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# ICC INTERNATIONAL COURT OF ARBITRATION 21404/ASM

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PT Ventures, SGPS, S.A. - Claimant

v.

Vidatel Ltd – First Respondent

Mercury – Serviços de Telecomunicacões SARL – Second Respondent Geni SARL – Third Respondent

# ANSWER OF THE FIRST RESPONDENT

[xx] January 2016

#### INTRODUCTION

- 1. This Answer is provided on behalf of the First Respondent, Vidatel Ltd ("**Vidatel**"), pursuant to Article 5(1) of the ICC Arbitration Rules. Unless otherwise stated, Vidatel adopts the abbreviations and defined terms as used in the Request.
- 2. Vidatel wishes to clarify at the outset that:
  - (a) this Answer is not intended as a definitive statement of Vidatel's position and Vidatel will wish to set out in subsequent memorials and/or submissions the detail of the factual and legal propositions on which it relies;
  - (b) moreover, the preparation of Vidatel's Answer has been substantially hindered by (i) the diversion of resources necessary to respond to a host of interim applications and parallel proceedings initiated by PTV against both Vidatel and other entities connected to the transactions complained of in PTV's Request; (ii) the further distraction of PTV's legal challenges under French law to the constitution of the Tribunal; and (iii) [the refusal of the ICC Secretariat to extend time for the Answer beyond 5 January 2016);
  - (c) in those circumstances, failure at this stage to address any specific allegation is not to be taken as an admission with respect to that allegation;
  - (d) indeed, except where this Answer makes explicit admissions, PTV is required to prove each and every fact upon which its claims depend.
- 3. By way of summary of Vidatel's responses to the allegations made against it:
  - (a) Vidatel denies all allegations of conspiracy, "looting" of Unitel and other similar allegations of dishonesty. Vidatel has at all times acted in good faith and in what it considered to be the best interests of Unitel.
  - (b) Insofar as PTV claims to be unaware of transactions about which it now complains this appears to be the result of a lack of information-sharing in the wake of PTV's acquisition by the Brazilian telecoms company Oi. Although Oi's lack of communication with PTV's former representatives within Unitel

(principally Zeinal Bava and Luis Pacheco de Melo) is regrettable, it is not something for which Vidatel is responsible, let alone the basis of a claim for damages.

- (c) In any event, PTV's attempt in arbitral proceedings <u>between shareholders</u> to challenge the validity and effectiveness of transactions entered into <u>by Unitel</u> is misconceived.
- (d) Even if this arbitration were a proper forum to complain about such transactions then PTV's quantification of its losses for nearly US\$2.5 billion is on any view fanciful.

## **GENERAL COMMENTS**

- 4. Much of the background to the dispute is uncontentious. In particular, it is true (as explained by PTV at paragraphs 4-16 of the Request) that:
  - (a) The immediate parties and their ultimate owners are those described in paragraph 7 of the Request (albeit that the legal relevance of vague and subjective labels such as "influential" or "most influential" is not understood).
  - (b) The relationship between PTV and the Respondents dates back to 1999/2000 and that there has been substantial economic growth in Angola since the end of the civil war in 2002. Unitel has itself grown to a very substantial business with more than 10 million customers and 2,400 employees (albeit that the suggestion that PTV was instrumental in achieving that growth is not accepted).
  - (c) Unitel is a major Angolan telecoms company of which PTV and the Respondents are each 25% shareholders, all four of them being parties to a Shareholders' Agreement dated 15 December 2000.
  - (d) The Shareholders Agreement and the Management Agreement between Unitel and PTV of the same date sought to govern the parties' relationship for the establishment and operation of a mobile telecommunications network pursuant to a license from INACOM.

- (e) The express terms of the Shareholders Agreement include those quoted at paragraphs 9 to 16 of the Request.
- 5. It is also true, if regrettable, that the relationship between the shareholders has deteriorated.

