

## SEPARATE OPINION OF DR. KAMAL HOSSAIN

### INTRODUCTION

While I agree with the Decision on Jurisdiction (“the Decision”) to the extent that the Objections to Jurisdiction cannot be accepted at this stage (the jurisdiction stage), I am of the view that some critical issues involved can be properly determined only after consideration of evidence, which may be presented at the merits stage. I am, therefore, setting out below reasons for my Separate Opinion.

### I. FACTS RELEVANT TO JURISDICTION

#### a. Parties

1. The statement in paragraph 1 of the Decision that Claimants are members of a group of companies known collectively as the Grupo Marsans does not substantiate or clarify the averments in paragraph 2 of the Claimants’ Memorial on Merits dated 29.9.2012 (“CMM”) to the effect that the Claimants purchased Argentine Airlines in 2001 and owned and operated them until the Argentine Government nationalized them in 2008. These averments remain unproven assertions and would have to be proved by production of evidence. The rejection of Objections to Jurisdiction, therefore, is subject to the power reserved by the Tribunal to conclusively determine the objections after consideration of the evidence presented at the merits stage.

#### b. Dispute

##### (i) Acquisition of the Argentine Airlines

2. From the evidence thus far produced at the jurisdiction stage it is clear that it was a Spanish Company, Air Comet, which acquired the shares held by Sociedad Estatal de Participaciones Industriales (“SEPI”), a Spanish Government entity for one dollar under the Share Purchase Agreement dated 20 October, 2001 (“SPA”). As noted above in paragraph 1, the Claimants’ assertion in the CMM that the Claimants purchased Argentine Airlines in 2001 and owned and operated them until 2008 remains an unproven assertion. Footnote 8 in the Decision starts with the assertion that Teinver’s initial share purchase (was) in 2006, which is clearly inconsistent with the statement in paragraph 2 of the Claimants CMM that “Claimants purchased the Argentine Airlines in 2001”. In that footnote, the ownership structure in place at the time that Claimants instituted this arbitration on December 11, 2008 is described, and it concludes with the following statement: “During this time, Air Comet has kept its shareholdings in Interinvest, which in turn has kept its shareholdings in ARSA and AUSA.” What is meant by “during this time” in this statement needs to be clarified.
3. Without these clarifications, and consideration of evidence, the following statements in paragraph 8 of the Decision raise certain questions:

“[A]ccording to Claimants, the dispute centers on two preliminary issues:

- (i) a disagreement between the Parties as to the Argentine regulatory framework—regarding airfare caps in particular—within

which the Argentine Airlines were required to operate between 2002 and 2008, and

(ii) disagreement between the Parties as to the remedy due to Claimants for the expropriation of their shares in those airlines”.

The questions raised are as follows: Who are “the Parties” referred to in sub-paragraph (i) above, which shares can be described as “their (Claimants’) shares” and on what basis can the Claimants assert ownership of shares which are described in sub-paragraph (ii) above as “**their** shares” in the airlines ?

The answer to these questions will have to be taken into account in order to arrive at definitive findings at the merits stage on key questions such as Claimants’ investments. The statement in paragraph 2 of the CMM that: “This is a straightforward case of formal expropriation without compensation by the Government of Argentina ... the GOA has paid no compensation to the **Claimants** for taking of **their investments**” requires consideration of evidence to determine what is meant by **Claimants’ investments** and whether **their** investments have been the subject-matter of expropriation.

## II. PROCEDURAL MATTERS

### a. Request for Arbitration and its Registration by ICSID

4. The Separate Opinion relies on the Procedural History set out in Part II of the Decision.

## III. POSITION OF THE PARTIES ON JURISDICTION

5. Respondent’ submissions are summarized in paragraph 72 of the Decision as follows:
  - i. The Tribunal lacks jurisdiction because Claimants failed to meet the requirements set forth in Article X of the Treaty;
  - ii. The Tribunal lacks jurisdiction because Claimants have no legal standing to claim for legal rights that belong to another legal person;
  - iii. The Tribunal lacks jurisdiction to adjudicate certain of Claimants’ allegations that concern the acts of non-state entities, which cannot be attributed to Respondent; and
  - iv. The Tribunal lacks jurisdiction because the investment invoked by Claimants is not an investment protected by the Treaty.
6. The Claimants’ Submissions on Jurisdiction are summarized in paragraph 73 of the Decision as follows:
  - i. The Tribunal has jurisdiction over Claimants’ claims because Claimants have satisfied the procedural provisions of the Australia-Argentina BIT, which they may rely on through the application of the Treaty’s MFN clause;

