Claimant

A. The Tribunal has jurisdiction over Claimant's claims and its jurisdiction is not ousted in view of Clause 17 (Dispute Settlement) of the JV Agreement

1. Claimant contends that the ICSID Tribunal has jurisdiction to decide on all his claims, properly formulated as claims based on violation of the BIT, notwithstanding whether their factual background lays in violation of the JV Agreement. Dispute Settlement Clause of JV Agreement does not preclude the jurisdiction of the Tribunal and cannot be regarded as a waiver of right to arbitrate before the ICSID Tribunal.

A.1. The jurisdiction of the ICSID Tribunal was properly established under the applicable international law

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."* This clause has to be read together with Article 11 of the BIT where Respondent offered to arbitrate any *"disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter."*

3. Respondent contends that all the conditions necessary to establish jurisdiction of the Tribunal are met. Namely, (1) the present dispute is of legal nature; (2) it stems directly out of investment; (3) it occurred between a state party and a national of another state and both states are parties to the ICSID Convention; and (4) both parties to the present dispute consented in writing to submit to the Centre. This criterion includes also the scope of the jurisdictional offer in Art. 11 of the BIT.

A.1.(i) The dispute is of a legal nature arises directly out of the investment, between Contracting State and a national of another Contracting State to ICSID Convention

4. Claimant – as it it clear from its initial pleadings[1] – argues that Respondent breached its obligations under the applicable BIT. The BIT is a source of international law[2] and the obligations arising under the BIT are hence obligations of legal nature. Claimant also seeks a legal remedy for the alleged breaches. A dispute can be considered as legal "if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed;"[3] or if "the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and [if the dispute] is more than a mere 'conflict of interest.'"[4] Therefore, if Claimant formulates its pretensions in legal terms and on the basis of existent law, and Respondent answers in terms of law,[5] there is a dispute of legal nature.[6]

5. Whether the dispute arises directly out of an investment is both question of whether the Claimant made an investment covered by the BIT, and what the relationship between the investment and the dispute is.[7] The joint-venture project can be qualified as an investment both under the BIT and as well under the ICSID Convention. The present dispute relates directly to the investment, mainly because the actions complained of has led to the termination of the Claimant's investment in the Sat-Connect project.

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1 *Minutes of the First Session of the Arbitral Tribunal* (ICSID Case No. ARB/X/X), held in Malibu, California, on 15 March 2010 [Minutes], §§ 15, Claimant, sub-paragraph 4

2 Statute of the ICJ, Article 38(1)(a)

3 C Schreuer: *The ICSID Convention: A Commentary* (2001) 105, § 42; cf. International Court of Justice [ICJ], *East Timor Case (Portugal v. Australia),* Judgment on Jurisdiction, 30 June 1995, ICJ Reports (1995) 89, § 22; Permanent Court of International Justice, *The Mavrommatis Palestine Concession (Greece v. Great Britain),* Judgment, 30 August 1924, PCIJ Series A, No. 2, p. 11; *Azurix,* § 58

4 Report of the Executive Directors of the World Bank on the ICSID Convention, available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>, § 26

5 *Minutes,* § 15

6 *El Paso,* § 62

7 C Schreuer, Commentary

6. The present dispute arises directly out of an investment according to Salini test[8] and the broad definition of investment in the BIT, since the right of Claimant under the JV Agreements and the subsequent Claimant's 40 % share on Sat-Connect may be qualified as an investment. Claimant asserts that both investment test are met, hence the jurisdiction of the tribunal is established.[9]

7. The concept of investment is defined in Article 1(1) of the BIT as including *inter alia "[b)] shares [… d)] patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets [… e)] any right of a financial nature accruing […] by contract […]"*. Claimant contends that its share in Sat-Connect project, intellectual property rights provided to the project and rights arising out of the JV Agreement qualifies as an investment covered by the BIT.

8. In the terms of the ICSID Convention, four criteria determine the existence of an investment: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host State's development.[10] Claimant asserts that all of these criteria are met, because Claimant expended at least monetary investment of § 47 million[11] and established a joint-venture with unlimited duration.[12] Development of Sat-Connect project can be considered as both assumption of business risks and contribution to the development of Beristan economics. Notably, Claimant transferred innovative technologies to Beristan – as a leading developer of new technologies in satellite communications technologies.[13]

9. Both Respondent and Opulentia which is the state, where Claimant is incorporated,[14] are Parties to ICSID Convention. According to rule of incorporation, widely recognized as the rule determining nationality of corporations,[15] Claimant is a national of Opulentia.

