Code: Jennings

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TELEVATIVE INC. [Claimant]

vs.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN [Respondent]

(ICSID Case No. ARB/X/X)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

ABBREVIATIONS AND DEFINITIONS iii

ABBREVIATIONS AND DEFINITIONS iii

AUTHORITIES AND CASELAW v

SCHOLARLY WORKS AND ARTICLES vii

PART ONE: FACTUAL BACKGROUND 1

PART TWO: LEGAL DISCUSSION 3

JURISDICTIONAL ISSUES 3

I.RATIONE MATERIAE OBJECTIONS 3

A.CLAIMANT'S CONTRACTUAL CLAIMS FALL OUTSIDE THE JURISDICTION OF THIS TRIBUNAL 3

1. All claims related to Beritech's actions are mere JVAgreement Claims and not claims under the BIT 4

2. Umbrella clause claims against Beristan are not "legal disputes" 16

(II)FPS claims do not relate to an investment "made in conformity with laws and regulations" 20

(B) CLAIMANT FAILED TO ABIDE BY THE PROVISION ON THE BIT WHICH REQUIRED FOR CLAIMANT TO WAIT FOR SIX MONTHS BEFORE THE REQUEST FOR ARBITRATION. 22

Merits 25

(A)SELLER'S INVESTMENT WAS NOT EXPROPRIATED 25

a.Concept of expropriation 25

b. Seller's claim is a contractual claim against a party other than Respondent 26
c.In any event, the contractual claim lacks merit....................29
(B)RESPONDENT ACCORDED FAIR AND EQUITABLE TREATMENT ("FET") AT ALL TIMES 30
a.Legitimate expectations of Seller....................32
b.Due process was always available and there was no denial of justice....................32
c.Respondent did not use governmental powers for improper purposes 33
d.Discrimination 33
(C)RESPONDENT GRANTED SELLER CONSTANT FULL PROTECTION AND SECURITY ("FPS") 34
a.CWF actions had a legal basis 34
(D)OBSERVANCE OF COMMITMENTS, BERISTAN AS GUARANTOR 35
a.The requirements to trigger Beristan's responsibility are not fulfilled 35
(E)ALTERNATIVELY, THE MEASURES ADOPTED BY BERISTAN ARE JUSTIFIED UNDER ARTICLE 9 OF BERISTAN-OPULENTIA BIT 36
a.ART.9 of Beristan-Opulentia BIT is different from Art.25 of ILC Articles 37
b.The self-judging nature of "national security" 37
(F)ALTERNATIVELY, UNDER ART.25 OF THE ILC ARTICLES, BERISTAN SHOULD BE EXEMPTED FROM LIABILITY 39

PART THREE: PRAYER FOR RELIEF....................42

ABBREVIATIONS AND DEFINITIONS

Abbreviation	Full denomination
¶	Paragraph
Art.	Article
Beristan-Opulentia BIT	Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the encouragement and reciprocal protection of investments
BIT	Bilateral Investment Treaty
BoD or Board of Directors	Sat-Connect's board of directors
Buyer or Beritech	Beritech S.A.
Clarification(s)	First and second rounds of clarifications issued by the Moot organizers. Clarifications numbered 118 to 181 pertain to the first round of Clarifications. Clarifications numbered 183 to 269 pertain to the second round of Clarifications
Problem	Foreign Direct Investment International Moot Competition, problem 2010, issued by the Moot organizers
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
i.e.	*Id est* (that is)
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ILC	International Law Commission
JVAgreement	Joint venture agreement entered into by Beritech S.A. and Televative Inc. on 18 October,2007
JVTribunal	Arbitral tribunal established under the JVAgreement
Opulentia	The United Federation of Opulentia
p./pp.	Page/Pages

Project	The implementation of the development and deployment of a satellite network and accompanying terrestrial systems and gateways that will provide connectivity and communications for users within the region of Euphonia.
Purchase Decision	Suspension of certain voting and economic rights appurtenant to Televative's interest in the Sat-Connect Project by Beritech, in furtherance of Clause 8 of the JVAgreement upon a material breach thereof by Claimant
Respondent or Beristan	The Republic of Beristan
Sat-Connect	Sat-Connect S.A.
Seller or Televative	Televative Inc.

AUTHORITIES AND CASELAW

Short Citation Form	Full Citation
Anderson	Alasdair Ross Anderson and others v. Costa Rica, ICSID Case No. ARB (AF)/07/3. Award, May 19,2010
Azinian	*Azinian, Davitian & Baca v. Mexico*, ICSID Case No. ARB (AF)/ 97/2 (NAFTA). Award on Jurisdiction and Merits, October 18,1999
Azurix	*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12. Award, July 14,2006
BIVAC	*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay*, ICSID Case No. ARB/07/9.Decision on objections to Jurisdiction, May 29,2009
Consortium	*Consortium R.F.C.C. v Morocco*, ICSID Case No. ARB/00/06. Award, December 22,2003
Continental	*Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, September 5,2008
Fedax	*Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award on Jurisdiction, July 11,1997
El Paso	*El Paso Energy International Company v. Argentine*, ICSID Case No ARB/03/15. Decision on Jurisdiction, April 27,2006
ELSI	*Elettronica Sicula S.p.A. (ELSI) (U.S.A.) v. Italy*, ICJ, July 20,1989
Enron	*Enron Corporation and Ponderosa Assets, L.P v. Argentina*, ICSID Case No. ARB/01/3. Award on Jurisdiction, January 14,2004
Enron Annulment	*Enron Corporation and Ponderosa Assets, L.P v. Argentina*, ICSID Case No. ARB/01/3. Decision on the Application for Annulment of the Argentine Republic, July 20,2010
Genin	*Alex Genin et. al v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25,2001
Goetz	*Antoine Goetz et consorts v. Burundi*, ICSID Case No. ARB/95/3. Award, February 10,1999
Impregilo	*Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3. Award on Jurisdiction, April 22,2005
Inceysa	Inceysa Vallisoletana S.L. v. El Salvador, ICSID Case No. ARB/03/26/ Award, August 2,2006
Joy Mining	*Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11. Award on Jurisdiction, July 6,2004

Lauder	*Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, September 3,2001
Maffezini	*Emilio Agustín Maffezini v. Spain*, ICSID, Case No.ARB/97/7, Decision on objections to Jurisdiction, January 25,2000
Neer	*(L.F. Neer) v. Mexico*, General Claims Commission, United States-Mexico, Decision, October 15,1926
Nicaragua	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ, Decision, June,27,1986
Occidental	*Occidental Exploration and Production v. Ecuador*, LCIA Case No. UN3467. Final Award, July 1,2004
Olguín	*Olguín v Paraguay*, ICSID Case No. ARB/98/5. Final Award, July 26,2001
Saluka	*Saluka investments BV (The Netherlands) v. Czech Republic*, UNCITRAL. Partial Award, March 17,2006
SD Myers	*S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA)
Sempra Annulment	*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16. Decision on the Argentine Republic's Application for Annulment of the Award, June 29,2010
SGS v. Pakistan	*SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13. Award on Jurisdiction, August 6,2003
SGS v. Philippines	SGS Société Générale de Surveillance S.A. v. Phillippines, ICSID Case No. ARB/02/6. Decision of the Tribunal on Objections to Jurisdiction, January 29,2004
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2. Award, May 29,2003
Tradex	*Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award, April 29,1999
Vivendi I	*Compañía de Aguas del Aconquija S.A. and Vivendi v. Argentina*, ICSID Case No. ARB/97/3. Award, November 21,2000
Vivendi I Annulment	*Compañía de Aguas del Aconquija S.A. and Vivendi v. Argentina*, ICSID Case No. ARB/97/3, ICSID Case No. ARB/97/3. Decision on Annulment, July 3,2002
Waste Management II	*Waste Management, Inc. v. Mexico*, ICSID Case No. ARB (AF)/00/03. Final Award, April 30,2004.
Wena Annulment	Wena Hotel Limited v. Egypt, ICSID Case No. ARB/98/4. Decision on Annulment, February 5,2002
Wintershall	*Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 Award on Jurisdiction, December 8,2008.

