# Third Annual

# Foreign Direct Investment International Moot Competition

# 22nd – 24th October 2010

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## Televative Incorporation

(Claimant)

v.

## The Government of the Republic of Beristan

(Respondent)

(ICSID Case No. ARB/X/X)

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# Counter Memorandum for Respondent

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# Statement of Facts

1. The Euphonian countries *Republic of Beristan* and the *United Federation of Opulentia* ("*Opulentia*") both have entered into the *Beristan – Opulentia Bilateral Investment Treaty* ("*BIT*") in March 1996 to foster their relationship. Its purpose is to establish favorable investment conditions between the two countries and private investors.

2. In 2007, the *Beristian* company *Beritech S.A. ("Beritech")* and the *Opulentian* company *Televative Incorporation* founded the joint venture *Sat-Connect S.A. ("Sat-Connect")* under *Beristian* law. The *Joint Venture Agreement ("JVA")* was co-signed by the Respondent as a guarantor upon *Beritech's* default. No further specific assurances on the part of Respondent were made to Claimant. The purpose of the *JVA* is to develop and deploy a satellite network in *Beristan* that may be used by *Beristian* armed forces and for civil purposes as well. Therefore, the whole *Sat-Connect* project is closely connected to Respondents national security interests.

3. *Beritech* is a telecommunication services provider established by Respondent. All telecommunication services in *Beristan* were privatized since 1996. Respondent holds 75 % of *Beritech's* shares, while private *Beristian* investors own the remaining 25 %.
   Claimant is an independent successful multinational, privately held company and a leading developer in the field of satellite communications.

4. Claimant owns a 40 % minority share in *Sat-Connect*, while *Beritech* holds a 60 % majority stake. Thereby *Beritech* has the right to appoint five members of the Board of Directors, while Claimant can appoint four. The quorum consists of six directors.

5. On 12 August 2009, the independent "Beristan Times" published an article in which a *Beristian* government official and defense analyst raised national security concerns by revealing that *Sat-Connect* had been compromised due to leaks by Claimant's seconding personnel. These concerns are shared by *Beristian* military circles and even Claimant acknowledged that it received requests by *Opulentia* to disclose confidential information.

6. On 21 August 2009, the chairman of the Board of Directors informed the directors of *Sat-Connect* about these security-related issues. The potential relevance of the Buyout Clause of the *JVA* was raised by one director and discussed among the present ones as well. All the directors were informed about the date of the next meeting. Some directors appointed by Claimant even speculated that the Buyout would be discussed.

7. On 27 August 2009, due to the substantiated risk of a likely upcoming dissemination of confidential information *Beritech* invoked Clause 8 of the *JVA* with the support of the majority of *Sat-Connect's* Board of Directors. Six directors were present at the beginning of this meeting. Despite the critical overall situation, Claimant's representatives either refused to participate or left the meeting before a common decision could be made. One of the directors appointed by Claimant later filed protest, claiming that she was not aware of the agenda, especially of the Buyout.

8. On 28 August 2009, *Beritech* served notice to Claimant informing them about their obligation to hand over all of *Sat-Connect's* equipment and to leave the facilities within 14 days. As Claimant neither responded, nor react in any way to this notice, the *Civil Works Force ("CWF"),* secured all sites and facilities of the *Sat-Connect* project, on 11 September 2009. Claimant's personnel left *Beristan* voluntarily. At this time, Claimant's total monetary investment in the *Sat-Connect* project amounted US$47 million.

9. On 19 October 2009, *Beritech* filed a request for arbitration against Claimant under Clause 17 of the *JVA*. *Beritech* immediately paid US$47 million into an escrow account, which has been made available for Claimant and is being held pending till the decision in this arbitration. Claimant both refused to accept this payment as well as to respond to *Beritech's* arbitration request.

10. Then, nine days later, on 28 October 2009, Claimant requested arbitration itself in accordance with the *International Centre for Settlement of Investment Disputes Convention ("ICSID")* Rules of Procedure for the Institution Conciliation and Arbitration Proceedings and notified Respondent.

11. Both Respondent and *Opulentia* signed and ratified the *ICSID Convention* and the *Vienna Convention on the Law of Treaties ("VCLT").* Both of them further ratified the "*New York Convention*" and they are party to the *International Covenant on Civil and Political Rights* as the *International Covenant on Economic, Social and Cultural Rights*.

# Part one: Jurisdiction of the Claim

## A. This Tribunal does not have jurisdiction over the present case

12. This Tribunal is not allowed to hear the present case in view of Article 25(1) of the *ICSID Convention* (**I**). Moreover, the proceedings initiated under Clause 17 of the *JVA* are opposed to additional proceedings (**II**).

## I. This Tribunal is not allowed to hear the present case

13. According to Article 25(1) of the *ICSID Convention* a tribunal has jurisdiction over any legal dispute between a contracting state and a national of another contracting state that arises directly out of an investment, provided that both consented to the submission to *ICSID.*

14. Firstly, Claimant's non-compliance with Art 11(1) of the *BIT* hinders this Tribunal's jurisdiction (**1**). Secondly, *Beritech* is a separate private entity, whose conduct is not attributable to Respondent (**2**).

### 1. Non-compliance with the Waiting Clause hinders this Tribunal's jurisdiction

15. The *BIT* contains several requirements that are a prerequisite to the parties' consent to arbitration. Thus, the non-compliance with the *BIT's* Waiting Clause in Article 11(1) of the *BIT* forecloses this Tribunal's jurisdiction over the present case. Waiting clauses shall encourage the parties to reach an amicable settlement through negotiations.[1] As none of the *BIT's* provisions must be construed to be meaningless (**a**) and there is still a significant chance to reach an amicable settlement (**b**), the non-compliance with the six months waiting period in Article 11(1) of the *BIT* precludes this Tribunal's jurisdiction.

*a. The Waiting Clause must not be construed to be meaningless*

16. Article 31(1) *VCLT* states that every provision in a treaty shall be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty".[2] As Respondent and *Opulentia* both ratified the *VCLT*[3], Article 11(1) of the *BIT* must be interpreted in compliance with these rules.

[1] *Schreuer*, P. 232; *Occidental v. Ecuador*, Para. 57.

[2] Article 31(1) *VCLT*.

[3] *Uncontested Facts*, No. 18.

17. The authors of the *BIT* wanted the parties to negotiate within the six months "cool down period". This obligation to search for an amicable settlement of the dispute has to be examined in close connection with the *BIT's* preamble reading that the *BIT's* purpose is to establish favorable conditions for improved economic cooperation and that offering encouragement will contribute towards stimulating business ventures.[4] Offering a possibility to resolve disputes without the need to resort to expensive international arbitration is a way of establishing and maintaining favorable investment conditions. Degrading the *BIT's* Waiting Provision to not more than a formality will lead to a misinterpretation not only of Article 11(1) but of the whole *BIT*, as the establishment of favorable conditions would not be reached.
18. The *BIT's* Waiting Clause must not be made meaningless by degrading it to a mere procedural requirement.

*b. There is a significant chance to reach an amicable solution*

19. Claimant ignored Respondent's attempts to settle the dispute amicably. Claimant is not released from its obligation to find an amicable solution, since whether an amicable settlement is reached by the *BIT's* Dispute Resolution Clause or by the *JVA's* Dispute Resolution Clause is irrelevant (**1**). Secondly, Claimant's refusal to participate in any negotiations bars this Tribunal's jurisdiction (**2**).

*1) An amicable solution of the dispute can be based on the BIT or on the JVA*

20. Since the arising dispute could have been settled amicably within the arbitration proceedings initiated by *Beritech*, it is not crucial under which agreement or contract an amicable settlement can be reached, as long as the outcome of the negotiations leads to a termination of the proceedings. In fact, both Article 11(1) of the *BIT* and Clause 17 of the *JVA* do not refer to a special negotiation procedure or even provide for certain requirements that need to be fulfilled.
21. *Beritech* served notice of its desire to settle amicably on 11 September 2009 and only proceeded with arbitration when that failed.[5] This notice is evidence of *Beritech's* desire to find a solution without unnecessarily invoking any arbitral tribunal. The dispute could have been solved by these negotiations in the same way as through the amicable settlement period provided by the *BIT*. Further, the outcome would have been the same. Consequently, Claimant's failure in responding to *Beritech's* notice divests this Tribunal's jurisdiction.

[4] Preamble of the *BIT*.

[5] *First Clarifications*, Q. 175.

*2) Non-participation in amicable consultations bars this Tribunal's jurisdiction*

22. Furthermore, Article 11(1) of the *BIT* provides that if the dispute cannot be settled amicably within six months, the dispute shall be submitted to one of the listed forums.[6] The word "cannot" in Article 11(1) shall ensure that only disputes that are unsolvable within six months become causes of action in court proceedings.

23. In *Salini v. Morocco ("Salini")*, the provision at issue provided a six months period to settle the dispute amicably. Morocco claimed that Salini did not try to settle amicably within the given time frame. By examining the parties' communications in this case, the Tribunal came to the conclusion that the requirement of the six months waiting period had been met due to Salini's writings that contained several attempts to come to an amicable solution.[7] In the present case Claimant did not even attempt to enter into negotiations. Nor did Claimant answer to *Beritech's* notice to settle the dispute amicably, neither it contacted Respondent.

