INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

MABCO CONSTRUCTIONS SA

Claimant

and

REPUBLIC OF KOSOVO

Respondent

ICSID Case No. ARB/17/25

DISSENT ON JURISDICTION

Professor Dr. August Reinisch

I. INTRODUCTION

1. I am afraid but I am unable to concur with my co-arbitrators' view that this Tribunal would have jurisdiction over the present dispute.

2. This is indeed a highly complex story of an attempt to make an investment in the tourism sector of the Kosovo through participating in the privatization of the Grand Hotel Prishtina. However, to consider that it actually amounted to an "investment" made by the Claimant in order to fall under the *ratione materiae* and *ratione personae* jurisdiction of an ICSID tribunal would just require too many leaps of faith.

3. While the story is indeed perplexingly strange and full of factual difficulties, as outlined in the majority's factual background,[1] it is also a relatively simple contractual dispute concerning a share purchase agreed upon between private parties.

4. Mr. Behgjet Pacolli, a highly successful businessman and prominent politician of Kosovo and Swiss nationality, together with Mr. Ejupi, the founder and owner of NTSH Eurokoha-Reisen, entered into an agreement with Mr. Zelqif Berisha. Mr. Berisha, the owner and director of UTC/Unio Commerce, had successfully bid for the privatization of Grand Hotel, but was unable to pay the entire purchase price. Mr. Pacolli and Mr. Ejupi agreed to participate in this privatization venture by providing part of the unpaid purchase price to UTC to be then paid to the privatization agency of the Kosovo (KTA/PAK). Under an agreement between the three businessmen, Mr. Pacolli, Mr. Ejupi and Mr. Berisha, apparently orally entered into sometime around April 2006 and put into writing in the so-called Agreement of Good Understanding,[2] Mr. Pacolli and Mr. Ejupi would participate with a 40% and a 20% share in the hotel project obliging the two to make cash infusions of 4 million and 1 million Euro, respectively, and Mr. Berisha to hand over to the former their shares after a period of two years.

[1] *Mabco Constructions SA* v. *Republic of Kosovo*, Decision on Jurisdiction, ICSID Case No. ARB/17/25 (*Mabco* v. *Kosovo*, Decision on Jurisdiction), paras. 136 *et seq*.

[2] "Agreement of Good Understanding – Hotel Grand Prishtina", dated January 2007 (C-17).

5. On this obligation Mr. Berisha reneged, triggering a law-suit by Mr. Pacolli before the courts in the Kosovo. While Mr. Pacolli prevailed in these proceedings at first instance,[3] he lost on appeal.[4]

6. Mabco, the Claimant in this arbitration, a Swiss company founded and controlled by Mr. Behgjet Pacolli, appeared neither in the contractual arrangements, nor in the legal proceedings. It was always Mr. Behgjet Pacolli who acted in his own name when trying to obtain the shares contractually[5] and subsequently in litigation.[6]

7. Also in lengthy discussions with the PAK concerning the fulfilment of the privatization requirements of Grand Hotel and the eventual withdrawal of the shares, it was Mr. Behgjet Pacolli and/or his brother Mr. Selim Pacolli, representing him, who acted.[7]

8. The Claimant Mabco comes into play in a letter by a Kosovo lawyer writing to the PAK on 20 June 2012, a few days after the Kosovo-Switzerland Bilateral Investment Treaty (BIT)[8] entered into force. In this letter, Mabco is referred to as a "working unit" of MABETEX GROUP[9] and the PAK is informed that "MABETEX group has sustained

[3] Judgment of the Municipal Court of Prishtina, dated 28 May 2009 (R-29).

[4] Judgment of the District Court of Prishtina, dated 13 April 2010 (R-31).

[5] The "Agreement of Good Understanding – Hotel Grand Prishtina", January 2007 (C-17), refers to Mr. Zelqif Berisha, Mr. Behxhet Pacolli and Mr. Remzi Ejupi as "Co-Owners" without any mentioning of Mabco; The Annex agreement, dated 28 March 2012 (C-20), refers to Mabetex, not Mabco as the company involved next to Mr. Behxhet Pacolli ("Selim Pacolli, born on 21/09/1969 in Marec-Prishtina Commune, holder of personal ID number 2005867137, representing Mr. Behxhet Pacolli, acting on behalf of the company 'MABETEX' and in his personal name.").

