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

1. Respondent contends that all of Claimant's claims are contractual in nature, notwithstanding the manner in which these claims were formulated in Claimant's Case. The ICSID Tribunal is not competent to decide on such contract claims because Respondent did not consented in writing thereto.

2. The absence of Respondent's consent in writing – as required pursuant to Article 25(1) ICSID Convention[1] – stems from narrow scope of Article 11 (Settlement of Disputes between Investors and the Contracting Parties) of the BIT where Respondent consented to arbitrate exclusively such disputes *"that concern an obligation of the former [Contracting Party, i.e. Respondent] under this Agreement [the BIT] in relation to an investment of the latter [Contracting Party, i.e. Opulentia]".*

3. Secondly, Respondent could not consented in writing to arbitrate Claimant's claims which shall be performed by Beritech – an independent legal entity – because obligations of Beritech arising out of JV Contract are governed by municipal law of Beristan and therefore may not be attributed to Respondent according to international law rules on attribution.

4. Further, even if the tribunal concludes that (a) Claimant's claims have to be treated as treaty-based and/or (b) the Article 11 of the BIT allows to arbitrate contract-based claims before the ICSID tribunal, and (c) Respondent assented to arbitrate contract-based claims vis-á-vis Beritech before the ICSID Tribunal because these obligations may be attributed to Respondent itself; the choice of forum in Clause 17 (Dispute Settlement) of the JV Agreement and pending JV Agreement arbitration ousts jurisdiction of the ICSID Tribunal over the Claimant's claims, because the JV Agreement arbitrator may be deemed an *ad hoc* Arbitration Tribunal according to Article 11(1)(b) of the BIT.

5. Furthermore, the ICSID Tribunal has to dismiss Claimant's claims because claimant disregarded the waiting period, set out for amicable settlement pursuant to Article 11(1) of the BIT.

### *A.1. Respondent's consent to arbitrate Claimant's contract-based claims was not given*

6. Consent of the parties to the dispute before the ICSID Tribunal is a basic precondition to establish Tribunal's jurisdiction.[2] Respondent assets that tribunal lacks both jurisdiction to the substance of the dispute and with regard to parties to the dispute.

#### A.1.(i) Claimant's claims has to be characterized as contract-based according to objective criteria; Claimant's characterization of his claims as treaty-based does not suffice to establish jurisdiction of the ICSID Tribunal

7. Respondent contends that Claimant's claims are contractual in nature and there are no treaty-based claims upon which Claimant could rely. If there are any claims arising under the BIT, they are *prima facie* implausible particularly because Claimant has only improperly reformulated its contract-based claims.

8. As Respondent continues in greater extent hereinafter, Claimant's treaty-based claims are *prima facie* implausible in particular because

   - none of the alleged breaches of the JV Agreement are attributable to Respondent because – if any – all the breaches were committed by Beritech, legal entity distinct from Respondent;

   - there was no taking of property, because the ownership of stake in Sat-Connect S.A is subject to pending arbitration commenced pursuant to the JV Agreement; before the decision of the JV Agreement arbitrator, Claimant may not set certain that he suffered any loss;

   - according to principle *volenti non fit iniuria,* Claimant's rights could not be infringed by invoking terms of the JV Agreement which Claimant previously accepted; there is no unfair or inequitable

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1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature on 18 March 1965

2 CH Schreuer: The ICSID Convention: A Commentary (2001) 90, § 6

treatment or expropriation where the interests of Claimant are seized with its own voluntary consent, conceived in a contract, because there is no violation of law;

- it is solely question of interpretation and application of the JV Agreement whether there was any breach of the JV Agreement; Claimant's allegations of facts do not exceed the premise that the BIT was violated for the JV Agreement was violated; if there is no breach of the JV Agreement, Claimant's hands would remain empty because Claimant does not rise any breach of the BIT which would be independent from breach of the JV Agreement;

- if there were any breaches, all of them were compensated in value agreed in the JV Agreement.

9. Although a certain majority of investment tribunals[3] held that it is up to Claimant to formulate its claims, and *"if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT [...], the Claimant should be able to have them considered on their merits"*,[4] Respondent urges that it is well settled case law that the tribunals are authorized and also obliged to review if Claimant's claims are prima facie inadmissible according to objective criteria.[5] The review of plausibility of the claims has to be employed elsewhere the doubts concerning admissibility of Claimant's claims arise, and the tribunal is empowered to go into the merits of the case.[6]

10. Respondent also emphasizes that tribunals which were not willing to apply too strict scrutiny on Claimant's claims in jurisdictional phase of proceedings argued with specific nature of this jurisdictional phase where claimants are not obliged to set out extensive allegations of facts.[7] However, if the jurisdictional and meritorious phases of proceedings are merged – such as in present case[8] – Claimant can no more hesitate to set out allegations of facts upon which the tribunal can assess the nature of Claimant's claims in their full extent .

