THIRD ANNUAL
FOREIGN DIRECT INVESTMENT ARBITRATION MOOT
22 – 24 OCTOBER 2010
MALIBU

MEMORANDUM FOR RESPONDENT

ON BEHALF OF
The Government of Beristan.
RESPONDENT

AGAINST
Televative Inc.
CLAIMANT

respectfully submitted

TEAM BAXTER

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TREATIES AND OTHER INTERNATIONAL PUBLICATIONS

ILA Recomms.	INT'L L. ASS'N, *Recommendations on Parallel Proceedings*, (2006).
Ber-Opt BIT	Treaty Between the Republic of Beristan and The United Federation of Opulentia Concerning the Encouragement and Reciprocal Protection of Investments, Beristal, Beristan March 20, 1996.
ICSID Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S.

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Public Sector Modernisation	(Organization for Economic Cooperation and Development (OECD), *Public Sector Modernisation: Changing Organisational Structures,* OECD Policy Brief (2004)
U.N. Res. 1803	UN General Assembly Resolution 1803 (XVII) *Permanent sovereignty over natural resources,* ¶ 4, 14 December 1962.
OECD Draft	OECD Draft Convention on the Protection of Foreign Property of 1967, 7 ILM 118, 120 (1968).
NAFTA	The North American Free Trade Agreement, 1992 Oct. 7

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Nauru	Case Concerning Certain Phosphate Lands in Nauru, ICJ Reports 1992 p. 240 (paras. 64-70).
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STATEMENT OF FACTS

1. Beritech S.A. ("Beritech") is a company established under Beristian law and endowed with separate legal personality. Televative Inc. ("Claimant") is a private company incorporated in Opulentia. (Record at 16, ¶ 1).

2. In October 2007, Claimant and Beritech signed a private agreement ("JV Agreement") establishing a joint venture company, Sat Connect S.A. ("Sat Connect"). (Record at 16, ¶ 3). The purpose of the joint venture was to develop and deploy satellite communications technology for private use. (Record at 18, ¶ 6). To encourage these types of strategic alliances within its territory, Respondent signed the JV Agreement as guarantor of Beritech's contractual obligations. (Record at 16, ¶ 3).

3. Claimant owns 35 percent of the stake in the joint venture, and Beritech owns the other 65 percent. (Record at 16, ¶ 7). These two companies appoint the nine members of the Sat-Connect board of directors. (Record at 16, ¶ 4). The members of the board elect the chairperson. (First Clarification, Q. 81). The Beristian Minister of Telecommunications is a member of the Beritech Board of Directors. (First Clarification, Q. 135).

4. On 21 August 2009, the chairperson of the Sat-Connect board of directors convened a special meeting of the board to discuss alarming reports in the Beristan Times that Claimant had leaked confidential information about the joint venture to its home country's government. (Record at 17, ¶ 9).

5. On 27 August 2009, the Sat Connect board of directors met to discuss their contractual right to invoke the buyout clause. Six of the nine board members attended; the minimum required to establish a quorum. One of the board members left the meeting before the vote. (Record at 17, ¶ 10). These board voted to invoke the buyout clause. (Record at 16, ¶ 4).

6. The following day, Beritech notified the Claimant that it had to hand over possession of all its interests and assets in the Sat Connect project and remove its seconded personnel from the site within 14 days. (Record at 17, ¶ 10).

7. Concerned over serious risks to national security, Beristan sent the Civil Work Force after the 14-day deadline expired to secure the Sat-Connect site and ensure that Claimant complied with it contractual obligation to leave the premises once the buyout clause had been invoked. (Record at 17, ¶ 11).

8. On 19 October 2009, Beritech filed for arbitration under Clause 17 of the JV Agreement, and placed $47 million in an escrow account to cover the value of
9. Televative's material investment, in accordance with the JV Agreement. (Record at 18, ¶ 13). Claimant has neither accepted the funds nor responded to the request for arbitration. (Record at 18, ¶ 13).

10. On 28 October 2009, Claimant requested arbitration in accordance with the ICSID convention. (Record at 18, ¶ 14, 15).

11. On 1 November 2009, the ICSID secretary general registered this dispute for arbitration.

PART ONE: JURISDICTION

A. The Dispute is Barred as a Contractual Claim

12. Claimant seeks ICSID adjudication of claims arising out of Beritech's invocation of the buy-out provision in Clause 8 of the Sat-Connect Joint Venture Contract. These claims are essentially contractual in nature, as they arise from alleged breaches of the specific provision of the joint venture agreement.

13. As contract claims, Claimant's allegations fall within the *exclusive* jurisdiction of the *ad hoc* tribunal stipulated under Clause 17 of the Joint Venture Contract.[1] Therefore, Claimant is barred from bringing these claims before any tribunal other than the one specified by contract.