[6] The lawsuit filed by Mr. Pacolli and NTSH against UTC, dated 5 June 2007 (R-30), was brought by "Behgjet Pacolli from Prishtina, president of c.e.o MABETEX GROUP" and "NTSH Eurokoha-Reisen", demanding confirmation "that the Claimants are co-owners of the hotel 'Grand Hotel Prishtina' Prishtina as follows: the first Claimant Behgjet Pacolli from Prishtina of the ideal part of 2/5 or 40%, and the second Claimant NTSH "Eurokoha - Reisen" from Prishtina of the ideal part of 1/5 or 20% of this hotel."; the Judgment of the Municipal Court of Prishtina, dated 28 May 2009, (R-29) lists as claimants Mr. "Behxhet Pacolli" and "NTSH Eurokoha-Reisen", whereas "Unio Commerce" appears as respondent; the same is true for the Judgment of the District Court of Prishtina, dated 13 April 2010 (R-31).

[7] The so-called "October 21, 2011 Letter of Mabco to PAK" (C-22) was sent and signed by Mr. Selim Pacolli, not mentioning Mabco, but that he represented his brother, Mr. Behgjet Pacolli, as 40% owner according to the Agreement of Good Understanding; the so-called "March 5, 2012 Letter of PAK to Mabco" (C-23) was sent to Mr. Behxhet Pacolli not mentioning Mabco; the so-called "March 19, 2012 Letter of PAK to Mabco and NTSH" (C-24, C-38) was sent to Mr. Selim Pacolli not mentioning Mabco; the letter from UTC, Mabetex Project Engineering and NTSH to PAK, dated 28 March 2012 (R-32), signed by Mr. Selim Pacolli on behalf of Mabetex mentions Mabetex, not Mabco; the letter from Mr. Selim Pacolli to PAK dated 11 June 2012 (R-42) in re share withdrawal refers to Mr. Behgjet Pacolli as 40% owner, not to Mabco.

[8] Agreement between the Swiss Confederation and the Republic of Kosovo on the Promotion and Reciprocal Protection of Investments, 27 October 2011, entered into force on 13 June 2012 (Kosovo-Switzerland BIT) (C-1).

[9] In the "June 20, 2012 Letter from Mabco to PAK" (C-40) "Mr. Behgjet Pacolli" is referred to as "a legal representative of MABETEX GROUP — working unit MARCO CONSTRUCTION S.A. headquartered in Lugano, Switzerland."

a serious moral and pecuniary damage and shall never agree with your decision on withdrawal of shares."[10]

9. In the end, it appears that attempts were made to acquire shares in the privatization of the Grand Hotel Prishtina, but so far these attempts have been unsuccessful, not leading to an "investment" in Kosovo, but to a contractual claim against UTC/Unio Commerce.

10. I believe it is the assessment of these facts where I am unable to follow the majority's views and not really the legal prerequisites. We seem to concur that in order to be protected under the BIT[11] and/or the Kosovo Foreign Investment Law (FIL)[12] an "investment" must have been made and, for an ICSID tribunal to exercise jurisdiction *ratione materiae*, the dispute must "directly aris[e] out of an investment."[13] We also agree that in order to fall under the Tribunal's jurisdiction *ratione personae*, the Claimant, a company incorporated in Switzerland must have made the investment and not Mr. Pacolli, a dual Swiss and Kosovo national, since his latter nationality would prevent him from bringing an ICSID claim pursuant to Article 25(2)(a) of the ICSID Convention.[14]

11. In my view, the present case fails on jurisdictional grounds for two main reasons, first because no investment has been made and second because any attempts to make an investment were made by a dual Swiss-Kosovo national and not by the Swiss claimant.

