

***Date of dispatch to the parties: December 21, 2012***

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.  
(CLAIMANTS)

and

The Argentine Republic  
(RESPONDENT)

(ICSID Case No. ARB/09/1)

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DECISION ON JURISDICTION

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*Members of the Tribunal*  
Judge Thomas Buergenthal, President  
Henri C. Alvarez Q.C., Arbitrator  
Dr. Kamal Hossain, Arbitrator

*Secretary of the Tribunal*  
Mrs. Mercedes Cordido-Freytes de Kurowski

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## TABLE OF ABBREVIATIONS

The Treaty	Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments of October 3, 1991
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington D.C., 1965
MFN clause	Most-Favored Nation clause
VCLT	Vienna Convention on the Law of Treaties, 1969
Assignment Agreement	Credit Assignment Agreement among Teinver, Transportes de Cercanías and Autobuses Urbanos as the assignors and Air Comet as the assignee, dated January 18, 2010
Funding Agreement	Funding Agreement made between Claimants and Burford Capital Limited, effective as of April 14, 2010
RFA	Claimants' Request of Arbitration, filed on December 11, 2008
Merits	Claimants' Memorial on the Merits, filed on September 29, 2010
Mem.	Respondent's Memorial on Jurisdictional Objections, filed on December 6, 2010
CM	Claimants' Counter-Memorial on Jurisdiction, filed on January 24, 2011
Rep.	Respondent's Reply on Jurisdictional Objections, filed on March 10, 2011
Rej.	Claimants' Rejoinder on Jurisdiction, filed on April 27, 2011
Exh. C-	Claimants' Exhibits and Legal Authorities
Exh. E-	Respondent's Exhibits
LA AR	Respondent's Legal Authorities
Tr. Day [#], [page:line]	Transcript of the Hearing on Jurisdiction and Provisional Measures Day 1: May 27, 2011 Day 2: May 28, 2011 Day 3: May 30, 2011

## I. Facts Relevant to Jurisdiction

### a. Parties

1. This claim is brought by Teinver S.A. (“Teinver”), Transportes de Cercanías S.A. (“Transportes de Cercanías”) and Autobuses Urbanos del Sur S.A. (“Autobuses Urbanos”) (collectively, “Claimants”), all companies incorporated in the Kingdom of Spain, against the Argentine Republic (“Respondent”), under the Agreement between the Argentine Republic and the Kingdom of Spain on the Promotion and Protection of Investments of October 3, 1991 (the “Treaty”).<sup>1</sup> Claimants are members of a group of companies known collectively as the Grupo Marsans.

### b. Dispute

2. This dispute concerns Claimants’ allegations that Respondent has violated the Treaty, international law, and Argentine law, as well as commitments and representations made by the Respondent to Claimants, by unlawfully re-nationalizing and taking other measures regarding Claimants’ investments in two Argentine airlines: Aerolíneas Argentinas S.A. (“ARSA”) and Austral-Cielos del Sur S.A. (“AUSA”) (collectively, “the Argentine Airlines”).<sup>2</sup>

#### i. Acquisition of the Argentine Airlines

3. By 1991, the Spanish government, through asset purchases made by the state-owned airline Iberia Líneas Aéreas de España, S.A. (“Iberia”), was a significant shareholder in both of the Argentine Airlines. In 1994, Iberia incorporated a fully-owned Argentine subsidiary, Interinvest S.A. (“Interinvest”), to serve as the holding company for the Spanish investments in the Argentine airline industry.<sup>3</sup> In 1995, the Spanish government created the Sociedad Estatal de Participaciones Industriales (“SEPI”) to operate as the holding company for all companies fully or partially owned by the Spanish government.<sup>4</sup> As such, SEPI acquired Iberia’s shareholdings in Interinvest at that time.
4. By mid-2001, the Argentine Airlines were experiencing financial difficulties, and ARSA filed for bankruptcy reorganization.<sup>5</sup> In June 2001, SEPI announced that it would sell its participation in Interinvest through a bidding process. At the time, SEPI owned 99.2% of Interinvest, and in turn Interinvest held 92.1% of ARSA’s shares and 90% of AUSA’s shares.<sup>6</sup> Air Comet S.A. (“Air Comet”), a Spanish subsidiary of Grupo Marsans, bid on Interinvest and won. At this time,

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<sup>1</sup> The authentic language of the Treaty is the Spanish text. This Decision will generally refer to the English-language translation (Ex. C-1(ENG)), although it will revert to the authentic Spanish text where the translation is ambiguous or otherwise unsatisfactory.

<sup>2</sup> RFA ¶¶ 2, 11.

<sup>3</sup> Interinvest was incorporated in order to comply with Argentine law, which requires companies in the aeronautic sector to be held directly by an Argentine company or national. *See* Merits ¶ 25, fn. 16.

<sup>4</sup> Merits ¶ 26.

<sup>5</sup> Merits ¶ 28, Arias Wit. ¶ 13.

<sup>6</sup> Ex. C-11.

Air Comet was owned by two of the three Claimants, Autobuses Urbanos (35%) and Transportes de Cercanías (35%), as well as by two other Spanish companies, Proturin S.A. (29.8%) and Segetur S.A. (0.2%).<sup>7</sup> (Claimant Teinver became a shareholder of Air Comet later, that is, on July 20, 2006, when it purchased Proturin’s and Segetur’s entire shareholdings.<sup>8</sup>)

5. On October 2, 2001, Air Comet and SEPI entered into a Share Purchase Agreement (“SPA”), through which Air Comet acquired SEPI’s 99.2% interest in Interinvest (which, in turn, maintained the interests in the Argentine Airlines noted above).<sup>9</sup>
6. Air Comet paid a purchase price of US\$1 for the interest in Interinvest.<sup>10</sup> Under the SPA, Air Comet agreed, in accordance with the industrial plan it created for the Argentine Airlines, to assume the assets and liabilities of the Airlines, to retain airline employees for two years, to make a US\$50 million capital increase, to maintain its majority interest in the corporations, to service specified flight routes, and to expand aircraft fleets.<sup>11</sup> For its part, SEPI agreed to assume the airlines’ liabilities up to US\$300 million, and to assume commitments resulting from the implementation of the industrial plan up to US\$248 million.<sup>12</sup> SEPI later agreed to contribute an additional US\$205 million to cover the operational losses suffered by the airlines between July and October 2001.<sup>13</sup>
7. In December 2002, ARSA and a majority of its creditors reached a settlement on debt restructuring, which was subsequently approved by an Argentine commercial court, as well as a court of appeals.<sup>14</sup>

## ii. Nature of the Dispute

8. Claimants allege that Respondent has unlawfully expropriated their investment in the Argentine Airlines.<sup>15</sup> Claimants characterize this expropriation as consisting of two parts. The “formal” expropriation occurred when the Argentine Congress “purposefully and explicitly” enacted the nationalization of the companies in December 2008.<sup>16</sup> However, this formal expropriation was

<sup>7</sup> Claimants’ Letter of June 16, 2011, 5; RFA Ex. C-5.

<sup>8</sup> See Claimants’ letter of June 16, 2011 at 5. Since Teinver’s initial share purchase in 2006, the shareholding structure of Air Comet has changed several times. On October 2, 2007, Teinver became Air Comet’s majority shareholder, with the following distribution of shares: Teinver (56%), Autobuses Urbanos (22%) and Transportes de Cercanías (22%). *Id.* Teinver purchased additional shares from Transportes de Cercanías on December 31, 2007, with the following distribution of shares: Teinver (66.67%), Autobuses Urbanos (22%) and Transportes de Cercanías (11.33%). *Id.* at 6. On February 8, 2008, Claimants’ respective participations shifted substantially: Teinver (96.77%), Autobuses Urbanos (2.13%) and Transportes de Cercanías (1.1%). *Id.* at 6. This was the ownership structure in place at the time that Claimants instituted this arbitration on December 11, 2008. During this time, Air Comet has kept its shareholdings in Interinvest, which in turn has kept its shareholdings in ARSA and AUSA. *Id.* at 5. On December 10, 2009, Transportes de Cercanías and Autobuses Urbanos sold their remaining shareholdings in Air Comet to Teinver, leaving Teinver as the sole shareholder of Air Comet. *Id.* at 6.

<sup>9</sup> Ex. C-18.

<sup>10</sup> *Id.* at § 2.

<sup>11</sup> *Id.* at § 7.

<sup>12</sup> *Id.* at § 9.

<sup>13</sup> Merits ¶ 41.

<sup>14</sup> Merits ¶ 46, Ex. C-526, C-530, C-531.

<sup>15</sup> Merits ¶ 2.

<sup>16</sup> Merits ¶ 357.

allegedly the culmination of a long process of “creeping” expropriation which started in October 2004 or earlier.<sup>17</sup> As such, according to Claimants, the dispute centers on two primary 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.<sup>18</sup>

## **II. Procedural Matters**

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

9. On December 11, 2008, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a Request for Arbitration (“the Request”) against Respondent from Claimants. The Request concerned the alleged nationalization of two commercial airlines, and their subsidiaries, in which Claimants alleged having invested.
10. In the Request, Claimants invoked Argentina’s consent to dispute settlement through ICSID arbitration provided in the Treaty, and, by way of an Most-Favored Nation (“MFN”) clause contained in Article IV(2) of the Treaty, in the 1991 Bilateral Investment Treaty between the United States of America and the Argentine Republic (the “U.S.-Argentina BIT”).
11. On December 17, 2008, ICSID, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ICSID Institution Rules”), acknowledged receipt of the Request and transmitted a copy to the Argentine Republic and to the Argentine Embassy in Washington D.C.
12. On January 30, 2009, the Acting Secretary-General of the Centre registered the Request and notified the Parties thereof, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the ICSID Convention”) and in accordance with Rules 6(1)(a) and 7(a) of the ICSID Institution Rules. The case was registered as ICSID Case No. ARB/09/1. On that same date, and in furtherance of Rules 7(c) and (d) of the ICSID Institution Rules, the Secretary-General invited the Parties to communicate any agreements reached regarding the number of arbitrators and the method for their appointment, and to constitute an arbitral tribunal as soon as possible.

### **b. Constitution of the Arbitral Tribunal**

13. On April 3, 2009, Claimants requested that the Arbitral Tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; that the Tribunal shall consist of three arbitrators, one appointed by each Party and the third, the President of the Tribunal, be appointed by agreement of the Parties. On that same date, ICSID acknowledged Claimants’ letter, and further advised the Parties that pursuant to Rule 3(1) of the ICSID Rules of

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<sup>17</sup> Merits ¶ 357.

<sup>18</sup> CM ¶ 99.

Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), either Party was to proceed to name two persons, one as their party-appointed arbitrator, and the other for the position of the President of the Tribunal. This first Party was to then invite the other Party to concur on the proposal for the position of the President of the Tribunal, and to name its party-appointed arbitrator.

14. On April 27, 2009, Claimants appointed Henri C. Alvarez, a Canadian national, as arbitrator.
15. On May 12, 2009, Claimants informed ICSID that Respondent had failed to appoint an arbitrator and had made no proposals for the position of the President of the Tribunal, and in accordance with Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Arbitration Rules requested that the Chairman of the Administrative Council appoint the two arbitrators that had not been appointed. The following day, ICSID informed Respondent that unless notification was received by May 29, 2009 that it had appointed an arbitrator, and that the Parties had reached an agreement on the appointment of the President of the Tribunal, then ICSID was to proceed to make the appointments in accordance with the relevant provisions of the ICSID Convention, ICSID Arbitration Rules and the normal procedures of the Centre.
16. On June 1, 2009, Respondent appointed Dr. Kamal Hossain, a Bangladeshi national, as arbitrator.
17. Following some exchanges between the Parties and ICSID, the Parties were informed on December 14, 2009, that ICSID was to propose to the Chairman of the ICSID Administrative Council the appointment of Judge Thomas Buergenthal, a United States national, as the President of the Tribunal. The Parties were invited to provide observations to the proposed appointment by December 21, 2009.
18. On December 21, 2009, both Parties informed ICSID that they did not have any observations on the proposed appointment of Judge Thomas Buergenthal as President of the Tribunal.
19. On December 28, 2009, the Chairman of the ICSID Administrative Council appointed Judge Thomas Buergenthal as President of the Tribunal.
20. By letter of January 4, 2010, in accordance with Rule 6(1) of the ICSID Arbitration Rules, the Secretary-General of ICSID informed the Parties and the arbitrators that the Tribunal was thus constituted by (i) Mr. Henri C. Alvarez, QC (appointed by Claimants), (ii) Dr. Kamal Hossain (appointed by Respondent), and (iii) Judge Thomas Buergenthal (appointed by ICSID pursuant to Article 38 of the ICSID Convention). Further, the Tribunal was informed that Dr. Sergio Puig, Counsel at ICSID, would serve as the Secretary to the Tribunal. He was subsequently succeeded in this capacity by Mrs. Mercedes Cordido-Freytes de Kurowski, Counsel, ICSID.

**c. Arbitral Procedure**

21. The First Session of the Tribunal with the Parties was held on March 22, 2010, at the World Bank’s Paris Conference Centre, at which the Parties confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID

Convention and the ICSID Arbitration Rules, and that they did not have any objections in this respect.

22. During the session, the Parties also agreed on a number of procedural matters, and that Claimants' Memorial on the Merits would be filed by September 22, 2010. The Tribunal then proposed two schedules for the written and oral pleadings in this case.
23. On April 16, 2010, both Parties confirmed their agreement with the schedule proposed. Respondent, however, made a reservation to its agreement, noting that should the Tribunal decide to bifurcate, then a specific schedule for the proceedings on jurisdiction should be established.
24. On April 23, 2010, Respondent informed ICSID and the Tribunal of newspaper publications, in which it was reported that the alleged majority shareholder of some of the Claimants had transferred part of its ICSID claim to a U.S. investment fund in exchange for a contribution to pay the costs arising in the proceedings. Respondent requested that the Tribunal require Claimants to provide all available information regarding the matter and the content of the agreement that was signed with said investment fund, and to also submit all related documentation.
25. On May 28, 2010, Claimants filed their response stating that they had not sold their claim as alleged by Respondent. Claimants stressed that they had no obligation to disclose any agreements with third parties with respect to the funding of costs in this proceeding, and that Respondent did not argue the necessity or relevance of its request. Claimants further argued that due to Respondent's conduct (alleged nationalization) and refusal to pay any compensation, Claimants' group of companies were in a distressed financial state, and thus had no choice but to obtain external funding in order to afford the costs of the arbitration and pursue their claim against Respondent. Claimants lastly noted that in any instance, this financing did not affect the jurisdiction of the Tribunal.
26. The Parties were informed on June 16, 2010 that after careful consideration of their respective positions on the matter of obtaining third-party funding, the Tribunal had decided not to grant Respondent's request at this early stage as it did not consider the currently available information on record as sufficient. However, the Tribunal added that it did not preclude granting a similar request in the future once the main pleadings had been filed.
27. On September 21, 2010, the Tribunal granted an extension of the deadline for the filing of Claimants' Memorial on the Merits until September 29, 2010, as agreed by the Parties, noting that Respondent would then have a one-week extension of the deadline for the filing of its subsequent submission.
28. On September 29, 2010, Claimants filed their Memorial on the Merits.
29. On December 6, 2010, Respondent filed its Memorial on Jurisdiction, and Claimants' Counter-Memorial on Jurisdiction was subsequently filed on January 24, 2012.

30. On February 4, 2011, the Tribunal issued Procedural Order No.1, ruling that Respondent's jurisdictional objections would be dealt with as a preliminary question, and that the proceeding on merits was accordingly suspended. The Tribunal also decided that a second round of pleadings on jurisdiction would be filed, with Respondent to file their Reply on Jurisdiction by March 7, 2011, and Claimants to file their Rejoinder on Jurisdiction within thirty (30) days of their receipt of Respondent's Reply on Jurisdiction. Additionally, the Tribunal proposed two sets of dates for the hearing on jurisdiction.
31. On February 9, 2011, the Respondent filed a request for the Tribunal to decide on production of documents. Subsequently, Claimants filed observations on the Respondent's request on February 14, 2011, and Respondent filed a response on February 21, 2011.
32. On February 24, 2011, the Parties were invited to consult in regard to the schedule for the forthcoming hearing, and to submit an agreed proposal by April 25, 2011.
33. On February 28, 2011, Claimants filed a reply on Respondent's request for production of documents.
34. On March 1, 2011, the Parties were informed that the Tribunal, after careful and due deliberation, had decided not to grant Respondent's Request for the Production of Documents at this jurisdictional stage. It was added, however, that the Tribunal did not preclude a similar request at a later stage.
35. On March 10, 2011, Respondent filed its Reply on Jurisdiction.
36. On April 12, 2011, Claimants filed a request for provisional measures, asserting that Respondent had initiated measures to collect taxes that would result in Respondent's effective acquisition of title to Claimants' Argentine holding company, Interinvest S.A. ("Interinvest"), and was thus requesting that the Tribunal order Respondent to halt any court or administrative collection proceedings against this company. Specifically, Claimants sought an interim order directing Respondent to withdraw or otherwise cease and desist from enforcing the tax-related payment orders that it had issued until the Tribunal rendered its award. They also requested that the Tribunal issue an immediate order preserving the *status quo ante* until such time as it ruled on this application for provisional measures. Claimants further requested that the Tribunal issue an emergency, temporary order prohibiting Respondent from enforcing the existing tax payment orders or from issuing any new ones.
37. On April 13, 2011, the Tribunal fixed a procedural calendar for the filing of the Parties' submissions on Claimants' request for the Tribunal to decide on provisional measures.
38. On April 20, 2011, Respondent submitted its observations on Claimants' request for an emergency, temporary order, stating that neither the ICSID Convention nor the Arbitration Rules made provision for the issuing of emergency, temporary orders, and that in any case, the absence of urgency was manifest in this instance. As such, Respondent requested that the Tribunal reject the request, and in addition reserved its rights and the State's power to levy taxes and to enforce

such rights through such channels and in such courts, tribunals and otherwise as may be appropriate.

39. On April 26, 2011, Respondent requested an extension of the deadline that had been set out during the first session for the filing of new documents.
40. After consulting with the Parties, on April 27, 2011, the Tribunal extended the deadline for the Parties to submit new documents; fixed a procedural calendar for the filing of the Parties' subsequent submissions on Claimants' requests for provisional measures; and invited the Parties to confer and to reach agreement on the structure, schedule and other matters regarding the hearing.
41. Also on April 27, 2011, Claimants filed their Rejoinder on Jurisdiction.
42. On April 29, 2011, the Tribunal issued Procedural Order No. 2, denying Claimants' request for an emergency, temporary order, noting that the Parties would be able to fully present their arguments in such regard during the hearing on jurisdiction. The Parties were further invited to refrain from aggravating or extending the dispute.
43. On the same date, Claimants renewed their request for an emergency, temporary order, in light of the fact that Interinvest had been served with a notice for immediate payment of taxes. Respondent was invited to comment on Claimants' request by May 4, 2011.
44. Also on April 29, 2011, Respondent filed observations on Claimants' request for provisional measures of April 12, 2011. Claimants filed a response on May 4, 2011.
45. On May 6, 2011, Claimants informed the Tribunal of the Parties' agreement concerning the organization of the hearing on jurisdiction, which was later confirmed by the Respondent. On the same date, Claimants filed their Reply on their Request for Provisional Measures.
46. On May 13, 2011, the Parties were informed that further to their exchanges on the matter of Claimants' request for an emergency temporary order of April 29, 2011, the Tribunal had determined that in view of the proximity of the hearing, there was no imminent or sufficiently imminent threat until the hearing, and as such Claimants' request was denied.
47. Also on May 13, 2011, Respondent filed a Rejoinder on Provisional Measures.
48. On May 27-31, 2011, the Tribunal held a hearing on jurisdiction and Provisional Measures at the seat of the Centre in Washington D.C.
49. On June 8, 2011, the Tribunal issued Procedural Order No. 3, posing questions to the Parties after the hearing.
50. The Parties filed their answers to the questions posed by the Tribunal in accordance with the procedural calendar that was set forth in Procedural Order No. 3, and on July 5, 2011, Claimants made a further submission to complement their answers.

51. On August 26, 2011, Ms. Annalise Nelson was appointed Assistant to the President of the Tribunal with the agreement of the Parties.
52. On August 30, 2011, Claimants filed a letter concerning the conclusion of the reorganization proceedings of Aerolíneas Argentinas S.A. in Argentina and addressing recent case law, including the recent Decision on Admissibility and Jurisdiction in *Abaclat and others v. Argentina*<sup>19</sup>, and the Order Taking Note of the Discontinuance of the Annulment Proceeding in *ATA v. Jordan*.<sup>20</sup>
53. On October 26, 2011, Respondent filed a letter in response to Claimants' letter of August 30, 2011, and adjoining the expert report of Mr. Juan Antonio Cabezudo Álvarez.
54. On November 8, 2011, Claimants filed a letter in response to Respondent's letter of October 26, 2011. In their letter, Claimants characterized portions of Respondent's letter as rearguing out-of-time its jurisdictional objection arising out of Claimants' alleged lack of *jus standi*. Claimants requested the Tribunal to strike Argentina's belated arguments and disregard the new expert report from Mr. Juan Antonio Cabezudo Álvarez. Claimants also noted recent case law, including the *Impregilo v. Argentina* award<sup>21</sup> and the Decision on Jurisdiction in *Hochtief*.<sup>22</sup>
55. On December 15, 2011, the Tribunal informed the Parties, that it had taken note of the arguments made in Respondent's October 26, 2011 letter and Claimants' November 8, 2011 letter as they relate to the pleadings on jurisdiction, with the exception of the expert report of the Spanish attorney, Mr. Juan Antonio Cabezudo Álvarez, attached to Respondent's letter, and Respondent's arguments based thereon.
56. Also on December 15, 2011, Respondent requested leave from the Tribunal to file certain dissenting opinions in recent case law. The Tribunal granted Respondent's request on December 20, 2011.
57. On December 22, 2011, Respondent filed a letter attaching the above-mentioned dissenting opinions, including those of (i) Professor Brigitte Stern in *Impregilo*; (ii) Mr. Chris Thomas in *Hochtief*; and (iii) Professor Georges Abi-Saab in *Abaclat*.
58. On February 17, 2012, Respondent filed a letter requesting leave from the Tribunal to introduce into the record the recently adopted decisions of the United States Court of Appeals for the

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<sup>19</sup> *Abaclat and others v. Argentine Republic* (case formerly known as *Giovanna a Beccara and others*) (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, August 4, 2011 (hereinafter "*Abaclat v. Argentina*"), Exhibit C-769.

<sup>20</sup> *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2), Order Taking Note of the Discontinuance of the Proceeding, July 11, 2011 (hereinafter "*ATA v. Jordan*"), Exhibit C-770.

<sup>21</sup> *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award, June 21, 2011 (hereinafter "*Impregilo v. Argentina*"), Exhibit C-772.

<sup>22</sup> *Hochtief AG v. Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction, October 24, 2011 (hereinafter "*Hochtief v. Argentina*"), Exhibit C-773.

District of Columbia Circuit in *Republic of Argentina v. BG Group plc* of January 17, 2012,<sup>23</sup> and of the arbitral tribunal in the UNCITRAL case, *ICS v. Argentine Republic*.<sup>24</sup>

59. On February 22, 2012, the Tribunal accepted Respondent's letter of February 17, 2012, and provided Claimants with the opportunity to respond to this letter.
60. On February 28, 2012, Claimants filed a letter in response to Respondent's letter of February 17, 2012.
61. On March 26, 2012, Claimants filed a second request for provisional measures, alleging that Respondent had taken unlawful actions on March 14, 2012 that irreparably threaten to harm Claimants' investment and the rights Claimants seek to protect in this arbitration. Specifically, Claimants asserted that Respondent, acting through the Boards of Directors of the Argentine Airlines and their related service companies, which Respondent now controls, announced that they would submit Amended Financial Statements for the fiscal year ending December 31, 2008 for approval at upcoming Shareholders' Meetings. According to Claimants, the amended 2008 financial statements would also amend previously-approved and final financial statements for the fiscal years ending in 2004, 2005, 2006, and 2007.<sup>25</sup>
62. In their second request for provisional measures, Claimants sought an interim order directing Respondent to stop any procedures aimed at approving any formal or material changes to the financial statements of the Argentine Airlines for any year prior to 2008; to stop any procedures aimed at approving the 2008 Amended Financial Statements; to make available to Claimants' representatives in Interinvest, in their capacity as shareholders of the Argentine Airlines, all information available and subject to discussion and vote in any shareholders' meeting(s) to be scheduled in this respect; and to authorize Claimants' representatives in Interinvest to attend, participate and/or exercise their voting rights in any shareholders' meeting(s) to be scheduled in connection with the alleged "adjustments" to the Argentine Airlines financial statements, and in all cases free of any coercion, or physical or legal threat, until the Tribunal renders its Award.<sup>26</sup> Claimants also requested that the Tribunal issue an emergency temporary order preserving the *status quo ante* with respect to the financial statements until such time as it ruled on this application for provisional measures.
63. Also on March 26, 2012, Respondent filed a letter, with attachments, informing the Tribunal of "some new developments of a serious nature" that had unfolded in criminal proceedings in Spain.
64. On March 28, 2012, the Tribunal fixed a procedural calendar for the filing of the Parties' submissions on Claimants' second request for the Tribunal to decide on provisional measures and for Claimants' response to Respondent's letter regarding the Spanish criminal proceedings.

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<sup>23</sup> *Republic of Argentina v. BG Group plc*, United States Court of Appeals for the District of Columbia Circuit, January 17, 2012 (hereinafter "*Argentina v. BG*"), Exhibit C-775.

<sup>24</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, February 10, 2012 (hereinafter "*ICS v. Argentina*"), Exhibit C-774.

<sup>25</sup> Claimants' Second Application for Provisional Measures, March 26, 2012, ¶ 4.

<sup>26</sup> *Id.* at ¶ 5.

