FOREIGN DIRECT INVESTMENT MOOT
22-24 OCTOBER 2010

INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES

In the Proceeding Between

TELEVATIVE INC.
[Claimant]

vs.

THE GOVERNMENT OF THE REPUBLIC OF
BERISTAN
[Respondent]

MEMORIAL FOR CLAIMANT
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<td><strong>Brownlie, Ian</strong>&lt;br&gt;Principles of Public International Law, 6th ed.&lt;br&gt;(Oxford: OUP 2003)&lt;br&gt;cited as: Brownlie</td>
</tr>
<tr>
<td><strong>Cheng, Bin</strong>&lt;br&gt;General Principles of Law as Applied by International Courts and Tribunals&lt;br&gt;(Cambridge University Press 1953, 2006)&lt;br&gt;cited as: Cheng</td>
</tr>
<tr>
<td><strong>Crawford, James</strong>&lt;br&gt;The Drafts on Responsibility of States for Internationally Wrongful Acts with comments, 2001, Yearbook of the International Law Commission, vol, II, Part Two.&lt;br&gt;cited as: ILC Commentary</td>
</tr>
<tr>
<td><strong>Dolzer, Rudolph, Schreuer, Christoph</strong>&lt;br&gt;Principles of International Investment Law&lt;br&gt;(Oxford: OUP, 2008)&lt;br&gt;cited as: Dolzer/Schreuer</td>
</tr>
<tr>
<td><strong>Dugan, Christopher, Wallace, Don, Rubins, Noah, Sabahi, Borzu</strong>&lt;br&gt;Investor – State Arbitration&lt;br&gt;(New York, OUP, 2008)&lt;br&gt;cited as: Dugan</td>
</tr>
<tr>
<td><strong>Gardiner, Richard</strong>&lt;br&gt;International Law&lt;br&gt;(Longman Law Series 2003)&lt;br&gt;cited as: Gardiner</td>
</tr>
<tr>
<td><strong>Hewitt, Ian</strong>&lt;br&gt;Joint ventures,</td>
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<td>Author/Title</td>
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<td><strong>Team Pinto, Memorial for Claimant</strong></td>
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<td>Schwebel, Stephan</td>
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<td>Author</td>
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<tr>
<td>Stefan Schwebel</td>
</tr>
<tr>
<td>G.C. Christie</td>
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</tbody>
</table>
| Michael Feit    | ‘Responsibility of the State Under international Law for the }
<table>
<thead>
<tr>
<th>Author</th>
<th>Title and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Team Pinto, Memorial for Claimant</td>
<td>Breach of Contract Committed by a State-Owned Entity’, Berkeley Journal of International Law, Vol. 28, issue 1, 142-177 cited as: Feit</td>
</tr>
<tr>
<td><strong>Fransworth, E. Allan</strong></td>
<td>‘Duties of good faith and fair dealing under the UNIDROIT principles, relevant International Covenants, and National Laws’ Tulane Journal of International Law &amp; Comparative Law, Vol. 3, 1995, 47-63. cited as: Fransworth</td>
</tr>
<tr>
<td>Author</td>
<td>Title</td>
</tr>
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<td>--------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Author</td>
<td>Citation</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Team Pinto, Memorial for Claimant | *‘Essential Security Interests under International Investment Law’*  
Part I Chapter 5  
International Investment Perspectives:  
Freedom of Investment in a Changing World,  
cited as: OECD (Essential Security) |
|                        | *Working Paper on International Investment,*  
Indirect Expropriation” and the “Right to Regulate” in International Investment Law  
(2004/4)  
cited as: OECD (Indirect Expropriation) |
| **Paulsson, Jan**      | *‘Jurisdiction and Admissibility’,*  
Global Reflections on International Law, Commerce and Dispute Resolution 2005, 601-617.  
cited as: Paulsson |
| **Reinisch, August**   | *‘Legality of expropriations’*  
Ed. August Reinisch, Standards of Investment Protection,  
(New York: OUP 2008)  
cited as: Reinisch |
| **Reisman, Michael**   | *‘The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold’,* 362 - 381  
15 ICSID Review – Foreign Investment law Journal 2000  
cited as: Reisman |
<p>| <strong>Schill, Stephan W.</strong> | <em>‘Enabling Private Ordering –Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’</em>, |</p>
<table>
<thead>
<tr>
<th>Author</th>
<th>Citation Details</th>
</tr>
</thead>
</table>
| Schreuer, Christoph | ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’,  
                     The Law and Practice of International Courts and Tribunals 2005, 1-17,  
                     [online] www.univie.ac.at/intlaw/pdf/cspubl_75.pdf.  
                     (last access: 17 September 2010)  
                     cited as: Schreuer ‘Calvo’s Clause’ |
|                  | ‘Fair and Equitable Treatment in Arbitral Practise’  
                     The Journal of World Investment & Trade 358-386  
                     June 2005 Vol. 6 No. 3  
                     cited as: Schreuer (FET) |
|                  | ‘Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi Case Considered’,  
                     281-323.  
                     Ed. Todd Weiler, International Investment Law and  
                     Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral  
                     Treaties and Customary International Law  
                     (Cameron May 2005)  
                     cited as: Schreuer (ed Weiler) |
| Shaw, Malcolm    | International Law  
                     cited as: Shaw |
<table>
<thead>
<tr>
<th>Authors</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Wackernagel, Clemens</strong></td>
<td>‘Verhältnis von treaty und contract claims in der inernationalen Investitionschiedsgerichtsbarkeit’,</td>
</tr>
<tr>
<td>cited as: Yannaca-Small</td>
<td></td>
</tr>
</tbody>
</table>
INDEX OF CASES AND ARBITRAL AWARDS

INTERNATIONAL COURT OF JUSTICE

cited as: Barcelona Traction

Fisheries Jurisdiction, United Kingdom v Iceland, ICJ, Merits, Judgement, ICJ Reports 1974 p. 3.
cited as: Fisheries Jurisdiction

cited as: Nicaragua case

cited as: Nuclear Tests

North Sea Continental Shelf, ICJ, Judgement, ICJ Report 1969, p.3.
cited as: North Sea Continental Shelf

ICJ, United States Diplomatic and Consular staff in Tehran.
cited as: US States Diplomatic and Consular staff in Tehran

AD HOC ARBITRATION (UNCITRAL)

cited as: CME v Czech Republic, Partial Award

Eureko B.V. v Poland, Ad Hoc Investment Treaty Case, Partial Award, 19 August 2005.
cited as: Eureko v Poland

Methanex v United States, UNCITRAL, Partial Award on Jurisdiction, 7 August 2002.
cited as: Methanex v United States, Partial Award on Jurisdiction

cited as: SD Myers, First partial award
cited as: Ronald Lauder v Czech Republic

Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006.
cited as: Saluka v Czech Republic

ICSID

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16 Award, 2 October 2006.
cited as: ADC v Hungary

ADF Group Inc. v. United States, ICSID Case No. ARB (AF)/00/1 (NAFTA), Award, 9 January 2003.
cited as: ADF v USA

Amco v Indonesia, ICSID Case No. ARB/81/1, Award, 20. November 1984.
cited as: Amco v Indonesia

cited as: AAPL v Sri Lanka

Azurix Corp. v The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003.
cited as: Azurix v Argentina, Decision on Jurisdiction

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

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.
cited as: Bayindir v Pakistan, Decision on Jurisdiction

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award 27 August 2009.
cited as: Bayindir v Pakistan

Bureau Veritas, BIVAC BV v Paraguay, ICSID Case No ARB/07/9, Decision on Objection to Jurisdiction, 29 May 2009.
cited as: Bureau Veritas v Paraguay, Decision on Jurisdiction
cited as: CMS v Argentina, Decision on Jurisdiction

CMS Gas Transmission Co. v Republic of Argentina, ICSID Case No ARB/01/8, Award, 12 May 2005.
cited as: CMS v Argentina

cited as: CMS v Argentina, Annulment Decision

Compañía de Aguas del Aconquija, S.A and Vivendi Universal v Argentine Republic, ICSID Case No. ARB/97/3, Award, 21 November 2000.
cited as: Vivendi v Argentina

Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No. ARB/97/3, Decision of Annulment, 3 July 2002.
cited as: Vivendi v Argentina, Annulment Decision

cited as: Consortium R.F.C.C.

cited as: Duke Energy v Ecuador

cited as: El Paso v Argentina, Decision on Jurisdiction

cited as: Enron v Argentina, Decision on Jurisdiction

Enron Corporation and Ponderosa Assets, L.P. v Argentina, ICSID Case No ARB/01/3, Award, 22 May 2007.
Enron v Argentina, ICSID Case No ARB/96/3, Award, 9 March 1998.
Cited as: Enron v Argentina

Fedax N.V. v Venezuela, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002.
Cited as: Fedax v Venezuela

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

Generation Ukraine, Inc. v Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003.
Cited as: Generation Ukraine v Ukraine

Goetz and others v Burundi, ICSID Case No. ARB/95/3 Award (Embodying the Parties’ Settlement Agreement), 10 February 1999.
Cited as: Goetz v Burundi

Cited as: Impregilo v Pakistan, Decision on Jurisdiction

LANCO International Inc. v The Argentine Republic, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998.
Cited as: LANCO v Argentina, Decision on Jurisdiction

LG&E Energy v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.
Cited as: LG&E v Argentina, Decision on Liability

Maffezini v Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.
Cited as: Maffezini v Spain, Decision on Jurisdiction

Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, 12 April 2002.
Cited as: Cement Shipping

Noble Ventures Inc v Romania, ICSID case No ARB/01/11, Award, 12 October 2005.
Cited as: Noble Ventures v Romania

Pan America Energy LLC v The Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006.
cited as: *Pan America v Argentina*, Decision on Jurisdiction

*Plama Consortium Ltd. v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.  
*cited as: Plama v Bulgaria*, Decision on Jurisdiction

*cited as: Salini v Marocco*, Decision on Jurisdiction

*Cited as: Sempra v Argentina*

*cited as: SGS v Pakistan*, Decision on Jurisdiction

*SGS Société Général de Surveillance S.A v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.  
*cited as: SGS v Philippines*, Decision on Jurisdiction

*Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.  
*cited as: Siemens v Argentina*, Decision on Jurisdiction

*Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Award 6 February 2007.  
*cited as: Siemens v Argentina*

*cited as: Wena Hotels v Egypt*, Decision on Jurisdiction
Wena Hotels Ltd. v Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Award 8 December 2000.
cited as: Wena v Egypt

**IRAN-US CLAIMS TRIBUNAL**

*Amoco International Finance Corp v Iran*, Award 14 July 1987 15 CTR 189.
cited as: Amoco v Iran

*ITT Industries, Inc. v The Islamic Republic of Iran et al.*, Award of 26 May 1983, 2 CTR 348.
cited as: ITT Industries v Iran

cited as: Saghi v Iran

*Phelps Dodge Corp v Iran*, 10 CTR 121 (1986).
cited as: Phelps Dodge v Iran

cited as: Phillips Petroleum

cited as: SEDCO v NIOC

*Starrett Housing Corp. v Iran*, 4 CTR 122 (1983).
cited as: Starrett Housing

cited as: Tippetts

**NAFTA**

cited as: Canfor v US, Decision on Preliminary Question

*GAMI Investments, INC. v The United Mexican States*, NAFTA, Award, 15 November 2004.
cited as: GAMI v Mexico
Marvin Feldman v Mexico, ICSID Case No. ARB(AF)/99/1, NAFTA, Award on Merits, 16 December 2002.
cited as: Marvin Feldman v Mexico

Mondev International Ltd. v United States of America, ICSID Case No. ARB(AF)/99/2, NAFTA, Award, 11 October 2002.
cited as: Mondev v USA

Pope & Talbot Inc. v The Government of Canada, NAFTA Interim Award, 26 June 2000.
cited as: Pope&Talbot v Canada

Tecnicas Medioambientes S.A. v The United Mexican States, ICSID Case No. ARB(AF)/00/2 Award, 29 May 2003.
cited as: Tecmed v Mexico

cited as: UPS v Canada, Separate Statement

Waste Management v Mexico, ICSID Case No. ARB(AF)/98/2 NAFTA Final Award, 30 April 2004.
cited as: Waste Management v Mexico

