SECOND ANNUAL
FOREIGN DIRECT INVESTMENT MOOT
22-24 OCTOBER 2010

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceedings between

TELEVATIVE INC [Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN [Respondent]

MEMORIAL FOR CLAIMANT
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LIST OF BOOKS


STATUTES AND TREATIES

- BIT between Germany and Pakistan, 1951
- *ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*,

- **ICSID Arbitration Rules.**
- United Nations, Report
- **UNITED NATIONS, Report of the International Law Commission on the work performed during its 32nd session, p. 87.**

**JOURNALS AND ARTICLES**

- **KATIA YANNACA, Interpretation of the umbrella Clause in Investment Agreements, OECD Working Papers on International Investment, No. 2006/3.**
• CHRISTOPHER SCHREUER, "The Concept of Expropriation under the ETC and other Investment Protection Treaties", (revised 20 May 2005).
• K. HOBER, investment Arbitration in Eastern Europe: Recent cases on Expropriation, 14 The American Review of International Arbitration 399 (2003).
• HANS KELSEN, "The Pure Theory of Law" 1934.
• CRAWFORD JAMES, Second Report on State Responsibility op. cit., p. 31
• K.A. BYRNE, Regulatory Expropriation and State Intent, 38 Canadian YBIL 89, 96 (2000)

LIST OF CASES

• CMS Gas Transmission Co. v. Argentina, ICSID Case no. ARB/01/8; IIC 303 (2007)
  Cited as: CMS v Argentina
• Lanco International Inc v Argentina, ICSID Case No. ARB/97/6.
  Cited as: Lanco International v Argentina
  Cited as: S.A. & Vivendi Universal v. Argentine Republic
• Aguas Del Tunari, S.A., v Republic of Bolivia, ICSID Case no. ARB/02/3.
  Cited as: Bolivia case
• Eureko B.V. v Poland, Partial Award 19 August 2005.
  Cited as: Eureko B.V v Poland
• **Fedax N.V. v. Republic of Venezuela**, ICSID Case No. ARB/96/3
  Cited as: Fedax N.V v Republic of Venezuela

• **Société Générale de Surveillance v. Republic of the Philippines**, ICSID Case No. ARB/02/6.
  Cited as: SGS v Philippines.

• **Agricultural products Limited v. Srilanka** ICSID case no. ARB/87/3
  Cited as: Agricultural products Limited v. Srilanka

• **Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica**; ICSID Case No. ARB/96/1 Award of Feb. 17, 2000.
  Cited as: Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica

• **The First ECT Arbitral Award**, 16 December 2003 (unpublished)

  Cited as: CME v The Czech Republic

• **Mondev International Ltd. v. United States of America** (ICSID Case No. ARB (AF)/99/2), Award, (11 October 2002), 6 ICSID Reports 192.
  Cited as: Mondev International Ltd. v. United States of America

  Cited as: MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile

• **Suez and Ors v Argentina, and joined case**, Decision on Liability, ICSID Case No ARB/03/19; IIC 443 (2010) 30 July 2010.
  Cited as: Suez and Ors v Argentina, and joined case

• **Saluka Investments B.V. v. the Czech Republic** (UNCITRAL), Partial Award (17 March 2006), at para. 262
  Cited as: Saluka Investments B.V. v. the Czech Republic

• **INA Corporation v. The Islamic republic of Iran** 8 Iran-US CTR, pp. 373, 380; 75 ILR, p. 603.
  Cited as: INA Corporation v. The Islamic republic of Iran

• **LG&E Energy Corp and ors v Argentina**, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36
  Cited as: LG&E Energy Corp and ors v Argentina

• **National Grid PLC v Argentina**, Award, Ad hoc—UNCITRAL Arbitration Rules; Case 1:09-cv-00248-RBW; IIC 361 (2008)
Cited as: National Grid PLC v Argentina

- Azurix Corp v. Argentine Republic, ICSID Case No. ARB/01/12, 14 July 2006.
  Cited as: Azurix Corp v. Argentina Republic

- Amco I v. Indonesia, Award of November 20, 1984.
  Cited as: Amco I v. Indonesia

- Amco II v. Indonesia, Award in the Resubmitted Case of June 5, 1990.
  Cited as: Amco II v. Indonesia

- Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, Award, ICSID Case No ARB/05/16; IIC 344 (2008)
  Cited as: Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan

- Amco Asia Corporation and Others v. The Republic of Indonesia, ICSID Case No. ARB/81/1, Award on the Merits of 20 November 1984, 1 ICSID Reports 413.
  Cited as: Amco Asia Corporation and Others v. The Republic of Indonesia

- Marvin Feldman v Mexico, ICSID Case No. ARB/(AF)/99/1, Award of December 16, 2002
  Cited as: Marvin Feldman v Mexico

- Suez and Ors v Argentina, and joined case, Decision on Liability, ICSID Case No ARB/03/19; IIC 443 (2010) 30 July 2010
  Cited as: Suez and Ors v Argentina, and joined case

- Metalclad v Mexico, ICSID Case No. ARB (AF)/97/1, Award (Ad hoc), 25 August 200, IIC 161 (2002)
  Cited as: Metalclad v Mexico

WEBSITES

# LIST OF ABBREVIATIONS

1. Art.  
   Article

2. Cl.  
   Clause

3. ICSID  
   International Centre for Settlement of  
   Investment Dispute

4. ICSID Convention  
   Convention on the Settlement of Investment Disputes  
   between States and Nationals of other States

5. JV  
   Joint Venture

6. JVA  
   Joint Venture Agreement Between Beritech S.A. &  
   Televative Inc.

7. BIT  
   Bilateral Investment Treaty

8. Beristan-Opulentia BIT  
   Treaty Between The Republic of Beristan and the United  
   Federation of Opulentia concerning the Encouragement and  
   Reciprocal Protection of investment.

9. V.  
   Versus

10. E.g.  
    Exempli gratia

11. Ibid  
    ibidem

12. i.e.  
    *Id est* (that is)

13. U.S.C  
    United States Code

14. UN  
    United Nations

15. UNCTAD  
    United Nations Conference on Trade and Development

16. P/pp  
    Page/Pages

17. Vol.  
    Volume

18. No.  
    Number

19. VCLT  
    Vienna Convention on Law of treaties

20. FET  
    Fair and Equitable Treatment

    Government

22. ICJ  
    International Court of Justice

23. ILC  
    International Law Commission

24. IP  
    Intellectual Property

25. Para  
    Paragraph

26. U.N.T.S  
    United Nations Treaty Series
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<th>No.</th>
<th>Abbr.</th>
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<tr>
<td>27.</td>
<td>OUP</td>
<td>Oxford University Press</td>
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<td>28.</td>
<td>CUP</td>
<td>Cambridge University Press</td>
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<td>29.</td>
<td>ILC</td>
<td>International Law Reporter</td>
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<td>30.</td>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>Section</td>
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<td>32.</td>
<td>USD</td>
<td>United States Dollar</td>
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<td>33.</td>
<td>UNO</td>
<td>United Nations Organisation</td>
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<td>FIL</td>
<td>Foreign Investment Law</td>
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<td>ECT</td>
<td>Energy Charter Treat</td>
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<td>P.C.I.J.</td>
<td>Permanent Court of International Justice</td>
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<td>CIL</td>
<td>Customary International Law</td>
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MEMORANDUM FOR CLAIMANT

STATEMENT OF FACTS

1. Opulentia and Beristan are the two Contracting Parties under BIT. Televative (hereafter called as “Claimant”) is a successful multinational enterprise that specializes in satellite communications technology and systems. It was incorporated in Opulentia on 30 January 1995.

2. The government of Beristan (hereafter called as “Respondent”) established a company, Beritech S.A., in March 2007. The Beristan Gov owns a 75% interest in Beritech and rest is owned by wealthy Beristian investors.

3. On 18 Oct 2007, Beritech and Televative signed a JVA, and thereafter Televative becomes 40% minority share holder while the Beritech owns rest 60%.

4. 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. The satellite and communications technology that Sat-Connect will deploy can be used for civilian or military purposes.

5. On August 12, 2009, The Beristan Times published an article challenging national security. A highly placed Beristan government official indicated that critical information has been passed from the Sat-Connect project to the Government of Opulentia. Both Televative and Opulentia denied the story.

6. 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 allegations regarding the August 12th article. The content of this meeting is disputed by Claimant.