### PT'S ALLEGATIONS: OVERVIEW

- 6. So far as PT's claims are concerned, and following the numbering of PTV's Request, it is not in dispute that: (1) PT has had fewer than three appointees on the Unitel board; (2) there have been substantial delays in Unitel's payment of dividends in US Dollars to its two "foreign investors" (being PT and Vidatel, Geni and Mercury as Angolan companies receiving dividends in Kwanza); (3) Unitel purchased a stake in BFA from BPI and has entered into transactions with Unitel International Holdings and Tokeyna; (4) PT has at times complained about shortage and/or delay in information; (5) Unitel has purported to suspend PTV's rights and there have been proposals (not at the time of writing put into effect) for (6) changes to Unitel's share capital and (7) the amendment to Unitel's shareholder agreement and by-laws.
- 7. By way of general response to those allegations, the following concessions and clarifications are important:
  - (a) It is clear to Vidatel that the purported suspension of PTV's rights (Issue 5) has had the effect of inflaming an already difficult situation and has contributed to an atmosphere of mistrust. This in turn seems to have led PTV to doubt the motives of legitimate and necessary proposals, notably the redenomination of Unitel's shares so as to comply with Angolan law. In those circumstances, Vidatel sees it as imporant to record that it accepts PTV's position¹ that the purported suspension has no proper basis under Angolan law or under the Shareholders' Agreement. That is not to say that the purported suspension caused any loss to PTV (and Vidatel denies that it did so) but Vidatel does not intend to maintain in the context of these arbitration proceedings a position which, on reflection and analysis, cannot be sustained.

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<sup>&</sup>lt;sup>1</sup> e.g at Request ¶59

- (b) Vidatel also makes a further concession so far as Unitel's corporate governance and documentary records are concerned. Vidatel now recognises that Unitel's corporate records (in particular as to the decision-making of its corporate bodies and officers) are not as detailed and complete as they should be or indeed as Vidatel had believed that they were. Vidatel recognises therefore, that in its capacity as shareholder it was content to allow matters to be handled somewhat informally such that corporate formalities may not always have been fully observed. Such lack of formality does not amount to evidence of fraud or conspiracy. Morover, as mentioned at 3(c) above and explained further at 11 to 13 below, questions of corporate invalidity are outside the scope of this arbitration.
- (c) In relation to Tokeyna, Vidatel seeks to make both a concession and a clarification. Vidatel concedes that PTV was not previously aware that Tokeyna is a Unitel vehicle, incorporated by Unitel and for Unitel's benefit albeit that for administrative reasons and at Unitel's request the legal title to its shares has been held on an interim basis by Isabel Dos Santos. Insofar as PTV's complaint are based on a misunderstanding of the role of Tokeyna then those complaints fall away in light of this explanation.
- (d) In any event, the significance of Tokeyna within these arbitral proceedings falls away for a second reason, namely the intention on the part of Unitel to cancel and/or reverse the Tokeyna transactions so that from the perspective of Unitel (and hence PTV as a shareholder) it is as though those documents were never executed. At the time of writing this cancellation and/or reversal has not yet been effected but Vidatel understands it to be imminent and on any view will have occurred prior to the Tribunal making any award.

#### PROPER SCOPE OF THE ARBITRATION

8. There is a further preliminary matter which Vidatel wishes to emphasise before dealing below with PTV's complaints. It relates to the proper subject matter of the arbitration and hence the extent of the Tribunal's jurisdiction. The parties to the arbitration agreement are PTV and the three Respondents. The arbitration agreement at Article 16.1 of the Shareholders' Agreement provides (so far as relevant):

Any claim, dispute or other matter in question between the Parties with respect to or arising under this Agreement or the breach thereof, shall be decided by arbitration...

- 9. Hence the dispute must arise <u>between the Parties</u> and must be with respect to or arising under the Shareholders' Agreement between them.
- 10. Those limitations on the scope of the Tribunal's jurisdiction give rise to two distinct sub-issues:
  - (a) the position of Unitel and the status of its transactions;
  - (b) the distinction between Vidatel and Isabel Dos Santos.

