No. ARB/X/X

IN THE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ICSID

__________________________

TELEVATIVE, INC.,
CLAIMANT,

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN,
RESPONDENT.

__________________________

MEMORIAL FOR CLAIMANT

__________________________

SOUTH TEXAS COLLEGE OF LAW

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TABLE OF CONTENTS

TABLE OF CONTENTS.................................................................................................................. i
LIST OF ABBREVIATIONS........................................................................................................... iii
LIST OF AUTHORITIES................................................................................................................ iv
LIST OF LEGAL SOURCES........................................................................................................... vi
ISSUES PRESENTED........................................................................................................................ 1
STATEMENT OF FACTS.................................................................................................................... 1
SUMMARY OF THE ARGUMENT...................................................................................................... 4
ARGUMENTS....................................................................................................................................... 6
PART I: ARGUMENTS ON JURISDICTION.................................................................................... 6
I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE..................................................... 6
   A. The Parties Have Manifested Consent to ICSID Jurisdiction.................................................. 6
   B. The Tribunal Has Personal Jurisdiction Over The Dispute.................................................... 7
       1. Beritech is a state entity for the purpose of establishing personal jurisdiction................. 7
   C. The Tribunal Has Subject Matter Jurisdiction Over This Dispute......................................... 8
       1. The dispute meets the requirements of a legal dispute....................................................... 9
       2. The dispute arises directly from a qualifying investment................................................ 9
   D. The BIT’s Timing Requirements Do Not Bar Jurisdiction..................................................... 11
       1. Amicable Settlement Provisions are merely procedural and are not a prerequisite for
          jurisdiction.......................................................................................................................... 11
II. THE TRIBUNAL HAS JURISDICTION OVER TELEVATIVE’S CONTRACT-BASED
    CLAIMS UNDER ARTICLE 10 OF THE BIT............................................................................ 12
   A. The Umbrella Clause Applies to This Dispute.............................................................. 12
       1. The text of the Umbrella Clause is clear......................................................................... 12
       2. The BIT should be interpreted in favor of protecting investments............................. 14
       3. The location of the Umbrella clause does not prevent its application......................... 14
   B. The BIT Agreement Provision Does Not Preclude BIT Jurisdiction............................... 17
III. THE TRIBUNAL HAS JURISDICTION REGARDLESS OF CLAUSE 17 OF THE JV
     AGREEMENT............................................................................................................................. 15
   A. Televative’s Claims are Treaty-Based.............................................................................. 15
   B. The JV Agreement Provision Does Not Preclude BIT Jurisdiction.................................... 17
IV. CONCLUSION ON JURISDICTION......................................................................................... 18
PART II: ARGUMENTS ON THE MERITS.................................................................................. 19
I. RESPONDENT MATERIALLY BREACHED THE AGREEMENT..................................................... 19
   A. Respondent Unilaterally Terminated the Contract For its Own Gain................................ 19
   B. Respondent is Bound by a Duty of Good Faith and Fair Dealing.................................... 20
II. BERISTAN DISCRIMINATED AGAINST TELEVATIVE IN VIOLATION OF ITS
    INTERNATIONAL DUTIES....................................................................................................... 20
   A. Beritech and its Representatives are the Beristan Government....................................... 20
   B. By Preventing the Transfer of Televative’s Returns, Beristan has Violated its
       Obligations Under the BIT................................................................................................. 21
       1. Against the BIT’s Express Language, Beristan Improperly Disturbed Claimant’s
          Investment without Due Process of Law........................................................................ 22
   C. Beristan Violated Established International Law Standards of Fair and Equitable
       Treatment and National Treatment................................................................................... 22
       1. Beristan Violated the FET and the NT Standards vis-à-vis Televative......................... 23
(a) Beristan Discriminated Against Televative.................................................................23
(b) Respondent Breached Televative’s Legitimate Expectations........................................25
(c) Beristan, in Bad Faith, used its Power for Improper Purposes and to Coerce and
Intimidate Televative’s Representatives. ........................................................................26
(d) Not one “Countervailing Factor” Applies.......................................................................27

2. Beristan Deliberately Failed to Provide Protection and Security to Televative’s
Representatives.................................................................................................................28

III. TELEVATIVE’S INVESTMENT WAS EXPROPRIATED BY BERISTAN’S
UNLAWFUL INTERFERENCE..............................................................................................30

A. The Beristan-Opulentia BIT Regulates the State’s Right to Expropriate......................30
B. Televative’s Expropriated Rights are Protected by the Beristan-Opulentia BIT. ........31
   1. Televative’s Rights in Sat-Connect were Disturbed....................................................32
   2. Televative’s Contract Rights in Sat-Connect...............................................................32
      (a) Televative’s Intellectual Property must be protected under the BIT. .................32
      (b) Televative’s technical assistance is a property right entitled to protection. ........33
C. Beristan’s Unlawful Interference with Televative’s Investment Constitutes Indirect
Expropriation ....................................................................................................................34
   1. All the Elements of Indirect Expropriation are Present Here. .................................34
      (a) Beristan’s Interference with Televative’s Investment was Significant.................34
      (b) The Effect of Beritech’s Actions was to Neutralize Televative’s Investment....35
      (c) Respondent Spoiled Televative’s Reasonable Investment Expectations..........36
      (d) Respondent’s Actions were Discriminatory and Disproportionately Applied. ....37
D. In the Alternative, Based on the MFN Clause, Televative is Entitled to Rely on the
   Provision of the Beristan-Opulentia BIT....................................................................38

IV. CONCLUSIONS ON THE MERITS ...............................................................................39
REQUEST FOR RELIEF ....................................................................................................39
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th></th>
<th>DESCRIPTION</th>
<th>ABBREVIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and Reciprocal Protection of Investments</td>
<td>Beristan-Opulentia BIT</td>
</tr>
<tr>
<td>2</td>
<td>Bilateral Investment Treaty(ies)</td>
<td>BIT or BITs</td>
</tr>
<tr>
<td>3</td>
<td>Civil Works Force</td>
<td>CWF</td>
</tr>
<tr>
<td>4</td>
<td>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</td>
<td>ICSID Convention, Washington Convention or the Convention</td>
</tr>
<tr>
<td>5</td>
<td>Fair and Equitable Treatment Standard</td>
<td>FET</td>
</tr>
<tr>
<td>6</td>
<td>Full Protection and Security Standard</td>
<td>FPS</td>
</tr>
<tr>
<td>7</td>
<td>International Centre for Settlement of Investment Disputes</td>
<td>ICSID or the Tribunal</td>
</tr>
<tr>
<td>8</td>
<td>International Court of Justice</td>
<td>ICJ</td>
</tr>
<tr>
<td>9</td>
<td>Most Favored Nation Standard</td>
<td>MFN</td>
</tr>
<tr>
<td>10</td>
<td>National Treatment Standard</td>
<td>NT</td>
</tr>
<tr>
<td>11</td>
<td>Subject Matter Jurisdiction</td>
<td>SMJ</td>
</tr>
<tr>
<td>12</td>
<td>International Institute for the Unification of Private Laws</td>
<td>UNIDROIT</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Journal/Publication Details</th>
</tr>
</thead>
</table>
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The Convention, ICSID Convention, or Washington Convention

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Covenant

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Phoenix Action Ltd. v. The Czech Republic (Cited as: Phoenix Action)


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SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Cited as: SGS v. Pakistan)
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Philippines
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All references to “Record” are to the FDI Moot Problem as published by the Organization on its
web site. The problem has been assigned page numbers. Including all materials, the problem
has 20 pages.

All references to “First Clarification” and “Second Clarification” refer to the subsequent rounds
of clarifications held in June (First Clarification) and August (Second Clarification), 2010.
ISSUES PRESENTED

1.- Does the Tribunal have jurisdiction in view of Clause 17 for Dispute Settlement of the Joint Venture Agreement?

2.- Does the Tribunal have jurisdiction over Televative, Inc.’s (“Claimant”) contract-based claims arising under the Joint Venture Agreement by virtue of Article 10 of the Beristan-Opulentia BIT?

3.- Did the Government of the Republic of Beristan (“Respondent”) materially breach the Joint Venture Agreement by preventing Televative from completing its contractual duties and improperly invoking the Buyout Clause (Clause 8) of the Joint Venture Agreement?

4.- Did 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?

5.- Was Respondent entitled to rely on the Essential Security provision (Article 9) of the Beristan-Opulentia BIT as a defense to Televative’s claims?

STATEMENT OF FACTS

6.- On 30 January 1995, Claimant was incorporated under the laws of Opulentia.

7.- On 20 March 1996, the Republic of Beristan ("Respondent") and the United Federation of Opulentia entered into a bilateral investment treaty ("BIT") to the parties memorialize their desire to encourage and protect investments by nationals of one of the nations in the territory of the other nation.

8.- As an entity established in accordance with the laws of Opulentia on January 30, 1995, Televative Inc. ("Claimant") is a national of a Contracting Party to the Beristan-Opulentia BIT.
9.- In March 2007, Beritech S.A. ("Beritech") was established when the Beristian government contributed seventy-five percent (75%) of the capital of the company, and Beristian investors—with close ties to the Beristian government—contributed the remaining twenty-five percent (25%).

10.- On 18 October 2007, Beritech and Claimant entered into a joint venture agreement (the "JV Agreement") through which they agreed to establish Sat-Connect S.A. ("Sat-Connect") as a Beristian joint venture company with headquarters in the Beristian capital of Beristal.

11.- The purpose of Sat-Connect is to provide connectivity and communications to civilian and military users through the combination of a satellite network and terrestrial systems in Euphonia, which is a region that spans one-fifth of the world's surface and includes Beristan, six other countries, and the Euphonian Ocean.

