Concurring Opinion of Mr J Christopher Thomas QC

1. I have found the issues raised by the multi-party nature of the proceeding to be very difficult indeed, but in the end have subscribed to the course charted by the Tribunal. Faced with a situation in which the Claimants all *prima facie* would have had a basis for invoking the BIT had they filed their claims individually, the issue presented to the Tribunal has been to decide whether the fact that they filed a single, collective action without the Respondent's consent fundamentally changes the nature of the claims such as to deprive the Tribunal of the jurisdiction to hear them.

2. The Tribunal has concluded that if in fact it is presented with a "single dispute", it falls within the Parties' written consent required by Article 25 of the Convention; the Tribunal sees no additional requirement for a special consent.[172] The claims either fall to be considered as a single dispute within the Tribunal's jurisdiction or they do not. Not without misgivings, I have come to agree with this decision.

3. To begin, in my view, the ICSID Convention is capable of supporting multi-party arbitration. At the Third Annual Meeting of the ICSID Administrative Council, in 1969, the then-Secretary-General, Aron Broches, discussed the Secretariat's intention to develop rules and procedures for such arbitrations.[173] The stated objective was to draft model "Special Consent Clauses" and to consider what "special Regulations and Rules" might be required for multi-party ICSID arbitrations.[174]

4. Although Mr. Broches' comments were made in contemplation of contractual, rather than treaty arbitration, they evince the view that the Convention is sufficiently broadly drafted so as to be able to encompass this type of arbitration and, on my reading of the Convention, this is the case. They also indicate his view, at least, that special consent clauses and perhaps special regulations and rules would be required to allow the Convention to provide proper support to such proceedings.[175] In the end, however, no such special clauses, regulations or rules were developed and approved by the ICSID Administrative Council and since the beginning of ICSID arbitration the various iterations of the ICSID Arbitration Rules have not departed from what appears to me to be an assumed predicate of bilateral disputes.

---

172 Decision, paragraphs 280-292.

173 As noted by the Tribunal at paragraph 271 of the Decision.

174 Address by A. BROCHES, Secretary-General, to the Third Annual Meeting of the ICSID Administrative Council (September 29, 1969): "…as I observed at our meeting last year, many significant international investment arrangements involve more than just two parties, and for these it would be desirable to insert into the related agreements provisions for the settlement of multipartite disputes. At that time I suggested that it might be useful to promulgate special Regulations and Rules to facilitate such proceedings, but pending such a step by this Council we are now formulating a set of Special Consent Clauses that parties could insert into multipartite investment contracts."

175 I am aware that the statements of the Secretary-General do not fit within the normal interpretative sources set out in the Vienna Convention on the Law of Treaties. Allowance must be made, however, for the seminal role that Mr Broches played in the conception and elaboration of the Convention. His views are to be accorded special weight.

5. Various ICSID tribunals have since considered claims brought by more than one claimant; as noted by the Tribunal, most of these claims were proceeded on the basis that the co-claimants had different interests in the same investment vehicle.[176]

6. The possibility of arbitrating multi-party investment treaty disputes did not arise until the early 1990s. Then, starting with the NAFTA, pairs and groupings of states began to address the possibility of multiple claims by different parties with common issues of fact and/or law by including consolidation provisions in their treaties. Such provisions allow any party (one of a number of claimants or a respondent) to apply to a "consolidation tribunal" for the consolidation of separate claims that share common questions of fact and/or law. [177] Based upon the NAFTA example, many states have subsequently included consolidation provisions in their treaties.[178] The very existence of consolidation provisions recognizes that the commonalities between treaty claims may be so strong as to justify their being heard together in whole or in part and that this may dictate forcibly consolidating separate claims over the objection of one or more disputing parties.[179]