A.1.(ii) Claimant properly formulated its claims as treaty-based

10. It is a well-settled case law which asserts that it is up to Claimant to formulate its claims,[16] 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"*.[17] Claimant does not accept a foreseeable Respondent's contention that Claimant's claims are to be characterized as contract-based. There is no clear-cut border line between so called treaty-based and contract-based claims.[18] All of the Claimant's claims are to be regarded as treaty claims in the sense that they are brought before the ICSID Tribunal on the basis of the BIT. There is no such thing as an improper reformulation of contractual claims as treaty-based.

11. It is necessary to ask, what the treaty claims and what the contract claims are. It seems that every claim which has its background in a breach of a contract shall be considered as contract-based. However, the distinction cannot be drawn in such a simplified manner. The same factual basis may give rise both to the breach of a contract and to the breach of a treaty, because the qualification of a conduct as unlawful in municipal and in the international law is rather independent.[19]

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8 *Salini v. Morocco,* § 52 – 57; Schreuer: ICSID Convention Commentary,

9 *Fedax N.V. v. Venezuela,* Award on Jurisdiction, 11 July 1997 [Fedax], §§ 18 – 20

10 *Salini v Morocco,* § 52 – 57

11 Minutes, Annex 2 (Uncontested Facts), § 12

12 Ibid., § 3

13 Ibid., § 1

14 Minutes, Annex 2 (Uncontested facts), § 1

15 ICJ, *Case concerning Elettronica Sicula S.p.A. (United States of America v. Italy),* ICJ Reports (1989) 17 [ELSI], § 70; *SOABI v. Senegal,* Decision on Jurisdicion, 1 August 2001, § 29; *Autopista v. Venezuela,* Decision on Jurisdicion, 27 September 2001, § 107

16 *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 Jurisdiction], § 180

17 SGS v Pakistan, § 145

18 *Siemens v. Argentine Republic,* Award, 6 February 2007 [Siemens Award], § 206; Noble Ventures, § 82

19 *Vivendi Annulment,* § 95; ELSI case, §§ 73, 124; *International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts,* GA Res 56/83, 14 December 2001 [ILC Articles on Responsibility], Article 3;

12. It is obvious from the Minutes that Claimant does not urge the ICSID Tribunal to declare that Beritech invoked the buy-out clause improperly and to adjudge compensation according to laws of Beristan as a proper law of the JV Agreement.[20] Claimant seeks to prove that the complex of Respondent's acts and omissions, including the false allegations of the high-ranking Beristian army officers[21] and expulsion of seconded personnel by CWF,[22] caused the termination of Claimant's investment in the Sat-Connect project and led to violation of substantive standards of the BIT.

13. As Claimant argues in parts C and D of this memorial, Respondent's acts and omissions were clearly capable to constitute uncompensated expropriation, unfair and inequitable treatment, unjustified measures and a breach of the umbrella clause. These actions also incited and supported Beritech to invoke material breach of the JV Agreement. The ICSID Tribunal is not precluded to take into account the terms of the JV Agreement, because *"it is one thing to exercise contractual jurisdiction […] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 [fair and equitable treatment] of the BIT."*[23]

A.1.(iii) Respondent consented in writing to arbitrate Claimant's claims

14. Respondent gave its jurisdictional offer to arbitrate the dispute before the ICSID Tribunal in writing – which is an accepted practice[24] – through Article 11(2)(a) of the BIT. 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.[25] If state offers more options to the investors in a BIT – as Respondent did in the present BIT – the choice of particular forum is up to investor.[26]

15. When the existence of consent of the both parties to the dispute is recognized, it is appropriate to proceed with the second step and consider what is the scope of the established consent both *ratione personae* and *ratione materie.* Claimant recalls that Respondent consented to arbitrate *"disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party that concern an obligation of the former under this Agreement in relation to an investment of the latter."* Regarding the personal jurisdiction, there has to be dispute between a state and a foreign investor. Regarding the subject-matter of the dispute, it has to concern (1) investment and (2) obligation of the state party arising out of the BIT.

