**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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# DISSENTING OPINION OF KAMAL HOSSAIN

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1. I regret that I am compelled to give a separate dissenting opinion. In my respectful submission my main disagreement with my colleagues centres around setting out of contentious factual positions regarding the identity of the Claimants and their investment in Argentina. These issues have remains unresolved from the Decision on Jurisdiction (when I provided a Separate Opinion) and were to be dealt with in the Award on the Merits. The Award does not deal with or settle those outstanding issues. My objections related to the preliminary, but fundamental, unresolved issues which were to be dealt with in the Award on the merits upon consideration of the evidence on record, such as the identity of the Claimants which is dealt with, but not resolved in the Award, in turn giving rise to other abnormalities.

2. To determine the identity of the Claimants, the following simple, but crucial, issues should have been resolved:

   - 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 ?

3. In the Award the term "Claimants" is used not only to refer to the three named Claimants - Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. – but also to Air Comet, Interinvest, and/or other entities and individuals operating with the

Marsans Group. I cannot agree with this particularly because Claimants do not spell out the ownership structure of the Marsans Group.

4. It may be useful at the outset to review the facts regarding the identity of the numerous parties involved. It is crucial that we identify the "Claimants" and distinguish them from other parties or non-entities. It is only the three named Claimants who can be considered as asserting their own "rights" and claiming their "reliefs" for the infringement of their rights of which only the Claimants can claim protection of the Argentina-Spain Bilateral Investment Treaty ("BIT" or "Treaty").

**IDENTITY OF CLAIMANTS**

5. The three named Claimants have failed to establish their investment in Argentina which is protected by the BIT. The facts surrounding the identity of the Claimants are set out below.

6. In the 1980s the Government of Argentina ("GOA") initiated a general privatization process pursuant to which the state-owned *Aerolíneas Argentinas Sociedad del Estado* ("AASE") was to be privatized. In 1990 AASE's assets were transferred to a newly-formed company named *Aerolíneas Argentina Sociedad Anónima* ("ARSA") which was acquired by a group of investors including the Spanish state-owned airline *Iberia Líneas Aéreas de España, S.A.* ("Iberia"). Iberia controlled 20% of the shares, other Spanish investors 9.5%, and Argentine investors 55.5%. Subsequently, between 1990 and 1996, the Spanish Government increased its participation in ARSA from 20% to 84%.

7. In 1971 *Austral Líneas Aéreas, S.A.* ("Austral") was formed by the merger of two privately-owned airlines *Austral Compañía Argentina de Transportes Aéreos Comercial e Industrial* and *Aerotranportes Litoral Argentino*. In 1985, Austral was purchased by *Cielos del Sur S.A.*, a holding company, which became *Austral-Cielos del Sur S.A* ("AUSA"). During 1991 *Iberia Líneas Aéreas de España, S.A.* ("Iberia") a Spanish state-owned airline acquired Cielos del Sur. By 1991, the Spanish Government acquired AUSA and became a significant shareholder in both ARSA and AUSA (collectively referred to as the Argentine Airlines). It may be noteworthy that the Spain-Argentina BIT came into force on 28 September 1992.

8. 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 Airlines. As a result, Interinvest became the Argentine Airlines' controlling shareholder.

9. In 1995, the Spanish Government constituted *Sociedad Estatal de Participaciones Industriales* (SEPI) to operate as the holding company for all companies fully or partially owned by the Spanish Government. As a consequence, SEPI acquired Iberia's shareholding participation in Interinvest.

10. In 2001, the Argentine Airlines were owned by SEPI. SEPI was a holding company for all companies fully or partially owned by the Spanish government. SEPI owned the Argentine Airlines through an Argentine intermediary company called Interinvest. SEPI owned 99.2% of Interinvest, and Interinvest in turn held 92.1% of ARSA's shares and 90% of AUSA's shares.[1] By mid 2001 the Argentine Airlines were experiencing financial difficulties and ARSA filed for bankruptcy reorganization. In 2001 SEPI announced it would sell its participation in Interinvest through a bidding process.

11. Air Comet, a Spanish company, entered into a Share Purchase Agreement ("SPA") dated October 2, 2001 with SEPI for the purchase of shares in Interinvest for a consideration of United States Dollar One (US$ 1). It is important to note that Air Comet is not a Claimant in this arbitration.

12. The changes in the shareholding of Air Comet were as follows:

**2001:**
In 2001 the shareholders in Air Comet were as follow:
*Autobuses Urbanos* - 35%
*Transportes de Cercanías* -35%
*Proturin S.A.* -29.8%
*Segetur S.A.* -0.2%

**July 2006:** Teinver purchased the shareholding of *Proturin* and *Segetur*.

**2006-2007:** There were changes in the share structure of Air Comet several times, which becomes majority shareholder of Air Comet and the shareholding in Air Comet stood as follows:

[1] Ex. C-11.

**October 2, 2007:**
Teinver - 56%
Autobuses Urbanos -22%
Transportes de Cercanías -22%

**December 31, 2007**, Teinver purchased additional shares from Transportes de Cercanías so that the shareholdings in Air Comet stood as follows:

Teinver - 66.67%
Autobuses Urbanos -22%
Transportes de Cercanías -11.33%

**December 11 2008:**
Request for Arbitration was received by ICSID from the Claimants on 11 December 2008, on which date the shareholding in Air Comet stood as follows:
Teinver - 96.77%
Autobuses Urbanos -2.13%
Transportes de Cercanías -1.1%

13. On 30 January 2009 ICSID registered the Request and notified the parties, the case being registered as ICSID Case No. ARB/09/1.

14. Two of the Claimants held shares in Air Comet, which was a Spanish company, when Air Comet entered into the SPA with SEPI by investing US$1 to acquire the shares of Interinvest, an Argentine company, holding shares of the Argentine Airlines. The third Claimant, Teinver, was not even a shareholder of Air Comet when Air Comet acquired the shares from SEPI through the SPA. Teinver cannot claim to have "acquired their investment" by way of the SPA between Air Comet and SEPI when Teinver was not even a shareholder of Air Comet. Similarly, for the other two Claimants (Spanish companies),

their shareholding in Air Comet (another Spanish company) cannot constitute an "investment" in the Argentine Airlines under the Spain-Argentine BIT.