11. Firstly, Respondent asserts that Claimant primarily formulated its claims as contract-based and yet presented these claims as contract-based before the tribunal as may be read from Minutes of the First Session of the Arbitral Tribunal:

> *"The Parties and the Tribunal <u>have agreed</u> on a procedure to the effect that at this stage the Tribunal shall only address the following: [...] (b) whether the Tribunal has jurisdiction <u>over Claimant's contract-based claims</u> arising under the JV Agreement [...]"*[9]
>
> *"<u>Claimant also asserts</u> that Respondent <u>breached the JV Agreement</u> by preventing Claimant from completing its contractual duties and improperly invoking the buyout clause in the JV Agreement."*[10]

12. Therefore, Claimant is estopped to reformulate its claims as contract based in further stage of the proceedings, namely in Claimant's memorial, because *"in international arbitration a Claimant must state its claim in its initial application, and wholly new claims cannot thereafter be added during the pleadings."*[11] In its initial application, Claimant stated that its claims contract-based.

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3 *Compańia de aguas del aconquija S.A. and Vivendi Universal (formerly Compagnie générale des eaux) v The Argentine Republic,* Award, 21 November 2000 [Vivendi I], § 53; Vivendi Annulment, § 74; Salini v Morocco, § 62 – 63; Wena Hotels Limited v Arab Republic of Egypt, Decision on Jurisdiction, 25 May 1999 [Wena Hotels], 41 ILM (2002) 881, 890; SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, Decision on Jurisdiction, 6 August 2003 [SGS v Pakistan] §§ 144 – 145; Siemens A.G. v The Argentine Republic, Decision on Jurisdiction, 3 August 2004 [Siemens v Argentina], § 180

4 SGS v Pakistan, § 145

5 SGS v Philippines, § 157; Amco Asia Corporation v Republic of Indonesia, Resubmitted Case, Decision on Jurisdiction, 10 May 1988 [Amco], §§ 125 – 127; Occidental Exploration and Production Company v The Republic of Ecuador, Award, 1 July 2004 [Occidental], §§ 80, 92; Joy Mining Machinery Limited v The Arab Republic of Egypt, Award, 6 August 2004 [Joy Mining], § 78; Azurix Corp. v The Argentine Republic, Decision on Jurisdiction, 8 December 2003 [Azurix], § 76; Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic, Decision on Jurisdiction, 14 January 2004 [Enron], § 67

6 CH Schreuer, Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered, in T Weiler: International Investment Law and Arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (2003) 281, 322

7 *e. g. SGS v Pakistan,* § 145, footnote 165 *in fine*

8 *Minutes of the First Session of the Arbitral Tribunal* (ICSID Case No. ARB/X/X), held in Malibu, California, on 15 March 2010 [Minutes], §§ 14, 16

9 Minutes, § 14

10 Minutes, § 15, Claimant, sub-paragraph 7

13. Even if the tribunal omits these own assertions of Claimant and accepts that Claimant was not prevented form re-labeling its claims as claims based on violation of the BIT, the tribunal shall – as early as in the jurisdictional phase of proceedings – look behind the Claimant's claims and decide whether their characterization by Claimant as treaty-based is plausible.[12] As the tribunal in SGS v Philippines held: *"[...] it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on."*[13] Notably, the SGS v Philippines tribunal held that claims to expropriation are inadmissible.[14]

14. Conclusions of the SGS v Phillipines tribunal were then affirmed in Occidental v Ecuador, Joy Mining v Egypt, Azurix v Argentina, and Enron v Argentina where all tribunals addressed the issue of plausibility of Claimant's claims.[15] Respondent emphasizes that teachings of aforesaid tribunals shall be preferred to to tribunals which did not addressed the issue of plausibility at all. Where concerns about plausibility occurred the tribunals did not hesitate to employ a test based on objective criteria.

15. Accordingly, Respondent asserts that all Claimant's treaty-claims – including breaches of Articles 2 (fair and equitable treatment and full protection and security), 4 (expropriation) and 10 (observance of undertakings) of the BIT – are *prima facie* implausible and hence the tribunal lacks jurisdiction over them.

