

**Skadden, Arps**



**FOREIGN DIRECT INVESTMENT INTERNATIONAL  
MOOT COMPETITION (“FDI MOOT”)**

**PROBLEM 2010**

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### **MINUTES OF THE FIRST SESSION OF THE ARBITRAL TRIBUNAL**

TELEVATIVE INC. [Claimant]

vs.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN [Respondent]

(ICSID Case No. ARB/X/X)

Malibu, California, 15 March 2010

The first session of the Arbitral Tribunal was held on 15 March 2010 from 2:00-5:00 p.m. at the Pepperdine University School of Law, Malibu, California, United States of America.

Present at the session were:

The Members of the Tribunal

XXX, President

YYY, Arbitrator

ZZZ, Arbitrator

ICSID Secretariat

XYZ, Secretary of the Tribunal

Representing the Claimant

Brownlie & Partners

Representing the Respondent

Wälde Associates LLP

The President of the Tribunal opened the session and welcomed the participants. It was agreed to consider the matters listed on the Provisional Agenda, which is attached to these Minutes as Attachment 1.

1. Constitution of the Tribunal and the Tribunal Members' Declarations

It was noted that the Tribunal had been properly constituted in accordance with Article 37(2)(b) of the ICSID Convention and the ICSID Arbitration Rules. The parties expressed their agreement that the Tribunal had been properly constituted. Copies of the Declarations signed by the members of the Tribunal pursuant to ICSID Arbitration Rule 6(2) were distributed prior to the first session.

2. Representation of the Parties

It was noted that the Claimant is represented by:

Brownlie & Partners

and that the Respondent is represented by:

Wälde Associates LLP

3. Apportionment of Costs and Advance Payments to the Centre

The parties agreed that, in accordance with Article 61 of the ICSID Convention and Rule 14 of the ICSID Administrative and Financial Rules, the parties would defray the expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to costs.

It was recalled that the Centre had requested in Case No. ARB/x/x each party to pay an amount of US\$25,000 to defray the costs of the proceeding during its first three to six months. The Claimant made the payment requested on 16 November 2009 and the Respondent on 25 November 2009.

4. Fees and Expenses of Tribunal Members

The parties agreed that in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of the Tribunal would receive:

- a fee of US\$3,000 (three thousand United States dollars), or such other fee as may be set forth from time to time in the Centre's Schedule of Fees, for each day of meetings or each eight hours of other work performed in connection with the proceeding; and

- subsistence allowances and reimbursement of travel and other expenses within limits set forth in Rule 14 of the ICSID Administrative and Financial Rules and the Memorandum on the Fees and Expenses of ICSID Arbitrators.

5. Applicable Arbitration Rules

It was noted that, pursuant to Article 44 of the ICSID Convention, the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since 10 April 2006.

6. Place of Proceedings

It was confirmed that seat of arbitration shall be Pepperdine University School of Law, Malibu, California, United States of America, in accordance with the agreement of the Parties and following upon the Arbitral Tribunal's consultation with the Secretary General of ICSID in accordance with Article 62 and 63 of the ICSID Convention, and Arbitration Rule 13(3). This is without prejudice to holding sessions with the parties at any other place, with the agreement of the parties and after consulting the Secretary General of the Centre if appropriate. In addition, it was agreed that the Tribunal may meet without the parties at any other place as convenient.

7. Procedural Languages

At the election of the parties, the language of the proceedings shall be English. It was agreed that all memorials, witness statements, expert reports, observations, and the like filed by the Claimant or by the Respondent shall be in English. Consequently, it was agreed that neither the Claimant nor the Respondent shall be required to provide the other Party with Beristian or Opulentian translations and the English version of the originally filed instrument shall be the sole authoritative version.

It was also agreed that the Tribunal will render its decisions in English only. The every day communications from the Secretariat to the parties shall be made in English. In the case of communications from the Secretariat conveying instructions from the Tribunal, these will be made in English only.

