

In the Matter of an Arbitration  
Under the UNCITRAL Arbitration Rules

LCIA Case No. UN 7927

Société Générale  
In respect of DR Energy Holdings Limited and  
Empresa Distribuidora de Electricidad del Este, S. A.

v.

The Dominican Republic

Award on  
Preliminary Objections to Jurisdiction

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### *Background and Procedure*

1. The Notice of Arbitration with which these proceedings were initiated under the UNCITRAL Arbitration Rules was submitted on March 15, 2007. The Tribunal was properly constituted on June 26, 2007, after the appointments of Mr. R. Doak Bishop and Mr. Bernardo Cremades as arbitrators and the appointment on that date of Professor Francisco Orrego Vicuña as the Presiding Arbitrator by agreement of the two co-arbitrators.
2. The Claimant in this is case Société Générale, a company registered in France, which claims in respect of DR Energy Holdings Limited (“DREH”), a company organized under the laws of the Cayman Islands, and Empresa Distribuidora de Electricidad del Este, S. A., (“EDE Este”) a joint venture created in the Dominican Republic in 1999 between the Republic and the foreign investor AES Distribución Dominicana Limited, which later sold its interest to the Claimant. The Claimant alleges to be an indirect owner of DREH, which in turns owns 50% of EDE Este. The various relevant corporate arrangements will be explained further below. The Claimant is represented by Paul, Hastings, Janofsky & Walker LLP.
3. The Respondent in this case is the Dominican Republic and it is represented by Simpson Thacher & Bartlett LLP. The Claimant lists several instrumentalities of the Dominican Republic that are relevant in this case in their capacity of regulatory bodies of the electricity sector, in particular the Corporación Dominicana de Empresas Eléctricas Estatales (“CDEEE”) and the Superintendencia de Electricidad (“SIE”).
4. The Claimant invokes as the basis for this arbitration the provisions of the Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investments, signed on January 14, 1999, and which entered into force on January 23, 2003 (“Treaty” or “BIT”).<sup>1</sup>
5. The Tribunal held a first meeting with the parties in New York City on November 19, 2007. At this meeting various organizational aspects of the arbitration were discussed, agreed and placed on record by the Tribunal at the end of the meeting. It was decided in particular that the arbitration would be conducted under the UNCITRAL Arbitration Rules, that the language shall be English and that the place of arbitration shall be New York City, New York, United States of America. It was also agreed that the administration of the case would be entrusted to the London Court of International Arbitration,

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<sup>1</sup> Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investments, 14 January, 1999, 2225, 1-39576 *U. N. T. S.* 547, entered into force on January 23, 2003.

which assigned to it the reference “Arbitration No. UN 7927”. The procedural timetable was also established on this occasion.

6. Prior to this first meeting, the Tribunal issued on October 30, 2007, an Order on Confidentiality regarding document production, which was previously agreed by the parties. Document production also took place before the first meeting during the period September-October 2007. Various other matters raised by the parties were decided by the Tribunal by correspondence before the first meeting took place, including a request from the Claimant to consolidate this arbitration with other proceedings beginning at the time, which was not accepted.
7. The parties agreed that in accordance with Article 7(2) of the Treaty the law governing this dispute “consists of the terms of the Treaty, the terms of any specific agreements entered into in connection with the investment, and the relevant rules and principles of international law”.
8. The Memorial on Objections to Jurisdiction, the Answer to such Memorial, the Reply and the Rejoinder were all submitted in compliance with the procedural timetable noted. A hearing on jurisdiction took place in New York City on April 14-15, 2008. On this occasion the parties further explained their arguments to the Tribunal and submitted documents in support thereof, a witness introduced by the Claimant was examined and cross-examined, and the Tribunal addressed questions to both the parties and the witness. It was also agreed that post-hearing briefs would be prepared by the parties, which were submitted on May 30, 2008; each party submitted a Reply to the post-hearing brief of the other on July 11, 2008, as directed by the Tribunal. The Claimant submitted an Amended post-hearing memorial on June 12, 2008, following the directions of the Tribunal after submissions of the parties.
9. Following the hearing, the Tribunal deliberated on the jurisdictional objections. This Award is concerned with the objections to jurisdiction raised by the Respondent.
10. Notwithstanding the references that will be made below in respect of the Claimant’s corporate structure, it is important for the sake of clarity to note at the outset the main features of such structure. Société Générale (France), the Claimant, is the majority owner of Trust Company of the West Group (“TCW”) (Nevada). The percentages of this ownership have been increasing and eventually will reach 100%. TCW is in turn the 100% owner of TAMCO (California), which owns 50.1% of TCW Energy Advisors LLC (Delaware).<sup>2</sup> A company organized by employees and officials of TCW under the name of Sosa Partners LLC (Delaware) is the owner of the remaining 49.9% of TCW Energy Advisors LLC.

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<sup>2</sup> Claimant's Amended Post-Hearing Memorial on Jurisdiction, at 17.

TCW Energy Advisors LLC is in turn the General Partner of Dominican Energy Holdings LP (Delaware), but as such owns no shares in the company. 100% of the shares of Dominican Energy Holdings LP are held by a Limited Partner, Peste LLC (Nevada), owned by a United States citizen. Dominican Energy Holdings LP is a company different from DR Energy Holdings Ltd. (Cayman), which appears further below in the corporate structure.

11. Dominican Energy Holdings LP owns 100% each of Dominican Distribution Holdings LLC (Delaware) and Dominican Distribution Holdings Ltd. (Cayman). Dominican Distribution Holdings LLC owns 10% of DREH. (Cayman), while 90% is owned by Dominican Distribution Holdings Ltd. DREH owns 50% of the shares of EDE Este, which as noted was established in the Dominican Republic. DR Energy Holdings Ltd. was formerly owned by AES, a United States company, under a different corporate structure, which as noted sold its interest to the Claimant.

12. The corporate structure is supplemented by an administration agreement between EDE Este and DREH, a management agreement with TAMCO and an operating agreement with AES, the former investor. As the reader of this Award will no doubt be confused by the similarity of names and their interrelationships, the Tribunal is including in Annex 1 a complete chart of the relevant corporate structure.

#### *The Objections to the Tribunal's Jurisdiction*

13. The Respondent submitted its objections to the Tribunal's jurisdiction on November 16, 2007, raising four main issues. First it is submitted that there has been no real investment in this case but only transactions that do not qualify under the terms of the Treaty. Second, it is submitted that the facts invoked as the basis for the claim do not constitute an expropriation and are not in breach of the Treaty provisions. Third, it is alleged that in any event the events complained of took place before the Treaty entered into force on January 23, 2003, and the Claimant became a protected investor and such Treaty cannot be applied retroactively. Fourth, it is argued that the alleged events took place before Société Générale acquired the investment from AES and accordingly there was no investor of French nationality affected.

14. The Tribunal will now address these various questions and the most interesting legal issues they entail, not devoid on occasion of extraordinary complexity, all of which have been argued with great competence by counsel for the parties.

*The first objection to the Tribunal's jurisdiction: the existence of an investment (Jurisdiction *ratione materiae*)*

*The Respondent's views*

15. Respondent's first objection to the Tribunal's jurisdiction concerns the claim that in this case the Claimant has not made an investment and accordingly there can be no dispute qualifying under the Treaty provisions. The Respondent argues that while the Claimant alleges it made an investment as an indirect shareholder in EDE Este, in the light of Article 1(1)(b) of the Treaty and also in terms of its interest in the concession granted by the Dominican Republic to this company under the terms of Article 1(1)(e) of the Treaty, it not sufficient to look at these articles in isolation but the Preamble to the Treaty also needs to be considered.
16. Article 1(1)(b) refers to "[s]hares, issue premiums and other forms of participation, even if minority or indirect, in companies constituted in the territory of either Contracting Party". Article 1(1)(e) in turn refers to "[c]oncessions, accorded by law or by virtue of a contract...". The Respondent believed at first that the Claimant was both a shareholder in EDE Este and had an interest in the concession under which this company operates in the Dominican Republic,<sup>3</sup> but a more complex corporate structure and chain of interests was to become known later. But even under the earlier assumption the Respondent believed that such assets or interests do not make of the Claimant an investor because if the Preamble is taken into account the issue of whether there has been a contribution made to the parties' economic development arises prominently. The Preamble indeed refers to the protection of "investments" so as to "stimulate transfers of capital and technology" between France and the Dominican Republic "in the interest of their economic development".
17. Under the corporate structure later explained, the Respondent believes that any connection between the Claimant and an investment was even more remote.<sup>4</sup> The Respondent argues that the Claimant does not own any shares in EDE Este as these are owned by Dominican Energy Holdings LP, which in turned is exclusively owned by Peste LLC as the sole limited partner in Dominican Energy Holdings LP, a Delaware limited partnership in which TCW Energy Advisors LLC is a general partner.<sup>5</sup> As such the Claimant and its affiliates are not entitled to receive any distributions from the partnership but only a management fee to TCW as the contractual manager; the Respondent asserts that the management fee is the only interest TCW and its parent corporations have in this case, which is not a protected investment under the Treaty.<sup>6</sup> Moreover, the Respondent asserts that this corporate structure was deliberately chosen to keep the Claimant out of the ownership chain, thus enabling it to

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<sup>3</sup> Respondent's Memorial on Jurisdiction, at 19.

<sup>4</sup> Respondent's Post-Hearing Memorial on Jurisdiction, at 1-2.

<sup>5</sup> Respondent's Post-Hearing Memorial on Jurisdiction, at 7-12.

<sup>6</sup> Respondent's Post-Hearing Reply Memorial on Jurisdiction, at 1-2.

avoid any risk associated to tax, accounting or legal matters. Neither does TCW Energy Advisors LLC have any unlimited liability in connection with the partnership.

