MEMORIAL FOR CLAIMANT

RUSSIAN ACADEMY OF JUSTICE

ICSID Case No. ARB/X/X

Televative Inc.  

vs.  

The Government of  
Beristan

CLAIMANT  

RESPONDENT  

· Maxim Popov · Pavel Myslivskiy · Asiyat Kurbanova · Artem Antonov ·
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STATEMENT OF FACTS

1. Claimant, Televative Inc., is a private company incorporated in Opulentia, it specializes in satellite communications technology and systems.

2. Respondent is the Beristan Republic. The Government of Beristan established a state-owned company, Beritech S.A., in March 2007. The Beristan owns a 75% interest in Beritech and 25% of Beritech is owned by the Beristian investors.


4. Beritech and Televative signed a Joint Venture Agreement (hereinafter the ‘JV Agreement’) on 18 October 2007 to establish the joint venture company, Sat-Connect S.A., under the Beristian law. Beritech owns a 60% majority stake in Sat-Connect, and Televative owns a 40% minority stake. Accordingly, Beritech has the right to appoint 5 directors of the Sat-Connect Board of Directors, while Televative can appoint 4. A quorum of the board of directors is obtained with the presence of 6 members. Televative’s total monetary investment in the Sat-Connect project stands at US $47 million. Beristan has co-signed the JV Agreement as guarantor of Beritech’s obligations.

5. On 12 August 2009 The Beristan Times published an article in which a highly placed Beristian government official raised national security concerns by revealing that the Sat-Connect project had been compromised due to leaks by Televative personnel who had been seconded to the project. The official indicated it was believed that critical information from the Sat-Connect project had been passed to the Government of Opulentia. Both Televative and the Government of Opulentia have made statements to deny this published story.

6. On 21 August 2009 the Chairman of the Sat-Connect board of directors, made a presentation to the directors in which he discussed the allegations that had appeared in The Beristan Times.

7. On 27 August 2009 Beritech, with the support of the majority of Sat-Connect’s board of directors, invoked the buyout clause of the JV Agreement. Six directors were present at this meeting and one director, Alice Sharpeton, appointed by Televative, refused to participate and left the meeting before its end. Beritech then served notice on Televative on 28 August 2009 requiring the latter to hand
over possession of all Sat-Connect site, facilities and equipment within 14 days and to remove all seconded personnel from the project.

8. On **11 September 2009** the Civil Works Force (“CWF”), the civil engineering section of the Beristani army, secured all sites and facilities of the Sat-Connect project. Those personnel of the project who were associated with Televative were instructed to leave the project sites and facilities immediately, and were eventually evacuated from Beristan.

9. On **12 September 2009** Televative submitted a written notice to Beristan of a dispute under the Beristan-Opulentia BIT, in which Televative notified Beristan their desire to settle the dispute amicably, and failing that, to proceed with arbitration pursuant to Article 11 of the BIT.

10. On **19 October 2009** Beritech filed a request for arbitration against Televative under Clause 17 of the JV Agreement. Beritech has paid US$47 million into an escrow account, which has been made available for Televative and is being held pending the decision in this arbitration. Televative has refused to accept this payment and has refused to respond to Beritech’s arbitration request.


12. On **1 November 2009** the ICSID Secretary General registered for arbitration this dispute brought by Televative against the Government of Berista
ARGUMENTS

PART ONE: JURISDICTION

1. JURISDICTION UNDER THE ICSID CONVENTION

13. The Claimant is to demonstrate that the Tribunal has jurisdiction with respect to
the submitted claims before it advances to the substantive issues.

14. The Article 25(1) of the ICSID Convention provides 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…to submit to the Centre.’

15. Under the Article 25 of the ICSID Convention three major jurisdictional
requirements are to be satisfied: first, the dispute must be legal in nature and
arise directly out of an investment (jurisdiction *ratione materiae*). Second, the
parties of the dispute must be a Contracting State or its designated constituent
subdivision or agency as one of the parties and a national of another contracting
state as the other party (jurisdiction *ratione personae*). Third, the parties to the
dispute must have consented in writing to the ICSID jurisdiction over the
dispute (jurisdiction *ratione voluntatis*).\(^1\) Claimant will demonstrate the presence
of all of these requirements respectively.

A. The requirements of *ratione materiae* jurisdiction are present

16. It is a consistent practice of this tribunal that to satisfy requirements of the
jurisdiction *ratione materiae* the double test is to be applied: the tribunal has to
determine whether the dispute arises out of an investment within the meaning of
the ICSID Convention and whether it relates to an investment as defined in the
parties consent to the ICSID arbitration and the BIT formula.\(^2\) Claimant will
demonstrate that both of these requirements are present in the case.

1. The *ratione materiae* jurisdiction under the ICSID Convention

17. Under the practice of the ICSID Tribunal an investment should have the
following characteristics to satisfy the requirements of the Article 25 of the
ICSID convention: it should have (a) a certain duration, (b) an expectation of
gain and profit, (c) an element of risk, (d) a substantial commitment to the host
state economy and (e) significance to the host state’s development. All of these

\(^1\) The ICSID Convention, Article 25.

Malaysia, para. 55; Aguas del Tunari v. Bolivia, para. 278.
characteristics, which are often cumulatively referred to as Salini test\(^3\), are present in the case.

a. The investment has a sufficient duration

18. Investment projects are to have an extended duration.\(^4\) The practice of the ICSID Tribunal has often indicated a minimum duration of two years for an investment project to continue.\(^5\) However, the requirement of such duration is not absolute and can be shortened referring to the circumstances of each case and the interplay with the other criteria.\(^6\)

19. Thus, for instance, in *Consortium R.F.C.C. v. Morocco* the highway construction contract lasted for twenty months only. However, the Tribunal found that the investment satisfies the minimum duration requirement referring to the fact that the contract had been extended for an additional period of six months.\(^7\)

20. The same line of argument was followed in *Saipem v. Bangladesh*, where a fourteen months contract for a constriction of an oil pipeline was granted protection because of its extension for twelve months.\(^8\) In that case the tribunal held that the proper duration was for the ‘entire or overall operation’, including the contract period, actual construction and the warranty period on the work.\(^9\)

21. In the case at hand Televative signed a Joint Venture Agreement [*hereinafter ‘the JV Agreement’*] on 18 October 2007 and this agreement was mandatory terminated through the invocation of the buyout procedure by Beritech on September 11, 2009.\(^10\)

22. The Claimant contends that the fact that there was almost one month left for the two-year threshold to be met is insufficient to deny the jurisdiction of this Tribunal.

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\(^4\) Ibrahim F.I et al., *The Experience of the International Centre for Settlement of Investment Disputes*, p. 308.

\(^5\) *Salini* v. *Morocco*, para. 54; *MHS* v. *Malaysia*, para. 111.


\(^8\) *Saipem* v. *Bangladesh*, paras. 7, 11.


\(^10\) Uncontested facts, paras. 3, 11.
23. Since the JV Agreement did not contain a duration clause it was to last for the whole period of its operation, that is until the satellite network and accompanying terrestrial systems and gateways are deployed and developed. Thus, the two-year threshold would have been met unless Beritech had improperly invoked the buyout clause, resulting in the expulsion of Televative’s personnel performed by military forces of Beristan.

24. Consequently, the duration of ‘overall operation’ of the contract exceeds the minimum period of two years.

b. The investment of Televative appertains certain regularity of profit and return

25. The regularity of profit and return or at least expectation of profit is a typical aspect of any investment. Infusions of capital made without any reasonable, substantiated belief that profit would result could be excluded from the definition of investment.

26. However, this very criterion has not been adopted by the majority of tribunals. Moreover, in MHS v. Malaysia case it was expressly referred to as being not determinative.

27. The Claimant submits that Televative’s sole reason for the participation in the Sat-Connect project was the expectation of commercial return from the application of its unique knowledge and intellectual property in the sphere of satellite telecommunication.

28. Thus, this requirement is satisfied.

c. The assumption of risk requirement is present

29. The assumption of risk is another characteristic of investment. Tribunals for instance have acknowledged the risk of changes in production costs of a work

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11 Clarification No. 183.
13 CME v. Czech Republic, para 34; Metalclad v. Mexico, para. 122.
15 MHS v. Malaysia, para 108.
16 Bayindir v. Pakistan, para. 136.
stoppage, posting guarantee money. These investment risks must be higher than normal commercial risks.  

30. Moreover, the mere existence of the dispute may serve as an indication of risk. The tribunals also pointed out that the risk is inherent in any long-term commercial contract.