- ii. The Tribunal has jurisdiction, in the alternative, because Claimants have satisfied and/or are excused for reasons of futility from the requirements set forth in Article X of the Treaty;
- iii. The Tribunal has jurisdiction over Claimants' claims because Claimants are legitimate parties to this arbitration;
- iv. The Tribunal should defer questions of state attribution for acts of non-state entities to the merits phase of this arbitration or, in the alternative, determine that the acts alleged are attributable to Respondent; and
- v. The Tribunal has jurisdiction over Claimants' claims because Claimants' investment was acquired and effected in accordance with the legislation of Argentina and in good faith.

#### **IV. JURISDICTIONAL OBJECTIONS**

##### **a. First Jurisdictional Objection: Claimants' fulfillment of the procedural requirements of Article X of the Treaty**

7. According to Respondent, Claimants failed to meet the requirements of Article 10. Specifically, Respondent alleges that Claimants have not attempted to amicably settle their dispute in accordance with Article X(1) and (2) of the Treaty and further that Claimants have not subjected their dispute to the Argentine courts for a period of eighteen months before seeking this arbitration, in accordance with Article X(3). (Paragraphs 2 to 25 – Respondent's Memorial on Objection to Jurisdiction – "RMOJ").
8. The Claimants have made two responses to this objection. First, Claimants assert that they are entitled to invoke the Treaty's MFN clause in Article IV(2) in order to benefit from the more favorable dispute settlement provisions of other BITs negotiated by Argentina. Second, Claimants assert that even if the Treaty's MFN clause does not permit them to borrow the dispute settlement provisions from other Argentine BITs, they have satisfied the requirements of Article X of the Treaty, or, in the alternative, that they should be excused from Article X's requirements for reasons of futility. (Paragraphs 7 to 10 – Claimants' Counter-Memorial on Jurisdiction "(MJ)").

##### **i. Compliance with the requirements of Article X**

9. The Tribunal first addressed the issue of Claimants' Compliance with the requirements of Article X of the Treaty. After a careful and exhaustive consideration of the submissions and the evidence presented and the reasons articulated in paragraphs 107 to 136 the Tribunal found that the Claimants have satisfied the requirements of Article X(1-3) of the Treaty (paragraph 116 of the Decision).
10. In my view, therefore, since the Tribunal has arrived at an agreed finding that the Claimants have satisfied the procedural requirements of Article X of the BIT, it is not necessary for the Tribunal to embark upon consideration of the alternative submission invoking the MFN clause. In my view when an issue can be resolved, as in this case, by relying on an express provision (Article X) and a clear finding can be, and has been, arrived at that its requirements have been fulfilled, recourse to the MFN clause

is not justified. That would involve reaching out to other agreements and consideration of contested issues on which an agreed interpretation would be difficult and may even prove to be impossible. This is why recourse in these circumstances to the MFN clause may well be avoided. The more so, since jurisprudence on the issue of whether an MFN clause can be applied to jurisdictional issues reveals considerable divergence of juristic views and is the subject of continuing controversy.

11. The parties had pointed to a significant body of jurisprudence on the issue of whether MFN clauses can be applied to jurisdictional issues. Both parties had acknowledged that this body of case law is not consistent, and that there remains a great deal of controversy on this issue.”<sup>1</sup>. The divergence of opinions by tribunals on MFN clauses is not only with regard to the interpretation of ordinary meaning.
12. Investment arbitration jurisprudence on the ordinary meaning of MFN provisions has not been entirely consistent, even when the same BIT is concerned. Notably, each of the cases that has addressed Article IV(2) of the Spain-Argentina BIT has concluded that the broad language of the MFN clause applies to the Article X dispute resolution provisions. However, other tribunals have disagreed. The Belgium/Luxembourg-Soviet Union BIT applied by the tribunal in *Berschader* contained “all matters” language similar to that of the Spain-Argentina BIT. Nonetheless, the *Berschader* tribunal rejected the claimant’s attempt to use the MFN clause. In contrast with the tribunals in *Maffezini*, *Gas Natural* and the *Suez* cases, the tribunal in *Berschader* noted that “all matters covered by the present treaty” cannot be interpreted “literally,” because the MFN clause is not capable of being applied at all to several of the matters covered by the BIT.
13. I would like to express my reservation with regard to the analysis and observations set out in paragraphs 137 to 186 of the Decision and to express my disagreement with the conclusion expressed in paragraph 186 which commences with statement that: “the Tribunal finds that Claimants may equally rely on the Article IV(2) MFN clause of the Treaty to make use of the dispute resolution provisions contained in Article 13 of the Australia-Argentina BIT.”