12.- As a co-signor of the JV Agreement, Respondent guarantees Beritech’s contractual obligations. Beritech owns a controlling sixty-five percent (65%) equity interest in Sat-Connect, and Claimant owns the remaining thirty-five percent (35%) equity interest. Respondent, through Beritech, appoints five of the nine Sat-Connect directors, and Claimant appoints the remaining four directors.

13.- Six directors must be present at a Sat-Connect meeting to establish a quorum; thus, at least one of the four directors appointed by Claimant must be present in order for the board to conduct its affairs.

14.- Slightly prior to the anticipated completion of the installation of the Sat-Connect satellite network and terrestrial systems, and after Claimant had made a US $47 million investment, an official of Respondent's government accused Claimant personnel of compromising the Sat-Connect project.

15.- In an article on 12 August 2009 in The Beristan Times, a ranking Beristian government official accused Claimant personnel of compromising the Sat-Connect project by revealing
"critical information" to the government of Opulentia. Whereas the entire existence of the project was secret prior to the article, it would not have entered into the public domain but for the comments by the Beristian government official to The Beristan Times.

16.- On 21 August 2009, Michael Smithworth, the chairman of the Sat-Connect board of directors, made a presentation to the board in order to discuss the contents of the 12 August 2009 article in The Beristan Times.

17.- The Sat-Connect directors loyal to Respondent's interests scheduled a meeting for 27 August 2009 and concealed that the purpose of the meeting would be a vote on the compelled buyout of Claimant's interest in Sat-Connect through the invocation of Clause 8 of the JV Agreement. Alice Sharpeton, one of the four directors appointed by Claimant, was present at the meeting. When Sharpeton learned of the meeting agenda, she did not participate and left before the meeting ended. Later that day, Sharpeton filed a notice of protest and specified that she had no prior notice of the meeting agenda. The other five Sat-Connect directors present that day were those appointed by Beritech. With only five board members with loyalties to Respondent present after Alice Sharpeton’s departure from the meeting, the board no longer had a quorum present to conduct business.

18.- Purporting to act with the Sat-Connect board’s authorization for a forced buyout, Beritech served notice upon Claimant on 28 August 2009 to remove all Claimant personnel from the project and give Beritech possession of the Sat-Connect site, facilities and equipment within 14 days. This action occurred after two years of good relations between the parties. Claimant was only removed from Sat-Connect after Sat-Connect—through vast contributions by Claimant—had nearly finished developing the technology essential for the communication systems to function.

19.- On 11 September 2009, staff from the Civil Works Force ("CWF"), the civil engineering section of the Beristan army, seized control of all Sat-Connect sites and facilities, and ordered all personnel associated with Claimant to immediately leave the premises and subsequently, the
country for fear of being held captive by Respondent’s military until Claimant submitted to Respondent’s demands regarding the value of Claimant’s investment in Sat-Connect.

20. Claimant's monetary investment in the Sat-Connect project was US $47 million at the time of seizure.

21. Thirty-eight days after seizing the assets of the project and expelling Claimant personnel, Beritech filed a request for arbitration on 19 October 2009, followed by a deposit of US $47 million into escrow. Claimant asserts that through Beritech, the Beristian government violated its obligations under the BIT between Beristan and Opulentia; therefore, Claimant refuses to participate in the arbitration proceedings that would treat this as a purely contractual dispute on the JV agreement rather than a BIT violation.

22. On 28 October 2009, in order to assert a BIT violation by Beristan, Claimant requested this arbitration in accordance with ICSID procedure, and served notice on the government of Beristan.

23. On 1 November 2009, the ICSID Secretary-General registered this dispute for arbitration.

24. On 15 March 2010, the First Session of the Arbitral Tribunal was held.

**SUMMARY OF THE ARGUMENT**

25. The Tribunal has jurisdiction over the dispute pursuant to Article 25 of the Convention. The parties to this dispute have clearly consented to the Tribunal’s jurisdiction. The Tribunal has both subject matter jurisdiction (SMJ) and personal jurisdiction in this dispute. All timing requirements have been satisfied and the jurisdictional limitations of the Beristan-Opulentia BIT do not apply.

26. Based on the Beristan-Opulentia BIT, Beristan has irrevocably consented to the Tribunal’s jurisdiction. The Tribunal has SMJ because this dispute is legal in nature and arises directly out of an investment. The Tribunal also has personal jurisdiction because this dispute
arose between a contracting state (Beristan) and a national of another contracting state (Televative).

27.- The Convention’s and the Beristan-Opulentia BIT’s timing requirements were satisfied. This dispute preceded any attempt to invoke the Tribunal’s jurisdiction; the BIT’s eighteen-month “cooling off” period is questionable because a shorter period should be applied or because it is merely procedural. Furthermore, Televative did not resort to Beristan courts for relief for any of its claims.

28.- Beristan has violated its international obligations by discriminating against Claimant. This discrimination is abundantly proved. The evidence shows that Sat-Connect’s board deliberately concealed the agenda of the August 27, 2009 meeting. Without the required quorum, the remaining Sat-Connect directors, all loyal to Respondent, voted to compel the buyout of Claimant’s equity interest in Sat-Connect. Beritech’s actions deprived Claimant of a fair opportunity to perform its contractual duties by permitting the seizure of the Sat-Connect through military action; Respondent violated several established international law standards. The evidence shows that Beristan violated the Fair and Equitable Treatment standard (FET) as well as the National Treatment standard (NT).

29.- The evidence also shows that Respondent failed to comply with the Full Protection and Security standard (FPS) vis-à-vis Televative and its investors. Respondent did not exercise the proper due diligence to adequately protect Televative’s property and investment. Beristan failed to detain the military seizure of Sat-Connect and is fully liable for the damages sustained by Claimant.

30.- Finally, Claimant’s investment was expropriated by Beristan’s unlawful interference in using military action to remove Claimant’s personnel from the Sat-Connect project on grounds of an alleged “leak” without foundation to support such an allegation. As a result, Claimant lost significant value and control over its investment. Such interference effectively neutralized the benefit of Claimant’s investments and its reasonable investment expectations were ruined. Moreover, Respondent’s actions were discriminatory and applied disproportionately.
ARGUMENTS

PART I: ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE.

31.- In order to retain jurisdiction, the Tribunal must have personal jurisdiction over the parties, subject matter jurisdiction over the dispute, and the timing requirements must be satisfied. Pursuant to Article 25 of the Convention, the Tribunal has jurisdiction over the dispute between the parties. Article 25 provides that the Centre shall have jurisdiction over “any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”\(^1\) Article 25 further provides that “once the parties have given their consent, no party may withdraw its consent unilaterally.”\(^2\) Additionally, consent of the parties “is the cornerstone of the jurisdiction of the Centre.”\(^3\) Here, all three elements satisfied and therefore the Tribunal has the authority to exercise jurisdiction.

A. THE PARTIES HAVE MANIFESTED CONSENT TO ICSID JURISDICTION.

32.- The parties manifested their consent in writing. Both Beristan and Opulentia are Contracting States under the ICSID Convention and have both ratified the Convention.\(^4\) Further, Article 11(2) of the Beristan-Opulentia BIT provides that the Contracting Parties consent to the submission of disputes to binding arbitration under the specified choice of the complaining party. Further, the Contracting Parties agreed that “[s]uch consent, together with the written submission of the investor … shall satisfy the requirement for … written consent of the parties to the dispute for purposes of Chapter II of the ICSID convention.”\(^5\) Therefore, Beristan has consented to consent and, pursuant to the Convention, cannot unilaterally revoke this consent.

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\(^1\) Article 25(1) of the ICSID Convention.
\(^2\) Id.
\(^3\) Report, at ¶ 23.
\(^4\) Record at 18 (Uncontested Facts ¶ 15).
\(^5\) Article 11(2)(a) of the Beristan-Opulentia BIT.
B. THE TRIBUNAL HAS PERSONAL JURISDICTION OVER THE DISPUTE.

33.- The Tribunal has personal jurisdiction (ratione personae) over this dispute and thus is able to assert its competence and adjudicate the matter. For personal jurisdiction, the Convention requires that the dispute must arise between “between a Contracting State … and a national of another Contracting State.”6 The Convention further defines who is considered a national of another contracting state. This definition includes “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.”7 Here, Beristan and Opulentia are contracting states to the Beristan-Opulentia BIT and it is undisputed that Televative is a national of Opulentia.8

1. Beritech is a state entity for the purpose of establishing personal jurisdiction.

34.- Beritech is a state-owned company performing functions on behalf of the state. Regardless of Beristan’s attempts to disguise its majority owned and controlled company (Beritech) as a private entity, Beritech is clearly a state entity under well-recognized principles of international law.

35.- The conduct of an entity whose structure and function flows from the government and which “is empowered by the law of that State to exercise elements” of authority “shall be considered an act of the State under international law.”9 In order to determine if an entity is a state body, the Tribunal in Emilio Augustin Maffezini v. the Kingdom of Spain used a structural test that examined factor such as “ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.”10 The Maffezini Tribunal also found that the structural test alone might not be sufficient for determining whether an entity is an organ of the state or if the entity’s actions are imputable to

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6 Article 25(1) of the ICSID Convention.
7 Article 25(2)(b) of the ICSID Convention.
8 Record at 9, 16.
9 Article 5 of the Articles on State Responsibility.
10 Maffezini at 28, ¶ 76.
the state. The Tribunal used a second test, the functional test, in which it looked “to the functions of or role to be performed by the entity.”