7. On August 27, 2009, Beritech invoked Cl. 8 of the JVA, to compel a buyout of Televative’s interest in the Sat-Connect project. Six directors were present at the meeting and one director, Alice Sharpeton, appointed by Televative, refused to participate in the meeting and left the meeting before its end. Later it was protested by her that she had no prior notice concerning the proposed agenda for the meeting. On 28 August, 2009 Televative was served by a notice from Beritech requiring the former to hand over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

8. Thereafter, on 11 September, 2009, staff from “CWF” the civil engineering section of the Beristian army took over all the sites and facilities of the Sat-Connect project.

1 First Clarification, Question 178
Personnel associated with Televative were removed from the project sites and were eventually evacuated from the Beristan.

9. Televative was given 14 days to withdraw its seconded staff from all Sat Connect facilities who still remained thereafter were asked by the Civil Work Force to leave the facilities immediately on September 11 2009.2

10. 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 Art. 11 of the BIT.3

11. Televative’s total monetary investment in the Sat-Connect project stands at US $47 million.

12. On 19 October, 2009, Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech paid US $47 million into an escrow account which has been made available for Televative. Televative refused to accept this amount and also refused to respond to Beritech’s arbitration request.

13. It was Televative’s strategic decision not to initiate arbitration under Cl. 17 JVA out of fear of losing its standing in ICSID arbitration.4

14. On 28 October, 2009, Claimant requested arbitration in accordance with ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration proceedings and notified Government if Beristan. Claimant establishes the jurisdiction under Beristan-Opulentia BIT (Annex 1), to which both the countries are parties.

15. Beristan and Opulentia are ICSID Contracting States and have ratified the ICSID Convention; also they have ratified the Vienna Convention on the Law of Treaties. Both the countries have long polite yet tense relations.

16. On 1 November 2009, the ICSID Secretary General registered for arbitration.

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2 Second Clarification, Question 248.
3 First Clarification, Question 133.
4 Second Clarification, Question 256.
SUMMARY OF ARGUMENTS

17. JURISDICTION. The dispute arises between Televative and Government of Beristan. The dispute satisfies the requirements for jurisdiction under Art. 25(1) of ICSID Convention: the parties’ consent to the arbitration under ICSID, and the requirements ratione personae (jurisdiction over the parties to the dispute) and ratione materiae (over the subject matter of the dispute). First, the matter fulfills all the requisites of ICSID jurisdiction, so the matter is competent to be decided in the Tribunal. Second, the dispute settlement clause of the JV Agreement is irrelevant as far as the present dispute is concerned. Third, the Tribunal has jurisdiction over the contract based claims of Claimant arising under JVA by the virtue of Art 10 of the Beristan-Opulentia BIT. Art. 10 is the ‘umbrella clause’ which covers the entire contractual obligation with regard to the investment made. The main aim of this provision is to provide protection to the investor. Fourth, This Cl. is part of bilateral treaty breach of which creates obligation under international law.

18. MERITS. In the present matter Claimant has special rights under Art. 2 and Art. 10 of protection of investment. Respondent State as a guarantor of rights has materially breached the JVA and the provisions of the Beristan-Opulentia BIT by improperly invoking Cl. 8 of JVA. The decision of buyout was taken without proper notice to Claimant and amounted to unlawful indirect expropriation. Respondent has violated the general principals of international law and CIL by denying fair and equitable treatment to Claimant. Respondent have invoked Cl. 8 of JVA relying upon Art. 9 based on unsubstantiated assertions in order to have complete title over the Sat-Connect Project and depriving Claimant of their Intellectual Property.
ARGUMENTS ADVANCED

PART ONE: JURISDICTION

I. WHETHER THE TRIBUNAL HAS JURISDICTION IN VIEW OF CLAUSE 17 (DISPUTE SETTLEMENT) OF THE JOINT VENTURE AGREEMENT (“JV AGREEMENT”)?

19. The present matter is concerned with the dispute between Televative and Government of Beristan. Respondent relying on a newspaper article charged false allegations on Claimant and improperly expropriated Claimant’s interest in Sat-Connect and deprived Claimant from their right of fair and equitable treatment; as a result Claimant approached ICSID for relief. The Tribunal has jurisdiction to decide the matter under Art. 25 of ICSID. Respondent has raised jurisdictional objections in accordance with Cl. 17 of JVA and further alleges that the claims are incompetent to be governed by the BIT as they are contractual in nature.

20. Claimant instituted the proceedings in front of the present Tribunal against Respondent on October 28, 2009. Claimant shall establish that the matter falls within the jurisdiction of both ICSID and the Tribunal and shall also prove all Respondent’s objections as ill-founded. ICSID an arbitration center is the preeminent forum in which Claimant shall seek compensation from Respondent, who have improperly expropriated their investments.

21. The scope of the Jurisdiction of the Centre for the present matter is more specifically defined in Art. 25. The requirements for the establishments of such jurisdiction can be divided into three fundamental categories: firstly, the parties’ consent to submit their dispute to ICSID arbitration; secondly, the Tribunal’s competence ratione personae over the parties to the dispute and lastly, the Tribunal’s competence ratione materiae, i.e. over the subject matter of the dispute.

22. In ICSID Arbitration requires the consent of both Claimant and Respondent. Art. 25(1) of the ICSID (Convention) provides: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or

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any constituent sub division or agency of a Contracting state designated to the Centre by the state) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre, when the parties have given their consent, no party may withdraw it unilaterally.⁶

(Emphasis Added)

23. Respondent contends that this Tribunal lacks jurisdiction as
   i. Claimant’s claims are contractual in nature, and
   ii. Claimant has improperly reformulated them as claims arising under the Beristan-Opulentia BIT.

24. In the instant case, the host state wrongfully expropriated foreign assets and violated its BIT guarantees of fair, non-discriminatory treatment for foreign investors. Claimant’s rights have been violated under general international law and applicable treaties, and in particular Art 2 (FET), Art 4 (expropriation) and Art 10 (observance of commitments) of the Beristan-Opulentia BIT⁷.

25. ICSID arbitration tribunals earlier have also ordered host States to pay damages for wrongful treatment of foreign investors' assets because the host State either wrongfully expropriated foreign assets, or violated its BIT guarantees of fair, non-discriminatory treatment for foreign investors.⁸ In the present case, the facts are similar to the above cases referred and so Claimant can seek remedy from this Tribunal. Also the Government of Beristan plays a role of Guarantor, as it co-signed the JV Agreement as guarantor for Beritech’s obligation.⁹

A. THE PRESENT MATTER FALLS WITHIN THE PURVIEW OF THE ICSID JURISDICTION UNDER ART. 25

26. ICSID jurisdiction offers certain key advantages one of them being attempts to bring expropriation claims against foreign States in the courts of the investor's home State are

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⁷ Beristan-Opulentia BIT, Record, Annex 1, p 10-13.
⁸ CMS Gas Transmission Co. v Argentina (2005)
often frustrated by the foreign State's ability to claim sovereign immunity. In the instant case the expropriation claims are brought under the Tribunal as it is neutral forum, and as a practical matter, ICSID is often the only forum in which legal claims can be brought against the host State.

27. Although ICSID jurisdiction has spawned much arbitral jurisprudence, the essential pre-requisites to such jurisdiction are:

i. that there be an “investment” dispute;
ii. that the host State be an ICSID Contracting State;
iii. that the investor be a “national of another Contracting State;” and
iv. that both host State and investor have “consented” to arbitrate before ICSID.

Firstly, the dispute in the present matter is a legal dispute arising directly out of an investment. According to Art. 1 of Beristan-Opulentia BIT 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. Art. 1 (b) reads as:

“It comprises of shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Gov and public securities in general.”

In order for the directness requirement to be satisfied, the dispute and investment must be ‘reasonably closely connected.’ As Professor Schreuer notes, ‘disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment….’ In the present case, illegal expropriation of Claimant’s interest in Sat-Connect by Beritech was a clear dispute arising directly out of Claimant’s investment in Sat-Connect; and further

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10 Although foreign sovereign immunity from suit is no longer available for most commercial transactions, most legal systems still confer general immunity from measures of attachment and execution. See, e.g., U.S. Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C., p 1609-11. The FSIA affords a limited “expropriation exception” to foreign sovereign immunity, thus permitting litigation in the United States courts against a foreign State where “rights in property” have been “taken in violation of international law” and where certain further links exist between those actions and the United States.

