

TEAM EL-ERIAN

**Foreign Direct Investment Moot
22-24 OCTOBER 2010**

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

ICSID Case No. ARB/X/X

In the Proceeding Between

TELEVATIVE Inc.

**THE GOVERNMENT OF THE
REPUBLIC OF BERISTAN**

CLAIMANT/INVESTOR

RESPONDENT/STATE

MEMORIAL FOR RESPONDENT

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STATEMENT OF FACTS

1. On March 2007 Beristan, hereinafter Respondent, established a private mixed economy enterprise, Beritech S.A. Respondent owns a 75% interest, and 25% is owned by private Beristian Investors.
2. Televative Inc. hereinafter Claimant, is an enterprise that specializes in satellite communications technology and systems. It is a privately held company, incorporated in Opulentia on 30 January 1995.
3. Beritech and Televative signed a Joint Venture Agreement (the “JVA”) on 18 October 2007 to establish a commercial joint venture company, Sat-Connect S.A., under Beristian Corporate Law. In addition, the Government of Beristan has co-signed the JVA as guarantor of Beritech’s obligations.
4. On 12 August 2009, news of Claimant leaking information to the government of Opulentia were published in an article of “The Beristan Times”, hereinafter Beristan Times Article.
5. On 21 August 2009, Sat- Connect’s chairman made a presentation to the Board of Director (BOD) in order to discuss the accusations made with regarding a potential breach of clause 4 of the JVA.
6. On 27 August 2009, Sat-Connect’s BOD invoked clause 8 of the JVA which entitled Beritech to enforce a buyout of Claimant’s interests in the Sat-Connect project. On this meeting, a Claimant’s appointed director left during the voting process in order to boycott the correct implementation of the buyout.
7. On 28 August 2009, Beritech served notice on Claimant requesting them to handover the possessions of Sat-Connect, and remove all of its personnel in the next fourteen days. Claimant refused to do so.
8. On 11 September 2009, The Civil Works Force, hereinafter CWF, in order to secure national security and Respondent’s national welfare, secured the facilities of Sat-Connect, and asked Claimant’s personnel to leave Sat-Connect’s facilities.
9. On 12 September 2009, Claimant mistakenly submitted a written notice to Respondent regarding a dispute under the BIT, attempting to foreclose the jurisdiction of Domestic Tribunal that was to be established under clause 17 of the JVA.

10. On 19 October 2009, Beritech filed a request for arbitration under clause 17 of the JVA, looking for a declaratory relief that its rights under the JVA were properly exercised. Even though Claimant has failed to submit a reply, the tribunal has already been constituted.
11. On 28 October 2009, Claimant completely ignored the JVA's provisions on dispute settlement by maliciously requesting ICSID arbitration.

I. PART ONE: RESPONDENT'S POSITION ON JURISDICTION

A. Since the Alleged Wrongful Conduct Cannot be Attributed to Respondent, Claimant Fails to Meet the Requirements under Article 25 of the ICSID Convention

12. ICSID tribunals may have jurisdiction only when all the requirements under ICSID Convention are met. One of these requirements is jurisdiction *Ratione Personae*. For that purpose, article 25 of the Convention establishes that:¹

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State [...]”

According to the principles of customary international law on state responsibility, embodied in the International Law Commission Articles on State Responsibility (ILC Articles), there can only be state responsibility for internationally wrongful act when the conduct in question can be attributed to the State under international law.²

13. In the present case however, the alleged wrongful conduct cannot be attributed to the Respondent, mainly because the conduct of Beritech cannot be attributed to Beristan. Hence, this tribunal lacks *Ratione Personae* jurisdiction because Respondent is not a party to the present dispute.

1. Respondent Cannot be Held Responsible for the Effects of a Legal Instrument which it Is not a Party

14. In order to configure international responsibility, article four of the ILC Articles sets forth the general rule that a state is responsible for its own acts, in that sense, a conduct of a state

¹ ICSID convention, Article 25

² ILC Articles, Art.2

organ is considered as an act of the state.³ *Contrario Sensu*, a conduct in which the state or one of its organs has not participated, cannot be attributed as an act of that state.

15. In that connection, the JVA was signed between Claimant and Beritech, not Beristan. Hence, Respondent is not a party to the JVA, and since the dispute arises out of the JVA agreement, Respondent cannot be part of that dispute. The General Principle of Law *Res Inter Alios Acta*, by which a legal instrument produces effects only to the parties thereof, and can by no means create rights or obligations to third persons is imperative and cannot be overlooked in this case.⁴ In application of this principle, no responsibility arising out of the JVA can be attributed to Respondent.⁵

16. Following the same reasoning, the tribunal on *Implegilo SPA. v Islamic Republic of Pakistan* came to a similar conclusion, stating that:

“ [...] jurisdiction based on the BIT could not extend to breaches of contract to which an entity other than the state was a named party”.⁶

17. The Tribunal must realize that the only legal dispute to be found here is the one that exists between Claimant and Beritech. Consequently, this tribunal lacks *Ratione Personae* jurisdiction.

2. *The Conduct of Beritech is not Attributable to Respondent because Beritech did not Act on the Instructions, Direction, or Control, of Beristan, nor did it Exercise Governmental Authority*

18. The official commentaries to the ILC Articles recognize that a state is not responsible for the conduct of individuals or private entities.⁷ “A state is not responsible for the conduct of its nationals, even when such a conduct causes injury to a foreign national”.⁸

³ See. ILC Articles, Art.4

⁴ See. Méndez S, p. 14

⁵ See. Crawford, 2008, p. 13

⁶ Hobér, p. 577. See *Impregilo v Pakistan*, para.66

⁷ ILC Articles Commentaries on Article 8.

⁸ Cohen, p.17

19. However, Claimant attempts to invoke articles 5 and 8 of the ILC Articles Respondent as exceptions to this general rule, in order to attribute the enforcement of the Buyout Provision of the JVA to Respondent. In that sense, Claimant makes unsubstantiated allegations that Respondent is “behind this decision” and that there has been a sort of “conspiracy” to harm Claimant.⁹

20. Respondent will move on to prove that the conduct of Beritech cannot be attributed to Respondent, not even with the exceptions of articles 5 and 8 of the ILC Articles.

a. Claimant has failed to prove that Beritech acted on the instructions of the Beristian Government

21. Article 8 of ILC Articles establishes that the conduct of a private entity could be considered as an act of the state only under exceptional circumstances, that is:

“[...]if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”¹⁰

22. Claimant has failed to prove that Beritech acted under the instructions of Respondent.

23. Claimant’s argument that there is a link of this sort between Respondent and Beritech is based solely on the press article published in the Beristan Times. Thus, Claimant accusation is based on non-official information. In effect, the Beristan Times is an independent and autonomous journal that has no relation with the Government of Beristan¹¹, thus, following the general principle by which the conduct of its nationals cannot be attributed to the state, Respondent cannot be held responsible for the publications of local newspapers.

⁹ Claims by Claimant, Para.2, *See also*, Para.4

¹⁰ ILC articles, Art. 8

¹¹ First Round of Clarifications, Question 178

24. Additionally, even if a government defense analyst gave the declarations, they did not constitute an official government statement. On the contrary, they are no more than a mere - off record- exposition of a personal perspective of the Sat-Connect project.¹²
25. Furthermore, the fact that Respondent owns a percentage of shares in Beritech does not mean that there is a connection between the analyst and Beritech by which a relation between the latter and the Government could be presumed. On the contrary, it is an uncontested fact that the defense analyst has no relation with Beritech.¹³
26. The Tribunal must also consider that if Claimant alleges that the press article influenced the Sat-Connect BOD to execute clause 8 of the JVA, then considering that it is an independent newspaper, that would prove that Respondent did not influence the decision.
27. The Tribunal in *Tradex Hellas S.A. v. Republic of Albania* tribunal reached a similar conclusion.¹⁴ Tradex initiated ICSID arbitration on the basis of an agricultural, engineering, and industrial joint venture signed with a state owned company.¹⁵ After Albanian villagers took over part of the land, making the entrance for the company's employees impossible, Tradex claimed that this conduct was to be attributed to Albania because of an official statement of the Prime Minister, who announced that the government intended to fulfill its privatization program regarding agricultural enterprises. Under the view of Tradex, the takeover by villagers was influenced by the Prime Minister speech in such a level that the conduct was attributable to Albania. The tribunal did not agree with Claimant, instead it held that:
- “[...] even if the villagers felt encouraged to such occupations by the Berisha [Prime Minister] speech, that would not be a sufficient basis to attribute such occupations to the state of Albania”.*¹⁶

¹² First Round of Clarifications, Question 178

¹³ First Round of Clarifications, Question 162

¹⁴ Bishop, Crawford, & Reisman, 2005, p. 817, *See. Tradex v Albania*

¹⁵ *See. Tradex v Albania, Facts*

¹⁶ Bishop, Crawford, & Reisman, 2005, p. 820, *See Also, Tradex v Albania, para.165*

28. This decision is relevant to the present case because the decision to implement the Buyout Provision was taken by Sat-Connect BOD, which is an independent decision that was the product of the decision-making process of that private entity. Even if it was influenced by the newspaper's article, this is not enough to alter the principle by which the state is not responsible for the conduct of private entities; nor could it be enough to argue that Beritech was acting under the instructions of Respondent.

b. Claimant has failed to prove that Beritech acted on the direction or control of Beristan

29. Another reason for why the conduct of Beritech cannot be attributed to Respondent under article 8 of the ILC Articles is that Beritech did not act under the direction or control of Respondent.

