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)

DISSENTING OPINION OF DR. KAMAL HOSSAIN

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

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

Date: April 8, 2016

DISSENTING OPINION

1. Although I respect my distinguished colleagues, and I agree with the decision to the extent that in the operative part in paragraph 239(a), it directs "the Respondent to refrain from publicizing the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by communications to the press or otherwise", I am compelled to give my dissenting opinion for the reasons elaborated below.

2 I do not agree that at this late stage we need to defer a "decision in respect of the Claimants' Application for Provisional Measures as it relates to the suspension of the criminal proceedings in regard of counsel for the Claimants and the Claimants' court-appointed receivers, with liberty to the Claimants to bring this Application back before the Tribunal in this respect should it become necessary". I also do not agree that we need again to "remind(s) the Parties that they are obligated to refrain from aggravating the dispute", having done so on previous occasions.

3. My main disagreement with my colleagues, however, centres around setting out of contentious factual positions, which are not necessary for the order made. In my view it is inappropriate to set out these contentious issues in the decision on provisional measures, as these convey the erroneous impression that these issues may be treated as settled. This would, in my view, be unacceptable, as it would amount to determining issues which are to be determined in the final award.

4. My objections relate to some preliminary but fundamental unresolved issues which are to be dealt with in the award on the merits upon consideration of the evidence on record, such as
   - Who are the Claimants?
   - How and when did the Claimants invest in the Argentine Republic?
   - What is the "investment" made by the Claimants?
   - Does King and Spalding have a valid Power of Attorney ?

5. Paragraphs 6, 7, 8, 9, 13, 15, 16, 18, 19, 20, 22, 23, 25, 26, 27 and 29 of the decision on provisional measures refer to the "Claimants" although the issue regarding the identity of the Claimants is still unresolved and is to be determined in the final award on the merits. I am, therefore, of the view that as this issue is still unresolved, an impression to the contrary should not be conveyed by the reference to "Claimants" (without any qualification) in the paragraphs referred to above.

6. I cannot agree with paragraph 164 where "Claimants" are being referred to, without clarification of the identity of the Claimants. The paragraph refers to "the Marsans corporate group to which Claimants belong" and further reference is made to the "ultimate shareholders of the Claimants", and "the company through which they [Claimants] made their investments, Air Comet". These assertions appear to presume that

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the issue of identity has been resolved. This is clearly not the case and the Tribunal is yet to decide whether the three named "Claimants" - Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. – can upon consideration of the entire evidence be treated as Claimants. It would appear that "the Marsans group" has in effect been prosecuting the claims, and putting themselves forward as Claimants. The Marsans group is admittedly not a corporate entity. It is a group composed of an indeterminate number of members and, therefore, it cannot be treated as "Claimants."

7. The issue of the identity of the "Claimants" is not one which has been decided by the Tribunal. This issue is still being considered by the Tribunal. I, therefore, disagree to the reference to "Claimants" without any qualifications in the provisional measures decision. In particular, I am of the view that a view taken at the jurisdictional stage cannot to be treated as "a final decision". The Tribunal in *Siemens AG v Argentina* (ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004) expressed its view on this issue in the following terms:

> "At this [jurisdictional] stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by Siemens are correct. **This is a matter for the merits**. The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them." [*emphasis added*]"

8. I cannot agree with the observation in paragraph 172 that "the Tribunal notes that the statements made in the public deeds are consistent with the previous statements in evidence from the receivers". We have not analyzed the evidence from the receivers. As such we cannot reach a conclusion on whether the public deeds are consistent with any evidence from the receivers. The Exhibit C-1200 (Affidavit) itself raises questions about its effectiveness. For instance on page two of each of the affidavits it is stated:

> "He does not certify through documentation the present representation, that he assures to have been granted, therefore the effectiveness of this deed is subject to subsequent ratification of the represented person. I have advised the parties appearing before me of this circumstance and they insist in this execution".

The Tribunal has not decided on the impact of this or any subsequent ratification. This remains an open and contested issue which should be determined in the award on the merits.