65. On April 1, 2012, and following correspondence from the Parties, the Tribunal amended the procedural calendar for the filing of the Parties' submissions on Claimants' second request for provisional measures. The Tribunal directed the Parties to take no actions or steps to aggravate the dispute or to render Claimants' application moot pending the Tribunal's consideration of it.
66. On April 4, 2012, Claimants filed a response to Respondent's March 26, 2012 letter concerning the "new developments" in the Spanish criminal proceedings.
67. On April 11, 2012, Respondent filed observations on Claimants' second request for provisional measures.
68. On April 23, 2012, Claimants filed observations in reply to their second request for provisional measures.
69. On May 4, 2012, Respondent filed observations in rejoinder on Claimants' second request for provisional measures.
70. On May 24, 2012, Respondent filed further observations concerning Claimants' second request for provisional measures and Respondent's fourth objection on jurisdiction. On May 25, 2012, the Tribunal invited Claimants to file a response to Respondent's submission by June 1, 2012. On June 1, 2012, Claimants filed a response to Respondent's submission of May 24, 2012.
71. On September 28, 2012, Respondent directed the Tribunal's attention to (i) the award rendered on August 22, 2012 in *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1); (ii) the decision rendered by a Swedish court on November 9, 2012 concerning the award rendered on October 1, 2007 in the case *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005; and (iii) to a recent submission before the United States Court of Appeals for the Second Circuit in the case of *Thai-Lao Lignite (Thailand) Co., Ltd & Hongsa Lignite (Lao PDR) Co., Ltd v. Government of the Lao People's Democratic Republic*. By letter of October 9, 2012, Claimants, upon invitation from the Tribunal, provided their comments on Respondent's submission of September 28, 2012.

### **III. Position of the Parties on Jurisdiction**

#### **a. Respondent's position**

72. In its written and oral submissions on jurisdiction, Respondent argues the following:
  - 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.

The Respondent requests the Tribunal to declare, pursuant to Rule 41(5) of the ICSID Arbitration Rules, that the Centre has no jurisdiction and that the Tribunal has no competence over this case and, therefore, to dismiss the claim, ordering costs and fees against Claimants, plus interest, pursuant to Rule 47(1)(j) of the Arbitration Rules.<sup>27</sup>

#### **b. Claimants' position**

73. In their written and oral submissions on jurisdiction, Claimants argue the following:

- 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.

Claimants request the following relief: i) a declaration that the dispute is within the jurisdiction of the ICSID Convention and within the competence of this Tribunal; ii) an order dismissing all of Respondent's objections to the admissibility of the dispute and dismissing all of Respondent's objections to the jurisdiction of the Centre and the competence of the Tribunal; and iii) an order that Argentina pay the costs for these proceedings,<sup>28</sup> including the Tribunal's fees and expenses, and the costs of Claimants' representation, subject to interest until the day of payment.<sup>29</sup>

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<sup>27</sup> Rep. ¶ 388.

<sup>28</sup> The Tribunal understands Claimants' submission in paragraph 385(iii) as seeking the costs in respect of deciding on the objections to its jurisdiction.

<sup>29</sup> Rej. ¶ 385.

## IV. Analysis

### a. First Jurisdictional Objection: Claimants' Fulfillment of the Procedural Requirements of Article X of the Treaty

74. Respondent's first jurisdictional objection to this dispute is rooted in Article X of the Treaty, which provides that
1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.
  2. If a dispute within the meaning of section 1 cannot be settled within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made.
  3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances:
    - (a) At the request of one of the parties to the dispute, when no decision has been reached on the merits after a period of 18 months has elapsed as from the moment the judicial proceeding provided for in section 2 of this article was initiated or  
  
When such a decision has been reached, but the dispute between the parties persists;
    - (b) When both parties to the dispute have so agreed.
75. According to Respondent, Claimants have failed to meet the requirements of Article X. Specifically, Respondent alleges that Claimants have not attempted to amicably settle their dispute in accordance with Article X(1) and (2) of the Treaty. Respondent also alleges 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).
76. 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.
77. As the Parties' submissions concern two distinct arguments in the alternative, the Tribunal will address each of them in turn. The Tribunal will first address the issue of Claimants' compliance

with the requirements of Article X of the Treaty. The Tribunal will then assess, on an alternative basis, the issue of the applicability of the MFN clause to Article X of the Treaty.

**i. Compliance with the Requirements of Article X**

**1. Position of Respondent**

**6-month requirement**

78. Respondent argues that Claimants resorted to the jurisdiction of ICSID without first conducting amicable negotiations for at least six months with the Argentine Republic, even though the fulfillment of this requirement is one of the conditions upon which Respondent's consent to ICSID arbitration is based.<sup>30</sup>
79. Under Article X(1) and (2) of the Treaty, disputes "shall, if possible, be amicably settled" within a term of six months.<sup>31</sup> Article X(2) provides that the 6-month negotiation period must be counted from the date of submission of such dispute by either party.<sup>32</sup> According to Respondent, the period starts to run once a party claims that there is disagreement about the facts and rights related to the Treaty, not when the Treaty is breached.<sup>33</sup>
80. Respondent asserts, moreover, that investors must give formal notice of the dispute to Respondent's competent authorities, in order for the government to be aware of the dispute.<sup>34</sup> This notice should describe the nature of the dispute and express the intent to commence amicable negotiations for the purpose of resolving the conflict within the framework of the Treaty.<sup>35</sup>
81. Respondent contends that Claimants failed to give notice to the Argentine authorities of the formal commencement of amicable negotiations and that these negotiations never actually took place.<sup>36</sup> It was only on November 20, 2008 that Claimants notified Respondent of the filing of their claim under the Treaty, when they sent a letter informing Respondent that Claimants had decided to submit an investment dispute under the Treaty.<sup>37</sup>
82. Respondent further submits that none of the documents submitted by Claimants as proof of negotiations mention the rights provided for in the Treaty, international arbitration proceedings, or even the Treaty's requirement to hold amicable negotiations for a term of six months.<sup>38</sup> Although Claimants reference meetings with Argentine officials, nothing demonstrates that those discussions were held within the context of Article X(1). To the contrary, those meetings

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<sup>30</sup> Mem. ¶ 10.

<sup>31</sup> Mem. ¶ 2.

<sup>32</sup> Rep. ¶ 34.

<sup>33</sup> Rep. ¶ 36.

<sup>34</sup> Rep. ¶ 32.

<sup>35</sup> *Id.*

<sup>36</sup> Mem. ¶ 15.

<sup>37</sup> Mem. ¶ 13.

<sup>38</sup> Mem. ¶ 24.

concerned the local legal framework applicable to Argentina's commercial air transportation industry.<sup>39</sup>

83. Respondent notes that Claimants have submitted purported evidence, including newspaper articles and statements by Argentine senators and congressmen, that Respondent was aware that Claimants would resort to ICSID proceedings, but Respondent argues that this evidence is irrelevant.<sup>40</sup> Respondent's objection is based on Claimants' failure to meet the 6-month amicable settlement requirement.<sup>41</sup> Claimants' obligation under Article X(1) and (2) is not fulfilled by media discussions regarding the possibility of resorting to ICSID in the event that negotiations are unsuccessful.<sup>42</sup> Likewise, the statements made by Respondent's congressmen and senators regarding Claimants' possible resort to ICSID do not constitute negotiations; such statements are speculative and do not express the will of the National Congress or the Respondent.<sup>43</sup>

**18-month local court requirement**

84. According to Respondent, the language of Article X(2) and (3) of the Treaty requires that disputes must first be submitted to the domestic courts of competent jurisdiction before they can be submitted to international arbitration.<sup>44</sup> This language is mandatory, and the prior submission of disputes to the local courts is a jurisdictional requirement which may not be set aside or disregarded.<sup>45</sup>
85. Respondent disputes Claimants' assertion that they have met this requirement, based on an expropriation suit that was filed by the Argentine Republic against Interinvest in the Argentine courts. According to Respondent, the expropriation lawsuit under Argentine law and the present arbitration are clearly different, as they do not involve the same parties or subject matter.<sup>46</sup> The purpose of the expropriation lawsuit is for the domestic court to determine the value of the property expropriated by Argentina, while the subject of the arbitration is not only expropriation but also allegations of unfair treatment, arbitrary measures, and failure to grant full protection and security, which are all governed by the Treaty.<sup>47</sup>
86. Respondent further argues that the Request for Arbitration filed with ICSID should have been submitted only *after* the dispute had been submitted to the local courts for 18 months. However, the expropriation suit commenced on February 5, 2009, while the Request for Arbitration was filed by Claimants earlier, on December 11, 2008.<sup>48</sup>

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<sup>39</sup> Mem. ¶ 21.

<sup>40</sup> Rep. ¶¶ 44, 45.

<sup>41</sup> Rep. ¶ 45.

<sup>42</sup> Rep. ¶ 47.

<sup>43</sup> Rep. ¶¶ 48, 49.

<sup>44</sup> Rep. ¶ 9.

<sup>45</sup> Rep. ¶ 17.

<sup>46</sup> Rep. ¶ 71.

<sup>47</sup> Rep. ¶ 72.

<sup>48</sup> Rep. ¶ 69.

87. Finally, Respondent argues that Claimants' assertion that they have satisfied the 18-month court requirement contradicts their invocation, through the Treaty's MFN clause, of the Argentina-U.S. or Argentina-Australia BITs. Both of the latter BITs establish that disputes may only be submitted to international arbitration if they have *not* been submitted to the local courts.<sup>49</sup>

### **Futility**

88. Respondent argues that Claimants are not entitled to an excuse from the requirements of Article X by reason of futility. Argentine law guarantees the judicial protection of the rights at issue, and Claimants did not encounter any obstacles in the filing of judicial claims. The Argentine courts routinely adopt final and provisional decisions in less than eighteen months, in both ordinary and expedited summary proceedings.<sup>50</sup> Moreover, there is no basis for Claimants to assert that they would be required to incur disproportionate court costs in pursuing a remedy before the Argentine courts, and there is no basis on which to conclude that the Argentine courts lack independence.<sup>51</sup>

## **2. Position of Claimants**

### **6-month requirement**

89. Claimants assert that they have complied with the 6-month period in the Treaty, as they submitted their request for arbitration well after six months had elapsed from the time Argentina "instigated" the dispute.<sup>52</sup> By December 11, 2008, the Parties had gone through more than a year of intense negotiations and no fewer than three attempted settlement agreements.<sup>53</sup>
90. Claimants assert that Article X requires neither a formal notice nor express allegations of Treaty breaches. The first part of Article X(1) of the Treaty broadly defines the term "disputes" as "[d]isputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement." This broad definition of disputes does not refer to the legal basis of such disputes nor does it require that any settlement negotiations be formally held under the Treaty or address or allege breaches of specific Treaty provisions. It requires only that the dispute be related to an investment.<sup>54</sup>
91. According to Claimants, Article X(1) provides a "best-efforts" clause to attempt to settle the dispute, and Article X(2) provides a "cooling-off" period whereby either party can proceed to the next stage as soon as six months have passed since the instigation or initiation of the dispute itself.<sup>55</sup> The sole condition for proceeding from amicable settlement attempts to the next step is that the dispute "cannot be settled within six months from the date on which one of the parties to the dispute instigated it."<sup>56</sup>

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<sup>49</sup> Rep. ¶ 73.

<sup>50</sup> Rep. ¶ 75.

<sup>51</sup> Rep. ¶¶ 76-84.

<sup>52</sup> CM ¶ 22(ii).

<sup>53</sup> Rej. ¶ 11.

<sup>54</sup> CM ¶ 76.

<sup>55</sup> Rej. ¶¶ 5, 70-71.

<sup>56</sup> CM ¶ 82.

92. Claimants assert that the Treaty’s 6-month cooling off period starts to run as of the date on which one of the parties to the dispute “instigated” (“*promovió*”) the dispute.<sup>57</sup> This “instigation” of a dispute refers to the act or omission actually triggering the dispute. Thus, the 6-month period starts to run not when a formal breach of the treaty is alleged, raised or communicated, but rather when the disputed conduct occurs.<sup>58</sup>
93. Claimants note that while other treaties to which one of the Parties is a signatory may explicitly require a notification of the dispute under the BIT before the 6-month period can began to run, no such requirement is included in Article X of the Treaty.<sup>59</sup> Furthermore, under Article X, there is no requirement that a claimant raise formal or explicit allegations of the Treaty breach.<sup>60</sup> Considering that the dispute is to be submitted first to local tribunals and only thereafter to international arbitration, Article X cannot reasonably be construed to require that formal *treaty* allegations be made for the “dispute” to exist.<sup>61</sup> Furthermore, international jurisprudence holds that it is not necessary for a State to expressly refer to a specific treaty in its exchanges with the other State—what matters is that the exchanges “refer to the subject-matter of the treaty.”<sup>62</sup>
94. Claimants assert that, as a matter of fact, Respondent “instigated” this dispute as early as October 2002, after it failed to implement promised relief measures for the Argentine Airlines.<sup>63</sup> Alternatively, Claimants assert that the “dispute” began in October 2004, when Respondent rejected Claimants’ request for an airfare increase.<sup>64</sup> The dispute intensified in 2005 and 2006, and, after lengthy negotiations, Respondent again promised relief measures. However, by approving an insufficient airfare increase and failing to provide promised subsidies, Respondent again breached its agreement with Claimants.<sup>65</sup>
95. According to Claimants, the dispute continued in April 2008, when Claimants requested Respondent to take urgent action to correct governmental measures impacting its operations, including the approval of airfare increases or subsidies.<sup>66</sup> In May 2008, Respondent, Interinvest and the Argentine Airlines concluded an agreement to change the Airlines’ corporate structure, increasing Respondent’s interest and granting a controlling interest to a prospective private Argentine investor. As part of this agreement, Respondent agreed to raise domestic fares and grant relief measures. However, Respondent failed to do so, and the deal with the prospective investor ultimately fell through.<sup>67</sup>
96. On July 17, 2008, the Parties reached an agreement regarding the sale of the Argentine Airlines to Respondent. Under the agreement, the Parties agreed that the purchase price would be

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<sup>57</sup> *Id.*

<sup>58</sup> CM ¶ 87.

<sup>59</sup> CM ¶ 96.

<sup>60</sup> Rej. ¶ 97.

<sup>61</sup> Rej. ¶¶ 97, 113.

<sup>62</sup> Rej. ¶ 132.

<sup>63</sup> CM ¶ 100.

<sup>64</sup> Rej. ¶ 16.

<sup>65</sup> *Id.*

<sup>66</sup> Rej. ¶ 17.

<sup>67</sup> CM ¶ 106; Rej. ¶ 17.

determined by independent appraisers appointed by each Party and that, if there were still a disagreement on the price, the Parties would appoint a third independent appraiser.<sup>68</sup> According to Claimants, however, Respondent continued the dispute on July 24, 2008, when it submitted a bill to Congress for the “repossession” of the Argentine Airlines. In doing so, Claimants allege, Respondent breached the July 17, 2008 Agreement.<sup>69</sup> On September 18, 2008, the Argentine Congress passed a law approving Respondent’s repossession of the Argentine Airlines. However, Congress determined that the amount of compensation would be calculated exclusively by the Argentine *Tribunal de Tasaciones de la Nación*, in disregard of the third-party valuation mechanism set out in the July 2008 Agreement, thus further entrenching the dispute.<sup>70</sup>

97. Finally, Claimants assert that even if this Tribunal required the “dispute” between the Parties to concern the Treaty, Claimants have met this requirement. Respondent was aware that, if the ongoing negotiations failed, Claimants could submit an ICSID complaint. The dispute between Claimants and Respondent was a national event and was extensively discussed in the Argentine press starting in early 2008.<sup>71</sup> During a Congressional debate in August 2008, various congressmen acknowledged that Claimants were preparing their ICSID arbitration under the Treaty. Moreover, during a September 1, 2008 Congressional hearing, Claimants’ representatives confirmed they would resort to international arbitration if Respondent failed to pay fair compensation.<sup>72</sup>
98. Therefore, according to Claimants, even if a “dispute” did not exist between the Parties between 2002 and 2007, the evidence demonstrates that the current dispute in connection with Claimants’ investments had been instigated, raised and formally discussed by May 2008. The evidence also demonstrates that the Parties had attempted to solve this dispute amicably through several negotiations that lasted more than six months, including the negotiations that surrounded the May 15, 2008 Agreement and the July 17, 2008 Agreement.<sup>73</sup>

### **18-month local court requirement**

99. According to Claimants, the 18-month local court requirement of Article X(3) has been satisfied, because Argentine tribunals have had the opportunity to undo the measures giving rise to this dispute for more than eighteen months, and yet have failed to do so.<sup>74</sup> Claimants cite to multiple actions brought before the Argentine courts. First, the *Tribunal de Tasaciones*, in two different valuations, in October 2008 and in January 2009, found that the Argentine Airlines were worth approximately negative US\$832 million and negative US\$770 million.<sup>75</sup> Second, following Interinvest’s rejection of the January 2009 valuation, Respondent initiated a lawsuit in an Argentine court seeking the expropriation of the shares of the Argentine Airlines. That court has not yet issued a substantive decision in the case.<sup>76</sup>

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<sup>68</sup> CM ¶ 111.

<sup>69</sup> CM ¶ 112.

<sup>70</sup> CM ¶ 123.

<sup>71</sup> CM ¶ 135.

<sup>72</sup> CM ¶ 136.

<sup>73</sup> CM ¶ 127.

<sup>74</sup> CM ¶ 22(iii).

<sup>75</sup> CM ¶ 140.

<sup>76</sup> *Id.*

100. Claimants acknowledge that both the *Tribunal de Tasaciones*' valuation and the expropriation lawsuit initiated by the GOA are based exclusively on Argentine law. However, these suits relate to the same subject matter now before this Tribunal: the question of compensation for Respondent's take-over of Claimants' investments.<sup>77</sup>
101. Claimants also acknowledge that the 18-month period had not lapsed when they requested arbitration on December 11, 2008. However, at present, Respondent's expropriation lawsuit has been before Argentine tribunals for well over 18 months without resulting in any substantive decision.<sup>78</sup> Claimants assert, as a result, that (i) Argentine courts have had more than 18 months to decide the main issues in this dispute and that (ii) the core purpose of the local court requirement—to give the host State the opportunity to consider and/or remedy the disputed measures before they are brought to international arbitration—has been satisfied.<sup>79</sup> International jurisprudence supports the position that under these circumstances, such preconditions have been met.<sup>80</sup>
102. Finally, Claimants assert that their satisfaction of the 18-month local court requirement of Article X(3) does not contradict the dispute settlement provisions of the U.S.-Argentina BIT.<sup>81</sup> The U.S.-Argentina “fork in the road” clause requires the investor to choose either a local court remedy or international arbitration. However, here, it was Respondent, and not Claimants, who initiated the local expropriation suit.<sup>82</sup> According to Claimants, this position is fully in accordance with Article X(2) of the Treaty, which makes clear that the proceedings before local tribunals may be submitted “at the request of either party.”<sup>83</sup>

### **Futility**

103. Claimants submit that even if this Tribunal were to determine that the requirements of Article X have not been met, it would be futile to require Claimants to make further attempts at amicable settlement or to require Claimants to resubmit the dispute to the Argentine courts for an additional 18 months.<sup>84</sup>
104. According to Claimants, they have attempted to amicably settle the present dispute on several occasions from September 2002 onwards, and with even greater focus as of May 2008.<sup>85</sup> In addition to these negotiations, Claimants have also held additional negotiations with Argentina, from October 2008 until early 2010, specifically concerning the compensation due to Claimants for the expropriation of their investment.<sup>86</sup>

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<sup>77</sup> CM ¶ 139.

<sup>78</sup> Rej. ¶ 161.

<sup>79</sup> *Id.*

<sup>80</sup> Rej. ¶¶ 162-165.

<sup>81</sup> Rej. ¶ 171.

<sup>82</sup> CM ¶ 143.

<sup>83</sup> *Id.*

<sup>84</sup> CM ¶ 22(iv).

<sup>85</sup> CM ¶ 158.

<sup>86</sup> CM ¶ 159.

105. Claimants also argue that requiring them to resubmit the dispute once they have satisfied the 18-month local court requirement would serve no purpose whatsoever and would only add cost and time to the proceedings.<sup>87</sup> Furthermore, the fact that the core matter of the dispute has already been pending for more than 18 months demonstrates that it would be futile to now require Claimants to litigate for an additional 18 months.<sup>88</sup> Jurisprudence supports the view that when a requirement to resort to local courts would be futile, ineffective and/or would not provide the claimant with appropriate means of legal redress, that requirement should be waived.<sup>89</sup>
106. Claimants argue that in any event, the failure to comply with the 6- and 18-month waiting periods is not a bar to jurisdiction. According to Claimants, the majority of ICSID tribunals addressing this issue have found that such waiting periods constitute procedural, rather than jurisdictional, requirements.<sup>90</sup>

### 3. Analysis of the Tribunal

#### (a) The Requirements of X(1) and X(2)

107. Article X(1) and (2) reads as follows:

1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.
2. If a dispute within the meaning of section 1 cannot be settled within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made. *[Si una controversia en el sentido del párrafo 1 no pudiera ser dirimida dentro del plazo de seis meses, contando desde la fecha en que una de las partes en la controversia la haya promovido, será sometida a petición de una de ellas a los tribunales competentes de la Parte en cuyo territorio se realizó la inversión.]*

...

108. The Tribunal agrees with Claimants that Article X(1) can fairly be interpreted as a general “best efforts” obligation for the parties to attempt to amicably settle their dispute. However, it would be an overly literal interpretation of Article X(2)’s “cannot be settled within six months” language to read it as simply requiring that the Parties *wait* for six months after the dispute began before they proceed to the next step in the dispute settlement process. The natural reading of Articles X(1) and (2) together is that the Parties are obligated to make their best efforts to amicably settle their dispute, and that they are required to do so for six months before proceeding to the next step.

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<sup>87</sup> CM ¶ 22(iv).

<sup>88</sup> Rej. ¶ 182.

<sup>89</sup> Rej. ¶ 192.

<sup>90</sup> CM ¶ 168.

### i. The Commencement of the 6-Month Period

109. Claimants assert that the relevant moment for Article X(2) is the date on which Respondent's substantive *conduct* that is in dispute takes place.<sup>91</sup> In other words, the key inquiry is when the act or omission that triggered the dispute occurred. To reach this conclusion, Claimants point to the use of the word "*promover*" in the Spanish language original of Article X(2), the relevant portion of which reads "*contando desde la fecha en que una de las partes en la controversia la haya promovido.*" They translate "*promover*" as "initiate," "provoke," "give rise to," "cause," and "instigate."<sup>92</sup> From this, Claimants conclude that "*promover una controversia*" refers to the "substantive conduct, acts or omissions" committed by Respondent that are at the origin of this dispute.<sup>93</sup> Claimants note that "*promover*" is different from the verbs used in the dispute resolution preconditions of other BITs, which instead require the parties to "*someter*" a dispute or define the date that a dispute "*surgió.*"<sup>94</sup>
110. Claimants' interpretation does not ascribe a natural or ordinary meaning to the phrase "*promover una controversia*" or "instigate a dispute." Claimants' argument focuses almost exclusively on the word "*promover*," while largely ignoring the meaning or importance of the word "dispute." While "instigate" or "initiate" or "provoke" all suggest the commencement of something, that something in question is the dispute itself, not the acts giving rise to the dispute. Both "dispute" and "*controversia*" are synonyms for "argument" or "disagreement." As stated by the PCIJ in *Mavrommatis*, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."<sup>95</sup> To instigate a dispute, therefore, refers to the time at which the *disagreement* was formed, which can only occur once there has been at least some exchange of views by the parties. It does not refer to the commission of the act that caused the parties to disagree, for the very simple reason a breach or violation does not become a "dispute" until the injured party identifies the breach or violation and objects to it.
111. Claimants assert that their interpretation is not unprecedented and that other investment treaties have similar provisions. However, the only provision Claimants have identified is NAFTA Article 1120, which has starkly different language from Article X(2).<sup>96</sup> NAFTA Article 1120 includes the clause "provided that six months have elapsed since the events giving rise to a Claim." But Article X(2) makes no mention of "the events giving rise to the claim," and it would be a stretch to read such a phrase into the plain meaning of "*promover una controversia.*" Furthermore, to the extent that the purpose of the 6-month requirement is to grant the host state the opportunity to redress the problem before the investor submits the dispute to arbitration, measuring from the date that the breach occurred would not further this policy goal.<sup>97</sup> Without

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<sup>91</sup> CM ¶ 87.

<sup>92</sup> CM ¶ 84.

<sup>93</sup> CM ¶¶ 85, 86.

<sup>94</sup> Rej. ¶¶ 129-30.

<sup>95</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11. (hereinafter "*Mavrommatis*").

<sup>96</sup> Rej. ¶ 124.

<sup>97</sup> See, e.g., *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Case), Award of September 3, 2001, ¶ 185 (hereinafter "*Lauder v. Czech Republic*"), Exhibit C-329 ("[T]he waiting period does not run from the date [on] which the alleged breach occurred, but from the date [on] which the State is advised that said breach has occurred.

some exchange of views, Respondent could have no idea that an investor believed it to be in breach.

## ii. The Requirement of Formal Notification

112. The ordinary meaning of Article X(1) supports Claimants' argument that they were not required to give formal notice in order to commence settlement negotiations. Article X(1) simply defines "disputes" as "arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement." There is nothing in this language that suggests that Claimants must formally notify Respondent that there is a dispute under the Treaty or identify the specific provisions of the Treaty that are the basis of the dispute. All that is required for a dispute to exist under Article X(1) is that it be "in connection with investments." In this regard, Claimants' citation of *Vivendi I* is on point.<sup>98</sup> *Vivendi I* concerned the France-Argentina BIT, which contained an article with a similar definition of disputes as "relating to investments made under this Agreement." The tribunal concluded that this article "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."<sup>99</sup>
113. Claimants correctly point out that other BITs expressly define "dispute" with reference to the dispute's legal basis under those BITs. For example, the U.S.-Ecuador BIT describes disputes as follows:

For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to: (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.<sup>100</sup>

114. The U.S.-Ecuador BIT was addressed by the tribunals in *Murphy*<sup>101</sup> and *Burlington*,<sup>102</sup> which determined that a dispute does not exist, and settlement of this dispute cannot be attempted, until it has been articulated in terms of a treaty breach. Specifically, the tribunal in *Murphy* held that the claimants were required to inform the respondent of their intention to hold talks for purposes of settling their claim under the BIT.<sup>103</sup> However, both *Murphy* and *Burlington* are

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This results from the purpose of the waiting period, which is to allow the parties to enter into good-faith negotiations before initiating the arbitration.").

<sup>98</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002 (hereinafter "*Vivendi I v. Argentina*"), Exhibit C-403.

<sup>99</sup> *Vivendi I v. Argentina*, Decision on Annulment, at ¶ 55.

<sup>100</sup> Rej. ¶ 105, citing Article VI(1) of the U.S.-Ecuador BIT.

<sup>101</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, Decision on Jurisdiction, (ICSID Case No. ARB/08/4), December 15, 2010, at ¶ 104 (hereinafter "*Murphy v. Ecuador*"), Exhibit C-417.