30. Beritech is an autonomous legal person with distinct legal personality than the Beristian Government. Moreover, Beritech is a private company constituted under the laws of Beristan. On this context, it is a well-accepted legal principle that a juridical person is independent and different from its shareholders. In essence, legal entities are distinct from individual human beings and can own assets in their own name.¹⁷ In the same line, they acquire obligations under their own responsibility, without involving the shareholders that of the legal entity.¹⁸

31. The fact that Beritech and Respondent are different and independent legal entities is further evidenced by the fact that the latter is guarantor of Beritech's obligations under the JVA. It is evident that no legal entity may be a guarantor of the fulfillment of its own obligations.

32. Another reason for why Beritech's conduct cannot be attributed to Respondent is that Beritech maintains its autonomy despite the fact that Respondent owns the majority of Beritech's shares. In fact, one of the characteristics of legal entities is that its will is different

¹⁷ See. Hansmann and Kraakman, 2010, p.26

¹⁸ See. Cohen p. 43.

from the will of its shareholders.¹⁹ Accordingly, the tribunal in the case *Amco Asia Corporation and Others v. The Republic of Indonesia*²⁰ held that the actions of an entity registered as a limited liability company could not be attributed to the owners of the company's shares because the acts of such entities are not normally to be attributed to the shareholders.²¹ Also, the tribunal correctly stated that a greater or lesser state participation in its capital, or more generally, in the ownership of its assets, is not a decisive criterion for the purpose of attribution of the entity's conduct to the state.²²

33. In the same line, Kaj Hobér considers that the “*mere fact that a state establishes a corporate entity is not a sufficient basis for the attribution of subsequent conduct of the entity*”.²³ The Tribunal in *Maffezini v. Kingdom of Spain* adopted a similar position where an entity owned by the state participated as a shareholder in a private entity, it considered that this is a common practice in commercial business arrangements, and therefore this is not a basis for attribution to the state.²⁴

34. For these reasons, this tribunal must reject Claimant's argument and find that Beritech did not act under the direction or control of Respondent.

c. Claimant Has Failed to Prove that Beritech Exercised Elements of Governmental Authority

35. Claimant also attempts to attribute Beritech's conduct to Respondent by invoking the rule of Article 5 of the ILC Articles.

¹⁹ See. *Barcelona Traction*, 1970

²⁰ See. *Amco v the Republic of Indonesia*, 1981

²¹ Bishop, Crawford, & Reisman, 2005, p.815

²² Bishop, Crawford, & Reisman, 2005, p. 813

²³ Hobér, p. 557

²⁴ Cohen, p.24

36. Article 5 of ILC Articles establishes another exception by which an act of individuals can be attributed to the state, that is when an entity is “[...] *empowered by the law of that State to exercise elements of the governmental authority.*”²⁵
37. The conduct of Beritech is not attributable to Respondent under article 5 of the ILC Articles.
38. First of all, the relevant provision establishes as a specific requirement that the entity has to be *empowered by the law of the state* to exercise elements of governmental authority. The tribunal must note that under the laws of Beristan, Beritech has been incorporated as a private entity²⁶ and as such it does not have the power to exercise governmental activity. Quite the opposite, Beritech can only exercise those activities allowed by Beristian Corporate Law.
39. Thus, instead of exercising governmental authority, Beritech can only act in a commercial capacity.
40. The exercise of commercial activities is normally excluded from the rule of attribution established in article 5 of the ILC Articles:
- “If it is to be regarded as an act of the State for purpose of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity on which the entity may engage”.*²⁷
41. While the governmental organ seeks to meet public interests and needs, the goal of the private entity is to meet private interests. Because of its condition, private parties are actors motivated by ‘*either a self-interested pursuit of profit or self-interested promotion of an ideological goal*’.²⁸ Beritech was incorporated as a telecommunications service provider with commercial interests that differ from those of the Government²⁹.

²⁵ ILC Articles, Art.5

²⁶ Uncontested Facts, Para.2

²⁷ Bishop, Crawford, & Reisman, 2005, p. 814

²⁸ Donnelly, 2009, p. 9

²⁹ First Round of Clarifications, Question 161

42. The fact that Beritech signed a contract with Claimant does not change the private nature of its activities. On the contrary, the conclusion of the JVA is an expression of a commercial activity. In fact, both Claimant and Beritech were acting together in order to expand the provision of connectivity and communication services for users in the entire region of Euphonia.³⁰ It is undeniable that Sat-Connect’s business was selling services and licensing technology to other companies and governments in the region.³¹
43. The fact that the JVA contains a Buyout Provision does not alter the commercial nature of Beritech’s activities.³² As a general rule of law, *freedom of contract* is a well-established principle by which the parties are free to enter into a contract and to determine its content.³³
44. The official commentaries to the UNIDROIT principles consider that freedom of contract is of “*paramount importance in the context of international trade*”.³⁴ These commentaries stress the importance that the right of business people to freely agree on the terms of individual transactions to the extent of considering it a cornerstone of an open, market-oriented and competitive international economic order.³⁵ Thus, both parties to the JVA, private contracting parties, have agreed on the terms of its content and performance.
45. In exercise of their freedom of contract, both Claimant and Beritech accepted the Buyout Provision. The fact that this provision concedes a favorable right to Beritech and an obligation to Claimant cannot be interpreted as an exercise of governmental activity, or discretionary power.
46. Consequently, the Buyout Provision does not alter the commercial nature of this contract, and thus, the JVA cannot be considered as an “administrative contract”, in terms of the French legal doctrine.³⁶

³⁰ First Round of Clarifications, Question 148

³¹ First Round of Clarifications, Question 148

³² JV Agreement, Clause 8

³³ UNIDROIT principles, Art.1.1

³⁴ UNIDROIT principles commentaries, Art.1.1

³⁵ UNIDROIT principles commentaries, Art.1.1

³⁶ Gordillo, 2009, p.10

47. In consideration of the reasons presented, this tribunal should follow the criteria of the tribunal in *Amco v. The Republic of Indonesia*, and find that Beritech is a private entity that has its own profit-seeking goal, no different than other private economic entities³⁷, as such, it does not exercise elements of governmental authority. Consequently, in accordance with the position of the tribunal in *Maffezini v. Spain*, this tribunal should deny any kind of attribution to Respondent.³⁸

48. In conclusion, the conduct of Beritech is not attributable to Respondent because it is not an organ of the state, it has not acted under the instructions of the state, it has not acted under the direction or control of the state, and, being a private commercial entity, it is not capable of exercising governmental authority nor has it exercised governmental authority in the present case.

B. The Tribunal Lacks Jurisdiction Over Contract Claims

49. The question that needs to be resolved is whether this international arbitration tribunal that has been constituted under the BIT has jurisdiction over claims that are fundamentally based in a breach of the JVA, which are nothing more than contract claims.³⁹

50. Normally, states acquire obligations with private investors through different legal instruments. However, not every obligation exists under International Law. In this context, investors and States can have private contractual relations that are governed by domestic law. These contracts between States and private parties tend to contain dispute resolution clauses that provide for domestic arbitration. This is the case of the JVA, which establishes a forum selection clause on its article 17 that gives jurisdiction to a local arbitration tribunal.⁴⁰