Unitel and the Status of its Transactions

- 11. Unitel is of course a legal entity separate from its shareholders. The actions of Unitel in that separate legal capacity feature prominently in PTV's Request. Indeed, PTV alleges that various high-value transactions <u>purportedly</u> entered into by Unitel with third parties are in truth null and void: see paragraph 45 of the Request.
- 12. Although it is nowhere acknowledged within PTV's Request, such allegations in relation to Unitel create insuperable difficulties for PTV in bringing its claims against Vidatel and its fellow shareholders. Unitel is of course not a respondent to the arbitration nor a party to the underlying Shareholders' Agreement containing the agreement to arbitrate. It follows that the Tribunal would have no power to make any award binding on Unitel as to the legal status of the transactions which PTV seeks to impugn.
- 13. The problem for PTV goes further, however, because whether or not the transactions are void is an essential preliminary issue which logically must be resolved <u>before</u> the alleged liability of the Angolan Shareholders can be addressed. Indeed, if the transactions are void then Unitel has not suffered the losses about which PTV complains and which in turn form the basis of its own claim for loss in its capacity as shareholder. Although in theory Unitel might suffer a loss if the effects of the void transaction could not be unwound, there is no allegation by PTV (and certainly no evidence) that payments could not in principle be reversed if a competent Court or

Tribunal concluded that this is what needed to happen. In any event, there is no room for such speculation whilst the prior question of whether transaction is valid or invalid in the first place remains unresolved.

14. The only appropriate response on the part of the Tribunal is to decline to deal with any of PT' complaints alleging invalidity.

Vidatel and Isabel Dos Santos

- 15. It is true that Mrs Dos Santos owns and controls Vidatel. It is also true (as PTV asserts at paragraph 25 of its Request) that she has been a director of Unitel since 2001 and served as President of the Board of Directors since 2013.
- 16. However, it does not follow that PTV is entitled to advance complaints against Mrs Dos Santos in her capacity as director and/or President under the guise of a claim against Vidatel under the Shareholders' Agreement. Like Unitel, Mrs Dos Santos is not a party to the arbitration agreement and cannot therefore be made a respondent to the arbitration proceedings.
- 17. Yet much of the substance of PTV's complaint is in reality directed at Mrs Dos Santos personally as distinct from Vidatel in its capacity as shareholder. Importantly, PTV's allegation at paragraph 4 of its Request is not that the Respondent's "scheme to loot Unitel" has been for <a href="Vidatel's">Vidatel's</a> benefit or, at paragraph 26 that <a href="Vidatel">Vidatel</a> is particularly responsible for decision-making. Rather, PTV alleges that the looting has been for the benefit of Isabel Dos Santos and that Isabel Dos Santos is the key decision-maker. Indeed, there is no allegation in the Request that Vidatel as a company has derived any benefit from any of the impugned transactions. The only allegation which (even if proved, and it is hotly contested: see [xxx] below) would represent any benefit to Vidatel is the dividend issue, in relation to which PTV alleges that Vidatel has received preferential treatment.
- 18. PT cannot sensibly suggest that Vidatel is responsible in its capacity as sharehoder for having procured Mrs Dos Santos to act in a certain way. Such allegations make no sense when Mrs Dos Santos controls Unitel and not the other way around.

19. In summary, insofar as PT's compaints are in substance complaints against Mrs Dos Santos then the Tribunal has no jurisdiction to entertain them.

