.

143

[Investor? Inventor?](#)

There is a term 'inventors' in Article 2(1) and 6(1) of BIT between Opulentia and Beristan. This is BIT so I guess it supposed to be 'investors', isn't it?

"Investors" is correct.

142

[New York Convention](#)

Are the two concerned parties of this case, Beristan and Opulentia, the contracting parties and both of them ratified 'New York Convention'?

Both Beristan and Opulentia have ratified the "New York Convention".

141

[Euphonia and Opulentia](#)

Do six other countries in Euphonia include the United Federation of Opulentia?

It will be helpful to know the relationship between Opulentia and Sat Connect S.A. regarding this case. Opulentia is one of the six other countries.

140

[Participation of directors at the meeting](#)

How many directors attended the meeting on August 21, 2009 when the chairman of the Sat-Connect S.A. board of directors made a presentation to the directors? Also, I'd like to know 'Alice Sharpeton' participated in that meeting in particular.

It could be 'prior notice' if almost directors participated in that meeting, so I need to clarify this fact as well. All members of the board of directors were present.

139

[Waldock 7 Expulsion of Personnel](#)

Which provisions of Beristanian law were invoked by Beristan as the legal basis for expulsion of personnel associated with Televative and were the procedures provided by such law complied with during actual expulsion?

Executive Order.

138

[Waldock 6 Buyout Procedure](#)

Please clarify the mechanics of buyout procedure both as envisaged by applicable law and other agreements between the parties and as actually implemented, particularly whether the actual title to shares in the JVCo has passed on to Beritech, whether the meeting of Sat-Connect, which was left by one of the directors, still remained quorate under applicable law?

At the August 27th, 2009, Sat-Connect board meeting, the board of directors, upon approving the buyout, voted to suspend Televative's shares in the Sat-Connect joint venture. Subsequent to the August 27th meeting, the Sat-Connect board of directors submitted Televative's shares in the Sat-Connect joint venture to be held in escrow, along with the \$47 million submitted by Beritech, pending the decision of the arbitral tribunal in the proceedings commenced by Beritech.

136

[Waldock 4 -Governing law with respect to JV Agreement](#)

Does Beristan law incorporate UNIDROIT or other commonly accepted principles of contract law and in particular the principle of good faith?

Yes.

135

[Waldock 3 - Beritech and Beristan](#)

What is the nature and degree of relations between Beristan and Beritech, i.e. in terms of participation in Board of Directors and Management Board, sufficiency of the shareholding for passing all matters requiring shareholder approval, whether the nominees of Beristan vote per their own discretion or under direct instructions from Government, what matters are delegated to the Board of Directors and management respectively, has there been any instructions in regard to the actions of Beritech in relation to Sat-Connect, does Beritech perform any public function?

See Annex 2, Uncontested Facts, paragraph 2. The Minister of Telecommunications of Beristan is a member of the board of directors of Beritech.

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[Amicable Settlement](#)

Had Televative undertaken any attempt to settle the dispute amicably and in particular has it made a written application for the settlement of the dispute envisaged by Article 11(1) of the BIT and when and has Beritech sent notice of its intention to commence arbitration as provided for in clause 17 of the JVA?

On September 12, 2009, Televative submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT, in which Televative notified Beristan their desire to settle amicably, and failing that, to proceed with arbitration pursuant to Article 11 of the BIT. As noted in paragraph 13 of Annex 2, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement October 19, 2009.

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[Barros Clarification #5](#)

Clause 17 of the Joint Venture Agreement states that the agreement shall be governed in all respects by the laws of the Republic of Beristan. Do international commercial principles such as the UNCITRAL Arbitration Rules apply?

The UNCITRAL Arbitration Rules do not apply. However, the 1959 Arbitration Act of Beristan was amended in February 2007 to conform to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.

127

[Barros Clarification #2](#)

Who was present at the board meeting on the 21st of August 2009? What were the contents of the meeting?

All nine board members were present.

126

[Is Opulentia part of Euphonia? Is all the information about the Sat-Connect project in the public domain?](#)

Yes, Opulentia is within the region of Euphonia. Not all information concerning the Sat-Connect project is in the public domain.

121

[Guerrero Cl.4](#)

What proportion of Sat-Connect project's segments was intended to be used by Beristan Armed Forces with reference to commercial exploitation?

There was no intention that any particular "proportion" of the Sat-Connect project was to be used by Beristan Armed Forces.

120

[Guerrero Cl.3](#)

How is the issue of expropriation governed by the laws of the Republic of Beristan?

The Beristan Constitution states, "Private property shall not be taken for public use without just compensation and due process."

118

[Guerrero Cl.1](#)

At what operational stage is the arbitral tribunal requested by Respondent on 19 October 2009? Did the arbitral tribunal decide about its jurisdiction? What was the Claimant's conduct during the arbitration?

The arbitration was commenced by Beritech. Despite Televative's refusal to participate, the tribunal has been constituted and determined that the seat of the arbitration shall be Beristan.