9. Attention was drawn to the paragraphs 42 and 76 relating to the issue of counsel's authority to represent Claimants in this arbitration. The effect of the Nominated Lawyer (King & Spalding) having acquired direct financial interests in the subject matter of this arbitration case and any award is an issue which merits consideration. It may be noted that under the Funding Agreement (in particular clauses 6.1 and 6.2) the Funder, which is not an "investor" under the BIT, is intended to be a significant beneficiary, along with the

Nominated Lawyers, of the proceeds of any award. The award proceeds are to be immediately paid to the Nominated Lawyers or an escrow agent for payment to the Funder and payment of any outstanding invoices (including those of the Nominated Lawyers). Only the remainder will be paid to Claimant." Paragraph 31 refers to the Credit Assignment Agreement and the Funding Agreement between the Claimants and Burford and the issue of standing (or lack of legal standing) of the Claimants' counsel, King & Spalding. The issue of the Funding Agreement is further discussed in paragraphs 135, and 150 of the decision on provisional measures. We are yet to decide on these issues which are to be dealt with in the award on the merits. I consider it inappropriate for these contentious factual issues to be included in the decision on provisional measures, when consideration of these issues on the basis of evidence and due consideration of the relevant legal implications is awaited and is to be dealt with in the Tribunal's award on the merits.

10. The issue for this Tribunal to determine in its final award is whether King & Spalding has valid powers of attorney. Claimants argued that the powers of attorney are valid and that the Claimants' reorganization administrators are simply "stepping into the shoes" of Claimants for purposes of the continuation of this arbitration. Respondent argues, to the contrary, that Claimants' powers of attorney were extinguished by the bankruptcy, that a new powers of attorney are needed, and that a valid new powers of attorney have not yet been granted to King & Spalding or anyone else. This remains a contentious issue to be determined in the award on the merits.

11. Claimants have produced letters written by the trustees in insolvency for each of the Claimants that purport to "ratify" the powers of attorney. Respondent submits that these letters are flawed. Respondent submits that the letters are not addressed directly to ICSID but rather to King & Spalding, attorneys representing Claimants. It also submits that the letters are undated, and that they do not appear to have been notarized. Finally, Respondent submits that the letters appear to have been executed unilaterally by the trustees, and do not appear to be the result of an order from a commercial court of Madrid. According to Respondent, the trustees lack the right to "ratify" the acts done by King & Spalding and to authorize the firm to carry on its activities.

12. This issue is thus clearly not free from complexity. It will be for the Tribunal to decide in the award on the merits whether the Claimants have discharged the onus of proving that their lawyers have continued capacity to represent them after the commencement of the insolvency proceedings. The questions, among others, which the Tribunal is to consider before rendering its final award is whether the undated non-notarized letters, which were not submitted to the ICSID Tribunal before August, 2013, can be accepted as proof that King & Spalding fulfilled the legal requirement for representing the Claimants after the insolvency proceedings had commenced.

13. In paragraph No. 183 the majority decision notes:

> "Further, the Respondent has raised the question of the alleged invalidity of the powers of attorney held by King & Spalding and their authority to represent the Claimants in this arbitration. This matter has been before the Tribunal for some time and has been the subject of extensive expert evidence and argument. The Respondent has also raised the same or similar arguments before both this Tribunal and in the Complaints as to the alleged motives for which the Claimants and their counsel would seek to uphold the validity of the powers of attorney. **Again, this is clearly a matter squarely within the jurisdiction of the Tribunal to decide in its award"**. [*Emphasis added*]

14. The statement in paragraph 183 is clearly in contradiction to the previous statement in paragraph 136 where it is stated as follows:

> "136. Finally, with respect to King & Spalding's authorization to represent the Claimants, **this issue was also squarely before the Tribunal and there was substantial evidence before it in support of the ongoing validity of the relevant powers of attorney, including repeated statements from the Claimants' court-appointed receivers**". [*Emphasis added*]

15. Given the contradictory positions on the issue of the validity of the powers of attorney indicated above, this issue clearly must remain open for decision in the final award.