SCHOLARLY WORKS AND ARTICLES

Short Citation Form	**Full Citation**
AKYÜZ	AKYÜZ, S., The Jurisdiction of ICSID: The Application of the Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States, Year Book of International Law (2003)
DOLZER & SCHREUER	DOLZER, R. & SCHREUER, C., Principles of International Investment Law, (2008)
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC, (2001)
ILC Commentary	CRAWFORD, J., The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).
HOBER	HOBER, K., State Responsibility and Attribution, The Oxford Handbook of International Investment Law, (2008)
MC. LACHLAN, SHORE, WEINEGER	MC. LACHLAN, SHORE, WEINEGER, International Investment Arbitration, Oxford University Press
PARK	PARK, W., The Arbitrator's Jurisdiction. The Arbitrator's Jurisdiction to Determine Jurisdiction, IV. Taxonomy: What is a Jurisdictional Question? In Albert Jan Van den Berg (ed), International Arbitration 2006: Back to Basics.
Public Statement	Public Statement on the International Investment Regime, August 21,2010
SCHILL	SCHILL, S., International Law and Justice Working Papers, IILK Working Paper 2006/6, NYU Law School
SCHLOEMANN & OHLHOFF	SCHLOEMANN, H. & OHLHOFF, S.,"Constitutionalization" and Dispute Settlement in the WTO: national security as an issue of competence

SCHREUER DISPUTE	SCHREUER, C., What is a Legal Dispute?
SCHREUER EXPROPRIATION	SCHREUER, C., The Concept of Expropriation under the ETC and other Investment Protection Treaties
SCHREUER SETTLEMENT	SCHREUER, C., Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road, in The Journal of World Investment and Trade, April 2004.
TAWIL	TAWIL, G., The Distinction Between Contract Claims and Treaty Claims: An Overview" in, Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics.
UNCTAD	UNCTAD, The protection of national security in IIAs, New York and Geneva, (2009)

PART ONE: FACTUAL BACKGROUND

1. On January 30,1995, Televative, claimant in these proceedings, was incorporated in Opulentia.[1]

2. On October 2007, Claimant entered into a joint venture agreement with Beritech, a company owned by Beristian investors including the Beristian government.[2] As Beritech had been recently incorporated in the very months preceding the JVAgreement, its then controlling shareholder –the State of Beristan– executed the document as guarantor of any breaches by Beritech of its obligations thereunder.[3]

3. Under the JVAgreement, and in order to carry out the Project, Televative and Beritech committed themselves to contribute with capital, technology, trademarks and know how to Sat-Connect, a company incorporated under Beristian law which sole purpose was to develop the Project.[4] The JVAgreement imposed confidentiality obligations on the parties thereto and, particularly, it was agreed that, in case of a material breach by Televative, its shares would be subject to a call option to the benefit of Beritech.[5] The option would be preceded by a decision by the Board of Directors of Sat-Connect, at which both parties had representatives.[6] The JVAgreement provided that any disputes thereunder would, after an attempt to settle the matter amicably, be settled in an arbitration seated in Beristal by a tribunal –the JVTribunal- which would apply Beristian law.[7]

4. On August 12,2009, it became known to Beritech that certain information protected under the JVAgreement had been compromised by Claimant's actions, and had reached the hands of foreign governments.[8]

5. The disclosure of that information represented a violation of the confidentiality clause in the JVAgreement,[9] which resulted in the suspension of Claimant's shares according to clause 8 of the instrument.[10]

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[1] Problem, Facts,¶1.
[2] Problem,Facts,¶2.
[3] Id. 2
[4] Problem, Facts ¶3,¶5.
[5] JVAgreement, Clauses 4, 8.
[6] Problem, Facts,¶10, and Clarifications 138, 242.
[7] JVAgreement, Clause 17.
[8] Problem, Facts,¶8.
[9] JVAgreement, Clauses 8,17.
[10] Problem,¶8.

6. After the suspension became effective, Beritech set a reasonable time within which Seller should relinquish access to the confidential materials in the premises of Sat-Connect.[11] Seller's failure to honor the duty to turn over the premises compounded the compromise to national security, which ultimately resulted in a need to have the premises peacefully vacated with the assistance of properly trained personnel, which was provided by the Civil Work Forces.[12]

7. When Seller failed to take delivery of the purchase price –which remains escrowed for the benefit of Seller– Beritech attempted to settle the matter amicably,and when those attempts failed, it pursued arbitration under Clause 17 of the JVAgreement. To Respondent's knowledge, Seller remains to this date a defaulting party in that arbitration.[13]

8. Subsequent developments show that Seller chose instead to categorize its disagreement with Buyer as an ICSID claim against the Republic of Beristan under the Beristan-Opulentia BIT.[14] These presents constitute the Republic of Beristan's statement of defense in response to that attempt.

[11] Problem, Facts,¶10, and Clarification 248.
[12] Problem,¶10,¶11, and Clarifications 248, 217.
[13] Problem,¶13.
[14] Problem,¶14.

PART TWO: LEGAL DISCUSSION

JURISDICTIONAL ISSUES

9. Respondent respectfully submits that this Tribunal lacks jurisdiction over the present case since (I) Claimant's claims are either (A) of a contractual nature and therefore fall outside the jurisdiction of this Tribunal,or (B) do not relate to an investment existing "in conformity with the laws and regulations of" Beristan,[15] and (II) Claimant failed to abide by the provisions of the Beristan–Opulentia BIT which required Claimant to pursue amicable settlement for six months before commencing arbitration.

I. RATIONE MATERIAE OBJECTIONS

A. CLAIMANT'S CONTRACTUAL CLAIMS FALL OUTSIDE THE JURISDICTION OF THIS TRIBUNAL

10. The jurisdiction of this Tribunal is contingent upon Claimant proving that its claims meet the requirements set forth by both the BIT and Article 25 of the ICSID Convention. In case Claimant fails to meet any of these requirements, the consequence would be the lack of jurisdiction of this Tribunal.

11. As will be demonstrated throughout these proceedings, Claimant's claims related to the suspension of its interest in Sat-Connect are contractual in nature, in spite of Claimant's wrongful attempt at disguising its claims as BIT grievances.

12. A thoughtful and discrete analysis of Claimant's claims under this heading shows that they are solely based on two provisions of the JVAgreement. On the one hand, Claimant questions Beritech's enforcement of the call option included in the JVAgreement[16] and posits that, in itself, such actions constitute a breach of the Beristan-Opulentia BIT. On the other, Claimant considers that Respondent should be held liable based on the guarantee received from Respondent, in spite of the fact that the guarantee given by Respondent would be enforceable only upon a determination of default on the part of Beritech,a condition which has not been met.[17]

[15] Cf. Beristan-Opulentia BIT, Art. 1.1.
[16] JVAgreement, Clause 8.
[17] Problem, Facts ¶3, and Clarification 152.

1. All claims related to Beritech's actions are mere JVAgreement Claims and not claims under the BIT

13. Claimant claims that Beritech improperly invoked the call option provision in the JVAgreement. Clearly these claims derive from Buyer's alleged impropriety in the performance of the JVAgreement and do not amount to BIT claims because:

    i. They do not represent the breach of obligations under the Beristan-Opulentia BIT,

    ii. The Umbrella Clause does not transform the JVAgreement obligations of Beritech into BIT obligations of Beristan, and

    iii. In any case the alleged violation of the JVAgreement would be an act of Buyer and not of Respondent.

i. Claimant's claims are not based on breaches of obligations of the Beristan-Opulentia BIT

14. For this dispute to fall within the jurisdiction of ICSID,it must comply with the conditions required under Article 25 of the ICSID Convention. This is the bar contracting parties to the ICSID Convention decided to abide by.

15. According to AKYÜZ,[18] Article 25 of the ICSID Convention includes at least four restrictive requirements to be met, namely, (i) the parties' written consent to submit the dispute to the jurisdiction of ICSID; (ii) that the dispute arise out of an investment; (iii) that it be of a legal nature –the latter two, usually considered the *ratione materiae* requirements–; and, finally, (iv) a *ratione personae* requirement related to the identity of the parties. Article 25 (1) of the ICSID Convention reads as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

16. In this case, Claimant fails to prove that it meets the *ratione materiae* requirements, since its contractual claims fail to contend that an actual legal obligation was even literally

[18] *AKYÜZ* p. 338.

breached.[19] Conversely, its claims consist in a twitched and deceiving articulation of certain of the facts involved in the disagreement between Claimant and Beritech, without any relevance to the determination that any obligation of Beristan under the relevant BIT was breached. In addition to that, Claimant's claims do not arise out of an investment, nor do they constitute treaty breaches, but instead they derive of two different contractual disputes.[20]

17. Furthermore, under the BIT, Respondent did not give its consent to submit to ICSID Arbitration contractual disputes, but only breaches to the BIT.[21] As this consent was only given by the State of Beristan to resolve investment related disputes between it and Opulentian investors, Respondent cannot be forced to take part in an arbitration concerning a contractual dispute between private parties.

18. Since the JVAgreement has a forum selection clause for the resolution of disputes arising therefrom[22], only the JVTribunal constituted under the rules and provisions of the 1959 Arbitration Act of Beristan, as envisaged in the JVAgreement[23], would be in a position to decide on Claimant's claims, and to decide whether Buyer could be found liable for any of Claimant's allegations..

19. Article 11 of the Beristan-Opulentia BIT sets forth that:

> "For the purpose of resolving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter…"

20. A simple analysis of BIT Article 11 shows that this Tribunal cannot decide on a dispute except where it can be argued that a "Contracting Party" has breached its obligations under the BIT. Claimant's allegations related to JVAgreement breaches do not include breaches either by Respondent or, as a matter of substance, of the relevant BIT. Since Claimant's allegations,if at all, are related to breaches by an entity different to Respondent to certain contractual arrangements to which Respondent is not a party to –

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[19] Problem, Facts ¶13, and Clarifications 118,170.
[20] Problem, Facts ¶3,¶10.
[21] Beristan - Opulentia BIT, Article 11.
[22] JVAgreement Clause 17.
[23] Id.

and that therefore Respondent cannot breach in any way–,Claimant cannot bring these claims before this Tribunal.

21. On the relation between the State of Beristan and Buyer, in *Impregilo*, a very similar case in which there was a Joint Venture Agreement involving Italian, Pakistani companies and a Pakistani State Entity for the construction of a water barrage, the tribunal found that WAPDA -The Pakistani Water and Power Development Authority–,and not Pakistan, was the party to the contracts.[24]

22. It also found that, under the law of Pakistan, WAPDA possessed a legal personality distinct from that of the State of Pakistan.[25] WAPDA's alleged contractual breaches were by the tribunal individualized as breaches of the JVA,"a municipal law agreement, [to which] Pakistan was not a party".

