INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

Spender Team

TELEVATIVE INC.

[Claimant]

v.

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

[Respondent]

(ICSID Case No. ARB/X/X)

MEMORIAL FOR RESPONDENT

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¶	paragraph
Annex 2	Annex 2 to the FDI Moot Problem 2010 – Uncontested Facts
Beristani Tribunal	Arbitral Tribunal constituted upon the Respondent's request of 19 October 2009 on the basis of Clause 17 of JVA
Beritech	Beritech S.A.
The BIT	Treaty between the Republic of Beristan and the United Federation of Opulentia concerning the Encouragement and Reciprocal Protection of Investments
Clarifications 1	FDI Moot 2010 Clarification Requests (4 June) Responses
Clarifications 2	FDI Moot 2010 2nd Clarification Requests (6 August) Responses
Clause 8	Clause 8 of the Joint Venture Agreement between Beritech S.A. and Televative Inc. dated 18 October 2007
Clause 17	Joint Venture Agreement between Beritech S.A. and Televative Inc. dated 18 October 2007
CWF	Civil Works Force
ECHR	European Court of Human Rights
JVA	Joint Venture Agreement between Beritech S.A. and Televative Inc. dated 18 October 2007
ICSID	International Centre for Settlement of Investment Disputes
Meeting	Sat-Connect Board of Directors' Meeting of 27 August 2009
Minutes	Minutes of the first session of the Arbitral Tribunal (part of the FDI Moot Problem 2010
SPV	Special Purpose Vehicle

STATEMENT OF FACTS

1.On **18 October 2007** two private entities – Claimant and Beritech - concluded a commercial contract establishing Sat-Connect, a joint venture company. The Sat-Connect project was aimed at developing and deploying a satellite network and accompanying terrestrial systems. Respondent intended to use the system for the purposes of the armed forces. In JVA the parties agreed, *inter alia*, to treat all the information regarding the project as confidential (Clause 4 JVA), and to resolve any dispute arising out of the contract by arbitration under Beristani Arbitration Act (Clause 17). Respondent agreed to assume Beritech's obligations upon its default.

2.Despite the confidentiality obligation assumed by the parties to JVA, a leak of information from Claimant's personnel to the Government of Opulentia was reported by Beristani press on **12 August 2009.** According to a defense analyst, critical information, including encryption keys, technology systems and intellectual property was disclosed. Claimant denied the published story, admitting however that requests for such information had been made by Opulentian authorities, and that it had refused what was called "unlawful" access. Nonetheless, special legislation concerning these issues was enacted in Opulentia in aftermath of these allegations. Due to the leak, Respondent decided to secure all sites and facilities of the Sat-Connect project in order to prevent any further disclosure of information concerning the system. On **11 September 2009** the CWF, a civil engineering section of Beristan army, which was empowered to fulfill this task by an Executive Order, secured the project facilities and asked the personnel seconded by Claimant to leave all the Sat-Connect's sites. Afterwards, the personnel was evacuated from Beristan.

3.Claimant's reprehensible actions also spawned a contractual dispute between the parties to the JVA over the interpretation of the buyout clause. To the best of Respondent's knowledge, Beritech availed itself of its contractual right to buy out Claimant's shares, due to a material breach of the JVA confidentiality clause committed by Claimant. On **19 October 2009** Beritech filed a request for arbitration under a dispute resolution clause included in JVA and paid USD 47 million into an escrow account which has been made available to Claimant and is held pending the decision of the Beristani Tribunal. In spite of its express consent on this forum, agreed upon in the JVA, Claimant refused to respond to Beritech's arbitration request.

4.Claimant made no attempt to settle the dispute amicably. It refused to discuss the current situation with Beritech and failed to appear at the Sat-Connect Board of Directors Meeting. Instead, and despite the pending arbitration proceedings in Beristan, on **1 November 2009** Claimant filed with the ICSID Secretary General the request for arbitration.

SUMMARY OF ARGUMENT

5.Firstly, Respondent submits that the Tribunal is not competent to hear the case - it lacks jurisdiction with respect to the claims for the breach of JVA and the rest of the Claimant's request are inadmissible. The claims for the breach of JVA are contract-based and thus, given the formulation of the arbitration clause (Art. 11) and the umbrella clause (Art. 10) of the BIT, the Tribunal is not entitled to consider them. Moreover, the jurisdiction of the Tribunal as to the claims under JVA is barred by Clause 17 JVA. The rest of Claimant's requests cannot be reviewed by the Tribunal as well, since they are inextricably intertwined with those for the breach of JVA. Thus, the Tribunal should stay the proceeding not till the Beristani Tribunal constituted pursuant to Clause 17 issues its ruling.

6.Secondly, with respect to the merits of the case, it is submitted that only actions undertaken by CWF can be attributed to Respondent for the purposes of international responsibility. Actions and omissions of Beritech are not attributable to Respondent.

7.Thirdly, CWF intervention was justified in light of the Respondent's essential security interest. Therefore, Respondent is entitled to rely on Art. 9 BIT and the measures adopted by it in order to protect essential security cannot be precluded by virtue of the BIT substantive provisions. In consequence, the international law standards adopted in the BIT are not applicable in this case.

8.Fourthly, Respondent did not breach in any way JVA. In particular, Respondent did not breach its duties as the guarantor to JVA. Since Beritech has fulfilled its contractual obligations, Respondent's obligations were never actualized. Moreover, the alleged improper invocation of the buyout provision cannot be attributed to one particular party, as the resolution to suspend the Claimant's shares was adopted by Sat-Connect itself and not individually by any of its shareholders.

9.Fifthly, even if the international law standards were applicable and Beritech's actions could be attributed to Respondent, Respondent did not expropriate Claimant. Moreover, Respondent acted in a non-discriminatory manner, affording fair and equitable treatment to the Claimant's investment and granting it full protection and security. Therefore, Respondent fulfilled all its international law obligations towards Claimant's investment and did not breach any of the substantive BIT provisions.

PART ONE: JURISDICTION

10.Respondent submits that the proper forum for the present dispute is the Beristani Tribunal constituted pursuant to Clause 17 JVA. Institution of the present BIT proceedings is a glaring example of disruptive forum shopping aimed at undermining the jurisdiction of the Beristani Tribunal. The Tribunal should prevent Claimant from taking such action given the fact that Beritech voluntarily agreed that any dispute arising under JVA should be resolved solely by the Beristani Tribunal.

11. JVA was concluded by Claimant with Beritech, a private company incorporated under the laws of Beristan. Both parties, being equal partners, carefully negotiated the provisions of JVA, so that it would be tailored to fit their needs. It is therefore no wonder that as prudent businessmen they made sure that JVA contained an arbitration clause, Clause 17, providing for a forum capable of resolving their disputes in an impartial and quick manner. Clause 17 stipulating Beristani arbitration as an exclusive method of resolving disputes under JVA has been introduced into JVA with Claimant's full consent. Claimant's present actions are therefore in manifest disregard of that contractual arrangement.

12.Since the claims for the breach of JVA are contract-based (**I.**), the Tribunal does not have jurisdiction over them (**II.**). Moreover, the Tribunal should decline jurisdiction over the claims arising in connection with the JVA as they fall within the scope of Clause 17 (**III.**). As for the other requests made by Claimant, the Tribunal should stay the proceedings as it is impossible to rule on them before the Beristani Tribunal decides on the legality of Beritech's buyout and since the consultation requirement provided for in Art. 11 BIT has not been met **(IV.)**.

I. CLAIMS PURSUED IN THIS ARBITRATION ARE CONTRACT-BASED.

13. In the present arbitration Claimant alleges that its investment was thwarted by Respondent's unlawful actions. In this respect Claimant invokes Art. 2 (discrimination and lack of fair and equitable treatment), Art. 4 (expropriation) and Art. 10 (breach of the contractual provisions of JVA) of the BIT. Nevertheless, the crux of Claimant's argumentation concentrates on the issues connected with JVA, the legality of Beritech's actions resulting in the buyout of Claimant's shares in Sat-Connect in particular.

14.For instance, as to the alleged infringement of the FET standard, Claimant contends that it consisted of, among other, "*abusive exercise of Beritech's rights under Clause 8 of the JV Agreement*"[1]. Claimant's expropriation claim in turn is heavily based on an allegation that "*under the buyout provision Beritech paid significantly less than* (…) *an arms-length buyer*"[2]. Finally, Claimant alleges that Respondent infringed its obligation to observe its undertakings by "*preventing Claimant from completing its contractual duties*"[3] as well, as by "*improperly invoking the buyout clause*"[4]. All the Claimant's statements cited above clearly indicate that Claimant's contentions are by and large based on the fact that its cooperation with Beritech has turned sour.