<sup>102</sup> *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction, June 2, 2010, at ¶ 337 (hereinafter "*Burlington v. Ecuador*"), LA AR 6.

<sup>103</sup> See *Murphy v. Ecuador*, Decision on Jurisdiction, at ¶¶ 107-109.

distinguishable based on the language of the U.S.-Ecuador BIT, and both tribunals make clear that their determination is predicated on the treaty's definition of "dispute."<sup>104</sup>

115. International jurisprudence also supports the general proposition that there is no requirement that a party formally notify the other party that negotiations are occurring under a particular treaty, in order for negotiations to be occurring with respect to a dispute. As the International Court of Justice ("ICJ") has stated:

[I]t does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.<sup>105</sup>

116. Because Article X and international jurisprudence are clear that, under these circumstances, Claimants were not obligated to initiate formal negotiations under the Treaty or to notify Respondent of their possible resort to ICSID arbitration under the Treaty, the Parties' voluminous materials regarding discussions in the Argentine media and within the Argentine Senate regarding the possibility of recourse to ICSID arbitration are not relevant.

### iii. Determining When the Dispute Began

117. Considering that a formal notification of the existence of the dispute or the start of the negotiation period was not required, the issue for the Tribunal is to identify when the "dispute" can be considered to have begun. Considering that the Request for Arbitration was brought on December 11, 2008, the critical date is therefore June 11, 2008, six months earlier.
118. It is clear from the voluminous briefing on this subject that the two sides have had differing views on the regulation and control of the Argentine Airlines for years, and that the Parties have had numerous communications and exchanges, that have included the highest levels of the Argentine government.<sup>106</sup> However, the disagreements during this period have been dynamic, and Claimants' arguments reflect this. Claimants have identified two "core issues" to their dispute: 1) a disagreement over the regulatory framework that was applied to Claimants

<sup>104</sup> See *Burlington v. Ecuador*, Decision on Jurisdiction at ¶¶ 335-337 ("[T]he "dispute" to which Article VI(3)(a) refers is one that relates to "an alleged breach of any right conferred or created by this Treaty with respect to an investment." Stated otherwise, as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI."); see also *Murphy v. Ecuador*, Decision on Jurisdiction, at ¶ 103.

<sup>105</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports November 26, 1984, ¶ 83 (hereinafter "*Nicaragua v. U.S.A.*"), Exhibit C-406. See also *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, April 1, 2011, ¶ 30, Exhibit C-554, (hereinafter "*Georgia v. Russian Federation*").

<sup>106</sup> See, e.g., CM ¶ 103.

(regarding the airfare caps imposed upon the Argentine Airlines) and 2) a disagreement over the compensation owed to Claimants for the expropriation of their investment (through Respondent's direct expropriation of Interinvest's shares).<sup>107</sup> The first issue, an alleged "creeping expropriation" of the *Argentine Airlines*, purportedly began in 2004.<sup>108</sup> The second issue, the alleged direct expropriation of *Interinvest's* shares in the Argentine Airlines, began much later.

119. International courts and tribunals agree that for a dispute to exist, it must have crystallized into an actual disagreement. As the ICJ held in *Mavrommatis*, "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."<sup>109</sup> It must be shown that "the claim of one party is positively opposed by the other."<sup>110</sup> As the *Maffezini* tribunal recognized, the dispute "must relate to clearly identified issues between the parties and must not be merely academic...The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim."<sup>111</sup> A diplomatic request by an investor to a host State for further assistance does not, on its own, necessarily express disagreement on the parties' rights and obligations.<sup>112</sup> Instead, only when a request "manifest[s] a disagreement over the rights and obligations" can it be considered a dispute.<sup>113</sup>
120. It is clear that a disagreement between the Parties regarding the *regulatory treatment* of the Argentine Airlines had developed long before the June 11, 2008 critical date, and that the Parties had conducted substantial negotiations regarding this disagreement. Claimants assert that a dispute has existed in this case since late 2004, when the Respondent rejected the Argentine Airlines' request for an increase in airfare caps.<sup>114</sup> This dispute allegedly escalated in 2006 when, despite prior promises to increase the airfare caps, Respondent now conditioned this and other measures on Claimants' transfer of a percentage of their shares in ARSA.<sup>115</sup> It is true that many of the discussions between the Parties took the form of a *request* from Claimants for various promised regulatory changes. However, a 2004 letter from the Argentine Airlines to Respondent makes clear their position that Respondent has failed to properly apply its

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<sup>107</sup> CM ¶ 99.

<sup>108</sup> Rej. ¶ 91.

<sup>109</sup> *Mavrommatis*, *Judgment No. 2*, p. 11.

<sup>110</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90.

<sup>111</sup> *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Jurisdiction, January 25, 2000 (hereinafter "*Maffezini v. Spain*"), at ¶ 94 (internal citations omitted).

<sup>112</sup> See *Burlington v. Ecuador*, Decision on Jurisdiction, at ¶ 298 ("While Claimant's expectation is conceivably a diplomatic request for further assistance in connection with the indigenous opposition in the Block, this request for assistance does not express disagreement with the manner in which the Respondent has fulfilled its obligation to provide protection and security in the Block. In and of itself, a request for assistance does not express disagreement on the parties' rights and obligations are, unless the surrounding context suggests otherwise, *i.e.* that the party whose assistance is requested has thus far failed to abide by its duty to assist.")

<sup>113</sup> See *id.* at ¶ 320 ("In the view of the Tribunal, the 4 December 2002 letter is sufficient to raise a "dispute" within the meaning of Article VI(3) of the Treaty. While the main purpose of the letter is to request assistance from PetroEcuador with the episodes of violence and the opposition met in the Block, the tone and the context of the letter do manifest a disagreement over rights and obligations.")

<sup>114</sup> CM ¶ 101.

<sup>115</sup> CM ¶ 102.

regulations.<sup>116</sup> This demonstrates that Claimants plainly disagree with Respondent over the application of Argentine laws and regulations to them.

121. It is less clear that a disagreement between the Parties regarding the *expropriation* of Interinvest's shares existed before June 11, 2008. While Claimants assert that they disagreed with Respondent over the fair valuation of their investment by April 2008,<sup>117</sup> the evidence on this is not so clear. At that point, Respondent's first attempt to find a buyer for the Argentine Airlines had failed, because Claimants had rejected the potential buyer's purchase offer.<sup>118</sup> However, it seems difficult to characterize Claimants' rejection of a *third party's* purchase offer as a *legal* dispute with Respondent, rather than simply a failed business transaction. The Parties subsequently executed an agreement providing for Respondent to buy the shares of the Argentine Airlines on July 17, 2008. While Claimants argue that the negotiating environment of this agreement was hostile and threatening,<sup>119</sup> it is conceptually difficult to view an executed *agreement* as constituting a legal *dispute*.<sup>120</sup>
122. The issue, therefore, is whether it is enough for purposes of Article X(2) that by June 11, 2008, a disagreement existed concerning the *regulatory treatment of the Argentine Airlines* (and was being negotiated), even if a clear disagreement regarding the *valuation of Interinvest's (ultimately expropriated) shares in the Argentine Airlines* had not yet crystallized. In other words, are these two disagreements sufficiently related that negotiations under the first disagreement are enough to satisfy Article X(2)?
123. The answer to this question is yes. International jurisprudence suggests that the *subject matter* of the negotiations should be the same as the dispute that is brought before the court or tribunal. In the recent *Georgia v. Russia* case, the ICJ noted that "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter."<sup>121</sup> The tribunal in *CMS*, describing the existence of multiple types of sovereign actions that could constitute disputes, noted that "as long as [these multiple different actions] affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different

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<sup>116</sup> See, e.g., Merits ¶ 124, citing an October 4, 2004 letter from the Argentine Airlines to the Argentine Secretary of Transportation, Mr. Ricardo Jaime, in which they request an increase in the airfare caps. In this letter, the Argentine Airlines assert that the current airfare caps imposed on them are "completely out of step with the cost increases brought about by the fuel price increase, thereby distorting the remunerative rate concept established in Law No. 19,030, the Law on Commercial Aviation Policy." See Ex. C-71.

<sup>117</sup> Rej. ¶ 91.

<sup>118</sup> CM ¶ 104.

<sup>119</sup> CM ¶ 107.

<sup>120</sup> Later, on September 18, 2008, Congress passed a law approving Respondent's repossession of the Argentine Airlines, and authorized compensation to be calculated by the *Tribunal de Tasaciones de la Nación*, in disregard of the third-party valuation mechanism of the July 2008 agreement. CM ¶ 123. Following a disagreement between the *Tribunal de Tasaciones* and Credit Suisse, Claimants' valuator, as to the value of the Argentine Airlines, Congress passed a law on December 22, 2008 authorizing the expropriation of the Argentine Airlines' shares that belonged to Interinvest. Merits ¶ 276.

<sup>121</sup> *Georgia v. Russian Federation*, Preliminary Objections, Judgment, April 1, 2011, ¶ 30, Exhibit C-554. See also *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, September 15, 2003, ¶ 14.5, Exhibit C-297, noting that, in that case, "[t]here is no doubt that the subject matter of the two mediations was the Claimant's Parkview Project and the conduct of Ukrainian authorities in respect thereto. This is sufficient for the purposes of the requirement in Article VI(2) of the BIT."

sources or emerge at different times does not necessarily mean that the disputes are separate and distinct.”<sup>122</sup>

124. Claimants have characterized the subject matter of their dispute as concerning Respondent’s treatment of Claimants’ investments in the Argentine Airlines and Interinvest.<sup>123</sup> Respondent has retorted that the subject matter of the negotiations between the Parties was merely contract issues and matters of domestic law, which is different from the subject matter of a BIT claim.<sup>124</sup> However, Respondent’s argument is really just a general assertion that the claim must be characterized in the same terms (and possibly employing the same legal theories) when it is being negotiated as when it is finally subjected to arbitration. Again, nothing in the text of Article X(1)’s reference to “a dispute in connection with investments” requires that the dispute be characterized solely in terms of Treaty violations.
125. Given that the formal expropriation alleged does indeed appear to be closely related to, and follow, what the Claimants characterize as “only the culmination of a creeping expropriation” that began in October 2004,<sup>125</sup> it appears reasonable to conclude that these two core issues are related to the point that they share the same subject-matter. Therefore, given that the dispute had crystallized before June 11, 2008, and that the Parties continued to exchange views and work towards agreement after this point, it is clear that the Claimants have satisfied the 6-month amicable settlement period.

#### (b) Futility

126. Even if the Tribunal were to find that Claimants had not formed a “dispute” within the meaning of Article X(1) before June 11, 2008, and had not attempted to amicably settle the dispute by the time they filed the Request for Arbitration on December 11, 2008, the Claimants’ failure to comply with this obligation should be excused for reasons of futility. Claimants have asserted that further negotiations with Respondent would be futile, because they have attempted to settle this dispute from 2002 until May 2008, and then again between October 2008 and early 2010.
127. ICSID tribunals have held that waiting periods may be waived when further negotiations would be futile. For example, the tribunal in *Occidental* held that additional “attempts at reaching a negotiated solution were indeed futile in the circumstances” where the investor had sought to rebut allegations in a *caducidad* proceeding, to no avail, for 18 months before the *caducidad* decree was finally issued.<sup>126</sup>
128. Claimants assert that they continued negotiations with Respondent between October 2008 and early 2010.<sup>127</sup> These negotiations concerned a potential transaction whereby Respondent would assume Claimants’ obligations and rights with respect to purchase orders Claimants had placed

<sup>122</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003, at ¶ 109 (hereinafter, “*CMS v. Argentina*”).

<sup>123</sup> Rej. ¶ 132.

<sup>124</sup> Mem. ¶¶ 39-40.

<sup>125</sup> Merits ¶ 501.

<sup>126</sup> *Occidental Petroleum Corporation et al. v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Jurisdiction, September 9, 2008, ¶¶ 93-95, Exhibit C-439.

<sup>127</sup> CM ¶¶ 159.

for several Airbus aircraft on the Argentine Airlines' behalf. According to Claimants, Respondent was interested in assuming these commitments in exchange for the termination of these ICSID proceedings.<sup>128</sup> Respondent has not challenged this assertion.<sup>129</sup> While a draft agreement was initialed on February 8, 2009, and although Respondent later obtained financing from the Spanish government for this agreement, Respondent ultimately did not sign the agreement.<sup>130</sup>

129. This failed transaction, the negotiations for which lasted at least six months, demonstrates that even after Respondent had received formal notice of Claimants' legal claims against Respondent under the Treaty, the Parties continued to attempt but were ultimately unable to reach any sort of amicable agreement. It is clear, therefore, that requiring Claimants to engage in any further settlement attempts would serve no further purpose.

**(c) The Local Court Requirement of Articles X(2) and (3)**

130. Respondent also argues that Claimants have failed to comply with Articles X(2) and (3), which require that Claimants' dispute must be submitted to a local court of the host State for a period of 18 months before they may submit the dispute to this Tribunal.<sup>131</sup> In response, Claimants have identified two different proceedings that they assert "count" for purposes of Articles X(2) and (3): first, the valuations of the Argentine Airlines that were conducted in October 2008 and January 2009, and second, the expropriation lawsuit that was initiated by Respondent against Interinvest shortly after the January 2009 valuation was completed.
131. Respondent raises several issues with Claimants' identified proceedings. First, Claimants' Request for Arbitration should have been filed only after the dispute was brought before the Argentine courts; in fact, the expropriation proceedings post-date the filing of these ICSID proceedings. Second, the expropriation proceedings only concern local laws, not international investment claims. Third, the parties in the expropriation proceeding—namely, Respondent and Interinvest—are not identical to the parties to this arbitration proceeding.
132. The Tribunal does not agree with Respondent's assertion that the subject matter of the expropriation suit in domestic court is not the same as the subject matter of this arbitration. It is

<sup>128</sup> Merits ¶¶ 284-303; CM ¶¶ 158-65.

<sup>129</sup> See also Exhibit C-235, containing a February 8, 2009 draft agreement between Respondent and Interinvest. In Section 3.1(b) of the agreement, Interinvest would be required to "*desistirá íntegra y expresamente de todos los derechos que pudiera eventualmente invocar, como también a todas las acciones entabladas o en curso, fundados o vinculados a las medidas mencionadas en el párrafo anterior [la re-nacionalización, estatización, expropiación relativa a las empresas del Grupo AA], así como también a cualquier tipo de solicitud de arbitraje y/o conciliación, demanda judicial...*".

<sup>130</sup> CM ¶ 162.

<sup>131</sup> "2. If a dispute within the meaning of section 1 cannot be settled within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made.

3. The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties to the dispute, when no decision has been reached on the merits after a period of 18 months has elapsed as from the moment the judicial proceeding provided for in section 2 of this article was initiated or When such a decision has been reached, but the dispute between the parties persists; (b) When both parties to the dispute have so agreed."

true that the Argentine court proceedings only involved the determination of the value of the expropriated assets, while the ICSID proceeding raises specific issues related to the validity of the expropriation (i.e., fair and equitable treatment, arbitrary and unjustified measures, and full protection and security). As a matter of substance, however, the goal of both suits is to make the Claimants (and Interinvest, in the case of the Argentine proceeding) whole for the economic loss suffered as a result of the nationalization. As the ICJ Chamber in *ELSI* noted,

[T]he local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.<sup>132</sup>

133. The Tribunal also finds that the fact that the local court proceeding was brought by Respondent against Interinvest rather than against Claimants themselves does not affect Claimants' fulfillment of this requirement. As the *ELSI* Chamber acknowledged, international legal remedies may apply "different law to different parties" than local law remedies do, and this should not be a barrier to the fulfillment of any local court remedy requirements. That the domestic expropriation proceedings were brought against Interinvest, an Argentine company owned by Claimants through Air Comet, does not prevent those proceedings from counting for purposes of Article X(2) and (3) when the subject matter of those proceedings is the same as that before this Tribunal.
134. The Tribunal notes, moreover, that the Treaty permits either party to initiate local court proceedings for purposes of Article X. In this case, it was Respondent that initiated the dispute against Interinvest. Therefore, the manner in which the proceedings have been cast by Respondent in local courts should not give rise to a successful objection against the Claimants that they failed to comply with the procedural requirements of Article X, as long as the subject matter of the dispute under the Treaty was considered in the local proceedings, which, in this case, it was.
135. Finally, while Claimants concede that the 18-month local court period had not lapsed at the time they filed their Request for Arbitration, they are correct to note that 18 months have subsequently passed, and the local suit remains pending. As such, the core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.<sup>133</sup>

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<sup>132</sup> *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports, July 20, 1989, ¶ 59, Exhibit C-437.

<sup>133</sup> See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), at 613, ¶ 26 ("For the purposes of determining its jurisdiction in this case, the Court ... need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*. It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. . . . The present Court applied this principle in the case concerning the Northern Cameroons (I.C.J.

136. For the reasons articulated above, this Tribunal finds that the Claimants have satisfied the requirements of Article X(1)(3) of the Treaty. However, because the Claimants invoked, in the alternative, the application of the Treaty's Most-Favored Nation Clause in relation to Respondent's first objection, the Tribunal now turns to this claim.

**ii. The Application of the Most-Favored Nation Clause (Article IV(2)) to Dispute Settlement Provisions**

137. Article IV(2) of the Treaty provides that

In all areas governed by this Treaty, such treatment shall not be less favourable than that accorded by each Contracting Party to investments made within its territory by investors of a third country.

138. In their Request for Arbitration, Claimants invoked the MFN clause in Article IV(2), and asserted that this clause entitles them to use "the more favorable treatment accorded to investors under, for example, the U.S.-Argentina BIT."<sup>134</sup> In their Memorial on the Merits, Claimants again invoke the MFN clause, reference the U.S.-Argentina BIT as an example, and assert that they have complied with all the requirements of the U.S.-Argentina BIT in order to access ICSID arbitration.<sup>135</sup> Then, in their Counter-Memorial, Claimants assert that they rely on the dispute settlement provisions of the Australia-Argentina BIT.<sup>136</sup> Article 13(1) of the Australia-Argentina BIT provides that

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Reports 1963, p. 28), as well as in *Nicaragua Jurisdiction*, when it stated: 'It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.' (I.C.J. Reports 1984, pp. 428-429, para. 83.)"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412 (hereinafter "*Croatia v. Serbia*") ¶ 85, Exhibit C-579 ("The Court observes that as to the first of these two arguments, given the logic underlying the cited jurisprudence of the Court deriving from the 1924 Judgment in the *Mavrommatis Palestine Concessions* case (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2), it does not matter whether it is the applicant or the respondent that does not fulfill the conditions for the Court's jurisdiction, or both of them — as is the situation where the compromissory clause invoked as the basis for jurisdiction only enters into force after the proceedings have been instituted. What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew— or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.").

<sup>134</sup> RFA ¶ 44.

<sup>135</sup> Merits ¶¶ 328-331. Article VII(2) of the U.S.-Argentina BIT provides that in the event of a dispute, the parties "should initially seek resolution through consultation and negotiation." If this is unavailing, the investor may choose to submit the dispute for resolution before a) the courts or administrative tribunals of the State party to the dispute; b) in accordance with any previously-agreed procedures; or c) in accordance with the terms of sub-provision 3. Article VII(3), in turn, provides that if the investor has not submitted the dispute for resolution under VII(2)(a) or (b), and that six months have elapsed from the date the dispute arose, the investor may submit the dispute to ICSID, ICSID Additional Facility, in accordance with UNCITRAL Arbitration Rules, or any other mutually agreed arbitration rules. *See* Ex. C-3.

<sup>136</sup> CM ¶ 7; *see* Ex. C-394.

Any dispute which arises between a Contracting Party and an investor of the other Contracting Party relating to an investment shall, if possible, be settled amicably. If the dispute cannot so be settled, it may be submitted, upon request of the investor, either to:

- (a) the competent tribunal of the Contracting Party which has admitted the investment; or
- (b) international arbitration in accordance with paragraph 3 of this Article.

Article 13(3), in turn, provides that the investor may choose international arbitration proceedings through either ICSID, a tribunal governed by UNCITRAL Rules, or any other mutually-agreed arbitration rules.

### 1. Position of Respondent

139. Respondent asserts that the MFN clause of Article IV(2) of the Treaty may not be used by Claimants to access the dispute settlement provisions of another BIT to which Argentina and a third State are parties, for the following reasons:
140. First, Respondent argues that the obligations contained in Article X—to first hold negotiations and to submit the dispute to the Argentine courts for 18 months—are *jurisdictional* requirements that may not be set aside or disregarded.<sup>137</sup>
141. Second, Respondent characterizes Article X as part of its standing, unilateral offer to arbitrate.<sup>138</sup> This unilateral offer must be accepted by the investor in order for there to be an arbitration agreement, and in accepting the offer the investor is not entitled to alter the terms of acceptance.<sup>139</sup> Arbitration is based on consensus, and if there is no respect for the established conditions of Respondent's offer, there can be no consent to arbitration.<sup>140</sup>
142. Third, Respondent asserts that as a rule, MFN clauses contained in BITs are neither arbitration agreements nor part of the treaty's offer to arbitrate; they cannot therefore be applied to jurisdictional matters.<sup>141</sup> An MFN clause may *only* apply to jurisdictional matters where the State Parties have so consented. This consent, in turn, must be based on the States' clear and unequivocal intentions as expressed in the treaty.<sup>142</sup>
143. Respondent concedes that arbitral tribunals have not adjudicated this issue uniformly. However, according to Respondent, starting with *Maffezini v. Spain*, those tribunals applying MFN clauses to jurisdictional matters have failed to understand that MFN clauses do not extend to dispute settlement provisions and are not a part of offers to arbitrate.<sup>143</sup> Nor do such decisions reflect the

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<sup>137</sup> Mem. ¶ 32; Rep. ¶ 96.

<sup>138</sup> Mem. ¶ 39.

<sup>139</sup> Mem. ¶ 40-41.

<sup>140</sup> Mem. ¶ 44.

<sup>141</sup> Mem. ¶ 48; Rep. ¶ 111.

<sup>142</sup> Mem. ¶ 48.

<sup>143</sup> Mem. ¶ 52.

majority view on the subject. Indeed, an “equal number of decisions” have rejected recourse to dispute settlement provisions through a treaty’s MFN clause.<sup>144</sup> Respondent also notes that “many” States have subsequently explicitly limited the scope of the MFN treatment in their bilateral investment treaties in order to avoid the result reached in *Maffezini*.<sup>145</sup>

144. Fourth, Respondent argues that the ordinary meaning of the Treaty’s MFN clause does not demonstrate the two States’ clear and unequivocal intention to apply it to the provisions on the settlement of disputes, either in accordance with the rules on treaty interpretation in the Vienna Convention on the Law of Treaties (“VCLT”) or in accordance with the *ejusdem generis* principle.<sup>146</sup>
145. To the contrary, argues Respondent, substantial evidence demonstrates that the States’ intention was for the MFN clause *not* to apply to matters of jurisdiction and procedure.<sup>147</sup> Respondent asserts that the 18-month clause is an essential provision of the Treaty which was specifically negotiated by Argentina and Spain, as it has been in some—but not all—of Argentina’s BITs.<sup>148</sup> Moreover, at the time the Treaty was concluded, both Parties had entered into other BITs that did not contain local court preconditions. It is therefore impossible that the Parties intended for the Treaty’s MFN clause to apply to dispute settlement provisions, because such an interpretation would have immediately deprived Article X of all effect.<sup>149</sup> Finally, Argentina continued to include 18-month court provisions in subsequent BITs. Such provisions would be meaningless if it was possible for them to be set aside by applying an MFN clause.<sup>150</sup>
146. Fifth, Respondent asserts that Claimants cannot be allowed to import parts of the dispute settlement clause of the U.S.-Argentina BIT, which contains a fork-in-the-road provision.<sup>151</sup> The dispute settlement provisions of the Treaty and the U.S.-Argentina BIT are fundamentally different and incommensurate. Under the Treaty, if the dispute is *not* submitted to the Argentine courts, it may not proceed to international arbitration, whereas under the U.S.-Argentina BIT, if the dispute *is* submitted to the Argentine courts, it may not subsequently proceed to international arbitration. There is no evidence that Spain and Argentina accepted, through the application of the Treaty’s MFN clause, such a “radical change” in their consent to international jurisdiction.<sup>152</sup>
147. Sixth, Respondent argues that the authentic interpretation of the State Parties to the Treaty is clear. In *Maffezini*, in which an Argentine investor sued Spain under the Treaty, the Kingdom of Spain adopted the same position as the Argentine Republic is taking in the instant case regarding the inapplicability of the MFN clause to dispute settlement provisions.<sup>153</sup> The unilateral interpretation previously made by Spain has now been upheld by the Argentine Republic, thus

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<sup>144</sup> Rep. ¶ 132; *see also* Respondent’s Letters of February 17 and September 28, 2012.

<sup>145</sup> Mem. ¶¶ 54-55.

<sup>146</sup> Mem. ¶¶ 57-68.

<sup>147</sup> Mem. ¶ 28.

<sup>148</sup> Mem. ¶ 70.

<sup>149</sup> Rep. ¶ 113.

<sup>150</sup> Rep. ¶ 145.

<sup>151</sup> Mem. ¶¶ 74-75.

<sup>152</sup> Rep. ¶ 124.

<sup>153</sup> Mem. ¶ 83.

making it an authentic interpretation of the Treaty in accordance with Article 31(3) of the VCLT.<sup>154</sup>

148. Seventh, Respondent asserts that Claimants' invocation of Article 13 of the Australia-Argentina BIT, through application of the MFN clause in their Counter-Memorial, is not timely and must be dismissed.<sup>155</sup> To change the instrument upon which they are relying at this point is against the principle of good faith and should be barred by estoppel.<sup>156</sup> It also severely affects Respondent's right to defend itself and turns the jurisdiction of this Tribunal into a moving target.<sup>157</sup>

## 2. Position of Claimants

149. Claimants assert that through the operation of the MFN provision in Article IV(2) of the Spain-Argentina BIT, they may rely on the procedural rules on admissibility of investor-state claims contained in Article 13 of the Australia-Argentina BIT, rather than the provisions set forth in Article X of the Treaty. Article 13 of the Australia-Argentina BIT provides neither the 6-month nor the 18-month requirements contained in the Treaty's Article X.<sup>158</sup>
150. Claimants assert that the text of Article IV(2) of the Treaty clearly indicates that the MFN standard can be relied on with respect to the waiting periods provided in Article X.<sup>159</sup> The MFN clause is extremely broad because it encompasses "all matters" dealt with in the Treaty.<sup>160</sup> The third and fourth paragraphs of Article IV list exhaustively those matters that are excluded from the scope of the MFN clause. This list does not include dispute-resolution provisions or "waiting periods."<sup>161</sup> Therefore, on the basis of *expressio unius est exclusio alterius*, the MFN clause extends to all matters not expressly excluded.<sup>162</sup>
151. Second, according to Claimants, there is no rule that an MFN clause can only be deemed to apply to dispute settlement provisions where there is evidence that this is the Parties' clear and unequivocal intention. Argentina's reliance on this purported special presumption finds no support in either the VCLT or international jurisprudence.<sup>163</sup>
152. Third, Claimants assert that the case law decided under the Treaty's MFN clause<sup>164</sup> unanimously supports Claimants' position. In each of the four cases, the claimants invoked Article IV(2) to

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<sup>154</sup> Rep. ¶ 125.

