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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date:

Grupo Francisco Hernando Contreras, S.L. v. República de Guinea Ecuatorial (ICSID Case No. ARB(AF)/12/2) - Award

Case Report by:

Lucas Loviscek **, editor Diego Luis Alonso Massa ***

Summary:

In the Award rendered on December 4, 2015, which was accompanied by a dissenting opinion by the Claimant-appointed arbitrator, the Tribunal decided that it did not have jurisdiction to hear the dispute between Grupo Francisco Hernando Contreras, S.L. and the Republic of Equatorial Guinea because Claimant did not demonstrate that the alleged investments were made in conformity with the host State laws, as required by the Agreement between the Kingdom of Spain and the Republic of Equatorial Guinea on the Reciprocal Promotion and Protection of Investments (“APPRI” or “BIT”). The Tribunal asserted that, for that reason, Claimant could not be deemed an investor protected under the aforementioned treaty.

However, the Tribunal rejected Equatorial Guinea’s additional objections to jurisdiction, which were that (1) the Agreement had not entered into force between the parties; 2) the parties had not consent to submit the dispute to international arbitration; 3) Equatorial Guinea State courts had jurisdiction to hear the dispute and 4) there existed no legal dispute between the Parties.

Main Issues:

Jurisdiction – *ratione personae* – nationality - investor; jurisdiction –*ratione materiae* - investment; consent – ICSID Arbitration (Additional Facility) Rules – investment law.

Tribunal:

Judge Bernardo Sepúlveda Amor – President, Professor Francisco Orrego Vicuña, Professor Raúl E. Vinuesa.

Claimant's Counsel:

Dr. Sergio Polvorinos Santos, (Director de Asesoría Jurídica Grupo Francisco Hernando Contreras, S.L., Toledo, España) and Dr. Joséénez (Estudios Jurídicos y Procesales, S.L.P., Madrid, España).

Respondent's Counsel:

Dr. Sergio Esono Abeso Tomo and Dr. Francisco Evuy Ngema, (Gabinete y Agencia “T&E”, Malabo, Guinea Ecuatorial).

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Digest

1. *Relevant Facts and Procedural Dates*

The Claimant, Grupo Francisco Hernando Contreras, S.L. (“Grupo Contreras” or “Claimant”), was a company incorporated in Spain that allegedly made investments in the Republic of Equatorial Guinea (“Equatorial Guinea” of “Respondent”) to pursue several construction projects through the creation and ownership of Nueva Edificación 2000, S.A. (“Nueva Edificación”) and a Joint Venture with the government of Equatorial Guinea, named Industrias y Construcciones Guinea Ecuatorial, S.A. (“INCOGESA”). (¶¶1, 6-9, 57)

The dispute arose from the alleged arbitrary hurdles that Respondent imposed upon Claimant’s investment that allegedly resulted in the impossibility of developing the construction projects concerned. In Claimant’s view, the government of Equatorial Guinea violated several provisions and protections established by the Agreement on Reciprocal Protection and Promotion of Investments between the Kingdom of Spain and the Republic of Equatorial Guinea (the “BIT”). In response, the Claimant filed a Request for Arbitration pursuant to ICSID Arbitration Additional Facility Rules (since Equatorial Guinea was not a Contracting Party to the ICSID Convention). The Secretariat registered the request on March 23, 2012 in accordance with Articles 4 and 5 of the ICSID Arbitration (Additional Facility) Rules (the “Rules”).

On December 18, 2012 the Respondent raised preliminary objections to the Tribunal’s jurisdiction pursuant to Article 45 of the Rules and on May 6, 2013 it requested the Tribunal to bifurcate the proceedings and decide on the jurisdictional objections prior to ruling upon the substance of the case. On June 26, 2013 the Respondent submitted the Answer to the Request and filed additional objections on jurisdiction pursuant to Article 45 (2) of the Rules. After holding two deliberation meetings, the Tribunal decided to render an award on the jurisdictional objections. (¶¶ 31-35, 56).