8. Records of Hearings

The parties agreed that the records of the hearings shall be kept, and that there will be transcripts of each hearing. It was agreed that complete sound recordings would be made of this session and subsequent sessions.

9. Means of Communication and Copies of Instruments

It was agreed that ICSID Administrative and Financial Regulation 24 shall govern communications between the parties. It was agreed that all communications and written instruments in these proceedings were to be addressed to the Centre. It was further agreed that written instruments were to be submitted to the Centre in an original and five copies, except that brief communications that were not substantive applications or submissions could be transmitted by facsimile and e-mail. The Centre would arrange for the appropriate distribution of copies.

It was noted that, except as otherwise required by the Arbitration Rules, decisions of the Tribunal could be communicated to the parties through instructions to the Secretariat.

It was agreed that the date of filing of an instrument shall be the date of its dispatch by international courier, and that the parties will send a note, by fax, on the day of dispatch to the Secretary of the Tribunal informing him or her of such dispatch. It was also agreed that an electronic version of the text of the instrument shall simultaneously be sent to the Secretary of the Tribunal via e-mail. The *dies a quo* for the commencement of periods of time will be the day at which a written pleading with its translation and all its enclosures is received by the other party, a fact that will be certified by the Secretary of the Tribunal.<sup>1</sup>

10. Quorum

The parties agreed that all three members of the Tribunal shall be present at its sittings.

11. Decisions of the Tribunal by Correspondence or Telephone Conference

In accordance with ICSID Arbitration Rule 16(2), the Tribunal may take decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members are consulted.

12. Delegation of Power to Fix Time-Limits and to Sign Procedural Orders on Behalf of the Tribunal

In accordance with ICSID Arbitration Rule 26(1), the President of the Tribunal will have the power to fix time-limits for the completion of the various steps of the proceedings and to sign procedural orders on behalf of the Tribunal, after consultation with the other members of the Tribunal as far as possible.

13. Pre-Hearing Conference

It was agreed that ICSID Arbitration Rule 21 shall govern with respect to pre-hearing conferences.

14. Written and Oral Procedures

It was agreed that the proceedings herein shall be comprised of both written and oral procedures. The Parties and the Tribunal have agreed on a procedure to the effect that at this stage the Tribunal shall only address the following:

- (a) whether the Tribunal has jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement (“JV Agreement”);
- (b) whether the Tribunal has jurisdiction over Claimant’s contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT.
- (c) whether Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement;
- (d) whether Respondent’s actions or omissions amount to expropriation, discrimination, a violation of fair and equitable treatment, or otherwise violate general international law

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<sup>1</sup> For the purposes of the FDI Moot Competition, submissions shall be by email only to admin@fdimoot.org

or applicable treaties; and

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

If the Arbitral Tribunal confirms its jurisdiction and finds the Respondent to be liable, a separate second stage on remedies will follow.

#### 15. Summary of Parties Contentions

The Parties and the Tribunal have agreed on the following summary of their positions:

##### Claimant

- Claimant, Televative Inc., contends that after a period of good relations extending almost two years, the parties (including Televative, Beritech S.A. and Sat-Connect) had nearly completed development of the required technology – the satellites, the launch rockets, the terrestrial gateways and network infrastructure, and compatible handheld and desktop communication devices. Claimant alleges that this success was due largely to Claimant's own significant efforts and the transfer of its advanced technology to the joint venture, Sat-Connect S.A. The next step would have been for Sat-Connect to deploy the systems and network while working with Claimant to ensure it was properly operational.
- At this point, however, Beritech S.A. informed Claimant that it was buying-out Claimant's interest in the joint venture under the buyout provision (Clause 8) of the JV Agreement. Claimant contends that Respondent was behind this decision and that it was taken without proper notice to Claimant and without any opportunity to respond to the false charges that were raised against Claimant. These charges involve allegations that Claimant leaked information about Sat-Connect's technology and systems to the Government of Opulentia, where Claimant is incorporated and domiciled.
- According to Claimant, upon being informed of the forced buyout by Beritech, Beristian military personnel removed Claimant's personnel from all offices, sites and facilities of the Sat-Connect project.
- Claimant contends that its expulsion from the Sat-Connect project, the forcible removal of its personnel by members of the Beristian military, and the improper buyout of its interest in Sat-Connect were the product of a conspiracy against Claimant and violate Claimant's rights under general international law and applicable treaties, and in particular Articles 2, 4 and 10 of the Beristan-Opulentia BIT.
- Claimant asserts Respondent illegally expropriated its interest in Sat-Connect, because Beristan now has all of Claimant's contributions of capital, research and development to the Sat-Connect project and does not want to pay Claimant market-based prices for its interest in Sat-Connect. Under the buyout provision, Beritech paid significantly less than what Claimant would receive if it were to sell its interest to an arms-length buyer, because the buyout provision only returns Claimant's paid-in investment – without including compensation for potential future profits as well as for the intellectual property, know how and trade secrets that have been developed and are now controlled by Sat-Connect.
- Claimant alleges that Respondent also breached the fair and equitable treatment standard to which Claimant is entitled under the Beristan-Opulentia BIT by reason of the arbitrary and unfair expulsion of Claimant for motives unrelated to Claimant's performance of the

JV Agreement, through the abusive exercise of Beritech's rights under Clause 8 of the JV Agreement to buyout Claimant, and the discriminatory efforts to favour local Beristian personnel, who ultimately replaced Claimant's seconded personnel.

- 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. Claimant argues that it can assert these contract claims by virtue of Article 10 of the Beristan-Opulentia BIT.
- Claimant contends that the dispute resolution provisions of the JV Agreement are irrelevant, as the present claims are brought under the Beristan-Opulentia BIT and are therefore distinct from any contract claims.
- Finally, Claimant argues that the alleged national security concerns are based solely on Respondent's own unsubstantiated assertions. Moreover, these concerns were foreseeable given the substance of the JV Agreement. Claimant absolutely denies leaking any information to the Opulentian government.

#### Respondent

- Respondent contends that Claimant's claims are inadmissible and the Tribunal lacks jurisdiction because Claimant's claims are contractual in nature and Claimant has improperly reformulated them as claims arising under the Beristan-Opulentia BIT. Respondent urges that Claimant should respond to Respondent's notice of arbitration in the separate arbitration proceedings that Respondent has already commenced pursuant to the dispute settlement clause in the JV Agreement.

Alternatively,

- Respondent claims that Beritech was entitled to rely on Clause 8 of the JV Agreement (buyout) because Claimant breached the confidentiality provision of that Agreement (Clause 4) by leaking information about the Sat-Connect project—including information about the technology, systems, intellectual property and encryption to be used and other trade secrets—to the Government of Opulentia.
- Respondent alleges that Claimant leaked information from the Sat-Connect project to the Government of Opulentia. Respondent further asserts that the advanced satellite and telecommunications technology of the Sat-Connect project, which included systems that are being used by the Beristian armed forces, directly implicate the national security of Beristan. Respondent argues that Claimant's removal from the Sat-Connect project was justified on national security grounds.
- Respondent denies that it violated any terms of the Beristan-Opulentia BIT, or otherwise violated general international law or applicable treaties. Respondent urges that Claimant is not entitled to compensation or any other remedies.

#### 16. Pleadings: Number, Sequence, Time Limits

It was agreed that, contrary to the usual practice of four consecutive written pleadings (a memorial by the Claimant, a counter-memorial by the Respondent, a reply and a rejoinder), there would be only one simultaneous submission of written pleadings: a memorial by the Claimant and a counter-memorial by the Respondent.<sup>2</sup> After consultation with the parties and due

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<sup>2</sup> This limitation is a concession to the strictures of the FDI Moot competition.

deliberation by the Tribunal, the President announced that the pleadings are to be submitted within the following time-limit:

- The Claimant shall file its memorial by Sunday, 19 September 2010.
- The Respondent shall file its counter-memorial by the same date, Sunday, 19 September 2010.