#### PTV'S INDIVIDUAL COMPLAINTS

## 1. Board Representation

- 20. PTV makes the stale and unconvincing complaint that since 2006 it has been denied its right to appoint three board directors. The contractual provision to that effect is at Article 9.1 of the Shareholders' Agreement and its language is common ground. The historical reason for the inclusion of this provision was the way in which PT Telecom wished to account for its indirect investment in Unitel. As Vidatel understands it, in order for PT Telecom to book its interest in Unitel on a consolidated basis, accounting rules require that PTV have the right to appoint a majority of the board.
- 21. Irrespective of the original reason for Article 9.1, the short response to the complaint which PTV now makes is that it has not insisted upon or sought to enforce its rights under that provision. Rather, it has approved the composition of the board, including at General Meetings of 18 October 2006, 28 September 2008, 18 June 2012 and 22 October 2012. Indeed, it is unsurprising that PTV was content with this arrangement given that the provision in the Shareholders' Agreement for PTV to have three appointees had been linked to the Management Agreement between Unitel and PTV, the 5 year term of which expired in 2005.
- 22. The board was thereby authorised to act on Unitel's behalf and to bind Unitel. Having approved the board in General Meetings it is simply not open to PTV now to assert, in response to transactions with which PTV is (now) uncomfortable or unhappy, that the position would have been different if the composition of the board had been different. Yet that is precisely PTV's submission at paragraph 30 of its Request.
- 23. The suggestion that PTV "protested repeatedly" on the issue also rather overstates the position. As the footnote 22 to that allegation shows (referring to letters of 24 November 2014 and 30 January 2015), the complaints that PTV relies upon were in fact made just twice, in fairly quick succession and only after PTV had failed to complain about the issue for more than 8 years.

#### 2. Dividends

- 24. PTV's complaints that it is has not received dividends due to it:
  - (a) fail even to identify what it is that Vidatel as shareholder is said to have done to prevent Unitel from making such payment;
  - (b) fundamentally misunderstand the nature of its legal entitlement (which is to participate in Unitel's profits in Kwanza);
  - (c) overlook the acute and widely publicised foreign exchange difficuties in Angola;
  - (d) proceed on an incorrect premise as to the sums received by Vidatel;
  - (e) wrongly assume that the mere delay in payment of a debt <u>by Unitel</u> (a creditworthy entity) entitles PTV to claim the full amount as damages as against <u>Vidatel</u>.

No Relevant Allegation Against Vidatel

- 25. The first and fundamental problem facing Vidatel in seeking to respond to PTV's claim is that PTV's Request advances no factual against Vidatel as to what Vidatel is alleged to have done in order to prevent PTV from receiving dividends. Paragraph 38 of the Request refers to the "Respondent's Actions" but without any attempt to explain what those actions are. Indeed, it is not easy to understand how in its capacity as shareholder Vidatel can have stood in the way of payment by Unitel.
- On the face of it, PTV's complaint about non-payment of dividends is purely against Unitel. Indeed, at paragraph 35 of its Request PTV refers to the shareholders (including Vidatel) having voted for the <u>distribution</u> of dividends. Self-evidently, this reflects the intention that the sums be <u>distributed</u> rather than withheld. There is no allegation that Vidatel as shareholder subsequently sought to countermand that instruction to Unitel or block its execution. If PTV's belief or suspicion is that Mrs Dos Santos caused Unitel not to pay dividends then that is a complaint against her personally and falls outside the scope of the arbitration (see above at paragraphs 15to 19 above.

27. In any event, if and when PTV articulates a proper complaint against Vidatel along with the evidence in support then Vidatel will respond.

Kwanza/US Dollars

28. As to the nature of PTV's entitlement, Vidatel agrees with PTV that it arises under Articles 23 and 24 of the Angolan Companies Law. Those provisions, however, make no reference to receiving payment in a foreign currency. On the contrary, they contemplate that the shareholder will participate in the profits of the company in the currency in which those profits are generated.

Foreign Exchange Issues

- 29. Vidatel will adduce evidence in due course as to the foreign exchange controls in Angola and the difficulty in exporting US Dollars. Strikingly, PTV's Request does not even acknowledge these issues.
- 30. As the Kwanza is not a freely convertible currency, the process to obtain USD is as follows:
  - (a) An application is made to the Angolan Central Bank for permission to convert the dividends into USD and subsequently expatriate them outside of Angola;
  - (b) Once and only if such approval is granted, it can be taken to a commercial bank. Conversion of the Kwanza to USD will then depend on the availability of USD within the commercial bank in question.
- 31. The entitlement to be paid dividends in a foreign currency therefore depends upon not only the approval of the Angolan Central Bank but also the ability of commercial banks in Angola to effect the exchange. This is part of doing business in Angola.
- 32. If PTV wishes to receive payment of dividends without further delay then it can nominate an Angolan bank account (and indeed is obliged to maintain such an account as a matter of Angolan, albeit that Vidatel understands that PTV is in breach of this obligation). The relative ease with which Unitel is able to make Kwanza payments can be seen by the fact that Geni and Mercury (who receive dividends in Kwanza) have

received far greater sums by way of dividends and the sums outstanding to them as recorded in Unitel's accounts are correspondingly lower than the sums due to PTV.