18. The Respondent further explains that the Claimant has no ownership of the partnership under Delaware law and that the concept of an “indicia of ownership” which the Claimant proposes is not found under such law. Neither could an indirect holding of 50.1% that the Claimant has in TCW Energy Advisors LLC through TCW be considered an investment under the Treaty as a management fee does not qualify in this respect. The Respondent also explains that, moreover, the mere exercise of control by the Claimant over the operation does not meet the ownership test under the Treaty.<sup>7</sup>
19. The Respondent distinguishes this case from *SGS v. The Philippines*<sup>8</sup> in which services were provided outside the country in question, but it was also held that a substantial part of the relevant services were provided in the Philippines. Similarly, in *SGS v. Pakistan*<sup>9</sup> funds had been injected into the territory in compliance with the investor’s obligations, just as in *Fedax v. Venezuela*<sup>10</sup> it was decided that the funds concerned had been made available to be used by the Venezuelan Government as the beneficiary of the credit. In the Respondent’s view, nothing of the sort happened in the instant case. As a result of the purported remoteness that the Claimant has with the alleged investment the test applied by the Tribunal in *Enron v. Argentina*<sup>11</sup> to establish a “cut-off point” beyond which the investment would be outside the scope of the protection granted by the treaty and of the arbitration clause is not met in the instant case.
20. The Respondent further explains in support of this objection that TCW paid only US\$ 2 for the participation of AES in EDE Este, while AES had in turn written down the value of its investment to US\$ 0. There never was, the Respondent asserts, any capital contribution to EDE Este nor an intention to make such contribution. Neither has there been any transfer of technology or other activities that could qualify as a contribution. In the Respondent’s view the whole operation was speculative with the express intention of avoiding any risk associated with losses of EDE Este, insulating TCW from any liability for this operation, ensuring that EDE Este’s financials would not become consolidated with

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<sup>7</sup> Respondent's Post-Hearing Reply Memorial on Jurisdiction, at 5-7.

<sup>8</sup> *SGS Société Générale de Surveillance v. Republic of the Philippines*, Decision on Jurisdiction, January 29, 2004, ICSID Case No. ARB/02/6 (hereinafter “*SGS Société Générale v. Philippines*”), para. 101.

<sup>9</sup> *SGS Société Générale de Surveillance v. Republic of Pakistan*, Decision on Jurisdiction, August 6, 2003, ICSID Case No. ARB/01/13 (hereinafter “*SGS Société Générale v. Pakistan*”), para. 136.

<sup>10</sup> *Fedax N. V. v. Republic of Venezuela*, Award on Jurisdiction, July 11, 1997, ICSID Case No. ARB/96/3 (hereinafter “*Fedax*”), para. 41.

<sup>11</sup> *Enron Corp. and Ponderosa Assets LP v. Argentine Republic*, Decision on Jurisdiction, January 14, 2004, ICSID Case No. ARB/01/3 (hereinafter “*Enron*”), paras. 50, 52, 56.

TCW's own balance sheets, and refusing any responsibility for EDE Este's operations, which were left in the hands of AES, the former investor. The various exit strategies that the Claimant devised for this operation culminated in the effort to recover in this arbitration US\$ 680 million for its US\$ 2 outlay.

21. The Respondent's legal argument in support of this objection emphasizes the role of the Preamble in treaty interpretation under the Vienna Convention Article 31(1) and (2),<sup>12</sup> as this will allow for the interpretation of the provisions of the Treaty in their context and in the light of the Treaty's purpose and objectives, thus giving effect to the expressed intention of the parties. It is also argued that both the decisions of the International Court of Justice<sup>13</sup> and arbitral tribunals<sup>14</sup> have relied on the role of the preamble for the interpretation of treaties. On questions of interpretation of investment treaties a number of decisions have specifically relied on the connection of the investment to economic development as expressed in their respective preambles.<sup>15</sup>

*The Claimant's views*

22. In opposing this first objection to the Tribunal's jurisdiction, the Claimant explains that the US\$ 2 nominal amount paid to AES for its shareholding in EDE Este is not the investment but a figure relating to the complex circumstances of this case. The investment is represented by the 50% shareholding that the Claimant acquired and thus became the beneficiary of all the legal rights associated with those shares, including both contract rights and rights associated with the concession. The total consideration was in the range of US\$ 50-60 million because in addition to the purchase price AES obtained a right of first refusal and a deferred purchase fee expressed in terms of the fee paid to AES for its work under the management contract with EDE Este.
23. The Claimant further explains that AES was compelled to sell its assets in EDE Este because the mounting debt the latter company was incurring as a result of the adverse measures taken by the Respondent was reflected and consolidated in AES's own books, with the result that the value of its shares was also affected.<sup>16</sup> AES had already written-off these losses so as to prevent further damages. The Claimant's purchase allowed AES to increase its shareholder and market value while retaining the

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<sup>12</sup> Convention on the Law of Treaties, 1969, 1155 *U.N.T.S.* 322.

<sup>13</sup> International Court of Justice, *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment, 1952 *I. C. J. Reports*, 176; *Asylum Case*, Judgment 1950 *I. C. J. Reports*, 266.

<sup>14</sup> *Malaysian Historical Salvors SDN, BHD v. Malaysia*, Award on Jurisdiction, May 17, 2007, ICSID Case No. ARB/05/10 (hereinafter "Malaysian Historical Salvors"); *Philippe Gruslin v. Malaysia*, Award, November 27, 2000, ICSID Case No. ARB/99/3 (hereinafter "Gruslin").

<sup>15</sup> *Malaysian Historical Salvors*, cit., para. 66; *Gruslin*, cit., para. 13.8.

<sup>16</sup> Declaration of R. Blair Thomas, January 25, 2008, para. 8, at 3.

managerial control of EDE Este, just as the purchase had a beneficial effect for the Respondent as it ensured the continued supply of electricity.

24. The Claimant also asserts that the whole operation amounted to a legitimate transaction that had no speculative elements to it, particularly in light of the fact that it was not buying a claim as the Respondent has argued.<sup>17</sup> Neither was the investment free from risk because the value of EDE Este was gradually being destroyed, and the fact that the Claimant chose the options that would best minimize risk is what any prudent investor would have done in the circumstances.<sup>18</sup> Moreover, the Claimant asserts that it was and still is also willing and prepared to make capital contributions if the Respondent would meet its obligations. The Claimant had simply identified a potential business opportunity for benefiting from the investment in EDE Este if the Respondent was willing to meet its obligations, as it had repeatedly promised. Exit strategies would also be available in case the situation did not improve, but in any event this is irrelevant for a jurisdictional determination.
25. The Claimant explained at the hearing that because of those very risks it chose in the end a corporate structure that would shield Société Générale and TCW from the dangers that had already affected AES, that is the possibility of having to consolidate EDE Este's losses into its own books.<sup>19</sup> The investor would be remunerated by means of the management contract with TAMCO in what has been described as the upstream segment of the investment with all liabilities remaining elsewhere in the corporate structure. The corporate structure would also shield the Claimant from other adverse consequences relating to tax, accounting or legal questions.
26. The Claimant's legal argument in support of its views emphasizes the fact that the Treaty broadly defines an investment so as to include "all assets such as property, rights and interests of any nature", including indirectly held shares, issue premiums and other forms of participation, just as it includes concessions accorded by law or by virtue of a contract and other claims and rights to any benefit having an economic value (Art. 1(1)). The concept of the unity of the investment as identified in *Duke Energy*<sup>20</sup> also supports the view that an investment can be a multi faceted operation that does not refer just to the purchase price but to other elements as well. The Claimant explains that in the instant case it indirectly owns most of the assets protected under the Treaty, including shares, the concession rights and other claims and rights with an economic value. It is thus not relevant to take into consideration

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<sup>17</sup> Statement of Mr. Christopher F. Dugan, Hearing Transcript, Vol. I, at 123.

<sup>18</sup> Declaration of R. Blair Thomas, January 25 ,2008, paras. 18-19, at 8-9.

<sup>19</sup> Witness Statement of Mr. R. Blair Thomas, Hearing Transcript, April 14, 2008, at 244, 306.

<sup>20</sup> *Duke Energy International Peru invs.. No. 1, Ltd. v. Peru*, Decision on Jurisdiction, ICSID Case No. ARB/03/28, February 1, 2006 (hereinafter "Duke"), paras. 39,42-44.

just the purchase price.

27. The Claimant also maintains that the Treaty is not restricted to the protection of “ownership” but encompasses other interests as well, with particular reference to “rights and interests of any nature” (Article 1(1)).<sup>21</sup> As long as the investor controls these interests there shall be a qualifying investment under this broad scope of the Treaty, which is very much the situation in the instant case. It follows that the corporate structure chosen does not break the chain of interests connected to the investment and thus the Claimant is not remotely positioned in this respect. The Claimant explains that under the Dominican Energy Holdings LP Agreement it receives 90% of the profit stream originating in Ede Este, which results in a protected form of participation whether it is called management fee, profits, equity, revenues or an economic benefit.
28. The Claimant further maintains that the corporate structure chosen is entirely within the scope of applicable Delaware law and that TCW Energy Advisors LLC controls the partnership in Dominican Energy Holdings LP since it has under the Limited Partnership Agreement the authority and discretion to manage the operations and affairs of such partnership and makes its business decisions.<sup>22</sup> The Agreement also broadly defines “interest” as the entire ownership interest that might pertain to both general and limited partners. It follows that TCW Energy Advisors LP has unlimited liability for the obligations of the partnership.<sup>23</sup> The interpretation of the Agreement also leads to the conclusion that the management fee is a share of profits rather than a fixed expense incurred by the Partnership, a view which is opposed by the Respondent in light of its own expert interpretation of the Agreement.<sup>24</sup>
29. The Claimant argues next that the parties did not intend to incorporate any quantitative or qualitative thresholds in connection with the assets protected under the Treaty, a proposition that has been rejected by several arbitral tribunals.<sup>25</sup> In any event, the Claimant asserts that if the Preamble as a whole is taken into consideration and not just selected paragraphs as the Respondent has done, it will be realized that the Claimant has indeed made an investment, including the objective of creating “favourable conditions for reciprocal investments on a stable basis and with due regard to fair and equitable treatment”. In this context, the Preamble does not contain substantive requirements as to the

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<sup>21</sup> Claimant's Amended Post-Hearing Memorial on Jurisdiction, at 4-11.

