The International Centre for Settlement of Investment Disputes

Aguas del Tunari, S.A., Claimant/Investor v. Republic of Bolivia, Respondent/Contracting Party	ICSID Case No. ARB/02/3

Decision on Respondent's Objections to Jurisdiction

Members of the Tribunal
David D. Caron, President
José Luis Alberro-Semerena
Henri C. Alvarez

Representing Aguas del Tunari, S.A
Michael E. Curtin
Aguas del Tunari, S.A.

Robert G. Volterra (until February 11, 2005)
Matthew Weiniger
Herbert Smith

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Enrique Barrios
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Representing the Republic of Bolivia
Mario Moreno Viruez
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Criales, Urcullo, Freire & Villegas

Washington, D.C., October 21, 2005

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Introduction and Summary

1. The Claimant in this proceeding is Aguas del Tunari, S.A. ("AdT"), a company organized under the laws of Bolivia.

2. AdT, under the "Contract for Concession of Use of Water and for the Public Potable Water and Sewer Service for the City of Cochabamba" (the "Concession") concluded in September 1999 and by other contracts related to this Concession, received the right to provide water and sewage services for the city of Cochabamba, Bolivia. By early April 2000, the Concession had ceased to be effective.

3. AdT claims the Republic of Bolivia ("Bolivia") through various acts and omissions leading up to, and including, the rescission of the Concession in April 2000, breached various provisions of a bilateral investment treaty, namely the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (the "Netherlands-Bolivia BIT" or "BIT").[1]

4. AdT initiated this proceeding against Bolivia before the International Centre for Settlement of Investment Disputes ("ICSID") invoking the Netherlands-Bolivia BIT as the basis of jurisdiction.

5. Bolivia has raised a number of objections to the jurisdiction of the Tribunal including arguments that Bolivia did not consent to ICSID jurisdiction and that AdT is not a Dutch national as defined by the BIT.

6. The Parties agreed that these objections should be considered as a preliminary matter.

7. In this Decision, the Tribunal concludes that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.

Procedural History

The Request for Arbitration

8. AdT initiated this proceeding on November 12, 2001, when it filed a Request for Arbitration with ICSID. In the Request for Arbitration, AdT alleged that various actions attributable to Bolivia constituted an expropriation of its investment in Bolivia and were in breach of Bolivia's obligations under the Netherlands-Bolivia BIT.

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[1] The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, *entered into force* November 1, 1994. The text is available online at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_bolivia.pdf. As to the national implementation of this treaty, see for Bolivia, Law No. 1586 of August 12, 1994, and for the Netherlands, Tractatenblad 1994, Nr. 239.

9. On December 5, 2001, Bolivia filed a document entitled "Memorial on ICSID Jurisdiction in the Aguas del Tunari S.A. Matter." In this document, Bolivia objected to ICSID jurisdiction on several bases and argued that the requested arbitration was "manifestly outside the jurisdiction" of ICSID.[2]

Notice of Registration

10. On February 25, 2002, the Secretary-General of ICSID provided both AdT and Bolivia with a "Notice of Registration" in the Arbitration Register of AdT's Request for Arbitration in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or "Convention").[3]

11. In issuing the Notice, the Secretary-General acknowledged Bolivia's opposition to the registration of the Request for Arbitration.[4] He also noted that the Secretariat's administrative task of registering the dispute was required under Article 36(3) of the ICSID Convention unless the dispute described in the Request for Arbitration was manifestly outside the jurisdiction of ICSID. Upon careful review of the information contained within the Request for Arbitration and supplemental correspondence made by the parties, the Secretary-General did not find the dispute to be "manifestly outside the jurisdiction of the Centre." The registration of the Request for Arbitration was made without prejudice to the rights of both parties to fully present their respective cases concerning jurisdiction to the Arbitral Tribunal that was to be convened under Articles 41 and 42 of the ICSID Convention.

The Appointment of Arbitrators

12. On April 19, 2002, after an exchange of correspondence, the parties agreed to use Article 37(2)(b) of the ICSID Convention to determine the number and method of the appointment of arbitrators. This Article provides for each party to appoint one arbitrator and the two parties to agree on a third arbitrator to serve as President of the Tribunal. On April 25, 2002, AdT appointed Henri Alvarez, a national of Canada, as a member of the Arbitration Tribunal. On April 29, 2002, Bolivia appointed Dr. José Luis Alberro-Semerena, a national of Mexico, as a member of the Tribunal. No objections were raised to either appointment.

13. On May 30, 2002, having failed to reach a consensus by a May 29 deadline set by the Secretary-General for the appointment of the President of the Tribunal, AdT requested that the Chairman of the ICSID Administrative Council designate an arbitrator to serve as

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[2] Memorial of the Republic of Bolivia, p. 1, ¶ 1.1. (hereinafter "Resp. Mem." See Appendix I for a complete list of abbreviations used in this Decision).

[3] "Notice of Registration," February 25, 2002 to AdT and Bolivia, The Secretary-General took note of AdT's supplemental letters to the Centre of January 4, January 21, February 5, and February 14, 2002 as supplementing AdT's original Request for Arbitration.

[4] Letter of Ko-Yung Tang, Secretary-General, ICSID, February 25, 2002 to AdT and Bolivia. The Secretary-General took note of Bolivia's supplemental letters to the Centre on December 5, 2001, and January 7, January 29, February 8, and February 15, 2002.

President of the Tribunal as provided by Article 38 of the Convention and Rule 4 of the ICSID Arbitration Rules ("Arbitration Rules").

14. On June 26, 2002, absent any objection on the part of the parties, the President of the ICSID Administrative Council appointed Professor David D. Caron, a national of the United States, as President of the Tribunal. The Tribunal was officially constituted on July 5, 2002, in accordance with the Convention and the Arbitration Rules. Ms. Margrete Stevens has served as Secretary of the Tribunal.[5]

Petition of Non Governmental Organization to Intervene and for Other Forms of Involvement of Non-Disputing Parties

15. On August 28, 2002, an environmental non-governmental organization filed a Petition dated August 29, 2002, with the Tribunal on behalf of "La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado," requesting permission to intervene in the arbitration, or for other forms of involvement in these proceedings.

16. The petitioners through their counsel, Earthjustice, requested that the Tribunal grant them standing to participate as parties in any proceedings convened to determine AdT's claim, and to afford the petitioners all rights of participation accorded to other parties. Alternatively, should party status be denied to one or more of the petitioners, the petitioners sought the right to participate in proceedings as *amici curiae*, meaning they would be allowed: (1) to make submissions concerning: the procedural aspects of the Tribunal, the jurisdiction of the Tribunal, the arbitrability of the claims raised by AdT and the merits of AdT's claims; (2) to attend all hearings of the Tribunal; (3) to make oral presentations during hearings of the Tribunal; and, (4) to have immediate access to all submissions made to the Tribunal.[6] In addition, petitioners requested that the Tribunal: (1) publicly disclose all statements, including written submissions, concerning the claims and defenses of both parties; (2) open all hearings to the public; and, (3) visit the area of Cochabamba.[7] Petitioners argued that they had standing since each petitioner had a direct interest in the subject matter of AdT's claim. Petitioners believed that their involvement would increase transparency in the international arbitral process and that they would provide "unique expertise and knowledge" during the Tribunal's proceedings and deliberations.[8]

17. On January 29, 2003, the President of the Tribunal wrote a letter to the petitioners acknowledging the petitioners' stated concerns over the resolution of this dispute. Based on

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[5] Ms. Frutos-Peterson was designated to serve as Secretary of the Tribunal. However, Ms. Frutos-Peterson subsequently became unavailable and Ms. Margrete Stevens was designated to serve as Secretary of the Tribunal on August 29, 2002.

[6] Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, SEMAPA Sur, Friends of the Earth-Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado, dated August 29, 2002, p. 19, ¶ 63.

[7] *Id.*, p. 6, ¶ 17.

[8] *Id.*, p. 2, ¶ 2.

its consideration of the petitioners' requests and the views of the parties to the dispute, the President wrote on behalf of the Tribunal that:

> [T]he Tribunal's unanimous opinion [is] that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non parties and, *a fortiori,* to the public generally; or to make the documents of the proceedings public.

The Tribunal's letter goes on to observe that "the consent required of the Parties to grant the requests is not present," and that "[a]lthough the Tribunal did not receive any indication that such consent may be forthcoming, the Tribunal remains open to any initiative from the parties in this regard."

18. Finally, the Tribunal wrote that it "is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work." It also emphasized that as far as future stages of proceedings, the Tribunal holds "this view without in any way prejudging the question of the extent of the Tribunal's authority to call witnesses or receive information from non-parties on its own initiative."[9]

First Session

19. The First Session of this Tribunal was held in Washington, D.C., on December 9, 2002.[10]

20. At the First Session, Bolivia reiterated its earlier objections and indicated that it would request the Tribunal to order the production of evidence by AdT in order for Bolivia to develop and support its objections to the jurisdiction of the Tribunal.

21. The Parties agreed, and the Tribunal concurred, that the question of the jurisdiction of this Tribunal would be decided as a preliminary matter.

22. The Tribunal indicated that although Bolivia had raised jurisdictional objections to the registration of the claim at the time of the claim's submission to the Centre, the rules and practice of the Centre called for the subsequent filing of "Objections to Jurisdiction" by Bolivia to put both AdT and the Tribunal on notice of Bolivia's objections. With this observation in mind and given Bolivia's stated intent to file a request for production of

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[9] The Tribunal notes that the Petition and the letter of the Tribunal responding to it are not a formal part of the record of this proceeding. The Tribunal observes that the Petition has been electronically published by the petitioners at http://www.earthjustice.org/news/documents/boliviapetition.pdf. Given the unusual character of the letter of the Tribunal, it is reprinted as Appendix III to this Decision.

[10] The December 9th date for the First Session was agreed upon following notice from the parties on August 29, 2002, of their agreement to postpone the originally scheduled date of September 9, 2002. The agenda for the First Session was based in part on a "Joint Submission to the Tribunal Regarding Preliminary Procedural Matters," filed by the parties on November 15, 2002.

evidence by AdT, the Tribunal made the following procedural decisions and memorialized these decisions in the minutes and transcript of the First Session. Specifically, the Tribunal ordered Bolivia to file its "Objections to Jurisdiction" and any request for the production of evidence by January 17, 2003; AdT was ordered to file its response to the request for production of evidence within two weeks of Bolivia's filing or by January 31, 2003, whichever was earlier; Bolivia was ordered to file any reply to AdT's response within one week of that reply or by February 7, 2003, whichever was earlier; and AdT was ordered to file any rejoinder to Bolivia's reply within one week of that reply or by February 14, 2003, whichever was earlier.

Procedural Order No. 1

23. In accordance with the Tribunal's orders, Bolivia timely filed a document entitled "Republic of Bolivia's Objection to Jurisdiction and Requests for the Production of Evidence and for Clarification of Procedures." AdT timely filed its "Response to Bolivia's Objection to Jurisdiction and Requests for the Production of Evidence and for Clarification of Procedures." Bolivia filed its "Reply" to AdT's Response on February 5, 2003; and AdT filed its "Rejoinder" to Bolivia's Reply on February 13, 2003.

24. On April 8, 2003, the Tribunal issued "Procedural Order No. 1" on Bolivia's requests for the production of evidence and Bolivia's motion for the immediate dismissal of the claims against it.

25. As to the request for production of evidence, the Tribunal determined that Article 43 of the Convention and Arbitration Rule 34(2) granted the Tribunal a substantial measure of discretion regarding the production of documentary evidence or witnesses from the parties although such discretion was guided by several considerations:

> 13. The Tribunal interprets Article 43 as granting the Tribunal a substantial measure of discretion in the ordering of the parties to produce documentary evidence or witnesses. *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 647 (Cambridge Univ. Press, 2001) (stating that the "tribunal has complete discretion in . . . exercising the power to summon further evidence"). The Tribunal finds that its exercise of this discretion is not without limits, however, and that Article 43 provides some guidance as to the exercise of its discretion. In general, the Tribunal's discretion to order the production of evidence is informed by concepts of materiality, relevance and specificity present in the laws of evidence generally and by the customs of evidentiary production in international arbitration generally. More particularly, Article 43 provides that the Tribunal may order the production of evidence at any stage of the proceedings when in the Tribunal's judgment such an order is "necessary."
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> 14. As a consequence, the Tribunal bears in mind a number of considerations in evaluating whether or not to order the production of evidence. These considerations include: the necessity of the requests made to the point the requesting party wishes to support, the relevance and likely merit of the point the requesting party seeks to support, the cost and burden of the request on the Claimant and the question of how the request may be specified so as to both fulfill legitimate requests by a party while not allowing inquires that are an abuse of process.
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> 15. At the close of the First Session, the Tribunal encouraged the Respondent in making its request for documents to provide "specificity in [its] identification of documents." Transcript of First Session at p. 58. The Tribunal notes that the requests for documents by

> the Respondent in the main do not specifically identify documents but are instead general. The Tribunal acknowledges that it would be difficult for the Respondent to be more specific given the broad factual context that it asserts must be examined in order to develop its second objection to jurisdiction. The Tribunal also notes that it is within its power under Article 43 of the ICSID Convention to employ its discretion to tailor and narrow Respondent's general requests, taking into account the considerations outlined in paragraph 14.

26. After considering AdT's asserted basis for, and Bolivia's objections to, jurisdiction, the Tribunal determined that neither party's arguments as to the necessity of the various requests for the production of evidence were sufficiently developed or clear so that the Tribunal could grant or deny these requests. The Tribunal wrote:

> 30. It is the view of the Tribunal that neither party's arguments as to the necessity of the various requests for production of evidence are sufficiently developed or clear that the Tribunal may order or deny such production at this time. The argument advanced by Respondent to support its requests for the production of documents requires the Tribunal to undertake consideration of the merits of Respondent's second jurisdictional objection without the benefit of full briefing by the parties or the opportunity of the Tribunal to put questions to the parties during a hearing. A review of Respondent's second jurisdictional objection is required (1) to decide the likely merit of that objection even if the objection were factually supported, and therefore the necessity of ordering of documents in support of the development of that objection, and (2) to ascertain the exact scope of that objection so that appropriate limits might be placed on the requests for documents made by Respondent. Without such an estimation of the likely legal merit of Respondent's objection and without criteria for the narrowing of Respondent's requests for production of evidence, the Tribunal is faced with a factually intense, and consequently expensive and lengthy, factual inquiry that ultimately may not be necessary to the resolution of this case. Therefore, although the Tribunal concludes that it is within its power to undertake such an incidental preliminary review of the merits of the second jurisdictional objection in order to decide upon a request for production of evidence, the Tribunal concludes in its discretion that such a decision by the Tribunal at this point would be premature and that the Tribunal's capacity to decide upon this important request would be enhanced greatly by both briefing and oral argument before the Tribunal.

27. Bolivia, along with its request for production of evidence, filed a motion to dismiss premised on the basis that AdT had "rested its case" on jurisdiction. The Tribunal found that AdT had not in any previous submission to ICSID waived its right to present its jurisdictional arguments, but had instead, at various points, offered to expand and elaborate its case. As a result, Bolivia's motion for an immediate dismissal was denied.

28. The Tribunal created a schedule for submissions from the parties on the subject of Bolivia's two main objections to jurisdiction. The written submissions pertaining to the "Objections to Jurisdiction" ordered by the Tribunal in Order No. 1 were subsequently filed in timely fashion: Claimant filed its "Memorial on Jurisdiction" on June 4, 2003; Respondent filed its "Counter-Memorial on Jurisdiction" on August 4, 2003; Claimant filed its "Reply" on September 4, 2003; and Respondent filed its "Rejoinder" on October 6, 2003.

The Postponement of the Hearing on Respondent's Objections to Jurisdiction

29. In Procedural Order No. 1, the Tribunal requested the ICSID Secretariat to work with the Tribunal and the Parties to decide a mutually convenient time and place for a three-day hearing on Bolivia's "Objections to Jurisdiction" in either November or December 2003. An agreement was reached and a hearing was scheduled in Washington, D.C., for November 17-19, 2003.

30. In a letter dated October 22, 2003, Respondent noted that "certain events in Bolivia over the past several weeks have required the priority attention of the Bolivian Government," and requested that the "hearing scheduled for 17, 18, and 19 November be postponed."[11] Bolivia argued that these events had diverted the focus and attention of the Bolivian government and would continue to do so for some time. AdT in a letter dated October 23, 2003, objected to any postponement stating that: Bolivia's request was "unnecessary and unreasonable", Bolivia's counsel would have had standing instructions to proceed, there would be no material changes to previously submitted arguments, and the events in Bolivia would have no impact on Bolivia's presentation of its legal case on jurisdiction.[12]

31. On November 5, 2003, the Tribunal issued "Procedural Order No. 2" ("Order No. 2") on Bolivia's motion for postponement of the hearings scheduled to begin on November 17, 2003. The Tribunal took notice of the severity and seriousness of the disruptions in La Paz and in other parts of Bolivia during September and October 2003. The Tribunal noted that, as a general matter, a request for postponement of a hearing by only one of the parties is not to be granted without sufficient cause especially where a request for postponement is made on short notice. Hearings are scheduled months in advance with attention paid to the schedules of the parties, their counsel, and the Members of the Tribunal. The Tribunal noted that the requirement of "sufficient cause" is particularly strict when a request for postponement is made shortly before the scheduled date.

32. In issuing Order No. 2, the Tribunal emphasized that Counsel for Bolivia did not assert that the seriousness of the events in September and October 2003 directly necessitated the postponement of the hearing. Rather, the possibility that Bolivia's counsel did not have adequate opportunity for final consultations with necessary Bolivian officials constituted sufficient cause to postpone the hearing.

33. The Tribunal, invoking its general authority over arbitral procedure, in cases where the Arbitration Rules do not provide specific direction and the parties are not in agreement, decided that the severity of events in Bolivia and the closeness in time of those events to the scheduled hearing might prevent Counsel for Bolivia from consulting with the responsible Bolivian officials whose attention would be justifiably diverted by domestic matters.

34. The Tribunal disagreed with AdT's argument that there would be no prejudice in denying Bolivia's motion since the jurisdictional issues to be addressed at the hearing were primarily legal issues. Although the scope of the hearing was to be limited to already

[11] Letter of Dana Contratto, counsel to Bolivia, October 22, 2003, to ICSID.
[12] Letter of Matthew Weiniger, counsel to AdT, October 23, 2003, to ICSID.

submitted written arguments, it was not unusual, in the Tribunal's view, in arbitration for subtle aspects of a party's oral presentation and emphasis of its arguments to be altered in final consultations between a party and its counsel. Moreover, the Tribunal cautioned that the attorney-client relationship could be adversely affected if counsel was compelled to present an oral argument without having the opportunity for final consultation.

35. The Tribunal emphasized that its "conclusion that a lack of opportunity for counsel to consult with its client could be prejudicial does not, however, necessarily indicate that a postponement is justified." The Tribunal wrote:

> 13. * * *. The inability of counsel to consult with its client is not in and of itself sufficient cause to postpone a hearing because that circumstance ordinarily is within the control of the party. Both states and private parties encounter demands to which they may prefer to give a priority over the demand of counsel to confer on a matter subject to arbitration. The inability of counsel to consult with its client therefore can be a sufficient cause to postpone a hearing only in extraordinary circumstances.

In reviewing the particular facts of this case, the Tribunal found the circumstances cited by Counsel for Respondent to be extraordinary. The Tribunal wrote that

> 14. * * * . [I]t is not unreasonable that the severity of events in Bolivia over these recent weeks required the focus of the Government of Bolivia and diverted such focus from the present arbitration. The combination of this diverted focus and the closeness of the events in Bolivia to the scheduled Hearing may effectively prevent Counsel for Bolivia from consulting with the relevant Bolivian officials. Simultaneously, the Tribunal also observes that its recognition of Bolivia's special duty to public order will diminish quickly as the events of the past several weeks recede into the past.

36. The Tribunal thus concluded that the severity and extraordinary nature of the events in Bolivia constituted sufficient cause to postpone the hearing.

37. In making this determination, the Tribunal noted that up to that point, each party had fully met all the requests of the Tribunal including those for written submissions. The Tribunal noted that requests for extensions and postponements may be employed as dilatory tactics. Noting that these types of tactics could threaten the integrity of the entire arbitral process, the Tribunal acknowledged its duty to guard against them. However, there was no indication whatsoever that Bolivia's request for postponement was an example of such a dilatory tactic.

38. Order No. 2 recommended that the hearing on Bolivia's Objections to Jurisdiction be scheduled for January 12-14, 2004 subject to consultation by the Secretariat with the Parties. Subsequently, in accordance with Arbitration Rule 13(2), the Tribunal Secretary conferred with each party, and, noting various scheduling conflicts, February 9, 10, and 11, 2004, were set as the dates for the hearing.

Motions as to the Presentation of Witnesses at the Hearing

39. The Tribunal, in Order No. 2, advised each Party to notify each other and the Tribunal by December 15, 2003, if they wished to present witnesses at the February 9-11 hearing.

40. On December 15, 2003, Bolivia filed its Response to Order No. 2 and indicated that it intended to present two expert witnesses at the hearing - Professor Rudolf Dolzer and Professor Merritt B. Fox. Bolivia also requested that all witnesses relied upon by AdT be made available for cross-examination. AdT also filed a response on December 15, 2003, indicating that it did not intend to present at the hearing any expert witnesses and objecting to Bolivia's request that all witnesses be made available for examination since cross-examination is expensive and unnecessary for expert witnesses offered to explain a point of law rather than a matter of fact.

41. On December 31, 2003, the Tribunal issued "Procedural Order No. 3" ("Order No. 3"). The Tribunal observed that it is, in its view, customary in international arbitration that such witnesses, whether they are experts in law or witnesses of fact, be made available for examination if so requested. The Tribunal also noted that, if need be, it may be acceptable to examine witnesses via videoconference or other such means. However, the Tribunal found it presumptively preferable that witnesses appear in person. The Tribunal thus granted Bolivia's motion that witnesses relied upon be made available for examination at the hearing.

42. Order No. 3 also set forth the order of presentations for the hearing and the maximum allowable time for each respective presentation. Order No. 3 provided that, absent agreement of the parties to the contrary, a witness with evidence to be offered on a particular issue should be presented and cross-examined during that party's "first round presentation." Any time taken by direct examination or cross-examination of a witness would be counted against the overall time allotted to the examining Party. The Tribunal advised each Party that they could each decide to devote the time allocated to their oral proceedings to the presentation of a witness whose statement was already a part of the written record. If a witness was presented, the other Party could decide whether to examine the witness noting that such cross-examination would count against their own time.

The Hearing on Respondent's Objections to Jurisdiction & Post Hearing Correspondence from the Parties

43. The Hearing on Respondent's Objections to Jurisdiction was held in Washington, D.C., on February 9, 10 and 11, 2004.

44. The Tribunal notes that the Parties jointly requested on a monthly basis from March 2004 through June 2004 that the Tribunal not render a decision.

The Tribunal's Post Hearing Inquiry to the Netherlands, the Non-Disputing State Party to the BIT

45. At various stages of these proceedings the parties presented evidence and made arguments addressing several public statements made by the Government of the Netherlands regarding various provisions of its BIT with Bolivia.[13]

46. Given that the Government of the Netherlands is not a party to, or otherwise present in this arbitration, the presentation of its statements was left to the Parties.

47. The Tribunal concluded that specific information from the Government of the Netherlands would assist the work of the Tribunal. Acting under Rule 34 of the Arbitration Rules, the Tribunal on October 1, 2004, wrote to Johannes G. Lammers, Legal Advisor to the Foreign Ministry of the Netherlands, posing specific questions.

48. The Tribunal advised the Parties of this inquiry in a letter dated October 4, 2004, to which the Tribunal's letter of October 1st was attached. The October 4th letter advised the Parties that they would be provided, as appropriate, an opportunity to comment on any reply from Mr. Lammers.

49. On December 14, 2004, the Tribunal received a reply letter from Mr. Lammers dated October 29, 2004, to which there was attached a document entitled "Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, signed on 19 March 1992 and entered into force on first November 1994." This letter and its attachment were transmitted via "Procedural Order No. 4" ("Order No. 4") to the Parties with the request that they provide by January 5, 2005, any comments they might have on those aspects of Mr. Lammers' letter which were responsive to the Tribunal's limited inquiry. Both Parties submitted timely comments.

Factual Background

50. The following section summarizes the factual background regarding the parties and transactions that led to this proceeding. The particular factual circumstances summarized are those that surface as aspects of the arguments Bolivia advances in its jurisdictional objections.

Aguas del Tunari, S.A.

51. AdT, the Claimant in these proceedings, is a legal person constituted in accordance with the laws of Bolivia.[14]

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[13] See *infra* at ¶¶ 259-260.

[14] AdT has submitted to the Tribunal (1) The Act constituting AdT (Escritura Publica de Constitución de una Sociedad) dated August 23, 1999, (Ex. 1 to the Request for Arbitration), (2) The Modification of the statutes of AdT (Modificación de Estatutos) dated September 2, 1999, (Ex. 2 to the Request for Arbitration), and (3) Registration of AdT at the Commercial Registry (Matrícula de Inscripción) (Ex. 3 to the Request for Arbitration). Bolivia does not question that AdT is a Bolivian legal entity.

The Conclusion of the Water and Sewage Concession for Cochabamba in September of 1999

52. In 1998, Bolivia opened an international tender process to privatize water and sewage services as well as an electricity generation license for its third largest city, Cochabamba. By April 1999, only one bid was made by a consortium called "Aguas del Tunari"[15] and led by International Water Ltd.[16] That one bid did not comply with the requirements of the tender process and that process ended without success. The consortium approached Bolivia to open negotiations concerning the concession[17] and by April 19, 1999, a negotiation committee was formed by decree.[18] By Supreme Decree dated June 11, 1999, the Bolivian Water and Electricity Superintendencies were given authority to negotiate the water concession and an electric generation license.[19]

53. On September 2, 1999, AdT, the locally incorporated vehicle for the consortium's foreign investment, was formally registered as a Bolivian company, thereby completing a formation process begun in July 1999.[20]

54. On September 2, 1999, the Bolivian government approved the text of the Concession clearing the way for its conclusion.[21] And on September 3, 1999, the Concession was concluded and signed by Mr. Luis Guillermo Uzin Fernández, Superintendent of Water, and Mr. Geoffrey Richard Thorpe of AdT, and formally ratified by an Administrative Resolution.[22] AdT notes that several related contracts were also concluded at approximately the same time.[23]

55. The Concession took effect on November 1, 1999.[24]

56. The public's response to the Concession is described below.[25]

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[15] Request for Arbitration, November 12, 2001, ¶¶ 8-9.
[16] Resp. Counter Mem., p. 8, ¶ 15.
[17] *Id.*, ¶ 16.
[18] Supreme Decree No. 25351, April 19, 1999,(Ex. 17 to the Request for Arbitration).
[19] Supreme Decree No. 25413, June 11, 1999,(Ex. 18 to the Request for Arbitration).
[20] Registration of AdT at the Commercial Registry (Matrícula de Inscripción) (Ex. 3 to the Request for Arbitration).
[21] Resp. Counter Mem., p. 15, ¶ 27.
[22] Concession Contract between the Superintendence of Water and the Consortium, Aguas del Tunari, (Ex. 20 to Request for Arbitration); Administrative Resolution SA No. 24/99, (Ex. 21 to Request for Arbitration).
[23] Request for Arbitration, p. 6, note 15. Claimant lists the other contracts as: The "SEMAPA Property System Contract" entered between AdT and the Municipal Potable Water and Sewer Service of Cochabamba (SEMAPA) (the commercial leasing and transfer of SEMAPA's property to AdT), the "Misicuni Property System Contract" entered between AdT and the Misicuni Company (the commercial leasing of the main tunnel of the Multipurpose Misicuni Project), and the "Contract for Transfer of Facilities for the Titiri Pumping Station" entered between AdT and the Misicuni Company (the sale of the Titiri Pumping Station to AdT). Also, there are two contracts for licenses as granted by "Joint Resolution" by the Superintendencies of Water and Electricity: "License to Generate Electricity and the Concession for Use of Water from the Misicuni, Visacha, and Putucuni Rivers and from their tributaries," and "License Contract for Generation of Electricity with the Superintendencies of Water and Electricity."
[24] Administrative Resolution SA No. 39/99 (Ex. 24 to Request for Arbitration)
[25] *See* ¶¶ 62 to 70.