17. Dates of Subsequent Sessions

It was decided that Arbitration Rule 43 and ICSID Arbitration Rule 13(2) shall govern with respect to the scheduling of sessions of the Tribunal subsequent to the first session. It was agreed that the hearing on 22 October 2010 will be tentatively scheduled for 4:00 pm<sup>3</sup> and continue the following two days.

18. Production of Evidence

Without prejudice to the power of the Tribunal to request the parties to produce any further evidence at any stage of the proceeding, it was agreed that each pleading is to be accompanied by the documentation on which it relies, and by signed statements of the witnesses and experts on which it relies.

The Tribunal may allow a party to submit documentation at another time due to extraordinary circumstances.<sup>4</sup>

19. Publication of the Decisions Relating to the Proceedings and of the Award

In accordance with Article 48(5) of the Convention the president invited the parties to consider whether they would consent to publish the award or any decisions rendered by the Tribunal.

20. The Award

It was agreed that in accordance with ICSID Arbitration Rule 46 the preparation of the Award would be drawn up and signed within 120 days after the closure of the proceedings. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

**II. Other Matters**

There being no further business, the President adjourned the meeting at 05:00 p.m. Sound recordings were made of the session and deposited in the archives of the Centre.

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<sup>3</sup> This time is subject to adjustment to accommodate the competition schedule.

<sup>4</sup> The FDI Moot Competition will be based exclusively on the facts and evidence provided by the organizers. Pleadings should not be accompanied by the documentation or by signed statements of the witnesses and experts; references to the evidence provided by the organizers will suffice. Further relevant facts may come forward in the course of clarifications issued by the organizers in response to Requests for Clarification.



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Secretary of the Tribunal  
Malibu, California, 15 March 2010

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President of the Tribunal  
Malibu, California, 15 March 2010

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## ANNEX 1

### **TREATY BETWEEN THE REPUBLIC OF BERISTAN AND THE UNITED FEDERATION OF OPULENTIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS**

The Republic of Beristan and the United Federation of Opulentia (hereinafter referred to as the "Contracting Parties") desiring to establish favourable conditions for improved economic co-operation between the two countries, and especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party; and acknowledging that offering encouragement and mutual protection to such investments based on international agreements will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties,

Hereby agree as follows:

#### Article 1

#### DEFINITIONS

For the purposes of this Agreement:

1. The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term "investment" comprises:

- a) movable and immovable property and any other right "in rem" including, in so far as they may be used for investment purposes, real guarantees on others' property;
- b) shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities in general;
- c) credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter;
- d) copyright, commercial trade marks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;
- e) any right of a financial nature accruing by law or by contract and any license, concession or franchise issued in accordance with current provisions governing the

exercise of business activities, including prospecting for cultivating, extracting and exploiting natural resources.

2. The term "investor" shall be construed to mean any natural or legal person being a national of a Contracting Party who effected, is effecting, or intending to effect, investments in the territory of the other Contracting Party.
3. The term "natural person", in reference to either Contracting Party, shall be construed to mean any natural person holding the nationality of that State.
4. The term "legal person", in reference to either Contracting Party, shall be construed to mean any entity established in the territory of one of the Contract in accordance with the respective national legislation such as public establishments, joint-stock corporations or partnerships, foundations or associations regardless of whether their liability is limited or otherwise.
5. The term "income" shall be construed to mean the money that has yielded or is still to yield by an investment, including in particular, profits, interest income, income from capital investment, dividends, royalties, returns for assistance and technical services and miscellaneous other considerations, including reinvested income and capital gains.
6. The term "territory" shall be construed to mean in addition to the areas lying within the land boundaries, the "maritime zones". The latter also comprise the marine and submarine zones over which the Contracting Parties have sovereignty, or exercise sovereign or jurisdictional rights, according to the International law.

## Article 2

### PROMOTION AND PROTECTION OF INVESTMENTS

1. Both Contracting Parties shall encourage Investors of the other Contracting Party to invest in their territory, and shall authorize these investments in accordance with their legislation.
2. Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party.
3. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.