15. Since Air Comet is not a Claimant, the burden of proof rests on the three named Claimants to prove that their "investment" in the Argentine Airlines, to show what liabilities were assumed, and what contributions were made by each of the Claimants to the Argentine Airlines. Claimants have not discharged this burden of proof to show that their shares in Air Comet, a Spanish limited liability company, falls within the definition of "investment" under the BIT. Claimants made no financial contribution (since they were not parties to the SPA) and assumed no liabilities under the SPA. The liabilities were assumed by Air Comet, and not by Claimants. The rights of Claimants do not exist independently of the rights of Air Comet. Claimants have not satisfied how their shareholding rights in Air Comet can be treated as a protected investment under the BIT.

16. No shares in Argentine Airlines were ever sold to the three named Claimants. Claimants had the burden of showing when the shares in the Argentine Airlines were sold to the three Claimants, which they have failed to do. The SPA between Air Comet and SEPI does not provide proof of acquisition of shares by the Claimants, given the fact that the Claimants were not even parties to the SPA.

17. Claimants' shares in Air Comet were not shares in Argentine entities. Air Comet was a company incorporated in Spain. Claimants were all Spanish shareholders with no

connection to Argentina. The Claimants' shareholding in Air Comet (under the laws of Spain) could not have been an investment "acquired or effected in accordance with the legislation of" Argentina or "shares in Argentine entities". The Claimants' shareholdings thus fail to meet the territoriality requirement of the BIT.[2]

**MARSANS GROUP**

18. The composition and legal character of the "Marsans Group" remain undefined. It is evident that the "Marsans Group" is not a legal entity nor can it be treated as a party to these proceedings. "Marsans Group" is also not party to any agreement related to the transactions involved in these proceedings. Assertions that Claimants were "part of the Marsans Group,"[3], a Spanish consortium that was owned by the late Mr. Gonzalo Pascual Arias and by Mr. Gerardo Díaz Ferrán, do not give them any *locus standi* in this arbitration. To make matters even more complex, the assets of the so-called Marsans Group, including Teinver, were sold by Mr. Díaz Ferrán and Mr. Pascual Arias to a

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1. The term "investments" in Article I of the BIT is defined to 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****; ...*
   *The content and scope of the rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party* ***in whose territory the investment is situated****. ...*
   *4.* ***The term "territory" shall mean the land territory of each Party****, as well as the exclusive economic zone and the continental shelf beyond the limits of the territorial sea of each Party over which it has or may have, in accordance with international law, jurisdiction and sovereign rights for the purposes of prospection, exploration and conservation of natural resources.*

[3]RFA ¶ 3.

Spanish entity called "Posibilitum Business" in July 2010.[4] Mr. Pascual Arias died on June 21, 2012. Mr. Díaz Ferrán was provisionally detained on December 5, 2012 in connection with the Operación Crucero criminal investigation conducted in Spain, where he currently remains in detention.[5]

19. On April 14, 2010 Claimants entered into the "Burford Funding Agreement" with Burford Capital Limited ("the Funder" or "Burford"), an investment company headquartered in Guernsey, Channel Islands. The Burford Funding Agreement which concerned the financing of Claimants' litigation expenses in this arbitration. Respondent has argued that Burford is a "vulture fund" that will be the primary beneficiary of any ICSID award in this case.

20. According to the Burford Funding Agreement the Funder will get the following allocations from any compensation paid to the Claimants by the Tribunal:

    40% of the first $100 million
    30% of the net recovery amount between $100 million and $500 million
    25% of the net recovery amount between $500 million and $800 million
    15% of the net recovery amount above $800 million

21. The so-called "Marsans Group" cannot claim to be entitled to any relief since an undefined group which was neither a party to the SPA, nor was it named as a Claimant, can clearly not be treated as Claimant. In these proceedings Claiman**ts** can only be those

[4] *See* Merits Hearing p. 54. *See also* Respondent's Memorial on Jurisdiction, ¶ 282 ("The transaction entailed selling assets such as ViajesMarsans and Teinver S.A., which comprise the Hotetur hotel chain, the Air Comet S.A. airline, SegurosMercurio and Newco handling company, among more than 50 travel companies.").

[5] CM ¶ 111; *see* Ex. RA-180, Annex P03.

entities or persons who have instituted the arbitration, in other words, Claimants-on-record.

22. These Claimants on record are:

- *TRANSPORTES DE CERCANÍAS S.A.*
- *AUTOBUSES URBANOS DEL SUR S.A.*
- *TEINVER S.A.*

23. None of the three Claimants nor "the Marsans Group", the late Mr. Gonzalo Pascual Arias, Mr. Gerardo Díaz Ferrán, or Burford were a party to the SPA dated October 2, 2001. It was Air Comet which invested US$1 to acquire the shares of Interinvest in Argentine Airlines. Air Comet, however, is not a Claimant. The Claimants were not parties to the SPA and undertook no contractual responsibilities under the SPA.

24. The real identity of the "Claimants" is not an issue that can remain unresolved. Equally important is how and when any investment was made by the three named Claimants, which can claim to be protected under the BIT.

25. The scope of protection that can be claimed and granted to parties could be gathered from the provisions of the BIT. The BIT will have to be reasonably construed, giving due weight to the object of the BIT as set out in the following terms:

> *The Argentine Republic and the Kingdom of Spain, hereinafter referred to as "the Parties",*

*Desiring to intensify economic cooperation for the economic benefit of both countries,*

*Intending to create favourable conditions for investments made by investors of either State in the territory of the other State,*

*Recognizing that the promotion and protection of investments in accordance with this Agreement will encourage initiatives in this field."*

26. The Claimants Memorial on Merits ("CMM") states in paragraph 2 that "Claimants purchased the Argentine Airlines in 2001 and operated them until the GOA nationalized them in 2008". There are a number of statements in the CMM which instead of clarifying the identity of the Claimants obscures it by confusing references to Claimants with references to Air Comet and/or to the Marsans Group as summarized below:

(a) In paragraph 34 of the CMM it is stated that out of nine offers SEPI pre-selected four bidders including the Claimants through **Air Comet** as part of the Marsans Group.