15.Consequently, claims presented in this arbitration are contract-based to the extent they are grounded on Beritech's infringements of JVA alleged by Claimant. In this respect Claimant's requests can be divided into purely contractual claims (requests formulated under Art. 10 of the BIT for the alleged breaches of JVA) and contractual claims dressed as treaty claims (other claims for breaches of respective treaty provisions). Regardless of this division, neither of these claims can at this stage be recognized by the Tribunal.

16. *Firstly,* Claimant's requests raising supposed Beritech's breach of JVA provisions, formulated under Art. 10 BIT (the so-called "umbrella clause"), are purely contractual. This fact is admitted by the Claimant itself who confirms that its contention is that Respondent "*breached the JV Agreement*"[5].

17.The contractual nature of these claims remains unchanged regardless of Art. 10 BIT, because a breach of an umbrella clause may only be established once it is ascertained that the contract had been breached. As the tribunal in *BIVAC* case stated: "(...) *if the Tribunal were to find no breach of the Contract, there would be no breach of the BIT*"[6]. This means that the fundamental basis of Claimant's requests under Art. 10 BIT is JVA, and thus these claims are contractual in nature.

18. *Secondly*, the Tribunal should also not recognize the rest of Claimant's requests. In this respect it is immaterial that they are also based on the allegedly illegal actions taken by the CWF. As will be shown below these claims are so intertwined with pure contract

1 *Minutes* ¶ 15, p. 7 of the record.
2 *Minutes* ¶ 15, p. 6 of the record.
3 *Minutes* ¶ 15, p. 7 of the record.
4 *Minutes* ¶ 15, p. 7 of the record.
5 *Minutes* ¶ 15, p. 7 of the record.
6 *BIVAC*, ¶ 149.

claims forwarded by Claimant that the Tribunal should stay the present proceedings until the Beristani Tribunal issues its ruling[7].

II. THIS TRIBUNAL HAS NO JURISDICTION OVER THE CONTRACT-BASED CLAIMS.

19. In the present proceedings Claimant attempts to pursue contractual claims against a private company, arguing that the Tribunal should hear them by virtue of Art. 10 BIT. However, the Tribunal is not competent to resolve a dispute between two private parties – Claimant and Beritech. The claims for the breach of JVA fall outside both the personal and material scope of the Tribunal's jurisdiction. Consequently, the Tribunal does not have jurisdiction to hear them either by virtue of Art. 11 BIT or Art. 10 BIT. Firstly, these claims do not relate to the obligations undertaken by Respondent (**A.**). Secondly, the additional protection granted to Claimant under Art. 10 BIT does not cover Bertiech's purely commercial obligations arising out of JVA (**B.**).

A. THE CLAIMS ARE BEYOND THE PERSONAL SCOPE OF THIS TRIBUNAL'S JURISDICTION.

20. Claims presented in this arbitration relate to the alleged breach of JVA by Beritech. Respondent was not a party to JVA and its role under this agreement was only ancillary – it only guaranteed that it would assume Beritech's obligations under JVA upon Beritech's default. Claimant asserts that JVA was breached because Beritech improperly invoked Clause 8, upon which Beritech was entitled to buy out Claimant's shares.

21. The alleged improper invocation of a contractual right by Beritech does not automatically render Respondent liable as a guarantor. The guarantee compels Respondent to assume Beritech's obligations if the latter fails to fulfill them. However, Claimant does not assert that Beritech breached any of its obligations, but that it improperly invoked its contractual right. Therefore, in these proceedings no breach of the Respondent's obligations as a guarantor could be claimed and Claimant does not contend it.

22. Respondent's jurisdiction offer entailed in Art. 11 BIT covers:

"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"[8]

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[7] See ¶¶ 56 - 60 below.

[8] Art. 11 BIT.

23. This Tribunal is entitled to hear disputes which relate solely to the Respondent's obligations. Claimant, however, asserts claims concerning obligations of a third party - Beritech. As it was firmly emphasized by a tribunal in the *Impregilo* case:

"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."*[9]

24. JVA was concluded between Claimant and Beritech, and Claimant's requests in this arbitration relate to improper invocation of a Beritech contractual right. Respondent does not have any obligations under JVA apart for those as a guarantor, and these have not been breached. Therefore, this Tribunal is not competent to hear the claims relating to the alleged breach of JVA, since they fall outside the personal scope of the Tribunal's jurisdiction.

B. ART. 10 BIT DOES NOT CONFER JURISDICTION TO HEAR THE CLAIMS PRESENTED IN THIS ARBITRATION.

25. The Tribunal is not competent to hear the contractual claims forwarded by Claimant on the basis of Art. 10 BIT. This provision relates only to obligations assumed by the State (**i.**) and does not extend the BIT protection over purely commercial claims (**ii.**). Moreover, it would be against the purpose of BITs to turn a disagreement between Claimant and Beritech into an issue for which international arbitration is available (**iii.**).

i. CONTRACTUAL OBLIGATIONS UNDER JVA CANNOT BE ATTRIBUTED TO RESPONDENT.

26. In order to determine whether the claims presented in this arbitration fall within the scope of Art. 10 BIT attention must be paid to the wording of this provision. It reads as follows:

"Each Contracting Party shall constantly guarantee the observance of any <u>obligation it has assumed</u> with regard to investments in its territory by investors of the other Contracting Party [emphasis added]*."*

27. It is clear from the wording of Art. 10 BIT that the scope of the umbrella clause is restricted to obligations undertaken with regard to the investment by Respondent itself and not by separate state entities.

28. Claimant contends that Respondent breached JVA. However, such an allegation is based on a flawed presumption that Beritech's obligations arising under JVA are

[9] *Impregilo*, ¶ 214.

attributable to Respondent. It was Beritech that was party to JVA and the obligations it has assumed towards Claimant cannot be attributed to Respondent.

29.Firstly, under the municipal law of Beristan, Beritech's actions cannot be attributed to Respondent. Beritech is a separate entity which has no power to contractually bind Respondent by its actions. Moreover, Beritech was not granted any authority which could create an impression that it was acting on behalf of Respondent. The relations between Beritech and Respondent do not go beyond normal relations between the company and its shareholder and there are no compelling reasons to disregard the separation of these two entities.

30.When ascertaining the scope of obligations undertaken by the host state, the ICSID tribunals tend to respect the separate legal personality even of the state provinces. As it was clearly stated in the *Vivendi Annulment:*

"The state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts."[10]

Likewise, Beritech has a separate personality under the Beristani law and is solely responsible for the performance of its own contracts. Therefore Respondent is not liable for obligations assumed by Beritech.

31.Secondly, Beritech's obligations cannot be attributed to Respondent by means of international rules of attribution. International rules of attribution may only be applicable to determine the State responsibility but not to ascertain the scope of its obligations. The sole purpose of the international rules of attribution is to define the State and the scope of its internationally wrongful conducts. As Professor Crawford clearly explains:

"The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. (…). Thus the rules concerning attribution set out in this Chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government [emphasis added]*."*[11]

32.Therefore, the international rules of attribution cannot be applied to define the scope of contractual obligations assumed by Respondent. Consequently, it is the municipal law that governs the scope of obligations undertaken by Respondent under JVA. Under the

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10 *Vivendi Annulment*, ¶ 96.

11 *Crawford*, p. 92.

municipal law Respondent assumed obligations with respect to Claimant's investment solely as a guarantor. As was proven above, under the Beristani law Beritech's obligations cannot be attributed to Respondent.

ii. ART. 10 BIT DOES NOT EXTEND TO PURELY COMMERCIAL OBLIGATIONS.

33. Even if Beritech's obligations were to be assigned to Respondent, remedies for a breach thereof could not be claimed in these proceedings. Art. 10 BIT cannot engage a State's international responsibility for a breach of a purely commercial contract. Likewise, Respondent's obligations as a guarantor do not fall within the scope of protection established by Art. 10 BIT.

34. The balance of opinion in the evolving jurisprudence on the umbrella clauses is consistent in one aspect – a mere breach of purely contractual obligations in itself does not give rise to international liability of the State[12]. As was emphasized in *Siemens*:

"What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its "superior governmental power [emphasis added]*"*[13]

35. In the present case even Claimant admits the alleged breach of JVA was not a result of sovereign interference by Respondent – one of the main claims presented in the proceedings is that Clause 8 has been improperly invoked. Such approach indicates that the Claimant itself perceives the disputed buyout as in fact an action undertaken by Beritech purely in its capacity as a contractual party, without any sovereign public interference.