11 ICSID Convention, Art. 25 (1).


13 Id.
breach of the FET standard helps us to conclude that the matter is in accordance with the first pre-requisite.

28. Secondly, it has been clearly stated in the facts that both Beristan and Opulentia are Contracting States and both have ratified the ICSID Convention.\textsuperscript{14}

29. Thirdly, the nationality of the investor; \textit{Art 25(1) ICSID} jurisdiction states, in relevant parts:

\begin{center}
the jurisdiction of the Center shall extend to [disputes]... between a Contracting State...and a national of another Contracting State.
\end{center}

Claimant was juridical person incorporated under the laws of Opulentia. Thus the relevant provision for determining Claimant’s nationality for the purpose of establishing the competence of the present Tribunal is \textit{Art. 25(2) (b) of the ICSID Convention}. This provision imposes two criteria for determining the nationality of a corporation; firstly, the place of incorporation, i.e., the law under which the corporation is formed, and Secondly, the place of its seat, i.e., the state where the headquarters or the center of its management is located.\textsuperscript{15} Opulentia is the Contracting State, and Telelative is a privately held company that was incorporated in Opulentia on 30 January 1995.\textsuperscript{16} Thus Claimant submits that both the conditions are satisfied and the Tribunal can be said to have jurisdiction \textit{ratione personae} in accordance with the \textit{Art. 41 of the ICSID Convention} and also has competence \textit{ratione personae} over the dispute.

30. Fourthly, it is undisputed between the parties that both Beristan and Opulentia have ratified the ICSID Convention and are Contracting States under \textit{Art. 11 of the Beristan-Opulentia BIT}.

31. Thus, Claimant’s argument focuses only on establishing that Claimant is to be treated as a national of the other Contracting Party i.e. United State of Opulentia for the purpose of the ICSID Convention. Moreover, the present dispute is legal in nature and is directly arising out of investment. So, it may be established hereby that the matter fulfills all the pre-requisites of the jurisdiction of the Tribunal and hence matter fits for the jurisdiction of the Tribunal.

\textsuperscript{14} Uncontested facts, Record, Annex 2, p 18.
\textsuperscript{15} UN conference on trade and development, Dispute settlement, EDM/Misc.232/Add.3
\textsuperscript{16} Uncontested facts, Records, Annex 2, p16.
B. THE ISSUES RAISED IN THE PRESENT MATTER ARISE FROM THE BERISTAN-OPULENTIA BIT AND THE FORUM SELECTION CLAUSE IN THE AGREEMENT CANNOT OVERRIDE THE BIT DISPUTE SETTLEMENT CLAUSE.

32. Respondent contends that Claimant’s claims are contractual in nature and so the Tribunal does not have jurisdiction to decide the case; for the case to be in jurisdiction of the Tribunal claims should arise under the treaty signed between both the Contracting States but all the contentions of Claimant are contractual in nature. However Claimant shall demonstrate that all the claims contended in the present matter are treaty based and arise out of BIT and not the JV Agreement.

33. Claimant asserts that Respondent illegally expropriated its interest in Sat-Connect and refused to pay Claimant’s market-priced prices for its interest in Sat-Connect which is in contradiction to Art. 4(2) of Beristan-Opulentia BIT, and also Art.4 (3) states, as relevant

“The just compensation shall be equivalent to the real market value of the investment ........”

Claimant asserts that Respondent illegally expropriated its interest in Sat-Connect, because Beristan is in possession of Claimant’s contribution of capital, research and development to the Sat-connect project and refused to pay market-based prices for its interest in Sat-Connect. The total monetary investment in the Sat-Connect project stands at USD 47 million and Beritech paid the same amount into an escrow account, which was made available for Televative. But Claimant did not accept the amount and held it pending. Art. 31(2) of the VCLT 17 requires that the interpreter as one part of his task look to the “ordinary meaning” of a word or phrase unless a “special meaning” was intended by the parties. According to Art.4 (3) of BIT the compensation should be equivalent to the real market value of the investment and should also include interest calculated on a six-month basis. But Beritech merely returned the total monetary investment of Televative which is in contradiction to Art.4 of Beristan-Opulentia BIT.

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34. Claimant states that improper expulsion from the Sat-Connect project and the immense pressure of respondent forced the personnel to leave the project site and further the land of Beristan. Also the forcible removal of the remaining personnel by Beristan military forces and improper expropriation of its interests in Sat-Connect were a result of a conspiracy against Claimant. Such acts violate Claimant’s rights under Art. 2 (Promotion and Protection of Investments) which states, in relevant parts:

(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 FET and full protection and security of the investments of investors of the other Contracting Party.

(3) ……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.

Respondent breach the FET 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 JVA. Also the investments of claimant’s were subjected to unjustified or discriminatory measures, by way of expropriating Claimant’s interest in Sat-Connect.

All these acts of Respondent violate the rights of Claimant conferred under Beristan-Opulentia BIT. It deprives the investor of their right to FET in the host state and which is in contradiction to Art. 4 of Beristan-Opulentia BIT and hence it is a claim arising under the BIT.

35. Claimant also submits that the dispute resolution provision of the JVA is irrelevant, as the present claims are brought under the Beristan-Opulentia BIT and are therefore distinct from any contract claims; and treaty based claim cannot be resolved according to the host state laws as the treaty is between two countries and violation of any such agreement cannot be governed by any of the private state laws. Only international laws

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18 Beristan-Opulentia BIT, Annex 1, Record, p 9.
can be applicable which are neutral in nature and so not biased to any of the parties. Hence, Claimant decided to approach ICSID.

36. Claimant also asserts that Respondent breached the JVA by preventing Claimant from completing its contractual duties and improperly invoking the buyout Cl. in the JVA. Claimant asserts these contract claims by virtue of Art. 10 of the Beristan-Opulentia BIT which talks about Observance of Commitments and reads as follows:

“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.”

Respondent decide to buyout Claimant under Cl. 8 of the JVA and justify themselves on national security grounds, and also replaced Claimant’s seconded personnel, thus preventing Claimant to complete their Contractual Duties. The exercise of Beritech’s rights under Cl. 8 of the JVA to buyout Claimant is arbitrary in nature. Claimant was neither given any proper notice nor was provided with an opportunity to respond to the false charges raised against them. This is a clear violation of the Principle of Natural Justice.

37. The above acts of Respondent are in breach of Art. 10 of the BIT which binds Respondent “to observe all the commitments and not act contrary to the same.” The host country’s consent extended to all BIT provisions, including the umbrella Cl. (Art. 10). The investor-state contract is one of the obligations or commitments the host country was bound to observe under the umbrella Cl. Claimant emphasizes that the claims it raises in its Request for Arbitration are brought under the Beristan-Opulentia BIT and not under the JVA. In particular, Claimant argues that its action against Beristan is an “entirely separate cause of action” distinct from claims brought under the JVA. As such, Claimant states: “an exclusive jurisdiction Cl. under a JVA will thus have no effect on any action brought under a bilateral investment treaty.”

38. In the leading case of Lanco International v Argentina19, it was found that Argentina’s settlement Cl. in the concession agreement did not supplant consent to ICSID jurisdiction in BIT. As signatories to the BIT, the United States and Argentina made a generic offer to submit to international arbitration as selected by the investor.

19 Lanco International v Argentina
The investor consented by submitting the dispute for ICSID arbitration. Therefore, the consent of both parties required by Art. 25(1) of the ICSID Convention was present.

39. In furtherance of the above, the case of Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic (“Vivendi”)\(^\text{20}\) state that, even where an explicit and affirmative exclusive jurisdiction Cl. exists within a JVA, such a Cl. does not affect the jurisdiction of an ICSID tribunal in respect to a claim made under a BIT. ICSID tribunals derive their jurisdiction solely from the consent given by countries in the BIT. While the BIT provides for arbitration in a neutral forum such as ICSID, the investor-state contract usually contains a forum-selection Cl. specifying the courts or tribunals of the host country. It is now widely accepted that ICSID tribunals have jurisdiction over BIT claims notwithstanding a forum-selection Cl. in the contract.\(^\text{21}\)

40. In the same vein, a Tribunal in the Bolivian case\(^\text{22}\), found that the jurisdiction of the Bolivian courts recognized under the Concession Agreement, even if found to be exclusive, did not extend to the same obligations or parties rose by Claimant under the BIT.