³⁷ Bishop, Crawford, & Reisman, 2005, p.817

³⁸ Cohen, 2005 p. 22, *See Also*, *Maffezini v Spain*, para.52

³⁹ *See*. Alexandrov, 2004, p.1

⁴⁰ JV Agreement, Article 17

51. As a consequence, when a dispute arises out of the JVA, and the subject matter of the claims is only contractual, the ICSID tribunal established under the BIT cannot accept jurisdiction to resolve the contract claims because the forum selection clause of the contract must produce its full effects. In the present case Claimant has presented its claims solely based on the JVA and as a consequence, the claims are in reality nothing more than contract claims and the forum that has jurisdiction over them is the one provided in the same contract.
52. However, on its attempt to establish the jurisdiction of this tribunal, Claimant has relied on the dispute settlement clause of the BIT. The fact that Respondent offered its consent to ICSID jurisdiction in the BIT is not a disputed fact. However, that offer of consent exists exclusively for the purpose of resolving disputes arising out of the obligations acquired in the BIT. Claimant alleges that this ICSID tribunal has jurisdiction by virtue of article 11. Now, therefore, it is of dire importance for the tribunal to note that article 11 of the BIT restricts the scope of the Tribunal's jurisdiction to disputes "*that concern an obligation of the [host state] under this Agreement*"⁴¹
53. From the language of the treaty it is clear that Beristan has extended its offer of consent exclusively over disputes arising out of the BIT, not to disputes arising out of contracts. Thus, this tribunal cannot hear the claims presented by Claimant because as it will be proven, they do not arise out of the BIT, but only out of the JVA.
54. Regarding contract claims, the Ad Hoc Committee in the *Vivendi* case expressed that in a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal does not have jurisdiction over those claims, giving effect to any valid choice of forum clause established in the contract.⁴² In the same line, the *SGS v. Pakistan* tribunal correctly held that it did not have jurisdiction over contract claims that did not also constitute breaches of the substantive standards of the BIT.⁴³ Moreover, Giorgio

⁴¹ Beristan-Opulentia BIT, Art.11

⁴² Vivendi Decision on Annulment, para.98, *See Also*. Crawford, 2008, p.14

⁴³ *SGS v Pakistan*, para.161-162.

Sacerdoti affirms that a cause of action based on contractual relations would be a claim for domestic courts under the proper law applicable to the contract.⁴⁴

55. Since the cause of action of the claims is in reality merely contractual, the claims presented by Claimant are governed by the law of the contract and by Beristian municipal law and this tribunal lacks jurisdiction to hear the present case.

1. The Legal Instrument that Governs the Relation Between Beritech and Claimant is a Private Contract

56. It is important to take into account that Respondent does not have a direct legal relationship with Claimant. The entire dispute finds its grounds on a private contract signed between Beritech and Claimant. As it can be noted, the parties to the JVA are private entities who act within the scope of a commercial transaction under private law. The claims submitted exist within this scope.

57. The Claims are based on the allegedly “improper” enforcement of the Buyout Provision. In fact, Claimant alleges that the decision of the enforcement of the Buyout Provision:

*“was taken without proper notice and without any opportunity to respond to the false charges that were raised against Claimant”.*⁴⁵

Whether Claimant had proper notice of Sat-Connect BOD meeting or had the opportunity to respond to the charges of which it was accused is a question related to the validity of the decision of the BOD. Hence, the essential basis of this claim is centered upon the correct application of clause 8 of the JVA, question that has to be solved by the Domestic Arbitration tribunal, applying Beristian Corporate Law.

58. When arguing that the Buyout Provision was improperly enforced Claimant simply denies that there has been a leakage of information, and that there is no breach of article 4 of the JVA, the confidentiality agreement. In consequence, under Claimant’s perspective, clause

⁴⁴ See. Sacerdoti, 2005, p.19

⁴⁵ Parties Contentions, Claimant, Para.2 p. 6

number 8 was improperly invoked.⁴⁶ Following the same analysis, this is a discussion on the performance of private contractual obligations and such they are outside of the jurisdiction of this tribunal because of the dispute settlement provision of the contract.

2. Although Claimant has attempted to present its claims as a violation of the BIT, those claims are still contractual in nature and are solely based on the performance of the JVA

59. Claimant has attempted to present other claims based on treaty allegations. Nevertheless, those remain as contractual in nature. Claimant has alleged that a proper compensation under the BIT has not been granted.⁴⁷ However, the alleged compensation is not a treaty claim, but is rather a question regarding the value of the purchased shares, purchase that was a consequence of the application of clause 8 of the JVA.

60. In addition, Claimant has argued a violation of Fair and Equitable Treatment (FET) standard under the BIT. Nonetheless, a correct reading of the claim, as presented by Claimant, will demonstrate the contractual basis of its allegation⁴⁸:

“ [...] by reason of the arbitrary and unfair expulsion of Claimant for motives unrelated to Claimant’s performance of the [JVA], through the abusive exercise of Beritech’s rights under Clause 8 of the JV”

As it can be appreciated, Claimant has once again centered its argument of a supposed breach of FET, on the performance of obligations of the JVA. Moreover, it has based this argument on an analysis of the “motives” of the enforcement of the Buyout Provision. If Claimant contends that the motives for enforcing the Buyout Provision and it argues that such enforcement was an “abusive” exercise of a contractual right, then it should present those claims –which are contractual in nature- to the domestic arbitration tribunal, which is the only competent forum to solve this contractual discussion.

⁴⁶ Parties Contentions, Claimant, Para. 7. p. 7

⁴⁷ Beristan-Opulentia BIT, Article 4. 1. (3)

⁴⁸ Parties Contentions, Claimant, Para. 6. p. 6

61. The claims remain contractual in nature despite the involvement of the Civil Works Force (CWF) because they are still based on the performance of the JVA. Claimant has presented its claim by stating⁴⁹:

“Respondent breached the [JVA] by preventing Claimant from completing its contractual duties and improperly invoking the buyout clause in the JV Agreement. Claimant argues that it can assert these contract claims by virtue of Article 10 of the Beristan-Opulentia BIT.”

The fundamental basis of the claim is contractual in nature this is why Claimant had no other choice than to rely on the Umbrella Clause of the BIT. If this tribunal finds it has jurisdiction over the present dispute a question arises: what will happen to the dispute settlement clause of the contract and the domestic arbitration tribunal that has exclusive jurisdiction over the contract claims?

3. Claimant has failed to prove that the ICSID tribunal has jurisdiction by virtue of the subject matter of the claims

62. Respondent recognizes that a number of authorities have expressed the principle by which on the jurisdiction phase, it is for the Claimant to characterize the claims “*as it sees fit*”.⁵⁰ Consequently, the tribunal would have jurisdiction if Claimant can effectively present its claims as arising under the treaty. Nonetheless, Respondent has proven that Claimant’s claims are really contractual in nature.

63. In this sense, Zachary Douglas affirms:

*“the respondent state must demonstrate to the comfortable satisfaction of the tribunal that the ‘fundamental basis of the claim[s]’ is an investment contract between the claimant and the respondent, and not the minimum standards of investment protection in the investment treaty”.*⁵¹

⁴⁹ Parties Contentions, Claimant, Para. 7. Pp. 7

⁵⁰ See. Escobar, 2005, p. 40

⁵¹ Zachary, 2003, p. 91

Respondent has proven that the essential basis of all claims, *as presented by claimant*, is the JVA.

64. Finally, the criteria of *SGS v. Pakistan* tribunal must be considered, which concludes that when parties have not agreed on accepting ICSID jurisdiction on merely contractual claims, the tribunal's jurisdiction over those claims should rest on the contract, not on the BIT.⁵² On the same line, it is necessary to acknowledge the principle established by the *Vivendi Ad Hoc* Committee by which the tribunal should give effect to the valid choice of forum established in the contract, when the essential basis of claims are contractual.⁵³ For these reasons, this tribunal should reject jurisdiction, and should respect the full legal effects of clause 17 of the JVA.

C. The Jurisdiction Established by Clause 17 of the JVA Prevails Over any other Jurisdiction

65. In the case that this tribunal would mistakenly consider that it has jurisdiction over the contract claims, then there would be a conflict of jurisdiction between this tribunal and the forum chosen by Beritech and Claimant in the JVA. Thus, Respondent will now prove that in the event of a conflict of jurisdiction, the forum selected by the parties in the JVA must prevail over this tribunal.

66. It is important to determine the existence and validity of the arbitration established in clause 17 of The JVA.⁵⁴ Neither Beritech nor Claimant has questioned the validity of this agreement. Thus, we conclude that it is legally binding for both parties.⁵⁵ As such, Article 17 of the JVA constitutes a forum selection clause that parties have to respect in the cases:⁵⁶

⁵² *See. SGS v Pakistan*, Para.161

⁵³ *Vivendi Decision on Annulment*, para.98

⁵⁴ *See. Gaillard*, 2007

⁵⁵ UNIDROIT Principles, Article 1.3

⁵⁶ *JV Agreement*, Clause 17

“[...] of any dispute arising out of, or relating to this Agreement [JVA]”.

67. By virtue of the international principles, *generalia specialibus non derogant*, *pacta sunt servanda*, and *prior in tempore, potior in iure*, this ICSID Tribunal should decline its jurisdiction over the presented claims in favor of the Domestic Arbitral Tribunal already constituted under the JVA.

1. The specific consent acknowledged in the JVA prevails over the general consent of the BIT by virtue of the principle generalia specialibus non derogant.