<sup>155</sup> Rep. ¶ 104.

<sup>156</sup> Rep. ¶ 105.

<sup>157</sup> Rep. ¶ 106.

<sup>158</sup> CM ¶ 23.

<sup>159</sup> CM ¶ 24.

<sup>160</sup> CM ¶ 26.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Rej. ¶¶ 29-32.

<sup>164</sup> CM ¶ 29 et seq. Claimants make reference to *Maffezini v. Spain*; *Gas Natural SDG SA v. Argentine Republic* (ICSID Case No. ARB/03/10), Decision on Jurisdiction, June 17, 2005 (hereinafter, "*Gas Natural v. Argentina*"), Exhibit C-260; *Suez, Sociedad General de Aguas de Barcelona S.A. and Intergua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, May 16, 2006 (hereinafter "*Suez InterAguas v. Argentina*"), Exhibit C-400; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction, August 3, 2006

displace the provisions of Article X. In each case, the tribunals emphasized the inclusive “in all matters” language of Article IV(2). And in each of the cases, the tribunals did not deny application of the MFN clause to the “waiting periods.”<sup>165</sup>

153. Fourth, Claimants note that a number of other arbitral tribunals have permitted claimants to invoke MFN clauses of their applicable BITs in order to bypass waiting periods. In those cases, despite the fact that the base BIT contained waiting periods, the tribunals granted the claimants the more favorable treatment of other treaties.<sup>166</sup> According to Claimants, only three<sup>167</sup> out of a total of thirteen tribunals have rejected the invocation of an MFN clause to displace an 18-month local court precondition to international arbitration.<sup>168</sup> However, the MFN clauses of the applicable BITs in *Wintershall*, *ICS* and *Daimler* were substantially different from that of the present Treaty’s MFN clause, and the facts of those cases were also substantially different.<sup>169</sup>
154. Claimants argue that Respondent is wrong to characterize the jurisprudence on this issue as being sharply divided.<sup>170</sup> Instead, Respondent included in its case survey a series of decisions which are distinguishable from the instant case.<sup>171</sup> Those cases did not concern use of the MFN clause to bypass procedural or admissibility-related waiting periods (which depend solely on the action and filing date of the claimant). Instead, the claimants in those cases sought to use the MFN clause to extend the Tribunal’s substantive jurisdiction.<sup>172</sup>
155. Fifth, Claimants assert that Respondent’s treaty negotiation practice demonstrates that it did not include waiting periods in many of its BITs. Only 10 of the 50 BITs referenced in Respondent’s Memorial provide for the 18-month period. This further confirms that such provisions are procedural and technical in nature, and do not relate to matters of fundamental public policy for Argentina.<sup>173</sup>
156. Sixth, according to Claimants, Respondent has not put forth an “authentic interpretation” of the text based on the State Parties’ subsequent practice.<sup>174</sup> What Argentina is claiming is not an

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(hereinafter “*Suez Vivendiv. Argentina*”), Exhibit C-255 (note that *Suez Vivendi v. Argentina* was consolidated with *AWG Group Ltd. v. Argentine Republic*, a related arbitration brought under the UNCITRAL Rules).

<sup>165</sup> CM ¶ 29.

<sup>166</sup> CM ¶ 44.

<sup>167</sup> *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award, December 8, 2008 (hereinafter “*Wintershall v. Argentina*”), LA AR 7; *ICS v. Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, February 10, 2012; *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, August 22, 2012 (hereinafter “*Daimler v. Argentina*”).

<sup>168</sup> CM ¶ 51; Claimants’ Letter of February 28, 2012, at 2; Claimants’ Letter of October 9, 2012, at 1.

<sup>169</sup> CM ¶ 52, 57; Claimants’ Letter of February 28, 2012, at 2, 4; Claimants’ Letter of October 9, 2012, at 2-4.

<sup>170</sup> Rej. ¶ 44.

<sup>171</sup> According to Claimants (CM ¶ 59), these cases include *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, November 15, 2004 (hereinafter “*Saliniv. Jordan*”), LA AR 21; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, February 8, 2005 (hereinafter “*Plamav. Bulgaria*”), LA AR 11; *Telenor Mobile Communications v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award, September 13, 2006, (hereinafter “*Telenor v. Hungary*”), Exhibit C-254; and *Vladimir Berschader and Moïse Berschader v. The Russian Federation* (SCC Case No. 080/2004), Award, April 21, 2006 (hereinafter “*Berschader v. Russian Federation*”), LA AR 19.

<sup>172</sup> CM ¶ 59.

<sup>173</sup> CM ¶ 71.

<sup>174</sup> Rej. ¶ 60.

interpretation of Article IV of the Treaty, but rather an amendment to the text of Article IV.<sup>175</sup> Even if it was an interpretation, Respondent must demonstrate an agreement and/or consistent subsequent practice between the State Parties as to the interpretation. Respondent, however, relies only on statements made by Spain in the context of a single dispute, the *Maffezini* case, in which Spain was the respondent.<sup>176</sup>

157. Seventh, the Claimants believe there is no contradiction in using Article 7(3) of the U.S.-Argentina BIT because of its fork-in-the-road choice between local court remedies and international arbitration. Claimants themselves have not submitted the present dispute to the Argentine courts; rather, it was Respondent that submitted the question of compensation to local courts. Claimants, therefore, would not be precluded from going to international arbitration under the U.S.-Argentina BIT.<sup>177</sup>
158. Finally, Claimants assert that their invocation of the Australia-Argentina BIT is not untimely. According to Claimants, they relied on the MFN clause even before they submitted their Request for Arbitration.<sup>178</sup> Moreover, Claimants relied on the Australia-Argentina BIT for the first time in their Counter-Memorial on Jurisdiction because Argentina itself only raised its objection with respect to the 6-month waiting period for the first time in its Memorial on Jurisdiction.<sup>179</sup>

### 3. Analysis of the Tribunal

#### b. The Ordinary Meaning of Article IV

159. Article IV, captioned “Treatment,” provides as follows:

1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.
2. In all matters governed by this Agreement, such treatment shall be not less favourable than that accorded by each Party to investments made in its territory by investors of a third country.
3. Such treatment shall not extend, however, to the privileges which either Party may grant investors of a third State by virtue of its participation in:
  - a free trade area;
  - a customs union;
  - a common market;
  - a regional integration agreement; or

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<sup>175</sup> Id.

<sup>176</sup> Rej. ¶ 61.

<sup>177</sup> Rej. ¶ 21.

<sup>178</sup> Rej. ¶ 14. See Claimants’ letter to the President of the Argentine Republic, November 20, 2008, Ex. C-265 (“In that sense, pursuant to Article X(4) of the Treaty, and invoking its Article IV(2) which provides investors with the right to invoke the most favoured nation treatment that the Republic has granted to investors of other countries, as for example to the investors of the United States or the Republic of Chile”).

<sup>179</sup> Rej. ¶ 56.

An organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms analogous to those accorded by that Party to participants of the said organization.

4. The treatment accorded under this article shall not extend to tax deductions or exemptions or other analogous privileges granted by either Party to investors of third countries by virtue an agreement to prevent double taxation or any other tax agreement.

160. On its face, the language of Article IV(2) is broad. It applies to “all matters governed by this Agreement.” Its language in Spanish is no less broad: “*en todas las materias regidas por el presente Acuerdo.*” “All,” or “*todas,*” is unambiguously inclusive. “Matters,” or “*materias,*” is also broad and general. While not decisive on the issue, it is illustrative to note that other BITs have confined the application of MFN treatment to a smaller category of activities than Article IV(2)’s broad “all matters” language. The Argentina-Germany BIT,<sup>180</sup> for example, contains more constrained provisions:

- Article 3(1): None of the Contracting Parties shall accord in its territory *to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares*, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.
- Article 3(2): Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, *as regards its activities related to investments*, to a less favorable treatment than the one accorded to its own nationals and companies or to nationals and companies of third States.<sup>181</sup>

161. The MFN clause in the Italy-Jordan BIT at dispute in *Salini v. Jordan* also contains a more limited scope of application:

- Both Contracting Parties, within the bounds of their own territory, *shall grant investments effected by, and the income accruing to, investors of the Contracting*

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<sup>180</sup> The Argentina-Germany BIT was at issue in *Wintershall, Hochtief, Daimler and Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, August 3, 2004 (hereinafter “*Siemens v. Argentina*”), Exhibit C-330.

<sup>181</sup> Treaty between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments, April 9, 1991, UNTS Vol. 1910, 171 (1996)(emphasis added). Ad Article 3 in the Protocol to the Argentina-Germany BIT provides as follows: “(a) The following shall more particularly, though not exclusively, be deemed “activity” within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of an investment. The following shall more particularly, though not exclusively, be deemed “treatment less favourable” within the meaning of article 3: less favourable measures that affect the purchase of raw materials and other inputs, energy or fuel, or means of production or operation of any kind or the marketing of products inside or outside the country. Measures that are adopted for reasons of internal or external security or public order, public health or morality shall not be deemed “treatment less favourable” within the meaning of article 3.”

*Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.*<sup>182</sup>

162. Likewise, the MFN clause in the U.K.-Argentina BIT at dispute in *ICS v. Argentina* contains a more limited scope of application:

- Neither Contracting Party shall in its territory subject investors of the other Contracting Party, *as regards their management, maintenance, use, enjoyment or disposal of their investments*, to treatment less favourable than that which it accords to its own investors or to investors of any third State.<sup>183</sup>

163. In the BITs referenced above, MFN treatment only applies to qualifying “investments,” “activities related to investments,” “income accruing” to investors, or “management, maintenance, use, enjoyment or disposal” of those investments. Such terms are narrower than the general “matters” language contained in the Treaty. Moreover, none of these other BITs contains the simple and expansive “all” of the Treaty.<sup>184</sup>

164. Other subsections of Article IV of the Treaty contain explicit carve-outs to the application of MFN treatment. Article IV(3) provides that MFN treatment shall not extend to the treatment either Party extends to third states by virtue of their common participation in a free trade area, a customs union, a common market, a regional integration agreement or an organization of mutual economic assistance. Article IV(4) provides that MFN treatment shall not extend to the treatment either Party extends to investors of third states concerning tax deductions or similar provisions. The issues of jurisdiction and admissibility are absent from this list of explicit carve-outs.

165. The Tribunal notes that 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 Treaty has concluded that the broad language of the MFN clause applies to the Article X dispute resolution provisions.<sup>185</sup> However, other

<sup>182</sup> *Salini v. Jordan*, Decision on Jurisdiction, at ¶ 66.

<sup>183</sup> *ICS v. Argentina*, Award on Jurisdiction, at ¶ 65. As noted above, the *ICS* Tribunal determined that the MFN clause of the U.K.-Argentina BIT did not apply for purposes of dispute settlement provisions. In reaching this conclusion, the tribunal pointed to 1) the state of the law at the time the BIT was concluded and the expectation of the parties were such that, without express language in the treaty, treatment could not have extended to dispute resolution mechanisms (¶¶ 285-296); 2) the contextual language established that “treatment” only referred to the “management, maintenance, use, enjoyment or disposal of” an investment (¶¶ 297-304); and 3) the phrase “in its territory” imposes a territorial limitation that excludes international arbitration, which is in the nature of an extra-territorial dispute settlement procedure (¶¶ 305-309).

<sup>184</sup> See also *Maffezini v. Spain*, Decision on Jurisdiction, at ¶ 60 (noting that with respect to the BITs concluded by Spain, “the only one that speaks of “all matters subject to this Agreement” in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that “this treatment” shall be subject to the clause, which is of course a narrower formulation.”).

<sup>185</sup> *Maffezini v. Spain*, Decision on Jurisdiction, at ¶ 64; *Gas Natural v. Argentina*, Decision on Jurisdiction, at ¶¶ 30-31; *Suez Interaguas v. Argentina*, Decision on Jurisdiction, at ¶ 54-55; *Suez Vivendi v. Argentina*, Decision on Jurisdiction, at ¶ 54-55. See also *Impregilo v. Argentina*, Award, at ¶ 108, in which the majority of arbitrators determined that the broad “all matters” language of the MFN clause in the Italy-Argentina BIT extended to dispute settlement provisions. Note, however, that one of the arbitrators, Brigitte Stern, dissented on this particular point. *Impregilo v. Argentina*, Concurring and Dissenting Opinion, at ¶ 46 et seq.

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.<sup>186</sup>

166. Likewise, the tribunals that have adjudicated the MFN provisions of the Argentina-Germany BIT have not uniformly interpreted the ordinary meaning of that BIT’s MFN provisions.<sup>187</sup> The tribunals in *Siemens* and *Hochtief* concluded that the language of the MFN provisions (language that is less sweeping and more particularized than the MFN clause in the instant Treaty) implicitly included dispute settlement provisions.<sup>188</sup> However, the tribunals in *Wintershall* and *Daimler* disagreed.<sup>189</sup> The *Wintershall* tribunal determined that the BIT’s MFN clause in Article 3 “does not mention that the most-favoured-nation “treatment” as to investments, and investment related activities, is to be in respect of “all relations” or that it extends to “all aspects” or covers “all matters in the treaty.””<sup>190</sup> The *Daimler* tribunal, for its part, determined that the language of the Argentina-Germany BIT’s MFN clause was territorially limited, that “treatment” was intended by the parties to refer only to treatment of the investment, and that the BIT did not extend MFN treatment to “all matters” subject to the BIT.<sup>191</sup>

#### (a) Jurisprudence Concerning the Application of MFN Clauses to Dispute Settlement Provisions

167. This Tribunal is not bound by the decisions of previous tribunals, and it makes its determination on a basis of the text of the Treaty and the factual and legal arguments put forth by the Parties. Nonetheless, the Tribunal acknowledges that it does not adjudicate in a vacuum. The issue of application of MFN clauses to dispute settlement provisions has been addressed by numerous panels and in numerous factual scenarios. Moreover, both Parties have made extensive analyses and arguments on the case law on this issue. Below, the Tribunal will identify the points on which the different case holdings can be distinguished, and the points on which there is analytical disagreement between tribunals.

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<sup>186</sup> *Berschader v. Russian Federation*, Award, at ¶ 192.

<sup>187</sup> The MFN clauses of the Germany-Argentina BIT are contained in numerous provisions. See ¶ 158 of this decision, *supra*.

<sup>188</sup> *Siemens v. Argentina*, Decision on Jurisdiction, at ¶ 85 et seq.; *Hochtief v. Argentina*, Decision on Jurisdiction, at ¶ 66 et seq. (note, however, the dissenting opinion of Christopher Thomas, Q.C., on this particular issue. *Hochtief v. Argentina*, Separate and Dissenting Opinion, at ¶ 45 et seq.

<sup>189</sup> *Wintershall v. Argentina*, Award, at ¶ 162 et seq.; *Daimler v. Argentina*, Award, ¶ 179 et seq. (note, however, the dissenting opinion of Charles N. Brower on this particular issue). *Daimler v. Argentina*, Dissenting Opinion, at ¶ 17 et seq.

<sup>190</sup> *Wintershall v. Argentina*, Award, at ¶ 162 (emphasis added).

<sup>191</sup> *Daimler v. Argentina*, Award, at ¶¶ 224, 230-231, 236.

### i. UNCTAD's Case Taxonomy

168. As noted by Claimants, UNCTAD's recent publication on *Most-Favoured-Nation Treatment*<sup>192</sup> categorizes the cases addressing the application of MFN clauses to jurisdiction in a way that largely corresponds with each case's outcome.
169. UNCTAD sorts the cases into two categories. In the first category, claimants "have invoked the MFN treatment clause to override a procedural requirement that constitutes a condition for the submission of a claim to international arbitration."<sup>193</sup> UNCTAD refers to this category of cases as concerning "admissibility" requirements. In the second category, claimants "have attempted to extend via MFN the jurisdictional threshold, i.e., the scope of the mandate of the arbitral tribunal, beyond that specifically set forth in the basic treaty. This use of the MFN clause would give the arbitral tribunal jurisdiction to hear issues or disputes that the basic treaty does not contemplate or expressly excludes."<sup>194</sup> UNCTAD refers to this category of cases as concerning "scope of jurisdiction."
170. UNCTAD identifies the following cases as fitting within the "admissibility"<sup>195</sup> category: *Maffezini*, *Siemens*, *Gas Natural*, *National Grid*,<sup>196</sup> *Suez InterAguas*, *AWG Group*<sup>197</sup> and *Wintershall*. To these cases, the Tribunal would add *Impregilo*,<sup>198</sup> *Hochtief*,<sup>199</sup> *Abaclat*,<sup>200</sup> *ICS*,<sup>201</sup> and *Daimler*.<sup>202</sup> In each of these cases, the claimant was required under the respective terms of its BIT's dispute settlement provisions to seek a remedy before a local court of the host State for a period of time before bringing arbitration. Each of the claimants in these cases sought to use its BIT's MFN clause in order to "borrow" a dispute settlement provision from another treaty that did not contain a local court requirement as a precondition of arbitration. With the exceptions of *Wintershall*, *ICS* and *Daimler* the claimants' arguments were successful.
171. UNCTAD identifies the following cases as fitting within the "scope of jurisdiction"<sup>203</sup> category: *Salini*, *Plama*, *Telenor*, *Berschader*, and *Tza Yap Shum*.<sup>204</sup> In these cases, the claimants sought to use the MFN clause to expand the scope of jurisdiction under their applicable BIT. In *Salini*, the claimant attempted to use the MFN clause to bring in contract claims before an ICSID tribunal. In *Plama*, the claimant attempted to use the MFN clause to broaden the scope of

<sup>192</sup> "Most Favoured-Nation Treatment," UNCTAD Series on International Investment Agreements II at 66-67, UNCTAD/DIAE/IA/2010/1, January 24, 2011 (hereinafter "UNCTAD *MFN Treatment*"), Exhibit C-563.

<sup>193</sup> *Id.* at 66.

<sup>194</sup> *Id.* at 67.

<sup>195</sup> *Id.* at 67-73.

<sup>196</sup> *National Grid Plc v. Argentine Republic* (UNCITRAL), Decision on Jurisdiction, June 20, 2006, (hereinafter "*National Grid v. Argentina*"), LA AR 25.

<sup>197</sup> See *Suez Vivendi v. Argentina*, Decision on Jurisdiction.

<sup>198</sup> *Impregilo v. Argentina*, Award, at ¶¶ 79 et seq. (note, again, the dissenting opinion of B. Stern on this issue).

<sup>199</sup> *Hochtief v. Argentina*, Decision on Jurisdiction, at ¶¶ 59 et seq. (note, again, the dissenting opinion of C. Thomas on this issue).

<sup>200</sup> *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility, at ¶¶ 568 et seq.

<sup>201</sup> *ICS v. Argentina*, Award, at ¶¶ 243 et seq.

<sup>202</sup> *Daimler v. Argentina*, Award, ¶¶ 179 et seq.

<sup>203</sup> UNCTAD *MFN Treatment*, at 73-79.

<sup>204</sup> *Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence, June 19, 2009.

jurisdiction beyond that of its applicable BIT, which only provided jurisdiction to resolve issues of compensation in the case of an expropriation.<sup>205</sup> Similarly, in *Telenor* and *Berschader*, the claimants attempted to use the MFN clause to broaden jurisdiction beyond their BITs, which only provided jurisdiction over expropriation claims.<sup>206</sup> In each of these cases, the claimant's attempts to rely on the MFN clause were rejected by the tribunals. UNCTAD identified only one case within this category, *RosInvestCo*, that departed from this trend.<sup>207</sup>

172. Looking at the taxonomy above, it is clear that Claimants' position falls within the "admissibility" category of cases cited by UNCTAD, in which tribunals normally rule in favor of applying the MFN clause. Claimants are seeking to apply the Treaty's MFN clause in order to dispense with the requirements of Article X, namely, that the Parties attempt to amicably settle their dispute for 6 months, and that their dispute be subjected to the local courts of Argentina for 18 months.

## ii. Other Interpretative Issues

173. In addition to looking at case law according to outcome, the Tribunal considers the interpretative assumptions underlying tribunals' decisions. At least one of the tribunals in the "admissibility" cases identified by UNCTAD looked for evidence that the State parties did *not* intend to include dispute settlement provisions within the scope of the MFN clause. As the tribunal in *Gas Natural* stated, "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."<sup>208</sup>
174. In contrast, tribunals in the "scope of jurisdiction" cases have taken as a starting principle that the extension of the MFN clause to cover jurisdictional issues *cannot be assumed*. As the tribunal in *Plama* set forth, "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."<sup>209</sup> According to *Plama*, "an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty)."<sup>210</sup>
175. Likewise, tribunals have differed in their views on whether dispute settlement provisions constitute a vital protection of foreign investors. Many of the tribunals following the *Maffezini*

<sup>205</sup> *Plama v. Bulgaria*, Decision on Jurisdiction, at ¶¶ 186-187.

<sup>206</sup> *Telenor v. Hungary*, Award, at ¶¶ 81-83, *Berschader v. Russian Federation*, Award, at ¶¶ 151-153.

<sup>207</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 079/2005, Award, October 2007; see also UNCTAD *MFN Treatment*, at 79. *The Russian Federation v. RosInvestCo UK Ltd.*, Case No. T24891-07, Order, Stockholm District Court, November 9, 2011. In a default judgment rendered November 9, 2011, the Stockholm District Court declared that the arbitration agreement, which had arisen through the claimant's request for arbitration under the Russia-U.K. BIT, did *not* give the arbitrators jurisdiction to determine whether Russia had undertaken measures of expropriation against the claimant. .

<sup>208</sup> *Gas Natural* Decision on Jurisdiction, at ¶ 49.

<sup>209</sup> *Plama v. Bulgaria*, Decision on Jurisdiction, at ¶ 223.

<sup>210</sup> *Id.* at ¶ 218. See also *Berschader v. Russian Federation*, Award, at ¶ 181.

Decision on Jurisdiction have determined that these provisions are a fundamental part of the “treatment” or protection owed to investors:

- “Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today *dispute settlement arrangements are inextricably related to the protection of foreign investors*, as they are also related to the protection of rights of traders under treaties of commerce.”<sup>211</sup>
- “From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, *dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.*”<sup>212</sup>
- “[T]he Tribunal considers that the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states. As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries *inter se*), *a crucial element – indeed perhaps the most crucial element – has been the provision for independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts.*”<sup>213</sup>
- “Access to [dispute settlement] mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”<sup>214</sup>
- “Article X[’s dispute settlement provision] is a benefit conferred on investors and designed to protect their interests and the interests of a State Party in its capacity as a host State party to a dispute with an investor: *it is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on.*”<sup>215</sup>

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<sup>211</sup> *Maffezini v. Spain*, Decision on Jurisdiction, at ¶ 54 (emphasis added).

<sup>212</sup> *Suez InterAgua v. Argentina*, Decision on Jurisdiction, at ¶ 57 (emphasis added).

<sup>213</sup> *Gas Natural v. Argentina*, Decision on Jurisdiction, at ¶ 29 (emphasis added).

<sup>214</sup> *Siemens v. Argentina*, Decision on Jurisdiction, at ¶ 102 (emphasis added).

<sup>215</sup> *Hochtief v. Argentina*, Decision on Jurisdiction, at ¶ 68 (emphasis added).

176. The above tribunals do not share the concern expressed by Respondent, and by a few other tribunals, that such an approach disregards the fundamental requirement that a State Party consent to jurisdiction. For example, the tribunal in *Telenor* noted, “[W]hat has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties.”<sup>216</sup> Because consent is a basic requirement for jurisdiction over a State, and because the terms of consent to arbitration are negotiated on an individual basis for each BIT, these tribunals were unwilling to assume, without explicit language by the State Parties on this point, that the jurisdictional requirements of one BIT can be borrowed by an investor of a third State.
177. The position taken by each tribunal may very well be influenced to an extent by the facts before it. The tribunals that considered whether MFN protection could extend to admissibility requirements were not asked to extend the reach of MFN protection to provisions that would change the arbitral forum or the scope of matters that could be subjected to arbitration. In contrast, the tribunals that considered the latter issue were not required to assess whether MFN protection could cover admissibility requirements.
178. In *Plama*, for example, while the tribunal held that the MFN clause could not be used to substitute the BIT’s dispute settlement mechanism in favor of ICSID arbitration, it also expressed a certain sympathy for the *Maffezini* tribunal:

The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present.<sup>217</sup>

What the *Plama* tribunal characterized as *Maffezini*’s “curious” 18-month local court requirement has not proved to be as “exceptional” as the *Plama* tribunal suggests. Since the *Plama* decision on jurisdiction was issued, numerous tribunals have addressed the application of MFN clauses to 18-month local court requirements.<sup>218</sup> In any case, the *Plama* tribunal’s dictum suggests a view that treatment of a requirement may vary depending on the nature of that requirement.

179. Moreover, the tribunal in *Maffezini* itself was careful to stress that its decision was bounded by “important limits arising from public policy considerations.”<sup>219</sup> *Maffezini* included within these limits BIT clauses that provide for a specific arbitration forum, such as ICSID, and that provide

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<sup>216</sup> *Telenor v. Hungary*, Award, at ¶ 95. See also *Wintershall v. Argentina*, Award, at ¶ 179, which notes with approval the tribunals that do not “regard as sufficient a consent of the Host State to international arbitration which would be a merely presumed consent.”

<sup>217</sup> *Plama v. Bulgaria*, Decision on Jurisdiction, at ¶ 224.

<sup>218</sup> See, e.g., *Gas Natural, National Grid, Suez Vivendi, Suez InterAguas, Impregilo, Hochtief, Abaclat*.

