

CLAIMANT

- A. The ICSID Tribunal has jurisdiction over Claimant's contract-based claims arising under the JV Agreement pursuant to Article 11 of the BIT and Article 25 of the ICSID Convention, the jurisdiction of the ICSID Tribunal is not superseded by Clause 17 (Dispute Settlement) of the JV Agreement**
1. Claimant's claims based on violation of the JV Agreement are claims of legal nature, between Respondent as a host state and Claimant as individual of another state, both parties to this dispute gave it consent in writing and the dispute arises directly out of investment
 - (i) Acts of Beritech are attributable to Respondent according to general international law rules on attribution
 - (ii) Even if these acts of Beritech are not attributable to Respondent, Respondent itself contributed significantly to failure of the JV Agreement
 - (iii) Respondent gave its consent to ICSID Arbitration in the BIT and this consent was given to all claims arising out of investment which includes also contract-based claims
 - (iv) Claimant is not estopped and/or did not waive its right to arbitrate nor the principle of *lis pedens* apply to the ICSID arbitration
 2. Even if the tribunal has no jurisdiction to decide on Claimant's contract-based claims, Respondent relies on the breaches of the BIT through the breaches of the JV Agreement which themselves suffice to confer a jurisdiction on the ICSID Tribunal
 - (i) Claimant formulated its claim as treaty-based claims which is relevant for jurisdictional test
 - (ii) Also, if a stricter scrutiny is employed, Claimant's claims are objectively treaty-based
- B. The umbrella clause elevates breaches of the JV Agreement to breaches of the BIT**
- (i) The umbrella clause has to be interpreted as a meaningful standard which makes it a breach of contract a breach of the BIT
 - (ii) Even if interpretation of the umbrella clause shall be narrowed somehow, the JV Agreement may be deemed as a concession contract concluded by Respondent in its sovereign powers and/or the intensity of Respondent's wrongful infringements to the JV Agreement triggers the BIT protection

RESPONDENT

- A. The ICSID Tribunal has no jurisdiction over Claimant's contract-based claims arising under the JV Agreement, especially in view of Clause 17 (Dispute Settlement) of the JV Agreement**
- there is no *consent* in writing
 - the dispute does not arise *directly* out of investment

1. Acts of Beritech, an enterprise with independent legal personality, may not be attributed to Respondent, therefore Respondent could not consent to arbitrate Claimant's claims vis-à-vis independent legal entity.

Firstly, respondent contents that performance of the JV Agreement upon which Claimant relies cannot be arbitrate against Respondent. Rather, it shall be arbitrated against Beritech, an independent legal entity, according to dispute resolution clause at Article 17 of the JV Agreement. Respondent did not consent to arbitrate claims which he did not assumed.

2. Even if acts of Beritech are attributable to Respondent, the ICSID Tribunal lacks jurisdiction due to *lis pedens* principle because there is former pending arbitration where Claimant's contract claims shall be heard

3. Even if principle of *lis pedens* does not bar the ICSID Tribunal from hearing Claimant's claims, Respondent did not consent to Claimant's contract claims, because these claims are not covered by Article 10 of the BIT

(i) Respondent did not consent in the BIT to arbitrate contract claims, Respondent's consent does not go beyond claims arising out of the BIT itself, therefore Claimant's consent to arbitrate its contract claims is not capable to establish jurisdiction of the ICSID Tribunal

(ii) Alternatively, dispute settlement clause in contract has to be preferred to dispute settlement clause in the BIT according to *specialia derogat generalibus* principle and due to contractual nature of the claims

(iii) Even if the ICSID Tribunal has jurisdiction over Claimant's contract claims, such claims are inadmissible, because the contract arbitrator is exclusively authorized to decide on performance of parties to the JV Agreement, unlike the ICSID Tribunal

4. Even if there is a consent given by Respondent, Claimant effectively waived its right to arbitrate and/or is estopped to arbitrate before the ICSID Tribunal.

B. The ICSID Tribunal has no jurisdiction over Claimant's contract-based claims arising under the JV Agreement by virtue of Article 10 (Umbrella Clause) of the BIT

1. The umbrella clause does not change a general principle of international law that the breach of contract by a state is not a internationally wrongful act attributable to this state, the Tribunal may not base its jurisdiction on an inapplicable clause of the BIT

2. Even if the umbrella clause could elevate the breach of the JV Agreement to a breach of international law, obligations arising from the JV Agreement are not covered by the umbrella clause in the present BIT

(i) because of lack of attribution

(ii) because it covers only contracts which the host state concludes within its sovereign powers

(iii) alternatively, because the purported breaches are not able to trigger the BIT protection

3. Claimant did not set a prima facie claim that Respondent did not observe obligations which it had assumed in the JV Agreement vis-à-vis Claimant's investment