36.- In applying the structural test, the Maffezini Tribunal found that the Ministry of Industry authorized a national State agency to establish SODIGA and that even though SODIGA was formed as a private commercial corporation, the government was to own no less than 51% of the corporation. Here, the Beristan government established Beritech, a state-owned company, and maintained 75% ownership of the company. It can also be argued that while 25% ownership of the company remained private, that interest was held by investors with close ties to the government. Further, Beritech was established as a telecommunications services provider for the country of Beristan and the Minister of Telecommunications is likewise a member of the board of directors.

37.- Under these facts and application of the structural test, it is clear that Beritech is a state entity. Beritech is an entity created, owned, and controlled by Beristan. Under the Maffezini tests, there is a presumption that Beritech is a state entity and acted on behalf of the Beristan government. Thus, personal jurisdiction is satisfied.

C. THE TRIBUNAL HAS SUBJECT MATTER JURISDICTION OVER THIS DISPUTE.

38.- In order for the tribunal to have subject matter jurisdiction (ratione materiae) over the dispute, three requirements must be satisfied. Article 25(1) of the Convention requires that there be 1) a legal dispute, 2) arising directly out of an underlying transaction, and 3) a qualifying investment. Televative satisfies all these requirements and thus, the Tribunal has subject matter jurisdiction.

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11 Id.
12 Maffezini at 29, ¶ 79.
13 Maffezini at 415, ¶ 83.
14 Record at 16 (Uncontested Facts ¶ 2).
15 Id.
16 First Clarification Q161, Q135.
17 Article 25(1) of the ICSID Convention.
1. **The dispute meets the requirements of a legal dispute.**

39.- Televative has a legal dispute against Beristan. The requirement that there be a legal dispute is “an absolute requirement for ICSID’s jurisdiction.”\(^{18}\) The Report of the Executive Directors explains that disputes “must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”\(^{19}\) Additionally, it has been found that a “dispute must relate to clearly identified issues between the parties … and must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”\(^{20}\)

40.- The nature of the dispute between Televative and Beristan meets this definition. Under the Beristan-Opulentia BIT, Televative has the right to “fair and equitable treatment and full protection and security the investments.”\(^{21}\) Further, the BIT provides for Televative to be treated no less favorably than Beristan nationals or investors of Third States under the National Treatment and Most Favored Nation Clause of Article 3.\(^{22}\) Finally, Televative has the right to demand the real market value of its investment in the event of the expropriation of its investment by the Contracting State.\(^{23}\)

41.- Here, all these issues are in contention. Therefore, under the definition of a legal dispute, Televative has presented concrete claims against Beristan that create a cognizable legal dispute between the parties.

2. **The dispute arises directly from a qualifying investment.**

42.- While Article 25 of the Convention provides no definition of what constitutes an investment for purposes of jurisdiction, several tribunals have identified elements and factors for determining whether or not there is an investment. The Tribunal in *Phoenix Action, Ltd. v. The Czech Republic* identified the following elements as being pertinent to an investment: “(1) a

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\(^{18}\) UN Dispute Settlement, 9.

\(^{19}\) Report, at ¶26.

\(^{20}\) Maffezini, at ¶94 (quoting Schreuer at 337).

\(^{21}\) Article 2(2) of the Beristan-Opulentia BIT.

\(^{22}\) See Article 3 of the Beristan-Opulentia BIT.

\(^{23}\) See Article 4 of the Beristan-Opulentia BIT.
contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; and (6) assets invested bona fide.”24 The tribunal further identified factors for determining whether there is a bona fide investment that qualifies for protection under the BIT.25 These factors include the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation.26

43.- Here, Televative meets these requirements for a qualifying investment. Specifically, at the time this dispute was brought, Televative had a total monetary investment of $47 million.27 Additionally, Televative and Beritech signed the JV Agreement in on October 18, 2007, and it can be inferred from the conduct of the parties and the purpose of Sat-Connect that both parties, at least initially, intended for the operations of Sat-Connect to continue indefinitely. It was not until two years later that this dispute arose. Also, risk is an inherent element of the creation of any joint venture. Here, it cannot be argued Televative did not take a risk by signing the JV Agreement and contributing both monetary investments and labor into a joint venture project that had no guarantees of success. Likewise, the JV Agreement established that Sat-Connect would be located in Beristal, Beristan and the finished product would provide communications services for a region that included Beristan.28 Thus, providing economic activity in Beristan. Further, there is no evidence presented that the investment was not made in accordance with the law of Beristan. In consideration of these facts, it can also be decided that the investment was bona fide. Therefore, Televative’s investment satisfies all factors for determining a qualified investment.

44.- This dispute clearly arises directly from Televative’s investment. The core of the dispute is the expropriation of Televative’s investment and the failure of the Beristan government to compensate Televative in accordance with the obligations set for the in the Beristan-Opulentia BIT.

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24 Phoenix Action, at 45, ¶114.
25 Id., at 52, ¶135.
26 Id., at 52, ¶135-140.
27 Record, at 18 (Uncontested Facts ¶12).
28 Record, at 16 (Uncontested Facts ¶3, 5).
45.- All elements of the Convention’s requirements on subject matter jurisdiction are met. Consequently, the Tribunal has subject matter jurisdiction over Televative’s claims against Beristan.

**D. THE BIT’S TIMING REQUIREMENTS DO NOT BAR JURISDICTION.**

46.- The Beristan-Opulentia BIT requires that the parties must try to amicably settle a dispute before submitting the dispute for arbitration. Furthermore, Article 11 provides that in the event the matter cannot be settled amicably within six months, the complaining party can submit the dispute to the tribunal of his choosing. However, it has been found that the timing requirements are procedural and are not a prerequisite for jurisdiction. Thus, Televative’s failure to wait six months to apply for arbitration under ICSID does affect the Tribunal’s jurisdiction.

1. Amicable Settlement Provisions are merely procedural and are not a prerequisite for jurisdiction.

47.- It is well settled that failing to follow an amicable settlement provision does not preclude jurisdiction of the dispute. The Tribunals in *Bayindir* and *Lauder* both found that the waiting period requirements were procedural and therefore not a requirement for jurisdiction. The *Lauder* Tribunal reasoned that the purpose of the provision “is to allow the parties to engage in good-faith negotiations before initiating the arbitration” and that a strict interpretation of the provision would “amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interest of the parties.” Further, both Tribunals found that a lack of the Respondents’ willingness to negotiate with the Claimant after notified of the dispute provided additional justification to allow for jurisdiction.

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29 Article 11(1) of the Beristan-Opulentia BIT.
30 Id.
31 Bayindir, at 28, ¶¶99-100.
32 See Bayindir at 28, ¶100; see also Lauder at ¶187.
33 Lauder at ¶187.
48. On September 12, 2009, Televative submitted written notice to Beristan of the dispute and notified Beristan that Televative was willing to settle the dispute amicably. Less than one month later, Beritech filed a request for arbitration against Televative pursuant to the JV Agreement. Beritech’s action of filing for arbitration is a very strong indication that Beritech, and Beristan, were not willing to enter into good-faith negotiations to settle the dispute amicably. Any attempt by Televative to continue amicable settlement would be futile and thus it is unnecessary and unreasonable to bar jurisdiction based on a procedural matter.

II. THE TRIBUNAL HAS JURISDICTION OVER TELEVATIVE’S CONTRACT-BASED CLAIMS UNDER ARTICLE 10 OF THE BIT.

A. THE UMBRELLA CLAUSE APPLIES TO THIS DISPUTE.

49. Article 10 of the Beristan-Opulentia applies to this dispute and Televative’s contractual claims. Article 10 (the “umbrella clause”) requires that the Contracting Parties observe their obligations “with regard to investments in its territory by investors of the other Contracting Party.” Two ICSID cases dealing with the application of umbrella clauses are SGS v. Pakistan and SGS v. Philippines. In those cases, both Tribunals looked at the text of the umbrella clause, the intent of the parties in light of the purpose and objective of the BIT, and the location of the clause within the framework of the BIT. While the Tribunal in SGS v. Pakistan found that the umbrella clause could not be interpreted to cover contractual claims, the Tribunal in SGS v. Philippines found that the umbrella clause “makes it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.” The facts in this case are more similar to SGS v. Philippines and it should follow that the umbrella clause applies.

1. The Text of the Umbrella Clause is Clear.

50. With regard to the text of the clause, the Tribunal in SGS v. Philippines noted that the Contracting Parties used the term “shall” in the same manner as used in the other substantive

34 First Clarification, Q133.
35 Record, at 18 (Uncontested Facts, ¶13).
36 Article 10 of the Beristan-Opulentia BIT.
37 See SGS v. Pakistan; SGS v. Philippines.
38 SGS v. Philippines, at ¶128.
Articles. Additionally, the Tribunal found that the term “any obligation” is “capable of applying to obligations arising under national law, e.g. those arising from contract.” Overall, the Tribunal found that the actual language of the clause was less expansive than the one in question in *SGS v. Pakistan* and therefore was intended to cover the type of dispute in question.

51.- The language of the Beristan-Opulentia umbrella clause closely resembles the BIT in *SGS v. Philippines* and thus, should be interpreted to include contractual obligations. Article 10 of the Beristan-Opulentia BIT uses the term “shall” along with “any obligation it has assumed.” In applying the rationale from the *SGS v. Philippines* Tribunal, this clause should be interpreted to mean that it imposes a mandatory obligation on the Contracting Parties that could include contract-based claims.

52.- Further, the clause is not so vague as to raise the same concerns found in *SGS v. Pakistan*. That Tribunal found that the vague language of the clause, “while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion.” Here the difference can be found in the language “with regard to investments in its territory” as opposed to “commitments entered.” The Tribunal in *SGS v. Philippines* found the language to be vague and “less clear and categorical” than the language used in the Swiss-Philippines BIT. The Tribunal subsequently reasoning that the difference in language supported their finding of the existence of a treaty-based obligation for contract disputes.