24. In *Azurix v. Argentine Republic ("Azurix")*, the US – Argentine Republic Treaty also provided for a six months waiting period and that a solution for the arising dispute should be found through negotiations and consultations.[8] The Tribunal stated that the Waiting Clause were pointless if no amicable settlement could be reached.[9] Hence, it is evident that Claimant has to try to reach an amicable settlement or at least to prove that it is impossible for both parties to reach a common agreement. Again, in the present case Claimant neither tried to reach an amicable settlement nor was it impossible to come to a common agreement, as *Beritech's* willingness to settle amicably shows.

25. Claimant rejected *Beritech's* attempt to find an amicable solution although *Beritech's* behavior showed a possibility to come to an amicable solution. Therefore, Claimant's non-compliance with the waiting clause divests this Tribunal's jurisdiction.

**2. Beritech's behavior is not attributable to Respondent**

26. This Tribunal does not have jurisdiction over the present case since *Beritech's* conduct as a private entity cannot be attributed to Respondent. According to Article 25(1) of the *ICSID Convention*, *ICSID's* jurisdiction extends only to disputes between "a Contracting State" and

[6] Article 11 *BIT.*

[7] *Salini v. Morocco,* P. 614.

[8] Article VII(2),(3) *United States of America – The Argentine Republic BIT.*

[9] *Azurix v. Argentine Republic,* Para. 55.

a party of "another Contracting State".[10] Claimant's allegations that Respondent was behind the invocation of the Buyout Clause are unsubstantiated. Respondent's ownership of 75% of *Beritech's* shares and Respondent's control do not transform *Beritech* into a state-entity (**a**). Moreover, *Beritech's* activities are those of a private entity (**b**).

*a. Ownership and control do not transform Beritech into a state entity*

27. The fact that Respondent owns 75% of *Beritech's* shares does not transform *Beritech* into a state entity. In *CSOB v. Slovak Republic ("CSOB")* the Tribunal had to decide whether a company's conduct can be attributed to a state. Although 65% CSOB's shares were owned by the Czech Republic and this majority gave absolute control over CSOB, the Tribunal found that the mere fact that Claimant was a state-owned company could not be seen as an indication for CSOB's nature as a state entity and therefore also demanded a functional test.[11] Ownership and control solely cannot be seen as an indication for *Beritech's* nature as a state entity without taking *Beritech's* function into account.

28. In *Maffezini v. Spain ("Maffezini")*, the Kingdom of Spain established a company called SODIGA through the National Institute of Industry. At the beginning of the *ICSID* proceedings, Spain and some of Spain's state entities owned over 88% of SODIGA's shares. Although it was undisputed that SODIGA was owned and controlled by the state, the Tribunal held that "…the intent of a state to create a corporate entity which is intended to operate in the private sector, even if state owned, is not sufficient to raise the presumption of being a state entity."[12] This case is comparable to the one at hand: Respondent established *Beritech* in March 2007 and owns a 75% majority stake in it. As SODIGA in *Maffezini*, *Beritech*, as a telecommunications provider, is intended to operate in the private sector. Following the Tribunal's decision in *Maffezini*, an additional functional test is required to determine whether *Beritech's* conduct can be attributed to Respondent.

*b. Beritech does not perform activities of a public nature*

29. The functional test reveals that *Beritech* is a state owned but solely commercial enterprise, not exercising any governmental functions. Thus *Beritech's* conduct cannot be attributed to Respondent

[10] Article 25(1) *ICSID Convention.*

[11] *CSOB v. Slovak Republic*, P. 257 *et seq.*

[12] *Maffezini v. Spain*, P. 31.

30. In *CSOB* the Czech Republic held 65% of the shares of a bank called CSOB. The Czech Republic stated that CSOB was no proper claimant according to Article 25(1) of the *ICSID Convention*, since the 65% ownership of the Czech Republic would deprive the entity of the possibility to be a "national of another Contracting State" in view of *ICSID.*
31. The Tribunal entered into the examination of CSOB's function and came to the conclusions that CSOB exercised several banking transactions on behalf of the Czech Republic.[13] Nevertheless, the Tribunal determined that this fact did not lead to a clear finding that CSOB exercised governmental functions. The focus would have to be on the nature of the activities in question rather than on their purpose.[14] Similarly, a leading authority on *ICSID* held that a mixed economy company's or government-owned corporation's conduct should only be attributed to the state itself as long as it is acting as an agent for the government or is discharging an essentially governmental function.[15]
32. The Tribunal in *CSOB* found that financial transactions on behalf of a state rather commercial then governmental. CSOB was classified as a state-owned but commercial entity and not as a state-entity.
33. *Beritech* is a telecommunications services provider, established under *Beristian* law. Its scope is not restricted to the activities of the *JVA.*[16] In contrast to CSOB, *Beritech* does not even act on behalf of Respondent and must be considered independent in view of its business activities. This fact is an indication for *Beritech's* nature as a state owned but merely commercial entity. Additionally, as a telecommunications services provider, *Beritech* is subject to the *Beristan Telecommunications Act of 1996* which was passed in view of the privatization of telecommunications services in *Beristan.*[17] Therefore providing telecommunication services is of a commercial nature rather than of a governmental one. *Beritech's* actions are not attributable to Respondent.

[13] *CSOB v. Slovak Republic*, P. 258.

[14] *Ibid.*, P. 259.

[15] *Broches*, P. 355; *Maffezini v. Spain*, P. 29 *et seq*.

[16] *First Clarifications*, Q. 161.

[17] *First Clarifications*, Q. 166.

## II. Solely the JVA's Forum Selection Clause applies to the present case

34. Furthermore, the *JVA's* Forum Selection Clause refers all disputes arising out of the *JVA* to *Beristian* arbitration tribunals and insofar excludes *ICSID* arbitration, since Claimant's claims are contractual in nature. *ICSID* tribunals came to the conclusion that the applicability of a forum selection clause depends on the nature of the claims. Contractual claims shall be litigated through the Dispute Settlement Provision in question, while only treaty claims can be litigated before an *ICSID* tribunal.[18]

35. The characterization of a claim as treaty or contractual claim depends on how the claims are put forward since a treaty cause of action is not the same as a contractual cause of action. Claimant has to show which conducts are in the circumstances contrary to the treaty standard.[19] Contractual claims arise directly out of a contract between two parties, whereas treaty claims are characterized by arising out of specific treaty provisions.

36. In *AES v. Argentine Republic ("AES")*, the Tribunal held that it did not have jurisdiction over any breach of a concession contract, as long as the breach of the concession contract at the same time did not result in a violation under the treaty. Thus a consideration whether the claims are treaty or contractual claims is essential.

37. As shown above, *Beritech's* actions cannot be attributed to Respondent as it is not a state entity and does not perform activities of a public nature.[20] However, as an independent company, *Beritech* is not party to the *BIT*. There is no possibility to hold it liable for any alleged breaches of the *BIT's* standards. These provisions, which apply in investor-state disputes, simply do not apply to the case at hand.

38. *Beritech's* payment of US$47 million was determined by Clause 8 of the *JVA.* Claimant knew and agreed that the adequate price for his shares was calculated in advance. The question whether this payment is adequate is contractual in nature, as the source of right for the payment is laid down in the *JVA.* Further, the removal of Claimants seconded personnel through the *CWF* only happened in consequence of Claimant's refusal to hand over *Beritech's* possessions. In fact, the *CWF* only executed *Beritech's* rights under the *JVA* to ensure that *Beritech* can use and possess its property. If this process or the usage of the Buyout Provision was unlawful, is again a question of domestic law and *Beristian* arbitral tribunals.

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[18] *AES v. Argentine Republic*, P. 30 *et seq*.; *Sempra v. Argentine Republic*, P. 33 *et seq*.; *Siemens v. Argentine Republic*, P. 73.

[19] *Siemens v. Argentine Republic*, P. 73.

[20] *Counter Memorandum for Respondent*, P. 6-8.

39. Not least, Claimant agreed to the last sentence of Clause 17 of the *JVA*: "Each party waives any objection which it may have now or hereafter to [*Beristian*] arbitration proceedings and irrevocably submits to the jurisdiction of the arbitral tribunal constituted for any such dispute." Claimant knew that it entered into a contract with an independent and privatized company which must be sued under domestic law and in front of the *Beristian* arbitral tribunals.
40. Concluding, as Claimant's claims against *Beritech* are contractual in nature, this Tribunal is requested to decline its jurisdiction over the present case again.

## B. The Umbrella Clause does not establish this Tribunal's jurisdiction

41. Claimant's attempts to invoke the Umbrella Clause contained in Article 10 of the *BIT* must fail. First of all, Respondent is not a party to the *JVA* and therefore has no duty to observe any obligation (**I**). Alternatively, the Umbrella Clause's scope does not cover the dispute at hand (**II**).