## Article 3

### NATIONAL TREATMENT AND THE MOST FAVOURED NATION CLAUSE

1. Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to its own nationals or investors of Third States.

2. The treatment accorded to the activities connected with the investments of investors of either Contracting Party shall not be less favourable than that accorded to similar activities connected with investments made by their own investors or by investors of any Third Country.
3. The provisions of 1) and 2) of this Article do not apply to any advantages or privileges which one Contracting Party grants or may grant at some future time to Third States by virtue of its membership in Customs or Economic Unions, Common Market associations, Free Trade Areas, regional or subregional Agreements, international multilateral economic Agreements, or Agreements entered into in order to prevent double taxation or to facilitate cross-border trade.

#### Article 4

#### NATIONALIZATION OR EXPROPRIATION

1. (1) The Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.  

(2) Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

(3) The just compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards. Whenever there are difficulties in ascertaining the market value the compensation shall be calculated on the basis of a fair appraisal of the establishment's constitutive and distinctive elements as well as of the firm's activities components and results. Compensation shall include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment. In the event of failure to reach an agreement between the investor and the Contracting Party having liability, the amount of the compensation shall be calculated following the settlement of dispute procedure provided by Article 11 of this Agreement. Once the compensation has been determined it shall be paid promptly and authorization for its repatriation in convertible currency issued.
2. The provisions of paragraph 1. of this Article shall also apply to income from an investment, and, in the event of winding-up, to the proceeds of liquidation.

#### Article 5

#### COMPENSATION FOR DAMAGES OR LOSSES

Should Investors of one of the two Contracting Parties incur losses in their investments in the territory of the other Contracting Party, due to war or other forms of armed conflict,

states of emergency or other similar events, the Contracting Party in which the affected investment has been made shall offer adequate compensation. Compensation payments shall be freely transferable in convertible currency without undue delay.

The Investors concerned shall receive the same treatment as the nationals of the Contracting Party having liability, and, at all events shall be treated no less favourably than investors of Third States.

## Article 6

### REPATRIATION OF CAPITAL, PROFITS AND INCOME

1. Each of Contracting Parties shall guarantee that after inventors have complied with all their fiscal obligations, as well as all relevant administrative procedures, they may transfer the following abroad, without undue delay, in any convertible currency:
  - (a) capital and additional capital amounts used to maintain and increase investments;
  - (b) net income, dividends, royalties, payments for assistance and technical services, interest and any other profits;
  - (c) the proceeds of the total or partial sale liquidation of an investment;
  - (d) funds to repay loans relating to an investment and interest due thereon;
  - (e) remuneration and allowances paid to nationals of the other Contracting Party in respect of subordinate work and services performed in relation to an investment effected in its territory, in the amount and manner prescribed by current national legislation and regulations.
2. While considering the provisions of Article 3 of this Agreement, the Contracting Parties undertake to apply to the transfers mentioned in paragraph 1 of this Article, the same treatment that is accorded to investments effected by investors of Third States, if this is more favourable.
3. Both Contracting Parties may adopt provisions governing the manner of complying with the fiscal obligations referred to in paragraph 1 above.

## Article 7

### SUBROGATION

In the event that one Contracting Party or any of its institutions has provided an insurance guarantee in respect of non-commercial risks for investments effected by one of its investors in the territory of the other Contracting Party, and has made payments on the basis of that guarantee, the other Contracting Party shall recognize the assignment of the rights of the insured investor to the Contracting Party guarantor and its subrogation shall not exceed the original rights. In relation to the transfer of payments to the Contracting Party or its Institution by virtue of such subrogation, the provisions of Articles 4, 5 and 6 of this Agreement shall apply.

## Article 8

### TRANSFER PROCEDURES

The transfers referred to in Articles 4, 5, 6 and 7 shall be effected without undue delay and, at all events, within six months, provided that all fiscal obligations have been met. Transfers shall be made in a convertible currency at the prevailing exchange rate applicable on the date of the transfer.

## Article 9

### ESSENTIAL SECURITY

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests.