41. Claimant in the instant proceedings raises a claim against Government of the Republic of Beristan, who is party to the Beristan-Opulentia BIT, and not to the JVA. So the claims arise under the Treaty and not the JVA, for the reason that Gov. of Beristan is not bound by the JVA.

42. Likewise, assuming that Cl. 17 was an exclusive forum selection Cl. for disputes arising under the JVA, Claimant in the instant case seeks to establish a breach of an obligation under Beristan-Opulentia BIT and not under JVA but rather alleges a breach of an obligation existing under the Beristan-Opulentia BIT. The circumstance that a claim under the JVA and a claim under the BIT against Beristan could both point to the same set of facts should not blur the legal distinction between the two types of claims. It is often the case that one set of facts may give rise to disputes under different laws in different fora.

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\(^{20}\) Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic (2000).

\(^{21}\) Matthew Wendlandt, SGS v Phillipines and the role of ICSID Tribunal in Investor-State Disputes, The University of Texas School of Law (2008).

43. The applicable law is to be found under the Beristan-Opulentia BIT under Art. 11 which provides for jurisdiction of the Tribunal. BIT involves consent to arbitration before ICSID; jurisdiction under the BIT is limited by the jurisdictional provisions of the ICSID Convention. The same was also observed in *Bolivian case*.\(^\text{23}\) The applicable law for interpretation of the BIT is that to be found in CIL.

44. In conclusion, Claimant submits that the Cl. 17 of the JVA is irrelevant as Claimant’s bring their claims under the Beristan-Opulentia BIT, and not under the JVA. In spite of an exclusive forum-selection Cl. in JVA, the Dispute Settlement Art. of the BIT will be preferred over any such provision, as the former cannot have any effect on any action brought under a bilateral investment treaty. Although both contractual claims and treaty based claims arise from the same set of facts, the law applicable to them shall be different. One will be governed by the municipal law while other by the international law, the two shall not be interchanged. In the present matter the claims are not based on the Agreement but assert a cause of action under the BIT.

For all the above reasons Claimant requests the Tribunal to find that the present matter falls within the jurisdiction of ICSID Tribunal.

II. WHETHER THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT’S CONTRACT BASED CLAIMS ARISING UNDER THE JV AGREEMENT BY VIRTUE OF ART. 10 OF THE BERISTAN–OPULENTIA BIT.

45. The Tribunal has jurisdiction over Claimant contract based claims arising under JVA by virtue of *Art.10 of the Beristan – Opulentia BIT*. Claimant seeks arbitration before the ICSID on the basis of *Cl. 1(c) of the Art. 11 of the Beristan-Opulentia BIT*. In the present case *Art.10 the Beristan – Opulentia BIT* clearly states that each party shall constantly guarantee the observance of any obligation it has assumes with regards to investments in its territory by investors of other contracting party.

46. *Art. 25(1) of the ICSID Convention* required only that the dispute arise directly out of an investment regardless of the contractual or treaty nature of the dispute.\(^\text{24}\) In the

\(^{23}\) *Ibid*.

\(^{24}\) Omar E. Garcia-Bolivar, “*The recent jurisprudence of ICSID on jurisdiction*” (2004).
MEMORANDUM FOR CLAIMANT

instant dispute the matter is directly arising from investment, so the Tribunal has jurisdiction over the claims regardless they are contractual or treaty based.

47. The matter before the Tribunal deals with the legal rights of Claimant. Respondent illegally expropriated Claimant’s interest in the Sat-Connect neglecting the contribution of Claimant in capital, research and development. Moreover Beristan had not paid the market-based price to Claimant. Under the buyout provision, Beritech paid significantly less than what Claimant would receive if it were to sell its interest to 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 IP, knowhow and the trade secrets that have been developed and now controlled by Sat-Connect in which Beritech owns the majority share of 60%.

48. This is clearly a violation of rights of the Televative by the Beritech and the Government of Beristan. Moreover, on September 11, 2009, staff from the civil works force the civil engineering section of the Beristan army secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were associated with the Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

49. A dispute arising out of an investment contract will be a “dispute with respect to investments” in the same way an alleged expropriation would be. In the instant matter the dispute has arose due to investment made by Claimant Televative in the country of Beristan. Claimant invested through the JVA signed by Televative and Beritech, state owned company of Beristan. The Government of Beristan co-signed the JVA as guarantor of Beritech’s obligation.

50. In an award rendered in Eureko v Poland; the Tribunal stated: “Any obligations” is capacious; it means not only obligations of a certain type, but ‘any’ – that are to say, all – obligations. It can be inferred that these obligation also takes into account the performance of contractual duties and responsibility which arise under the contract. About the observance of “any undertakings”, the Abs-Shawcross Draft plainly included all contractual investment obligations within its scope, including those between a state

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26 Eureko B.V v Poland, Partial Award.
and foreign private investors since an “undertaking” is generally understood to be broader than a contract and thus encompasses obligations arising from a contract.\textsuperscript{27} The \textit{Art.10 of the BIT} in the present dispute also mentions “any obligation”. Hence this takes into purview all the contact based claims.

\textbf{A. ART.10 OF THE BERISTAN-OPULENTIA BIT IS THE “UMBRELLA CLAUSE”, WHICH ENSURES FULLFILMENT OF CONTRACTUAL OBLIGATION}

51. In general, BITs address four substantive issues:

(i) Conditions for the admission of foreign investors to the host State;

(ii) Standards of treatment of foreign investors;

(iii) Protection against expropriation; and

(iv) Methods for resolving investment disputes.\textsuperscript{28}

The \textit{Art.10 of the BIT} should be considered as an umbrella Cl. of this bilateral investment treaty. They are often referred to as ‘umbrella clauses’ because they put contractual commitments under the BIT’s protective umbrella.\textsuperscript{29} The umbrella clause is a treaty provision found in many BITs that requires each Contracting State to observe all investment obligations it has assumed with respect to investors from the other Contracting State.\textsuperscript{30} The idea behind the metaphor is that an umbrella clause brings otherwise independent investment arrangements between a Contracting State and private investors from the other Contracting State under the treaty’s “umbrella of protection. The Tribunal in \textit{SGS v Philippines} \textsuperscript{31} decided that the umbrella clause applies to all breaches of the relevant investor-State contract. The Tribunal, therefore, had jurisdiction over contractual disputes arising under the Agreement, including any purely contractual claims that were not also premised on the BIT’s substantive provisions.

\textsuperscript{27} Katia Yannaca, “Interpretation of the the umbrella Clause in Investment Agreements”, OECD Working Papers on International Investment .

\textsuperscript{28} George M. von Mehren et al., Navigating through Investor-State Arbitrations: an Overview of Bilateral Investment Treaty Claims.

\textsuperscript{29} C. Schreuer, “Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road”.

\textsuperscript{30} Judith Gill Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases .

\textsuperscript{31} An example of an umbrella clause is Article X of the Switzerland-Philippines BIT, which provides that “[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.”

SGS v Philippines(2006)
B. THE BREACH OF UMBRELLA CLAUSE CREATES BREACH OF BILATERAL TREATY WHICH INTURN CREATES OBLIGATION UNDER INTERNATIONAL LAW

52. The umbrella Cl. ensures observance of the commitment undertaken by both the contracting parties. This clause is a part of a bilateral treaty. Therefore, it creates an obligation in customary international law according to the VCLT. Art. 38(1) of ICJ states that treaties are source of international law. It is also recognized that “treaties may furthermore elevate contractual undertakings into international law obligations, by stipulating that breach by one State of a contract with a private party from the other State will also constitute a breach of the treaty between the two States”32. It can be inferred that in present case the claims arising under the contract are basically international law obligation since the breach of a contract between a state and investor by the state will also constitute breach of the treaty.

53. An investment treaty would transform a mere contractual obligation between state and investor into an international law obligation, in particular if the treaty included a clause obliging the state to respect such contract.33 The contractual obligation have transform into international law obligation in the present case.

54. The ‘Umbrella Clauses’ have been added to BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as ‘umbrella clauses’ because they put contractual commitments under the BIT’s protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT’s substantive standards. In this way, a violation of such a contract becomes a violation of the BIT”.34 It can be inferred that the instant matter is violation of international bilateral treaty which is concerned with investment in a state by a company registered in another state. Beristan is violating the BIT by preventing claimant from completing its contractual duties and improperly invoking the buyout clause in the JVA. The Televative can assert these contract claims by the virtue of Art. 10 of the Beristan-Opulentia BIT.