16. If the treaty-based claims are implausible, only their contractual basis remains. Respondent then relies on widely respected conclusions of *ad hoc* Committee in *Viviendi Annulment,* which stated: *"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."*[16] Accordingly, the ICSID Tribunal should honor Clause 17 of the JV Agreement and dismiss all Claimant's claims.

**A.1.(ii) Settlement of Disputes Clause in the BIT is not broad enough to encompass claims based on violation of the JV Agreement which may not be confused with claims based on violation of the BIT**

17. Claimant may probably rely on such case law where the tribunals found themselves competent to decide both on treaty-based and on contract-based claims. Respondent seeks to prove that, unlike in certain number of cases where the tribunals accepted their jurisdiction over contract-based claims,[17] Claimant's claims has to be treated differently, mainly due to narrow Settlement of Disputes Clause in the BIT. The BIT allows an investor to submit only claims concerning a breach of the BIT itself.

18. Claimant will probably employ as its principal authority decision on jurisdiction in SGS v Philippines where the tribunal stated that it had jurisdiction over Claimant's contract-based claims,[18] noting that the dispute resolution clause in the BIT

> *"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 […] would be a "dispute with respect to investments"; so too would a dispute arising from an investment contract […]"*[19]

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11 SGS v Philippines, § 157; International Court of Justice [ICJ], Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), ICJ Reports (1992) 240, 265 – 270, §§ 64 – 70

12 United Parcel Services v Canada, Decision on Jurisdiction, § 37; ICJ, Case concerning Oil Platforms (Islamic Republic of Iran v United States of America), ICJ Reports (1996) 803, § 16

13 SGS v Philippines, § 157

14 Ibid., § 161

15 Occidental, §§ 80, 92; Joy Mining, § 78; Azurix, § 76; Enron, § 67

16 Vivendi Annulment, § 98

17 SGS Société Générale de Surveillance S.A. v Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [SGS v Philippines], § 130 – 135; Compańia de aguas del aconquija S.A. and Vivendi Universal (formerly Compagnie générale des eaux) v Argentine Republic, Decision of the ad hoc Committee on Annulment, 3 July 2002 [Vivendi Annulment], § 55; Salini Costruttori S.p.A. and Italstrade S.p.A. v Morocco, Decision on Jurisdiction, 23 July 2001 [Salini v Morocco], § 59 – 61

18 SGS v Philippines, §§ 130 – 135

19 Ibid., § 131

19. However, this conclusion was based on Article 8 of the Switzerland-Philippines BIT[20] where the wording *"disputes with respect to investments"* allows to encompass much broader scope of disputes than present *"disputes with respect to investments […] that concern an obligation […] under this Agreement [emphasis added]"* in Article 11 of the BIT. The appendix cited as underlined which restricts disputes to disputes about performance of the BIT itself, excludes – according to ordinary meaning of the terms used[21] – any contractual dispute from the scope of the present dispute settlement clause, including the dispute concerning performance of the JV Agreement.

20. Notably, the SGS v Philippines tribunal argued that if the parties to the BIT intended to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT they would use more specific term in the dispute settlement clause, such as *"[d]isputes […] regarding the interpretation or application of the provisions of this Agreement"* used in interstate arbitration clause in the Switzerland-Philippines BIT.[22] The broad dispute settlement clause in Switzerland-Philippines BIT was also contrasted with Chapter 11 of NAFTA[23] which allows investors to bring before the tribunal only claims for breaches of specified provisions of Chapter 11 itself.[24] In NAFTA arbitral practice, this also rendered contract-based claims inadmissible; as the tribunal in Azinian v Mexico held:

> *"foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and* still not be in a position to state a claim under NAFTA.*"*[25]

21. Vivendi Annulment decision followed the same line of argumentation as the tribunal in SGS v Philippines and addressed broad scope of jurisdictional offer of the host state as allowing the investor to bring purely contract-based claims before the ICSID Tribunal.[26] However, these conclusions stemmed from the Argentina-France BIT[27] which stated that "[t]out differend relatif aux investissements, au sens du présent Accord [… (all disputes with respect to investments according to present Agreement)]"[28] are subject to international arbitration. Therefore the Vivendi Annulment decision is inapplicable as authority with regards to establishing jurisdiction of this tribunal which has to rely on much narrower Article 11 of the Beristan-Opulentia BIT.

