Arbitration Institute of the Stockholm Chamber of Commerce

In an arbitration between

RENTA 4 S.V.S.A.
AHORRO CORPORACIÓN EMERGENTES F.I.
AHORRO CORPORACIÓN EUROFONDO F.I.
ROVIME INVERSIONES SICAV S.A.
QUASAR DE VALORS SICAV S.A.
ORGOR DE VALORES SICAV S.A.
GBI 9000 SICAV S.A.

Claimants

and

THE RUSSIAN FEDERATION

Respondent

SEPARATE OPINION OF CHARLES N. BROWER

INTRODUCTION

1. I begin by confirming what is stated in Paragraph 154 of the Award on Preliminary Objections ("the Award') to which this Separate Opinion is appended. The fact that the Award does result from such "extensive and collegial deliberations" with co-arbitrators whose integrity and intellect I respect most highly renders me particularly hesitant to air the views set forth below. Yet, I choose to articulate my partially differing views for two reasons. First, I believe that by doing so I may contribute usefully to the public debate over the issues addressed by this Tribunal in this case, a debate reflected in past awards of other tribunals and doubtless to be continued in ongoing and future arbitrations. Second, given what we have been informed may be the practical impact of the Award,[1] it may not be amiss to anticipate the possibility of judicial proceedings in due course in which the correctness of the Award is put in issue, in which case I entertain the

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1 At the hearing leading to the Award Claimants' counsel noted that "owners of about $10 billion in losses reside in countries that have bilateral investment treaties with Russia, and the large majority of those live in countries that have bilateral investment treaties with Russia that are similar to the UK treaty [involved in *RosInvestCo v. Russia*, referred to in the Award at paragraphs 48, 73, 95, 97, 98 and 104] and the Spanish treaty" (T:378). Hence, counsel stated, "[t]his is a very important case. This is about more than the few million dollars that are at stake for the Claimants in this case" (T:377).

fond hope that the views I express may further illuminate certain issues for the benefit of any such forum.

2. I agree entirely with subparagraph (i) of paragraph 155 of the Award. Hence I am in agreement with what has been said in paragraphs 19-67 of the Award, while adding only my own emphasis to the statements in its paragraph 45 to the effect that it is solely the Claimants' own insistence that we may not address the issue of whether the alleged expropriation of which they complain was lawful or unlawful that has precluded us from addressing such issue, and that the Award therefore expresses no opinion as to whether, in the absence of that insistence, we would have had jurisdiction under the Spanish treaty to address that issue.

3. I am in disagreement with, and hence dissent from, subparagraph (ii) of paragraph 155 of the Award. While I do embrace some of the Award's conclusions leading up to its rejection of jurisdiction based on Article 5(2), namely those establishing that Claimants' raising of the MFN issue was timely, that it is not precluded by Article 11(3) of the Danish treaty with Russia nor is it negated by Article 10 of the Spanish treaty, and that dispute settlement mechanisms may be encompassed by the term "treatment," I disagree with the majority's analysis insofar as it denies Claimants access through the MFN clause of the Spanish treaty to the broader consent to international arbitration Respondent gave under Article 8(1) of the Danish treaty. Thus I would have ruled that this Tribunal has jurisdiction not only to consider Claimants' claim of expropriation, with all of its ramifications, under Article 6 of the Spanish treaty, but also to hear claims arising under Articles 4 (protection against arbitrary or discriminatory measures) and 5(1) (fair and equitable treatment) of that treaty.

4. Finally, I also am in disagreement with, and hence dissent from, subparagraph (iii) of paragraph 155 of the Award insofar as it excludes from this arbitration the Claimants Emergentes, Eurofondo and Renta 4 S.V.S.A., who, in my view, either should be admitted as qualified Claimants or given an opportunity to undertake whatever formalities may be required for their claims to be presented to this Tribunal. That is to say, while I concur with paragraphs 135-153 of the Award, holding that ADRs qualify as "investments" under the Spanish treaty, that ownership is proven and that there is no

problem as regards admissibility, I reject paragraphs 121-134 of the Award, which find Emergentes, Eurofondo and Renta 4 S.V.S.A. not to be qualified investors under the Spanish treaty.