55. The history of the Umbrella Cl. makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an

33Supra note 21.
34Supra note 23.
international forum. Therefore in the instant matter, the contract based claims arising out of investment agreement i.e. JV agreement can be resolved under the treaty between the two contracting parties. In the instant case, the language of the Art.10 clearly signifies that it is umbrella clause of the Beristan-Opulentia BIT. It is read as each party shall constantly guarantee the observance of any obligation it has assumes with regards to investments in its territory by investors of other contracting party. Under present umbrella clause all contract claims have been to the level of BIT claims since Beristan was obliged under the clause to “constantly guarantee” its investment “commitments” to investors, which included all contractual commitments. Beritech improperly invoked the buyout, which stopped the Televative to perform their contractual obligation. Therefore, the contention of the respondent that Claimant’s claims are contractual in nature is baseless.

56. UNCTAD\textsuperscript{36} analysis of the provision notes that “the language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally. A provision of this kind might possibly alter the legal regime and make the agreement subject to the rules of international law”. One of the main purposes of ICSID is to ‘facilitate the settlement of disputes between States and foreign investors’ with a view to ‘stimulate a larger flow of private international capital into those countries which wish to attract it’\textsuperscript{37}.

57. As it is above mentioned that UNCTAD that the umbrella clause of the BIT is broad enough to cover the contractual claims of claimant which is subject to international law. Thus, the Beristan-Opulentia BIT is broad enough to cover the contractual claims under the JVA with respect of the investment which should be in accordance with international law.

65. The Beristan-Opulentia BIT is a treaty between two countries. Therefore it should be governed by \textit{Art. 31 of the Vienna Convention} which states that a treaty should be interpreted with its ordinary meaning. The treaty between Beristan and Opulentia

\textsuperscript{35} The clause appeared in the first \textit{BIT between Germany and Pakistan} in 1959 (Article 7): “Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party”.


\textsuperscript{37} Report of the Executive Directors of ICSID.
should be treated in good faith with its ordinary meaning. Interpretation under Art.31 of
the Vienna Convention is a process of progressive encirclement where the interpreter
starts under the general rule with:

1. the ordinary meaning of the terms of the treaty,
2. in their context and;
3. In light of the treaty’s object and purpose, and by cycling through this three step
   inquiry iteratively closes in upon the proper interpretation.\footnote{Supra note 22.}

The Art.10 clearly provides for observance of any obligation with regard to the
investment by the two contracting parties when interpreted with its ordinary meaning
and in good faith. Thus breach of this provision would amount to breach of treaty and
general international law.

Hence, respondent’s contention that it has not violated the BIT, general international law
and applicable treaties is completely wrong and baseless.

C. THERE WAS BREACH OF ART.10 OF THE BIT AND CLAIMANT WAS NOT GIVEN
   PROTECTION AND FAIR AND EQUITABLE TREATMENT.

66. The award given in \textit{Asian Agricultural products Limited v Sri Lanka}\footnote{\textit{Agricultral products Limited v Sri Lanka} (1990).} dealt with the
standard of “full protection and security” put forth in the BIT. This was equated by the
awards with the standard of due diligence of CIL. The BIT serves to attract foreign
investment by granting broad investment rights to investors and flexibility in the
resolution of investment disputes. In the present dispute, Claimant had been expelled
from Sat-Connect project, its personnel were removed forcefully from the site by the
members of Beristan military there was violation of Claimant’s right under general
international law and applicable treaties, and in particular Art. 2, 4 and 10 of the
Beristan-Opulentia BIT. Claimant were not provided with the protection and security
put forth in the BIT.

67. Respondent had also breached the FET standard to which Claimant was entitled under
Beristan-Opulentia BIT. As mentioned in the \textit{Venezuela} case \footnote{Fedax N.V v \textit{Venezuela}} the undertakings
Mentioned in BIT should be observed therefore, Claimant is entitled to protection and required treatment which is a provision of Beristan-Opulentia BIT.

68. The Tribunal has jurisdiction over Claimant contract based claims arising under JVA by virtue of Art. 10 of the Beristan-Opulentia BIT. Claimant seeks arbitration before the ICSID on the basis of Cl. 1(c) of the Art. 11 of the Beristan-Opulentia BIT. Art. 10 of the BIT is the umbrella clause which covers the entire obligation including contractual claims. The main aim of this provision in the treaty is to provide the necessary protection to the investor. In an umbrella clause the contractual claims elevated to the level of claims arising under BIT. Moreover the language of this particular Cl. covers any obligation with regard to investment. This BIT is treaty signed by the two contracting state which do create obligation under customary international law since a treaty is a source of international law according to the Art. 38 of ICJ draft articles. Therefore it is submitted that breach of the agreement in the instant matter should be considered as the breach of the treaty, and thus the honorable Tribunal has the jurisdiction over the contract based claims arising under the JVA by the virtue of Art. 10 of the BIT.

CONCLUSION ON JURISDICTION

69. The Tribunal is requested to find that it has jurisdiction over the present dispute. Firstly, Claimant fulfills all the essential pre- requisites to such jurisdiction; and satisfies all the conditions of Art. 25 of the ICSID Convention. Also Cl. 17 of the JVA is irrelevant as far as the present matter is concerned because all the Claims arise out of the Beristan-Opulentia BIT. Secondly, Art. 10 of the BIT can be considered as ‘Umbrella Clause’, which provides protection to the investor and ensures the observance of all the commitments including contractual obligations by the Contracting State. Lastly, the umbrella clause is a part of Bilateral Treaty between two countries, breach of which creates obligations under international law.
PART TWO: MERITS

III. 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?

70. The Customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Art. 26, under the title Pacta sunt servanda that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. This entitles parties to require that obligations be respected and to rely upon the obligations being respected. This fundamental provision is applicable to the determination whether there has been violation of that principle, and in particular, whether material breaches of treaty obligations have been committed. Moreover, certain provisions of customary law in the Vienna Convention are relevant, such as Art. 60, which gives precise definition of the concept of material breach of a treaty. In the present case, Respondent has materially breached the JVA by incapacitating them from completing its contractual duties in violation of Art. 10 of BIT. It is a material breach because claimant now has to give up their entire Stake in Sat Connect for reasons unconnected with Claimant’s performance.

71. In its most common sense, the principle refers to private contracts, stressing that contained clauses are law between the parties, and implies that non-fulfillment of respective obligations is a breach of the pact. Respondent owe an obligation to promote Claimant’s investment and also protect it from unlawful expropriation. And breach of these provisions entitles Claimant to not only terminate the contract but also claim damages, including loss of profits.

41 Art. 60 of Vienna Convention on Law of Treaties read as: (1).A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
(2).A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State;
(3).A material breach of a treaty, for the purposes of this article, consists in:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
72. **Art. 10 on Observance of Commitments** state that “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.”

73. Respondent have materially breached the agreement by:

- expulsion of claimant from the Sat-Connect project
- the forcible removal of its personnel by members of the Beristan military; and
- the improper buyout of its interest in Sat-Connect.

74. Under **Art. 2**, “Both Contracting Parties at all times should 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” and “…shall in no way be subject to unjustified or discriminatory measures.”

75. Respondent has violated the rights of Claimant under general International Law and Art. 2, 4 and 10 of the BIT by improperly invoking Cl. 8 (Buyout) of the JVA and thus materially breached the agreement.

76. Respondent has invoked the buyout Cl. on the grounds of national security concern alleging that a material breach of the Confidentiality provision. But there is no proof of the alleged material breach of the Confidentiality provision.

77. According to Claimant, the above undisputable breaches of the BIT, are alone sufficient to justify a ruling against Respondent.

**IV. WHETHER THE RESPONDENT’S ACTIONS OR OMISSIONS AMOUNT TO EXPROPRIATION, DISCRIMINATION, A VIOLATION OF FAIR AND EQUITABLE TREATMENT, OR OTHERWISE VIOLATE GENERAL INTERNATIONAL LAW OR APPLICABLE TREATIES**

A. **RESPONDENT EXPROPRIATED CLAIMANT’S PROPERTY**

79. Respondent has indirectly expropriated Claimant’s property by buying out Claimant’s interest in the JV Respondent have interfered with Claimant’s investments to such an extent so as to constitute expropriation. Firstly, Claimant contends that the “substantial
deprivation test” laid down in the Metalclad, shows that the buyout of Claimant’s interest in the JV amounts to “taking” of Claimant’s property. Secondly, this taking of property amounts to indirect expropriation. Thirdly, that this indirect expropriation is unlawful.