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[10] Ibid. See also the so-called "Letter from Mabco and NTSH to PAK", dated 28 June 2012 (C-37), written by "Selim Pacolli" and "NTSH Eurokoha-Reisen" to the PAK, wherein the former referred to himself as "'general representative of Mabatex Group - Mabco Construction' headquartered in Lugano - Switzerland and of owners of this Swiss investor."

[11] See *supra* note 8.

[12] See *infra* notes 19 *et seq*.

[13] Article 25(1) ICSID Convention ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

[14] Article 25(2)(a) ICSID Convention ("'National of another Contracting State' means: (a) any natural person who 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 as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;"); See also *Champion Trading Company* v. *Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, p. 14 (CL-12) ("According to the ordinary meaning of the terms of the Convention (Article 25 (2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national.").

12. This result corresponds to the object and purpose of investment protection, i.e. to protect existing investments against interference by host states, not to support claimants in their contractual disputes with private parties about the fulfilment of their obligations. In essence, this is what the dispute presented by the Claimant is all about, a contractual dispute concerning a share purchase agreed upon between private parties, Mr. Pacolli and Mr. Ejupi, on the one side, and Mr. Berisha, on the other side.[15]

13. This dispute should be distinguished from the dispute regarding the withdrawal of the Grand Hotel shares from UTC by the PAK, which resulted from UTC's non-fulfilment of the privatization requirements and may be viewed as a dispute between UTC and the host state. It is undoubted that neither Mr. Pacolli nor Mabco ever acquired Grand Hotel shares. Thus, any dispute about the withdrawal exists between the privatization agency, PAK, and the party whose shares have been withdrawn, UTC.

II. WAS THERE AN INVESTMENT?

14. Contrary to the majority's view, acknowledging that "Claimant is not entirely clear or consistent as to the exact nature of the investment it claims to have acquired in respect of the Grand Hotel shares,"[16] but still finding that "*a claim of entitlement to ownership of the shares*"[17] constitutes an "investment",[18] I have difficulties in concluding that a contractual entitlement to receive shares constitutes an "investment" within the meaning of Article 1 of the BIT or Article 2 of Kosovo's Foreign Investment Law 2005[19]/2014[20],[21] on the one hand, and in the sense of Article 25 of the ICSID Convention, on the other hand.

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[15] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 334 ("Claimant did of course have a contractual relationship with UTC and, on that basis, a cause of action against UTC.").

[16] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 293.

[17] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 294 [emphasis in original].

[18] *Mabco* v. *Kosovo*, Decision on Jurisdiction, paras. 295 *et seq*. (in regard to the ICSID Convention); paras. 302 *et seq*. (in regard to the BIT); paras. 313 *et seq*. (in regard to the FIL).

[19] Assembly of Kosovo, Law No. 02/L-33 on Foreign Investment, 21 November 2005 (C-2).

[20] Republic of Kosovo, Law No. 04/L-220 on Foreign Investment, 12 December 2013 (C-18) (R-19).

[21] The Claimant has variously invoked both investment laws at different stages of these proceedings, making it difficult for the Tribunal to ascertain on which legislation its non-BIT claims are based. However, I concur with my colleagues finding that since most of the challenged measures took place before the entry into force of the 2014 act it must be largely the 2005 legislation which applies in the present case. *Mabco* v. *Kosovo*, Decision on Jurisdiction, paras. 460 *et seq*.

15. We agree that in ICSID arbitration the "investment" criterion, both under the ICSID Convention and the instrument conferring consent to ICSID arbitration, i.e. the BIT or the applicable host state legislation, must be fulfilled. This follows from the well-established, double-barrelled test, as expressed by the ICSID tribunal in *CSOB* v. *Slovak Republic*[22] and affirmed by many other tribunals.[23]

16. In the present case, this implies that Claimant must have made an "investment" in the sense of Article 25 of the ICSID Convention and either Article 1 of the Kosovo-Switzerland BIT 2011 or Article 2 of Kosovo's Foreign Investment Law 2005/2014.