53.- Following the rationale of the *SGS v. Philippines* Tribunal, the language of the Beristan-Opulentia umbrella clause is narrowly tailored and supports the interpretation that by failing to observe the binding commitments made the State, there is a breach of treaty and dispute that can be brought under the BIT.

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39 Id. at ¶115.
40 Id.
41 Id. at ¶119.
42 Article 10 of the Beristan-Opulentia BIT.
43 *SGS v. Pakistan*, at ¶ 166.
44 Article 10 of the Beristan-Opulentia BIT; *SGS v. Pakistan*, at ¶53.
45 *SGS v. Philippines*, at ¶119 (comparing the language of the Swiss-Philippines BIT to say “any obligations assumed with respect to specific investments.”); See also Myrsalieva 447-48 (discussing the comparisons of the language used).
2. The BIT should be interpreted in favor of protecting investments.

54.- In light of the purpose and objective of the Beristan-Opulentia BIT, the umbrella clause should be interpreted in favor of protecting investments. The Preamble of the Beristan-Opulentia BIT provides that the Contracting Parties “desir[e] to establish favourable conditions for improved economic co-operation between the two countries … especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party.”\(^{46}\) It additionally discusses the “encourage and mutual protection to such investments.”\(^{47}\)

55.- The *SGS v. Philippines* Tribunal found that – in light of the language in the Swiss-Philippines BIT preamble – the “object and purpose of the BIT supports an effective interpretation of [the umbrella clause]” and that “it is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”\(^{48}\) The court further reasoned that it is “consistent with the object and purpose of the BIT” to find that obligations and commitments made by the State be “incorporated and brought within the framework of the BIT by [the umbrella clause].”\(^{49}\)

56.- In this case, the umbrella clause should be interpreted in a light most favorable for the protection of investments and the investors from the other Contracting Party. The intent and purpose of the Beristan-Opulentia BIT is clear – to promote, encourage, and protect the investments made by nationals of one Contracting in the territory of the other Contracting Party. Interpreting the umbrella clause in a manner that restricts the protection and encouragement of investments is contradictory to the BIT’s purpose.

3. The location of the Umbrella clause does not prevent its application.

57.- While not located within the substantive framework of the Beristan-Opulentia BIT, the location is not decisive and does not bar its application. The *SGS v. Pakistan* Tribunal supported it conclusion by reasoning that if the parties had intended for the umbrella clause to impose

\(^{46}\) Preamble of the Beristan-Opulentia BIT.

\(^{47}\) *Id.*

\(^{48}\) *SGS v. Philippines*, at ¶116.

\(^{49}\) *Id.* at ¶117.
substantive obligations “they would logically have placed [it] among the substantive ‘first order’ obligations.” It was concluded that subrogation clause and dispute settlement provisions marked the separation of the substantive “first order” obligations from the other provisions and because the umbrella clause was placed after those provisions it could not be seen as being a substantive “first order” obligation. However, the Tribunal in SGS v. Philippines noted that the location of the provision is not decisive.

58.- Here, the Beristan-Opulentia BIT places the umbrella clause subsequent to the substantive obligation provisions and the Articles concerning subrogation, transfer procedures, and essential security, but before the dispute settlement provisions. However, in view of the intent of the Contracting Parties and the language used, the location of this provision is not dispositive of its applicability. Following the SGS v. Philippines Tribunal’s reasoning regarding location, the umbrella clause in the Beristan-Opulentia BIT is applicable regardless of its location within the BIT.

III. THE TRIBUNAL HAS JURISDICTION REGARDLESS OF CLAUSE 17 OF THE JV AGREEMENT.

59.- While Clause 17 of the JV Agreement provides for a forum selection for disputes arising under the contract, the provision does not act as a bar precluding other dispute settlement forums. Televative has claims that are treaty based and which arise from Beristan’s violations of substantive treaty provision. Thus, the Tribunal has jurisdiction over this dispute arising from the BIT and as such, the JV Agreement cannot override this jurisdiction.

A. TELEVATIVE’S CLAIMS ARE TREATY-BASED.

60.- Because Televative’s claims are based on Beristan’s violation of relevant treaty provisions, the Tribunal has jurisdiction over such claims, as well as jurisdiction concerning any ancillary claims that arise under the JV Agreement. Restrictions on the Tribunal’s jurisdiction

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50 SGS v. Pakistan, at 365, ¶170.
51 Id., at 364, ¶169.
52 SGS v. Philippines at ¶124.
apply only to claims that are purely contractual. Additionally, Tribunals “retain[] jurisdiction in relation to breaches of contract that would constitute, at the same time, a violation of the Bilateral Treaty by the State.”

61.- When dealing with the differences between contractual claims and treaty claims, the Tribunal in *SGS v. Philippines* discerned that “the purpose of the BIT is to promote and protect foreign investments” and that “[a]llowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim.” The Tribunal further noted that distinguishing between claims arising under BITs and those arising under investment agreements could give rise to “overlapping proceedings and jurisdictional uncertainty” and that such distinction “should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.” Additionally, the Tribunal reasoned that because investments are entered into by means of contracts and other agreements, the language “disputes with respect to investments” found in BITs and the phrase “legal dispute arising directly out of an investment” in Article 25(1) “naturally includes contractual disputes.”

62.- In addition to the compelling policy reasons asserted in *SGS v. Philippines*, Article 42 of the Convention specifically states that ICSID tribunals have the authority to apply either domestic or international law depending on which is applicable to the dispute.

63.- The evidence presented shots that Televative claims arise from the actions of Beristan, which are clear violations of the Beristan-Opulentia BIT. Specifically, Beristan’s actions, made through its agent Beritech, amount to expropriation, discrimination, and violations of fair and equitable treatment. All violations of obligations of the BIT. Beristan’s egregious conduct is the

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53 *Salini v. Morocco*, at ¶62.
54 *Id.*
55 *SGS v. Philippines*, at ¶132.
56 *Id.*
57 *Id.*
58 Article 42(1) of the ICSID Convention (stating that “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”).
basis of Televative’s claims and accordingly constitutes treaty-based claims. Additionally, Beritech violated several provisions of the JV Agreement when they forced Televative out of the joint venture. This Tribunal retains jurisdiction over this contract-based claims and has the authority to decide such issues under the domestic law of Beristan.

64.- Thus, pursuant to applicable law and international principles, the Tribunal has jurisdiction over Televative’s claims.

B. THE JV AGREEMENT PROVISION DOES NOT PRECLUDE BIT JURISDICTION.

65.- The Beristan-Opulentia BIT expressly provides for the settlement of “disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party.” This Article provides for no limitation or differentiation of the types of disputes to be submitted.

66.- The Vivendi annulment tribunal addressed the issue of competing jurisdictional claims by finding that

[W]here the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state cannot operate as a bar to the application of the treaty standard.\(^{50}\)

In the notable Vivendi case, the Claimants brought their claim pursuant to the France-Argentina BIT claiming that the Republic of Argentine, through the actions of the Province of Tucumán, violated substantial treaty obligations.\(^{61}\) However, in addition to the BIT, the Claimants had entered into a Concessions Contract with the Province of Tucumán that provided for exclusive jurisdiction of disputes arising from the Concessions Contract.\(^{62}\) The problem for the Vivendi Tribunal arose at the merits stage when the Tribunal believed that in order to determine if there

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\(^{59}\) Article 11 of the Beristan-Opulentia BIT.

\(^{60}\) Vivendi annulment, at ¶101.

\(^{61}\) See Vivendi; see also Cremades.

\(^{62}\) Id.
had been a violation of the treaty, it would have to be decided if there was a breach of the contract. Such decision though needing to be made under the jurisdiction of the contract.63

IV. CONCLUSION ON JURISDICTION.

67.- The Tribunal has jurisdiction over Televative’s claim because all requirements of the Article 25 of the Convention are satisfied. The parties have manifestation irrevocable consent to ICSID jurisdiction through the BIT and ratification of the Convention.

68.- Additionally, Televative has shown that the Tribunal has subject matter jurisdiction over this dispute. The facts show that Televative’s investment in Beristan meets the requirements of a “qualifying investment” for purposes of subject matter jurisdiction. Further, the dispute at issue arises directly from this qualifying investment.

69.- Furthermore, the BIT’s timing requirements do not bar the Tribunal’s jurisdiction over this dispute. Amicable settlement provisions have continually been found to be merely procedural and thus not a prerequisite for jurisdiction. Strict application of the provision is against public policy and only causes undue delays and increased costs for all sides.

70.- Televative’s claims are treaty-based and can brought under the Beristan-Opulentia BIT. Further, Televative’s claims can be brought under the BIT by virtue of Article 10. The umbrella clause should be interpreted in favor of protecting investments and the unambiguous language of the provision found in the Beristan-Opulentia BIT support this conclusion.

71.- Finally, the Tribunal has jurisdiction over Televative’s entire claim, even claims that are contractually based.

63 Id.
PART II: ARGUMENTS ON THE MERITS

I. RESPONDENT MATERIALLY BREACHED THE AGREEMENT.

72.- Respondent summarily declared a material breach of the confidentiality clause of the joint venture agreement as a pretext to seize the interest of Claimant in the Sat-Connect project. To determine material breach, this Tribunal should not confine itself to a strict reading of this joint venture contract because the approach is inappropriate for long-term investment contracts. The purpose of the Agreement was the creation of long-term, cooperative venture whereby the parties became bound by the duty of good faith and fair dealing. Respondent violated this duty by expelling Claimant from the project thus preventing Claimant from fulfilling its contractual duties and denying Claimant a fair opportunity to perform.