The Terms of the Concession

57. The Concession provided for a 40-year relationship between AdT and the Bolivian Water and Electricity Superintendencies. AdT agreed to provide a regular volume of drinkable water of a certain quality for the city of Cochabamba in exchange for a negotiated return on its investment. The Concession contemplated the possibility of AdT expanding operations to meet the needs of a larger population.[26] The contracts related to the Concession and referred to in paragraph 56, among other things, involved AdT in water projects with electricity generation components.

58. The Concession provided for dispute settlement in its Article 41 entitled, "Resolution of Controversies." In relevant part, Concession Article 41 provides:

> Article 41.2 [AdT] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.
>
> Article 41.3 The provisions of the present Contract are not to be interpreted as a renunciation on the part of the Shareholders, the Founding Shareholders, including the Ultimate Shareholders, of methods of dispute resolution established in International Treaties recognized by the Republic of Bolivia
>
> Article 41.4 [...]
>
> Article 41.5 The Parties [the Superintendency of Water and AdT] recognize that the Shareholders and Ultimate Shareholders including the Founding Shareholders are free to have recourse to those methods of dispute resolution which are legally available to them in accordance with Bolivian Law (such as, for example, arbitration under the rules of the ICC, ICSID or UNCITRAL or other similar international organizations). The Parties agree to cooperate in the above-mentioned process, to the extent permitted by Law.[27]

This article is a basis for part of Bolivia's objections to jurisdiction.

59. The Concession also has several provisions addressing the ownership structure of AdT. Article 37.1 reads in relevant part:

> [E]very Founding Stockholder has to keep more than 50% of the original equity percentage in voting shares of the Concessionaire at least over the first seven (7) years of the Concessions.[28]

The Upstream Ownership of AdT in September 1999

60. At the time the Concession was concluded in September 1999, the 'upstream' ownership of AdT was as follows:

> 1. Twenty percent of the shares in AdT were divided between four Bolivian companies;[29]

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[26] Concession at Annex 6.

[27] Concession (Ex. 20 to Request for Arbitration). The passages of the Concession relevant to this Decision are reproduced in the original Spanish at Appendix II.

[28] *Id.*

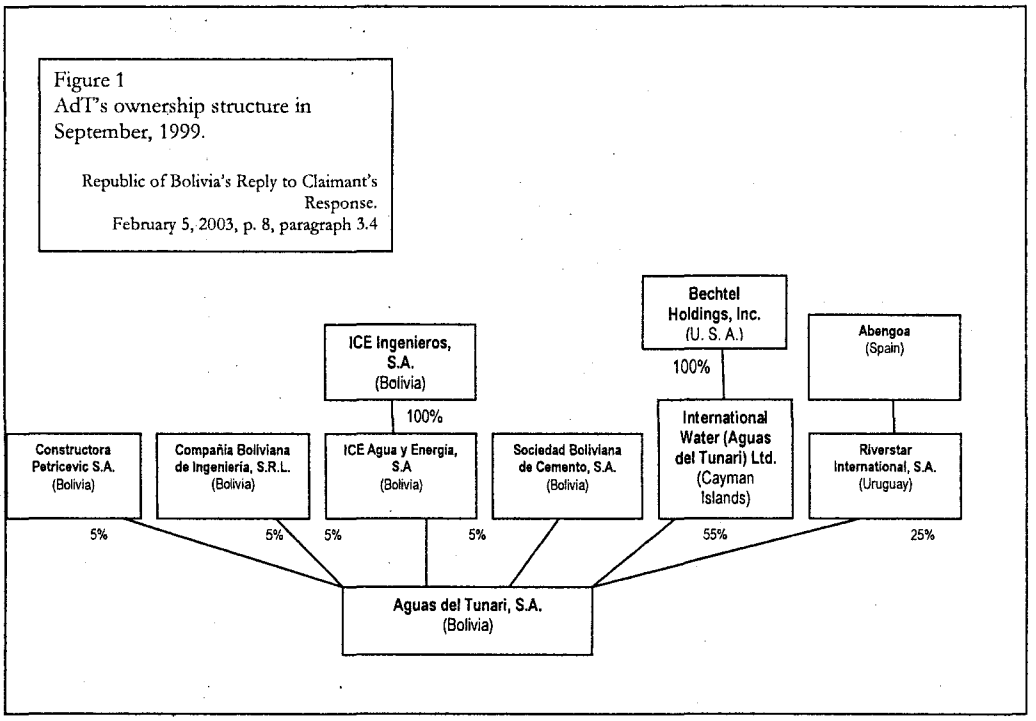
2. Riverstar International, S.A. of Uruguay owned twenty five percent of the shares; and[30]

3. The remaining fifty five percent of the shares were owned by International Water (Tunari) Ltd ("IW Ltd") of the Cayman Islands. The shares of IW Ltd were 100 percent owned by Bechtel Enterprise Holding, Inc., a company organized under the laws of the United States of America.

61. This upstream ownership structure is depicted by the following chart:

Figure 1
AdT's ownership structure in September, 1999.

Republic of Bolivia's Reply to Claimant's Response. February 5, 2003, p. 8, paragraph 3.4



The Events in the Fall of 1999 Following the Award of the Concession

62. Two lines of events in the Fall of 1999 are relevant to this proceeding. First, there is the reaction of the public to the awarding of the Concession and the responses of both Bolivia and AdT to that reaction. Second, there is planning for, and the eventual effectuation of, a corporate reorganization of the upstream ownership of AdT. The Parties disagree about the details or significance of each of these lines of events and whether there is a connection between the two.

63. As to the first line of events, it appears from the record before the Tribunal that citizen groups were aware generally of the negotiation of a concession but sought more specific information concerning that process. Thus on September 3, 1999 (the day the Concession was concluded), a news article reported that the Defense of Water Committee

[29] Those companies are comprised of Constructora Petricevic, S.A.; Compañía Boliviana de Ingeniería, S.R.L.; ICE Agua y Energía, S.A.; and, Sociedad Boliviana de Cemento, S.A., each at 5 percent.
[30] Riverstar is 100 percent owned by Abengoa of Spain.

criticized the negotiations as lacking transparency and requested that the Bolivian government publicize the true rates that would govern before it concluded the Concession.[31]

64. Respondent writes: "In fairness, no one negotiating the Concession agreement could have anticipated the intensely hostile reaction that greeted AdT immediately upon the Agreement's signing."[32] On September 14, 1999, a news article reported the statements of the government and the concerns of citizen groups as to what the new rates would be. The government indicated they would take effect on December 1, 1999.[33] In October, an article discussed both company, governmental and private views on how the Concession would possibly affect private water wells in the Concession area, noting citizen concerns.[34]

65. The record before the Tribunal suggests that the level of criticism of the Concession by citizen groups became greater after the Concession came into effect in November 1999. In an article dated November 17, 1999, the rate increases and their possible impacts are discussed. The article notes calls for the annulment of the Concession.[35]

66. Respondent writes that "representatives of the Waters Superintendency held meetings and discussions with Cochabamba community groups in an attempt to clarify the scope of AdT's authority within the concession area."[36] On November 28, 1999, AdT attempted to respond to public criticism by publishing an "Open Letter" in several Bolivian newspapers, including the Cochabamba press, seeking to provide clearly its view on seven points.[37] A news article dated November 29, 1999 describes how various labor organizations from Cochabamba were expected to present claims of unconstitutionality against the Potable Water and Sewage Service Law and to demand rescission of the Concession.[38] As the new rates took effect on December 1, 1999, a news story emphasized how politicians, unionists, and neighborhood leaders of Cochabamba raised their voices against the rate increases.[39] A further newspaper story dated December 5, 1999 reported that the Superintendent of Waters had indicated that the new rates would remain in force unless a new Administrative Resolution was adopted.[40]

67. As to the second line of events, on November 9, 1999, Bechtel announced that it had reached an agreement with Edison, S.p.A. of Italy whereby Edison and Bechtel would join their respective water management projects, including IW Ltd, together in a single joint venture. As a consequence, Edison would assume a 50 percent interest in IW Ltd.

68. On November 24, 1999, Bechtel wrote to Waters and Electricity Superintendencies informing them of proposed changes in AdT's ownership as a consequence of Edison's

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[31] Resp. Counter Mem., Ex. 5.
[32] Resp. Counter Mem., p. 16, ¶ 30.
[33] Resp. Counter Mem., Ex. 7.
[34] Resp. Counter Mem., Ex. 8.
[35] Resp. Counter Mem., Ex. 10.
[36] Resp. Counter Mem., p. 18, ¶ 35.
[37] Resp. Counter Mem., Ex. 28.
[38] Resp. Counter Mem., Ex. 12.
[39] Resp. Counter Mem., Ex. 14.
[40] Resp. Counter Mem., Ex. 18.

involvement.[41] In that letter, Bechtel wrote that "[f]rom our review of the contracts in connection with the Project, in order to complete the Transaction, your acceptance of the transfer of the Shares appears to be necessary." On December 3, 1999, local Bolivian counsel for Bechtel wrote to the Waters Superintendency stating that "given that such change has to do with tax requirements outside of Bolivia," it was his opinion that the transfer would leave AdT "under the same control," have "no adverse impact" for Bolivia, and that he saw "no reason why approval should not be granted."[42] The Waters Superintendency gave its approval to the proposed transfer of IW Ltd's shares in AdT to a Dutch company on December 3, 1999, although Bolivia disputes the content and legal effect of that act.[43]

69. Claimant states that it discontinued its effort to transfer the shares from IW Ltd, a Cayman Islands corporation, to a new Dutch corporation as described in the previous paragraph. Claimant states it instead decided to migrate the company from the Cayman Islands to Luxembourg. Respondent disagrees with the distinction made between transfer and migration. (The Tribunal addresses this difference between the Parties as the fourth aspect of the First Objection beginning at paragraph 156.)

70. In anticipation of the corporate reorganization anticipated as a part of the joint venture with Edison, Baywater Holdings, B.V., ("Baywater") was incorporated under Dutch law on November 25, 1999. On December 8, 1999, International Water Holdings B.V. ("IWH B.V.") and International Water (Tunari) B.V. ("IWT B.V.") were incorporated under Dutch law by Baywater and IWH B.V., respectively. On December 21, 1999, IW Ltd of the Cayman Islands "migrated" to Luxembourg where it became known as International Water (Tunari) S.a.r.l. (IW S.a.r.l."). Finally, on December 22, 1999, IWT B.V. became the 100 percent shareholder of IW S.a.r.l.

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[41] Resp. Counter Mem., Ex. 1.

[42] Resp. Counter Mem., Ex. 2.

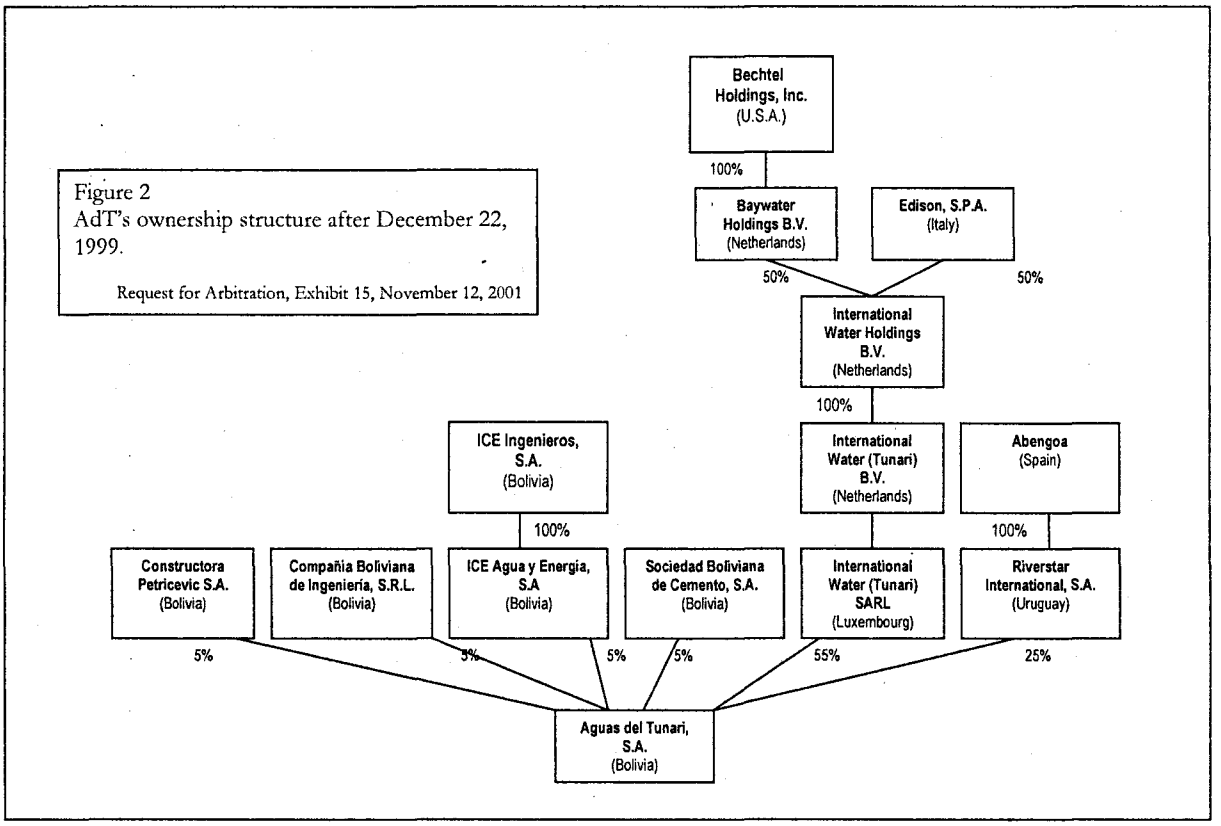
[43] Resp. Counter Mem., pp. 26 and 43. Respondent states that "Based on Mr. Guevara's representations, the Water Superintendent gave his approval for Bechtel to proceed with the transfer of ownership shares." *See* Resp. Counter Mem. pp. 25-26, ¶¶ 47-48. Respondent also states the Water Superintendency did not possess the authority to approve the proposed transfer of shares. *Id.* , p. 26, ¶ 48.

The December 1999 Ownership Structure of AdT

71. AdT claims the resulting structure after the December 1999 reorganization was as depicted in the following chart:

Figure 2
AdT's ownership structure after December 22, 1999.

Request for Arbitration, Exhibit 15, November 12, 2001



72. Although Respondent does not question this chart, it also is not clear that Respondent accepts the accuracy of this chart. For the purposes of the jurisdictional objections raised at this stage of the proceedings, the Parties agree that these changes meant that as of December 1999 AdT was no longer held by a Cayman Islands corporation. Finally, although the Parties also appear to accept that 55 percent of AdT's upstream ownership passed through Dutch companies after December 22, 1999, Bolivia disputes the substance of these Dutch entities, describing them as mere shells.

The Challenges to the Concession and Its Termination

73. The Parties agree that there was significant opposition to the Concession after January 1, 2000 in various parts of Bolivia, and particularly in Cochabamba. The Parties disagree as to the reasons for this opposition. The Parties also disagree as to whether either party violated its obligations under the Concession in responding to opposition groups. The Parties agree that the opposition movement grew in intensity in the early months of 2000 after AdT began operations in January 2000 and that the Concession was terminated in early April 2000 after major violent protests.

The Issues Presented

General Considerations Regarding Jurisdiction

74. This Tribunal is constituted under the ICSID Convention to which both Bolivia and the Netherlands are State Parties.[44] Jurisdiction in ICSID arbitration requires the consent of both the Claimant and the Respondent. Article 25(1) of the ICSID Convention provides:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre.* When the parties have given their consent, no party may withdraw its consent unilaterally. (Emphasis added)

75. The consent of the parties required in Article 25(1) can be expressed in a variety of written instruments. Moreover, the offer to arbitrate may be contained in one type of written instrument, the acceptance in another. It is for the Claimant to establish the bases of jurisdiction of an ICSID Tribunal.

76. AdT bases the jurisdiction of the Tribunal on the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia.[45] In such bilateral investment treaties, the two State parties provide their consent to arbitration. This consent is contained in the form of an offer to arbitrate claims of investors based in a contracting State who allege breaches of the treaty by agents of the other contracting State.

77. Under Rule 41(1) of the Arbitration Rules, objections to jurisdiction "shall be made as early as possible." Bolivia raised a series of objections when AdT filed its Request for Arbitration and continued to object in subsequent filings. Bolivia's objections to jurisdiction are timely.

78. The Tribunal notes that Arbitration Rule 41(2) provides that: "[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."[46] The Tribunal views this authority as necessarily including the power to consider ways in which an ambiguous or unclear objection may bear on jurisdiction and to restate such objections, as appropriate, so as to allow a full examination of jurisdiction.

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[44] Bolivia signed the Convention on May 3, 1991; ratification took place on June 23, 1995; and the Convention entered into force for Bolivia on July 23, 1995. The Netherlands signed the Convention on May 25, 1966; ratification took place on Sep. 14, 1966; and the Convention entered into force for the Netherlands on October 14, 1966 (see http://www.worldbank.org/icsid/constate/c-states-en.htm).

[45] See *supra* note 1, the Treaty will hereinafter be referred to as the "BIT" or Netherlands-Bolivia BIT."

[46] See ICSID Rules of Procedure for Arbitration Proceedings, Chapter 5, available at: http://www.worldbank.org/icsid/basicdoc/partF-chap05.htm#r41.

Claimant's Assertions as to the Basis of Jurisdiction

79. Claimant seeks arbitration before ICSID on the basis of the Netherlands-Bolivia BIT.[47] Specifically, Article 9(6) of the BIT states:

> If both Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965 [ICSID Convention], any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the International Centre for Settlement of Investment Disputes.

80. AdT asserts that it is a "national" of the Netherlands as defined by the BIT. Articles 1(b)(ii) and (iii) of the BIT define "nationals" as:

> (ii)without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party;
> (iii)legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.

81. AdT identifies itself as a legal person constituted in accordance with the laws of Bolivia which is "controlled directly or indirectly" by nationals of the Netherlands, that is, IWT B.V. and IWH B.V. of the Netherlands.[48]

82. AdT contends that given that both Bolivia and the Netherlands are parties to the ICSID Convention and that AdT is a national of the Netherlands as defined by the BIT, ICSID is an available forum for AdT in its investment dispute with Bolivia.

Respondent's Objections

83. Respondent presents two objections to the jurisdiction of the Tribunal.

84. Respondent's First Objection is that Bolivia did not consent to the jurisdiction of ICSID. Respondent's First Objection has numerous aspects that are argued both separately and in their totality. Even though Respondent's First Objection is not presented clearly, the Tribunal has gone to great effort to consider the various possible aspects of Respondent's First Objection. The Tribunal has identified six aspects to the First Objection:

1. First, that the circumstances surrounding the negotiation of the Concession and the dispute settlement clause contained in the Concession preclude ICSID jurisdiction,
2. Second, that Bolivia is not the proper party to be named in this proceeding,
3. Third, that the BIT, through Article 2, refers the Tribunal to limits existing in Bolivian law and regulations and those limits preclude ICSID jurisdiction in this case,

[47] Request for Arbitration, p. 2, ¶ 3.
[48] Request for Arbitration, pp. 3-4, ¶ 6.

4. Fourth, that the Concession fixed AdT's ownership structure and that AdT's reorganization in December 1999 breached the Concession and bars the jurisdiction of this Tribunal,
5. Fifth, certain representations as to the legal implications of a proposed transfer of AdT's ownership were breached and that these breaches preclude ICSID jurisdiction, and
6. Sixth, Bolivia's consent to the BIT did not encompass the situation presented in this proceeding.

85. Respondent's Second Objection is more specific. In this Objection, Respondent argues that AdT is not a "national" of the Netherlands as defined by Articles 1(b)(ii) and (iii) of the BIT in that AdT is not "controlled directly or indirectly" by nationals of the Netherlands.

The Applicable Law

86. The applicable substantive law is to be found in the BIT between Bolivia and the Netherlands, in particular Articles 1(b)(iii), 2 and 9(6). The BIT entered into force between Bolivia and the Netherlands on November 1, 1994.

87. Inasmuch as Article 9(6) of the BIT involves consent to arbitration before ICSID, jurisdiction under the BIT is limited by the jurisdictional provisions of the ICSID Convention.

88. The applicable law for interpretation of the BIT is that to be found in customary international law. The Netherlands, but not Bolivia, is a party to the Vienna Convention on the Law of Treaties ("Vienna Convention").[49] The parties, however, agree that the provisions of the Vienna Convention relating to the interpretation of treaties reflect customary international law. The Tribunal agrees with this view and applies the Vienna Convention on this basis. [50]

89. The Tribunal notes that the BIT was done in three languages: Spanish, Dutch and English. The Treaty in its closing clause states the three texts are equally authentic, but that in case of a difference of interpretation, "the English text will prevail." Therefore the Tribunal should interpret all three texts with special reference to the English text in the case of difference. Both Bolivia and AdT, apparently seeing little benefit in doing otherwise, present their arguments as to the meaning of the BIT on the basis of the English text. The Tribunal does likewise.

90. Article 31 of the Vienna Convention provides the "general rule of interpretation."

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[49] The Vienna Convention on the Law of Treaties, *adopted and opened for signature on* 23 May 1969, *entered into force* 27 January 1980 (1155 United Nations Treaty Series 331) was signed by Bolivia on May 23, 1969 but has not been yet ratified. The Vienna Convention was acceded to by the Netherlands on April 9, 1985. As to the status of ratifications, see:
http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp#N8.

[50] *See,e.g,* Cl. Mem., pp. 51-53, ¶¶ 142-146; Resp. Counter Mem., p. 71, ¶ 149; Resp. Rej., p. 48, ¶ 91.

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

91. Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule of interpretation found in the Vienna Convention. First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word "meaning" itself has at least sixteen dictionary meanings.[51] Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document. Second, the Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action.[52] Rather than cataloging such canons (which at best may be said to reflect a *general pattern*), the Vienna Convention directs the interpreter to focus upon the *specific case* which may, or may not, be representative of such general pattern. To say a canon reflects a widespread practice does not mean it reflects a universal one. The Vienna Convention's directive to look to the ordinary meaning of a word in its context and in light of the object and purpose of the treaty is intended to (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to general

[51] Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties,* 22 CURRENT LEGAL PROBLEMS 205, 219 (1969). Barak writes: "From the standpoint of language, one meaning does not have preference over another. Any meaning which is possible in a semantic sense is also permissible semantically. It would be a mistake to base a doctrine of legal interpretation on dictates, as it were, of linguistics." AHARON BARAK, JUDICIAL DISCRETION 341-342 (1987).

[52] Both parties at various points in their submissions refer to canons of interpretation.

assumptions about the intent of states, assumptions which necessarily are based on assessments of past practice.[53]

92. Article 32 of the Vienna Convention addresses "supplementary means of interpretation." That article provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> i. leaves the meaning ambiguous or obscure; or
>
> ii. leads to a result which is manifestly absurd or unreasonable.

The ILC Commentary on its earlier draft of this article notes that the "supplemental" role of Article 32 serves to emphasize the centrality of Article 31: "that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."[54]

93. The Tribunal in applying the Vienna Convention, particularly as to the interpretation of "controlled directly or indirectly," therefore:

> First, considers the meaning of a word of a text in accordance with Article 31 of the Vienna Convention,
>
> Second, confirms the resulting interpretation in accordance with Article 32 of the Vienna Convention, and,
>
> Third, applies that interpretation to the case at hand.

The First Objection

The First Aspect of Respondent's First Objection which asserts that the Concession Agreement precludes ICSID jurisdiction

Respondent's Objection

94. Respondent argues that the text and negotiating history of the Concession as well as the laws of Bolivia all indicate that disputes concerning the Concession were to be resolved in Bolivian courts in accordance with Bolivian laws.

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[53] Lauterpacht amidst the situation prevailing before the Vienna Convention observed: "The view which is gaining increasing acceptance seems to be that some of the current rules of construction of treaties * * * instead of aiding what has been regarded as the principal aim of interpretation, namely, the discovery of the intention of the parties, they end up by impeding that purpose." Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties,* 26 BRITISH YEARBOOK OF INTERNATIONAL LAW, 48, 52 (1949).

[54] I.L.C. Report on the Work of Its 8th Session, 1966 I.L.C. YEARBOOK (II) 223, Commentary to Article 28, para. 18.

95. Respondent first argues that the text of the Concession requires that this dispute be resolved in Bolivian courts in accordance with Bolivian laws.[55]

96. Respondent points generally to Concession Article 41 (entitled "Resolution of Controversies") and, in particular, argues that Article 41.2 constitutes an exclusive jurisdiction clause selecting Bolivian courts that bars AdT from pursuing arbitration before ICSID.[56] Article 41(2) provides:

> [The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.[57]

According to Bolivia, Article 41 contains "very carefully constructed dispute resolution mechanics"[58] which should govern dispute resolution relating to the Concession. Bolivia asserts that the Concession "explicitly limits" AdT to the jurisdiction of the regulatory authorities and courts of Bolivia[59] and by signing the Concession, AdT "committed" itself to the "jurisdiction and competence of the regulatory authorities and courts of Bolivia."[60]

97. Respondent argues that its interpretation of Article 41.2 is supported by the provisions of Article 41 taken as a whole. Bolivia notes the use of the term "Concessionaire" in Article 41.2 and the term "shareholders" in Article 41.3 was intentional.[61] Bolivia also notes that Articles 41.3 and 41.5 explicitly recognize that the shareholders of AdT may invoke the jurisdiction of ICSID. In contrast, Article 41.2, addressing the resolution of disputes by the Concessionaire, does not mention ICSID. Bolivia argues that the difference between Articles 41.2 on the one hand, and Articles 41.3 and 41.5 on the other hand, implies that AdT, as a "Concessionaire," is precluded from invoking the jurisdiction of ICSID.

98. Second, the Respondent contends that the negotiating history of the Concession supports this argument. Referencing the Bolivian Constitution, Bolivia argues that it was made clear to all parties that "...it was inconceivable, and equally unacceptable, that this company [the Concessionaire] could bring any dispute it had with the Bolivian government *outside* of Bolivia, or be subject to any law other than the law of Bolivia, consistent with Section 24 of the Bolivian Constitution."[62] Respondent emphasizes that it would only have

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[55] Resp. Counter Mem., pp. 10-11, ¶¶ 18-19.
[56] *Id.*, p. 14, ¶¶ 25-26.
[57] The original text is in Spanish and is reproduced in Appendix II.
[58] Bolivia's Obj., p. 3.
[59] *Id.*
[60] *Id.* In its oral submissions, Bolivia extends its interpretation of the Concession explaining that AdT, as the concessionaire, is subject exclusively to the System of Sectoral Regulation ["SIRESE."] and subject to the jurisdiction of the Supreme Court of Bolivia *See infra* at paragraphs 96 and 100. The SIRESE system is a regulatory system complete with its own administrative adjudication process. Oral Statement of Bolivia's Counsel, Jose Antonio Criales, (February 11, 2004), pp. 574-577.
[61] Bolivia's Obj., p. 3. The relevant Spanish text is reproduced at Appendix II.
[62] Resp. Counter Mem., p. 11, ¶ 19, (emphasis in original). The English translation of Article 24 of the Bolivian Constitution provides:

> Foreign subjects and enterprises are subject to Bolivian laws, and in no case may they invoke exceptional position or have recourse to diplomatic claims.

considered Bolivian corporations in awarding any concession concerning Cochabamba's water services.[63] Since AdT was a Bolivian Corporation operating within the laws and regulations of Bolivia, AdT should not have expected to be within the ambit of any bilateral investment treaty that gave it access to ICSID.