A. THE KOSOVO-SWITZERLAND BIT

17. Article 1(1) Kosovo-Switzerland BIT 2011 provides in relevant part:

> "The term 'investment' means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, including: […] (b) a company, or shares, parts or any other kind of participation in a company; (c) claims to money or to any performance having an economic value, except claims to money arising solely out of commercial contracts for the sale of goods and services; […]."[24]

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[22] *Ceskoslovenska Obchodni Banka, a.s.* v. *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 68 ("A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in [...] the BIT.").

[23] *Malaysian Historical Salvors Sdn, Bhd* v. *The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007 (RL-45), para. 55 ("Under the double-barrelled test, a finding that the Contract satisfied the definition of 'investment' under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the criterion of an 'investment' within the meaning of Article 25."); *Malicorp Limited* v. *The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 107 ("[…] in order for a proceeding based on breach of the treaty to be admissible, the investment to which the dispute relates must pass a double test (also known as the 'double keyhole approach' or 'double-barrelled test;'."); *Mytilineos Holdings SA* v. *The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, 8 September 2006, para. 112 ("It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an 'investment' under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention.").

[24] Article 1(1) Kosovo-Switzerland BIT, *supra* note 8.

18. It thus defines as investment "every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party."[25] It does require that an asset must have been "established" or "acquired", it does not include the attempt to acquire an asset. The BIT's definition is thus fairly clear in its aim to protect investments on the basis of "established or acquired" assets.

19. The text of the BIT is also explicit in not merely containing a broad, asset-based definition of investment. In addition, it incorporates some of the elements developed by ICSID tribunals in the so-called *Salini*-test,[26] such as "the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk."[27] Thereby, it makes clear that not every asset listed should qualify as an investment.[28] Rather, assets qualify as investment if they are established or acquired as a result of (usually) a capital commitment, held and operated in order to receive returns, with all the uncertainties associated with entrepreneurial risk. In this regard, I agree with the majority that suggested as a test "[…] that a claim to money can qualify as an investment provided that it "entail[s] a 'transfer of resources into the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.'""[29] However, I do not agree with the majority's conclusion that "*a claim of entitlement to ownership of the shares*" could already constitute an "investment."[30]

20. Once shares, constituting participation in a company, have been acquired they would constitute an investment under the definition of the BIT. However, to view attempts to acquire shares as claims to performance having an economic value and thus "investments" would extend the notion of investment to any claim to obtain whatever has been contractually stipulated, whether real property, intellectual property rights,

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[25] *Ibid*.

[26] See *infra* at note 40.

[27] Article 1(1) Kosovo-Switzerland BIT, *supra* note 8.

[28] See even for cases where such a clarification is missing in the text of a BIT, *Romak S.A.* v. *Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 207 ("[…] the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. […] By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of investment the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'." [emphases omitted]).

[29] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 308.

[30] Ibid. ("The Tribunal is accordingly not prepared to exclude fully the possibility that a claim of entitlement to ownership of shares under certain circumstances is cognizable as a qualifying investment.").

shares or other rights, without the characteristics required for an "investment", i.e. acquiring assets used in order to produce gain or profit with the assumption of risk.

21. As the tribunal in *Clorox* v. *Venezuela*[31] found "under its common meaning, an investment consists of deploying money or other goods in the hope of receiving a benefit," which in its view "basically corresponds to the Latin etymology of the words 'investment' and 'invest,' which imply an input (*in*) and a return (*versus, vertere*)."[32] Also the tribunal in *Saba Fakes* v. *Turkey*[33] correctly emphasized "that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk […] derive from the ordinary meaning of the word 'investment', […], one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed […]."[34]

B. THE FOREIGN INVESTMENT LAW

22. As noted by the majority,[35] Kosovo's 2005 Foreign Investment Law defines "investment" as "any asset that has (i) been contributed to a Kosovo business organization in return for an ownership interest in that business organization;"[36] and continues to define the term "asset", among others, as "any item of value, whether tangible or intangible, and includes, but is not limited to, the following and similar items: a. movable and immovable property, including rights in and to such property such as a mortgage, lien, pledge, lease or servitude; […] d. claims or rights to money, goods, services, and performance under contract;"[37]

23. In a similar way, Kosovo's 2014 Foreign Investment Law defines "investment" as an "asset owned or otherwise lawfully held […] for the purpose of conducting lawful

[31] *Clorox Spain S.L.* v. *Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019.