A. RESPONDENT UNILATERALLY TERMINATED THE CONTRACT FOR ITS OWN GAIN.

73.- Respondent declared a material breach of the Agreement for an alleged breach of confidentiality without a scintilla of credible evidence. On August 12, 2009, the Beristan Times published an article that reported a leak of confidential information by personnel of Claimant.\(^{64}\) The source of the information was a high-ranking official of the Beristan government, a majority shareholder in Beritech\(^{65}\). Only six days later, with the bare minimum of six directors to form a quorum of the total nine directors convened to consider the validity to the rumor of a breach of confidentiality by Claimant.\(^{66}\) Respondent’s five directors unilaterally invoked the buyout clause. Within two weeks after the meeting, Claimant’s personnel were physically removed from the Sat-Connect facility.\(^{67}\) Respondent stands to gain Claimant’s share – 35% of the Sat-Connect equity interest and profits realized.

\(^{64}\) Record, at 17.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
B. RESPONDENT IS BOUND BY A DUTY OF GOOD FAITH AND FAIR DEALING.

74.- Respondent is bound by the duty of good faith and fair dealing in its relationship with Claimant as specified in the Agreement. This duty recognized in international law. For international commercial contracts, UNIDROIT Article 1.7 recognizes the duty of good faith and fair dealing. Furthermore, the duty of good faith and fair dealing is a principle of UNIDROIT that cannot be waived.

II. BERISTAN DISCRIMINATED AGAINST TELERVATE IN VIOLATION OF ITS INTERNATIONAL DUTIES.

75.- By entering into the Beristan-Opulentia BIT, both contracting states memorialized their desire and consent to encourage and protect investments by nationals of one nation in the territory of the other. The Beristan-Opulentia BIT provides that both governments “shall constantly guarantee the observance of any obligation as has assumed with regard to investments in its territory by investors of the other Contracting Party.” The BIT also states the two parties will accord investments “fair and equitable treatment” and will not “subject to unjustified or discriminatory measures” the companies in which investments by the other contracting party’s nationals have been made. In short, Beristan is under the obligation to afford Claimant, at a minimum, “no less favourable treatment than that accorded to investments effected by…its own nationals”. Claimant respectfully submits that Beristan violated these treaty based duties and standards.

A. BERITECH AND ITS REPRESENTATIVES ARE THE BERISTAN GOVERNMENT.

76.- As shown above, Beritech is an agency of the Beristan government acting under color of law. The Beristan government contributed seventy-five percent (75%) of the equity capital of Beritech while Beristan investors with close ties to the Beristan government simultaneously

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68 See Article 1.7 of UNIDROIT.
69 UNIDROIT
70 Article 10 of the Beristan-Opulentia BIT.
71 Article 2 (2) of the Beristan-Opulentia BIT.
72 Article 2(3) of the Beristan-Opulentia BIT.
73 Id.
74 Article 3(1) of the Beristan-Opulentia BIT.
contributed the remaining twenty-five percent (25%). Beritech is therefore essentially entirely owned and controlled by Respondent.

77.- Through Beritech, Respondent and its closely-tied investor group entered into a joint venture agreement with Claimant that established Sat-Connect as a Beristian joint venture. Beritech owns a controlling sixty-five percent (65%) equity interest in Sat-Connect, and Claimant owns the remaining minority stake of thirty-five percent (35%) of the equity. Thus, the majority voting block of Sat-Connect is held by Beritech, and Beritech is entirely owned by Respondent. Therefore, Respondent was not only under the obligation to perform as required by the JV agreement, but also under the obligation to guarantee the obligations it assumed with regards to Sat-Connect in its own territory vis-à-vis Claimant.  

B. BY PREVENTING THE TRANSFER OF TELEVATIVE’S RETURNS, BERISTAN HAS VIOLATED ITS OBLIGATIONS UNDER THE BIT.

78.- The Beristan-Opulentia BIT expressly creates two duties. First, there is a duty to ensure investors “fair and equitable treatment and full protection and security of the investments of investors of the other Contracting Party,” which includes ensuring that the management, maintenance, and enjoyment of the investments “shall in no way be subject to unjustified or discriminatory measures.” Second, there is a duty for the host state to refrain from expropriating an investment of investors of the other Contracting Party. The only possible exceptions are expropriation for public purposes or in protecting the national interest, provided that the investor is given immediate full and effective compensation and that the measures taken are done on a non-discriminatory basis and in conformity will all legal provisions and procedures. Beristan has violated both duties.

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75 See Article 10 of Beristan-Opulentia BIT.
76 Article 2(2) of the Beristan-Opulentia BIT.
77 Id.
78 See Article 4 of the Beristan-Opulentia BIT.
79 Article 4(2) of the Beristan-Opulentia BIT.
1. Against the BIT’s Express Language, Beristan Improperly Disturbed Claimant’s Investment without Due Process of Law.

79.- Based on the express language of Articles 2 and 4 of the Beristan-Opulentia BIT, the actions taken by Respondent were against the language, intentions, and spirit of the agreement. As described, the agreement requires the Respondent to ensure the management, maintenance and enjoyment of Claimant’s investment in Sat-Connect. If that investment is to be disturbed, it can be so for a public purpose or national interest, and only in a non-discriminatory manner in conformity with legal due process.

80.- However, Beristan’s actions were clearly discriminatory and thus a violation of Beristan’s obligations under the BIT. Sat-Connect’s board decided to discriminate between Beristan and Opulentia shareholders in voting to compel the buyout of Claimant’s interest without the required quorum, and in enforcing that decision through unjustified military action. This measure is a per se violation of the BIT’s requirement to ensure Claimant’s quiet enjoyment of its investment and does not satisfy its requirements for a valid expropriation. The conclusion that necessarily follows is that by allowing the military to expel Claimant from Sat-Connect, Beristan has violated its international obligations under the BIT.

C. BERISTAN VIOLATED ESTABLISHED INTERNATIONAL LAW STANDARDS OF FAIR AND EQUITABLE TREATMENT AND NATIONAL TREATMENT.

81.- As expressed in the introduction to this section, the BIT, as well as other relevant international accords, imposes on the Beristan and Opulentia government’s different mandatory standards. Both the FET and the NT standards, among others, were violated.

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80 See Article 2 & 8 of the Beristan-Opulentia BIT.
81 See Article 2 of the Beristan-Opulentia BIT.
82 See Article 4(2) of the Beristan-Opulentia BIT.
83 Record, at 6.
84 See Article 4 of the Beristan-Opulentia BIT.
1. Beristan Violated the FET and the NT Standards vis-à-vis Televative.

82.- The Beristan-Opulentia BIT adopted the FET as well as the NT standards that impose on both signing parties a general duty of good faith towards the other party’s investors. This includes ensuring that investments “shall in no way be subject to unjustified or discriminatory measures.” As stated in EDF (Services) Limited, “the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.”

83.- To analyze whether Respondent has breached the standard, the Tribunal must consider several factors giving rise to a violation against “countervailing factors” which may indicate that the standard has not been breached. Factors giving rise to a violation of the standard are: (i) discrimination; (ii) breach of the investor’s legitimate expectations; (iii) use of power for improper purposes, including coercion and harassment; and (iv) bad faith or inconsistency. The “countervailing factors” are: (i) objective basis; (ii) no disproportionate impact; (iii) the investor’s claim is not supported by any national or international recognized right; and (iv) “caveat investor.” The evidence shows that Beristan violated these standards.

(a) Beristan Discriminated Against Televative.

84.- At the core of the FET standard is the condition of transparency. One of the most serious factors which show a breach of the FET and NT standards is discrimination. Beristan, through the unjustified use of military force, impermissibly deprived Claimant of its rights in Sat-Connect.

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85 Article 4(3) of Beristan-Opulentia BIT.
86 EDF (Services) Limited v. Romania, at 63 (citing Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/91, at ¶ 254).
87 See McLachlan, at 233-47 (analyzing the treatment of investors in the context of the international review of administrative actions).
88 Id., at 235-43; See also Suarez, at 253-54 (discussing how some of these factors have been addressed by different tribunals).
89 Id., at 243-47.
90 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, at 55 (stating that “[t]ransparency appears to be a significant element for the protection of both the legitimate expectations of the investor and the stability of the legal framework.”).
85.- The *Plama* Tribunal, discussing actions taken by the Republic of Bulgaria, held that a discriminatory measure entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.\(^91\) It defines unreasonable or arbitrary measures as “those not founded in reason or fact but on caprice, prejudice or personal preference.”\(^92\) For a state’s measure to be “reasonable,” the conduct must bear a reasonable relationship to some rational policy; “non-discrimination” calls for the rational justification of any differential treatment of a foreign investor.\(^93\)

86.- The *SD Myers* Tribunal also set out two relevant factors to determine whether purposeful discrimination exists: (i) “whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;” and (ii) “whether the measure, on its face, appears to favour its nationals over non–nationals who are protected by the relevant treaty.”\(^94\)

87.- Here, Beritech, which controls Sat-Connect, discriminated against Claimant by improperly invoking the JV Agreement’s forced buyout provision, giving neither Claimant proper notice nor the opportunity to respond to the allegations of “leaking” confidential information. The evidence shows such purpose when the Sat-Connect board’s majority voted to invoke Clause 8 of the JV agreement, without revealing to the Claimant-appointed directors the purpose of the August 27, 2009 meeting.\(^95\) The vote proceeded despite the quorum being insufficient, the vote conveniently held among the majority, all five directors voting appointed by Beritech and therefore loyal to the interests of Respondent. Clearly, the invocation of the forced buyout provision was an arbitrary measure based on unsubstantiated allegations of breach of confidentiality, not on confirmed facts. It was capricious and prejudicial because the entire procedure was never transparent from the outset. Claimant had no fair opportunity to learn the purpose of the meeting or to answer the charges raised against it, much less defend itself when the CWF arrived on Sat-Connect premises.