---

<sup>1</sup> Cases relating to MFN include: *Maffezini v Kingdom of Spain*, ICSID Case No.ARB/97/7, 2000  
*Salini Costruttori e Italstrade S. atA. V. Jordan*, ICSID Case No.ARB/02/13, 2004  
*Plama Consortium Limited v. Bulgaria*, ICSID Case No.ARB/03/24, 2005  
*Vladimir Berschader and Moise Berschader v Russia*, SCC Case No. 080/2004 (BLEU-USSR BIT) (Sjovall P., Lebedev & Weiler). Award, 21 April 2006)  
*Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, 2006  
*Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, 2008  
*Renta 4 SVSA, et al. v. The Russian Federation*, SCC Case No. Arbitration V (024/2007). Award on preliminary objections rendered on - 20 March 2009  
*Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6) - Decision on Jurisdiction and Competence, June 19, 2009  
*Austrian Airlines v. Slovak Republic*, UNCITRAL Case, Award of 20 October, 2009  
*RosInvestCo UK Ltd. V. Russia*, SCC Case No. Arb. V079/2005 (UK-USSR BIT) (Bockstiegel P., Steyn & Berman). Award on Jurisdiction, October 2007  
*Impregilo S.P.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, June 21, 2011  
*Hochtief Ag v. The Argentine Republic*, ICSID Case No. ARB/07/31, Award, 7 October, 2011

14. I find support for my view in recent juristic writing, in which the cases have been critically analyzed. Newcombe and Paradell<sup>2</sup> after reviewing the jurisprudence observe that: "... the overview of the jurisprudence ... highlights (that) tribunals have adopted conflicting approaches to the application of MFN clauses to investor-state arbitration provisions" and that "(t)he use of MFN treatment to obtain the more favourable procedural treatment in other investor-state arbitration provisions has been criticized on the basis that it amounts to cherry picking", and conclude that: "At present, the more persuasive view is that MFN treatment obligations with respect to foreign investment and investors arise only on the basis of an express treaty obligation."
15. Campbell McLachlan QC *et al.* have expressed their views in the following terms:<sup>3</sup> "This analysis led the Tribunal to substitute instead a simple rule of construction to the effect that an MFN provision would not apply to dispute settlement provisions unless the parties expressly provided that it did. It is submitted that the reasoning of the Tribunal in *Plama* is to be strongly preferred over that in *Maffezini* ... The result, if, as is suggested, the approach in *Plama* is preferred, will be that the MFN clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide."
16. A critical review which covers some of the most recent cases by Paparinskis concludes that:<sup>4</sup>
- "The cases after 2007 are less easily read as reflecting an even implicit consensus. Some recent decisions follow the earlier approaches. The 2009 decision in *Tza Yap Shum* and the majority decision in *Austrian Airlines* rejected the investors' argument for the extension of its jurisdiction. The former tribunal explained itself as following both *Plama* and *Maffezini* and the majority of the latter tribunal also relied on the distinction between substantive and procedural rules attracted by the MFN clause. In 2011, a majority of the *Impregilo* tribunal explicitly situated itself within the *Maffezini* line of decisions. However, the recent general trend rejects earlier practices and explanations."
17. I find the analysis in the Concurring and Dissenting Opinion of Professor Brigitte Stern in the *Impregilo* case persuasive. The following extracts from that Opinion are set out below:<sup>5</sup>

---

<sup>2</sup> *Law and Practice of Investment Treaties, Standards of Treatment*, Chapter 5, "Most Favoured Nation Treatment", pages: 194 to 232, Wolters Kluwer, 2009

<sup>3</sup> Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration, Substantive Principles*, Oxford, 2008, p.75.)