<sup>219</sup> *Maffezini v. Spain*, Decision on Jurisdiction, at ¶ 56.

for a highly institutionalized system of arbitration with precise rules of procedure.<sup>220</sup> For the *Maffezini* tribunal, such provisions cannot be replaced or bypassed.

180. To be sure, several tribunals have criticized the *Maffezini* public policy limits. The *Plama* tribunal noted that *Maffezini* did not specify the origin or the basis of these “public policy” considerations.<sup>221</sup> The *Salini* and *Wintershall* tribunals asserted that the limits identified by *Maffezini* did not do enough to prevent the risk of treaty shopping.<sup>222</sup> Nonetheless, a significant number of tribunals have either directly applied *Maffezini*’s four limitations or have used its discussion as the basis for an inquiry into what public policy considerations animated the State parties’ formulation of their MFN clauses. For example, in *Plama* and *Berschader*, the tribunals found it significant that the BIT was concluded while the State respondents were still communist governments, favoring limited dispute settlement and limited protections for investors.<sup>223</sup>
181. In light of the above discussion, the Tribunal is cognizant of the concern articulated by numerous tribunals that the reach of the MFN clause not extend beyond appropriate limits. The Tribunal also acknowledges that the nature of the dispute settlement provisions that Claimants seek to replace via the Article IV(2) MFN clause is relevant to any such determination.
182. In that respect, the Tribunal finds it significant that Claimants have not requested that the Tribunal apply the MFN clause in order to replace the Treaty’s provisions on the arbitral forum or rules. Nor have Claimants requested that the Tribunal apply the MFN clause in order to broaden the scope of legal issues that may be adjudicated through arbitration. Instead, they have argued that the procedural requirements of Article X, namely the negotiation and local court requirements, may be bypassed in favor of the more procedurally limited dispute settlement provisions of the Australia-Argentina BIT.

**(b) The dispute settlement clause of the U.S.-Argentina BIT and the Australia-Argentina BIT**

183. As a final argument, Respondent has protested Claimants’ invocation of the U.S.-Argentina BIT and the Australia-Argentina BIT on two grounds. First, Respondent asserts that Claimants cannot take advantage of the U.S.-Argentina BIT’s dispute settlement provisions because there is no advantage to take; the U.S.-Argentina BIT’s fork-in-the-road provisions (providing for either a local court remedy or an arbitral remedy) are not better, but simply constitute a different settlement regime.<sup>224</sup> Second, Respondent argues that Claimants’ invocation of the Australia-

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<sup>220</sup> *Id.*, at ¶ 63.

<sup>221</sup> *Plama v. Bulgaria*, Decision on Jurisdiction, at ¶ 221.

<sup>222</sup> *Salini v. Jordan*, Decision on Jurisdiction, at ¶ 115; *Wintershall v. Argentina*, Award, at ¶ 182.

<sup>223</sup> *Plama v. Bulgaria*, Decision on Jurisdiction, at ¶ 195-97; *Berschader v. Russian Federation*, Award, at ¶¶ 200, 203.

<sup>224</sup> The relevant provisions of Article VII of U.S.-Argentina BIT, on dispute settlement include the following: Article VII(2): “In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.” Article VII(3) provides that “Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b)... the national or

Argentina BIT is inadmissible because it was untimely presented, and that modifying the dispute settlement procedures invoked “severely affects” its right to defend its interests.

184. On the first point, it is clear that the U.S.-Argentina BIT (and the Australia-Argentina BIT) has advantages that the Treaty does not; under the former, it is possible to access arbitration with fewer procedural preconditions. Moreover, Claimants have not already selected the local court “fork” under the U.S.-Argentina BIT. Article X(3)(a) of the Treaty is satisfied when *either* the Respondent or the investor brings the suit before a local court. Here, it was the Respondent that brought a suit against Interinvest in the Argentine courts relating to the expropriation of the Argentine Airlines. As such, it is clear that Claimants have not already “picked” the local court “fork,” thereby forfeiting their access to arbitration.
185. On the second point, the Tribunal notes that Respondent does not point to any actual or perceived harm, nor is there any evidence that Claimants’ switch from relying on the U.S.-Argentina BIT to relying on the Australia-Argentina BIT would have any effect on the arguments made by Respondent. As such, the Tribunal rejects this argument.
186. To conclude, 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. The broad “all matters” language of the Article IV(2) MFN clause is unambiguously inclusive. Moreover, applying the dispute settlement provisions contained in Article 13 of the Australia-Argentina BIT would not change the scope, the forum or the rules applicable to this arbitration. Claimants have satisfied the requirements of Article 13 of the Australia-Argentina BIT, which states that any dispute “shall, if possible, be settled amicably,” and which permits an investor to submit the dispute to international arbitration in the event that it cannot be settled.<sup>225</sup> Claimants have clearly complied with this provision.

### **c. Second Jurisdictional Objection: Claimants’ Standing**

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

##### **1. Position of Respondent**

187. Respondent argues that Claimants’ claims, which are based on the alleged violation of rights held by Interinvest and the Argentine Airlines, are derivative and indirect in nature. As such, argues Respondent, Claimants do not have standing to bring this claim. On one hand, Claimants are claiming rights that are vested in third parties (namely, Interinvest and the Argentine

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company may choose to consent in writing to the submission to the dispute for settlement by binding arbitration” to ICSID, to the ICSID Additional Facility, in accordance with the UNCITRAL Arbitration or to any other mutually agreed arbitration institution. Note that Respondent’s argument could be extended to the Australia-Argentina BIT invoked by Claimants. Article 13 of the Australia-Argentina BIT provides that “1. Any dispute which arises between a Contracting Party and an investor of the other Contracting Party relating to an investment shall, if possible, be settled amicably. If the dispute cannot so be settled, it may be submitted, upon request of the investor, either to: (a) the competent tribunal of the Contracting Party which has admitted the investment; or (b) international arbitration,” including to ICSID, in accordance with the UNCITRAL Arbitration Rules or to any other mutually agreed arbitration institution.

<sup>225</sup> Australia-Argentina BIT, art. 13, Exhibit C-394.

Airlines) who are not parties to this arbitration.<sup>226</sup> On the other hand, Claimants have only indirect shareholdings in these companies, which they hold through the Spanish intermediary company Air Comet S.A.<sup>227</sup>

188. According to Respondent, Claimants bring two different indirect claims. The first of these claims relates to Interinvest S.A.'s rights. Respondent asserts that Interinvest, an Argentine company which is not protected under the Treaty, is the only entity with legal standing to complain of the alleged expropriation of the Argentine Airlines' shares.<sup>228</sup> The second of these claims relates to the rights of ARSA and AUSA. Here, according to Respondent, Claimants also invoke a set of rights which are not held by them.<sup>229</sup> The only entities with legal standing to complain of the adoption of airfare regulatory measures are ARSA and AUSA, the parties whose assets were affected by the measures.<sup>230</sup>
189. Respondent asserts that it did not adopt any measure to the detriment of Claimants' own investment. None of Claimants' shares in Air Comet were expropriated. Furthermore, the rights deriving from those shares were not infringed, nor was their exercise limited in any way.<sup>231</sup> There is a distinction between the rights of companies and of their shareholders,<sup>232</sup> and it would be unjust to award compensation to a person or an entity that is not entitled to obtain redress.<sup>233</sup>
190. According to Respondent, Claimants' indirect claim is inadmissible under the Treaty, which affords no protection to indirect shareholders.<sup>234</sup> Respondent notes that while some investment treaties refer to the "direct or indirect" control of assets or provide for the protection of both the rights and interests of investors, the Treaty does not allow indirect claims to be filed.<sup>235</sup> Moreover, in defining "investment," the Treaty includes property and rights acquired by foreign investors.<sup>236</sup> It does not protect the mere shareholders' *interests* in the companies in which they have an indirect shareholding.<sup>237</sup>
191. Furthermore, Respondent asserts that Claimants' indirect claim is inadmissible under general international law.<sup>238</sup> It is a general principle of law that the company's shareholders cannot complain of alleged violations of rights vested in the company in which they hold shares.<sup>239</sup> The decisions rendered by the International Court of Justice have consistently maintained that, under international law, shareholders are not entitled to assert the rights of the companies in which they have a shareholding. In other words, derivative claims are not valid.<sup>240</sup> Respondent notes that

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<sup>226</sup> Rep. ¶ 222.

<sup>227</sup> Rep. ¶ 223.

<sup>228</sup> Mem. ¶ 108.

<sup>229</sup> Mem. ¶ 114.

<sup>230</sup> Mem. ¶ 116.

<sup>231</sup> Mem. ¶¶ 102, 115.

<sup>232</sup> Mem. ¶ 123.

<sup>233</sup> Mem. ¶ 126.

<sup>234</sup> Rep. ¶ 172.

<sup>235</sup> Mem. ¶ 153.

<sup>236</sup> Mem. ¶ 159.

<sup>237</sup> Mem. ¶ 160.

<sup>238</sup> Mem. ¶ 128.

<sup>239</sup> Mem. ¶ 130.

<sup>240</sup> Rep. ¶ 175.

the European Court of Human Rights has also rejected the admissibility of indirect actions.<sup>241</sup> Under international law, indirect or derivative claims can only be accepted where a treaty has expressly provided for indirect or derivative actions.<sup>242</sup>

192. Respondent also argues that the ICSID Convention does not allow indirect or derivative claims to be filed. Article 25 of the ICSID Convention lays down the objective criteria for a dispute to fall within the jurisdiction of the Centre.<sup>243</sup> When the ICSID Convention was drafted, the drafters considered allowing controlling shareholders of domestic companies to bring claims to enforce the rights of the companies in which they held shares.<sup>244</sup> However, the drafters ultimately rejected this possibility. Instead, they drafted Article 25(2)(b), which provides for the possibility of a domestic but foreign-controlled company to sue its own State when the parties agreed that the domestic company would be treated as a national of the other State due to its foreign control.<sup>245</sup>
193. It is further Respondent's view that neither the ICSID Convention nor international investment law or customary or general international law provide for a *jurisprudence constante* principle.<sup>246</sup> The judicial decisions cited favorably by Claimants that concern BITs permitting indirect shareholding are not applicable to this dispute.<sup>247</sup>
194. Respondent also urges that Claimants' indirect claim is inadmissible under Argentine law. Argentine law does not allow indirect claims to be filed, and the corporation is the only entity empowered to defend its own interests.<sup>248</sup> Respondent notes that general international law and the Treaty require that the Tribunal apply the domestic law of the State in which the shareholder holds interests in order to decide on the rights that may be invoked by a shareholder under international law.<sup>249</sup> It has been recognized in ICSID decisions that domestic law is relevant for the purposes of determining ICSID's jurisdiction.<sup>250</sup>
195. Respondent makes a number of policy claims regarding Claimants' standing. It asserts that Claimants disregard the set of legal relationships existing among the companies which are part of the corporate chain connecting Teinver S.A. to the Argentine Airlines, as well as those relationships between these companies and their own creditors.<sup>251</sup> If the Tribunal were to order Respondent to pay Claimants compensation, then Claimants would be allocated payments that should have been prioritized for the Argentine Airlines' creditors and the remaining intermediary companies. Claimants, as the last link in this chain of creditors and shareholders, would be unjustly enriched.<sup>252</sup>

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<sup>241</sup> Mem. ¶ 136.

<sup>242</sup> Mem. ¶ 141.

<sup>243</sup> Mem. ¶ 165.

<sup>244</sup> Mem. ¶ 167.

<sup>245</sup> Mem. ¶ 168.

<sup>246</sup> Rep. ¶ 195.

<sup>247</sup> Rep. ¶ 204.

<sup>248</sup> Mem. ¶ 182.

<sup>249</sup> Rep. ¶ 238.

<sup>250</sup> Rep. ¶ 240.

<sup>251</sup> Mem. ¶¶ 196-98.

<sup>252</sup> Mem. ¶ 205.

196. Furthermore, Respondent asserts that there is an actual risk of double or multiple claims, because there is nothing to prevent Interinvest S.A. from filing an action before the Argentine courts in parallel with the present arbitration.<sup>253</sup> Multiple claims could potentially lead to a situation of double recovery.<sup>254</sup> In addition, allowing Claimants to file this indirect action erroneously implies that shareholders have a right to the preservation of the value of their holdings, when in fact, the value of stockholdings varies according to the fluctuations in corporate assets.<sup>255</sup>
197. Finally, Respondent points out that only Teinver S.A. currently owns shares in Air Comet. Between October 2007 and December 2009, both Transportes de Cercanías and Autobuses Urbanos transferred all of their shares in Air Comet to Teinver. As such, Transportes de Cercanías and Autobuses Urbanos are neither direct nor indirect shareholders in the Argentine companies.<sup>256</sup>

## 2. Position of Claimants

198. Claimants assert that they are not claiming rights held by Interinvest and/or the Argentine Airlines. Rather, they are claiming in their own name and on their own behalf, on the basis of the rights conferred on them by the Treaty and the ICSID Convention.<sup>257</sup> Claimants reiterate that their own claims include the following actions taken by Respondent: 1) formally expropriating Claimants' investment in the Argentine Airlines without any compensation; 2) effectuating the creeping expropriation of their investments in the Argentine Airlines; 3) failing to treat Claimants' investment in Interinvest and the Argentina Airlines fairly and equitably; 4) impairing by unjustified and discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of Claimants' investments in Interinvest and the Argentine Airlines; 5) failing to provide the required protection to Claimants' investments in Interinvest and the Argentine Airlines; and 6) violating specific obligations entered into with respect to Claimants' investment in Interinvest and the Argentine Airlines.<sup>258</sup>
199. Claimants argue that these claims arise directly from their rights under the Treaty, that is, the protection that Respondent owes directly to Claimants as Spanish investors in Argentina. Claimants are thus not asserting contractual rights held by the Argentine companies in question. Claimants are entitled to claim that Respondent's conduct was in breach of the Treaty, regardless of whether that conduct may also amount to a breach of Interinvest's or the Argentine Airlines' rights under local law.<sup>259</sup>
200. Claimants assert that claims by both direct and indirect shareholders for measures impacting their shareholdings are admissible under the Treaty and the ICSID Convention, and are well recognized in international law. First, Claimants assert that claims by shareholders for harm caused to their shareholdings have been unanimously upheld by ICSID tribunals. While

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<sup>253</sup> Mem. ¶ 209.

<sup>254</sup> Mem. ¶ 211.

<sup>255</sup> Mem. ¶ 212.

<sup>256</sup> Rep. ¶ 154.

<sup>257</sup> CM ¶ 220.

<sup>258</sup> CM ¶ 221.

<sup>259</sup> CM ¶ 225, Rej. ¶ 246.

Respondent asserts that a shareholder may not recover damages for harm caused to its “shares and other forms of participation” in companies incorporated in the host-State, virtually all ICSID tribunals that have decided similar objections unanimously have rejected them.<sup>260</sup> Moreover, ICSID tribunals have acknowledged that an *indirect* shareholder could claim damages “suffered by a company in which it holds shares,” even though the applicable BIT did not contain the “direct or indirect” wording.<sup>261</sup>

201. Second, Claimants argue that claims by indirect shareholders are admissible under the wording of the Treaty. While the Treaty does not contain “direct or indirect” language, Article I(2) of the Treaty provides that “any kind of assets, such as property and rights of every kind [including] shares and other forms of participation in companies” constitute qualifying investments. Under this inclusive formulation, indirect shareholders may pursue claims for measures affecting their “shares and other forms of participation in companies.”<sup>262</sup> This conclusion was also reached by other ICSID tribunals interpreting Article I(2) of the Treaty.<sup>263</sup> Furthermore, the object and purpose of the Treaty is to create favorable conditions and to promote capital flow and investment between investors of the Contracting Parties. This aim is equally pursued through direct and indirect ownership of investments.<sup>264</sup>
202. Third, Claimants argue that international law does not support Respondent’s position, and that Argentina’s reliance on ICJ case law is misplaced. According to Claimants, the question addressed in those cases was not whether the shareholders had a cause of action under international law, but whether, under customary international law, a State could exercise diplomatic protection over its nationals, who are shareholders with investments affected by a third State.<sup>265</sup> The right of a particular State to exercise diplomatic protection in favor of its nationals—even if they are shareholders in foreign companies—is irrelevant to the issue of whether an investor has standing under a BIT to claim for measures impacting its shareholding in local companies.<sup>266</sup>
203. Fourth, in Claimants’ view, Respondent misinterprets Article 25(2)(b) of the ICSID Convention. Article 25(2)(b) is not applicable to the present dispute, since the Treaty lacks any reference to the Parties’ consent to treat a company incorporated in the host State and controlled by a foreign investor as a foreign investor for the purposes of the Treaty. Claimants have not even attempted to invoke 25(2)(b) as a source of jurisdiction.<sup>267</sup> Furthermore, Argentina misunderstands the negotiating history of this provision. The issue before the drafters concerned whether to allow local companies access to the ICSID Convention in certain situations such as when they were owned by foreign nationals.<sup>268</sup>

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<sup>260</sup> CM ¶ 226.

<sup>261</sup> CM ¶ 246; Rej. ¶ 229 (citing *Siemens v. Argentina*, Decision on Jurisdiction, at ¶ 137).

<sup>262</sup> CM ¶ 234.

<sup>263</sup> CM ¶ 235 (citing *Gas Natural v. Argentina*, Decision on Jurisdiction, at ¶ 34).

<sup>264</sup> CM ¶ 237.

<sup>265</sup> CM ¶¶ 248-50.

<sup>266</sup> CM ¶ 252.

<sup>267</sup> CM ¶ 259.

<sup>268</sup> Rej. ¶ 282.

204. Fifth, Claimants assert that Argentine corporate law is irrelevant to decide whether Claimants have *jus standi* under the Treaty and international law. Claimants' claims are Treaty claims, and they do not constitute an exercise of rights under Argentine domestic law.<sup>269</sup>
205. Sixth, Claimants argue that Argentina's policy concerns are immaterial to the outcome of the current arbitration and, in any case, are misleading and unfounded. Claimants assert that none of Respondent's policy objections has any support in the Treaty, the ICSID Convention or international law, including investment case law.<sup>270</sup> Respondent's concerns about preferential treatment over third parties (including creditors), double recovery and double-payment pertain to the merits of the dispute, not to the jurisdictional stage.<sup>271</sup>
206. Finally, Claimants assert that Transportes de Cercanías and Autobuses Urbanos are legitimate parties to the arbitration. Transportes de Cercanías and Autobuses Urbanos transferred their shares to Teinver on December 10, 2009, but this transfer has no impact on their standing in the current arbitration. The relevant dates for determining ICSID jurisdiction are the dates of consent and/or registration of the dispute.<sup>272</sup> Transportes de Cercanías and Autobuses Urbanos indirectly held shares in Interinvest and the Argentine Airlines both when consent was perfected and at the time the Request for Arbitration was submitted.<sup>273</sup>

### 3. Analysis of the Tribunal

207. In maintaining that the Claimants do not have standing because they are merely "indirect" shareholders in Interinvest and the Argentine Airlines, Respondent advances two distinct legal arguments.<sup>274</sup> The first argument addresses the question whether Claimants, as shareholders, can recover damages for harms that were inflicted *upon the companies* in which Claimants invested (i.e., Interinvest and the Argentine Airlines), as opposed to harms that were inflicted directly upon Claimants themselves. This will be referred to below as Respondent's "derivative claim" argument. Respondent's second legal argument concerns the question whether Claimants must be direct shareholders, in the sense that they must *directly* own the shares in Interinvest, rather than through an intermediary subsidiary such as Air Comet. This will be referred to below as Respondent's "intermediary investor" argument.

#### (a) Respondent's "Derivative Claim" Argument

##### i. Article I of the Treaty

208. According to Respondent, the Treaty provides no protection to "derivative" shareholders. While it protects the shareholders' *direct* rights arising out of the shares, it does not, in Respondent's view, protect the shareholders' "mere interests" in the companies in which they have the shareholding. Respondent asserts that while some investment treaties may provide for the

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<sup>269</sup> CM ¶ 265.

<sup>270</sup> CM ¶ 269.

<sup>271</sup> CM ¶ 270.

<sup>272</sup> Rej. ¶ 300.

<sup>273</sup> *Id.*

<sup>274</sup> Rep. ¶¶ 222-23.

protection of both the rights and interests of investors, the Treaty does not provide for this possibility. Respondent contrasts the language of Article I(2) with the analogous provision of the U.S.-Argentina BIT, which extends protections to “a company or shares of stock or *other interests in a company or interests in the assets thereof*.”<sup>275</sup> Respondent also notes that the U.S.-Argentina BIT, in contrast to the Treaty, protects investments that are “owned or controlled *directly or indirectly*.”<sup>276</sup>

209. While Respondent is correct to note that Article I(2) of the Treaty does not explicitly include or exclude “indirect” investments from its coverage, the broad and inclusive language of this provision suggests that “indirect” shareholders are protected by the Treaty. Article I(2) sets forth the definition of “investments” that are protected under the Treaty:

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 forms of participation in companies;

....

210. This definition is broad and inclusive. “Investment” encompasses “any kind of assets,” “property and rights of every kind,” and the list of qualifying investments that follows the definition is exemplary rather than exclusive. Other ICSID tribunals interpreting the Treaty have noted the breadth of this definition. The tribunal in *Gas Natural* noted that “while the ICSID Convention does not define the term ‘investment,’ the BIT clearly does so in an inclusive way,” and that the Treaty’s definition “follows the almost universal practice of BITs to define the subject of the Treaty as comprehensively as possible.”<sup>277</sup>

211. The other ICSID tribunals that have looked at the Treaty have found Article I(2)’s broad language to implicitly permit the kinds of claims that Claimants have advanced. In the *Suez Vivendi* and *Suez InterAgua*s arbitrations, Argentina raised an identical argument, asserting that the shareholder claimants had no standing to bring the dispute because they were alleging a merely “derivative” injury based on the injury to the company in which they hold shares, rather than a direct injury claimants had suffered. The tribunals in these cases rejected this argument, finding that claimants had a valid “investment” under the terms of the Treaty:

“[U]nder the plain language of these BITs, the Tribunal finds that Suez’s as well as AGBAR’s and InterAgua’s shares in APSF are “investments” under the Argentina-France and Argentina-Spain BITs. These shareholders thus benefit from the treatment promised by Argentina to investments made by French and Spanish nationals in its territory. Consequently, under Article 8 of the French treaty and Article X of the Spanish treaty, these shareholder Claimants are entitled to have recourse to ICSID arbitration to enforce their treaty rights. Neither the

<sup>275</sup> Mem. ¶ 162.

<sup>276</sup> Mem. ¶ 152.

<sup>277</sup> *Gas Natural v. Argentina*, Decision on Jurisdiction, at ¶¶ 33-34.

Argentina- France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case.”<sup>278</sup>

212. It is notable that the *Suez* tribunals described the Treaty as not *limiting* the rights of shareholders to bring “derivative” claims. The tribunals explicitly rejected the notion that there is any “default” under international investment law that restricts what kinds of claims can be brought. In this respect, the tribunals refused to take their cues from domestic corporate law. Under this logic, the fact that the Treaty does not explicitly permit “derivative” actions is irrelevant, because the very concept of a “derivative” claim is alien to the Treaty or the ICSID Convention.
213. The tribunal in *Gas Natural* reached a similar result as the *Suez* tribunals, using a slightly different reasoning. In *Gas Natural*, Argentina again argued that claimant, a shareholder in an Argentine company that was granted concessions, lacked standing to bring its claim. The tribunal disagreed. After finding claimant’s shareholdings in the Argentine company to constitute a valid “investment” under the Treaty, it found the claimant to have standing because “a claim asserting the impairment of the value of the shares held by Claimant as a result of measures taken by the host government gives rise to an investment dispute within the meaning of Article X of the BIT[.]”<sup>279</sup> The tribunal in *Gas Natural* accepted that a diminution in the value of the claimant’s shares constituted an injury under the Treaty. Like the *Suez* tribunals, the *Gas Natural* tribunal was simply not perturbed by the possibility that this claim was merely “derivative” of an injury to the Argentine company.<sup>280</sup>
214. In light of the language of Article I(2), this Tribunal finds that the Claimants have standing based on their investments in the Argentine Airlines. Respondent’s subsequent legal arguments, which draw on ICJ case law, the ICSID Convention and Argentine law, assert that the “derivative” distinction matters for purposes of interpreting the Treaty. However, none of Respondent’s arguments, which are analyzed below, undermine the conclusions reached by this Tribunal in light of the text of Article I(2).

## ii. ICJ Case Law

215. Respondent asserts that general international law does not permit indirect claims brought by shareholders for harms suffered by the companies in which they hold shares. Specifically,

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<sup>278</sup> *Suez InterAguas v. Argentina*, Decision on Jurisdiction, at ¶ 49; see also *Suez Vivendi v. Argentina*, Decision on Jurisdiction, at ¶ 49.

<sup>279</sup> *Gas Natural v. Argentina*, Decision on Jurisdiction, at ¶¶ 34-35.

<sup>280</sup> The *Gas Natural* tribunal also implies that it is generally understood that foreign investors acquire rights under the ICSID Convention and the applicable BIT when they purchase shares in a locally-established corporation: “Indeed, the standard mode of foreign direct investment, followed in the present case and in the vast majority of transnational transfers of private capital, is that a corporation is established pursuant to the laws of the host country and the shares of that corporation are purchased by the foreign investor, or alternatively, that the shares of an existing corporation established pursuant to the laws of the host country are acquired by the foreign investor. The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration.” (*Id.* at ¶ 34).

Respondent points to *Barcelona Traction (Belgium v. Spain)*, in which the ICJ held that Belgium lacked *jus standi* to exercise diplomatic protection of Belgian national shareholders with respect to measures taken by Spanish authorities that affected the Canadian company in which the Belgian nationals held shares.

216. Claimants argue that *Barcelona Traction* is not applicable, because the case's holding does not concern the direct standing of shareholders, but only whether a right of a *state* had been violated as a result of its nationals having suffered an infringement of their rights as shareholders. However, in order to determine whether Belgium had a right to bring its case, the Court had to first address the scope of the Belgian nationals' rights as shareholders. On that issue, the Court concluded that "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected."<sup>281</sup>
217. Nonetheless, *Barcelona Traction*'s discussion of shareholder rights is inapposite to the circumstances of the present case for two reasons.
218. First, the Court's decision was made in the absence of the specific framework of a BIT. The Court noted that such treaties, while not applicable to the Belgian shareholders, could give shareholders a "direct right to defend their interests against states."<sup>282</sup> This indeed is the Claimants' case since they brought their claim under a BIT that explicitly protects investments they have made in any kind of assets, including shares.
219. Second, the Court acknowledged that international law was silent on the issue of shareholder rights. In the absence of any international authority, the Court explicitly resorted to municipal law to provide the content of the shareholders' rights.<sup>283</sup> In the present case, there is no reason to resort to municipal law when the treaty instrument provides the source of the rights asserted by the Claimants.
220. The Court's analysis in *Barcelona Traction* was confirmed in its 2007 judgment on preliminary objections in *Ahmadou Sadio Diallo (Guinea v. DRC)*, where the Court noted that foreign investment treaties have taken primacy under international law in adjudicating the rights of companies and their shareholders:

The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in

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<sup>281</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 46 (February 1970).