### I. Respondent had no duty to observe any obligations

42. Respondent cannot be held liable for any contractual breaches since Respondent acted as guarantor for *Beritech's* obligations upon its default only.[21] Respondent is not a party to the *JVA* and further made no other specific assurances to Claimant.[22] Therefore, the *JVA* solely was contracted between Claimant and *Beritech*. The Umbrella Clause's wording read in connection with Article 25(1) of *ICSID* does not establish *ICSID* jurisdiction over commercial disputes between private entities (**a**). Secondly, case law shows that commercial claims between private entities are not admissible before an *ICSID* tribunal (**b**).

#### 1. ICSID must not hear commercial disputes between private entities

43. The *ICSID Convention* is the only framework admissible to questions concerning the procedural rules of *ICSID* proceedings. Its Article 25(1) states that *ICSID's* jurisdiction extends to any legal dispute arising out of an investment between a contracting state and a national of another contracting state. Additionally, the *ICSID Convention* provides jurisdiction over disputes between a national of a contracting state and any constituent subdivision or agency of another contracting state designated to *ICSID*. Both variants do not apply in the present case since *Beritech* is a private entity, not acting on behalf of the state and not being a subdivision

[21] *First Clarifications,* Q. 152.

[22] *Second Clarifications,* Q. 253.

or agency designated to *ICSID*. Consequently, this Tribunal does not have jurisdiction over a merely commercial dispute between private entities.

44. Even the *BIT's* Umbrella Clause's wording strengthens this fact, as the Umbrella Clause shall ensure that a state respects all obligations it has entered into with regard to investments in its territory. *Beritech* as a private entity is not a party to the *BIT*. Construing the Umbrella Clause as a relevant dispute resolution provision for commercial disputes between two private companies would render the whole *ICSID* framework meaningless and giving investors the right to sue a state for every alleged breach of contract of a company in its territory would open the floodgates for numerous complaints that would not be within Respondent's sphere. It is within the nature of an *ICSID* tribunal that it cannot rule on commercial disputes between two private entities.

45. The mere fact that Respondent co-signed the *JVA* as a guarantor for *Beritech's* monetary obligations does not establish *ICSID* jurisdiction over the dispute at hand. Respondent's co-signature does not elevate Respondent to being a party to the contract itself. Therefore, this Tribunal does not have jurisdiction over the present case.

**2. Only the parties to a contract have to observe the specific obligations**

46. The duty to observe specific contractual obligations only applies to the parties of a contract. As Respondent is not a party to the *JVA*, it does not have to observe any contractual obligations.

47. In *Salini*, the private Italian entities Salini and Italstrade entered into a concession contract with the Moroccan company ADM for the construction of a highway in Morocco. ADM itself had entered into a contract with entity acting on behalf of the state. Salini alleged a breach of contract and a violation of the Treaty.[23] Although the Treaty did not provide an umbrella clause, the Tribunal came to an essential conclusion on the question, whether the breach of a contract by a private corporation can be claimed under a treaty's dispute resolution provision. The Dispute Resolution Clause of the Treaty read that all disputes or differences shall be resolved amicably and failing that – be submitted to *ICSID*. The Tribunal analyzed the wording of the Treaty and held that contractual claims were not excluded from its jurisdiction, but the scope of application was limited to the concerned parties, *id est* the state and the injured party.[24]

[23] *Italy – Morocco BIT.*

[24] *Salini v. Morocco,* Para. 61.

48. Like ADM in *Salini, Beritech* is a merely commercial entity. The fact that Respondent owns 75% of *Beritech's* shares is irrelevant in view of the functional test exercised above.[25] Since Claimant entered into a joint venture agreement with a private and independent company, Respondent has no duty to observe any obligations.

49. A similar question occurred in *Azurix*. The private corporation Azurix sued the Argentine Republic under the US – Argentine Republic Treaty for non-compliance with a contract between Azurix' Argentine subsidiary ABA and the Province of Buenos Aires. The Tribunal came to the conclusion that Argentina had no obligation to comply with this contract, as it was not a party to it. Additionally, the Tribunal held that even if the Province's behavior could be attributed to the Argentine Republic there would still not be a contract with Argentina itself and therefore *ICSID* could not have jurisdiction over this case.[26]

50. Similarly, Respondent did not enter into a contract with Claimant. Only *Beritech* as a separate legal entity is a party to the *JVA* while Respondent co-signed the *JVA* solely as a guarantor for *Beritech's* monetary obligations. Consequently, Respondent cannot be held liable under the *BIT's* Umbrella Clause.

## II. The Umbrella Clause does not cover Claimant's Contractual Claims

51. Even if Respondent would have a duty to observe any obligations, the Umbrella Clause of the *BIT* does not cover Claimant's Contractual Claims. Umbrella clauses shall guarantee the host state's observance of contracts entered into with an investor from another contracting state.[27] However, an umbrella clause must not be construed to elevate every breach of a contract by an entity to a breach of a treaty. As numerous tribunals held, the admissibility of contractual claims depends on the scope of the specific umbrella clause.[28] In the present case, the Umbrella Clause's scope does not cover Claimant's Contractual Claims. The inaccuracy of the Umbrella Clause prevents Claimant from litigating its Contractual Claims in front of an *ICSID* tribunal (**1**). Additionally, a broad interpretation of the Umbrella Clause would render several other *BIT* Provisions meaningless (**2**). A broad interpretation would even render the *JVA's* Dispute Resolution Provision meaningless (**3**).

[25] *Memorandum for Respondent*, P. 7-8.

[26] *Azurix v. Argentine Republic*.

[27] *Dolzer&Schreuer*, P. 153.

[28] *CMS v. Argentine Republic, Award*, Para. 299; *El Paso v. Argentine Republic*, Para. 66 *et seq*.; *Joy Mining v. Egypt*, Para. 81; *SGS v. Pakistan*, Para. 162 *et seq*.

### 1. The Umbrella Clause is too inaccurate to cover contractual claims

52. The *BIT's* Umbrella Clause obliges Respondent to constantly guarantee the observance of any obligation it has assumed with regard to investments. The word "obligation" has several different meanings. None of these meanings are meant to be an indication for a purely contractual obligation to be within the Umbrella Clause's scope of application. Therefore, construing "obligation" to mean any possible obligation a state can assume, would lead to uncountable varieties to sue a state in front of an *ICSID* tribunal.

53. This interpretation is supported by the Tribunal's findings in *SGS v. Pakistan ("SGS")*. In this case, the Tribunal had to decide whether the breach of a commercial contract could become a breach of a treaty by invoking the Switzerland – Pakistan BIT's Umbrella Clause. The Umbrella Clause stated that either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to investments.[29] The Tribunal examined the Umbrella Clause's wording and came to the conclusion that the Umbrella Clause does not elevate any breach of contract to a breach of the Treaty since the word "commitment" was not specific enough, as it not only refers to contractual commitments and therefore would open the floodgates for numerous *ICSID* proceedings based on every little breach of duty by a state.[30] An interpretation in such a broad way without evidence that the Contracting States wanted to give this specific meaning to this provision would be wrong, as it would massively affect a state's sovereignty to change its municipal or administrative laws.[31]

54. Although the wording in the *BIT* is slightly different by referring to any obligation instead of any commitment, the outcome is the same. The word "obligation" is not specific enough as it does not solely refer to contractual obligations of the host state. Therefore, construing the Umbrella Clause of the *BIT* to mean all kinds of obligations would be an intervention into Respondent's sovereignty since every change in a host state's legislation could then lead to *ICSID* proceedings. An interpretation in such a broad way without evidence that the Contracting States wanted to give this specific meaning to this provision would be wrong. Additionally, in contrast to the case in *SGS* where the State was a contracting party, Respondent is not party to the *JVA.* Therefore, contractual claims must not be covered by the Umbrella Clause of the *BIT* in the present case more than ever.

[29] Article 8 *Switzerland – Islamic Republic of Pakistan*.

[30] *SGS v. Pakistan*, Para. 167-168.

[31] *Ibid.*, Para. 166.

55. The Tribunal in *Joy Mining v. Egypt ("Joy Mining")* came to a similar conclusion by examining Article 2(2) of the United Kingdom – Egypt Treaty, which read that each Contracting Party shall observe any obligation it may have entered into with regard to investments.[32] It was held that an umbrella clause could not have the effect of transforming all contract disputes into investment disputes under the Treaty. Contractual claims should only become treaty claims under an umbrella clause if there was a clear violation of treaty rights or such a massive violation of contract rights as to trigger the treaty protection.[33] Both the Umbrella Clause in *Joy Mining* and the one of the *BIT* are referring to obligations in general and not to contractual obligations in particular. Hence, Respondent must not be sued under the *BIT's* Umbrella Clause, as the breach of a merely commercial contract is no violation of the *BIT's* rights and as the violation of contract rights would not be of such a magnitude as to trigger the Treaty protection. Claimant's claims are not within the scope of Article 10 of the *BIT*.

**2. No provision of the BIT must be rendered meaningless**

56. Interpreting the Umbrella Clause of the *BIT* broadly and allowing Claimant to litigate the dispute at hand in front of an *ICSID* tribunal would render several other *BIT* provisions meaningless. Especially Article 2(2) of the *BIT* and Article 4 of the *BIT* would be irrelevant, when every minor breach of contract would already be sufficient to initiate *ICSID* proceedings. Undermining these substantive treaty standards cannot have been within the intention of the Contracting Parties and thus, it is advisable to interpret the Umbrella Clause in a narrower way.