<sup>4</sup> ICSID Review, Fall 2011, "MFN Clauses and International Dispute Settlement: Moving beyond *Maffezini* and *Plama*", pp. 14-35

<sup>5</sup> ICSID Case No. ARB/07/17 references are to paragraphs in the *Concurring and Dissenting Opinion of Professor Brigitte Stern*.

“78. Just as an MFN clause cannot change the conditions *ratione personae*, *ratione materiae*, and *ratione temporis*, as has just been demonstrated, it must be equally true that an MFN clause cannot change the condition *ratione voluntatis*, which is a qualifying condition for the enjoyment of the jurisdictional rights open for the protection of substantial rights.

79. In other words, before a provision relating to the dispute settlement mechanism can be imported into the basic treaty, the right to international arbitration – here ICSID arbitration – has to be capable of coming into existence for the foreign investor under the basic treaty, in other words the existence of this right is conditioned on the fulfillment of all the necessary conditions for such jurisdiction, the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State’s consent to such jurisdiction, the condition *ratione voluntatis*.

80. As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty’s right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.

...

...

...

83. There appears to be no legal reason to treat differently these two types of requirements that condition the State’s consent. On this issue, I am in agreement with my co-arbitrator Charles Brower, who explained in his Separate opinion in *Renta 4*, that “ ... there is no reason to differentiate between admissibility-related aspects of accessing investor-State arbitration and matters of jurisdiction ...”

...

...

...

93. The importance of consent has always been stressed in international arbitration cases and especially in ICSID cases. *Plama*, of course, has laid a great emphasis on the necessity of a clear and unambiguous consent:

In the view of the Tribunal, the following consideration is equally, if not more, important. ... Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away *the basic prerequisite for arbitration: an agreement of the parties to arbitrate*. It is a well-established principle, both in domestic and international law, that *such an agreement should be clear and unambiguous*. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.

Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference".

...

...

...

96. The decision in *Wintershall* has insisted again on the idea that the State must have given its consent and that this consent is a condition for the access to international arbitration:

In the present case, therefore the BIT between Argentina/and Germany is a treaty undoubtedly providing for a right of access to international arbitration (ICSID) for foreign investors, who are German nationals – but this right of access to ICSID arbitration is not provided for unreservedly, but upon condition of first approaching competent Courts in Argentina ... a local-remedies rule may be lawfully provided for in the BIT – under the first part of Article 26; once so provided, as in Article 10(2), *it becomes a condition of Argentina's "consent" – which is, in effect, Argentina's "offer" to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions inter alia of Article 10(2); an investor (like the Claimant) can accept the "offer" only as so conditioned.*"

18. I am, therefore, of the view that recourse to the MFN clause in the present case is neither necessary nor justified.

## **b. Second Jurisdictional Objection: Claimants' Standing**

### **i. Claimants' Investment in Interinvest and the Argentine Airlines**

19. The Respondent's position as elaborated in paragraphs 85 to 215 of the Memorial on Objections to the Jurisdiction dated 6 December, 2010 ("MOJ"), at pages 41 to 79 may be summarized as follows:

- (a) Argentina-Spain BIT does not afford any protection to "indirect shareholders"
- (b) No "investment" **recognized by Argentine** law was expropriated.
- (c) The definition of "investment" under the Argentine-Spain BIT is clearly narrower than that under the US-Argentina BIT. The following submission is made in paragraph 164 of the MOJ, page 64:

"164. The concept of investment under the US-Argentina BIT is clearly broader than that of the Argentina-Spain BIT. For these reasons, the material scope of the Argentina-Spain BIT should not be extended, as Claimants wrongly expect, to include their mere interests in the indirect shareholdings they currently have (in the case of Teinver S.A.) or previously had (in the case of Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.) in Interinvest S.A., Aerolíneas Argentinas S.A. and Austral-Cielos del Sur. Claimants cannot interpret

the applicable BIT in an extensive manner, distorting its content and invoking a scope of protection that simply does not exist.”