OTHERS

Case concerning certain German interests in Upper Silesia, PCIJ Series A, No.7(1926)3.
cited as: Chorzow factory

cited as: Eastern Sugar, Partial Award

EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006
cited as: EnCana v Ecuador

cited as: Fiona Trust
cited as: Nykomb v Latvia

Selwyn Case (interlocutory), 1903, British Venezuelan Commission, Reports of International Arbitral Awards (2006), Volume IX, pp. 380-385,
cited as: Selwyn Case

Supreme Court of Texas, Pace Corp. v. Jackson 155 Tex. 179, 284 S.W.2d 340, 351 (1955).
cited as: Pace v Jackson

cited as: Watkins v Rich

cited as: Taiwan Navigation v. Seven Seas

United States Court of Appeals, Grundstad v Ritt, 166 F.3d 867 (7th Cir. 1997 No. 96-2428)
cited as: Grundstad v Ritt

United States Court of Appeals, Interocean Shipping Co. v National Shipping & Trading Corp., 523 F.2d 527 (2nd Cir. 1975).
cited as: Interocean v National Shipping

cited as: Prima Paint
LIST OF STATUTES AND TREATIES


cited as: *ICSID Convention*

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cited as: *ICSID Arbitration Rules*

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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>Convention</td>
<td>ICSID Convention</td>
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<td>e.g.</td>
<td>Exempli gratia</td>
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<td>ed.</td>
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<td>et al.</td>
<td>Et alia (and others)</td>
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<td>et seq.</td>
<td>Et sequens (and the following ones)</td>
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<td>FET</td>
<td>Fair and equitable treatment</td>
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<td>i.e.</td>
<td>Id est (that is)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICSID</td>
<td>Convention on the Settlement of Investment Disputes between states and Nationals of other States</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>Sat-Connect</td>
<td>Sat-Connect SA</td>
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<td>VCLT</td>
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STATEMENT OF FACTS

1. On 1 January 1997, Beristan (“Respondent”) and Opulentia entered into a Bilateral Investment Treaty (BIT). Both countries are ICSID Contracting States and have ratified the ICSID Convention.

2. On 30 January 1995, Televative (“Claimant”), a privately held company, was incorporated in Opulentia.

3. In March 2007 Respondent established a state-owned company called Beritech. Respondent owns 75% interest in the company. The remaining 25% of Beritech is held by a small group of Beristian investors.

4. On 18 October 2007 Beritech and Claimant signed a joint venture agreement (the “JV Agreement”) and established Sat-Connect S.A under Beristan law. Claimant owns a 40% minority share in Sat-Connect, while Beritech owns a 60% majority stake. Respondent 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 Claimant personnel who had been seconded to the project.

6. On 27 August 2009, the majority of Sat-Connect’s board of directors invoked the buyout clause (Clause 8) of JV Agreement on the basis of the confidentiality provision in the JV Agreement (Clause 4).

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1 Clarifications 174.
2 Record, Annex 2, [15].
3 Record, Annex 2, [16].
4 Record, Annex 2, [16].
5 Record, Annex 2, [16].
6 Record, Annex 2, [16].
7 Record, Annex 2, [16].
8 Record, Annex 2, [17].
9 Record, Annex 2, [17].
7. On **28 August 2009**, Beritech served notice on Claimant requiring the latter to hand over possession of all Sat-Connect sites, facilities and equipment within 14 days and to remove all personnel from the project.\(^{10}\)

8. On **11 September 2009**, on the basis of an executive order,\(^{11}\) staff from the Civil Work Force (“CWF”) of the Beristian army secured all sites and facilities of the Sat-Connect project. The personnel of Claimant were eventually evacuated from Beristan.\(^{12}\)

9. On **19 October 2009**, Beritech filed a request for arbitration against Claimant under Clause 17 JV Agreement. Beritech has paid US$47 million into an escrow account, which has been made available for Claimant and is being held pending the decision in this arbitration.\(^{13}\) Claimant has not accepted this payment and has not responded to Beritech’s arbitration request.\(^{14}\)

10. On **28 October 2009**, Claimant requested arbitration in accordance with the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and notified Respondent.\(^{15}\)

11. On **1 November 2009**, the ICSID Secretary General registered for arbitration the dispute brought by Claimant against Respondent.\(^{16}\)

\(^{10}\) Record, Annex 2, 17 [10].
\(^{11}\) Clarifications 155.
\(^{13}\) Record, Annex 2, 18 [13].
\(^{14}\) Record, Annex 2, 18 [13].
\(^{15}\) Record, Annex 2, 18 [14].
\(^{16}\) Record, Annex 2, 18[16].
SUMMARY OF ARGUMENTS

12. JURISDICTION: The dispute satisfies the requirements for jurisdiction: First, this Tribunal has jurisdiction over presented Treaty claims by virtue of Article 11 BIT. The contractual forum selection clause [clause 17] cannot oust the jurisdiction of this Tribunal over treaty claims. In any event, Clause 17 JV Agreement is not applicable to Respondent and non-exclusive in nature. In addition, contract claims fall within the scope of Article 11 BIT. Second, this Tribunal has jurisdiction over contract claims by virtue of Article 10 BIT. The wording and context of Article 10 BIT indicates that it was intended to allow investors to refer contract claims to international treaty arbitration. This conclusion is maintained despite the contractual dispute settlement provision in the JV Agreement since breaches of Article 10 BIT constitute a BIT claim and are not mere contract claims. Third, claims cannot be dismissed because of grounds of admissibility. The concept of admissibility does not exist in ICSID arbitration and the claims are admissible in any event.

13. MERITS: First, Respondent materially breached the JV Agreement by the improper invocation of Clause 8 JV Agreement that is attributable to Respondent. Additionally, a material breach occurred by enforcing the improper buyout, resulting in the prevention of Claimant from completing its contractual duties. Second, Respondent has expropriated Claimant’s investment through a material breach of the JV agreement and the sending of the CWF. Claimant is totally deprived of control over its investment. The same actions amount to discrimination and violation of fair and equitable treatment and full protection and security. Third, Respondent is not entitled to rely on Article 9 BIT as a defence to Claimant’s claims. Respondent has not invoked Article 9 BIT in good faith.
ARGUMENTS

PART ONE: JURISDICTION

14. Claimant has requested arbitration in accordance with ICSID Rules before this Tribunal. Respondent contends that Claimant’s claims are inadmissible and that the Tribunal lacks jurisdiction because the claims are contractual in nature. However, such jurisdictional and admissibility objections are unfounded and the present dispute falls within the ambit of ICSID.

15. The jurisdictional requirements for ICSID arbitration set in Article 25 ICSID Convention are undisputed.

16. This Tribunal has jurisdiction over the presented claims notwithstanding clause 17 of the JV Agreement (I) and contract-based claims fall within the ambit of this Treaty by virtue of Article 10 of the Beristan-Opulentia Bilateral Investment Treaty (“BIT”) (II). Furthermore, Respondent’s objection concerning “admissibility” is unfounded (III).

I. THE TRIBUNAL HAS JURISDICTION DESPITE CLAUSE 17 JV AGREEMENT.

17. The claims put forward are treaty claims, which can be referred to this Tribunal under Article 11(1)(c) BIT.18 The dispute is the improper invocation of the buyout clause under clause 8 JV Agreement19 and the sending of the Civil Works Force (“CWF”) of Respondent’s army which removed Claimant’s personnel from all offices, sites and facilities of the Sat-Connect project.20 Respondent’s actions resulted in the violation of treaty standards, including expropriation, breach of fair and equitable treatment (“FET”), discrimination, and lack of full protection and security.

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17 Record, Annex 2, 18 [14].
18 Record, Annex 1, 13 et seq.
19 Record, Annex 3, 19.
20 Record, 6, [15].
18. Claimant respectfully requests this Tribunal to take into account the claims as they are presented by Claimant. Any further inquiry would run the risk of converting a preliminary, jurisdictional dispute into a determination of the merits.

19. Alternatively, even if this Tribunal finds that alleged claims do not amount to treaty breaches, contractual claims still can be referred to this Tribunal by virtue of Article 11 BIT notwithstanding Clause 17 JV Agreement.

A. ARTICLE 11 BIT ENCOMPASSES TREATY CLAIMS.

20. Claimant’s claims constitute treaty claims and fall within the scope of Article 11(1)(c) BIT. The dispute settlement provision seeks to resolve “disputes with respect to investments between a Contracting Party and an investor that concern an obligation of the former under this Agreement”.

21. The underlying dispute arises out of an “investment”. The dispute is the improper invocation of the buyout clause under Article 8 JV Agreement and the legality of the sending of the CWF. The relevant investment of Claimant through the joint venture comprises the transfer of capital and research, a holding of 40% of the shares in Sat-Connect and contractual rights by virtue of the joint venture. All of them are covered by Article 1(1) BIT, which defines the concept of “investment” broadly.

22. The claims at issue constitute treaty breaches. Article 11 BIT states that its objective is to resolve disputes that fall within the substantive provisions of the BIT. The improper invocation of the buyout clause and the enforcement of such through the CWF constitute

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21 Vivendi v Argentina [53]; Vivendi v Argentina, Annulment Decision [74]; Wena Hotels v Egypt, Decision on Jurisdiction, 890; SGS v Pakistan, Decision on Jurisdiction [145]; Enron v Argentina, Decision on Jurisdiction [67]; Siemens v Argentina, Decision on Jurisdiction [180].
22 Wena Hotels v Egypt, Decision on Jurisdiction, 890; Siemens v Argentina, Decision on Jurisdiction [180].
contract breaches and violated the principles of FET\textsuperscript{28}, the prohibition of discriminatory measures\textsuperscript{29} and resulted in an expropriation.\textsuperscript{30} Furthermore, the expulsion of Claimant from the Sat-Connect project constitute a breach of the guarantee agreement that also amounts to a breach of international law in respect of full protection and security.\textsuperscript{31} That the same set of facts can amount to treaty and contract breaches at the same time is not uncommon\textsuperscript{32} and was also implicit in the Vivendi annulment decision.\textsuperscript{33}

23. Article 10 BIT confirms the jurisdiction of this Tribunal over disputes concerning any contract claims.\textsuperscript{34} All breaches are breaches of the substantive provisions itself and can be referred to this tribunal under Article 11 BIT.

24. Furthermore, the improper invocation of the buyout is attributable to Respondent under Article 8 and 11 of the ILC Articles on State Responsibility (“ILC”). The CWF acted directly on basis of a governmental act and no attribution needs to be established.

