Partial Dissent by Prof. Dr. Jacomijn J. van Haersolte-van Hof

1. Applicant submits that "in adopting a restrictive approach to jurisdiction over the Implementation Claim"[1] the Tribunal manifestly exceeded its powers (Article 52(2)b) ICSID Convention) and annulment is equally warranted pursuant to Article 52(1)(e) for lack of reasons.[2]

2. The majority concludes that the Tribunal committed an annullable error pursuant to Article 52(1)(b) because "the Tribunal did ultimately shield the manner in which the CMC Order was implemented from review as to the consistency with any provision of the BIT"[3] and that the Tribunal committed an annullable error by failing to state reasons as to the Implementation Claim within the meaning of Article 52(1)(e) because it "sees a contradiction between indicating *first* the need to analyze whether the way in which the CMC Order was *implemented* was *consistent* with the *BIT* and *then,* not addressing in any way this basic premise, but instead analyzing the consistency of that implementation with an Order whose lawfulness determination was out of the scope of the Tribunal."[4]

3. If I had been deciding this matter alone, I would have come to a different outcome. The crux of where I appear to part ways from the majority is the consideration in the last sentence of paragraph 102 of the Decision where the majority states that it "fails to see how a claim on the manner of implementation of an order […] would amount to a claim on whether the implementation was faithful or not."

4. I understand the Award to reflect that the CMC Order and what properly results thereof is essentially "out of bounds" for the Tribunal. Only where the implementation in and of itself constitutes an independently actionable expropriation, the Claimant could be successful.

5. The Tribunal considered that it had already (in the Decision on Jurisdiction) "found that any claims of expropriation as a result of the CMC Order itself occurred prior to the 2015 BIT and therefore fall outside the scope of its temporal jurisdiction. As such, in order for the Claimant to succeed, it needs to show that there has been an independently actionable expropriation that does not flow from the alleged unlawfulness of the CMC Order".[5] Consequently, the Tribunal considered that that it first had to determine what the CMC Order, when properly interpreted, required.[6] In paragraphs 116-144 of the Award the Tribunal does that, and then turns to the issue of whether there was a direct expropriation by virtue of the KCR Decree[7] and concludes that Claimant's expropriation claim does not succeed.[8]

[1] Memorial, Header VI A.
[2] Memorial, Header VI B.
[3] Decision, para. 117.
[4] Decision, para. 149.
[5] Award, para. 113.
[6] Award, para. 115.
[7] Award, para. 145.
[8] Award, para 149.

6. In the Tribunal's analysis, this conclusion is the result of the comparison between the CMC Order and the KCR Decree.[9] While there is not a substantive review of the KCR Decree on the basis of the requirements of the BIT, the Tribunal's decision does in my view constitute a substantive decision, namely through the prism of (the analysis of) the scope and effect of the CMC Order. This may or may not be deemed the most effective or persuasive approach to reviewing the claims before the Tribunal, but it is a tribunal's prerogative to shape and structure its analysis.

7. I do not therefore see this as failing to exercise jurisdiction or shielding the Implementation Claim from review. Rather, the Tribunal structured the (substantive) review of the key measures as a two-step review, essentially reviewing the KCR Decree through the prism of the CMC Order. This is not a failing to exercise jurisdiction (over the KCR Decree) or an impermissible allocation of jurisdiction (over the CMC Order, over which the Tribunal lacked temporal jurisdiction) but an effort to determine what is or is not a valid basis for a (substantive) claim of expropriation. I also note that the analysis of the claims in this case was clearly impacted by the reformulation and arguably somewhat inconsistent approach by Claimant, not in the least as a result of the initial attempts to present its case on the basis that the Tribunal did have temporal jurisdiction over the CMC Order, and the subsequent need to reformulate the claim as deriving from the KCR Decree (and therefore not being excluded from the temporal scope of the BIT).

8. The majority takes issue with the approach of what it refers to as "equat[ing] the measure at issue (the KCR Decree) with the CMC Order, without explaining why the jurisdictional preclusion of the latter (the CMC Order) would extend to the former."[10] In my view that is precisely what the Tribunal has done when it identified and considered the boundaries of the "faithful implementation of the CMC Order."[11]

9. The majority considers that it is not for the Committee to consider whether the approach taken by the Tribunal is appropriate or not,[12] but in fact, it does take issue with the Tribunal's approach, when it states that "the Tribunal fails to explain why the 'proper interpretation' of a measure which was outside the scope of its jurisdiction, would assist the Tribunal in determining whether the '*manner*' i.e. a way to proceed or act, in which the relevant measure (issued by a different authority in a subsequent time) was implemented would be consistent with the BIT"[13] and when it posits that there is no examination or discussion of the content of the KCR Decree in the Tribunal's Award nor an explanation as to what the Tribunal understood as material difference.[14]

10. I respectfully disagree: this is the analysis conducted by the Tribunal in paragraphs 145-149 of the Award, having first in paragraphs 116-144 set out the first tier of its analysis (namely the scope and effect of the CMC Order), resulting in the Tribunal's conclusion that Claimant's expropriation claim did not succeed because there is no material difference between the CMC Order and the KCR Decree. Is this analysis appropriate or

[9] Award, paras. 146-148.
[10] Decision, para. 107.
[11] Award, paras. 146-148.
[12] Decision, para. 105.
[13] Decision, para. 106.
[14] Decision, para. 108.

convincing? Is the glass half-full or half-empty? Would an analysis that had first considered the scope and effect of the KCR Decree, and a subsequent review of the attributes of the CMC Order (and presumably a conclusion on the lack of jurisdiction or inadmissibility of the expropriation claim) been more appropriate or convincing? An annulment is not an opportunity to second-guess a tribunal's analysis or evaluate the persuasiveness or even correctness of the underlying decision. The Tribunal's Award does contain an analysis and a decision which goes beyond jurisdiction and (also) amounts to a substantive review.

11. I therefore respectfully disagree with the majority's ultimate conclusion that the Tribunal did ultimately shield the manner in which the CMC Order was implemented from review, by not analyzing the consistency of the KCR Decree with any provision of the BIT as alleged by the Applicant.[15]

12. Similarly, I disagree with the finding that the Tribunal failed to state reasons: it is not for a committee to review the adequacy[16] or even the correctness[17] of reasons, and unlike the majority I do not see any contradiction between the Tribunal's analysis whereby it first considered the CMC Order, in order to identify whether and if so to what extent subsequent acts, in particular the KCR Decree, could and did constitute an independent basis for Claimant's expropriation claim.

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Member of the *ad hoc* Committee

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[15] Decision, para. 117.
[16] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, CL-274, para. 5.08.
[17] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("Vivendi I"), CL-103, para. 64.