31. In the case at hand, Televative experienced high commercial risks while initiating the project in Beristan. It was exposed to various political risks as inherent in every transnational investment, including: changes of project participation costs or even work stoppage out of state policy alterations, changes in the host state legislation etc.

32. Thus, the risks faced by Televative were substantially higher than those, which it could have been experienced in Opulentia, and consequently these risks fall under the third criterion of Salini test.

d. The substantial commitment is present

33. Though the Washington Convention itself does not contain a minimum sum of investment as a jurisdictional requirement for ICSID, the tribunal has frequently examined the magnitude of Claimant’s total expenditures to determine whether there is an investment. While adjudging whether a contribution constitutes a substantial commitment, the Tribunal has made several substantive conclusions. Firstly, in a number of cases tribunals pointed out that the contribution should not only be assessed in financial terms, but also in terms of know-how, equipment, personnel and services.

34. Secondly, in Bayindir case the tribunal considered Bayindir’s contributions in know-how, equipment, personnel and finances to be the elements of substantial commitment. Finally, in Joy Mining case the tribunal noted that the term

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18 Ibid.
19 MHS v. Makaysia, para. 112.
20 Fedax v. Venezuela, para. 40.
22 Joy Mining v. Egypt, para. 57; Jan de Nul v. Egypt, para. 92; Helnan v. Egypt, para. 77.
23 Consortium R.F.C.C. v Morocco, para. 61; LESI & Astaldi v. Algeria, para. 73(i); MHS v. Makaysia, para. 109.
24 Bayindir v. Pakistan, para. 137.
‘substantial’ refers *inter alia* to the relationship between the actual contribution to the project and an expected value of an entire project.25

35. Televative has contributed to the Sat-Connect project $47 million of monetary investment26 and more than $100 million of the intellectual property over the life of the technology.27

36. Thus, the expenditures of Televative do constitute a substantial commitment.

ee. The contribution to economic development of the host State is present

37. The importance of contribution to the economic development of the host state as a jurisdictional requirement for the ICSID was emphasized both by the ICSID itself and the doctrine.28 This factor can even be of a decisive importance29 since a failure to contribute to the economic development has been regarded as one of the grounds to deny the *ratione materiae* jurisdiction.30

38. Moreover, in *LESI* cases tribunals rejected the relevance of this criterion as it is already covered by the other criteria of *Salini* test.31

39. As it was noted by the ICSID Tribunal a relationship between an investor and a government could serve as an evidence of the argument that the respective activity in fact contributes to the economic development of the country. Another criterion is ‘positive effect on the economic development of the host state’32 or creation of a continuing benefit to the economy that lasts longer than the contract itself.33

40. Televative owns 40% of shares of Sat-Connect34 and has contributed intellectual property rights, the value of which amounts to $100 millions.35 Sat-Connect was created for the purpose of developing and deploying satellite network and

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26 Uncontested facts, para. 12.
27 Clarification No. 165.
28 *Salini v. Moroco*, para. 52; *MHS v. Malaysia*, para. 44.
30 *MHS v. Malaysia*, para. 123.
31 *Patrick Mitchell v. DRC*, para. 49.
32 *LESI-DIPENTA v. Algeria*, para II. 13(iv); *LESI & Astaldi v. Algeria*, para. 72(iv).
33 *MHS v. Malaysia*, para. 125.
35 Uncontested facts, para. 4.
36 Clarification No. 165.
accompanying terrestrial systems, which would provide communications for users, including Berestrian military forces.\textsuperscript{37}

41. Thus, the very purpose of Televative’s participation in the Sat-Connect project is deeply connected with the development of Beristan’s telecommunication infrastructure, which means that the requirement of contribution to the host state development is present in the case.

42. Consequently, all the characteristics of the investment are present in the case.

\textit{2. Ratione materiae jurisdiction under the BIT}

43. Article 1 of the Beristan-Opulentia BIT defines the term ‘investment’ as

‘any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party on the territory of the other, in conformity with the laws and regulations of the latter’.

44. Therefore, to evidence that Televative’s participation in the Sat-Connect project does comply with the BIT definition of investment two major conditions are to be met: (a) Televative should have invested any kind of property in the territory of Beristan and (b) “this property” should have been invested in conformity with laws and regulations of Beristan.

\textbf{a. Televative’s participation in the Sat-Connect project falls under the definition of ‘any kind of property’}

45. Under the facts of the case Televative owns 40\% interest in Sat-Connect. Televative’s monetary investment is estimated to $47 million\textsuperscript{38} while the value of its intellectual property is estimated as no less than $100 millions.\textsuperscript{39}

46. Consequently, Televative’s participations falls under the list of investment types, as enumerated in paragraphs (b) and (d) of the Article 1 (1) of the BIT.

\textbf{b. Televative’s investment on the territory of Beristan was ‘in conformity with the laws and regulations’ of the host state}

47. The facts of the case do not bestow the Tribunal with any evidence that Televative’s investment on the territory of Beristan was illegal. The participation of Televative in the Sat-Connect project was even endorsed by the Government

\textsuperscript{37} Uncontested facts, paras. 5-6.
\textsuperscript{38} Uncontested facts, para. 12.
\textsuperscript{39} Clarification No. 165
of Beristan. Consequently, Televative’s investment in Beristan was in conformity with the latter’s laws and regulations.

48. Thus, all the requirements of the *ratione materiae* jurisdiction, both under the ICSID Convention and the BIT are present in the case.

**B. The requirements of *ratione personae* jurisdiction are present**

49. Under the ICSID Convention, the Centre’s jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State or its any constituent subdivision or agency and a national of another Contracting State.

50. The Claimant shall demonstrate that both of these requirements are present in the case.

1. *Beritech constitutes an agency of Beristan within the meaning of the Article 25 of the ICSID Convention*

51. According to the Article 25 of the ICSID Convention one of the parties of the dispute should be a Contracting State or its any constituent subdivision or agency. However, as neither ICSID Convention nor the BIT itself provide any rules as to what constitutes a state agency the pertinent rules of international law should be applied.

52. In the landmark *Maffezini v Kingdom of Spain* the tribunal held that that the issue of whether a private entity constitutes a state entity should be resolved on the jurisdictional stage of the proceedings while the issues of attribution should be addressed together with the merits of the case.\(^{40}\)

53. The tribunal further outlined the two major tests which should be applied to demonstrate that certain body constitutes a state entity. Firstly, under the structural test the direct or indirect ownership or control by the state is to be demonstrated.\(^{41}\) Under this test it should also be examined whether the creation of the company was initiated by the state and whether the state participation in the stock capital was significant.\(^{42}\)

54. In case if the structural test is inconclusive the functional test is to be applied: that is whether an entity at issue carries out functions essentially governmental

\(^{40}\) *Maffezini v. Spain*, Decision on Jurisdiction, para. 75.

\(^{41}\) *Maffezini v. Spain*, Decision on Jurisdiction, para. 77.

\(^{42}\) Ibid, paras. 77, 83.
in nature,\textsuperscript{43} or those ‘which are otherwise normally reserved to the state or which by their nature are not usually carried out by private businesses or individuals.’\textsuperscript{44} The same two-element test is also supported by the doctrine.\textsuperscript{45}

55. In the case at hand Beritech falls under these respective criteria. Beritech was established by the Government of Beristan in March 2007 only several months before the signing of the JV agreement.\textsuperscript{46} The Government owns 75\% of Beritech’s interest and the remaining 25\% are owned by Beristan investors closely connected to the Government. Moreover, the Minister of Telecommunications of Beristan is a member of the Board of Directors of Beritech.\textsuperscript{47} Consequently, Beritech was owned and controlled by Beristan and the structural test requirements are satisfied.

56. Beritech was exercising essentially governmental functions while participating in the Sat-Connect project. The project involved development of state military telecommunication system. Though it is undisputable that Beritech was also exercising commercial activities, its governmental functions should not be discarded. The Claimant asserts that one of such essential functions was enhancement of military technologies of Beristan, a function which can only be deemed as essentially governmental. Moreover, the other principal purpose of Beritech’s participation in the Sat-Connect JV was to sustain the control of Beristan over the Sat-Connect project. The close functional ties between Beristan and Beritech are substantiated by the fact that Beristan co-signed a JV agreement as a guarantor and that it used its military forces to support the implementation of the buyout procedure by Beritech.

57. Consequently, while participating in the JV agreement Beritech acted as a vehicle of Beristan and thus was exercising essentially governmental functions.

58. Thus, under both structural and functional tests Beritech constitutes a state agency within the meaning of the Article 25 of the ICSID Convention.