20. I find that the Decision has not addressed the reasoning underlying the above arguments but tends to follow, what in my view, are questionable assertions in some earlier ICSID cases. The facts of this case do not justify simply adopting the interpretations which found favour in earlier cases, in particular in cases such as *Siemens v. Argentine Republic* or *Mobil Corporation v. Venezuela*.
21. I find it difficult to accept the reasoning in the *Siemens* case which is set out in the following terms (emphasis added):

“The Tribunal has conducted a detailed analysis of the reference in the Treaty to “investment” and “investor”. **The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty.**”

....

“**The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company.** Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment **excludes** indirect investments.” (paragraph No. 137 of the Decision on Jurisdiction dated 03.08.2004 in *Siemens Ag v. Argentine Republic*.)

“**The tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes “every kind of assets” and enumerates specific categories of investments as examples. One of those categories consists of “shares, bonds or other kinds of interests in companies and joint ventures”.**”

“**The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments.**”

I find equally unacceptable the reasoning in the *Mobil* case referred to which is stated in the following terms: “Investment as defined in Article 1 could be direct or indirect as recognized in similar cases”. (Paragraph No. 165 of the Decision on Jurisdiction dated 10.06.2010 in *Mobil Corporation, Venezuela and others vs. Venezuela*.)

22. In Article I(2) of the BIT: (emphasis added in dark bold letters):

“The term **“investments” shall mean any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment** and in particular, but not exclusively, the following:

- Shares and other terms of participation in companies;

....



**The content and scope of the rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party in whose territory the investment is situated.”**

The words “**in accordance with the legislation of the country receiving investments**” in Article I(2) must be given due weight.

23. In my view on a plain reading of the words in Article I(2) of the BIT shares **held** in a company means shares **directly** held, unless **indirectly held** shares **are expressly included**. An interpretation, which would **expand** the meaning to include shares “indirectly held” cannot be understood to be the plain meaning of the word “held” since “indirectly held” widens the scope without limit, and enlarges the obligation imposed (also without limit). It is, therefore, reasonable to expect that to include “shares indirectly held” this must be done expressly as in the US BITs.
24. I think we need to heed the caution counseled by Campbell McLachlan and his co-authors in the following terms:
- “Those involved in investment treaty arbitrations should take care not to allow the use of other awards to transgress the appropriate boundaries. Their citation should not overwhelm a tribunal’s consideration of the case before it.”<sup>6</sup>
25. In my view the following submissions merit serious consideration:
- (a) The interpretative principle of *in dubio mitius*, requires that in interpreting treaties, if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.<sup>7</sup>
- (b) The Respondent in its Memorial on Objections to the Jurisdiction dated 6 December 2010 submits that: “Under international law, indirect or derivative claims cannot be filed. Nonetheless, some treaties have expressly provided for indirect or derivative actions under extraordinary circumstances. This constitutes an exception to the general principle that no person may bring a claim on behalf of another” (p. 56, para 141). In support of its argument the Respondent cites the *Case Concerning Ahmadou Sadio Diallo*<sup>8</sup> and *International Thunderbird Gaming Corp and the United Mexican States*, UNCITRAL case under the NAFTA rules (Submission of the United States of America, paras 4-9.)

---

<sup>6</sup> Campbell McLachlan *at el.*, *op. cit.* p. 75

<sup>7</sup> Jennings, R. Y. & Watts, A. (eds.), Oppenheim’s *International Law*, Vol. 1 (9th edn; Essex: Longman, 1992) p. 1278 *Nuclear Tests case*, ICJ Rep 253 (1974) at 267; *Access of Polish War Vessels to the Port of Danzig*, PCIJ Ser A/B No 43 (1931) at 142; *Air Transport Services Agreement Arbitration*, 38 ILR 182 (1963) at 243; and *De Pascale Claim*, 40 ILR 250 (1961); Sornarajah, M., *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2007) p. 254.)

<sup>8</sup> (*Republic of Guinea v. Democratic Republic of Congo*, 2007 I.C.J. 1 (May 24), ¶ 88.

26. In a recent survey of awards by M. Valasek and P. Dumberry, the following views are expressed:<sup>9</sup>

“... arbitral tribunals have also recognized the right of intermediate (“shell”) corporations to submit their own claims to arbitration. These developments have even led some authors to suggest the existence of a new “rule” of customary international law providing shareholders with a procedural “right” to bring arbitration claims against the State where they make the investment. These are undoubtedly overall positive developments for the protection of foreign investors. This evolution nevertheless gives rise to several legitimate concerns from the perspective of capital-importing States that have entered into numerous BITs.