ARTICLE 5(2) OF THE SPANISH TREATY

5. In my view the majority in this case is mistaken in its view that Article 5(2) of the Spanish treaty grants most-favored-nation treatment only in respect of fair and equitable treatment, and does not permit Claimants to incorporate Respondent's broader consent to arbitration under Article 8(1) of the Danish treaty with Russia, which accords the right to SCC arbitration in respect of any dispute under that treaty, for the benefit of investors covered under the Spanish treaty.

6. At the outset, while the Award deals with *Plama* (in paragraphs 95 and 98) and rightly ascribes to it no weight for present purposes, I think it nonetheless important to emphasize, as part of what the Award in paragraph 87 calls "normative background," the wrongheadedness of *Plama's* analytical *diktat* to the effect that

> an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[2]

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[2] *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 Feb. 2005, para. 223. The same point was expressed repeatedly by the *Plama* Tribunal in terms of the MFN provision needing to be "clear and unambiguous" in that respect:

> ... [A]n agreement of the parties to arbitrate ... should be clear and unambiguous (para. 198).
>
> ... [T]he parties' clear and unambiguous intention ... (para. 199).
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> ... [T]he reference [in the MFN clause] must be such that the parties' intention to import the arbitration provision of the other agreement [BIT] is clear and unambiguous (para. 200).
>
> ... [C]learly and unambiguously ... (para. 200).
>
> ... [T]he intention to incorporate [into the primary BIT] dispute settlement provisions [from the BIT sought to be accessed] must be clearly and unambiguously expressed (para. 204).
>
> ... [U]nless the States have explicitly agreed thereto ... (para. 212).
>
> ... [A]n arbitration clause must be clear and unambiguous and the reference to an arbitration clause [via an MFN clause] must be such as to make the clause part of the contract (treaty) (para. 218 - the parenthesized reference to "treaty" is in the original).

7. The principle basis on which the *Plama* tribunal reached its conclusion, and on which also the tribunals in *Telenor*, *Berschader* and *Wintershall* relied, i. e., that a State's acceptance of jurisdiction must be "clear and unambiguous", however, is a principle that, whatever validity it may have had in an earlier era, is patently incompatible with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Thus, the International Court of Justice and numerous arbitral tribunals have repeatedly stated that instruments containing a State's consent to submit to the jurisdiction of an international court or tribunal are to be interpreted like any other international legal instrument, that is neither restrictively nor liberally, but according to the standards set down in the Vienna Convention.

8. Thus, after a meticulous review of the jurisprudence of both the Permanent Court of International Justice as well as the International Court of Justice, Judge Rosalyn Higgins, in her Separate Opinion in the *Oil Platforms* case, concluded that

> [i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. ... The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.[3]

Following *Plama v. Bulgaria,* see also *Telenor Mobile Communications A.S. v. The Republic of Hungary,* ICSID Case No. ARB/04/15, Award of 13 Sept. 2006, para. 90 (stating that "[t]his Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal"); *Vladimir Berschader and Moïse Berschader v. The Russian Federation,* SCC Case No. 080/2004, Award of 21 April 2006, para. 181 (stating that "the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties"); *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award of 8 Dec. 2008, para. 167 (observing that "ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted*" – emphasis in the original). I note, however, that the award in *Wintershall AG v. Argentina* was rendered after the close of the oral hearings in the present case, without the Parties having had an opportunity to comment upon this decision. Therefore, it is, in the present context, cited solely for purposes of completeness.

[3] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment of 12 Dec. 1996, Separate Opinion by Judge Higgins, I.C.J. Reports 1996, p. 857, para. 35.

9. The same approach to interpreting jurisdictional instruments also dominates the practice of arbitral tribunals. Thus, as Professor Berthold Goldman and his colleagues famously said more than a quarter of a century ago in the jurisdictional decision in the first *Amco Asia* ICSID arbitration, which has been followed by a number of other tribunals:

> [L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.[4]