57. The Tribunal in *SGS* came to a similar conclusion. It held that *ICSID* jurisdiction shall only apply to a treaty's substantive standards. Otherwise claimants could arbitrarily submit every dispute to *ICSID* jurisdiction without showing which particular treaty standards have been violated.[34] Interpreting the Umbrella Clause of the *BIT* in a way that elevates every contractual claim to a claim under the *BIT* would leave the specific protection standards meaningless. This could not have been the intention of the Contracting Parties. Thus, the Umbrella Clause must be construed in a narrow way, not elevating claims from a commercial contract to treaty claims.

[32] Article 2(2) *United Kingdom – The Arab Republic of Egypt BIT*.

[33] *Joy Mining v. Egypt*, Para. 81.

[34] *SGS v. Pakistan*, Para. 168.

58. Another tribunal confronted with the meaning of an umbrella clause was the Tribunal in the *El Paso v. Argentine Republic ("El Paso")* case. By critically examining the decision in *SGS* and analyzing the Umbrella Clause in the US – Argentine Republic Treaty the Tribunal came to a similar conclusion. It held that an extensive interpretation of the Umbrella Clause would render the whole treaty completely useless, as the only relevant provision would be the Umbrella Clause and not the substantive treaty standards.[35] As the Umbrella Clause reads that each party shall observe any obligation it may have entered into with regard to investments[36] the formulation is comparable with the one in the *BIT* at hand. Therefore, in the present case an extensive interpretation of the Umbrella Clause would lead to the same problem, rendering the *BIT's* substantive provisions useless. Concluding, the Umbrella Clause must not cover Claimant's Contractual Claims.

**3. The JVA's Dispute Resolution Provision must not be rendered meaningless**

59. Establishing *ICSID* jurisdiction over Claimant's Contractual Claims under the *BIT's* Umbrella Clause would render alternative dispute resolution provisions and forum selection clauses of commercial contracts meaningless. By doing so, the benefits of a dispute resolution provision would only apply in favor of the investor. Investors could always invoke a treaty's dispute resolution provision and could submit already settled proceedings in accordance with the forum selection clause of a contract to *ICSID* to modify the outcome of these proceedings.

60. Similarly, the Tribunal in *SGS* which came to the conclusion that umbrella clauses should be read in a way as to enhance mutuality and balance of benefits in the interrelation of different agreements.[37] In view of the comparable cases and in view of the *BIT's* purpose to establish favorable conditions for improved economic cooperation[38] it is counterproductive to render the *JVA's* Dispute Resolution Clause meaningless in favor of the *BIT's* Umbrella Clause. Again, the Umbrella Clause must not cover Claimant's Contractual Claims.

[35] *El Paso v. Argentine Republic*, Para. 76.

[36] Article II (2) (c) *United States of America – The Argentine Republic BIT*.

[37] *SGS v. Pakistan*, Para. 168.

[38] Preamble of the *BIT*.

## C. Conclusion on Jurisdiction

61. For the foregoing reasons, Claimant may not sue Respondent in front of this Tribunal since *Beritech's* actions are not attributable to Respondent. Additionally, this Tribunal does not have jurisdiction in view of Clause 17 of the *JVA*. Further, it does not have jurisdiction over Claimant's Contractual Claims arising under the *JVA* by virtue of Article 10 of the *BIT*.

# Part two: Merits of the Claim

62. Even if this Tribunal might have jurisdiction over the case, Respondent would not have committed an internationally wrongful act for the following reasons: Respondent did not materially breach the *JVA* (**A**). Secondly, its actions neither violated the *FET* Standard, nor did they amount to discrimination or an expropriation (**B**). Finally and in any case, Respondent is entitled to rely on the Essential Security ("*ES*") Provision of the *BIT* as a defense to Claimant's Claims (**C**).

## A. Respondent did not materially breach the JVA

63. Respondent did not materially breach the *JVA*, as it is not responsible for any of *Beritech's* actions since the prerequisites of the applicable *International Law Commission Articles on State Responsibility* ("*ILC Articles"*) are not fulfilled (**I**). Therefore Respondent did not prevent Claimant from completing its contractual duties and did not improperly invoke Clause 8 of the *JVA.* Moreover, *Beritech* was entitled to rely on the Buyout Provision of the *JVA* (**II**).

### I. Beritech's actions are not attributable to Respondent

64. Claimant falsely accuses Respondent to be responsible for *Beritech's* decision to rely on the Buyout Provision (Clause 8) of the *JVA*. It is a general principle of international procedure that the Claimant has to prove the conditions required to establish the claim.[39] In *AAPL v. Sri Lanka* the Tribunal considered this to be one of the "established international law rules", relying on *Bin Cheng*[40] and the supporting authorities referred to therein.[41] Thus, Claimant has the burden of proof for the conditions required in the *ILC Articles* to establish its allegations. Claimant cannot meet its burden of proof, since Respondent neither pushed *Beritech* to buyout Claimant's interest in the Joint Venture, nor are *Beritech's* actions attributable to Respondent.

[39] *Tradex v. Albania*, Para. 74.

[40] *Cheng*, P. 327

[41] *AAPL v. Sri Lanka*, Para. 56.

65. According to the *ILC Articles* the only conduct attributable to a state on the international level is conduct of state organs, exercising state powers, or of persons or groups of persons acting on behalf of the state. The *ILC's Articles* are applicable (**1**). However, none of its prerequisites are fulfilled (**2**).

**1. The ILC Articles are applicable and prevailing**

66. The *ILC Articles* apply to both states and non-state parties and cover both treaty and non-treaty obligations.[42] Since their adoption by the *International Law Commission* ("*ILC*") in 2001, the *ILC Articles* have been recognized as the most authoritative statement of the international law standard as to when actions are attributable to a state.[43] Even before their finalization, the *International Court of Justice* ("*ICJ*") relied on a previous draft in 1997.[44] Furthermore, the *ILC Articles* have been relied upon by international tribunals, constituted to address investor-state disputes concerning the question of whether to attribute an entity's conduct to the state or not.[45] Since the present case deals with an issue whether an action of *Beritech* is attributable to Respondent, the *ILC Articles* are applicable and prevailing.

**2. The ILC Articles' prerequisites are not fulfilled**

67. *Beritech's* actions cannot be attributed to Respondent in light of the *ILC Articles* since *Beritech* is not a state organ of Respondent (**a**) and it is not empowered to exercise governmental authority (**b**). Finally, Respondent neither instructed *Beritech*, nor did it direct or control *Beritech* to invoke the Buyout Provision (**c**).

*a. Beritech is not a state organ of Respondent*

68. *Beritech* does not qualify as a state organ when applying Article 4 of the *ILC Articles*. Even though the term "State organ" is not defined, the *Commentary to the ILC Articles* ("*Commentary*") states that the reference to a "State organ" covers all the individual or collective entities which make up the organization of the state and act on its behalf.[46] It is particularly necessary to recall that international law acknowledges the general separateness of corporate entities on

[42] *Hobér*, P. 553.

[43] *Hobér*, P. 550, 554.

[44] *Gabcíkovo-Nagymaros Project*, Para. 47.

[45] *ADF v. US*, Para. 166; *Eureko B.V. v. Poland*, Para. 129.

[46] *Ibid.*, Article 4, Commentary 1.

the national level.[47] State ownership is not sufficient to constitute a state organ, as a state may be a shareholder in a private law company as well.[48] This view was affirmed by the Tribunals in *CSOB* and *Maffezini*.[49]

69. In fact, telecommunication services in *Beristan* were privatized due to the *Telecommunication Act* of 1996. Unlike in *CSOB,* where the entity in question acted on behalf the Slovak Republic[50], *Beritech* as a telecommunications services provider operates under its own command in the private sector, on behalf of several investors rather than the State as a whole. The *Minister of Telecommunications'* participation in *Beritech's* Board of Directors is no evidence that *Beritech* is state-controlled or acts on behalf of a state ministry's direction. Rather, the *Minister* solely acts in a private capacity. *Beritech* as an independent and solely commercial company is not part of the State infrastructure as it does not perform public functions. Thus, *Beritech* cannot be considered a state organ for purposes of attribution.

*b. Beritech does not exercise governmental authority*

70. Since Respondent's internal law does not empower *Beritech* to exercise governmental authority (**1**), its actions are not attributable to Respondent. Alternatively *Beritech's* actions may not be characterized as "governmental" (**2**).

*1) Respondent's internal law does not empower Beritech to exercise governmental authority*

71. Even under Article 5 of the *ILC Articles,* the existence of a greater or lesser state participation or the ownership of company's assets is not a decisive criterion for the purpose of attribution of the entity's conduct to the state.[51] Instead, Article 5 refers to the basic circumstance that an entity might be empowered to exercise specific elements of governmental authority by internal law. Its formulation, "empowered by the law of that State"[52], limits itself to these cases.[53] Indeed, there is no indication that *Beritech* is explicitly empowered to exercise elements of Respondent's governmental authority by *Beristian* law.