99. Respondent supports its position by citing an internal Bolivian negotiation report dated June 8, 1999. Respondent points in particular to the report's description of the efforts of AdT's consortium to incorporate a general referral to ICSID of disputes arising out of the Concession.[64] Respondent notes that the June 1999 report records Bolivia's view that "arbitration is not permitted under the norms of the [SIRESE] regulatory system and the laws covering the subject matter."[65]

100. Third, Respondent argues that its interpretation of the Concession as giving exclusive jurisdiction to Bolivia is necessitated by Bolivian law. Respondent directs the Tribunal's attention to: (1) Article 136 of the Bolivian Constitution, which places Bolivia's natural resources (including water) within the "original dominion" of the State, and, (2) the statutory SIRESE system which implements Article 136.[66] Because AdT voluntarily complied with the requirements of the SIRESE system in order to be considered for the Cochabamba concession, Bolivia argues that AdT also agreed to be bound exclusively to the dispute resolution process of the SIRESE system.[67]

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[63] Resp. Counter Mem., pp. 10-11, ¶ 19.

[64] In particular, Respondent points to paragraph 27 of the "Report from the Negotiating Committee formed to Negotiate with the Aguas del Tunari Consortium" (Ex. 38 to Resp. Rej.) as stating:

> On May 31, 1999, AGUAS DEL TUNARI raised for consideration by the Negotiating COMMISSION certain matters it wished to incorporate into the contracts in order to obtain the financing required for the SEMAPA concession and the performance of the MISICUNI project, which are summarized below.... (a) Arbitration before international entities, such as ICSID, for the resolution of any dispute over revisions of tariffs, payments for termination of the contract, compliance with quality standards and similar matters.... (unofficial translation from the Spanish).

[65] Oral Statement of Bolivia's Counsel, Alexandre de Gramont, (February 9, 2004), pp. 137-41. "And the [negotiating] committee reported its response to AdT specifically. After analyzing these proposals, the Committee communicated to the consortium that arbitration is not permitted under the norms of the [SIRESE] regulatory system and the laws covering the subject matter. And that position is reflected in the Concession Agreement...", p.138, Lines 6-12.

[66] Article 136 of the Bolivian Constitution reads:

> Within the regional original domain of the State, in addition to property to which the law gives that character, are the soil and the subsoil with all their natural resources: lake, river and thermal waters; and all physical elements and forces susceptible of utilization. Laws shall establish the conditions of such ownership, and those for their concession and allotment to private individuals.

The Spanish text may be found at Appendix II.

[67] Oral Statement of Bolivia's Counsel, José Antonio Criales, (February 9, 2004), pp. 176-87. "...Concessionaires will be Bolivian entities subject only to SIRESE and the Supreme Court of Bolivia, while foreign shareholders to such Concessionaires in some appropriate cases may pursue international arbitration under BITs," *Id.*, p. 186, Lines 6-10.

101. Bolivia argues that the language of Article 41.2 of the Concession in relation to the other sections of Article 41, the negotiating history of the Concession and the legal context in which those negotiations took place – namely Articles 24 and 136 of the Bolivian Constitution, all indicate that the Concession required that AdT be a Bolivian national subject exclusively to Bolivian laws and tribunals "that would *not* fall within the foreign 'control' terms of the Bolivian-Netherlands Bilateral Investment Treaty (or other BITs like it)."[68]

Claimant's Reply

102. AdT argues that this aspect of Respondent's First Objection is misplaced. Claimant emphasizes that the claims it raises in its Request for Arbitration are brought under the BIT and not under the Concession.[69] Even assuming *arguendo* that Article 41.2 of the Concession was an exclusive forum selection clause, it would not be relevant to the Tribunal's consideration of its jurisdiction under the BIT.[70]

103. In particular, Claimant argues that its action against Bolivia is an "entirely separate cause of action" distinct from claims brought under the Concession.[71] As such, Claimant states: "[a]n exclusive jurisdiction clause under a concession contract will thus have no effect on any action brought under a bilateral investment treaty."[72]

104. AdT refers the Tribunal to previous ICSID Awards that it argues support this proposition.[73] First, Claimant cites to *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* ("*Vivendi*")[74] in support of its argument that, even where an explicit and affirmative exclusive jurisdiction clause exists within a concession contract, such a clause does not affect the jurisdiction of an ICSID tribunal in respect to a claim made under a BIT.[75] Second, Claimant likewise refers the Tribunal to *Lanco International, Inc. v. The Argentine Republic* ("*Lanco*").[76] AdT analogizes its case to that of *Lanco* where the tribunal found that a forum selection clause in the concession contract did not exclude the jurisdiction of ICSID based upon a BIT between the United States and Argentina.[77] Relying on *Lanco*, AdT asserts that its claim against Bolivia is based upon the "breach of the Respondent's International Law obligations under the terms of the BIT [and] not on breaches of the Concession Contract."[78]

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[68] Resp. Counter Mem., p. 33, ¶ 63.
[69] Request for Arbitration, pp. 2-4, ¶¶ 3-7.
[70] Cl. Mem., p. 29, 31-35 ¶¶ 90, 94-101.
[71] *Id.*, p. 34, ¶ 98.
[72] *Id.*
[73] *Id.*, p. 31, ¶ 94.
[74] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Award of November 21, 2000, *reprinted at* 40 ILM 426 (2001) , 5 ICSID Rep. 299 (2002); Decision on Annulment, July 3, 2002, *reprinted at* 41 ILM 933 (2002), 5 ICSID Rep. 240 (2002).
[75] Cl. Mem., p. 31, ¶ 94.
[76] *Lanco International, Inc. v. The Argentine Republic,* "Preliminary Decision: Jurisdiction of the Arbitral Tribunal" dated December 8, 1998, *reprinted at* 40 ILM 457 (2001), 5 ICSID REP. 370 (2002).
[77] Cl. Mem., p. 34, ¶ 99.
[78] *Id.*, p. 35, ¶ 101.

105. Respondent does not address the Claimant's view of these two cases as they bear on this aspect of Respondent's objections.[79]

106. Claimant further argues that if the Tribunal were to consider the Concession relevant, Bolivia's characterization of Concession Article 41 is an attempt to "convert" a clause that "recognizes the rights of the Respondent, on a non-exclusive basis, to regulate water affairs in its territory into an exclusive jurisdiction clause."[80] AdT argues that the text of Concession Article 41 should be read instead as a clause where the parties "...expressly preserved any rights to resort to international arbitration legally available."[81]

107. AdT argues that the language of Concession Article 41 is not a waiver or limitation of ICSID jurisdiction.[82] Rather than reading Concession Article 41.2 as an exclusive forum selection clause, AdT argues that Article 41.2 serves only to recognize the regulatory rights that Bolivia possessed over domestic water matters under the SIRESE regulation system.[83]

108. Claimant argues that the negotiations between AdT and the Government of Bolivia resulted in an "arms-length" agreement over the terms of the Concession.[84] AdT states that its negotiation team was unaware from the June 1999 round of negotiations of Bolivia's alleged position that the "awardee of the Concession Agreement not be controlled by any foreign entity whose BIT would allow the Bolivian company access to ICISD."[85] Moreover, AdT objects to the use of "subjective statements of original intent" saying they should have "no part" in interpreting the Concession.[86]

The Decision of the Tribunal

109. This objection involves the legal interplay of forum selection clauses in contractual relationships and the availability of arbitration under a bilateral investment treaty. The Tribunal notes that several other tribunals have addressed these questions in the past few years. The Tribunal, as discussed below, in general, agrees with the direction taken by previous tribunals, although the reasoning employed here differs in several respects.

110. Claimant refers to the BIT between Bolivia and the Netherlands as the basis for bringing this case before this Tribunal. Respondent objects to jurisdiction before this Tribunal on the basis that the Concession places all disputes raised by AdT within the exclusive jurisdiction of appropriate Bolivian courts and thereby precludes AdT from invoking the jurisdiction of ICSID.

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[79] However, Bolivia responds to *Vivendi* and *LANCO* in terms of the question of majority shareholding and control, calling AdT's reliance on these cases as "misplaced." Resp. Counter Mem., pp. 65-66, ¶ 137.
[80] AdT's Response, p. 4, ¶ 7.
[81] *Id.*, and Cl. Mem., p. 30, ¶ 92.
[82] AdT's Response, p. 4, ¶¶ 7-8.
[83] *Id.*; Cl. Mem., p. 30, ¶ 91.
[84] Cl. Mem., p. 5, ¶ 14.
[85] Cl. Reply, p. 10, ¶ 26 quoting Resp. Counter Mem., pp. 34-35, ¶ 66.
[86] *Id.*, at ¶ 27.

111. Two questions are presented. First, as a threshold matter, the Tribunal observes that in order for the separate document raised by the Respondent to be in conflict with this Tribunal's exercise of jurisdiction, that document must both deal with the same matters and parties and contain mandatory conflicting obligations. Second, if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal's jurisdiction.

112. As to the requirement that the separate document contain mandatory conflicting obligations, the Tribunal concludes that Article 41.2 of the Concession does not place all disputes concerning the Concession within the *exclusive* jurisdiction of Bolivian courts. Article 41.2 provides:

> [The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.

This clause differs in wording and structure from other forum selection clauses encountered by the members of the Tribunal and those present in other ICSID proceedings where the issue of the effect of a contractual forum selection clause on ICSID jurisdiction has been considered. For example, in *Vivendi* the forum selection clause at issue provided:

> For purposes of interpretation and application of this Contract, the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán[87]

Two phrasings discussed in the *Vivendi* clause are frequently seen and noteworthy for this proceeding. First, the selection of a particular court is explicitly "exclusive." Second, the parties, in exclusively choosing a court, delineate explicitly the matters given to that court – in this instance "interpretation and application of this Contract." Article 41.2 of the Concession in the current case lacks the explicitness of both of these aspects. This Tribunal need not decide whether the Claimant is correct that Article 41.2 only serves to recognize the regulatory rights that Bolivia possessed over domestic water matters under the SIRESE regulation system. It is sufficient that the Tribunal concludes that Article 41.2 of the Concession does not constitute an exclusive reference to the Bolivian legal system of all disputes arising under, not to mention those related to, the Concession.

113. Similarly to this case, the *Lanco* tribunal appears to have viewed the relevant clause in that case as not creating a mandatory conflicting obligation. The forum selection clause at issue in *Lanco* provided:

> For all purposes derived from the agreement and the BID CONDITIONS, the parties agree to the jurisdiction of the Federal Contentious-Administrative Tribunals of the Federal Capital of the ARGENTINE REPUBLIC.[88]

The *Lanco* tribunal held that this clause was not a "previously agreed dispute settlement provision" within the meaning of the applicable BIT inasmuch as "the contentious – administrative jurisdiction cannot be selected or waived [. . .]."[89]

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[87] *Vivendi* Award of November 21, 2000, ¶ 27.
[88] *Lanco* Award, ¶ 6.

114. As to the requirement that the separate document deal with the same matters and parties, the Tribunal finds that the jurisdiction of the Bolivian courts recognized under Article 41.2 of the Concession, even if it were found to be exclusive, does not extend to the same obligations or parties raised by the Claimant under the BIT. Claimant in the instant proceeding does not raise a claim against the Water Superintendency, as a party to the Concession, but rather raises a claim against the Republic of Bolivia itself as party to the BIT. Likewise, assuming that Article 41.2 was an exclusive forum selection clause for disputes arising under the Concession, the Claimant in the instant case does not allege a breach of an obligation under the Concession but rather alleges a breach of an obligation existing under the BIT.[90] The circumstance that a claim under the Concession against the Water Superintendency and a claim under the BIT against Bolivia could both point to the same set of facts should not blur the legal distinction between the two types of claims. It is often the case that one set of facts may give rise to disputes under different laws in different fora. The Tribunal notes that its conclusion accords with the reasoning of the tribunal in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic,* Award of November 21, 2000,[91] and the subsequent decision of the *Ad Hoc* Committee appointed for the Annulment Proceeding in the same matter which in denying annulment of this aspect of the award indicated its agreement with the reasoning of the award.[92]

115. As to the second question posed in paragraph 111 above, the Tribunal holds that the question of whether a conflicting mandatory obligation in a separate document can affect the jurisdiction of an ICSID tribunal is a question of the intent of the Parties in concluding the separate document. As an inquiry into the intent of the parties, the Tribunal observes that this inquiry turns on the facts of the specific case. Nonetheless, the Tribunal finds it particularly helpful in such an inquiry to distinguish between: (1) a separate document that waives the right to invoke, or modifies the extent of, ICSID jurisdiction (where the intent of the parties to alter the possibility of ICSID jurisdiction is direct); and, (2) a separate document that contains an exclusive forum selection clause designating a forum other than ICSID (where the intent of the parties to alter the possibility of ICSID jurisdiction must be implied).

116. As to the former case of a separate document that waives the right to invoke, or modifies the extent of ICSID jurisdiction, the Tribunal notes that Claimant at the Hearing in this case stated as a general matter that "scholarly opinion is divided" on the issue of

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[89] *Id.*, ¶ 26. As one commentator wrote recently "[t]he most attractive and not least plausible explanation why the reasoning turned on Article 26 is that the forum clause was being seen as non-exclusive and so did not imply a waiver of the right to international arbitration in the first place." Ole Spiermann, *State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 ARBITRATION INTERNATIONAL 179, 191 (2004).

[90] An exclusive forum selection clause in a contact is generally regarded as severable from the contract of which it is a part. And although it is usually the case that such a clause only refers to disputes arising under the contract, it can be broader in scope. For example, some clauses refer not only to disputes "arising under" the contract but also disputes "related to" the contract.

[91] *Vivendi,* Award, ¶ 53.

[92] *Vivendi,* Decision on Annulment Proceedings, ¶¶ 73, 76, 80, and 95 to 97. "In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of a contract are different question." *Id.*, at ¶ 96.

whether such a waiver is possible,[93] and directed the Tribunal's attention more specifically to the Decision on Jurisdiction in *Azurix Corp. v. The Argentine Republic*[94] ("*Azurix*").

117. The *Azurix* Award, however, does not address the question of whether an investor may waive its right to arbitration before ICSID, but rather holds that jurisdictional clauses contained within a set of Bidding Terms, a Concession Agreement, and Commitment Letters did not constitute such a waiver.[95] The several clauses in question in *Azurix* were similar to one another and are exemplified by clause 1.5.5. of the Bidding Terms and Conditions which provided for the exclusive jurisdiction of the courts for contentious-administrative matters of the city of La Plata "for all disputes that may arise out of the Bidding, waiving any other forum, jurisdiction or immunity that may correspond."[96] The *Azurix* tribunal held that this clause was not a waiver of a claimant's right to arbitration before ICSID for two reasons. First, the waiver clause was a part of a contract to which the respondent was not a party and, consequently, claimant's contractual obligation to waive access to certain other fora was not made "in favor of Argentina."[97] Second, the analysis of the waiver clause was held to be analogous to that made with regard to forum selection clauses in that the waiver of other fora was limited to claims under the contract just as the selection of an exclusive forum was limited to claims under the contract.[98] The *Azurix* tribunal therefore concluded that the waiver clause did not present a conflicting mandatory obligation. Both of the conclusions of the *Azurix* tribunal turned upon the particular facts of that case. Both conclusions are the consequence of an inquiry into the intent of the parties and an inclination to require specific language of a waiver of the right to invoke the jurisdiction of ICSID for claims of treaty rights under a BIT, an inclination with which this Tribunal agrees.[99]

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[93] Oral Statement of AdT's Counsel, Matthew Weiniger, (February 9, 2004), p. 38, Lines 13-14.

[94] *Azurix Corp. v. The Argentine Republic*, "Decision on Jurisdiction" dated December 8, 2003, *available at* http://www.asil.org/ilib/azurix.pdf.

[95] "Since the Tribunal has found that the waiver does not cover the claim of Azurix in the dispute before it, the Tribunal does not need to comment further on the issue of renunciation by individuals of rights conferred upon them by treaty." *Id.*, ¶ 85.

[96] *Id.*, ¶ 26.

[97] *Id.*, ¶ 85.

[98] *Id.*, ¶¶ 80-81.

[99] In *Société Générale de Surveillance v. Republic of the Philippines* (January 29, 2004) (available at www.worldbank.org/icsid/cases/SGSvPhil-final.pdf) ("SGS"), the tribunal gave effect to a forum selection clause. The Tribunal emphasizes that the facts of the SGS case are distinct from the present proceeding.

First, the contractual forum clause at issue in SGS was found to contain mandatory conflicting obligations. The clause provided that "actions concerning disputes in connection with obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila." The SGS tribunal found the clause to be a "binding exclusive jurisdiction clause" for "all actions concerning disputes in connection" with contractual obligations. (Of note, SGS did not object to this clause being effective and binding upon both parties.) The present proceeding does not involve a forum selection clause of this character.

Second, the applicable law was different. SGS presented its claim under the Swiss-Philippine BIT. The SGS tribunal gave effect to the forum selection clause. The tribunal did so – even though it recognized that SGS's claims were claims of a breach of the treaty obligations contained in Article X(2) (the "umbrella clause") of the Swiss-Philippine BIT -- because it viewed SGS's claims as being essentially contractual in nature. The present proceeding does not involve an umbrella clause.

Despite these differences, the Tribunal also recognizes that its reasoning differs from that of the SGS tribunal. The Tribunal observes that its view is closer to that of paragraph 11 of the dissenting Declaration of Arbitrator Antonio Crivellaro in *Société Générale de Surveillance v. Republic of the Philippines.*

118. Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID.[100] However, the Tribunal need not decide this question in this case.

119. As to the latter case of a separate document containing an exclusive forum selection clause that designates a forum other than ICSID, the Tribunal notes that the specific intent of the parties to preclude ICSID jurisdiction will be more difficult to ascertain than in the case of explicit waiver. The Tribunal is of the view that it is not the existence of the exclusive forum selection clause that would be given effect by an ICSID tribunal, but rather that the tribunal could, at most, give effect to a waiver implied from the existence of an exclusive forum selection clause. The Tribunal does not find the authority under the ICSID Convention for it to abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists. To the contrary, it is the Tribunal's view that an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. As stated above, an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties.

120. Relying on Article 41 as a whole, the negotiating history of the Concession, and the requirements of Bolivian law, Respondent argues that AdT in agreeing to the Concession also agreed not to invoke the jurisdiction of ICSID. The Tribunal does not find the evidence submitted sufficient to prove this assertion.

121. First, the Tribunal notes that Respondent does not argue that there exists an explicit waiver of ICSID jurisdiction by AdT. Even assuming Concession Article 41 were an exclusive jurisdictional grant, the Article does not constitute an explicit waiver of ICSID jurisdiction.

122. Second, the Tribunal finds that there is not a sufficient basis in the written and oral submissions presented to the Tribunal as to the text of the Concession and Bolivia's record of its negotiating position to imply such a waiver. Both parties have presented conflicting arguments over what was and was not concluded during the Concession negotiations. Article 41 is silent as to the issue of the availability to AdT of ICSID and arbitration generally. Respondent asks that the Tribunal imply from this silence, the structure of Article 41 generally, and the laws of Bolivia including its Constitution, a waiver by AdT of any right it may have to invoke the jurisdiction of ICSID. Having considered the language of Article 41 and the disputed nature of the negotiating history, the silence of Article 41 as to the right of AdT to invoke arbitration before ICSID reflects just as likely an impasse in the negotiations between the parties on this point. Consequently, the Tribunal finds neither common

[100] *See* Spiermann, *supra* note 89.

intention of the Parties to exclude ICSID jurisdiction in the case of a claim by AdT nor any clear waiver on the part of AdT in Article 41 or the Concession generally of its rights to pursue its claims before ICSID. The Tribunal will not read an ambiguous clause as an implicit waiver of ICSID jurisdiction; silence as to the question is not sufficient.

123. For the foregoing reasons, the Tribunal denies the first aspect of Respondent's First Objection.

The Second Aspect of the First Objection which asserts that Bolivia is not a proper party

Respondent's Objection

124. Respondent argues it is not the proper party to this dispute.

125. Referring to ICSID Convention Article 25(1) and 25(3), Bolivia argues that the Waters Superintendency should have been specifically designated by the Government of Bolivia as a "constituent agency or sub-division" in order for ICSID jurisdiction to apply. Bolivia did not at any time designate the Water Superintendency as a "constituent agency or subdivision" or consent to ICSID jurisdiction for actions by the Water Superintendency.[101]

126. Bolivia asserts that the Water Superintendency is a "separate and autonomous legal entity," that exists apart from the Republic of Bolivia.[102] All actions and interactions upon which AdT bases its claims were actions of the Water Superintendency, including the rescission of the Concession.[103]

127. In support of this objection, Bolivia relies upon the ICSID award in *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St Kitts and Nevis* ("*Cable TV*").[104]

128. Bolivia reads the *Cable TV* award as a refusal on the part of an ICSID tribunal to find ICSID jurisdiction over a party who was not designated as a "constituent subdivision or agency" by a Contracting State under Article 25(1). Respondent suggests that the Tribunal should find that the relationship between the Water Superintendency and Bolivia parallels in important aspects the relationship between the Nevis Island Administration and the Federation of St. Kitts and Nevis.

129. Thus, Respondent objects to the jurisdiction of this Tribunal on the ground that the Republic of Bolivia was not a party to the Concession Agreement and the Water Superintendency was never designated as a "constituent subdivision or agency of Bolivia for the purposes of ICSID jurisdiction.[105]

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[101] Resp. Counter Mem., p. 46, ¶¶ 91- 92.
[102] *Id.*, p. 47, ¶ 94.
[80] *Id.*, p. 48, ¶ 96.
[104] *Id.*, p. 47, ¶ 95; *Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings Ltd. v. Federation of St Kitts and Nevis*, Award of January 13, 1997, *reprinted at* 5 ICSID REP. 106 (2002).
[105] Resp. Counter Mem., p. 51, ¶ 103.

Claimant's Reply

130. AdT affirms that its claim is brought against Bolivia, not the Water Superintendency.[106] AdT also contends that the legal status of the Water Superintendency and Respondent's references to ICSID Convention Article 25(1) and 25(3) are irrelevant to the jurisdictional basis of this proceeding.

131. Claimant disagrees with the conclusions Respondent draws from *Cable TV*. Claimant emphasizes that, unlike in the current proceeding, the case in *Cable TV* was brought under a concession agreement agreed to by the parties and not under a bilateral investment treaty as is the case in these proceedings.[107] AdT asserts that Bolivia consented to ICSID jurisdiction by its ratification of the BIT. In emphasizing that its claim is against Bolivia for actions in violation of Bolivia's obligations under the BIT, AdT argues it does not seek, nor is there any need to look into, substituting Bolivia for the Water Superintendency as a party to the Concession.

132. AdT acknowledges that it will be its task at the proceedings on the merits to establish the State responsibility of Bolivia under the BIT for its alleged expropriation of AdT's investments.[108] AdT also acknowledges that it will be its task, where necessary, to establish the basis for attribution of the actions of the Water Superintendency to Bolivia.[109] AdT observed in this regard that: (1) the Concession was negotiated under the supervision of Bolivian officials with authority independent of the Water Superintendent,[110] (2) the Concession was only one of six contracts concluded between AdT and various agencies of Bolivia,[111] (3) the breadth of its investment can only mean there was coordination by the Bolivian government itself,[112] and, (4) it was deprived of its investment not only by the acts of the Water Superintendency, but also through Bolivia's failure to provide security for AdT's property and staff during the disturbances in Cochabamba and the transfer of AdT's property to a publicly owned company.[113]

The Decision of the Tribunal

133. Respondent objects to ICSID jurisdiction on the ground that the Water Superintendency, not the Republic of Bolivia, is the proper party to this arbitration. The Tribunal notes that this aspect of the Respondent's First Objection is related to the first aspect in that it is premised on the view that this dispute arises out of the Concession (to which the Water Superintendency was a party) rather than the BIT (to which Bolivia is a party).

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[106] Cl. Reply, p. 26, ¶ 72.
[107] *Id.*, p. 27, ¶ 74.
[108] *Id.*, p. 26, ¶ 72(b).
[109] *Id.*, p. 28, ¶ 77.
[110] *Id.*, p. 33, ¶ 90, citing Request for Arbitration, Ex. 16 to 19.
[111] *Id.*, p. 28, ¶ 77.
[112] *Id.*
[113] *Id.*, p. 29, ¶ 78 citing Request for Arbitration, ¶¶ 33-35.

134. Bolivia relies on the ICSID award in *Cable TV*. The jurisdictional basis of that case, however, is distinct from that presented in this proceeding.

135. In *Cable TV*, the Claimant cable corporation invested more than a million U.S. dollars on the Island of Nevis as part of a contract with the Government of Nevis. The dispute clause in the Agreement indicated that disputes relating to the contract would be referred to arbitration under the rules and procedures of the ICSID Convention. The tribunal in *Cable TV* held that it had no jurisdiction over the case because (1) the Federation of St. Kitts and Nevis was incorrectly named as a party in a dispute arising out of a contract involving only the Nevis Island Administration and (2) there was no other basis to find the consent of the Federation to arbitration either as a party itself or on behalf of the Nevis Island Administration.[114]

136. The Tribunal acknowledges Bolivia's argument that the Water Superintendency is similar to the Nevis Island Administration as a somewhat autonomous unit within a larger State. More critically, however, the jurisdictional basis asserted in *Cable TV* was a clause in a concession contract and not, as in this proceeding, a bilateral investment treaty. The dispute brought by AdT before this Tribunal is based on alleged acts by Bolivia in violation of the BIT between the Netherlands and Bolivia. Unlike the situation in *Cable TV*, AdT has not named as a Respondent an entity which is not a party to the document containing the jurisdictional clause. The holdings in *Cable TV* do not bear on the situation presented in this proceeding.

137. The Parties raise a number of issues which require more extensive findings based on additional evidence. At this jurisdictional phase of the proceedings, the Tribunal need not determine the questions of (1) attribution and State responsibility under the BIT, or (2) the precise relationship between the Republic of Bolivia and the Water Superintendency. These questions will be determined later, as needed, at the merits phase of the Tribunal's proceedings.

138. The Tribunal denies the second aspect of Respondent's First Objection.

The Third Aspect of the First Objection which asserts that Article 2 of the BIT recognizes the exclusive jurisdiction of Bolivian law over this dispute

Respondent's Objection

139. In the third aspect of its First Objection, Bolivia argues that Article 2 of the BIT contains references to Bolivian law which in this case preclude ICSID jurisdiction. Respondent observes that Article 2 explicitly acknowledges that in protecting and admitting investments, Bolivia does so "within the framework of its law and regulations" and "subject to its laws and regulations."[115] Bolivia thus argues:

> Article 2 of the BIT refers to the Bolivian law as the framework under which these powers and regulations will be in effect over the investment and over the private investor invited to

[114] *Cable TV* at Section 8.01.

[115] Oral Statement of Bolivia's Counsel, Alexandre de Gramont, (February 9, 2004), p. 142, Lines 9-11.

> come to Bolivia. So there is AdT's obligation to be subject to Bolivian laws, SIRESE, and the Supreme Court of Bolivia. . . .[116]

140. Respondent thus objects to the jurisdiction of this Tribunal on the ground that Article 2 of the BIT incorporates a reference to Bolivian law and the application of that law to this case requires AdT to submit to the exclusive jurisdiction of the applicable Bolivian courts and tribunals.

Claimant's Reply

141. Claimant disagrees with Respondent's interpretation of Article 2 of the BIT. AdT asserts that Article 2 of the BIT is a standard "admission clause." AdT argues that the reference in Article 2 to the laws and regulations of Bolivia does not have bearing on any matters other than the admittance of an investment into the Bolivian market. Claimant maintains that Article 2 is meant only to shepherd foreign investment into Bolivia. Respondent's interpretation, in Claimant's view, goes beyond the original purpose of Article 2 and cannot be supported by relevant comparative practice. AdT claims that if Respondent's interpretation of Article 2 were to be followed to its logical end, then there would "never be an ICSID arbitration."[117] AdT goes on to assert that such an interpretation would also permit an indirect resurrection of the Calvo Doctrine.[118]

The Decision of the Tribunal

142. The first aspect of the First Objection argues that the terms of, and the circumstances surrounding, the Concession indicate that AdT agreed to be bound to dispute resolution governed by domestic Bolivian law within Bolivia.[119] In contrast, this aspect of the First Objection asserts that Article 2 of the BIT contains a reference to Bolivian law which places the claim raised by AdT within the exclusive jurisdiction of Bolivia's courts and tribunals. Respondent in its First Objection often passes back and forth between these two aspects of objection. The Tribunal recalls that in its consideration of the Concession-based first aspect of the First Objection, it denied Respondent's arguments that the circumstances surrounding the tender offer, the negotiation of the Concession or the actual language of the Concession placed the current dispute within the exclusive jurisdiction of the Bolivian courts and tribunals. Separating the strands of Respondent's arguments, the Tribunal thus focuses in this aspect solely on the argument concerning Article 2 of the BIT.