16. Respondent might argue that most of action which led to the end of Claimant's investment in the Sat-Connect project was committed by Beritech, a separate legal entity under the municipal law of Beristan. However, Claimant emphasizes that significant portion of action was *prima facie* committed by Respondent itself. Further, separate legal personality of Beritech under municipal law of Beristan does not preclude international responsibility of Respondent for actions which are attributable thereto. As it is more comprehensively argued in the part dealing with the merits, (1) actions of Beritech are attributable *to the* Respondent and (2) rules of attribution are operable because international obligations – particularly the umbrella clause – are allegedly breached.[27]

17. It might be Respondent's contention that claims submitted by Claimant to the ICSID Tribunal are contractual in nature and therefore the jurisdictional offer in the Article 11 of the BIT is too narrow to encompass such claims. (Let us say that the keyhole is too small to enter the key.) However, claimant formulated its claims as arising out of violation of the BIT. As it was stated above, the tribunal has to accept these claims as they are and cannot subject them to a too strict scrutiny. Than the Claimant's key gets easily to the keyhole.

18. Even if the tribunal classifies the Claimant's claims as based on the JV Agreement, Claimant asserts that the jurisdiction of the ICSID Tribunal is not limited to the breaches of the BIT itself. The tribunal is authorized and indeed required to decide on such claims due to the BIT's umbrella clause. The effect of the umbrella clause is,

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20 Minutes, § 15; Annex 3, Clause 17
21 Minutes, Annex 2 (Uncontested Facts), § 8
22 Ibid, § 11
23 *Vivendi Annulment,* § 105; referring to *Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments,* signed on 3 July 1991
24 C Schreuer: *The ICSID Convention: A Commentary* (2001) 210, § 286
25 Minutes, Annex 2 (Uncontested facts), § 14
26 C Schreuer: *The ICSID Convention: A Commentary* (2001) 215, § 295
27 *Noble Ventures, Inc. v. Romania,* Award, 12 October 2005 [Noble Ventures], §§ 82 – 86; *Eureko B.V. v. Republic of Poland,* Partial Award, 19 August 2005 [Eureko], §§ 132, 134, 250; Vivendi III

that it makes a non-performance or a breach of the contract a breach of the BIT.[28] It is Respondent's obligation under Article 10 of the BIT to *"constantly guarantee the observance of any obligation it has assumed with regard to investments"*. Therefore, every obligation arising out of the JV Agreement is an "*obligation […] under this Agreement [the BIT] in relation to an investment of the latter"* according to Article 11 of the BIT.

19. The Eureko Tribunal based its jurisdiction on similarly narrow jurisdictional offer in the Dutch-Polish BIT[29] as it is drafted in Article 11 of the BIT. The relevant provision of the Dutch-Polish BIT stated that an investor could subject to the arbitration *"dispute […] relating to the effects of a measure taken by the [state party]with respect to the essential aspects pertaining to the conduct of its business, such as the measures mentioned in Article 5 of this Agreement […]".*[30] Despite narrow drafting of the Polish jurisdictional offer, the tribunal did not agree with the responding party´s objection to jurisdiction which was based on a contractual nature of the claims[31] and even accepted jurisdiction over contract-based claims through operative effect of the umbrella clause.[32] Claimant urges the tribunal to follow the teachings of this tribunal.

A.1.(iv) Jurisdiction of the ICSID Tribunal is not affected by non-compliance with the waiting period which is merely a procedural requirement

20. Claimant does not oppose that it was obliged to conform with requirement to settle the dispute *"amicably within six months of the date of a written application"* (within the so-called "waiting period") pursuant to Article 11(1) of the BIT before it submits the dispute to the ICSID Tribunal. However, it is a well-settled case law – relying on the arguments developed by PCIJ and ICJ[33] – that the waiting period is a mere procedural, and not jurisdictional requirement.[34]

21. Claimant is not obliged to wait and attempt to negotiate before submitting its case to the tribunal, where the prospect to amicable settlement is elusive.[35] Respondent clearly manifested its refusal to negotiate by the use of CWF against Claimant's seconded personnel.[36] Furthermore, strict interpretation of the waiting period clause would contravene the principle of orderly and cost-effective procedure.[37] Therefore, it may be concluded, that the jurisdiction of the ICSID Tribunal is not affected by non-compliance of Claimant with the waiting period.