[47] *Ibid.*, Article 8, Commentary 6.

[48] *Smutny,* P. 35.

[49] *CSOB v. Slovak Republic*, P. 257 *et seq.*; *Maffezini v. Spain,* Para. 84.

[50] *CSOB v. Slovak Republic*, P. 258.

[51] Article 5, Commentary 3 *ILC Articles.*

[52] *Ibid.*, Article 5.

[53] *Ibid.*, Article 5, Commentary 7.

*2) Alternatively, Beritech's actions may not be characterized as "governmental"*

72. Article 5 of the *ILC Articles* does not provide a definition of "governmental authority". However, as pointed out in the *Commentary*, the precise and detailed definition of what can be regarded as "governmental authority" will depend on the history and tradition of the state in question.[54]

73. Again, since telecommunication services in *Beristan* were privatized in 1996[55], providing these services cannot be regarded as "governmental" or as an exercise of "state authority" in *Beristan* anymore. Rather than being a part of the *Sat-Connect* project, *Beritech's* purpose is mainly to provide telecommunication services. Its mission statement and bylaws do not restrict its scope of activities to the *JVA*.[56]

74. Even the circumstance that *Sat-Connect's* developed satellite system will provide secure telecommunications services for military beside civilian purposes[57] cannot attest the execution of public powers. Originally, there was no intention that any particular "proportion" of the *Sat-Connect* project was to be used by *Beristian* armed forces[58], and still questions have been raised about the suitability of the system for military purposes.[59] Respondent's guarantee for *Beritech's* monetary obligations upon *Beritech's* default is not sufficient to characterize *Beritech's* actions as "governmental".

*c. Respondent neither instructed nor directed or controlled Beritech*

75. In any case, *Beritech's* decision to buy out Claimant's interest in the *Sat-Connect* project is not attributable to Respondent under Article 8 of the *ILC Articles* since *Beritech* neither acted on behalf Respondent's instructions (**1**), nor was it acting under Respondent's direction or control when invoking the Buyout Provision (**2**).

[54] *Ibid.*, Article 5, Commentary 6.

[55] *First Clarifications*, Q. 166.

[56] *First Clarifications*, Q. 161.

[57] *First Clarifications*, Q. 178.

[58] *First Clarifications*, Q. 121.

[59] *First Clarifications*, Q. 178.

*1) Respondent did not instruct Beritech to invoke the Buyout Clause*

76. Respondent did not instruct or encourage *Beritech* to buy out Claimant's interest in *Sat-Connect* (**a**), and even if *Beritech* felt encouraged by the *Beristian* government, its actions would not be attributable to Respondent (**b**).

*a) The Beristian government did not instruct or encourage Beritech*

77. All actions of *Beritech* were products of its own decisions and are not attributable to Respondent. The fact that a *Beristian* government official raised national security concerns due to highly probable leaks by Claimant's seconded personnel is not sufficient to assume that *Beritech* acted on the "instruction" or "encouragement" of Respondent. To mention government's misgivings is a natural part and task of a working and healthy republic. Instead of to "instruct" or to "encourage" any corporation to take any action, Respondent's government just fulfilled its duties towards *Beristian* citizens. It neither instructed nor encouraged *Beritech* to invoke the Buyout Clause of the *JVA* or authorized any action.

*b) Even if Beritech felt encouraged by the Beristian government, its actions are not attributable to Respondent*

78. In *Tradex v. Albania* ("*Tradex*") villagers occupied a farm owned by a Joint Venture in which a foreign investor participated. The Tribunal found that the villagers' actions could not be attributed to the State since the villagers were not acting on the direction of the Albanian government notwithstanding certain decisions of the government and conduct of government officials. According to the Tribunal the villagers merely acted in their own interest. Even if they felt encouraged by the government to occupy the farm, this "would not be a sufficient basis" to demonstrate that the government ordered the occupation. [60]

79. In the present case the usage of the Buyout Provision of the *JVA* occurred as a result of decisions by *Beritech* itself, not the *Beristian* government. *Beritech* acted on its own initiative, as its own entity, to further its goal of protecting confidential information. Even if *Beritech* felt encouraged by the *Beristian* official, according to the *Tradex* analysis this is not sufficient to demonstrate that Respondent ordered the Buyout. Thus, *Beritech's* actions are not attributable to Respondent, even if the *Beristian* government offered encouragement, which it did not.

[60] *Tradex v. Albania*, Para. 165.

*2) Beritech did not act under the direction or control of Respondent*

80. As mentioned above[61], the fact that a state initially establishes a corporate entity is not a sufficient basis for the attribution to the state of the subsequent conduct of that entity as decided in several cases.[62] In fact, the conduct of a "state-established" private law company which is not acting with delegated public law authority *prima facie* is private conduct.[63] Even corporate entities owned by and in that sense subject to the "control" of the state are considered to be separate, and their conduct in carrying out their activities is not attributable to the state, unless they are exercising elements of governmental authority within the meaning of Article 5 of the *ILC Articles*.[64]

81. However, *Beritech* as an independent telecommunication services provider in *Beristan* did not exercise public powers.[65] Respondent did not use its ownership interest in *Beritech* specifically in order to enforce the Buyout as well. Therefore, *Beritech's* actions have to be regarded as its independent decisions and its actions may not be attributed to Respondent under the *ILC Articles*.

## II. The Buyout of Claimant's interest was justified

82. Even if *Beritech's* actions were attributable to Respondent, its conduct would be no material breach of the *JVA*. Instead, Claimant materially breached the Agreement (**1**). Therefore, *Beritech* was entitled to invoke the Buyout Provision of the *JVA* (**2**).

### 1. Claimant materially breached the *JVA*

83. Clause 4(4) of the *JVA* states that any breach of the Confidentiality Provision shall be deemed a material breach of the *JVA*. There was the substantiated risk that Claimant's seconded personnel likely would leak confidential information about the *Sat-Connect* project to the Government of *Opulentia*, if not already happened (**a**). Therefore Claimant breached the Confidentiality Clause and thus, materially breached the *JVA*. Additionally, none of the exceptions to the Confidentiality Provision would apply (**b**).

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[61] *Counter Memorandum for Respondent*, P. 7.

[62] *Eastman* v. *Iran*, P. 153; *Otis* v. *Iran*, P. 283; *Schering* v. *Iran*, P. 361.

[63] Article 8, Commentary 6 *ILC Articles*.

[64] *Ibid.*, Article 8, Commentary 6.

[65] *Counter Memorandum for Respondent*, P. 6-8, 19.

*a. Claimant's personnel likely would have leaked confidential information*

84. A substantiated risk that confidential information are likely to be disclosed by Claimant is sufficient to assume a breach of the Confidentiality Provision. This is due to the fact that in the event of such a risk, it is irresponsible and unreasonable to wait until confidential information finally would be disseminated. As *Sat-Connect's* confidential information must stay confidential in any case, every possibility to prevent its dissemination has to be taken. It cannot be expected from Respondent that it stays inactive, although it knows that a disclosure is likely to happen.

85. Additionally, if it was required to wait until confidential information of the *Sat-Connect* project were disclosed, the protection the Confidentiality Provision of the *JVA* offers would be rendered meaningless. Once confidential information got to the public domain or foreign governments, there is no way to get them back or to compensate the damage that would occur. This would be contrary to the rule of *effet utile* under which a provision has to be construed in the most effective way. In fact, there was the substantiated risk that, if not already happened, Claimant's seconded personnel likely would disseminate confidential information and therefore, Claimant breached the Confidentiality Provision.

86. Regarding that there are more and more foreign laws compelling disclosure of confidential information to national security services, a highly placed *Beristian* government official and defense analyst indicated that in fact there have been leaks not only involving encryption keys, but also concerning the technology, systems and intellectual property of the *Sat-Connect* project.[66] These concerns were shared by *Beristian* military circles.[67] Earlier in 2009, Claimant has been one of three *Opulentian* technology firms from which *Opulentian* government authorities have been alleged to have received access to civilian encryption keys.[68] It is very likely that, as an *Euphonian* country[69], *Opulentia* has great interest in getting confidential information about a satellite system that can provide connectivity and communications anywhere within *Euphonia.*[70] In fact, Claimant acknowledged that it received requests to disclose

[66] *First Clarifications,* Q. 178, *Uncontested Facts,* No. 8.

[67] *Second Clarifications,* Q. 231.

[68] *First Clarifications,* Q. 178.

[69] *First Clarifications,* Q. 146, 141, 126.

[70] *Uncontested Facts,* No. 5.

confidential information.[71] As even *Opulentian* legal scholars have been divided on whether legislation enacted subsequent the leak out of the disclosure will stop abuses or simply give them legal cover[72], it was highly probable that *Sat-Connect's* confidential information were endangered. In this ambience of insecurity, it would have been irresponsible and unreasonable in view of the confidentiality of Sat-Connect's encryption keys and information not to rely on the protection of the Confidentiality Clause of the *JVA*. Therefore, due to this substantiated risk of an upcoming dissemination, *Beritech* had to act and to rely on the Buyout Provision.