(b) In paragraph 35 it is stated that "SEPI ultimately selected **Claimants'** offer.

(c) In paragraph 36 it is stated that "(a) Claimants offered certain synergies, (b) **Air Comet** was owned by the Marsans Group" as explained by Gerardo Diaz Ferran, former co-owner of Marsans Group.

(d) The Argentine Airlines was thus to become part of a larger network of companies ...". We were owners of "Viajes Marsans, the number one travel agency in Spain ... **Air**

**Comet** which operated charter flights to the Caribbean, South America and Canary Island".

(e) In paragraph 40 it is stated that: "on 2 October 2001, SEPI and **Air Comet** entered into a Share Purchase Agreement ("SPA") through which the latter acquired 99.2% of the share of Interinvest while the purchase price was US$1, and **Claimants** undertook a number financial commitments:

- To assume Interinvest's, ARSA's and AUSA's liabilities (ARSA's liabilities at the time were in excess of US$1 billion);
- To retain ARSA's and AUSA's personnel for a period of two years;
- To maintain a majority interest in the Argentine Airlines for a period of two years;
- To restart flights on existing routes and develop new routes as soon as possible;
- To make a US$50 million capital contribution; and
- To modernize and expand the airlines' fleet.

**WHAT IS THE INVESTMENT? WHO MADE THE INVESTMENTS, WHEN AND HOW?**

27. As indicated above, instead of clarifying the identity of the Claimants the averments reproduced above have made this task difficult, if not impossible. This is further evident from the averments made regarding who are the investors and what investments are claimed to have been made by them and on what dates. These are summarized below:

28. In Paragraph 41 of the CMM it is stated that:

(a) "In exchange for these commitments, SEPI agreed to contribute up to US$248 million to be applied by Claimants' Air Comet in the implementation of a business plan,

(b) US$300 million to be applied to the payment of specific pre-existing debts. In addition, given that the financial statements upon which SEPI launched the bidding process and Claimants made their offer were updated as of July 2001, SEPI later agreed to contribute an additional amount of US$205 million to cover the operational losses suffered by the Argentine Airlines between July and October 2001."

29. In Paragraph 1 of the Claimants' Post Hearing Brief ("CPHB"), it is stated that the Claimants rely on their memorials which are hereby incorporated by reference, and then go on to state in paragraph 7 as follows:

> "7. During the merits hearing, Argentina argued that Claimants' invested "not even one peso" in the Argentine Airlines. But in fact, Claimants and their subsidiaries invested millions of dollars in the Argentine Airlines. Claimants made cash contributions of US$13.5 million in Interinvest, US$9.9 million in ARSA, and US$0.8 million in AUSA. KPMG confirmed it. Further, Claimants also reinvested in the Argentine Airlines the US$106 million in profits that ARSA and AUSA made during 2002, 2003, and 2004."

30. The averments made in the pleadings, in the CMM and CPHB somewhat disingenuously refer to Grupo Marsans as the Claimants without any attempt to define the composition and character of Grupo Marsans or to explain how an undefined consortium, embracing a large number of entities (according to one report, consisting of at least 117 companies) can be referred to as Claimants disregarding the fact that there are three named Claimants of which one (Teinver) did not even acquire any shares before 2006/2007. Example of such averments are summarized below:

(a) In paragraph 4 of the CPHB the Claimants expert Ricover is quoted as saying that "I do not see any reasons to support that Grupo Marsans was not running the Argentine Airlines efficiently"

(b) in the next paragraph 5, it is stated that "Claimants have demonstrated that these achievements were direct consequences of their investments and sound management of the Argentine Airlines."

(c) In paragraph 6 Grupo Marsans is indicated to have been the bidder which had entered into SPA, blatantly ignoring the fact that it was Air Comet which was bidder and party to the SPA.

(d) Matters are not made clearer, by the further averments in paragraph 6 as follows: This Tribunal already acknowledged the complexity of this transaction in which

Claimants and other companies of Grupo Marsans made a number of significant commitments". It is noteworthy that Air Comet did not institute the arbitration as a Claimant.

31. Article 25 of the ICSID Convention limit's the Centre's jurisdiction to the legal disputes arising 'directly out of an investment'. While the term 'investment' has been construed widely, it is not without limits. The key to determining whether a activity constitutes an investment is not "the area of economic activity covered, but the form and nature of that activity". In *Fedax NV v Republic of Venezuela*[6] the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development. Schreuer observes that the ICSID Convention 'does not imply unlimited freedom for parties…the term "investment" has an objective meaning independent of the parties' disposition'.

32. The Spain-Argentina BIT contains a definition of 'investment' and provides that:

> 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;
> -Rights derived from any kind of contribution made with the intention of creating economic value, including loans directly linked with a specific investment, whether capitalized or not;
> - Movable and immovable property and real rights such as mortgages, privileges, sureties, usufructs and similar rights;

[6] ICSID Case No. ARB/96/3.

> -Any kind of rights in the field of intellectual property, including patents, trade marks, manufacturing licenses and know-how;
> - Concessions granted by law or by virtue of a contract for engaging in economic and commercial activity, in particular those related to the prospection, cultivation, mining or development of natural resources.

33. The Preamble to the Spain-Argentina BIT provides:

> "The Argentine Republic and the Kingdom of Spain, hereinafter referred to as "the Parties",
>
> Desiring to intensify economic cooperation for the economic benefit of both countries,
>
> Intending to create favourable conditions for investments made by investors of either State in the territory of the other State,
>
> Recognizing that the promotion and protection of investments in accordance with this Agreement will encourage initiatives in this field,
>
> Have agreed as follows:"

The purpose of the BIT was the promotion and protection of investment and the creation of favourable conditions for investments made by investors in the territory of the host state for the "economic benefit" of the host state.