68. This tribunal must recognize that the specific consent of Clause 17 of the JVA prevails over the general consent of the BIT, by virtue of the maxim *generalia specialibus non derogant*. This General Principle of Law determines that when any matter falls under any specific provision, it shall be ruled by that provision and not by a more general one. On this respect, Zachary Douglas points out that *“[...] the parties’ consent to investment treaty arbitration is no more “solemn” than their consent to the submission of their contractual disputes to a different forum”*.⁵⁷

69. In the present case, the domestic arbitration restrained in The JVA is in fact a more specific consent provided by both Beritech and Claimant, while the provision of the BIT results to be more general. The very nature of Clause 17 of the JVA enables us to reach this conclusion. While the former extends specifically to “any dispute arising out of or relating to this agreement [JVA]”⁵⁸, Article 11 of the BIT extends consent to “disputes with respect to investments” with any investor that may have a dispute in the future with the host state.⁵⁹

70. In application of the general rules of interpretation contained in Article 31.1 of the Vienna Convention on the Law of Treaties (Vienna Convention) and in UNIDROIT principles, the term ‘agreement’ contained in the contract should be solely understood as the JVA, and in turn, the term ‘investment’ should be understood in the light of Article 1 of the BIT: as “any

⁵⁷ Zacary, 2003, p.77

⁵⁸ JV Agreement, Clause 17

⁵⁹ Beristan-Opulentia BIT, Art.11

kind of property invested”.⁶⁰ While this last wording could cover a plurality of “investments”, the term “agreement” refers specifically to The JVA itself. Because of this, the latter contains a more specific consent than the former. The judgment of the ICSID Tribunal in *SPP v Egypt* follows this position, concluding that

“A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor’s State and Egypt”⁶¹.

71. In that case, the tribunal, establishing that specificity overlaps generality in matters of consent, approved the maxim *generalis specialibus non derogant*.⁶² Hence, Respondent suggests this Tribunal to recognize the primacy of The JVA’s Clause 17, by rejecting its jurisdiction. Failure to do so leads to a possible risk of annulment, in application of article 52 of the ICSID Convention, on the basis that the Tribunal has exercised a jurisdiction it did not have.

2. The JVA Dispute Settlement Clause Prevails over the BIT in Strict Application of Pacta Sunt Servanda and the Principle of Good Faith.

72. International Law fully recognizes the principle of good faith as a peremptory norm of International Law. The Vienna Convention codified this principle by establishing that a treaty is binding to the parties⁶³ from the moment of its entry into force⁶⁴, and they should perform it in good faith.⁶⁵ Additionally, this principle is not limited to international law for it governs all legal relations under the scope of domestic law. Thus, the performance of contracts is also governed by *pacta sunt servanda*. This is recognized by UNIDROIT principles in its article 1.3, which states “a contract validly entered into is binding upon the parties”.⁶⁶

⁶⁰ UNIDROIT Principles, Art.1.1

⁶¹ Zachary, 2003, p. 76, *SPP v Egypt*, para.83

⁶² Zachary, 2003, p.76

⁶³ Vienna Convention, Art., 26

⁶⁴ Vienna Convention, Art., 24.2

⁶⁵ Vienna Convention, Art., 26

⁶⁶ UNIDROIT Principles, Art., 1.3

73. Since the JVA is ruled by *pacta sunt servanda*, its provisions have to be fully performed in good faith. On this context, Clause 17 constitutes an acquired obligation that Claimant is obliged to comply. Thus, the Domestic Arbitral Tribunal is the only valid forum for deciding over the contractual relation between the parties to the JVA. Thus, if this tribunal accepts Claimant's arguments by accepting jurisdiction, it would be rewarding an action that is in open contradiction to the principle of good faith and *pacta sunt servanda*.

a. Claimant has the obligation to respect its acquired commitments in accordance with the Principle of Pacta Sunt Servanda, otherwise it would incur in the Estoppel Theory

74. Claimant pretends to ignore its obligations under the JVA by requesting ICSID arbitration. By doing so, Claimant is weakening the unity of contractual bargain.

75. Claimant's strategy of making claims for the performance of contractual provisions before an international tribunal and in doing so, repudiating one of the provisions of the same contract –the dispute settlement provision that provides for domestic arbitration- amounts to bad faith behavior.

76. For this reason, in accordance with the Estoppel Doctrine, this tribunal should condemn Claimant's attitude by recognizing its lack of jurisdiction over the presented claims.⁶⁷ The American/Mexican Claims Commission has described such an attitude in the following terms:

“The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if [the choice of jurisdiction clause] of its contract had no existence in fact [...].”⁶⁸

77. Claimant's behavior presents notable similarities with the attitude described by the quoted case. By claiming the validity of this tribunal's jurisdiction, Claimant attempts to ignore its

⁶⁷ Cottier & Muller, 2007, p. 7

⁶⁸ Zachary, 2003, p. 89

acquired commitments, acting in contradiction with its own acts. Hence, Respondent encourages this Tribunal to condemn claimant's actions by rejecting its jurisdiction and consequently, reinforcing the contractual obligations that Claimant tries to evade.

3. *This ICSID Tribunal should Recognize the Validity of Claimant's Waiver to Any Jurisdiction other Than the Jurisdiction Agreed To on the JVA*

78. At the end of Clause 17 of the JVA, Claimant and Beritech expressly accepted a waiver to

*"[...] any objections which [the parties] may have now or hereafter to [the Local Arbitration] and irrevocably submit to the jurisdiction of the arbitral tribunal constituted for any such dispute"*⁶⁹

Consequently, waiving to any objection to the local arbitration implies a Claimant's waiver to initiate any other proceedings.

79. This provision is completely valid and legally binding by virtue of the principle of *freedom of contract*.⁷⁰ Additionally, since the JVA was concluded after the BIT, the principle by which subsequent provisions prevail over prior provisions should be fully considered.

80. On the contrary, it is inconceivable to support the hypothetical allegation that Claimant was incapable of waiving the offer provided in the BIT. It is also unacceptable to argue that Article 11 was obligatory to the parties, as even the very nature of an "offer" is optional, not mandatory. The wording of the mentioned article demonstrates the optional nature of it, which reads:

*"[...] the investor in question **may** in writing submit the dispute, at his discretion, for settlement to: [...]"*⁷¹

81. Moreover, even if treaties are agreed between states, individuals are certainly able to choose a forum offered in the BIT or in any other valid instrument.⁷² Thus, if investors are able to

⁶⁹ JV Agreement, Clause 17

⁷⁰ UNIDROIT Principles, Art. 1.1

⁷¹ Beristan-Opulentia BIT, Art.11

choose, there is no reason to presume they are not able to waive an offered forum and adopt a different one. This responds to the principle *a maiore ad minoris*, by which if investors *can* do more (choose), then certainly, can do less (waive).

82. Furthermore, since BITs grant rights directly to individuals, individuals therefore have the right to dispose of those rights⁷³. Due to the fact that the claims presented are purely of contractual nature, this ICSID Tribunal should recognize the validity of the waiver, and consequently should confine itself to the provisions of the JVA, recognizing the Domestic Arbitration Tribunal's exclusive jurisdiction over those contract claims.

4. If This ICSID tribunal accepts Claimants arguments, then it should decline its jurisdiction because it would be creating a situation of Lis Pendens due to the already commenced local arbitration

83. The Domestic Arbitral Tribunal established in Clause 17 of the JVA has already been constituted. However, in order to hinder this procedure, Claimant requested ICSID arbitration nine days after being notified with the constitution of the domestic arbitration tribunal. This Tribunal then faces a situation where a valid arbitration has commenced.

84. As it is a duty of any tribunal to care for the well being of international judicial order, we urge this Tribunal to decline its jurisdiction applying the principle of *prior in tempore potior in iure*.⁷⁴ Otherwise, Claimant's tactic to delay and obstruct the validly commenced Domestic Arbitration by suggesting its disability would triumph, injuring the interest of international judicial order.

85. Thus, if this ICSID Tribunal accepts Claimant's arguments, it will be facing a situation of *lis pendens* as there would be two proceedings the cause of action of which is in fact the same (the JVA). In order to resolve this situation and following the *SPP v. Egypt* tribunal's line of

⁷² See. Escobar, 2005, p.41

⁷³ Escobar, 2005, p. 40, *See Also*, *Azurix v Argentina*, para.23

⁷⁴ Zacary, 2003, p. 109

thought, this Tribunal should decline its jurisdiction because there is *pending a decision by the domestic arbitral tribunal that knew the claim before*.⁷⁵

86. Furthermore, the fact that Claimant has not responded to the Local Arbitration does not change the situation of *lis pendens* because the claims that it has presented in this ICSID tribunal are the same that would naturally correspond to the contractual arbitration. Even more, if this tribunal accepts Claimant's argument that Beritech's conduct is attributable to Respondent, then all the elements of *lis pendens* would be present: same claims, same cause of action and even same parties.⁷⁶

D. Article 10 of the BIT does not Empower this Tribunal to Know Claimant's Contract-Based Claims Arising under the JVA

87. Claimant fails to establish how this tribunal could have jurisdiction over the presented contract claims by virtue of article 10. Respondent strongly argues that this Tribunal does not have jurisdiction over the contract claims by virtue of the "umbrella clause".