2. **In any event Beristan constitutes a Contracting State within the meaning of the Article 25 of the ICSID Convention**

\textsuperscript{43} Maffezini v. Spain, Award, para. 52.
\textsuperscript{44} Maffezini v. Spain, Decision on Jurisdiction, para 79.
\textsuperscript{45} M. Feit, Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity.
\textsuperscript{46} Uncontested facts, para. 2.
\textsuperscript{47} Clarification No. 135.
59. Alternatively, the requirements of the Article 25 are still complied with as Beristan itself has contributed to misconduct with respect to Televative.

60. Under the customary international law the term ‘state organ’ covers ‘all individual or collective entities which make up the organization of the State and act on its behalf’. A certain organ of a state, even if having a separate legal personality, is thus equated to a state itself for the purposes of defining the jurisdiction of the tribunal.

61. The executive part of the forcible buyout of Televative’s interest in Sat-Connect was performed by the civil engineering section of the Berestian army [hereinafter ‘CWF’], which secured all sites and facilities and virtually expelled the personnel of the Claimant from the territory. These acts were exercised relying onto the Executive Order issued by Beristan.

62. Thus, CWF constitutes an executive organ of Beristan and consequently the requirement of ‘Contracting state’ for the purposes of jurisdiction under the Article 25 of the ICSID Convention is complied with.

3. **Televative is a national of ‘another Contracting state’ within the meaning of the Article 25 of the ICSID Convention**

63. In order to satisfy the second requirement of *ratione personae* jurisdiction Claimant is to demonstrate that Televative constitutes “a national of another contracting state” in terms of the Article 25 of the ICSID Convention.

64. Under the Article 25 (2) (b) of the Convention the standing is granted to:

‘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 and any juridical person which had the nationality of the Contracting State party to the dispute on that date’

65. Thus, the legal person is to have a nationality of a Contracting State to the ICSID Convention and may not have the nationality of the host state. The

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48 Articles on Responsibility of States for internationally wrongful acts, the Commentary [hereinafter ‘the Commentary to ILC Articles’], Article 4(1).
49 *Eureko v. Poland*, para. 133.
50 Uncontested facts, para. 11.
investor of the Contracting State has to be a national (1) at the time when the violation of its rights was committed and (2) at the time of filing the claim.\(^{52}\)

66. There is a consistent practice of the ICSID tribunal, which reverberates the wording of the Article 25. Thus, for instance, in the case of *Tokios Tokeles v. Ukraine* the arbitral tribunal concluded that, according to the Washington Convention, the only relevant criteria for determining if the company has a right to file a claim against the host country is the state of company’s incorporation.\(^{53}\)

67. However, the nationality test may also vary according to the definition proposed by the BIT.\(^{54}\)

68. The Article 1 of the Beristan – Opulentia BIT defines the term “legal person” as any entity established on the territory of contracting state in accordance with respective national legislation i.e. the BIT itself enshrines the incorporation test.\(^{54}\)

69. Telelative had been incorporated in Opulentia on 30 January 1995 and remained incorporated in Opulentia on the 28 October 2009, when it filed an arbitration request to ICSID. Thus, all the relevant requirements of investor’s nationality are present in the case.\(^{55}\)

70. Consequently, both requirements of *ratione personae* jurisdiction are satisfied.

**C. The requirements of *ratione voluntatis* jurisdiction are present**

71. The consent of the parties is a basis of the jurisdiction of all international arbitration tribunals.\(^{56}\) Within the frame of current investment law, states expressly consent to the mandatory submission of certain investment disputes to arbitration by virtue of arbitration clauses in treaties thus satisfying the written consent requirement of Article 25 (1) of the Washington Convention.\(^{57}\)

72. In the case at hand the consent for the ICSID arbitration is given by Beristan in advance by virtue of the Art. 11(2) of the BIT. This consent has never been anyhow withdrawn or limited by Beristan. Moreover, the relevant BIT provision is similar to the one enshrined into the UK – Sri Lanka BIT cited by the ICSID

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\(^{52}\) *The Panevezys-Saldutiskis Railway Case* p. 13-14.

\(^{53}\) *Tokios Tokeles v. Ukraine*, paras. 46-50.


\(^{55}\) Uncontested facts, para. 1.


tribunal in AAPL v. Sri Lanka. This very provision was recognized by the Tribunal as sufficient to satisfy the written consent requirement.

73. Consequently, the third major jurisdictional requirement is met is the case and Televative has jurisdiction under the Article 25 of the ICSID Convention.

II. JURISDICTION UNDER THE BERISTAN-OPULENTIA BIT

A. The effect of the umbrella clause

74. Under the Article 10 of the Beristan-Opulentia BIT each Contracting Party guarantees:

‘[t]he observance of any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.’

75. The clause of this type is often referred to as an ‘umbrella clause.’ As it was demonstrated above Beritech constitutes a state agency in terms of the ICSID Convention.

76. Claimant shall demonstrate that non-compliance of Beritech with its contractual commitments may constitute a breach of the Article 10 of the BIT since (1) contractual undertakings of a state entity may be attributed to the host state and (2) the violation of such undertakings constitutes a breach of the umbrella clause.

1. Contractual undertakings of state entity are attributable to the host state

77. It is a rule of international law that a ‘party cannot avoid its obligations by delegating authority to bodies outside the core government.’ Indeed, the relevant case law indicates that a contractual undertaking will be covered by the umbrella clause if attributable to the state under the international law rules of attribution of conduct to the state.

78. Thus, in Noble Ventures v. Romania the tribunal examined whether for the purposes of applying an umbrella clause the respondent state could be regarded as a party of contracts entered into by two Romanian entities and Claimant. The

58 AAPL v. Sri Lanka, Award, para. 2.
59 United Parcel Service v. Canada, para. 17.
60 S.M. Perera, State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes, p. 510.
tribunal noted that as the BIT does not provide any answer to this question, ‘the rules of attribution can only be found in general international law.’ Further, the tribunal found that as these two entities ‘acted as an empowered public institution’ their contractual undertakings could be ‘attributable to Respondent for the purposes of assessment under the BIT’ despite their independent legal personality under the municipal law.

79. Similar conclusions were reached by the tribunals in such cases as Eureko, Nykomb, SGS v. Pakistan, Joy Mining Ltd. v. Egypt, EnCana Corporation v. Ecuador, L.E.S.I. – DIPENTA case.

80. Therefore, international law applies rules of attribution for the purposes of the operation of an umbrella clause. Consequently, as Beritech constitutes a state entity, its contractual undertakings may be attributable to Beristan and an umbrella clause may apply to contracts signed by Beritech.

2. Violation of contractual undertakings by state entity constitutes a breach of an umbrella clause

81. An umbrella clause in the BIT implies that state’s “non-compliance with contractual undertakings, even if of a commercial nature, constitutes a violation of treaty obligation”.

82. Moreover, it has been argued that in the absence of separate protection of state’s contractual commitments the mere inclusion of an umbrella clause into the BIT would serve no practical sense and would be “meaningless and ineffective” as the treaty obligations are already protected under the other substantive provisions of the BIT. Such interpretation of the investment treaty would be

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61 Noble Ventures v. Romania, para. 68.
62 Noble Ventures Inc v. Romania, paras. 79 – 80.
63 Eureko v. Poland, paras. 115-134.
64 Nykomb v. Latvia, section 4.2.
65 SGS v. Pakistan, para. 166.
66 Joy Mining v. Egypt, para. 81.
67 EnCana v. Ecuador, para. 154.
contrary to the Article 31 of the Vienna Convention on the Law of Treaties.\(^{71}\) In *Noble Ventures v. Romania* the tribunal followed this approach noting that an umbrella clause is obviously intended to create obligations other than those specified in the other provisions of the treaty.\(^{72}\)

83. In *obiter dictum* of *Salini S.p.A. v. Jordan* the tribunal also implied, though failing to state it expressly, that an umbrella clause bestows purely contractual obligations with protection under the treaty.\(^{73}\)

84. Consequently, the contractual obligations of Beritech with respect to Televative are protected under the Article 10 of the BIT and may be considered by the Tribunal during the course of current proceedings.

**B. The dispute resolution provisions of the JV Agreement are irrelevant for the purposes of adjudication under the auspices of the ICSID Tribunal**

85. The Article 11 (2) of the Beristan – Opulentia BIT stipulates that:

> ‘each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in written submission of the investor under paragraph 1 (b) or (c) above.’