36. In fact, Respondent did not use its public authority to interfere with the Claimant's contractual rights. At the time of the CWF intervention, Claimant's shares had already been suspended by Sat-Connect, and, as it will be discussed below[14], CWF actions were ordered independently from and not in relation to the contractual dispute within Sat-Connect. Respondent's only aim was to protect its national security interest and not interfere with the dispute between Claimant and Beritech.

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12 *Toto*, ¶ 202.

13 *Siemens*, ¶ 253.

14 See ¶¶ 74 – 93 below.

iii. ART. 10 BIT DOES NOT TRANSFORM THE DISPUTE IN SAT-CONNECT INTO BIT DISPUTE.

37.Moreover, Claimant should not be entitled to seek protection under the umbrella clause against a mere contractual quarrel between two private parties. Claimant had voluntarily entered into JVA, and consented to all of its terms and provisions, including Clause 8 and the buy-out procedure. It is part of the risks inherent in every business transaction that the other might improperly invoke its contractual rights. However, instead of presenting its claims to the Beristani Tribunal, the exclusive forum for the disputes arising out of JVA, Claimant tries to bring the case to international arbitration. The validity of the buyout process should be established in a ruling issued by an appropriate municipal forum and not the investment arbitration tribunal.

38.The Tribunal is not entitled to hear a dispute between two private parties relating to purely commercial obligations, as it would be against the principles underlying the BITs. The umbrella clauses were not supposed to turn every minor disagreement on a detail of a contract performance into an issue for which international arbitration is available[15]. As emphasized by professor Rajski in his dissenting opinion issued in the *Eureko* case, broad interpretation of the umbrella clause may "*create a privileged class of foreign parties to commercial contract who may easily transform their contractual disputes with State–owned companies into BIT disputes."*[16] It would be contrary to the purpose and the main principles of investment arbitration to allow Claimant to present its contractual claims against a private company in these proceedings.

39.In light of the above, Respondent submits that this Tribunal has no jurisdiction to hear the claims presented in this arbitration, as the claims relate to contractual obligations, which were not undertaken by Respondent and which do not fall within the scope of protection granted by Art. 10 BIT.

III. THE JURISDICTION OF THE TRIBUNAL IS BARRED BY VIRTUE OF CLAUSE 17 JVA.

40.Even if the Tribunal finds that the claims presented in this arbitration fall within the scope of Art. 10 BIT, the Tribunal should not exercise its jurisdiction since the parties

15 *El Paso*, ¶ 82*; Schreuer,* p. 255.
16 *Rajski,* ¶ 11.

have already agreed on how such a dispute is to be resolved[17]. Therefore, the Tribunal should decide it is incompetent to hear this dispute as Clause 17 is an exclusive jurisdiction clause (**A.**) and as such should be honored by the Tribunal (**B.**).

A. CLAUSE 17 IS AN EXCLUSIVE JURISDICTION CLAUSE.

41. Clause 17 is an exclusive jurisdiction clause which precludes any other forum which could otherwise be competent from hearing the dispute. Consequently, Clause 17 ousts the competence of the Tribunal to the extent that the jurisdiction of both *fora* overlaps.

42. Pursuant to Clause 17 any disputes arising out of or related to JVA should be resolved by Beristani arbitration, in accordance with the 1959 Arbitration Act of Beristan. Therefore the choice made in JVA should be considered as a 'true' previously agreed dispute procedure. Other than in some previous ICSID cases, such as *Lanco*[18] or *Salini v. Morocco*[19], Clause 17 does not designate a forum which would have been otherwise competent to resolve the disputes between the parties.

43.Moreover, Clause 17 excludes all *fora* otherwise potentially competent to resolve the disputes arising out of JVA from doing so. This contractual provision clearly stipulates that each party to JVA irrevocably submits to the jurisdiction of the arbitral tribunal constituted for disputes arising under JVA. Hence, the wording of Clause 17 straightforwardly indicates it is an exclusive jurisdiction clause by which the parties to JVA barred all other *fora* from resolving disputes arising out of that agreement.

44. In sum, the choice made by the parties to JVA to submit their legal disputes exclusively to an impartial, expedient forum, the Beristani Tribunal, proves that Clause 17 is a proper jurisdiction clause. Due to its particular wording, Clause 17 should be construed as expressing the parties' mutual agreement that any and all disputes concerning JVA should be resolved exclusively by the Beristani Tribunal.

B. THE TRIBUNAL SHOULD GIVE EFFECT TO CLAUSE 17 THEREBY HONORING THE PARTIES' CHOICE OF FORUM TO ADJUDICATE THEIR DISPUTES.

45. Having established that Clause 17 is a proper exclusive jurisdiction clause, the Tribunal is left with no alternative, but to find that it is incompetent to rule on the claims for the alleged breach of Art. 10 BIT. This is the most reasonable conclusion to be

17 *SGS v Philippines,* ¶ 155.
18 *Lanco,* ¶ 38.
19 *Salini v. Morocco,* ¶ 27.

reached in the present case as it honors the choice of the parties to JVA which in Clause 17 have expressly stipulated another forum to resolve their disputes.

46. One of the most important rules in international arbitration is the principle of party autonomy. Some scholars emphasize the significance of that rule by stating that "*a voluntary system such as international arbitration is underpinned by party autonomy*"[20], while others dub it the "*hallmark of the free market autonomy*"[21].

47. Against this background, by requesting the Tribunal to proceed with recognizing the case at bar regardless of Clause 17 Claimant is in fact urging the Tribunal to violate the aforementioned principle. The Tribunal cannot disregard the fact that Clause 17, as explained above, is an exclusive jurisdiction clause granting the sole competence to adjudicate the disputes arising out of JVA to the Beristani Tribunal. Consequently, the Tribunal cannot consider claims for the alleged breaches of JVA and should declare itself incompetent to hear claims under JVA.

48. This approach is in perfect coherence with the ICSID case law. According to the teachings of the 2002 Annulment Committee in the well-established *Vivendi* case:

"*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*"[22]

49. Accordingly, the 2002 Annulment Committee held that in the presence of a jurisdiction clause in a contract the investment arbitration tribunal should be precluded from recognizing claims based on that contract presented to it. The sound logic of this reasoning, indicating the importance of party autonomy in this respect, has been adopted by numerous other investment arbitration tribunals evaluating similar cases[23].

50. Furthermore, Clause 17 was posterior to the BIT and as such it has to be interpreted as ousting the jurisdiction of the present Tribunal. JVA was entered into by Beritech and Claimant on 18 October 2007[24] whereas the BIT itself became effective over ten years before that event, on 1 January 1997[25]. The parties to JVA must have been well aware of

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20 *Spiermann*, p. 188.
21 *Sornarajah*, p. 81.
22 *Vivendi Annulment*, ¶ 98.
23 *SGS v. Pakistan*, ¶ 161; *SGS v. Philippines*, ¶ 161; *BIVAC*, ¶ 148; *Saluka Jurisdiction*, ¶¶ 53-58.
24 *Annex 2*, p. 16
25 *Clarifications 1*, Q. 174.

that instrument during the negotiations leading to the conclusion of the said agreement. Therefore, had they intended to entitle Claimant to submit its disputes with Respondent arising out of JVA to ICSID arbitration, they would have certainly reflected that in the wording of Clause 17. Forbearance from doing so must be interpreted as expressing the parties' clear intent to choose the Beristani Tribunal as the exclusive forum competent to resolve disputes arising out of JVA.

51. This argument finds support in the jurisprudence of ICSID case law. In similar circumstances (existence of an exclusive jurisdiction clause posterior to the BIT) the tribunal in the *BIVAC* case stated that:

> *"The parties could have included a provision in Article 9(1) to the effect that the obligations it imposed were without prejudice to any rights under the BIT* (...). *The fact that they did not do so* (...) *indicates, at the very least, that the parties to the Contract, including BIVAC, intended the exclusive contractual jurisdiction of the Tribunals of the City of Asunción to be absolute and without exception, and for it to mean what it says."*[26]

52. Last but not least, it cannot be ignored that the present case was first submitted to the Beristani Tribunal. Both the notice of dispute (11 September 2009[27]) and request for Beristani arbitration (19 October 2009[28]) were served by Beritech before Claimant notified Respondent of the dispute (12 September 2009[29]) and requested ICSID arbitration (28 October 2009[30]). Due to that fact the Tribunal should allow the competent forum which was seized of jurisdiction first to continue in recognizing the case and decide it has no competence to hear the contractual claims for the supposed breach of JVA.