## Article 10

### OBSERVANCE OF COMMITMENTS

Each Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

## Article 11

### SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND THE CONTRACTING PARTIES

1. For the purpose of resolving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter, if the dispute cannot be settled amicably within six months of the date of a written application, the investor in question may in writing submit the dispute, at his discretion, for settlement to:
  - (a) the Contracting Party's Court, at all instances, having territorial jurisdiction;
  - (b) an ad hoc Arbitration Tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law ("UNCITRAL");
  - (c) the International Centre for the Settlement of Investment Disputes, for the application of the arbitration procedures provided by the Washington

Convention of 18th March 1965 on the Settlement of Investment Disputes between States and Nationals of other States.

2. Each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written submission of the investor under paragraph 1(b) or (c) above. Such consent, together with the written submission of the investor given under paragraph 1, shall satisfy the requirement for:
  - (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
  - (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
3. Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to any arbitration procedure or judicial procedures that may have been instituted until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the arbitration tribunal or the judgment of the court of law within the terms prescribed by ruling or the judgment, or any other terms that may derive from international or internal law applicable to the case at issue.

## Article 12

### SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Any disputes which may arise between the Contracting parties relating to the interpretation and application of this Agreement shall, as far as possible, be settled amicably through diplomatic channels.
2. In the event that the dispute cannot be settled within three months from the date on which one of the Contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of them, be laid before an ad hoc Arbitration Tribunal as provided in this Article.
3. The Arbitration Tribunal shall be constituted in the following manner: within two months from the receipt of the request for arbitration, each Contracting Party shall appoint a member of the Tribunal. These two members shall then select a national of a Third State to act as Chairman. The Chairman shall be appointed within three months from the date on which the other two members are appointed.
4. If the appointments have not been agreed within the time provided by paragraph 3 of this Article, either of the Contracting Parties, in default of any other arrangement, may apply to the President of the International Court of Justice to make the appointments within three months. In the event that the President of the Court is a national of one of the Contracting Parties or he is otherwise prevented from discharging the said function, the application shall be made to the Vice President of the Court. If the Vice-President of the Court is a national of one of the Contracting Parties or he is equally prevented from

discharging the said function for any reason, the most senior member of the International Court of Justice, who is not a national of one of the Contracting Parties, shall be invited to make the appointments.

5. The Arbitration Tribunal shall rule with a majority vote, and its decisions shall be binding. Both Contracting Parties shall pay the costs of their own arbitrator and of their own costs at the hearings. The President's costs and any other costs shall be divided equally between the Contracting Parties. The Arbitration Tribunal shall lay down its own procedures.

#### Article 13

##### RELATIONS BETWEEN GOVERNMENTS

The provisions of this Agreement shall be enforced irrespective of whether or not diplomatic or consular relations exist between the Contracting Parties.

#### Article 14

##### APPLICATION OF OTHER PROVISIONS

1. Whenever any issue is governed both by this Agreement and by another International Agreement to which both the Contracting Parties are parties, or whenever it is governed otherwise by general international law, the most favourable provisions, case by case, shall be applied to the Contracting parties and to their investors.
2. Whenever, as a result of laws, regulations, provisions or specific contracts, one of the Contracting Parties has adopted a more advantageous treatment for the investors of the other Contracting Party than that provided in this Agreement, they shall be accorded that more favourable treatment.

#### Article 15

##### ENTRY INTO FORCE

This Agreement shall become effective on the date on which both Contracting Parties have notified the other of the effected performance of their respective constitutional procedures.

#### Article 16

##### DURATION AND EXPIRY DATE

1. This agreement shall remain effective for 10 years as from the date in which the notification procedures indicated in Article 15 have been effected and it shall be tacitly renewed for further periods of 5 years, unless either Party terminates it by giving prior written notice thereof one year before any expiry date.
2. In the case of investments effected prior to the expiry dates of the present agreement, as provided in Article 16, the provisions of Articles 1 to 14 shall remain effective for a further five years after the aforementioned dates.