1. CLAUSE 17 JV AGREEMENT DOES NOT OUST THE TRIBUNAL’S JURISDICTION OVER TREATY CLAIMS.

25. Clause 17 JV Agreement,\textsuperscript{35} which provides the option to refer disputes arising out of the JV Agreement to arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, does not affect the Tribunal’s jurisdiction over Claimant’s claims. Claimant relies on the well-recognised distinction between treaty and contract claims in investment treaty arbitration.\textsuperscript{36} Claimant directs this Tribunal to a number of decisions that have commonly agreed that contractual forum selection clauses cannot derogate from the jurisdiction of treaty-based tribunals for claims based on a breach of treaty.\textsuperscript{37}

\begin{itemize}
  \item 28 Part Two II C.
  \item 29 Part Two II B.
  \item 30 Part Two II A.
  \item 31 Part Two II D.
  \item 32 \textit{GAMI Investments v Mexico} \cite{GAMIInvestments}; \textit{Mondev v USA} \cite{Mondev}; \textit{Waste Management v Mexico}, \cite{WasteManagement}; Selwyn Case, British Venezuelan Commission, 381.
  \item 33 \textit{Vivendi v Argentina}, Annulment Decision, \cite{VivendiAnnulment}.
  \item 34 Claimant’s further arguments are submitted under PART II (B).
  \item 35 Record, Annex 3, 19.
  \item 36 Crawford, 3 \textit{et seq}; Gaillard (ed Weiler), 328; Schreuer (ed Weiler), 288.
  \item 37 \textit{Vivendi}, Annulment Decision; \textit{LANCO v Argentina}, Decision on Jurisdiction; \textit{Salini v Marocco}, Decision on Jurisdiction; \textit{Azurix v Argentina}, Decision on Jurisdiction; \textit{SGS v}
26. As an international tribunal, this Tribunal takes precedence over claims based on breaches of the BIT. Consequently, the proper sphere of treaty disputes from other disputes arising from the factual matrix of the same investment must be distinguished.\textsuperscript{38} A useful guide concerning the differentiation of treaty and contract claims is the annulment decision of \textit{Vivendi v Argentina}.\textsuperscript{39} The Committee held that whether a breach of the treaty or a breach of contract exists are different questions.\textsuperscript{40} The Committee stated further that:

\begin{quote}
where “the fundamental basis of a 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 …cannot operate as a bar to the application of the treaty standard.\textsuperscript{41}
\end{quote}

27. Even before the Annulment decision of \textit{Vivendi}, where the concept of contract and treaty claims was established, ICSID tribunals consistently followed the approach of upholding their jurisdiction despite contractual forum selection clauses.\textsuperscript{42} After \textit{Vivendi}, tribunals have widely adopted the distinction between BIT and contract claims and followed the approach that contractual forum selection clauses cannot deprive them of their jurisdiction over BIT claims.\textsuperscript{43} Since it is common practice to give treaty tribunals primacy over treaty claims, Claimant can pursue the presented treaty claims, irrespective of Clause 17 JV Agreement.

\section*{2. CLAUSE 17 JV AGREEMENT IS NOT APPLICABLE TO RESPONDENT.}

28. The dispute resolution clause contained in Clause 17 JV Agreement is not applicable to Respondent as it is only a guarantor to the JV Agreement and not a party to the arbitration agreement between Claimant and Beritech. As guarantor, Respondent would assume the

\begin{quote}
\textit{Pakistan}, Decision on Jurisdiction; \textit{Impregilo v Pakistan}, Decision on Jurisdiction; \textit{Bayindir v Pakistan}, Decision on Jurisdiction; \textit{CMS v Argentina}, Decision on Jurisdiction. \textsuperscript{38}
\end{quote}

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\textit{McLachlan}, 99.
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\textit{Vivendi v Argentina}, Annulment Decision. \textsuperscript{39}
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Ibid. [96]. \textsuperscript{40}
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Ibid [101]. \textsuperscript{41}
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Lalive, ‘\textit{Holiday Inns v Morocco}’ [159]; \textit{LANCO v Argentina}, Decision on Jurisdiction [39 et seq]; \textit{Salini v Morocco}, Decision on jurisdiction [25 et seq]. \textsuperscript{42}
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CMS v Argentina, Decision on Jurisdiction, [70-73]; SGS v Pakistan, Decision on Jurisdiction, [146-174] \textit{Azurix v Argentina}, Decision on Jurisdiction [75-85], \textit{Enron v Argentina}, Decision on Jurisdiction [89-94]; \textit{Siemens v Argentina}, Decision on Jurisdiction [174-180]; Schreuer, ‘Calvo’s Grandchildren’, 8. \textsuperscript{43}
\end{quote}
obligations of Beritech under the JV agreement upon Beritech’s default.\textsuperscript{44} Thus, the issue is whether Respondent is liable as guarantor under Clause 17 JV Agreement.

29. Clause 17 JV Agreement forms a separate arbitration agreement independent of the JV Agreement in which it is included. This results from the general principle of “separability” of arbitration agreements.\textsuperscript{45} Separability means that a contractual arbitration clause as an agreement between the parties is independent from the substantive obligations.\textsuperscript{46} The tribunal in \textit{Plama v Bulgaria}\textsuperscript{47} held expressly, that the principle of separability of arbitration clauses is generally accepted.\textsuperscript{48}

30. Consequently, Clause 17 JV Agreement must be treated as an autonomous contract independent of the substantive provisions guaranteed in the JV Agreement, even though from a formal perspective there is no division. If Respondent had aimed to be bound by Clause 17 JV Agreement, Respondent should have expressed its consent. Consent is the cornerstone of arbitration, and therefore a careful analysis is required.\textsuperscript{49}

31. When it co-signed the JV Agreement, Respondent agreed to guarantee the obligations of Beritech but did not unambiguously express its intent to be bound by Clause 17 within the JV Agreement. Claimant points to a number of US courts that have rejected guarantee theories on particular facts as grounds for binding third parties to an arbitration clause.\textsuperscript{50}

32. In \textit{Grundstad v Ritt} the Court held that a guarantor is not bound by an arbitration clause contained in the principal agreement even when the guarantee is incorporated in the principal agreement.\textsuperscript{51}

33. Thus, Clause 17 JV Agreement neither expressly nor implicitly covers Respondent and therefore is not applicable.

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\textsuperscript{44} Clarifications 152.
\textsuperscript{45} UNITRAL Rules Art. 21.2; \textit{Prima Paint; Fiona Trust}.
\textsuperscript{46} Redfern/Hunter [2.89].
\textsuperscript{47} \textit{Plama v Bulgaria}, Decision on Jurisdiction.
\textsuperscript{48} Ibid [212].
\textsuperscript{49} Redfern/Hunter [2.89].
\textsuperscript{50} \textit{Grundstad v Ritt; Interoce. v National Shipping; Taiwan Navigation v Seven Seas}.
\textsuperscript{51} \textit{Grundstad v Ritt}. 
3. CLAUSE 17 JV AGREEMENT IS NOT EXCLUSIVE.

34. The dispute resolution clause contained in Clause 17 JV Agreement\(^{52}\) is not exclusive and not binding to the parties of the JV Agreement. It provides that “any party may give notice to the other party of its intention to commence arbitration” (emphasis added).\(^{53}\)

35. The use of the term “may” indicates that there was no intention of the signing parties to make it an exclusive dispute resolution clause. Otherwise they would have used mandatory language like “shall” or “must” like in the other sentences of clause 17 JV Agreement.

36. Once a party decides to refer to the forum provided in Clause 17, the arbitration procedure becomes exclusive. Until the notice is given, it is in the parties’ discretion whether to refer their claim to competent forum under Clause 17. Claimant has not responded to the notice of arbitration initiated through Beritech and so has not waived any of its rights. Clause 17 JV Agreement cannot interfere with this Tribunal’s jurisdiction, as it is not exclusive.

B. ARTICLE 11 BIT IS SUFFICIENTLY BROAD TO COVER CONTRACT CLAIMS.

37. In addition to contract breaches amounting to treaty breaches by virtue of Article 10 BIT\(^{54}\), contract claims fall under Article 11 BIT. The claims at issue are the improper invocation of the buyout clause and the breach of the guarantee agreement by sending the CWF. In guaranteeing Beritech’s performance, Respondent is liable for Beritech’s contract breaches. Respondent itself breached its guarantee agreement by taking over the Sat-Connect project by the CWF on the basis of the improper invocation of the buyout clause.\(^{55}\) These contract breaches fall under Article 11 BIT.

38. Article 11 BIT is broadly worded and encompasses both treaty and contract claims. In interpreting Article 11 of the BIT reference needs to be made to Article 31(1) VCLT. The VCLT is part of customary international law and has been ratified by Opulentia and 1.

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\(^{52}\) Record, Annex 3, 19.
\(^{53}\) Record, Annex 3, 19.
\(^{54}\) Claimant’s further arguments are submitted under Part One II.
\(^{55}\) Record, Annex 2, 17 [11]; see further Part Two I. B. 2.
Beristan. Article 31(1) VCLT states that interpretation of a treaty provision should focus on the text having regard to its context and purpose since this is presumed in international law to be the most faithful expression of the common intention of the parties.

39. The dispute settlement provision in Article 11 BIT stipulates that “disputes with respect to investments” shall be submitted to international arbitration. There is no specific limitation to “treaty” claims as opposed to purely contractual claims as disputes with respect to investments can be either treaty-based or contract-based. This becomes evident when contrasting Article 11 with the inter-State dispute settlement provision in Article 12 BIT. The settlement provision in Article 12 BIT expressly refers to disputes which may arise “relating to the interpretation and application of this Agreement.” If the parties to the BIT intended to limit Article 11 BIT to treaty claims, they would have used the same language as in Article 12 BIT.

40. Moreover, the current BIT was signed with the intention of protecting the interests of investors in the host state. The Preamble of the BIT provides that the objective is to “establish favourable conditions…especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party”.

41. A plain reading of Article 11 BIT in the context of its object and purpose indicates that the obligations of Respondent towards Claimant include any investment-related responsibilities that Respondent may have entered into with Claimant.

42. Claimant points to the approach taken by the Committee in Vivendi where a similarly worded provision was interpreted. Article 8 of the French-Argentine BIT deals with disputes “…relating to investments made under this Agreement.” The Committee held that since the provision was sufficient for the dispute to relate to an investment made

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56 Record, Annex 2, 18 [15].
57 Gardiner, 79.
58 Record, Annex 1, 13.
59 Record, Annex 1, 14.
60 Record, Annex 1, 14.
61 Record, Annex 1, 9.
62 Record, Annex 1, 9.
63 Vivendi v Argentina, Annullment Decision.
64 Ibid [53].
under the BIT without any restriction of investor’s claims to a treaty breach, the wording was sufficiently broad to cover contract breaches. The interpretation in Vivendi was not an isolated approach.

43. Clause 17 JV Agreement does not oust the tribunal’s jurisdiction over contract claims because it is neither applicable to Respondent nor exclusive. In light of the above, the contract claims fall within the ambit of Article 11 BIT.

C. CLAIMANT COMPLIED WITH THE SCHEDULED WAITING PERIOD IN ARTICLE 11 BIT.

44. According to Article 11 BIT the investor has to pursue an amicable settlement within six months of the date of a written application to ICSID. On 12 September 2009, Claimant submitted a written notice to Respondent of a dispute under the BIT, in which Claimant notified Respondent of its desire to settle amicably. After failing to reach an amicable settlement, Claimant requested arbitration in accordance with ICSID Rules under Article 11(1) (c) BIT on 28 October 2009. Once an attempt at settlement fails, there is no need to wait until the end of the scheduled period.

45. In light of the general practice the attempt at amicable settlement has been fulfilled and this Tribunal is entitled to assume jurisdiction.

II. THIS TRIBUNAL HAS JURISDICTION OVER CONTRACT CLAIMS BY VIRTUE OF ARTICLE 10 BIT.

65 Vivendi v Argentina, Annulment Decision [55].
66 Salini v Morocco, Decision on Jurisdiction [59-61]; SGS v Philippines Decision on Jurisdiction [132-135]; also affirmed by scholars: Crawford, 12 et seq; Schreuer (ed.Weiler), 299.
67 See above I. A. 2
68 See above I. A. 3
69 Record, Annex 1, 13.
70 Clarifications 133.
71 Clarifications 133; Record, Annex 2, 18 [14].
72 Salini v Morocco, Decision on Jurisdiction [19]; Azurix v Argentina, Decision on Jurisdiction [55], CMS v Argentina, Decision on Jurisdiction[121-123], Ronald S. Lauder v Czech Republic [187-191].
46. Respondent’s contention that this Tribunal lacks jurisdiction because Claimant’s claims are contractual in nature is unfounded.\(^{73}\) The BIT contains Article 10 BIT,\(^{74}\) an “umbrella clause” that has the effect of allowing Claimant to refer any claim regarding a breach of the JV Agreement under the jurisdiction of this Tribunal.

A. RESPONDENT IS LIABLE AS GUARANTOR FOR CONTRACT BREACHES ARISING OUT OF THE JV AGREEMENT.

47. The JV Agreement was concluded between Claimant and Beritech. As guarantor to Beritech, Respondent can be held liable for any breaches of the JV Agreement. In addition, Respondent itself breached the guarantor agreement by enforcing the buyout through the CWF. Thus, Respondent cannot circumvent its obligations by arguing that it was not a party to the JV Agreement.