14. Beritech's initiation of a parallel arbitration to decide these claims also militates against accepting jurisdiction.

1. The Fundamental Basis of the Dispute is Contractual

15. Claimant's allegations originate with Beritech's invocation of the buy-out provision in Clause 8 of the joint venture agreement. Claimant takes issue with Beritech's application of this provision and Beritech's interpretation of the confidentiality clause that triggered the buy-out. These claims are fundamentally contract claims defined by and arising from the joint venture agreement.

16. On the basis of these initial contract claims, Claimant seeks to attribute the acts of an independent corporation to the state and to construe those acts as treaty obligations.

1 *See* Joint Venture Contract, cl. 17.

17. Claimant's attempt fails for two reasons. First, as will be discussed in the merits section, the alleged actions of Beritech are not attributable to the state. Second, even if they were, not every violation of a contract by a state amounts to a violation of a BIT as well.[2] Where the same actions give rise to two sets of claims tribunals, following the lead of *Vivendi*, determine jurisdiction by examining the "fundamental basis" of the claims presented.

18. In applying this test, the tribunal in *SGS v. Phillipines* emphasized that the "basis" of the claim alluded to in the *Vivendi* test, is the grounds on which the claimant seeks relief.[3] If the claimant seeks relief for breaches arising from violations of the contract then the fundamental basis of the claim is contractual.[4] Accordingly, alleging a claim for expropriation or violation of the fair and equitable treatment standard does not automatically eliminate the contractual basis of the claims.[5] If those allegations of expropriation and violations of fair and equitable treatment arise from a claim for breach of contract, then they remain fundamentally contractual, even when such causes of action invoke principles of an applicable BIT.[6]

19. Here Claimant's allegations of violations of the BIT, including claims of expropriation and violations of fair and equitable treatment are tied inescapably to Claimant's allegations that Beritech wrongfully interpreted and breached the joint venture contract. Given this reliance of Claimant's treaty claims on the contractual claims, the Tribunal should consider this dispute to be essentially contractual in nature.

2. The Clause 17 Exclusive Forum Selection Provision Bars Claimant from Asserting Contract Claims Before this Tribunal

20. In signing the Sat-Connect joint venture contract Claimant consented to submit all of its claims arising from the contract to arbitration by an *ad hoc* tribunal constituted in accordance with the Arbitration Act of Beristan (AAB).[7] The language of Clause 17 of

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2 *Vivendi*, ¶ 95.

3 *SGS v. Phillipines*, ¶ 154 (" a party should [not] be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum.).

4 *SGS v. Phillipines*, ¶¶ 155, 158.

5 *SGS v. Phillipines*, ¶ 157.

6 *See SGS v. Phillipines*, ¶¶ 158-59 (describing the level of complexity beyond contractual implications, required to classify a claim as fundamentally treaty-based).

the joint venture renders *ad hoc* arbitration under the AAB the exclusive forum for resolution of disputes.

21. Claimant's submission of contract claims to this tribunal is barred by Claimant's prior consent to be bound by exclusive forum selection clause in the joint venture contract because the essential nature of these claims is contractual. In *Joy Mining v. Egypt*,[8] the tribunal held that an exclusive forum selection clause must be honored and all of the parties's contractual claims had to be heard by a tribunal convened in accordance with a contractually specified forum. Clause 17 functions in an identical manner here and removes Claimant's contract claims from ICSID's jurisdiction.

22. Even if the tribunal exercises jurisdiction over Claimant's allegations asserted under the BIT, it should still decline jurisdiction over the contract claims because they fall squarely under the Clause 17 proscription. In *SGS v. Pakistan*, the tribunal recognized that the presentation of an exclusive forum selection clause required the tribunal to decline all claims arising directly out of the contract at issue.

23. Claimant disputes this conclusion, relying principally on the holdings in the *Lanco*[9] and *Vivendi* arbitrations. This reliance is misplaced. First, the logic of prior awards is not controlling in ICSID arbitration. Second, while it is true that analogous awards may prove persuasive, neither the facts in *Lanco* nor the facts in *Vivendi* are sufficiently similar to the facts in the present dispute to meaningfully guide the Tribunal's decision in this action.

24. In *Lanco* the contract at issue was signed before the passage of the controlling BIT. Given this order of events, the tribunal reasoned that it made sense for the BIT, as the more recent agreement, to control the issue of jurisdiction.[10] In the present dispute the Beristan-Opulentia BIT entered into force eleven years before the parties signed the joint venture contract. Therefore, it is reasonable to believe that the parties intended to limit the broad jurisdiction granted under ICSID by including the exclusive language of Clause 17. This interpretation is consistent with the international principles of treaty interpretation cited by other tribunals *Lanco* itself: *lex posterior derogat legi priori*.[11]

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7 Clause 17 specifies that disputes arising out of or relating to the joint venture agreement "shall be resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan [(AAB)]."