86. It has been argued that such broad form of jurisdiction clause as submitting *any* investment dispute to arbitration may include not merely treaty claims, but all claims connected to the BIT, including contractual ones.\(^{74}\)

87. Thus, the Annulment decision in *Vivendi II* interpreting such broad jurisdiction clause stated that that:

> ‘[r]ead literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.’ \(^{75}\)

88. The Committee further ruled that an investor can elect treaty adjudication notwithstanding the exclusive contractual dispute provision.\(^{76}\)

89. In *Lanco* the tribunal held that the breach of contract was tantamount to the breach of the investment treaty and underlined that once the foreign investor has

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71 *Eureko v. Poland*, para. 246.
72 *Noble Ventures v. Romania*, paras. 51-60, 85.
74 E. Gaillard, *Treaty-based Jurisdiction: Broad Dispute Resolution Clauses*.
75 *Vivendi II*, para. 55.
76 *Vivendi II*, para. 103.
chosen ICSID arbitration pursuant to the BIT, Argentina was obliged to comply with ICSID arbitration proceedings despite the contrary forum selection clause included in the contract.77

90. Other tribunals have reached the same conclusion in such cases as: Sempra Energy v. Argentina,78 Eureko v. Poland,79 PSEG v. Tukey.80

91. Therefore, for the jurisdiction to be upheld one should demonstrate that the contractual claims are related to the investment claims under the BIT. Under the practice of investment tribunals the breach of contractual obligations may constitute a violation of the BIT if the BIT contains an umbrella clause81 or by virtue of the violation of fair and equitable treatment by the state.82

92. However, as on the jurisdictional stage the tribunal should at all times refrain from delving into the merits of the case, it is sufficient for the Claimant to demonstrate that the facts presented “fairly raise questions of breach of one or more provisions of the BIT.”83

93. In the case at hand the non-observance of contractual commitments by Beritech as a state entity of Beristan as well as the acts of CWF indeed ‘raises questions of breach of one or more international obligations under the BIT’ and as it will be demonstrated by the Claimant in the merits it constitutes such violations virtually.

94. Consequently, under the pertinent rules of international law the dispute resolution provisions of the JV Agreement are irrelevant for the purposes of the ICSID jurisdiction.

C. The waiting period

95. The Article 11(1) of the Beristan-Opulentia BIT states that the dispute in relation to an investment may be submitted to arbitration by the investor if it ‘cannot be settled amicably within six months of the date of a written application.’

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77 Lanco v. Argentina, para. 460.
78 Sempra Energy v. Argentina, Decision on Jurisdiction, paras. 121-22.
79 Eureko v. Poland, para. 101.
80 PSEG v. Turkey, para. 158.
81 Eureko v. Poland, para. 112.
96. On 12 September 2009 Televative has submitted a written notice to Beristan of a dispute under the BIT, notifying Beristan of its desire to settle the dispute amicably and failing that to proceed with the ICSID arbitration.84

97. A request for arbitration under the ICSID rules was submitted by Televative on October 28, 2009, i.e. more than one month after the notice of arbitration.85 However, Claimant submits that the fact that the six month period of amicable settlement was not complied with may not serve as a bar for tribunal’s jurisdiction.

98. Under the case law the period of amicable settlement is typically regarded as a procedural requirement. Moreover, the tribunal would find no violation of this rule if the negotiations have proved to be futile.86

99. Thus, in Lauder v. Czech Republic the tribunal held that the requirement of six months period compliance is merely a procedural rule, but not a jurisdictional provision.87 The purpose of this rule is to allow the parties to engage in good faith negotiations. As there were no prospects of successful negotiation the tribunal found that insistence on the waiting period compliance would amount to excessive formalism.88

100. In Ethyl case, the arbitration notice was sent only five days after passing of contested piece of legislation. The tribunal found no violation of the waiting period requirement as there was no prospect for investor to change the situation through negotiations.89 The same approach was also adopted in Wena hotels case90 and SGS v. Pakistan.91

101. In the case at hand Televative sent its notice for the ICSID arbitration only after Beritech had requested arbitration under the JV Agreement. The negotiations between the parties cannot be regarded other than futile, since each party persists on its own forum, failing to admit the adversarial position.

102. Consequently, as the further negotiations would still be futile, Televative was entitled to initiate the ICSID arbitration pursuant to the Article 11 of the BIT.

84 Clarification No. 133.
85 Uncontested facts, para. 14.
86 C. Schreuer, Traveling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road.
87 Ronald S. Lauder v. Czech Republic, para. 187.
88 Ibid., para. 190.
89 Ethyl v. Canada, para. 77.
90 Wena Hotels v. Egypt, p. 881.
91 SGS v. Pakistan, para. 184.
PART TWO: MERITS

I. ACTS OF BERITECH AND CWF ARE ATTRIBUTABLE TO BERISTAN

103. It was demonstrated by the Claimant in the jurisdictional part of its contentions that Beritech indeed falls under the criteria of ‘state agency’ and that CWF a ‘Contracting State’ for the purposes of jurisdiction under the Article 25. However, the issue of attribution of conduct of these respective entities can only be addressed in the merits. The Claimant will therefore demonstrate that the acts of Beritech and CWF are attributable to Beristan.

104. The relevant rules on attribution for the purpose of state responsibility under the international law are enshrined in the Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter ‘ILC Articles’], which are regarded as an accurate incorporation of customary rules of international law. These Articles have been consistently used by international investment tribunals. For instance, in Maffežini\(^{92}\), Noble Ventures, Inc. v. Romania,\(^{93}\) and Eureko v. Poland,\(^{94}\) the ILC Articles were used to determine whether an act of a state organ or of a state-owned entity can be attributed to the state. There is thus a widespread recognition that these rules are applicable to investor-state disputes.

105. Under the ILC Articles attribution can be based either on Article 4, 5 or 8. Thus, in order to attribute conduct it is sufficient if one of the elements is present in the entity that carried out that conduct: the entity is an organ of the state, it is empowered to ‘exercise elements of the governmental authority’ or it is controlled by the state.\(^{95}\)

106. The Claimant contends that both the conduct of Beritech with respect to improper invocation of the buyout clause of the JV Agreement and subsequent resort to the CWF military forces are attributable to Beristan.

A. Acts of Beritech are attributable to Beristan

107. The Claimant submits that acts of Beritech are attributable to Beristan by virtue of Articles 5 and 8 of the ILC Articles on State Responsibility.

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\(^{92}\) *Maffežini v. Spain*, Decision on Jurisdiction, para. 75.
\(^{93}\) *Noble Ventures v. Romania*, paras. 69-70.
\(^{94}\) *Eureko v. Poland*, paras. 33-34.

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108. The ultimate test of the attribution of conduct of an entity to a state under the Article 5 is the function carried out by the person or entity, irrespective of its organizational or structural status.\textsuperscript{96}

109. The term ‘governmental authority’ in this article implies ‘state authority’ and should be characterized on case by case basis.\textsuperscript{97} Thus, in Maffizini case certain acts of SODIGA, a private bank with significant state interest, were attributed by the tribunal to the state referring to the public functions as immanent to these acts.\textsuperscript{98}

110. Under the Article 8 of the ILC Articles, if a private person or entity acts on the instructions of the state, irrespective of whether the conduct involves governmental activity, the corporate veil must be pierced and such conduct should be attributed to state.\textsuperscript{99} The corporate veil of private entity may not be utilized by a state to avoid obligations, abuse rights or other fraudulent purposes.\textsuperscript{100}

111. The Claimant therefore is to demonstrate that improper invocation of buyout clause by Beritech was performed as a part of Beristan’s governmental authority or under state’s direction or control.

112. It has been proved in the jurisdictional part of the contentions that Beritech due to its close structural and functional governmental ties constitutes a state agency. The Government of Beristan exercises control over its decisions by virtue of ownership of overwhelming majority of Beritech’s shares and membership of government Minister in the Board of Directors.

113. The decision to initiate buyout procedure was made solely by the Sat-Connect directors appointed by Beritech relying on the article in the local Berestian newspaper. The rationale behind this decision lies within the essentially governmental sphere of protection of Beristan’s military encryption security. The allegations that this decision was taken in exercise of normal commercial activities may not be interpreted other than unsubstantiated since should it have

\textsuperscript{96} K. Hober, State Responsibility and Attribution in P. Muchlinski et al., The Oxford Handbook of International Investment law, p. 556.
\textsuperscript{97} Ibid.
\textsuperscript{98} Mafezzini v. Spain, Decision on Jurisdiction, para. 79.
\textsuperscript{99} K. Hober, State Responsibility and Attribution in P. Muchlinski et al., The Oxford Handbook of International Investment law, p. 557.
\textsuperscript{100} K. H. Bochstiegel, Arbitration and State Enterprises: A Survey on the National and International State of Law and Practice.
been of purely commercial nature, Beritech would not have forced the buyout so promptly, but rather conduct a thorough investigation, assess the evidence if any and finally ensure sufficient quorum.