<sup>22</sup> Claimant's Amended Post-Hearing Memorial on Jurisdiction, at 13-18.

<sup>23</sup> Claimant's Reply to Respondent's Post-Hearing Memorial on Jurisdiction, at 11.

<sup>24</sup> Respondent's Post-Hearing Reply Memorial on Jurisdiction, at 12-20.

<sup>25</sup> *Lanco International Inc. v. Argentina*, Preliminary Decision on Jurisdiction, ICSID Case No. ARB/97/6, December 8, 1988 (hereinafter "Lanco"), para. 10; *Saluka Investments BV v. Czech Republic*, Partial Award, UNCITRAL, March 17, 2006 (hereinafter "Saluka"), para. 211.

definition of investment, which is solely governed by the provisions of the Treaty, including specifically the purchase of shares.

30. It is also explained that in spite of control not being a jurisdictional requirement under the Treaty, the fact that AES manages the operations of EDE Este does not detract from the Claimant's control of the corporate and board policies of the investment, making an important contribution to the economic development of the Dominican Republic in terms of the supply of electricity, improvement of distribution and employment.

*The Tribunal's findings on the existence of an investment*

31. The Tribunal is in no doubt about the importance of the Preamble in matters of treaty interpretation and in this respect the Respondent has correctly pointed to the jurisprudence of the International Court of Justice in both the *Rights of Nationals of the United States of America in Morocco* and the *Asylum* cases. The arbitral decisions noted are also relevant to support this view. The Vienna Convention on the Law of Treaties mandates an interpretation in good faith and 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 (Article 31.1). It is also explicit in identifying not only the text of the treaty but also its preamble and annexes as part of the context in which interpretation is to take place (Article 31.2).

32. In the instant case, the text of Article 1 of the Treaty broadly but non-exhaustively<sup>26</sup> defines the term investment in a detailed manner and therefore expresses unequivocally the intent of the parties. If any restrictions had been intended, they would have been embodied in that article. On occasions some forms of investment are excluded from the protection of the treaty; this was done for example in Article 1 (a) of the ASEAN Framework Agreement<sup>27</sup> when excluding portfolio investments from protection under the Agreement, but this was not done in the instant case. The Preamble sets out the general purposes and objectives of the Treaty but, as the Claimant has argued, cannot add substantive requirements to the provisions of the Treaty. The Treaty articles and its Preamble have different roles that should not be confused. Their confluence in the context of treaty interpretation relates to a situation in which the ordinary meaning of the text cannot be clearly established by the pertinent provisions themselves, which is not the case here.

33. While the reference the Preamble makes to the parties being convinced "that the promotion and

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<sup>26</sup> Treaty Article I (1): "The term 'investment' shall be understood to mean all assets...and in particular, but not exclusively:..."

<sup>27</sup> Framework Agreement on the ASEAN Investment Area, Protocol of Amendment, September 14, 2001, Article 1 (a).

protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development” sets out the general objective of the economic relationship between France and the Dominican Republic, this does not detract from the fact that every single form of investment listed under Article 1 qualifies for protection. To the extent that shares, concessions under contract and claims and rights to any benefit having an economic value are involved in this dispute, they all qualify for such protection independently from the manner in which they each contribute to stimulating the transfer of capital and technology. This transfer is thus the overall objective but not a specific requirement for each individual form of investment, which would be in any event most difficult to establish on a case-by-case basis. The Tribunal in *Saluka* addressed a similar situation holding that:

“The Tribunal does not believe that it would be correct to interpret Article 1 as excluding from the definition of “investor” those who purchase shares as part of what might be termed bare profit-making or profit-taking transactions. Most purchases of shares are made with the hope that, in one way or another, the result will in due course be a degree of profit on the transaction...”<sup>28</sup>

34. It is quite evident that in this case the principal objective of the transaction was the potential profitability of the investment in the hope that the electricity sector in the Dominican Republic would become financially viable, particularly since Société Générale is a financial services company and TCW an investment fund. Following a question from the Tribunal at the hearing it was explained in greater detail that the Respondent’s government and specifically the *Superintendencia de Electricidad* were informed and well aware of the purchase of AES’ investment by the Claimant.<sup>29</sup>

35. The issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty. The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country. Moreover, the Claimant has also expressed its intention to undertake the capitalization of EDE Este if the obligations relating to the investment are met. Although corporate governance rights might in some circumstances qualify as an investment, as the Claimant recalls the tribunal held in *Eureko*,<sup>30</sup> such a holding might not be as appropriate in this case, but the important role of distribution of electricity in the overall performance of a complex economy can be

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<sup>28</sup> *Saluka*, cit., para. 209.

<sup>29</sup> Question by Arbitrator Cremades, Hearing Transcript, Vol. I, at 165-166; Witness Declaration of R. Blair Thomas, January 25, 2008, para. 16, at 7-8, with reference to meetings held with the President of the Dominican Republic, the head of CDEEE and the President of the Superintendencia de Electricidad.

<sup>30</sup> *Eureko B. V. v. Republic of Poland*, Partial Award on Liability, UNCITRAL August 19, 2005 (hereinafter “Eureko”), paras 139-146.

considered as one additional element of the Claimant's involvement in and contribution to the economy of the Dominican Republic.

36. The parties have extensively discussed whether a US\$ 2 purchase price can be considered an investment. If this were the only element involved in such a transaction doubts could legitimately arise about its meaning, but in fact the transaction includes many other elements, such as the potential market value of the shares purchased, contract rights related to the concession and other claims and rights to benefits having an economic value. All such elements are specifically listed in the definition of investment under Article 1 of the Treaty. The purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business. To the extent that the purchase price might include a discounted value and hence entail a form of compensation for the distressed state of a company, this is something that might be discussed at the merits stage of a dispute, as the Claimant has explained in connection with a question from the Tribunal at the hearing.<sup>31</sup>

37. The fact that the Claimant has participated through various corporate vehicles as a General Partner of Dominican Energy Holdings LP in the upstream segment of the investment that has been explained, and as such holds no shares in the general partnership, does not disqualify that operation as one related to the Claimant's economic interest in the investment as a whole, which includes one set of corporate arrangements in the upstream segment and the purchase of shares and different arrangements downstream. The end result is that the Claimant is entitled to the benefits of its investment in EDE Este through the chain of interests built and to the extent of its rights in such chain. The Claimant is accordingly remunerated by means of the management fee that is payable by Dominican Energy Holdings LP to TCW Energy Advisors LP. While various alternative structures were considered at the time the investment was in the process of planning,<sup>32</sup> each reflecting different modalities and priorities, in the end the structure finally chosen is the only one this Tribunal must take into account in reaching its conclusions.

38. The Claimant has also convincingly argued that the transaction is not exempt from business risks. The mere fact of taking over a business that had heavy losses, which had significantly affected AES as the former investor is a risk the Claimant undertook in the hope of seeing the value of those assets increase in the near future. To see that objective frustrated or worse to see that the value kept deteriorating is a risk associated with the transaction. This very risk explains why the Claimant had to consider an exit strategy as any prudent investor would do, but this strategy does not affect the

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<sup>31</sup> Claimant's Amended Post-Hearing Brief on Jurisdiction, at 35-36.

<sup>32</sup> Second Declaration of R. Blair Thomas, May 30, 2008, paras. 8-12, at 5-6.

existence of a protected investment under the Treaty.

39. If in the end it is concluded that such losses were caused simply by bad business judgment and are not attributable to any governmental interference in breach of the treaty guarantees, then a damage recovery in this arbitration could not be sustained because, as noted in *Maffezzini*,<sup>33</sup> investment treaties are not an insurance policy against bad business judgments. But such a determination belongs to the merits. In this context it can only be concluded that the transaction made was not speculative and pursues a legitimate business purpose. It certainly was not related to the purpose of buying a claim. Neither does the fact that Société Générale and TCW are financial service companies in any way affect the protection to which the investment might be eventually entitled.

40. The Claimant has also made the argument that the most-favored-nation (“MFN”) clause contained in Article 4 of the Treaty entitles it to treatment not less favorable than that accorded to investors of other nations that have entered into treaties with the Dominican Republic. The Claimant believes in particular that the definition of investment included in the Central American Free Trade Agreement-Dominican Republic with the United States, which includes among other features the “expectation of gain or profit”, extends to Société Générale as the beneficiary of the clause under the Treaty here concerned.<sup>34</sup> The Tribunal does not believe this to be the case.

41. Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of “investment” itself.

42. The Tribunal was also informed at the hearing that proceedings had been initiated by TCW under the CAFTA-DR Agreement.<sup>35</sup> Moreover, the Respondent’s argument to the effect that the clause in the CAFTA-DR Agreement is expressly excluded in respect of privileges extended in the context of a free trade area is persuasive as this is the very kind of free trade arrangement the Agreement envisages.<sup>36</sup>

43. The Tribunal has noted above, however, that the Treaty’s definition of “investment” is not exhaustive and that an expectation of profitability is naturally related to that definition. Thus, resort to

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<sup>33</sup> *Emilio A. Maffezzini v. Kingdom of Spain*, Award on the Merits, ICSID Case No. ARB/97/7, November 13, 2000, para. 64.

<sup>34</sup> Claimant’s Reply to Respondent’s Post-Hearing Memorial on Jurisdiction, at 5.

<sup>35</sup> Statement by Mr. Christopher F. Dugan, Hearing Transcript, Vol. I, at 168.

<sup>36</sup> Respondent’s Post-Hearing Reply Memorial on Jurisdiction, at 9.

other treaties is unnecessary.