8 *Joy Mining* at ¶147.

9 *Lanco*.

10 *Lanco*, ¶¶ 25-27.

11 *Lanco*, ¶ 24.

25. Furthermore, the Clause 17 language is more specific as it applies explicitly to the contract at issue. "It is not to be presumed that such a general provision [as the BIT dispute resolution clause] has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties."[12] This reading is in keeping with the international principle of treaty interpretation: *generalia specialibus non derogant*.[13]

26. The *Vivendi* award is equally inapplicable to the present case. In *Vivendi* the tribunal found that the fundamental basis of the claims presented was the *independent* standard of the BIT. To the contrary, in the present action the basis of Claimant's allegations is the code of conduct stipulated in the joint venture agreement, including the rules on corporate governance specified by contract and the applicability of the essential security provision.

3. Beritech's prior initiation of an *ad hoc* Arbitration Militates Against Accepting jurisdiction

27. Pursuant to Clause 17, Beritech has initiated a parallel *ad hoc* arbitration under the AAB rules. The AAB arbitration commenced a full ten days before Claimant filed a request for arbitration with the ICSID Secretariat.[14] Despite the initiation of the *ad hoc* proceeding, this Tribunal retains competence to determine its own jurisdiction.[15] Faced with the existence of parallel arbitration, however, international law recognizes the discretion of the Tribunal to decline jurisdiction in deference to the first forum seized. This concept is analogous to the international litigation doctrine of *lis pendens*.

28. Arbitration is considered parallel when they are between the same parties,[16] arise from the same set of facts and have the potential to provide the same relief.[17] With regard to Claimant's contract claims, this proceeding is parallel to the *ad hoc* proceeding initiated by Beritech. First, though Claimant has named Respondent in this arbitration, Beritech is

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12 *SGS v. Phillipines*, ¶ 141.

13 *SGS v. Phillipines*, ¶ 141.

14 Uncontested Facts, ¶¶ 13–14.

15 *Cremades*, at 2.

16 The parties' positions may be reversed and still be considered identical. *Cremades*, at 3.

17 *SGS v. Pakistan*, ¶ 61.

the party alleged to have breached the contract. Second, the contract causes of action arise from the same set of facts, namely the leak of information by Claimant and the actions of Beritech in interpreting the contract. Third, the compensation Claimant seeks, namely compensation for breach, is the same relief that Claimant would obtain if it prevailed in the *ad hoc* arbitration.

29. The International Law Society (ILA) Recommendations on Parallel Arbitrations recognize when a tribunal is faced with parallel arbitrations, it should decline jurisdiction in deference to the first arbitration initiated in the interests of efficiency, sound case management and avoiding oppressive tactics.[18]

30. In the present case, a refusal to decline jurisdiction would waste resources on duplicative adjudications of the same claims and could potentially lead to unjust double recovery on contract claims. Furthermore, if the awards produce conflicting results, enforcement may be difficult. Given these possible adverse consequences, the Tribunal should follow the ILA Recommendations and decline jurisdiction over contract claims.

B. The Tribunal lacks jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 of the Beristan-Opulentia BIT.

31. Claimant has improperly repackaged its contractual claims into treaty-based claims under the Beristan-Opulentia BIT. Claimant should respond to Beritech's notice of arbitration in the separate arbitration proceedings that have already commenced pursuant to the dispute settlement clause in the JV Agreement.

32. The JV Agreement between Beritech and Claimant contains an exclusive forum-selection clause which is binding in the instant case. Clause 17 makes Beristian law binding in the present dispute. It states that disputes which arise out of or relate to the Agreement may be submitted by any party first to informal conciliation, then, if the dispute cannot be resolved amicably within sixty days, "[t]he dispute shall be then resolved only by arbitration under the rules and provisions of the 1959 Arbitration Act of Beristan, as amended." Additionally, both parties waived their right to object to such arbitration proceedings and irrevocably submitted themselves to the jurisdiction of an *ad hoc* tribunal properly constituted under such provision.

33. Having made this irrevocable submission, Televative now wishes ICSID to get them out of it by making unfounded allegations against Respondent. The questions governing their ability to do so are twofold. First, is this a claim arising out of or relating to the joint venture agreement? Second, if so, is this Tribunal bound by the exclusive forum selection clause? The answer to both questions is yes, and the Tribunal should dismiss this case to

18 *ILA Recomm.* No. 5.

be heard by a duly constituted tribunal under Beristan's Arbitration Act.