<sup>282</sup> *Id.* at ¶ 90.

<sup>283</sup> *Id.* at ¶ 50.

practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative.<sup>284</sup>

In *Diallo*, for the reasons explained in *Barcelona Traction*, the Court was compelled to resort to the municipal law of the DRC to assess the scope of Mr. Diallo's rights in the absence of an applicable BIT.<sup>285</sup>

221. Contrary to Respondent's assertions, *Barcelona Traction* and *Diallo* do not solidify any general principle of international law on shareholder rights that should be applied to the present dispute. Indeed, the Court has taken pains in both *Barcelona Traction* and *Diallo* to distinguish these cases from the situation in which an investment treaty regime would apply.

### iii. The ICSID Convention

222. Respondent argues that the ICSID Convention does not extend protections to claims by shareholders. Specifically, Respondent asserts that the ICSID Convention's drafters had discussed the possibility of allowing shareholders of domestic companies to bring claims, but that this idea was ultimately rejected in favor of Article 25(2)(b) as it currently stands.
223. However, there is no evidence that the ICSID Convention's drafters rejected the possibility of shareholders bringing "derivative" suits under the ICSID Convention. The history cited by Respondent only concerns a very specific issue that arose in the ICSID Convention's negotiations concerning the nationality of claimants. As Christoph Schreuer explained in his authoritative *Commentary*, while the ICSID Convention was intended for disputes between a State and a national of another State, and not for disputes between a State and its own nationals, the drafters were aware that the reality on the ground could be more complicated. Many States required a foreign investor to carry out its activities under a locally incorporated company.<sup>286</sup> While such a company would otherwise be precluded from bringing a suit because of its nationality, the drafters ultimately created Article 25(2)(b) as an exception to the nationality requirement to accommodate this situation.
224. Therefore, to the extent that the drafters "rejected" the suggestion that the local company's shareholders be granted standing, it was only in this specific and limited context. Moreover, the drafters rejected this suggestion in this specific context for practical reasons rather than because of any general view that "derivative" actions should not be permitted under the ICSID Convention: they noted that such an arrangement "would not be feasible where shares are widely scattered and their owners are insufficiently organized."<sup>287</sup>

<sup>284</sup> *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, 2007 I.C.J. 1 (May 24), ¶ 88 (hereinafter "*Ahmadou Sadio Diallo* case").

<sup>285</sup> *Id.*; see also *Ahmadou Sadio Diallo* case, 2010 I.C.J. 1, ¶ 104. Respondents also cite to European Court of Human Rights case law. Mem. ¶ 136, citing *Agrotexim and others v. Greece*, 1995 Eur. Ct. H.R. 42, ¶¶ 64-66 (LA AR 47); *Tadeusz Olczak v. Poland*, European Court of Human Rights, Decision on Admissibility of 7 November 2002, ¶ 59 (LA AR 54). However, these cases involve an adjudication of a shareholder's rights under a specific instrument—the ECHR—that is simply not comparable to an investment treaty.

<sup>286</sup> See Christoph Schreuer, *The Icsid Convention: A Commentary* (2<sup>nd</sup> Ed.), AR LA-63 at 296.

<sup>287</sup> *Id.* at 297.

225. Finally, Article 25(2)(b) simply is not relevant to these proceedings. Claimants are nationals of another State, not a local Argentine company. Moreover, in order for Article 25(2)(b) to apply, the State parties to a BIT must agree to treat locally incorporated companies in this manner. Spain and Argentina did not so agree in their Treaty or elsewhere.

#### iv. Argentine Law

226. Respondent has asserted that Argentine law does not permit “derivative” claims to be brought by shareholders to recover for injuries done to the companies in which shareholders own shares. However, Respondent fails to demonstrate how Argentine corporate law is relevant to the issue of jurisdiction.

227. Respondent has argued that “it has been recognized that domestic law is relevant for the purposes of determining ICSID’s jurisdiction.”<sup>288</sup> Respondent is, of course, correct that domestic law may be “relevant” to jurisdictional issues. However, the cases cited by Respondent address the situation in which domestic law is used by a tribunal to determine a *question of fact* in connection to a jurisdictional issue.<sup>289</sup> In none of these cases does domestic law *define* the basic jurisdictional requirements. Instead, domestic law may be used by a tribunal in order to determine whether a claimant has, as a matter of fact, satisfied the legal requirements for ICSID jurisdiction that are set by the applicable BIT and the ICSID Convention.

228. Respondent itself has acknowledged that the jurisdictional requirements for this dispute are contained in the ICSID Convention and in the applicable BIT. It stated in its Memorial on Jurisdiction that “The question relating to the competence of this Tribunal consists, therefore, in determining how a foreign investor may acquire *ius standi*. The answer to this question may be found in the Treaty and the ICSID Convention.”<sup>290</sup> Furthermore, investment arbitration case law on this point is well-documented and consistent.<sup>291</sup> In *BG Group plc v. Argentina*, for example, the tribunal rejected the very argument made here by Respondent. As that tribunal noted:

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<sup>288</sup> Rep. ¶ 240.

<sup>289</sup> See, e.g., *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, August 2, 2006, ¶¶ 149, 157 (hereinafter “*Inceysa v. El Salvador*”) (regarding the reliance upon domestic law in order to determine whether an investment was illegal or fraudulent), LA AR 77; *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/2), Decision on Jurisdiction, May 11, 2005, ¶ 57 (hereinafter “*Camuzzi v. Argentina*”), Exhibit C-402 (“Even though particular aspects relating to the meaning and scope of the rights relating to the assets are governed by the law and regulations of the Argentine Republic, it must be borne in mind, as noted above, that as regards jurisdiction the applicable law is that of the Convention and the Treaty.”); see also *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3), Award, December 28, 2009, ¶ 166 (LA AR 194) (“A review of ICSID cases shows that *tribunals do refer to national law, for instance to determine whether the requirements of nationality or of the existence of an investment are fulfilled*. In other words, depending on the circumstances, certain jurisdictional requirements under Article 25 of the ICSID Convention may sometimes have to be assessed taking into account national law.”) (emphasis added).

<sup>290</sup> Mem. ¶ 151.

<sup>291</sup> See, e.g., *CMS v. Argentina*, Decision on Jurisdiction, at ¶ 42 (“the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation.”); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction, December 8, 2003, ¶ 50, Exhibit C-490 (“The jurisdiction of the Centre is determined by Article 25 of the Convention. In addition, the competence of the Tribunal is governed by the terms of the instrument expressing the parties’ consent to ICSID arbitration. Therefore, the task of the Tribunal [at the jurisdictional stage] is to assess whether the Claimant’s request for arbitration falls within the terms of said Article 25 of the Convention and (...) the BIT.”); *Siemens v. Argentina*, Decision on

Argentina's reliance on principles of domestic corporate law must fail. BG's claim is made under the Argentina-UK BIT. BG is an "Investor" who has made an "Investment" in Argentina within the definition of Article 1(a)(ii) of the treaty. It is further uncontroverted that BG's shares in [the local companies] are "assets" within the meaning ascribed to the term in this award pursuant to Argentine law. *The meaning of the BIT is to be determined not by analogy with private law rules, but from the words of [the] treaty itself and in the light of the purpose which it sets out to achieve.*<sup>292</sup>

**(b) Respondent's "Intermediary Investor" Argument**

229. In addition to its "derivative claim" arguments, Respondent also argues that the Treaty does not provide standing to an "indirect" shareholder who only owns shares in the allegedly injured company through an intermediary (in this case, Air Comet).<sup>293</sup> Respondent suggests that because Article I(2) does not explicitly refer to investments made "directly or indirectly," indirectly-held investments are not protected.
230. Contrary to Respondent's assertions, nothing in the broad language of Article I(2) of the Treaty suggests that shares held through subsidiaries are excluded from coverage under Article I(2). Again, the language of Article I(2) affirmatively extends the definition of protected "investments" to "any kind of assets" and "property and rights of every kind." For this reason, the Tribunal considers that Claimants' shareholdings in the Argentine Airlines constitute "investments" under Article I(2).
231. Moreover, the Tribunal's conclusion is consistent with previous awards. In *Siemens v. Argentina*, which concerned a BIT with language very similar to Article I(2) of the Treaty, the tribunal conducted a close textual analysis of the relevant treaty provision that is instructive to the present dispute. The claimant in *Siemens* was a German investor who held shares in an intermediary company, which in turn held shares in a local company. The tribunal concluded that the claimant's investment was covered by the BIT, using the following reasoning:

The Tribunal has conducted a detailed analysis of the references 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 definition of "investment" is very broad. An investment is any kind of asset considered to be

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Jurisdiction, at ¶ 31 ("Argentina in its allegations has not distinguished between the law applicable to the merits of the dispute and the law applicable to determine the Tribunal's jurisdiction. This being an ICSID Tribunal, its jurisdiction is governed by Article 25 of the ICSID Convention and the terms of the instrument expressing the parties' consent to ICSID arbitration, namely, Article 10 of the Treaty.").

<sup>292</sup> *BG Group plc v Argentine Republic*, UNCITRAL, Final Award, December 24, 2007, ¶¶ 203-04, Exhibit C-340. Note, that the Final Award rendered by the Tribunal was subsequently denied enforcement on different grounds by the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit decided the appeal on the basis of arbitrability, finding that BG and Argentina had not agreed to submit the arbitrability question itself to arbitration, and that the BG tribunal did not have jurisdiction to consider the matter of its own competence. See *Republic of Argentina v. BG Group plc*, D.C. Cir., No. 11-7021 (January 17, 2012).

<sup>293</sup> Rep. ¶¶ 207-208.

such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words “not exclusively” before listing the categories of “particularly” included investments. One of the categories consists of “shares, rights of participation in companies and other types of participation in companies.” The plain meaning of this provision is that shares held by a German shareholder are protected under 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.<sup>294</sup>

232. Several other ICSID tribunals have found indirectly-held shareholdings to constitute investments, even where the BIT does not explicitly refer to “directly or indirectly” held investments. For example, the tribunals in *Kardassopoulos v. Georgia*,<sup>295</sup> *Cemex v. Venezuela*,<sup>296</sup> and *Mobil v. Venezuela*<sup>297</sup> addressed similar fact patterns and reached similar conclusions to that in *Siemens*.

### (c) Respondent’s Policy Arguments

233. In addition to its legal arguments regarding the issue of the “indirectness” of Claimants’ shareholdings, Respondent has advanced a number of policy arguments against Claimants’ standing in this dispute. According to Respondent, the Claimants are upsetting the hierarchy of creditor claims against the Argentine Airlines and Interinvest, and it is inappropriate to award damages to a shareholder rather than to the company that has actually suffered injury. Respondent also expresses its concern that this suit could increase the risk that Respondent could be subjected to double-payment, because Interinvest could recover through the Argentine Courts in addition to any recovery by the Claimants under the Treaty.

234. Respondent’s assertions could have relevance in the merits proceeding of this case, but Respondent fails to demonstrate why these assertions are relevant at the jurisdictional stage. Moreover, Respondent has failed to articulate why these policy issues, as specifically applied to the facts at hand, should affect the outcome of this jurisdictional objection. Respondent has not attempted to demonstrate the extenuating nature of the facts here, or to differentiate the facts in this case from the large number of other ICSID cases in which claimant shareholders were found to have standing.

235. To conclude, the Tribunal finds that Claimants, as indirect shareholders, have standing to recover for damages that were inflicted upon the companies—i.e., Interinvest and the Argentine

<sup>294</sup> *Siemens v. Argentina*, Decision on Jurisdiction, at ¶ 137 (emphasis added).

<sup>295</sup> *Ioannis Kardassopoulos v. Georgia*, (ICSID Case No. ARB/05/18), Decision on Jurisdiction, July 6, 2007, ¶¶ 123, Exhibit C-486, at ¶¶ 123-124 (following *Siemens*).

<sup>296</sup> *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/08/15), Decision on Jurisdiction, December 30, 2010, at ¶¶ 149-58, Exhibit C-482.

<sup>297</sup> *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07/27), Decision on Jurisdiction, June 10, 2010, at ¶¶ 162-65, Exhibit C-483.

Airlines—in which Claimants invested. The ordinary language of Article I(2) is designed to protect “all assets”—including indirect shareholdings. The Tribunal also finds that Claimants are not deprived of standing by the fact that their investments were made through their subsidiary, Air Comet.

## **ii. Claimants’ Other Investments**

### **1. Positions of the Parties**

236. Claimants assert that they have made several qualifying investments under Article I(2) of the Treaty, and that these investments in Argentina go beyond the ownership and control of “shares and other forms of participation in companies.”<sup>298</sup> Specifically, Claimants assert that they have also made the following qualifying investments under the Treaty: (a) significant capital contributions to expand and support the Argentine Airlines’ operations, (b) concessions to operate in the Argentine airlines sector, (c) investment in management and know-how, (d) rights relating to aircraft, engines, a flight simulator, etc., and (e) movable and immovable property.<sup>299</sup>
237. Respondent disputes that these investments qualify under Article I(2). Specifically, Respondent asserts that Claimants have not substantiated by evidence their capital contributions, nor would such contributions confer any rights other than those vested in shareholders.<sup>300</sup> Respondent asserts that Claimants do not directly hold concessions to operate in the Argentine airlines sector and that they did not invest in other property and rights already within the possession of the Argentine Airlines at the time of investment.<sup>301</sup> Finally, Respondent asserts that Claimants have not demonstrated that they actually made investments in the Argentine Airlines’ aircrafts, or that the Argentine Airlines were the recipients of aircrafts ordered by Astra, an Irish subsidiary of Claimants, nor would these activities constitute qualifying “investments” under the Treaty.<sup>302</sup>

### **2. Analysis of the Tribunal**

238. The Tribunal will not address Claimants’ other alleged investments at this time. The Tribunal has concluded that Claimants’ indirect shareholdings constitute an “investment” under the Treaty. Consequently, Claimants have standing to bring this dispute. The Tribunal may consider Claimants’ other alleged investments at the merits stage of these proceedings.

## **iii. Claimants’ Third-Party Funding Agreement and Assignment of Award Proceeds**

239. 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.<sup>303</sup> In its post-hearing submissions, Respondent has also questioned two

<sup>298</sup> Rej. ¶¶ 199-202.

<sup>299</sup> CM ¶¶ 217-219; Letter of June 16, 2011, at 3.

<sup>300</sup> Rep. ¶ 163.

<sup>301</sup> Rep. ¶ 166.

<sup>302</sup> Rep. ¶ 164.

<sup>303</sup> See, e.g., Tr. Day 3 at 495, 505 and 578, Respondent’s Letter of June 23, 2011, ¶ 8 et seq.

agreements entered into by Claimants subsequent to commencing this arbitration. One of these, a Credit Assignment Agreement among Teinver, Transportes de 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.

240. The Parties do not dispute that Air Comet commenced voluntary reorganization proceedings on April 20, 2010.<sup>304</sup> 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.<sup>305</sup>
241. 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.<sup>306</sup> In addition, the Parties acknowledge that Claimants executed the Funding Agreement with Burford.<sup>307</sup> However, the Parties disagree as to the effects of these agreements on Claimants’ standing in this case.

### 1. Position of Respondent

242. As a procedural matter, Respondent asserts that Claimants concealed their reorganization proceedings as late as April 12, 2011, and that Claimants were under a duty to make registration documents and court filings available to the Tribunal and Respondent.<sup>308</sup>
243. Respondent asserts that Claimants’ assignment to Air Comet of proceeds from an eventual award in this case was “fraudulent,” because it was made on a date “suspiciously close” to Air Comet’s reorganization, and “gratuitous,” because it was not backed by consideration.<sup>309</sup> Respondent asserts that Claimants should have notified Respondent as the alleged debtor of the agreement.<sup>310</sup> Moreover, Respondent argues that the agreement contravenes Spanish public policy on collection preferences, and that consequently the parties to the agreement were required to obtain judicial authorization from the Spanish courts in order to proceed.<sup>311</sup>
244. As for the assignment itself, Respondent maintains that Claimants assigned to Air Comet a right they never owned, because Claimants themselves lack jurisdiction to bring this dispute and claim a remedy. Such an assignment would violate the general principle of law under which “a person

<sup>304</sup> Claimants’ Letter of June 16, 2011, at 16-17.

<sup>305</sup> *Id.*, at 12, Respondent’s Letter of June 23, 2011, ¶ 9.

<sup>306</sup> Claimants’ Letter of June 16, at 16; Respondent’s Letter of June 23, 2011, ¶ 17.

<sup>307</sup> Claimants’ Letter of June 30, 2011, at 5-6; Respondent’s Letter of June 23, 2011, ¶ 23. While the Funding Agreement became effective on April 14, 2010, the transaction contemplated by it only closed on July 4, 2010. *See* Ex. RA-160, Schedule 1 No. 3(a) and Claimants’ Letter of June 30, 2011, at 6.

<sup>308</sup> Respondent’s Letter of June 23, 2011, ¶¶ 10, 15.

<sup>309</sup> *Id.* at ¶ 18.

<sup>310</sup> *Id.* at ¶ 19.

<sup>311</sup> *Id.* at ¶ 27.

can transfer no greater right than he owns[.]”<sup>312</sup> Moreover, Claimants’ lack of standing is clear in light of the very text of the assignment to Air Comet and related court-filed writings, which note that “AIR COMET is the one that is in fact affected by the expropriation since it owns 100% of Interinvest S.A., which in turn owns 100% of Aerolíneas Argentinas’ shares...”<sup>313</sup>

245. Regarding Claimants’ Funding Agreement with Burford, Respondent asserts that it is Burford, and not Claimants, that is the real party interested in this arbitration. According to Respondent, Burford has “not only invoked that it holds a purported “common legal interest” with the Claimants in this proceeding, but it is also the only party that would seem to be potentially benefited in the case of a hypothetical award against Argentina in the instant case.”<sup>314</sup>
246. According to Respondent, Burford does not meet the basic jurisdictional requirements under the ICSID Convention. Burford is not an investor in Argentina, nor is it a company organized in Spain that could invoke the Treaty relied upon by Claimants to institute this arbitration proceeding.<sup>315</sup> Thus, allowing Burford to benefit from a dispute settlement mechanism authorized under the Treaty is contrary to the object and purpose of the latter, and would impermissibly bypass the limits of Argentina’s and Spain’s consent to arbitral jurisdiction.<sup>316</sup>

## 2. Position of Claimants

247. Claimants contest Respondent’s assertion that Claimants have purposefully concealed information from this Tribunal regarding the voluntary reorganizations. Claimants assert that they have disclosed in good faith all relevant facts during this arbitration proceeding, and that the allegedly “concealed” reorganizations have no bearing on this Tribunal’s jurisdiction. Likewise, the Assignment Agreement and the Funding Agreement are irrelevant to the question of the jurisdiction of this Tribunal.<sup>317</sup>
248. According to Claimants, Respondent’s assertions are misplaced for the following reasons: (i) Claimants’ standing to bring this arbitration is exclusively governed by the ICSID Convention and the Treaty; (ii) under the ICSID Convention, the Treaty and international law, the relevant date for the purposes of determining the Tribunal’s jurisdiction is the date of the institution of the proceedings; and (iii) both the Spanish reorganization proceedings and the Assignment Agreement post-date the institution of the proceedings.<sup>318</sup>
249. Claimants emphasize that Article 25 of the ICSID Convention defines “national of another contracting state” as “any juridical person which had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit such dispute to conciliation or arbitration.*”<sup>319</sup> According to Claimants, this principle has been firmly

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<sup>312</sup> Respondent’s Letter of October 26, 2011, at 13.

<sup>313</sup> *Id.* at 12-13.

<sup>314</sup> Respondent’s Letter of June 23, 2011, ¶ 39.

<sup>315</sup> *Id.* at ¶ 42.

<sup>316</sup> Respondent’s Letter of October 26, 2011, at 9-10.

<sup>317</sup> Claimants’ Letter of June 30, 2011, at 10.

<sup>318</sup> Claimants’ Letter of June 16, 2011, at 9-11.

<sup>319</sup> *Id.* at 8 (emphasis added).

established by ICSID tribunals, and moreover, is a firmly established rule in international adjudication.<sup>320</sup>

250. Claimants note that consent was perfected on November 20, 2008, that the Request for Arbitration was filed on December 11, 2008, and that registration of their Request by ICSID took place on January 30, 2009. No events between those dates would affect the Claimants' standing in these proceedings.<sup>321</sup> Each of Respondent's allegations occurred after the institution of these proceedings, and is therefore irrelevant to the issue of jurisdiction. Specifically, the Assignment Agreement between Claimants and Air Comet was executed January 18, 2010. The Funding Agreement between Claimants and Burford took effect on April 14, 2010. Claimants' Spanish reorganization proceedings occurred starting in late December, 2010.
251. With respect to Claimants' Spanish reorganization proceedings, Claimants note that these proceedings were voluntarily initiated, and that Claimants have kept the administration and disposition powers over their assets.<sup>322</sup> Claimants assert that under Spanish law, they do not need the express authorization of their respective reorganization administrators to continue any arbitration proceedings, including the instant one before ICSID, unless they were to withdraw, to accept a counter-claim, or to settle the dispute.<sup>323</sup> Nonetheless, their respective reorganization administrators have provided letters demonstrating their knowledge and acquiescence to continue this arbitration.<sup>324</sup>
252. Claimants argue that their assignment of the rights of the net proceeds of this arbitration to Air Comet has no bearing on Claimants' standing to bring this arbitration. The Assignment Agreement is a valid transaction which remains in full force and effect. Even if the Assignment Agreement was declared null and void, such circumstance would not undermine Claimants' standing to bring the present claim against Argentina. Claimants' position as Argentina's creditor would remain unaltered, and Air Comet would be the only one affected by the declaration of nullity.<sup>325</sup>
253. Furthermore, Claimants argue that Respondent incorrectly characterizes the Air Comet assignment as an "assignment of a claim." In fact, Claimants have executed an assignment of the rights to the net proceeds that may be obtained from an eventual award against Argentina. Claimants remain the legal holders of the claim against Argentina.<sup>326</sup> Under the assignment, Air Comet is to receive any proceeds that may remain after deducting all payments.<sup>327</sup>
254. Finally, with respect to the Burford Funding Agreement, Claimants submit that Burford is not a party to the arbitration. The Claimants did not sell or transfer the claim to Burford. Rather, Burford funds the arbitration in exchange for a percentage of the recovery in the case of a successful claim. Such financing agreements are frequently made, and Respondent has pointed

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<sup>320</sup> *Id.* at 8-9.

<sup>321</sup> *Id.* at 9.

<sup>322</sup> *Id.* at 14.

<sup>323</sup> *Id.* at 15.

<sup>324</sup> *Id.* at 15, Claimants' Letter of June 30, 2011, at 16.

<sup>325</sup> Claimants' Letter of June 30, 2011, at 11.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 11-12.

to no investment award or decision finding third-party funding to be illegitimate, unlawful or inappropriate.<sup>328</sup>

### 3. Analysis of the Tribunal

#### (a) Existence of Jurisdiction

255. First, international case law has consistently determined that jurisdiction is generally to be assessed as of the date the case is filed:

- The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.<sup>329</sup>
- [I]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ... This is not only a principle of ICSID proceedings, it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not. The ICJ developed cogent case law to this effect in the *Lockerbie* case. (...) The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (...) cannot withdraw the Tribunal's jurisdiction over the dispute.<sup>330</sup>

256. Second, to the extent that Respondent's standing argument is based on the assertion that Claimants transferred their rights or interests in this case to Burford after initiating this arbitration, this argument is unavailing. As Schreuer notes, "ICSID Tribunals have applied [the principle that jurisdiction is determined as of the date of filing] consistently. In some cases the claimants had divested themselves of or had transferred the rights that had given rise to the dispute after the institution of proceedings. Tribunals have rejected the argument that, as a consequence, claimants in the proceedings were no longer the real parties in interest."<sup>331</sup> In *CSOB v. Slovakia*, the claimant had, subsequently to filing the arbitration, assigned its arbitral claims against the respondent to a third party. The tribunal in *CSOB* held that

<sup>328</sup> Claimants' Letter of June 30, 2011, at 5-7.

<sup>329</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, February 14, 2002, I.C.J. Reports 2002, p. 3, ¶ 26, Ex. C-762.

<sup>330</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3), Decision on Jurisdiction, November 14, 2005, ¶¶ 60, 61 and 63. See also Schreuer, *The Icsid Convention: A Commentary*, Ex. C-761 at 92 ("It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which the judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction.").

<sup>331</sup> *Id.* at 92.

it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.<sup>332</sup>

257. Third, to the extent that Respondent's characterization of the Assignment Agreement as "fraudulent" implies that Claimants committed illegalities under Spanish law with respect to the performance of their investment, this argument is similarly unavailing. In *Hamester v. Ghana*, the respondent argued that claimant had committed illegalities in the performance of the investment.<sup>333</sup> Like the Treaty, the BIT in *Hamester* required the investment to be legally acquired. However, the Tribunal found that *subsequent* illegality did not affect its jurisdiction over claimant's dispute.<sup>334</sup>
258. Respondent has not countered these cases with any opposing case law, nor has it seriously sought to distinguish the facts in the current dispute. As a factual matter, Respondent does not contest Claimants' assertion that consent to this arbitration was perfected on November 20, 2008, that the Request for Arbitration was filed on December 11, 2008, and that registration took place on January 30, 2009. Nor does Respondent assert that any of the events it alludes to occurred prior to this time. Ordered chronologically, the subsequent events referred to by Respondent in its pleadings occurred as follows:
- January 10, 2010: Assignment Agreement executed assigning potential proceedings of an award under this arbitration from Claimants to Air Comet
  - March 23, 2010: Reorganization proceedings of Air Comet commence
  - April 14, 2010: Funding Agreement executed between Burford and Claimants regarding the financing of this arbitration
  - April 24, 2010: Agreement executed between King & Spalding, counsel for Claimants, and Claimants
  - June 21, 2010: Agreement between Air Comet and its reorganization administrators

<sup>332</sup> See *Ceskoslovenska Obchodni Banka, a.s. (CSOB) v. The Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Jurisdiction, May 24, 1999, at ¶ 31 (hereinafter "*CSOB v. Slovak Republic*"), Exhibit C-539.