114. The fact that not only none of the acts reasonable for every diligent entrepreneur was performed by Beritech, but the implementation of the buyout was also facilitated by the CWF military forces, leads to a conclusion that the whole buyout procedure was motivated politically rather than commercially.

115. Consequently, since Beritech being a state agency under governmental control while invoking and implementing a forcible buyout was in fact exercising governmental authority, its acts with respect to Televative are attributable to Beristan.

B. Acts of CWF are attributable to Beristan

116. The Article 4(1) of the ILC Articles stipulates that

‘the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state…’

Moreover, under the Article 4(2) of the ILC Articles if certain organ or entity is characterized as a state organ under the internal law, it should also be characterized as such for purposes of attribution.

117. In Eureko v. Republic of Poland the tribunal equating the formulation of the Article 4(2) to the ‘well-settled principle in international law’ held that the State Treasury is not a legal entity separate from the State, but it is a State. This position is also substantiated by doctrine. Moreover, an investment tribunal cannot be regarded as acting ultra vires while assessing the acts of the army and police personnel as an integral part of the investment dispute.

118. It was demonstrated by the Claimant on the jurisdictional stage of its contentions that CWF constitutes an organ of Beristan. Consequently, its conduct is attributable to the State.

119. Thus, both the acts of Beritech and CWF are attributable to Beristan.

101 Eureko v. Poland, para. 127.
102 Eureko v. Poland, para. 133.
104 Amco v. Indonesia, para. 68.
II. RESPONDENT FUNDAMENTALLY BREACHED THE JOINT VENTURE AGREEMENT BY MISAPPLYING CLAUSE 8

120. The JV Agreement contains clause 8 that bestows Beritech, whose acts are attributable to Respondent, with a right to commit forcible buyout in case of violation of confidentiality. In the case at hand, Claimant submits that (A) Respondent did not have grounds for such buyout since there is no evidence supporting Respondent’s allegation that Claimant’s personnel violated the Confidentiality Clause 8 of the JV Agreement; (B) even if it had such grounds, Respondent’s improper conduct while invoking the buyout resulted in the void decision. (C) In addition, Claimant submits that by the invocation of the buyout Respondent deprived Claimant of what it expected under the JV Agreement.

A. There is no evidence supporting Respondent’s allegation that Claimant’s personnel violated the Confidentiality Clause 8 of the Joint Venture Agreement

121. Clause 4 of the JV Agreement prescribes that in any event confidential information concerning the internal functioning of the Sat-Connect project should never be disclosed, and that the breach of this provision will cause the application of clause 8 of the JV Agreement, namely, the buyout procedure. However, Claimant submits that there was no breach of confidentiality on the following grounds.

122. On August 12, 2009 The Beristan Times published the article, which became the only “evidence” for Beritech, whose acts are attributable to Respondent, to inculpate Claimant for violation of Clause 4 of the JV Agreement. However, this article consisted of groundless allegations, made by so-called ‘highly placed Beristian government official.’ Moreover, that article provided neither the name of this official nor any substantial evidence of Claimant’s wrongdoing, but, it merely alleged that Televative was one of the Opulentian companies, which had transferred access to civilian encryption codes. Televative has been always denying these unsubstantiated allegations.

123. Besides, Respondent adopted the buyout decision without notification of Claimant, leaving no opportunity for Claimant to respond to the unsubstantiated

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105 JVA, Clause 8.
106 JVA, Clauses 4, 8.
107 Uncontested facts, para. 8; Clarifications No. 178, 203, 209, 222, 231, 247.
Moreover, there is no indication of investigation initiated either within the corporate structure of Sat-Connect or by Berestian authorities.

124. Thus, there is no any considerable evidence to prove Claimant’s *culpa* and it appears to be insinuation made for the purposes of exclusion of Televative from the Sat-Connect project.

**B. Respondent’s improper conduct during the buyout procedure resulted in the void decision**

1. Sat-Connect’s Directors Appointed by Claimant were not properly notified about the buyout procedure in violation of Beristan law

125. Beristanian law establishes precise rules concerning the arrangement of company’s Board of Directors meetings – it is required that all directors should receive the 24 hours prior notice concerning the upcoming agenda. These rules were violated by Beritech.

126. On August 27, 2009 Beritech with the support of the majority of Sat-Connect’s Board of Directors, all of which were appointed by Beritech, invoked the buyout clause of the Joint Venture Agreement. However, in the case at hand there was no any official prior notice with respect to the agenda of the upcoming meeting and consequently the directors appointed by Claimant were not aware of the possibility of invocation of the buyout clause.

127. Respondent may argue that the directors could have received unofficial information about the upcoming buyout at the previous meeting of August 21, 2009, however this is nothing but a presumption. Only official information may be invoked to evidence the fact of notification.

128. Thus, Claimant submits that the meeting of August 27, 2009 should not have taken place due to violation of the prior notice procedure and all decisions of that meeting were null and void.

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108 Uncontested facts, para. 10; Clarifications No. 193, 211, 208.
109 Clarification No. 176.
110 JVA, Clause 8; Uncontested facts, para. 10; Clarifications No. 190, 208, 211, 229.
111 Clarification No. 140.
2. There was no quorum during the buyout procedure

129. Beristian law and Sat-Connect bylaws stipulate that for a decision of the Board of Directors to be adopted, there should be a quorum of 6 directors. Moreover, the quorum should be established at the time of voting. These requirements were not fulfilled in the present case.

130. On August 27, 2009 six directors were present at the meeting, but one of them, namely, Alice Sharpeton, left the meeting before the voting started. As a result there were only five directors appointed by the Beritech who adopted the decision of buyout, i.e. they had no quorum. Therefore, in accordance with the Beristian legislation, this decision was null and void.

131. In conclusion, by ignoring Beristian legislation and company’s bylaws, Respondent shows its intent to remove Claimant from the Sat-Connect project without the proper compensation.

C. By implementing the void buyout decision Respondent deprived Claimant of what it had expected under the JVA

132. As it was noted in Photo Productions v. Securicor Ltd., a fundamental breach occurs where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit of the contract.

133. Claimant’s purpose of joining the JV Agreement was to establish the Sat-Connect project and then to have profit from it. Claimant fairly expected strict observance of the JV Agreement Clauses.

134. However, Respondent’s unlawful implementation of the buyout provision substantially deprived Claimant of what it had expected under the Agreement, namely the receipt of the profit from the project and adherence to Agreement’s obligations by Respondent.

135. In case of fundamental breach of the agreement by Beritech, Televative is entitled to terminate it and claim damages, including the loss of profit.
136. Thus, Claimant requests the Tribunal to find that Respondent fundamentally breached the JVA and is to pay full compensation for its wrongdoing.

III. RESPONDENT HAS BREACHED FAIR AND EQUITABLE TREATMENT STANDARD

137. Article 2(2) of the Beristan-Opulentia BIT contains a host state’s obligation to grant at all times the fair and equitable treatment to foreign investments.\textsuperscript{117}

138. Thus, this Article contains the fair and equitable treatment standard, which is considered by the prominent scholars in the field of international investment law to be the most important standard of investment protection.\textsuperscript{118}

139. Respondent may argue that this standard is similar to the minimum standard of treatment of aliens, however, as it was rightly stated in \textit{Azurix}, the fair and equitable treatment reflects an independent, self-contained standard.\textsuperscript{119}

140. This approach is also accepted by prominent scholars in the field of international investment law, e.g. Professor Mann, emphasized that the fair and equitable clause should be interpreted as an autonomous standard.\textsuperscript{120}

141. Moreover, it was underlined by the practice of investment dispute adjudications that fair and equitable treatment seeks for the higher level of protection of foreign investments than customary standard of minimum treatment of aliens.\textsuperscript{121}

142. Investment tribunals have repeatedly underlined that fair and equitable treatment standard should be interpreted within the factual background of every case.\textsuperscript{122} Furthermore, arbitration practice has noted that (A) the breach of the contractual obligations automatically causes violation of the fair and equitable treatment and that this standard obliges host states (B) not to treat foreign investors arbitrarily as well as (C) to respect investor’s legitimate expectations.