A. The claim is contractual

34. The substance of Televative's claim falls entirely within the four corners of their agreement with Beritech. Sat-Connect's board found that Claimant broke the confidentiality agreement described in clause 4 by leaking confidential project-related information to an unauthorized third party, so Beritech exercised its contractual right to invoke the buyout clause. Any dispute arising out of this contractual relationship must be resolved by a Beristian tribunal as described in Clause 17.

B. The exclusive contractual forum-selection clause is binding.

35. Prima facie, parties which signed a document which irrevocably submits them to a certain jurisdiction should be bound by that jurisdiction. Nothing in the instant case contradicts this presumption.

36. In the case of *SGS v. Philippines,* the Tribunal found it a "basic principle in each case... that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision." [19]. That Tribunal turned to the BIT and the ICSID Convention to determine whether any such valid provision existed, as do we.

37. In attempting to defeat the exclusive forum selection clause, Claimants will likely rely on Article 11 of the Beristan-Opulentia BIT. This Article grants the investor in a dispute between one nation's investors and the other nation the right to select, at discretion, the local courts, an ad hoc Arbitration Tribunal, or ICSID. In SGS v. Philippines, the Tribunal asked whether a similar provision in the governing BIT granting choice of forum to the investor "was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned."[20]

38. The Tribunal applied the canon "generalia specialibus non derogant," since the provisions of a BIT are necessarily "general" and "[i]t is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties."[21] The tribunal also cited Christoph Schreuer, who similarly holds that "[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application."[22] The Beritech-Opulentia BIT is the governing framework, and, in the absence of any forum selection clause, would allow the investor to

19*SGS v. Philippines*, ¶138
20*SGS v. Philippines*, ¶140.
21*SGS v. Philippines*, ¶141.
22*Schreuer commentary*, 362.

choose between the three provided fora. But by signing the Joint Venture Agreement with its exclusive forum-selection clause, Claimant contractually opted out of the right to select a forum.

39. The other possible avenue by which Claimants may attack the forum selection clause is the ICSID convention itself. Article 26 provides: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”[23]

40. The simple answer to the above objection is that "[t]he words 'unless otherwise stated' in the first sentence give the parties the option to deviate from it by agreement.” SGS v. Philippines, quoting Schreuer p. 347. Therefore, the parties were free to sign the exclusive forum selection clause, whereby they declined to consent to ICSID jurisdiction. The parties have agreed to deviate from this provision by signing a contract with an exclusive forum selection clause in it. Therefore, Article 26 does not apply.

41. The situation is similar to that in *AMT v. Zaire*. There, as a result of a similar BIT provision, the states were held to have “each on its part, accepted the competence of ICSID to be eventually proceeded against by a national of the other co-contracting State.”[24] However, the Tribunal found that Zaire had not irredeemably given itself up into ICSID’s hands: “this acceptance is not automatic for all disputes, the Parties in question... remain masters of the procedure of their choice.” [25]

42. Merely being a national of a State which has signed a BIT did not rob AMT, and does not rob Televative, of the freedom of contract. They signed a joint venture agreement which contains an exclusive forum selection clause, and it must be assumed that they knew what they were doing and signed it deliberately. Here, as did claimants in the *Woodruff* case, "the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission." .[26]

43. The broad choice-of-forum permissions in the BIT are designed as default rules to protect investors, but investors still enjoy the freedom of contract and can assume more risk if they choose to do so. Presumably, Claimant factored any disadvantage it saw from being bound to Beristian arbitration into its calculus and still found the deal advantageous. It would be unfair to allow them to take additional advantage by invalidating the clause now that they have changed their minds.

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23 *ICSID Convention*, Article 26
24 *AMT*, 5.20.
25*AMT*, 5.20.
26 *Woodruff,* 222.

44. The ad hoc Committee in the Vivendi case found similarly, holding that, "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."[27]. Here, the claimants want the Tribunal to indemnify them against the valid operation of contractual provisions. Instead, all contract-based claims should be heard by a Beristian tribunal in accordance with the unambiguous language of the contract itself.

45. Here, Claimants also allege that their rights under Articles 2, 4, 8, and 10 of the Beristan-Opulentia BIT have been violated. (these Articles are the only ones under consideration in this matter, since "in international arbitration a Claimant must state its claim in its initial application, and wholly new claims cannot thereafter be added during the pleadings."[28].