10. In view of this broad consensus on the interpretative methodology to be applied to questions regarding the jurisdiction of international dispute settlement bodies, the principle basis of the decisions in *Plama*, *Telenor*, *Berschader* and *Wintershall* is, with respect, wrong and cannot be followed. In consequence, I see no reason why an issue of the incorporation of broader consent to arbitration under the host State's third-country investment treaties should be treated differently from the consistently accepted application of MFN clauses to substantive standards of treatment, or the (rather) consistently accepted application of MFN clauses to the shortening of waiting periods.[5] While, on the one hand, there is no reason to differentiate between admissibility-related aspects of accessing investor-State arbitration and matters of jurisdiction, there equally is little merit in distinguishing between matters of substantive investment protection and the enforcement of these rights through investor-State dispute settlement.[6]

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[4] *Amco Asia Corporation and Others v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction of 25 Sept. 1983, para. 14(i), 23 I.L.M. 351, 359 (1984) (emphasis in the original); see also, e. g., *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction of 24 June 1998, para. 55; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2002, para. 43; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interaguas Servicios Integrales del Agua, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para. 64.

[5] It may be noted that, so far, only the tribunal in *Wintershall v. Argentina*, paras. 108-197, has declined to rule that waiting periods can be shortened based on an MFN clause. Unlike earlier tribunals it qualified the requirement to pursue local remedies for eighteen months before turning to international arbitration as a jurisdictional condition to the host State's consent to arbitration, rather than as an admissibility-related question, and declined to shorten waiting periods based on an MFN clause.

[6] *Cf.* in this respect *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005, para. 29; *Suez InterAguas v. Argentina*, Decision on Jurisdiction,

11. Against this "normative background," my dissent from the majority's reasoning relates to the construction of Article 5(2) of the Spanish treaty. While in the majority's view that provision constitutes an MFN clause which, due to its reference to paragraph 1 of Article 5, encompasses only matters forming part of fair and equitable treatment, I consider this construction not to be in conformity with the interpretative rules set out in the Vienna Convention on the Law of Treaties and hence mistaken. I am further of the view that, even if the majority's construction of Article 5(2) were correct, the result reached should not differ from that which follows from the construction I give to Article 5(2); namely, the Respondent's broader consent to arbitration under the Danish treaty is an aspect of fair and equitable treatment, hence Article 5(2) enlarges the jurisdiction of this Tribunal to encompass claims made under Articles 4, 5(1) and 6 of the Spanish treaty.

12. The Award spells out, in paragraphs 102-120, the conundrum presented by the unofficial English translation of the Spanish treaty as regards the reference that Article 5(2) makes to "[t]he treatment referred to in paragraph 1." The Award, in this context, acknowledges (in its paragraph 111) what it calls "some lexical difficulties." They are easily recapitulated thusly: if it is concluded that the reference in Article 5(2) to "[t]he treatment referred to in paragraph 1 above" is only to "fair and equitable treatment" rather than "treatment" more broadly, how can this be reconciled with the fact that (1) Article 5(3) excludes from "[s]uch treatment ... privileges" accorded to third-State investors pursuant to a "free trade area," a "customs union," a "common market," or certain "mutual economic assistance" arrangements, while providing also that "[t]he treatment under this article shall not include tax exemptions or other comparable privileges" granted to third-State investors "by virtue of a double taxation [or similar] agreement," all of which privileges and exemptions extend well beyond any concept of "fair and equitable treatment" and have nothing whatsoever to do with it; and (2) Article 5(4) provides that, "[i]n addition to the provisions of paragraph 2 above" [note the reference is not to paragraph 1], each of the treaty parties will grant national treatment, a

May 16, 2006, para. 57; *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of 3 Aug. 2006, para. 59; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of 3 Aug. 2006, para. 59 (all pointing out that differentiating between substance and procedure has no merit).

concept likewise entirely separate and apart from the notion of "fair and equitable treatment," and which grants treatment extending well beyond it. In the end, the Award resolves these "lexical difficulties" by declaring (in its paragraph 117):

> Something has to give. The choice is between an explicit stipulation and a revelation by grammatical deconstruction. The Tribunal naturally prefers the former.

It then proceeds to speculate on why the treaty's drafters acted as they did, suggesting their actions may have been "reflexive," and that had they engaged in a "searching exegetical endeavor" they might have realized that some of Article 5's language was "unnecessary in this particular instance."