22. The same manner of interpretation of the dispute settlement clause was employed in Salini v Morocco,[29] and mutatis mutandis in other part of the Vivendi Annulment decision where the ad hoc Committee – deciding whether the investor has taken the fork in the road – stated that the dispute settlement clause in the Argentine-France BIT *"does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself"*.[30]

23. According to aforesaid case law, a conclusion may be drawn that the narrow wording of the Settlement of Disputes Clause in the BIT gives the investor a possibility to claim for breaches of the BIT itself, however not to bring a contract-based claim before the investment tribunal. Because all of Claimant's claims are contractual in nature, the tribunal has no jurisdiction to hear any of these claims.

#### A.1.(iii) Even if the ICSID Tribunal has jurisdiction *ratione materiae,* there is no jurisdiction *ratione personae,* because Respondent's consent to arbitrate does not encompass claims *vis-á-vis* entities distinct from Respondent itself; whereas actions of Beritech may not imputed to Respondent

24. Respondent contends that its jurisdiction offer contained in Article 11 of the BIT does not encompass offer to arbitrate claims arising out of contract entered into by Beritech, a separate legal entity.

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20 *Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments,* signed on 31 March 1997
21 *Vienna Convention of the Laws of Treaties,* opened for signature on 23 May 1969. Article 31(1)
22 *SGS v Philippines,* §§ 132(b)
23 *North American Free Trade Agreement,* signed on 17 December 1992. Article 1126, 1127
24 *SGS v Philippines,* Decision on Jurisdiction, §§ 132(e)
25 *Robert Azinian, Kenneth Davitian & Ellen Baca v The United Mexican States,* Award, 1 November 1999 [Azinian], § 85 (emphasis in original)
26 Vivendi Annulment, § 55
27 *Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments,* signed on 3 July 1991
28 Ibid. Article 8(1)
29 *Salini v Morocco,* § 59 – 61
30 *Vivendi Annulment,* § 55

25. Respondent relies on case law of tribunals which held principles of attribution inapplicable with regard to contracts.[31] The tribunal in Impregilo v Pakistan – applying Italy-Pakistan BIT[32] which allowed in relevant part to arbitrate *"disputes arising <u>between a Contracting Party and the investors</u> of the other"*[33] – stated that *"the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party."*[34]

26. The question of attribution is indeed a question of international law.[35] However, the JV Agreement is governed by laws of Beristan, pursuant to choice of the parties expressed in Clause 17 of the JV Agreement, and could not be governed by international law pursuant to well known principle developed by Permanent Court of International Justice: *"[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on municipal law of some country".*[36]

27. This strict difference between treaties and contracts was never abandoned by international judicial practice, even in arbitrations concerning breaches of oil concessions contracts.[37] The arbitrators recognized international responsibility stemming from the breaches of the *pacta sunt servanda* principle, however, never applied public international law as a law governing a contract.[38]

28. Whether there is a separate legal personality is a question of municipal law.[39] Beritech is a company incorporated pursuant to laws of Beristan with complex shareholder structure and its own capacity to enter into contracts, own property (e.g. stake in Televative S.A.) and commence proceedings,[40] therefore possessing independent legal personality. In case the Beritech has independent legal personality under the laws of Beristan, Respondent may not be held liable for violations of the JV Agreement upon which Claimant relies.

29. Accordingly, the ad hoc Committee in Vivendi Annulment held significantly:

> *"whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. [...] For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the State [...] is internationally responsible for the acts of its provincial authorities. By contrast, the State ... is not liable for the performance of contracts entered into by Tucumán, which possesses a separate legal personality under its own law and is responsible for the performance of its own contracts."*[41]

30. Furthermore, it is well settled case law, that international law principles of attribution are not operative in case of contractual claims,[42] and no provision in the BIT – including the umbrella clauses – are not capable to transform the municipal obligation arising out of a contract to obligation governed by international law and change parties thereto, e. g. though imputing the obligation to the the host state.[43]

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31 *Impregilo v Pakistan,* Decision on Jurisdiction, 22 April 2005 [Impregilo], 12 ICSID Reports 245; Nagel v Czech Republic, Award, 10 September 2003, §§ 162 – 163

32 Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments, signed on

33 Ibid. Article 8

34 Impregilo, § 214

35 MN Shaw, Intenational Law (2008) 785; International Law Commission (fifty-third session), Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 4 – 9; ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur, ICJ Reports, 1999, §§ 62, 87; ICJ, Case concerning Genocide Convention (Bosnia v. Serbia), ICJ Reports, 2007, § 385