Article 10 of the BIT Does Not Grant Jurisdiction

46. They also attempt to expand this Tribunal's jurisdiction to cover their contractual claims "by virtue of Article 10" of the BIT. However, the umbrella clause in Article 10 is unable to engulf the wholly contractual claims presented by the instant case. Claimant ran afoul of the confidentiality agreement, which materially breached the JV agreement, triggering the JV agreement's buyout provision, and the resulting enforcement of Beristian law raises no treaty-based claims. ICSID could only assert jurisdiction if it felt able to enforce any agreement between parties to a BIT. The quantity of Claimant’s losses do not suffice to qualitatively transform their grievance into a matter of international law.

47. The tribunal in SGS v. Philippines expressed the general worry that if the umbrella clause and the dispute resolution clause can work together to bring every matter under the jurisdiction of international arbitration, "it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration." Id. at 52. Hearing every breach of contract claim and letting investors out of agreements which have proven disadvantageous is not ICSID's job.

48. One commentator holds that "safeguarding investment expectations is an inadequate justification for deciding contract claims in each and every case."[29] The Tribunal found it a basic principle that "a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[30] Here, the specific forum-selection clause both parties agreed to in the JV agreement holds force, and is not

27 *Vivendi*, ¶ 98
28 SGS ¶ 157. *See* Nauru, ¶s 64-70.
29*Wenlandt* at 526.
30Id. at 53.

overridden by the default rules laid out in the BIT.

49. The Tribunal in SGS did find that the non-contractual expropriation dispute in question was able to overcome the exclusive forum selection clause in that dispute. They were persuaded by the argument that Article 26 of the ICSID Convention, which provides that consent of the parties to ICSID arbitration must "unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." As discussed above, both parties have otherwise stated. As such, only "a breach of the BIT independent of a breach of contract claim" would be admissible before an ICSID tribunal. Id at p. 61. However, this entire dispute is contained within several clauses of the JV agreement as discussed above, and so falls outside ICSID's jurisdiction.

50. Even if this tribunal is persuaded that it is required to accept jurisdiction, SGS v. Philippines provides a good alternative to letting claimants use ICSID to save them from themselves. Having taken jurisdiction, that tribunal chose to give effect to the clear forum-selection clause which both parties had signed, and stayed the proceedings.

PART TWO: MERITS OF THE CLAIM

I. RESPONDENT DID NOT BREACH ANY OBLIGATION UNDER THE BIT OR INTERNATIONAL LAW

51. Beristan did not breach any obligation under the BIT or international law in regards to Claimant’s rights under its agreement with Beritech.

52. Beristan recognizes the Articles on State Responsibility as the clearest codification of customary international law in this field. The Articles on State Responsibility make it clear that acts amounting to the breach of any obligation must be attributable to the State and must arise out of an international obligation undertaken by the State. (Article 2).

53. The acts of an independent company, even if state-owned, are not necessarily attributable to a State. The acts of Beritech, even if state-owned, are not attributable to Beristan. This means that the present dispute is merely a contractual dispute between two companies And, the acts of the defense analyst and the CWF, even if attributable to the state, do not amount to breaches of any international obligation undertaken by the Beristan. Therefore, Beristan did not materially breach any obligation under the BIT or international law.

A. The Acts of the Separate Legal Entity, Beritech, Are Not Attributable to the State

54. The acts of a separate legal entity such as Beritech are not attributable to the State, regardless of state ownership.

55. Governments establish commercial entities with specialized functions as a means of engaging investors in a more efficient manner. The Articles on State Responsibility are silent on the attribution of the acts of state-owned entities, because such entities are not State organs.[31]

56. Tribunals have respected the legal separation between State and state-owned entities, and those that have found attribution have done so only under a narrow set of circumstances. First, tribunals found where the legal separation had been created as a means of fraud or evasion. Also, the acts of a state-owned entity were attributable where it exercised a public power. (Philips Petroleum v. Iran). Lastly, in order to find attribution, the state-owned entity must have been under the control of the State in order "to achieve a particular result."[32]

57. The facts in this case do not support any of these contentions in the present dispute. Beritech is a separate legal entity exercising a purely commercial function under the direction of independent board members. That Beritech was established by Beristan is not determinative in attributing its acts to the State. Additionally, Beritech does not fit into the State's hierarchy and does not exercise any official government authority. The only link between Beritech and the Berisitan government is that the Beristian Minister of Telecommunications is one of nine board members; this minister does not even serve as the chairperson.