143. All these elements of fair and equitable treatment standard were violated by Respondent.

\textsuperscript{117} The Beristan-Opulentia BIT, Art. 2(2)
\textsuperscript{118} I. Tudor, \textit{The fair and equitable Treatment Standard in International Law of Foreign Investment}, p. 250.
\textsuperscript{119} \textit{Azurix v. Argentina}, Award, para. 250.
\textsuperscript{120} F.A. Mann, \textit{British Treaties for the Promotion and Protection of Investments}, 52 British Yearbook of International Law 241. 244; \textit{Tecmed v Mexico}, para. 155.
\textsuperscript{121} \textit{Occidental Exploration v. Ecuador}, paras. 189-190.
\textsuperscript{122} \textit{Saluka Investments v. Czech Republic}, Partial Award, para. 291.
A. By breach of contractual obligations Respondent violated fair and equitable treatment standard

144. It is well accepted that one of the aspects of the fair and equitable treatment standard is an obligation to comply with contracts as signed between a host state or its agency and an investor. That is not merely the non-fulfillment of state’s contractual duties (e.g. non-payment of debts by creditor), but ‘outright and unjustified’ measures with usage of ‘puissance publique’, that are required for the violation of this standard to arise.

145. Thus, in the case of Impregilo S.p.A. v. Islamic Republic of Pakistan the tribunal stated:

“In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“puissance publique”), and not as a contracting party, may breach the obligations assumed under the BIT.”

146. In the case at hand the Clause 8 of the JV Agreement entitles Beritech to purchase all Claimant’s interest in the Sat-Connect project if there is a leak of the confidential information in violation of the Article 4 of the JV Agreement.

147. Under the Respondent’s position Claimant has breached the Article 4 of the JV Agreement, since there was a leak of information performed by the employees seconded by Claimant to the Sat-Connect project. However, this position does not reflect the real situation, since there is no evidence that the leak of confidential information has occurred. Subsequently, there were procedural violations during the buyout procedure – there was no quorum at the Board of Directors meeting. Moreover, the directors appointed by Claimant were not properly notified about the upcoming agenda. After the improper decision was finally adopted, Respondent applied its’ ‘puissance publique’ and issued

124 Waste Management v Mexico, para 115.
125 Waste Management v Mexico, para 115.
126 Impregilo v. Pakistan, para. 260.
127 Impregilo v. Pakistan, para. 260.
128 JVA, Clause 8.
Governmental Executive Order and empowered the CWF to force to leave Claimant’s personnel.\textsuperscript{129}

148. Thus, as the acts of Beritech are attributable to Respondent, Claimant submits that Respondent violated the fair and equitable treatment by improper invocation of the Clause 8 of the JV Agreement and by empowering CWF to force the Claimant’s personnel to leave the Sat-Connect project.

**B. Respondent treated Claimant arbitrarily**

149. Numerous investment tribunals and scholars have identified that protection from arbitrariness is inseparable element of the fair and equitable treatment.\textsuperscript{130} For example, in the Waste Management, the tribunal concluded that the fair and equitable treatment is breached if:

\textquote{[t]he conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety\textsuperscript{131}}

150. Moreover, as it was noted in CMS v. Argentina any arbitrary measure is \textit{per se} contrary to the fair and equitable treatment.\textsuperscript{132}

151. As it was held in \textit{Lauder v. Czech Republic} arbitrary measures may include actions that are ‘founded on prejudice or preference rather than the reason or fact.’\textsuperscript{133} And the ICJ in ELSI stated that arbitrary measures constitute ‘a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.’\textsuperscript{134}

152. In the case at hand, the actions of Respondent should be deemed arbitrary on the following grounds. Similar to the \textit{Lauder case}, the decision concerning the forcible buyout was substantiated neither in law nor in fact and was motivated by preference and prejudice. Respondent applied the buyout procedure referring only to the rumors concerning the leak of the confidential information.

\textsuperscript{129} JVA, Clauses 4, 8; Uncontested facts, para. 10; Clarifications No. 178, 190, 200, 203, 208, 209, 211, 222, 229, 231, 247.


\textsuperscript{131} \textit{Waste Management Inc. v. United Mexican States (Number 2)}, Final Award, para. 98.

\textsuperscript{132} CMS v. Argentina, Award, para. 290; PSEG v. Turkey; para. 259.

\textsuperscript{133} \textit{Ronald S. Lauder v. Czech Republic}, para. 221.

\textsuperscript{134} ELSI case, para. 128.
Moreover, Respondent blatantly violated its’ internal legislation by adoption of the decision concerning buyout without the pertinent quorum.\textsuperscript{135}

153. Furthermore, Claimant submits that the Governmental Executive Order was issued in order to take over the Sat-Connect project by Beristian army and to expel the Claimant’s employees. And this very Executive Order is a document of such nature that cannot be appealed either to a court or other governmental authority.\textsuperscript{136}

154. Consequently, Claimant did not have right to appeal these arbitrary actions of the Respondent’s Government.

155. Thus, Claimant submits that all the abovementioned acts as attributable to Respondent were applied arbitrarily and without reasonable grounds and consequently violate the requirement of non-arbitrariness of the fair and equitable treatment standard.

\textbf{C. Respondent failed to respect Claimant’s legitimate expectations}

156. Legitimate expectations is a key element of fair and equitable treatment.\textsuperscript{137} In \textit{Saluka} case they are considered to be the ‘dominant element of the standard.’\textsuperscript{138}

157. Under \textit{Tecmed} case the fair and equitable treatment obliges a host state

\begin{quote}
‘to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to take the investment.’\textsuperscript{139}
\end{quote}

158. Legitimate expectations are expectations arising from foreign investor’s reliance on specific host state conduct, e.g. written representations or commitments made by the host State with respect to the investment.\textsuperscript{140} These commitments should be targeted at a specific person.\textsuperscript{141} Another requirement of the breach of legitimate expectations is the presence of damages suffered by an investor.\textsuperscript{142}

\textsuperscript{135} JVA, Clauses 4, 8; Uncontested facts, paras. 4, 10; Clarification No. 200.

\textsuperscript{136} Uncontested facts, para. 11; Clarifications No. 155; 228.


\textsuperscript{138} \textit{Saluka Investments v. Czech Republic}, Partial Award, para. 302.

\textsuperscript{139} \textit{Tecmed v. Mexico}, para. 183.

\textsuperscript{140} A.Newcombe, L. Paradell, \textit{Law and Practice of Investment Treaties: Standards of Treatment}, p. 279; \textit{Middle East Cement v. Egypt}, para. 183.


\textsuperscript{142} A.Newcombe, L. Paradell, \textit{Law and Practice of Investment Treaties: Standards of Treatment}, p. 281.
In this particular case Beritech as a state entity attributable to Beristan has voluntarily signed the JV Agreement that shall be considered as commitment of the state with respect to the specific investor, *i.e.* Claimant. Thus, Beristan created the legitimate expectation that in any event this very agreement would be complied with. However, by the improper application of the buyout procedure the contract was violated.

Thus, Claimant has practically lost all its investments and has been suffering losses that are still not compensated by Respondent.

Consequently, Respondent has violated fair and equitable treatment by non-fulfillment of its contractual obligations under the JV Agreement, since treated Claimant arbitrarily and failed to respect Claimant’s legitimate expectations.

**IV. RESPONDENT HAS VIOLATED CLAIMANT’S PROPERTY RIGHTS**

**A. The Beristan-Opulentia BIT protects shareholder’s rights and intellectual property rights**

Article 1 of the Beristan-Opulentia BIT establishes that the term ‘investment’ constitutes any kind of property invested by either legal or natural person.\(^\text{143}\)

The same Article also specifies under the points (b) and (d) that shareholder’s rights\(^\text{144}\) and intellectual property rights\(^\text{145}\) are protected accordingly. In the case at hand Claimant had investments in a form of (1) shares; (2) and in a form of intellectual property.

**1. Claimant’s shareholding rights are protected under the BIT.**

As it was noted in *Genin*, the BIT protects shareholding rights when shares are enumerated as a form of investment.\(^\text{146}\) Claimant doesn’t have to demonstrate that he owns the majority of shares of the company in order to qualify his shares as an investment under the BIT.\(^\text{147}\) Moreover, as it was explicitly stated in *Eureko* case,

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143 The Beristan-Opulentia BIT, Art 1.
144 The Beristan-Opulentia BIT, Art. 1 (b).
145 The Beristan-Opulentia BIT, Art. 1 (d).
146 *Genin and others v. Estonia*, para. 324.
147 *CMS v. Argentina*, Decision on Jurisdiction, para. 51.
‘[t]he definition of investment adopted in bilateral investment treaties is a clear example of protection of minority shareholders.’

165. In the case at hand Claimant owns a 40% minority share in Sat-Connect, where Respondent owns 60% of the shares. Consequently, the Claimant’s shareholding rights fall under the definition of investment and are protected under the BIT.