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[116] Oral Submission of Bolivia's Counsel, José Antonio Criales, (February 9, 2004), pp. 177-78, Lines 19-21 and 1-5.

[117] Oral Submission of Claimant's Counsel, Matthew Weiniger, (February 9, 2004), p. 247, Lines 8-12.

[118] The Tribunal need not address the Calvo Doctrine except to note that Bolivia has concluded various BITs and is a Contracting State of ICSID. For more on the doctrine, *see generally*, D. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955) and INTERNATIONAL ARBITRATION IN LATIN AMERICA (Nigel Blackaby, David Lindsey & Allessandro Spinillo, eds., 2002).

[119] Resp. Rej., p. 22, ¶ 10.

143. Article 2 of the BIT provides:

> Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

144. Both sentences in Article 2 of the BIT contain a reference to the laws and/or the regulations of Bolivia. Respondent appears to refer to the language of both references, although the first mention appears to predominate in Respondent's arguments.

145. As to the first sentence, the Tribunal observes that if one omits the reference to Bolivian law, the first sentence states that both Bolivia and the Netherlands "shall . . . promote" economic cooperation by protecting in its territory the investments of nationals of the other contracting State. This sentence thus contains the obligation to "promote economic cooperation" as a fundamental goal of the BIT[120] through the protection of investments. The BIT in its other provisions provides a forum and applicable substantive law for claims that an investment was not so protected. Article 2, in this sense, importantly requires that the host State take efforts to protect investments in its territory before such a dispute arises.

146. Given this interpretation of the first sentence, what meaning is to be given to the subordinate phrase "within the framework of its law and regulations?" The BIT not only provides a remedy for breaches, but also attempts to facilitate the creation of a climate in which economic cooperation can flourish. Thus, the Tribunal reads the reference to "the framework of its laws and regulations" as a reference limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments.

147. As to the second sentence, the Tribunal observes that if it omits the reference to Bolivian law, the second sentence states that both Bolivia and the Netherlands "shall admit" the investments of nationals of the other Contracting Party. This obligation to allow the entry of foreign investment is a common provision in bilateral investment treaties, and is often termed an "admission clause." The obligation to admit is "subject to" the decision of Bolivia ("its right") to "exercise powers conferred by its laws or regulations." The Tribunal concludes that the inclusion of the term "subject to" indicates that the duty to admit investments is limited by "the right to exercise powers conferred by its laws or regulations." The Tribunal notes that the reference specifically subjects the State's duty to admit investments not to the laws and regulations of Bolivia, but rather to the "right to exercise powers" conferred by such laws or regulations. The Tribunal finds this language significant as it implies an act at the time of admittance in accordance with the laws or regulations in force at that time.

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[120] Specifically the Preamble to the BIT notes that the two governments enter into the agreement "[d]esiring . . . to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and "[r]ecognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties [. . .]."

148. The Tribunal thus concludes that (1) there is an effective reference to Bolivian law in both the first and second sentences of Article 2 of the BIT, but (2) that both references are of limited scope. The Tribunal now turns to the more ambiguous question of the precise scope of these limited references to Bolivian law.

149. Bolivia argues for a broad interpretation of the role to be given the references to Bolivian law in Article 2. It argues that these references allow it to condition the basis on which a foreign investment enters its market. For example, Bolivia argues that Article 2 authorizes a local incorporation requirement. More broadly, Bolivia contends that the references to Bolivian law can serve to place an investment within the exclusive jurisdiction of Bolivian courts and tribunals.

150. Bolivia's expert witness, Professor Rudolph Dolzer, spoke in support of Bolivia's interpretation.[121] He asserted that the question of admission of an investment into a destination country cannot be separated from the question of jurisdiction.[122] Professor Dolzer argued that the Bolivian practice of requiring investors to incorporate locally and be subject to the Bolivian legal system is a respected and established practice. Moreover, Professor Dolzer points to the "specific reference" to the Bolivian legal framework contained within Article 2 of the BIT.[123]

151. The Tribunal disagrees with the breadth of Bolivia's interpretation of Article 2.

152. The Tribunal notes that it need not decide whether the Bolivian requirement to locally incorporate the vehicle of foreign investment is authorized by Article 2 of the BIT. First, it is clear that there is no question that AdT, the vehicle for foreign investment in the Concession, was locally incorporated. Second, as discussed in the first aspect of this Objection, the Tribunal does not accept Bolivia's argument that local incorporation of an investor in and of itself establishes the exclusive jurisdiction of Bolivian courts and tribunals.[124]

153. As to the more pertinent question of whether the references to Bolivian law in Article 2 reach so far as to encompass the conclusion that Bolivian courts and tribunals possess exclusive jurisdiction, the scope of the two references in Article 2 must be understood in terms of their context and purpose. In this regard, it need be recalled that a primary objective of the BIT, measured both in terms of the motivation for its conclusion and in terms of its substantive provisions, is agreement upon ICSID as an independent and neutral forum for the resolution of investment disputes in accordance with a substantive applicable law specified in the BIT. In this light, the Tribunal concludes that the State Parties

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[121] Oral Statement of Bolivia's Expert, Professor Rudolph Dolzer, (February 9, 2004), pp. 188-211.
[122] *Id.*, p. 197, Lines 13-15.
[123] *Id.*, p. 198, Lines 6-14.
[124] See *supra* ¶¶ 109-123. The Tribunal observes that it is common practice as an investment pre-condition that the vehicle for foreign investment be locally incorporated. The Tribunal also observes that such local incorporation is not in practice a bar to ICSID jurisdiction. Indeed the ICSID Convention specifically contemplates the possibility of claims being brought by a locally incorporated investor, see Article 25(2)(b) of the Convention. *See, e.g.,* Nigel Blackaby, *Arbitration Under Bilateral Investment Treaties in Latin America,* in INTERNATIONAL ARBITRATION IN LATIN AMERICA 379, 388-89 (Nigel Blackaby, David Lindsey & Allessandro Spinillo eds., 2002).

cannot have intended the references to national law in Article 2 to be so encompassing as to defeat the object and purpose of the Treaty. Respondent's interpretation would permit a host State to take its affirmative responsibility to "promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party" and transform it into an opportunity to introduce exclusive local jurisdiction for investment disputes.

154. The Tribunal therefore concludes that the references to Bolivian law in Article 2 of the BIT do not extend, at a minimum, to aspects of Bolivian law that in turn would assert exclusive jurisdiction over disputes under the BIT.

155. The Tribunal denies the third aspect of Respondent's First Objection.

The Fourth Aspect of the First Objection which asserts that the transfer of AdT's stock bars the jurisdiction of the Tribunal

Respondent's Objection

156. Respondent argues that the Concession was carefully structured to preclude changes in the foreign ownership of AdT that might bring it within the coverage of a BIT. Respondent observes that in December 1999 IW Ltd, an immediate foreign owner of 55% of the shares of AdT, moved its place of incorporation from the Cayman Islands to Luxembourg and changed its name to International Water (Tunari) S.a.r.l. ("IW S.a.r.l.").[125] Bolivia also notes that there simultaneously were further changes in the upstream ownership with IW S.a.r.l. in turn being owned by a Dutch corporation, IWT B.V., which is itself a subsidiary of IWH B.V., a second Dutch corporation. Bolivia argues each entity was a new legal entity and a new undefined shareholder of AdT. The resulting ownership structure was not the same as the one provided for by the Concession. Respondent characterizes these actions as a series of "unilateral private share transactions" that were unauthorized by Bolivia.[126]

157. Respondent argues that the transfer of AdT's stock from the Caymanian holding company was a breach of the Concession. On the basis of this alleged breach of the Concession, Respondent objects to the jurisdiction of this Tribunal.

Claimant's Reply

158. Claimant argues that the actions taken in December 1999 did not breach the Concession's restrictions on change in ownership of AdT. Claimant concedes that a change in ownership by a Founding Shareholder would have required the permission of Bolivia. However, Claimant argues that the December 1999 transaction did not involve a sale of shares and change of ownership, but rather the "migration" of a corporation from the Cayman Islands to Luxembourg.

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[125] Resp. Rej., pp. 18-20, ¶¶ 34-36.
[126] Bolivia's Obj., p. 3.

159. As for the changes in corporate structure that occurred upstream of IW S.a.r.l., Claimant argues that the Concession does not address ownership changes above the first tier of owners of AdT, the Founding Shareholders.[127] Moreover, AdT argues that the Concession "placed no restriction on the transfer of shares by 'Final Shareholders,'" that held shares in the "Founding Shareholders."[128] Thus, the Concession did not touch or concern these Ultimate Shareholders.[129]

The Decision of the Tribunal

160. Article 37.1 of the Concession requires "[e]very Founding Stockholder keep more than 50% of the original equity percentage in voting shares of the Concessionaire at least over the first seven (7) years of the Concessions."

161. Annex 13 of the Concession lists IW Ltd, a wholly owned subsidiary of Bechtel Enterprises Holdings, Inc. (which owned 55 percent of AdT), as one of the "Founding Stockholders."

162. In December 1999, IW Ltd of the Cayman Islands changed its place of incorporation to Luxembourg. This was accomplished without the permission of Bolivia.

163. Bolivia argues that this change of place of incorporation is a breach of Article 37.1 of the Concession. AdT argues that it is not a breach because IW Ltd of the Cayman Islands and IW S.a.r.l. of Luxembourg are the same entity. It argues that it is not the case that one entity went out of existence to be replaced by another, but rather that the same entity "migrated" from one jurisdiction to another.

164. We first must ask precisely what Article 37.1 of the Concession required of the Founding Shareholders. The text of Article 37.1 requires each Founding Shareholder to "keep more than 50% of the original equity percentage in voting shares of the Concessionaire." The Tribunal understands Bolivia to argue that the intent of Article 37.1 was to ensure that AdT would remain, for the first seven years of the Concession, under the same structure of corporate control as when the Concession was signed.[130] Under this line of argument, any transfer of control over AdT during this period "would plainly be a violation" of Concession Article 37.1.[131]

165. The Tribunal disagrees with the breadth of Bolivia's interpretation. In the Tribunal's view, the Concession allows for some change in the organizational chart depicting upstream ownership without the consent of Bolivia. The restrictions of Article 37.1 apply to the Founding Shareholders, but not to the Ultimate Shareholders. Given this distinction between Article 37.1's application to the first-tier level ownership of AdT (the Founding Shareholders) and its inapplicability to the final tier of ownership (the Ultimate

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[127] Cl. Reply, pp.21-22, ¶ 59.
[128] *Id.*
[129] The Tribunal notes that Claimant uses the term "Final Shareholders" while the Concession uses the Spanish term "Ultimate Shareholders." The Tribunal shall use the term "Ultimate Shareholders."
[130] Resp. Rej., pp. 8-9, ¶ 19.
[131] Resp. Counter Mem., p. 23, ¶ 46.

Shareholders), it follows that Article 37.1 did not restrict Ultimate Shareholders in their organization of the various tiers of ownership. The Tribunal thus concludes that Article 37.1 was not a guarantee that the organizational chart of corporate ownership would not change in any respect. Rather, the Tribunal interprets the provision to require that, among the Founding Shareholders (the first tier of upstream ownership of AdT), the same entities "keep more than 50% of" their original interest. The issue therefore is whether IW Ltd, as a Founding Shareholder, kept more than 50% of its original interest.

166. It is not disputed that if IW Ltd of the Cayman Islands had transferred all of its rights and obligations to a new corporation in Luxembourg, then the Luxembourg corporation would not be the same entity for the purposes of Article 37.1. The Parties disagree, however, whether the asserted "corporate migration" in this instance yields the same or a different entity.

167. Bolivia argues that for a corporation to be the same entity, it must remain incorporated in the same jurisdiction. Bolivia asserts that new rights and obligations accompanied the "migration" from the Cayman Islands to Luxembourg. A "new" company emerged and IW Ltd, a "Founding Shareholder," ceased to be the same legal person. AdT argues that Caymanian and Luxembourg law both recognize IW Ltd and IW S.a.r.l. as the same legal entity.[132] Respondent characterizes AdT's claim that IW S.a.r.l. of Luxembourg and the IW Ltd of the Cayman Islands are the same legal entity as "patently absurd."[133]

168. Claimant's argument is that just as a natural person may migrate from one jurisdiction to another, changing his or her nationality, so too is it possible for a legal person to migrate.

169. Claimant provided to the Tribunal expert opinions as to the laws of the Cayman Islands and Luxembourg and the application of those laws to the instant case.

170. First, the Caymanian law firm of Maples and Calder examined the Caymanian Companies Law and concluded that IW Ltd was an exempted limited liability company under Section 183 of the Cayman Islands Companies Law. Sections 226 and 227 further allow an exempted company to deregister and continue as the same corporate body in another jurisdiction so long as the receiving jurisdiction permits it.[134]

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[132] Cl. Mem., pp. 43-44, ¶ 126; Maples and Calder Letter, August 28, 2003 in Cl. Reply, Ex. 48, at Section 3.

[133] Resp. Counter Mem., p. 27, ¶ 50.

[134] Cl. Reply, Ex. 48, Opinion Letter, Maples and Calder, August 28, 2003, at Section 3. Maples and Calder assert the Cayman Islands Companies Law (2003 Revision) was in effect at the time of deregistration. The Companies Law reads in part: Section 226. (1) An exempted company incorporated and registered with limited liability and a share capital under this Law, including a company registered by way of continuation under this Part, which proposes to be registered by way of continuation as a body corporate limited by shares under the laws of any jurisdiction outside the Islands (hereinafter called an "applicant") may apply to the Registrar to be de-registered in the Islands. (2) The Registrar shall so de-register an applicant if: (a) the applicant proposes to be registered by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant in the manner provided in this part [...]."

171. Second, the Luxembourg office of the firm of Allen and Overy[135] indicated that Luxembourg law does not "oppose" the transfer of the registered office and place of effective management of a company to Luxembourg "in continuation of its legal personality" so long as the laws of the transferring country state that continuation of legal personality is possible. Thus, IW Ltd "adopted" Luxembourg nationality on the day of the transfer.

172. On the issue of corporate migration, Bolivia provided the Tribunal with the expert opinion of Professor Merritt B. Fox.[136] Professor Fox is of the opinion that IW S.a.r.l. of Luxembourg is a "different corporation" from IW Ltd. Every corporation, Professor Fox asserts, is "unique" and "distinct" from another corporation because of two factors – a corporation's name and its incorporating jurisdiction. Each corporation has "property and contractual rights and duties [that] belong distinctly to it and no one else."[137] Since IW S.a.r.l. did not exist before December 1999, it cannot be deemed a "Founding Stockholder" and could not and did not hold AdT stock. Moreover, inasmuch as IW S.a.r.l. acquired AdT's stocks from IW Ltd after the execution of the Concession, Professor Fox reasons that there were two entities: one that previously held AdT stocks (IW Ltd) and one that came into possession of those stocks (IW S.a.r.l). Professor Fox thus concludes that IW S.a.r.l. is a "different corporation... and hence a different legal person."[138]

173. The Parties questioned the weight to be given to the other Party's expert opinions. Bolivia stated that the two law firms used by Claimant are not experts and are Bechtel's "corporate attorneys who have every interest in defending the transactions they carried out at Bechtel's behest."[139] Claimant questions the relevance of Professor Fox's opinion noting that he is an American lawyer with no expertise in Bolivian, Caymanian or Luxembourg law. AdT argues Professor Fox can only have "a general comparative law view."[140] Consequently, AdT maintains Professor Fox's conclusions are not reliable since he does not specify which set of laws he is comparing when he made his assessment.[141] In addition, the Maples and Calder opinion asserts that Professor Fox's statements are "incorrect as a matter of Cayman Islands law."[142] The Allen and Overy opinion likewise disagrees with Professor Fox's opinion as to the content of Luxembourg law.

174. The Tribunal finds that although Professor Fox's opinion may be accurate as a general matter, it does not bear on the particular situation presented by this case. The possibility of corporate migration between two jurisdictions appears to be relatively rare. It requires that the jurisdiction being left behind and the jurisdiction being entered both accept the possibility of migration in their legal systems. Not many national legal systems provide for corporate migration. The Tribunal concludes that, although unusual, a corporate

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[135] The Tribunal notes that Allen and Overy represented IW S.a.r.l. in connection with its "transfer of the registered office and place of effective management" and change of the company's name from IW Ltd. to IW S.a.r.l. *See* Cl. Reply, Ex. 50, Opinion Letter, Allen & Overy Luxembourg, August 28, 2003, at Section 1.
[136] Resp. Counter Mem., Ex. B, pp. 14-15.
[137] *Id.*, p. 15.
[138] *Id.*
[139] Resp. Rej., p. 20, ¶ 37.
[140] Oral Statement of AdTs Counsel, Matthew Weiniger, (February 9, 2004), p. 67, Lines 7-20.
[141] *Id.*, p. 68, Lines 5-10.
[142] Maples & Calder, *supra* at note 134, at Section 3.5.

migration is permitted by the laws of the Cayman Islands and its continuation as a legal entity is permitted by Luxembourg law.

175. Bolivia further argues that the question of whether IW Ltd and IW S.a.r.l. are the same entity is to be decided with reference to Bolivian law, not Caymanian or Luxembourg law. Bolivia argues that its law controls corporate registration, deregistration and subsequent legal status of AdT's shareholders and that, under Bolivian law, corporate migration is not possible.[143] In Bolivia's view, "Founding Shareholder" must be understood in accordance with Bolivian law and that law does not recognize IW S.a.r.l. as being the same company as IW Ltd.[144] AdT argues that Caymanian and Luxembourg law are the only relevant laws that govern the change of IW Ltd's domicile and name-change. [145]

176. The Tribunal disagrees with Bolivia. The status of IW S.a.r.l. is first a question governed by the law of Luxembourg. It is true that each country has the choice to recognize or not recognize the corporations of other States. As a question of private international law, States in examining the status of a foreign corporation generally defer either to the law of the seat of the company or the law at the place of incorporation.[146] Whichever of these approaches is adopted in this case, the Tribunal concludes on the bases of the arguments made and evidence submitted that the law that determines the status of IW S.a.r.l. would not be the substantive corporate law of Bolivia.

177. Finally, Bolivia points to correspondence from Claimant's parent company to the Water Superintendency seeking "approval" for a particular series of stock transfers from IW Ltd as an admission by AdT that this type of transaction would have been an otherwise unauthorized action.[147] This correspondence is discussed by the Tribunal as the fifth aspect of the First Objection. Suffice it to say for this aspect of the First Objection that (1) the correspondence involved not a corporate migration but rather a direct transfer of AdT stock; (2) the transaction described in the correspondence was never executed; and (3) the Claimant concedes that such a transfer would have required the approval of the appropriate Bolivian authorities.

178. The Tribunal therefore concludes that the migration of IW Ltd from the Cayman Islands to Luxembourg with its change of name to IW S.a.r.l. did not constitute a breach of Article 37.1 of the Concession.

179. The Tribunal notes that, given its holding, it need not reach a further issue not argued by the Parties; namely, whether a breach of the Concession would bar the jurisdiction of this Tribunal. Respondent appears to assume that the appropriate remedy for a breach of certain provisions of the Concession is that this Tribunal refrain from exercising jurisdiction over a matter otherwise properly placed before it.

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[143] Resp. Rej., p. 22, ¶ 38.
[144] *Id.*
[145] Cl. Reply, pp. 23-24, ¶¶ 61-66.
[146] U. Drobnig, *Private International Law*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1116 (R. Bernhardt ed.1992).
[147] Letter of Michael C. Bailey, Vice President & Managing Director, Bechtel, November 24, 1999, Ex. 1 to Resp. C. Mem.

180. The Tribunal denies the fourth aspect of Respondent's First Objection.

The Fifth Aspect of the First Objection which asserts that misrepresentations by representatives of Claimant bar the jurisdiction of this Tribunal

Respondent's Objection

181. Bolivia received two letters from representatives of Bechtel Enterprises Holdings, Inc. in November and December 1999 discussing a proposed change of ownership of AdT and making representations as to the legal effect and impact of that proposed transaction.[148]

182. Respondent claims the first of these two letters contained representations concerning a direct transfer of AdT's stocks from IW Ltd in the Cayman Islands to a different company to be based in the Netherlands.[149] Respondent notes that the letter provided that "as a result of the Transaction the shareholder shall no longer be a company established in the Cayman Islands controlled 100% by IWL, but another company established in the Netherlands and controlled by New IWL."[150] Bolivia asserts that the second of these letters, signed by Bechtel's Bolivian counsel, stated that "transferring the Founding Shareholder status" from the Cayman Islands to a "Dutch firm" would result in "no adverse effect or impact for the Bolivian Government, for Bolivian entities or the town of Cochabamba[...]".[151]

183. Respondent claims that Claimant breached the representations it made in these two letters. Under this objection, Respondent does not dispute the legality of the transfer that took place as it does in the fourth aspect of the First Objection, but instead claims that it received assurances that AdT would remain under the "same control" with no "adverse effect or impact" after the proposed transfer. Respondent claims that, in fact, a different company endowed with new rights and obligations emerged as a result of the transfer. Bolivia argues that one of the new rights possessed by the new company was the protection and availability of a BIT between the Netherlands and Bolivia.[152]

184. Respondent claims AdT subsequently breached its representations by the very act of filing a Request for Arbitration against Bolivia. Respondent argues that this breach of the representations made regarding the legal effects of the proposed stock transfer should deny AdT the benefit of ICSID jurisdiction.[153]

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[148] Letter of Michael C. Bailey, Vice President & Managing Director, Bechtel, to the Superintendencies of Water and Electricity, November 24, 1999, and Letter of Dr. Ramiro Guevara, Servicios Legales S.C., to Luis Uzin, Water Superintendent, December 3, 1999. First submitted to the Tribunal with Bolivia's Reply and found at Resp. Counter Mem., Ex. 1 and 2.

[149] *Id.*

[150] Letter of Michael C. Bailey, Resp. Counter Mem., Ex. 1.

[151] Letter of Dr. Ramiro Guevara, Resp. Counter Mem., Ex. 2 and pp. 41-42, ¶ 81.

[152] Resp. Rej., pp. 19-22, ¶¶ 35-38. As in the fourth aspect of the First Objection, Respondent has also asserted that Concession Article 37.1 barred such reorganizations and that any such reorganization would have constituted a breach of the Concession, which would thus preclude Claimant from ICSID relief, see *supra* ¶¶ 156-157.

[153] Resp. Rej., pp. 19-20, ¶ 36.

Claimant's Reply

185. Claimant emphasizes that the transaction proposed within the two letters did not actually take place.[154] The proposed change of ownership discussed within these letters, Claimant argues, was abandoned and a different series of transactions took place in December of 1999.[155]

186. AdT concedes that Bolivia's approval was indeed required for the specific transaction detailed by the November and December 1999 letters since that plan would have "envisaged International Water (Aguas del Tunari) Ltd.(IWL) selling its share to a new company to be formed in the Netherlands."[156] Since IW Ltd was a "Founding Shareholder," AdT acknowledges that without the consent of Bolivia, Concession Article 37.1 would have barred this sale. Claimant argues that consent was not required for the corporate migration that actually took place as the property rights of AdT's holding company were not "altered and no transfer [took] place."[157]

187. AdT argues there were no similar consent requirements for change of ownership by "Final Shareholders."[158] Thus, "[...]when the structure of the transaction changed in that it was decided that the shares of IW S.a.r.l. would be held by a Dutch company rather than the Dutch company holding IW S.a.r.l's stake in AdT directly, the need to obtain permission was removed." AdT concludes that the letters relied upon by Bolivia are therefore "irrelevant" since the actual accomplished transaction differed significantly from the proposed course of action outlined in that correspondence.[159]

The Decision of the Tribunal

188. Bolivia argues that representations made in two letters to the Water Superintendent from representatives of Bechtel concerning the legal effect of a change in ownership of AdT were breached and that this breach bars the jurisdiction of this Tribunal. However, receipt of the letters did not mean necessarily that the proposed course of action was the one that actually took place. Rather, the evidence before the Tribunal indicates that the proposed transaction was never executed.

189. It will be recalled from the Tribunal's discussion of the fourth aspect of Respondent's First Objection that the transaction that actually occurred involved the migration of IW Ltd of the Cayman Islands to Luxembourg as IW S.a.r.l. This transaction is not the transaction proposed in the November and December letters. In those letters, there is no mention of Luxembourg. Rather the proposed transaction involved a transfer of ownership to a Dutch company. Thus, the Tribunal need not determine the precise content

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[154] Cl. Reply, p. 11, ¶ 30.
[155] *Id.* AdT points to Ex. 8 to 14, documents related to the corporate migration of AdT's holding company, in the Request for Arbitration as evidence to support this claim.
[156] *Id.*, pp. 11-12, ¶¶ 31-32.
[157] See *supra* at ¶¶ 158-159; Oral Statement of AdT's Counsel, Matthew Weiniger, (February 9, 2004), p. 93, Line 17.
[158] Cl. Reply, pp. 11-12, ¶ 32.
[159] *Id.*

of representations contained within the correspondence as the proposal was never executed and such representations cannot have legal effect.

190. Parenthetically, Respondent accuses AdT of fraud.[160] Again, since the transaction outlined by the alleged misrepresentations never took place the Tribunal need not reach a conclusion regarding Respondent's accusation of fraud.

191. The Tribunal notes that, given its holding, it need not reach Respondent's argument that if the Tribunal found a misrepresentation of the type asserted by Respondent, then Claimant would be estopped from invoking the jurisdiction of this Tribunal.[161]

192. The Tribunal thus concludes that the fifth aspect of Respondent's First Objection fails inasmuch as the transaction proposed in the two letters was not executed.

The Sixth Aspect of the First Objection which asserts that Claimant's invocation of the Netherlands-Bolivia BIT is an assertion of jurisdiction not within the scope of Bolivia's consent to arbitration

Respondent's Objection

193. Under this aspect of the First Objection, Respondent draws upon all of the previous aspects of this objection and asserts that these aspects in their totality evidence a qualification of Bolivia's consent to ICSID arbitration.

194. In Bolivia's view, the possibility of ICSID jurisdiction must fall within the "reasonable contemplation" of the parties involved.[162] Reiterating that "consent" is the cornerstone of the ICSID system, Bolivia argues that consent should be limited to circumstances a Contracting State can reasonably contemplate:

> [N]otwithstanding the general proviso for jurisdiction contained in a BIT, the host state may invite an investment and such invitation may limit the host State's consent to ICSID jurisdiction. If the investor accepts the invitation to invest on those terms, then 'the investor's acceptance may not validly go beyond the limits of the host's offer.'[163]

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[160] Bolivia has further asserted that the Water Superintendent's approval was "obtained solely on the basis of a misrepresentation (*i.e.*, was procured by fraud)," Resp. Counter Mem., p. 43, ¶ 84.

[161] Bolivia argues Claimant is estopped from invoking the jurisdiction of this Tribunal. *See e.g.* Resp. Rej., p. 23, ¶ 42; Oral Statement, Bolivia's Expert, Professor Rudolf Dolzer, (February 9, 2004), p. 201, Lines 13-17. However, since the alleged representations discussed in the Fifth Aspect of the First Objection never occurred, such alleged representations can not serve as a basis for estoppel The Tribunal further recalls the statement of the International Court of Justice in the Temple of Preah Vihear case that the representation relied upon should be "clear and unequivocal." ICJ REPORTS (1962) pp. 143-144. *See generally* J.P. Müller & T. Cottier, *Estoppel*, in II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 116 (R. Bernhardt ed., 1992) (defining estoppel restrictively).

[162] Resp. Counter Mem., pp. 36-37, ¶ 71 (Quoting SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 239 (2001) and Rand, Hornick and Friedland, *ICSID's Emerging Jurisprudence,* 19 N.Y.U. INT'L L. & POL. 33, 57 (1986). (Internal citations omitted).

[163] *Id.*, p. 37, ¶ 72, (Internal citations omitted).