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\(^91\) *Plama*, at 57, ¶ 184.
\(^92\) *Id.*
\(^93\) *Id.*, at 56-57, ¶ 183.
\(^94\) *SD Myers*, at 27, ¶ 252.
\(^95\) *Record*, at 17 (Sat-Connect’s board meeting).
88.- The military seizure of the Sat-Connect facility is the direct consequence of the “practical effect of the [Beritech] measure”\cite{SD Myers, at 27, ¶ 252} to discriminate between national and foreign shareholders,\cite{Id.} because of Beritech’s close economic ties to Respondent. Clearly, the use of military force to expel Claimant’s personnel, “appears to [favor Beristan] nationals over non–nationals [Claimant] who are protected by the relevant [Beristan-Opulentia] treaty.”\cite{Id.} All of Claimant’s equity interest and intellectual property was seized by Respondent. In fact, the CWF’s arrival on the premises was specifically designed to intimidate and discriminate against shareholders. Thus, the evidence shows how Beristan willfully discriminated against Claimant. The intent of favoring its own citizens by permitting an unlawful seizure of Claimant’s property without due process and justification is a violation of the standards, particularly NT.

\textbf{(b) Respondent Breached Televative’s Legitimate Expectations.}

89.- As expressed by the \textit{Plama} Tribunal, transparency is a “significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework” in meeting the standard for FET.\cite{Plama, at 55, ¶ 178} FET requires the host state to honor the investor’s legitimate expectations and provide a stable legal framework.\cite{Id., at 53, ¶ 175} Upon analyzing numerous treaties, the \textit{CMS Gas} Tribunal held that international law “unequivocally shows that [FET] is inseparable from stability and predictability.”\cite{CMS Gas, at 1235, ¶ 276} Indeed, a foreign investor’s legitimate expectations include “\textit{reasonable and justifiable}” expectations that the investor took into account when making the investment, including the conditions that were specifically offered by the host state and relied upon by the investor.\cite{Plama, at 54, ¶ 176} Inextricably linked are the standards of good faith, due process, and non-discrimination.\cite{See id.}

90.- Here, Televative and Beritech established Sat-Connect to develop and deploy a satellite network and several terrestrial systems and gateways to provide connectivity and
communications for users of the system anywhere within Euphonia.\textsuperscript{104} Televative’s investment in Sat-Connect stands at US$47 million.\textsuperscript{105} Claimant relied on Respondent’s backing of the Sat-Connect project, given the treaty executed between Beristan and Opulentia prior to the formation of Sat-Connect, the composition of Sat-Connect’s ownership interests, the Respondent itself having co-signed the JV Agreement that created Sat-Connect, and two years of good relations between Beritech and Claimant in working to complete the satellite network project. Claimant never would have contributed such a high investment or its intellectual property if at any moment it lacked confidence in the host state’s legal and business environment. After two years of good working relations, technology transfers, and such a significant investment, the minimum Claimant would expect from its host state would in fact be a good-faith course of dealing, due process under the law, and non-discrimination.

91.- Therefore, Respondent violated the FET because it deprived Claimant due process of law when it deployed staff from the CWF to seize the Sat-Connect facilities after Sat-Connect, through Claimant’s US$47 million investment, had nearly finished developing the technology essential for the communication systems to function.

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(c) \textit{Beristan, in Bad Faith, used its Power for Improper Purposes and to Coerce and Intimidate Televative’s Representatives.}
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92.- Respondent, through Beritech and the CWF, exercised its powers to expel Televative’s representatives from the Sat-Connect project and omitted to provide adequate protection from the military’s seizure of the project sites. These acts are violations of international commitments assumed by Beristan under the Covenant. The Covenant provides specifically that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, …, home …, nor to unlawful attacks on his honour and reputation.”\textsuperscript{106} Furthermore, “[a]ny advocacy of national, … hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”\textsuperscript{107}

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\textsuperscript{104} Record, at 16. \\
\textsuperscript{105} Record, at 18. \\
\textsuperscript{106} Article 17 of the \textit{Covenant}. \\
\textsuperscript{107} Art 20 of the \textit{Covenant}.
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93.- Beritech, without justification, served Claimant with a notice to vacate the Sat-Connect premises without providing the opportunity for Claimant to confront the board’s decision to compel the buyout of Claimant’s interest. The CWF’s entry and seizure of the Sat-Connect facility constituted an abuse of right on the part of both Beritech and Respondent, and it also disclosed vast amounts of confidential information: trade secrets, data, technology, specifications, improvements, inventions, current and planned research and development, structures, business plans, financial information. The information related to the Sat-Connect project had remained secret, in compliance with the JV Agreement, until the August 12, 2009 Beristan Times article.

94.- The evidence abundantly proves that Respondent, through Beritech, acted in bad faith. Black’s Law Dictionary defines bad faith as “[d]ishonesty of belief or purpose.” Given Sat-Connect’s ownership structure, Beritech’s equity composition, and Beritech’s links to Respondent, the Centre may fairly conclude that Respondent acted with dishonest beliefs and purposes, thereby violating its treaty obligations. Despite the Covenant not being self-executing, it nevertheless applies directly to the case at bar, convincingly supporting a finding of a FET violation.

(d) Not one “Countervailing Factor” Applies.

95.- Not one, single countervailing factor is applicable in this dispute. There is no “objective basis” for the discriminatory decisions adopted by Respondent’s agencies and representatives. Protecting national shareholders is not a valid basis, under international standards, to permit an expropriation of an investment without due process of law. Resorting to military action to remove Claimant from the Sat-Connect project on mere, unsubstantiated allegations of breach of confidentiality has no basis. The failure to investigate charges that put a US$47 million investment at stake constitutes a failure of due diligence and an abuse of right. Simply deeming the allegations—the rumor—of a “leak” as true is not and cannot be sufficient to justify sending the military to seize a law-abiding business interest.

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108 Record, at 19.
109 Black’s Law Dictionary, at 149.
110 See McLachlan, at 243-47.
111 Record, at 6-7 (November 16, 2005, VanCal shareholder’s meeting minutes).
96.- The impact of the measures on national and foreign investors is markedly different. Claimant’s investors are unable to collect their returns, are deprived of their intellectual property, and of the ability to enjoy and administrate their investment. Meanwhile, Beritech’s investors—all having close ties to Respondent—fully enjoy their investment. Also, Televative’s claims are supported by internationally recognized rights arising from violations of the Convention, the Beristan-Opulentia BIT and applicable international law.

97.- The *Caveat Investor* standard is not applicable to Claimant because after two years of good working relations, there was a change of circumstances. Televative did not find any cause for concern in Respondent’s legal system at the time of the Sat-Connect’s creation. Even if Claimant had performed the strictest due diligence, nothing would have prepared it or its representatives for the level of arbitrariness, mistreatment, and abuse that Respondent inflicted.

98.- In conclusion, Beristan violated several treaty- and international law-based standards, especially the FET and NT standards, *vis-à-vis* Televative.

2. **Beristan Deliberately Failed to Provide Protection and Security to Televative’s Representatives.**

99.- The Beristan-Opulentia BIT calls for both Contracting Parties to “at all times ensure treatment in accordance with customary international law, including…full protection and security of the investments of investors of the other Contracting Party.” The FPS standard exists in treaties as a separate obligation and it applies essentially when the foreign investment has been affected by civil strife and physical violence. FPS specifically deals with the exercise of the state’s police powers and its omission to exercise due diligence to adequately protect the investor’s property from “actual damages caused by either miscreant State officials, or by the actions of others.”

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112 Article 2(2) of the Beristan-Opulentia BIT.
114 *McLachlan*, at 247.
115 *Id.*
100.- Case law outlines some important factors which show when a host state has breached the standard. *Tecmed* points out that the FPS standard was not breached so long as the host state authorities did not do any of the following:

“encouraged, fostered, or contributed their support to the people or groups that conducted the [protests] against the [investment or investors] or [did] not [react] unreasonably, in accordance with the parameters inherent in a democratic state….”

101.- In addition, both *American Manufacturing* and *Wena* held that inaction by the host state authorities to prevent violent acts, regardless of the government’s participation, made the state liable. Breach of the FPS standard required that the authorities were aware of the acts, had the capacity to prevent them (or at least minimize their effects) and completely failed to do so.

102.- Here all factors are satisfied. First, Beristan encouraged and fostered a hostile business environment by failing to investigate the accusations made by government officials in the August 12, 2009 Beristan Times article before the Sat-Connect vote to compel Beritech’s buyout of Televative’s investment contribution. Secondly, Respondent sent the CWF to seize the Sat-Connect project on the basis of a corporate resolution alone and knowingly declined to investigate the allegations of the “leak” as the minimum of due process would require. Therefore, Respondent failed to provide Televative even the minimum physical and legal security to Televative’s investment.

103.- In *Wena*, protestors took over a hotel and affected the investment for over a year. The Tribunal implied that if the claimant would have proved the authorities participated in any way in the protests, a finding of breach of the FPS standard would have been proper.

104.- Here, the evidence clearly supports a finding of breach of the FPS standard. The Beristan Times published an article falsely accusing Televative of leaking confidential information to its [footnotes]

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116 *Tecmed*, at 181, ¶ 176.
118 *Id.*
119 *See Wena*, at 114, ¶ 88 n.198.
home government.\textsuperscript{120} The publication triggered the August 27, 2009 vote to compel the buyout of Claimant’s interest in Sat-Connect without any further investigation, followed by military seizure of the Sat-Connect facilities and Claimant’s US$47 million investment. At a minimum, Respondent should have conducted an investigation \textit{before} acting on a mere corporate resolution and using military force against Claimant.

