Claimant

A. Whether the Tribunal has jurisdiction in view of Clause 17 (Dispute Settlement) of the Joint Venture Agreement ("JV Agreement")

1. According to Claimant´s contention, the ICSID Tribunal has jurisdiction to decide on all his claims, including those based on violation of the JV Agreement. Dispute Settlement Clause of JV Agreement does not preclude the jurisdiction of the Tribunal and may not be regarded as a waiver of right to arbitrate before the ICSID Tribunal.

2. The jurisdiction of the ICSID Tribunal stems from Article 25 of ICSID Convention which states that *"[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."*

3. Firstly, Respondent consented to the dispute in writing in Article 11(2)(a) of the Beristan - Opulentia BIT [Annex 1]. Claimant did so by submitting the request for arbitration in accordance with ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and by notifying the Government of Beristan [Annex 2, 14].

4. Secondly, both Respondent and Opulentia which is the state, where Claimant is incorporated, are Parties to ICSID Convention. According to rule of incorporation [Barcelona Traction, ELSI, Diallo Cases], Claimant is a national of Opulentia.

5. Thirdly, the present dispute arises directly out of an investment since, according to Salini test and the broad definition of investment in the BIT, the JV Contract and subsequent 40 % share of Claimant on Sat-Connect may be qualified as an investment.

6. The vast majority of investment tribunals which had to decide on jurisdiction concerning so called contractual claim recognized and affirmed its jurisdiction over these contractual claims. It is well settled case law, that dispute settlement clauses in contract do not deny jurisdiction to the international tribunals.

7. Many tribunals took as their essential authority Vivendi Annulment Decision where it was stated that a breach of contract and breach of treaty is a different matter, so that there is no bar for the tribunal to decide on merits of contract-based claims. Relying on Article 3 of ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, the tribunal held: *"A state may breach a treaty without breaching a contract, and vice versa"*.

8. The tribunal concluded that there is a jurisdiction to base decision on contractual issues, *"at least so far as necessary in order to determine whether there has been a brach of the substantive standards of th BIT"* (§ 110); therefore the tribunal faced with a contractual claim is *"obliged to consider and decide it"* (§ 112).

9. Respondent will probably rely on conclusions of Vivendi Annulment at § 98: *"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;"* and assert that Claimant´s claims are contractual in nature.

10. However, as it was stated in Eureco Partial Award, these conclusions may not be assumed as authoritative without reference to other parts of the Vivendi Annulment Decision.

11. Eureko Tribunal–accordingly with true merits of Vivendi Annulment–emphasized that *"decisicion of* ad hoc *Committee in Vivendi … authorizes, and indeed, requires, this Tribunal to consider whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum* [the relevant contracts], *constitute breaches of the Treaty."*

12. Also Claimant addresses that acts of Respondent or acts attributable to Respondent, according to general international rules on attribution of conduct to states, constitute a breach of the BIT. There is no such thing as improper reformulation of contractual claims as treaty-based. A breach of treaty is independent from a breach of contract. Therefore Claimant is allowed to bring a breach of his rights under the JV Agreement before the ICSID Tribunal which has jurisdiction to decide on its merits to see if the obligations of Respondent under the BIT were violated or not.

13. Furthermore, this view is shared by majority of other tribunals. Tribunal in SGS v Philippines held that

> *"Article VIII* [the dispute settlement clause] *is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term ´disputes with respect to investments´ … is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a ´dispute with respect to investments´; so too would a dispute arising from an investment contract such as the CISS Agreement."*

14. The tribunal supported this conclusion on broad scope of its jurisdiction by five arguments. (1) Tribunals have competence to apply municipal law governing the investment contract. (2) Comparison between investor-state settlement clause and state parties settlement clause leads to broad interpretation of the former. (3) Choice of forum to settle the contract claims is consistent with purpose of the BITs. (4) Contract is often a precondition to make an investment (see Mihaly v Sri Lanka). (5) Exclusion of the contract claims from the scope of dispute settlement clause has to be state expressly (see NAFTA 1116 – 17, Vivendi § 55).

15. These arguments were than repetitively used in Noble Ventures v Romania or Bayindir v Pakistan Jurisdiction Decision where the tribunal held that it may address contractual matters even in the absence of an umbrella clause (§ 250).

16. Arguments used in SGS v Philippines and elsewhere are seen by commentators as much more persuasive than arguments used in SGS v Phillipines by the tribunal to deny its jurisdiction over contract claims of the investor. In fact, SGS v Philippines Decision, as a sole decision where the jurisdiction over contract claims was not recognized, was widely criticized (Schreuer, Wälde).

17. The SGS v Philippines Tribunal denied its jurisdiction arguing that broad scope of its jurisdiction would lead to (1) flood of lawsuits concerning the smallest contractual claims; and (2) evasion of forum selection clauses; based on (3) *in dubio mitius* interpretation rule evolved in WTO jurisprudence. Ignorance of modes of interpretation laid down in article 31

of Vienna Convention on Law of Treaties and ignorance of *effect utile* interpretation rule evolved in jurisprudence of ICJ.