44. The question of transfers of investments has also been discussed in the instant case. This has become a normal feature of a global economy and the transfers are not as such disqualified from treaty protection. Several arbitral tribunals have considered cases in which transfers have taken place,<sup>37</sup> and when the treaty's jurisdictional requirements have been met, the claims have been judged on the merits. The transfer of AES's investment in EDE Este to the Claimant thus does not preclude the existence of a protected asset, and there are no indications that this case might have involved a strategy such as was the case in *Mihaly*<sup>38</sup> and *Banro*.<sup>39</sup>
45. The Tribunal must now address the contentious question of whether the complex corporate structure chosen for this investment detracts from the nature of the investment or in some way disqualifies the Claimant from invoking the protections of the Treaty. While many arbitrations have been confronted with complex corporate structures, which have become a normal feature of international business,<sup>40</sup> few have reached the complexity of this case. A first aspect to consider in this respect is if the arrangements in question are both lawful and legitimate. Nothing in this case suggests that they were not lawful or legitimate, especially since in light of the dramatic experience of AES it was reasonable for the Claimant to take as much care as possible in insulating itself from potentially adverse tax, accounting and legal consequences that might otherwise ensue.
46. The Tribunal has also examined with attention the arguments made by the parties in connection with applicable Delaware law<sup>41</sup> and the manner in which this could affect the Claimant's protection as an investor under the Treaty. The Tribunal accepts that Delaware law and the Partnership Agreement are broad enough so as to include various forms of ownership or other interests within the scope of the partnership.<sup>42</sup> TCW Energy Advisors LP controls the partnership by means of its management and business decisions. Risk and liability are not in principle absent from such arrangement. It follows that

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<sup>37</sup> *Fedax*, cit; *Duke*, cit; *Autopista Concesionada de Venezuela, C.A. v. Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/00/5, 2001 (hereinafter "Autopista"); *El Paso v. Argentina*, ICSID Case No. ARB/02/15; *EnCana v. Ecuador*, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT) Award, February 3, 2006; *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Award No. 2, May 31, 1990, 1 ICSID Reports 569, 580.

<sup>38</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, ICSID Case No. ARB/00/2, March 15, 2002.

<sup>39</sup> *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, Award, ICSID Case No. ARB/98/7, 2000.

<sup>40</sup> *Aucoven*, cit; *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Jurisdiction, ICSID Case No. ARB/02/3, 2005; *American Manufacturing & Trading v. Zaire*, Award, ICSID Case No. ARB/93/1, February 21, 1997.

<sup>41</sup> Delaware Revised Uniform Limited Partnership Act, DEL. CODE, ANN. Tit. 6, 17-101(5), 2008.

<sup>42</sup> Claimant's Expert Opinion of Daniel S. Kleinberger, May 30, 2008, at 23-26.

the chain of interests relating to the investment is not broken as a result of this corporate structure as it will continue downstream through the other arrangements described and in the end it will be remunerated by means of the management fee.

47. As noted above, the Respondent interprets Delaware law differently. It submits that the only ownership interest in the partnership is that held by Peste LLC, with the Claimant's interest being restricted to its entitlement to a contractual management fee, which does not qualify as an investment under the Treaty.<sup>43</sup> The Tribunal is not persuaded, however, that not even if this view were correct would it mean disqualifying the Claimant's interest in the investment under the Treaty given its broad definition of investment. Moreover, if the management fee were the only interest the Claimant has in this transaction it would be difficult to understand why it chose such an extraordinarily complex corporate structure and did not simply enter into a contract for management remunerated by means of a fee. In this context, the very principle of freedom of contract the Respondent invokes in connection with the partnership agreement under Delaware law<sup>44</sup> can only be taken to mean that what the contract intended was the attainment of a broader interest by means of that particular partnership.

48. The Tribunal is next persuaded that the definition of investment under the Treaty Article 1 (1) relates protection not only to a formal ownership of shares or other such usual kind of transaction but also to a broader category of rights and interests of any nature. This allows for great flexibility in respect of the manner in which the investment is organized, and nothing suggests that the corporate structure chosen is contrary to this objective. As long as the business undertaken and the pertinent legal arrangements are lawful, as is the case here, there will be no reason to refuse the protections of the Treaty. This in the end is the reason why investment law has always searched for the economic interest underlying a given transaction and if it is compatible with the terms of the law and the Treaty, such interest is recognized as entitled to protection.<sup>45</sup>

49. A second aspect of the question to be considered is whether, as in *Enron*, there might here be an argument to the effect that the Respondent cannot be bound by an arbitration agreement extending indefinitely to a chain of investors because one after the other might become claimants without the knowledge of the Respondent's government. In that case it was held that the Respondent was bound by

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<sup>43</sup> Respondent's Post-Hearing Memorial on Jurisdiction, at 14-20.

<sup>44</sup> Respondent's Post-Hearing Memorial on Jurisdiction, at 13, with reference to the Delaware Revised Uniform Limited Partnership Act, Section 17-1101.

<sup>45</sup> *Antoine Goetz and others v. Republic of Burundi*, Award, ICSID Case No. ARB/95/3, February 10, 1999, para. 89; *CMS Gas Transmission Company v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/01/8, 2003, para. 51; *Ioannis Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No. ARB/05/18, 2007, paras. 123-124; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, Award, ICSID Case No. ARB/01/6, 2003 para. 9.4.8.

the arbitration agreement in respect of indirect investors that had been invited to participate in the business and that were furthermore required to channel their investment through an intermediate company.

50. The Tribunal must note that in the instant case the Respondent did not invite the Claimant to invest in EDE Este nor did it require that it follow any particular corporate structure or the use of investment vehicles. Nevertheless, although Respondent's consent to undertake the transaction was not formally requested in writing, there is convincing evidence that the Respondent was informed of the Claimant's interest and that specific meetings took place between the officials of the Claimant and the Respondent to consider this interest and the future prospects of the regulatory framework of the electricity sector in the Dominican Republic. Decisions were taken on this basis and when the purchase of the investment materialized and the transaction was completed the arbitration agreement embodied in the Treaty between France and the Dominican Republic became applicable, subject to issues of nationality and questions relating to the date of entry into force of the Treaty, which will be discussed further below.

51. The Tribunal also notes that the Treaty, in defining investment in the broad manner explained, including minority or indirect forms of equity interest, necessarily implies that there may be one or several layers of intermediate companies or interests intervening between the claimant and the investment.

52. The Tribunal accordingly concludes on this first objection to jurisdiction that notwithstanding the complexities of the investment undertaken and of the corporate structure chosen, there is an investment entitled to the protection of the Treaty and that it has jurisdiction *ratione materiae* over the subject matter of the dispute.

*The second objection to the Tribunal's jurisdiction: the evidence on the alleged facts amounting to expropriation for jurisdictional purposes (Jurisdiction ratione materiae)*

*The Respondent's views*

53. A second objection also relates to the consideration of jurisdiction *ratione materiae*. It concerns the question whether the facts pleaded by the Claimant fall within the scope of Article 5(2) of the Treaty governing expropriation. The Respondent believes they do not. In the Respondent's view there is thus no dispute relating to an investment as required by the jurisprudence of international courts and tribunals. Moreover, the Respondent argues that not any dispute will fall under the protections of the Treaty, but the dispute has to relate to the main purpose of the investment; many disputes might arise

but some will be patently outside the scope of the Treaty as they will not related to the protections granted.

54. The Respondent recalls that in the *Oil Platforms Case*, the International Court of Justice expressly indicated that it should ascertain whether “the dispute is one which the Court has jurisdiction *ratione materiae* to entertain”.<sup>46</sup> Also a tribunal in *Bayindir* held that it had to assess whether the facts alleged by the claimant “fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to”.<sup>47</sup>

55. The Respondent argues in this respect that as there has been no transfer of title to property, the facts alleged could not constitute a case of direct expropriation.<sup>48</sup> Neither has there been a substantial impairment of the value of the investment or other forms of deprivation that could amount to indirect expropriation. The Respondent asserts that the investor has full ownership and control of the investment made, its ability to operate has not been affected and there has been no interference with management. The question whether profits are diminished does not amount in the Respondent’s view to expropriation,<sup>49</sup> not even when the value might have decreased substantially<sup>50</sup> or the customer base has been reduced, independently of the discussion of whether such effects are attributable to the Respondent. The Respondent also asserts that the Claimant has not indicated a precise date for any such act of expropriation to have taken place as all such allegations are based on speculation about eventual future events.

#### *The Claimant’s view*

56. The Claimant believes that the facts it has alleged amount to an expropriation but that in accordance with legal standards governing jurisdiction the Tribunal must only satisfy itself at this stage that such acts are capable of constituting a breach of the Treaty provisions and thus ascertain the existence of a dispute. Only at the merits stage is a tribunal required to decide whether the facts have been indeed proven and if so consider the questions of liability and remedies.

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<sup>46</sup> International Court of Justice, *Oil Platforms Case*, Preliminary Objection, Judgment, 1996 I. C.J. Reports, para. 16.

<sup>47</sup> *Bayindir Insa Tuzim Ticaret ve Sanyai A. S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29, November 15, 2005, para. 197.

<sup>48</sup> *Compañía del Desarrollo de Santa Elena, S. A. v. Republic of Costa Rica*, Award, ICSID Case No. ARB/96/1, 2000, paras. 15-18; *GAMI Investments, Inc. v. United Mexican States*, Award, UNCITRAL (NAFTA), 2004, para. 17.

<sup>49</sup> *LG&E Energy Corp. v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1, 2006, para 191.

<sup>50</sup> *CMS*, cit., para. 69.

57. The Claimant also argues that the claim for expropriation must be accepted on the basis of the facts invoked by the Claimant, which for jurisdictional purposes must be taken to be true. In the Claimant's view there has already been a transfer of title to the property concerned as the imposition of a growing debt by the regulatory bodies by way of forcing EDE Este to record agreed subsidies as accounts payable to such entities amounts to usurpation constituting direct expropriation. Also the imposition of having to distribute electricity below cost, changing the threshold for non-regulated users and interfering in the management of EDE Este results in an indirect expropriation even though day to day operations have not been taken over and the company continues to operate, albeit on uneconomic terms forced upon it. The Claimant also asserts that market share in connection with the threshold of unregulated users that has been changed is a part of the protected investment, as decided by arbitral tribunals in other disputes.<sup>51</sup> In the Claimant's view, all such disputes relate to the substance of the investment and are not peripheral questions, thus falling within the protection of the Treaty and the jurisdiction of this Tribunal.