13. I believe that Articles 31 and 32 of the Vienna Convention on the Law of Treaties preclude the existence of such a "choice" as that which the majority has posited. It is rather like Alexander the Great severing the Gordian Knot, instead of untying it, as the ancient King of Phrygia had prescribed, and as I understand the Vienna Convention requires. The result of interpretation may be "unambiguous," but it nonetheless must result from a process that includes the very "grammatical deconstruction" rejected by the majority. Under Article 31 of the Vienna Convention one looks not just to the "ordinary meaning" of a word or words; words must be viewed "in light of [the treaty's] object and purpose," and in their "context," which under Article 31(2) of the Convention includes the entire text of the treaty. If the meaning of a term remains unclear following application of Article 31 of the Convention, or is ambiguous, or is "manifestly absurd or unreasonable," a tribunal then must look to supplementary means of interpretation as prescribed in Article 32. The majority here has not followed the prescribed route.

14. Furthermore, in placing such heavy emphasis on the "lexical" implications of the reference in Article 5(2), the Award bases its analysis and reasoning exclusively on the English translation of a treaty which, according to its terms, was executed only in the Spanish and Russian languages, each being equally authentic. Conclusions derived from a non-authentic version of an international treaty, however, must be treated with utmost caution. This is all the more so considering that Article 33 of the Vienna Convention provides both a special rule of interpretation where two authentic texts may vary and a rule for when a non-authentic translation can be considered as an authentic text. The

Tribunal, however, has discussed neither the Spanish nor the Russian version of the treaty provision in question, nor has it indicated that the English translation could be considered as authentic pursuant to Article 33(2) of the Vienna Convention.[7]

15. As a matter of textual analysis, I would have found that the reference in Article 5(2) to that Article's paragraph (1) should, in context, be read as referring to "treatment," not to "fair and equitable treatment." In support of this conclusion, I note that the Spanish heading of Article 5, which is part of the "context," is "Tratamiento," or simply "Treatment." Moreover, the Spanish text of Articles 5(1) and (2) is more consistent than the non-authentic English version with the interpretation I favor. They state:

> 1. Cada Parte garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte.
>
> 2. El tratamiento mencionada en el punto anterior no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer Estado.

The combination of the heading and the text support the conclusion that the term "treatment" in Article 5(2) refers to all treatment ("tratamiento") under the treaty, not just "fair and equitable treatment," considering that Article 5 itself deals with MFN treatment and national treatment in addition to fair and equitable treatment.

16. The Russian version of the Spanish treaty lends further support to the broad understanding of Article 5(2) as a general most-favored-nation clause. Thus, the heading of Article 5 reads as "Rezhim kapitalovlozhenii" which, translated literally, means "Investment Regime," in the sense of overall conditions relating to investment. This suggests that every subparagraph in Article 5 concerns a quality or characteristic of the investment regime the Contracting Parties must accord to investors covered under the Spanish treaty, i. e., a regime that is fair and equitable and no less favorable than that granted to domestic or third-country investors. This is consonant with the Russian version of Article 5(2), which provides that "[t]he regime mentioned in point 1 of this article shall be no less favorable than the regime granted by each party in relation to investments carried out on that party's territory by investors of any third state." This

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[7] In fairness it must be noted, however, that neither Party has put forward arguments relating to the Russian version of the treaty and references to the Spanish text were limited.

makes rather clear that the investor is not limited to such "fair and equitable" regime as Russia may grant to third-country investors, but can avail itself of any other regime under which third-country investors operate.

17. Apart from the parsing of the Article's text, i. e., the "lexical difficulties," I find comfort in this regard in other sources, ones on which the Award has relied in part in concluding that is has jurisdiction of Claimants' claims under Article 10. For example, the legislative history concerning the ratification of the Spanish treaty suggests that Spain understood the provision in Article 5(2) on most-favored-nation treatment in a broad sense as encompassing all treatment accorded to foreign investors. Thus, the Spanish Council of State observed in an opinion concerning the question of whether the approval of the Cortes Generales was necessary prior to the ratification of the treaty that

> [i]f, in addition, we take into account the most favored nation clause contained in article 5.2, guaranteeing to USSR investors *in all events* the same benefits as that granted by Spain to any investment of a third-party nation, it is clear ... that this text requires preliminary authorization from the Cortes Generales for the declaration of consent of the state to be bound thereunder.[8]