195. In terms of this case, Respondent argues that:

> Indeed, Bolivia specifically conditioned the award of the Cochabamba water services concession to a Bolivian company that would not fall under the Bilateral Investment Treaty (or other BITs like it.) That is, Bolivia specifically required that the awardee of the Concession Agreement not be controlled by any foreign entity whose BIT would allow the Bolivian company access to ICSID.[164]

In particular, Bolivia argues that (1) the circumstances surrounding the tender offer, (2) the terms of the Concession particularly as it limited change in the ownership of AdT, and (3) the content of Bolivian law particularly as it is relevant in light of Article 2 of the BIT all validly define the "reasonable contemplation" of the parties regarding the availability of ICSID jurisdiction in the proceedings. Respondent emphasizes that:

> To Bolivia's knowledge, the facts of this case are unique in the jurisprudence of ICSID. Bolivia is unaware of any other case in which a host country authorized the award of an investment contract on the express condition that the awardee not be subject to such foreign control as would allow the awardee to invoke ICSID jurisdiction; where the awardee specifically agreed and represented in the investment contract that it would not be subject to such control; where the awardee's controlling shareholder, in making certain post-contract changes to the awardee's upstream ownership, specifically represented that control would not change; and where the awardee, based on those post-contract changes in the upstream ownership, seeks nonetheless to invoke the Centre's jurisdiction.[165]

196. Bolivia maintains that in ratifying the ICSID treaty, it never consented to the availability of ICSID jurisdiction for an entity such as AdT with migratory ownership interests. Bolivia asserts that consent to ICSID arbitration should be measured on a case-by-case basis taking into consideration the conduct of parties to an investment agreement, the language of the investment agreement, the internal legislation of a host state, and international treaties.[166]

197. Bolivia argues that AdT's contention that Bolivia granted its consent when the ICSID Convention came into force for Bolivia in 1995 is too "simple" and ignored the "conduct" of the parties prior to and during the investment.[167] Bolivia characterizes AdT's approach to the consent issue as "simple and formulaic."[168] Bolivia submits AdT's understanding runs counter to a "basic principle" of ICSID jurisprudence, namely "[t]he inclination of ICSID to extend jurisdiction with the reasonable contemplation of the parties [...]"[169]

198. Bolivia thus argues the Tribunal should reject AdT's "rigid" formula for determining consent solely on the Treaty, the Convention and the Request for Arbitration. Rather, Bolivia argues that: "there is no support for Claimant's argument that only the Treaty, the Convention, and the Request for Arbitration are relevant for the purpose of

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[164] *Id.*, p. 35, ¶ 66, (Emphasis in original).
[165] *Id.*, p. 36, ¶ 70.
[166] *Id.*, p. 37-39, ¶¶ 73-75. (Citing for authority MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 48 (1994))
[167] Resp. Counter Mem., pp. 37-38, ¶ 73.
[168] Resp. Rej., p. 31, ¶ 59.
[169] *Id.*, p. 32, ¶ 61.

determining consent in this case. The facts and circumstances surrounding the Concession Agreement, and the Agreement itself, are relevant."[170]

199. Last, Bolivia offers the opinion of its expert witness Professor Rudolf Dolzer that the "circles of beneficiaries" of the BIT was "carefully" described and negotiated. Thus, any shift in this circle of beneficiaries would be seen as a "very serious matter" by the governments involved. Professor Dolzer urges these basic considerations deserve special consideration within a realistic assessment of the situation that goes beyond textual formalities.[171] Professor Dolzer stresses the point that Article 2 of the BIT makes each party aware of the fact they are operating within a "specific setting" that has a "distinct legal relevance"-namely, the framework of the Bolivian legal system.[172] Professor Dolzer concludes that each party was aware of this "specific reference" and that "the investor has chosen to accept the setting of the investment within the framework of Bolivia's laws and regulations to which the BIT between Bolivia and the Netherlands makes specific reference."[173]

Claimant's Reply

200. AdT does not directly address each point of this aspect. Rather, AdT maintains that "[t]here is no requirement in either the BIT or the ICSID Convention, on which the Tribunal's jurisdiction is based, that Bolivia must consent to the Dutch control of a Bolivian national for an ICSID tribunal to have jurisdiction over disputes between that Dutch-controlled Bolivian national and Bolivia."[174]

201. Thus AdT notes that Bolivia has consented to submitting a dispute to ICSID under the BIT between Bolivia and a Bolivian company under the direct or indirect control of a Dutch national.[175] AdT reasserts its claim is based on the BIT that "constitutes a general, written consent by the Respondent, and the Request for Arbitration a general written consent by the Claimant."[176] Importantly, AdT states "[n]either party sought to limit its written consent in any way."[177]

The Decision of the Tribunal

202. Bolivia argues that its consent to ICSID jurisdiction under the BIT is qualified by the particular circumstances of the case: the negotiation and terms of the Concession, and Article 2 of the BIT read in conjunction with the laws of Bolivia. Bolivia presents this objection as an extension of all its objections that speaks to the entire situation with which it is confronted.

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[170] *Id.*, p. 38, ¶ 71.
[171] Oral Testimony of Respondent's Expert, Professor Rudolph Dolzer, (February 9, 2004), pp. 193-196.
[172] *Id.*, p. 197, Lines 17-18.
[173] *Id.*, p. 198, Lines 8-14.
[174] Cl. Rep., p. 13, ¶ 49.
[175] *Id.*
[176] *Id.*
[177] *Id.*

203. The Tribunal by majority finds that Bolivia's objection that it limited the scope of its consent to ICSID jurisdiction by way of Article 2 of the BIT plus the structuring of the Concession, in particular requirements as to AdT's corporate structure, has already been dispensed with by way of the Tribunal's decisions regarding the first, second, third and fourth Aspects of the First Objection.[178]

204. In his Declaration, Arbitrator Alberro-Semerena dissents from the Tribunal's decision on the sixth aspect of the First Objection. The Tribunal observes that it is unanimous on the other aspects of its decision on the First Objection and that many of the points determined therein bear on the sixth aspect of the First Objection.[179] In Procedural Order No.1, the Tribunal determined that its discretion to order the production of evidence was informed by concepts of materiality, relevance and specificity. Given the Tribunal's findings on the other aspects of the First Objection, a majority of the Tribunal does not find there to be present an undecided issue that would justify the ordering of the production of documents suggested.

205. The Tribunal denies the sixth aspect of Respondent's First Objection.

The Second Objection

Respondent's Second Objection which asserts that the Claimant is not a Bolivian entity "controlled directly or indirectly" by nationals of the Netherlands as required by the Netherlands-Bolivia BIT

Respondent's Objection

206. Respondent objects to the jurisdiction of the Tribunal on the ground that AdT is not a "national" of the Netherlands as defined by Articles 1(b)(ii) and (iii) of the BIT. Respondent, in particular, argues that AdT is not "controlled by Dutch nationals".[180]

207. Respondent argues that AdT is not an entity controlled by nationals of the Netherlands in two principal respects. First, Respondent argues that "control" refers to the ultimate controller, who in this instance is Bechtel, a U.S. company.[181] Second, Respondent

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[178] See *infra*, ¶¶ 109-123, 133-138, 142-155, 160-184.

[179] These are, primarily: (1) "the Tribunal finds neither common intention of the Parties to exclude ICSID jurisdiction in the case of a claim by AdT nor any clear waiver on the part of AdT in Article 41 or the Concession generally of its rights to pursue its claims before ICSID" (Paragraph 122, *supra*), (2) [t]he Tribunal . . . concludes that Article 37.1 was not a guarantee that the organizational chart of corporate ownership would not change in any respect" (Paragraph 165, *supra*), (3) [t]he Tribunal . . . concludes that the migration of IW Ltd from the Cayman Islands to Luxembourg with its change of name to IW S.a.r.l. did not constitute a breach of Article 37.1 of the Concession" (Paragraph 178, *supra*) and (4) "the Tribunal need not determine the precise content of representations contained within the [November 24, 1999] correspondence as the proposal was never executed and such representations cannot have legal effect" (Paragraph 189, *supra*).

[180] *See, e.g.,* Resp. Counter Mem., p. 51 ¶ 104.

[181] *See, e.g.,* Resp. Counter Mem., p. 72 ¶ 149-150, where Bolivia argues: "AdT's argument that the 'ordinary meaning' of 'directly or indirectly' modify 'control' in the Bilateral Investment Treaty so that a company can have multiple controllers is fanciful at best. * * *. Rather the issue is who ultimately controls and that is why the term 'indirect' is even used, to denote that control can be through another corporate entity just as Bechtel's

argues that the question of whether an entity is "controlled, directly or indirectly," is a question of fact which is not necessarily satisfied by 100 percent ownership.

208. Respondent argues that IWT B.V. and IWH B.V., the Dutch companies that Claimant alleges control it, are mere shells that do not "control" the Claimant.[182] It is on the basis of the factual exercise of control that Respondent moves for the production of documents discussed *supra* in paragraphs 26-27.

209. Respondent thus argues that "[t]he issue of control in this case is whether the Netherlands entities as a matter of fact have the power, without the permission of others, to control their own corporate destinies and, accordingly, that of the Claimant, AdT."[183] In Respondent's view, Bechtel remains in control and the Dutch companies entities are corporate "shells." [184]

Claimant's Reply

210. Claimant argues that where there is 100 percent ownership, then there necessarily exists control. Claimant asserts that the term "control" was introduced into the ICSID Convention and international investment law generally not to take away from those situations where there is majority shareholder ownership but rather to extend investment protection to situations where there is a minority shareholder interest which by virtue of voting rights or other legal factors also possesses legal control.[185]

211. Claimant asserts that AdT qualifies as a Dutch national under the BIT since it is incorporated in Bolivia but is controlled, directly or indirectly, by Dutch nationals. Specifically, Claimant states that while AdT is incorporated in Bolivia, 55 percent of AdT's shares are held by IW S.a.r.l. In turn, 100 percent of IW S.a.r.l's shares (and voting rights) are held by IWT B.V., which is a Dutch national. Moreover, 100 percent of IWT B.V.'s shares (and voting rights) are held by yet another Dutch corporation, IWH B.V.[186]

212. Claimant also strongly disputes Respondent's suggestions that IWT B.V. and IWH B.V. are mere "shells" created solely for the purpose of gaining ICSID jurisdiction. In particular, Claimant argues that the change in ownership structure of AdT was only one element of a much wider joint venture between Bechtel Enterprises Holdings, Inc. and Edison S.p.A., that that joint venture and change in structure occurred before the events that

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control of AdT in his case is through Netherlands and Luxembourg entities." *See also id.* at p. 52, ¶¶ 106-107. At other points, Bolivia also argues that an entity must "have the power, without the permission of others, to control their own corporate destinies." *See, e.g.,* Bolivia's Reply at para 1.2. Together these propositions suggest that Bolivia argue there is only one controlling entity and that entity would be the ultimate parent corporation.

[182] *See, e.g.,* Resp. Counter Mem., pp. 56-59, ¶¶ 115-122, Resp. Rej., pp. 62-75, ¶¶ 116-134 where Bolivia argues: "[M]ajority shareholding or even majority voting rights do not *per se* constitute control. ... **T**]he choice of a 'control' test by the parties, as opposed to a more conventional and objective test, such as place of incorporation or seat of the company, indicates an intent by the parties to look beyond formalistic determinations of corporate nationality to consider the reality of the company."

[183] Bolivia's Reply, ¶ 1.2

[184] *Id.,* ¶ 3.10.

[185] Cl. Mem., pp. 46-50, ¶¶ 133-138.

[186] *Id.,* p. 15, ¶ 49.

would so severely affect the Concession were foreseeable, and that there is no question, that as far as Respondent's Second Objection, that both IWT B.V. and IWH B.V. could bring the claims directly under the BIT.

213. Claimant concludes that it is controlled indirectly by Dutch nationals, IWT B.V. and IWH B.V., as required by the BIT.[187]

The Decision of the Tribunal

The Questions Presented

214. Claimant seeks arbitration before the ICSID on the basis of Article 9(6) of the Netherlands-Bolivia BIT.[188]

215. The Parties do not dispute that the Claimant, AdT, is a national of Bolivia. The issue before the Tribunal is whether AdT is – for the purposes of the BIT and in accordance with the terms of the BIT – to be regarded also as a "national" of the Netherlands.

216. The Netherlands-Bolivia BIT, like the ICSID Convention and the majority of BITs, recognizes that the investor of one of the State Parties may incorporate an entity in the other State Party as a vehicle for its investment activity. Indeed, it is by no means uncommon practice that foreign investors may be required to incorporate locally by the host state.

217. To address this possible local incorporation of the investor, the Netherlands-Bolivia BIT follows the pattern of many BITs and provides that a "national" of the Netherlands as defined by Articles 1(b) includes not only:

> (i) natural persons having the nationality of that Contracting Party in accordance with its law;
> (ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party;

but also:

> (iii) legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.

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[187] *Id.*

[188] Article 9(6) of the BIT provides:
"If both Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965 [ICSID Convention], any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the International Centre for Settlement of Investment Disputes."

218. It will be recalled that AdT's ownership since December 22, 1999, as depicted in Figure 2, is as follows:

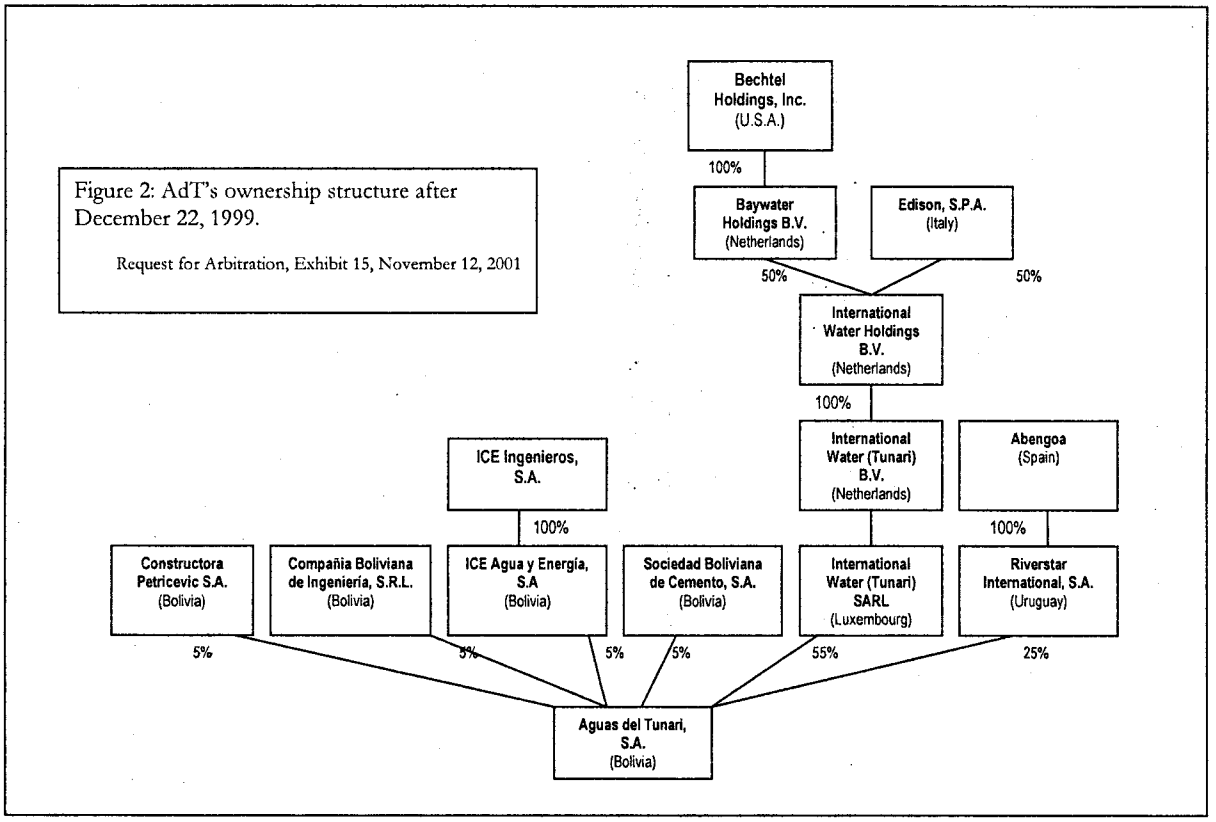

Figure 2: AdT's ownership structure after December 22, 1999.

Request for Arbitration, Exhibit 15, November 12, 2001

219. With this ownership structure in mind, it is helpful to recognize what this objection is *not* about.

> First, there does not appear to be any argument that AdT is foreign controlled, rather the disagreement is as to the location of that foreign control.[189]
>
> Second, there does not appear to be any argument that the Dutch upstream ownership (namely IWT B.V., IWH B.V., and Baywater) are all "legal persons constituted in accordance with the law of" the Netherlands as required by Article 1(b)(ii). Respondent's first objection argued that the act of bringing the Dutch entities into the chain of AdT ownership was a violation of the Concession or representations made to the Respondent.[190] Respondent does not argue, however, that the Dutch corporations are not properly constituted in accordance with Dutch law. Although the requirement of control raised by the second objection is not relevant to these Dutch entities,

[189] Oral Statement of AdT's Counsel, Robert Volterra, (February 10, 2004), p. 407.

[190] The Tribunal concluded in the Fourth and Fifth Aspects of First Objection that these actions resulted in neither a breach of the Concession nor of a representation.

these entities were not named as claimants in this proceeding.[191] Rather, in this proceeding, it is the Bolivian entity, AdT, that is named as claimant and it is that choice that makes Article 1(b)(iii) the basis for this objection.

220. Moreover, it is noteworthy that no suggestion is made that there is yet some other entity, beyond all those mentioned in Figure 2, which controls AdT. Whatever entity (or entities) controls AdT, it (or they) is (or are) depicted in Figure 2. Claimant asserts that both IWT B.V. and IWH B.V. qualify as Dutch entities controlling AdT for the purposes of the BIT. Respondent argues that the true controller of AdT at all times was Bechtel, a U.S. corporation.

221. Recognizing what this objection does not concern, the Tribunal identifies two questions raised by the application of Article 1(b)(iii) to this case.

First, Article 1(b)(iii) requires that AdT, the Claimant and a Bolivian corporation, be "controlled directly or indirectly" by either IWT B.V. or IWH B.V. This question has been argued extensively by the Parties and is primarily a question as to the interpretation and application of the phrase "controlled directly or indirectly" found in Article 1 of the BIT.

Second, as can be seen in Figure 2, between AdT and the various Dutch companies is IW S.a.r.l., a Luxembourg corporation. IW S.ar.l. is 100 percent owned by the various Dutch entities. It, however, owns only 55 percent of AdT. For AdT to be "controlled directly or indirectly", it must be the case that IW S.a.r.l. controls AdT. This question was not argued by the Parties in their written filings, but was raised as a part of the Hearing.

222. The Parties disagree on the legal test governing the question of whether AdT is "controlled directly or indirectly" by either IWT B.V. or IWH B.V. For the Claimant, 100 percent ownership necessarily equals control and majority shareholding itself is sufficiently determinative of control.[192] For the Respondent, the word "control" means there must be *more* than "ownership." For the Respondent, control means the exercise of powers or direction, not merely the legal potential to do so.[193] Thus Respondent uses terms as "real control"[194] in its submissions to ask for "something more"[195] to determine the "reality of the

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[191] The Tribunal notes that Respondent's First Objection would apply equally if the Dutch entities had been named as claimants. Respondent's Second Objection turns particularly, however, on the naming of AdT as Claimant. It may be that there are yet unexpressed reasons why AdT, rather that none of the Dutch entities, was named as Claimant. The Tribunal will consider the relevance of such reasons, if any, if and when they are expressed.

[192] AdT argues, for example, that: "In a situation where share ownership is clearly at a level that gives control, share ownership is the only relevant factor." Cl. Mem., p. 46, ¶ 134.

[193] Thus Bolivia replies, for example, that "AdT's claim that majority shareholding constitutes *per se* control for purposes of the Bilateral Investment Treaty is exactly the sort of formalistic result that the 'control' test is intended to avoid... Control does not in fact reside in AdT's up-the-corporate-chain Netherlands shareholders. It resides elsewhere, at a locus that would not permit ICSID jurisdiction to obtain.", Resp. Counter Mem., p. 59, ¶ 122.

[194] Resp. Counter Mem., p. 67, ¶ 140.

[195] In oral submissions made to the Tribunal, Counsel for Bolivia stated that "we believe that the answer to the question of who controls AdT requires something more than a mere showing of majority ownership of voting

corporate personality."[196] Claimant argues that 100 percent ownership entails the legal potential to control and that Respondent's use of modifiers for "control," such as effective or actual, is unwarranted.[197] Respondent contends that control is a factual question particularly relevant to situations where the company alleged to control another company in fact has little, if any, capacity to exercise such control.[198]

223. Thus the crucial point of disagreement is that Claimant, on the one hand, interprets the phrase "controlled directly or indirectly" as requiring only the legal potential to control the Claimant and that the phrase thus potentially encompasses not only the ultimate parent of AdT, but also the subsidiaries of the parent above the Claimant. The Respondent, on the other hand, interprets the phrase "controlled directly or indirectly" as requiring "ultimate" control of AdT or, if the phrase is not limited to the ultimate controller, then "effective", "actual" control of AdT. Thus the difference in view between the Parties is not between "control" and "ownership," but rather between "control" as requiring the legal potential to control and "control" as requiring the actual exercise of control.

224. Finally, it is important to observe that the framing of the issue before the Tribunal is rendered necessary by Claimant's reliance on its documentary evidence of IWT B.V.'s and IWH B.V.'s legal ownership interest in, and resultant potential to control of, AdT as sufficient proof to establish jurisdiction under the BIT. As noted above, Respondent has requested the production of documents from Claimant bearing on the control in fact of AdT by IWT B.V. or IWH B.V. Claimant opposes such a production request arguing that such documents legally are immaterial and that such a broad discovery order as a practical matter would be burdensome. In addition, as discussed in paragraph 246, *infra*, Respondent does not make clear what evidence would be sufficient to establish the exercise of control argued by Respondent to be required by the BIT. The issue as framed by Claimant might be mooted if the Tribunal ordered the production of documents and such documents established not only the legal potential to control, but also the exercise of control. But, given that Respondent has not indicated what evidence would establish effective control, there is not a basis to make an appropriately tailored order for production of documents. Moreover, it is Claimant's prerogative to structure its claim and in doing so it runs the risk of the Tribunal denying jurisdiction in this matter.

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shares, particularly because of the unique facts and circumstances of this particular case." Oral Statement of Bolivia's Counsel, Dana Contratto, (February 10, 2004), p. 425, Lines 1-5.

[196] Resp. Counter Mem., pp. 66-67, ¶ 139.

[197] In oral submissions to the Tribunal, Counsel for AdT stated:, "In the claimant's pleading, the word "control" is put simply as control. But the respondent, when it discusses control, in the manner that the respondent wishes to convince the Tribunal should be, in fact, the standard of control in the BIT, they always have to modify the word "control." They use words such as "effective control, ultimate control, actual control, real control." But these words do not exist in the Bilateral Investment Treaty [. . .]." Oral Statement of AdT's Counsel, Robert Volterra, (February 10, 2004), p. 287, Lines 4-14.

[198] Resp. Counter Mem., p. 67, ¶ 140.

The Meaning of the Phrase: "controlled directly or indirectly"

The Ordinary Meaning of the Phrase: "controlled directly or indirectly"

225. Article 1(b)(iii) provides that a national of a Contracting Party includes "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party."

226. Article 31(2) of the Vienna Convention requires that the interpreter as one part of his task look to the "ordinary meaning" of a word or phrase unless a "special meaning" was intended by the parties. The phrase requiring interpretation is "controlled directly or indirectly" where "controlled" is the past participle of the transitive verb "control." As anticipated by the Vienna Convention itself in requiring the interpreter to look not only to the ordinary meaning of a phrase, but also to the context in which it is found and in light of the object and purpose of the document, the ordinary meaning of "controlled directly or indirectly," although clearly an essential element of the task of interpretation, is not determinative in this instance.

227. To find the "ordinary meaning" of the word "controlled", the Tribunal sought guidance from standard desk dictionaries. One standard American English dictionary defined the transitive verb "control" as "to exercise restraining or directing influence over... to have power over."[199] According to another desk dictionary, the verb control can be defined as to "manage: to exercise power or authority over something such as a business or a nation."[200] Similarly, a standard British English dictionary defines "control" as both "the fact of controlling" and "the function or power of directing and regulating; domination, command, sway."[201] On the one hand, the use of the word "manage" in the second quotation seems to conform to the Respondent's view that control involves actual exercise of powers or direction. On the other hand, the words "power" and "authority" point in the opposite direction. "Authority" is defined simply as "the right or power to enforce rules or give orders"[202] and "power" as either "the ability, skill, or capacity to do something" or "the authority to act or do something according to a law or rule."[203] Thus while some definitions suggest the actual exercise of influence, others emphasize the possession of power over an object. Thus, the ordinary meaning of "control" would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares.

228. The Tribunal notes that Respondent argues, among other things, that the use of the word "controlled," rather than "control," is significant.[204] Like the Tribunal, the

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[199] Webster's On-Line Dictionary, www.m-w.com (2005); I WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 496 (1971)("to exercise restraining or directing influence over ... [and] [to] have power over ....")

[200] ENCARTA WORLD ENGLISH DICTIONARY, 1999, p. 395.

[201] OXFORD ENGLISH DICTIONARY III 851-52, 853 (2nd ed. 1989).

[202] ENCARTA WORLD ENGLISH DICTIONARY, 1999, p. 113

[203] *Id.* p. 411.

[204] The Tribunal notes that the Respondent itself is inconsistent on the significance of the use of "controlled," rather "control." Respondent, for example, primarily argues that the phrase "controlled directly or indirectly" in the BIT is coextensive with the phrase "foreign control" in the ICSID Convention. *See, e.g.,* Resp. Counter Mem., at ¶ 113.

Respondent starts with the definitional meaning of "control," but from that definition then argues that:

> The word used in the Treaty, "controlled," is a participle *i.e.*, a verb used in adjective form. To say that an object is "controlled" is different from saying that an object is capable of being controlled; an object that is "controlled" is actually controlled. "Controlled" is not a complex or unusual word. To apply the word in this case means that AdT must have been controlled, *i.e.* commanded, regulated, restrained, or directed, by a Dutch company or companies.[205]

Respondent thus argues that the use of the past participle 'controlled' in Article 1(b)(iii) of the BIT implies the requirement of the exercise of actual or effective control.

229. Indeed, the general definition of "controlled" rather than "control" is supportive of Respondent's argument. The word "controlled" in some instances is defined simply as the past participle of "control" and the reader is referred to the definition of control. But in other instances, "controlled" is defined more specifically as "[r]estrained, managed or kept within bounds,"[206] and "held in check, restrained, dominated."[207] Thus the past participle in some instances carries with it a reference to the actual exercise of restraint.

230. The Tribunal notes that Article 31(4) of the Vienna Convention indicates that a special meaning shall be given to a term if the parties so intended the special meaning. There is no indication in the record that any special meaning for the word "controlled" was intended by these contracting parties. The Tribunal observes, however, that the negotiators of the Netherlands – Bolivia BIT likely possessed a sophisticated knowledge of business and law. For such persons, the ordinary meaning of a word or phrase also includes the legal meanings given to such words or phrases. The Tribunal thus turns to consider the legal meaning of "control" and controlled."

231. The legal definition for the verb "control" provides several meanings for control.[208] The first definition for "control" is "to exercise power or influence over <the judge controlled the proceedings>." The second definition is "to regulate or govern <by law, the budget officer controls expenditures>." The final definition is "to have a controlling interest in <the five shareholders controlled the company>." The first definition of control suggests the actual exercise of control with emphasis on the right to exercise control over an object but does not suggest ownership of the object. The second definition similarly points to a right to control but not ownership of that which is controlled. The third definition of control ties control to ownership interest providing that a "controlling interest" is understood as a "legal share in something ... sufficient ownership of stock in a company to control policy and management; especially a greater-than-50% ownership interest in an enterprise."[209]

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[205] Resp. Rej., at ¶ 92. The only other reference to the significance of adjectival past participle use of "control" was made during the hearing, *see* Transcript (February 10, 2004), p. 422-423.
[206] MERRIAM WEBSTER'S INTERNATIONAL DICTIONARY 497 (1993).
[207] Oxford English Dictionary III 853 (2nd ed. 1989).
[208] BLACK'S LAW DICTIONARY, 353 (8th Ed., 2004).
[209] *Id.*, at 828.