58. Additionally, the decision of the Sat-Connect board of directors is one step removed from the acts of Beritech. The Sat-Connect board is appointed by both Claimant and Beritech. If Claimant was unhappy about the steps that board was taking, it needed only to excercise its influence through the formal mechanisms in place under the JV Agreement. In fact, Beritech has initiated an arbitration under Clause 17 of the JV Agreement as a means of settling this dispute in the manner agreed to by the Claimant. That Claimant now wishes to excuse itself from its contractual obligations under the JV Agreement by repackaging its claims as investment claims under the BIT, is an absurd excuse for evading its bargained-for business responsibilities. In such a scenario, Beristan has no obligation to save the Claimant from itself.

59. Beritech's actions, whether lawful or not, are not attributable to the State, and claimant must, therefore, comply with its obligations under the JV Agreement.

B.

1. Respondent Has Not Illegally Expropriated Claimant's Assets

31 *Barcelona Traction*
32 Crawford, ¶6.

60. Claimant allegations that respondent has illegally expropriated claimant's assets fail for two reasons. First, the actions of Beritech are not attributable to Respondent. Second, the occupation of the Sat-Connect facilities was conducted in accordance with the Beristan-Opulentia BIT and principles of international law.

a) The Acts of Beritech Do Not Constitute Expropriation

61. Claimant invokes Article 4 of the Beristan-Opulentia BIT in support of its contentions that Respondent expropriated Claimant's investment. In part, Article 4 forbids "direct or indirect expropriation or nationalization."[33]

62. The existence of an expropriation is dependent an action by the host-state. Expropriation is the result of the government action on an investor's property.[34] International law defines expropriation as "a taking *by the state* of the property of a national of another state." Similarly, while tribunals recognize that the act of taking does not have to be overt, the requirement of state participation is universal.

63. Article 4 also prohibits *the State* form permanently or temporarily limiting Claimant's "joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgment or orders issued by Courts or Tribunals having jurisdiction." [35]

64. Claimant alleges that Beritech's invocation of the Clause 8 buy out provision constitutes an illegal expropriation and an impermissible limitation on Claimants joined rights of ownership in the Sat-Connect venture. This claim fails because, as explained above, the acts of Beritech are not attributable to Respondent

65. Claimant further alleges that Respondent's deployment of the military to the Sat-Connect facilities constituted an expropriation and impermissible deprivation of Claimant's joined rights in the venture. These claims also fail.

66. The military was deployed to the Sat-Connect site 14 days after the buy-out clause.

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33 BIT 4.2

34 Hunter 455.

35 BIT 4.1

At that point in time the buy-out clause had achieved its full effect and, therefore, Claimant no longer possessed legal title to any of the property of the Sat-Connect joint venture.

67. Respondent could not deprive Claimant's of rights or property that Claimant did not legally possess. Claimant's has failed to state a claim for expropriation under the standards set by the Beristan-Opulentia BIT and international law.

b) The Beristan-Opulentia BIT Recognizes Respondent's Right to Take Control of Claimant's Property

68. Notwithstanding, Claimant's failure to meet the requirements of a claim for expropriation, Respondent argues that any actions attributable to Respondent and constituting a government taking were legal. International law has long recognized the right of a sovereign to control the conduct of private investors within its territory. In general an the international community has recognized an expropriation "based on grounds or reasons of public utility, security or the national interest. . .as overriding purely individual or private interests, both domestic and foreign."[36]

69. Similarly, the Restatement allows government taking of an investor's property if the seizure is for a public purpose, is not discriminatory and is accompanied by provision for just compensation.[37]

70. The Beristan-Opulentia BIT also recognizes the possibility of legal expropriation. Article 4 contains a similar exception to the prohibition on expropriation allowing the state to take an investor's property if it does so

> 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.[38]

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36 U.N. Res.

37 *Restatement*, § 217.

38 BIT 4.2

71. These exceptions to prohibitions on nationalization and expropriation evidence long standing recognition of the sovereign right to assert authority over alien property. [39] Even clauses in agreements between the host state and the investor that prevent the host state from applying new laws to deprive investors of property will not necessarily stand in the way of a lawful expropriation.[40]

72. To the extent that the Tribunal attributes Beritech's buy-out of Claimant's property to Respondent, those acts fall within the category of expropriation sanctioned by international law and the Beristan-Opulentia BIT.

(1) **Respondent's Seizure of Claimant's Property Served a Public Purpose**

73. To the extent that Respondent can be held liable for taking Claimant's property, Respondent conducted this taking for a public purpose. In light of the impending threat to national security, posed by the leak of sensitive information about the country's fledgling satellite system, Respondent acted in the interest of national security. Nonetheless, out of respect for the sovereign right of territoriality, this requirement of expropriation is rarely at issue, though it is a requisite for state taking.[41]

(2) **Respondent's Seizure of Claimant's Property Was Non-Discriminatory**

74. Even if the Tribunal finds that Respondent expropriated Claimant's property, that expropriation was not discriminatory. A discriminatory expropriation is an act by the host state that "singles out a particular person or group of people without a reasonable basis."[42] Tribunals and scholars have construed the reasonable basis requirement broadly.[43] A measure is typically considered reasonable if the "taking is based on economic and social policies [and] is not directed against particular groups simply because they own the property involved."[44] 42 I.L.M. at 654

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39 *See Dolzer*, at 89.