*b. None of the exceptions to the Confidentiality Provision would apply*

87. Moreover, none of the exceptions to the Confidentiality Clause would apply. The information in question would not properly come into the public domain as especially the encryption technology is meant to be confidential and shall not get to the *Opulentian* government. The fact that it was publicly known that the system was being developed and the *Sat-Connect* project was interested in selling services and licensing technology to other companies and governments in the region[73] does not change the confidential status of the information. Even if technologies and systems are licensed to other companies and states, highly confidential information like military encryption keys will not be transmitted. Furthermore, in contrast to being required by law, the dissemination of this information would be most undesired and would violate essential national security and defense issues. Instead of being necessary, the substantiated risk of an upcoming dissemination materially breached the *JVA*.

**2. Beritech was entitled to rely on the Buyout Provision**

88. *Beritech's* decision to use the Buyout Provision was not only materially lawful but also supported by the majority of the board of directors. *Mrs. Sharpeton's* decision to leave the meeting before its end was solely due to her attempt to sabotage the board of directors meeting and thereby to support Claimant's espionage. Likewise, some other directors appointed by Claimant decided not to attend the meeting and thus deprive it of the necessary quorum although they knew that the Buyout Provision could be subject of the meeting.[74] It is not acceptable that *Mrs. Sharpeton* tried to reverse the legal decision of the *Sat-Connect* board of directors for the reason that she allegedly had no prior notice concerning the precise agenda

[71] *First Clarifications*, Q. 178.

[72] *Ibid.*

[73] *First Clarifications,* Q. 148.

[74] *Second Clarifications,* Q. 208.

for the meeting, since there was a prior notice (**a**). However, it is of no effect that she by leaving tried to prevent the board of directors from coming to a democratic conclusion (**b**).

*a. There was a prior notice for the meeting on 21 August 2009*

89. Contrary to *Mrs. Sharpeton's* allegations there was a prior notice for the meeting on 21 August 2009. Six days before the meeting in question, the chairman of the *Sat-Connect* board of directors made a presentation to all directors[75] in which he discussed the accusations that had come up.[76] This is reflected by the minutes of this meeting, which further states that the potential relevance of the Buyout Clause of the *JVA* was raised by one director and discussed among the present ones as well.[77] Thus, none of the directors was without a clue about the incidents and their possible consequences. Some directors appointed by Claimant even speculated that the Buyout would be discussed.[78] Additionally, all the directors were informed about the date of the next meeting[79] and therefore, everyone – including *Mrs. Sharpeton* – was able to form an own opinion. *Mrs. Sharpeton's* behavior therefore cannot be protected.

*b. However, Mrs. Sharpeton's leaving is of no effect for the quorum*

90. Although a quorum is required at the moment of the voting[80], neither *Beristian* law nor *Sat-Connect's* bylaws regulate the loss of quorum once established.[81] This is an indication that once a quorum has been established, it cannot be lost during a meeting. It is the individual and independent decision of every director whether to leave a meeting before its end or not, but he has to take into account that leaving a meeting is of no effect for the existence of the quorum once established. Otherwise there would be no way to prevent directors from arbitrarily sabotaging the Board of Directors meetings when they fear to be outvoted. As the quorum of six directors for a valid decision has been established at the beginning of the concerning meeting[82] and as it did not cease to exist, the decision of *Sat-Connect's* Board of Directors was valid.

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[75] *First Clarifications,* Q. 140, 127.

[76] *Uncontested Facts,* No. 9.

[77] *First Clarifications,* Q. 169.

[78] *Second Clarifications,* Q. 208.

[79] *Second Clarifications,* Q. 208.

[80] *Second Clarifications,* Q. 200.

[81] *Second Clarifications,* Q. 255.

[82] *Uncontested Facts,* No. 10.

91. Consequently, Respondent did not materially breach the *JVA* as it did not prevent Claimant from completing its contractual duties and did not improperly invoke the Buyout Clause of the *JVA*. The lawful usage of this Provision was solely *Beritech's* decision as an independent corporation. *Beritech* was entitled to rely on the Buyout Clause in the *JVA*.

## B. Respondent's actions did not violate any of the BIT's standards

92. Respondent is not responsible for any of *Beritech's* actions.[83] In any case, even if Respondent should be held liable for *Beritech's* actions in general, none of its actions towards Claimant violated general international law or applicable treaties. Respondent's actions neither amounted to a violation of the *FET* Standard (**I**), nor did they amount to discrimination (**II**). Finally, Respondent's actions did not amount to an expropriation as well (**III**).

### I. None of Respondent's actions violated the FET Standard

93. The *FET* Standard requires states to provide a reasonably stable investment environment, consistent with investor expectations.[84] Arbitral tribunals[85] and various international instruments[86] assess the Standard in the light of the minimum standard required by customary international law. Thus, it constitutes a minimum pattern for substantive justice.[87] The determination of a breach of the *FET* Standard requires weighing the investor's legitimate and reasonable expectations against the State's legitimate regulatory interests.[88] A violation of this Standard only occurs, when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.[89]

94. Therefore, even if *Beritech's* actions could be attributed to Respondent, it has not violated the *FET* Standard. The Standard does not provide this Tribunal with an open-ended mandate to

[83] *Counter Memorandum for Respondent*, P. 17-21.

[84] Moses, P. 230.

[85] *Dolzer&Stevens*, P. 59; *AAPL v. Sri Lanka*, P. 580-655; *ADF v. US*, Para. 179; *AMT v. Zaire*, Para. 6.10; *Eastern v. Estonia*, Para. 367.

[86] Article 1105(1), *Binding Interpretation on NAFTA*; Notes and Comments to Article 1, *OECD Draft Convention on the Protection of Foreign Property*; *OECD Investment Law*, P. 84.

[87] *Azinian v. Mexico*, Paras. 83, 87; *Eastern v. Estonia*, Para. 367.

[88] *Saluka v. Czech Republic*, Para. 306.

[89] *S.D. Myers v. Canada*, Para. 263.

second-guess government decision-making (**1**). Secondly, there has not been any denial of justice (**2**). Thirdly, Respondent acted in accordance with the principle of good faith (**3**).

**1. This Tribunal may not set out totally subjective standards**

95. This Tribunal may not substitute its judgment for the choice of solutions by the state. The Tribunal in *Saluka v. Czech Republic ("Saluka")* relied on the Tribunal in *S.D. Myers v. Canada ("S.D. Myers")* which had already said before that the *FET* Standard does not create an "open-ended mandate to second-guess government decision-making".[90] Indeed, this Tribunal has to assess whether state conduct was clearly unreasonable. That was not the case since Respondent acted in good faith.

**2. There has not been any denial of justice**

96. The notion of denial of justice is defined as improper administration of civil and criminal justice towards an alien, including denial of access to the courts, inadequate procedures, and unjust decisions.[91] A denial of justice "could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if the administer justice in a seriously inadequate way."[92] In the present case Respondent has not denied Claimant justice. Although the Buyout was justified, Claimant had access to *Beristian* courts or adequate procedures to oppose *Beritech's* decision to invoke the Buyout Provision of the *JVA* all the time.

**3. Respondent acted in accordance with the principle of good faith**

97. The various elements of *FET*, including the dominant element[93] of the protection of legitimate expectations, are manifestations of the more general principle of good faith. Since Claimant may not rely on any of its expectations as they are not legitimate, Respondent acted in good faith. At first, Claimant cannot rely on its expectations on state conduct (**a**). Secondly, its expectations on a stable and predictable legal framework were not legitimate or reasonable (**b**).

*a. Claimant may not rely on its expectations on state conduct*

98. Even though legitimate expectations concern the treatment of investments may arise "based on the conditions offered by the host State at the time of the investment"[94], *IIA* jurisprudence

[90] *Saluka v. Czech Republic*, Para. 284; *S.D. Myers v. Canada*, Para. 261; *Feldman v. Mexico*, P. 139.

[91] *Brownlie*, P. 506; *OECD Fair and Equitable Standard*, P. 28.

[92] *Azinian v. Mexico*, Para. 102.

[93] *Saluka v. Czech Republic*, Para. 302.

[94] *LG&E v. Argentine Republic*, Para. 262.

highlights that, in order to create legitimate expectations, state conduct needs to be specific and unambiguous.[95] Further, in order to protect expectations, they must rise to the level of legitimacy and reasonableness in the light of the circumstances.[96]

99. However, both the *ES* Provision of the *BIT* and the Confidentiality Provision of the *JVA* explicitly express that it is highly important in *Beristan* that no danger for the national security or defense arises and that confidential information remains confidential. Although it co-signed the *JVA,* Respondent never explicitly stated that it would not adopt measures it considers necessary to ensure national security. On the contrary, it solely guaranteed for monetary obligations. No further specific assurances on the part of Respondent were made to Claimant.[97]

100. Moreover, especially in light of the Confidentiality Provision, Claimant, as a multinational and successful company with great experience and knowledge, should have expected that it would be bought out by *Beritech* in the case of a substantiated risk of likely an upcoming dissemination of confidential information. Its expectations on state conduct were not frustrated.