34. The relevant test for the Tribunal to determine whether it has jurisdiction is a "double keyhole approach" or a "double-barreled" test. Claimants have to satisfy the requirements of both the ICSID Convention and the BIT. Under the double-barreled test the activities of Claimants have to meet the definition of "investment" in the BIT as well as the

"objective" criteria of an investment within the meaning of Article 25 of the ICSID Convention (as held in *CSOB v Slovakia*[7], *Salini v Morocco*[8], and *Joy Mining v Egypt*[9]).

35. The ICSID Convention expressly states in Article 25 clause (1):

> "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."

For the purpose of proper definition of "investment" we need to interpret Article 25 of the ICSID Convention. Article 31 of the Vienna Convention requires that courts and arbitral tribunals shall interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Vienna Convention specifically states that the preamble and the annexes qualify part of the text for the purposes of interpretation (Article 31(2)) and that context includes "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "(c) any relevant rules of international law applicable" (Article 31(3)(b) and (c)). The current leading decision on the definition of "investment" in ICSID arbitration, *Salini v Morocco*[10]*,* has existed for more than a decade. It laid down the test that requires investment to have four

[7] *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction (May 24, 1999), available at http://www.worldbank.org/icsid/cases/csob_decision.pdf; Decision of the Tribunal on the Further and Partial Objection to Jurisdiction of December 1, 2000, 15 ICSID Rev.—FILJ 530 (2000).
[8] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 129 Journal du droit international 196 (2002) [French original]; English translation in 42 ILM 609 (2003).
[9] *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction of 06 August 2004.
[10] ICSID Case No. ARB/00/4

elements: (i) a contribution of money or other assets; (ii) a certain duration; (iii) an element of risk; (iv) a contribution to the host State's development.

36. Claimants' had not transferred any financial resources to the host state, Argentina, when Air Comet bought shares in the Argentine Airlines for US$1. The SPA did not involve any contribution of assets by Claimants. Air Comet received payments from SEPI to meet the liabilities of the Argentine Airlines. Air Comet made a nominal payment of US$1 for the shares. There was no risk borne by Claimants. In relation to the activities or obligations undertaken by Air Comet under the SPA:

- there was no transfer of financial resources from Claimants to Argentina;
- the SPA involved a one-off transaction and not of any certain duration;
- there was no risk borne by Claimants; and
- there was no substantial commitment or significant contribution to Argentina's development.

37. Acquiring of the shares by Air Comet and subsequent transfers to the three named Claimants could not properly, therefore, be treated as protected "investment".

38. The Tribunal's Decision on Jurisdiction is based on a *prima facie* assessment. The Tribunal in *Siemens AG v Argentina* (ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004) explained the position 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*]

39. Nothing stated by the Tribunal at the jurisdictional phase is conclusive on the basic issue to whether Claimants have rights which fall under the definition of "investments" as contained in Article I of the BIT and in respect of which protection can be granted under the BIT.

40. The identification of the "investment", that is the subject matter of the present claim, and the identities of the investors, who are entitled to claim damages, are crucial issues to be determined at the merits stage. The alleged violation of the investors' rights, and the potential relief than can be awarded, will depend on the answer to the following questions:

    - What constituted the "investment"?
    - Who are the investors? What are the identities of the investors who can claim damages under the BIT?

41. In the present case, the identification of the "investment" is difficult since the investment arises from a complex transaction under which Claimants were purportedly undertaking responsibilities and risks in assuming debts and liabilities of the airlines going forward and the undertaking to maintain and expand the operations of the airlines. The questions which need to be answered at the outset are:

    - Which Claimant assumed what liability?

- Whether Claimants assumed liabilities, by what means, and in relation to which creditors?

42. Regardless of the complexity of the transactions, Claimants' "investment" of which they seek protection under the BIT has to be identified.

43. Can the shares that Claimants held in Air Comet S.A., a Spanish limited liability company, fall under the definition of "investment" which states that the "investment" has to be "***acquired or effected in accordance with the legislation of the country receiving the investment"*** *and that the "content and scope of the rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party* ***in whose territory the investment is situated"***? Do we not need to consider under which Argentine law Claimants acquired rights which can be treated as "investment" under the BIT?

44. It seems disingenuous for Claimants to allege making an "investment" in the Argentine Airlines. The Argentine Airlines were in operation long before Claimants bought on different dates (as late as 2006 in the case of Teinver) shares in Air Comet, a Spanish company. We need to ask the further questions –

    Whether and how did each of the Claimants acquire shares in Air Comet? Can Claimants' acquisition of shares, in the circumstances of the case, be treated as an investment made "in accordance with the legislation of" Argentina? What are the

content and scope of the rights acquired by Claimants as determined by Argentine law?

45. Since there is no evidence that Claimants made any financial contribution which can be characterized as "investment" in the Argentine Airlines, it is not clear how any right in respect of Claimants' shares in Air Comet can be said to be protected under the BIT.

46. The issue to be decided is whether Claimants (as shareholders of Air Comet) may claim compensation for alleged violations of the BIT when Air Comet (the company which actually held the shares in Interinvest, the holding company of the Argentine Airlines) itself does not make such claims before the Tribunal. Claimants have failed to show how their shareholder rights exist independent of the rights of Air Comet and how those shareholder rights can be treated as a protected investment.

47. It is necessary to look at the precise content and scope of the rights which Claimants allege are their investments and to consider whether these rights constitute investments which can claim to be protected by the BIT.