23. As a different entity acting without any directives of the State, both WAPDA and Beritech entered into certain commercial agreements; WAPDA hiring an Engineer for contractual purposes related to the source of its business, and Beritech entering into the JVAgreement with Claimant.[26]

24. In relation to WAPDA status the tribunal said:

> "The status of WAPDA as a party to the Contracts is a matter for the law of Pakistan, being both the law by which WAPDA was established and exists, and also the law governing the Contracts."[27]

25. Similarly, in this case Beritech, as WAPDA, is not controlled by Respondent but only by its deliberative organs – in which Claimant has its proper representation - and is the proper party to the contractual dispute.

26. Claimant contends the State of Beristan has materially breached certain obligations arising out of performing the JVAgreement. Claimant's allegations conveniently silence the fact that the JVAgreement only comprises up to this date obligations between it and Beritech.[28] In addition to that, in order for Claimant's claims to have any merit, this Tribunal should accept as a proven fact that Beritech's exercise of the call option implies a breach of its obligations under the JVAgreement.

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[24] *Impregilo,¶216.*
[25] *Id.*
[26] *Impregilo ¶14,* and Problem, Facts ¶3.
[27] *Id.* ¶199.
[28] Clarification 152.

27. This is not possible for this Tribunal since the JVAgreement itself contained a dispute settlement mechanism, which has already been set in motion, and under which the JVTribunal has been constituted in Beristal to analyze whether Beritech has breached its obligations.[29] Until the JVTribunal does not reach a decision, whether there has been breach by Beritech or not is uncertain, and Claimant's word is certainly not enough to prove otherwise.

28. It was the *Vivendi I Annulment* Committee that determined that breaches of the BIT and breaches of a contract were two different scenarios by concluding that:

> "Each of these claims will be determined by reference to its own proper or applicable law… in the case of the Concession contract, by the proper law of the contract".[30]

29. Therefore again, an ICSID tribunal like this, cannot rule on the consequences of a commercial contract breach, especially one which has not even been proven.

30. Seller's claims are a consequence of the breach of a confidentiality obligation in the JVAgreement accountable only to himself. The fact that these claims arise of the supposed ill performance of the JVAgreement, reflect patently the contractual sphere of the alleged dispute to which only Claimant and Buyer are to this date parties.[31]

31. It was also the *SGS v. Pakistan* tribunal which differentiated treaty claims and contract claims, availing the forum selection clause of the contract and the parties true will, and not resorting to the ICISD tribunal to solve the dispute arising out of it, when this alternative method was already envisaged by them.[32]

32. Claimant has tried to link not only Buyer, a private company, with the State of Beristan, but the State of Beristan with Buyer's commercial contract through Article 10 of the BIT. As he failed, is now resorting to adapt the claims under the JVAgreement so that Respondent is found responsible.

33. TAWIL characterizes the differences between contract and treaty claims and its breaches. For doing so, he approaches the issue through 5 categories:

    a. The source of the Right,

[29] Clarification 118.
[30] *Vivendi 1 Annulment,¶96.*
[31] FDI Moot Problem, Facts,¶10.
[32] *Sgs v. Pakistan,¶161.*

b. The content of the Right,

c. The parties to the Claim,

d. Applicable Law, and finally

e. The host State's responsibility.[33]

34. The first of these categorizations has to do with the basis on which the clause of action is originated. Since Buyer's claims are derived from its performance on a contract and not from a violated obligation of the state, the source of the right is contractual and does not constitute in itself a treaty claim under the BIT.[34] The *Impregilo* tribunal found that:

> "the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party. Indeed, had the intention been to extend each Contracting Party's jurisdiction offer in this way, the language of Article 9 would have been so crafted."[35]

35. Secondly, the content of the right, as a contract right is particularly conceived for that commercial agreement. Proof of that is that the specificity of the confidentiality clause Buyer breached, and as a consequence derived in the call option of the Board of Directors of Sat-Connect, was developed for the JVAgreement and not, for example, conceived under the BIT.[36]

36. Thirdly the parties to the claim are those who executed the contract, in this case Buyer and Seller. The tribunal in *Joy Mining* ruled and prevented Claimant from unlawfully transforming through its statements, a contractual claim into an investment claim for the only purpose of obtaining ICSID jurisdiction.[37]

37. The true nature of the JVAgreement is not an investment but a commercial contract entered into between two private and independent parties. Although international contracts are today a central feature of international trade, this fact does not, in any way leave the categorization of any international commercial contract to be conceived as an investment. [38]

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[33] TAWIL, p.2.
[34] Problem, Facts ¶15.
[35] *Id.* *¶*214.
[36] JVAgreement, Clause 8.
[37] *Joy Mining,¶*82.
[38] *Joy Mining,¶*58.

38. Seller has failed to show that Buyer acted with any influence of any of the State's of Beristan organs or subdivisions, as for example happened in the *Maffezini* case.[39]

39. Fourthly, Claimant's claims are purely based on contractual provisions related to the JVAgreement, which Seller committed itself to comply with and which Seller agreed would be settled under Beristian law.[40] Hence this also supports the fact that these are not treaty claims allegedly breached, but contractual commitments which have not been proved breached yet. To this matter the *Wena Annulment* Committee also commented that:

> "…It is therefore apparent that Wena and EHC agreed to a particular contract, the applicable law and the dispute settlement arrangement in respect of one kind of subject, that relating to commercial problems..."[41]

40. And in comparison with the treaty breaches said that:

> "…Wena…could invoke for the purpose of a different kind of dispute, that concerning the treatment of foreign investors by Egypt…other mechanism…a separate dispute settlement arrangement and might include a different choice of law provision or make no choice at all…The private and public functions of these various instruments are thus kept separate and distinct…"[42]

41. The inexistence of a dispute arising out of an investment, and the absence of its legal nature, results in the lack of jurisdiction of this Tribunal.[43]

ii. The Umbrella Clause does not transform the JVAgreement obligations of Beritech into BIT obligations of Beristan

42. Claimant alleges that Respondent is responsible for the breach of the JVAgreement due to Article 10 of the BIT, which states that:

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

43. Article 10 incorporates an "Umbrella Clause" which binds Respondent compelling it to "*honor its obligations to investors of the other state*".[44] Given the fact that Respondent

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[39] *Maffezini,*¶85-87.
[40] JVAgreement, Clause 17.
[41] *Wena Annulment,*¶31-35.
[42] *Id.*
[43] ICSID Convention, Article 25(1).
[44] MC. LACHLAN, SHORE, WEINEGER, p. 90.

has not violated any obligation towards Claimant in the JVAgreement, BIT Article 10 cannot be applied to the JVAgreement.[45]

44. The only subject to whom an Umbrella Clause can be connected to is a state. Therefore it is unreasonable that Seller's claims are meant to constrain Respondent in a dispute to which he is strange to.

45. Furthermore, Seller has knowingly chosen to ignore the fact that "*as a guarantor, Beristan would assume the obligation of Beritech under the JVAgreement upon Beritech's default*".[46]

46. Even if it could be considered that Beritech's actions could be tantamount as actions of Beristan, a breach of a commercial contract would not equate a breach of the BIT. TAWIL, regarding cases in which a dispute relating to a commercial contract to which a state is party arises, wrote that it should be considered:

> "excluded from the scope of protection of the umbrella clause… [those] contracts in which the State enters into acting as a merchant "[47]

47. Respondent does not contend that it had co-signed the JVAgreement between Buyer and Seller. However, as evidenced by the facts of this case,[48] the contract guarantee was only to be executed under a series of circumstances – which have not been proven in this case –, and it involves two different parties than those to the JVAgreement.

48. According to Seller, the call option triggers the effect of the Umbrella Clause, but does not take into account the fact that Respondent's guarantee obligation is directly related to the decision of the JVTribunal constituted in Beristal, who has not issued a decision on whether Buyer breached its obligations and before which Seller decided not to show.[49]

49. The tribunal in the *BIVAC* case, when dealing with a claim that certain contract breaches could be considered breaches to an Umbrella Clause which could be heard by an ICSID tribunal, denied that possibility. The tribunal based its decision in two previous *SGS*'s decisions,[50] and held that:

[45] Problem, Facts ¶3, Clarifications 118,152, and170.
[46] Clarification 152.
[47] TAWIL. p.13.
[48] Problem, Facts ¶3, Clarification 118,152,170.
[49] Clarification No.118.
[50] *See Sgs v. Pakistan and Sgs v. Phillippines.*

> "[the argument] relies on the two SGS decisions to support its proposition that 'neither of these tribunals interpreted the umbrella clause to elevate a pure breach of a commercial contract into a treaty violation', and relies in particular on the decision in SGS v. Pakistan as authority that 'the Tribunal held that it had no jurisdiction to decide SGS's purely contractual claims'" [51]

50. Not only contract claims cannot be directly transformed into treaty claims, but they cannot be elevated upon the absence of the JVTribunal's decision which is yet to rule on the matter.

51. The tribunal in *El Paso* in which a Gas, Power, Oil and other resources development company tried to elevate contract claims to the status of treaty claims, stated that:

> "…the protection of the applicable umbrella clause would only be triggered by breaches to contracts of a governmental nature, setting aside those concerning ordinary commercial agreements…"[52]

52. Like in *El Paso*, this Tribunal cannot decide on the application of the Umbrella Clause since there is no contract breach "*of a governmental nature*" yet determined.