88. The so called umbrella clause may only be applied to Respondent's legal obligations towards Claimant.⁷⁷ As it has been proven, the JVA was signed between Beritech and Claimant. Erroneously, Claimant considers that it can invoke the BIT's Umbrella Clause by virtue of a contract on which Respondent is not a party. This needs to be supported by the fact that the conduct of Beritech is by no means attributable to Beristan. Hence, the umbrella provisions of article 10 of the BIT could never extend to the JVA.

1. Claimant adopts a mistaken interpretation of the scope of an umbrella clause

89. Claimant has adopted Dolzer and Steven's approach to Umbrella Clause interpretation by arguing that "a simple breach of contract" would be susceptible of Umbrella Clause

⁷⁵ See. SPP v Egypt

⁷⁶ Turner, 2005, p.19, See. *SGS v Pakistan*, para.115

⁷⁷ Schreuer 2004, 2004, p. 251

protection.⁷⁸ However, this position is mistaken and should not be adopted by this tribunal. This interpretation would lead us to conclude that all other treaty standards are useless. In fact, this is the position adopted by the tribunal in *SGS v Pakistan case*, which considered that such a wide interpretation would lead to wrongfully believe that:

*“[T]here would be no real need to demonstrate a violation of a substantive treaty standard if a simple breach of contract, or of municipal statute or regulation, by itself, could suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party”*⁷⁹

90. As a matter of fact, the Tribunal not only found inadmissible such an extensive interpretation of the clause, but also encouraged to adopt a moderate criterion.⁸⁰ For this purpose, this Tribunal should recognize that not all breaches of contract are susceptible of Umbrella Clause Protection. Relating to this issue, the *CMS* Tribunal affirmed that the treaty might protect purely commercial aspects of a contract only when there is a significant interference by governments or public agencies with the rights of the investor.⁸¹ As it has been proven, the present case does not fulfill with this requirement because there has been no intervention of the Beristian Government in the commercial relation between Claimant and Beritech. Thus, this tribunal should dismiss Claimant’s wide interpretation of the umbrella clause, by rejecting its jurisdiction by virtue of article 10 of the BIT.

91. It must also be noted that the dispute settlement clause of the BIT covers only the disputes that arise out of the BIT. Therefore the BIT tribunal cannot have jurisdiction over contract claims.

E. Conclusions on Jurisdiction

92. This Tribunal lacks jurisdiction due to the fact that the presented claims cannot be attributed to Respondent. In addition, the claims are merely contractual and are solely based on the

⁷⁸ Schreuer 2004, 2004, p. 251

⁷⁹ Schreuer 2004, 2004, p.252, *See also* *SGS v Pakistan*, para. 168

⁸⁰ Schreuer 2004, 2004, p.252

⁸¹ *CMS*, para.299

performance of the JVA. Thus, Clause 17 of the JVA prevails over any other jurisdiction. Finally, this tribunal does not have jurisdiction by virtue of the umbrella clause of the BIT.

II. PART TWO: RESPONDENT'S POSITION ON MERITS

93. From the Minutes of the First Session of this Tribunal, it has been established that the Tribunal shall only address the discussion whether Respondent's actions amount to expropriation, discrimination, a violation of FET, or otherwise violate general international law or applicable treaties.⁸² Additionally, this tribunal must address the question of whether article 9 of the BIT related to Essential Security is applicable. Respondent affirms that Claimant has failed to prove the existence of any expropriation, discrimination, or any kind of violation of FET. Finally, Respondent asserts that Essential Security is completely applicable.

A. Respondent is entitled to Rely on the Essential Security Clause as a defense to Claimant's Claims

94. Following the criteria of the *CMS Annulment Committee*, Essential Security contained in article 9 of the BIT constitutes a separate defense from the State of Necessity defense under customary international law.⁸³ This is important because the consequences of the application of both concepts are radically different.

95. Contrary to the classical concept of State of Necessity, if the Essential Security defense contained in article 9 of the BIT applies, the substantive obligations under the Treaty do not apply.⁸⁴ By contrast, the State of Necessity is an excuse that is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.⁸⁵ In other words, the application of article 9 of the BIT would result in the non-existence of a treaty breach, while the application of State of Necessity concept means that although there was a breach, responsibility is precluded. This difference is fundamental due the fact that in

⁸² Minutes of the First Session, Para.14

⁸³ Bjorklund, 2008, p. 495, *See Also*, CMS v Argentina Annulment Committee, para.132-133

⁸⁴ *See*. Bjorklund, 2008, p. 495

⁸⁵ *See*. Bjorklund, 2008, p. 495

application of article 9, Respondent has not breached any obligation of the BIT. This position has been adopted by the Ad Hoc Committee in *Sempra* case.⁸⁶

96. Since there is no definition of Essential Security interests provided in the BIT, customary international law definition of necessity, secondarily applied, sets the appropriate criteria to be met for the provision to be invoked.⁸⁷ Thus, the question is whether the measure adopted by Respondent concerning the participation of the CWF adjusts to the requirements of article 25 of ILC Articles.

97. In first place, the leak of critical military information by Claimant compromised the *Essential Interest* of Beristan to preserve its National Security. Classically, there is no doubt that military related issues are part of the security agenda of states and are considered as essential interests. In addition, literature has included military threats as part of security issues related to survival of the state as a political unit.⁸⁸

98. Consequently, the debate has not been whether military concerns are essential interests. On the contrary, several tribunals have not questioned that premise, but rather have analyzed whether issues not related to military interests could constitute essential interests.⁸⁹ Moreover, because of its direct relation to the peremptory norms of international peace and security, protection of sovereignty, and the principle of self-preservation, National Security constitutes a value protected by the international community.

99. As a general rule, the values enshrined in peremptory norms are by definition recognized as essential interests of all states.⁹⁰

100. Without a doubt, the continuation of critical military information leakage constituted a *Grave and Imminent Peril* that compromised the survival interests of Respondent. Critical information in the hands of the Opulentian Government substantially makes Beristan military

⁸⁶ *Sempra v Argentina Annulment Committee*, para.204

⁸⁷ *See*. Bjorklund, 2008, p.496, *See Also Sempra v Argentina Annulment Committee*, para.208

⁸⁸ *See*. Waever, p. 53

⁸⁹ Bjorklund, 2008, p. 480

⁹⁰ Vinuales, 2008, p. 8

vulnerable, affecting its capability to protect its national sovereignty, and the security of its population. Moreover, it results in Respondent's military capabilities being inferior. No State can risk its national security, having the obligation to respond to all threats in order to preserve it.

101. According to Ole Weaver, issues with this undercutting potential must be addressed prior to all others because, *"if they are not, the state will cease to exist as a sovereign unit and all other questions will become irrelevant."*⁹¹ If as a consequence of the possession of critical military information, Opulentia strikes the territory of Beristan, or affects Beristian population's rights, then it would be too late to think whether Respondent's National Security was facing a grave and imminent peril. For this reason, the continuation of information leakage was by itself an imminent peril that Respondent could not permit to occur.

102. The tribunal must also note that the perils that Respondent was facing at the time were not only from other governments. Respondent could not risk having this valuable information falling into the hands of insurrectionist armed groups and/or terrorists. The situation called for immediate action in order to protect Beristan's national security interests.

103. In this connection, the participation of the CWF was the only means in order to safeguard the essential security interests of the state.⁹² Due to the reasons explained in the previous paragraphs, Respondent had no other choice but to act in this way.⁹³ The only way to stop the continuation of information leakage was to prevent Claimant from having access to that information. That is the reason why the CWF was entitled to ask Claimant's personnel to leave Sat-Connect facilities.

104. Being the only means available to safeguard Respondent's Essential Interest, it was also the most logical answer to this situation. Nonetheless, even if this tribunal finds that there were other means available, it should be noted that:

⁹¹ Ole Waver, Pp. 53

⁹² Bishop, Crawford, & Reisman, 2005, p.1205

⁹³ See. Yanaka-Small, 2007, p. 104.