105.- Therefore, the Tribunal should find a breach of the FPS standard and hold Beristan accountable for that breach.

III. 

TELEVATIVE’S INVESTMENT WAS EXPROPRIATED BY BERISTAN’S UNLAWFUL INTERFERENCE.

A. THE BERISTAN-OPULENTIA BIT REGULATES THE STATE’S RIGHT TO EXPROPRIATE.

106.- A State may expropriate for the public interest so long as it does so in a non-discriminatory, proportionate manner.\textsuperscript{121} Expropriation is not just an outright seizure, but also the interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable—to–be–expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”\textsuperscript{122}

107.- The \textit{Lauder} Tribunal signals that “there is heightened protection against deprivations resulting from regulatory actions when the acquired rights have obtain legal approval on which investors justifiably rely.”\textsuperscript{123} The intent to deprive Claimant of its property is not required.\textsuperscript{124} In general, expropriation involves the “coercive appropriation by the State of private property”. \textsuperscript{125}

\textsuperscript{120} Record, at 17.
\textsuperscript{121} Article 1 of the \textit{ECHR First Protocol}; \textit{See also Litvinoff}, at 226; \textit{See also Broches II}, at 208-209; \textit{See also} \textit{Appleton}, at 42.
\textsuperscript{122} \textit{Metalclad}, at 91-92, ¶ 103.
\textsuperscript{123} \textit{Lauder}, at 41, ¶ 197.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}, at 42, ¶ 200.
108.- While the Beristan-Opulentia BIT does not define “expropriation,” it does prohibit it for purposes different than the public interest or when conducted in a discriminatory manner, against due process and without immediate, full and effective compensation.126

109.- Beristan contends that a “finding of expropriation would require a specific decree or legislative act.”127 However, such an interpretation would eliminate the possibility of a claim of indirect expropriation, which does not require obvious measures. Indirect expropriation does not involve an overt taking, but instead effectively neutralizes the enjoyment of the property128, thereby depriving the investor of its value. Because a wide variety of measures are susceptible to lead to indirect expropriation, each case should therefore to be decided on the basis of its own attending circumstances.129

110.- The BIT’s expropriation regulations should have been respected by Respondent in exercising power over Televative’s investment. Respondent breached the BIT’s expropriation provisions by failing to afford Claimant due process of law prior to resorting to military action in seizing the Sat-Connect project, and by failing to immediately and adequately compensate Claimant for the loss of value of its investment.

B. TELEVATIVE’S EXPROPRIATED RIGHTS ARE PROTECTED BY THE BERISTAN-OPULENTIA BIT.

111.- The Beristan-Opulentia BIT provides that “[i]nvestments 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.”130 Televative’s expropriated rights fit the definition of an “investment”, as specified in Article 1 of the BIT, and are therefore entitled to protection against expropriation.

126 Article 4(2) of the Beristan-Opulentia BIT.
127 Record at 5.
128 Lauder, at 43, ¶ 200.
129 Id.
130 Article 4(2) of the Beristan-Opulentia BIT.
1. Televative’s Rights in Sat-Connect were Disturbed.

112.- The express terms of the Beristan-Opulentia BIT\textsuperscript{131} make Claimant’s ownership interest and capital contributions a protected investment. Televative does not contend that Beritech’s exercise of its majority shareholding rights to compel the buyout of Claimant’s interest in Sat-Connect constituted expropriation.\textsuperscript{132} Instead, Televative respectfully submits that its ownership interest “had been interfered with to such an extent as to give rise to a compensable claim.”\textsuperscript{133} The expropriatory measures are the military seizure of Claimant’s physical and intellectual property,\textsuperscript{134} the expulsion of Claimant’s representatives from the Sat-Connect facilities, and the deliberate concealment of the purpose of the August 27, 2009 meeting agenda to compel the buyout of Claimant’s interest without first affording Televative the opportunity to defend itself against allegations that it had “leaked” confidential information to the government of Opulentia.

2. Televative’s Contract Rights in Sat-Connect.

113.- Televative provided technical assistance, research and development, intellectual property, and made capital contributions to Sat-Connect. The following is an evaluation of why these rights are investments and thus entitled to the BIT’s protection against expropriation.

(a) \textit{Televative’s Intellectual Property must be protected under the BIT.}

114.- The rights to intellectual property in exchange for a royalty payment are property rights.\textsuperscript{135} The BIT specifically protects intellectual property (IP) rights.\textsuperscript{136}

115.- The \textit{Vienna Convention} requires a plain meaning interpretation of treaties, allowing the use of “supplementary means of interpretation”\textsuperscript{137} only if any ambiguities remains.\textsuperscript{138}

\textsuperscript{131} See Arts. 1(a), 1(b), 1(d), 1(e), 1(2), and 4 of the Beristan-Opulentia BIT.
\textsuperscript{132} See Mouri, at 140-42 (explaining why the exercise of majority shareholder rights by the government is not \textit{per se} expropriatory); See Garcia-Bolivar II, at 76 (discussing how a change in policy is more unfair treatment than expropriation).
\textsuperscript{133} Mouri, at 143 (citing the holding of the Iran-U.S. Claims Tribunal in the \textit{Foremost Tehran, Inc.} case).
\textsuperscript{134} As defined in Article 1(2) of the Beristan-Opulentia BIT.
\textsuperscript{135} See Mouri, at 44-45.
\textsuperscript{136} Article 1(1)(d) of the Beristan-Opulentia BIT.
116.- Using the *ejusdem generis* approach to construction of contracts, the licensing agreement shall be included as a property right.\(^\text{139}\) The BIT lists mutually binding relations: mortgages, pledges, lease, etc., and one forced relation, a lien. In all these cases, a party affected its property for the benefit of another. Technology transfers, in that sense, are very similar to all these contacts and most similar to a lease of IP rights. Therefore, it should be considered as a property right included in the BIT.

117.- The maxim of interpretation, *expressio unius est exclusio alterius*, does not apply here because the BIT uses the expansive words, “similar rights,” thereby implying that the list is merely illustrative.\(^\text{140}\)

**(b) Televative’s technical assistance is a property right entitled to protection.**

118.- The rights to remuneration for technical assistance are also property rights.\(^\text{141}\) Consequently, rights derived from the rendering of technical assistance to Sat-Connect are “rights to performance having an economic value.”\(^\text{142}\) Televative had the right and obligation to perform certain services to Sat-Connect under the JV Agreement and the right to charge a fee. Additionally, Televative derived value from the contract by assuring that Sat-Connect maintained high technical standards of support and quality. This would then increase Televative’s share value. Therefore, the Tribunal should consider Televative’s rights to remuneration for its technical assistance to Sat-Connect a property right included in the BIT.

\(^{137}\) See Article 31 of the Vienna Convention.

\(^{138}\) *Id.*, Article 32.

\(^{139}\) *See Farnsworth*, at 457, § 7.11 (explaining that *Ejusdem generis* to ascertain the meaning of a word in a series when a list of specific descriptors is followed by more general descriptors, such as here “similar rights.” Then the meaning of the general descriptor (“similar rights”) must be restricted to the same class of the specific descriptors that precede it).

\(^{140}\) *Id.* (explaining that *expressio unius est exclusio alterius* assumes that items not on the list are excluded from it).

\(^{141}\) *See Mouri*, at 130.

\(^{142}\) Article 1(1)(c) of the Beristan-Opulentia BIT.
C. BERISTAN’S UNLAWFUL INTERFERENCE WITH TLEVATIVE’S INVESTMENT CONSTITUTES INDIRECT EXPROPRIATION.

1. All the Elements of Indirect Expropriation are Present Here.

(a) Beristan’s Interference with Tlevative’s Investment was Significant.

119.- To constitute indirect expropriation, the measures must impact the investment in a manner “of a certain ‘magnitude or severity’.”\textsuperscript{143} The “‘test is whether that interference is sufficiently restrictive to support the conclusion that the property has been ‘taken’ from the owner’.”\textsuperscript{144}

120.- Interference with the continuation of management tasks has been considered an indirect expropriation.\textsuperscript{145} The Iran-U.S. Claims Tribunal has held that the appointment of government managers “qualified as indirect expropriation either by itself, … or in conjunction with other acts effectively depriving an investor” of its property.\textsuperscript{146}

121.- Here, Beristan restricted Televative’s effective exercise of its shareholder and board member rights at the August 27, 2009 meeting.\textsuperscript{147} Ms. Sharpeton was severely limited by the whims of Beritech and prevented from exercising her corporate duties because the Beritech-appointed directors purposefully concealed the meeting agenda and then ambushed her with the vote to compel Beritech’s buyout of Televative’s 35% equity interest in Sat-Connect.\textsuperscript{148} Then, Beritech passed the resolution to buy out Televative’s share in Sat-Connect, served the order to vacate\textsuperscript{149}, and then Beristan deployed the CWF to expel Claimant’s representatives from the Sat-Connect premises\textsuperscript{150} without affording Claimant due process of law.

\textsuperscript{143} Reinisch, at 30 (citing Pope & Talbot, Inc. v. Government of Canada, (Interim Award) 7 ICSID Rep 43, 69).
\textsuperscript{144} McLachlan, at 298 (citing Pope & Talbot).
\textsuperscript{145} See generally Mouri; See also generally Reinisch.
\textsuperscript{146} Reinisch, at 41 (citing Phillips Petroleum Co. v. Iran, 21 Iran-U.S. C.T.R. 79 (1989); See also Mouri at 51-52.
\textsuperscript{147} Record, at 17 (board meeting of August 27, 2009).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
122.- The above actions unlawfully deprived Televative of the use and enjoyment of its investment. This is true particularly because Televative’s investment consists largely of invaluable intellectual property and the value in the IP rights lies in keeping that information secret. The August 12, 2009 Beristan Times article and the entry of the CWF upon the Sat-Connect premises caused for Televative’s intellectual property to enter the public domain, thereby irreparably diminishing the value of Televative’s investment. The investment has been damaged beyond repair.