53. TAWIL asserts that today's common accepted construction of the concept of the Umbrella Clause leaves no margin for any sort of discussion on its content. It is a commitment assumed "*by a host State under investment related contracts*".[53]

54. Since Claimant's claims are based on breaches to the JVAgreement, and given the fact that Respondent did not assume any specific obligation under the JVAgreement in relation to an investment made by Claimant, this Tribunal lacks jurisdiction over the present dispute.

55. Regarding the role of Respondent as a guarantor of the JVAgreement, the tribunal in *Joy Mining* stated that:

> "Disputes about the release of bank guarantees are a common occurrence in many jurisdictions and the fact that a State agency might be a party to the Contract involving a commercial transaction of this kind does not change its nature."[54]

56. It continue saying that:

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[51] *BIVAC,¶*131.
[52] *El Paso ¶*80.
[53] TAWIL, p. 14.
[54] *Joy Mining ¶*79.

> "It is still a commercial and contractual dispute to be settled as agreed to in the Contract, including the resort to arbitration if and when available. It is not transformed into an investment or an investment dispute."[55]

57. Following the *Joy Mining* tribunal's interpretation, Claimant was unable to pose their claims as BIT breaches which truly were contractual and not disputably as treaty breaches. This Tribunal cannot rule either on a mere breach of an allegation only stated by Claimant and pending a judicial sentence specially elected by the same subject.[56]

iii. In any case, the alleged violation of the JVAgreement would be an act of Buyer and not of Respondent

58. Contrary to Claimant's allegations, none of the actions of Beritech are attributable to the State of Beristan because (a) Beritech is a private and independent company and in principle its actions cannot be attributed to Beristan, (b) none of the exceptions on the ILC Articles apply to Beritech's actions and (c) none of Beritech's actions can be attributed to respondent. In any case, (d) Beritech's actions were in accordance to international law.

a. Beritech is a private and independent company

59. Contrary to Claimant's allegations that the State of Beristan is responsible for the purchase decision adopted by Beritech and supported by the Board of Directors of Sat-Connect, Respondent is not liable for these actions since Respondent does not control Beritech and does not control the result of the decisions taken by the deliberative organ of Sat-Connect.

60. The issue of State responsibility for wrongful acts has been dealt with extensively and along the years. In matters of customary law, some scholarly works and projects of international covenants have constituted a source for internationally customary law. But it was not until 2001, when the International Law Commission concluded the ILC Articles, that a written systematization of these principles, with the approval and reception of both doctrine and jurisprudence, was concluded.

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[55] *Id.*

[56] FDI Moot Problem, Facts,¶13, Clarifications 118, and 138.

61. Even though the ILC Articles are not a treaty, they constitute a binding source for international obligations and they "*accurately reflect customary international law on state responsibility*".[57]

62. Article 2 of the ILC Articles states:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

63. Since Beritech is a private company, its actions cannot be attributed to none but to Beritech itself. Beritech's actions cannot be attributed to the State of Beristan, since all of the decisions adopted by it were decided by board members elected by the shareholders, and in use of its legitimate powers.[58] A decision such as the purchase decision can only be taken with the approval of the Board of Directors.[59]

64. The decision that purportedly affected Buyer's interests in the Project was supported by the Board of Directors of Sat-Connect, an organ to which Claimant had appointed representatives.[60] It was Sellers's decision,[61] not to participate in the board meeting of August 27,2009, depriving its directors of discussing the agenda of the meeting.[62]

65. It is Article 8 of the ILC Articles, which deals with actions or conduct directed or controlled by the state entities. Since no evidence was presented by Claimant, on Beritech actions being somehow affected by any governmental instructions or guidelines to operate it is clear that:

> "As a general principle, the conduct of private persons or entities is not attributable to the State under international law"[63]

66. As it was Seller's decision not to take part in the Board of Directors meeting, there is nothing that can be attributed to Respondent in terms of responsibility for the exercise of the call option by Beritech. Claimant had the opportunity as any of the other members

[57] State Responsibility and Attribution, p. 553.
[58] Problem, Facts ¶10.
[59] Clarification 242.
[60] Problem, Facts ¶4.
[61] Clarification 208.
[62] Clarification 169.
[63] ILC Commentary. Article 8 (1).

that were integrating the Board of Directors at that time, to take part in the meeting and to decide on the matters it dealt with, but knowingly did not.[64]

b. None of the exceptions on the ILC Articles apply to Beritech's actions

67. Although the principle is that a State is not responsible for the actions of private parties, Articles 4, 5 and 8 of the ILC Articles provide for three exceptions that can be used to attribute the conduct of a private party to the State. They are: a) a state organ exercising legislative, executive or judicial power (Article 4), b) the exercise of elements of governmental authority (Article 5), and c) the direction or control by the state of these private actors (Article 8). As none of them apply to Beritech's actions, their acts cannot be attributed to the State of Beristan.

68. Regarding the first and second exceptions in the ILC Articles mentioned hereinabove, none of them apply to either Beritech or Sat-Connect. The Claimant has not proven this and there is no indication in the facts of this case that Beritech or Sat-Connect exercised legislative, executive or judicial powers, or any other elements of governmental authority.

69. The third exception of the ILC Articles is contained in Article 8 and is related to the conduct of a private party directed or controlled by the state. Although Seller alleges that Buyer was acting on behalf of Respondent, it has not presented this Tribunal with no evidence to prove any such direction or control by the State of Beristan on Buyer's decisions. Per se, Beritech's actions cannot be attributable to Respondent.[65] Furthermore, and as it was decided by the ICJ tribunal in *Nicaragua,*[66] "the Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the state".[67]

70. Neither there is evidence in the present case that any organs of control, in charge of the state, were present in Beritech operations, nor any governmental representative had acted in its authority as such.

[64] Clarification 208.
[65] ILC Commentary, Article 8 (4).
[66] *Nicaragua,* ¶86.
[67] ILC Commentary, Article 8 (4).

71. In the *Maffezzini*[68] case, SODIGA was a company owned and managed by the State with the support of different secretaries and its officers, including the Ministry of Finance, the Ministry of Industry, and the Council of Ministers, all of them acting on behalf of the Kingdom of Spain and conducting themselves as agents of Spain. The tribunal found that SODIGA's representative was not exercising acts of public authority through all of its acts but one, by acting in it as a representative of Spain in the company.

72. Clearly in this case, the fact that one of the members of the Board of Directors is a Minister of the State of Beristan does not represent the same consequence, since neither he acted in his condition of a State representative, nor any evidence was shown that can link him to any of the decisions taken by the Board of Directors of Sat-Connect in any way. Moreover, it was not Respondent who managed the Project, but Sat-Connect's Board of Directors. This evidences that Sat-Connect was a private company independent from the State of Beristan.

73. The call option was taken in accordance with every quorum and majority condition needed by the board members, acting by the power they were invested with,[69] and not in any way directed or induced by the State of Beristan, fact that Claimant states but fails to prove.

c. None of Beritech's acts can be attributable to Respondent and in any case, Beritech's actions were in accordance to international law.

74. Claimant's claims relating to Beritech's alleged ill performance of the JVAgreement, as are presented in this case, do not represent an international wrongful act under which international responsibility could be attributed to Beristan.

75. To conclude, since Claimant's claims are not based on the BIT but on the JVAgreement, and the State of Beristan is not a party to the JVAgreement, Claimant's claims cannot be heard by this Tribunal.

76. Claimant has avoided taking part not only in the amicable settlement it had consented to pursue, but deliberately disregarded the already constituted JVTribunal in the State of Beristan,[70] the only tribunal which can decide on the legitimacy of Claimant's claims.[71]

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[68] *Maffezini.* ¶85-87.
[69] FDI Moot Case 2010, Facts ¶10 and Clarifications 138, 208, 244.
[70] Clarification 208.

77. For the above stated, an eventual conclusion on the breach of the contractual obligations will not arise from what this Tribunal decides. It will be decided only by the JVTribunal, the one that Claimant freely chose to solve such a dispute and which has already been constituted.[72]

78. Hence this Tribunal lacks of jurisdiction to hear the present dispute.

2. Umbrella clause claims against Beristan are not "legal disputes"

79. Claimant contends the State of Beristan is responsible as a guarantor of the Joint Venture Agreement which it co-signed in that capacity. Respondent showed that even though it was not in presence of an investment, it was willing to guarantee Buyer's obligations because of the importance and nature the JVAgreement represented to a Beristian company.[73]

80. Seller has tried to link the contract guarantee existing between Buyer and Respondent in order to obtain jurisdiction under the ICSID Convention. However, the lack of a court sentence that decides on the alleged breach of Buyer's obligations, determines neither the guarantee can be considered an obligation under the Beristan -Opulentia BIT, nor can it be possibly executed since the condition for this to be possible is still contested.

81. This guarantee does not find its origin in an obligation under the Opulentia–Beristan BIT but under the JVAgreement. Since as was said previously, the obligation will only arise out of a proven breach of a contract, which under no circumstance can be decided by this Tribunal.

82. Only upon obligations assumed by the State that it can be responsible. As recently said, not until Beritech's default is decided, can Seller execute the mentioned guarantee.[74]

83. The contract guarantee is not an obligation under the Opulentia – Beristan BIT and even being elevated by an Umbrella Clause, the obligation does not arise out of a legal dispute. For a breach of an obligation to be heard under an ICSID tribunal, a state must first violate an international obligation in relation to an investment and derived from a particular BIT.