<sup>333</sup> *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, June 18, 2010, at ¶ 96 (hereinafter "*Hamester v. Ghana*"), LA AR 73.

<sup>334</sup> *Id.* at ¶ 127 ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the *initiation* of the investment ("made") and (2) legality *during the performance* of the investment. ... 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. Therefore, in this first step of the analysis of the case relating to jurisdiction, the Tribunal is only concerned with allegations of fraud in the initiation of the investment, and not with the multiple allegations of fraudulent conduct during the life of the investment. . . .").

- December 22, 2010: Spanish judge authorizes Air Comet’s reorganization administrators to consent to the Burford Agreement
- December 23, 2010: Reorganization proceedings of Teinver commence
- January. 28, 2011: Reorganization proceedings of Autobuses commence
- February 16, 2011: Reorganization proceedings of Cercanías commence

259. Based on the fact that each of the allegations made by Respondent concerns an event—the Claimants’ reorganizations, the Assignment Agreement and the Funding Agreement—that post-dates the filing of the arbitration, the Tribunal finds this sufficient grounds to reject Respondents’ objection. The Tribunal will not address Respondent’s remaining allegations regarding the Assignment Agreement and the Funding Agreement as they concern Claimants’ standing, without prejudice to further submissions by the Parties in respect of the Respondent’s allegations in so far as they affect the merits of Claimants’ claims, as appropriate, during the merits stage.

#### **d. Third Jurisdictional Objection: Issues of State Attribution**

260. In their Memorial on the Merits, Claimants have asserted that the administration of Argentine President Nestor Kirchner was “hostile towards Claimants’ management of the Argentine Airlines and seemed driven by a desire to ultimately “re-Argentinize” the companies.”<sup>335</sup> Claimants assert that the administration took a number of measures that destabilized the legal and business environment surrounding Claimants’ investment.<sup>336</sup>

261. In particular, Claimants highlight President Kirchner’s appointment of Mr. Ricardo Cirielli as Undersecretary of Air Transportation. Claimants describe Mr. Cirielli as a powerful union leader who had a record—both before and after his appointment—of being openly critical of Claimants’ management of the Argentine Airlines.<sup>337</sup> Claimants assert, moreover, that during his appointment as Undersecretary of Air Transportation, Mr. Cirielli repeatedly lent his support to the unions and spoke out against airfare increases requested by the Argentine Airlines.

262. Claimants also assert that the Government of Argentina “implicitly support[ed]” strikes organized by the Argentine Aeronautical Technical Staff Association (“APTA”) and the Argentine Airline Pilots Association (“APLA”).<sup>338</sup> Claimants point to a 9-day strike that was organized by APLA and APTA in November 2005. Claimants allege that this strike severely affected the Argentine Airlines generally and ARSA in particular, affecting around 95,000 passengers, causing nearly 380 flights to be suspended and causing a loss of approximately US\$12 million to the Argentine Airlines.<sup>339</sup>

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

263. Respondent argues that Claimants have attempted to attribute responsibility to Respondent for acts by non-state entities. According to Respondent, Claimants make the following allegations:

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<sup>335</sup> Merits ¶ 164.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> Merits ¶ 182.

<sup>339</sup> *Id.* ¶¶ 170-71, 184-190.

1) that Respondent is responsible under international law for the acts of two Argentine labor unions, APTA and APLA; 2) that Respondent is responsible under international law for the acts of these unions because they were coordinated by Mr. Ricardo Cirielli to commit acts detrimental to the Argentine Airlines and thus force the nationalization of the companies; and 3) that Respondent is responsible for the acts of Mr. Cirielli before he took office as Undersecretary of Air Transportation in Argentina.<sup>340</sup>

264. Respondent asserts that it is not responsible for the acts of the two unions, which are not state organs and do not exercise governmental authority or act on the instructions or under the direction or control of Respondent.<sup>341</sup> Under international law, a labor union is neither a “State organ” nor does it exercise elements of “governmental authority” as defined in Articles 4 and 5 of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (“ILC Articles”).<sup>342</sup> Nor have Claimants met the test of attribution set forth in Article 8 of the ILC Articles.<sup>343</sup> Claimants have failed to prove the existence of an instruction or order by Respondent to individuals or entities or the existence of the *effective control* by the Government over them. Moreover, the “overall control” standard relied on by Claimants is inappropriate to use as a standard here.<sup>344</sup> In any case, the evidence submitted by Claimants in these proceedings does not even rise to the level of satisfying the “overall control” standard.<sup>345</sup>
265. Respondent also argues that the acts committed by Mr. Cirielli prior to his appointment as Undersecretary or following his period in public office cannot be attributed to the Argentine Government.<sup>346</sup> Moreover, while Claimants also seek to attribute responsibility for the acts committed by Mr. Cirielli as a public officer based on the control that he allegedly exerted over the labor unions, Claimants do not point out any act giving rise to the responsibility of States.<sup>347</sup> The fact that Mr. Cirielli was the Secretary General of APTA before and after becoming a public officer does not mean that APTA’s actions can be attributed to him.<sup>348</sup>
266. Finally, according to Respondent, the issue of attribution of responsibility under international law is jurisdictional in nature.<sup>349</sup> Claimants must prove that they have a *prima facie* case of attribution of responsibility in order for the subject-matter of the attribution to be argued on the merits of the case.<sup>350</sup> According to Respondent, case law has held that it is more appropriate to examine this question at the jurisdictional stage where it becomes apparent that the State is not involved at all or where the question of attribution may be resolved on the basis of a preliminary analysis. This is exactly the case here.<sup>351</sup>

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<sup>340</sup> Mem. ¶ 218.

<sup>341</sup> Mem. ¶ 219.

<sup>342</sup> Mem. ¶ 224.

<sup>343</sup> Rep. ¶¶ 264-265.

<sup>344</sup> Rep. ¶¶ 266-269.

<sup>345</sup> Rep. ¶ 270.

<sup>346</sup> Mem. ¶¶ 221, 230.

<sup>347</sup> Rep. ¶ 278.

<sup>348</sup> Rep. ¶ 261.

<sup>349</sup> Mem. ¶ 220.

<sup>350</sup> Rep. ¶ 245.

<sup>351</sup> Rep. ¶ 247.

## ii. Position of Claimants

267. Claimants assert that questions of state attribution should be decided in the merits phase of this arbitration.<sup>352</sup> Several investment law awards have held that whether state attribution is a question of jurisdiction or of merits is not clear-cut, and depends on the given case.<sup>353</sup> Here, because the question of state attribution is closely intermingled with the merits, and because it requires an in-depth analysis of the complex relationships between certain acts and the state, it is appropriate to resolve these issues during the merits phase.<sup>354</sup>
268. In the alternative, Claimants argue that the acts of the unions are attributable to Respondent. There is ample evidence that in various instances, APTA and APLA acted “on the instructions or under the direction or control” of Respondent.<sup>355</sup> Respondent maintains that the acts of the unions can only be attributable to the GOA if the government exercised “effective control” over them. Some tribunals have, however, rejected this “effective control” test in favor of an “overall control” test, including the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia and the European Court of Human Rights.<sup>356</sup> Claimants assert that there is ample evidence that Respondent exerted overall control over the unions, especially through Mr. Cirielli.<sup>357</sup> By appointing Mr. Cirielli as Undersecretary of Air Transportation while allowing him to simultaneously retain a position as union leader, Respondent created the situation of control over the union.<sup>358</sup> Respondent also, at least implicitly, supported strikes organized by APLA and APTA, including strikes in November 2005, September and October 2007, and January 2008, which caused the Argentine Airlines significant harm.<sup>359</sup>
269. Claimants assert that they do not currently seek to attribute to Respondent acts by Mr. Cirielli made prior to his appointment as Undersecretary.<sup>360</sup> Claimants simply seek to demonstrate that the Argentine Government knowingly appointed and kept in office an Undersecretary of Air Transportation who had previously served as the Secretary General of the powerful APTA union and who was openly hostile to Claimants’ management of the Argentine Airlines as an element of their allegations of unfair treatment under the Treaty at the hands of the Respondent.<sup>361</sup> Moreover, Respondent does not dispute that the acts by Mr. Cirielli during his tenure as Undersecretary are attributable to Respondent.<sup>362</sup> Citing Article 4 of the ILC Articles, Claimants assert that such acts are attributable to Respondent, even if they amount to an abuse of power.<sup>363</sup>

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<sup>352</sup> CM ¶ 291.

<sup>353</sup> CM ¶¶ 291-293.

<sup>354</sup> CM ¶ 298.

<sup>355</sup> CM ¶ 299.

<sup>356</sup> CM ¶¶ 299-300.

<sup>357</sup> CM ¶ 301; Rej. ¶ 314.

<sup>358</sup> Rej. ¶ 314.

<sup>359</sup> *Id.*

<sup>360</sup> Rej. ¶ 317.

<sup>361</sup> CM ¶ 305; Rej. ¶ 317.

<sup>362</sup> CM ¶ 302.

<sup>363</sup> CM ¶ 303.

### iii. Analysis of the Tribunal

270. The Tribunal notes that Respondent has not asserted that *none* of the acts alleged in Claimants’ Memorial on the Merits are attributable to the Argentine Government. Rather, Respondent’s arguments in this regard concern only whether certain alleged acts committed by two Argentine labor unions and by the Argentine Undersecretary of Air Transportation may be attributed to the State.
271. While Respondent asserts that substantial case law supports its position that the question of attribution is jurisdictional in nature,<sup>364</sup> this case law also recognizes that not all questions of attribution are identical or involve an identical context. Case law on this subject *does* support the conclusion that matters of state attribution should be adjudicated at the jurisdictional stage when they represent a fairly cut-and-dry issue that will determine whether there is jurisdiction.
272. For example, the issue before the *Maffezini* tribunal concerned the question whether the dispute between the claimant and respondent, a private commercial corporation established by the Spanish government, constituted an investor-State dispute under the meaning of Article 25 of the ICSID Convention, or whether it merely constituted a private dispute. The *Maffezini* tribunal determined that the question whether the respondent could be considered a state entity was critical to whether the tribunal could take jurisdiction over the case.<sup>365</sup> In *CSOB*, and also for purposes of determining whether the dispute constituted an investor-State dispute under Article 25, the tribunal had to determine whether the claimant was a private entity or subject to state control.<sup>366</sup>

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<sup>364</sup> Mem. ¶ 220.

<sup>365</sup> *Maffezini v. Spain*, Decision on Jurisdiction, at ¶ 75. The tribunal noted that the issue of whether the private commercial corporation was a state entity for purposes of determining the jurisdiction of the Centre and the competence of the tribunal was necessarily an issue to be decided at the jurisdictional stage of these proceedings. However, the tribunal noted that the issue of whether the actions and omissions complained of by the claimant were imputable to the State was an issue that “bears on the merits of the dispute and can be finally resolved only at that stage.” *Id.*

<sup>366</sup> *CSOB v. Slovak Republic*, Decision on Jurisdiction, at ¶ 27. In *CSOB*, the respondent had argued that the claimant did not meet the requirement of Article 25(1) that a dispute must be between a Contracting State and a national of another Contracting State. Specifically, the respondent had argued that the dispute was between two Contracting States because the claimant was purportedly a state agency of the Czech Republic rather than an independent commercial entity, and because the real party in interest to the dispute was the Czech Republic. The tribunal concluded, however, that the respondent failed to sustain its contention that the Centre lacked jurisdiction and the tribunal competence to hear the case on the ground that the claimant was acting as an agent of the State or discharging essentially governmental activities. *See also Hamester v. Ghana*, Award, at ¶ 141 (“For a jurisdictional objection to prosper, it has to be such a definitive impediment that the Tribunal has no right to entertain, or enquire into, the dispute. If, for example, one takes the jurisdictional requirements *ratione personae* as set out in Article 25 of the ICSID Convention, i.e. that the dispute is a legal dispute between a Contracting State of the ICSID Convention and investors of another Contracting State, the determinative criteria are clear and easily answered: the two Parties must respectively be a foreign investor from a Contracting State, and a Contracting State, for jurisdiction to exist. Here, as jurisdiction depends on the German/Ghana BIT, the Tribunal can deal with a dispute between the German company Hamester and the Republic of Ghana. In other words, if Hamester was not a German company, or if the case had been brought against a State other than Ghana, there would evidently have existed a clear jurisdictional objection. Not all issues, however, are so discrete or easily answered. Many—as is the case with attribution—entail more complex considerations, which could be characterized both as jurisdictional and relevant to the merits (and so to be considered only if the Tribunal has jurisdiction). Moreover, each of the alleged acts is closely connected to the question of whether Respondent has committed substantive violations of the BIT.”).

273. Here it is not necessary for the Tribunal to attribute the acts of the unions and Mr. Cirielli to the Respondent in order for this Tribunal to have jurisdiction over the dispute. The Claimants allege actions by Argentine government institutions contrary to the Treaty, whose attribution to the Respondent is not in dispute. Moreover, the issue of the attribution of the acts by the unions and Mr. Cirielli is not clear-cut. As the tribunal in *Hamester* noted:

[I]n many instances, questions of attribution and questions of legality are closely intermingled, and it is difficult to deal with the question of attribution without a full enquiry into the merits. In any event, whatever the qualification of the question of attribution, the Tribunal notes that, as a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State... This approach — to deal with the question of attribution as a merits question — is particularly appropriate, in the Tribunal's view in this case. The Tribunal is not faced here with a situation where it is readily evident that the State is not involved at all, or where the issue is capable of an answer based upon a limited enquiry (akin to other jurisdictional issues).<sup>367</sup>

Respondent argues, based on *Hamester*, that it is clear that Respondent is not involved at all with these alleged acts, and that this issue can be resolved on a preliminary basis. However, the issue is not as straight-forward as Respondent asserts.

274. Claimants' assertions regarding the unions and Mr. Cirielli are closely connected to their allegation that Respondent has violated the Treaty. Both sets of assertions concern the difficult and fact-intensive question of whether the Argentine government tolerated or encouraged or otherwise supported the union activities in question. In the case of the unions, Claimants assert that Respondent's support of the unions was part of its broader goal to renationalize the Argentine Airlines.<sup>368</sup> In the case of Mr. Cirielli, Claimants seek to demonstrate that Respondent knowingly appointed and kept in office an individual who was hostile to the Claimants' presence in Argentina.<sup>369</sup> If the Tribunal were to resolve these issues at this jurisdictional stage, it would do so only on the basis of the Parties' arguments from their jurisdictional pleadings. The Tribunal would not have the benefit of the Parties' further pleadings on the merits or any further evidentiary submissions that may touch upon these issues. Given the fact-intensive nature of Claimants' allegations, the Tribunal must postpone adjudication of this issue until the merits phase. Consequently, Respondent's jurisdiction objection is rejected.

275. Given this conclusion, it is not necessary for the Tribunal to address in detail the substance of Respondent's arguments regarding attribution. The Tribunal does note, however, that Respondent has requested the Tribunal to expressly declare that the acts of labor unions are not attributable to the Argentine Republic under Articles 4 or 5 of the ILC Articles,<sup>370</sup> which address, respectively, the conduct of organs of a State and of persons or entities that are empowered by

<sup>367</sup> *Hamester v. Ghana*, Award, at ¶¶ 143-45.

<sup>368</sup> CM ¶ 301.

<sup>369</sup> CM ¶ 305.

<sup>370</sup> Rep. ¶ 257.

the law of that State to exercise elements of government authority. Claimants have responded to this request, arguing that they do not in fact maintain that the unions fall within Articles 4 or 5 of the ILC Articles. Rather, to Claimants, the issue is whether they fall within Article 8 of the ILC Articles,<sup>371</sup> which concerns conduct of a person or group acting on the instructions of, or under the direction or control of a State. Because the two Parties agree that Article 8, and not Articles 4 or 5, would be relevant to the analysis of the unions' conduct,<sup>372</sup> there is no need for this Tribunal to make any such declaration.<sup>373</sup>

276. Finally, it should be clarified that both Parties agree that the current objection on the attribution of state acts refers to Mr. Cirielli's acts *before and after* his tenure as the Undersecretary of Air Transportation. While Claimants discuss Mr. Cirielli's acts *during* office in their pleadings,<sup>374</sup> this issue was not within the scope of Respondent's original objection.<sup>375</sup> Furthermore, Claimants assert that they do not seek to attribute liability to Respondent for Mr. Cirielli's pre-office acts.<sup>376</sup> As such, the Parties do not appear to actually disagree on the issue of attribution as it concerns Mr. Cirielli's conduct before and after holding his office.<sup>377</sup>

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

##### i. Position of Respondent

277. In Respondent's fourth and final objection, it asserts that Claimants' investment is not protected by the Treaty because of alleged illegalities connected to that investment. Specifically, Respondent asserts that Claimants, by certain actions taken with respect to their investment, have violated Spanish and Argentine law and have committed other misdeeds.

<sup>371</sup> Rej. ¶ 307

<sup>372</sup> See also Rep. ¶ 256.

<sup>373</sup> The Tribunal notes that while the Parties agree that Article 8 of the ILC Articles applies to the unions' activities, they remain at odds over the proper interpretation of the term "control" as used in Article 8. As noted above, Respondent maintains that the rigorous standard of "effective control," which has been used in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ("Nicaragua Merits") I.C.J. Reports 1986, ¶ 115, and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ Reports 1, ¶ 396 et seq. (February 26) (LA AR 75), and which is described in the ILC Commentary at Article 8, ¶ 4, is the appropriate legal standard. Claimants maintain, instead, that the proper standard to be applied to the unions is the less rigorous standard of "overall control," which has been used in *Prosecutor v. Duško Tadic*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at 1541, ¶ 117 and p. 1546, ¶ 145, Exhibit C-504; and in *Loizidou v. Turkey*, Merits, ECHR, Judgment, December 18, 1996, ¶ 56, Exhibit C-505.

<sup>374</sup> CM ¶ 302.

<sup>375</sup> Mem. ¶ 228.

<sup>376</sup> CM ¶ 304; Rej. ¶ 317.

<sup>377</sup> The Tribunal notes that the Parties appear to disagree on the legal standard applicable to Mr. Cirielli's conduct while in office. Claimants assert that ILC Article 4 is applicable to his acts (CM ¶ 302, Rej. ¶ 316), while Respondent suggests that Article 8 should apply (Rep. ¶ 279). For the reasons indicated previously, and because Mr. Cirielli's conduct while in tenure of his position was not the subject of Respondent's objection, the Tribunal declines to address these arguments at this time.

**Alleged Violations of Spanish Law**

278. Respondent bases its allegations on a pending proceeding in Spain involving the directors of Air Comet. Respondent alleges that subject matters of the investigation have a direct impact on and relation to this arbitration.<sup>378</sup>
279. Respondent bases its allegations on facts alleged by the Office of the Attorney General in an ongoing Spanish court investigation of directors of SEPI and Air Comet, involving acts related to the 2001 Share Purchase Agreement (“SPA”) between SEPI and Air Comet.<sup>379</sup> According to Respondent, the investigation concerns whether these actors were guilty of misappropriation of public funds, fraud or illegal exaction, document forgery, fraudulent use of process, and/or crimes against the federal treasury in connection with the SPA.<sup>380</sup>
280. The SPA, which provided for the transfer of SEPI’s 99.2% shareholding in Interinvest to Air Comet, was approved by the Spanish Cabinet and was subsequently executed on October 2, 2001. As part of the SPA, SEPI sold to Air Comet S.A. its interest in Interinvest for US\$ 1 dollar, while SEPI agreed to transfer \$300 million to Interinvest to service ARSA’s liabilities (in addition to transferring other funds to Air Comet).<sup>381</sup> Respondent alleges that instead of complying with the terms of the SPA, Air Comet used the SEPI funds to buy the existing claims against ARSA, with Air Comet subrogated as a creditor.<sup>382</sup>
281. According to Respondent, the defendants in this investigation purportedly have asserted that SEPI and Air Comet executed a supplemental private agreement, signed on October 15, 2001, in which the parties agreed that Air Comet would subrogate the claims as described above. However, the Spanish Office of the Attorney General believes this document may either be a false document created after its indicated date, or, to the extent it is an authentic document, it concerns conduct that deviates from that which was authorized in the SPA by the Spanish Cabinet.<sup>383</sup>
282. Respondent alleges that Air Comet committed tax fraud in connection with its subrogation of ARSA’s debt claims. Respondent asserts that Air Comet failed to declare its subrogation for tax purposes, even though it created a taxable event under Spanish law when it acquired claims against ARSA.<sup>384</sup> According to Respondent, several of the defendants in the proceeding have already made court statements and the State Agency of the Tax Administration has issued an expert report.<sup>385</sup>
283. Respondent notes that the Spanish Central Court for Investigative Proceedings No. 6 of Madrid concluded on September 7, 2011 that the investigations in this proceeding allow the inference that Díaz Ferrán, Pascual Arias and Mata Romayo were involved in conduct that could be

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<sup>378</sup> Rep. ¶ 286.

<sup>379</sup> Mem. ¶ 254.

<sup>380</sup> *Id.*

<sup>381</sup> Rep. ¶ 282.

<sup>382</sup> Mem. ¶ 257.

<sup>383</sup> Mem. ¶ 259.

<sup>384</sup> Mem. ¶ 261-262.

<sup>385</sup> Mem. ¶ 267.

“presumably and initially qualified as a crime against the Treasury Department committed by Air Comet.”<sup>386</sup> Respondent also notes that the Prosecution of the Spanish National Court has requested a penalty of imprisonment for Mr. Díaz Ferrán, Mr. Pascual Arías and Mr. Antonio Mata Ramayo, along with a joint compensation amounting to 99 million euros.<sup>387</sup>

284. In addition to this investigation, Respondent notes a number of “new developments” as of March 26, 2012 in pending Spanish criminal proceedings that directly involve Mr. Díaz Ferrán and Mr. Pascual Arías.<sup>388</sup>
285. First, Respondent notes that the Central Court for Investigation Proceedings No. 1 of Madrid admitted a criminal investigation proceeding on February 2, 2012 against Mr. Díaz Ferrán, Mr. Pascual Arías and Mr. Iván Losada (administrator of Teinver S.L.) in connection with their management of Viajes Marsans.<sup>389</sup>
286. Second, Respondent notes that Mr. Díaz Ferrán and Mr. Pascual Arías are being investigated in another proceeding by the Spanish National Court in connection with the potential commission of procedural fraud. According to Respondent, the two men allegedly submitted false documentation to a judge in order to obtain an unfair judicial resolution.<sup>390</sup>
287. Third, Respondent notes that one of the Marsans Group’s creditors has brought a criminal action against Mr. Díaz Ferrán, Mr. Pascual Arías, Mr. Iván Losada and Mr. Ángel de Cabo in the Court for Investigation Proceedings No. 8 of Madrid, concerning their actions with respect to insolvency proceedings. According to Respondent, Mr. Díaz Ferrán and Mr. Pascual Arías sold their companies to Possibilitum Business, controlled by Mr. de Cabo, which had engaged in illegal activities in the course of reorganization proceedings.<sup>391</sup>
288. Fourth, Respondent points to a proceeding pending before Commercial Court No. 12 of Madrid, and notes that the Province of Madrid’s Prosecutor (Economic Crimes Section) has requested the court that Mr. Díaz Ferrán, Mr. Pascual Arías and Possibilitum Business be declared guilty with respect to acts taken as the *de facto* and *de jure* administrators in the reorganization of Viajes Marsans S.A., Viajes Crisol S.A.U., Rural Tours S.A.U. and Tiempo Libre S.A.U.<sup>392</sup>
289. Fifth, Respondent notes that the Commercial Court No. 9 of Madrid found Mr. Díaz Ferrán and Mr. Pascual Arías “guilty of the bankruptcy of Seguros Mercurio S.A.”<sup>393</sup> Respondent notes that the court also found Teinver and other Marsans Group companies “liable as accomplices to the bankruptcy.”<sup>394</sup> Specifically, Teinver and the other companies directly took part in transactions,

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<sup>386</sup> Respondent’s Letter of October 26, 2011, at 2, citing the September 7, 2011 Order of the Central Court for Investigation Proceedings No. 6 in Madrid, Ex. AR-172, at 2.

<sup>387</sup> Respondent’s Letter of March 26, 2012, at 2, citing Annex I.

<sup>388</sup> See Respondent’s Letter of March 26, 2012.

<sup>389</sup> *Id.* at 3, see also Annex II.

<sup>390</sup> *Id.* at 5; see also Annexes IV and V.

<sup>391</sup> *Id.* at 6.

<sup>392</sup> *Id.* at 6-8; see also Annex VII.

<sup>393</sup> Respondent’s Letter of May 24, 2012, at 1.

<sup>394</sup> *Id.* at 1-2.

particularly in 2008 and 2009, intended to fraudulently remove assets owned by Seguros Mercurio.<sup>395</sup>

### **Alleged Violations of Argentine Law**

290. Respondent notes that Air Comet was engaged in “irregular and fraudulent behavior” during the course of ARSA’s reorganization proceedings.<sup>396</sup> Respondent asserts that during the reorganization proceedings, Air Comet was both the controlling company of the airline *and* its main creditor, thereby acting in an impermissible double role under Argentine law.<sup>397</sup>
291. Respondent also notes that a criminal investigation has been filed in the Argentine courts against Antonio Mata Ramayo, Díaz Ferrán, Pascual Arias and others, as directors of ARSA, regarding the “fraudulent administration” of the company.<sup>398</sup> The investigation comprises several components. First, and similar to the Spanish investigation above, the subjects of investigation have been charged with causing Air Comet’s fraudulent diversion of SEPI funds intended to settle ARSA’s liabilities.<sup>399</sup> Second, the investigation concerns ARSA’s December 31, 2001 balance sheet, which allegedly included bogus entries regarding SEPI’s alleged capital contribution of ARS 1.238 million in 2001. Respondent asserts that these bogus entries resulted in the dilution of the Argentine State’s shares in the airlines, reducing its participation below the minimum legal threshold for active participation as a shareholder.<sup>400</sup> Third, the investigation concerns possible crimes committed by Mr. Mata and others in relation to Air Comet’s subrogation of claims previously held by third-party creditors. Allegedly, Air Comet re-assigned these claims to another company, Royal Romana Playa S.A., for valuable consideration, allowing the latter to cast a vote in ARSA’s reorganization plan.<sup>401</sup>
292. Finally, Respondent asserts that it is irrelevant that the Commercial Court of Buenos Aires ended ARSA’s reorganization proceedings on June 17, 2011.<sup>402</sup> The termination of those proceedings does not demonstrate that Claimants committed no illegalities with respect to ARSA’s reorganization, and indeed, the criminal investigations in Spain and Argentina are ongoing with respect to Claimants’ fraudulent conduct and irregularities in connection with ARSA.<sup>403</sup>

### **Other Alleged Misdeeds**

293. Respondent also points to a number of “issues” with the business management of the Grupo Marsans and of the Argentine Airlines. Respondent characterizes Marsans’ management worldwide as “deplorable,” noting that Air Comet’s operations halted in 2009, that a number of writs of attachment have been issued against Marsans’ owners, Díaz Ferrán and Pascual Arias, that other legal suits that have been brought against certain Marsans affiliates, and that certain

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<sup>395</sup> *Id.* at 2.

