1. 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 key brought by Claimant gets easily to the keyhole.

2. Even if the tribunal classifies 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, that it makes a non-performance or a breach of the JV Ageement breach of the BIT.[1] 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.

3. The Eureko Tribunal based its jurisdiction on similarly narrow jurisdictional offer in the Dutch-Polish BIT[2] 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 […]".*[3] Despite narrow drafting of the Polish jurisdictional offer, the tribunal withheld objections to jurisdiction based on contractual nature of the claims[4] and even accepted jurisdiction over contract-based claims through operative effect of the umbrella clause.[5] Claimant urges the tribunal to follow 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 procedural requirement

4. Claimant also assert that it was not obliged to conform with requirement to settle the dispute *"amicably within six months of the date of a written application"* pursuant to Article 11(1) of the BIT in order to invoke the jurisdiction of the ICSID Tribunal. It is well settled case law – stemming from arguments developed by PCIJ and ICJ[6] – that the waiting period is a mere procedural, and not jurisdictional requirement.[7]

5. 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.[8] Respondent clearly manifested its refusal to negotiate through threats to use force against Claimant's seconded personnel.[9] Further, strict interpretation of the waiting period clause would contravene the principle of orderly and cost-effective procedure.[10] 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

6. There are mainly three reasons why the jurisdiction of the ICSID Tribunal is not affected by existence of Settlement of Dispute Clause 17 in the JV Agreement and pending arbitration commenced on 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.

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1 SGS v Phillipines, Schreuer; Newcombe & Paradell,The Law and Practice of Investment Treaties (2009) 436
2 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
3 Ibid, Article 8
4 Eureko, § 112
5 Ibid, § 250
6 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
7 Ethyl v. Canada, § 74 – 88; Lauder v. Czech Republic, § 187; SGS v. Pakistan, § 184
8 Lauder, §§ 188 – 189
9 Minutes, Annex 2 (Uncontested Facts), § 11
10 SGS v. Pakistan, § 184

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

7. It is well settled case law, that dispute settlement clauses in contracts do not deny jurisdiction to the international tribunals.[11] 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 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."*[12]

8. Further, 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.[13] The fundamental principle is that same set of facts can give rise to different claims grounded on differing legal orders.[14]

9. Respondent will probably rely on conclusions of Vivendi Annulment – putatively opposing 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.*[15] However, this argument has to be rejected because (1) Claimant properly formulated its claims as treaty-based and otherwise, 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 other parts of the Vivendi Annulment decision.

10. 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 mere obiter dictum.[16] 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."*[17] Claimant asserts that facts of this case require 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 obligations

11. 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.[18] 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.

12. 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 with effect not exceeding the municipal law.

13. 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. If the international investment practice significantly limits the admissibility of counterclaims,[19] it could be hardy contended, that the host state is allowed to commence an investment dispute.

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11 Vivendi Annulment, § 95; SGS v. Pakistan, § 147, 154; SGS v. Philippines, § 155; Noble Ventures, § 53; Eureko, § 112 – 113
12 Vivendi Annulment, § 105
13 Ibid, § 103
14 SGS v. Pakistan, § 147; ELSI case, §§ 73, 124
15 Vivendi Annulment, § 98
16 Eureko, § 103
17 Ibid., § 112
18 Minutes, Annex 2 (Uncontested Facts), § 14
19 [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;

14. 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[20] – a source of municipal law with its own methods of interpretation and application. Further, Arbitration Rules of the UN Commission on International Trade Law[21] are not to be confused with 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006.[22]

15. 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.[23] The strict prohibition to commence arbitration differs widely from standard drafting of the waiting period in the BIT. 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

16. 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 renders Respondent internationally responsible for breaches of the JV Agreement – as a principal vehicle to make an investment in the Sat-Connect project. This applies even if these breaches were committed by Beritech because actions of Beritech are imputable to the Respondent. Further 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

17. The principal question of tribunal 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 of the BIT for Respondent to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investment.[24] 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.[25]

18. It is well-known fact that this effect of the umbrella clause was not recognized by some tribunals.[26] However, the arguments presented mainly in *SGS v. Pakistan* in order to make the umbrella clause ineffective shall be rejected.