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[71] Clarification 118.
[72] JVAgreement, Clause 17.
[73] Problem,¶3.
[74] Clarification 152.

84. The guarantee Respondent co signed with Buyer is to be executed only after a particular set of events.[75]

85. Seller is trying to hold Respondent liable for a subsidiary obligation, consequential of a breach of an agreement that has not even been substantiated by the proper parties, or ruled by the JVTribunal constituted in Beristan.[76]

86. This ICSID Tribunal cannot rule on this specific demand and decide on the contract guarantee, which represents pure and exclusive contractual breaches - this one not even involving Respondent as a counter part-. It cannot do it, simply because the event that can derive in the execution of the guarantee is still contested.[77]

87. Only a few days ago, 35 renowned scholars discussed the future of the ICSID Regime and the increasing number of cases ICSID is dealing with.

88. They expressed their concern on the harm, a pro investor prima facie analysis, usually does. They also referred to the undesired result admitting disputes outside their jurisdictional powers, has. If this Tribunal were to decide on the present dispute, it would bring chaos to ICSID as the number of contractual disputes that would be presented before these tribunals will be far away from reasonable.[78]

89. The Vienna Convention on the Law of Treaties, in its Article 31(1) stipulates that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"

90. A joint reading of the Convention and Article X of the BIT clearly indicate that for starters the contract guarantee is excluded by the specific wording of the Umbrella Clause and therefore cannot be elevated to an eventual treaty breach if the breach of the obligation is not determined.

91. The ordinary meaning both parties accorded to give to the Umbrella Clause is related to the possibility of elevating breaches of Respondent's obligations relating to investments. ,However, the only circumstance under which Respondent would have possibly taken part in the present dispute would have been in the case of Beritech failing to comply with

[75] Clarification 152.
[76] Clarification 118.
[77] Id. and Clarification 152.
[78] Public Statement,¶5,¶6.

its obligations. As Buyer did not default, and none of its obligations were reportedly breached by the JVTribunal decision, Respondent cannot be held liable.[79]

92. The *Olguín* case, in which an ICSID tribunal discussed the existence of an investment out of bank credits and securities, and the responsibility of the State on determined obligations derived from that supposed investment had a precise approach on the "guarantee" subject. [80]

93. The tribunal decided it was incompetent to rule on the responsibility of the Paraguayan before the invocation of a subsidiary guarantee of the bank credit. It went on to say that:

> "The probability—and not the certainty—of such an outcome is due, as stated earlier in this Award, to the fact that the Claimant contributed significantly, within his own individual circle of action, to the occurrence of the facts that he is also censuring." [81]

94. The exact same unfaithful conduct is the one Claimant is trying to mislead this Tribunal from actually unveiling. It was only but for Claimant's own actions that the leak of information was made public, and consequently the buyout provision executed.[82] And it was only by Claimant's omission that he did not take part in the BoD in which he could have challenged the buyout decision.

95. The bank guarantee, in this case provided by a private institution had the same purpose and character the State would have got in the case of Beritech failing to comply with its obligations. A subsidiary guarantee in case the actual contractual party did not fulfill its duties.[83]

96. In addition, the sum of money that represents as the value of the buyout made by the BoD, was indeed placed in an escrow account after the decision taken by Sat-Connect's organ, and furthermore pending there because of the refusal of Seller to accept it.[84]

97. Claimant is aware of the constitution of the JVTribunal towards the resolution of any contractual dispute.[85] Claimant gave its consent to submit to the jurisdiction of the said

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[79] Clarifications,118 and 152.
[80] *Olguín,*¶72.
[81] *Olguín,*¶73.
[82] Problem, Facts ¶10.
[83] Clarification 152.
[84] Problem, Facts ¶13.
[85] Clarification 118.

tribunal any disputes arising out of the JVAgreement and once constituted is improperly submitting the dispute to another jurisdiction.[86]

98. As the *Vivendi I Annulment* committee found:

> "In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract" [87]

99. SCHREUER[88] asserts that the breach of an agreement can in fact be the factual situation that determines the legal aspect of a dispute. He asserts the true meaning of a legal dispute "*can be decisive to determine a court's or tribunal's jurisdiction*".[89] He continues stating that:

> "In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence".[90]

100. It is for the ICSID tribunal to find the existence of a dispute and its nature, which needs to be of a legal character.[91] It was the Report of the ICSID Executive Director that asserted that:

> "The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of a legal obligation".[92]

101. The analysis of this wording implies that given the nonexistence a breach of a legal obligation, the result entails the absence of the legal aspect of the dispute. The inexistence of a legal dispute bars the jurisdiction of the present tribunal.

102. The JVTribunal, before which Seller has not appeared thus far, is yet to determine the existence of the dispute.[93]

103. This Tribunal cannot determine the existence of a legal dispute, as this is an obligation of the JVTribunal. If this ICSID Tribunal were to rule on a dispute, which

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[86] JVAgreement, Clause 17.
[87] *Vivendi I Annulment,¶*98.
[88] *SCHREUER* DISPUTE, p. 8.
[89] *Id.* p 2.
[90] *Id.* p 4.
[91] AKYÜZ, p. 338.
[92] *Id.* p. 349.
[93] Clarification118.

existence is yet to be determined, it would be deciding over the fictitious assertion and therefore with no genuine reasons, that a court sentence decided on Buyer's breach.

104. Clearly, as this is not the case and the JVTribunal has not decided on the matter, the continuation of these proceedings will end up representing a manifest excess of this Tribunal's powers, and its Award contingent of an annulment under Article 52 (b) and (e).

(II) FPS CLAIMS DO NOT RELATE TO AN INVESTMENT "MADE IN CONFORMITY WITH LAWS AND REGULATIONS"

105. Seller contends his alleged investment was not awarded FPS. However, as will be explained further on, Seller was awarded with FPS throughout all of it. Seller is unlawfully presenting its claims for the violation of the standard when he did not own the alleged investment.

106. Article 1(1) of the BIT states that "*For the purposes of this agreement;*

> The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

107. As the *Anderson* tribunal said on the importance of the legality of investments in a state's territory:

> "The fact that the Contracting Parties…specifically included such a provision is a clear indication of the importance that they attached to the legality of investments."

108. It is not, but under the premises established in the BIT, that Respondent is to observe these standards.

109. By the time, the deliberative organ of Sat – Connect decided the call option[94] not only the confidentiality of the Project was violated[95], but Seller remained within the premises of the Beristian company without any shareholding's rights whatsoever.

[94] Problem, Facts ¶10, Clarification 138.
[95] Problem, Facts ¶8.

110. In addition to that, upon the call option took place and the further suspension of the shares was decided by the BoD, Seller had no possibility of owning an investment. Therefore, given 14 days to withdraw their personnel from the facilities, when some of Seller's personnel did not leave, the CWF asked the employees to leave the premises, which they did voluntarily and without suffering any harm.[96]

111. Claimant's allegations, regarding Respondent asking Claimant's personnel out of the premises of Sat Connect and escorting them by the Civil division of Defense Forces[97], constitute no wrongful act, since these actions meant no harm to any the workers involved and had been executed as part of a professional intervention by a special branch of the Defense Forces in furtherance with national security interests.[98]

112. In addition to that, the case is clear when shows it was by only by Seller personnel's will, the employees left Beristan.[99]

113. No FPS claims can be heard by this Tribunal, for the observance of them only arises out of the compliance with the laws and regulations of Beristan. Once Seller was not part of the Project anymore, it had absolutely nothing to do in Sat – Connect premises, making the intervention of the CWF a very much legal one.

114. It was Seller's actions that deprived him of its participation in the JVAgreement.[100] Seller's misbehavior throughout the Project, his decision not to participate in the BoD meeting when the call option was discussed,[101] and the fact it did not show before the JVTribunal to defend itself,[102] are only some of the facts that show its ill performance against the principle of good faith.

115. This Tribunal must prevent Seller to benefit from his own wrongdoing, like the tribunal in *Inceysa* did when a Spanish company tried to obtain ICSID jurisdiction out of an illegal performance against to the laws and regulations of El Salvador.[103]

116. The *Anderson* tribunal said:

[96] Problem, Facts ¶11, Clarifications 204, 248.
[97] Clarification 204, 248.
[98] Clarification 204.
[99] Id.
[100] Problem, Facts ¶8,¶10.
[101] Clarification 208.
[102] Clarification 118.
[103] DOLZER AND SCHREUER, p. 87.

> "The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country."

117. As Seller's allegations of violation of FPS obligations do not arise out of an investment done in conformity with the laws of regulations of Beristan, this Tribunal lacks of jurisdiction.

(B) CLAIMANT FAILED TO ABIDE BY THE PROVISION ON THE BIT WHICH REQUIRED FOR CLAIMANT TO WAIT FOR SIX MONTHS BEFORE THE REQUEST FOR ARBITRATION.

118. BIT Article 11 states that regarding:

> "Any disputes with respect to investments, if the dispute cannot be settled amicably within six months of the date of a written application, the investor in question may in writing submit the dispute".

119. SCHREUER asserts this provision has as its purpose to give the parties in the dispute,"*an opportunity to reach a negotiated settlement"*.[104]

120. In this case, Claimant failed to attempt amicable settlement for a period of six months period, and therefore since a jurisdictional prerequisite has not been met this Tribunal lacks jurisdiction over the present case.