(b) The Effect of Beritech’s Actions was to Neutralize Televative’s Investment.

123.- The key element that reveals an indirect expropriation is the “purpose and circumstances” of a particular government action and its effects. Here, the Tribunal should find that the cumulative effect of the actions taken by Respondent unlawfully deprived Televative of its rights in Sat-Connect.

124.- Case law and doctrine have developed two lines of analysis. The “sole effect” doctrine, the majority rule, analyses the “reality of the impact” of the measures, giving less importance to their form. The other test is a hybrid analysis which evaluates purposes, context, as well as effect of the measures.

125.- In Foremost Teheran, Inc., a case almost identical to the one at hand, the Iranian government took the same actions as those taken by Respondent. Although in that case the Tribunal found no expropriation, it nevertheless found that the “level of interference established constitute[d] ‘other measures affecting property rights’,” and thus was expropriatory. This

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151 Dolzer, at 156.
152 See McLachlan, at 296 (characterizing the rule as controversial); See Redfern & Hunter, at 494-96.
153 McLachlan, at 295; See also Appleton, at 38 (explaining that the U.S. Supreme Court considered that “regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact.”).
154 See generally Phelps Dodge (explaining that the Iranian government appointment of managers to the company was an expropriation because the investor’s shares were rendered useless by the government interference); See also Brunetti, at 207 (discussing the importance of the Phelps Dodge holding).
155 See Dolzer, at 158; See also Reinisch, at 33; See also McLachlan, at 296; See also Appleton, at 39-46.
156 Foremost Tehran, at 251.
case is an example of either open or covert state conduct that neutralized and rendering the investment useless, and the Tribunal found Iran liable regardless of the government’s intent.

126.- The interference here was significant and the sole effect of the actions taken by the Beristan government was to effectively prevent Televative from exercising its ownership rights in Sat-Connect and neutralizing the investment by exposing confidential intellectual property to the public domain.

127.- Even if this Tribunal applied the hybrid analysis, the same outcome would result. By the context of Beritech’s decision to compel the buyout without due process and then seeking the forced removal of Claimant from the Sat-Connect project, the measures were all arbitrary, disproportionate, and unreasonable. The intellectual property was still in use. Televative’s representatives were expelled from the Sat-Connect facilities. Claimant-appointed board directors were unable to exercise Televative’s rights when Beritech’s directors surprised them with the vote for the compelled buyout. Finally, the evidence shows that Respondent, through its almost total ownership of Beritech, stood to gain a significant amount of equity and profits resulting from the forced buyout of Claimant’s share.

128.- The factual background conclusively reveals that the capricious measures taken by the FWC (which constitute Beristan’s state action), effectively neutralized Televative’s capacity to exercise any rights in its investment and therefore indirectly expropriated it.

(c) **Respondent Spoiled Televative’s Reasonable Investment Expectations.**

129.- Televative’s expected returns from Sat-Connect were not only dividends but also royalties from the *confidential* intellectual property transfers and technical assistance services. All these were obliterated by Respondent’s actions.

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157 See generally Record.
158 Record, at 17.
159 See generally Record, at 17-18.
130.- Undoubtedly, Claimant’s reasonable expectations play a critical role. These “reasonably-to-be-expected” benefits call for a case-by-case analysis.\textsuperscript{160} The issue is whether the investor could reasonably foresee that its investment would depreciate and lose all its value or a substantial part of it in a short period of time, due to government actions and measures.\textsuperscript{161} Televative’s investment consists largely of intellectual property and the high monetary value in the IP rights lies in keeping that information secret. Clearly, Televative could and did in fact foresee that its investment might depreciate and lose all its value as a result of breaches of confidentiality.\textsuperscript{162} Therefore, the JV Agreement reflects that Televative’s expectations of Beritech maintaining of all its intellectual property and technology transfers secret were the essence of the investment project. Without the information being kept secret, the value of the IP rights would plummet as would the shares of Sat-Connect.

131.- Given the present circumstances, the Tribunal should find that the military seizure of the Sat-Connect premises and the release of Televative’s confidential intellectual property into the public domain ruined Televative’s investment and thus constituted a “blatant”\textsuperscript{163} expropriation of Televative’s interests in Sat-Connect.

\textbf{(d) Respondent’s Actions were Discriminatory and Disproportionately Applied.}

132.- The Beristan-Opulentia BIT contains non-discriminatory provisions that the host has to grant to the other contracting party’s investors.\textsuperscript{164} Beristan has violated these obligations. Discrimination entails like persons being treated differently, in similar circumstances, without reasonable or justifiable grounds.\textsuperscript{165}

133.- The Beristan government seized Televative’s property and investment assets, while the Beristan shareholders’ equity interests were left intact. This is, on its face, a discriminatory

\textsuperscript{160} See Reinisch, at 36-37; See also Schreuer II, at 4-5; See also Collins, at 112.

\textsuperscript{161} See McLachlan, at 303-04; See also Appleton, at 45 (explaining that only substantial depravations are recognized as expropriations).

\textsuperscript{162} See Clause 4 of Excerpt from Joint Venture Agreement Between Beritech S.A. and Televative Inc., Record at 18.

\textsuperscript{163} See McLachlan, at 264.

\textsuperscript{164} See Article 2 & 3 of the Beristan-Opulentia BIT.

\textsuperscript{165} Plana, at 57, ¶184.
measure. The effects of such measure show that in compelling the buyout of Televative’s equity interest and seizing the Sat-Connect premises, the remaining member of Sat-Connect, Beritech, owned almost entirely by Respondent, stood to gain total control and ownership of the joint venture. This behavior is an abuse of right almost tantamount to theft, and must be condemned by this Tribunal. Without question, the military seizure had a disproportionate effect between national and foreign investors. Although enforcing an order to vacate could be justified, the use of military force to expel a business partner from its premises and the refusal to pay adequate compensation for Televative’s loss of its investment is unjustifiable.

134.- Based on the foregoing, we request the Tribunal to find that Beristan, through the CWF and Beritech, expropriated Televative’s investment and violated specific international obligations provided for in the BIT.

**D. IN THE ALTERNATIVE, BASED ON THE MFN Clause, TELEVATIVE IS ENTITLED TO RELY ON THE PROVISION OF THE BERISTAN-OPULENTIA BIT.**

135.- In the alternative, Televative submits that the provisions in Article 4(2) of the Beristan-Opulentia BIT are fully applicable here. Article 4(2) of the Beristan-Flatland BIT provides that if a company incorporated in the host state is expropriated, the other contracting state’s shareholders have a right to fair, effective and prompt compensation. Opulentia shareholders are to be treated like shareholders of any Beristan company. However, this same treatment was not accorded to Claimant.

136.- The MFN clause’s over-arching effect in the text of the BIT should lead the Tribunal to conclude that Beristan must accord Televative “treatment which is not less favourable than [Beristan] accords its own investors or to investors of any third State,” such as any other country in the Euphonia region. This regulation as applied to Televative, by way of the MFN clause, would better protect its rights in Sat-Connect, entitling it to demand just compensation from Respondent.

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166 See Article 3(1) and 3(2) of the Beristan-Opulentia BIT.

167 Article 3(2) of the Beristan-Opulentia BIT.
IV. CONCLUSIONS ON THE MERITS

137. Beristan has discriminated against Televative, thus violating its obligations under the Beristan-Opulentia BIT. Beristan imposed a military intervention and seizure to Sat-Connect’s foreign shareholders, targeting Claimant’s representative, and damaged the value of Claimant’s investment. In addition, by discriminating and appropriating Claimant’s interest without due process of law, Beristan violated both the FET and the NT standards. Beristan also violated the FPS standard by allowing the use of its police power to intimidate Televative’s agents and seize Claimant’s property without legal justification.

138. Moreover, Beristan expropriated Televative’s investment by unlawfully interfering with Televative’s legal rights in Sat-Connect. Consequently, the military intervention caused Televative to significantly lose the control and value over its investment. Respondent’s actions effectively neutralized its benefits. As a result, Televative’s reasonable investment expectations were spoiled. Moreover, Beristan’s actions were applied discriminatorily and disproportionately, in violation of express covenants contained in the treaty. These acts amount to nothing short of expropriation.

REQUEST FOR RELIEF

139. In light of the foregoing submissions Televative, Inc., Claimant in these proceedings, respectfully requests the Tribunal to find that the Tribunal has jurisdiction over these claims and that the Government of the Republic of Beristan, Respondent:

1. Discriminated against Televative International in violation of the Agreement between the Government of the Republic of Beristan and the Government of the Federated States of Opulentia on the Promotion and Protection of Investments, and in doing so:
   a. Violated, established standards of international law, particularly the Fair and Equitable Treatment standard and the National Treatment standard; and,
   b. Failed to provide Televative Inc., its investment and investors, with full protection and security.

2. Unlawfully interfered with Televative Inc.’s investment, in violation of the Agreement between the Government of the Republic of Beristan and the
Government of the Federated States of Opulentia on the Promotion and Protection of Investments, so as to constitute expropriation, mainly by:

a. Seizing the Sat-Connect project and Televative’s capital contributions through the unlawful use of military force; and,

b. Using military action disproportionately, discriminatorily, and without due process of law.

Respectfully submitted on September 19th, 2010 by

/s/
Team Bengzon

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