18. As regards the understanding of the USSR, a comparable legislative history is missing. However, in the paper on BITs published in 1991 by a member of the USSR's negotiating team (Mr. R. Nagapetyants), to which the Tribunal has referred in paragraph 50, the author stated in regard to most-favored-nation clauses in Soviet BITs:

> By according most-favored treatment, the host country established the terms of business for the partner country's investors equal to those under which the investors of any third country operate. This means that if any agreement concerning the protection of investment that was signed at a later date provides more benefits and advantages, then they automatically are extended to all investors from countries with which investment agreements were previously signed on most-favored terms.[9]

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8 Council of State Opinion No. 55-810/RS, 14 March 1991, Exhibit C-55 – emphasis added.

9 R. Nagapetyants, *Agreements Concerning the Promotion and Mutual Protection of Investment*, Foreign Trade 1991, No. 5, at 11, Exhibit C-49. It may be noted, however, that such statements made by government officials in a non-official quality are not attributable to the State. In consequence, they do not constitute context in the sense of Article 31 of the Vienna Convention on the Law of Treaties and may not be relied on as *travaux préparatoires* under Article 32 of the Convention. However, they may be useful as an indicator of the ordinary sense of the wording used in an international instrument and reflect the general

19. Even were the Award correct in its conclusion that Article 5(2) refers exclusively to "fair and equitable treatment," the question remains whether the Respondent's broader consent to international arbitration given under Article 8 of the Danish treaty must be extended to the Claimants as part of the "more favorable" fair and equitable treatment available under that treaty. Succinctly, the issue here is whether the Danish treaty's provision of broader arbitration possibilities represents an aspect of "fair and equitable treatment" that is more favorable than the Spanish treaty's restriction of such dispute settlement mechanisms to issues of "compensation due" for an expropriation under its Article 10.

20. Here the majority, once again in my view, goes astray when it rejects such a possibility. Notably, the majority does not reject the notion that dispute settlement mechanisms can be included in the broader concept of "treatment" of foreign investors and investments. Instead, it expresses concern that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration" (paragraph 100, quoting McLachlan, Shore & Weiniger, *International Investment Arbitration*, at p. 257; similarly paragraph 106). That, I submit, is not the issue. It is not a question of whether the broader access to international arbitration accorded under the Danish treaty is more favorable than domestic adjudication in Russia. Instead, the question is solely whether the scope of international arbitration available under Article 8 of the Danish treaty is "more favorable" than that under Article 10 of the Spanish treaty. I dare say that it is undeniable that "more" arbitration, i. e., that additional causes of action may be pleaded and decided by an international arbitral tribunal, is "more favorable" than a more limited scope of arbitration. To state the question is to answer it.

21. In any case, strictly speaking, it is not relevant, in my view, to attempt evaluation of whether one dispute settlement mechanism objectively is "more favorable" than another. What is relevant is that Danish and Spanish investors in Russia are afforded "different" dispute settlement options. The purpose and rationale of MFN clauses is, as the International Court of Justice has so clearly stated in *Rights of Nationals of the United*

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understanding of certain provisions of those involved at the time an international treaty was negotiated and concluded.

States of America in Morocco to "establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned."[10] From this perspective, the mere existence of differences in the available dispute settlement mechanisms is sufficient to trigger an MFN clause and thereby to extend the treatment afforded by the Danish treaty to those benefitting from the MFN clause in the Spanish treaty.

22. The focus, then, again assuming that the majority is correct in understanding Article 5(2) as incorporating only more favorable fair and equitable treatment, must be on whether international arbitration is an aspect of fair and equitable treatment. My view is that it is. Yet, the question here is not whether the standard of fair and equitable treatment *requires* access to international arbitration, or, as the Award puts it in paragraph 105, whether "access to international arbitration [is] a necessary part of FET." That is an entirely separate subject and irrelevant to determining the scope of more favorable fair and equitable treatment actually accorded to a third party. Rather the issue is whether the Danish treaty's grant of across-the-board treaty dispute arbitration is a form of fair and equitable treatment granted to those third-party investors.