36 Permanent Court of International Justice, Serbian Loans Case, Judgment No. 14, Series A, No. 20 (1929) 41

37 e.g. Saudi Arabia v Arabian American Oil Company, 27 ILR 117 [Aramco], 168; Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, ILM (1978) 1

38 SM Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International law,* in Justice in International Law: Selected Readings (1994) 425, 434

39 Impregilo, § 199 – 210; Salini v Morocco, § 60;

40 Annex 2 to the Minutes (Uncontested Facts), §§ 2 – 4, 13

41 Vivendi Annulment, § 98

42 *Salini v Morocco,* § 59 – 61; *Consortium RFCC v. Kingdom of Morocco,* Decision on Jurisdiction of 16 July 2001 [RFCC Jurisdiction], §§ 68 – 69; *Consortium RFCC v. Kingdom of Morocco,* Award, 22 December 2003 [RFCC Award], § 32 – 35; *Cable Television of Nevis. v. Federation of St. Kitts and Nevis,* Award of 13 January 1997 [Cable Television], § 2.22

43 *CMS Gas Transmission Company v. Argentine Republic,* Decision of the ad hoc Committee on the Annulment, 25 September 2007 [CMS Annulment], § 95(c); J Crawford, Treaty and Contract in Investment Arbitration, TDM, Provisional (January 2008) 19

31. For the foregoing reasons, Respondent contends that its jurisdiction offer contained in Article 11 of the BIT does not encompass offer to arbitrate claims arising out of contract entered into by Beritech, a separate legal entity.

**A.2.(iv) Claimant could not properly commence ICSID arbitration before the end of the waiting period pursuant to Article 11(1) of the BIT**

32. Pursuant to Article 11(1) of the BIT, Claimant is allowed to submit the dispute to arbitration, only if it *"cannot be settled amicably within six months of the date of a written application"*. Claimant did not make any attempt to settle the dispute about interpretation and application of the Buy-out Clause in the JV Agreement by consultations or negotiations with Beritech, after the Clause was invoked on 27 August 2009.[44] Instead, on 28 October 2009, Claimant just requested arbitration before the ICSID Tribunal.[45]

33. Respondent recalls findings of tribunal in Enron v Argentina which held that *"[s]uch a requirement [six months waiting period] is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."*[46] Since there was no six months period of negotiation, strictly speaking, since there were no attempts to settle the dispute amicably by Claimant, the Claimant's claims has to be dismissed on jurisdictional basis.[47]

34. It may be objected that other tribunals did not consider the waiting period to be jurisdictional and rather treated it as a procedural requirement. However, these tribunals were always concerned with futility of negotiations which would probably not lead to any settlement.[48] Respondent contends that it it not this case, because if Claimant did not seek for settlement anyhow it cannot be concluded that the settlement was impossible.[49]

***A.2. Alternatively, wide Dispute Settlement clause in the JV Agreement ousts jurisdiction of the ICSID Tribunal and renders Claimant's claims inadmissible***

35. Even if the tribunal rejects Respondent's objections against jurisdiction of the tribunal over Claimant's contract based claims and thus affirms that (a) Claimant's claims are properly formulated as treaty-based; and/or (b) the narrow Settlement of Disputes Clause in the BIT does not bar Claimant to bring its contract-based claims before this tribunal; and (c) jurisdictional offer given by Respondent through Article 11 of the BIT may be extended to breaches by Beritech of the JV Agreement; the selection of forum, agreed in Clause 17 of the JV Agreement oust jurisdiction of the ICSID Tribunal and renders Claimant's claims inadmissible.

36. The absence of jurisdiction of the ICSID Tribunal stems from following reasons: (1) Wide scope of Article 17 of the JV Agreement allows the contract tribunal to decide on violations of the BIT as *ad hoc* Arbitration Tribunal according to Article 11(2)(b) of the BIT; (2) therefore pending proceedings before the JV Agreement tribunal constitutes a *lis pendens*; alternatively, (3) the ICSID Tribunal is not competent to decide on validity and scope of obligations of the parties to the JV Agreement; it is only competent to decide how the performance or non-performance of the JV Agreement is reflected by the BIT standards.