16. In paragraph 181 of the decision it is stated, "This issue [i.e. Claimants claim is a derivative and indirect and, falls outside the scope of the BIT] has been extensively briefed and addressed in this arbitration". In my view, this issue despite a preliminary view having been taken at the jurisdiction stage cannot be treated as a final view and must be treated as an issue that still remains to be dealt with in the award on merits.

17. Paragraph 184 refers to a "brief review of certain aspects of the Complaints" and concludes that "it would appear that these arbitral proceedings could be seen as the motivation, at least in part, for the filing of the Complaints". I cannot agree with this speculative conclusion regarding "the real motivation" of the independent prosecutors in Argentina. There is no evidence to suggest that the filing of the Complaints is anything other than what it purports to be, an investigation into possible criminal activities. In my view, no evidence was adduced before the Tribunal, which could justify the making of adverse comments about independent criminal investigations being undertaken by a sovereign state.

18. In paragraph 185 it is stated "At this stage, the Tribunal concludes that there is a direct relationship between the Complaints and the criminal investigation commenced by the Federal Prosecutor and this ICSID arbitration such that certain rights of the Claimants in this arbitration may warrant protection". I cannot agree with this conclusion of the

majority of the Tribunal since this issue was not treated as a contentious issue, as would be evident from the Tribunal having expressly stated in paragraph 193 that:

> "[T]he criminal proceedings commenced by way of the Complaints and the Federal Prosecutor's preliminary investigation do not address the investment dispute before the Tribunal and, therefore, do not threaten the exclusivity of these ICSID proceedings."

19. It is clear to me from the following extracts from the majority decision, with which I concur, that there was consensus to deny the grant of provisional measures with regard to the following matters:

- "[T]he criminal proceedings commenced by way of the Complaints and the Federal Prosecutor's preliminary investigation do not address the investment dispute before the Tribunal and, therefore, do not threaten the exclusivity of these ICSID proceedings" (paragraph 193).

- "[I]n the absence of any specific indication of how Claimants or their officers and directors have been harassed or intimidated, there is no basis for provisional measures in that regard" (paragraph 200).

- The Tribunal "reaches the same conclusion with respect to Burford" and I concur (paragraph 201).

- "[I]t not clear whether the criminal investigation commenced by the Federal Prosecutor includes allegations against counsel or the Claimants' court-appointed receivers" (paragraph 206).

- The request for provisional measures should not be granted and the Tribunal should defer its decision "as it relates to the request that the Tribunal order the suspension of the criminal proceedings in regard of counsel for Claimants and Claimants' cout-appointed receivers (paragraph 208).

- There is consensus that Claimants have not "on the basis of the evidence presented to date, demonstrated irreparable harm or necessity for the granting of the provisional measures requested" (paragraph 228).

- "[I]t is not clear whether counsel or the Claimants' court-appointed receivers are included within the scope of the investigation. At this stage, on the basis of the evidence and arguments before it, the Tribunal is unable to determine whether there is sufficient likelihood that counsel and the court-appointed receivers are included within the scope of the criminal investigation so as to justify granting the interim measure sought in their regard" (paragraph 230).

- "[F]or the purposes of provisional measures, the requirement of urgency is met when a question cannot await the outcome of the award on the merits" (paragraph 233).

- "[I]t will take some time before the investigation is completed and a recommendation or charge, if any, is submitted to the Federal court. While there was no specific evidence given on how much time this process can be expected to take, the Tribunal's sense is that it is likely to take several months and, therefore, formal charges are not imminent" (paragraph 234).

In light of the consensus on not granting provisional measures with regard to the above matters, it is not appropriate to set out contentious factual matters in the provisional measures decision, which should appropriately be dealt with in the final award on the merits.

20. Again, I regret that I have felt compelled to give this dissenting opinion.

[signed]
Dr. Kamal Hossain
Arbitrator