23. That consent to arbitrate investment treaty disputes is a form of fair and equitable treatment that a State may grant to investors also becomes evident if we consider that the prohibition against denial of justice not only forms part of customary international law, but also is an integral part of the fair and equitable treatment standard itself.[11] Thus, a State that does not provide to a foreign investor dispute settlement procedures at all necessarily will deny that investor any fair and equitable treatment when a dispute arises. The means by which the State in questions offers dispute settlement, in order to avoid a denial of justice, is largely in its discretion. It can do so by setting up a domestic court system, but it may equally provide dispute settlement by consenting to arbitration.

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[10] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 Aug. 1952, I.C.J. Reports 1952, p. 192.

[11] See Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), pp. 18-19, 26-27, available at http://iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf (visited 16 March 2009); see generally on the development of the modern definition of denial of justice, including the jurisprudence in investor-State arbitration relating to fair and equitable treatment, Jan Paulsson, *Denial of Justice in International Law*, pp. 57 *et seq.* (Cambridge University Press 2007).

24. For these reason, I conclude that Article 5(2) of the Spanish treaty, on any interpretation, grants Claimants the benefits of the Respondent's broader consent to SCC arbitration provided in Article 8 of the Danish treaty, both as a jurisdictional alternative to Article 10 of the Spanish treaty in respect of Claimants' claim of uncompensated expropriation pursuant to Article 6 and as a basis for the Tribunal hearing their claims under Articles 4 and 5(1).

ARTICLE 1(1) (B) OF THE SPANISH TREATY (EXCLUSION OF EMERGENTES, EUROFUNDO AND RENTA 4 S.V.S.A.)

25. Finally, in my view the majority is equally mistaken in declining jurisdiction over the Claimants Emergentes, Eurofondo and Renta 4 S.V.S.A. on the basis that they are not protected investors under Article 1(1) of the Spanish treaty because they are not, in the case of Emergentes and Eurofondo, corporate bodies with independent legal personality under Spanish law, or, in the case of Renta 4 S.V.S.A., because it does not own the ADRs in question. In my view, however, all three entities either should have been admitted as qualified Claimants or should have been given an opportunity to undertake whatever formalities may be required for their claims to be presented to this Tribunal.

26. As regards Emergentes and Eurofondo, the Award correctly notes (in its paragraph 127) that

> No rational basis has been proposed to explain why either of the State-parties to the Spanish BIT should have desired to promote and protect the investments of physical persons and corporate bodies but not those of entities that are able to mobilise capital but lack legal personality.

Well said! The ensuing sentence - "Yet the words of the Treaty are what they are" - , however, hardly answers the question.

27. The majority cites the letter of 25 April 2008 of Claimants' Spanish counsel stating that "it is clear that [both Claimants] are not a corporate body ('persona jurídica')," while at the same time making it "also clear that they are capable of acquiring rights and obligations of a contractual nature . . . were authorized to operate by the Spanish stock market regulator . . . and are registered entities, as required . . . [and that when involved in legal proceedings] the Funds' claims are asserted on their behalf by

their management companies, following the same pattern established by [the Spanish] civil system to have represented by a court the interest of minors or of other entities that can own rights and obligation, but cannot act directly at Court." The record shows that these two funds fall into the Spanish legal category of an "entity" which may invest abroad and is the owner of its investments, but whose assets will be held by a depositary and which must be represented in judicial proceedings by a management company. This tripartite foreign investment system under Spanish law was in place at the time the Spanish treaty was concluded (T:277). The majority proceeds on the basis that since these two funds are not themselves "personas jurídicas," i. e., they are not "juridical persons" having themselves the power to sue though existing as legal entities, that is the end of the story. It beggars imagination, however, to conclude that the investment fund cannot appear before us because it is not itself, technically speaking, a "persona jurídica;" and that the "persona jurídica" who is entitled under Spanish law to represent it in judicial proceedings is not able to represent it here because it has not itself made the investment.

28. The Award arrives at its result based on a mistaken approach to interpretation of the term "corporate body", or, as the authentic Spanish version of the treaty states "persona jurídica". Instead of interpreting this term from the perspective of international law, the Award equates it with the same term under domestic Spanish law. Thus, in the majority's view the fact that Emergentes and Eurofondo, as investment funds, are not "corporate bodies"/"personas jurídicas" in the sense of the Spanish Civil Code, disqualifies them as "corporate bodies"/"personas jurídicas" under Article 1(1)(b) of the Spanish treaty. This interpretative approach violates the principle of the primacy of international law over domestic law and the principle that international treaties must be interpreted autonomously, i. e., not in accordance with the domestic legal orders of the contracting State parties involved.