53. In sum, the Tribunal should find that the existence of Clause 17, an exclusive jurisdiction clause posterior to the BIT, ousts its competence to consider the contract-based claims presented in this arbitration. Claimant cannot be allowed to forward requests under JVA and to disregard the contractual mechanism envisaged for resolving disputes arising thereunder at the same time. Indeed, allowing it to do so would amount to letting Claimant to, as one ICSID tribunal put it, "*approbate and reprobate in respect of the same contract*"[31].

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26 *BIVAC*, ¶ 146.
27 *Clarifications 1*, Q. 175.
28 *Annex 2*, ¶ 13.
29 *Clarifications 1*, Q. 133.
30 *Annex 2*, ¶ 13.
31 *SGS v. Philippines*, ¶ 155.

54.Claimant should therefore observe its duty to "*comply with the contract in respect of the very matter which is the foundation of its claim*"[32], to use the words of the very same tribunal. Consequently, contract-based claims forwarded in this arbitration should be either refuted due to lack of the Tribunal's jurisdiction to hear them or dismissed as inadmissible.

IV. REQUEST FOR THE STAY OF PROCEEDINGS.

55.With respect to the other claims presented in this arbitration Claimant, Respondent moves for a stay of proceedings on the following grounds. The claims pursued for the alleged breach of Art. 4 BIT are intertwined with purely contractual claims (**A.**) and the consultation requirement envisaged in Art. 11 BIT has not been fulfilled (**B.**).

A. THE TRIBUNAL SHOULD STAY THE PROCEEDINGS CONCERNING THE CLAIMS FORWARDED FOR BREACH OF ART. 4 BIT.

56. As regards the claims pursued for the alleged breach of Art. 4 BIT, the Tribunal should stay the proceedings since these claims are inextricably intertwined with purely contractual claims, referred to above, as they both arise out of the same factual basis. All claims under Art. 4 BIT may be traced back to Beritech's buyout of Claimant's shares in Sat-Connect and thus depend on the issue of the legality of the buyout and adequacy of the purchase price for the shares in Sat-Connect.

57. For instance, if the Beristani Tribunal, appropriate to hear the claims arising out of JVA, ruled that Beritech's use of the buyout provision was improper, then the shares in Sat-Connect are essentially Claimant's property. Thus, no expropriation claim may be forwarded and the damages, if any, connected with Claimant's temporary inability to exercise its shareholder rights will undoubtedly be awarded in the Beristani arbitration.

58. This example illustrates that recognition of the alleged treaty claims is entirely dependent on the findings of the Beristani Tribunal which has exclusive jurisdiction over claims for the alleged breach of JVA. In cases where the contract and treaty claims significantly overlap it is submitted that:

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[32] *SGS v. Philippines*, ¶ 155.

"(...) *the treaty tribunal should exercise its discretion to stay its own proceedings to await the resolution of the contractual issues by the chosen forum.*"[33]

59. Accordingly, the Tribunal should follow the path paved in the *SGS v. Philippines* case[34] and stay the present proceedings concerning the alleged treaty claims. Given the particular circumstances of this case such a ruling will minimize the risk that both tribunals will issue contradictory rulings.

60.Consequently, the proceedings as to Claimant's treaty claims should be stayed given their strict dependence on the ruling issued by the Beristani Tribunal on the claims for the alleged breach of JVA.

B.THE CONSULTATION REQUIREMENT HAS NOT BEEN FULFILLED.

61.Additionally, Respondent requests the stay of the proceedings, since the requirements for submitting the dispute to this Tribunal have not been fulfilled. Claimant failed to make an attempt at resolving the dispute amicably, as envisaged in Art. 11 BIT.

62. Pursuant to Art. 11 BIT, the investor may in writing submit the dispute for settlement to the ICSID Tribunal, if:

"*the dispute cannot be settled amicably within six months of the date of a written application"*.

63.Claimant failed to notify Respondent about its concerns and to settle the dispute amicably. Instead it immediately turned to ICSID and filed a request for arbitration on 28 October 2009, just 6 weeks after the alleged expropriation of the Claimant's investment took place. Respondent had no chance whatsoever to address the Claimant's allegations before the present proceedings were initiated.

64.Art. 11 BIT introduces a requirement that must be fulfilled before the arbitration proceedings may be commenced. The purpose of this provision is to encourage the parties to engage in negotiations in good-faith before initiating the arbitration[35]. It enables the host State to address the investor's concerns before the case is brought to international arbitration allowing both parties to save time and costs. Respondent had no opportunity to even try to settle the dispute with Claimant amicably, as Claimant did not inform Respondent about its intention to file a request for arbitration.

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33 *Douglas*, point D. *in fine*.

34 *BIVAC*, ¶ 149.

35 *Paulsson*, p. 55.

65.According to the ICSID jurisprudence if the claims have not been notified to the host state at all, they should be declared inadmissible[36]. A stay of proceedings due to the non-fulfillment of the consultation period requirement may be granted when the investors did not attempt to settle the dispute amicably[37].

66.Letting Claimant commence the arbitral proceedings at this stage would prejudice Respondent's rights and would be contrary to the principle of good faith. This is why, as held by the tribunal in *SGS v Philippines,* Claimant cannot be allowed to claim under the provisions of the BIT without itself complying with it[38]. The Tribunal should stay the proceedings and give the parties a chance to settle the dispute amicably within the time prescribed in Art. 11 BIT.

36 *Goetz*, ¶ 90-93.

37 *Paulsson*, p. see also: *Lauder*, ¶¶ 186 - 191.

38 *SGS v. Philippines*, ¶ 154

PART TWO: MERITS OF THE CASE

I. ONLY THE ACTS OF THE CWF ARE ATTRIBUTABLE TO RESPONDENT.

67. Should the Tribunal assume jurisdiction over the dispute and proceed to decide on its merits, it should first take into consideration that only the claims regarding actions and omissions attributable to Respondent may be subject to its rulings. Accordingly, it is submitted that only the acts of the CWF may be attributed to Respondent **(A.)**, but not the actions of Beritech **(B.)**.

A. ACTS AND OMISSIONS OF CWF ARE ATTRIBUTABLE TO RESPONDENT.

68. Respondent accepts that the actions adopted by its armed forces (CWF), acting upon its orders[39], are attributable to it in light of the principles of international law[40]. Nonetheless, it will be explained below that these actions were justified by national security concerns[41], and additionally, they were immaterial to Claimant's rights[42].

B. ACTS AND OMISSIONS OF BERITECH ARE NOT ATTRIBUTABLE TO RESPONDENT.

69. As for the actions of Beritech however, they cannot be attributed to Respondent due to the lack of any connecting factor recognized by international law.

70. Firstly, Beritech is a separate legal entity, even though it is owned by Respondent holding 75% of its share-capital[43]. As such, and differently from CWF, it cannot be considered an organ of the State as mentioned in Art. 4 of the ILC's *Articles on State Responsibility*.

71. According to the *Articles*, acts of persons other than the State organs can only be attributed to the latter when such entities exercise "*elements of governmental authority*" and provided that: "*the person or entity is acting in that capacity in the particular instance*"[44]. Assessing the position of Beritech as a state-owned entity in this context, it is relevant to note, following Professor Crawford that:

"the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets (...) – these are not decisive criteria for the purpose of

39 *Clarifications 2*, Q. 187.
40 *Draft Articles*, Art. 4.
41 See ¶¶ 74 – 93 below.
42 See ¶¶ 113 – 131 below.
43 *Annex 2*, ¶ 2, p. 16.
44 *Draft Articles*, Art. 5.

attribution of the entity's conduct to the State[emphasis added]. *Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority"*[45]

72.The actions of Beritech would thus only be attributable to Respondent if the company exercised public authority of some kind. However, it is clear from the facts of the case that it did not. Furthermore, the actions contested by Claimant, that is the invocation of JVA buyout provision, were of strictly contractual character, as described above[46].

73.In sum, it is submitted that the actions of Beritech may not be attributed to Respondent.

II. RESPONDENT SHOULD BE ENTITLED TO RELY ON ART. 9 BIT AS IT ACTED TO PROTECT ITS "ESSENTIAL SECURITY INTEREST".

74.The removal of Claimant's personnel from the Sat-Connect project, executed by CWF following the leak was justified on national security grounds and consequently, Respondent is entitled to rely on Art. 9 BIT as a defense to Claimant's requests.