48. The term "investments" in Article I of the BIT is defined to 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****;*

*- Rights derived from any kind of contribution made with the intention of creating economic value, including loans directly linked with a specific investment, whether capitalized or not;*

*- Movable and immovable property and real rights such as mortgages, privileges, sureties, usufructs and similar rights;*

*- Any kind of rights in the field of intellectual property, including patents, trade marks, manufacturing licenses and know-how;*

*- Concessions granted by law or by virtue of a contract for engaging in economic and commercial activity, in particular those related to the prospection, cultivation, mining or development of natural resources.*

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

*No modification in the legal forum in which assets and capital have been invested or reinvested shall affect their status as investments in accordance with this Agreement.*

*3. The terms "investment income or earnings" shall mean returns from an investment in accordance with the definition contained in the preceding paragraph and shall expressly include profits, dividends and interest.*

*4.* ***The term "territory" shall mean the land territory of each Party****, as well as the exclusive economic zone and the continental shelf beyond the limits of the territorial sea of each Party over which it has or may have, in accordance with international law, jurisdiction and sovereign rights for the purposes of prospection, exploration and conservation of natural resources.*

49. Claimants cannot claim that their rights in respect of which they claim protection of the BIT were “acquired or affected in accordance with the legislation of the country receiving the investment” (that is the Argentine law) since Claimants’ rights are those of a shareholder of Air Comet S.A., a limited liability company in Spain.

50. The precise content and scope of the rights alleged by Claimants as being violated must be identified and the question that must be answered is whether the rights of Claimants can be treated as “investments” as defined in Article I of the BIT.

## IV. ISSUE OF ADMISSIBILITY AND STANDING NOT ADDRESSED IN THE DECISION ON JURISDICTION

51. The issue of the Power of Attorney of King & Spalding to represent Claimants arose in the context of the insolvency proceedings in respect of Claimants and of Air Comet.

52. Insolvency Proceedings were commenced in respect of each of the Claimants on the dates as noted below:

    - Teinver in December 2010.
    - Transportes de Cercanias in February 2011.
    - Autobuses Urbanos del Sur in April 2012.
    - Air Comet in March 2008.[11]

53. The issue for this Tribunal to determine is whether King & Spalding has valid powers of attorney at the present stage of this arbitration, now that each of Claimants' administrative powers have been suspended. Claimants argue that the powers of attorney are still 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' power of attorney was extinguished by the bankruptcy, that a new power of attorney is needed, and that a valid new power of attorney has not yet been granted to King & Spalding or anyone else.

[11] Vol. 6, page 994-998.

54. The bankruptcy of Air Comet and of all three Claimants is related to certain factual and legal disputes in this case. First, Respondent has asserted that Claimants' bankruptcy terminated King & Spalding's power of attorney to represent Claimants in this case. Second, the Parties disagree on the causes of Claimants' and Air Comet's bankruptcy. Claimants, through witness Díaz Ferrán, assert that the bankruptcies were the direct result of Respondent's unlawful acts and policies towards the Airlines. Respondent argues that the bankruptcies were due to reasons wholly unconnected to Respondent's actions, including Claimants' poor business management, lack of liquidity and failure to make payments. With respect to Air Comet's bankruptcy, Respondent argues that the company was in a state of bankruptcy as early as April 2008, predating the expropriation of the Airlines later in 2008. These arguments with respect to the causation of the Claimants' insolvencies are relevant to both Claimants' claims and Respondent's counterclaim.

55. Moreover, Respondent argues that King & Spalding's attempts to "ratify" its power of attorney fail. While Claimants have produced letters written by the trustees in insolvency for each of the Claimants that purport to ratify the power of attorney, Respondent asserts that these letters are flawed. It notes that the letters are not addressed directly to ICSID but rather to the King &Spalding attorneys representing Claimants. It also notes that the letters are undated, and that they do not appear to have been notarized. Finally, Respondent notes 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 taken by King & Spalding and to authorize the firm to carry on its activities. Respondent asserts

that "every lawyer is aware that, in order for a power of attorney to be renewed within the context of an insolvency proceeding, there must be a court order authorizing such renewal."

56. Claimants argue that the reorganization administrators "are not required to seek authorization from the courts hearing Claimants' reorganization proceedings," noting that "[i]n accordance with Article 51(2) of the Spanish Bankruptcy Law, the court's authorization would only be required in order to withdraw, to accept a claim, in whole or in part, and to settle disputes".

57. With respect to the power of attorney granted to King & Spalding, Claimants' expert witness Aurora Martinez Florez asserts that after the suspension of powers, the board of trustees directly steps into the shoes of the debtor in the agreements and powers of attorney granted by the debtor before the declaration of bankruptcy.

58. With respect to Article 48(3) of the Bankruptcy Law, which provides that "Any power of attorney existing at the time of the initiation of the insolvency proceedings shall be affected by the suspension or control of financial and property-related powers," Martinez Florez argues that "affected" does not mean that powers of attorney are terminated.

59. The Respondent's expert J.J. Cigaran Magan has testified that

    Page 987, lines

    12 … Well, I think that in the courts, it is a
    13 basic, essential rule, and any attorney knows that

14 they cannot go to a court without Powers of Attorney
15 granted in notarial instruments.

60. The onus was on the Claimants of proving that their standing and the continued capacity of their lawyers to represent them subsisted after the commencement of the insolvency proceedings. This onus has not been discharged. The undated non-notarized letters from the trustees in insolvency which were not directly addressed to this Tribunal cannot be accepted as proof that King & Spalding fulfilled the legal requirement for representing the Claimants after the insolvency proceedings had commenced.

61. The issue is further complicated by the third party funding arrangement which exists under the Burford Funding Agreement. The Funding Agreement, with effective date April 14, 2010, is between

(i) Teinver S.A.,

(ii) Transportes de Cercanías S.A. and

(iii) Autobuses Urbanos del Sur S.A. (all companies incorporated under the laws of Spain and have their principal place of business in Madrid, Spain), and

(i) Burford Capital Limited (described as a "closed-ended investment company organized under the laws of Guernsey having its principal place of business at Regency Court, Glategny Esplanade, St Peter Port, Guernsey GY1 1 WW").