48. In any event, the acts of Beritech are attributable to Respondent under the ILC. The ILC is not only applicable to international law breaches, but the language and approach of ILC’s Articles and commentaries also suggest that they refer to a general attribution of conduct.\(^{75}\) Therefore, breaches arising out of the JV agreement between the Claimant and Beritech are covered by Article 10 BIT if attributable to the Respondent under international law. This is confirmed by the tribunals in *Noble Ventures v Romania*\(^{76}\), *Eureko v Poland*\(^{77}\) and *SGS v Pakistan*.\(^{78}\)

B. THE SCOPE OF ARTICLE 10 BIT INCORPORATES CONTRACT CLAIMS.

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\(^{73}\) Record, 7.
\(^{74}\) Record, Annex 1, 13.
\(^{75}\) Gallus,166 et seq; Newcombe [9.15].
\(^{76}\) *Noble Ventures v Romania*, [68-86].
\(^{77}\) *Eureko B.V. v Poland* [260].
\(^{78}\) *SGS v Pakistan*, Decision on Jurisdiction [166].
49. The wording and context of Article 10 BIT refer to contract claims. A number of decisions of international investment tribunals have held that so-called “umbrella clauses” refer to contract claims.  

50. The specific wording of an umbrella clause is crucial to its scope. Article 10 BIT provides:

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

51. Interpreting Article 10 BIT, reference must be made to Article 31(1) VCLT. Article 10 BIT maintains mandatory language as it refers to “shall constantly guarantee”. Article 10 BIT was intended to create obligations beyond the other substantive provisions in the BIT. Other tribunals like *SGS v Philippines* and *Noble Ventures v Romania* confirmed that the notion “shall” in umbrella clauses impose obligations to observe contractual commitments.

52. The words “any obligations” are all-encompassing and are not limited to international obligations or non-contractual obligations, so that the scope includes legal obligations arising out of the JV Agreement. As States often conclude investment contracts with investors which describe the rights and duties of the parties concerning a specific investment, Article 10 BIT, which speaks of “any obligation it [a party] has assumed with regard to investment”, must be understood as a clear reference to such investment contracts. This understanding that “any obligations” refers to all obligations, including...

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79 *Fedax v Venezuela* [29]; *SGS v Philippines*, Decision on Jurisdiction [113-129]; *Eureko v Poland* [78-114]; *Noble Ventures v Romania* [46-62]; *LG&E Energy v Argentine Republic*, Decision on Liability [169-175]; *Bureau Veritas v Paraguay*, Decision on Jurisdiction [128 - 161].

80 OECD, (Umbrella Clauses), 9.

81 Record, Annex 1, 13.

82 See I. B. [38].

83 *Eureko v Poland*, [115].

84 *Noble Ventures v Romania* [51].
contractual obligations with regard to investments is widely accepted in Treaty arbitration.\textsuperscript{85}

53. The context of Article 10 BIT supports the approach of assigning the foreign investor a wide range of rights under the BIT, since the purpose of the BIT is to promote and protect foreign investments.\textsuperscript{86}

54. Moreover, the approach of allowing foreign investors to use investment treaty arbitration to seek relief for claims based on the violation of investor-State contracts by virtue of an “umbrella clause” has been followed by several investment tribunals.\textsuperscript{87} In \textit{SGS v Philippines},\textsuperscript{88} the tribunal had to interpret Article X (2) of the Swiss-Philippines BIT, reading:

“Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”.

The tribunal found that the wording of this clause was sufficiently clear and unambiguous to make a State’s failure to observe contractual commitments a breach of this provision.\textsuperscript{89}

55. The tribunal in \textit{Eureko v Poland}\textsuperscript{90} interpreted an umbrella clause by referencing to Article 31(1) VCLT and held that the cardinal rule of the interpretation of treaties was that every operative clause has to be interpreted as meaningful rather than meaningless.\textsuperscript{91} Therefore, an umbrella clause has to be interpreted as imposing a substantive obligation separate from and in addition to the other substantive provisions of the BIT.\textsuperscript{92}

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\textsuperscript{85} \textit{Eureko v Poland} [246]; \textit{SGS v Philippine}, Decision on Jurisdiction [115]; \textit{Enron v Argentina} [274].
\textsuperscript{86} See I. B. [40].
\textsuperscript{87} \textit{Fedax v Venezuela} [29]; \textit{SGS v Philippines}, Decision on Jurisdiction [113-129]; \textit{Eureko v Poland} [78-114]; \textit{Noble Ventures v Romania} [46-62]; \textit{LG&E Energy v Argentine Republic}, Decision on Liability [169-175]; \textit{Bureau Veritas v Paraguay}, Decision on Jurisdiction [128 - 161].
\textsuperscript{88} \textit{SGS v Philippines}, Decision on Jurisdiction.
\textsuperscript{89} Ibid [115].
\textsuperscript{90} \textit{Eureko v Poland}.
\textsuperscript{91} Ibid [247 et seq].
\textsuperscript{92} Ibid[248 et seq].
56. Recently, the tribunal in *Bureau Veritas v Paraguay*[^93] applied a broad application of following umbrella clause

“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.”

57. The tribunal held that the provision was undoubtedly capable of being read to include a contractual arrangement.[^94]

58. The position adopted in two ICSID decisions that umbrella clauses only protect breaches of contracts based on sovereign conduct is not applicable to the present case. *El Paso v Argentina*[^95] and *Pan America v Argentina*[^96] distinguish the State as a merchant from the State as a sovereign. According to their interpretation, umbrella clauses only protect against breaches of contracts based on sovereign conduct. Since Respondent contested that the claims are contractual in nature; it can be expected that it will assume that no sovereign conduct on its side was involved. However, practical difficulties arise when distinguishing between governmental and purely commercial conduct, and a characterization test to differentiate the two would produce arbitrary results.[^97]

59. Even if Respondent argues that the motives of the breaches of the JV Agreement were commercial in nature and attempts to circumvent its international obligations, a characterization test would require a hearing on the merits and cannot give clear evidence of Respondent’s real motive. In any event, a “sovereignty” test is unsupported in public international law.[^98] Therefore, Article 10 BIT must be regarded as an enforcement mechanism for Respondent’s obligations, independent of whether Respondent has acted as a sovereign or as a merchant.

60. Thus, the considerations concerning the wording and context of Article 10 and the arguments of the tribunals lead to the conclusion that a broad understanding of umbrella clauses must be applied. If the wording is straightforward and the context is consistent

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[^93]: Bureau Veritas v Paraguay, Decision on Jurisdiction.
[^94]: Ibid [141].
[^95]: El Paso v Argentina, Decision on Jurisdiction.
[^96]: Pan America v Argentine Republic, Decision on Jurisdiction.
[^97]: Crawford, 19.
[^98]: Crawford.19; Naniwadekar, 179.
with the purpose and object of the BIT, there is no other alternative but to allow investors
to refer their contractual claims to treaty arbitration. Any other interpretation would
deprive Article 10 BIT of its meaning and would be contrary to the principle that all
clauses of a legal instrument should be given effect.\textsuperscript{99}

61. Also the history of umbrella clauses indicates that they were introduced to apply without
exception to contract claims.\textsuperscript{100} Furthermore, the economic rationale behind foreign
investment points to such a broad understanding. States try to attract investments by
assuring foreign investors a reliable legal framework. Once Respondent has given its
consent to included contract claims into the BIT by virtue of Article 10 to attract foreign
investments, the Tribunal should not stay the proceedings on account of jurisdictional
failure. This Tribunal is respectfully requested to hold that Article 10 BIT allows Claimant
to refer its contract claims to ICSID arbitration.

C. THE BREACHES OF ARTICLE 10 GIVE RISE TO A BIT CLAIM
NOTWITHSTANDING CLAUSE 17 JV AGREEMENT.

62. The separate dispute settlement provision contained in Clause 17 JV Agreement does not
affect the Tribunal’s jurisdiction over Claimant’s claims. Apart from the fact that Clause
17 JV Agreement is not exclusive\textsuperscript{101} and not applicable to Respondent,\textsuperscript{102} it cannot
override the consent to arbitration under the BIT when Claimant invokes the violation of
an umbrella clause.

63. A breach of Article 10 BIT constitutes a violation of this clause and gives rise to a BIT
claim. The BIT provides an alternative forum without annulling the contract claim. A
contract violation gives rise to two independent claims: a contract claim based on the
contract violation and a BIT claim based on the violation of the umbrella clause.
Respondent’s consent to arbitration under the BIT has to be regarded as an alternative

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\textsuperscript{99} Dugan, 560.
\textsuperscript{100} Sinclair, 411 \textit{et seq}; Wong, 143 \textit{et seq}; OECD (Umbrella Clause) 4 \textit{et seq}.
\textsuperscript{101} See I. A. 3.
\textsuperscript{102} See I. A. 2.
forum to the contractual forum. Consequently, it is for this Tribunal to determine whether or not Article 10 BIT was breached. In order to make this determination, the Tribunal needs to analyse whether the JV Agreement has been breached, since only a breach of a contract leads to the breach of an umbrella clause.

64. The same arguments as to why a contractual forum selection clause cannot override the consent to investor-state arbitration relating to violation of an investment treaty are therefore applicable to claims involving the violation of an umbrella clause.

65. This result complies with the intention of the parties of the BIT. It was entirely open to Respondent to introduce a limitation in the BIT concerning the effect of the umbrella clause by giving exclusivity to the forum selection clauses of investment contracts. This is not uncommon in BIT practice.

66. Moreover, reasons of efficiency and expediency militate against a separation of treaty and contract claims. The logical approach would be to unite all claims under a single forum with the most comprehensive jurisdiction, particularly since Claimant has already initiated ICSID proceedings and this Tribunal has been properly constituted. Arguments that a contractually chosen forum would be better placed to decide contractual legal issues relating to the interpretation and application of substantive law are unfounded. This argument does not take into account that the difficulty is primary related to factual issues rather than to the interpretation and application of domestic contract law. Therefore, this Tribunal has jurisdiction over contract claims by virtue of Article 10 BIT.

III. RESPONDENT’S OBJECTIONS ON ADMISSIBILITY ARE UNFOUNDED.

A. THE CONCEPT OF ADMISSIBILITY DOES NOT EXIST IN ICSID ARBITRATION.

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103 Dissent Crivellaro SGS v Philippines, [4 et seq]; Wackernagel, 26 et seq.
104 See I. A. 1.
105 Article 4 (5) Netherlands/India BIT; Declaration Antonio Crivellaro, SGS v Philippines, [4 et seq].
106 Schill, 52; Schreuer ‘Calvo’s Grandchildren’, 12.
107 see Douglas, 388.
67. Respondent contends that the claims are inadmissible and that Claimant should respond to the notice of arbitration in the separate arbitration proceedings. The Tribunal is requested to reject this challenge on the ground that the concept of admissibility does not exist in ICSID arbitration.

68. The term “admissibility” does not appear in the ICSID Convention. The difference between jurisdiction and admissibility is that

“Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it”.

69. In contrast to the ICSID Convention, an explicit distinction between jurisdiction and admissibility is recognised in Article 79(1) of the ICJ’s Rules of Court. Thus, it can be assumed that it was not the intention of the drafters of the ICSID Convention to include the concept of admissibility. This conclusion is affirmed in Methanex, where the tribunal stated that the UNCITRAL Arbitration Rules do not confer any express powers to reject a claim based on reasons of inadmissibility. Therefore, there was no express or implied power to reject claims based on inadmissibility. This result is further confirmed by ICSID tribunals in CMS v Argentina and Enron v Argentina.