75.Art. 9 BIT reads:

"Nothing in this Treaty shall be construed to: (...) 2. to preclude a Party from applying measures that it considers necessary (...) for the protection of its own essential security interest."

76.Clauses such as the one quoted above, which refer to "*essential security interest*" or to "*non-precluded measures*", serve as a defense to justify actions otherwise prohibited by BITs that are adopted by a State to protect its national security[47]. It is accepted that such exceptions:

"affirm the right of States to pursue objectives identified in these provisions, even if, in doing so, States act inconsistently with obligations set out in other provisions of the respective agreements"[48]

77.It should be thus held in mind that by virtue of Art. 9 each of the Contracting Parties of the BIT expressly reserved the right to protect their "*essential security interest*" whenever it is in danger. In the case at hand Respondent was forced to make use of the

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45 *Crawford* ¶ 3, p. 43.
46 See ¶¶ 33 - 36 above.
47 *Newcombe/ Paradell*, p. 485.
48 *WTO Dispute DS 285,* ¶ 291.

said reservation for justified reasons and by adequate means, since the leak of information from the Sat-Connect project to the Government of Opulentia threatened Respondent's national security **(A)**. In consequence, the measures adopted by Respondent were necessary to protect its essential security interest and as such they were justified under Art. 9 BIT **(B.)**. For the same reasons, the said provision was invoked in good faith **(C.)**.

A. THE LEAK FROM SAT-CONNECT DIRECTLY IMPLICATED RESPONDENT'S NATIONAL SECURITY.

78.The first element that must be evaluated by the Tribunal when deciding on the applicability of Art. 9 BIT is the significance of the leak of information from the Sat-Connect project to the Government of Opulentia. It will be proved below, by presenting the relevant facts, that the Sat-Connect project was closely related to the national security of Respondent **(i.)**, and that Respondent's assessment of the possible adverse consequences of the leak should be followed by the Tribunal **(ii.)**.

i. THE SAT-CONNECT PROJECT WAS CLOSELY RELATED TO THE NATIONAL SECURITY OF RESPONDENT.

79.The Sat-Connect system was developed to provide connectivity and communications in Beristan, as well as in the entire region of Euphonia, by means of a satellite network accompanied by terrestrial systems and gateways[49]. More importantly, it was to be used by several segments of Respondent's armed forces[50]. It should be beyond any doubt that any technology providing communication for military purposes is inextricably related to the State's national security and consequently must be subject to special protection by the State. There is also no need for elaborating on the strategic relevance of connectivity and communication in the modern world. The Sat-Connect project must be thus considered directly related to the national security of Respondent.

80.The presented assessment can by no means be altered by the fact that the system was also to be used for civilian purposes[51]. Such technologies, exploited for both military and civilian purposes, are commonly regarded as raising national security concerns. For these reasons, these "dual use technologies", as they are commonly described, are often subject

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49 *Annex 2*, ¶ 5, p. 16.
50 *Annex 2*, ¶ 6, p. 17.
51 *Annex 2*, ¶ 6, p. 17.

to trade restrictions[52], as well as to other limitations. For instance, security reasons led the Japanese authorities to restrict the export of a popular toy[53], whereas the use of a particular mobile phone by officials of the French Government was prohibited[54].

81.In this light, the security concerns about the Sat-Connect project have to appear as especially well-grounded, as there was no particular proportion of Sat-Connect that was to be used by the military to the exclusion of civilian users[55]. It means that any unauthorized access to the system as a whole, made possible by the transfer of encryption keys (reported in The Beristan Times)[56] or otherwise, would directly affect the operational capability of Respondent's army. No expert opinion is necessary to establish the fatal consequences that a State may suffer in case of emergency if its armed forces are deprived of secure communication.

82.Because of these grave implications on Respondent's national security, and despite the fact that the leak has not yet been officially confirmed[57], it is clear from the facts of the case that a serious security concern was raised with regard to the Sat-Connect system. Respondent was faced with the risk of losing control over this strategic technology and that alone must be considered as a sufficient threat to its essential security interest.

ii. RESPONDENT'S ASSESSMENT OF THE FACTS SHOULD BE FOLLOWED BY THE TRIBUNAL.

83.All the facts presented above prove that the Sat-Connect project was of special concern for the national security of Respondent. Thus, due to the leak from the project to the government of another State, reported in the press[58], Respondent had to assess the threat provoked by these circumstances to its essential security. It must be emphasized, that it is the right of a sovereign State to decide on its national security. When the circumstances are so grievous as to raise security concerns, only the State authorities are in a position to decide on the exceptional measures required. This principle was adopted by the ECHR which decided that:

52 E. g., Council Regulation (EC) No 1334/2000 of 22 June 2000.
53 http://www.theregister.co.uk/2000/04/17/playstation_2_exports/.
54 http://news.bbc.co.uk/2/hi/business/6221146.stm.
55 *Clarifications 1*, Q. 121.
56 *Clarifications 1*, Q. 178.
57 *Clarifications 2*, Q. 247.
58 *Annex 2*, ¶ 8, p. 17.

"It falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency"[59]

84.Accordingly, Respondent exercised its discretion as a sovereign, when deciding that the leak implicated its national security. Consequently, its judgment may not be contested by Claimant, nor should it be reviewed by this Tribunal. It must be stressed that:

"There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war."[60]

85.In conclusion, the Tribunal should follow Respondent's assessment of the presented facts and accept that the leak from the Sat-Connect project amounted to a threat to the national security of Beristan.

B.RESPONDENT ADOPTED MEASURES NECESSARY TO PROTECT ITS ESSENTIAL SECURITY.

86.Having established above that the leak from the Sat-Connect project implicated Respondent's national security, it is submitted that the intervention of the CWF and the removal of the personnel seconded by Claimant from the project sites was a preventive measure **(i.)**, and that under Art. 9 BIT it was in Respondent's discretion to adopt such measures **(ii.).**

i.RESPONDENT WAS FORCED TO ADOPT PREVENTIVE MEASURES.

87. Respondent could not have been reasonably expected to disregard the security risks arising with respect to the Sat-Connect system that was to be used by its armed forces. This in turn forced Respondent to react to the situation. As a reversal of the decision to make military use of Sat-Connect would be to the detriment of its army, depriving it of access to modern technology, Respondent was left with no other option, but to secure the project sites and facilities from the Claimant's personnel, which was allegedly the source of the discussed leak[61]. The involvement of the CWF indicates the serious concern caused to Respondent by the situation and its intention to adopt firm, yet effective measures.

88.The forcible removal of Claimant's personnel should be thus comprehended as an attempt to ensure the security of the Sat-Connect technology, by preventing any leaks in the future. The Tribunal should view the preventive measures adopted by Respondent as

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59 *Ireland v United Kingdom*, p. 79.

60 *FYROM*, ¶ 50.

61 *Annex 2*, ¶ 8, p. 17.

justified under Art. 9 BIT. Otherwise, the protection of State's essential security interest would be limited to situations when the loss or detriment was already suffered. Such an unreasonable outcome was noted by the Tribunal in *Continental Casualty,* deciding upon a clause similar to Art. 9:

"Art. XI does not require that ―total collapse of the country or that a ―catastrophic situation has already occurred before responsible national authorities may have recourse to its protection. (…) There is no point in having such protection if there is nothing left to protect"[62]

89. Applying this logic to the case at hand, Respondent contends that its actions were aimed at protecting the security of the Sat-Connect project until its completion, and simultaneously at avoiding any vulnerability of the system when used by the armed forces of Beristan. This justification would remain valid even if the press allegations regarding the leak were proved to be wrong, as it must be reiterated again that Respondent could not have taken any risk with regard to its national security.

ii.IT WAS WITHIN RESPONDENT'S DISCRETION TO DECIDE ON NECESSARY MEASURES.

90.As for the actions executed by the CWF, according to the wording of Art. 9 BIT, it was within Respondent's own discretion to decide on measures necessary to protect its essential security interest. Various tribunals have held the phrase "*measures <u>it</u> considers necessary* [emphasis added]", used in the mentioned provision, indicates the self-judging character of the clause[63], as opposed to the phrase: "*measures necessary*"[64]. Consequently it was for Respondent to decide when or to what extent its essential security interests were at stake and what measures needed to be applied.

91.What is more, contrary to some other bilateral investment treaties[65], the BIT does not enumerate in Art. 9 the situations, in which a State may adopt necessary measures. This broad scope of the discussed provision is yet another argument in support of Respondent's position.