121. Even though Claimant was aware of the jurisdictional bar that was the "6 *months period*", has not made any effort to obey by the "cooling off period" and utilizing it to negotiate a solution to the present dispute, and instead, unlawfully submitted the dispute to this Tribunal.[105]

122. In addition to that, it is under those unique conditions the BIT was agreed by Respondent and would constitute a serious violation not to stand by those stipulations. This conduct shows a manifest disregard for the provisions of the –Beristan-Opulentia BIT. The same BIT, Seller has intended to use in its benefit and as was explained before and now is ignoring the same instrument which precisely includes the waiting period provision.

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[104] SCHREUER SETTLEMENT, p 232.
[105] Problem. Facts ¶14.

123. The tribunal in the *Goetz*[106] case, decided the waiting period was to be complied with, and its violation would have barred the jurisdiction on determined claims. William W. Park when dealing with the issue of admissibility of the claims states that it consists of a jurisdictional limit, which restricts "eligibility for arbitration"[107].

124. On September 12,2009, Televative submitted a written notice to Beristan, in which Televative informed its desire to settle the dispute amicably, and failing that, to proceed with arbitration pursuant to Article 11 of the BIT.[108]

125. On October 28,2009, 47 days after initiating the amicable settlement mechanism, Televative filed its request for arbitration before ICSID and notified the Government of Beristan, therefore violating the period to engage in amicable settlements. [109]

126. SCHREUER states that this period of time would constitute itself as a bar to the tribunal's competence. This will occur if Claimant, in a clear sign of bad faith – contrary to the Vienna Convention on the Law of Treaties – "*starts arbitration prematurely in order to put pressure on the opposing party in negotiations*".[110]

127. The six months period was bilaterally established by Opulentia and Beristan as one of the aspects comprehending its given consent to proceed in a determined way under specific conditions. Any alteration of this period would constitute a serious violation for there would leave no opportunity for the parties to solve the matter.

128. Throughout this period Claimant showed no signs, nor made any effort in order to settle the dispute as prescribed by the BIT.

129. The tribunal in the *Enron*[111] case found that:

> "[the waiting period] is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction". [112]

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[106] *Goetz,¶90-3*
[107] PARK,*.p.4.*
[108] Clarification 133.
[109] Problem. Facts,¶14.
[110] SCHREUER SETTLEMENT, p. 239.
[111] *Enron*
[112] *Id. ¶89*

130. Claimant's conduct shows the absence of any kind of actions leading to pursue a remedy and therefore avoid ICSID arbitration.

131. In *Wintershall*[113], the arbitrators cited the *Maffezini* tribunal regarding whether the "waiting period" could be dispensed or not and determined that:

> "The requirement of recourse to local courts for an eighteen-month period in Article 10(2) is fundamentally a jurisdictional clause, not a mere procedural provision…and it can only be dispensed with by some "legitimate" extension of rights and benefits by means of the operation of an MFN Clause" [114]

132. This was not what Claimant pursued; since there is no evidence of the invocation of an MFN Clause to surpass this necessary period of time to resolve the dispute.

133. Respondent did not consent to arbitration before an ICSID tribunal under these circumstances thus this ICSID tribunal has no jurisdiction on the present dispute.

134. The "6-month-waiting" period is a jurisdictional requirement for Claimant to pursue ICSID arbitration. Therefore, its violation for all the reasons above stated, bars the jurisdiction of this Tribunal

[113] *Wintershall*
[114] *Id. ¶172*

MERITS

(A) SELLER'S INVESTMENT WAS NOT EXPROPRIATED

135. Seller alleges that Respondent expropriated Televative's investment in the Sat-Connect project. Contrary to what Seller contends, Beristan has not expropriated Televative's investment as will be demonstrated in the following paragraphs. Based on Seller's breach of contract, Buyer exercised the call option prescribed under the JVAgreement, to Seller's apparent and unjustified dissatisfaction, which does not amount to more than a contractual disagreement between private parties.

a. CONCEPT OF EXPROPRIATION

136. Scholars and case law agree that an expropriation "*is a governmental taking of property for which compensation is required.*"[115]

137. Expropriation under the Beristan-Opulentia BIT is regulated under Article 4, which provides that:

> 1. The Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.
>
> 2. Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subject to any measure having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

138. The Beritan-Opulentia BIT covers direct and indirect expropriations, none of which have materialized in this case. According to the *Tecmed* tribunal, direct expropriation can be defined as :

> "…a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect."[116]

[115] See*, e.g.,* MC.LACHLAN, SHORE, WEINEGER, p. 266,¶8.03.
[116] *Tecmed,¶*113.

139. On the other hand, 'indirect expropriation' is a general term which comprises several types of measures, falling under denominations such as '*de facto*,' 'creeping expropriation, ' or "measures 'tantamount' or 'equivalent' to expropriation.".The *Tecmed* tribunal also defined these different types of indirect expropriation as follows:

> "Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect."[117]

140. As will be evidenced throughout this section, in the present case there is neither a direct expropriation nor an indirect expropriation since: i) no administrative or legislative action providing the transfer of Televative's property to Beristan has been issued; ii) Beristan has not acquired title over Claimant's investment, and; iii) Claimant has not been deprived of any rights or assets it is entitled to under the JVAgreement or otherwise in connection with the Project.

b. SELLER'S CLAIM IS A CONTRACTUAL CLAIM AGAINST A PARTY OTHER THAN RESPONDENT

141. As was established in the precedent paragraphs, this dispute arose from the performance of a buyout provision to which Seller does not agree.

142. Seller alleges that Respondent was behind Buyer's decision of performing the buyout provision in order to build an expropriation attributable to Respondent. However, it is an uncontested fact that the buyout decision was taken by Buyer and confirmed by the Sat-Connect's Board of Directors, in accordance with the procedure provided in the JVAgreement.[118]

143. Nonetheless, the merit of the Purchase Decision is being decided by the arbitral tribunal established under the JVAgreement.[119]

144. Commentary No. (6) of Article 8 of the ILC Commentary, in order to define when a conduct of a state-owned entity is attributable to the host-state, provides the following:

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[117] Id.,¶114.
[118] Problem, Annex 2,¶10.
[119] See Clarification No. 138.

> "The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie 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."[120]

145. In this sense, FEIT establishes the requirements to make attributable to the state the conduct of an entity as follows:

> "In order to establish the responsibility of a state for the breach of contract committed by one of its entities, two preconditions must be fulfilled. As a first precondition, a state can only be held responsible if the state-owned entity was empowered with governmental authority and if it acted in such capacity when breaching the contract. As a second precondition, the contractual breach must amount to a violation of international law...
>
> (…)
>
> It appears that the state's responsibility under the expropriation clause will only arise if a state-owned entity breaches its contractual obligation by using methods unavailable to a regular contracting party or if the investor is unable to seek redress before a court (see SGS v.Philippines, Waste Management II, Azurix)."[121]

146. Seller failed to prove its assertion that Buyer acted in exercise of governmental authority or under control of the State of Beristan. As was evidenced above, the conduct of Beritech, which was in conformity with the JVAgreement and Beristian law, differs from the conduct required to make the host state responsible for the conduct of a state-owned company.

147. Nevertheless, if Seller considers that the Purchase Decision was wrongly performed by Beritech, it would still not constitute an expropriation, but a contractual dispute.

148. In this vein, the *Azurix* tribunal held that:

> "...contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has

[120] See Commentary Articles, Article 5, p. 42.
[121] FEIT, p. 176.

> breached the contract in the exercise of its sovereign authority, or as a party to a contract. As already noted, a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign'."[122] [123]

149. Contrary to what Seller alleges, Buyer simply exercised its right under the JVAgreement. Based on Televative's material breach, Beritech, with the support of Sat-Connect, decided to perform its contractual right. There were no sovereign functions since it was a performance of a contractual right.

150. Deciding on a similar issue, the tribunal in the case *R.F.C.C.*,quoted by SCHREUER, stated the following:

> "The Moroccan partner of the investor had merely exercised rights under the contract and had not acted in a public capacity. This, the tribunal pointed out, was evidenced by the fact that there was no passage of law, government decree or execution of a judgment."[124]

151. Buyer and Seller entered into an agreement in which they included a penalty clause. This clause provided that the buyout of Claimant's shares would occur in the event it breached its obligations under the contract. Indeed, Televative breached its contractual obligations, what led to the enforcement of the Purchase Decision.

152. In this line, the *Tradex* tribunal, hearing on a claim arising from an agreement signed by both parties of the dispute, held the following:

> "[A]n agreement reached in consent with the foreign investor and signed by it... can hardly be seen as an act of expropriation in itself."[125]

153. This dispute is being settled by the JVTribunal established under ART.17 of the JVAgreement. In the event that the said tribunal makes a decision favorable to Seller, Televative will recover the possession of its assets. On the contrary, if the tribunal finds that Televative has breached its contractual obligation of confidentiality, Televative will still have available the US$ 47 million, held in an escrow account since August 27th 2009.

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[122] Cf. R.F.C.C.
[123] *Azurix,*¶315.
[124] SCHREUER EXPROPRIATION,¶70, quoting *R.F.C.C.,*¶65-66, 69, 85-89.
[125] *Tradex,*¶177.