2. *Analysis by the Tribunal*

The tribunal began its analysis by identifying the main jurisdictional issues between the parties that needed to be decided upon. The Tribunal observed that these topics were: (i) whether the BIT was in force, (ii) the parties’ consent to submit the dispute to arbitration, (iii) the legal nature of the dispute (iv) whether Claimant was an investor or not, and (v) whether the alleged investment had been effectively made or not. As a result, the Tribunal bifurcated the issue regarding the projects in Malabo and Bata (allegedly based on a contractual relationship among the Parties) and the project in Oyala (allegedly based on a contract directly awarded to the Claimant).

Regarding both projects the Tribunal was to decide whether the investments had been made in accordance with the laws of the host State¹. (¶ 95).

2.1. Analysis of first jurisdictional issue: Whether the BIT was in force or not

On the one hand, Respondent objected to the Tribunal's jurisdiction on the basis that the BIT had not entered in force between the Parties, since the authorities of Equatorial Guinea's Executive Branch have not given notice of its ratification. (¶ 97).

The Claimant on the other hand stated that Article 12 (4) of the BIT established that the BIT was provisionally applicable as of the date of its signature, November 23, 2003. In addition, it maintained that the Government of Equatorial Guinea ratified the BIT in 2009, and duly promulgated the proper instrument of ratification. (¶ 98).

The Tribunal noted that the Contracting Parties to the BIT effectively agreed on its provisional application as of the date of its signature, pursuant to Article 12 (4). However, regardless of that argument, it found that the Respondent in its Counter - Memorial did not challenge the Tribunal's jurisdiction on the ground that the BIT had not entered into force, and in fact, Respondent withdrew this objection during the hearing on the preliminary objections on jurisdictional issues. (¶¶ 100-101).

In light of above, the Tribunal concluded that the BIT was in force and was applicable to the dispute. (¶ 102).

2.2. Analysis of second jurisdictional issue: the Parties' consent to submit the dispute to arbitration

Respondent maintained that the Claimant did not demonstrate the existence of the parties' written consent to submit the dispute to arbitration as required by Article 25 of the ICSID Convention. (¶ 103).

Claimant submitted that Respondent gave its consent to the present arbitration proceedings when voluntarily accepting the provisional application of the BIT pursuant to its Article 12 (4), while Claimant expressed its written consent when it submitted the Request for Arbitration. (¶ 104).

According to the Tribunal, Respondent's argument could not be sustained since the execution of the BIT is a clear evidence of Respondent's consent to take on the international obligations implicitly stemming from the BIT, including the referral of any disputes arising therefrom to international arbitration. It also held that Claimant expressed its consent to arbitrate by submitting the Request for Arbitration. (¶ 105). Further, the Tribunal found that Article 25 of the ICSID Convention was not

¹ The Tribunal relied on the definition of "investment" provided for in Article 1 (2) of the BIT: "[...] any type of asset that was invested by investors of a Contracting Party on the territory of the other Contracting Party in accordance with the laws of the latter."

applicable to the arbitration proceedings since they had been instituted under the scope of the Rules. In this regard, the Tribunal quoted Article 2 of the Rules that stipulates that the proceedings initiated pursuant to the Additional Facility Rules are outside the jurisdiction of the Centre and, therefore, none of the ICSID Convention provisions shall be applicable. (¶ 106).

Consequently, the Tribunal concluded that the Parties had effectively expressed their consent to be bound by the BIT which, as already stated, was in force as of the date of execution. (¶ 107).

2.3. Analysis of the third jurisdictional issue: The legal nature of the dispute.

In relation to the third jurisdictional issue, Respondent argued that the controversy among the Parties did not involve a legal dispute as required by Article 25(1) of the ICSID Convention. It submitted that a legal dispute exists where the action seeks compensation for damages and it is based on a prior contract, national laws or an international treaty which was not the case here. (¶ 108).