92.Accordingly, it is beyond the Tribunal's powers to substantially review the measures adopted by Respondent, as under the BIT it was the sole arbiter of the situation. Nonetheless, the justification of these actions was presented in detail above in order that the Tribunal may have access to full information on the case at hand, as well as to

62 *CCC,* ¶¶ 180 – 181.
63 E. g., *Nicaragua, Oil Platforms.*
64 E. g., *Enron,* ¶ 339 , *Sempra,* ¶ 388.
65 E.g. Canada 2004 Model BIT.

establish Respondent's honest intentions with regard to the Sat-Connect project and Claimant.

C. RESPONDENT INVOKES ART. 9 BIT IN GOOD FAITH.

93. Lastly, Respondent submits that given all the circumstances described above, it was forced to make use of the essential security exception, it did so on justified grounds, and the measures adopted against Claimant were necessary to protect the national security of Beristan. Art. 9 BIT was thus invoked in good faith, as required by Art. 25 of the *Vienna Convention*. Accordingly, any argument Claimant may raise to the contrary should be dismissed by the Tribunal.

III. RESPONDENT DID NOT IN ANY WAY BREACH JVA.

94. Should the Tribunal find that it has jurisdiction over Claimant's contract-based claims and that these claims are admissible, it is maintained that Respondent in no way infringed the provisions of JVA. First of all, none of Beritech's alleged breaches of JVA can be attributed to Respondent (**A.**) and secondly none of its contractual duties as the guarantor of Beritech's obligations were breached (**B.**). Nevertheless, even if Beritech's actions are attributable to Respondent they did not constitute breaches of JVA (**C.**).

A. BERITECH'S ACTIONS ARE NOT ATTRIBUTABLE TO RESPONDENT.

95. Claimant holds that Respondent materially breached JVA by "*preventing Claimant from completing its contractual duties and improperly invoking Clause 8 (Buyout) of the JV Agreement*"[66]. By making such a statement Claimant however confuses two distinct entities, by assigning, without valid grounds, Beritech's alleged breaches of JVA to Respondent.

96. As pointed out above Respondent's obligations under JVA were distinct from that of Beritech and thus Beritech's actions cannot be attributed to Respondent, neither by virtue of municipal nor international rules of law[67]. Due to that fact Respondent cannot be held responsible for any of the Beritech's alleged breaches of JVA.

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66 *Minutes*, ¶ 15, p. 7 of the record.

67 See ¶¶ 26 – 32 above.

B.RESPONDENT DID NOT BREACH ITS DUTIES AS THE GUARANTOR OF BERITECH'S OBLIGATIONS.

97. As indicated above, JVA was co-signed by Respondent acting in the capacity of guarantor of Beritech's obligations. The only duty that JVA imposed on Respondent was to assume Beritech's obligations in case the latter failed to fulfill them[68]. Respondent would have therefore breached its obligation under JVA only if it had not performed duties that Beritech had defaulted on. No such situation took place in the case presently under consideration.

98. In this respect it needs to be stressed that Claimant does not plead the non-fulfillment of any obligations of Beritech under JVA. All Claimant's contentions are centered on the fact that Beritech allegedly invoked Clause 8 in an unlawful manner. However, regardless of the issue of legality of the buyout procedure, by invoking Clause 8 Beritech only availed itself of a contractual right conferred on it by the mutual consent of the parties to JVA.

99. Therefore, it cannot be assumed that by activating the mechanism provided for in JVA Beritech breached any of its obligations. And only in such a case would Respondent have the obligation to assume Beritech's contractual duties. Quite to the contrary, as pointed out below it was Claimant who defaulted on its obligation to keep certain information of the Sat-Connect project confidential, thus materially breaching JVA. This entitled Beritech to avail itself of the right to buy out Claimant's shares provided for by Clause 8, which Beritech decided to execute.

100. Consequently, since there was no default on Beritech's part, Respondent was not obliged to fulfill its duties as a guarantor under JVA. It follows then that Respondent could not have breached JVA in the capacity of guarantor of Beritech's obligations.

C.EVEN ASSUMING THAT BERITECH'S ACTIONS MAY BE ATTRIBUTED TO RESPONDENT, IT DID NOT BREACH JVA IN ANY MANNER.

101. Nevertheless, should this Tribunal find that Beritech's actions are attributable to Respondent, it does not render Respondent liable for breaching JVA. To the best of Respondent's knowledge Beritech was fully entitled to buy out Claimant's shares in Sat-Connect.

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68 *Clarifications 1*, Q. 152.

102. Due to the fact that Respondent was not directly involved in the events that led to the invocation of Clause 8, it is not in a position to assert whether or not the buyout was properly conducted. Based on the information submitted by Claimant, it may however be inferred that all preconditions to the invocation of Clause 8 were fulfilled.

103. According to Clause 8 Beritech was entitled to buy out Claimant's shares in Sat-Connect in case the latter committed a material breach of JVA. To avoid any uncertainties the parties to JVA have defined what infringements of the said agreement would fall into this category. Pursuant to Clause 4.1 JVA any breach of the Clause 4, such as the breach of an obligation not to disclose any confidential information, was to be deemed material breach of JVA. The fact that the parties to JVA explicitly provided that any breach of Clause 4 of JVA would entitle Beritech to take over all of Claimant's interest in Sat-Connect clearly indicates the crucial importance both parties attached to the issue of confidentiality.

104. Nevertheless Claimant did infringe Clause 4 by passing confidential information from the Sat-Connect project to the Government of Opulentia. The existence of that leak of crucial telecommunications data is soundly evidenced by the article in The Beristan Times. The fact that such sensitive security information appears in an independent newspaper[69] only indicates that it was such common knowledge that the leak actually took place that it was impossible for the appropriate Beristani agencies to keep the news about the leak confidential.

105. The actions undertaken by the Government of Opulentia further substantiate the fact that Claimant actually disclosed confidential information from the Sat-Connect project. Even though Opulentia denied having obtained any sensitive data from Claimant, appropriate legislation has been hastily passed after the news of the leak aired which, according to the Opulentian legal scholars, may simply give legal cover to such activities involving the passing of confidential information[70]. In this light Claimant's statement that it "*denied permitting <u>unlawful</u> access* [emphasis added]"[71] seems to be rather a wordplay aimed at covering its shady dealings with the Government of Opulentia than an utter denial that straightforwardly clarifies this complicated situation.

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69 *Clarifications 1*, Q. 168.
70 *Clarifications 1*, Q. 178.
71 *Clarifications 1*, Q. 178.

106. As to possible Claimant's contentions regarding the legality of the buyout procedure, Beritech could not have breached JVA in this respect. It has to be emphasized that any issues concerning the Sat-Connect's resolution approving the buyout are Sat-Connect's internal matters for which Beritech cannot be held liable. Accordingly even if any irregularities took place with respect to the buyout procedure, they cannot be perceived as a material breach of JVA on Beritech's part.

107. Nevertheless the very procedure of the buyout was conducted in accordance with the applicable law and Sat-Connect's bylaws. First of all it has to be stressed, that any potential questions as to the legality of that process would have had to be substantiated by Claimant, pursuant to the well known probatory rule "*ei incumbit probatio, qui dicit, non qui negat*". Consequently, if Claimant raised any allegations that the buyout procedure was conducted improperly and failed to furnish sufficient evidence in that respect, this Tribunal would be left with no option but to accept that there were no irregularities in this respect.

108. To begin with, it cannot be said that Alice Sharpeton had no prior notice of the agenda of the Meeting. Given the subject matter of the meeting of 21 August 2009 (presentation discussing the allegations of the leak[72]) at which all the directors of Sat-Connect were present[73] and the fact that no agenda of the Meeting was distributed among them[74] it was only natural to assume that its subject-matter would concern the issue of Beritech's buyout of Claimant's shares in Sat-Connect. The fact that some directors appointed by Claimant speculated that the Meeting would concern that issue[75] only confirms that they in fact had prior notice as to the agenda of that meeting.

109. Furthermore, no allegations as to the lack of quorum necessary to pass the resolution approving Beritech's buyout may be raised in this arbitration. According to the well established principle of "*nullus commodum capere de sua iniuria propria*" no one can be allowed to take advantage of his own wrong[76]. In the present case by undermining the quorum of the Meeting Claimant acted contrary to the principle of good faith and fair dealing. Due to that fact its arguments as to the quorum should not be heard by this Tribunal.

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72 *Annex 2*, ¶ 9, p. 17 of the record.
73 *Clarifications 1*, Q. 127.
74 *Clarifications 2*, Q. 208.
75 *Clarifications 2*, Q. 208.
76 *Cheng*, p. 149.