*The Tribunal's findings on whether the facts alleged fall within the protection of the Treaty*

58. The Tribunal must first address the Claimant's argument that because the Respondent might not have addressed each individual claim other than expropriation this must be taken as an admission of the Tribunal's jurisdiction over them. It is first not quite evident that only expropriation has been addressed by the Respondent as many issues have been discussed in connection with the Claimant's overall and specific arguments in support of its case. But even if that were the case, barring an express statement to the effect of accepting jurisdiction no presumption can be made in light of the Respondent's opposition to all of the jurisdictional arguments of the Claimant. Discussion of specific claims belongs to the merits stage.

59. As with the first objection discussed, the Tribunal is in no doubt about the principles governing a jurisdictional determination that it has been requested to make in this case. The Respondent has again correctly invoked the jurisprudence of the International Court of Justice to the effect that the Court must satisfy itself that "the dispute is one which the Court has jurisdiction *ratione materiae* to entertain",<sup>52</sup> as it would be a total loss of time to consider a dispute which it believes falls outside its jurisdictional ambit. If such were the case summary dismissal of the claim would be an appropriate decision. The Respondent is equally correct in explaining that such a principle has been expressed in *Bayindir* and a number of other decisions as the need for the tribunal to assess whether the facts

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<sup>51</sup> *Pope & Talbot Inc. v. Canada*, Interim Award, UNCITRAL (NAFTA), 2000, para. 96; *S. D. Myers, Inc. v. Canada*, Partial Award, UNCITRAL (NAFTA), 2000, para. 232.

<sup>52</sup> *Oil Platforms Case*, cit.

alleged by the claimant “fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to”<sup>53</sup>.

60. The nature of this determination is of necessity a provisional one because the actual evidence about whether the acts took place in fact and are attributable to the Respondent is to be tested at the merits phase of a case. It is thus a *prima facie* determination subject to the burden of proving that the claim finds support in both fact and law. No tribunal could know the truth beforehand and any other approach would lead to a prejudgment of the matter as the parties will not have had at that time the opportunity to argue their views on the merits. If there is doubt about the facts alleged amounting to a breach of the treaty the matter may be joined to the merits. The Tribunal may also dismiss a claim at the outset as a question of admissibility if it is abundantly clear that the claimant cannot prove the merits of such claim. But these are of course exceptions to the logical order of a *prima facie* determination that, if favorable to jurisdiction, will be followed by the examination of the claim on the merits, which is the accepted legal standard in the matter.

61. For upholding jurisdiction, a tribunal will have to convince itself merely that the allegations of the claimant have some merit and are credible, which explains why normally the facts as presented by the claimant will be relied upon, unless they are shown to be entirely baseless at first sight. Although the parties have in this case chosen to argue mainly whether the facts invoked by the Claimant do or do not amount to expropriation, and thus whether they fall or not under the Treaty provisions and can result in a dispute over which the Tribunal has jurisdiction, it is necessary for reaching a *prima facie* determination to recall that the Claimant has argued in its Statement of Claim not only that expropriation in breach of Article 5 of the Treaty has taken place but also that the facts of the case result in other breaches as well, including the failure to provide complete and total protection and security as required also by Article 5, the violation of fair and equitable treatment of Article 3 and a violation of the most favored nation treatment obligation of Article 4, also arguing that the facts constitute a denial of justice contrary to both the Treaty and customary international law.<sup>54</sup>

62. The Tribunal must accordingly establish at this stage whether the facts as alleged could constitute a breach of the Treaty, without necessarily identifying precisely what is the breach that has taken place, a matter which again will pertain to the merits. The same facts can result on close examination in different and separate breaches if proven. The Respondent is right to argue in this respect that not every dispute is capable of falling under the protection of the Treaty as there may be disputes that

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<sup>53</sup> *Bayindir*, cit.

<sup>54</sup> Notice of Arbitration and Statement of Claim, 15 March 2007.

relate to entirely different matters, as discussed in the *Waste Management* case.<sup>55</sup> The Tribunal's determination is thus confined to whether the facts alleged relate to a dispute concerning the Treaty protection or some other commitment undertaken in respect of the investment by the Respondent.

63. There can be no doubt about the fact that the business of EDE Este has been doing badly in the Dominican Republic. The continuing and increasing losses of this company evidence that something has gone very wrong. The measures the Claimant alleges that have been at the root of this situation relate to the Respondent's regulatory framework governing the electricity sector and the changes that it argues have taken place or other related aspects. This, independently from the merits of the claim, establishes an inevitable link between the facts complained of and the protections provided by the Treaty because the electricity sector is a regulated business. Whether the measures taken are in fact detrimental to the investment in breach of the Treaty and are to be attributable to the Respondent is a matter for the merits but *prima facie* it is not difficult to discern that if proven they could result in liability under the Treaty.

64. As it has been explained above, the precise nature of the eventual breach is also something to be determined at the merits stage. The facts alleged could amount to a form of direct expropriation if the requirements governing this form of taking under the Treaty and international law are met, particularly if there has been a transfer of title. Such facts could also result in a form of indirect or creeping expropriation if there has been substantial deprivation of the benefits or value of the investment, if the investor has been deprived of the control, management or operation of the investment or some other such form of sufficient interference with the business has taken place. Even if the facts do not lead to a finding of expropriation, they could still be in breach of fair and equitable treatment or of some other legal guarantee available under the Treaty.

65. The parties would have to discuss at the merits stage whether transfer of the title to property has taken place and its date, whether there has been a situation amounting to confiscation or creeping expropriation or whether the stability and predictability of such measures and other requirements associated with fair and equitable treatment have been dramatically altered so as to result in liability and damages. All such precise characterizations, however, are also a matter for the merits.

66. The Tribunal is *prima facie* persuaded at this jurisdictional stage that if proven on the merits the facts alleged are capable of resulting in a breach of the Treaty and eventually in a finding of liability. The Tribunal accordingly concludes that it has jurisdiction *ratione materiae* over a dispute that arises

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<sup>55</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/98/2, Decision on Jurisdiction, June 2, 2000, with reference to the Dissenting Opinion of Mr. Keith Highet.

from an investment and that could eventually result in breach of the protections granted to the investor under the Treaty.

*The third objection to the Tribunal's jurisdiction: retroactive application of the Treaty (Jurisdiction razione temporis)*

67. The Respondent has raised a third objection to the Tribunal's jurisdiction which concerns two issues of retroactive application, one in respect of the Treaty and the other in respect of nationality. Both relate to the Claimant's argument that its rights are protected as from when the acts and events took place, even if this was before the Treaty had entered into force or the Claimant had acquired the investment as a French national.

*Retroactive application of the Treaty*

*The Respondent's views*

68. The Respondent also submits that the Tribunal lacks jurisdiction on one further point: as the acts and events complained of not only preceded the date on which the investment was acquired by the Claimant as a French national, a question discussed further below, but also preceded the date of entry into force of the Treaty on January 23, 2003, the Treaty cannot be applied retroactively to such acts and events. The Respondent relies to this effect on Article 28 of the Vienna Convention and the rule on non-retroactivity also examined above, just as it relies on Article 13 of the Articles on State Responsibility insofar as there can be no breach of an international obligation "unless the State is bound by the obligation in question at the time the act occurs".<sup>56</sup>

69. Neither does the Respondent believe that Articles 1 and 7 of the Treaty in any way alter its non-retroactive nature and scope. It is argued in this respect that Article 1 only addresses the investments covered but not the retroactive application of the Treaty and, as held in *Salini v. Jordan* in relation to a similar article in the treaty there applicable, that article "does not give the substantive provisions of the Treaty any retrospective effect".<sup>57</sup> Neither could Article 7 apply to disputes that preceded its entry into force.

70. The same principle was upheld, it is recalled, in the *Phosphates in Morocco* case in which it was

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<sup>56</sup> *Articles on State Responsibility*, Article 13.

<sup>57</sup> *Salini Costruttori s. p. a. v. Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13, November 9, 2004, para. 177.

decided that “the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification...”,<sup>58</sup> just as they were upheld again in *Salini v. Jordan*,<sup>59</sup> *Feldman*<sup>60</sup> and *Mondev*<sup>61</sup> The Respondent asserts that no intention of allowing for retroactive effect can be found in the Treaty and as decided in *Impregilo* the legality of the acts in question must be determined according to the law applicable at the time of their performance.<sup>62</sup> It is further maintained that, as held in *MCI Power*, there can be no breach of an international obligation if there is no Treaty establishing such obligation, and even if there were a breach of an obligation under customary international law before the treaty enters into force this would not allow to have recourse to the treaty’s arbitral jurisdiction.<sup>63</sup>

71. In the Respondent’s view all acts and events complained of had ceased to exist before the Treaty came into force, and thus there could be no continuous course of conduct as the Claimant argues. They were all one-time acts. The Respondent recalls the requirement contained in Article 14 (2) of the Articles on State Responsibility for a continuing character extending over the entire period during which the act continues and remains in breach of an international obligation; and that as held in *Impregilo* although acts taking place before the treaty enters into force could have consequences after that date this does not mean that they have a continuing character as “they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date”.<sup>64</sup>
72. The Respondent further explains in support of its views that all the acts were completed at the time of their performance, even if the consequences or effects may have continued. As noted in the Commentaries to the Articles on State Responsibility, “An Act does not have continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which

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<sup>58</sup> Permanent Court of International Justice, *Phosphates in Morocco*, Preliminary Objections, Judgment, 1938, PCIJ Ser. A/B, No. 74, at 10.

<sup>59</sup> *Salini v. Jordan*, cit., para. 177.

<sup>60</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, Decision on Jurisdiction, ICSID Case No. ARB (AF)/99/1, December 6, 2000, para. 62.

<sup>61</sup> *Mondev International Limited v. United States of America*, Award, ICSID Case No. ARB (AF)/99/2, October 11, 2002, para. 68.

<sup>62</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, para. 311.

<sup>63</sup> *M. C. I. Power Group L. C. and New Turbine Inc. v. Republic of Ecuador*, Award, ICSID Case No. ARB/03/6, July 31, 2007, paras. 93, 96.