A.2. Jurisdiction of the ICSID Tribunal, properly established under the ICSID Convention and the BIT, is not ousted or superseded by municipal agreement of the parties

22. There are mainly two reasons for the conclusion that the jurisdiction of the ICSID Tribunal is not affected by the existence of Settlement of Dispute Clause 17 in the JV Agreement and the pending arbitration commenced on a basis of the JV Agreement. Firstly, the treaty cause of action is to be distinguished from contract cause of action. Secondly, the JV Agreement arbitrator is not authorized to decide on obligations arising out of the BIT.

A.2.(i) Treaty-based claims exist independently from any claims arising out of the contract

23. It is a well-settled case law, that dispute settlement clauses in contracts do not deny jurisdiction to the international investment tribunals.[38] The *ad hoc* committee in Vivendi Annulment stated that

> *"where the 'fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a*

28 SGS v Phillipines, Schreuer; Newcombe & Paradell,The Law and Practice of Investment Treaties (2009) 436
29 Agreement between the Kongdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocial Protection of Investments, signed on 7 September 1992, Article 8
30 Ibid, Article 8
31 Eureko, § 112
32 Ibid, § 250
33 PCIJ, *Certain German Interests in Polish Upper Silesia,* Judgment on Jurisdiction No. 6, 1925 PCIJ Series A, p. 14; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment on Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 427 – 429
34 Ethyl v. Canada, § 74 – 88; Lauder v. Czech Republic, § 187; SGS v. Pakistan, § 184
35 Lauder, §§ 188 – 189
36 Minutes, Annex 2 (Uncontested Facts), § 11
37 SGS v. Pakistan, § 184
38 Vivendi Annulment, § 95; SGS v. Pakistan, § 147, 154; SGS v. Philippines, § 155; Noble Ventures, § 53; Eureko, § 112 – 113

contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard."[39]

24. Furthermore, the tribunal – relying on Article 3 of ILC Articles on Responsibility – observed that the Respondent cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty.[40] The fundamental principle is that same set of facts can give rise to different claims grounded on differing legal orders.[41]

25. Respondent will probably rely on conclusions of Vivendi Annulment – at the first sight opposing to the arguments presented above – that *"[i]n 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.*[42] However, this argument has to be rejected because (1) Claimant properly formulated its claims as treaty-based and the umbrella clause has the effect of changing the breach of a contract to the breach of the BIT; and (2) the essential basis test has to be read with reference to the other parts of the Vivendi Annulment decision.

26. The essential basis test was objected by Government of Poland in *Eureko*. The *Eureko* Tribunal rejected the objections and held, that the essential basis test was a mere *obiter dictum*.[43] Furthermore, the tribunal stated that if Claimant advances claims for breaches of the BIT *"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."*[44] Claimant asserts that facts of this case require the Tribunal to refuse Respondent's objections and recognize jurisdiction, notwithstanding Clause 17 of the JV Agreement.

A.2.(ii) The JV Agreement arbitrator does not posses a competing jurisdiction, because it is not empowered to decide on the BIT claims

27. Claimant asserts that there is no competing jurisdiction conferred to the JV Agreement arbitrator. In article 11(2) of the BIT, Respondent offered three options for settlement of investment disputes: (1) domestic courts; (2) UNCITRAL ad hoc international arbitration; and (3) ICSID arbitration. Claimant decided for the third option.[45] It might be Respondent's contention, that the JV Agreement arbitration was commenced within the second option, so that Claimant's decision is too late to posses any legal consequences.

28. However, terms *"dispute arising out of or relating to this Agreement"* used in Clause 17 of the JV Agreement cannot encompass claims based on violation of the BIT, as a source of international law, because the JV Agreement is a municipal agreement. The parties to municipal agreement could not reasonably intended the dispute resolution clause as involving claims arising out of the BIT.[46]

29. Secondly, the investment dispute within the meaning of the BIT may be commenced merely by the investor. Article 11(1) of the BIT clearly states that *"the investor in question may in writing submit the dispute*;" not the state party or a national thereof. If the international investment practice significantly limits the admissibility of counterclaims,[47] it could be hardy contended, that the host state is allowed to commence an investment dispute.