[32] *Ibid*., para. 820 (translation from Spanish) ("[…] en su sentido corriente, una inversión consiste en el empleo de dinero u otros bienes con la esperanza de sacar un beneficio. Ello corresponde básicamente a la etimología latina de las palabras "inversión" e "invertir" que implican una entrada (*in*) y un retorno (*versus, vertere*).").

[33] *Saba Fakes* v. *Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (RL-46).

[34] *Ibid*., para. 110.

[35] *Mabco* v. *Kosovo*, Decision on Jurisdiction, paras. 315 *et seq*.

[36] Article 2 of the Foreign Investment Law 2005, *supra* note 19.

[37] *Ibid*.

commercial activities", it does not define "investment" as assets attempted to be acquired.

24. Specifically, the definition of "investment" in Article 2 of Kosovo's Foreign Investment Law 2014 provides as follows:

> "[…] any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo for the purpose of conducting lawful commercial activities, including but not limited to: […]
>
> 1.4.3. cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in a (sic!) the Republic of Kosovo or foreign business organization; bonds, debentures, other debt instruments;
>
> 1.4.4. claims or rights to money, goods, services, and performance under contract;"[38]

25. Like the BIT, the Foreign Investment Law does not regard any "asset" as an "investment." Rather, it defines as "investment" "[…] any asset owned or otherwise lawfully held […] for the purpose of conducting lawful commercial activities."

26. While I agree that claims to performance under contract sometimes may form assets held for the purpose of conducting lawful commercial activities, this is not the case here since the claim to receive shares could not yet be viewed as commercial activity by which one conducts business.[39]

C. THE ICSID CONVENTION

27. Most importantly, the *ratione materiae* jurisdiction under the ICSID Convention is lacking since the attributes of even a scaled-down *Salini* test have not been met. Indeed, most ICSID tribunals have limited the original *Salini*-test, which mentioned next to "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction" "the contribution to the economic development of the host

[38] Law No. 04/L-220, 12 December 2013 (C-18) (R-19).

[39] Law No. 04/L-220, 12 December 2013 (C-18) (R-19) ("1.6. Business activity – any activity involving the offering, providing or producing of goods, services, property and/or works to anyone in return for or in expectation of any type of payment or compensation.").

State of the investment as an additional condition."[40] Today, most ICSID tribunals hold that in fact only "the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment."[41]

28. I concur with the majority that contribution to the economic development of the host state has fallen out of favour[42] and that it should not be seen as a separate jurisdictional requirement.[43] However, I disagree with the majority's application of the core requirements of the *Salini* test, which demands that a substantial commitment is made in order to acquire assets which are being used over a certain period of time for entrepreneurial purposes, i.e. aimed at producing profit and return. Whether one would like to emphasise the expectation of regular profit and return or the implicit risk of such use does not seem to be important, but what is important is that the notion of investment implies the acquisition of some assets for economic purposes.[44]

29. Where only a transfer of money is made, leading to a claim to acquire assets, this in itself does not yet constitute an investment. As long as the contractual claim to ownership to assets has not been fulfilled by the other party, the usual commercial,

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[40] *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (CL-28), para. 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.").

[41] *Saba Fakes* v. *Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (RL-46), para. 110 ("[…] that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention."). See also *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43; *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 295; *GEA Group Aktiengesellschaft* v. *Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 151; *Poštová banka, a.s. and Istrokapital SE* v. *The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 360; *Vestey Group Ltd* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (RL-19), para. 187.

[42] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 296.

[43] See also *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 306 ("[…] the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable owing to its subjective nature. Indeed, whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host State can often be a matter of appreciation and can generate a wide spectrum of reasonable opinions. Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant's activities. This is for example the case of mergers and acquisitions or of failed construction projects." [footnotes omitted]).