<sup>64</sup> *Impregilo*, cit., para. 312.

continues”.<sup>65</sup> In any event, the Respondent asserts, even if an act continues after the Treaty came into force there will be no breach of its obligations or access to its jurisdiction until after the date when the obligation began to exist for the State, which is the principle upheld in *Feldman* and *MCI*.<sup>66</sup>

73. Because of the same reason, the Claimant cannot circumvent the jurisdictional requirements by attempting to replead its case that the acts are not only continuing but also composite. In the Respondent’s view, the acts were and remain one-time acts occurring before the Treaty came into force and thus, are not a part of a series that could result in composite acts.

*The Claimant’s view*

74. The Claimant has opposed this objection to the Tribunal’s jurisdiction on the basis that the acts are continuing in nature and thus, they meet the criteria defined in Article 14 (2) of the Articles on State Responsibility noted. Not only does the breach of the Respondent’s international obligations extend during the entire period during which the act continues but also the acts remain not in conformity with the international obligation. The Claimant’s understanding of the meaning of the decisions in *MCI Power*, *Feldman* and *Mondev* is also different from that of the Respondent as the fact that jurisdiction over acts preceding the entry into force of the treaty was not admitted in those cases did not exclude the consideration of such prior acts for “purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force”<sup>67</sup> or the relevance of prior events to breaches taking place after the entry into force.<sup>68</sup>

75. The Claimant asserts that moreover those acts are composite in nature and scope and combine with the acts and omissions occurring after the entry into force to constitute a violation, thus also meeting the requirement of them having an aggregate effect as stated in Article 15 of the Articles on State Responsibility. Those acts may also be taken into account as a factual basis or to provide evidence of intent in respect of obligations coming into existence at a later point in time.<sup>69</sup> The same approach was adopted in both *Mondev* and *Tecmed* in that they took into consideration the factual basis of events that occurred before the entry into force of the treaty.<sup>70</sup>

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<sup>65</sup> *Commentaries to the Draft Articles on State Responsibility*, Commentary to Article 14, paras. 2, 6.

<sup>66</sup> *Feldman*, cit., para. 62; *M. C. I.*, cit., paras. 90, 97, 136.

<sup>67</sup> *M. C. I.*, cit., para. 93.

<sup>68</sup> *Mondev*, cit., para. 69.

<sup>69</sup> *Commentaries*, cit., 144 (11).

<sup>70</sup> *Mondev*, cit., para. 69; *Técnicas Medioambientales Tecmed S. A. v. United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, May 29, 2003, para. 66.

76. Thus, the acts complained of could not be considered individual acts as those that were taken into consideration in *Impregilo* for concluding that they had occurred at a specific point in time;<sup>71</sup> the acts here have not ceased to exist and continue to be in violation of the Treaty until now. The Claimant refers in particular to those acts concerning the non-implementation of the tariff regime, the failure to pay the indemnification promised and the failure to contribute the promised capital, and other questions such as not enforcing measures against theft or not extending treatment as favorable as that accorded to another electricity company. The Claimant also recalls in this context that a tribunal has held that the failure to pay sums due under a contract constitutes continuing conduct actionable under the treaty.<sup>72</sup>

77. The Claimant further argues in support of its views that Article 1 of the Treaty protects assets invested in accordance with the legislation of the Contracting Party in whose territory it is made “...before or after the entry into force of this Agreement”, as Article 7(1) and (2) grants jurisdiction to decide “[a]ny dispute relating to investments...” of the Contracting Parties. On this basis, it distinguishes this Treaty from those considered in a number of other decisions that have refused to accept retroactive effect. The Claimant also argues that this is the position under Article 28 of the Vienna Convention on the Law of Treaties which does not allow for the retroactive effect of treaties only when the treaty does not address retroactivity and does not contain an expression of the intent of the parties in this connection, which is not the case in the instant dispute. The Claimant asserts that a number of arbitral decisions have directly or indirectly supported this interpretation.<sup>73</sup>

*The Tribunal’s findings on the retroactive application of the Treaty*

78. The Treaty contains certain provisions concerning the application of the principle of *ratione temporis*, particularly its Articles 1 and 7. While there are other aspects of the principle of *ratione temporis* as applied to substantive obligations or jurisdictional questions, the instant case is simpler from the point of view that all conclusions will be governed by the rules on non-retroactivity and the principle of intertemporal law. The concept of continuing and composite acts, which begin before but continue after a treaty comes into effect or have cumulative effects over time, must also be discussed in connection with these basic principles of the law of treaties.

79. The Tribunal accordingly first notes that the basic principle in this matter is the non-retroactivity

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<sup>71</sup> *Impregilo*, cit., para. 313.

<sup>72</sup> *SGS v. Philippines*, cit., para. 167.

<sup>73</sup> *Impregilo*, cit., para. 309; *Helnan International Hotels A/S v. Egypt*, Decision on Jurisdiction. ICSID Case No. ARB/05/19, 2006, para. 49; *SGS v. Philippines*, cit., para. 167.

of treaties, from which rights and obligations arise. Article 28 of the Vienna Convention on the Law of Treaties sets this principle in unequivocal terms, except if the intention of the parties indicates otherwise. Article 28 of that Convention provides indeed that “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

80. The principle of non-retroactivity is not in doubt in this case and the parties do not appear to disagree about it.<sup>74</sup> It is accepted that the Treaty entered into force on January 23, 2002, and that the Claimant became the investor on November 12, 2004. While the parties have provided their respective listings of dates and events, the discussion about specific dates of occurrence of such acts and events is something that has to be undertaken in connection with the merits; the Tribunal can accept, however, for jurisdictional purposes, that both parties are correct in identifying situations that took place either before or after that date. While under the general principle the Tribunal would lack jurisdiction over treaty violations in respect of acts and events taking place before the Treaty entered into force, it would clearly have jurisdiction for such acts and events occurring after the critical date.
81. The issue here is thus whether the Treaty has provided for retroactive effect by expressing a “different intention” or such intention can be “otherwise established”. The Claimant believes that both Article 1 and Article 7 (1) and (2) of the Treaty do establish a different intention, the first by extending its application to assets invested “before or after the entry into force of this Agreement” and the second by granting jurisdiction over “any dispute relating to investments”. The Respondent does not of course share this view.
82. The Tribunal is of the view that the Claimant’s interpretation of the articles noted is not the correct one in respect of retroactivity of the Treaty and that no such intention can be identified in the Treaty or otherwise. Article 1 refers to “assets that shall be or shall have been invested” before or after the date of entry into force of the Treaty, but if the intention had been to allow for retroactivity one would expect that it would require a clear and unequivocal expression of intention to that effect, which is not found in the Treaty or elsewhere.
83. To infer that this might have been the result sought by the parties in the absence of a clear expression of intention to that effect would upset the normal meaning of the rules on retroactivity under both the Treaty and the Vienna Convention.

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<sup>74</sup> Statement by Mr. Peter C. Thomas, Hearing Transcript, Vol. I, at 65.

84. The Tribunal concludes accordingly that it has jurisdiction for alleged treaty violations over the acts and events that have taken place after the entry into force of the Treaty on January 23, 2003, but not over those that have taken place before this date.

85. A similar concept supporting this conclusion, rooted in the principle of intertemporal law, is well supported by the *Island of Palmas* award to the effect that a juridical fact must be appreciated in the light of the law contemporary with it and not the law in force at the time the dispute arises.<sup>75</sup> So too, the Institut de Droit International concluded in respect of intertemporal law that “[u]nless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it”<sup>76</sup>

86. *Impregilo* also well evidenced that retroactive effect is not a matter to be welcomed and that the legality of the acts needs to be determined according to the law applicable at the time of their performance.<sup>77</sup> The interpretation of the Treaty suggested by the Claimant would lead to the opposite result, that is the acts and omissions that took place before the Treaty became effective would be judged not by the law contemporary with those acts and events but by the law as established in a later treaty of which the Claimant is a beneficiary.

87. The Tribunal is persuaded, however, that there might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty. The tribunals in *MCI, Feldman* and *Mondev*, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for “purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force”<sup>78</sup> or the relevance of prior events to breaches taking place after the treaty’s entry into force.<sup>79</sup>

88. In such a case, the act is indeed continuous but its legal materialization as a breach occurs when

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<sup>75</sup> *Island of Palmas* Arbitration, 1928, RIIA ii, 829.

<sup>76</sup> Institut de Droit International: Resolution on the Intertemporal Problem in International Law, Session of Wiesbaden, 1975, Rapporteur Mr. Max Sorensen, para 1.

<sup>77</sup> *Impregilo*, cit., para. 311.

<sup>78</sup> *M. C. I.*, cit., para. 93. See also Articles on State Responsibility, Article 14.

<sup>79</sup> *Mondev*, cit., para. 69.

the Treaty has come into force and the investor qualifies under its requirements. Thus, there is no strict issue of retroactive application of the treaty concerned, and Article 28 of the Vienna Convention is not implicated. If it is merely the continuing effects of a one-time individual act that as such has ceased to exist that is involved, then the non-retroactivity principle fully applies,<sup>80</sup> but when both the existence of the wrongful act and its effects continue both before and after the critical date, then the non-retroactivity principle will not exclude the application of the obligations of the treaty to the acts and omissions that occur after its effective date.

89. At the hearing on jurisdiction, the Tribunal had the occasion to discuss with the parties specific examples of acts, independent from those eventually involved in this case, that might be considered continuing in nature in which the act and its effects could be found to result in the breach of an international obligation after the critical date.<sup>81</sup> The Tribunal is again grateful to counsel for the parties, which most competently explained their respective points of view on this and other matters and helped the Tribunal to better understand their arguments in this respect.

90. It follows that the Tribunal must be satisfied that there could be a breach of obligations under the Treaty for jurisdiction over treaty violations to be established, and this again can only happen once the obligation has come into force. The actual determination of which acts specifically meet the continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified.