**A.2.(i) Wide scope of Article 17 of the JV Agreement allows the contract tribunal to decide on violations of the BIT, because the dispute concerning violations of the BIT is a dispute relating to the JV Agreement**

37. Respondent disagrees, nevertheless points out, that the ICSID tribunal – in order to preliminary establish its jurisdiction – had to accept that Respondent's jurisdictional offer in Article 11 of the BIT encompasses claims *vis-á-vis* Beritech, a separate legal entity. Therefore the ICSID tribunal had to necessarily accept also that the acts of Beritech are attributable to Respondent. If there is such a relation of imputability between respondent and Beritech – which Respondent opposes above – the actions of Beritech are assimilated to the state itself which renders the state liable.[50]

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44 Annex 2 to the Minutes (Uncontested Facts), § 10
45 Ibid., § 14
46 *Enron,* § 88
47 *cf. Antoine Goetz and others v Burundi,* Award, 10 February 1999, §§ 90 – 93
48 *Ethyl Corp. v Canada,* Decision on Jurisdiction, 24 June 1998 [Ethyl], § 84; *Ronald Lauder v The Czech Republic,* Final Award, 3 September 2001 [Lauder], §§ 188 – 189; *SGS v Pakistan,* §§ 130 -131;
49 *Ethyl,* § 87 – 88
50 MN Shaw, *International Law* (2008) 786

38. Assuming that Respondent – which shall the actions of Beritech be imputed to – entered into the JV Agreement itself, the jurisdiction of the ICSID tribunal, preliminary established on Respondent's consent given in Article 11 of the BIT, is superseded by Clause 17 of the JV Agreement which is *lex specialis* to the consent based on the BIT and subsequent Claimant's acceptance.

39. The specific agreement takes precedence over the general agreement in the BIT.[51] Clause 17 of the JV Agreement has closer relationship to Claimant's investment *ratione materiae* than Article 11 of the BIT. The jurisdictional offer in the BIT encompasses unlimited number of investment disputes while the JV Agreement – as a basic precondition for Claimant to make an investment in the territory of Beristan – concerns only one specific investment, the Sat-Connect Project. The principle of *generalia specialibus non derogant* hence should apply.

40. Furthermore, the compromissory clause in the JV Agreement is wide enough to encompass all prospective treaty-based claims relating to investment which was made through the JV Agreement and Sat-Connect Project. The relevant part of the JV Agreement states that the notice of intention to commence arbitration may be given *"[i]n the case of any dispute arising out of or relating to this Agreement"*.[52] Clauses drafted in such a broad manner are in practice of various arbitration tribunals and courts treated as encompassing any and all disputes touching on the contract in question regardless of whether they sound in contract, tort, statue or treaty, regardless of the label attached to the dispute.[53]

41. Respondent admits that previous argument employed by the responding party to the dispute in SGS v Pakistan was not accepted.[54] However, the SGS v Pakistan tribunal based it decision manly on two reasons: (1) the contract with dispute resolution clause was entered into by the parties before the Switzerland-Pakistan BIT was signed, therefore the parties could have not reasonably drafted the dispute resolution clause as involving claims arising out of the BIT;[55] (2) because the contract arbitrator was prohibited to apply provisions of the BIT by decision o Supreme Court of Pakistan.[56]

42. Neither of these reasons is relevant to present dispute. (1) The JV Agreement was signed on 18 October 2007, more than 10 years after the BIT became effective (1 January 1997).[57] The parties to the Clause 17 of the JV Agreement were or should have been well aware of the prospective claims arising out of the BIT. (2) The 1959 Arbitration Act of Beristan, applicable to the dispute according to Clause 17 of the BIT, was amended in February 2007 to conform to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[58] Article 28 of UNCITRAL Model Law states that *"the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."*[59] The JV Agreement tribunal is therefore not precluded to apply and interpret the BIT.

43. Even if the JV Agreement tribunal could not be considered as an ad hoc UNCITRAL Tribunal according to Article 11(2)(b) of the BIT, it is a tribunal established upon common consent of Claimant and Respondent. Respondent is not precluded to enlarge its jurisdictional offer pursuant to Article 11 of the BIT for specific investments – such as the Sat-Connect project.

44. Because the Clause 17 of the JV Agreement takes precedence before Article 11 of the BIT whereas (1) parties to both clauses are the same; and (2) the subject-matter consented by the parties to be dealt with by arbitrators is the same; the proper tribunal to decide on Claimant's claims whatever their nature could be is the tribunal constituted pursuant to the JV Agreement.