IN WITNESSS WHEREOF, the undersigned being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE AT Beristal, this twentieth day of March, in the year one thousand nine hundred ninety six, in English.

FOR THE GOVERNMENT OF THE REPUBLIC  
OF BERISTAN

FOR THE GOVERNMENT OF THE UNITED  
FEDERATION OF OPULENTIA

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## ANNEX 2

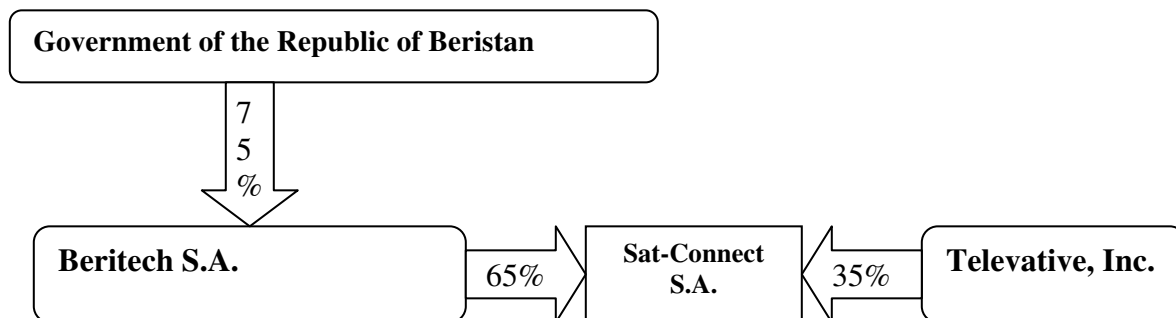
### UNCONTESTED FACTS

1. Claimant, Televative Inc., is a successful multinational enterprise that specializes in satellite communications technology and systems. It is a leading developer of new technologies in this field. Televative is a privately held company that was incorporated in Opulentia on 30 January 1995.
2. The Government of Beristan established a state-owned company, Beritech S.A., in March 2007. The Beristian government owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors, who have close ties to the Beristan government.
3. Beritech and Televative signed a joint venture agreement (the “JV Agreement”) on 18 October 2007 to establish the joint venture company, Sat-Connect S.A., under Beristian law. The Government of Beristan has co-signed the JV Agreement as guarantor of Beritech’s obligations. Sat-Connect’s corporate offices are located in Beristal, the capital city of Beristan.
4. Televative owns a 40% minority share in Sat-Connect, while Beritech owns a 60% majority stake. Of the nine members of Sat-Connect’s board of directors, Beritech has the right to appoint 5 directors, while Televative can appoint 4. A quorum of the board of directors is obtained with the presence of 6 members.
5. Sat-Connect was established for the purpose of developing and deploying a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users of this system anywhere within the vast expanses of Euphonia. Euphonia is a region encompassing almost one-fifth of the world’s surface, which includes Beristan, six other countries, and the Euphonian Ocean.



6. The satellite and communications technology that Sat-Connect will deploy can be used for civilian or military purposes. Several segments of the Beristian armed forces will use the Sat-Connect system.
7. The ownership structures for these entities is illustrated below:

**Diagram of Ownership Structures:**



8. On August 12, 2009, The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia. Both Televative and the Government of Opulentia have made statements to deny this published story.
9. On August 21, 2009, the chairman of the Sat-Connect board of directors, Michael Smithworth, made a presentation to the directors in which he discussed the allegations that had appeared in the August 12<sup>th</sup> article in The Beristan Times. The content of this meeting is disputed by Claimant.
10. On August 27, 2009, Beritech, with the support of the majority of Sat-Connect's board of directors, invoked Clause 8 of the JV Agreement, to compel a buyout of Televative's interest in the Sat-Connect project. Six directors were present at this meeting and one director, Alice Sharpeton, who had been appointed by Televative, refused to participate and left the meeting before its end. She later filed a protest that she had no prior notice concerning the proposed agenda for the meeting. Beritech then served notice on Televative on August 28, 2009, requiring the latter to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.
11. Thereafter, on September 11, 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristian army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were

associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

12. Televative's total monetary investment in the Sat-Connect project stands at US \$47 million.
13. On October 19, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US\$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. Televative has refused to accept this payment and has refused to respond to Beritech's arbitration request.
14. On October 28, 2009, Claimant requested arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified the Government of Beristan. In its request for arbitration, Claimant states that jurisdiction is established by the BIT between Beristan and Opulentia (Annex 1) and because both countries are contracting states to the ICSID Convention.
15. Beristan and Opulentia are ICSID Contracting States and have ratified the ICSID Convention. Beristan and Opulentia have also ratified the Vienna Convention on the Law of Treaties. Beristan and Opulentia have long had polite yet tense relations.
16. On 1 November 2009, the ICSID Secretary General registered for arbitration this dispute brought by Claimant Televative against the Government of Beristan.

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### ANNEX 3

#### EXCERPT FROM JOINT VENTURE AGREEMENT BETWEEN BERITECH S.A. AND TELEVATIVE INC. DATED 18 OCTOBER 2007

##### Clause 4 – Confidentiality

- (1) All matters relating to this Agreement and the Sat-Connect project, including all Confidential Information, shall be treated by each of the parties, including the JV company Sat-Connect, as confidential. Each of the parties and Sat-Connect agree that it will keep confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person or entity not authorized under this Agreement, without the prior written approval of the Sat-Connect board of directors except (i) where the information properly comes into the public domain, (ii) as required by law, or (iii) as may be necessary to enforce the terms hereof.

- (2) Confidential Information shall include all trade secrets, data, know-how, materials, products, technology, formulae, computer programs, specifications, compositions, improvements, inventions, discoveries, current and planned research and development, systems, structures, architectures, manuals, business plans, software, marketing plans, financial information, and other information developed during the Sat-Connect project, or disclosed or submitted, orally, in writing, or by any other media, to the Sat-Connect project by one of the parties. The parties shall not use any of the Confidential Information for any purpose other than for or in connection with the purposes of this Agreement.
- (3) Any dissemination of Confidential Information shall be only with written prior approval and in connection with the purposes of this Agreement, and shall be only to the employees, agents or affiliates who have a need to know said Confidential Information in order to carry out proper purposes and responsibilities related to this Agreement and the Sat-Connect project. Further, any such dissemination will be made only after such employees, agents and affiliates have agreed to comply with the terms and provisions of this Clause 4.
- (4) Any breach of this Clause 4 shall be deemed a material breach of the Agreement. This Clause will survive for 3 years after the expiration or termination of this Agreement or dissolution of the Sat-Connect project.

#### **Clause 8 – Buyout**

If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement. Under such circumstances, Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period +time from the execution of this Agreement until the date of the buyout.

#### **Clause 17 – Dispute Settlement**

The Agreement shall be governed in all respects by the laws of the Republic of Beristan. In the case of any dispute arising out of or relating to this Agreement, any party may give notice to the other party of its intention to commence arbitration. The parties must then attempt to settle the dispute amicably and, unless they agree otherwise, cannot commence arbitration until 60 days after the notice of intention to commence arbitration. The dispute shall then be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended. Each party waives any objection which it may have now or hereafter to such arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute.

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### **ANNEX 4**

#### **IMPORTANT NOTE TO TEAMS ON CLARIFICATIONS**

Registered teams may request clarification of additional relevant legal and factual issues in connection with the problem.

Each team may pose 8 questions by 4 June and a further 8 by 6 August 2010.

Each team shall post its questions on an internet bulletin board accessible to all registered teams, i.e., each team can see the questions posted by other teams. Details about the URL and access credentials will be given to all teams after the registration deadline for teams has passed.

The organisers' responses (clarifications) will be posted on 20 June and 22 August 2010 respectively. Otherwise, the organisers will decide in their sole discretion as to the relevance of the requested information, and whether and how to respond in the best interests of a fair and educational competition.