Claimant invoked Article 2(a) of the Rules arguing that the dispute was based on legal disagreements that arose directly out of an investment. Consequently, it claimed the full compensation for damages plus the expenses incurred as a result of Respondent's violation of several BIT provisions. (¶ 109)

The Tribunal reiterated that the ICSID Convention was not applicable to the proceedings because they had been initiated and conducted under the Rules. However, the Tribunal further observed that the Rules also make reference to legal disputes. In this regard, it found that the claim pleaded by the Claimant constituted, *prima facie*, a legal dispute since Claimant sought compensation for the alleged violations of the protection standards provided for in the BIT. (¶ 110).

2.4. Analysis of the fourth jurisdictional issue: whether the Claimant was an investor or not

Respondent submitted that Grupo Contreras was not an investor under the terms of the BIT, since it had not made an investment in Equatorial Guinea, pursuant to Article 1(1) and (3), and consequently, the Tribunal had no jurisdiction to hear the case. (¶112).

Claimant, in response to Respondent's arguments that the investment was not made in accordance with the laws of Equatorial Guinea, maintained that Respondent's jurisdictional objection pertained to the substance of the case and could not be considered a preliminary objection. Claimant appealed to the definitions of investor and investment provided for in the BIT to assert its right to the jurisdiction of the Tribunal, stating that it held shares (and other participation interests) in companies, pursuant to Article 1(2) of the BIT. The Claimant explained that Grupo Contreras

was incorporated under the laws of the Kingdom of Spain and, consequently, was covered by Article 1(1)(b) of the BIT because it was a Spanish investor, which invested in Equatorial Guinea through its ownership stake in Nueva Edificacion. Further, it submitted that it made investments in Equatorial Guinea in accordance with local laws and that the Government of Equatorial Guinea recognized its nature of investor in letters issued by Equatorial Guinea's high ranked officials. (¶¶ 113-117).

The Tribunal first noted that in order to decide on its jurisdiction it was imperative to analyze whether the Claimant qualified as an investor, whether it made investments on the territory of Equatorial Guinea and whether such investments had been made in accordance with the host State laws. The Tribunal considered the definition of Investor contained in the BIT and concluded that Grupo Contreras qualified as a company of Spanish nationality pursuant to Article 1(1)(b) of the BIT because it was incorporated and had its main place of business in Spain. In addition, it qualified as a company that owned or controlled a company incorporated in the host State, in accordance with Article 1(2) of the BIT. However, the Tribunal disagreed with Respondent on the fact that the letters signed by the Government of Equatorial Guinea's high officials were sufficient evidence of its nature of investor. In fact, contrary to Claimant's arguments, the Tribunal explained that these letters showed the disagreements among the parties, since such letters contained the allegation made by the authorities of the Government of Equatorial Guinea that the Grupo Contrera had failed to make significant investments according to local laws. Furthermore, the Tribunal underscored that in order for Claimant to be deemed an investor protected by the BIT, it was necessary not only that Claimant had complied with the nationality requirement but also that it had made investments in the territory of Equatorial Guinea in accordance with local laws. (¶¶ 121-123)

In light of the foregoing, the Tribunal concluded that it had been satisfied as to the Spanish nationality of Claimant, and that it should then have to consider whether Claimant had made an investment in the territory of the host State. (¶124).

2.5. Analysis of the fifth jurisdictional issue: if the alleged investment was effectively made.

The Tribunal began its analysis on this point by highlighting that according to the BIT wording and context, the definition of "investor" was strictly linked with that of "investment". In this regard, the Tribunal explained that without an investment made in the territory of one of the Contracting Parties to the BIT by a national or a company of the other Contracting Party in conformity with the laws of the host State, it was not possible to assert the existence of an investor protected under the BIT. (¶ 126).

Regarding this point, the Respondent objected to the Tribunal's jurisdiction arguing that Claimant had not made an investment that could be protected under the BIT, because it did not make any contribution in Equatorial Guinea's territory and there was no contractual relationship with Claimant that justified such an investment. Respondent further asserted that there was no investment, since Claimant did not comply with the requirements provided for in Equatorial Guinea's laws to consider that a contract had been duly executed with the State. Respondent therefore maintained that the activities held by Grupo Contreras in Equatorial Guinea could not be considered investments protected under the BIT. (¶¶128-130).