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51 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* Decision on Jurisdiction, 14 April 1988 [SPP]; *Lanco International Inc. v Argentine Republic, Preliminary Decision on Jurisdiction,* 8 December 1998 [Lanco], § 27 – 28; *Salini v Morocco*, § 27

52 Annex 3 to the Minutes. Clause 17

53 *SGS v Pakistan,* § 66; *Pennzoil Exploration and Production Co. v Ramco Energy Ltd.,* Partial Award, ICC Case No. 7319 of 1992; *J.J. Ryan & Son Inc. v. Rhone Poulenc Textile S.A.,* 863 F.2d 315, 321 (4th Cir. 1988)

54 *SGS v Pakistan,* § 155

55 Ibid, § 153

56 Ibid, § 154

57 Annex 2 to the Minutes (Uncontested Facts), § 3; Clarification Requests (4 June) Responses, § 174

58 Clarification Requests (4 June) Responses, § 130

59 General Assembly Resolution 40/72 (11 December 1985), General Assembly Resolution 61/33 (4 December 2006). Article 28(2)

**A.2.(ii) The ICSID Tribunal has to dismiss Claimant's claims, as requires the *lis pendens* doctrine due to the pending proceedings before the JV Agreement Tribunal**

45. Respondent contends that there is an overlap between two pending proceedings, the first pending before the ICSID Tribunal and the second before the tribunal established pursuant to Clause 17 of the JV Agreement.[60] In order to render the doctrine of *lis pendens* applicable, the parties to the dispute and the cause of action has to be identical.[61] As it was stated above, both proceedings concern disputes between Claimant and Respondent and both of the disputes are relating to the JV Agreement.

46. Than, the proceeding which had commenced prior has to supersede the proceeding commenced as the second one. Therefore, the ICSID Tribunal has to dismiss all Claimant's claims. Otherwise, all the decisions of the present tribunal could be subject to annulment according to Article 52(1)(d) of the ICSID Convention for serious departure from a fundamental rule of procedure; and could not be enforced pursuant to Article V(1)(c) of the New York Convention.[62]

## 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

47. Article 10 of the BIT does not change contract claims to treaty claims and does not establish additional jurisdiction to the tribunal. Claimant may not rely on Article 10 of the BIT to elevate its contract-based claims to the international plane and make the performance of the JV Agreement – a municipal contract – breach of international law.

48. Even if umbrella clause could change the question of performance of the contract to a question of international responsibility, obligations arising from the JV Agreement are not covered by the umbrella clause in the BIT because these obligations were not assumed by Respondent, these obligations are of pure commercial nature and there were no state infringements into the contractual relationship between Claimant and Beritech.

### *B.1. The umbrella clause does not change a general principle of international law that the breach of contract by a state is not a breach of international law*

49. Respondent relies on conclusions of the tribunal in SGS v Pakistan that the obligation to *"constantly guarantee the observance of commitments [...] with respect to investments"*[63] – drafted almost identically as in the Beristan-Opulentia BIT – does not convert breaches of investor-State contracts into breaches of the BIT.[64]

50. The Tribunal properly begun with interpreting the umbrella clause in the BIT according to its ordinary meaning in the light of object and purpose of the BIT itself.[65] Thereafter, concerned with far-reaching impact of extensive interpretation of the umbrella clause which could not be intended by the contracting States,[66] the tribunal employed interpretation according to principle *in dubio mitius.*[67] The tribunal added that if the umbrella clause changes every breach of contract to a breach of treaty, the sense of other standards incorporated in the BIT would be blurred and this would lead to evasion of dispute settlement clauses in investor-State contracts.[68] This also corresponds with rule of international law that breach of contract is not *per se* an internationally wrongful act.[69]

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60 Annex 2 to the Minutes (Uncontested Facts), §§ 13 – 14

61 Z Douglas, *The International Law of Investment Claims* (2009) 308 – 309

62 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature on

63 Switzerland-Pakistan BIT. Article 9

64 SGS v Pakistan, §§ 166, 173

65 VCLT, Article 31(1), ADF Group Inc. v United States of America, Award, 9 January 2003 [ADF]

66 SGS v Pakistan, § 163; VCLT, Article 31(3)(c)

67 *SGS v Pakistan,* § 171; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* Decision on Jurisdiction, 26 June 2003 [Loewen], §§ 160 – 164; WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R; WT/DS48/AB/R, adopted 16 January 1998, §§ 154, 163 – 165

68 SGS v Pakistan, § 168

69 SM Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International law,* in Justice in International Law: Selected Readings (1994) 425, 434 – 435; R Jennings & A. Watts, *Oppenheim's International Law* (1992) 927

51. Respondent considers this interpretative approach appropriate and urges the present tribunal to follow the teaching of SGS v Pakistan, although there was some portion of criticism, particularly based on objections that the tribunal failed to address standard means of treaty interpretation including the principle of *effect utile,*[70]