## Incorrect Allegations as to Vidatel Receipts

- 33. No doubt in order to put its claim as high as possible, PTV has assumed and asserted (without identifying any basis for doing so) that Vidatel has received payments in respect of dividends declared for financial years since 2011.
- 34. This is simply wrong: although Vidatel has received payments <u>in</u> 2013 and 2014 they correspond to the dividends declared in respect of FY2011. Vidatel has yet to receive any payment at all in relation to FY2012 or FY2013.
- 35. The detailed accounting information and proof of payments will be provided in due course in order to rebut PTV's alllegations if they are maintained.
- As to whether PTV intends to maintain its allegation in its current form, Vidatel notes that in one of the rounds of evidence filed by PTV in the BVI in support of an interim freezing injunction against Vidatel, PTV has submitted a spreadsheet reflecting PTV's analysis of the declaration and receipt of dividends: see Exhibit CGSB3 to the Third Affidavit of Charles Balmain, p 264. As submitted by Vidatel in the course of those interim proceedings, the conclusions that PTV has sought to draw from that analysis (as to which see Balmain 3, p 52) are entirely consistent with Vidatel's own explanations that it has not received payment of dividends declared in respect of FY2012, FY2013 or FY2014. PTV has made no attempt to amend its Request to reflect information and evidence which has subsequently come to light.

#### Misconceived Quantum

- 37. The flaws in PTV's claim are not limited to its incorrect allegation that Vidatel has been paid in respect of the FY2012 and subsequently declared dividends. Indeed, there is an even more fundamental defect. Unitel's obligation to pay dividends to PTV is a debt and recorded as such in Unitel's books and reflected in its annual financial statements. Unitel is good for the money (and PTV has certainly not sought to suggest otherwise).
- 38. The delay in receipt of dividends (whether in Kwanza or US Dollars) is not therefore a loss of principal. Even if PTV could make out a factual case, as yet unpleaded, that

Vidatel had obstructed payment of dividends that Unitel would otherwise have been made, PTV it is not entitled to say as against Vidatel that the whole of its entitlement to dividends has been lost. The claim for losses asserted at paragraph 97 of PTV's Request is untenable so far as unpaid dividends are concerned (and, indeed, untenable more generally for the reasons set out below).

## 3. Alleged Looting

- 39. Faced with transactions which PTV's current management seem not to fully understand, PTV has jumped to the conclusion that they are part of a concerted scheme to "loot" Unitel. Vidatel denies those allegations. But in any event they are not on a proper analysis allegations against Vidatel at all. Rather, they are complaints about Unitel and/or Unitel's individual directors. For the reasons given at paragraphs 8 to 19, such claims are outside the scope of this arbitration and the Tribunal's jurisdiction.
- 40. The claims fail on the facts anyway. Vidatel has openly acknowledged at paragraph 7(b) above that there have been shortcomings in the internal processes, communication and record-keeping within Unitel. Board meetings and shareholder meeting are relatively infrequent and necessarily deal with matters at a high level. As a foreign investor with no Angolan presence, PTV has not been involved (or at least not recently) in the day-to-day financial and operational challenges of the company. Inevitably, PTV will not therefore have had a grasp on the detail of some of Unitel's transactions and the rationale for them.
- 41. Vidatel also now accepts that the problem has been compounded by PTV apparently not being told that Tokeyna is itself a Unitel vehicle. [Indeed, upon a review of the relevant records in the context of responding to PTV's Request, Vidatel now recognises that the language used at a Board Meeting of 2 February 2014 and a General Meeting of 4 November 2014 was unfortunate since in each case there was a reference to the hiring of consultancy services "outside the group". The more accurate explanation would have been that such services had been hired "outside Angola". [For careful review but we need to explain these refs in the minutes]]
- 42. In short, the concept of Tokeyna was developed by Unitel in conjunction with third party management consultants, tax and legal advisors (none of the advice from whom Vidatel is in a position to disclose without Unitel's consent). The concept was for