[44] See also *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 308.

counterparty risk materialized, but not yet an investment risk as a typical characteristic of an investment.[45]

30. What is needed for an investment to exist is both a contribution and something created by such contribution, i.e. ownership or control of (at least potentially) wealth-creating assets.[46]

31. In determining whether there is an "investment" in the sense of Article 25 of the ICSID Convention I agree with those ICSID tribunals that use "a fact-specific and holistic assessment"[47] and stress that the *Salini*-elements[48] should not be characterized "as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[49]

32. Applying these considerations to the present facts indicates that much remains mysterious about the various money transfers back and forth in April 2006. Still, I understand that one may possibly recognize a contribution in the form of a transfer of 4 million Euro from Mabco (via NTSH Eurokoha-Reisen) to UTC for the purpose of acquiring shares in the Grand Hotel Prishtina. However, even this assumption remains highly problematic.

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[45] See *Romak S.A.* v. *Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, paras. 229, 230 ("All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction. An 'investment risk' entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction.").

[46] *Malicorp Limited* v. *The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 110 ("Clearly Article 1(a) of the Agreement emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets. It can be inferred from this that assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.").

[47] *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 (RL-45), para. 107; see also *Joy Mining Machinery Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004 (RL-44), para. 54 ("The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract as a whole in order to determine whether it could qualify as an investment under Article 25 of the Convention […].").

[48] See *supra* note 40.

[49] *Ambiente Ufficio S.p.A. and others* v. *Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 480.

33. For the following reasons, I cannot concur with the majority's assessment of the facts constituting "positive evidence that Mabco made the transfer of funds in connection with the Grand Hotel acquisition."[50]

34. While the majority criticizes the Respondent offering a possible alternative explanation for the 4 million Euro transfer as "sheer conjecture,"[51] it seems to take at face value the statements of Claimant's witnesses without any documentary evidence that the payment was indeed made for the privatization of the Grand Hotel. In fact, the majority seems to apply a *prima facie* test to the question whether an investment existed.[52]

35. In my view, a *prima facie* test is appropriate only when it comes to assessing whether the claims raised are capable of constituting breaches of the applicable BIT or investment law.[53] However, when it comes to establishing whether the *ratione materiae* requirement of an "investment" is fulfilled, the claimant has to prove the facts which are critical for the jurisdiction of a tribunal.[54]

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[50] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 367.

[51] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 364.

[52] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 337, finding that "for the purpose of establishing jurisdiction on a *prima facie* basis, and without prejudice to any decision on the merits, there is a colourable basis for Mabco's contention that it had a claim of entitlement against Respondent for registration of the shares in its name […] and that claim, under the circumstances of this case, may be regarded as an investment."

[53] *Impregilo S.p.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254 ("[…] whether the facts as alleged by the Claimant […], if established, are capable of coming within those provisions of the BIT which have been invoked." [emphasis omitted]); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (CL-45), para. 197 ("[…] the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.").

[54] *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (CL-33), para. 64 ("In sum, the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven."); *Pac Rim Cayman LLC* v. *The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012 (CL-1), para. 2.8-2.9 ("[t]he application of that '*prima facie*' standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends […] all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour".); *Planet Mining Pty Ltd* v. *Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Decision on Jurisdiction, 24 February 2014, para. 96 ("At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is, that the facts it alleges are susceptible of constituting a breach of the Treaty if they are ultimately proven.").

36. What the record reveals is that on 28 April 2006 (after various unsuccessful attempts) a transfer of 4 million Euro was made from Mabco to NTSH Eurokoha-Reisen. What the record does not reveal is whether this transfer was made for purposes of acquiring the shares in Grand Hotel. For the majority there "are good indications of the purpose for which the transfer was made, and Respondent offers no serious alternative explanation for it."[55] However, the payment order concerning the initial transfer made by Mabco to NTSH Eurokoha-Reisen did not expressly indicate that it represented Mabco's share for the Grand Hotel. Rather, the order merely noted "Agreement" as payment motive.[56] Whether the 21 April 2006 payment of Euro 4,011,676.00 from NTSH Eurokoha-Reisen to UTC[57] can be viewed as "onward transfer"[58] may create some chronological difficulties. In addition, the absence of documentary evidence requires some conjecture to assume that the money was subsequently transferred from UTC to KTA.[59] In my view, the majority's assessment that the 4 million Euro transfer from Mabco to NTSH Eurokoha-Reisen was made in "connection with the Grand Hotel acquisition"[60] is based on Claimant's circumstantial evidence and as such insufficient to establish that a contribution has been made.