---

176 Decision, paragraph 285.

177 NAFTA Article 1126, Consolidation.

178 Consolidation provisions akin to NAFTA Article 1126 have since been negotiated in many bilateral investment treaties and free trade agreements entered into by each of the NAFTA Parties with other ICSID Contracting States and have been adopted by other non-NAFTA States in their treaty-making practice. States as diverse as Australia, Austria, Belarus, Belgium, Brunei, Chile, China, Costa Rica, the Dominican Republic, El Salvador, Germany, Guatemala, Honduras, Iceland, India, Italy, Korea, Japan, Jordan, Malaysia, Morocco, Nicaragua, the Netherlands, New Zealand, Oman, Panama, Peru, the Philippines, Rwanda, Thailand, Singapore, Slovakia, Sweden, Switzerland, the United Kingdom, and Uruguay have all entered into investment treaties with consolidation provisions. For example, the United States has included a power vested in the tribunal to consolidate proceedings in subsequent free trade agreements with investment chapters such as the CAFTA-DR, Chile, Korea, Morocco, Jordan, Oman, Panama, Peru, and Singapore. All are available at: http://www.ustr.gov/trade-agreements/free-trade-agreements. See also, Article 33 of the 2012 U.S. Model Bilateral Investment Treaty. For the proliferation of consolidation clauses, variously labelled as "Consolidation" or "Consolidation of Multiple Claims" in Mexico's treaties, see various bilateral investment treaties entered into by Mexico with various members of the European Union and other states such as: Australia, China, Iceland, India, Korea, and Switzerland. All are available at: http://www.unctadxi.org/templates/DocSearch 779.aspx. Likewise, Canada has entered into a number of post-NAFTA Foreign Investment Protection Agreements (FIPAs) and free trade agreements did provide for consolidation of claims. These can be seen at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d. The ASEAN Comprehensive Investment Agreement also includes a consolidation provision as does the Agreement establishing the ASEAN-Australia-New Zealand Free Trade Agreement (http://www.asean.fta.govt.nz/). The foregoing list of ICSID Contracting States that have agreed consolidation provisions in recent treaties does not purport to be exhaustive.

179 In a Discussion Paper prepared for UNCITRAL by Jan Paulsson and Georgios Petrochilos, when UNCITRAL launched the process of revising its 1976 Arbitration Rules, NAFTA Article 1126 was described as "remarkably far-reaching" in going so far as to permit consolidation even when the parties are not the same and allowing consolidation to proceed over the objections of claimants. See "Revision of the UNCITRAL Arbitration Rules", a Report by Jan Paulsson and Georgios Petrochilos, Freshfields Bruckhaus Deringer, Paris, paragraph 126 and footnote 138. Available at: http://www.uncitral.org/pdf/spanish/tac/events/hond07/arbrules_report.pdf. The authors' description is an indication of how radically different a treaty-based consolidation provision was from the existing practices of international commercial arbitration. As the 1976 UNCITRAL Rules stood at the time of the revision process, "consolidation [was] possible only where the parties specifically so agree". UN Commission on International Trade Law Working Group II (Arbitration), Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/WG.II/WP. 143 (20 July

7. Such a process contains important procedural features. All parties – claimants and respondents alike – are able to make submissions to a tribunal in favour of or against consolidation. This strikes a balance, recognizes the equality of the parties, and takes into consideration the interests of all parties. Put another way, no party has a dominant say in whether the claims will be consolidated, because that determination rests in the hands of the tribunal. It will decide whether the claims will proceed separately or together, in whole or in part. (In essence, it decides whether there is a "single dispute" in the sense used by the present Tribunal.[180])

8. However, there are many treaties – including the Treaty governing the present dispute – that lack such a provision, with the consequence that, faced with a decision by one side to present the claims collectively, they throw the parties and tribunals back to first principles.