80. Both the Beristan-Opulentia BIT (Art. 4(1) and 4(2)) and the FIL prohibit the host State from expropriating directly or indirectly, or subjecting to measures of similar effect, any foreign investment, if certain specific conditions are not met. These conditions under which a State may lawfully expropriate a foreign investment are limited to expropriations that are done:

- for a public purpose;
- in a non-discriminatory manner;
- in accordance with due process of law;
- upon payment of prompt, adequate, and effective compensation.

81. Claimant contends that Respondent has failed to comply with all these conditions and so the buyout of Claimant’s property amounts to unlawful expropriation.

(i) The Buyout has substantially deprived Claimant’s of their Property and it amounts to Indirect Expropriation:

82. It is relevant to mention a recent ICSID case of Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica, in which the Tribunal emphasized that the ‘ample authority for the proposition that property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.’

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42 Metalclad v Mexico (2001).
43 Rumeli Telekom As and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan (2008) at para 682.
83. The Tribunal stated that the decisive factor in drawing the line between expropriation and legitimate government measures must primarily be the degree of possession-taking control over the enterprise that the disputed measures give rise to”. 45

84. The Tribunal in CMS v Argentina found that the standard that a number of Tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation. 46

85. It is contended that the expropriation of claimant’s property has occurred as they have been completely deprived of the title, possession or access to the benefit and economic use of their property.

86. Also judicial practice indicates that the severity of the economic impact is the decisive criterion when it comes to deciding whether an expropriation or measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. 47 The deprivation would have to be permanent or for a substantial period of time. 48 Arbitral Tribunals have consistently looked at the degree and duration of deprivations to determine whether an expropriation has occurred. 49

87. It is contended that Claimant has been permanently deprived of the ownership, title, possession and access to the benefit and economic use of its property. The forceful buyout has a very severe and drastic effect on Claimant’s interest in the joint venture and the same has been taken away completely and permanently by Respondent.

88. In Marvin Feldman v Mexico, the Tribunal laid down that indirect expropriation can only be identified via case-by-case analysis of the specific facts. 50 The Tribunal introduced criteria to identify indirect expropriation which is as: (a) the disproportionate effect on the investor or (b) interference with the legitimate expectations.

45 First ECT Arbitral Award, (2003).
46 Supra note 8.
49 Supra note 45.
50 Marvin Feldman v Mexico (2002).
(ii) The effect of the buyout on claimant’s investment is disproportionate

89. **Art. 4(2) of the Beristan-Opulentia BIT** provides:

> “Investments of Investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriate, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party...” (Emphasis supplied).

The BIT focuses on the measures taken by any Contracting Party which can amount to expropriation.

90. The “sole effect doctrine” or “consequential expropriations” applies in the present case. The Tribunal in the case of *Compañía del Desarrollo de Santa Elena, S.A. v Costa Rica* held that the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact in determining whether expropriation has occurred. It is contended that the buyout done by Respondent has a drastic impact on Claimant’s property. Claimant has been deprived of their intellectual property which has been shared by Respondent and Claimant’ has now been deprived of its future benefits. Moreover, the reputation of Claimant in the international market has been badly affected which has reduced its future opportunities of getting into any investment project with any other party.

(iii) The buyout has resulted in the breach of legitimate expectation

91. Beristan has frustrated all the legitimate expectations which the complainant as an investor had before making the investment in Beristan. On the basis of the Tribunals decision in *Suez and Ors v Argentina*51, and *Saluka Investments B.V v The Czech Republic*,52 Claimant as an investor investing in Respondent State had certain expectations about the nature of the treatment which had been created by the Respondent State’s laws, regulations, declared policies, and statements. But Respondent through its actions subsequently frustrated and thwarted those legitimate

51 *Suez and Ors v Argentina* (2010).
expectations by illegally expropriating Claimant’s interest in the Sat-Connect project. Thus, Respondent has failed to accord the investment of claimant FET.

92. The Art. 2(2) of the Beristan-Opulentia BIT, in the light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment. Respondent has materially violated FET, legitimate expectation by unlawful expropriating Claimant’s property which also amounts to violation of the good faith principle established under the international law.53

B. THE EXPROPRIATION OF CLAIMANT’S PROPERTY IS UNLAWFUL

93. Art. 4(2) of the Beristan-Opulentia BIT states four circumstance in which expropriation is lawful: for public purpose, on a non-discriminatory basis and against prompt and adequate compensation and in accordance with all legal provisions and provisions. It is contended that neither the requirement for public purpose and nor that of compensation is satisfied. Moreover, Respondent has acted in a discriminatory manner.

(i) There was no public emergency or public purpose to compel a buyout of Claimant’s interest in the Sat-Connect project

94. Beristan has improperly invoked Cl. 8 (Buyout) of JVA and there is no breach of any provision of the JVA as alleged by the Beritech. Respondent has alleged that complainant leaked technology involved in the Sat-Connect project. Beritech has not at all enquired and investigated into the matter before taking such a drastic step of buying out Claimant’s interest in the Sat-Connect. All these allegations are mere assertions of Respondent and there was no leak of the technology. Therefore, there was no public emergency that existed which led Respondent to compel the buyout of Claimant’s interest in the Sat-Connect Project. Rather Respondent had a bad intention to exploit the technology which was invested by Claimant’s in the project and thus excluding Claimant from potential profits.

(ii) The actions and omissions taken by Respondent are discriminatory, and are not in accordance with the due process of law and are violative of the obligation of fair and equitable treatment of investment

- **Respondent has acted discriminatorily and against the due process of law**

95. Respondent has been discriminatory, unfair and has not acted with the due process of law in the following areas:

(i) Arbitrary and unfair expulsion of Claimant for motives unrelated to Claimant’s performance of the JVA.

(ii) Through the abusive exercise of Beritech’s right under Cl. 8 of the JVA to buyout Claimant’s interest in the Sat-Connect project.

(iii) The discriminatory efforts to favor local Beristan personnel, who ultimately replaced Claimant’s seconded personnel.

96. Respondent have out rightly and forcefully expropriated claimant’s interest in the JV and removed Claimant’s personnel from all the offices, sites and facilities of the Sat-Connect project without at all investigating about the matter and giving Claimant’s any opportunity to respond to the false charges raised against them which is against the due process of law.

97. Claimant’s expulsion from the Sat-Connect project was a result of force and pressure by Respondent and it was not in conformity with the laws of Respondent State. The forcible removal of its personnel by members of the Beristan military, and the improper buyout of its interest in Sat-Connect are products of a conspiracy against Claimant. It amounts to **breach of Art. 2 of the Beristan-Opulentia BIT**.

98. Claimant’s interest in the Sat-Connect was forcefully expropriated and Respondent wrongfully exercised its right under Cl. 8 of the JVA for no fault on its part in performing its contractual duties under the JVA as has already been proved. Moreover, the expulsion was on the basis of an article published in The Beristan Times in which a Beristan Government official raises a national security concern by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project.

99. The official indicated that it was **believed** that critical information from the Sat-Connect project had been passed to the Government of Opulentia. This action of
Respondent is unfair and arbitrary that on a mere belief of a person it took such a drastic and severe step of compelling a buyout of whole of Claimant’s interest in the Sat-Connect. There was no investigation carried out by the Government of Respondent State and for this reason the buyout of Claimant’s interest in Sat-Connect and forceful expulsion of the personnel associated with Claimant is unlawful and not in accordance with the due process of law. Further, they were not provided with an opportunity to prove that they had not breached the JVA and on a mere belief of a person were expropriated which is not in conformity with the FET, due process of law and are discriminatory.

100. It is further contended that Respondent had a bad intention in expropriating claimant’s property. In the words of Christopher Schreuer54 “if all the circumstances point towards a plan to deprive the investor of its investment, an underlying motive to expropriate can be construed. Also K.A. Byrne says: In the case of de jure nationalization, there is express intent to expropriate; in the case of a de facto nationalization, the intent is latent, yet can be determined from an examination of all the circumstances, in particular, the result of government measures.55

101. It is evident from facts that Beristan and Opulentia have had tense relations. The conduct of Respondent makes it clear that they had a mala fide intention and bad faith in expropriating Claimant interest in the JV and it is done to acquire SAT Connect completely. Respondent have created a situation such that the Confidentiality of the project is lost but it has no proof of the breach of confidentiality and all the allegations are false and baseless.