70. If jurisdiction is denied on grounds of inadmissibility, Claimant’s rights will be disregarded, as it will not have the possibility to have the decision reviewed. Parties to ICSID arbitration have the opportunity of contesting the tribunal’s decision with respect to jurisdiction pursuant to Article 52(1)(b) ICSID Convention. As a decision declining jurisdiction by the Tribunal is an award, it can be subject to annulment. However, determinations of “admissibility”, like determinations on the merits, are not reviewable. Claimant would be deprived of its legal rights to annul an award at the jurisdictional stage,

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108 Record, 7.
109 Laird (ed. Weiler), 222.
110 Waste Management, Dissent [58].
111 Methanex v U S, Partial Award on Jurisdiction.
112 Ibid [123 et seq].
113 CMS v Argentina, Decision on Jurisdiction, [41].
114 Enron v. Argentina, Decision on Jurisdiction.
115 Dolzer/Schreuer, [279 et seq].
116 Paulsson, 606 et seq.
which cannot be in conformity with the intentions of the drafters of the ICSID Convention.

B. CLAIMANT’S CLAIMS ARE ADMISSIBLE.

71. Alternatively, if this Tribunal finds that the concept of admissibility exists in ICSID arbitration, the claims are nevertheless admissible. The fact that the JV Agreement contains an exclusive jurisdiction clause cannot lead to a contrary result. Clause 17 JV Agreement refers to “disputes arising out of or relating to this agreement”\textsuperscript{117}. Treaty claims are not included in Clause 17 JV Agreement. As explained above, any breaches of the JV Agreement constitute a violation of Article 10 BIT and thus give rise to a BIT claim.\textsuperscript{118}

72. The decision by the SGS v Philippines tribunal to stay the proceedings until the contractual claims were decided by national courts was misguided.\textsuperscript{119} The tribunal held that an umbrella clause is not intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.\textsuperscript{120} This approach is misguided as it results from a misunderstanding of the nature of a BIT violation under an umbrella clause and its relation to a breach of contract. The tribunal in SGS v Philippines referred to Vivendi,\textsuperscript{121} where it was examined whether the fundamental basis of a claim is more related to a contract or a treaty.\textsuperscript{122} This distinction is not meaningful with respect to contract claims under the umbrella clause, which give rise to a BIT violation. Claims premised on the umbrella clause are ultimately claims whose “nature” is wholly that of treaty claims.\textsuperscript{123}

73. Furthermore, the tribunal in SGS v Philippines found that a party is allowed to refer its contractual claims—notwithstanding a forum selection clause—to a BIT tribunal if there

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\textsuperscript{117} Record, Annex 3, 19.
\textsuperscript{118} Dissent Crivellaro SGS v Philippines, Decision on Jurisdiction [11].
\textsuperscript{119} Ibid [11]; Schill, 50 et seq; Wong, 165 et seq.
\textsuperscript{120} SGS v Philippines, Decision on Jurisdiction [140].
\textsuperscript{121} Vivendi v Argentina Republic, Annulment Decision [96].
\textsuperscript{122} SGS v Philippines, Decision on Jurisdiction [153].
\textsuperscript{123} Wong, 170.
are “good reasons” preventing a claimant from complying with its contract.\textsuperscript{124} Claimant has good reasons not to reply to the notice of arbitration, since the respective arbitration tribunal was improperly constituted but nevertheless started with the proceedings. Clause 17 JV Agreement provides for a period of 60 days after the notice of intention to commence arbitration is given, where the parties must attempt to settle the dispute amicably.\textsuperscript{125} Beritech gave notice of its intention to commence arbitration on 11 September 2009.\textsuperscript{126} Instead of waiting 60 days, Beritech filed the request for arbitration against Claimant on 19 October 2009.

74. Claimant cannot be expected to participate in an arbitration proceeding where the tribunal has not acted according to the arbitration clause which expressly provided 60 days as a waiting period. This conduct displays a manifest lack of objectivity and a lack of due process. Therefore, even according to the \textit{SGS v Philippines} approach, the claims would be admissible.

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\textsuperscript{124} \textit{SGS v Philippines}, Decision on Jurisdiction [154].
\textsuperscript{125} Record, Annex 3, 19.
\textsuperscript{126} Clarification 175.
PART TWO: MERITS

75. Respondent breached its contractual obligations and violated its treaty obligations. Occurrence of a contractual breach on part of Respondent will be presented in Part I whereas the arguments in support of a treaty violation will be presented in Parts II and III.

I. RESPONDENT MATERIALLY BREACHED THE JV AGREEMENT.

76. First, Respondent acted inconsistent with its good faith obligation towards Claimant (A). Secondly, Respondent prevented Claimant from completing its contractual duties (B).

A. RESPONDENT INVOKED CLAUSE 8 JV AGREEMENT IMPROPERLY, AS IT DID NOT ACT CONSISTENTLY WITH ITS GOOD FAITH OBLIGATIONS.

77. The acts of Beritech are attributable to Respondent (1). Moreover, Respondent breached the contract by acting against its good faith obligations (2).

1. THE ACTS OF BERITECH ARE ATTRIBUTABLE TO RESPONDENT.

78. Article 2 ILC Articles ("ILC") states that there is an international wrongful act of a state, if it's attributable and constitutes a breach of an international obligation to the state. Beritech constitutes an “empty shell” of Respondent. Therefore, Claimant urges the Tribunal to attribute Beritech’s acts to Respondent, on the basis of Article 8 ILC (a) and Article 11 ILC (b).
a) **BERITECH IS ACTING UNDER CONTROL OF RESPONDENT.**

The ILC Articles are applicable in investor-state disputes.\textsuperscript{127} *Maffezini v Spain* supports the understanding that the ILC Articles, as part of the customary international law on state responsibility, can also be applied in investor state disputes.\textsuperscript{128}

79. Article 8 ILC provides that the conduct of a person is attributable to the state if the person is

"in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct."

The buyout was carried out “under the control”\textsuperscript{129} of Respondent. The invocation of Clause 8 JV Agreement by Beritech is the decisive act at stake.

80. International law acknowledges that corporate entities at the national level have separate legal personality.\textsuperscript{130} Nevertheless, the presumption is rebuttable. A shareholder can be held responsible if the exception of "piercing the corporate veil" applies. Claimant urges the Tribunal to determine the degree of control of Respondent over Beritech, in the context of Article 8 ILC, by taking the principle of piercing the corporate veil into consideration.\textsuperscript{131} The Commentary to the ILC states that the corporate veil has to be pierced “where [it] is a mere device or a vehicle for fraud or evasion.”\textsuperscript{132} The process of lifting the corporate veil plays a similar role in international law as in municipal law.\textsuperscript{133}

81. Respondent used its ownership interest in order to achieve its own interest through Beritech. Respondent owns a 75% interest in Beritech. The remaining 25% of Beritech is owned by a small group of wealthy Beristian investors, who have close ties to the

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\textsuperscript{127}Feit, 147.
\textsuperscript{128}Maffezini v Spain, Award on Jurisdiction [75]; Noble Ventures v Romania [69-70]; Eureko v. Poland [134]; Azurix v. Argentine [50].
\textsuperscript{129}Article 8 ILC.
\textsuperscript{130}ILC Commentary [6] to Art.8 ILC Articles.
\textsuperscript{131}Feit, 151.
\textsuperscript{132}ILC Commentary [6] to Art.8 ILC.
\textsuperscript{133}Barcelona Traction [58] 39.
Beristian Government.\textsuperscript{134} Thus the blocking minority of 25\% will not act against the decisions of Respondent, and a \textit{de facto} unity of ownership exists.

82. Furthermore, Beritech was established only seven months before the establishment of the Sat-Connect Joint Venture.\textsuperscript{135} Respondent has a genuine interest in the investment of Claimant to improve its military position with the help of Claimant’s know-how. Therefore, controlling the project is in the very interest of Respondent as several segments of Respondent’s armed forces will use the Sat-Connect system.\textsuperscript{136}

83. Beritech has only been established as an “empty shell” so that Respondent can avoid liability. Additionally, the Minister of Telecommunication is a member of the board of directors,\textsuperscript{137} and Sat-Connect specialises in the telecommunication sector.\textsuperscript{138} The Minster represents the direct interests of Respondent and in conjunction with the \textit{de facto} ownership of Beritech, future decisions of that company will be guided and controlled by Respondent.

84. Due to the unity of interest and ownership separate personalities of the corporation and Respondent, as \textit{de facto} unique shareholder, do not exist. Consequently, the acts of Beritech are attributable to Respondent by virtue of Article 8 ILC.

\textbf{b) RESPONDENT ACKNOWLEDGED THE CONDUCT OF BERITECH AS ITS OWN.}

85. Respondent acknowledged the conduct of Beritech as its own. Article 11 ILC establishes that

“Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”

86. Respondent’s executive order to its civil work force to evict Claimant represents a clear and unequivocal adoption of the buyout.\textsuperscript{139} There was no judicial approval of the notice

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  \item[1.] \textsuperscript{134} Record, Annex 2, 16 [2].
  \item[135] Clarifications 161.
  \item[136] Record, Annex 2, 17 [6].
  \item[137] Clarifications 135.
  \item[138] Record, Annex 2 16 [5].
  \item[139] Hobér, 569; ILC Commentary [8] to Article 11.
\end{itemize}
handed to Claimant on 28 August 2009 by Beritech.\textsuperscript{140} The sending of the CWF is not a mere support or acknowledgement of the intervention, but rather a “seal of official governmental approval” as well as a deliberate decision of Respondent to perpetuate the situation, which has been considered as transforming private acts into acts of state by the ICJ in the \textit{Tehran Hostage} Decision.\textsuperscript{141} Thus, the conduct is attributable through Article 11 ILC.

87. It will be demonstrated that the conduct is internationally wrongful.\textsuperscript{142} Furthermore, it has already been established that the contractual claims fall within the scope of Article 10 BIT.\textsuperscript{143} Therefore, a contractual breach on the part of Respondent constitute a breach of the treaty.

2. \textbf{RESPONDENT VIOLATED ITS GOOD FAITH OBLIGATIONS IN CLAUSE 8 JV AGREEMENT.}

88. Respondent had an obligation of good faith towards Claimant by virtue of the JV Agreement (a). Respondent acted against its good faith obligations and influenced the board to act against the interests of Sat-Connect (b).

c) \textbf{GOOD FAITH OBLIGATIONS EXIST IN THE JV AGREEMENT.}

89. The applicable law in the context of the JV Agreement is law of Respondent,\textsuperscript{144} which incorporates the UNIDROIT principles.\textsuperscript{145} Clause 8 JV Agreement allows a buyout in case of a material breach of contract. Clause 4(4) JV Agreement provides that any breach of confidentiality is a material breach of contract. The purpose of a confidentiality clause is to establish which information is absolutely necessary to be kept secret.\textsuperscript{146} Claimant, however, has never leaked information.

90. Clause 4(2) does not permit the parties to disregard their obligation to act in good faith. Article 1.7 of the UNIDROIT principles states that “each party must act in accordance

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\textsuperscript{140} Record, Annex 2 17 [10].
\textsuperscript{141} \textit{US Diplomatic and Consular staff in Tehran} [74].
\textsuperscript{142} Article 2 ILC.
\textsuperscript{143} Part One II.
\textsuperscript{144} Record, Annex 3, Clause 17, 19.
\textsuperscript{145} Clarifications 136.
\textsuperscript{146} Ian Hewitt, 27.
with good faith and fair dealing”. \(^{147}\) Thus, the good faith principle is an obligation. \(^{148}\) Good faith and fair dealing are of an autonomous nature. This means that the standard of good faith has to be found independently of municipal law. \(^{149}\)

**d) RESPONDENT VIOLATED ITS GOOD FAITH OBLIGATIONS TOWARDS CLAIMANT.**

91. Claimant submits that Respondent arbitrarily and capriciously exercised its power to terminate the contract. \(^{150}\) The consequence of the buyout is the termination of the contract. On 21 August 2009, the chairman of Sat-Connect’s board made a presentation in which he discussed the allegation that had appeared in the Beristan Times. \(^{151}\) After the meeting, no further information concerning the leaks was available. \(^{152}\)

92. Claimant urges the Tribunal to doubt the reliance of the newspaper article for two reasons. First, the official was quoted off the record. \(^{153}\) Secondly, the article states that the official believed that critical information from the Sat-Connect project was passed to the Government of Opulentia. \(^{154}\) Further information is needed to prove that information was actually leaked, which has not been provided by Respondent.