*“Once a peremptory norm is at stake, every improvement in the probability required to preserve the value enshrined in a peremptory norm is not only desirable but legally required.”*⁹⁴

The actions adopted by Respondent were the most effective because they ensured that the protected Essential Interest was completely preserved.⁹⁵

105. Furthermore, the participation of the CWF did not impair an essential interest of Opuentia, nor of the international community as a whole. The protection of National Security is a value that is considered of paramount importance to the international community. For that reason, it cannot be considered that the application of Article 9 of the BIT affects the essential interests of Opuentia. Ultimately, it could be thought that the participation of the CWF could have affected the interest of Claimant. However, the language of article 25 of ILC Articles is clear, and it suggests that the interests to be weighed are those of the contracting states, not those of the investor.⁹⁶ Nothing in the present case suggests that the essential interests of Opuentia have been affected. On the contrary, the preservation of values reflected in peremptory norms such as the protection of National Security is in the interest of Opuentia and the international community.⁹⁷

106. Finally, it is important to note that the international obligation in question does not exclude the possibility of invoking necessity, nor has Beristan contributed to the situation of necessity.⁹⁸ In effect, article 9 of the BIT is the one that allows the parties to take measures in order to preserve the Essential Security interests. Moreover, Beristan has not contributed to this situation. It was Claimant the one who leaked critical military information, thus threatening the Essential Security interests of Respondent.

⁹⁴ Vinuales, 2008, p.16

⁹⁵ See. Enron v Argentina Annulment Committee, para.370-372; 378

⁹⁶ Bjorklund, 2008, p.487, See. Enron v Argentina Annulment Committee, para.383

⁹⁷ Vinuales, 2008, p.12

⁹⁸ ILC Article, Art. 25

107. Due to the nature of clause 9 of the BIT, which is a Self-judging provision because it allows Beristan to take measures “*it considers necessary*”, and having considered the reasons explained in the previous paragraphs, Respondent is fully confident that it can rely on the Essential Security clause of the BIT.⁹⁹

108. Thus, Following the *CMS* annulment committee, respondent has not breached any treaty obligation. Alternatively, even if this Tribunal does not agree with this criterion, Respondent has demonstrated that it has complied with all the requirements of the State of Necessity under customary international law and of article 25 of ILC Articles. Thus, Respondent cannot be held responsible for any measures that may be found to constitute breaches of the BIT.

B. Claimant Has Failed to Prove the Existence of Discriminatory Measures

109. Claimant has attempted to argue a violation of FET because there have been “*discriminatory efforts to favor local Beristian personnel*”. Claimant relies on the fact that the CWF asked Claimants’ seconded personnel to leave from Sat-Connect facilities, and on the fact that Beritech replaced them with Beristian nationals. However, this tribunal should reject this claim on the basis that Discrimination is a completely different standard from FET, which is even established in an independent and different paragraph of the relevant provision of the BIT.¹⁰⁰ Under Schreuer’s perspective:

*“there is no good reason why treaty drafters should use two different terms when they mean one and the same thing. Likewise, it is difficult to see why one standard should be part of the other when the text of the treaties lists them side by side as two standards without indicating that one is merely an emanation of the other.”*¹⁰¹

The tribunal in *LG&E* has applied these criteria by analyzing both standards separately.¹⁰² Thus, this tribunal would be incurring in an error if it accepts this claim under the grounds of

⁹⁹ Yanaka-Small, 2007, p.2

¹⁰⁰ Beristan-Opulentia BIT, Article 4 (2)

¹⁰¹ Schreuer & Dolzer, 2008, p. 177, *LG&E v Argentina*, para.162-163

¹⁰² Schreuer, 2007, p. 7

FET. This would constitute an excess of power due to an *ultra petita* award that could be annulled by virtue of article 52 of ICSID Convention.¹⁰³

110. Additionally, Claimant's claim is so mistaken that even if it had been presented correctly, it would still not constitute a breach on the grounds of Discriminatory Measures because it has failed to prove discrimination on the basis of comparison.¹⁰⁴ There is no comparison for discrimination because although Claimant has attempted to establish it on Beristian personnel, there are no grounds to argue that it is a viable comparison based on nationality. In fact, not all of Claimant's personnel have Opulentian nationality. Moreover, its personnel included Opulentian as well as third-country nationals.¹⁰⁵ This proves that Beritech did not act in a discriminatory manner.

C. Claimant Has Failed to Establish that Respondent's Actions or Omissions Amount to a Violation of Fair and Equitable Treatment, Minimum Standard of Treatment (MST) or Customary International Law

111. Analyzing state practice and *opinio juris*, the tribunal in *Glamis Gold* found that FET is merely "a short reference to customary international law".¹⁰⁶ In the *Loewen case*, the tribunal held that FET constitutes an obligation only to the extent that it is recognized by customary international law.¹⁰⁷ The OECD stated "*the standard required [FET] conforms in effect to the "minimum standard" which forms part of customary international law*".¹⁰⁸ Interpreting article 1105 of the NAFTA, the NAFTA Free Trade Commission found that:

¹⁰³ Schreuer C., 2001, p. 723

¹⁰⁴ Schreuer & Dolzer, 2008, p. 177

¹⁰⁵ Second Round of Clarifications, Question 136

¹⁰⁶ *Glamis Gold v USA*, para.602-603, 605, 608

¹⁰⁷ *Loewen v USA*, para.128

¹⁰⁸ *See*. OECD Convention

“[...] Art 1105(1) prescribes the customary international minimum standard and that the concept of FET does not require treatment beyond that which is required by customary international law.”¹⁰⁹

Since article 4 of the BIT adopts the same treaty language as the above mentioned, this tribunal shall give the same interpretation that the NAFTA Free Trade Commission gave.

112. Since the MST under customary international law does not extend to grant protection of legitimate expectations, on which Claimant relies to allege a violation of FET, this tribunal should reject this claim. Moreover, even if customary international law could be understood as covering such a standard, Claimant has not shown -and cannot show- that Respondent has failed to accord FET.

1. Claimant Has Failed To Prove That Its Legitimate Expectations Were Somehow Illegally Or Inappropriately Affected By Respondent's Actions or Omissions

113. Respondent recognizes that the JVA provided Claimant with legitimate expectations that were consistent with the full development of its investment. Since these expectations emerge from the JVA, its existence and endurance strictly depend on the compliance of it. If Beritech would have violated the JVA, and by virtue of such violation it would have impeded the development of it, then it would have violated Claimant's legitimate expectations. However, this did not happen. On the Contrary, it was Claimant itself that violated the Confidentiality Clause of the JVA. As a consequence of this violation, it was Claimant who impeded the continuation of the contract, affecting its own legitimate expectations. It was Claimant's actions that gave enough reasons to the BOD to decide on the enforcement of Clause 8 of the JVA. Consequently, Claimant's legitimate expectations were banished by its own actions, not attributable to Respondent or Beritech. Even if Claimant persists on alleging that its Legitimate Expectations were affected, this constitutes a legitimate affectation –as a legitimate application of the Buyout Provision of the JVA- and can by no means constitute a breach of FET.

¹⁰⁹ Schreuer C. 2005, *See Also*, NAFTA, Art.1105

114. If Claimant were to allege that the intervention of the CWF constitutes a breach of legitimate expectations, by suggesting that this intervention has impeded Claimant to comply with its contractual obligations, this argument must also be rejected for the following reasons.

115. By the time the CWF removed all Claimant's seconded personnel, Claimant had no pending obligations to comply under the JVA because the Buyout provision was already enforced. Moreover, Beritech did not affect Claimant's legitimate expectations because it was diligent and sensible enough to request Claimant to remove all its personnel from the project facilities.¹¹⁰ Due to the threat that the presence of Claimant's personnel represented to Beristan's National Security, and because of the lack of response from Claimant –the party in breach- to Beritech's request to abandon the project, Respondent had no other choice than to act through the CWF. Thus, this expulsion does not constitute a violation of legitimate expectations. The intervention of the CWF simply responds to the application of article 9 of the BIT, in relation to the Essential Security interests, situation that was caused by the party in breach itself.

2. Claimant Fails to Prove its Assertion that Respondent Failed to Grant FET Because Clause 8 was Abusively Exercised and Because the Expulsion of its Personnel was Arbitrary and Unfair¹¹¹

116. According to Professor Schill, an arbitrary conduct can be regarded as a violation of the requirement to act in accordance with domestic law.¹¹² In this case, the JVA was signed in full compliance with the provisions of Beristian Corporate Law. In exercise of the principle of contractual freedom, both Claimant and Beritech agreed on establishing clauses numbered 4 and 8, which are in accordance to Beristian and International Law. Under the principle of freedom of contract, both parties found themselves in a situation of equality by which they

¹¹⁰ Uncontested Facts, Para.10

¹¹¹ Summary of Parties Contentions, Claimant, Para.6

¹¹² Schill, 2006, p.20

could acquire any kind of rights and obligations.¹¹³ Hence, the fact that clause 8 of the JVA concedes a favorable right to Beritech and an obligation to Claimant, cannot be interpreted as the exercise of an arbitrary conduct. Acting in accordance with domestic law, the exercise of the Buyout Provision is not arbitrary because it responds to the compliance of a provision of the JVA. It is important to acknowledge that a contract is law for the parties.¹¹⁴ Thus, Claimant was bound to comply with all of the JVA's provisions.