Tokeyna to be incorporated in the BVI and operate from Dubai. It would provide support services to Unitel with greater operational flexibility in terms of hiring and retaining key personnel, access to foreign currency and tax optimisation than would be possible if all such services were provided from Angola. The establishment of Tokeyna was therefore undertaken bona fide in order to further the commercial interests of Unitel.

- 43. Indeed, Unitel recognised throughout that Tokeyna was a related party so that there needed to be a transfer pricing mechanism in order to ensure that the price for Tokeyna's services was set on on arm's length basis. Plainly, Unitel would not have gone through this exercise if Tokeyna had been established simply to act as a repository of funds for the benefit of Mrs Dos Santos.
- 44. For essentially administrative reasons and to enable Tokeyna to be incorporated swiftly (having particular regard to the burden and delay of Know Your Client checks), Mrs Dos Santos at the request of Unitel agreed to act as the registered shareholder of Tokeyna on an interim basis. Unitel having organised and paid for the incorporation of Tokeyna, Mrs Dos Santos signed a Declaration of Trust and a share transfer form (with the transferee left blank) enabling Unitel at a later date and at it sole discretion to transfer Tokeyna into its own ownership or into the ownership of a nominee entity. All this will be explained further in due course in the proceedings by reference to witness evidence and contemporaneous documents.
- 45. As it turned out, Tokeyna never became operational and never in fact provided any services to Unitel. Governmental authorisation was necessary for the "outsourcing" to Tokeyna of management services as contemplated under the Unitel/Tokeyna arrangements. Despite Unitel's requests and a further protest against the initial refusal, such consent was refused. The Services Agreement between Tokeyna and Unitel therefore never began. No payments were ever made and no services provided. Vidatel understands that Unitel intends: (i) to formally cancel the agreement; and (ii) to reverse such accounting provisions as were made to reflect payments which would have been due but which have not and will now never be paid to Tokeyna.
- 46. As well as being counterparty to the (unimplemented) Services Agreement, Tokeyna is also party to the loan assignment by which Unitel's right to repayment under loans

entered into with the Dutch company Unitel International Holdings (formerly Jadeium BV) was sold to Tokeyna for \$150,000. Like the Services Agreement, no funds have in fact changed hands under this assignment and Vidatel understands that Unitel intends to reverse the transaction (whether by exercising the contractual right to repurchase the loans or by another route).

- 47. The rationale for entering into the assignment in the first place was part of Unitel's strategy to have access to foreign currency which (as noted above and as will be fully developed in evidence) is in short supply in Angola. The underlying loans between Unitel and Unitel International Holdings (which were in Euros and US Dollars) required the authorisation of the Central Bank of Angola ("BNA") to enable the foreign currency to be acquired and exported for the purpose of financing foreign investment. Unitel thereby had the benefit of a right to repayment in foreign currency from a creditworthy counterparty, Unitel International Holdings, whose repayment obligations were secured over the shares in the foreign telecoms companies (in Sao Tome, Cape Verde and Portugal) which the funds from Unitel were used to acquire.
- 48. That right to repayment is valuable to Unitel and it is incorrect for PTV to assert that there is "no strategic or other benefit whatsoever" (Request, paragraph 42).
- 49. Insofar as PTV alleges that Mrs Dos Santos sought to create deliberate confusion between Unitel Holdings (a Unitel subsidiary) and Unitel International Holdings, a company of which she is the shareholder, this is misconceived. PTV's has always been aware of the distinction (see, for instance the minutes of the General Meeting of 12 June 2013). Indeed, Mrs Dos Santos' role as the shareholder of Unitel International Holdings was publicly reported in the press in the context of her investment in telecoms companies outside Angola.
- 50. With the benefit of hindsight, Vidatel can see that the UIH loans ought to have been more clearly explained to PTV. Relationships at shareholder level were strained at the time, however, largely as a consequence of the acquisition by the Brazilian telecoms company Oi of an indirect interest in PTV. It is denied that the transactions have caused any loss to Unitel, however.
- 51. As to whether the transactions were validly authorised and executed, for the reasons given at paragraphs [xxx] above, this is not an area which the Tribunal can properly