... ..

The first area of concern relates to the fact that BITs typically do not distinguish between minority and majority shareholders which can submit separate claims from that of the corporation. As a matter of principle, all shareholders big and small, should receive legal protection under a BIT that does not expressly distinguish between them. This situation nevertheless raises some concerns where a corporation’s share capital is divided between numerous shareholders each holding a very small percentage of the total number of shares (imagine, for instance, 100 different shareholders each owning a mere 1% of the corporation’s share). Nothing (apart, of course, from the high costs of pursuing international arbitration) would prevent all these different shareholders from filing their own separate claims against the host State for the same treaty breach. Another area of concern is related to the protection offered to indirect investments made through multiple layers of intermediate corporations. Again, under a typical BIT, each holding company in a long chain of ownership could file its own separate claim against the host State for the same treaty breach.

As a result, capital-importing countries having entered into a significant number of BIT’s will increasingly run the risk of being respondents in multiple (and often simultaneous) arbitration claims filed by different entities included in the increasingly sophisticated and complex corporate structure of foreign investors. Such multiple claims will clearly result in very high legal costs for respondent States. They will also increase the likelihood of inconsistent arbitral decisions.

This possibility is not merely theoretical, as shown by the Lauder saga. Mr. Lauder, a U.S. national, was the ultimate beneficiary of an investment he made in the Czech Republic through an intermediate corporation (CME, a Dutch corporation). Mr. Lauder commenced an arbitration claim under the U.S. – Czech Republic BIT, while CME, 6 months later, started its own proceeding before a different arbitral tribunal under the Netherlands –Czech Republic BIT. Both claims arose from the *same facts*. It should be noted that the Czech Republic refused to consolidate the proceedings as requested by the

---

<sup>9</sup> “Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute”, ICSID Review, Spring 2011, p. 73 et seq.

Claimants. The disturbing aspect of these two parallel arbitration cases is that one Tribunal concluded that the Czech Republic had expropriated the investment and awarded \$360 million in damages to the Claimant, while the other Tribunal rejected the claim.

The scenarios envisaged above also raise the issue of *remoteness* between a shareholder and the actual investment ... This issue was addressed by the *Enron* Tribunal, which summarized a concern raised by Argentina as follows:

The *Enron* Tribunal concluded that such concern raises the “need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. For the *Enron* Tribunal, the establishment of a “cut-off point” beyond which claims by indirect shareholders would not be allowed should be based on “the extent of the consent to arbitration of the host State:”

If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.

The issue of remoteness of claims is likely to be one of the most contentious in the future. While some authors have criticized the *Enron* Tribunal’s reasoning on the “cut-off point” as lacking any “legal foundation”, recent awards have acknowledged the seriousness of the issue. As explained by the *Phoenix* Tribunal, some concern has indeed been voiced by international tribunals, *and is shared by this Tribunal*, that not any minor portion of indirectly owned shares should necessarily be considered as an investment. For good reasons, tribunals will, however, be reluctant to establish in each case where exactly should be the cut-off point. Indeed, no consensus exists on what “too remote” really means in practical terms.”

27. The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.
28. In the instant case, there is no evidence at this stage that participation of the Claimants’ investments was specifically sought by the host state so that they may be treated as included within the consent to arbitration given by the Argentine Republic.
29. On the basis of the evidence thus far presented it is not possible to arrive at a finding that the Claimants have established that they have “indirect investment” through multiple-layers of corporate entities which can qualify as “protected investment” under Article I(2) of the BIT. In the article cited above, in paragraph 26, it is stated that some authors suggest the existence of a **new rule** of customary international law providing shareholders with a procedural **right** to bring arbitration claims against the

state where they make the investment. It is noteworthy that both the words “rule” and the word “right” in the passage quoted are advisedly placed within inverted commas indicating that the new rule has yet to be recognized as an established rule on which there is general consensus. Indeed the circumstances in which shareholders may exercise a “right” against the host state of a company located within the state would depend upon the specific facts and circumstances and the terms of the relevant treaty and contractual arrangements.