37. Even if one would be willing to view the 4 million Euro transfer from Mabco to UTC in April 2006 as the contribution for acquiring an investment in the Kosovo, the other typical elements of an investment are still missing. The party receiving this "contribution", UTC, failed to comply with its contractual obligation to deliver the shares. Thus, all that occurred was a transfer of money for the purchase of shares. Since the seller of the shares failed to fulfil its part of the deal, the would-be investor, Mabco or Mr. Pacolli, failed to acquire any assets with which it would have been possible to engage in economic activities aimed at producing profit and return over a certain period of time. This sentiment is very well captured by Mr. Pacolli who testified during the hearing that he had received nothing for the 4 million Euro[61] and that on the basis of the

[55] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 364.

[56] Wire transfer receipt of EUR 4'000'000, dated April 29, 2006 (C-14).

[57] Transfer of EUR 4,011,676.00 from NTSH to UTC, dated 21 April 2006 (R-23).

[58] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 362.

[59] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 362 ("The record in the case does not appear to contain an exhibit of the onward transfer from UTC to KTA.").

[60] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 367.

[61] Transcript of the Hearing Day 1, 172:18-20, Mr. Pacolli ("We have received nothing. I [am] only the big loser. The energy, you know, and money we lost. And we -- still today we haven't received anything.").

agreement with Mr. Berisha of UTC he had intended to start investing in the hotel project.[62]

38. Thus, the only typical characteristic of an "investment" that may be recognized in the present facts is a contribution made in order to acquire assets that could be used for the purpose of producing a profit. The other elements, such as a certain duration and an element of risk are missing as a result of the failure to actually acquire an asset in return for the money contribution. Tellingly, the majority's finding of the element of duration is made conditionally "if" an investment had in fact been made. Similarly, its conclusion that there was risk is premised on the assumption that shares were in fact obtained.[63]

39. In my view, a "holistic assessment" of the facts leads to the conclusion that one cannot qualify the Claimant's activities as an investment under Article 25 ICSID Convention.

40. The majority's approach, regarding not only shares, embodying participation in a corporate entity, but also a claim to entitlement to ownership of such shares as "investments" in effect transforms a purchase agreement for the acquisition of assets into an investment.

41. This would render the distinction between a contractual obligation and an investment largely meaningless and, in my view, impermissibly expands the notion of "investment."

III. WAS AN INVESTMENT MADE BY THE CLAIMANT?

42. I also have to part ways with the Tribunal's majority in regard to its conclusion "that, notwithstanding Mr. Pacolli's having very often used his own name rather than Mabco's, the investment was in fact Mabco's."[64]

[62] Transcript of the Hearing Day 1, 174:5-10, Mr. Pacolli ("Because we had an agreement with Mr Zelqif Berisha, a signed agreement, confirmed by a lawyer in the time. […] and on base of this agreement we had to start with the investment, we had to invest.").

[63] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 300 ("Turning to the question of risk, the Tribunal notes that, at the relevant time, Kosovo had virtually no tourism industry and development of a successful tourism industry could not be assumed. The purchase of shares in the Grand Hotel therefore necessarily entailed a risk. Nor is there any reason to suppose that Claimant's investment, if made, would not have sufficient duration.").

[64] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 344.