110. Claimant's actions were aimed at preventing Beritech from invoking its contractual right to buy out the shares of the former in Sat-Connect. First of all it has to be emphasized that the four directors breaking the quorum were all Claimant-appointed. Three of them decided not to attend the Meeting precisely in order to deprive it of the quorum necessary to pass the resolution approving Beritech's buyout[77]. The actions of the fourth director, Alice Sharpeton were driven by the same purpose since she left the Meeting before the voting over the said resolution took place[78].

111. Consequently, the deliberate actions of Claimant's representatives should be perceived as being undertaken to prevent Beritech from invoking its right of buyout stipulated in Clause 8. Such activities by one contracting party, depriving the other party of the right to avail itself of its right are definitely contrary to the general principle of good faith and fair dealing enshrined in Art. 1.7 of the UNIDROIT Principles. Since the UNIDROIT Principles are incorporated by the laws of Beristan[79] Claimant's actions should be perceived as illegal. Consequently, Claimant may not rely on the lack of necessary *quorum* in order to question the legality of the buyout.

112. Due to the above, Beritech's actions cannot be viewed as undertaken in breach of JVA in any manner. Due to that fact and all the issues presented above, Respondent should not be held liable for the material breach of JVA alleged by Claimant.

IV. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT.

113. Claimant's investment was neither expropriated by Beritech's invocation of Clause 8 nor by the military intervention by the CWF. While the former act was taken by an independent company in order to exercise its contractual rights, the latter was aimed at protecting Respondents' essential security and in any event did not affect Claimant's investment.

114. Art. 4 BIT provides that investors' investments

„*shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects [...] except for public purposes, or national*

77 *Clarifications 2*, Q. 208.
78 *Clarifications 1*, Q. 156.
79 *Clarifications 1*, Q. 136.

interest, against immediate full and effective compensation [...]"[80]

115.While a direct expropriation means an outright or formal taking of property, an indirect expropriation was defined in *Metalclad* as including

„[a]lso covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State"[81]

116.It follows then that certain conditions need to be fulfilled to declare the activities of a State expropriatory. Claimant's argumentation in this respect, however, seems principally to rely on conjectures made up to fit its theory rather than on facts.

117.The Claimant's case is based on the theory that it was expropriated because of the conspiracy[82]. Apart from invoking the conspiracy theory, Claimant does not provide any evidence to support such grievous accusations. Claimant's fringe assertions in this regard seem to have been brought forward to blur the factual pattern of this case and lead this tribunal into believing that there is more to Claimant's case than an ordinary dispute between private contractual parties. It must be emphasized, however, that no event attributable to Respondent affected Claimant's investment adversely. What is more, since the two events, i.e. the buyout and actions taken by the CWF, were not interrelated, Claimant's conspiracy theory remains a fiction.

118.These two events were totally independent, in the sense that the former resulted from contractual arrangements between private parties whereas the latter did not affect Claimant's investment. Thus, Respondent submits that the buyout of Claimant's shares did not constitute expropriation (**A.**) and neither did the actions taken by the CWF (**B.**).

A. THE BUYOUT OF CLAIMANT'S SHARES DID NOT CONSTITUTE EXPROPRIATION.

119.As proved above[83], the fact that Respondent holds majority of shares in Beritech does not imply that the latter entity is a State agency or that it acted in the capacity of the state organs within the meaning of the Art. 5 of the Draft Articles. Beritech was not formed by Respondent in order to implement its policies. In particular, Beritech was not vested with any State responsibilities in the area of telecommunications. The

80 Art. 4(2) BIT.
81 *Metalclad*, ¶ 103.
82 *Minutes*, ¶ 15.
83 See ¶¶ 69 – 73 above.

Telecommunications Act does not mention or provide any role for Beritech in the privatization of the telecommunications sector[84].

120.Furthermore, contrary to Claimant's allegations[85], Beritech did not violate any obligations it owed to Claimant under JVA[86]. Nor did Respondent breach its commitments as guarantor[87].

121.In any event, even if this Tribunal should find that Beritech's actions are attributable to Respondent and that Beritech committed a breach of contract, it would nevertheless not amount to an internationally wrongful act as a mere contract violation may not constitute expropriation.

122.A number of recent arbitral awards have addressed this issue[88]. In *Waste Management II* the investor claimed expropriation where the State failed to make payments under a waste disposal concession. The tribunal rejected investor's argumentation that its contract was expropriated, stating that:

„The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts"[89]

In tribunal's view expropriation would have been found, had the State formally repudiated the contract in the form of *„decree or executive act"*[90].

123.Similar conclusions were adopted by ICSID tribunals in *Azurix*[91] and *SGS v. Philippines*[92] where tribunals declined to find mere contractual breaches to be violations of relevant investments treaties. Therefore, something more than exercise of contractual rights is needed to constitute expropriation.

124.In this respect, the *Impregilo* tribunal has rightly observed that a breach:

„[m]ust be the result of behaviour going beyond that which an ordinary contracting party

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84 *Clarifications 1*, Q. 166.
85 *Minutes*, ¶ 15
86 See ¶¶ 101 – 113 above.
87 See ¶¶ 91 – 100 above.
88 See e.g. *Consortium RFCC*, ¶ 972; *Waste Management II*, ¶ 171; *SGS v. Philippines*, ¶ 161; *Azurix*, ¶ 315; *Salini v. Morocco*, ¶ 155; *Siemens*, ¶ 260.
89 *Waste Management II*, ¶ 174.
90 *Waste Management II*, ¶¶ 168 - 172.
91 *Azurix*, ¶ 315.
92 *SGS v. Philippines*, ¶ 161.

could adopt. Only the State in the exercise of its sovereign authority ['puissance publique'], and not as a contracting party, may breach the obligations assumed under the BIT"[93]

and added that the standard of establishing that a contract violation constituted a treaty violation *„is a very high one"*[94].

125.As a consequence, whenever the State adopts a measure in an ordinary and usual contractual form that any other party could normally adopt in a similar contract not involving the State, there is no violation of BIT provisions concerning expropriation[95].

126.Here, Beritech exercised its rights in accordance with JVA. Even if the tribunal should find it did so contrary to JVA provisions, it is still undeniable that any other private party being in Beritech's position could have done the same. Therefore, finding that the alleged breach was expropriatory would undermine any kind of State involvement in the private sphere.

127.In any event, Claimant did not contest the buyout nor did it try to seek any remedy against its ill fortune. Rather, it abandoned its investment and now seeks redress for a virtual expropriation. In such a case, as affirmed in *Generation Ukraine*,

"*an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction"* [emphasis added].

This tribunal should act accordingly.

B.ACTIONS UNDERTAKEN BY THE CWF WERE NOT EXPROPRIATORY.

128.Notwithstanding the above considerations, it results from Claimant's conspiracy theory that its investment was expropriated as a result of two events: the buyout of shares in Sat-Connect and the intervention of the CWF. The logical consequence of Claimant's allegations is that by the time of the said intervention it had contractual rights that could be expropriated. In the same vein, tribunal in Generation Ukraine held that :

"*A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have*

93 *Impregilo*, ¶ 260.
94 *Impregilo*, ¶ 267.
95 See *Consortium RFCC*, ¶ 65.

eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation"[96]

However, this was not the case in the present dispute.

129.Shares in Sat-Connect reflected Claimant's paid-in investment as well as its intellectual property, given the fact that according to JVA they were to belong to and be exploited by Sat-Connect[97]. As established above, Claimant's shares in Sat-connect, however, were legally bought out by Beritech. Therefore, by the time of the CWF intervention Claimant had no interest in Sat-Connect any more.

130.In light of the above, it was only Claimant's personnel seconded to Sat-Connect that was interfered with by the military forces. Claimant's personnel, however, can hardly be classified as an investment as per the terms of the BIT. Specifically "personnel" is not included in the Art. 1(1) BIT which defines the "investment".

131.For all the above reasons, Claimant's investment was neither directly nor indirectly expropriated by Respondent.

V.RESPONDENT AFFORDED CLAIMANT FAIR AND EQUITABLE TREATMENT.

132.At no point did Respondent cease to afford Claimant fair and equitable treatment. All means adopted by Respondent with respect to Claimant's investment were both justified on national security grounds and non-discriminatory. As regards the buyout, it was executed by Beritech, a private company, in accordance with JVA. Respondent cannot therefore be held responsible for this occurrence as it cannot bear liability for any commercial misfortune Claimant suffers.