30. When a Treaty provision, Article I(2), defines terms which necessarily require consideration of Argentine law, such as whether an investment has been made in accordance with Argentina law, and where it expressly provides that the scope and content of the rights corresponding to the various categories of assets shall be determined by Argentine law, it is necessary to consider whether the “rights” or “assets” are recognized as such by Argentine law.
31. In paragraph 233 of the Decision Respondent’s policy arguments against the Claimants asserting claims on the basis of indirect shareholding are noted. I agree with the observation in paragraphs 234 of the Decision that Respondent’s assertion could have relevance in the merits stage proceeding of this case, but are not relevant at the jurisdictional stage. I, however, disagree with the views expressed in paragraph 235, in particular, with the concluding sentence to the effect that the Claimants have standing **to recover for damages** that were inflicted upon the companies and that ordinary language of Article 1(2) **is designed to protect “all assets” including indirect shareholdings** and the finding “the Tribunal also finds that Claimants are not deprived of standing by the fact that their investments were made through their subsidiary, Air Comet.” This should not preclude consideration by the Tribunal at the merits stage of the issue whether reliefs sought on the basis of “rights” asserted in respect of “investments” made through Air Comet can be granted. These “findings” while they may be seen as rejecting the jurisdictional objection to standing cannot definitively determine the question without consideration of the evidence to be presented at the merits stage together with provisions of Argentine law which are relevant to determine whether the Claimants’ rights may be enforced and the reliefs claimed may be granted.
32. The relevant provisions of Argentine corporate law would need to be considered and interpreted before such findings can be arrived at.

**ii. Claimants’ other investments**

33. I agree with the first sentence of paragraph 238 that the Decision to the effect that the Tribunal will not address Claimants’ other alleged investments at this time, but cannot agree with the definitive finding expressed in the second sentence that the Tribunal find that Claimants’ indirect shareholdings constitute an “investment” under the Treaty. While for the purpose of determining standing such evidence as has been placed at the jurisdiction stage may be sufficient to justify that finding, this cannot be definitive when other issues are concerned, such as the effect of illegality or fraud committed in the course of performance as well as the effect of an assignment agreement and a funding agreement entered into after the initiation of the arbitration which could materially affect rights relating to that investment and their enforceability in the sense of grant of reliefs claimed in respect of those rights.

**iii. Claimants' third-party funding agreement and assignment of award proceeds**

34. During the hearing on jurisdiction, Respondent raised its concern that Claimants' and Air Comet's recent reorganization proceedings in Spain could affect Claimants' authorization to bring this case. In its post-hearing submissions, Respondent has also questioned two agreements entered into by Claimants subsequent to commencing this arbitration. One of these, a Credit Assignment Agreement among Teinver, Transportes Cercanías and Autobuses Urbanos as the assignors and Air Comet as the assignee (the "Assignment Agreement"), dated January 18, 2010, concerned the assignment to Air Comet of the proceeds of a potential award in this arbitration. The other, a Funding Agreement made between Claimants and Burford Capital Limited, an investment company headquartered in Guernsey, and effective as of April 14, 2010 (the "Funding Agreement"), concerned the financing of Claimants' litigation expenses in this arbitration.
35. The Parties do not dispute that Air Comet commenced voluntary reorganization proceedings on April 20, 2010. Nor do they dispute that the Claimants each commenced voluntary reorganization roughly a year later, with Teinver on December 23, 2010, Autobuses Urbanos on January 28, 2011, and Transportes de Cercanías on February 16, 2011.
36. The Parties also acknowledge that Claimants concluded the Assignment Agreement, by which Claimants agreed to assign to Air Comet proceeds of an eventual award in this case. In addition, the Parties acknowledge that Claimants executed the Funding Agreement with Burford. However, the Parties disagree as to the effects of these agreements on Claimants' standing in this case.
37. I agree with the statement in paragraph 255 of the Decision that international case law has consistently determined that jurisdiction is generally to be assessed as of the date the case is filed. I, therefore, agree with the conclusion of the Tribunal that Respondent's jurisdictional objection may be rejected to the extent that the allegations concern events that post-date the filing of the arbitration. I also agree with the view of the Tribunal expressed in paragraph 259 that it will not address Respondent's allegations regarding Claimants' reorganization, assignment agreement and the funding agreement which post-date the filing of the arbitration, but that these will receive due consideration at the merits stage.