93. Six days later, in the meeting on 21 August 2009, Respondent, with the support of the majority of Sat-Connect’s board, invoked Clause 8, to compel a buyout of Claimant’s interest in the Sat-Connect project. \(^{155}\) Thus, even though no additional information was given, the majority of Sat-Connect board suddenly approved the buyout.

94. Directors of the joint venture have duties, \(^{156}\) including to promote in good faith the success of the entity for the benefit of its members as a whole. \(^{157}\) Furthermore, a duty

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\(^{147}\) Article 1.7 of the UNIDROIT principles.  
\(^{148}\) Keily, 5. d. (1).  
\(^{149}\) Vogenauer, 175.  
\(^{150}\) *Watkins v Rich.*  
\(^{151}\) Record, Annex 2, 17 [9].  
\(^{152}\) Clarifications 247.  
\(^{153}\) Clarifications 178.  
\(^{154}\) Record, Annex 2, 17 [8].  
\(^{155}\) Record, Annex 2, 17 [10].  
\(^{156}\) Hewitt, 184.  
\(^{157}\) Hewitt, 185.
exists to exercise independent judgment.\textsuperscript{158} The approval of the board was influenced by Respondent and thus was not independent. Furthermore, the approval was not in the benefit of Sat-Connect’s members as a whole.

95. The project was nearly completed before the buyout was invoked.\textsuperscript{159} Nevertheless, the next step would have been for Sat-Connect to deploy the systems and networks while working with Claimant to ensure the systems were properly operational.\textsuperscript{160} Any difficulties could only be resolved by Claimant’s expertise, as Beritech does not have expertise in this field, having only been established seven months before the closure of the joint venture project.\textsuperscript{161} In contrast, Claimant is a successful multinational enterprise specializing in satellite communications technology and systems. Therefore, the interests of the Joint Venture Company were not objectively represented by invoking the buyout clause. This is emphasized by the fact that the allegations are doubtful, as they have not been confirmed by any damage on part of Sat-Connect. Thus, no compromise to Sat-Connect due to the alleged leaks occurred.\textsuperscript{162}

96. Respondent acted against its good faith obligations, acted capriciously and arbitrarily, and did not mitigate the damage of its signatory. Therefore, Respondent breached the JV Agreement.

B. RESPONDENT PREVENTED CLAIMANT FROM COMPLETING ITS CONTRACTUAL DUTIES BY TAKING CONTROL OF SAT-CONNECT.

97. By taking over the Sat-Connect project with the help of the Civil Work Force (CWF), in order to hand it over to Beritech, Respondent prevented Claimant from completing its contractual duties. Respondent violated its good faith obligations (1) and its obligations as guarantor to Beritech to Claimant’s detriment (2).

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\textsuperscript{158} Hewitt, 185. \\
\textsuperscript{159} Record, 6. \\
\textsuperscript{160} Record, 6. \\
\textsuperscript{161} Clarifications 161. \\
\textsuperscript{162} Clarifications 222.
1. RESPONDENT PREVENTED CLAIMANT FROM COMPLETING ITS CONTRACTUAL DUTIES BY VIOLATING ITS GOOD FAITH OBLIGATIONS.

98. Respondent, through Beritech, served notice on Claimant on 28 August 2009, requiring the latter to hand over possession of all Sat-Connect sites, facilities and equipment within 14 days and to remove all seconded personnel from the project. This request had been carried out by CWF. In doing so, Respondent violated its obligation to act consistently with its good faith obligations.

99. The final vote on the buy-out clause is null and void, as a quorum was not established. According to Respondent’s law, a decision of the board of directors of a company issued in violation of a company’s bylaws is null and void. A quorum is only obtained with the presence of 6 members and it is required at the moment of voting. However, Alice Sharpeton left before the final vote took place. Therefore, only five directors were present, hence buyout clause was invoked improperly. The notice is based on an unlawful decision of the board.

100. As Beritech had no right to purchase the shares of Claimant, every subsequent act based on the buyout decision is unlawful. Furthermore, the intervention of the CWF is illegal. Claimant was still party to the JV Agreement and therefore under the duty to complete the contract. Thus, Respondent prevented Claimant completing its contractual duties and breached the JV Agreement.

2. RESPONDENT VIOLATED ITS OBLIGATION AS GUARANTOR TO CLAIMANT’S DETRIMENT.

101. Respondent co-signed the JV Agreement as guarantor of Beritech’s obligations. It has already been established that Beritech failed its obligations to act according to its good faith obligations. Thus, Respondent is urged to step in is determined by the JV Agreement.

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163 Record, Annex 2, 17 [10].
164 Clarifications 200.
165 Clarifications 200.
166 Record, Annex 2, 16 [4].
167 Clarifications 200.
168 Record, Annex 2, 17 [10]; Clarifications 156.
169 Record, Annex 2, 16 [3].
102. A guarantee represents a promise that ensures the fulfilment of a third party’s obligations and/or represents a promise to step in once the third party failed to fulfil its obligations. Also, a guarantee is an agreement that claims secondary obligations in regard of the guarantor to support the primary obligation of one party to another.170

103. Thus, the guarantor steps in once the debtor cannot pay its own debts. According to Article 1.1 UNIDROIT principles, the parties are free to determine the content of a contract. Claimant, and Respondent as guarantor, agreed that Respondent would assume the obligations of Beritech upon Beritech’s default.171 This applies to all obligations, including that of acting in good faith. Respondent is under the obligation to prevent a contractual breach, which it failed to do.

II. RESPONDENT’S ACTIONS AMOUNT TO EXPROPRIATION, DISCRIMINATION, VIOLATION OF FAIR AND EQUITABLE TREATMENT AND FULL PROTECTION AND SECURITY.

104. Respondent violated several treaty obligations with its actions towards Claimant. The treatment of the investor starting with the invocation of the buyout clause and culminating in the physical expulsion of the project amounts to an expropriation (A), discriminates against Claimant’s investment (B), violates fair and equitable treatment (C), and shows a lack of full protection and security of its investment (D). Respondent did not only materially breach the JV agreement, but also violated its BIT obligations.

A. RESPONDENT EXPROPRIATED CLAIMANT’S INVESTMENT.

105. Article 4(1)(2) BIT protects Claimant against an expropriation. The argument to demonstrate that Claimant’s investment has been unlawfully expropriated by Respondent will be made in two parts. In the first part, Claimant submits that the buyout and the suspension of the shares172 represent an “outright repudiation of the whole transaction”173 which amounts to an expropriation. Furthermore, the executive order by Respondent for

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170 PLC (Finance).
171 Clarifications 152.
172 Clarifications 138.
173 Waste Management v Mexico [160].
the intervention of the Civil Work Force\(^{174}\) substantially deprived Claimant of control over its investment and represents an expropriation (1). Thus, Respondent has indirectly expropriated Claimant’s investment. In the second part, Claimant argues that this expropriation does not meet the requirements listed in Art.4(1)(2) BIT and that this expropriation is therefore unlawful under the requirements of Art.4(1)(2) BIT (2).

1. **RESPONDENT INDIRECTLY EXPROPRIATED CLAIMANT’S INVESTMENT.**

106. Indirect expropriation occurs when the State “effectively neutralises” the enjoyment of the investment.\(^{175}\) The legal principle used to establish whether indirect expropriation has occurred is the “sole effect” doctrine, which states that it is the effect of the governmental action rather than its purpose or intent which is the sole determining factor.\(^{176}\) The improper buyout of its interests in Sat-Connect and its expulsion from the Sat-Connect Project have this effect on Claimant’s investment (the shares in the Sat Connect Project, transfer of intellectual property and know how).\(^{177}\) Each of these actions alone would allow the tribunal to make a finding on expropriation. At the very least, however, the combined effect of the measures clearly indicates that Claimant’s property has been taken by Respondent. In Article 1(1)(b), (d), and (e) the BIT not only protects shares and intellectual property as investment, but also other elements of contractual rights.

a) **THE BREACH OF THE GUARANTOR AGREEMENT AMOUNTS TO AN EXPROPRIATION OF CLAIMANT’S INVESTMENT.**

107. Under international law, direct expropriation involves the forcible taking of an individual’s property by the State through administrative or regulatory action.\(^{178}\) Expropriation is not confined to a direct taking but also includes measures that interfere with property rights to an extent that renders such rights useless.\(^{179}\)

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\(^{175}\) *Revere Copper*, [262]
\(^{176}\) *CMS v Argentina* [262]; *Tippetts v TAMS*, 221, 224-5.
\(^{177}\) See Part One A. [21]
\(^{178}\) *Brownlie*, 531-532; *Feldman v Mexico*[100].
\(^{179}\) *Starrett Housing*.
The breach of the guarantor agreement and the suspension of the shares deprived Claimant of its investment. In *Tippets* the tribunal found that deprivation or taking of property may occur through state interference even where legal title to the property is not affected. There is no need to determine whether the improper buyout has caused a formal transfer of the shares or whether the fact that they are suspended, but held in an escrow account, means that Claimant is still the owner of the shares. Claimant is, in any case, completely and permanently deprived of control over the shares to an extent which equates a formal, forced transfer of ownership. Therefore, Claimant has been substantially deprived of its investment.

Expropriation is a governmental taking of property. Whether and when a breach of contract by a State might represent an expropriation has been discussed extensively by scholars and several international tribunals. The “guiding principle” in determining whether a breach of contract by the state is capable of amounting to an expropriation is, if the breach of contract was committed under influence of the state’s governmental power.

The *Waste Management* tribunal found that even if the breach is caused by acts which are not exclusively governmental, but no remedy exists against the act, a finding on expropriation can be made. An outright refusal to comply with contractual obligations, without using of governmental power, might amount to expropriation in case that such a remedy is foreclosed. In such a case there “is an effective repudiation of the right (...) which has the effect of preventing its exercise entirely or to a substantial extent.”

1. See Par Two I. B. 2.
2. Clarifications 138.
4. Pope & Talbot, Interim Award [96-105]; *Azurix v Argentina* [322]; *En Cana v Ecuador* [174].
5. McLachlan, 266.
9. *Waste Management v Mexico* [175].
111. The improper buyout and the subsequent contravention of the Respondent’s guarantor obligations were not a simple breach of contract, but such an outright repudiation of the whole JV agreement that Respondent violated its international obligations. Additionally, the breach was brought to a termination by the use of governmental power through the subsequent intervention of the CWF.

b) **CLAIMANT HAS BEEN DEPRIVED OF ANY CONTROL OVER ITS INVESTMENT BY THE INTERVENTION OF CWF.**

112. One of the rights associated with ownership is the right to participate in the control and management of the property. The CWF secured the Sat-Connect sites and expelled Claimant’s personnel on 11 September 2009. As a consequence Claimant could not participate in the management and further development of the project. Respondent effectively denied Claimant any benefits of its contractual rights of management. In *Starrett v Iran* the tribunal held that the contractual right to manage the project and to complete the project according to the agreement was expropriated. The *Chorzów Factory* case also established that contractual rights of management can be expropriated.

113. Furthermore, day-to-day managing control has been regarded by several tribunals as a significant criterion to determine whether an expropriation has occurred. An easily recognisable expropriation includes the taking over of a mine or factory by governmental authorities. If the interference is substantial enough to cause a “permanent transfer of the power of management and control” over the investment a finding of expropriation can be made.

c) **THE EFFECT OF THE INTERFERENCE AMOUNTS TO AN EXPROPRIATION.**

114. In line with the criteria that tribunals have considered in assessing indirect expropriation, the executive order authorising the expulsion has had severe impact on Claimant’s

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191 *Starrett Housing*, 156/157.
192 *Chorzów Factory*, 44.
193 *Pope&Talbot v Canada, SEDCO v NIOC; Tippetts, Starrett Housing*, 154.
194 *Feldman v Mexico*, [100].
195 Brownlie [508].
investment (i), interfered with Claimant’s legitimate expectations (ii), and has a permanent effect (iii).  

i. **CLAIMANT HAS LOST ALL CONTROL OVER ITS INVESTMENT.**

115. In evaluating the effect, tribunals have focused on whether the investor retains ownership and control of the business, whether the entire value of the investment has been destroyed, or whether the value of the business has been significantly diminished. In *Tippetts* the tribunal emphasized that the intent of the Government is less important than the effects of the measures on the owner. It decided that a finding on taking can be made when the deprivation of property rights is not “merely ephemeral”. The intervention of the CWF, the expulsion from the Sat-Connect sites and the removal of Claimant’s personnel, deprived Claimant of any of the rights associated with the ownership of shares in the Sat-Connect Project.

ii. **THE INTERVENTION HAS INTERFERED WITH CLAIMANT’S LEGITIMATE EXPECTATIONS.**

116. According to the *Tecmed* tribunal the treatment of an investor should not affect the fundamental expectations that were taken into account by the foreign investor to make the investment. This includes the expectation that the host state act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor. Although this approach has been criticised as too far reaching, the standard of protection expectations has been accepted by subsequent tribunals, as long as the expectations are reasonable and legitimate.