30. Thirdly, the JV Agreement arbitrator is not bound by Arbitration Rules of the UN Commission on International Trade Law as the BIT requires. The arbitrator is bound by 1959 Arbitration Act of Beristan which remains – albeit it incorporates 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006[48] – a source of municipal law with its own methods of interpretation and application. Moreover,

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39 Vivendi Annulment, § 105
40 Ibid, § 103
41 SGS v. Pakistan, § 147; ELSI case, §§ 73, 124
42 Vivendi Annulment, § 98
43 Eureko, § 103
44 Ibid., § 112
45 Minutes, Annex 2 (Uncontested Facts), § 14
46 *SGS v. Pakistan,* § 153
47 [Saluka Counterclaim] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Decision on Jurisdiction over the Counterclaim, 7 May 2004, §§ 60 – 61, 76; Klökner v Cameroon, ICSID Case no. ARB/81/2, Decision on Annulment, 3 May 1985, 2 ICSID Reports 162, p. 165;
48 Clarification Requests (4 June) Responses, § 130

Arbitration Rules of the UN Commission on International Trade Law[49] are not to be confused with 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[50]

31. Fourthly, the waiting period in Clause 17 of the JV Agreement is of specific wording and orders party – after the notice of arbitration – to *"attempt to settle the dispute amicably and, unless they agree otherwise, cannot commence arbitration until 60 days after the notice of intention to commence arbitration. [emphasis added]"*. Beritech did not complied with the waiting period.[51] The strict prohibition to commence arbitration differs substantially from standard of drafting the waiting period in the BIT which is not prohibitive but rather a additional condition to general possibility to commence arbitration. Therefore – unlike in the BIT – the JV arbitrator lacks jurisdiction if the Settlement of Dispute Clause is invoked before the waiting period expires.

B. In addition, 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

32. 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. This clause, in turn, renders Respondent internationally responsible for breaches of the JV Agreement. This applies even if these breaches were committed by Beritech because actions of Beritech are imputable to the Respondent. Furthermore, the scope of the umbrella clause is wide enough to encompass the breaches of the JV Agreement.

B.1. The effect of the umbrella clause is to make the host state internationally responsible for the breaches of contracts

33. The principal question of the tribunal when considering the application of the umbrella clauses was what effect should be given to such clauses. Claimant asserts that Article 10 of the BIT makes it a breach by Respondent of the BIT to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to the specific investment.[52] This conclusion is supported by actual wording of the terms and by the principle of *effet utile* which requires to interpret the treaty provisions to be rather effective than ineffective.[53]

34. It is a well-known fact that this effect of the umbrella clause was not recognized by some tribunals.[54] However, the arguments presented mainly in these decisions which made the umbrella clause ineffective ought to be rejected.

35. Firstly, the tribunal in SGS v. Pakistan feared the indefinite expansion of claims based on the violation of the umbrella clause.[55] However, the scope of application of the umbrella clause is limited to *"obligations with regard to investments"* and the floodgate argument is easy to reject by the standard floodgate responses concerning the high costs.[56]

36. Secondly, the general principle of international law that *"a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law"*[57] was used to support the restrictive mode of interpretation.[58] However, it is obvious, that a rule of customary international law can be derogated from by a treaty unless the customary law rule is peremptory.[59]

37. Thirdly, the tribunal expressed its concern that the effect of a broad interpretation would be, *inter alia,* to override dispute settlement clauses negotiated in particular contracts.[60] However, the purpose of the umbrella clause is not to replace the JV Arbitrator with the ICSID Tribunal; this purpose is to make the performance of

49 General Assembly resolution 31/98 (15 December 1976)
50 General Assembly resolution 40/72 (1985), General Assembly resolution 61/33 (2006)
51 Minutes, Annex 2 (Uncontested Facts), § 10, 13
52 SGS v. Phillipines, § 128; Newcombe & Paradell, The Law and Practice of Investment Treaties (2009) 436; P Weil, *Problems relatifs aux contrats passés entre un Etat et un particullier,* 128 Receuil des Cours III, 1969, p. 130
53 SGS v. Philippines, § 115; Noble Ventures, § 50 – 53; Salini v. Jordan, § 95
54 SGS v. Pakistan, § 163 – 174; Joy Mining, §§ 80 – 81
55 SGS v. Pakistan, § 166
56 Crawford: Treaty and Contract, p. 369
57 Schwebel: On Whether the Breach, pp. 434 – 435
58 SGS v. Pakistan, § 167
59 VCLT, Article 53; cf. Noble Ventures, § 55
60 SGS v. Pakistan, § 168

the JV Agreement enforceable under the BIT.[61] Claimant also recalls that the exercise of the contractual jurisdiction has to be distinguished from the application of the terms of a contract in order to determine whether there has been a breach of the BIT.[62]