232. The legal definitions of "controlled" are particularly instructive as they cut directly against the significance to the adjectival past participle usage suggested by Respondent. The phrase "controlled group (controlled corporate groups)" is defined as "two or more corporations whose stock is substantially held by five or fewer persons.[210] "Controlled corporation (controlled company)" is defined as a "corporation in which the majority of the stock is held by one individual or firm"[211] And "controlled foreign corporation" is defined as "a foreign corporation in which more than 50% of the stock is owned by U.S. citizens who each own 10% or more of the voting stock." All three of these definitions refer solely to the power to control and not its actual exercise.

233. The Tribunal thus concludes that the word "controlled," like the word "control," is not determinative. The adjective "controlled" may indicate that "control" was actually exercised at some point in the past or it may mean that another possessed the capacity to control that company in the past (or indeed at the present moment). On the one hand, "controlled" may mean that an entity was subject to the actual control of another. On the other, "controlled" may mean that an entity was subject to the controlling capacity of another.

234. The Tribunal observes that there is no indication from any of the dictionaries consulted that "control" necessarily entails a degree of active exercise of powers or direction. If the parties had intended this result, a better choice of word for the BIT would have been "managed" rather than "controlled." In addition, although the contracting states would have eliminated uncertainty by utilizing phrasing such as "under direct or indirect control of" or "subject to the direct or indirect control of," rather than "controlled directly or indirectly" by another company, the ambiguous meaning of "controlled" leads the Tribunal to find the difference in phrasing to be not determinative.

235. Respondent argues that in light of the lack of a specific definition for "control" in the BIT, the Tribunal should look to the concept of "control" as it has been used in defining corporate nationality under international law. Bolivia states that there are four traditional tests for determining corporate nationality of an entity. Both the corporate seat test and the incorporating jurisdiction test "focus on objective factors for the purposes of simplicity, and ignore the possibility that the assigned nationality may not reflect the reality of the company's activities."[212] The other two tests focus respectively on control and on predominant interest in the company and, Bolivia argues, states select the "control" test because it is "designed to focus on the reality behind the corporate personality . . . [and is] often used 'to avoid inequitable results.' "[213] There is, however, no indication in the record that the contracting parties had such a particular special meaning for control in mind. Nor should such intent be assumed since the Tribunal finds the contexts of foreign investment protection and the regulation of corporate activity to be sufficiently distinct.[214]

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[210] BLACK'S LAW DICTIONARY, 353 (8th Ed., 2004).

[211] *Id.*, at 365.

[212] Resp. Counter Mem., p. 57, ¶ 116.

[213] Resp. Counter Mem., pp. 57-58, ¶ 118 (citations omitted).

[214] It is perilous to transfer meaning from one regulatory framework to another where the motivations underlying the choice of terminology often will be determinative. For example in the taxation area, the Tribunal found the legal definitions which emphasize the capacity to control (see para. 230 of the Decision) to be utilized in the definition of "controlled" corporations in the several taxation statutes. According to the U.S.

236. The word "controlled" is modified by the phrase "directly or indirectly." This phrase clearly indicates that one entity may control another entity in one of two ways. An entity that is *directly controlled* implies that there is no intermediary between the two entities, while an entity that is *indirectly controlled* implies that there is one or more intermediary entities between the two.

237. As stated above, one prong of Respondent's interpretation is that the phrase "controlled directly or indirectly" points to the "ultimate controller." In juxtaposition to Respondent's interpretation, Claimant argues that "[p]ursuant to the BIT test, it is possible for more than one entity to be a controlling entity for the purposes of the BIT."[215] The Tribunal agrees with the Claimant's view. The phrase, "directly or indirectly," in modifying the term "controlled" creates the possibility of there simultaneously being a direct controller and one or more indirect controllers. The BIT does not limit the scope of eligible claimants to only the "ultimate controller."

238. This conclusion, however, does not necessarily exclude the second prong of Respondent's interpretation, namely that any controller, whether it be a direct or indirect controller, must exercise actual control. Claimant in applying this phrase does so with an emphasis on the legal capacity to control that flows from ownership. Thus IW Sa.r.l. is the direct controller of AdT as it is the first entity in the chain of controlling ownership above AdT. IWT B.V. and IWH B.V., as entities above IW S.a.r.l., would both be indirect controllers. Respondent, in contrast, in applying this phrase emphasizes actual control and argues that Bechtel actually controls AdT, and that the legal intermediate entities are not relevant in that they exercise no control over AdT.

239. The Tribunal continues the task of interpretation by considering the other two core elements of the method of interpretation contained in the Vienna Convention: the context in which the phrase "controlled directly or indirectly" is found and the object and purpose of the BIT.

Internal Revenue Service, a "controlled foreign corporation" is "any foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote is owned directly, indirectly, or constructively by U.S. shareholders on any day during the taxable year of such foreign corporation or more than 50% of the total value of the stock is owned directly, indirectly or constructively by U.S. shareholders on any day during the taxable year of the controlled foreign corporation" Internal Revenue Manual, Section 4.61.7.3, at http://www.irs.gov/irm/part4/ch46s07.html. Likewise, Canada in its Corporation Capital Tax Act defines a "subsidiary controlled corporation" as "a corporation of which more than fifty per cent of the issued share capital, with full voting rights under all circumstances, is owned, directly or indirectly, by another corporation." An Act Respecting A Tax on the Capital of Certain Financial Corporations, Revised Statutes 1989, amended 1990, c. 10, s. 2; 1992, c. 15, s. 2; 1993, c. 17; 2004, c. 3, s. 3, available at http://www.gov.ns.ca/legi/legc/statutes/corpct.htm Section 2(z). The motivations in taxation that might suggest such a definition are unknown to the Tribunal, however, and the Tribunal, as stated in the text, declines to drawn inferences in such cases. The Tribunal similarly declines to draw inferences from other definitions of "control" in the U.S. regulatory contexts of its Securities Exchange Act or the American Law Institute Principles of Corporate Governance, as cited by Respondent's Expert Professor Fox.

[215] Cl. Mem., p. 53, ¶ 148.

The Phrase in Its Context and in Light of the Object and Purpose of the BIT

240. It is in the consideration of the context in which the phrase "controlled directly or indirectly" is found, and in light of the object and purpose of the BIT, that the Tribunal finds the basis for the interpretation of the phrase.

241. As to the object and purpose of the BIT, the Tribunal notes that the Preamble to the BIT provides:

> The Government of the Kingdom of the Netherlands and The Government of the Republic of Bolivia,
>
> Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party.
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable[...].[216]

Thus the object and purpose of the treaty is to "stimulate the flow of capital and technology" and the Contracting Parties explicitly recognize that such stimulation will result from "agreement upon the treatment to be accorded to ... investments" by "the national of one Contracting Party in the territory of the other Contracting Party."

242. As to the context in which the phrase "controlled directly or indirectly" is found, the Tribunal notes that Article 1 in defining the concept of "national" not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word "controlled" is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, "controlled" indicates a quality of the ownership interest.

243. The question therefore is how the term "controlled" in Article 1(b)(iii) is meant to qualify "ownership." Claimant argues that "control" is a capacity that the ownership interest possesses. If one entity owns 100% of another entity, then the first entity, in Claimant's view, possesses the capacity to control the other entity and that entity is a "controlled' entity. For the Claimant, the word "control," rather than simply "ownership," is employed in the BIT to address the situation where a minority shareholder through, for example, voting rights possesses the capacity to control the other entity. Respondent argues that "control" is a capacity that the ownership interest must exercise. Moreover, Respondent appears to argue that that exercise of control must be done by the owning entity itself.[217]

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[216] It is widely accepted that the preamble language of a treaty can be particularly helpful in ascertaining the motive, object and circumstances of a treaty. Dolzer and Stevens note in their book on BIT's that even though preambles rarely contain binding obligations, they may serve as "useful aids to interpretation of the treaty." RUDOLF DOLZER AND MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES, 20 (1995).

[217] *See e.g.* Oral Statement Counsel for Bolivia, Dana Contratto, (February 9, 2004), pp. 422-423, Lines 17-21.

244. The Tribunal does not find Respondent's view to be persuasive for three reasons.

245. First, Claimant's view that "control" is a quality that accompanies ownership finds support generally in the law. An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity. The first entity may decline to exercise its control, but that is its choice. Moreover, the first entity may be held responsible under various corporate law doctrines for the actions of its subsidiary, whether or not it actually exercised control over that subsidiary's actions. Respondent contends that IWT B.V. and IWH B.V. are mere "shells" which cannot even decline to exercise its possible control. Holding companies (if that is all IWT B.V. and IWH B.V. are in this case) owning substantial assets (here the rights under the Concession) are, however, both a common and legal device for corporate organization and face the same legal obligations of corporations generally.[218] The Tribunal acknowledges that the corporate form may be abused and that form may be set aside for fraud or on other grounds. As outlined in paragraph 331, *infra*, the Tribunal finds no such extraordinary grounds to be present on the evidence.

246. Second, Respondent's argument that "control" can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vague as to be unmanageable. Respondent asserts that the phrase "controlled directly or indirectly" referred to the "ultimate controller" provides a defined standard, but as stated in paragraph 237, the Tribunal rejects this interpretation as inconsistent with the language "directly or indirectly." Once one admits of the possibility of several controllers, then the definition of what constitutes sufficient "actual" control for any particular controller, particularly when an entity may delegate such actual control, becomes problematic. This becomes apparent with Respondent's difficulty in offering the Tribunal the details of its "actual" control test. In response to a question of the Tribunal as to the details of an actual control test, counsel for Respondent stated that "[c]ontrol is not a – a objective – there is not an objective bright –line test for control in a corporate organization control sense. You have to know details."[219] Indeed, Respondent's argument that "control" can be satisfied by only a certain level of actual control by one entity over another entity ignores the reality that such exercise of control may be delegated to a subsidiary or even to an independent subcontractor.[220] Moreover, the many dimensions of actual control of a

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[218] The Tribunal agrees with the *Aucoven* tribunal which, although working in the different context of Article 25 of the ICSDI Convention, when faced with a similar argument concerning the substance of the entity said to "control" the claimant in that dispute, wrote: "Although [respondent] views [the corporation said to control the claimant] as a mere formality, this formality is the fundamental building block of the global economy. *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela* (hereinafter referred to as *"Aucoven"*), in its Decision on Jurisdiction of September 27, 2001 at ¶ 67, *reprinted at* 16 ICSID Rev.—FILJ 469 (2001), 6 ICSID 419 (2004).

[219] Oral Statement by Respondent's Counsel, Dana Contratto, (February 11, 2004), p.595, Lines 9-12; Reasoning similar to that of Tribunal can be found in *Aucoven*, *supra* note 217, where the tribunal stated:

> 69. The thicket into which Venezuela would lead the Arbitral Tribunal is precisely what the drafters of the ICSID Convention decided to avoid. Finding the "ultimate", or "effective", or "true" controller would often involve difficult and protracted factual investigations, without any assurance as to the result.

[220] The Tribunal is aware that the Respondent in particular asserts that IWT B.V. and IWH B.V. are in its view mere shells that do not oversee the operations of Claimant at all. For that limiting case, there could be an administrable factual test of managerial control. However, the vagueness of Respondent's factual inquiry would

corporate entity range from day to day operations up to strategic decision-making. Would the minutes of one Board of Directors meeting delegating to a consulting firm the management of a majority owned company be evidence of actual control of that company? Would the minutes of one Board of Directors meeting delegating to a parent or subsidiary company management of a majority owned company be evidence of actual control of the company? Would the day to day direction by one company of the operations of a majority owned company not be sufficient evidence of actual control if a parent company dictated which business opportunities would be taken up by the majority owned company and which would not? The difficulty in articulating a test in the Tribunal's view reflects not only the fact that the Respondent did not provide such a test, but also the possibility that it is not practicable to do so and that, as discussed in the next paragraph, the resultant uncertainty would directly frustrate the object and purpose of the BIT.

247. Third, the uncertainty inherent in Respondent's call for a test based on an uncertain level of actual control would not be consistent with the object and purpose of the BIT. The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration before ICSID. If an investor can not ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated.

248. Before reaching a conclusion as to the interpretation of the phrase "controlled directly or indirectly" under Article 31 of the Vienna Convention, the Tribunal turns to a unique aspect of this proceeding, namely its consideration of the relevance of several statements of the Netherlands, the non-disputing State party to the BIT.

Article 31(3) of the Vienna Convention and the Significance to be Accorded to Statements of the Dutch Government

249. Respondent places great emphasis upon various statements of the Government of the Netherlands made in 2002. Respondent argues these statements support Respondent's interpretation of the BIT. Moreover, Respondent argues that the statements of the Dutch Government result in the unprecedented situation where both State Parties to the BIT agree that the Tribunal does not possess jurisdiction over the dispute before it: "This is the only ICSID case that we know of in which both state parties to the Treaty that's being invoked by the Claimant are on record as saying that that Treaty does not apply to this case."[221]

250. The Tribunal observes that Article 31(3) of the Vienna Convention provides that "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its

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apply to all assertions that one entity controls another entity. The BIT does not suggest that there be one test for "shells" and another for all situations other than shells. More importantly, the pejorative use of the poorly defined word "shell" points to hypothetical situations more appropriately addressed by doctrines created to address the fraudulent or abusive use of corporate form, and, as found by the Tribunal at paragraph 331, *infra,* neither of these situations is apparent in this case.

[221] Oral statement of Bolivia's Counsel, Alexandre de Gramont, (February 9, 2004), p.121, Lines 16-20.

provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [. . .]."

251. The position taken by Bolivia in this proceeding and the statements made by Ministries of the Government of the Netherlands to the Parliament of the Netherlands, despite the fact that they both relate to the present dispute, are not a "subsequent agreement between the parties." The coincidence of several statements does not make them a joint statement. And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement. The Tribunal therefore examines whether the Bolivian position in these proceedings and the internal statements of Ministries of the government of the Netherlands constitute "subsequent practice . . . which establishes the agreement of the parties" regarding the interpretation of the BIT.

252. The Dutch statements were made a part of these proceedings via the expert opinion of Professor Nico Schrijver, submitted by Claimant. According to Professor Schrijver, it is the custom in the Netherlands that a Member of Parliament may submit a question in writing to a Ministry of the Government of the Netherlands. That Ministry will take the lead in preparing a written reply, and that process may involve consultation by that Ministry with other Ministries. Professor Schrijver's opinion drew the attention of Respondent and the Tribunal to three parliamentary questions and replies made between February 21, 2002 and June 5, 2002. It is the third question and reply that is argued by the Respondent to be potentially relevant.[222] The last exchange must be approached, however, in light of the first two exchanges.

253. The first exchange was initiated on February 21, 2002, when Dutch MP Van Bommel posed several written questions to the State Secretary for Economic Affairs and the Minister for Development Cooperation concerning, *inter alia*, whether certain corporations could invoke the Dutch-Bolivian BIT in the specific dispute addressed by this Tribunal.[223] On behalf of the Minister for Development Cooperation and his Ministry, the State Secretary for Economic Affairs (Minister Ybema) replied on March 6, 2002. He declined to state whether the current dispute fell under the BIT, stating instead, *inter alia,* that the answer is up to the "discretion of the arbitration tribunal to which a dispute has been submitted."[224]

254. The second exchange was initiated on March 25, 2002, when MP Van Bommel submitted further written questions, requesting that the State Secretary and Minister "state clearly and unambiguously whether these multinationals can invoke the Dutch-Bolivian investment treaty in this case."[225] The State Secretary replied on April 6, 2002, and referred the MP to his March 6, 2002 reply to the earlier questions from MP Van Bommel, and otherwise only making comments of a general nature.

255. The third and final exchange was initiated on April 18, 2002, when a five member group of Dutch MPs, including MP Van Bommel, submitted further questions to the

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[222] Resp. Counter Mem., pp. 27-28, ¶¶ 49-51.
[223] Parliamentary questions ("Kamervragen"), Parliamentary year 2001-2002, no. 765.
[224] *Id.*, answer 6.
[225] Parliamentary questions ("Kamervragen"), Parliamentary year 2001-2002, no. 959.

Minister of Housing, Spatial Planning and Environment, the Minister for Development Cooperation and the State Secretary for Economic Affairs.[226] The MPs asked:

> Are you familiar with the publication 'Water, Human Right or Merchandise' of the association Milieudefensie ('Friends of the Earth')? What is your general opinion on this publication?[227]

On behalf of himself and the State Secretary, the Minister for Housing, Spatial Planning and Environment (Minister Pronk) replied on June 5, 2002:

> Yes. Access to safe and clean water is important. The publication brings a number of aspects of the complicated water issue to the attention of a larger public. The topic deserves this attention. However, the formulation in this pamphlet is sometimes factually incorrect or suggestive. One particular point I would like to mention with emphasis. On p. 16 (Water war in Bolivia) it is stated that Aguas del Tunari can resort to the dispute settlement commission of the World Bank under the Dutch-Bolivian Investment Treaty. This is incorrect. As recently stated in response to questions of MP Van Bommel [citing to the previous replies to Van Bommel], the Government is of the view that the investment treaty is not applicable to this particular case.[228]

256. Claimant, through Professor Schrijver's testimony, states that there "appears to be some confusion as to the facts."[229] Professor Schrijver's view is that the third reply applies "the incorrect facts to the correct legal assessment given in the Government's earlier replies."[230]

257. The third reply from The Netherlands government is inconsistent with the first two replies and appears to refer incorrectly to the latter. As a result, little can be concluded from the three written replies of The Netherlands government. Nonetheless, noting, the great weight placed on these replies by the Respondent, the Tribunal decided that further limited information as to the basis for the written replies of The Netherlands could assist the Tribunal in its work.

258. As noted in paragraph 47, the Tribunal in a letter dated October 1, 2004, wrote to the Legal Advisor of the Foreign Ministry of the Netherlands posing several specific questions. Given that this letter is the first inquiry of a non-disputing state party to a BIT, the entire text of the letter is attached to this decision as Appendix III. The Tribunal emphasizes three aspects of this letter of inquiry, however. First, the Tribunal wrote that:

> The Tribunal recognizes the obligation of the Netherlands under [Article 27 of] the ICSID Convention to not provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention. In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal's jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions.

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[226] Parliamentary questions ("Kamervragen"), Parliamentary year 2001-2002, no. 1229.
[227] *Id.*, question 1.
[228] *Id.*, answer 1.
[229] Cl. Mem., Ex. 46, Expert Opinion of Professor Schrijver, p. 18, ¶ 40.
[230] *Id.*

Second, the Tribunal stated:

> The ICSID Convention entrusts the Tribunal with deciding upon its jurisdiction in this matter. The parties to this arbitration have put in issue provisions of the BIT between the Netherlands and Bolivia. Given that the Government of the Netherlands is not a party or otherwise present in this arbitration, the Tribunal concludes that information from the Government of the Netherlands would assist the work of the Tribunal. Given further the above quoted Article 27 of the ICSID Convention and the fact that the Netherlands is not a party to this arbitration, the Tribunal is also of the view that such questions must be specific and narrowly tailored, aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case. It is the opinion of the Tribunal that it possesses the authority to seek this information under Rule 34 of the ICSID Arbitration Rules.

Third, the Tribunal asked:

> With all of these considerations in mind, the Tribunal notes that the written responses to parliamentary questions, summarized [in the letter] and attached in full, do not in and of themselves provide reasons of general application. If the Government's statement replying to the Parliamentary questions of 18 April 2002 reflects an interpretative position of general application held by the Government of the Netherlands, the Tribunal requests that the Government provide the Tribunal with information (of the type suggested by Articles 31 and 32 of the Vienna Convention on the Law of Treaties as being possibly relevant) upon which that general interpretative position is based.

259. As stated in paragraph 49, the Tribunal received on December 14, 2004, a reply letter from Mr. Lammers dated October 29, 2004, to which there was attached a document entitled "Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, signed on 19 March 1992 and entered into force on first November 1994."

260. The Tribunal first observes that the document attached to Mr. Lammers' letter contained only comments of a general nature that possibly may be relevant to the task of confirming an interpretation under Article 32 ("supplementary means of interpretation") of the Vienna Convention on the Law of Treaties. It does not provide the Tribunal, however, with any information of the type suggested by Article 31 of the Vienna Convention on the Law of Treaties as being possibly relevant and upon which a general interpretative position may be based. The Tribunal has made no use of this document in arriving at its decision.

261. Second, the Tribunal observes that Mr. Lammers in his reply cover letter states that the answers given by the Dutch government to this series of parliamentary questions were based on information from the press which at the time that the answers were given "may not necessarily have been correct."[231]

262. Given these first two observations, the Tribunal can find no "subsequent practice ... which establishes an agreement of the parties" regarding the interpretation of the BIT. In addition, the response from the Netherlands provides no additional information of the type suggested by Article 31 of the Vienna Convention on the Law of Treaties as being possibly relevant and upon which a general interpretative position might be based.

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[231] See October 29, 2004 Letter from Johan Lammers, Legal Adviser, Ministerie van Buietenlanse Zaken to David Caron, President of Tribunal.

263. The Tribunal's third final observation is that it clearly is not presented with, and therefore need not consider, the situation where the two state parties to a BIT both express the position that a tribunal lacks jurisdiction over a particular dispute before a tribunal. The inconsistency between the first and second replies of The Netherlands government, on the one hand, and its third reply, on the other hand, and the apparent incorrect reference in the latter to the first two replies does not, in the Tribunal's view, express with any clarity the position that the BIT does not apply in this case. [232] Further, and in any event, the Tribunal emphasizes, however, its firm view that it is the Tribunal, and not the contracting parties, that is the arbiter of its jurisdiction.

Conclusion as to the Meaning of "controlled directly or indirectly"

264. The Tribunal, by majority, concludes that the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these. In the Tribunal's view, the BIT does not require actual day-to-day or ultimate control as part of the "controlled directly or indirectly" requirement contained in Article 1(b)(iii). The Tribunal observes that it is not charged with determining all forms which control might take. It is the Tribunal's conclusion, by majority, that, in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase "controlled directly or indirectly" exists.

265. The Declaration of José Luis Alberro-Semerena dissents to the Tribunal's decision as to the interpretation given to the phrase "controlled directly or indirectly." The difference between the majority and the dissent as to Respondent's request for production for documents follows directly from their difference in the interpretation of that phrase.

Confirming the Interpretation of "controlled directly or indirectly"

266. The Tribunal turns to an Article 32 analysis to confirm its interpretation of the phrase "controlled directly or indirectly." In doing so, the Tribunal looks to:

a. The Negotiating History of the BIT
b. The Jurisprudence regarding Article 25(2) of the ICSID Convention
c. The Holdings of Other Arbitral Awards Concerning "Control"
d. The BIT Practice Generally of Both Nations

[232] The majority of the Tribunal accepts that the first two replies by the Dutch government properly reflect its view or intention which is consistent with our view that the Tribunal must be the arbiter of its jurisdiction. It is for an arbitral tribunal to determine in specific factual circumstances whether an investor falls within the scope of a bilateral investment treaty.

267. The Tribunal is aware that the Respondent raises many of these same sources either to confirm its interpretation of the phrase "controlled directly or indirectly" or because it views the interpretation offered by the Claimant to be "manifestly absurd or unreasonable."

The Negotiating History of the BIT

268. In Order No. 1, the Tribunal requested "that both Parties submit such evidence as is available as to the interpretation and practice that the Kingdom of The Netherlands and the Republic of Bolivia have placed on the relevant portions of the Bilateral Investment Treaty."

269. The Claimant presented evidence in the form of an expert report and expert testimony from Dr. Nico Shrijver, Professor of Public International Law at the Free University in Amsterdam and a member of the Netherland's Ministry of Foreign Affairs Advisory Committee on International Law Affairs. The Respondent presented evidence in the form of oral argument. Despite such efforts, the Tribunal has before it little evidence of the negotiating history of the BIT.

270. The BIT was signed by the Netherlands and Bolivia on March 10, 1992 and went into force on November 1, 1994.[233]

271. The Dutch government submitted an Explanatory Note to its Parliament after the BIT was negotiated indicating that the agreement provides for:

> [G]uarantees...with respect to expropriation of an investment and possible disputes can be submitted to neutral international arbitration.[234]

272. The Dutch government in its Explanatory Note makes only brief comments focusing particularly on two of the differences in the text from the Model Netherlands BIT. First, Article 1 changed the expression "win natural resources" to "exploit natural resources." Second, Article 9 noted that Bolivia was not yet a party to ICSID so that references were added in Article 9 providing for *ad hoc* arbitration.

273. In oral argument, the Respondent summarized its understanding of the treaty as permitting "Bolivian entities controlled by Dutch nationals to seek the jurisdiction of ICSID."[235]

274. This sparse negotiating history thus offers little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation.

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[233] List of agreements relating to the promotion and reciprocal protection of investments of the Kingdom of the Netherlands in Expert Opinion-Dutch Practice, Professor. Nico J. Schrijver, p. 22. (Ex. B to Cl. Mem.)
[234] *Id.*, at ¶ 24, footnote 18.
[235] Oral Statement by Respondent's Counsel, Alexandre de Gramont, (February 10, 2004), p. 124, Lines 15-17.

275. The jurisdictional aspect of the ICSID Convention relevant to the present proceeding is Article 25(2)(b). It provides in relevant part:

> (2) "National of another Contracting State" means:
>
> ....
>
> (b) any juridical person . . . which, *because of foreign control*, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention. (*Emphasis added.*)

276. The parties both make reference to various tribunal awards, scholarly commentary, and the drafting history regarding the use of the word "foreign control" in the ICSID Convention at Article 25(2)(b) in order to illuminate the meaning of "controlled directly or indirectly " in the BIT.

277. Understanding how the ICSID Convention is relevant to an arbitration initiated under a BIT, illuminates why the interpretation of the term control in Article 25(2)(b) may or may not bear on the interpretation of the term "controlled" in the BIT.

278. The Netherlands-Bolivia BIT contains an offer by Bolivia and by the Netherlands to defined nationals of the other party to arbitrate specified disputes before ICSID. A claimant accepts this offer through its filing of a request for arbitration. This Tribunal is established pursuant to the ICSID Convention and its jurisdiction is limited by the ICSID Convention, as defined in Article 25. This Tribunal must therefore evaluate whether the dispute presented to it under the BIT passes through the jurisdictional keyhole defined by Article 25 of the ICSID Convention.[236] The state parties to the BIT can seek to encompass all manner of disputes. But in attempting to place disputes under their BIT before ICSID, an institution regulated by a separate instrument, the scope of the disputes which may be submitted is necessarily limited to those disputes that pass through the jurisdictional keyhole defined by Article 25.[237]

279. The image of Article 25 of the ICSID Convention as a jurisdictional keyhole makes clear that the jurisprudence concerning the phrase "foreign control" in Article 25(2)(b) is of quite limited relevance to the interpretation of the BIT.

280. Article 1(b)(iii) is an agreement of Bolivia and the Netherlands to treat a judicial person of one of them as a national of the other if that judicial person is "controlled directly

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[236] Report of the Executive Directors on the ICSID Convention, March 18, 1965. Paragraph 25 states:

> While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, *consent alone will not suffice to bring a dispute within its jurisdiction.* In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto. (Emphasis added).

[237] In *Vacuum Salt Products Ltd. v. Republic of Ghana*, Award of February 16, 1994, 9 ICSID REV. - FILJ (1994), 4 ICSID REP. 329 (1997), the tribunal noted that "[t]he reference in Article 25(2)(b) to 'foreign control' necessarily sets an *objective* Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so." *Id.*, at ¶ 36 (emphasis added). Yet, although there is an objective limit, a Tribunal must also remain flexible so as to accommodate the agreement of the parties as to the definition of "foreign control."

or indirectly" by nationals of the other. The question is whether this definition of control in the BIT is such that disputes under the BIT pass through the jurisdictional keyhole of Article 25. In this light, it is not at all surprising that the drafting history, commentary and arbitral awards concerning that phrase "foreign control" in Article 25 all point to "foreign control" being "flexible" so that reasonable definitions in referring instruments may pass through the jurisdictional keyhole.