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196 OECD (Indirect Expropriation), 9-20.
197 CMS v Argentina [[263-4]; *ITT v Iran*, 348.
198 *Tecmed v Mexico* [115]]; *CME v Czech Republic*, Partial Award [591, 607].
199 Dugan, 455.
200 *Tippetts*, 225/226.
201 Ibid.
203 *Tecmed v Mexico* [154].
204 Ibid.
205 *Saluka v Czech Republic*, Partial Award [304], *CME v Czech Republic*, Partial award [611]; *Bayindir v Pakistan* [179].
117. The time to take into account is the time of decision to invest.\textsuperscript{206} The reasonableness of Claimant’s expectations have to be considered in light of all circumstances surrounding the investment and the political background in the host state.\textsuperscript{207} The BIT proclaims in its preamble that the Contracting Parties will contribute towards stimulating business ventures.\textsuperscript{208} Respondent guaranteed the JV Agreement. Claimant could therefore reasonably expect that Respondent had assessed the implications on its national security, and that the performance of the JV agreement lasts the implementation phase of the project.

118. Furthermore, Claimant could not have been aware that its property would be expropriated by Respondent. There was no indication that Respondent had changed its attitude towards host state of Claimant.\textsuperscript{209}

iii. \textbf{CLAIMANT HAS BEEN PERMANENTLY DEPRIVED OF ITS INVESTMENT.}

119. The executive order authorising the expulsion of Claimant has had a permanent effect on the control and enjoyment of its investment. The duration of a measure affecting a foreign investor’s interests is important in assessing whether an expropriation has occurred.\textsuperscript{210} The deprivation suffered by Claimant is “not merely ephemeral” \textsuperscript{211} and not only temporary.\textsuperscript{212}

120. The CWF secured the sites and expelled Claimant on 11 September 2009.\textsuperscript{213} The deprivation of Claimant’s property rights has lasted now for nearly one year. The expulsion of all Claimant’s associated personnel shows that Respondent has no intent to retransfer control. Since there is no end in sight, and Claimant operates in a fast pace industry, such as telecommunication, this measure has a permanent effect.

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\textsuperscript{206} Duke Energy \textit{v} Ecuador [340]; \textit{LG&E v Argentina}, Decision on Liability [127]; \textit{Bayindir v Pakistan}, [190].  
\textsuperscript{207} Duke Energy \textit{v} Ecuador [340]; \textit{Saluka v Czech Republic}, Partial Award [304].  
\textsuperscript{208} Record, Annex 1, 9.  
\textsuperscript{209} Clarifications 147, 184.  
\textsuperscript{210} Christie, 307.  
\textsuperscript{211} Tippetts, 225; Phelps Dodge \textit{v} Iran, 121; Saghi \textit{v} Iran, 3.  
\textsuperscript{212} TECMED [116]; \textit{Generation Ukraine \textit{v} Ukraine}, [20.32-21.33]; \textit{SD Myers}, First Partial Award, [283-4, 287]; \textit{LG&E v Argentina} [193].  
121. The tribunal in *Wena v Egypt*\(^{214}\) found that the seizure of the investor’s hotel, which lasted only for nearly a year, amounted to expropriation. So even if control of Claimant’s investment is transferred back to it, a finding on expropriation can nevertheless be made.

**2. THE EXPROPRIATION IS UNLAWFUL.**

122. The expropriation occurred in violation of the requirements set out in Article 4(1)(2) BIT and therefore amounts to an unlawful taking of property. According to Article 4(1)(2) an expropriation is unlawful unless it was made for a public purpose or in the national interest (a), against immediate full and effective compensation (b), on a non-discriminatory basis (c) and in conformity with all legal provisions and procedures (d).\(^{215}\) The criteria for lawful expropriation have not been satisfied by Respondent. Furthermore, Respondent breached Article 4(1)(1) BIT (e).

A) **RESPONDENT FAILED TO MEET THE PUBLIC PURPOSE OR NATIONAL INTEREST REQUIREMENT.**

123. In general states are at liberty to determine what is in their public needs and what is not.\(^{216}\) However, the exercise of this discretion has to be made in good faith\(^{217}\) and there is more and more consensus that the requirement should not be self-judging.\(^{218}\) The *ADC v Hungary* and *Siemens v Argentina* tribunals both required states to provide evidence that the invoked public interest exists.\(^{219}\) In general a security concern is a legitimate concern of national interest. However, Respondent failed to provide any evidence for a threat to the national security of Beristan. Respondent did not raise a general security concern, but holds Claimant responsible for a security threat based on an information leak.\(^{220}\) Whether there was an actual threat to national security was never part of an official investigation. Respondent only claims that this was its primary intention to cover its true motives.

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\(^{214}\) *Wena v Egypt*, [99].

\(^{215}\) Record, Annex 1, 11.

\(^{216}\) *Goetz v Burundi* [126].

\(^{217}\) Bin Cheng, 40.

\(^{218}\) Newcombe, 373.

\(^{219}\) *ADC v Hungary* [430, 432]; *Siemens v Argentina* [273].

\(^{220}\) Record, 7.
B) **RESPONDENT FAILED TO OFFER IMMEDIATE, FULL AND EFFECTIVE COMPENSATION TO CLAIMANT.**

124. No compensation was offered to Claimant. The real market value of the investment includes not only the total monetary investment, but also the contribution of technology and know-how by the claimant to the Sat-Connect Project. The claimant contends that the value of intellectual property rights over the life of the technology would be in excess of US$100m. Respondent’s failing to comply with even one of the conditions under Art. 4 (1) (2) makes it liable for breach of the BIT due to an unlawful expropriation.

C) **RESPONDENT’S TAKING WAS DISCRIMINATORY.**

125. A taking is discriminatory if it is specifically directed against someone without a reasonable basis for the distinction. The concept of discrimination has been defined as unreasonable distinctions between foreign and domestic investors in like circumstances. In *ADC v Hungary* the tribunal compared the treatment accorded to the national operator and foreign investors in general and found discrimination on that basis. In *Eureko v Poland* the tribunal decided that a deprivation made to keep an industry under national control is discriminatory.

126. The expropriation concerned only Claimant, and not Sat-Connect in total. Respondent claims that Claimant leaked information. However, Respondent has never presented any evidence of a leak in the Sat-Connect Project. Furthermore, Respondent has not established which side of the Project leaked. It could have been on Beritech’s side. Claimant does not have an interest to leak information that it has developed. Nonetheless, Respondent directed the measure specifically against Claimant. This creates a rebuttable presumption that the difference in treatment has no reasonable basis. It is therefore a safe assumption that Respondent targeted Claimant only because of its Opulentian nationality.

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221 Clarifications 165.
223 *Feldman v Mexico* [170].
224 *ADC v Hungary* [442].
225 *Eureko v Poland* [242].
226 Clarifications 231.
D) **RESPONDENT FAILED TO CONFORM TO ALL LEGAL PROVISIONS AND PROCEDURES.**

127. Respondent acted completely arbitrarily, disregarding any proper procedure and especially giving no opportunity to Claimant to have Respondent’s acts reviewed by an independent body. Claimant submits that it received no notice of the actions of Respondent. There were only two weeks between the improper buyout and the expulsion. Furthermore the executive order on which the intervention was based is not appealable. 227 Through this expulsion which was not based on a judicial decision, production of evidence is much more difficult. Respondent effectively denied Claimant any access to judicial review with the expulsion of Claimant from its territory.

128. A possible validity of the expropriation under Beristian law does not prevent it from being internationally unlawful. The legality of a taking under domestic law was not admitted as a defence in the Iran-US Claims Tribunal. 228 “All legal provisions and procedures” is a reference to due process, which is a ‘typical legality requirement for an expropriation’. 229 The due process criterion requires "to provide for a possibility to have the expropriation and, in particular, the determination of the amount of compensation reviewed before an independent body." 230

129. Arbitral tribunals have given even a more protective meaning in focusing on the whole expropriation procedure and not only on the review after the expropriation has occurred. In *Goetz v Burundi* the tribunal emphasized that for international legality, the measure “must be taken in accordance with a lawful procedure”. 231 In *ADC v Hungary* the tribunal found that due process of law in the context of an expropriation requires an “actual and substantive legal procedure” which has to contain at least: a reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator. 232 Respondent offered not one of these essential elements in a procedure to Claimant.

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227 Clarifications 228.
228 Heiskanen, 183.
231 *Goetz v Burundi*.
232 *ADC v Hungary* [435].
E) IN ADDITION, RESPONDENT VIOLATED ARTICLE 4(1)(1) BIT.

130. Respondent’s actions also limited Claimant’s joined rights of ownership in the Sat-Connect Project. The shareholding in the Sat-Connect project confers at least joined rights of ownership in all intellectual property, know-how and trade secrets that have been transferred to the project by Claimant developed by the Project and are now controlled by Sat-Connect. Claimant cannot use or co-determine the use and licensing of the IP Rights at the moment. This limitation is not, as required, based on an order of a competent court or tribunal, but results directly from the government on the basis of an executive order. Therefore Respondent also violated Article 4(1)(1) BIT.

B. RESPONDENT DISCRIMINATED AGAINST CLAIMANT.

1. RESPONDENT SUBJECTED CLAIMANT’S INVESTMENT TO UNJUSTIFIED AND DISCRIMINATORY MEASURES.

131. Article 2(3) BIT obliges Respondent not to subject the investment to unjustified or discriminatory measures. This obligation is also an element of the FET Standard under international law. A breach of the BIT will be established if the measure is either unjustified or discriminatory. As the BIT protects against nationality based discrimination in Article 3, Article 2(3) BIT has to be interpreted to cover other forms of discrimination. Saluka defined discriminatory conduct if similar cases are treated differently without reasonable justification. A discriminatory intent is today not necessary.

132. Respondent expelled Claimant’s personnel because it wanted to favour local personnel. It expelled Claimant from the Project for motives unrelated to Claimant’s

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233 Clarifications 269.
234 Record, Annex 2, 16 [5].
235 Yannaca-Small, 120.
236 Azurix v Argentina [391].
237 Newcombe, 306.
238 Saluka v Czech Republic [313].
239 LG&E v Argentina, Decision on Liability [146], Siemens v Argentina [321]; Eastern Sugar, Partial Award, [338].
240 Record, 7.
performance of the JV agreement.\textsuperscript{241} As established above in Part I of the merits, Claimant has acted in conformity with the JV agreement. If an expulsion is not related to the performance of a contract unfair motives of expulsion can be established.\textsuperscript{242}

\section*{2. RESPONDENT TREATED CLAIMANT LESS FAVOURABLY THAN ITS OWN NATIONALS.}

133. Even if the Tribunal does not follow Claimant’s classification of Beritech as a puppet of Respondent, but considers Beritech as a separate legal entity, Beritech is a local investor. Beritech has not been evicted from the Sat-Connect sites. In targeting Claimant in the Sat-Connect Project, without having established that the alleged leak occurred on Beritech’s side, Respondent failed to accord national treatment to Claimant. Article 3 BIT obliges Respondent to accord no less favourable treatment to investments from investors from Opulentia than that accorded to investments effected by its own nationals.