52. However, if the SGS v Pakistan decision is read carefully, it addresses both the question of canons of interpretation set out by the Vienna Convention on Laws of Treaties and the question whether the umbrella clause is not deprived of its meaning at all.[71] It also may not be left out that both decisions concerning investments of SGS in Pakistan and Philippines – although considerably distinct in reasoning on scope and effect of the umbrella clause – led to the same conclusion: disputes arising out of investment contract shall be decided before municipal forum notwithstanding presence of the umbrella clause.[72]

### *B.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*

53. Even if the umbrella clause was intended by the parties to the BIT to make the performance of an investment contract – such as the JV Agreement – enforceable as an internationally wrongful act, the performance of the JV Agreement cannot be enforced in such a manner because (1) it arises no commitments which was "assumed by" Respondent; (2) there was no sovereign involvements in the contractual relationship between Claimant and Beritech; and alternatively (3) if there ware such involvements, there are not able to trigger the BIT protection.

#### B.2.(i) The umbrella clause covers only commitment assumed by Respondent itself and may not be extended to cover commitments assumed by independent legal entity

54. Respondent once more relies on case law of tribunals which held principles of attribution inapplicable with regard to contracts.[73] It is not effect of the umbrella clause to change scope or parties to the municipal agreement.[74] The proper law of the JV Agreement remains the laws of Beristan and accordingly, Beritech remains the party to the JV Agreement too.

55. Therefore, there was no assumption by Respondent of commitment vis-á-vis Claimant as it is required by the umbrella clause. The commitments arising out of the JV Agreement were assumed by its proper party, company Beritech. It is true, that Respondent co-signed the JV Agreement as a guarantor of Beritech's obligations, however it does not render Respondent to be a party to the JV Agreement.

#### B.2.(ii) The umbrella clause covers merely contracts which the host state concludes within its sovereign powers or where it exercises its sovereign powers to involve into the contractual relationship

56. Alternatively, if the umbrella clause may be extended to obligations assumed by Beritech through the JV Agreement, Respondent urges the tribunal to restrict the scope of the umbrella clause to commitment concerning certain governmental or sovereign implications.[75] It is Respondent's contention that the JV Agreement is a common commercial contract which could be entered into be any enterprise, conferring no special authorities to the Claimnt.

57. In Joy Mining, the tribunal stated: *"A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved."*[76] This distinction was later confirmed by both El Paso v Argentina and Pan American v Argentina tribunals.[77] Both tribunals based their decisions on the Argentina-USA BIT with a similarly narrow dispute settlement clause as the Beristan-Opulentia BIT provides. Therefore Respondent considers these decisions appropriate as authorities in this case.

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70 SGS v Philippines, § 115

71 SGS v Pakistan, § 165 – 166, 172

72 J Crawford, *Treaty and Contract in Investment Arbitration,* TDM, Provisional (January 2008) 3

73 *Impregilo,* § 260; *Vivendi Annulment,* § 96; *Nagel,* §§ 162 – 163; *Salini v Morocco,* § 59 – 61; *RFCC Jurisdiction*, §§ 68 – 69; *RFCC Award*, § 32 – 35; *Cable Television*, § 2.22

74 *CMS Annulment,* § 95(c);

75 *El Paso v Argentina,* Decision on Jurisdiction, 27 April 2006 [El Paso], §§ 77 – 88; *Pan American v Argentina,* Decision on Preliminary Objections, 27 July 2006 [Pan American], §§ 108 – 115; *Texaco, §* 72

76 *Joy Mining,* § 72

77 *El Paso*, §§ 77; *Pan American,* § 108

58. The El Paso Tribunal noted significantly that

> *"[…] the umbrella clause in Article II of the [Argentine-USA] BIT, read in conjunction with Article VII [narrow dispute settlement clause in the Argentine-USA BIT],¨will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by State or a State-owned entity but will cover additional investment protections […] such as stabilization clause […]"*[78]

59. Because also the Beristan-Opulentia BIT restricts the scope of the investment disputes to disputes concerning interpretation and application of the BIT itself, Respondent Contends that the umbrella clause is not applicable to ordinary commercial contracts. The JV Agreement has no stabilization clause or any other clause which would require exercise of sovereign powers of the state. Therefore, the article 10 of the BIT does not extend the scope of Tribunal's jurisdiction pursuant to Article 11 of the BIT.

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78 El Paso, § 81