40 *Dolzer*, at 89.

41 *Kinsella*, at 177.

42 *Kinsella*, at 177.

43 *Kinsella*, at 177.

44 *Brownlie*, 515.

75. To the extent that Beritech's invocation of the buy-out clause is considered an expropriation, the action was reasonably based in a threat to national security. If the security of the nation-wide satellite network had been jeopardized it could have major negative social and economic ramifications resulting form a loss of privacy and security of information. Furthermore, the seizure of the Sat-Connect facility was based on the reasonable social policy of enforcing domestic contract law. Claimant had lost its assets and remained on the facility in violation of the terms of the joint venture agreement.

(3) Claimant Has Been Fully and Effectively Compensated for the Loss of Its Investment

76. Beritech has posted 47 million dollars in an escrow account readily available to Claimant. This amount represents the total value of Claimant's monetary investment in the Sat-Connect joint venture.

77. The requirement that an expropriating state provide just applies to the fair market value of the "The almost universal standard of compensation in expropriation established by BITs is the 'fair market value' of the investment immediately prior to the expropriatory measure."[45]

78. This measure of fair market value includes lost profits only where those profits can be measured with a degree of certainty.[46] For example, in the *Phelps Dodge* arbitration, the Iran Claims Tribunal held that because a venture was not yet operational any calculation of lost profits would be "too speculative" to constitute a basis for compensation.[47] Similarly, in *AAPL v. Sri Lanka*, the tribunal "refused to award lost profits since the future profitability of the firm could not be reasonably established with a sufficient degree of certainty."[48]

79. Claimant concedes that the Sat-Connect project was not even completely operational

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45 *Redfern*, 507.

46 *Redfern*, 508

47 *Phelps* 121

48 *Redfern*, 508.

at the time Beritech invoked the buy-out clause.[49] Like the business ventures in *Phelps Dodge* and *AAPL*, the certainty of potential profits from the Sat-Connect joint venture is impossible to ascertain with precision. In light of this uncertainty, lost profits from potential operation of the Sat-Connect joint venture cannot be considered part of the "fair market value" of Claimant's investment. Accordingly, Respondent does not owe Claimant compensation for hypothetical future profits form the still non-operational satellite network.

(4) **Respondent's Action Conformed with National Law**

80. The Beristan-Opulentia BIT adds an additional requirement to a finding of legal expropriation. Article 4 states that a taking of an alien's property must be accomplished "in conformity with all legal provisions and procedures."

81. The invocation of the buy-out clause was conducted in accordance with Beristian contract law and therefore meets this requirement. Furthermore, to the extent that the Tribunal considers the actions of the CWF to constitute a taking, those actions were performed in accordance with a validly issued Executive Order from the government of Beristan.[50] Therefore, insofar as the actions of Respondent are considered expropriations, they were carried out in accordance with domestic law and in compliance with Article 4 of the Beristan-Opulentia BIT.

2. Respondent Has Upheld the Standard of Fair and Equitable Treatment

82. The standard of fair and equitable treatment is indefinite and vaguely defined. In its basic and standard role the fair and equitable treatment standard incorporates the standard for treatment of investors set by customary international law into a treaty obligation.[51] Respondent has conducted its acts, even any alleged exprorpriation, in conformity with the principles of international law and has thereby upheld the standard of fair and equitable treatment in accordance with its obligations under Article 2 of the Beristan-Opulentia BIT.

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49 Minutes of the Tribunal, ¶ 15.

50 *First Clarifications*, no. 155.

51 *See* OECD Draft,

a) The Beristan-Opulentia BIT Codifies the Minimum Standard of Fair and Equitable Treatment Set by Customary International Law

83. The Beristan-Opulentia BIT sets a standard of fair and equitable treatment that is commensurate with the minimum standard established by customary international law. Article 2 of the Beristan-Opulentia BIT requires both Beristan and Opulentia to "ensure treatment in accordance with customary international law, including fair and equitable treatment."[52]

84. The language mirrors the language in NAFTA 1105 guaranteeing investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[53] The official FTC interpretation of this requirement construes it to mean require no treatment "in addition to or beyond that which is required by customary international law."[54] This interpretation standard is less expansive than other standards but is widely accepted.