102. These actions and omissions of Respondent are intended with the oppression of the minority i.e. Claimant’s interest. The JV (SAT-Connect) was in the land of Beristan i.e. of Respondent and they had the full control over the SAT- Connect and had majority shares. Moreover, all the Directors who took part in the Board of Director meeting were from Respondent State appointed by Respondent itself and so there were every chance of biasness. Beritech had misused its powers in expropriating claimant’s interest in the JV and it amounts to oppression of minority interest. All these circumstances shows that the buyout was made to expropriate claimant’s property.

54 Christop Schreuer, “The Concept of Expropriation under the ETC and other Investemnt Protection Treaties” (2005).
55 K.A. Byrne, “Regulatory Expropriation and State Intent” (2000)
103. Respondent had a bad intention in unlawfully expropriating Claimant’s interest in the Sat-Connect project. It has acted in a discriminatory manner and contrary to due process of law as has been proved.

- **Respondent has breached its obligation to ensure fair and equitable treatment to Claimant’s investment**

104. Respondent have breached the Beristan-Opulentia BIT as it has failed to accord claimant’s investments FET. Specifically Respondent has breached Art. 2 (2) of the Beristan-Opulentia BIT which provide:

**Article 2(2)**
Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including FET and full protection and security of the investments of investors of the other Contracting Party.

105. FET includes requirements of due process, non-arbitrary treatment, non-discrimination, due diligence, legitimate expectations, stability and predictability, transparency, and good faith. In *Mondev* \(^{56}\) case the Tribunal pointed out “*a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.*”

106. On the basis of the arguments on the indirect expropriation of Claimant’s property, it is clear that Respondent have failed to ensure FET to the investment of claimant.

107. As has been argued at length above, any investor invests in other state with a notion that it would be ensured FET and when the same are breached, the investor’s legitimate expectations are violated. Respondent have not ensured FET and thus had violated the BIT.

108. The *Abs-Shawcross Draft Convention on Investment Abroad of 1959* \(^{57}\) contained the following Art. I:

> “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most

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\(^{56}\) *Mondev International Ltd. v United States of America* (2002), para 118.

\(^{57}\) Hermann Abs and Lord Shawcross, *The Draft Convention*. 

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constant protection and security within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.”

Respondent is expected to fulfill all these conditions which it has failed to fulfill.

109. Under the Draft Convention on the Protection of Foreign Property developed by the OECD in 1967, Art. 1 provides that each party shall ensure FET, protection and security to such property and shall not impair the management, maintenance, use, enjoyment by unreasonable discriminatory measures. Respondent’s acts are contrary to this Convention.

110. Under Art. 2 of the BIT both the Contracting Parties shall encourage the promotion and protection of the investments. But the actions and omissions of the respondent are contrary to Art. 2. In MTD case the Tribunal said:

“...FET should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a proactive statement- ‘to promote’, ‘to create’, ‘to stimulate’- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.”

111. On the basis of this standard, it can be said that the FET standard had been violated by Respondent. Claimant has not been treated in an even-handed and just manner rather they have been treated discriminately which amounts to violation of Art. 2 of the Beritan-Opulentia BIT.

C. RESPONDENT IS LIABLE TO COMPENSATE CLAIMANT.

112. Respondent is liable to compensate for the overt expropriation under Art. 4(2) and 4(3). The Treaty imposes an obligation on Respondent to pay just compensation for any direct or indirect expropriation.

113. Further, there are two widely accepted propositions of international law. They are:

60 Supra note 53.
61 Ibid.
a) BITs, consistent with CIL, require states to pay compensation for expropriation, whether lawful or not, based on a formula that calculates loss from the moment of expropriation. In other words, compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier.  

b) The second is the venerable principle articulated more than seventy years ago by the Permanent Court of International Justice in *Chorzow Factory*\(^\text{63}\): ‘that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.

114. Claimant most humbly submits that it is entitled to just compensation and the value of the IP over the life of the technology would be in excess of USD 100 million. So, the compensation amount which Respondent has offered to Claimant is not just and it has to be equal to the fair market value of the technology.\(^\text{64}\) The buyout provision only returns Claimant paid in investments without including compensation for potential future profit as well as for the intellectual property know-how and trade secrets that have been developed and are now controlled by Sat-Connect. Claimant further submits that the false allegations have affected it’s the reputation in the international market and its international identity is affected. Claimant is entitled for compensation for all these damages caused to it because of the false allegation, assertions made by Respondent.

115. It is proved that Respondent’s actions of improperly invoking Clause 8 of the JV Agreement amounts to unlawful indirect expropriation and that Respondent’s actions are discriminatory, are violative of FET standards and thus violates general international law and Beristan-Opulentia BIT.

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\(^{63}\) *Chorzow Factory* Case (1928).

\(^{64}\) World Bank Guidelines Sec. IV (1) on “*Expropriation and Unilateral Alterations or Termination of Contracts*”(1992).
V. WHETHER RESPONDENT IS ENTITLED TO RELY ON ARTICLE 9 (ESSENTIAL SECURITY) OF THE BERISTAN-OPULENTIA BIT AS A DEFENCE TO CLAIMANT’S.

A. CLAIMANT HAS NOT BREACHED THE CONFIDENTIALITY PROVISION IN JV AGREEMENT?

116. Confidentiality involves a sense of ‘expressed’ or ‘implied’ basis of an independent equitable principle of confidence. Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others. The JVA specifies the intention of the parties in clause 4 wherein every information related to the JV company Sat-Connect is to be treated as Confidential and should not be disclosed to any person or entity not authorized under this Agreement. Respondent contend that Claimant has leaked information about Sat-Connect’s technology and systems to the Gov of Opulentia, where Claimant are incorporated and domiciled. Claimant acknowledged receiving requests, but has denied permitting unlawful access.

117. 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 JVA. Prospectively, several countries in the Euphonia region would be using the system. Claimant absolutely denies leaking any information to the Opulentian Gov.

B. THE DEFENSE OF STATE OF NECESSITY DOES NOT EXIST WITH THE RESPONDENT.

118. *Art. 9 of the BIT* is concerning the essential security which Respondent claim to have been threatened by the acts of Claimant. A ‘sovereign state possesses inherent right to regulate its domestic affairs’ but ‘the exercise of such a right is not unlimited’. It has boundaries; and an obligation in an investment treaty that is in force creates a boundary that must be honored. While investors assume risks associated with governmental activity, Claimant took that risk ‘with the legitimate and reasonable expectation that they would receive fair treatment and just compensation’, only to be gravely disappointed.

119. Expropriation demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken
against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful’. It may however be noted that in the present case Claimant have been denied fair hearing, and were not given notice of the buy-out.

120. The UNO has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it. In the present case the alleged security threat is not proved as its only based on the article in the Beristan Times and rumors among the Beristan Army personnel.

121. It is submitted that there is no grave or imminent danger to the essential security of the Respondent State and they cannot invoke the immunity under Art.9 of BIT. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the ILC. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.65

122. **Art. 25 of the ILC on State Responsibility**66 adequately reflect the state of customary international law on the question of necessity. Under that article:

> “1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

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66 Articles on “Responsibility of States for Internationally Wrongful Acts”, annexed to UNGA Resolution on 14 December 2001
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a. is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

b. does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

a. the international obligation in question excludes the possibility of invoking necessity; or

b. the State has contributed to the situation of necessity.”

123. Respondent have a latent motive to take over all the assets of the Sat-Connect and use it exclusively for their profit. They have expelled Claimant in order to gain complete access to the intellectual property contributed by Claimant. The State of necessity clause is only a cloak to hide the grave injustice done to Claimant. Respondent have abused the State of necessity clause, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity. However the essentials of Art.25 are not fulfilled in the present case.

124. James Crawford, who was rapporteur of the Draft Articles approved in 2001, noted that when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation. This deliberate action on the part of the State is therefore subject to the requirements of Art. 25 of the Draft Articles, which must concur jointly and without which it is not possible to exclude under international law the wrongfulness of a State's act that violates an international obligation.

125. Taking each element in turn, Art. 25 require first that the act must be the only means available to the State in order to protect an interest. It was not so in the present case. The State had ample alternatives available to cause an investigation into allegations in the article in Beristan Times, or at least give an opportunity to claimant to defend the false charges. According to S.P. Jagota, a member of the ILC, such requirement

implies that it has not been possible for the State to “avoid by any other means, even a much more onerous one that could have been adopted and maintained the respect of international obligations. The State must have exhausted all possible legal means before being forced to act as it does”. Any act that goes beyond the limits of what is strictly necessary “may not be considered as no longer being, as such, a wrongful act, even if justification of the necessity may have been admitted”. The Respondent has acted in mere disregard to the rights of claimant under the BIT and JVA.