62. The first point to note is that the Funding Agreement was executed by (i) Gerardo Díaz Ferrán and (ii) Gonzalo Pascual Arias. These individuals are not Claimants. It is not

understood how these individuals, not being Claimants, could execute the Funding Agreement which states in the recital that

- Claimant "requires funding to meet the costs of preparing, submitting and enforcing the Claim",
- Claimant "sought to make arrangements to obtain funds",
- Claimant "has approached the Funder",
- and Funder has a "common legal interest" with the Claimant.

63. Gonzalo Pascual Arias and Gerardo Díaz Ferrán are persons against whom the Spanish authorities had initiated criminal proceedings for embezzlement, and who have since been convicted by the Spanish Courts. The criminal proceedings against Gonzalo Pascual Arias (now deceased) and Gerardo Díaz Ferrán (now convicted and serving sentence in a Spanish prison) is dealt with in a separate section below.

64. The Funding Agreement was not executed by Air Comet, which was a party to the SPA and arguably may claim to have made an investment under the BIT. The reason Air Comet did not, and could not, execute the Funding Agreement was that by April 14, 2010 Air Comet was already in insolvency proceedings.

65. On January 4, 2010 ICSID informed that parties that the present Tribunal had been constituted. The Funding Agreement, by which Burford got involved in this arbitration, was executed within about four months from the constitution of the Tribunal, and well before the filing of the Claimants' Memorial on Merits dated September 29, 2010.

66. The Funding Agreement states

"WHEREAS
(A) Burford Capital Limited is an investment company headquartered in Guernsey and publicly traded on the AIM Market of the London Stock Exchange.
(B) The Claimant requires funding to meet the costs of preparing, submitting, conducting and enforcing the Claim (as defined below). The Claimant has therefore sought to make arrangements to obtain funds for such purpose that would allow repayment of such funds to the Funder, plus consideration for the attendant risk, to be conditional upon recovery of proceeds from the Claim.
(C) The Claimant has approached the Funder and for this purpose. The Funder has concluded that the Claim is meritorious and the Funder has a common legal interest with the Claimant in seeing that such Claim is pursued adequately."

67. Schedule 2 of the Funding Agreement states:

"The Recovery Amount shall be determined and distributed as follows.
1.First, the Expenses paid by the Funder shall be repaid to it and the Funder shall also receive a priority return of three times the Expenses.
2. Any premiums or success fees due to counsel shall be paid.
3. The amount remaining after those payments shall be the "Net Recovery Amount" which shall be allocated as follows:
3.1 In the event of a Settlement within twelve month of the Effective Date, 20% of Net Recovery Amount to Funder and the remainder to the Claimant, provided however that the total Recovery Amount payable to the Funder pursuant to section 1 and this section 3.1 shall not exceed 25% of the Award less the Expenses.
3.2 Absent such a settlement,
40% of the first US$100 million of Net Recovery Amount to the Funder,
30% of any Net Recovery Amount between US$100 million and US$500 million to the Funder,
25% of any Net Recovery Amount between US$500 million and US$800 million to the Funder, and
15% of any Net Recovery Amount above US$800 million to the Funder, in each case with the remainder to the Claimant.
4. Notwithstanding the foregoing, the Funder shall be entitled [to] receive a minimum amount so as to provide the Funder with an internal rate of return of not less than 50%."

68. Clause 6 of the Funding Agreement states

"6.1 In consideration of the Funder's undertakings in this Agreement, the Claimant agrees to pay the Funder the Recovery Amount immediately following receipt of all or any part of the Award…

6.2 … if the Claimant comes into possession of any Award proceeds, it shall immediately pay all such proceeds immediately to the Nominated Lawyers [King & Spalding LLP] or the escrow agent. The Claimant and the Funder both direct the Nominated Lawyers or the escrow agent to pay the Recovery Amount to the Funder as soon as practicable, to pay any outstanding invoices and to pay the remainder to the Claimant."

69. As would be evident from 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 the principal beneficiary, along with the Nominated Lawyers, of the proceeds of any award. The award proceeds are to be immediately paid to the Nominated Lawyers (King & Spalding LLP) 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.

70. Despite not being an "investor" under the BIT and the funds provided by Burford not being "protected investment" under the BIT, these proceedings have continued because Burford and the Nominated Lawyers have been assured of receiving significant amounts from any award which may be made by the ICSID Tribunal. Burford is a third party and as the Respondent states "is abusing the ICSID system by bringing forward a claim that is contrary to the purposes and goals of the Convention in order to make astronomical profits" .

71. In addition, according to Schedule 2, paragraph 4 of the Funding Agreement, Burford is guaranteed an internal rate of return of not less than 50% on its "investment".

72. Burford may have "invested" in the present arbitration proceedings by agreeing to fund the legal expenses but such an "investment" based on speculating on the prospect of obtaining a substantial portion the proceeds of any award resulting from a pending arbitration cannot be treated as protected "investment" under the BIT. The BIT guarantees the rights of "investors" who have made an "investment" in the territory of the host state. The BIT is not intended to enable payment of awards to third party funders who are not "investors" and who have no protected "investment", and who only come into the situation in the circumstances described above to advance funds in order to speculate on the outcome of a pending arbitration.

73. The practice of third party funding investment arbitration continues to be criticized by academics and professionals. The Funder's role in this case may well be characterized as "champerty", which has long been considered under English common law as being against public policy as it encourages vexatious litigation. A contract may be void for champerty, though it may not strictly amount to criminal offence. The purchase of a law suit by an attorney is champerty in its most odious form as has been held in a judgment of the English Chancery Division:

> So odious in the eyes of the law are these contracts, that they confer no rights on the parties making them, and if one pay out money under them he cannot recover it. [12]

74. Burford cannot, on any reasonable construction be characterized as an investor entitled to protection under the BIT. The Tribunal cannot, in these circumstances, be considered to

[12] *Rees v de Bernardy* [1896] 2 Ch 437.

have jurisdiction to grant an award to a party, such as Burford, which is not an investor under the BIT and has made no "investment" which can claim to be protected by the BIT.