85. The application of a more expansive reading of the standard would be unacceptable in the present dispute because language of the Beristan-Opulentia BIT explicitly subordinates the protections of the FET to the standard set by international law. Despite this limitation, the Beristan-Opulentia BIT still requires host states to uphold basic treatment standards of international law. Respondent has done so.

b) Respondent's Actions Were Consistent with Claimant's Expectations

86. Some tribunals have interpreted the fair and equitable treatment standard to encompass a duty to protect the investor's reasonable expectations. The host state is generally obligated "to avoid the frustration of investors' legitimate and reasonable expectations."[55] In interpreting reasonableness the tribunal in *Saluka* emphasized that "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged."[56]

52 Ber-Opt BIT, art. 2.2.

53 NAFTA art. 1105.

54 *Dolzer*, 125.

55 *Saluka*, ¶ 302

56 *Saluka*, ¶ 305.

87. The Joint Venture contract negotiated between Beritech and Claimant established a reasonable basis for Claimant's expectations. This contract expressly included the possibility of a buy-out based on a breach of confidentiality. To the extent that Claimant argues Beritech failed to protect Claimant's expectations, the terms of the investment contract negate Claimant's contentions.

88. Claimant argues that the Beristian Constitution and the Beristan Telecommunications Act of 1996. Asserting reliance on these articulated policies, which predate the contract by over a decade, is an abusive interpretation of the principle of fair and equitable treatment. Furthermore, asserting that this legislation, rather than the terms of the contract, constitutes the representation of the state to the Claimant is inconsistent with Claimant's argument asserting that the acts of Beritech are attributable to Respondent. If, as Claimant contends, the acts of Beritech are attributable to the state, then the joint venture contract evinces the Respondent's representations to the investor by virtue of that attribution. Therefore, as Respondent's actions were consistent with the representations in the contract, Respondent did not fail to protect Claimant's expectations.

89. The relative consistency of Respondent's position contrasts sharply with cases where tribunals have found the host states violated investors expectations. Generally, these cases involved contradictory representations by the states with regard to the investors specific contract.

c) Respondent Provided Claimant Due Notice and Opportunity to Respond to its Allegations in Accordance with the Principles of Due Process

90. Claimant further alleges that Respondents failed to adhere to the principles of due process in committing an expropriation. These principles encompass a notion of notice and good faith. But Claimants were on notice regarding the buyout provision, as they signed the JV agreement which contained it. They had an opportunity to participate in the decision-making process, but unfortunately their representative chose to walk out of the meeting.

91. Beritech provided Claimant with fourteen days notice before the CWF occupied the Sat-Connect site. Claimant therefore had notice and a full two weeks to lodge some formal complaint, or even to iniate and arbitration, in objection to the actions of Beritech. Claimant's own failure to exercise its rights bears no relation to Respondent conformity

with the principles of due process and good faith.

Respondent is Protected by the Defense of Essential Security

92. Article 9 of the Beristan-Opulentia BIT provides that "[n]othing in this treaty shall be construed... to preclude a Part from applying measures that it considers necessary... for the protection of its own essential security interests."

93. This matter originated with a media report of a "highly placed Beristian government official" who believed that the project was compromised and could pose a threat to Beristian national security[57]. Beritech's reliance on such information reported in an independent newspaper does not implicate Beristan's responsibility. The Joint Venture Agreement clearly provides that any breach of security is a breach of the contract sufficient to trigger the buyout provision. Beritech, under clause 8 of the JV Agreement, had the contractual right to do so.

94. In addition, states have broad authority to take measures in protection of their own national security interests. States may certainly do so when covered by a treaty which explicitly makes all of its rights derogable in the case of an essential security interest, as Article 9 does for the Beristan-Opulentia BIT. Therefore, Beristan owed not duty of protection to Claimant in this instant, because Beristan was exercising its rights under Article 9.

95. Claimants do not question the validity of Article 9. They are therefore restricted to asking the Tribunal to ignore the plain meaning of the BIT's language.

96. Broad security exemptions are present in all forms of foreign investment law. "Managing the competing interests of open investment and protection of national security requires balancing,"[58]. Many states have struck that balance in ways similar to that in the Beristan-Opulentia BIT. The President of the United States may step in to bar any transaction involving a foreign person taking a controlling interest in an American company whenever "the President determines the transaction poses a national security risk. No one may review the President's decision to prohibit or suspend a transaction."[59]

57 First Clarification, Q. 178

58 *Cooke* at 776

59 50 U.S.C. app. §2170(e).

97. In sum, sovereign states have the authority to act at its discretion when matters of national security are at stake. The Opulentia-Beristan BIT codifies that right. Therefore, Beristan's acts were lawful under the BIT and international law.