Claimant on the other hand, basing its arguments on the "Salini test" asserted that it had complied with the necessary requirements for an investment to exist in terms of contribution, risk and duration. In addition, Grupo Contreras argued that the investments were based on (i) contracts agreed upon with the Government of Equatorial Guinea for the development of construction projects in Malabo and Bata and (ii) a contract directly awarded by the State for construction works in Oyala. It further asserted that the investments were made in conformity with Equatorial Guinea's local laws. Furthermore, Claimant alleged that it had made a cash disbursement of one million Euro and that this contribution, coupled with its participation interest in a company, were evidence of its nature of investor. Finally, Claimant argued that the purchase of construction machinery in Spain and the expenses resulting from the creation of companies and the execution of contracts with subcontractors were also part of its investment. (¶¶131-134).

The Tribunal, applying the general rules of interpretation provided for in Article 31 of the Vienna Convention on the Law of Treaties, noted that although Article 1(2) of the BIT did not contain a restrictive and closed list of investments, the definition of investment provided therein did require the investor to be in conformity with the local laws of the other Contracting Party. The Tribunal also noted that pursuant to Article 2(a) of the Rules it had jurisdiction if the dispute arose from an investment and explained that it was possible and sometimes necessary to identify an investment through the meaning provided for in a Treaty (¶¶ 136 -139).

In this regard, the Tribunal invoked the Salini test but also noted that the parties disputed the existence of an investment based on the existence (the Claimant's view) or not (the Respondent's view) of a contribution arising out of a contractual relationship. The Tribunal also observed that the parties disagreed on whether the investment had been made in conformity to Equatorial Guinea's local laws.

As a result of this analysis, the Tribunal decided that it would first consider the contractual relationships invoked by Claimant as the basis of its investment, making a distinction between (i) the alleged contractual relationship for the performance of construction works in Malabo and Bata and (ii) the alleged contract directly awarded

by the State for the construction works in Oyala. Then, the Tribunal would analyze the conformity of the alleged investments to Equatorial Guinea's laws. (¶¶ 140-142).

2.5.1. Investment related to the construction projects in Malabo and Bata.

2.5.1.i The contractual relationship between the Parties.

Respondent maintained that there was no contractual relationship with the Claimant and that Claimant did not hold shares or other participation interest in companies incorporated under the laws of Equatorial Guinea. Respondent argued that, on the one hand, the agreement signed with Grupo Contrears was a mere memorandum of understanding and intentions, and that on the other hand, Claimant withdrew the capital contributed to Nueva Edificacion, leaving the company's capital below the minimum required by local law. Concerning the joint venture, Respondent asserted that it had never been incorporated and no contributions had been made by Claimant. In addition, Respondent objected that the acquisition of machinery in Spain could be considered an investment, on the grounds that they had been purchased prior to Equatorial Guinea's approval of Claimant's projects. (¶¶145-148).

In response, Claimant argued that the investments were based on contracts executed with Equatorial Guinea's authorities by means of which it invested in (i) the creation of a corporate structure with the needed capital contribution, (ii) the development of the plans and studies for the projects that had been delivered to Equatorial Guinea's authorities and (iii) the hiring of subcontractors and purchase of machinery. (¶ 160).

After analyzing the wording of the agreements executed by the Parties, mainly the "Constitution Agreement"² according to which Claimant was entrusted with the preparation of technical studies and final projects for the construction of certain manufacturing plants (¶167), the Tribunal noted that the rights and obligations arising out of the agreement were conditioned to the execution of construction contracts with the government and the set up and operation of the joint venture INCOGESA, all of this in conformity with the requirements provided for in the legislation of Equatorial Guinea. As a result, in the Tribunal's view it was imperative to determine whether a construction contract existed as the basis for Claimant's investment, and whether the joint venture INCOGESA had been duly incorporated and capable of performing its purpose. The Tribunal decided to address the aforementioned issues as part of its analysis to ascertain whether investments had been made in conformity with the host State's laws. (¶171).