133.Under Art. 2(2) BIT Respondent is obliged to "*ensure treatment in accordance with [...] fair and equitable treatment*" to investors "*at all times*"[98].

134.There is no exact definition of fair and equitable treatment. Generally speaking, when determining whether there has been a violation of the standard the tribunal:

"*will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable*"[99]

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96 *Generation Ukraine*, ¶ 911.
97 *Clarifications 2*, Q. 269.
98 Art. 2(2) BIT.
99 *Mann*, p. 244.

135.Fair and equitable treatment is a minimal standard. Thus, for the breach of the standard to occur, this tribunal must determine that Respondent acted in a manner that „*shocks, or at least surprises, a sense of juridical propriety*"[100].

136.A broader definition was proposed in *Waste Management II* where the tribunal found that

"*[t]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process*"[101]

137. No matter how broad the definition may be, it is concerned with the state's conduct rather than with the fact that investor suffered or its investment lost its original value[102].

138.Claimant raised several grounds on which fair and equitable treatment standard was allegedly breached. However, it fails to meet the burden of proving any such violation. Specifically, Respondent treated Claimant fairly and equitably observing at all times Claimant's legitimate expectations (**A.**), in accordance with principles of non-arbitrariness and non-discrimination (**B.**).

A.RESPONDENT TREATED CLAIMANT FAIRLY AND EQUITABLY OBSERVING CLAIMANT'S LEGITIMATE EXPECTATIONS.

139.Legitimate expectations of the investor must be respected to the extent which ensures that individuals are not deterred from investing in the host country. Therefore, in observance of the legitimate expectations the host state only:

"*implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate requirements of consistency, transparency, even-handedness and non-discrimination".*[103]

140.Here, Claimant has lost its investment, i.e. interest in Sat-Connect due to its own contractual arrangements. Therefore, violation of fair and equitable treatment could be found if and only if the acts and omissions of Beritech are attributable to Respondent and insofar as the standard extends to the obligations arising from contracts.

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100 *ELSI*, ¶ 128.
101 *Waste Management II*, ¶ 98.
102 *Lauder*, ¶ 291.
103 *Saluka Award*, ¶ 307.

141.According to a recent trend in ICSID jurisprudence a simple breach of contract by the State cannot trigger violation of the fair and equitable treatment standard. The *Consortium RFCC* tribunal held that breach of fair and equitable treatment could occur only in instances where the host state acted in its capacity as a sovereign and not within the scope of its role as a private party[104].

142.By the same token, tribunals in *Waste Management II*[105] and *Impregilo*[106] found that reliance on fair and equitable treatment standard depends on whether the impugned activity goes "*beyond that of an ordinary contracting party*"[107]. In this context the tribunal in *Waste Management II* held that:

"*[e]ven the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105* [FET standard], *provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem*"

143.In the present case, Beritech's actions, even if attributable to Respondent, did not involve *puissance publique* as Beritech only availed itself of its contractual rights. As such, Beritech's actions cannot be viewed as even potentially infringing the standard of fair and equitable treatment.

144.Respondent by itself has made no specific assurances whatsoever concerning Claimant's investment. It only guaranteed the assumption of Beritech's obligations upon Beritech's default. Legitimate expectations did not arise in this regard. Accordingly, Claimant itself does not purport to rely on the breach of Respondent's guarantee.

145.With regard to actions taken by the CWF, they were justified on public policy grounds[108]. The CWF were legally empowered to secure sites and facilities and evacuate Claimant-seconded staff based on the Executive Order[109]. This was a peaceful and non-intrusive evacuation. At no point were Claimant's personnel afraid for their well-being or safety[110].

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104 *Consortium RFCC*, ¶¶ 33-34.
105 *Waste Management II*, ¶ 108-117.
106 *Impregilo*, ¶¶ 266-270.
107 *Dolzer*, p. 142.
108 See ¶¶ 74 – 93 above.
109 *Clarifications 1*, Q. 155.
110 *Clarifications 2*, Q. 248.

B. RESPONDENT TREATED CLAIMANT IN ACCORDANCE WITH PRINCIPLE OF NON-ARBITRARINESS AND NON-DISCRIMINATION.

146.An arbitrary measure may be defined as:

"a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety"[111]

whereas a measure is discriminatory when it provides "*the foreign investment with a treatment less favorable than domestic investment"*[112]. Along these lines, the *Saluka* tribunal found that

„*the standard of 'nondiscrimination' requires a rational justification of any differential treatment of a foreign investor*"[113]

Respondent at no point acted in an arbitrary or discriminatory manner.

147.Claimant contends it was expelled from JVA in an arbitrary and unfair manner, for motives unrelated to its performance[114]. However, Claimant's alleged expulsion was a result of the exercise of contractual rights conferred on Beritech by virtue of JVA. The underlying reason for the actions taken was the leak of the Confidential Information, as defined in Clause 4(2) JVA[115], reported in the article in Beristan Times[116].

148.Claimant was offered payment of USD 47 million for its paid-in investment as required by JVA[117]. What is more, Claimant had the right to challenge the buyout procedure before the contractually agreed forum, i.e. the Beristani Tribunal. However, Claimant has refused both to accept the payment and to respond to Beritech's arbitration request[118].

149.Respondent denies it discriminated against Claimant's personnel by favoring local Beristani personnel[119]. Firstly, the expelled personnel were Claimant's employees, specifically seconded to the Sat-Connect project[120]. Given the fact that by the time of the

111 *ELSI*, ¶ 128.
112 *ELSI*, ¶ 128.
113 *Saluka Award*, ¶ 460.
114 *Minutes*, ¶ 15
115 Clause 4(2) JVA
116 *Clarifications 1*, Q. 178.
117 *Annex 2*, ¶ 13.
118 *Annex 2*, ¶ 13.
119 *Minutes*, ¶ 15.
120 *Clarifications 1*, Q. 160.

CWF intervention Claimant's shares had already been suspended, Claimant's staff was no longer entitled to occupy the Sat-Connect premises.

150.Secondly, the CWF intervention was not aimed at implementing Respondent's employment policy in a private company, but at protecting Respondent's essential security, threatened by possible further leaks of sensible information to the Government of Opulentia. However, even if it were so aimed, it must be emphasized that the expelled personnel included both Opulentian and third-country nationals.

151.For all these reasons, Claimant was treated fairly and equitably within the meaning of the BIT.

VI. RESPONDENT GRANTED CLAIMANT FULL PROTECTION AND SECURITY OF ITS INVESTMENT.

152.Respondent granted Claimant full protection and security at all times and by all means. It was not Respondent's duty, however, to protect Claimant from detrimental effects resulting from a private contract concluded by Claimant of its own will.

153.The full protection and security standard, expressed in Art. 2(2) BIT, requires the host state to act with due diligence and no more. It does not "*provide an absolute protection against physical or legal infringement*"[121].

154.In *Lauder*, the tribunal stated that the standard obliges the host state to

"*[e]xercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the treaty does not oblige the parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would amount to strict liability, which cannot be imposed on a State absent any specific provision in the Treaty*".

The tribunal went on to say that Czech Republic was obliged merely to "*[k]eep its judicial system available for the Claimant*" insofar as:

"*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*"

155.Applying this framework to the facts of the present case, it becomes clear that Respondent granted Claimant full protection and security with regard to its investment. Respondent had no duty to intervene in the private dispute concerning the buyout

121 *Dolzer*, p. 149; *ELSI*, ¶ 108.

procedure. Both Beritech and Claimant were able to seek justice and bring their claims relating to their legal relationship to the domestic arbitral tribunal according to Clause 17 JVA.

156.Finally, Respondent's intervention on 11 September 2009 did not constitute violation of Art. 2(2) BIT. Firstly, it did not concern Claimant's investment but Claimant's personnel. Secondly, as proved above[122], by the time of the intervention Claimant had no interest in Sat-Connect any more. It must be also emphasized that the CWF acted to protect Respondent's essential security which bars any claims relating to full protection and security.

157.For all the above reasons, Respondent did not fail to provide Claimant with full protection and security.

PART THREE: PRAYER FOR RELIEF

158.In the all the above submissions, Respondent respectfully asks the Tribunal to find that:

(1) The Tribunal is not competent to hear the case;

(2) Respondent is entitled to rely on Art. 9 BIT;

(3) Respondent did not breach the JVA;

(4) Respondent complied with its obligations under Articles 2, 4 and 10 BIT.

Respectfully submitted on 19 September 2010

by

SPENDER

on behalf of

THE GOVERNMENT OF THE REPUBLIC OF BERISTAN

[122] See ¶ 129 above.