consider given that Unitel is not a party. Vidatel's enquiries suggest, however, that there may <u>not</u> have been specific approval for individual contracts by the Audit Committee (also referred to as the Supervisory Board) of Unitel. However:

- (a) If Unitel failed to take the necessary steps then that is not a complaint which can be levelled at Vidatel. Indeed, Vidatel has no visibility of nor ability to control the affairs of an entirely separate corporate body within Unitel.
- (b) If the purported contracts need to be unwound as a consequence of their invalidity then that will need to be worked out in some other forum.<sup>2</sup>
- (c) Nevertheless, even on the basis of Vidatel's limited information, it appears that the question of authorisation may not be clear-cut. Although the Audit Committee may not have been asked for or given their approval as to specific contracts, it appears that they did approve some or all of the annual accounts in which the economic effects of those transactions are reflected.

#### BFA

- 52. This is another area of apparent misunderstanding on the part of PTV. This appears to be the result of a lack of communication within the PT group. PTV complains that Unitel has not received the benefit of dividends paid by BFA, in which Unitel acquired a 49.9% stake in 2008. PTV even suggests (and calculates its loss on this basis) that Unitel should have received the gross sum of 49.9% of the dividends declared by BFA in each of the years from 2008 to 2013 without taking into account at all of any financing costs of Unitel in relation to the acquisition.
- 53. Again, this is a misconceived claim by PTV which is explicable only on the basis that PTV has sought to inflate its claim as far as possible. As PTV well understood when the BFA transaction and its accounting treatment was approved and implemented, the intention was only ever that Unitel would act as temporary custodian of the BFA stake. Moreover, as recorded in the minutes of the board meeting of 21 February 2011, at which Luis Pacheco de Melo was present on behalf of PTV, it was expressly agreed at

<sup>&</sup>lt;sup>2</sup> As to which forum, possibilities include the chosen forum under the various agreements (albeit, on this premise, void), the home courts of any relevant defendant who has received a benefit which requires to be reversed or the Courts of a country such as Angola with a sufficiently close connection to the claims.

board level (with no dissent from PTV) that the dividends received from BFA would be used by Unitel to repay its loan from BPI.

## 4. Information Rights

- 54. PTV complains about having been "kept in the dark" and denied access to information. It is not alleged, however, that this has caused PTV any loss (nor could any such allegation sensibly be made). Nor does PTV seek any sort of mandatory relief but instead a declaration that there has been a prior faillure by Vidatel to "procure that Unitel" keep PTV informed as to its financial and business affairs.
- 55. In those circumstances, the dispute over information rights is a somewhat sterile one. For the record, however:
  - (a) PTV's legal adviser (Maria Manuela Cunha) was allowed to access and inspect Unitel's records pursuant to a shareholder's statutory right of inspection at a company's registered offices under Art 320 of the Angolan Companies Law.
  - (b) In any event, to the extent that PTV complains about any lack of access to the records of Unitel, or any alleged refusal to allow copies to be made this is not a complaint which can be levelled at Vidatel. The Claimant should take this issue up with Unitel.
  - (c) There has been no scheme to "sideline" or "oust" PTV<sup>3</sup> and insofar as PTV complaint is that documents and information packs have been supplied at or only shortly before meetings then this is how matters have been organised as between all attendees at those meetings.
  - (d) Vidatel recognises that there have been shortcomings in the record-keeping and administration at Unitel (see [xxx] above) but this is not due to any conspiracy but instead the consequence of Unitel's exponential growth, with which its administration has sometimes struggled to keep pace.