29. Thus, from the point of view of an autonomous interpretation of the term "corporate body"/"persona jurídica" we need not concern ourselves with the lack of legal personality of investment funds under Spanish legislation. Instead, the term "corporate body"/"persona jurídica" under the treaty encompasses any legal entity (other than a physical person) provided that it has been established, in the case at hand, in accordance

with Spanish legislation, is domiciled in Spain, and is not precluded by Spanish legislation from investing in the Yukos ADRs in question. An investment fund that has been created in accordance with Spanish legislation and is designed to engage in investment activities, both domestic and foreign, qualifies as a "corporate body" in the sense of Article 1(1)(b) of the BIT independent of its legal personality (or lack thereof) under domestic law. All these criteria are fulfilled as regards the Claimants Emergentes and Eurofondo.

30. The majority further comforts itself, in part, with the conclusion (in its paragraph 130) that this interpretation of Article 1(1)(b) "would parallel the possible disqualification of minors or other incompetent persons under Article 1(a)," which deals with natural persons. Here, as when confronting the "lexical difficulties" of Article 5, the majority follows this with the declaration that "[w]hy this was desirable leads to further speculation. The exercise is futile; it is what was agreed." That minors are excluded as covered investors, however, is nowhere to be found in Article 1(1)(a). Instead, this provision merely requires that an individual have the nationality of either Party and be entitled to invest in the territory of the other Party. This entitlement in the Spanish version is designated by the use of the words "facultada, de acuerdo con la legislación vigente en esa misma Parte, para realizar inversiones en el territorio de la otra Parte." The term "facultada" does not concern, however, as the majority mistakenly assumes, the legal capacity of an individual, but rather that individual's entitlement to invest abroad, an entitlement that could be limited by domestic legislation restricting investments in third countries.[12] This mistaken conclusion regarding the potential disqualification of minors as investors seems to have affected the majority's view that corporate bodies must have legal personality under domestic law. Yet, such requirement equally is nowhere to be found in Article 1(1)(b) of the treaty which merely states:

> Cualquier persona jurídica constituida con arreglo a la legislación de una Parte, domiciliada en su territorio y facultada, de acuerdo con la

[12] This conclusion is also supported by the Russian text of the treaty. The word in the Russian text corresponding to "facultada" ("allowed" in the English text before us) is, transliterated, "pravopolnomochnoye." While Russian-English dictionaries translate this as "competence," Russian-Russian dictionaries define the term as "having a legal right" to do something. This richer definition of the word corresponding to "facultada" ("allowed") is consonant with the two roots comprising the word: "pravo" (meaning "law") and "polnomochiye" (meaning "authority" or "power").

legislación vigente en esa misma Parte, para realizar inversiones en el territorio de la otra Parte.

31. With respect to Claimant Renta 4 S.V.S.A., which is the depositary for the Yukos ADRs of Renta 4 Europa Este FIM, an entity apparently of the same type as Eurofundo and Emergentes, the majority comes to an equally unacceptable conclusion: just as the funds themselves cannot come before the Tribunal because they do not have the right under Spanish law to represent themselves, so the custodian of Renta 4 S.V.S.A.'s Yukos ADRs has no standing because it is not itself the investor. This decision by the majority results literally in a "Catch 22" situation and makes no more sense of the situation than did the dismissal of Eurofondo and Emergentes. While Renta 4 S.V.S.A may not be the entity owning the Yukos ADRs in question, it is clear that it is bringing this action for the real party in interest, which is Renta 4 Europa Este FIM. Since the ADRs are, as the Award correctly finds, protected investments, one should either have accepted Renta 4 S.V.S.A.'s standing as acting for the funds owning the ADRs, or have allowed whatever amendment might be necessary to remedy any lack of standing on behalf of the real party in interest, i. e., Renta 4 Europe Este FIM.

32. I would at least have granted the three Claimants in question a period of time within which to cure the situation by prevailing on their respective management companies to enter the fray, based on my conclusion that a proper interpretation of Article 1(1)(b) should allow the management companies to act here in the interests of the funds.

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