281. Thus Professor Schreuer notes that national and treaty-based definitions should be deferred to, so long as they are reasonable:

> Definitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction will be controlling for the determination of whether the nationality requirements of Art. 25(2)(b) have been met. They are part of the legal framework for the host State's submission to the Centre. Upon acceptance in writing by the investor, they become part of the agreement on consent between the parties. Therefore, any *reasonable determination* of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal.[238]

282. Respondent appears to argue that "the definition of 'control' under the Bilateral Investment Treaty would be coextensive with the definition under the ICSID Convention with an emphasis on control as an "objective element that must be determined by the Tribunal."[239] Claimant argues that Article 25(2)(b) and the definition of control in the BIT are not co-extensive and that parties had the flexibility and "latitude to define 'control' in the BIT for the purpose of Article 25(2(b) of the ICSID Convention" as long as the agreement was reasonable.[240]

283. The drafting history of Article 25 as well as arbitral awards and scholarly commentary indicate, however, that the drafters intended a flexible definition of control in Article 25 not because they regarded "control" as requiring a wide ranging inquiry, but rather – recognizing the keyhole function that would be played by Article 25 -- to accommodate a wide range of agreements between parties as to the meaning of "foreign control."

284. Aron Broches, chairman of the consultative meetings for the negotiation of the ICSID Convention and General Counsel of the World Bank and subsequently ICSID's first Secretary-General, writes that during the drafting the attempt to provide an exacting definition of foreign control was "abandoned" and that instead it was decided that "an attempt should be made . . . to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State'."[241]

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[238] Schreuer, para. 481, p. 286 (emphasis added) (internal citations omitted).

[239] Resp Counter Mem., p. 55, ¶¶ 113-114.

[240] Cl. Mem., p. 18, ¶ 57.; Cl. Rej., p. 37, ¶ 105; Oral Statement of AdT's Counsel, Robert Volterra (February 10, 2004), p. 281, Lines 13-17.

[241] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 360 (1972-II). ; *See also Aucoven*, *supra* note 217:

> 96. ... [C]onsent in and of itself is not sufficient to ensure access to the Centre. Indeed, Article 25 of the ICSID Convention provides for additional objective requirements which must be met in addition to consent. These objective requirements are the following: . . . In the event that the investor is a corporation registered under the laws of the host State, the parties must agree

285. There is no issue in the Tribunal's view that Article 1 of the BIT under either the Claimant's or Respondent's interpretation would be an agreement as to "foreign control" that satisfies the flexible and deferential requirement of Article 25(2).

286. For the foregoing reasons, the Tribunal does not find the jurisprudence concerning the phrase "foreign control" in Article 25(2)(b) to assist the Tribunal in interpreting Article 1(b)(iii) of the BIT.

The Holdings of Other Arbitral Awards Concerning "Control"

287. Both AdT and Bolivia direct the Tribunal's attention to various ICSID decisions and awards for the criteria looked to by tribunals in order to determine "control."

288. The Tribunal finds that many of the awards cited do not bear on the issue presented in this arbitration because the facts of those cases involved a minority shareholder rather than a majority shareholder. In particular, although it is the case that the tribunals in some of these cases had the issue of control before them and considered to some degree evidence of actual control, it is unclear whether that evidence was considered because the tribunal regarded the exercise of power or direction as the test of control or whether such actual control was looked to as evidence of the existence of the capacity of a minority shareholder to exercise control. The Tribunal likewise notes that it appears that the claimants in these cases submitted such evidence of actual control; although it is again unclear whether they did so because they believed the exercise of power or direction was the test of control or that such exercise would evidence their capacity as a minority shareholder to control the corporation. The Tribunal thus finds the fact that the claimants in these various awards were minority shareholders to be a crucial difference. The tribunals in these various cases did not need to distinguish, as this Tribunal does, between the capacity to control and the exercise of control. Without access to the full records of these cases, the Tribunal does not believe it possible to assess their significance for the present arbitration.

The BIT Practice Generally of Both Nations

289. In Order No. 1, the Tribunal requested "that both Parties submit such evidence as is available as to the interpretation and practice that the Kingdom of The Netherlands and the Republic of Bolivia have placed on the relevant portions of the Bilateral Investment Treaty, on other Bilateral Investment Treaties they have concluded, and on relevant aspects of cognate practices, such as, for example, diplomatic espousal."

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to treat the locally incorporated company, because of "foreign control", as a "national" of another Contracting State for the purpose of the Convention.

97. The Convention does not contain any definition of these objective requirements. The drafters of the Convention deliberately chose not to define the terms . . . "foreign control". .... [T]hey preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention.

Aucoven, at ¶¶ 96-97 (citations omitted).

290. Both the Netherlands and Bolivia have entered into BITs with other states. The Parties submitted many of these treaties to the Tribunal and made oral arguments as to the possible significance of these agreements for the interpretive question posed in this case. Among other things, the Parties submitted two volumes containing, in addition to the Bolivia-Netherlands BIT, seven BITs concluded by Bolivia and twenty-nine BITs concluded by the Netherlands. These BITs are not inclusive of all BITs concluded by the parties. The Tribunal indicated during the February 2004 hearing that it was sufficient for the parties to submit only "specifically referred to" BITs.[242]

291. The practice of a state as regards the conclusion of BITs other than the particular BIT involved in a dispute is not of direct value to the task of interpretation under Article 31 of the Vienna Convention. The fact that a pattern might exist in the content of the BITs entered into by a particular state does not mean that a specific BIT by that state should be understood as necessarily conforming to that pattern rather than constituting an exception to that pattern.

292. The practice of a state as regards the negotiation of BITs may be helpful, however, in testing the assertions of parties as to the general policies of either Bolivia or the Netherlands concerning BITs, and in testing assumptions a tribunal may make regarding BITs.

293. Most relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s.

Netherlands Practice

294. According to one Dutch government source, the Netherlands pursued negotiating BITs with other nations as a means:

> To create a framework of rules concerning the treatment of investments which can be invoked directly by investors. By making arrangements in the form of a treaty, investors are offered the security that, during the term of the treaty, investments on the territory of the other country will be protected . . . A treaty cannot be changed unilaterally by one of the parties. By contrast, laws can be amended any moment by one of the parties.[243]

Another Dutch governmental statement describes BITs as providing guarantees that foreign investment disputes including "with respect to expropriation" could be "submitted to neutral international arbitration."[244]

295. Between 1991 and 1994 (the period most relevant to the instant case), in addition to the BIT concluded with Bolivia, the Netherlands entered into BITs with primarily developing or transitional nations including Albania, Argentina, Bangladesh, Cape Verde, the

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[242] Statement from Arbitrator Alvarez, (February 11, 2004), p 548, Lines 14-17.

[243] "Investeringsbeschermingsovereenkomst" (Note on Investment Protection Agreement), Netherlands Ministry of Economic Affairs at www.minez.nl quoted and translated in Expert Opinion-Dutch Practice, Professor Nico J. Schrijver, para. 10. (Ex. B to Cl. Mem.)

[244] Dutch Explanatory Note in Expert Opinion-Dutch Practice, Professor Nico J. Schrijver, ¶ 24, footnote 18.

Czech and Slovak Federal Republics, Estonia, Hong Kong, Indonesia, Jamaica, Latvia, Nigeria, Paraguay, Peru, Poland, Romania, Ukraine, Venezuela, and Vietnam. The Tribunal does not have copies of the Dutch BITs with Cape Verde, Hong Kong, Indonesia, Paraguay, or Vietnam. However, the remaining thirteen BITs and the Model Netherlands BIT drafted in 1993 provide some basis for examining the practice of the Netherlands.

296. The Tribunal observes that many, but not all, of the BITs concluded by the Netherlands between 1991 and 1994 follow the language and structure of the Model Netherlands BIT.[245] Almost every BIT, for example, uses the title and preamble language of the Model BIT.[246] Of particular relevance to this proceeding, the Model Netherlands BIT defines "nationals" in the following terms:

> (b) the term "nationals" shall comprise with regard to either Contracting Party:
> (i) natural persons having the nationality of that Contracting Party
> (ii) legal persons constituted under the law of the Contracting Party
> (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above,[247]

The Tribunal notes that the language of clause (b)(iii) is broader in geographic scope than the parallel clause in the BIT between the Netherlands and Bolivia. In the Model BIT, the definition of national includes not only entities in the host state controlled by nationals of the other state, but entities wherever located and so controlled.

297. Five of the thirteen contemporaneous BITs reviewed by the Tribunal use the exact language from the Model Netherlands BIT in defining "nationals."[248] An additional four of the thirteen BITs negotiated between 1991 and 1994 emphasize a broad geographic inclusivity and application of the BITs.[249] These BITs do not use the Model BIT's language but instead substitute the equally far-reaching phrase "wherever located" for "not constituted under the law of Contracting Party."[250] A BIT concluded with the Ukraine in 1994 uses the same language as the Model BIT but drops the reference to "directly or indirectly." Ten of the BITs thus employ the broad Model BIT definition of "nationals."

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[245] The Model BIT provides that investment interests are to be given "fair and equitable treatment" (Netherlands Model Agreement, Article 3) and protected from direct or indirect takings (Netherlands Model Agreement, Article 6). In addition, "any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party" can be submitted to ICSID for settlement by "conciliation or arbitration." Netherlands Model Agreement, Article 9.

[246] The Model Netherlands BIT is titled an "agreement on encouragement and reciprocal investment of investments" and includes a preamble establishing the mutual interest of the parties "to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and to ensure "fair and equitable treatment of investment." The BITs with Jamaica and Poland do not include language in the preamble on the "fair and equitable treatment of investment."

[247] Netherlands Model Agreement, Article 1 (b)

[248] Netherlands-Albania BIT (1994), Netherlands-Estonia BIT (1992), Netherlands-Latvia BIT (1994), Netherlands-Nigeria (1992), and Netherlands-Venezuela BIT (1991).

[249] Netherlands-Bangladesh BIT (1994), Netherlands-Jamaica BIT (1991), Netherlands-Peru BIT (1994), and Netherlands-Poland BIT (1992).

[250] Jamaica does not use the expression "legal persons" but instead refers to "corporations, firms or associations."

298. The remaining three BITs differ from the Model BIT in various respects as to the definition of "national." The Tribunal, as stated above, recognizes the need for care in assessing these differences.

299. First, a BIT concluded with Romania in 1994 contains the same language as the Model BIT except that the word "owned" is also included:

> (b)(iii) legal persons owned or controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.[251]

The Tribunal has no knowledge as to the reason that the State parties included the word "owned." Given the Tribunal's view that the word "controlled" in the context of defining the circle of eligible claimants necessarily is used not as an alternative to "owned" but rather to indicate a quality of ownership, the Tribunal views this provision as meaning "owned [established by majority ownership] or controlled [established by minority ownership plus voting rights]." However, there was no indication of the reason for the inclusion of the word "owned" in this provision and the Tribunal draws no inference from the language of this BIT.

300. Second, the Netherlands-Czech and Slovak Republic BIT concluded in 1991 defines "investors," rather than "nationals," broadly as nationals or legal persons under the laws of either of the Contracting parties:

> (b) the term 'investors' shall comprise
> i. natural persons having the nationality of one of the Contracting Parties in accordance with the law;
> ii. legal persons constituted under the law of one of the Contracting Parties.[252]

At oral argument, the Claimant referred to this BIT and agreed minutes between the Czech Republic and the Netherlands dated October 30, 2001, to illustrate the Dutch policy that changes in BITs, as opposed to clarifications of language in BITs, must be made by amendment.[253] Respondent argued that this practice is not relevant to the interpretation of the Bolivia-Netherlands BIT.[254] The Tribunal agrees with Respondent and does not find this BIT of assistance in understanding the practice of the Netherlands as that practice might bear on the Netherlands – Bolivia BIT.

301. Third, the Netherlands-Argentina BIT concluded in 1992 defines "investor" as including with regard to either Contracting Party as:

> i. natural persons having the nationality of that Contracting Party in accordance with its law;
> ii. without prejudice to the provisions of paragraph (iii) hereafter, legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force

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[251] Netherlands-Romania BIT (1994), Article 1.

[252] Netherlands-Czech and Slovak Federal Republic BIT Article 1(b).

[253] Oral Testimony of Claimant's Expert, Professor Schrijwer, (February 10, 2004), p. 315-316, Lines 20-21, 1-5.

[254] Oral Testimony of Respondent's Counsel Dana Contratto, (February 10, 2004), p. 424, Lines 8-13.

> in any part of the territory of that Contracting Party in which a place of effective management is situated.[255]
> iii. legal persons, wherever located, controlled, directly or indirectly by nationals of that Contracting Party.

Section (iii) uses the same language as the BITs concluded with Bangladesh, Jamaica, Peru, and Poland and is, as discussed above, geographically broad in its inclusivity of investors.

302. Unlike the other BITs described above, however, the Tribunal notes that the Netherlands and Argentina entered into an additional Protocol which indicates that the word "control" is to be understood in light of clear objective criteria. The Protocol states:

> With reference to Article 1, paragraph (b)(iii) the Contracting Party in the territory of which the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party. The following facts, inter alia, shall be accepted as evidence of the control:
>
> i. being an affiliate of a legal person of the other Contracting Party;
> ii. having a direct or indirect participation in the capital of a company higher than 49% or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs.[256]

303. The Claimant argues that the more restrictive language of Article 1 of the Protocol to the Netherlands-Argentina BIT was "inserted upon the initiative of Argentina."[257] The Respondent argues that the definition of "controlled" included in the Protocol is intended for the purposes of Argentinean and Dutch investors "to clarify that evidence of control or majority ownership of voting shares can constitute control."[258] The Tribunal observes that the definition of "controlled" provided in the Protocol is an easily administrable one, focusing on readily ascertainable criteria such as share participation and voting rights.

Bolivian Practice

304. Between 1991 and 1994, Bolivia entered into two BITs other than the one it concluded with the Netherlands; one with Peru, another with Argentina.

305. The Peruvian BIT concluded in 1993 defines nationals as including companies which are "controlled, directly or indirectly, by nationals" of a Contracting Party.[259] The

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[255] Netherlands-Argentina BIT, Article 1(b).
[256] Protocol to Netherlands-Argentina BIT, Section B.
[257] Expert Opinion-Dutch Practice, Professor Nico J. Schrijver, para. 18, Appendix 46 to Cl. Mem.; Oral Statement of Claimant's Expert Professor Schrijver, February 10, 2004, p. 306, Lines 12-18 "[T]hey (restrictive clauses) are always inserted at the insistence of the other states' party because, as you can see, from the Dutch model BIT and from the majority of the Bilateral Investment Treaties concluded by the Netherlands that this is not its own policy line, but of course, also the conclusion of a BIT is a way of give and take."
[258] Oral Statement of Bolivia's Counsel, Dana Contratto, (February 10, 2004), p. 423, Lines 4-8.
[259] Bolivia-Peru BIT, Section 4(b) (unofficial translation by the Tribunal).

Tribunal notes that this BIT signed in 1993 is very similar in substance to the Bolivia-Bolivia-Netherlands BIT.[260]

306. The Bolivia-Argentina BIT signed in 1994 requires that an investor be "effectively controlled" by investors of the other Contracting party.[261] The language of the text reads:

> (2) The term "investor" designates:
>
> a) any natural person who is a national of one of the Contracting Parties, in accordance with its legislation;
>
> b) any juridical person constituted pursuant to the laws and regulations of a Contracting Party and which has its seat in the territory of the said Contracting Party, whether or not its activity is for profit;
>
> c) any juridical person, established pursuant to the laws of any country, which is effectively controlled by investors of the other Contracting Party.[262]

307. The term "effectively controlled" is further defined in a Protocol and is very similar to the language in the Netherlands-Argentina Protocol. Specifically, the Bolivia-Argentina Protocol reads

> II. Addendum, Article 1, Subsection (2), Subparagraph (c)
> Juridical entities referred to in Article 1, Subsection (2), Subparagraph (c), which wish to invoke this Treaty may be requested to present proof of the said control. The following facts, amongst others, shall be accepted as proof:
> (1) Being an affiliate of a juridical entity constituted pursuant to the laws of that Contracting Party.
> (2) Having a direct or indirect participation in the capital of a juridical entity which permits effective control such as, in particular, participation in more than one-half of the share capital.
> (3) The direct or indirect possession of the necessary votes to obtain a predominant position in the company organs or to influence in a decisive manner the functioning of the juridical entity.[263]

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[260] The language in 4(b) Bolivia-Peru BIT presents an either/or scenario. Nationals include "Companies constituted pursuant to the legislation of that Contracting Party or which are controlled, directly or indirectly, by nationals of the same.".

[261] Bolivia-Argentina BIT, Section 2(c) (unofficial translation by the Tribunal).

[262] The original Spanish text reads:

> (2) El término "inversor" designa
>
> a) toda persona física que sea nacional de una de las Partes Contratantes, de conformidad con su legislación;
>
> b) toda persona jurídica constituída de conformidad con las leyes y reglamentaciones de una Parte Contratante y que tenga su sede en el territorio de dicha Parte Contratante, independientemente de que su actividad o no fines de lucro;
>
> c) toda persona jurídica establecida de conformidad con la legislación de cualquier país que esté efectivamente controlada por inversores de la otra Parte Contratante.

[263] The original Spanish text reads:

> II. Adendum Artículo I, apartado (2), inciso c).

308. Respondent argues that "effectively controlled" for the purposes of defining a national is different from "controlled" because it involves a corporate "decision-making structure."[264] The Tribunal does not find this distinction to be reflected in the definition of "controlled" in either the Netherlands-Argentina or the Bolivia-Argentina Protocols.

309. Having reviewed the practice of the Netherlands and Bolivia, the Tribunal observes four points.

310. First, the Dutch Model BIT, although followed often, was not accepted always without modification, as some popular images of bilateral investment treaty negotiations might suggest.

311. Second, the Dutch Model BIT and at least ten of the thirteen Dutch BITs reviewed contain definitions of "nationals" that seemingly are more encompassing than the one found in the Netherlands-Bolivia BIT.

312. Third, the Tribunal observes that the term "controlled" in the Netherlands-Argentina BIT is defined by those two States in an Additional Protocol by exclusive reference to the word "control":

> "With reference to Article 1, paragraph (b)(iii) the Contracting Party in the territory of which the investments are undertaken may require proof of the *control* invoked by the investors of the other Contracting Party. The following facts, inter alia, shall be accepted as evidence of the *control*." (Emphasis Added).

Likewise, the term "effectively controlled" in the Bolivia-Argentina BIT is defined in a Protocol by exclusive reference to the word "control":

> "Juridical entities referred to in Article 1, Subsection (2), Subparagraph (c), which wish to invoke this Treaty may be requested to present proof of the said *control*." (Emphasis Added).

The Tribunal in paragraph 233 above stated that the usage of the past participle of control is not determinative of the meaning of the phrase "controlled, directly or indirectly." The Tribunal observes that both Bolivia and the Netherlands in other BITs define the proof of an entity being "controlled" by reference to "control," and not, for example, by reference to "proof that the investor was controlled." This practice is consistent with the Tribunal's view that there is no appreciable difference between a company that is "controlled directly

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> Se podrá solicitar a las entidades jurídicas mencionadas en el Artículo I, apartado (2), inciso c) que quieran prevalerse del presente Convenio que aporten la prueba de dicho control. Se aceptarán como prueba, entre otros, los siguientes hechos:
> (1) El cáracter de filial de una entidad jurídica constituída según la legislación de esa Parte Contratante.
> (2) Un porcentaje de participación directa o indirecta en el capital de una entidad jurídica que permita un control efectivo tal como, en particular, una participación en el capital superior a la mitad.
> (3) La posesión directa o indirecta de la cantidad de votos que permita tener una posición determinante en los órganos societarios o de influir de manera decisiva en el funcionamiento de la entidad jurídica.

[264] Oral Testimony of Respondent's Counsel, Dana Contratto (February 10, 2004), p. 427, Lines 17-20.

or indirectly" by another company and a company that is "under the direct or indirect control of" or "subject to the direct or indirect control of" another company.

313. Fourth, the Tribunal observes that the Protocol to the Netherlands-Argentina BIT in defining "controlled," and the Protocol to Bolivia-Argentina BIT in defining "effectively controlled," both delineate a set of objective factors for determining who is or is not a "national" or "investor". The Tribunal in paragraph 247 above stated that the purpose of stimulating investment is furthered by clear definitions which thereby allow potential investors to ascertain whether they are, or are not, covered by a particular BIT. The Tribunal declines to speculate, as it should, as to why a Protocol was negotiated for the Netherlands-Argentina BIT and the Bolivia-Argentina BIT, but not for the Netherlands-Bolivia BIT. It does note, however, that the Tribunal's assumption that the state parties would seek to set out definitions with clear standards so as to bring about predictability as to the scope of BIT protections does appear to be borne out by the language of the Protocols.

314. The Tribunal concludes that the BIT practice of the Netherlands and Bolivia is necessarily of limited probative value to the task of interpreting the BIT between the Netherlands and Bolivia.

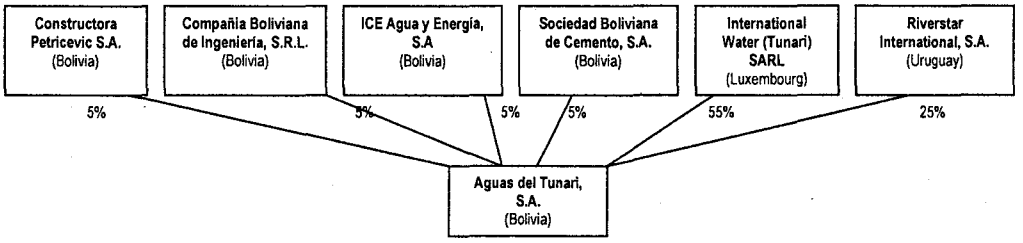
Applying the Interpretation: Is AdT "controlled directly or indirectly" by IWH B.V. or IWT B.V.?

315. It remains for the Tribunal to decide whether AdT is "controlled directly or indirectly" by either IWT B.V. or IWH B.V., as that phrase has been interpreted by the Tribunal.

316. The first tier of ownership above AdT is as follows:

Figure 3: The First Tier of Ownership of AdT after December 22, 1999.

Request for Arbitration, Exhibit 15, November 12, 2001



317. IW S.a.r.l. of Luxembourg owns 55% of the shares of AdT. Article 15 of AdT's Constitution is entitled "Shareholders' Rights" and it provides that "the shares of the same class or series will all be equal in rights and obligations. Each ordinary share authorizes its owner to the right of one vote in the general meeting."[265] The Tribunal notes, as does Respondent, that a 2/3 majority vote of AdT's voting shares is required for the execution of certain corporate acts including (1) adopting the report of the Board of the Directors, (2) authorizing the payment of dividends or other distributions out of company funds, (3) approving plans and budget, and (4) determining what is quorum for a meeting of the AdT's Board of Directors.[266] As indicated, IW S.a.r.l. has ownership interest of 55% in AdT. The Tribunal concludes that this level of ownership does not preclude IW S.a.r.l. from controlling AdT. For all acts other than the specific acts just mentioned, IW S.ar.l. possesses the capacity to affirmatively control AdT. As to the specified acts mentioned, IW S.ar.l. possesses the capacity for an effective veto. The Tribunal concludes that IW S.a.r.l. possesses the legal capacity to control AdT.

318. The upstream ownership of AdT specifically is that set forth in Figure 4:

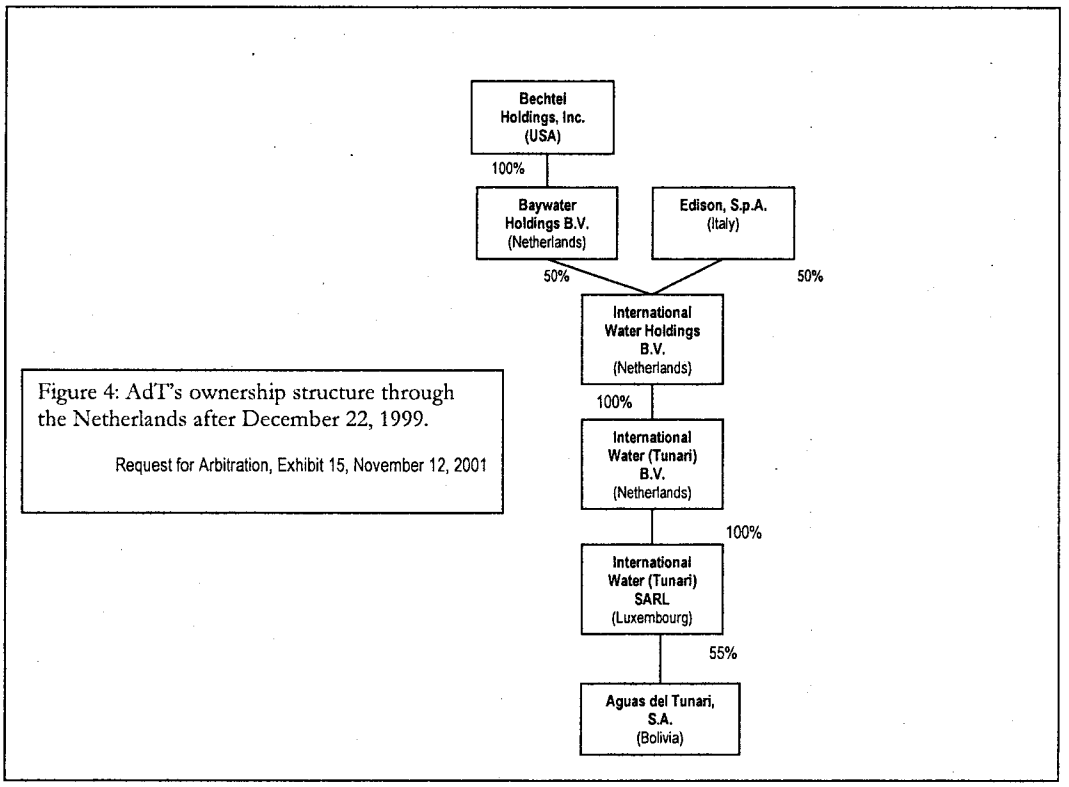


Figure 4: AdT's ownership structure through the Netherlands after December 22, 1999.

Request for Arbitration, Exhibit 15, November 12, 2001

319. IW S.a.r.l. is 100 % owned by IWT B.V., and IWT B.V. is 100 % owned by IWH B.V. Each of these companies held 100% of the voting rights which corresponded to the shares which were transferred from IW S.a.r.l..[267] Given these facts, the Tribunal finds that

[265] Request for Arbitration, Ex. 1.

[266] Request for Arbitration, Ex. 1, AdT Constitution, Article 40 (1)(5)(9)(10).

[267] Request for Arbitration, Ex. 9, Ex. 10, Article 16(7) and Ex. 13, Article 32(2).

both IWT B.V. and IWH B.V. indirectly control AdT satisfying the requirements of Article 1(b)(iii).

320. Given Respondent's allegations that IWT B.V. and IWH B.V. are mere shells, the Tribunal observes that IWH B.V. as a joint venture occupies a special place in the corporate structure above AdT.

321. On the basis of the evidence available, IWH B.V. is not simply a corporate shell set up to obtain ICSID jurisdiction over the present dispute. Rather, IWH B.V. is a joint venture 50% owned by Baywater and 50% owned by Edison S.p.A., an Italian corporation. IWH B.V. is structured so that neither Baywater nor Edison exclusively control IWH B.V., to the exclusion of the other, but rather the two entities must work together in order to direct IWH B.V.[268]

322. The Tribunal finds it noteworthy, from the oral and written submissions of the Parties and a review of the 2000 and 2001 Annual Report for IWH B.V., that in 2000, IWH B.V. had a "portfolio of 8 contracts plus two additions in early 2001"[269], "IWH and its consolidated subsidiaries employed an average of 55 employees", and "IWH generated net turnover of €8.6 million from its principal development and operations services activities."[270]

323. The Tribunal thus concludes that both IWT B.V. and IWH B.V. indirectly controlled AdT in accordance with the Tribunal's interpretation of the phrase "controlled directly or indirectly" found in Article 1(b)(iii) of the BIT.