126. Similarly, the ILC has defined the state of necessity as that situation where the only means of safeguarding an essential interest of the State against a grave and imminent peril is an act that is not in conformity with an international obligation binding that State with another State.

127. The main elements of the state of necessity are thus: the absolutely exceptional nature of the alleged situation; the imminent character of the threat against an important State interest; the impossibility of avoiding the risk with other means, and the necessarily temporary nature of this justification, linked to the due danger's persistence. None of the conditions are satisfied thus disentitling Respondent from using the immunity under State of necessity.

128. The State of Necessity defense is not available to Respondent as there was no imminent danger or peril to its security and they cannot rely on Art. 9 of the BIT as claimant have leaked any information so as to endanger the essential security of the State of Beristan.

129. The Commentary to the Draft Articles, states that “necessity will only rarely be available to excuse non-performance of an obligation and … it is subject to strict limitations to safeguard against possible abuse”. In this respect, James Crawford has opined that the danger must be established objectively and not only deemed possible. However the alleged national security concerns were only mere unsubstantiated assertions and did not justify the hasty buyout and evacuation of claimant and its personnel.

69 Ibid.
70 United Nations, Report of the ILC on the work performed during its 32nd session, p. 87.
71 National Grid PLC v Argentina (2008).
72 Supra note 67 p31.
130. Claimant contends that even if the state of necessity defense is available to Respondent under the circumstances of this case, *Art. 27 of the Draft Articles* makes clear that Respondent’s obligations to Claimant are not extinguished and they must compensate Claimant for losses incurred as a result of the Government’s actions. *Art. 27* provide that “invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to (a) compliance with the obligation in question… (b) the question of compensation for any material loss caused by the act in question”

131. *Art. 27* in it is a “without prejudice” clause, not a stipulation. It refers to “the question of compensation” and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity.\(^{74}\)

**D. DECISION OF THE STATE LACKS VALIDITY.**

132. The Beristan Constitution states, “*Private property shall not be taken for public use without just compensation and due process*”.\(^{75}\)

133. Beritech S.A. informed Claimant that it was buying-out Claimant’s interest in the joint venture under the buyout provision (Cl. 8) of the JVA. 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.

134. 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.

135. In recent years, a few arbitral Tribunals have sought to expand the scope and content of the “full protection and security” clause beyond protection from physical injury, and have interpreted it to apply to unjustified administrative and legal actions taken by a government or its subdivisions that injured an investment’s alleged legal rights. It is on these decisions that claimant rely, particularly *CME v The Czech Republic*\(^{76}\) and *Azurix Corp. v Argentina*\(^{77}\). E.g., in *CME*, which Claimant cite in support of their argument, the Tribunal stated: “The host State is obligated to ensure that neither by

\(^{74}\) *Supra* note 72.

\(^{75}\) First Clarification, Question 120.

\(^{76}\) *CME Czech Republic BV (The Netherlands) v The Czech Republic* (2010).

\(^{77}\) *Azurix Corp v Argentine Republic* (2006).
amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”

136. The Tribunal in *Azurix Corp. v Argentina*\(^{78}\) implied that it did, for it justified on that basis a finding that the Argentina-United States BIT providing for “full protection and security” applied to measures taken by a government and was not limited to physical actions. It stated: “However when the terms 'protection and security' are qualified by full and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”

137. Tribunals have identified four types of factual circumstances where a State's conduct amounted or could amount to a denial of justice.

138. First, Courts are not the only State organs the conduct of which can amount to a denial of justice. Administrative organs can also engage the State's international responsibility by denying justice. This was confirmed in the *Amco I*\(^{79}\) decision where the tribunal found that “the mere lack of due process would have been an insuperable obstacle to the lawfulness of the revocation.” The *Amco II* tribunal also found that “the whole approach to the issue of revocation of the license was tainted by bad faith, reflected in events and procedures”\(^{80}\) and that therefore, even if substantive grounds existed for the revocation of the license, the circumstances surrounding the decision made it unlawful. It pointed out that there is “no provision of international law that makes impossible a denial of justice by an administrative body.”\(^{81}\)

139. According to Claimant, the following elements constitute a denial of justice:

- Claimant was not given proper notice and the buyout was forceful.

- The decision to buyout Claimant’s stake in the Joint Venture was without any opportunity to respond to the false charges that were raised against Claimant.

- Respondent through the civil engineering section of the Beristian army secured all sites and facilities of the Sat-Connect project and instructed the personnel of the project who

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\(^{78}\) *Ibid.*

\(^{79}\) *Amco I v Indonesia* (1984), para. 242.

\(^{80}\) *Amco II v Indonesia* (1990), para. 98.

\(^{81}\) *Ibid* para137.
were associated with Televative leave the project sites and facilities immediately, and
were eventually evacuated from Beristan.

- Respondent terminated the Investment Contract with the utmost lack of good faith and
in clear violation of the international obligations contained in the Bilateral Investment
Treaty. The termination was unreasonable, arbitrary, grossly unfair, unjust, and
idiosyncratic and violated the legitimate expectation of Claimant.

140. According to Claimant, the above undisputable breaches of the BIT are alone sufficient
to justify a ruling against Respondent, irrespective of the collusion between Respondent
and powerful local partner.

141. Claimant further alleges that, in the present case, the termination of the Investment
Contract by Respondent was unlawful and improper for the same reasons as those
enumerated by the Amco Tribunals. Indeed, Respondent unilaterally terminated the
Contract abruptly and without warning and in breach of the suspension mechanism the
entire process was done without an input from Claimant who was de facto excluded
from the process. Consequently, irrespective of whether there may have been legitimate
grounds for the expropriation or buy out — which Claimant deny — the whole
approach leading to its termination lacked in due process. 82

142. In Amco Asia Corporation case, the Tribunal said that “if it was not for the presence of
a number of army/police personnel on the hotel premises, which personnel were called
into and as a matter of fact also succeeded to support the takeover, claimant would not
at least at that stage, have had to give up their control and management of the Kartika
Plaza Hotel. Respondent would therefore not at that date have been in the position to
take over the management of the hotel.”

143. By enforcing, with the assistance of army/police personnel, a unilateral decision
contrary to Contractual undertakings and without having this decision justified either by
agreement or by court decision, Respondent were committing an act of self help. In this
case where claimant through their ownership of the shares in PT Amco were foreign
investors the army/police personnel had a special duty to assist claimant in at least
preserving the status quo until the dispute between the parties was settled by means of
law.

144. It is generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens. If such acts are committed with the active assistance of state organs a breach of international law occurs.\textsuperscript{83}

145. In the present case Respondent has acted in grave disregard to the international standards of justice by expropriating claimant from the Sat-Connect project; forcibly removing its personnel from the Sat-Connect site and the improper buyout of its interest in Sat-Connect. The alleged leak does not have any basis as it is only a conspiracy to expel claimant form the joint venture. Thus, Respondent cannot to rely on Art.9 (Essential Security) of the Beristan Opulentia BIT as a defense to Claimant’s Claim.

\textbf{CONCLUSION ON MERITS}

146. It is respectfully submitted that Respondent have breached the international obligation of by unlawfully expropriating Claimant through abusive exercise of Beritech’s right under Cl. 8 of the JV and preventing them from completing their contractual obligations. Respondent’ actions are discriminatory, violative of the FET and the general principles of international law. The alleged national security concern is solely based on Respondent’ unsubstantiated assertions and unrelated to Claimant’s performance of the JVA.

\textsuperscript{83} Amco Asia Corporation and Others v The Republic of Indonesia (1984).
REQUEST FOR RELIEF

(1) Both the requirements of *ratione personae* and *rationae materiae* under Article 25 of the ICSID Convention are satisfied and hence the Tribunal has jurisdiction over the present dispute;

(2) The buyout of Claimant’s interest in the Sat-Connect project constitutes unlawful indirect expropriation of Claimant’s investment;

(3) Respondent has failed to provide fair and equitable treatment to Claimant with respect to its investment in Beristan.

Respectfully submitted on 19 September 2010 by

BADAWI

On behalf of Claimant

TELEVATIVE INC.