Dissenting Opinion of Professor Francisco Orrego Vicuña

I very much regret not to be able to join the majority decision of the Tribunal on the matter of admissibility of an ancillary claim as I do not share the conclusions of that decision nor the reasoning that led to it. The fundamental factual issue that needs to be taken into account is that the investment dispute brought before this Tribunal, irrespective of jurisdictional questions pending, arises from a single business decision by the Claimant so as to supply the Republic of Georgia with the gas that country needed. As noted in the decision, the mounting unpaid bills for this supply were the triggering factor of the dispute.

In this context both the Sistema repayment agreements and the Azot purchase were conceived as mechanisms to resolve the same underlying question, namely they were the ways found and agreed to make the Claimant whole for the monies owed. It would be hardly conceivable that an experienced investor would have undertaken the Azot purchase as a separate business in the circumstances. The record is also sufficiently clear that there was a link between the several components of the agreements reached. This, in the view of the dissenting arbitrator, would have justified the admissibility of those various components in terms of one being ancillary to the other.

The dissenting arbitrator also believes that the applicable law and the case law justify accepting the ancillary nature of the Sistema claims in the instant dispute. The requirements of Article 46 of the Convention are met in this case to the extent that the Tribunal shall "determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre".

The subject-matter of the dispute is not just the alleged wrongful acts concerning the Azot purchase but the alleged aggregate wrongful acts that affect the investment operation as a whole, including its various components. To the extent that these operations meet the jurisdictional requirements of the Convention and are within the consent given by the parties in the applicable treaties and contracts, there is no reason to exclude any of its individual components from being accepted by the Tribunal as ancillary claims.

It must also be noted in this respect that the dispute as a whole was duly notified to the President of Georgia by means of the Claimants' letter of April 18, 2008, just as it was explained in the Request for Arbitration of May 7, 2008 and the Memorial submitted on April 15, 2009.

The fact that no detailed claims concerning the Sistema dispute were brought at the outset in this arbitration, or that the letter referred to above expressed consent in respect of the Azot claim in particular, cannot be taken to mean that there was a kind of waiver of the right concerning their future submission, a right which was moreover expressly

safeguarded. The requirement that an ancillary claim be submitted not later than in the Reply, as noted in Arbitration Rule 40, has been amply satisfied in this case.

The case law concerning the interpretation and implementation of Article 46 of the Convention in specific instances of ancillary claims, as expressed in *Enron*, *CMS* and *LG&E*, has been consistent in understanding that claims arise directly out of the same subject-matter of the dispute when, as noted in the Explanatory Notes to the ICSID Arbitration Rules with respect to Arbitration Rule 40, the "factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute...".

The situation is not different here. Just like in those cases, the factual connection in this case between two concurrent arrangements directed to reach the same objective of making the Claimant whole for the monies owed, is close enough as to require their simultaneous adjudication so that settlement of the dispute will be final. Otherwise, the dispute will continue in so far the remaining claim has not been settled. The facts do not need to be identical in one and the other dispute. It suffices that they both concern the same business operation, the same investor and the same State party.

The last point with which this dissent is concerned is the question of procedural effectiveness. This has been at all times the reason behind the rule on ancillary claims, which seeks to avoid the unnecessary multiplication and duplication of proceedings. Unless the rules governing ancillary claims are applied with this objective in mind, the result might be that every single aspect of a dispute will need to be submitted to separate arbitrations.

The dissenting arbitrator believes that this objective would be better served by admitting the ancillary claims in the instant case. The Claimants have requested consolidation of the two ongoing arbitrations, but this proved not to be acceptable to the Respondent. Many other alternatives have been put into effect so as to achieve the same goal. In *Sempra*, *Camuzzi* and other cases, parallel proceedings were conducted with consolidated memorials and the same tribunal, following for the most a joint procedural schedule so as to avoid unnecessary duplication and costs.

On the basis of the views explained above, this arbitrator must respectfully dissent from the decision taken by the majority of the Tribunal.

[*SIGNED*]

Francisco Orrego Vicuña

November 30, 2009