2.5.1.ii Conformity with the laws of the host State

Respondent submitted that Claimant had not complied with the requirements provided for in its laws, so it could not be said that Claimant had made an

² "Acuerdo de Constitución" in Spanish.

investment that was protected under the BIT. (¶ 172) Respondent mentioned several Equatorial Guinea's laws as those applicable to investments³ (¶ 173) and argued that Claimant (i) did not comply with the Investment Law because it did not obtain the proper certificate of investor issued by the competent authority; (¶ 174) (ii) did not execute a contract with the State since, according to the State Contract Law, the execution of a construction contract with the State required the prior project's approval and further proceedings before the administrative authorities (on this particular point Respondent further asserted that the lack of response of the administration could not be construed as an acceptance); (¶¶ 179-180) (iii) did not comply with the Uniform Law because neither Nueva Edificación nor INCONESA had the proper authorizations, place of incorporation, legal representative and sufficient capital to operate in accordance with local laws; (¶¶ 181-187)

Claimant on the other hand, maintained that it duly complied with the obligations and requirements established by local laws when it made the investments in Equatorial Guinea. Grupo Contreras argued that both companies were incorporated in accordance with local law (¶195). It further maintained that its investment had been approved since, according to the agreements between the parties and the State Contract Law, the administration had 60 days to grant the approval. Consequently, according to the local Law of Administrative Proceedings, the administration's lack of response in due time meant the approval of its investment. (¶¶¶ 191, 193-194). In response to Respondent's allegations of the companies' insufficient capital, Claimant justified its withdrawal from Nueva Edificación based on the need to protect its investment in the face of an imminent expropriation. (¶ 196). In addition, it argued that the fact that a company may have been in a situation next to dissolution had no effect on the Tribunal's jurisdiction, as long as the company was duly incorporated. (¶ 197).

As a preliminary matter, the Tribunal emphasized the important role of the host State's the local law since, as already explained, the definition of investment provided for in the BIT refers to any asset invested by an investor of a Contracting Party in the territory of the other Contracting Party, in accordance with the laws of the latter. (¶ 199). In this regard, the Tribunal considered that the agreements with the State that had been invoked by Claimant as the basis for its investments should be analyzed under the laws of Equatorial Guinea, in particular, the State Contract Law that is the one regulating any contract executed with the State. (¶ 200).

Accordingly, the Tribunal observed that there was no evidence demonstrating that Claimant complied with the administrative proceedings required by the law in order to execute a contract with the State. (¶ 204). Regarding Claimants argument that the

³ In particular, Respondent mentioned (i) the Law of Investment Regime in the Republic of Equatorial Guinea (the "Investment Law"), (ii) the Basis of State Contract Law (the "State Contract Law") and (iii) the Uniform Act relating to Commercial Companies and Economic Interest Groups of the Organization for the Harmonization of Commercial Law in Africa (the "Uniform Law").

lack of response should be construed as an acceptance, and therefore an approval of the investment, the Tribunal explained that the Law of Administrative Proceedings of Equatorial Guinea applies if there is no other law providing for a particular administrative procedure. Therefore, as the State Contract Law establishes particular proceedings and does not recognize the administration's lack of response as an acceptance, the Tribunal concluded that the lack of response did not replace the State's voluntary expression of its intention to execute a contract that is required under Equatorial Guinea's law. (¶¶ 209-210). The Tribunal also asserted that the companies created by Respondent did not comply with the minimum required capital. As per the Respondent's argument that it withdrew the substantial capital contributed to Nueva Edificación due to the risk of an imminent expropriation, the Tribunal found that there was no evidence produced in the proceedings that could possibly demonstrate Claimant's assertions. (¶ 224).