19. Firstly, the tribunal in SGS v. Pakistan feared the indefinite expansion of claims based on the violation of the umbrella clause.[27] 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 with standard floodgate responses concerning the high costs.[28]

20. 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"[29] was used to support the restrictive mode of interpretation.[30] 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.[31]

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20 Clarification Requests (4 June) Responses, § 130
21 General Assembly resolution 31/98 (15 December 1976)
22 General Assembly resolution 40/72 (1985), General Assembly resolution 61/33 (2006)
23 Minutes, Annex 2 (Uncontested Facts), § 10, 13
24 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
25 SGS v. Philippines, § 115; Noble Ventures, § 50 – 53; Salini v. Jordan, § 95
26 SGS v. Pakistan, § 163 – 174; Joy Mining, §§ 80 – 81
27 SGS v. Pakistan, § 166
28 Crawford: Treaty and Contract, p. 369
29 Schwebel: On Whether the Breach, pp. 434 – 435
30 SGS v. Pakistan, § 167
31 VCLT, Article 53; cf. Noble Ventures, § 55

21. Thirdly, the Tribunal was concerned that the effect of a broad interpretation would be, *inter alia,* to override dispute settlement clauses negotiated in particular contracts.[32] However, the purpose of the umbrella clause is not to replace the JV Arbitrator with ICSID Tribunal; this purpose is to make the performance of the JV Agreement enforceable under the BIT.[33] Claimant also recalls that the exercise of the contractual jurisdiction has to be distinguished from application of the terms of a contract in order to determine whether there has been a breach of the BIT.[34]

22. Claimant urges the tribunal to prefer the interpretation which renders the umbrella clause effective as other tribunals did.[35] Also Schreuer 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."*[36]

B.2. Respondent can be held liable for obligations assumed via Beritech

23. 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.[37] 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."*[38]

24. 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.[39] In *Eureko,* independent legal personality of Polish State Treasury did not preclude liability of the host state for the breach of the umbrella clause.[40] 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]."*[41]

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

25. Article 10 of the BIT is imperative and Claimant asserts that the wording "any obligation with regard to investment" obliges Respondent to honor obligation of any kind, notwithstanding the nature the obligation could posses. As the tribunal in SGS v. Philippines stated the term *"any obligation"* – used in applicable Switzerland-Philippines BIT[42] 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."*[43] The scope of application of the umbrella is not restricted to obligations of a specific kind.[44] The umbrella clause is to be interpreted extensively as the state practice shows.[45]

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32 SGS v. Pakistan, § 168
33 SGS v. Philippines, § 126
34 Vivendi Annulment, § 105
35 Eureko, §§ 244 – 260; Noble Ventures, §§ 46 – 62; Fedax Award, § 29
36 Schreuer: Travelling the BIT Route, p. 255
37 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
38 International Law Commission at its fifty-third session, General Assembly resolution A/56/10 (2001), p. 41, § 7
39 Nykomb v. Latvia, p. 31, § 4.1
40 Eureko, § 260
41 Noble Ventures, § 86
42 Switzerland-Philippines BIT, Article X(2)
43 SGS v. Philippines, § 115
44 SGS v. Philippines, § 118; Noble Ventures, § 51; Eureko, §§ 257 – 258
45 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]

26. 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,[46] or it should be limited to significant interference of government or public agencies[47], this opinion is not preferable.[48] 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.

27. Distinction between obligations of administrative and commercial nature – although sometimes recognized – 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, therefore should have only a little relevance.[49] 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.[50]

28. 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 VCLT.[51]

46 SGS v. Pakistan, § 172; Joy Mining, §§ 78 – 79
47 CMS Award, §§ 302 – 303
48 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
49 Noble Ventures, § 82
50 Siemens Award, § 206
51 Dolzer, Schreuer, p. 161