18. It may be concluded, than the Tribunal has jurisdiction based on Article 11 of the BIT together with Article 25 of ICSID Convention which covers also the contractual claims, despite the Article 17 of JV Contract which cannot be reasonably viewed as an exclusive dispute settlement choice.

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

19. According to Article 10 of the BIT, the Respondent is obliged to observe any obligations it has assumed with regard to Claimant´s investment in its territory. The term "any obligation" may be applied to the JV Agreement.

Attribution

20. Although the JV Agreement was concluded between Claimant and Beritech, obligations assumed by Beritech may be attributed to Respondent by the general international rule of attribution as recognized in Articles 4 and 8 of ILC Draft articles on Responsibility of States for Internationally Wrongful Acts.

21. Due to attribution rule, the tribunal in Nykomb v Latvia acknowledged as covered by the umbrella clause a contract between the investor and a wholly owned state enterprise. In Eureko v Poland, independent legal personality of Polish State Treasury did not preclude liability of the host state for the breach of the umbrella clause. The way in which each state chooses to divide the work between its subdivisions is without relevance (see also SwemBalt v Latvia). These tribunals interpreted the umbrella clause without any limitations.

22. Claimant encourages the tribunal to follow the example given in Nykomb and Eureko. Broad interpretation fits as most convenient to the purpose of the BIT and may be simply justified by the rules of attribution, relevant also to other treaty standards (EnCana v Ecuador).

23. Claimant may also rely on other awards which applied more restricted attitude to the issue of attribution. According to SGS v Pakistan, obligation may be assumed by the host state or its subdivisions or legal representative thereof, if their acts are attributable to the host state. Respondent owns 70 % of shares of Beritech which renders him a controlling entity which may determine actions of controlled Beritech independently from fragmented minority.

24. As stated in Consorzio Groupement L.E.S.I.-DIPENTA v Algeria, a contract may be attributed to the host state where the government exercises important influence over the entity and was to some extent involved in the contract negotiations. Respondent guarantees compliance of Beritech with the JV Agreement. It is hardly probable that respondent did not influence the negotiations of the JV Agreement.

25. The tribunal in Noble Ventures v Romania recognized an obligation assumed by state ownership fund as covered by umbrella clause in view of the grant of of governmental power.

Scope of the umbrella clause

26. Scope of the umbrella Clause shall be interpreted extensively as the state practice shows (Germany). The umbrella clause may be applied both to obligations of administrate (sovereign) nature (e.g. concession agreements) and to obligations of commercial nature. The BIT expressly states that the state has a duty to observe *any obligation* it assumed (SGS v Philippines, Noble Ventures v Romania, Eureko v Poland).

27. Distinction between obligations of administrative and commercial nature–although sometimes considered–has no basis in relevant texts of the BITs and, as remarked the tribunal in Noble Ventures, distinction between commercial and sovereign acts of the host state is not manageable in practice, therefor should have only a little relevance. Also the tribunal in Siemens v Argetina rejected distinction between different types of investment contracts since it found no basis for such a distinction in wording "any obligations" and in the definition of investment.

28. Some tribunals proposed that the scope of umbrella clause should be limited only to sovereign acts (administrativ obligations) of the host state. Purely commercial obligations are not intense enough to be covered by the umbrella clause; significant interference of government or public agencies is required to trigger the limit for protection thereunder (CMS v Argentina, Joy Mining v Egypt

29. Claimant suggests the tribunal not to restrict the scope of the umbrella clause. References to abstract, such as distinction between *acta iure imperii* and *acta iure comercii,* has no methodological power of persuasion for it has no basis in modes of interpretation according to Vienna Convention on Law of Treaties (Dolzer & Schreuer).

30. The wording of Article 10 of the BIT leaves no space for doubts that the JV Argeement should not be covered by the umbrella clause protection.

Schreuer, Travelling, 255

The reasoning of the Tribunal in *SGS v. Philippines* on the umbrella clause is clearly preferable to the one in *SGS v. Pakistan*. It does justice to a clause that is evidently designed to add extra protection for the investor. Under the operation of an umbrella

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"There is, in fact, no particular difficulty when there is an 'umbrella treaty' ['*traité de couverture*'] between the contracting State and the national State of the co-contracting party, which turns the obligation to perform the contract into an international obligation at the charge of the contracting State *vis-à-vis* the national State of the co-contracting party. The intervention of the umbrella treaty transforms contractual obligations into international obligations thereby ensuring, as it has already been stated, 'the intangibility of contract under threat of violating the treaty';[90] any non-performance of the contract, even if it is legal under the national law of the contracting State, gives rise to the international liability of the latter *vis-à-vis* the national State of the co-contracting party."[91]

[90] García Amador, 4th report [on State responsibility], para. 98. [Footnote original].

[91] P. Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, 128 Recueil des Cours III, 1969, at p. 130; author's translation from the French original.