91. The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court. As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it “is sufficient to constitute the wrongful act”. But of course the latter determination can only be made when the obligation is in force.

92. In situations of this kind, the preceding acts might be relevant as factual background to the

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<sup>80</sup> ILC Articles, Article 14(1).

<sup>81</sup> Statement of Mr. Joseph R. Profaizer, Hearing Transcript, Vol. II, at 506 et seq.

violation that takes place after the critical date, and this is the meaning that the cases discussed above will have in considering that factual background and its relevance to explain later breaches. As the Respondent has rightly recalled, this explains why in *Tecmed*, while often believed to have assumed jurisdiction over acts preceding the treaty, this was only to the effect that such acts represented “converging action towards the same result”.<sup>82</sup> In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force.

93. In none of these situations, as noted, is there a case of retroactive application of the Treaty but one in which it shall only be applied at the time it has entered into force and on the basis of the factual background of acts and events that have preceded the critical date. On occasions the permanency of the act -or its continuing character- have led tribunals to consider that limitation periods extend accordingly and start running on the date the breach ceased to exist, thus being also continuously renewed.<sup>83</sup> This is also the view that some courts have taken in respect of human rights violations.<sup>84</sup> This view, however, has been opposed by some decisions of international tribunals not upholding interpretations that could result in suspension or prolongation of limitation periods expressly introduced to avoid such effect.<sup>85</sup> While in some cases and in the light of their specific circumstances this extension of the limitation period can be artificial, even then the exercise is not the retroactive application of the treaty but an exercise in bringing past and preceding acts under the time period in which the treaty does apply. In any event, for an exception to the basic rule on non-retroactivity to be accepted one would expect a clear intention of the parties to a treaty to that effect,<sup>86</sup> which is not the case here.

94. The Tribunal accordingly concludes that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal’s jurisdiction.<sup>87</sup> This will also be the case if a series of acts results in the aggregate in such breach of an obligation in force at the time the accumulation culminates after the critical date.

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<sup>82</sup> *Tecmed*, cit., para. 62.

<sup>83</sup> *UPS v. Canada*, Award on Jurisdiction, UNCITRAL/NAFTA, November 22, 2002. para. 127.

<sup>84</sup> See, for example, European Court of Human Rights, *Loizidou v. Turkey (Merits)*, 1996-VI Eur. Ct. H. R.2216, 1996.

<sup>85</sup> *Grand River Enterprises Six Nations Ltd. v. United States of America*, Decision on Objections to Jurisdiction, UNCITRAL/NAFTA, 2006, para. 29.

<sup>86</sup> Rosalyn Higgins: "Time and the Law: International Perspectives on an Old Problem", *International and Comparative Law Quarterly*, Vol. 46, 1977, 501, at 519.

<sup>87</sup> Joost Pauwelyn: "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *The British Year Book of International Law 1995*, 1996, 415, at 435.

*The fourth objection to the Tribunal's Jurisdiction: Nationality of the investor (Jurisdiction nationality ratione temporis and nationality ratione personae)*

95. The questions of nationality that the Respondent has raised as objections to jurisdiction have two aspects that the Tribunal needs to consider separately. The first issue relates to the question of the applicable rules and principles governing when the requirement of nationality needs to be met and thus poses a question of jurisdiction *ratione temporis*. The second concerns whether the different entities participating in the investment through the complex structure that has been described qualify as a French protected investor. This is strictly an issue of jurisdiction *ratione personae* and will be considered separately.

*a) The rules and principles governing nationality ratione temporis*

*The Respondent's view*

96. The Respondent also argues that the Tribunal lacks jurisdiction because the Claimant fails to comply with the requirements of nationality under the Treaty and international law as it only acquired the investment on November 12, 2004, while the acts and events complained of all occurred before that date. Until that date the investment was owned by AES, a company registered in the United States, and if any damage was caused it would have been caused to it, not to the later French purchaser. AES, however, made no claim for damages.

97. The Respondent explains that the Treaty applies only in respect of French investors and that the Claimant cannot claim for acts which took place before the date it became the investor as there was then no bond of nationality. In addition, the law of diplomatic protection requires nationality to be met at two critical dates, the date of the injury and the date of bringing the claim. The implications that might arise in this respect from the transfer of an investment were already addressed with due caution in the *Vivendi Annulment* in which the Committee held that “issues might well arise where there has been a transfer of control of a local company from a shareholder of one nationality to a shareholder of another”,<sup>88</sup> and provided an example that resembles the case here: “For example, if Dycasa had a Spanish treaty claim prior to March 1996, questions might arise as to how that claim could be later transferred to a French company, or as to how CGE could have acquired a French treaty claim in respect of conduct concerning an investment which it did not hold at the time the conduct occurred and which at the time did not have French nationality”.<sup>89</sup>

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<sup>88</sup> *Compañía de Aguas del Aconquija S. A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/97/3, July 3, 2002, para. 50.

<sup>89</sup> *Vivendi Annulment*, cit., para. 50.

98. The Respondent has provided a detailed list of the dates or periods in which the alleged acts and events took place, ranging from 1999 through the summer of 2004, dates all that precede the acquisition of the investment by the Claimant on November 12, 2004.

*The Claimant's view*

99. The Claimant submits an entirely different view, based on the argument that the Treaty applies retroactively to acts and omissions having taken place before the date of acquisition of the investment or the date of the Treaty's entry into force. The question of jurisdiction *ratione temporis* in connection with the date of entry into force of the Treaty has been discussed above. The Claimant explains that all such acts and omissions are continuing and composite in nature and scope. In any event, it is asserted that the Tribunal at a minimum has jurisdiction over the acts of omissions having taken place after November 12, 2004, a list of which was also provided.

100. The Claimant further argues that in accordance with the above provisions and interpretations the Treaty does not require a bond of nationality at the date of the breach, as the Respondent has maintained. Neither do the principles of diplomatic protection apply to investment treaties that emerged precisely to overcome the shortcomings of international law in this respect. In the Claimant's view, it is not unusual for tribunals to apply the protection of the treaty to events that have taken place before the investment became the asset of an investor having a different nationality, as happened in *Fedax* in which the obligation to pay arose before the investment became Dutch, or in several cases based on legitimate expectations at the time of the investment.<sup>90</sup> The *Vivendi Annulment* discussed some considerations about the issue of transfer and nationality in *dictum* but ultimately found that it did not need to address the issue.

*The Tribunal's findings on nationality ratione temporis*

101. The Tribunal has examined above the parties' arguments on the retroactive application of the Treaty, particularly in light of its Articles 1 and 7. These same arguments are raised in connection with the question of nationality and will not be repeated here. The same conclusions the Tribunal reached in respect of the interpretation of those articles is applicable in this other context.

102. There are, however, additional questions the Tribunal needs to address specifically in connection with nationality. To this end, the Tribunal will look first to the express terms of the Treaty, and second, to the law of diplomatic protection.

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<sup>90</sup> *Metalclad Corporation v. Mexico*, Award, ICSID Case No. ARB(AF)/97/1 (NAFTA), August 30, 2000, paras. 78-87.

103. First, the Treaty is between the French Republic and the Dominican Republic. The Treaty has as its goal the stimulation of “capital and technology transfers between the two countries in the interest of their economic development.” The term “companies” is expressly defined as “all legal entities incorporated in the territory of one of the parties, in conformity with its legislation and where its headquarters is located . . .” Article 2 refers to “investments made by the nationals and companies of the other Party . . .” Throughout the Treaty, it continually refers to the Contracting Parties and their “nationals and companies.” The dispute clause in Article 7 applies by its express terms to “Any dispute relating to investments between one of the Contracting Parties and a national or company of the other Contracting Party ...”.
104. As with the retroactive application of the Treaty, if the intention had been to allow for claims relating to any investment, independently of whether the claimant is eligible as a national of the other Contracting Party, one would have expected a clear and unequivocal expression of intention to that effect, which is not the case. Moreover, a close reading of Article 1 shows that the reference to assets invested before or after the entry into force of the Treaty cannot be taken in isolation. Such reference is in fact immediately followed by the specific definitions on nationality contained in the Treaty, thus making evident that the investment will be that of those qualifying under the requirements of nationality.
105. Similarly, the fact that Article 7 extends jurisdiction to any dispute concerning the investment does not mean that it could cover investments that are not eligible in terms of nationality. That article specifically refers to disputes between a “Contracting Party and a national or company of the other Contracting Party”. As with most investment treaties, the meaning of this provision is that the investment might have been made before or after the date of the Treaty, but that the treaty violation falling under the Tribunal’s jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party. One would expect any derogation of this principle to be express and not implied. The Treaty could thus not apply to any acts or omissions that occurred before that date because the investor’s nationality was different from that required by the treaty and did not permit it to qualify as a protected investor under the Treaty.
106. All of these terms lead inevitably to the conclusion that the Treaty was designed to protect only the nationals and companies of the Contracting Parties, in this case France. The investment of AES, a company incorporated in the United States, is not protected by the terms of this Treaty. Thus, the investment could not be protected by this Treaty until both this Treaty entered into force and Claimant, as a French company, acquired the investment and it became a French investment.
107. Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the

Claimant acquired the investment, that is on November 12, 2004, at which time the investment became protected under the Treaty to the benefit of French nationals and companies only. It follows that the Tribunal will only have jurisdiction over acts and omissions that took place after November 12, 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national.

108. Second, the law of diplomatic protection also supports this conclusion. It is necessary to keep in mind that while it is true that investment law has meant in some respects a departure from the law governing diplomatic protection and the traditional law of international claims, this is correct largely to the extent that applicable treaties and conventions have so established by providing rules different from those of diplomatic protection. While many such treaties, like the one now before the Tribunal, provide for rules on the definition of who is a national entitled to its protection, seldom do they provide for a rule establishing the moment at which such nationality is required. The rules governing issues not addressed by the specific language of the treaty may sometimes be provided by the law of diplomatic protection, which apply as customary international law, and thus, provides for a residual role for at least some aspects of the law of diplomatic protection. In the instant case, however, the Respondent has also persuasively explained that the Treaty itself is consistent with such rules and principles.<sup>91</sup>

109. The fact that such treaties have substituted for diplomatic protection and may even prohibit its exercise by the States that are parties to them, does not mean that the basic principles have also been automatically derogated as it is rather the means for materializing an international claim that have changed but not in all aspects its substantive requirements. It follows that the principle that a claimant must have the nationality of the relevant Contracting Party at the time of the breach still exists unless a different rule is expressed, and it will apply whether the claim is introduced directly by the individual or company concerned or by the State of nationality on its behalf. Flexibility has been introduced in respect of some rules of diplomatic protection, particularly on whether the nationality is required also at the time of adjudicating the claim or at the time of its submission - an issue which in any event is not relevant here, but this flexibility does not extend to the need to have the nationality at the time of the breach.