*b. Claimant's expectations on a stable and predictable legal framework were not frustrated*

101. Respondent did not fail to ensure a transparent and predictable framework for Claimant's business planning and investment which is an essential element of the *FET* Standard as well.[98] A foreign investor has to shape its expectations on the basis of the law and the factual situation prevailing on the country as it stands at the time of the investment.[99] The assessment of reasonableness or legitimacy of such expectations must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.[100]

102. In the case at hand, there were no changes in Respondent's state systems, internal law or in the process of decision-making since Claimant made its investment. Respondent's wish to care about its and its citizen's security is long established in *Beristan* and several of its con-

[95] *Feldman v. Mexico,* Para. 148; *GAMI v. Mexico*, Para. 76; *Metalclad v. Mexico*, Para. 148.

[96] *Saluka v. Czech Republic,* Para. 304.

[97] *Second Clarifications,* Q. 253.

[98] *Tackaberry & Marriott*, P. 722; *CME v. Czech Republic*, Para. 611; *CMS v. Argentine Republic, Award*, Para. 274; *Enron v. Argentine Republic*, Para. 183; *PSEG Global v. Turkey*, Para. 253.

[99] *Schreuer&Kriebaum,* P. 2.

[100] *Duke Energy v. Ecuador,* Para. 340.

cluded Treaties contain *ES* Provisions.[101] A foreign investor is presumed to know the general regulatory framework prevalent in a country at the time it first embarks upon the investment.[102] Again, Claimant easily could have known that if it created a situation of uncertainty and danger that confidential information likely will be disseminated, its interests would be bought out by *Beritech* – the Buyout was predictable.

## II. None of Respondent's actions amounted to discrimination

103. Even if *Beritech's* actions could be attributed to Respondent, it did not discriminate Claimant or its investment in the *Sat-Connect* project as none of Respondent's actions did violate the *National Treatment ("NT")* Standard.

104. Article 3(2) of the *BIT* states that the treatment accorded to the activities connected with the investments of *Opulentian* investors shall not be less favorable than that accorded to similar activities connected with investments made by *Beristian* investors. In *Pope & v. Canada* ("*Pope & Talbot*"), the Tribunal applied a test to identify discriminatory treatment[103] that was mirrored by the Tribunal in *S.D. Myers*[104]. Even if the both investors would be in similar circumstances and would not have received like treatment, the existence of any factors which might justify differences in standards of treatment between the two groups must be taken into account in any case (**1**).[105] An application of this test to the case at hand demonstrates that Respondent did not discriminate against the activities of *Opulentian* investors. Furthermore, Respondent had no discriminatory intent (**2**).

### 1. There are factors which justify differences in standards of treatment

105. The Tribunal in *S.D. Myers* stated that "the assessment of 'like circumstances' must also take into account circumstances which would justify governmental regulations that treat investors differently in order to protect the public interest".[106] Additionally, the *US Third Restatement*

[101] *First Clarifications*, Q. 177.

[102] *Schreuer&Kriebaum*, P. 8.

[103] *Pope&Talbot v. Canada*, Paras. 78-104.

[104] *S.D. Myers v. Canada*, Para. 251.

[105] *Dolzer*, P. 296-305.

[106] *S.D. Myers v. Canada*, Para. 250.

clarifies what does not constitute an unreasonable distinction, among them nationality-based classification for security or economic policy purposes.[107]

106. Due to the fact that there was the substantiated risk that, if not already happened, Claimant's personnel likely would leak confidential information and thus endanger national security, its removal from the *Sat-Connect* project was reasonable and justified. Respondent had to recruit the new personnel exclusively from the *Beristian* labor market to eliminate the possibility of repeated dissemination of confidential information to *Opulentia* by foreign workers. Moreover, Claimant's personnel left *Beristan* voluntarily after its removal from the *Sat-Connect* project.[108] Consequently, Respondent's actions did not amount to discrimination.

**2. Respondent had no discriminatory intent**

107. Discriminatory intent is necessary to establish a violation of the *NT* Standard: The Tribunal in *Eastern v. Estonia* required discriminatory intent as a necessary prerequisite for a finding of discrimination.[109] The *Methanex* decision also includes language that must be understood to require evidence of intent to discriminate.[110] Respondent had no discriminatory intent. Its actions solely aimed to ensure national security and defense rather than to discriminate any investors. Respondent did not discriminate any foreign investors.

## III. None of Respondent's actions amounted to an expropriation

108. Even if *Beritech's* actions were attributable to Respondent, it has not violated Article 4 of the *BIT* as it has not directly or indirectly expropriated Claimant's investment in the *Sat-Connect* project. Under customary international law, not all deprivations of property are expropriatory.[111] Both buying out Claimant's interests in the *Sat-Connect* project and removing Claimant's personnel were no expropriation since invoking the Buyout Clause was lawful.

109. According to the Buyout Provision of the *JVA*, *Beritech* has paid US$47 million into an escrow account, which has been made available for Claimant. Both the material and procedural requirements for invoking the Buyout have been met. Therefore, it was lawful.

[107] *Sabahi*, P. 271.

[108] *Second Clarifications,* Q. 204.

[109] *Eastern v. Estonia*, Para. 369.

[110] *Methanex v. US,* Para. 12.

[111] *Newcombe,* P. 2.

110. The fact that staff from the *CWF* secured all sites and facilities of the *Sat-Connect* project cannot be regarded as an expropriation as well. The *CWF* acted as a police to ensure the rights of *Beritech* pursuant to the lawful Buyout and the elapsed ultimatum to hand over possession when it asked Claimant's personnel to leave the facilities immediately. In *Amco v. Indonesia* the Tribunal accepted that in the Republic of Indonesia the military establishment *inter alia* has the task to take care of the internal security of the state.[112] Similarly, in the *Republic of Beristan*, a civil engineering section of the *Beristian* armed forces cares about internal security issues. After the reasonable ultimatum of 14 days expired, the *CWF* appropriate enforced the valid resolve of *Beritech* and the *Sat-Connect* Board of Directors to invoke the *JVA* Buyout Provision and therefore, Respondent did not expropriate Claimant by the *CWF*'s actions.

111. Alternatively, learned international law writers have regularly concluded that no right to compensation arises for reasonably necessary regulations passed for the "protection of public health, safety, morals or welfare"[113] or for government regulations that are "non-discriminatory and […] within the commonly accepted taxation and police powers of states".[114] This view is reflected in international investment instruments such as the *MIGA Convention*[115], *International Investment Arbitration ("IIA")* practice[116] and codifications such as the *US Third Restatement*[117] and the *1961 Harvard Draft*.[118] The inclusion of an anti-expropriation clause within a Treaty is not meant to limit this inherent right.[119]

112. Thus, Respondent does not incur responsibility for the non-discriminatory (**1**) exercise of sovereign police powers aimed at the general welfare (**2**), subject to specific commitments (**3**) or an analysis of proportionality and reasonableness (**4**).

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[112] *Amco v. Indonesia,* Para. 163.

[113] *Christie,* P. 338.

[114] *Aldrich*, P. 609

[115] Art 11 (a) (ii) *MIGA.*

[116] *Feldman v. Mexico*, Para. 103; *Methanex v. US*, Para. 7; *Saluka v. Czech Republic*, Para. 262; *TECMED v. Mexico*, Para. 132; *Too v. Modesto*.

[117] §712 *US Third Restatement.*

[118] Article 10(5) *1961 Havard Draft*.

[119] *Schreiber*, P. 454.

**1. The measure in question was non-discriminatory**

113. Removing Claimant's personnel was non-discriminatory for the reason that there was no arbitrary or unjustifiable distinction based on irrelevant criteria.[120] To ensure the protection of confidential information and national security it was necessary to remove Claimant's personnel from the *Sat-Connect* project as solely its personnel likely would have leaked information to the *Opulentia* government.

**2. The measure in question aimed at the general welfare**

114. Respondent acted to ensure the national security and therefore the measure was aimed at the general welfare. The actions were not only intended to protect the state and its defense systems itself, but also to fulfill the most basic duty towards *Beristian* citizens – the duty to protect them and to establish a reasonable level of security.

115. In the present case the aspect of national security is one of paramount importance to Respondent. Whenever encryption technologies and confidential information about the satellite communications network leak to other states, secure communication within army, government and the State as a whole would no longer granted. Especially several segments of the *Beristian* armed forces will use the *Sat-Connect* system[121] and they are dependent on a secure and encrypted communication to defend the State. Consequently, if a secure communication is not possible, states cannot fulfill their fundamental obligation towards their citizens – to take care of their security needs and to establish a space of safety.

**3. The measure in question did not violate a special commitment**

116. Although Respondent co-signed the *JVA*, its actions do not violate this commitment. The co-signment just exists to guarantee for *Beritech's* monetary obligations upon *Beritech's* default. It is no commitment which guarantees that the government would refrain from legitimated regulations. However, Beritech's proper use of the Buyout Provision of the *JVA* does not violate any contractual obligations. The measure in question therefore did not violate any special commitments.

**4. The measure in question was proportional**

117. Respondent's reasonable measures (**a**), compared with their impact on Claimant (**b**) – particularly in light of Claimant's illegitimate expectations (**c**) – were proportional.