154. Therefore, according to the precedent paragraphs, Seller should not submit its dispute to ICSID, since there has been no expropriation of Televative's investment, but a performance of a contractual right that lead to a dispute being settled by the accorded JVTribunal.

c. IN ANY EVENT, THE CONTRACTUAL CLAIM LACKS MERIT

155. Taking into account the sensitive information that the Sat-Connect project entailed, Seller and Buyer established in the JVAgreement a quick procedure upon any material breach (as defined in the JVAgreement) to ensure the security of the Project.

156. Two provisions in the JVAgreement are of particular relevance to the dispute at stake.

157. Clause 4 of the JVAgreement provides, in its relevant part, as follows:

> 1)…Each of the parties and Sat-Connect agree that it will keep confidential, will not disclose, and will not allow to be disclosed any said matters or Confidential Information, directly or indirectly, to any person nor authorized under this Agreement, without the prior written approval of the Sat-Connect board of directors…
>
> 4) Any breach of this Clause 4 shall be deemed a material breach of the Agreement…[126]

158. Clause 8 of the JVAgreement, states the following:

> If at any time Televative commits a material breach of any provision of this Agreement, Beritech shall be entitled to purchase all of Televative's interest in this Agreement. Under such circumstances, Televative's interest in this Agreement shall be valued as its monetary investment in the Sat-Connect project during the period + time from the execution of this Agreement until the date of the buyout.[127]

159. Therefore, according to the JVAgreement, Beritech had the power to enforce the buyout provision, based on Televative's breach of the JVAgreement.

160. There is no dispute between the parties that the buyout proceeding was enforced by Beritech only upon the approval of Sat-Connect's Board of Directors and in furtherance of a two-tiered procedure established under the JVAgreement. The

[126] Problem, Annex 3.
[127] Problem, Annex 3.

buyout procedure has not, to this date, been completed, as Seller's shares are only suspended pending the resolution of the matter by the arbitration panel currently hearing Beritech's motion. The decision to submit the matter to arbitration and to suspend the voting rights of Seller's shares was only adopted after the matter had been put to the vote of the Board of Directors of Sat-Connect, at a meeting to which Seller –for reasons of its own- chose not to send its representatives. It must be noted, also, that, as a matter of caution, the purchase price agreed for Seller's shares in the JVAgreement was concurrently put in escrow for the benefit of Seller. [128]

161. After the disputed decision, Beritech noticed to Seller about the Board of Director's buyout decision and requesting to hand over possessions and to remove personnel within 14 days. Nevertheless, Televative did not comply with this order and refused to leave Sat-Connect sites and facilities.

(B) RESPONDENT ACCORDED FAIR AND EQUITABLE TREATMENT ("FET") AT ALL TIMES

162. As will be evidenced in the following paragraphs, Respondent acted in conformity with the FET standard applicable to the present case.

163. Article 2 of Beristan-Opulentia BIT states:

> 2.2. Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security if the investments of investors of the other Contracting Party.
>
> 2.3. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.[129]

164. Therefore, according to Beristan–Opulentia BIT, it is applicable to the present case the minimum standard in accordance with customary international law.

165. In that sense, the tribunal in the *Neer* case established the scope of the minimum standard that host-states should grant to aliens, holding that the conduct of a

[128] Problem, Annex 2,¶10.
[129] Beristan-Opulentia BIT, Article 2.

State, in order to violate the FET standard,"'*should amount to an outrage, to bad faith, to willful neglect of duty,' such that an 'impartial man could recognize its insufficiency.*'"[130]

166. Despite the *Neer* case was awarded in 1926 and established a minimum standard of treatment that states should grant to aliens, as was said, tribunals still follow the doctrine established by the *Neer* tribunal and apply it also to investment arbitrations.

167. Following this interpretation, the *Genin* tribunal stated that the obligation of FET "*under international law is generally understood as to 'provide a basic and general standard which is detached from the host State's domestic law'*"[131]. However, the tribunal considered that the mentioned rule is not clear, therefore it understood to require an "international minimum standard" that is separate from domestic law, but that is, indeed, a minimum standard. So, it concluded that:

> "Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[132]

168. Furthermore, other tribunals adopted the interpretation and scope of the FET standard as stated above.[133]

169. Thus, the scope of the FET standard in accordance with this interpretation is that one which the host state's conduct must consist in "acts showing a willful neglect of duty, an insufficiency of an action falling far below international standards", none of which we can find in the present case. As will be shown in the following paragraphs, the conduct of Respondent was reasonable at all times.

170. Scholars identify relevant elements within the concept of FET none of which have materialized in this case. Recognized authorities as, MC LACHLAN, SHORE & WEINEGER establish, as applicable to Televative's claims, the elements that will be treated in the following paragraphs.[134]

[130] *Neer,¶*4.
[131] *Genin*,¶367.
[132] Id.,¶367.
[133] See *cases: Azinian, SD Myers* and *Waste Management II.*
[134] See , e.g., MC.LACHLAN, SHORE, WEINEGER, p. 235-247.

a. LEGITIMATE EXPECTATIONS OF SELLER

171. Legitimate expectations is generally accepted as the dominant elements of the FET standard[135]. It seeks the protection of the basic expectations that were taken into account by the foreign investor to make the investment. Following the *Occidental* tribunal,

> "The stability of the legal and business framework is thus an essential element of fair and equitable treatment"[136]

172. In relation to Seller's legitimate expectations, Respondent provided and maintained a stable and predictable legal framework and environment to the foreign investments. Respondent did not make any amendment to the rules that governed Seller's investment in Beristan.

173. Moreover, Respondent did not make any specific assurances to Televative concerning its investment. Seller made its own studies and analysis of its investment and after that entered into an agreement, accepting a buyout provision, among other provisions. Therefore, the performance of the buyout provision should not surprise, since it was one of the consequences directly connected to Seller's conduct.

b. DUE PROCESS WAS ALWAYS AVAILABLE AND THERE WAS NO DENIAL OF JUSTICE

174. This element of the FET standard encompasses two requirements that host-states shall grant to foreign investors: i) proper administrative proceedings and; ii) civil and criminal justice.[137]

175. Due process was always granted to Seller's claims. Both, administrative proceedings and civil justice was always available in Beristan for Claimant's claims. Moreover, under the JVAgreement there was a JVTribunal established for the settlement of disputes, however, Claimant decided to file its claims with ICSID although there is a decision pending hearing this issue.

176. The execution order is not subject to appeal because of its own nature. In cases like of high risk like the present, the execution must be prompt, since a delay could

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[135] *Saluka,¶302.*
[136] *Occidental,¶183.*
[137] SCHILL, p. 18,19.

have grave damages. However it does not violate the due process, since Seller had other ways to file its claims before Beristian's courts or with the JVTribunal established under the JVAgreement.

c. RESPONDENT DID NOT USE GOVERNMENTAL POWERS FOR IMPROPER PURPOSES

177. This element, as it name states, seeks to ensure that the host-state does not take advantage of its State powers at the expense of foreign investors.

178. As was evidenced along this memorial, Respondent had never interfered with Seller's investment. The only action taken by Beristan related to Televative's investment was the intervention of the CWF to secure the Sat-Connect's sites and facilities. However, those actions, as will be shown in the following paragraphs, were based on the legal basis of an execution order because of Seller's breach of its obligations of leaving Sat-Connect's sites and facilities.

179. The CWF actions cannot be deemed a use of powers for improper purposes since, one of the state's obligations is to ensure de public order and the compliance with the law of its citizens.

d. DISCRIMINATION

180. Seller alleges that Respondent acted in a discriminative manner by favouring local Beristian personnel in detriment of Televative's personnel.

181. ART.2.3 of Beristan-Opulentia BIT prescribes:

> Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.[138]

182. Seller's claims have no ground, since, Seller's personnel obligation to leave the Project does not entail the termination of the Project. In order to assure the proper

[138] Problem, Annex 1.

working of Sat-connect, it was necessary to hire new personnel. Beritech hired personnel with relevant expertise in the Beristian labor market, hence, there was no need to hire aliens.[139]

(C) RESPONDENT GRANTED SELLER CONSTANT FULL PROTECTION AND SECURITY ("FPS")

183. Article 2 of Beristan-Opulentia BIT reads:

> 2.2 Both Contracting Parties shall at all times ensure treatment in accordance with customary international law, including fair and equitable treatment and full protection and security if the investments of investors of the other Contracting Party.
>
> 2.3 Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.

a. CWF ACTIONS HAD A LEGAL BASIS

184. In international law, it is generally accepted that FPS is an obligation to host states to act in good faith in order to protect foreign investments, but it does not mean an obligation of giving a warranty to investor's property.

185. The *ELSI* tribunal set a leading case in this matter amply adopted by ICSID tribunals which stresses as follows;

> "The provision of constant protection and security cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed".[140]

186. In relation to the acts of the CWF, Beritech noticed to Seller about the buyout decision and its consequent obligation to leave Sat-Connect sites and facilities within 14 days. Because of Seller's failure to comply with that obligation, Beristan had no other choice than to secure the Sat-Connect project's sites and facilities, as always does in such circumstances.

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[139] See Clarification No.171.

[140] *ELSI*,¶108.

187. However, we will make clear that it was the Civil Work Force the division in charge of this task, a team of engineers specially trained to act in these civil matters. The CWF acted on the legal basis of an executive order motivated on Seller's failure to comply with its obligation of leaving the Sat-Connect project's sites and facilities. Moreover, Seller's personnel left Beristan voluntarily and they did never fear for their safety or well-being.[141]

188. In addition, the majority of tribunals understood that FPS standard means an obligation for the host state to act in a diligent manner in order to protect foreign investors.