2. Claimant’s IP rights are protected under the BIT

166. Article 1(d) of the Beristan-Opulentia BIT specifically establishes the intellectual property rights as a form of investment – ‘copyright, commercial trade marks, patent designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill.’

167. In this particular case Claimant owns intellectual property rights with the value of $100 million. Thus, these intellectual property rights of the Claimant are protected under the BIT.

B. Respondent has expropriated Claimant’s investments

168. Article 4 of the Beristan-Opulentia BIT protects investment from either direct or indirect forms of expropriation. In the case at hand Claimant submits that Respondent (1) directly expropriated Claimant’s investment; or, alternatively; (2) indirectly expropriated Claimant’s investment.

1. Respondent has directly expropriated the Claimant’s investment

169. Expropriation implies in a general sense a deprivation of a former property owner of this property, and is equivalent to a ‘taking’ of property. In Tecmed it was noted that expropriation is a forcible taking by a state of tangible and intangible property owned by private persons. In the practice of investment tribunals determination whether direct expropriation has occurred or not does not face with conceptual difficulties.

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148 Eureko v. Poland, para. 39.
149 Uncontested facts, para. 4.
150 The Beristan-Opulentia BIT, Art. 1 (d).
151 Clarification No 165.
152 The Beristan-Opulentia BIT, Art. 4.1(1).
154 Tecmed v. Mexico, para. 161.
155 C. McLachlan et al., International Investment Arbitration, para. 8.70.
170. In the case at hand the Beritech as a state entity being attributable to Respondent had committed direct expropriation through the forcible buyout of the Claimant’s investment, namely of the interest of Televative in the Sat-Connect Project as well as intellectual property. As a result of this buyout Claimant was deprived from its’ investment and was expelled from the Sat-Connect project by Berestian military forces.\(^{156}\)

171. Thus, Claimant submits that Respondent has directly expropriated the Claimant’s investment and must bear responsibility under the international law.

2. Respondent has indirectly expropriated Claimant’s investment

172. An action can amount to indirect expropriation when the governmental measures in question have a permanent character, or it substantially interferes within the investor’s property rights.\(^{157}\)

173. International investment tribunals and the doctrine have worked out the criteria in order to determine that an indirect expropriation has occurred. Thus, this Tribunal should analyze the following elements: (a) the duration of interference; (b) severity of the impact that measure had on the Claimant’s ability to use and enjoy its property.

a. The duration of interference into Claimant’s investments is excessive

174. The length of interference is the key element in determination of the indirect expropriation.\(^{158}\) As it was established by arbitral practice, the longer the interference is, the more likely it will be deemed expropriation.\(^{159}\) However, the more important factor is not the duration of the expropriatory acts, but the duration of deprivation of rights itself.\(^{160}\)

175. It is well accepted in international law that there is no doctrine of binding precedent, but the decisions of the tribunals are constantly taken into consideration by the subsequent tribunals.\(^{161}\) In relevant cases concerning expropriation, e.g. Metalclad v. Mexico the tribunal established that the measure,
which lasted for three years, constituted expropriation.\textsuperscript{162} Subsequently, in the case of 	extit{Wena Hotels v. Egypt} the measure lasted for about one year and lately was deemed by the tribunal as expropriative.\textsuperscript{163}

176. Finally, in the case of 	extit{Middle East Cement} the tribunal concluded that the four months interference in the investor’s property rights was not “ephemeral”.\textsuperscript{164} Therefore, the case law with regard to this specific aspect remains incoherent,\textsuperscript{165} and the assessment should be made with reference to specific circumstances of every case.\textsuperscript{166}

177. In the present case Claimant’s personnel was forced to leave the project on September 11, 2009, and Claimant’s shares have been held in escrow since August 27, 2009.\textsuperscript{167} Consequently, Claimant’s investments have been held by Respondent for more than a year so far. Under the 	extit{Middle East Cement} approach this is more than enough to constitute the expropriation.

\textbf{b. The degree of interference is excessive}

178. ‘There is a general consensus that another significant criterion in the case law concerning measures amounting to indirect expropriation is the severity or significance of the impact the measure had on the owner’s ability to use and enjoy his property.’\textsuperscript{168} This criterion for determination of expropriation is named by prof. Dolzer as the ‘sole effects doctrine.’\textsuperscript{169}

179. The Iran-US tribunal dealt with this criterion in order to determine that the expropriation had occurred. Thus, in 	extit{Starret Housing v. Iran} the tribunal established that when a state interferes in an investment to such extent that it is rendered practically useless such interference amounts to an expropriation.\textsuperscript{170}

180. Moreover, as it was noted in 	extit{Pope and Talbot v. Canada}, that under international law in order to establish that expropriation has occurred, the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Metalclad v. Mexico}, para. 107.
\item \textit{Wena Hotels v. Egypt}, para. 99.
\item \textit{Middle East Cement v. Egypt}, para. 107.
\item A. Reinisch, \textit{Standards of Investment Protection}, p. 159.
\item A. Reinisch, \textit{Standards of Investment Protection}, p. 159.
\item Uncontested facts, para. 10; Clarification No. 138.
\item \textit{Starrett v. Iran}, para. 154.
\end{enumerate}
\end{footnotesize}
‘substantial deprivation’ of property rights should be demonstrated.\textsuperscript{171} And in \textit{Metalclad} the tribunal stated that indirect expropriation constitutes ‘covert or incidental interference with the use of property which has the effect of depriving the owner in the whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property […]’.\textsuperscript{172} Finally, in \textit{Generation Ukraine} the tribunal noted that in order to constitute expropriation, the measure should create a persistent obstacle in investor’s use, enjoyment or disposal of the investment.\textsuperscript{173} Thus, the main criterion for determination of indirect expropriation is the degree of interference, which results in the deprivation of the property which is ‘severe, fundamental or substantial and not ephemeral’.\textsuperscript{174}

181. In the case at hand all Claimant’s investments (\textit{i.e.} shares and intellectual property) with the total value of $147 million have been held under control of Respondent after the unlawful invocation of the buyout procedure through the entity. Respondent has interfered with Claimant’s property rights to such extent that Claimant was virtually dispensed of its property and had no chance to operate its investment. Moreover, Respondent being facilitated by its CWF military forces has taken control over the Sat-Connect project and forced to leave all Claimant’s personnel.\textsuperscript{175}

182. Consequently, the degree of interference with Televative’s property by Respondent is excessive.

183. Thus, both of the criteria of indirect expropriation are present in the case.

\textbf{C. The expropriation does not meet the legality criteria as enshrined in Article 4(2) of the Beristan-Opulentia BIT}

184. Article 4(2) of the Beristan-Opulentia BIT establishes the requirements of legality of indirect, expropriation. The expropriation should \textit{inter alia} be firstly, for public purpose; secondly, in conformity with legal provisions and procedures (due process of law); thirdly, on the basis of ‘immediate full and effective compensation’. All these requirements were violated by Respondent. Under the

\textsuperscript{171} Pope v. Canada, para.96.
\textsuperscript{172} Metalclad v. Mexico, para. 103.
\textsuperscript{173} Generation Ukraine v. Ukraine, para. 20.32.
\textsuperscript{175} Uncontested facts, paras. 10-11.
practice of investment dispute adjudication the lack of even one of these requirement leads to the conclusion that the expropriation was unlawful.176

1. The requirement of public purpose was not complied with

185. The requirement of public purpose or public interest in the context of expropriation is a part of customary international law.177 Respondent may contend that a state is free to judge which actions are made for public purpose, however, the contemporary case law stipulates that public purpose requirement is not completely self-judging.178 The exercise of right to expropriate depends on genuine public need and the exercise of good faith.179 Public need may comprise of serious public demands in the field of economy, political or military security related to foreign relations.180

186. The burden of proof with respect to the justification of the measures with respect to Televative lies on Respondent.181 However, neither Beritech as a state entity nor Beristan itself has presented any positive evidence that the forcible buyout was necessary to protect legitimate public interests of Beristan. The allegations that the expropriation was made due to the leaks of military encryption codes in the Sat-Connect remain unsubstantiated.182

187. Thus, there is no genuine public need to expropriate foreign property, since there was no threat of imminent usage of the encryption technologies substantially hazardous for Beristan or its citizens.

188. Consequently, Claimant submits that Respondent expropriated Claimant’s property in violation of the public purpose requirement.