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<sup>&</sup>lt;sup>3</sup> Request, paragraph 57

(e) The competing pressures on the management of Unitel as well as its shareholders is also why PTV's letters have on occasions gone unanswered.

## 5. Purported Suspension

56. Vidatel has addressed this issue at paragraphs [xxx] above.

#### 6. Threatened Dilution

- 57. This is another sterile complaint: PTV's stake has <u>not</u> been diluted and it is has suffered no loss. It is an also another issue where PTV has misunderstood the position and sought to find wrongdoing where none exists.
- 58. Moreover, it is also an issue which has been overtaken by events since PTV issued its Request so that the current formulation of its claim is now unsustainable. At a General Meeting of 30 November 2015 at which the matter was reviewed, PTV's representative clarified that PTV accepted the principle of an increase in Unitel's nominal value per share and an increase in shareholder capitalisation. The 30 November 2015 meeting had been preceded by a distribution of information to shareholders on 20 November 2015 explaining the proposal both as to: (i) the Angolan law obligation to maintain a nominal value per share equivalent to \$5 per share, and (ii) the desirability for commercial reasons of increasing Unitel's shareholder capitalisation (including to bring Unitel closer to its competitors and to prepare it for future opportunities such as international investments or a possible flotation).

# 7. Proposed amendments to the By-Laws and Shareholders' Agreement

59. This is another sterile complaint in relation to a proposal which in the event was not implemented and so has given rise to no loss to PTV (indeed, it does not feature in PTV's prayer for relief). The agenda for the 15 December 2014 General Meeting included proposals for the such amendment but all shareholders voted to suspend consideration of the above agenda item. Consequently, the issue was not discussed further at the General Meeting of 15 December 2014.

## **QUANTUM ISSUES**

60. PTV quantifies its claim as nearly U\$2.5 billion, presupposing that:

- (a) the value of its equity interest in Unitel has been lost entirely (notwithstanding that PTV's indirect parent Oi still holds it on its books at around \$1.3bn);
- (b) its entitlement to payment of dividends from Unitel is worthless (notwithstanding that Unitel is a creditworthy debtor who recognises PTV's in all relevant financial statements); and
- (c) PTV's has suffered a loss of 25% of the sums allegedly "looted" from Unitel.
- 61. None of this bears scrutiny.
- 62. PTV remains a shareholder in Angola's largest private company and its shares are extremely valuable, hence the \$1.3bn valuation on Oi's balance sheet. As to dividends, its rights to payment from Unitel are valuable and PTV must give credit for them, even if PTV is able to establish some (currently unpleaded) claim for losses arising out of the delay. As to the alleged "looting", PTV's claim for losses cannot be reconciled with its claims that the transactions in question are void. In any event, PTV has identified no basis for saying that if the impugned transactions had not been entered into then PTV woud have received 25% of the funds, let alone received them in US Dollars. An altogether more sophisticated reconstruction would be necessary to assess what alternative investments Unitel might have entered into and what the tax and currency implications would have been. PTV has not begun to embark on that exercise.

#### PRAYER FOR RELIEF

- 63. For the above reasons, the First Respondent requests that the Tribunal:
  - (a) Dismisses all claims made by the Claimant; and
  - (b) Orders that the Claimant pay the First Respondent all costs and expenses incurred by the First Respondent in relation to this arbitration.

## PROCEDURAL MATTERS

- 64. The First Respondent's details in the Request are correct.
- 65. The First Respondent is represented in this arbitration by:

Quinn Emanuel Urquhart & Sullivan, LLP

# [names]

- 66. The First Respondent agrees with the Claimant that, pursuant to the Shareholders' Agreement:
  - (a) the place, or legal seat, of arbitration shall be Paris, France;
  - (b) the language of the arbitration shall be English; and
  - (c) the Shareholders' Agreement shall be governed by the law of Angola.
- 67. As to the constitution of the Tribunal, this has been addressed in separate correspondence, the most recent of which (at the time of filing this Answer) is [xxx]