117. Claimant knew and should have known that if it fails to comply with JVA's Confidentiality clause, it would entitle Beritech to exercise its right to purchase Claimant's interests in Sat-Connect. Definitely, there is no arbitrariness in a situation where Beritech acted according to the rules that governed the JVA.

118. Claimant seems to suggest that the performance and enforcement of a valid contract constitutes a violation of FET under the BIT. However we should clear out that the execution of a contract provision cannot be understood as a breach of contract or a violation of FET. Even more, the malicious attitude of Claimant is clearly an outright repudiation of the JVA, when it pretends to breach it and to not recognize its responsibility for such a breach. This attitude should be repudiated and condemned.

3. The Exercise of Clause 8 Does Not Constitute a Violation Of FET

119. Additionally, it is important to analyze whether or not Sat-Connect BOD's actions amount to a breach of FET.¹¹⁵ Claimant alleges an arbitrary conduct because it was not notified with the agenda of the meeting, and because the decision was not taken with the necessary quorum. However, Claimant cannot benefit from a situation that it has created. It was Claimant that tried to boycott the meeting and frustrate the application of the Buyout Provision through disloyal practices.

¹¹³ UNIDROIT Principles, Art. 1.1

¹¹⁴ UNIDROIT *Principles*, Art. 1.3

¹¹⁵ Schill, 2006, pp. 24-26

120. In strict application of the rules of procedure, the August 27 meeting was properly installed.¹¹⁶ Denoting dyes of bad faith, Claimant's appointed director left the meeting in order to impede the implementation of the buyouts.¹¹⁷ Although the quorum is required at the moment of voting, neither Beristan law nor Sat Connect's bylaws regulate the loss of quorum once established.¹¹⁸ Claimant is attempting to benefit from this lacuna by asserting that the decision was taken without the necessary quorum. Independently of the legal effect of that fact, this tribunal should reject Claimant's argument because of the general principle that *no one can benefit from its own wrong*. With a different decision, the tribunal would be awarding Claimant's bad faith.

121. Claimant's argument which states that the decision was taken without proper notice of the agenda of the Board's meeting on August 27 can neither be seen as an arbitrary action. In effect, all directors were present at the August 21 meeting, where a presentation discussing the allegations that had appeared in the Beristan Times article was made. Because of this, it results surprising that now Claimant pretends to affirm that it ignored the possibility of the implementation of the buyouts. Moreover, it is an uncontested fact that some directors appointed by Claimant speculated that the buyout would be discussed and decided not to attend the meeting and thus deprive it of the necessary quorum.¹¹⁹ For these reasons, Claimant's bad faith is evident.

4. Claimant has Failed to Prove that the Intervention of the CWF Amounts to a Violation of FET

122. Claimant states that the Intervention of the CWF could amount to a violation of FET. This assertion is mistaken. When analyzing whether the intervention was arbitrary, it turns out that such intervention, was completely justified by the circumstances and does not amount to a violation of FET.

¹¹⁶ Uncontested Facts, para.10

¹¹⁷ Uncontested Facts, para.10

¹¹⁸ Second Round of Clarifications, Question 8, Question 200

¹¹⁹ Second Round of Clarifications, Question 208

123. The intervention responds to the delicate situation that originated from Claimant's leakage of information. As it was fully explained previously, this situation allows Respondent to rely on Essential Security. The Government of Beristan, pursuant to its duty to watch over the wellbeing of its nationals, had no other choice but to intervene because the presence of the party in breach of the JVA constituted a National Security concern. Respondent's reaction is by no means unjustified, inconsistent or unreasonable, as it would always behave in such way, when facing a matter of National Security.

124. Moreover, it should be made clear that with the intervention of the CWF no contractual right was breached, because the execution of the buyout provision already took place, for which these contractual rights were left in "escrow". Even more so, when it was Claimant who breached the contract, Respondent's actions cannot amount to a violation of FET.

D. Claimant Has Failed to Prove that the Measures at Issue Amount to an Expropriation

125. Claimant has relied on the press article from the Beristan Times, on the implementation of Clause 8 of the JVA, and on the removal of its personnel by the CWF to claim that Respondent is responsible under article 4 of the BIT.¹²⁰ However, Claimant has failed to prove the existence of an expropriation, and has not even been able to demonstrate if the alleged facts could constitute a specific kind of property taking. On the contrary, it is clear that no expropriation has taken place. Hence, there is no evidence or valid juridical position by which a direct or indirect expropriation could be alleged, neither the necessary factual elements that could tantamount to an expropriation.

1. There is no Direct Expropriation

126. A direct expropriation is an "outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person."¹²¹ On this regard,

¹²⁰Beristan-Opulentia BIT, Art.4. See Also, Parties Contentions, Claimant, Para.4

¹²¹ Reinisch, *Expropriation*, 2005, p.2

the ICSID Tribunal in *Metalclad Corp. v Mexican United States* referred to direct expropriations as open, deliberate, and acknowledged takings of property.¹²² In order to configure this type of expropriation, it is required that the deprivation of the investor's property right responds to a stated purpose and objective of the governmental measure.¹²³ Hence, the presence of an official decree of the State by which it orders these takings is normally needed.¹²⁴ Since the Executive Order that ruled the CWF conduct is the only official act of the State in the present case, the question is whether that act could constitute a Direct Expropriation.¹²⁵

127. The immediate response to this question is no, and it is based on a logic rationale. In the present case, the actions taken by the CWF by virtue of the Executive Order cannot be deemed as a direct expropriation because its purpose was by no means a taking of Claimant's property. Even more relevant, it neither contained an order to conclude an expropriation nor to affect Claimant's ownership rights. Thus, it did not transfer Claimant's property rights to Respondent or to a third person. In contrast, it only enabled the CWF to ask Claimants' employees to leave Sat-Connect facilities.¹²⁶

2. No Measure can be Regarded as an Indirect Expropriation

128. Claimant has failed to prove that there has been an indirect expropriation or that Respondent is responsible for it. For August Reinisch,

*“an expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights.”*¹²⁷

¹²² Reinisch & Kriebaum, 2010, p.3, *See Also*. *Metalclad v Mexico*, Para. 103

¹²³ Heiskanen, 2006, p. 4

¹²⁴ *See*. Heiskanen, 2006, p.7

¹²⁵ First Round of Clarifications, Question 75

¹²⁶ Second Round of Clarifications, Question 248

¹²⁷ *See*. Reinisch, 2005, p.21

On this basis, we must analyze whether the Beristan Times' Article, the implementation of the Buyout Provision, and the participation of the CWF in sum may constitute an indirect expropriation.

129. First of all, the Beristan Times' Article is irrelevant for the analysis of indirect expropriation because it is not related with the posterior events and even if it was, the consequences are not attributable to Respondent. It cannot be held that the press article motivated the enforcement of the Buyout Provision, because Sat-Connect's BOD decisions are independent and autonomous. However, even if the content of Beristan Times' Article influenced Sat-Connect BOD to execute clause 8 of the JVA, by no means could it be concluded that such decision is attributable to Respondent. This Tribunal should follow the position of the ICSID tribunal on *Tradex Hellas S.A. v. Republic of Albania*, which recognized that even if a speech of the Prime Minister would influence a private property taking by Albanian villagers, Albania cannot be held responsible for such taking.¹²⁸ Since under article 8 of the ILC Articles, no effect that may have caused the publication of this article is attributable to Respondent, this Tribunal should reject Claimant's argument on the alleged connection of the Beristan Times' Article with the Buyout Provision implementation, and the CWF participation. For this reason, the press article should not be considered as an element that could contribute to an indirect expropriation.

130. Additionally, an indirect expropriation cannot be alleged on the grounds of the application of the Buyout Provision. This action did not result in a "substantial loss of control or economic value of Claimant's investment."¹²⁹ Claimant's rights were not deprived because this measure did not transfer any ownership right, nor decreased the economic value of the investment.

131. Furthermore, Claimant was not deprived to exercise its disposal rights, nor deprived it from continue to enjoy the investment. On the contrary, Claimant continues to be the owner of its interests in the Sat-Connect project. Although the buyouts were implemented, Claimant's

¹²⁸ Bishop, Crawford, & Reisman, 2005, p.817, *See Also*, *Tradex v Albania*, para.165

¹²⁹ *See*. Schreuer Exp, 2005, p.5

interests are held in escrow, while pending a decision on the arbitral proceeding initiated by Beritech, which looks for a declaratory relief that it properly exercised its rights under the JVA.¹³⁰

132. For this reason, even if it is argued by Claimant that this measure had an expropriatory effect, this cannot be accepted because the decision is not irreversible and is susceptible to revision by the already initiated local arbitration. The Iran-US Claims tribunal supports this criterion, broadly accepting in *Phillips Petroleum v Iran* case that the deprivation to the investment has to be irreversible in order to constitute an indirect expropriation.¹³¹ Since Claimant has the opportunity to reverse the effects of the BOD's decision by concurring to the local arbitration, this measure does not have an irreversible effect. Thus, no expropriation has occurred on the grounds of the Buyout Provision.