134. National treatment is a relative standard of protection and needs therefore a national investor that received better treatment than the foreign investor.\textsuperscript{243} Discriminatory intent is not necessary to establish a breach.\textsuperscript{244} National Treatment protects from discrimination based on nationality.\textsuperscript{245}

135. To compare the treatment the investors have to be in similar circumstances.\textsuperscript{246} Claimant and Beritech both invested in the Sat-Connect project.\textsuperscript{247} The appropriate comparator is therefore Beritech. Tribunals have generally pointed out that a violation of the standard only occurs, if the difference in treatment is not reasonable. However, the Respondent has to show the existence of legitimate reasons for the difference in treatment,\textsuperscript{248} which it failed to do. Claimant has therefore \textit{de facto} received less favourable treatment.

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\textsuperscript{241} Record, 6.
\textsuperscript{242} Bayindir v Pakistan, Decision on Jurisdiction [250].
\textsuperscript{243} Weiler/Laird, 262.
\textsuperscript{244} SD Myers v Canada; Noble Ventures v Romania [180].
\textsuperscript{245} Newcombe, 150.
\textsuperscript{246} Bjorklund (2008) 29.
\textsuperscript{247} Record, Annex 2, 16 [3].
\textsuperscript{248} Feldman v Mexico [177]; Nykomb v Latvia [34] (impairment clause); Newcombe 163-164.
C. RESPONDENT DID NOT ACCORD FAIR AND EQUITABLE TREATMENT (FET) TO CLAIMANT.

136. Article 2(2) BIT\textsuperscript{249} obliges the Respondent to ensure treatment in accordance with customary international law including FET. Respondent has violated the FET standard by reason of arbitrary and unfair expulsion of Claimant, abusive exercise of Beritech’s rights to buy out Claimant and the discriminatory efforts favouring local Beristian personnel. Claimant invites the tribunal not to look at isolated actions of Respondent, but to assess whether the treatment as a whole is fair and equitable.\textsuperscript{250}

137. FET is an elastic standard which has been continuously evolved by international tribunals.\textsuperscript{251} The reference to customary international law was interpreted by NAFTA tribunals as a reference to the evolving standard of international law.\textsuperscript{252} The Saluka tribunal suggests that the incorporation of FET in a BIT is supposed to enhance trust in the investor and therefore a lower degree of inappropriateness in the treatment of the investor is sufficient to violate the standard.\textsuperscript{253} The standard includes not only well-established fundamental standards of good faith (1), due process and non-discrimination (2),\textsuperscript{254} but also an obligation of transparency and the protection of the investor’s legitimate expectations.\textsuperscript{255}

1. RESPONDENT DID NOT ACT TRANSPARENTLY OR IN GOOD FAITH.

138. Transparency requires that a host state informs an investor before it adopts administrative decisions.\textsuperscript{256} Respondent has not informed Claimant of its decision to send the Civil Work Force. Furthermore it contravenes legitimate expectations\textsuperscript{257} of Claimant not to have discussed the allegations appearing in the Newspaper Article. Good

\textsuperscript{249} Record, Annex 1, 10.
\textsuperscript{250} Desert Line v Yemen [213].
\textsuperscript{251} Yannaca-Small, 119.
\textsuperscript{252} Mondev v USA, ADF v USA, Waste Management v Mexico [93].
\textsuperscript{253} Saluka v Czech Republic [293].
\textsuperscript{254} Saluka v Czech Republic [304].
\textsuperscript{255} Yannaca-Small, 121; Schreuer (FET) 374.
\textsuperscript{256} Schreuer (FET), 374.
\textsuperscript{257} See discussion under indirect expropriation.
faith is inherent in the concept of FET.\textsuperscript{258} The actions of Respondent taken in bad faith, as established in Part I of the merits, represent at the same time a violation of fair and equitable treatment.

2. \textbf{RESPONDENT DID NOT RESPECT DUE PROCESS.}

139. A fair and equitable treatment requires a state to apply due process\textsuperscript{259}. This element is ‘infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust and exposes the claimant to sectional prejudice or involves a lack of due process leading to an outcome which offends judicial propriety.’\textsuperscript{260}

140. Respondent violated its obligation to accord fair and equitable treatment by failure to accord due process by not giving any notice of the intervention\textsuperscript{261}, not investigating the allegations in an orderly, official manner, not giving any possibility to Claimant to defend itself against the allegation, not giving any notice of the forthcoming intervention of the Civil Work Force. Thus, Respondent failed to treat Claimant fair and equitable.

D. \textbf{RESPONDENT DID NOT OFFER CLAIMANT’S INVESTMENT FULL PROTECTION AND SECURITY.}

141. Article 2(2) BIT\textsuperscript{262} contains the obligation to ensure in accordance with customary international law full protection and security of the investments of investors of the other contracting party. With Claimant’s expulsion from the Sat-Connect project and the forcible removal of its personnel\textsuperscript{263} from the Sat Connect site, Respondent violated this obligation.

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\textsuperscript{258} Weiler/Laird, 272.  \\
\textsuperscript{259} Yannaca-Small (2008).  \\
\textsuperscript{260} Waste Management v Mexico [98].  \\
\textsuperscript{261} Middle East Cement Shipping [143].  \\
\textsuperscript{262} Record, 10.  \\
\textsuperscript{263} Record, Annex 2, 17 [11].
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142. Whether or not this Tribunal wants to follow the recent trend, that the full protection and security clause includes more than physical safety of its investment, is immaterial for Claimant. Customary international law contains a due diligence standard to ensure safety of the investment. Full protection and security must be accorded to the investor's rights regarding ownership, control and substantial benefits over his property, including intellectual property.

143. Respondent not only failed to protect Claimant from the intervention of others, but also actively intervened to remove Claimant from its investment, by sending its CWF to evict Claimant. The due diligence standard is therefore breached.

III. RESPONDENT IS NOT ENTITLED TO RELY ON ARTICLE 9 BIT.

144. The conditions of Article 9 BIT are not fulfilled and Respondent cannot suspend its treaty obligations. Respondent cannot justify its treaty violations on national security grounds, as it has not shown the circumstances which necessitate the protection of essential security of Respondent’s state.

145. Claimant and the Government of Opulentia have publicly denied these allegations surrounding the information leak. There is only one article and rumours, but nothing else. Respondent planned from the beginning to use the system developed by Sat-Connect for segments of its armed forces. Therefore, the legal conclusion must be that Respondent has to provide some evidence for its allegations.

A. THE INVOCATION OF ARTICLE 9 SHOULD BE REVIEWED BY THIS TRIBUNAL.

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\(^{264}\) CME v Czech Republic, Partial award [613]; Azurix v Argentina, [408].
\(^{265}\) Newcombe, 307; AAPL v Sri Lanka [45].
\(^{266}\) World Bank Guidelines, under III. Treatment 3a .
\(^{267}\) Wena Hotels v Egypt [84-95].
\(^{268}\) Record, Annex 1, 13.
\(^{269}\) Record, 7.
\(^{270}\) Clarifications 231.
\(^{271}\) Record, Annex 2, 17 [8].
\(^{272}\) Clarifications 231.
\(^{273}\) Record, Annex 2, 17 [6].
146. Article 9(2) BIT leaves the consideration about the “necessary measures” to the party concerned. Nevertheless, Respondent has the burden of proof that the exception applies. Article 9 BIT should be interpreted restrictively, following the *Enron* tribunal which considered self-judging clauses as irreconcilable with the object and purpose of investment treaties, because they deprive the treaty of any substantive meaning. The Preamble of the BIT states that “offering encouragement and mutual protection to (such) investments” is object and purpose of the BIT. If Respondent could solely rely on its own unsubstantiated assertions to suspend its obligations under the BIT the purpose of the BIT would be defeated. The restrictive interpretation of exceptions in international treaties was also emphasized by the *Canfor* tribunal.

**B. RESPONDENT DID NOT INVOKE ARTICLE 9 BIT IN GOOD FAITH.**

147. The invocation of Article 9 BIT has to be made, according to Article 26 VCLT, in good faith. The good-faith principle governs the observance of obligations assumed on an international level and restricts the conditions of invocation of an international rule. Self-judging does therefore not mean that the invocation of the clause is without limits. Self-judging clauses should be used with caution and cannot be used as an escape clause to treaty obligations. If the parties to the BIT, wanted to exclude a review of the circumstances of invocation, they could have incorporated a clause saying so. The invocation therefore stands under the review of this Tribunal whether Respondent had acted in good faith.

**C. THE GOOD FAITH STANDARD DOES NOT DIFFER SIGNIFICANTLY FROM NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW.**

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274 *UPS v Canada*, Separate Statement of Dean Ronald A. Cass [154].
275 *Enron v Argentina* [331].
276 Ibid [332].
277 *Canfor v Argentina*, Decision on Preliminary Question [187].
278 Newcombe 494.
279 *Nuclear Tests*, 268; *Fisheries Jurisdiction*, 34; *North Sea Continental Shelf*, 46.
280 Shaw, 104.
281 OECD (Essential Security), 110.
282 Newcombe 494, 495.
283 *LG&E v Argentina*, Decision on Liability [212]; *CMS v Argentina* [374].
148. The LG&E Tribunal suggests that this review does not differ significantly from a review on the basis of customary international law.\textsuperscript{284} The Enron\textsuperscript{285}, Sempra\textsuperscript{286} and CMS\textsuperscript{287} Tribunals reviewed Argentina’s invocation on the basis of customary international law, because they considered the exception in the Argentine-US BIT as too imprecise. The use of customary international law by ICSID tribunals in case that treaty provisions are imprecise is allowed by Article 42 ICSID Convention.\textsuperscript{288} Article 9 BIT does not define essential security interests. The Amoco Tribunal held that customary international law can be used to clarify the meaning and circumstances of treaty provisions.\textsuperscript{289}

149. Claimant invites the Tribunal to consider customary international law in form of the ILC Articles as the invocation of an essential security provision in the BIT is similar to an invocation of the status of necessity in international law. If the treaty itself does not determine its conditions of invocation customary rules of necessity have to be consulted.\textsuperscript{290}

150. The content of international law on this topic is contained in Article 25 ILC. The conditions of Article 25(1)(a) ILC, that the act is the only means to safeguard an essential interest against a grave and imminent peril, are not fulfilled, as the peril has to be “clearly established on the basis of evidence reasonably available at the time.”\textsuperscript{291} For an invocation in good faith, at least some kind of scientific or investigative proof is needed to establish peril. This is not the situation here. Thus Respondent cannot in good faith rely on Article 9 BIT if no evidence exists for a security threat.

151. Even if the Tribunal does not consider that a good-faith review requires an analysis of whether the substantive conditions of Article 9 BIT are met, Respondent still fails to comply with the good-faith standard.

\textsuperscript{284} LG&E v Argentina, Decision on Liability [214].
\textsuperscript{285} Enron v Argentina [333].
\textsuperscript{286} Sempra v Argentina [388].
\textsuperscript{287} CMS v Argentina [308, 374].
\textsuperscript{288} Reisman.
\textsuperscript{289} Amoco v Iran, 222 [112]; Nicaragua case, Jurisdiction and Admissibility, 392, 424.
\textsuperscript{290} Enron v Argentina [334].
\textsuperscript{291} ILC Commentary [16] to Art.25.
Moreover, valid compensation must be offered to Claimant. Claimant submits that it is entitled to adequate compensation according to Article 5 BIT and Article 27 (b) ILC.
REQUEST FOR RELIEF

Claimant respectfully asks the Tribunal to find that:

(1) this Tribunal has Jurisdiction in view of Article 11 BIT over Treaty and contract claims despite clause 17 JV Agreement;

(2) Jurisdiction over contract claims is further approved by virtue of Article 10 BIT;

(3) Respondent materially breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking clause 8 JV Agreement;

(4) Respondent actions amount to expropriation, discrimination, violation of FET and lack of full protection and securities; and

(5) Respondent is not entitled to rely on Article 9 BIT.

Respectfully submitted on 19 September 2010 by

PINTO

On behalf of Claimant
TELEVATIVE INC.