[120] *Counter Memorandum for Respondent,* P. 29-30.

[121] *Uncontested Facts,* No. 6.

*a. The government's measure was reasonable*

118. In *Saluka* the Tribunal stated that, in determining whether to impose forced administration, the regulator "enjoyed a margin of discretion"[122] and that "[i]n the absence of clear and compelling evidence that the CNB erred or acted otherwise improperly in reaching its decision, which evidence has not been presented to the Tribunal, the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision."[123] Thus, in making the assessment of whether the measure in question was reasonably necessary, the Respondent will enjoy a margin of appreciation as it did act improperly in reaching it decisions.

119. It was important and necessary to take measures and to protect Respondent and its citizens, since the likely upcoming leak of information from the *Sat-Connect* project to the *Opulentia* government would have threatened the national security of Respondent.[124] Since there was the substantiated risk that Claimant's seconded personnel likely would have leaked confidential information, it was reasonable and the only way to ensure Respondent's security and defense to remove them from the project as fast as possible. In the ambience of uncertainty that existed at that time, there was no possibility to trust Claimant's personnel anymore.

*b. The measure's impact on Claimant was compensated*

120. Even though Claimant was unable to use its interests in the *Sat-Connect* project, the impact of Respondent's measure is not grave. Since the Buyout Provision was properly invoked, *Beritech* has paid US$47 million into an escrow account, which has been made available for Claimant. Therefore, Claimant was compensated.

*c. In any case, Claimant may not rely on any legitimate expectations*

121. As shown above,[125] Claimant may not rely on any legitimate expectations. Particularly both the host state's legitimate right to regulate domestic matters within its own borders[126] and the public interests of that state[127] have to be taken into account. Since Respondent's urge to keep

[122] *Saluka v. Czech Republic*, Para. 272.

[123] *Ibid.*, Para. 273

[124] *Counter Memorandum for Respondent,* P. 32.

[125] *Counter Memorandum for Respondent,* P. 28-29.

[126] *GAMI v. Mexico,* Para. 93; *S.D. Myers v. Canada,* Paras. 261, 263; *Thunderbird v. Mexico,* Para. 194; *Waste Management v. Mexico,* Para. 94.

[127] *Saluka v. Czech Republic*, Para. 305.

confidential information confidential is long established in *Beristan*, Claimant should have expected that it would be bought out by *Beritech* in the case of such a situation of uncertainty and the danger of, if not already happened, likely upcoming dissemination of confidential information. Its expectations were not frustrated.

122. Summarizing, it is generally accepted that a State has the right to adopt measures having a general welfare purpose. The measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need addressed.[128] As Respondent's measures were proportional, its actions do not amount to an expropriation.

## C. Respondent is entitled to rely on the ES Provision of the BIT

123. Even if Respondent had violated one of its obligations under the *BIT*, it would not lead to an international wrongful act as the action in question is in accordance with the *ES* Provision of the *BIT*. The fact that a measure is not precluded by a treaty means that such a measure is not prohibited and hence, does not breach any obligation.[129] Respondent expressly reserved its right to adopt measures to protect certain essential interests and did not intend to curtail its rights under the *BIT* to guarantee public security whenever foreign investor's rights are affected.

124. The *ES* Provision is applicable. Respondent is the sole judge on the applicability of the *ES* Provision (**1**). However, even if the *ES* Provision would not be *self-judging*, its objective prerequisites would have been fulfilled (**2**).

### I. Respondent is the sole judge on the applicability of the ES Provision

125. It is in principle the State adopting the measures that has to judge whether a measure was necessary in order to protect an essential interest.[130] The inherent right of any government to take actions that appear to it to be reasonably necessary for its own protection entails that the assessment will be done by the state whose essential interests are affected. One has to some

[128] *LG&E v. Argentine Republic*, Para. 195.

[129] *Bottini*, P. 148, *CMS v. Argentine Republic, Annulment,* Para. 133.

[130] *Bottini*, P. 161 *with further references.*

extent to defer to that state's "determination of its public interest."[131] This is especially the case where, like here, the provision in question is *self-judging*.

126. Like all of the *ES* Provisions in the Treaties to which Respondent is party[132], the *ES* Provision of the *BIT* includes the words "that it considers" and thus, it employs the same wording which can already be found in Article XXI of the *General Agreement on Tariffs and Trade* ("*GATT*"). This provision of *GATT*, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests".[133] Similarly, the *ES* Provision in the case at hand express that it is only up to the State which actions it considers necessary to protect its essential security interests and to maintain international peace or security. Since it is impossible for a tribunal to determine what is or what is not necessary to protect a state's essential security the state's actions have to be accepted as long he acts in good faith.

127. Following the Tribunal in *Enron v. Argentine Republic*, *g*ood faith and a full substantive examination are different standards of review.[134] Only this procedure does not deprive the *self-judging* language of the *ES* Provision of the *BIT* of *effet utile*. In fact, Respondent acted in good faith. It intended to ensure its and its citizen's security instead of harming Claimants interests in the first place. As Respondent only wanted to fulfill its fundamental tasks like to ensure national security and defense, it can rely on the *ES* Provision of the *BIT*.

## II. The ES Provision's objective prerequisites are fulfilled

128. The *ES* Provision's requirements, even if it will not be regarded as *self-judging*, are different to the ones of the state of necessity under general international law. This was affirmed by the *ICJ*[135] and the *CMS ad hoc Committee*[136]. If the requirements of the state of necessity were applied to an essential security provision, the provision would have no effect.[137] This would be contrary to the rule of *effet utile* again. Thus, the scope of the *ES* Provision of the *BIT* shall

[131] *Siemens v. Argentine Republic*, Para. 273.

[132] *Second Clarifications*, Q. 249.

[133] *Nicaragua v. US*, Para. 222.

[134] *Enron v. Argentine Republic*, Para. 339.

[135] *Oil Platforms*, Para. 34.

[136] *CMS v. Argentine Republic, Annulment*, Para. 133.

[137] *CMS v. Argentine Republic, Award*, Para. 374.

not be governed by the state of necessity defined in the *ILC Articles.* In the case at hand, Respondent acted to protect its own essential security interests (**a**) and to maintain international peace and security (**b**). Finally, its measure was necessary (**c**).

**1. Respondent had to protect its own essential security interests**

129. Although existence and independence can certainly be regarded as essential interests, state practice shows that such interests can also refer to much wider issues, such as the economy, the environments, the safety of a civilian population, etc.[138] Respondent's goal was to secure its and its citizen security all the time. As to the danger of likely upcoming leaks of confidential information, the *Opulentian* requests to disseminate such information and the existing ambience of uncertainty, precisely this security was endangered. Respondent had to prevent military and intelligence encroachments of other states.

**2. Respondent had to act to maintain international peace and security**

130. To prevent a neighborhood of mistrust and suspicions, Respondent had to act. It has a great interest to continue its good relationship with its surrounding states and especially *Opulentia*. This is only possible, when Respondent can trust its neighbors. However, it is not possible, when there are misgivings that *Opulentia* tries to spy Respondent out and repeatedly requests the disclosure of confidential information.[139] Therefore, to establish a new level of confidence, Respondent had to keep its encryption keys confidential and to eliminate any misgivings completely.

**3. The measures were necessary**

131. The measures in question were necessary. Regarding the goals of *ES* Provisions and their relation to fundamental principles of customary international law, it is reasonable to interpret the term "necessary" as leaving a certain *marge d'appréciation* to States in the determination of the measures addressed to protect their essential interests.[140]

132. As outlined above[141], the taken measures were necessary to ensure Respondent's essential security interests. To remove Claimant's seconded personnel was the only way to ensure *SatConnect's* confidential information completely and to prevent further requests to disclose

[138] *LG&E v. Argentine Republic*, Para. 251; Article 25, Commentary 14 *ILC Articles.*

[139] *First Clarifications*, Q. 178.

[140] *Bottini*, P. 160.

[141] *Counter Memorandum for Respondent*, P. 32.

them by *Opulentia*. Any other possibilities would not have been practical or just as effective. Respondent's measures were necessary.

## D. Conclusion on Merits

133. For the foregoing reasons, Respondent did not commit an international wrongful act. It did not materially breach the *JVA* as *Beritech's* actions are not attributable to Respondent and in any case, the Buyout was justified. Further, Respondent's actions did not violate the *FET* Standard, nor they amounted to discrimination or an expropriation. Finally and in any case, Respondent is entitled to rely on the *ES* Provision of the *BIT* as a defense.

# Part three: Relief Requested

In light of the submissions made above, and reserving the right to further develop and expand its submissions in view of Claimant's subsequent written and oral submissions, Respondent respectfully asks this Tribunal to find:

**(1)** That this Tribunal does not have jurisdiction over this dispute;

**(2)** Alternatively, Respondent did not violate its obligations under Article 2, Article 3 and Article 4 of the *BIT*;

**(3)** And that in any case, Respondent can rely on Article 9 of the *BIT* as a defense.

RESPECTFULLY SUBMITTED ON 19 SEPTEMBER 2010 BY

**----------/s/----------**

**Team Fleischhauer**

On behalf of Respondent

*Wälde Associates LLP*