133. In addition, Schreuer asserts that the loss of control or economic value in order to constitute an expropriation has to be *substantial*.¹³² Moreover, The Iran-US claims Tribunal has expressed in the *Phillips Petroleum v. Iran* that the effect of the measure in question had to be sufficient enough for depriving the foreign investor of his or her property right.¹³³ Thus, it can be concluded that the implementation of clause 8 of the JVA did not have the mentioned effect, nor did it result in a substantial loss of control or economic value of the investment.

134. Furthermore, the implementation of the Buyout Provision cannot be considered as an element of an indirect expropriation since it is not attributable to Respondent. The ICSID tribunal in *Generation Ukraine, Inc. v Ukraine* emphasized that the elements that constitute an indirect [creeping] expropriation have to be attributable to the state.¹³⁴ For the host State to be liable for the effects of the measures, they have to be directly attributable to that State.¹³⁵ Since the conduct of Beritech cannot be attributed to Respondent, this Tribunal must

¹³⁰ First Round of Clarifications, Question 170

¹³¹ See. Schreuer Exp, 2005, p. 18

¹³² Schreuer Exp, 2005 p. 5

¹³³ Heiskanen, 2006, p. 14

¹³⁴ Reinisch, 2005, p. 21. See also. Heiskanen, 2006, See Also *Generation Ukraine v Ukraine*, para.22-23

¹³⁵ See. Heiskanen, 2006, p. 7

exclude the Buyout Provision from being considered in the analysis as a possible element of the alleged indirect expropriation.

135. Moreover, the enforcement of the Buyout Provision cannot be considered as an element of indirect expropriation because it was nothing more than the exercise of Beritech's contractual rights. Effectively, the enforcement of the Buyout Provision was the compliance of a contractual disposition that was a consequence of a breach of contract carried out by Claimant. Hence, it cannot be argued that this constitutes an expropriation. The ICSID tribunal in *Consortium RFCC v Morocco*, followed this position by rejecting the existence of an expropriation alleged on the basis of the imposition of a penalty for late performance provided in the contract.¹³⁶ On the contrary, the tribunal affirmed that:

*“the Moroccan partner of the investor had merely exercised rights under the contract and had not acted in public capacity.”*¹³⁷

Since Beritech exercised its rights within a commercial relation as a party to the contract, and did not act under public authority, there is no expropriation of contractual rights.¹³⁸

136. This tribunal should exclude the buyouts discussion from the analysis because otherwise, it would create an unfair and inequitable situation where Claimant would benefit from acts that are contrary to the principle of Good Faith—it would benefit from a breach of contract. Consequently, this tribunal should reject Claimant's arguments, following the general principle of law by which *no one can benefit from its own wrong*.

137. Finally, the last element to be considered is the participation of the CWF. Even if this tribunal considers that the effect of this measure could amount to an expropriation or could constitute one of the elements the sum of which could amount to an indirect expropriation, it must reject Claimant's arguments because the participation of the CWF responded to the application of the Essential Security article of the BIT, by which Respondent cannot be held

¹³⁶Schreuer Exp, 2005 p.26.

¹³⁷Schreuer Exp, 2005, p.26.

¹³⁸Schreuer Exp, 2005, p. 25

responsible of any possible deprivation. In this connection, the tribunal must note that it is an uncontested fact that Claimant's personnel left the country by their own will.¹³⁹ The CWF only asked Claimant's personnel to leave Sat-Connect facilities.¹⁴⁰

138. Having analyzed the facts under which Claimant alleges an indirect expropriation, it is imperative to notice that the Beristan Times' Article has not motivated any of the posterior events, and even if it did, Respondent cannot be held responsible for the consequences of it. In addition, the Buyout provision cannot be considered for the analysis as an element of indirect expropriation. This leaves the participation of the CWF as the only fact that can be considered for the discussion of indirect expropriation. Although this tribunal would find expropriatory effects, the Essential Security article of the BIT is completely applicable on the grounds of National Security. In sum, it is clear that all these elements do not constitute an indirect expropriation.

139. Claimant has failed to prove his case that it has suffered from a Direct or an Indirect Expropriation.

E. Claimant Has Failed to Prove that it Is Entitled to any Compensation

140. As shown above, Claimant has failed to establish that Respondent has breached the BIT or the JVA and therefore, that it should be entitled to compensation. As Professor Walde correctly states, it

*"[...] may be closer to the concept [of compensation] that governments are responsible for the detrimental impact they cause through administrative conduct."*¹⁴¹

Only if Claimant had sufficiently proven that it suffered a detriment or affection of its property, due to an action or omission, attributable to the State, then Claimant would be entitled to compensation. However, Claimant has failed to do so. As it was explained above,

¹³⁹ Second Round of Clarifications, Question 204

¹⁴⁰ Second round of Clarifications, Question 248

¹⁴¹ Walde & Sabahi, 2007, p. 2

the exercise of the buyouts are not attributable to Respondent; if considered so, then it does not constitute a breach of the contract nor the treaty. The same situation occurs with the alleged violation of Claimant's rights regarding the CWF intervention, which is justified on the grounds of Essential Security. Even more, Respondent has proven that through the intervention of the CWF no erosion of Claimant's property occurred. This excludes the possibility for Claimant to require any kind of compensation. Finally, Claimant has not even established its claims on how and when Respondent damaged or eroded any of Claimant's contract or treaty rights.

141. Compensation or damages are recognized only when there has been a deprivation of the investor's assets due to an act of the State contrary to international law. Like shown above, this is not the case. As a matter of fact, Respondent has fully proven that there has been no deprivation of Claimant's assets, contract or treaty rights, that could ever amount to an obligation of compensation. Moreover, it has also proven that there are no dues unpaid or pendant obligations towards Claimant.

1. Even If This Tribunal Considers that Claimant is Entitled to Compensation, it should conclude that the obligation was already complied and the payment done

142. Although this tribunal concludes that Respondent is obliged to any compensation, it as well has to recognize that Claimant has already been paid. Effectively, Beritech has paid Claimant's total monetary investment of US\$47 million into an escrow account, which has been made available for Claimant.¹⁴²

143. This payment is fully justified by the application of the Book Value valuation technique.¹⁴³ Being the most objective, this technique is the only one that should be applied because it is based on the available historic information consisting on expenditures incurred.¹⁴⁴ In

¹⁴² Uncontested Facts, para.12, para.13

¹⁴³ Walde, & Sabahi, p, 18

¹⁴⁴ Walde, & Sabahi, p, 18

consequence, this tribunal should reject any petition on considering speculative future projections that tend to be very easily manipulated and are likely to be infected by potential bias that could cloud the judgment of a party-appointed expert.¹⁴⁵

144. Furthermore, considering the fact that this dispute has arisen due to Claimant's breach of the confidentiality agreement, we submit that Claimant should in no case be awarded lost profits.

F. Conclusion on Merits

145. Respondent has not violated any of the standards alleged by Claimant, as a matter of fact, Respondent is entitled to rely on essential security as a defense to Claimant's claims, for which Respondent has not breached any contract nor treaty disposition. Claimant has in fact failed to prove any discriminatory measures from behalf of Respondent. Respondent's actions were lawful, appropriate, proportional, not arbitrary, nor discriminatory, neither of which violated Claimant's legitimate expectations or FET. Furthermore, Respondent has proven that there is no direct or indirect expropriation. Thus, Claimant cannot be entitled to any compensation.

¹⁴⁵ Walde, & Sabahi, p, 19

III. REQUEST FOR RELIEF

146. Respondent demands from this Tribunal to:

- a. Accept Respondent's objections to jurisdiction and find that it has no jurisdiction over this dispute.
- b. Alternatively, if it finds it has jurisdiction, the tribunal must find that it can only have jurisdiction over the treaty claims. Consequently, it must order Claimant to seek relief for its contract claims before the domestic arbitration tribunal.
- c. Alternatively, if the tribunals find it has jurisdiction over all claims, the tribunal must find that Respondent has not breached any of its obligations under the JVA, the BIT or customary international law.
- d. Declare that Claimant is not entitled to compensation
- e. Declare that Respondent has acted in good faith and in strict compliance of its obligations under the JVA, the BIT and customary law.
- f. Order Claimant to bear the costs of the arbitration including the legal fees of the Respondent's counsel.

Submitted on 19 September 2010 by

El-Erian

On Behalf of Respondent

The Republic of Beristan