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

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.

The absence of Respondent's consent in writing–as required pursuant to Article 25(1) ICSID Convention–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]".

Secondly, Respondent could not consented in writing to arbitrate Claimant's claims owed 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.

Further, even if the tribunal concludes that (a) Claimant's claims have to be treated as treaty-based and/or (b) Respondent assented to arbitrate contract-based claims before the ICSID Tribunal, and (c) contractual obligations may be attributed to Respondent; the choice of forum in Clause 17 (Dispute Settlement) of the JV Agreement and pending domestic arbitration ousts jurisdiction of the ICSID Tribunal over the Claimant's claims, eventually renders these claims inadmissible.

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

Consent of the parties to the dispute before the ICSID Tribunal is a basic precondition to establish Tribunal's jurisdiction. Respondent seeks to prove that, unlike in certain number of cases where the tribunals accepted their jurisdiction over contract-based claims, 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.

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

Respondent contends that Claimant's claims are inadmissible and the Tribunal lacks jurisdiction because Claimant's claims are contractual in nature and Claimant has improperly reformulated them as claims arising under the BIT.

Although a certain majority of investment tribunals 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", 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. 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.

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 have agreed on a procedure to the effect that at this stage the Tribunal shall only address the following: […] (b) whether the Tribunal has jurisdiction over Claimant's contract-based claims arising under the JV Agreement […]"

“Claimant also asserts that Respondent breached the JV Agreement by preventing Claimant from completing its contractual duties and improperly invoking the buyout clause in the JV Agreement.” 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.”

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. 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.” Notably, the SGS v Philippines tribunal held that claims to expropriation are inadmissible.

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. 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.

Accordingly, Respondent asserts that all Claimant’s 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 inadmissible to be dealt with by the tribunal which lacks jurisdiction over them.

As Respondent continues in greater extent infra, Claimant’s treaty-base claims are prima facie implausible in particular because none of the alleged breaches of the JV Agreement are attributable to Respondent. Secondly, 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 treatment or expropriation where the interests of Claimant are seized with its own voluntary consent, conceived in a contract.

If the treaty-based claims are implausible, only their contractual basis remains.

+ § 98 Vivendi Annulment

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

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 asserts, that all of these concluded cases may be distinguished from the present case on basis of “width” of relevant clause governing the settlement of disputes between a host state and an investor in the BIT.

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, 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 […]”

However, this conclusion was based on Article 8 of the Switzerland-Philippines BIT 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”

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–any contractual dispute from the scope of the present dispute settlement clause, including the dispute concerning performance of the JV Agreement.

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. The broad dispute settlement clause in Switzerland-Philippines BIT was also contrasted with Chapter 11 of NAFTA which allows investors to bring before the tribunal only claims for breaches of specified provisions of Chapter 11 itself.

Vivendi Annulment Decision followed the same line of argumentation and addressed broad scope of jurisdictional offer of the host state as allowing the investor to bring purely contract-based claims befor the ICSID Tribunal. However, these conclusions stemmed from the Argentine-French BIT which stated that "[t]out differend relatif aux investissements, au sens du présent Accord [… (all disputes with respect to investments according to present Agreement)]" 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.

The same manner of interpretation of the dispute settlement clause was employed in Salini v Morocco, 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".

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 none of these claims.

Respondent also urges that SGS v Pakistan declined its jurisdiction over contract-based claims even in case of broad dispute settlement clause.

A.1.(iii) Breaches of the JV Agreement upon which Claimant relies are not attributable to Respondent because the JV Agreement is governed by municipal laws of Beristan–where the separate legal personality of Beritech is recognized–and the BIT does not anyhow change lex contractus of the JV Agreement

The question of attribution is indeed a question of international law. However, the JV Agreement is governed by laws of Beristan, pursuant to choice of the parties expressed in Article 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".

This strict difference between treaties and contracts was never abandoned by international judicial practice, even in arbitrations concerning breaches of oil concessions contracts. 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.

Respondent relies on case law of tribunals which held principles of attribution inapplicable with regard to contracts. The tribunal in Impregilo v Pakistan–applying Italia-Pakistan BIT which allowed in relevant part to arbitrate "disputes arising between a Contracting Party and the investors of the other"–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."

Whether there is a separate legal personality is a question of municipal law. Beritech is a company with complex shareholder structure and its own capacity to enter into contracts, own property (stake in Televative) and commence proceedings, 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.
Accordingly, the ad hoc Committe 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."
Furthermore, it is well settled case law, that international law principles of attribution are not operative in case of contractual claims, 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.
On the aforesaid 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.
+ why Eureko and Noble Ventrures may not be applied, what is the significance of the state guarantee
A.2. Wide forum selection clause in the JV Agreement ousts jurisdiction of the ICSID Tribunal and renders Claimant's claims inadmissible
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e.g. Lanco International Inc. v Argentine Republic, Preliminary Decision on Jurisdiction, 8 December 1998 [Lanco]; ▪