9. In my view, the Claimants have effectively "self-consolidated" their individual claims by presenting them as one collective claim. As observed at paragraph 284 of the Decision, in the present Arbitration, there exist no separate sets of parallel proceedings, "but only one single proceeding instituted against the same Respondent by a multiple group of Claimants." The logic and attractiveness of this approach from the Claimants' perspective can be well understood given the issues of fact and law that are evidently common to their claims (for example, their acquisition of security entitlements derived from bonds issued by the Argentine Republic, the fact of sovereign default and the enactment of the *Ley Cerrojo*), as well as the cost and efficiency gains derived from such a process. It had the added advantage of presenting the Respondent with a *fait accompli* (or more precisely, in light of the Tribunal's Decision, something close to being a *fait accompli*) on the proceeding's unfolding as a collective one over the Respondent's vigorously stated objections.

10. As the Tribunal has pointed out, in cases such as *Canadian Cattlemen* and *Bayview*, the respondents insisted that (in the absence of a formal application to a consolidation tribunal) they had to give their consent to the consolidation of individual claims that were sought to be heard together.[181] In practice, therefore, as the Tribunal has recognized, there are examples of respondents insisting on their claimed right to consent to individual claims

---

2006), paragraph 68. (A RA 301.) The 2010 UNCITRAL Arbitration Rules continue to emphasise the central role of party consent. Garth Schofield in "The 2010 UNCITRAL Arbitration Rules: Changes and Implications for Practice," p 5. Available at: http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/THE%202010%20UNCITRAL%20ARBITRATION%20RULES.pdf, observed that the 2010 UNCITRAL Rules explicitly provide for the joinder of third parties, subject to the condition that any such additional parties were also party to the underlying arbitration agreement, but they did not incorporate more expansive proposals, including the non-consensual joinder of parties not party to the original arbitration agreement, or the consolidation of related arbitrations arising under different instruments.

180 *In the Matter of: The North American Free Trade Agreement; And in the Matter of: A Request for Consolidation by the United In States of the claims in: Corn Products International, v. United Mexican States (ICSID Case No. ARB (AF)/04/1) and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5)*, available at: http://italaw.com/sites/default/files/case-documents/ita0242.pdf; *Canfor Corporation v. United States of America and Tembec et al v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, available at: http://www.state.gov/documents/organization/53113.pdf.

181 Decision, paragraphs 285, 288.

being heard collectively (and this echoes Mr Broches' comment on the need for a Special Consent Clause for multi-party ICSID arbitrations). This is due to the fact that registering a group of individual claims as one single proceeding can conceivably have an impact, both positively and negatively, on each Party's ability to make its case.

11. In the absence of a consolidation provision, the Tribunal has dealt with the issue as follows. Having noted that there is only one single proceeding begun against the same Respondent by a multiple group of Claimants, it comments: "If, all the same, joinder, or alternatively consolidation, would not be admissible as a unilateral move by a group of claimants in separate but parallel arbitrations, the question inevitably arises, in what way is the position different if the grouping takes place beforehand, *i.e.* at the stage of the initiation of the arbitral proceedings at the unilateral initiative of a number of individual claimants?"[182] The Tribunal has answered this question by holding, at paragraphs 292-294, that a number of individual claimants can take the unilateral initiative of filing their claims together if there is a single dispute between the claimants and the respondent.

12. In my view, the Tribunal's search for the existence of a single dispute where, on the one hand, all Claimants have felt the effect of the Respondent's measures, but on the other hand, they have acquired different security entitlements in different bond issues at different times and in different circumstances, represents the best possible solution in the circumstances, having regard to: (i) the absence of a special consent clause and special rules and procedures on multi-party ICSID arbitrations; (ii) the absence of a consolidation provision in the Treaty; and (iii) the fundamental precepts of ICSID arbitration (*viz.* equality of arms and a full opportunity to make one's case). In the event that the Tribunal finds such a dispute, consent to this multi-party arbitration exists.

13. This leads to my final point, which is to underscore the Tribunal's recording, at paragraph 294, of the need to ensure that there is sufficient Claimant-specific evidence on the record in order to satisfy itself as to the existence, or not, of a single dispute and to ensure that all parties have a full opportunity to make their respective cases. This, in my view, is of seminal importance to the proper administration of justice in this case.

[SIGNED]

J. Christopher Thomas QC

182 Decision, paragraph 284.