189. In *Lauder*, there was a dispute between two private companies and Mr. Lauder, investor in one of those companies, commenced arbitration proceedings against the Czech Republic alleging that Czech Republic, through its Media Council, had violated the applicable BIT. However, the *Lauder* tribunal stated the following:

> "The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims and for such claims to be properly examined and decided in accordance with domestic and international law".[142]

190. In the present case, Respondent not only kept its judicial system available, but Seller did not even file any complaint or action, neither tried to settle amicably the dispute between Televative and Beritech. Furthermore, on September 11th, Beritech noticed Seller to settle the dispute amicably in accordance to the procedure established in the JVAgreement, but Televative did not answered to it.

(D) OBSERVANCE OF COMMITMENTS, BERISTAN AS GUARANTOR

a. THE REQUIREMENTS TO TRIGGER BERISTAN'S RESPONSIBILITY ARE NOT FULFILLED

191. The Beristan-Opulentia BIT provides in its ART.10 an "Observance of commitments" provision, by which:

[141] See Clarifications No. 248 and 204.
[142] *Lauder*, ¶314.

> "[e]ach Contracting Party shall constantly guarantee the observance of any obligation it has assumed with regard to investment in its territory by investors of the other Contracting Party"[143]

192. According to the Clarifications "*[a]s guarantor, Beristan would assume the obligations of Beritech under the JVAgreement upon Beritech's default*". [144]

193. Hence, Respondent has a secondary responsibility. Before Respondent's assumption of Beritech's obligations under the JVAgreement, it is required the default of Beritech.

194. In the present case there is no default of Beritech, since it simply performed its right accorded in the JVAgreement. Moreover, there is no award finding Beritech's default and this Tribunal has no power to hear on that dispute.

195. The tribunal in the *BIVAC* case stressed the following:

> "Our conclusion may be put simply: in circumstances in which there is no dispute that the alleged contractual debt continues to exist, or that the forum for the resolution of contractual disputes remains fully available, the materials put forward by BIVAC do not raise the possibility of an arguable case of expropriation."[145]

196. Being in the case a forum selection provided in the JVAgreement and that that forum not only remains available, but also it is hearing the dispute –pending on decision[146]- there could not be a denial of justice. Thus, there is no obligation that Respondent should assume.

197. Besides, Respondent is not a party in the dispute pending before the JVTribunal established under the JVAgreement.

(E) ALTERNATIVELY, THE MEASURES ADOPTED BY BERISTAN ARE JUSTIFIED UNDER ARTICLE 9 OF BERISTAN-OPULENTIA BIT

198. Alternatively, the acts of the CWF were justified on national security grounds. The leak of information from the Sat-Connect project to the Government of Opulentia implicated directly the national security of Beristan. Beristan, in order to comply with

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[143] Problem, Annex 1, Art. 10.
[144] Clarification No.152.
[145] *BIVAC,*¶117.
[146] *Clarification 138*

its obligations and safeguard Beristan's national security, decided to remove Televative's personnel from Sat-Connect sites and facilities.

199. Article 9 of the Beristan-Opulentia BIT establishes the following:

> "Nothing in this Treaty shall be construed:
>
> 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interest".

a. ART.9 OF BERISTAN-OPULENTIA BIT IS DIFFERENT FROM ART.25 OF ILC ARTICLES

200. According to the modern eye, it should be clear distinguished the BIT clauses generally known as Non Precluded Measures from Art.25 of the ILC Articles., as they have different scope, different cause of action and different effects.

201. In this sense, Art.9 of the Beristan-Opulentia BIT is a special conventional rule that may be invoked only within the scope of the BIT and, if applicable, there is no international wrongful act. Supporting this criterion, the *Sempra Annulment* Committee stated that:

> "Article XI is a primary rule, since it delimits the scope of the substantive obligations of the BIT itself. If the requirements under Article XI are met, there is no breach of the BIT. Article 25 is a secondary rule, since it provides discharge from responsibility of the State for internationally wrongful acts…The state of necessity does not extinguish or terminate the obligation, but excludes responsibility for its non-performance."[147]

b. THE SELF-JUDGING NATURE OF "NATIONAL SECURITY"

202. In relation to the self-judging nature of the "national security", SCHLOEMANN & OHLHOFF[148] stated the following:

[147] *Sempra Annulment,*¶115.
[148] SCHLOEMANN & OHLHOFF, p. 451.

> "In particular, the concept of national security, or "essential security interests," is a function of contemporary sovereignty, and as such demands individualization, or individual definition, by the state concerned before its juridical application is possible. The same applies, to a limited extent, to the related concepts of "emergency" and "necessity." WTO members, in other words, reserve a certain definitional prerogative to themselves. Any panel dealing with such issues will have to defer to the government concerned in that regard."

203. In the same line, according to the UNCTAD, Art.9 of Beristan-Opulentia BIT adopted a broad interpretation of essential security.[149]

> "Many IIAs include an exception clause allowing Contracting Parties to deviate from their IIA obligations in the case of a threat to their essential security interests. In most cases, these clauses are drafted in a general manner that leaves Contracting Parties ample discretion to decide whether a particular investment poses a threat to national security and how to respond to the threat."[150]

204. The exceptional circumstances given in the case preclude the wrongfulness of the acts carried out by CWF, which the State of Beristan does not deny acted under its control and orders.

205. This military information was entrusted to Seller in order to develop and carry out the Sat-Connect project together with Beritech, subject to the confidentiality provision established in the JVAgreement. Any leak of that information could amount to a great risk to the national security of Beristan. After finding out about the leak of information, in order to avoid such a risk and maintain the international peace, Beristan decided to act by removing Televative's personnel from the Sat-Connect project.

206. It should be noted, as discussed above, that Televative was served notice on August 28,2009 that they were obliged to leave the sites and facilities within 14 days. The CWF, in absence of Seller's compliance, proceeded to secure all Sat-Connect sites and facilities on September,11,2009, after the binding deadline.

207. Following the *Continental* tribunal, the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable".

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[149] UNCTAD, p. 144.
[150] UNCTAD, p. 158.

> The term "necessary" refers in our view to a range of degrees of necessity. At a one end of this continuum lies "necessary" understood as "insidpensable"; at the other, is "necessary" taken to mean as "making a contribution to".[151]

(F) ALTERNATIVELY, UNDER ART.25 OF THE ILC ARTICLES, BERISTAN SHOULD BE EXEMPTED FROM LIABILITY

208. If the Tribunal still considers that the conduct of Beristan means an international wrongful act attributable to the State of Beristan,we consider that under Art.25 of the ILC Articles Beristan should not respond for those acts.

209. Art.25 of the ILC Articles provides the following:

> 1. Necessity may not be invoked by a State as a ground of precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril: and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State has contributed to the situation of necessity. [152]

210. In order to determine the concept and scope of the Art.25 of the ILC Articles, the *Continental* tribunal stated the following:

> "Necessity is there taken into account as a"ground for precluding the wrongfulness of an act not in conformity with an international obligation," under certain strict conditions."The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin. It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."

[151] *Continental,*¶193.
[152] ILC Articles, Article 25, p. (•).

> Thus and act otherwise in breach of an international obligation ("not in conformity" with it) is not considered wrongful, and does note therefore entail secondary obligations attached to an illicit act, thank to the "exceptional" presence of one of the conditions that under international law preclude wrongfulness, here necessity."[153]

211. In addition, on August 31,2010, thirty-five academics issued a Public Statement in which they state the need of restructuring the BIT's and State-investor dispute settlement proceedings.

212. The Public Statement establishes in its preamble the following:

> "We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability."[154]

213. States should not lose its fundamental right of take every necessary measure to govern within its territory. In this sense,the Public Statement in its Art.4 states the following:

> "States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose."[155]

214. Hence, based on the last awards issued by ICSID tribunals and Committees[156] and the Public Statement,we consider appropriate this Tribunal to acknowledge the increasing trend of recognizing its sovereign capacities to the States to take

215. As evidenced in the uncontested facts, Beritech noticed Televative to leave Sat-Connect project's sites and facilities within 14 days. In absence of Televative's compliance with that measure, there was no other way to secure the national security than by removing Televative's personnel.

216. Televative's conduct of not comply with its obligation of leaving the sites and facilities should be interpreted as a manner of forcing Beristan to remove its personnel.

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[153] *Continental,¶*167.
[154] Public Statement, preamble.
[155] Public Statement,¶4.
[156] See *Sempra Annulment* and *Enron Annulment.*

217. Beristan’s conduct is pursuant to all the requirements provided in Art.25 of the ILC Articles as:

i. it was the only way for Beristan to safeguard its national security against a grave peril;

ii. does not seriously impair an essential interest of Opulentia;

iii. the international obligation does not exclude the possibility of invoking necessity, and;

iv. Beristan has not contributed to the situation of necessity.

PART THREE: PRAYER FOR RELIEF

218. In light of all the above reasons, The Republic of Beristan respectfully requests this Tribunal to find that it has no jurisdiction to rule over the present dispute.

219. Alternatively, if the Tribunal considers that is has jurisdiction to hear the present dispute, the Republic of Beristan respectfully requests to:

i. Dismiss each and every claim submitted by Seller and;

ii. Order Seller to pay the costs, expenses and counsel fees incurred as result of these proceedings.