Finally, the Tribunal noted that the burden of proof regarding the Tribunal's jurisdiction was to be borne by the Party that invoked the Tribunal's jurisdiction. In this regard, the Tribunal explained that Claimant's lack of due diligence could not be excused on the grounds that the State had failed to provide the necessary information as to the documents needed to operate in Equatorial Guinea. (¶ 228). Accordingly, the Tribunal relying on the evidence produced in the proceedings found that Claimant did not demonstrate (i) the existence of a construction contract with Equatorial Guinea; (ii) that the companies through which it alleged to have made the investment had been duly incorporated in accordance with the host State's law; (iii) the fulfillment of the pre-requisites stipulated in the agreement with the State⁴ nor (iv) any agreement by which Claimant was supposed to hire subcontractors and invest in machinery. (¶¶ 229-232).

In light of this analysis, the Tribunal concluded that the Claimant did not comply with Equatorial Guinea's laws and therefore could not be deemed an investor since the alleged investments had not been made in accordance with the BIT. (¶ 234).

2.5.1. Investment related to the construction project in Oyala.

2.5.1.i The contract directly awarded to Claimant.

The Respondent's position on this point was that, according to State Contract Law, the award of the construction project to the Claimant was provisional and never turned out to be a formal construction contract due to Claimant's conduct, i.e. the initiation of the arbitral proceedings. (¶ 235-236).

⁴ Regarding this point, the Tribunal noted that the expectation to invest was subject to the fulfillment of the requirements stipulated in the agreement with the State which included, among others, the State's approval after the necessary administrative steps had been taken.

Claimant submitted that the State directly awarded the construction contract of Oyala's project to Grupo Contreras and that the investment was based on the expenses and the subsequent damages it suffered during the performance of the contract. (¶¶ 237-238).

The Tribunal opined that in order to determine the existence of an investment based on a contract directly awarded by the State, it is imperative to analyze whether the contract had been awarded in accordance with the laws of the host State.

2.5.1.ii Conformity with the laws of the host State

Respondent invoked the State Contract Law that established that the provisional award of a construction project did not grant specific rights to the awardee, which only could acquire them, once the award has been approved by the competent authority, and as a result, is considered to be final. Respondent further argued that the Claimant did not produce any evidence that proved public notice of the contract "directly" awarded, this condition being required by the local laws. (¶¶ 242-244).

Claimant on the other hand, submitted that there existed no such a thing as a provisionally awarded contract in the realm of contracts directly awarded, since once the awardee has been appointed and all the necessary steps to make a decision as to the appointment have already been taken, the contract is directly awarded without any further steps.

The Tribunal first noted that according to local law, although the project was actually awarded to the Claimant by Equatorial Guinea's competent authority, in order for the award to be final, the awardee needed to accept said award and to execute a formal contract whereby the rights and obligations of the parties were specified. (¶ 250). In addition, the Tribunal noted that State Contract Law requires the publication of the contract award in the State's Official Bulletin in order for it to be considered final and duly executed. (¶ 251). Furthermore, the Tribunal found that there was no evidence that Claimant had requested the State the execution of the construction contract. As a result, it considered that Claimant abandoned its potential rights to invest in the Oyala project. (¶¶ 252-253)

For the aforementioned reasons, the Tribunal decided that because the provisional award of the construction project had not been, ultimately, confirmed by the execution of the contract as required by Equatorial Guinea's laws, the Claimant's alleged expenses were based on preliminary works for a prospective investment, which were not to be considered investments. (¶¶ 254, 257).

3. Decision

The Tribunal accepted Equatorial Guinea's jurisdictional objections to the effect that the dispute did not arise out of an investment, and that Claimant was not an investor

protected under the BIT. (¶ 263). Accordingly, the Tribunal decided that it had no jurisdiction over the case and, consequently, found it unnecessary to analyze Respondent's petition as to whether the dispute should be submitted to Equatorial Guinea's State courts. (¶ 264) Finally, the Tribunal decided the parties should share the costs equally between them and that each party should bear its legal fees. (¶¶ 275-276).

4. Dissenting Opinion of Francisco Orrego Vicuña (Claimant Appointed Arbitrator)

Mr. Orrego Vicuña dissented from the majority, holding that the Tribunal had jurisdiction over the case. (¶ 1).