43. Rather, the "doubt in the Tribunal's thinking that he was acting on these occasions in the name of Mabco"[65] leads me to believe that it would be wrong to disregard all the documentary evidence we have before us and to rely on after-the-fact testimony of Claimant's witnesses, stating that everyone knew that "when Mr. Pacolli negotiated and signed agreements, he did so on behalf of the relevant entity within the Mabetex group, which in the construction and engineering sector would have been Mabco"[66] and that such had been common practice in Kosovo.[67]

44. Therefore, I cannot follow the majority's determination "that, factually, Mr. Pacolli acted in his dealings with the KTA and the PAK, as well as with UTC and NTSH, in a representative capacity."[68]

45. In my view, looking at the documentary evidence on record there is not much that would support the assumption that "Mr. Pacolli acted in a representative capacity."

46. As already outlined above,[69] in all contemporaneous documents it was Mr. Behgjet Pacolli and not Mabco, who acted in the attempt to participate in the Grand Hotel privatization. Had it really been Mabco that entered into the Agreement of Good Understanding[70] it seems curious that it was nowhere mentioned and when court proceedings were brought it is strange that Mabco did not appear as plaintiff. Equally, it is surprising that when engaged in protracted communications with the PAK, trying to avert the impending withdrawal of shares, it was always Mr. Behgjet Pacolli and not Mabco who acted.

47. Given that Mr. Behgjet Pacolli is an experienced businessman one would expect him to be clear in his dealings when he is acting in his own name and when in the name of one of his companies.

48. To rely on an alleged practice in the Kosovo according to which everyone knew that "when Mr. Pacolli negotiated and signed agreements, he was understood as doing so on

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[65] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 339.

[66] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 342, relying on testimony by Mabco's Chief Financial Officer, Lucina Maesani-Gaiatto (CWS-5).

[67] *Ibid*., relying on testimony by Mr. Ejupi (CWS-4).

[68] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 388.

[69] See *supra* at paras. 6 *et seq*.

[70] "Agreement of Good Understanding – Hotel Grand Prishtina", dated January 2007 (C-17).

behalf of [one of his companies]"[71] cannot suffice to absolve the Claimant of its burden of proof to establish that Mr. Pacolli actually negotiated and acted on its behalf.

49. We can all speculate about different business practices. It may equally well be that Mr. Pacolli acted in his personal capacity because he was a well-known and successful businessman with whom an agreement was sought to invest in the Grand Hotel privatization, rather than with Mabco, S.A., a Swiss société anonyme with a share capital of 100.000,00 CHF.[72]

50. Such speculations cannot overcome Claimant's failure to establish that Mr. Pacolli's activities should in fact be attributed to Mabco.

51. That Mabco enters the scene in June 2012 is less surprising. The entry-into-force of the Kosovo-Switzerland BIT on 13 June 2012 certainly did not go unnoticed in legal circles.

52. It thus made strategic sense for Mr. Pacolli's lawyer to refer to Mr. Pacolli as "a legal representative of MABETEX GROUP — working unit MABCO CONSTRUCTION S.A. headquartered in Lugano, Switzerland" and to threaten in regard to the PAK's decision on the withdrawal of shares "legal steps for the implementation of rights under legal procedures, the latter as provided for in international law, agreement on protection of foreign investments signed by Government of the Republic of Kosovo and Swiss Government."[73]

53. However, such re-interpretation of the factual record should be viewed as what it is: an impermissible attempt to overcome the jurisdictional obstacle for Mr. Pacolli, as a Swiss-Kosovo dual national, to have an ICSID tribunal hear his claims. Of course, also this is speculation.

[71] *Mabco* v. *Kosovo*, Decision on Jurisdiction, para. 342.

[72] "Original excerpt of the Register of Commerce of Mabco Constructions SA and English translation" (C-4).

[73] "June 20, 2012 Letter from Mabco to PAK" (C-40).

IV. CONCLUSION

54. My point is that it is the task of ICSID tribunals to assess whether there is sufficient evidence that the core jurisdictional requirements are fulfilled.[74] In my view, this is not the case in regard to two crucial *ratione materiae* and *ratione personae* requirements.

55. I would thus have preferred this Tribunal to declare that it lacks jurisdiction over the present dispute.

Professor Dr. August Reinisch

Date: 29 October 2020

[74] See *supra* para. 35.