110. This finding does not mean that transfers of rights eventually giving rise to claims under a Treaty cannot take place, but questions of nationality, as discussed in *Vivendi*, even if in *dictum*, set a limit to the application of investment treaties to these transactions. One such limit is that the transaction in question must be a *bona fide* transaction and not devised to allow a national of a State not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage otherwise unavailable

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<sup>91</sup> Statement of Ms. Janet M. Whittaker, Hearing Transcript, Vol. II, at 416.

by transferring its rights after-the-fact to a qualifying national, as occurred in *Mihaly* and *Banro*. While AES at the time did not have the benefits of any treaty protection and the Claimant in this case has such benefits as a French national under the Treaty, nothing suggests that the transaction that took place here was designed to obtain an inappropriate jurisdictional advantage.

111. Another limit that has implications in this matter is the consent of the Respondent to the extension of the arbitration clause or agreement to a different beneficiary. While in this case apparently no arbitration clause under a treaty benefited AES, and thus, none could be transferred to the Claimant, there is a question about the consent to the transaction and related information available to the Respondent. Just as the Respondent cannot ignore that the Claimant became a protected investor following its purchase of the assets from AES, it cannot be held to have accepted that such protected investor could become entitled to claim for acts and events that took place before it actually became eligible under the Treaty. The principle upheld in *Mihaly* to the effect that no one can transfer a better title than he actually has without the consent of the host State is equally applicable here to a situation in which no one can claim without such consent a retroactive application of treaty rights to acts that occurred before the Claimant became an investor under the Treaty.

112. As noted above, the Claimant has also argued that the acts that took place before it became the investor are continuing and composite and accordingly transcend their own time extending to a later date on which it had become a protected national. This argument has been discussed above in the context of the date of entry into force of the Treaty and does not change the conclusions explained in respect of nationality.

*b) The situation concerning nationality ratione personae*  
*The Respondent's views*

113. The Respondent argues that the Tribunal could only exercise jurisdiction in this case if it is satisfied that EDE Este's shares were owned by a French investor at the time of the breach and at the time of submission of the claim. Quite separately from the question of *ratione temporis* noted above, the essence of this argument is that as the Claimant did not have any ownership interest in EDE Este because in light of the corporate structure chosen there has never existed a bond of nationality under the Treaty. Société Générale has been absent from the transaction concerning the purchase of AES's shares, which was envisioned, orchestrated and executed exclusively by TCW, which is a United States entity. It follows in the Respondent's view that none of the conduct the Claimant alleges is actionable under the Treaty. The Claimant's only interest, it is further argued, is a contractual right to payment for services provided by a United States company to a United States partnership for services to that partnership in the United States. The "French connection" in respect of which the Tribunal

expressed interest in the hearing has accordingly not been proven or established.<sup>92</sup>

*The Claimant's view*

114. The Claimant believes that as it has satisfied the requirements of the Treaty in connection with the existence of an investment and as it is a company registered in France, and therefore, the Tribunal has jurisdiction over its claims in the instant dispute. In the Claimant's view, nothing in Articles 1 or 7 of the Treaty require that the Claimant be actively involved or approve the specific details of any given investment. These were entrusted to its affiliate TCW and through it the Claimant participates in the chain of interests giving expression to its investment. The Claimant explains that decentralized decision making is common place in any large group of companies.<sup>93</sup> To the extent that the Claimant is within the chain of ownership or control, as is the case here, then it qualifies as an investor with standing to bring a claim. It follows that in the Claimant's view a sufficient "French connection" exists to establish jurisdiction over such claims.<sup>94</sup>

*The Tribunal's findings on nationality and the corporate structure*

115. The complex corporate structure that characterizes this case has implications in terms of the nationality of the Claimant. At first it appeared that the Claimant was the French shareholder of TCW and through it the indirect share owner of 50% of EDE Este, by passing the holdings in Dominican Energy Holdings LP and Dominican Republic Energy Holdings Ltd, a chain that extended from upstream to the downstream segments of the investment. To that extent, the requirement of nationality seemed to travel from top to bottom until resulting in the final 50% ownership of EDE Este.

116. Two additional aspects relevant in this respect surfaced, however, during the hearing on jurisdiction. The first is that Société Générale's participation in TCW has been in a percentage of ownership that has varied over time, which will eventually attain 100% participation.<sup>95</sup> As the Claimant is entitled to claim for its participation, not for that of interests which are not protected under the Treaty because of their different nationality, this will provide a different protected interest as that participation changes. This issue might have relevance if in the end damages are awarded on the

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<sup>92</sup> Respondent's Post-Hearing Memorial on Jurisdiction, at 1-6, 36, with reference to the Tribunal's questions on this issue, Hearing Transcript at 348-349, 356-357.

<sup>93</sup> Claimant's Reply to Respondent's Post-Hearing Memorial on Jurisdiction, at 16.

<sup>94</sup> Claimant's Amended Post-Hearing Memorial on Jurisdiction, at 21-22.

<sup>95</sup> Société Générale's participation in TCW has evolved from 55% held in 2002 to 61% held in 2003, 67% in 2004, 74% in 2005, 95% in 2006 and 99.4% in 2008, as reported in the Annual Report of Société Générale for each year.

merits, but the jurisdictional principle must be noted at the outset.

117. The second issue brought to the attention of the Tribunal on that occasion, and which was expressly addressed by the parties at the request of the Tribunal in their post-hearing briefs, is the participation of other companies in the corporate structure. Two are the companies that are of relevance in this regard. The first is Sosa Partners LLC which, as explained, owns 49.9% of TCW Energy Advisors LLC, with 50.1% owned by TAMCO, an affiliate of TCW. TCW Energy Advisors LLC is the General Partner of Dominican Energy Holding LP.

118. The Respondent has convincingly argued that Sosa Partners is not a qualifying French national under the Treaty. While it is owned by a group of TCW's employees and officials, it is a separate company registered in Delaware, and as far as the Tribunal can determine it has no corporate linkage with TCW, whether in terms of affiliation or participation.<sup>96</sup> While the French nationality of the shareholder can extend to TCW as an affiliate of Société Générale, it cannot extend beyond to an unrelated company such as Sosa Partners. It has been argued that Sosa was an arrangement related to the compensation of TCW's executives as it is normal within the industry,<sup>97</sup> but not even this would transform that company into an affiliate of TCW or even less into a qualifying investment. Sosa is not owned directly or indirectly by Société Générale, a French company, and Sosa's ownership has not been revealed to have any French connection. It follows that the Claimant's entitlement will be limited first by its shareholding interest in TCW, which has varied over time, and next by the participation of TAMCO in TCW Energy Advisors LLC, which amounts to 50.1%.

119. The second relevant company that has surfaced in the context of the corporate structure is Peste LLC, registered in Nevada, which owns as a Limited Partner 100% of the shares of Dominican Energy Holdings LP, the company to which TCW Energy Advisors LLC is as noted the General Partner. Peste LLC also cannot benefit from the French nationality of the Claimant. The issue is then how the interest in Dominican Energy Holdings LP - the ultimate owner of 50% of EDE Este, is shared between a 100% shareholder (Peste LLC) and a General Partner (TCW Energy Advisors LLC) in which the Claimant participates within the limits indicated.

120. The distribution of benefits has followed an equally difficult arrangement in the context of a strategy directed to prevent potential damages to the Claimant resulting from consolidation of assets and consequential liabilities. As explained above, this does not affect the interest of the Claimant in the investment as it is the expression of an indirect benefit-sharing arrangement. These arrangements

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<sup>96</sup> Statement of Mr. John J. Kerr, Hearing Transcript, Vol. II, at 376.

<sup>97</sup> Second Declaration of R. Blair Thomas, 30 May 2008, para. 4, at 3.

consist in the Limited Partner receiving a portion of the available cash amounting to US \$ 2.5 million less certain deductions, while the General Partner will be remunerated by means of a management fee “equal to 90% of the amount of Available Cash available for distribution”.<sup>98</sup> While the Tribunal accepts that this is the remuneration of the Claimant’s investment, its interest will also be limited to the amount of this remuneration.

121. It follows from the above that the Claimant’s nationality will indeed protect its interest, but limited by three factors: its percentage of participation in TCW at a given time; its percentage of TAMCO’s participation in TCW Energy Advisors LLC (50.1%) and percentage of remuneration of the latter as the General Partner in Dominican Energy Holdings LP (90% of available cash as calculated in the Partnership Agreement). Interests beyond these participations are not protected under the Treaty between France and the Dominican Republic on account of their different nationalities.

*Award*

[122] In light of the above considerations the Tribunal adopts the following Award:

1. The Tribunal has jurisdiction *ratione materiae* to the extent of the Claimant’s rights in the chain of interests in the investment;
2. The Tribunal has jurisdiction *ratione personae* to the extent of the Claimant’s interest as a protected French national; and
3. The Tribunal has jurisdiction *ratione temporis* in respect of Treaty breaches concerning acts and events having taken place after November 12, 2004, and may take into account prior acts and events resulting in such Treaty breaches.

Place of Arbitration: New York City, New York, United States of America

Date of this Arbitral Award: 19-09-08

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<sup>98</sup> Agreement of Limited Partnership of Dominican Energy Holdings, L. P., June 30, 2004, Section 8. 11.

**Annex I**  
**Corporate Structure of the Investment**