75. The questions about how any activities of the Marsans Group can be attributed to the Claimants remain pertinent.

76. It was not the Claimants but Air Comet which had entered into the SPA with SEPI. Claimants were not a party to the SPA. The Claimants' management of the Argentine Airlines is not established, nor have their claim, or what they had "invested". The burden of proof was on Claimants and they have failed to discharge it.

77. Air Comet, the party to the SPA, received from SEPI US$300 million which was to be used for liquidating ARSA's liabilities. There is no evidence that Air Comet used the funds for the purpose stipulated in the SPA. So there can be no basis for a claim by Air Comet nor by the three named Claimants as indirect shareholders of Air Comet to be treated as an "investor".

78. Since the Marsans Group are not Claimants and indeed the composition and status of the Marsans Group have remained undefined, no alleged contribution of the so-called Marsans Group can be treated as "investment" within the meaning of the BIT.

79. Mr Gerardo Diaz Ferran has been found criminally liable and sentenced to two years and two months' imprisonment by the Judgment of the Spanish Central Criminal Court No.1

(RA 669). The judgment (RA 669) sheds clear light on how through a complex set of transactions the funds which were meant to be applied to liquidate the liabilities of ARSA (and if indeed had they been applied might be treated as an "investment") had in fact been misappropriated.

80. The relevant portions of the Spanish Court Judgment (RA 669) are reproduced below:

***"ESTABLISHED FACTS***

*In accordance with the private agreement entered into between AIR COMET and its shareholders on 3 December 2001, which was notarially recorded on the same day, AIR COMET S.A. irrevocably agreed that <u>the claims acquired would only be used as funds of its own to increase capital or make irrevocable capital contributions to ARSA and undertook to fulfil such commitment within six months</u> as from approval of ARSA's Reorganization Plan. If the claims were not used as agreed upon, SEPI would be entitled to require the parties to repay any sum that was otherwise allocated.*

*...*

*In view of the fact that the claims assigned to AIR COMET remained effective, <u>AIR COMET obtained a benefit since these claims were acquired using funds provided by SEPI for no valuable consideration.</u>*

Thus no investment can be said to have made by Air Comet. The Spanish Court Judgment (RA 669) further concludes:

*...*

***CONCLUSIONS OF LAW***

*Nonetheless,* ***in reality, the millions of dollars given by SEPI to meet INTERINVEST's liabilities were used by AIR COMET to purchase the claims, thereby subrogating to the rights of ARSA's creditor and participating in its reorganization proceedings*** *(Report issued by the Spanish Court of Audit).*

*…*

*It is thus evident that Air* ***Comet was the only holder of the claims acquired through the USD 300 million provided by SEPI****.*

*…*

*In accordance with the agreement of 3 December 2001 between AIR COMET and its shareholders (Transportes de Cercanías, Busursa, Segetur and Viajes Marsans), the company* [Air Comet] *undertook to acquire a series of claims* [debts]*to be paid by ARSA, thus subrogating to the rights of the creditors.*

It may be noted that the two of the three named Claimants were not shareholders of Air Comet at the relevant time. Regarding the fraud committed by Air Comet the Spanish Court Judgment (RA 669) noted:

*…The claims acquired were used to increase ARSA's capital. Therefore,* ***AIR COMET ended up increasing its stake in ARSA by using funds granted by SEPI to INTERINVEST****, which were aimed at paying ARSA's liabilities.*

*…In fact, since AIR COMET acquired the claims —assets— without having the necessary funds to do so —with funds granted by INTERINVEST—* **this was actually an assignment**

***for no consideration, a gift or a case of unjust enrichment**, if not a mere present given by the donor. The ultimate beneficiary was AIR COMET, since it was its value that increased, and this fact cannot be concealed.*

*…*

*The claims were not settled. If they had, they would have produced no benefits, which is the theory advanced by the accused at trial in stating that Air Comet was "a simple agent". However, since those claims remained effective, Air Comet, in acquiring them, received the benefit deriving from its inclusion as a new creditor in ARSA's reorganization.*

*…In this respect, Judgment STS 979/2011 should be highlighted, among others: "The companies constitute a business structure that is controlled by a single person (in this case, the accused and their companies). There is no separation of assets in the conduct of their business that justifies the conclusion that they operate independently of each other. Their respective personalities are nothing but a front. **There is actually a single economic structure that is used to commit fraud or to harm a third party and thus cannot enjoy the protection granted by the law** to an entity that has a legal personality of its own".*

81. From the above judgment the following facts become clear that under the SPA by which Air Comet obtained shares of Interinvest for USD 1, SEPI had provided USD300,000 for the reduction of liabilities of Argentine Airlines and Air Comet had undertaken to utilize

that amount for the specific purpose of reduction of liabilities of Argentine Airlines. This was not done.

82. Despite contributions by SEPI for reducing the liabilities of ARSA the fact is that ARSA remained indebted since the obligations undertaken by Air Comet in the SPA were not fulfilled. The assertion that Air Comet "invested" that amount is, in fact, palpably unwarranted. The millions of dollars given by SEPI to meet Interinvest's liabilities were not so used but were used by Air Comet to purchase the claims. This cannot be treated as an investment of Air Comet in the Argentine Airlines.

83. The effect of this transaction was that the Interinvest's liabilities (and Argentine Airlines' liabilities) continued to be liabilities while Air Comet illegally acquired claims over the Argentine Airlines through fraudulent means.

84. Through the fraud so committed harm was caused to the Argentine Airlines to the extent that SEPI funds meant for reducing the liabilities of the Argentine Airlines were not so used, but were actually used to increase the share capital of Air Comet. Such a misuse of the funds which were intended to reduce the liabilities, but were misappropriated, cannot be regarded as Claimants' "investment".

85. Air Comet's acquisition has been found by the Spanish Court to have been **"an assignment for no consideration, a gift or a case of unjust enrichment".**

86. The Spanish Court has found that in this transaction there is **"actually a single economic structure that is used to commit fraud or to harm a third party [the Argentine Airlines] and thus cannot enjoy the protection granted by the law".**

87. In such a situation, where a Spanish Court has found that a fraud had been committed by Air Comet and Mr Ferran to harm the Argentine Airlines, it cannot be legally tenable to treat such misuse of the funds as an "investment" which may seek the protection of the BIT.