38. Claimant urges the tribunal to prefer the interpretation which renders the umbrella clause effective as other tribunals did.[63] Schreuer also considers the reasoning of SGS v. Philippines clearly preferable to the one in SGS v. Pakistan, because *"[i]t does justice to a clause that is evidently designed to add extra protection for the investor."*[64]

B.2. Respondent is liable for breaches of obligations assumed via Beritech

39. The issue of attribution is elaborated in respective parts of this memorial. However, the obligation arising out of Article 10 of the BIT is international obligation, therefore, the principles of attribution are operative.[65] Article 4(1) of the ILC Articles on Responsibility states that *"[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."* It is commented that *"[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis."*[66]

40. Accordingly, the tribunal in *Nykomb v. Latvia* acknowledged as covered by the umbrella clause in Article 10(1) of the ECT a contract between the investor and a wholly owned state enterprise.[67] In *Eureko,* independent legal personality of Polish State Treasury did not preclude liability of the host state for the breach of the umbrella clause.[68] Similarly, the tribunal in Noble Ventures stated that

> *"this Tribunal cannot do otherwise than conclude that the respective contracts [...] were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of [the umbrella clause]."*[69]

B.3. The scope of the umbrella clause is wide enough to encompass the breach of the JV Agreements

41. Article 10 of the BIT is imperative and Claimant asserts that the wording *"any obligation with regard to investment"* obliges Respondent to honor all legal commitments it has assumed with regard to investment, notwithstanding the nature they could posses. As the tribunal in SGS v. Philippines stated the term *"any obligation"* – used in applicable Switzerland-Philippines BIT[70] as well as in the Beristan-Opulenta BIT *"is capable of applying to obligations arising under national law, e.g. those arising from a contract."*[71] The scope of application of the umbrella is not restricted to obligations of a specific kind,[72] as the state practice also shows.[73]

42. Although some tribunals proposed that the scope of umbrella clause should be limited only to sovereign acts of the host state (the administrative contracts) whereas purely commercial obligations are not covered,[74] or it

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61 SGS v. Philippines, § 126
62 Vivendi Annulment, § 105
63 Eureko, §§ 244 – 260; Noble Ventures, §§ 46 – 62; Fedax Award, § 29
64 Schreuer: Travelling the BIT Route, p. 255
65 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
66 International Law Commission at its fifty-third session, General Assembly resolution A/56/10 (2001), p. 41, § 7
67 Nykomb v. Latvia, p. 31, § 4.1
68 Eureko, § 260
69 Noble Ventures, § 86
70 Switzerland-Philippines BIT, Article X(2)
71 SGS v. Philippines, § 115
72 SGS v. Philippines, § 118; Noble Ventures, § 51; Eureko, §§ 257 – 258
73 Note of German Government to Parliament concerning 1959 BIT between Germany and Pakistani; cited in J Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland* (1971) 97 [Frankfurt am Main: Athenäum]
74 SGS v. Pakistan, § 172; Joy Mining, §§ 78 – 79

should be limited to significant interference of government or public agencies[75], this opinion is not preferable.[76] The umbrella clause may be applied both to obligations of administrate nature and to obligations of commercial nature. The BIT expressly states that the state has a duty to observe *any obligation* it assumed.

43. Distinction between obligations of administrative and commercial nature – although sometimes recognized – has no basis in the relevant texts of BITs and, as remarked the tribunal in Noble Ventures, distinction between commercial and sovereign acts of the host state is not manageable in practice, therefore should have only a little relevance.[77] Also the tribunal in Siemens v. Argentina 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.[78]

44. Claimant suggests the tribunal not to restrict the scope of the umbrella clause. References to abstract concepts, such as distinction between *acta iure imperii* and *acta iure gestionis,* has no methodological power of persuasion for it has no basis in modes of interpretation according to Article 31 of VCLT.[79]

75 CMS Award, §§ 302 – 303

76 Schreuer: Travelling the BIT Route, p. 255; Wälde, T.: The Umbrella Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases, 6 Journal of World Investment and Trade (2004) 183, 225

77 Noble Ventures, § 82

78 Siemens Award, § 206

79 Dolzer, Schreuer, p. 161