**c. Third Jurisdictional Objection: Issues of State Attribution**

38. I agree with the view of the Tribunal 274 of the Decision that: "... Given the fact-intensive nature of Claimants' allegations, the Tribunal must postpone adjudication of this issue until the merits phase."

#### **d. Fourth Jurisdictional Objection: The Legality of Claimants' Investment**

##### **i. Position of Respondent**

39. The Respondent asserted that the Claimants have violated Spanish and Argentine law, and committed other misdeeds and, therefore, they cannot assert any rights claimed under the Claimants' alleged investments or seek to enforce them or obtain any relief with respect to those "rights". The violations of Spanish law are summarized in paragraph 278 to 289 and the violations of Argentine law are summarized in paragraphs 290 to 292. Other misdeeds are referred to in paragraphs 293.
40. The Respondent by its letter dated 24 May, 2012 notified the Tribunal as follows:

"... the Commercial matter No. 9 of Madrid found Gerardo Diaz Ferran and Gonzalo Pascual Arias – holders of a controlling interest in Claimants and witnesses in this arbitration – guilty of the bankruptcy of Seguros Mercurio, S.A. Furthermore, the court found Teinver S.L., one of the Claimants in this arbitration proceeding, and other companies of the Marsans Group, such as Viajes Marsans S.A. and Hotetur Club S.L, liable as accomplices to the bankruptcy" and that "... fraudulent acts were carried out by means of complex legal and accounting operations. In the opinion of the court, "all of them are part of a coordinated action aimed at removing the assets of the reorganized company in favour of other companies of the group.

In this sense, for instance, the court established that "by virtue of a private agreement entered into with a company in which Teinver has a 100% interest, related to Seguros Mercurio and also owned by Diaz Ferran and Pascual Arias through other companies, Seguros Mercurio proceeded to make payments in the amount of 5,847,039.84 euro in favour of other companies of the group other than the purchaser company." In light of the explanations afforded by the accused parties with respect to the terms of such operation, the court concluded that "the explanations provided by Mr. Diaz Ferran at the hearing were devoid of any logic.

Another questionable operation took place on October 30, 2009 and involves the sale of real property by Teinver to Seguros Mercurio. Oddly enough, it was found that at the time of the sale the property was about to be foreclosed at the request of the mortgagee. In this respect, the court held that "the operation is censurable from the legal point of view since it can be affirmed that, through it, a sham has been attempted in order to convey a property image different from the actual one.

Specially in relation to Diaz Ferran and Pascual Arias, the judge concluded that they should be reached by the declaration of guilt as "as they acknowledged in the act of the trial, they designed the operations described, controlling and deciding on the management not only of Seguros Mercurio, but of the entire Group, of which they were practically the sole shareholders."

The Respondent submits that the above facts provide a ground to the Tribunal for rejection on the ground of lack of jurisdiction.

41. I agree with the general observation in the Decision that for the purpose of jurisdiction timing is relevant, and that the Tribunal should focus on illegality at the initiation of the investment. Matters which arise during performance of the investment or which are subsequently found to have occurred would not sustain a jurisdictional objection. I, however, agree with the view elaborated in the *Hamester* case cited in paragraph 320 of the Decision, as follows:

“... Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal’s jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor’s conduct during the life of the investment is a merits issue.”

42. I am, therefore, of the view that observation in the Decision on issues which are post-commencement would not prejudice the Tribunal’s consideration of those matters in the light of evidence and submissions presented at the merits stage.
43. I, therefore, agree with the conclusions in paragraph 331 of the Decision that “The Tribunal notes that certain of the allegations raised may affect the merits of the claim and that it will be open to the parties to make further submissions in respect of these allegations as appropriate during the merits stage of the arbitration.”

## **V. COSTS**

44. I agree with the Tribunal’s view in paragraph 332 reserving this question for subsequent adjudication.

**VI. DECISION ON JURISDICTION**

45. I agree (subject to the observations and reservations set out above in my Separate Opinion) with the Decision of the Tribunal set out in paragraph 333 as follows:

- (1) The Objections to Jurisdiction are rejected;
- (2) It joins to the merits the determination of Respondent's responsibility for the acts of non-state entities.

Date: \_\_\_\_\_

[signed]

-----  
Dr. Kamal Hossain  
Arbitrator