**ALLEGED BREACHES OF THE FAIR AND EQUITABLE TREATMENT PROVISION**

88. My concerns regarding the identity of the Claimants are also relevant in assessing the Memorandum of Agreement signed between the Government of Argentina and Interinvest ("the July 2008 Agreement").[13]

89. The crucial issue remains that none of the three Claimants were parties to this July 2008 Agreement and thus had no rights under the July 2008 Agreement. As Professor Kinsbury has stated in his expert opinion an investor cannot invoke commitments under an agreement unless it is "a contract between the Claimant and the Government". I am in agreement with Professor Kinsbury and am of the view that since none of the three named Claimants were parties to the July 2008 Agreement they cannot claim for

[13] Claimant's Exhibit C-190.

contractual breaches of that July 2008 Agreement. Further, in Professor Kinsbury's opinion a simple breach of contract cannot be regarded as a breach of the BIT.[14]

90. The issue is whether the Claimants can claim a treaty breach under the BIT for any violations of the July 2008 Agreement between Interinvest and the Argentine Government. If there was a breach Interinvest, being an Argentine company, could not claim under the Spain-Argentina BIT. Air Comet, the Spanish shareholders of Interinvest, did not lodge any claims before this Tribunal and are not the Claimants. I am of the view that Claimants do not have standing to bring claims for treaty breaches for any alleged violations of the contractual terms of the July 2008 Agreement by Argentina.

91. The factual and legal context of the July 2008 Agreement is important in order to assess breaches of the Claimants' treaty rights by the Respondent.

92. The July 2008 Agreement was executed between Argentina and Interinvest since a potential investor, Mr. Mena, withdrew and "the reason Mr. Lopex Mena withdrew from the acquisition of the Airlines was that he could never have sufficient information of the economic, financial and operational situation of the Airlines because, as was said, the Marsans Group did not provide the necessary information".[15]

93. It is important that the July 2008 Agreement is not an agreement for sale of shares. The price of the shares which were to be transferred from Interinvest, arguably the most

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[14] Respondent's PHB, Para 134.
[15] Exhibit RA 555; Respondent's PHB, Para 144.

crucial element of any transfer of shares, remained to be agreed between Interinvest and the Respondent.

94. The main disagreement between Interinvest and Argentina that led to the failure of the July 2008 Agreement was the price valuation of the Argentine Airlines. Regardless of the price valuation, it was an agreed position that the financial condition of the Argentine Airlines was very bad – Respondent characterizes the Airlines as being "in truly bankrupt condition"[16] and Claimants assert that by mid 2008 "the Argentine Airline's financial condition hit its worst point since Claimants acquired them in October 2001"[17]. It may be pertinent that in 2001 when the SPA was executed the valuation of the Argentine Airlines was US$1. If the financial position in July 2008 was worse than that in 2001 then it appears that the Respondent's negative valuation (as conducted by TTN) of the Airlines is more credible than the Claimants' non-independent valuation conducted by Credit Suisse.

95. Since the price of the shares was not agreed between Interinvest and the Respondent, I cannot agree with the conclusion in paragraph 782 of the Award that the July 2008 memorandum "constituted a binding agreement between Interinvest and the Government of Argentina pursuant to which the two parties agreed to the purchase and sale of Interinvest's shares in the Airlines on the terms set out in the Agreement". Since the price was not agreed, the memorandum of July 2008 (referred to as July 2008 Agreement) cannot be treated as a binding agreement for the sale and purchase of the Airlines. A

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[16] Respondent's Counter Memorial, Para 478; Respondent's Rejoinder, Para 466.
[17] Claimant's Reply, Para 287.

binding agreement for sale was yet to be reached upon agreement of the price between the parties. The failure to reach an agreement cannot be treated as a breach of the treaty rights of the Claimants. There was no guarantee from the Government that the shares of the Airlines would be purchased. The July 2008 Agreement was merely an agreement to explore for a limited period of 60 days the possibility of a purchase of shares provided that the price valuation could be carried out.

96. The failure of the parties to agree to appoint an independent expert cannot be attributed as a treaty breach of the Claimants' rights under the BIT by the Respondent. The Respondent has consistently held that Interinvest failed to provide financial information required under the July 2008 Agreement.[18] Mr Munoz Perez also confirmed that even Credit Suisse valuation was done on the basis of a "Business Plan" prepared by "the Board of Directors of the Marsans Group".[19] A credible valuation by Credit Suisse would have required the auditors to independently to verify or carry out any audit the documents. This was not done. I cannot agree with the Tribunal that Respondent's complaints regarding the Credit Suisse valuation were formal and artificial.

97. I am of the view that the 2008 Agreement contained no commitments from the Respondent to the three named Claimants. The 2008 Agreement was not a binding agreement for the sale of shares but was a memorandum to explore the option of the sale of shares provided the price of the shares could be agreed at and other conditions could be met within a transition period of 60 days, which expired on 14 October 2008. For

[18] Respondent's Rejoinder, paras 490-493; Respondent's Counter Memorial, paras 507-508; Respondent's PHB, Para 159-162.
[19] Respondent's PHB, Para 40, citing testimony of M Perez, transcript p.489.

these reasons, the 2008 Agreement cannot be the basis of finding a treaty breach of obligations owed to the three named Claimants by the Respondent.

98. In conclusion, for all the reasons stated above, I consider and find that this Tribunal has no jurisdiction to grant reliefs under the Argentina-Spain Treaty to the Claimants in the form of declarations set out in paragraphs 1148 (a)-(c) or the directions set out in paragraphs 1148 (d)-(g) of the majority award, as Claimants have failed to establish that they are investors entitled to protection under the Treaty or that their investments in respect of which protection was sought are protected investments under the Treaty. With due respect to my co-arbitrators, I cannot concur in the majority award and enter this dissenting opinion.

[signed]
Kamal Hossain
Date: 13 July 2017