First, he shared the view of the majority that the nature of investor was strictly linked to the investment made and that the definition of investment went far beyond the list provided for in Article 1 of the BIT. (¶ 2) However, in his opinion if the investment could not be completed within an initial stage, this was not due to the investor's lack of interest but to the factual and legal hurdles that arose from the performance of the projects, evidence of which can be found in the Parties' disagreements that were submitted to arbitration. (¶ 4).

Mr. Orrego Vicuña disagreed with the majority on the issue that there was no contractual relationship between the parties. On Mr. Orrego Vicuña's view, it was clear that under civil law the essence of a contract could not be found in its formality, but instead in the meeting of the minds, usually expressed by means of an offer and an acceptance. In his opinion, in the case at hand, there had been a meeting of the minds which was evidenced by the executions of several agreements and the creation of companies in order to comply with the tasks the State had entrusted the investor with, regarding the construction of manufacturing plants and housing. According to Mr. Orrego Vicuña's opinion, the memorandum of understanding executed by the parties as well the commitment to create a joint venture went beyond mere intentions, as they involved the distribution of costs and subsequent funding. In addition, he noted that the investor's delivery of the projects' technical studies and plans to the State, in accordance with their prior agreement, ought to be considered further evidence of the existence of a contract. (¶¶ 5-7).

Mr. Orrego Vicuña disagreed with the majority on the issue that the lack of execution of a construction contract with the State and the non-performance of the procedure established by local law to that effect would undermine the existence of an investment. He also disagreed with the majority's opinion that the administration's lack of response could not be construed as an acceptance. In his view, even if the company incorporated by Claimant did not effectively operate, this did not mean that Claimant was neither entitled to any rights nor subject to any obligations. He further held that the interruption of the company's existence could

not be imputed to the investor, since it was apparent that he intended to carry out the project. In his view that situation should be attributed to the hurdles that arose during the process and that were submitted to the Tribunal's consideration. (¶¶ 8-9).

As per the lack or insufficiency of capital contribution by the investor, Mr. Orrego Vicuña noted that the policy implemented by the State created uncertainty and that situation was an expression of the risk, which the majority wrongly considered was not present in the investment. (¶11).

Contrary to the majority, Mr. Orrego Vicuña opined that in a context of perceived risk of expropriation, even if subjective, it is not reasonable that the investor should have exposed its capital to a vulnerable situation. (¶12). Furthermore, in Mr. Orrego Vicuña's view it was improper to consider that the investor had not acted adequately when it did not make the capital contribution to INCOGESA, because in its view, at that time the environment was not conducive to the performance of the project and the collaboration of the Parties; therefore, he considered that it was not reasonable to further develop the project. (¶ 13)

Mr. Orrego Vicuña disagreed with his colleagues on their opinion that the Claimant acted negligently as he had no knowledge of the local laws. He noted that if an investor is executing a contract with the State, the latter is under the obligation to request the performance of all the necessary steps required by the laws. (¶ 14).

Regarding the construction works to be performed in Oyala, Mr. Orrega Vicuña was of the view that the contract directly awarded, even if it had been alleged to be provisional, recognized the existence of an investor and an investment related to the performance of construction works. (¶ 15).

Mr. Orrego Vicuña finally noted that that the invested amount, the extent and the cost of the preparatory works and the potential profits that were not made fall within the substance of the case. Therefore, in his view, the majority's decision deprived the investor of the opportunity to demonstrate liability and request compensation for damages, which is the essence of its right to access to justice. (¶16).

Mr. Orrego Vicuña further introduced an "Addenda" to his opinion where he noted that Respondent should pay all the costs of the proceedings, including legal fees, due to Respondent's contempt of the Tribunal's and ICSID Secretary's decisions concerning costs and the misleading information it provided in this regard.

Finally, the President of the Tribunal, Mr. Bernardo Sepúlveda Amor and co-arbitrator Mr. Raúl Vinuesa issued a clarification resolution concerning Mr. Orrego Vicuña "Addenda" where they asserted that there was no evidence proving Respondent's contempt of the Tribunal and they reiterated their decision on allocation of the costs of the proceedings.