2. Claimant was not granted ‘immediate, full and effective compensation’

189. Under international law states are obliged to pay compensation for expropriated property, even if it was conducted in accordance with the international law.183

The Beristan-Opulentia BIT prescribes that investor should receive the

176 Waguih v. Egypt, para. 433.
179 ADC v. Hungry, para. 432.
181 ADC v. Hungry, para. 432.
182 Uncontested facts, para. 8; Clarifications No. 178, 203, 209, 222, 231, 247.
183 Feldman v. Mexico, para. 98.
‘immediate, full and effective compensation’ for the expropriated property. This formula reflects the Hull standard of compensation i.e. ‘prompt, adequate and effective compensation.’

190. Article 4(3) of the Beristan-Opulentia BIT prescribes that the full and effective compensation should be equivalent to the real market value. This provision reflects the principle of international law - *restitution in integrum*, which establishes that the compensation should meet the real market value of the expropriated property and the future profit.

191. In the present case Respondent may argue that its is obliged to pay total monetary investment of Claimant, which is equal to $47 million. However, the real market value of the Claimant’s investment including future profit is $147 million, which was neither received nor offered so far. Consequently, ‘immediate, full and effective compensation’ was not provided, and, thus, Respondent has violated the provision concerning the compensation.

3. Expropriation was not made in accordance with due process of law

192. Due process of law is another criterion of legality of expropriation.

‘Due process might be breached in a variety of ways, including failure to provide notice of fair hearing, non-compliance with local law, or failure to provide means of a legal redress.’

193. In the present case Claimant did not have right of legal redress within judicial organs of Respondent, since Respondent had issued an executive order, which triggered the physical interference into the Sat-Connect project and expulsion of the Claimant’s personnel. Executive order is an act, which cannot be appealed in any instances of the Respondent’s judicial or governmental system. Thus, Claimant submits that Respondent has violated the due process requirement by non-providing the means of legal redress.

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185 The Beristan-Opulentia BIT, Art. 4(3).
186 ILC Articles, arts. 31, 34 and 35; J. Crawford, *The International Law Commission’s Articles on State Responsibility*, 194, 211, 213.
187 World Bank Guidelines, Guideline IV, Art. 5.
188 Uncontested facts, para. 12; Clarification No. 165.
191 Uncontested facts, para. 11; Clarification No. 228.
V. RESPONDENT IS NOT ENTITLED TO RELY ON THE ESSENTIAL SECURITY PROVISION AS ENSHRINED IN ARTICLE 9 OF THE BERISTAN-OPULENTIA BIT

194. Article 9(2) of the Beristan-Opulentia BIT prescribes that a state shall never be precluded from

'[a]pplying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or for the protection of its own essential security interests.'\textsuperscript{192}

195. In \textit{Enron} tribunal stated that this provision is to exclude any possibility for the Party to escape from its obligations under the BIT.\textsuperscript{193}

196. Respondent may argue that the essential security exception is an independent treaty provision, however, in following the reasoning of \textit{Enron}\textsuperscript{194} and \textit{Sempra}\textsuperscript{195} this provision should be interpreted with reference to customary doctrine of state necessity.

197. Necessity may be invoked if a state can establish that violation of its treaty obligations ‘is the only way for State to safeguard an essential interest against a grave and imminent peril.’\textsuperscript{196} Further, it must demonstrate that the breach ‘does not seriously impair an essential interest of the State or States towards which the obligation exists or the international community as a whole.’\textsuperscript{197} Thus, in the present case it will be proved that (A) Respondent wasn’t protecting its essential interest; (B) there was no grave and imminent peril; (C) Respondent had other means to protect its essential interest; (D) Respondent has violated the requirement concerning non-impairment of essential interest of other states. The non-fulfillment of at least one criterion would cause the failure overall.\textsuperscript{198}

A. Respondent was not protecting its essential interest

198. Professor Ago pointed that ‘essential interest’ that allows the State to breach its obligation must be a vital interest, such as political or economic survival.\textsuperscript{199}

\textsuperscript{192} The Beristan-Opulentia BIT, Art. 9(2).
\textsuperscript{193} \textit{Enron} v. Argentine, Award, para. 332.
\textsuperscript{194} \textit{Enron} v. Argentine, Award, para. 333.
\textsuperscript{195} \textit{Sempra Energy} v. \textit{Argentina}, Award, para. 349.
\textsuperscript{196} ILC Articles, Art. 25 (1a).
\textsuperscript{197} ILC Articles, Art. 25 (1b).
\textsuperscript{198} \textit{Gabcikovo–Nagymaros} case, paras. 40-41; CMS v. \textit{Argentina}, Award, para. 331.
199. In *LG&E* the tribunal stated that essential interests of ‘economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests.’

200. In the case at hand Respondent could not be protecting its essential interests since they were not anyhow impaired. Claimant was not anyhow threatening the political economic survival of Respondent. Claimant was working for the benefit of Respondent in full compliance with the JV Agreement. Claimant was going to design new data encryption technologies after the establishing the Sat-Connect project in full accordance with the confidentiality considerations.

**B. There was no grave and imminent peril**

201. In *Gabcikovo-Nagymaros* the ICJ noted that ‘peril had to be established objectively and that it had to be ‘imminent’.

202. In *Enron* case tribunal noted that the government had a duty to prevent the worsening of the situation, but that ‘there is no convincing evidence that the events were out of control or had become unmanageable’. Same position was expressed in *Sempra*.

203. In *LG&E* the tribunal noted that the danger must be “extremely grave” and “imminent” in the sense that it will soon occur.

204. In the present case there was no imminent peril that the alleged leak of the confidential information would anyhow detriment internal or external security of Respondent. As well as that the leak of information would make the exercise of internal policies unmanageable, also there was no positive evidence that the alleged leak of information would rapidly cause serious disturbances.

**C. Respondent had other means to protect its essential security**

205. In order to invoke the necessity doctrine, a state must have no means to guard its vital interest other than breaching its international obligation.
206. In CMS the tribunal concluded that Argentina had other steps to take in response to the internal economic crisis without giving examples of such measures.206 The same position was expressed in Enron207 and Sempra.208

207. In addition, Professor Reinisch suggests that the more appropriate approach during the examination whether a state had other means to respond to the critical situation ‘would probably be to incorporate requirements of adequacy and proportionality.’209

208. In this case the risks associated with the alleged leak of information did not reach such extent which could permit Respondent to breach the BIT. Moreover, there are no credible sources that the leak has actually happened so far. Thus, Respondent had other means to response the threat – to commence investigation, to enhance the work of its intelligence services, etc.

209. Moreover, the proportionality and adequacy requirement is also not fulfilled, since the Claimant has been deprived from all of its investment without any sustainable evidence and without possibility to resolve the situation amicably.

**D. Respondent has failed to respect obligation of non-impairment of essential interests of other states**

210. ‘[T]he interest relied on must outweigh all other considerations, not merely from the point of view of the acting state but on reasonable assessment of the competing interests, whether these are individual or collective.’210

211. In this case it is arguable that the rights of Opulentia were directly violated, however, the reasoning in Enron211 and Sempra212 suggests that since the investment obligations are owed to foreign investors, essential interests of the state are to be substituted with the interests of the investor.

212. Consequently, under this approach interests of Opulentia are substituted by interests of Claimant, and, thus, they should be respected. However, in this case Respondent has blatantly impaired Claimant’s interests by improper invocation

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206 CMS v. Argentina, Award, para. 324.
207 Enron v. Argentine, Award, para. 308.
208 Sempra Energy v. Argentina, Award, para. 350.
211 Enron v. Argentine, Award, para. 342.
212 Sempra Energy v. Argentina, Award, para. 391.
of buyout procedure, which caused expropriation of its property and non-fulfillment of the compensation requirement.

213. Thus, Claimant submits that Respondent is not entitled to rely on essential security provision as enshrined in Article 9 of the Beristan-Opulentia BIT in order to escape the obligations under the BIT.

RELIEF REQUESTED

214. In the light of the submission as presented above, Claimant respectfully asks this Tribunal to adjudge and declare:

(a) that the Tribunal has jurisdiction in a view of the Clause 17 of the JV Agreement;
(b) that the Tribunal has jurisdiction over Claimant’s contract-based claims arising under the JV Agreement by virtue of the Article 10 of the Beristan-Opulentia BIT;
(c) that Respondent materially breached the JV Agreement by the improper invocation the Clause 8 of the JV Agreement;
(d) that Respondent actions and/or omissions amount to the violation of the Articles 2 and 4 of the BIT;
(e) that Respondent is not entitled to rely on the Article 9 as a defense to Claimant’s claims.

RESPECTUFULLY SUBMITTED ON SEPTEMBER 19, 2010.