<sup>396</sup> Mem. ¶ 269; Rep. ¶ 309.

<sup>397</sup> Mem. ¶¶ 270-271.

<sup>398</sup> Mem. ¶ 272; *see also* RA 168.

<sup>399</sup> Mem. ¶ 274.

<sup>400</sup> Mem. ¶ 275; Rep. ¶ 319.

<sup>401</sup> Mem. ¶ 276.

<sup>402</sup> Respondent’s Letter of October 26, 2011, at 3.

<sup>403</sup> *Id.*, at 1-2.

Marsans affiliates are undergoing reorganization.<sup>404</sup> Respondent also notes “accounting irregularities” in the Argentine Airlines, including the commingling of assets.<sup>405</sup>

**The Relevant Inquiry of Legality for Purposes of Jurisdiction**

294. Respondent asserts that the Treaty only protects investments that were made and carried out in accordance with the laws of the host state.<sup>406</sup> The purpose of Article I(2), which defines “investments,” is to prevent the Treaty from protecting investments that should not be protected.<sup>407</sup> Moreover, there is consensus within international investment law that fraud is prohibited according to good practices and international public policy.<sup>408</sup>
295. Respondent does not believe that the jurisdictional issue solely concerns whether the investments were *made* in accordance with Argentine law; this interpretation leads to results contrary to the object and purpose of the Treaty.<sup>409</sup> If the investment’s *inception* was the only relevant criterion at the jurisdictional stage, this would lead to an absurd situation in which transactions that were made legally, but were followed by “an everlasting series of illegal acts” following their creation, nonetheless still benefit from the Treaty’s protections.<sup>410</sup> Moreover, it would be necessary to consider the time at which each investment was made, which would be infeasible in most disputes in which there are numerous investment transactions involved.<sup>411</sup>
296. Respondent asserts that even if the jurisdictional test is limited to the time of the investment’s inception (here, the acquisition by Air Comet of Interinvest), the Tribunal is not limited to assessing only the formal act of executing the SPA.<sup>412</sup> Rather, the Tribunal must take account of the whole complex transaction leading to the “inception” of the investment, which includes both the execution of the SPA and the breach of or compliance with its terms.<sup>413</sup>
297. Finally, Respondent notes that even though this Tribunal is not bound by the conclusions made by local authorities, they may be of “substantial assistance” for the Tribunal to determine the legality of Claimants’ investments.<sup>414</sup> Furthermore, the “presumption of innocence” criminal law standard cannot be imputed into the context of international investment law, as Claimants have argued.<sup>415</sup>

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<sup>404</sup> Mem. ¶¶ 279-307; Rep. ¶ 305-308.

<sup>405</sup> Mem. ¶¶ 308, 312.

<sup>406</sup> Mem. ¶ 319.

<sup>407</sup> Mem. ¶ 322.

<sup>408</sup> Mem. ¶ 325.

<sup>409</sup> Rep. ¶¶ 347-48, 356.

<sup>410</sup> Rep. ¶ 356.

<sup>411</sup> Rep. ¶ 363.

<sup>412</sup> Rep. ¶ 365-66.

<sup>413</sup> *Id.*

<sup>414</sup> Rep. ¶¶ 369-71.

<sup>415</sup> Rep. ¶¶ 374-75, citing CM ¶ 331.

### **Good Faith**

298. As a final argument, Respondent asserts that an investment that “deliberately runs afoul of the law of the state” cannot be considered to have been made in good faith.<sup>416</sup> Respondent points to Claimants’ alleged breach of good faith in Air Comet’s subrogation of ARSA’s creditors’ claims and in Air Comet’s failure to declare this subrogation to the Spanish authorities due to its character as a taxable event.<sup>417</sup> Respondent also accuses the Grupo Marsans of ignoring good faith principles “in multiple jurisdictions.”<sup>418</sup>

#### **ii. Position of Claimants**

299. Claimants argue that Respondent has failed to establish that Claimants’ investments do not conform to Argentine or Spanish law. According to Claimants, Respondent’s allegations of illegality are “meritless.”<sup>419</sup> The mere existence of investigations in Spain and Argentina regarding Claimants’ investments does not provide grounds for the Tribunal to deny jurisdiction.<sup>420</sup> Moreover, Respondent fails to demonstrate how the issues at play in the Spanish investigation would render Claimants’ acquisition of its investment illegal under Argentine law.<sup>421</sup> Claimants assert that, in any event, the Treaty only requires that the investment be in conformity with the host State’s law at the time of the initiation of the investment, which it did.

### **Alleged Violations of Spanish Law**

300. According to Claimants, the Spanish legal investigations are not relevant to the jurisdictional inquiry because they do not concern Claimants’ *acquisition* of their participation in the Argentine Airlines. Respondent has not claimed that Claimants made their acquisition through, for example, an act of corruption or fraud.<sup>422</sup> Instead, the Spanish investigations concern 1) whether, in the performance of the SPA, SEPI should have requested prior consent of the Spanish Cabinet before allowing Air Comet to subrogate the rights of ARSA creditors,<sup>423</sup> and 2) whether Air Comet should have considered the acquisition of those credits for purposes of corporate income tax.<sup>424</sup>

301. Moreover, Claimants assert that Air Comet properly used the funds provided by SEPI,<sup>425</sup> and it did so with SEPI’s consent.<sup>426</sup> Claimants state that Respondent is also mistaken in its allegation that Air Comet gratuitously increased its patrimony with SEPI funds while failing to add them to its asset base for Spanish corporate tax purposes. Those credits against ARSA never actually entered into Air Comet’s patrimony. Air Comet acted in accordance with the SPA and the

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<sup>416</sup> Mem. ¶¶ 338, 340.

<sup>417</sup> Mem. ¶ 342.

<sup>418</sup> Mem. ¶ 345.

<sup>419</sup> CM ¶ 316; *see also* Claimant’s Letter of April 4, 2012.

<sup>420</sup> CM ¶¶ 317, 319.

<sup>421</sup> CM ¶ 318.

<sup>422</sup> CM ¶ 342.

<sup>423</sup> CM ¶ 343.

<sup>424</sup> CM ¶ 345.

<sup>425</sup> CM ¶ 322; CM ¶ 340.

<sup>426</sup> CM ¶ 344.

December 2001 Agreement in using SEPI's funds in direct benefit of ARSA's shareholder (Interinvest), which in return capitalized the credits, increasing its stockholding in ARSA and reducing the airline's debt.<sup>427</sup>

302. Claimants argue that the "mere existence" of the investigations and court proceedings in Spain and Argentina is insufficient to demonstrate an illegality.<sup>428</sup> Claimants note that even if a Spanish or Argentine court was to render a decision finding that Claimants had breached domestic law when making their investments, such a decision would not be binding on this Tribunal.<sup>429</sup> Respondent must prove its allegations of illegality before this Tribunal.
303. More specifically, Claimants disagree with Respondent regarding the contents of the September 7, 2011 Spanish court order. Claimants assert that the order did *not* make a final determination that crimes had been committed.<sup>430</sup> Rather, the court decided to continue with its investigation based on its finding that a crime may have been committed against the Spanish Treasury with respect to Air Comet's Spanish corporate income tax for 2002.<sup>431</sup> In that same order, however, the court also ordered the dismissal of every other accusation against Air Comet and the other individuals, including Díaz Ferrán and Pascual Arias, which included the crimes of falsification, unlawful exaction, procedural fraud, and misappropriation of public funds.<sup>432</sup> With respect to the alleged crimes against the Spanish Treasury, there has been no decision on the preliminary investigation.<sup>433</sup>
304. According to Claimants, even assuming that Respondent had provided sufficient legal and factual elements for the Tribunal to find a violation of Spanish law, it fails to demonstrate how such breaches of Spanish law could amount to breaches under Argentine law, which is the only standard under the Treaty (Art. 1(2)).<sup>434</sup>
305. With respect to the "new developments" alleged by Respondent, Claimants assert that these developments have no bearing on either the inception of Claimants' investment or on Argentine law, and that in any case, these developments consist of "mere allegations."<sup>435</sup>
306. First, with respect to the proceedings at the Central Court for Investigation Proceedings No.1 of Madrid regarding the alleged embezzlement by Mr. Díaz Ferrán, Mr. Pascual Arias and Mr. Ivan Losada, Claimants assert that these proceedings are totally unrelated to the jurisdiction of this Tribunal and to the subject matter of the arbitration.<sup>436</sup>

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<sup>427</sup> CM ¶ 345.

<sup>428</sup> CM ¶ 331.

<sup>429</sup> CM ¶ 332.

<sup>430</sup> Claimants' Letter of November 8, 2011, at 3.

<sup>431</sup> *Id.* at 4.

<sup>432</sup> *Id.* at 5.

<sup>433</sup> Claimants' Letter of April 4, 2012, at 3.

<sup>434</sup> CM ¶ 348.

<sup>435</sup> Claimants' Letter of April 4, 2012, at 2.

<sup>436</sup> *Id.* at 3.

307. Second, with respect to the procedural fraud claims, Claimants deny the validity of the claims as well as Respondent's purportedly unsupported conclusions.<sup>437</sup>
308. Third, with respect to the investigation concerning the legality of operations within the reorganization proceedings pending before the Court for Investigation Proceedings No. 8 of Madrid, Claimants assert that neither the claims nor the reorganizations themselves have any bearing on the present arbitration.<sup>438</sup>
309. Fourth, concerning the reorganization proceeding pending before Commercial Court No. 12 of Madrid, Claimants assert that this proceeding is irrelevant to the present arbitration. Moreover, the Prosecutor's petition has been opposed by the interested parties and no decision has yet been issued.<sup>439</sup>

Fifth, Claimants address the Commercial Court No. 9 of Madrid's findings that Gerardo Díaz Ferrán and Gonzalo Pascual Arias were "guilty of the bankruptcy of Seguros Mercurio, S.A." and that Teinver and other Marsans Group companies were liable as accomplices. Claimants assert that the bankruptcy of Seguros Mercurio S.A. is "unrelated to Claimants' second request for provisional measures, the jurisdiction of this tribunal, or even the subject matter of these proceedings."<sup>440</sup> Moreover, the Court's May 11, 2012 decision is not final, and Claimants understand that such appeal will be filed in due course.<sup>441</sup>

#### **Alleged Violations of Argentine Law**

310. Claimants assert that Argentine investigations into fraudulent management are groundless. First, Claimants state that the funds obtained from SEPI were properly used and directly or indirectly resulted in a benefit to ARSA and AUSA.<sup>442</sup> Second, Claimants note that Respondent did not disapprove of ARSA's 2001 balance sheets, and that Respondent's participation levels shrank after it failed to make the necessary contributions to maintain its participation at prior levels.<sup>443</sup> Claimants note that the Argentine proceedings remain at the preliminary investigation stage.<sup>444</sup>
311. Claimants also assert that Air Comet fully complied with the Argentine Bankruptcy Law with respect to the reorganization of ARSA.<sup>445</sup> The majority of ARSA's trustees approved the settlement agreement between ARSA and its creditors, and this settlement was subsequently approved by the responsible Argentine court.<sup>446</sup> Furthermore, the Commercial Court of Buenos Aires ended ARSA's reorganization proceedings on June 17, 2011. The court made no finding that Claimants, Air Comet or Interinvest had committed irregularities or illegalities during the

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<sup>437</sup> *Id.* at 4.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> Claimants' Letter of June 1, 2012, at 2.

<sup>441</sup> *Id.* at 2.

<sup>442</sup> CM ¶ 322.

<sup>443</sup> CM ¶ 321.

<sup>444</sup> Claimants' Letter of June 30, 2011, 18-19.

<sup>445</sup> CM ¶ 351.

<sup>446</sup> CM ¶¶ 352, 355.

reorganization. This decision therefore confirms that Respondent's accusations of "irregularities" in the context of ARSA's reorganization are groundless.<sup>447</sup>

### **Other Alleged Misdeeds**

312. Claimants respond that Respondent has failed to demonstrate the relevance of the bankruptcy proceedings or of the other circumstances surrounding Grupo Marsans' financial difficulties.<sup>448</sup> Furthermore, Claimants assert that it was Respondent's own failure to grant prompt and adequate compensation and to observe its commitments that severely impacted Claimants' group of companies.<sup>449</sup>

### **The Relevant Inquiry of Legality for Purposes of Jurisdiction**

313. Claimants assert that the Treaty only requires that the investment conform to law of the host State at the time it was "acquired or effected."<sup>450</sup> In other words, the analysis of the Tribunal at this stage must focus on the initiation of the investment. This assertion is also confirmed by relevant case law.<sup>451</sup> Claimants note that Respondent has not denied that Air Comet prevailed at the SEPI auction and legally acquired 99.2% shares of Interinvest, and that the SPA is a legal and binding agreement under Spanish law.<sup>452</sup>
314. Respondent's allegations refer only to the performance, rather than the inception, of Claimants' investment.<sup>453</sup> But Respondent has failed to provide any authority in support of its assertion that an investment must conform to the host state's law throughout the course of its operation and not just at the time of its commencement in order for it to fall within the protection of the Treaty. If such a requirement existed, almost any investment could be disqualified from Treaty coverage by pointing to technical violations of local law in the operation of the investment.<sup>454</sup> Furthermore, as described above, Respondent has failed to substantiate its allegations on non-performance.<sup>455</sup>

### **Good Faith**

315. Claimants assert that Respondent has not provided evidence that Claimants acted in bad faith at the time of making the investment (or later).<sup>456</sup> Unlike the case law cited by Respondent, there is no evidence of fraud on the part of Claimants at the time of the making of their investment, nor is there evidence that Claimants have attempted to gain access to an ICSID arbitration procedure to which they would not otherwise have been entitled.<sup>457</sup> Respondent has simply repeated certain

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<sup>447</sup> Claimants' Letter of August 30, 2011, at 1.

<sup>448</sup> CM ¶ 365.

<sup>449</sup> CM ¶¶ 366-67.

<sup>450</sup> CM ¶ 371.

<sup>451</sup> Rej. ¶ 324.

<sup>452</sup> CM ¶ 371; *see also* CM ¶ 313.

<sup>453</sup> CM ¶ 374; *see also* CM ¶ 314.

<sup>454</sup> CM ¶ 374.

<sup>455</sup> Rej. ¶ 328.

<sup>456</sup> CM ¶ 375.

<sup>457</sup> CM ¶ 378.

allegations such as the allegation that Air Comet purportedly committed tax fraud under Spanish law in its acquisition of liabilities of ARSA.<sup>458</sup>

### iii. Analysis of the Tribunal

316. The Parties disagree on two initial legal issues regarding the above allegations. First, they disagree over whether, under the Treaty and international investment law, *all* illegalities committed by investors in connection with an investment can deprive the investor of protection under the Treaty, or only illegalities that are related to the inception of the investment. Second, the Parties disagree on whether, as a factual matter, the illegalities alleged to have been committed by the Claimants occurred at the “inception” of the investment or at a subsequent time.

#### 1. Timing of the Alleged Illegality

317. As Respondent notes, it is widely acknowledged in investment law that the protections of the ICSID dispute settlement mechanism should not extend to investments made illegally. As noted recently by the tribunal in *Hamester v. Ghana*,

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, *e.g.* by the tribunal in *Phoenix*).<sup>459</sup>

318. However, as the Treaty itself makes clear, the critical time period for determining an investment’s legality is the time the investment was made. Articles I(2), II and III(1) of the Treaty address qualifying investments made by investors. Article I(2) defines “investments” as follows:

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*[.] (emphasis added)

The application of ordinary meaning of Article I(2) to the Claimants is perfectly straightforward: in order to qualify as an “investment” under the Treaty, Claimants’ investments must have been acquired or effected in accordance with Argentine law, the country receiving the investment. In other words, the relevant inquiry is whether Claimants’ entry into the investment, here its acquisition of shares in Interinvest through Air Comet, is legal.

319. Other provisions of the Treaty support this interpretation. Article II(1), which concerns the promotion and acceptance of investments, states that “[e]ach Party shall encourage, to the extent possible, investments *made* in its territory by investors of the other Party and shall accept those

<sup>458</sup> *Id.*

<sup>459</sup> *Hamester v. Ghana*, Award, ¶ 123.

investments in accordance with its legislation.” (emphasis added) Article III(1), which addresses the protection of investments, requires each party to “protect within its territory investments *made, in accordance with its legislation*, or the investors of the other Party[.]” (emphasis added).

320. Case law addressing BITs with similar language also supports this interpretation. The Germany-Ghana BIT at issue in *Hamester* contained similar language to the Treaty, and the tribunal ruled that only the inception of the investment was relevant for its jurisdictional inquiry:

The Tribunal considers that a distinction has to be drawn between (1) legality as at the *initiation* of the investment (“made”) and (2) legality *during the performance* of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal’s jurisdiction. 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.<sup>460</sup>

321. Similarly in *Fraport*, the respondent in that dispute had asserted that in order for the claimant to maintain jurisdictional standing under the Germany-Philippines BIT, the investment must not only be in accordance with the domestic law at the commencement of the investment but must also continually remain in compliance with the domestic law. While the tribunal ultimately agreed with the respondent that the investment was illegally *acquired*,<sup>461</sup> the tribunal rejected the respondent’s interpretation regarding the *continuation* of the investment. It noted,

The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.<sup>462</sup>

322. Even in *Inceysa*, a case in which the tribunal determined that the claimants had committed numerous fraudulent acts, the tribunal’s inquiry was directed towards the *inception* of the

<sup>460</sup> *Hamester v. Ghana*, Award, at ¶ 127 (emphasis added).

<sup>461</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award, August 16, 2007 (hereinafter “*Fraport v. Philippines*”), LA AR 84. This award was subsequently annulled, but the annulment decision was based on different grounds. See *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, LA AR 145.

<sup>462</sup> *Fraport v. Philippines*, 2007 Award at ¶ 345.

investment: “[T]he foreign investor cannot seek to benefit from an investment *effectuated* by means of one or several illegal acts and, consequently, enjoy the protection granted by the host state, such as access to international arbitration to resolve disputes, because it is evident that *its act had a fraudulent origin* and, as provided by the legal maxim, “nobody can benefit from his own fraud.”<sup>463</sup> All of the *Inceysa* tribunal’s factual findings of fraud concerned the inception of the investment, including the claimant’s presentation of false information as part of its bid tender, false representations made during the bidding process, false documents submitted as part of its bid, and a hidden relationship with another bidder in contravention of the bidding rules.<sup>464</sup>

323. In addition, the Tribunal notes that the relevant law for purposes of determining whether the investment was legally made is the law of the host State. Several of Respondent’s arguments concern allegations of illegality under *Spanish* law. In support of these arguments, Respondent asserts that “the general principles that endorse the non-protection of illegal investments or investments made in bad faith ... are not limited to the law of the host State, but also to the laws of other countries that may be involved.”<sup>465</sup> Once again, however, Article I(2) of the Treaty, which refers to investments “acquired or effected in accordance with the legislation of *the country receiving the investment*,” makes clear that the relevant law for this issue is the legislation of Argentina.

## 2. Claimants’ Alleged Illegalities

324. Respondent has failed to demonstrate that Claimants, as a factual matter, committed illegalities in the process of *acquiring* their investment in the Argentine Airlines. In this respect, the onus is on Respondent. While Claimants must make a *prima facie* showing that their investment comes within the protections of the Treaty,<sup>466</sup> Respondent has not, with this objection, raised any issue of fact to counter Claimants’ showing.<sup>467</sup>

325. As Claimants note, Respondent has not denied that Air Comet prevailed at the SEPI auction and legally acquired 99.2% shares of Interinvest, and that the SPA is a legal and binding agreement

<sup>463</sup> *Inceysa v. El Salvador*, Award, at ¶ 242 (emphasis added).

<sup>464</sup> *Id.* at ¶ 236.

<sup>465</sup> Mem. ¶ 340.

<sup>466</sup> *See, e.g., Salini v. Jordan*, Decision on Jurisdiction, ¶ 151 (“In conformity with [substantial] jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”).

<sup>467</sup> A number of tribunals have held that a respondent bears the burden of proof with respect to the facts alleged in its jurisdictional objections. *See, e.g., Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Jurisdiction, April 18, 2008, ¶ 75, Exhibit C-523. (“It will be seen that the jurisdictional objection entails issues of fact (whether the investments were and are under Mr. Patriciu’s dominant control; whether the origin of the investment funds was Romanian), and issues of law (what effect such factual circumstances would have on the Tribunal’s jurisdiction to hear a complaint by the investor). The issues of fact are ones which the Respondent bears the burden of proving according to the requisite standard, in order to sustain the claims of law it bases on them. The Parties are in dispute over both the issues of fact and the issues of law.”); *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB05/17), Award, February 6, 2008, ¶ 105 (LA AR 83) (“the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent.”); *Hamester v. Ghana*, Award at ¶ 132 (“Having carefully considered all the evidence, the Tribunal considers that the Respondent has not fully discharged its burden of proof” with respect to respondent’s allegation of illegality in the inception of the investment).

under Spanish law.<sup>468</sup> Instead, Respondent relies on the argument that account must be taken of the whole complex transaction leading to the “inception” of the investment—i.e., the SPA and its “related legal acts, including the breach of or compliance with its terms.”<sup>469</sup>

326. However, Respondent’s reliance on the whole of the SPA “transaction” is misplaced. The SPA is a contract between SEPI and Air Comet to effectuate an exchange of benefits, liabilities and obligations. Some of the commitments made by the parties relate to the transfer of share ownership in Interinvest.<sup>470</sup> However, the SPA’s other commitments concern not only SEPI’s assumption of liabilities and other economic commitments of the Argentine Airlines, but also obligations as diverse as management structures, the size of the Argentine Airlines’ aircraft fleet, the air routes to be taken by the Argentine Airlines, and employee headcount.<sup>471</sup> Each of these commitments, whether they are related to the transfer of shares or not, represents a promise to perform *once the contract has been executed*. As such, any question of whether either party has complied with or breached any of these terms of the SPA is a question of *performance*. Any breach that occurs later does not retroactively invalidate, render illegal or otherwise undermine the integrity or binding nature of the SPA itself; rather, it triggers a party’s legal liability under the SPA.
327. As discussed above, the relevant jurisdictional inquiry is whether Claimants acquired or made their investment in compliance with Argentine law. Here, Claimants *made* their investment by entering into the SPA. There is no evidence on the record that Claimants failed to comply with any Argentine laws or committed any illegalities in *entering* the SPA. No evidence suggests that either Claimants or SEPI were not authorized to sign the agreement, that Claimants committed fraud or made a critical omission in how they represented themselves during the bidding process, or that Claimants engaged in any corruption or failure to comply with bidding or other procurement requirements.
328. Consequently, this Tribunal finds that each of Respondent’s allegations concerns either Claimants’ performance under the SPA (i.e., Claimants’ subrogation of ARSA’s creditors’ claims) or other events subsequent to the acquisition of their investment. Respondent’s allegations regarding whether Claimants wrongly approved of ARSA’s 2001 balance sheets, whether Claimants’ role in ARSA’s reorganization violated Argentine law, and whether the Marsans Group “deplorably managed” its investments, are all issues arising *subsequently* to Claimants’ acquisition of their investment.

### 3. Claimants’ Alleged Lack of Good Faith

329. As a final argument, Respondent asserts that Claimants breached good faith principles when Air Comet subrogated ARSA’s creditors’ claims and when it failed to declare this subrogation to the

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<sup>468</sup> CM ¶ 313.

<sup>469</sup> Rep. ¶¶ 365-366.

<sup>470</sup> Ex. C-18, §§ 1-6.

<sup>471</sup> See Ex. C-18, §§ 7, 9.

responsible tax authorities.<sup>472</sup> Respondent also generally accuses Grupo Marsans of ignoring good faith principles “in multiple jurisdictions.”<sup>473</sup>

330. None of these alleged acts relate to the *acquisition* of Claimants’ investment, but rather post-date the making of the investment. Moreover, the cases cited by Respondent held that the relevant inquiry for whether an investment breaches good faith principles is determined with respect to the *acquisition* of their investment. In *Inceysa*, the case upon which Respondent principally relies, the tribunal found that the claimant’s numerous fraudulent representations violated the fundamental rules of the bidding process and constituted a breach of good faith.<sup>474</sup> Unlike the present case, *Inceysa* concerned the claimant’s acts with respect to the *acquisition* of its investment. Likewise, in *Phoenix*, the tribunal found that the claimants had made no actual “economic investment” but rather “simply a rearrangement of assets within a family to gain access to ICSID jurisdiction to which the initial investor was not entitled.”<sup>475</sup> *Phoenix* is simply not on point to the circumstances of the present dispute. Therefore, Respondent has failed to demonstrate that Claimants did not act in good faith in acquiring their investment.
331. In conclusion, for the reasons stated above, the Tribunal rejects Respondent’s fourth objection. The Tribunal notes that certain of the allegations raised under this objection 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

332. Both Parties have requested the Tribunal to order costs and fees, plus interest, against the opposing Party. The Tribunal reserves this question for subsequent adjudication.

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<sup>472</sup> Mem. ¶ 342.

<sup>473</sup> Mem. ¶ 345.

<sup>474</sup> *Inceysa v. El Salvador*, Award, at ¶¶ 236-37.

<sup>475</sup> *Phoenix Action v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, LA AR 85, at ¶ 140.

## **VI. Decision on Jurisdiction**

333. For the reasons set forth above, the Tribunal declares that:

- 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.

[signed]

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Judge Thomas Buergenthal  
President of the Tribunal

[signed]

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Henri C. Alvarez Q.C.  
Arbitrator

[signed]

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Dr. Kamal Hossain  
Arbitrator  
Subject to the attached  
separate opinion