Respondent's Motion for Production of Evidence

324. As recalled in paragraph 23 *supra,* Bolivia requested that the Tribunal order Claimant to produce evidence of the control of IWT B.V. and IWH B.V. over AdT. Bolivia's request for the production of documents corresponds in scope with its assertion that the requirement that AdT be "controlled directly or indirectly" requires an inquiry into the whether of IWT B.V. and IWH B.V. effectively and actually controlled the affairs of AdT.[271]

325. The Tribunal in Order No. 1 declined to order the production of evidence at that time writing:

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[268] The articles of incorporation of IWH B.V. indicate an equal sharing of power in the company between Bechtel Enterprises Holding, Inc. and Edison S.p.A. The articles of incorporation are reprinted as Ex. 13 to the Request for Arbitration. Bechtel Enterprises Holding, Inc. and Edison S.p.A. each hold a 50% interest in IWH B.V. Ex. 33 to Resp. Counter Mem., 2000 Annual Report of IWH B.V. at p. 1. Both Bechtel and Edison have an equal number of Managing Directors for IWT B.V. Articles 14 and 19 of the Articles of Incorporation. The duties, and decision making process, for the Board of Managing Directors are set forth in Article 18.

[269] *See e.g.* Annual Report 2000 International Water Holdings B.V., p. 1, (Ex. 33 to Resp. Counter Mem.).

[270] The Tribunal further notes that IW S.ar.l. and IWT BV are listed in the Annual Report as principal subsidiaries to IWH BV over which IWH "directly or indirectly, has power to exercise control." *See e.g.* Annual Report 2000 International Water Holdings B.V., pp. 6-7 (Ex. 33 to Resp Counter Mem.). This particular reference is given limited significance, however, as a statement by a party in interest during the pendency of the dispute.

[271] *See, e.g.,* Resp. Counter Mem., p. 67, ¶ 140.

> It is the view of the Tribunal that neither party's arguments as to the necessity of the various requests for production of evidence are sufficiently developed or clear that the Tribunal may order or deny such production at this time. The argument advanced by Respondent to support its requests for the production of documents requires the Tribunal to undertake consideration of the merits of Respondent's second jurisdictional objection without the benefit of full briefing by the parties or the opportunity of the Tribunal to put questions to the parties during a hearing. A review of Respondent's second jurisdictional objection is required (1) to decide the likely merit of that objection even if the objection were factually supported, and therefore the necessity of ordering of documents in support of the development of that objection, and (2) to ascertain the exact scope of that objection so that appropriate limits might be placed on the requests for documents made by Respondent. Without such an estimation of the likely legal merit of Respondent's objection and without criteria for the narrowing of Respondent's requests for production of evidence, the Tribunal is faced with a factually intense, and consequently expensive and lengthy, factual inquiry that ultimately may not be necessary to the resolution of this case. Therefore, although the Tribunal concludes that it is within its power to undertake such an incidental preliminary review of the merits of the second jurisdictional objection in order to decide upon a request for production of evidence, the Tribunal concludes in its discretion that such a decision by the Tribunal at this point would be premature and that the Tribunal's capacity to decide upon this important request would be enhanced greatly by both briefing and oral argument before the Tribunal.[272]

326. The Tribunal further indicated that it intended to render a decision on Bolivia's request for production of documents as a part of its decision on Respondent's jurisdictional objections.[273].

327. Given the Tribunal's decision concerning Respondent's second objection, the Tribunal finds Respondent's request for the production of evidence to be without object. Respondent's request is therefore denied.

Concluding Observation

328. Aware of the significance of this case for states and various non state groups, the Tribunal observes that Respondent has argued imaginatively and aggressively against the assertion of ICSID jurisdiction in this proceeding. As an unintended consequence, questions possibly have been raised as to the integrity of the ICSID process. At the end of the day, the Tribunal wishes to emphasize that it does not find the more provocative arguments raised by Respondent to be supported and that it is quite clear to the majority of this Tribunal that this dispute is within the jurisdictional reach of ICSID and the BIT.

329. To the extent that Bolivia questions the timing of the transfer of ownership in Claimant in November – December 1999 suggesting that it was done in anticipation of the events to follow in the Spring of 2000, the Tribunal notes that:

a. the planning of a joint venture of the scale of the venture between Bechtel Enterprises Holding Inc. and Edison S.p.A. in November-December of

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[272] Order No. 1, ¶ 30.

[273] *Id.*, ¶ 32 ("[I]t is the intent of the Tribunal to render at a minimum its decision on the first jurisdictional objection and Respondent's request for production of evidence.")

1999, of which the transfer was a part, likely predated the transfer by at least several months,

b. the present record indicates that in November-December of 1999 that civil society organizations expressed strong concerns about the proposed tariff structure and, in a few instances, called for the annulment of the concession, and

c. the present record does not establish that the severity of the particular events that would erupt in the Spring of 2000 were foreseeable in November or December of 1999.

330. Respondent objects to Claimant's assertion of jurisdiction implying that the availability of the BIT is the result of strategic changes in the corporate structure that somehow rise to the level of fraud or abuse of corporate form. The Tribunal observes that to the extent that Bolivia argues that the December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that:

a. the joint venture between Bechtel Enterprises Holding Inc. and Edison S.p.A. in November-December of 1999 involved significantly more operations than AdT's concessionary rights and duties,

b. the present record does not establish why the joint venture was headquartered in the Netherlands as opposed to some other jurisdiction, although Claimant indicated that the Netherlands was chosen for reasons of taxation,

c. a decision as to where to locate a joint venture is often driven by taxation considerations, although other factors such as the availability of BITs can be important to such a decision, and

d. it is not uncommon in practice, and -- absent a particular limitation -- not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.

331. The Tribunal does not find a sufficient basis in the present record to support an allegation of abuse of corporate form or fraud. The Tribunal, however, notes that Article 41(2) of the ICSID Arbitration Rules provides:

> The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

The Tribunal will bear in mind its duty to protect the integrity of ICSID jurisdiction during the merits phase as the Parties submit their full memorials and supporting evidence.

332. This Decision reflects the growing web of treaty based referrals to arbitration of certain investment disputes. Although titled "bilateral" investment treaties, this case makes clear that which has been clear to negotiating states for some time, namely, that through the definition of "national" or "investor," such treaties serve in many cases more broadly as

portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum.[274] The language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties.

333. The Tribunal by this Decision's denial of Respondent's objections to jurisdiction grants Claimant a neutral forum in which the substance of the dispute between it and Claimant may be arbitrated.

[274] Indeed, the negotiating history of the ICSID Convention indicates that the "CHAIRMAN [Aron Broches] observed that the consideration of the definition of 'national of a Contracting State' was related to the entire scope of the draft Convention. II(1) DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE ICSID CONVENTION 395 (1968).

Decision

334. In light of the foregoing, the Tribunal decides:

a. Respondent's First Objection to the jurisdiction of the Tribunal, except as to the sixth aspect, in each of the ways in which it asserts a lack of consent, is denied;
b. By majority, the sixth aspect of Respondent's First Objection is denied;
c. By majority, Respondent's Second Objection to the jurisdiction of the Tribunal based on whether Claimant is "controlled directly or indirectly" by nationals of the Netherlands is denied; and
d. By majority, Respondent's request for the production of evidence is, as a consequence of the Tribunal's holding as to the Second Objection, without object and is denied.

335. The Tribunal's decision as to the awarding of costs will be addressed as a part of the final award in this matter.

336. The Tribunal will proceed to the scheduling of the merits phase of the proceeding.

337. The dissenting Declaration of José Luis Alberro-Semerena is appended to the present Decision.

Made in equally authentic English and Spanish versions.

(signed)

Henri C. Alvarez
Arbitrator

Date: October 6, 2005

(signed)

José Luis Alberro-Semerena
Arbitrator

Date: October 11, 2005

(signed)

David D. Caron
President

Date: October 3, 2005

Declaration of José Luis Alberro-Semerena

1. I do not join the Tribunal on its Decisions on jurisdiction in the cases of the sixth aspect of the First Objection and of the Second Objection.

2. The Tribunal was established pursuant to the Netherlands-Bolivia Bilateral Investment Treaty (BIT) and to the ICSID Convention. Therefore, the Tribunal must evaluate whether the dispute passes through two different jurisdictional keyholes, defined by Article 1(b)(iii) of the BIT and by Article 25 of the ICSID Convention. The parties have agreed that the provisions of the Vienna Convention relating to the interpretation of treaties reflect customary international law and they consider it to be the applicable law to interpret the BIT.

3. The first issue on which I differ from the majority of the Tribunal is whether the evidence on record is adequate to ascertain Claimant's motivations and timing for abandoning the transaction described by Bechtel in its November 24, 1999 letter to the Water and the Electricity Superintendencies, in favor of the one that was ultimately put into place.

4. This issue is crucial because AdT did not have access to ICSID arbitration before its restructuring in late 1999; because the restructuring project presented by Bechtel to the Bolivian authorities in late November 1999 included the insertion of a Dutch company in the chain of ownership and was not approved by them; because the structure that was ultimately put into place did insert a Dutch company in the chain of ownership and because "if deception or misrepresentation can be shown to have existed, no inferences as to an agreement on nationality can be drawn from the fact of consent".[1]

5. Claimant argues "there is nothing in the BIT that would deny coverage to an otherwise entitled party because it acquired an investment in the context of rumors of problems on the horizon"[2].

6. Respondent, on the contrary considers that "the straightforward question is whether Bolivia can be deemed to have consented to a scheme in which a company registered in Bolivia may at any time, under all circumstances reorganize, restructure itself so as to gain the right to bring a suit before ICSID, whenever such suit appears to be convenient and desirable from the investors perspective. We submit that the answer to this question is no".[3]

7. The dissent with the majority of the Tribunal is not about whether a corporation may or may not restructure itself in a legal manner that is not contractually prohibited so as to base itself in a jurisdiction that it perceives to provide a beneficial regulatory and legal

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[1] *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 476 (Cambridge Univ. Press, 2001).

[2] Hearing on Respondent's Objections to Jurisdiction, February 11, 2004, Transcript, pp. 628.

[3] Hearing on Respondent's Objections to Jurisdiction, February 11, 2004, Transcript, pp. 206.

environment. The dissent is about whether it is in compliance with the BIT regardless of the circumstances.

8. The dissent comes from the fact that if AdT can restructure itself while "the Government of Bolivia engaged in a course of action outside of the Concession Contract which breached AdT's rights"[4], the balance between the benefits and obligation of the host State is broken since the later become unpredictable. "Needless to say, such a system would not be compatible with the basic concepts of appropriate reciprocity, which forms the basis of all bilateral treaties. Reciprocity is generally defined as a relationship of identical or equivalent treatment, and can only be achieved in a legal framework in which the obligations arising out of a treaty are to a reasonable extent, foreseeable and limited".[5]

9. Claimant considers, that "the parties to the Bilateral Investment Treaty clearly included within the terms of the Treaty scope for protection to extend to foreign-owned subsidiaries incorporated in their territory. As I put it to the Tribunal yesterday, the universe thereby became infinite. There is nothing in the wording of the Bilateral Investment Treaty that narrows its scope".[6] While there are instances of infinite offers of arbitration where states have investment statutes where they make a global offer to arbitrate, the notion that the universe of beneficiaries of a bilateral investment treaty is infinite has no precedent in scholarly commentary or tribunal awards, and no direct evidence of the validity of this interpretation –for example, in terms of the drafting history- was provided.

10. As early as September 1999, the public had begun protesting the Concession Agreements and there were explicit public demands to annul them in mid November 1999. Claimant states that "in December 1999, the Government of Bolivia (through the Superintendent of Water) concluded an agreement with communities within the area of Concession which, *inter alia*, purported to limit the effective area of the Concession".[7]

11. While the present record may not establish that the severity of the events of Spring 2000 was foreseeable in November or December of 1999, it is the case that the present record does not establish that the severity of the events of Spring 2000 was not foreseeable in November or December of 1999. The *prima facie* evidence of the fact that AdT was alarmed about the severity of the public demands is the publication of an "Open Letter" in the Cochabamba press defending its actions, in late November. Its preamble reflects concern about: "statements and publications circulated by different citizens, Institutions and mass media" and that "many of the pronouncements are incorrect and malicious".

12. On November 24, Bechtel wrote to Bolivia announcing "that it had signed a contract with Edison S. p. A. of Italy, whereby Edison will become a partner of Bechtel Enterprises Holdings, Inc. in its activities in the international water business". The parties intended to implement the transaction by forming a new company in the

[4] Request for Arbitration, ¶ 12.
[5] Expert Opinion of Professor Rudolf Dolzer, page 25.
[6] Hearing on Respondent's Objections to Jurisdiction, February 11, 2004, Transcript, pp. 626.
[7] Request for Arbitration, ¶ 12.

Netherlands. As a result of the transaction, the shareholders of 55% of AdT's shares and voting rights would no longer be a company established in the Cayman Islands but a new company established in the Netherlands. Given that a new Dutch shareholder would own 55% of AdT's shares, Bechtel entered a process of obtaining a waiver from the Water and the Electricity Superintendencies, in order to carry out the transaction while respecting the terms of the Concession.

13. The proposed transfer of IW Ltd's shares in AdT to a Dutch company was not authorized.

14. Social unrest and public opposition to the new rates continued during December.

15. On December 21, 1999, IW Ltd of the Cayman Islands migrated to Luxembourg changed its name and the next day a Dutch company became its 100 percent shareholder.

16. The evidence on record is inadequate to ascertain the motivations and the timing for abandoning the transaction described by Bechtel in its November 24, 1999 letter (a new direct Dutch ownership of AdT) in favor of the one that was ultimately put into place 27 days later (migration and indirect ownership by Dutch owners). The only difference one can infer from the record between the two is that the first transaction had to be authorized by the Waters and the Electricity Superintendencies while the second one was done without their knowledge after months of social unrest. In both cases, a Dutch company was inserted in the chain of ownership.

17. The Tribunal should have requested Claimant to produce the following information for the period November 24, 1999 –when Bechtel wrote to Bolivia informing of proposed changes in AdT's ownership- to December 21, 1999 - when IW Ltd of the Cayman Islands migrated to Luxembourg: (I) all documents showing the dates on which the decisions was made to migrate IW Ltd of the Cayman Islands to Luxembourg instead of the transaction announced on November 24, 1999; as well as (II) all the documents that examine the costs and benefits of each option and more generally that argue against and in favor of migrating IW Ltd of the Cayman Islands and having International Water (Tunari) B.V. acquire 100% of its shares.

18. The majority of the Tribunal denied Respondent's request for the production of evidence because it had no object given its interpretation. Thus, I conclude that Bolivia did not consent and decide that Claimant is not entitled to invoke ICSID jurisdiction under the BIT between Bolivia and the Netherlands.

19. The second issue on which I differ from the majority of the Tribunal is whether the evidence on record is adequate to determine whether Claimant was directly or indirectly controlled by Dutch nationals for jurisdictional purposes.

20. Claimant argues that this case is "about whether IWT or IWH control directly or indirectly AdT" and that majority shareholding with voting rights is the strictest possible

test of control.[8] In turn, Bolivia maintains that "controlled is unquestionably different from capable of being controlled or could be controlled"[9] and that the question is whether AdT was controlled by nationals of the Netherlands, thereby meeting the requirements of Article 1(b)(iii) of the BIT.

21. The majority found that AdT was a Bolivian legal person indirectly controlled by Dutch companies and therefore that the Tribunal has jurisdiction.

22. After examining the ordinary meaning of the phrase "controlled directly or indirectly" and reading it in light of the context and purpose of the BIT, my interpretation differs from that of the majority and I consider that the evidence submitted by Claimant is not sufficient to prove that AdT was directly or indirectly controlled by Dutch nationals. The majority of the Tribunal denied Respondent's request for the production of evidence because it had no object given its interpretation. In contrast my interpretation leads me to grant it. Thus, I dissent from the Tribunal's decision regarding Bolivia's objection to the jurisdiction of the Tribunal and consider that jurisdiction should be denied.

23. The answer to the question is in the use of the term "controlled".

24. With respect to the ordinary meaning of control, the majority of the Tribunal found that "while some definitions suggest the actual exercise of influence, others emphasize the possession of power over an object. Thus, the ordinary meaning of 'control' would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares. (Paragraph 227).

25. As for its legal definition, the majority of the Tribunal relies on three definitions: "to exercise power or influence over; ... to regulate or govern and ...to have a controlling interest in." Hence, the legal meaning of control also encompasses both the actual exercise of control and the right to control. (Paragraph 231).

26. In Article 1(b)(iii) of the BIT, the word "controlled" is a passive participial adjective formed from the verb "control" which modifies the noun "legal persons". Passive participial adjectives describe nouns that receive the effects of an action. Grammar indicates that for "legal persons" constituted in accordance with the law of a contracting party to be "controlled directly or indirectly" by nationals of another contracting party, they have to receive the effects of an action by nationals of the second contracting party. Thus, while both the ordinary meaning and the legal definition of control encompass the actual exercise of control as well as the right to control, the passive participial adjective requires the effects of an action. For jurisdiction to exist, Claimant has to prove that AdT received the effect of actions by Dutch companies.

27. Article 31(4) of the Vienna Convention indicates that a special meaning shall be given to a term, if the parties so intended. There is no indication in the record that the contracting parties intended any special meaning to the word "control". I agree with the majority of the Tribunal that the negotiators who contributed to the language of the BIT

[8] Hearing on Respondent's Objections to Jurisdiction, February 11, 2004, Transcript, pp. 620-621.
[9] Ibidem, p. 422, lines 12-14.

were likely sophisticated foreign negotiators with some knowledge of business and law. (Paragraph 230). Article 1(b)(iii) of the BIT, however, does not use "control" but "controlled". The parties could have used the expression "in direct or indirect control of" or "under direct or indirect control of" or "because of foreign control" as in the ICSID Convention which was public knowledge before the BIT was negotiated and would have incorporated existing case law and scholarly commentary. In contradistinction, they chose to use the passive participial adjective "controlled", which requires the effects of an action.

28. It is in the consideration of the context in which we find the phrase "controlled directly or indirectly," and in the light of the object and purpose of the treaty that we find the basis for its interpretation. (Paragraph 240).

29. The object and purpose of the BIT is to stimulate the flow of capital and technology. Indeed, the Contracting Parties explicitly recognize that such stimulation will result from "agreement upon the treatment to be accorded to ... investments" by "the national of one Contracting Party in the territory of the other Contracting Party." (Paragraph 240). Article 1 of the BIT determines the circle of beneficiaries, which is a subset of all existing persons.

30. Article 1(b)(i) and Article 1(b)(ii) empower all natural persons having the nationality of a Contracting Party and all legal persons constituted in accordance with the law of a Contracting Party.

31. Article 1(b)(iii) extends the protection of the BIT to legal persons against the actions of their own government[10] but limits those benefits to legal persons having the special attribute of being "controlled" by nationals of the other signatory. Assuming without conceding that an entity that owns 100% of the shares and voting rights of another entity possesses the power to control the second entity, there is no reason to posit that it is more reasonable to extend the privileges concomitant to Article 1(b)(iii) to companies potentially under the control of nationals of the other signatory, as opposed to companies actually receiving the effects of an action from nationals of the other signatory. The opposite is sounder: the access mechanism to the privileges concomitant to Article 1(b)(iii) should be an actual event, an action (controlled) and not a possibility.

32. It is incorrect to equate "controlled" and "control". One should be "aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect –*ut magis valeat quam pereat.* However, this principle of interpretation should not lead to confer, *at posteriori*, to a provision deprived of its object and purpose a result that goes against its clear and explicit terms".[11] To substitute "controlled" with the term "control" is to go against the text's clear and explicit terms. The fundamental issues of foreseeability, transparency and stability accepted by parties to a BIT cannot be resolved

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[10] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 358/359; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY. ¶. 496 (Cambridge University Press, 2001).

[11] *Banro American Resources, Inc. and Société Aurifére du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* (ICSID Case No. ARB/98/7), Award of the Tribunal of September, 2000.

by limiting "control" to majority ownership and voting rights when the Treaty explicitly uses the expression "controlled directly or indirectly".

33. Neither the jurisprudence concerning the phrase "foreign control" in Article 25(2)(b) of the ICSID Convention, nor other Arbitral Awards concerning "control", nor the BIT practices of the Netherlands and Bolivia can be of assistance in interpreting Article 1(b)(iii) of the BIT.

34. Since the BIT does not provide a definition of "directly or indirectly controlled" and, unlike the case of the ICSID convention, there is little or no history or commentary on the BIT, it is the Tribunal's responsibility to interpret the meaning of the expression. Many cases underline the importance of the Tribunal's authority to interpret access provisions past formal interpretations to actual relationships. "ICSID Tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved".[12]

35. This elucidation of the meaning of "controlled" is strengthened by the fact that the identification of corporate nationality has been difficult from the point of view of international law for almost a century, as wars have shaped the meaning assigned to it by sovereign powers. Different criteria have been put forward but none has prevailed: neither place of incorporation; nor seat of the company; nor ownership and voting rights.[13] To resort to a mechanistic interpretation of control would be to go against the historical development of the concept. An interpretation that favors an action is in keeping with the search for a functional definition.

36. Claimant states that "the jurisdictional issue ...is whether share ownership and voting rights in the Claimant by a Netherlands entity at a level greater than 50% is sufficient to establish direct or indirect control"[14] and that it "rests its case on jurisdiction on the sufficiency of the controlling interest of IWH and IWT to constitute control over the Claimant for purposes of the BIT"[15].

37. To say that A is sufficient for B is to say that A cannot occur without B, or that whenever A occurs, B occurs.

38. Commentary on the drafting of the ICSID convention makes it clear that share ownership at a level greater than 50% might not be controlling: "Thus, where nationals of a Contracting State hold 35 percent of the shares of a corporation and nationals of a

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[12] *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* (ICSID Case No. ARB/98/7), Award of the Tribunal of September 1, 2000.

[13] "The test was originally based solely on share ownership, but has been extended to cover nationality of principal officers, the exercise of controlling influence through means other than shareholding and the presence of substantial though not necessarily controlling interests". A. Fatouros, "National Legal Persons in International Law', in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, R. Bernhardt, ed. Vol 3. 1997 p. 495 cited in Professor Dolzer's expert opinion.

[14] Claimant's Memorial on Bolivia's Objections to Jurisdiction and Request for the Production of Evidence, p.73 ¶ 209.

[15] Ibidem, p. 69 ¶ 199.

non-Contracting State hold 55 percent of the shares, an agreement that the corporation has the nationality of the Contracting State may well be upheld by a tribunal".[16] "In the course of the drafting of the Convention, it was said ... even that 51% of the shares might not be controlling.".[17]

39. Previous tribunal awards have established that an investor with minority share ownership can control a company, thereby providing counterexamples to the assertion that majority share ownership and majority voting rights are sufficient to establish control. Even in the case of 100% ownership, Tribunals have examined "effective control": "This control is not only a result of the fact that LETCO's capital stock was 100% owned by French nationals as indicated by both LETCO and official documents of the Liberian Government, it also results from what appears to be effective control by French nationals; effective control in the sense that, apart from French shareholdings, French nationals dominated the company decision-making structure."[18]

40. Thus the interpretation of control advanced by Claimant is logically inconsistent. Majority shareholding and majority voting rights do not *per se* constitute control.

41. Given that "Claimant has already submitted all the documents on which it relies to show that, through majority share ownership and voting control, SARL controls the Claimant"[19] and given there is no evidence in the filings that AdT received the effects of actions of control and thus no proof that it was "controlled directly or indirectly" by Dutch nationals, the Tribunal should have requested the production of evidence to substantiate the claim that AdT was directly or indirectly controlled by IWH B.V. or IWT B.V. The tribunal in *Aucoven*, for example, listed criteria, different from share ownership, that could have been used to test control: nationality of the Board members, frequency of visits of board members of the direct shareholder, frequency of "monitoring" of *Aucoven*'s activities, and financial support.[20]

42. In order to specifically evaluate actions of control of AdT, the Tribunal should have requested Claimant to produce, *inter alia*, the following information for the period December 22, 1999 –when a Dutch company acquired International Water (Tunari) S.a.r.l. that used to be called IW Ltd of the Cayman Islands- to November 12 2001- when AdT submitted its Request for Arbitration: (I) all documents reflecting or constituting communications between AdT and (a) International Water (Tunari) S.a.r.l, (b) International Water (Tunari) B.V., (c) International Water Holdings B.V. and (d) Baywater Holdings B.V.; (II) all documents reflecting or constituting communications

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[16] C.F. Amerasinghe *Jurisdiction Rationae Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 47 BYIL 227, 1976. pp. 264-265

[17] Vacuum Salt Products Ltd. v. Republic of Ghana, Award of February 16, 1994, 9 ICSID Rev.—FILJ (1994), 4 ICSID 329 (1997), ¶ 43.

[18] Liberian Eastern Timber Corp [LETCO] v Republic of Liberia, Award of March 31, 1986 and Rectification of June 17, 1986, reprinted as 26 ILM 647 (1987), 2 ICSID Rep 346 (1994).

[19] Claimant's Memorial On Bolivia's Objections to Jurisdiction and Request for the Production of Evidence, p. 73 par. 210

[20] *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela* (hereinafter referred to as "*Aucoven*"), in its Decision on Jurisdiction of September 27, 2001, *reprinted at* 16 ICSID Rev.—FILJ 469 (2001), 6 ICSID 419 (2004), p. 26, ¶ 65.

relating to AdT between or among any of the following (a) International Water (Tunari) S.a.r.l, (b) International Water (Tunari) B.V., (c) International Water Holdings B.V. and (d) Baywater Holdings B.V.; and, finally, (III) all board of director minutes and shareholder meeting minutes for (a) AdT, (b) International Water (Tunari) S.a.r.l, (c) International Water (Tunari) B.V., (d) International Water Holdings B.V. and (e) Baywater Holdings B.V.. If AdT was indeed controlled directly or indirectly by International Water (Tunari) B.V. and International Water Holdings B.V., those documents would provide evidence of such actions of control.

43. The majority of the Tribunal denied Respondent's request for the production of evidence because it had no object given its interpretation.

44. By resting its case on jurisdiction on majority stock ownership with voting rights and not offering evidence that AdT received the effects of actions of control by Dutch companies, Claimant failed to prove that this dispute is within the jurisdictional reach of the BIT.

It is for the above reasons that I disagree with the Majority's decision in favor of jurisdiction and conclude that Claimant is not entitled to invoke ICSID jurisdiction under the BIT between Bolivia and the Netherlands. I wholeheartedly join in the Tribunal's commitment to its duty to protect the integrity of ICSID jurisdiction during the merits phase, as the parties submit their full memorials and supporting evidence

(signed)

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José Luis Alberro-Semerena
Arbitrator

Date: October 11, 2005

Appendix I

Abbreviations Used in this Award

Abbreviations used in the text

AdT (Claimant)	Aguas del Tunari
Arbitration Rules	Rules of Procedure for Arbitration
Baywater	Baywater Holdings, B.V.
BIT	The Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia, *entered into force* November 1, 1994.
Concession	Contract for Concession of Use of Water and for the Public Potable Water and Sewer Service for the City of Cochabamba
ICSID	The International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *entered into force* October 14, 1966.
IWH B.V.	International Water Holdings B.V.
IWT B.V.	International Water (Tunari) B.V.
IW Ltd	International Water (Tunari) Ltd.
IW S.a.r.l.	International Water (Tunari) S.a.r.l.
Order No. 2	Procedural Order No. 2 on Respondent's Motion for Postponement of the November 17, 18 and 19, 2003 Hearing on Respondent's Objections to Jurisdiction, November 5, 2003
Order No. 3	Procedural Order No. 3 concerning February 9, 10 and 11, 2004 Hearing on Respondent's Objections to Jurisdiction, and Respondent's Request of December 15, 2003 to Examine Witnesses, December 31, 2003

Order No. 4	Procedural Order No. 4 Inviting Comments on the Letter dated October 29, 2004 of Mr. Lammers, Legal Advisor of the Foreign Ministry of the Netherlands, Responding to the Tribunal's Letter of October 4, 2004 Posing Limited Questions, December 14, 2004
Respondent	The Republic of Bolivia
SEMAPA	Municipal Potable Water and Sewer Service of Cochabamba
SIRESE	System of Sectoral Regulation

Abbreviations used in citations and footnotes

Bolivia's Obj.	Republic's of Bolivia's Objection to Jurisdiction and Requests for the Production of Evidence and for Clarification of Procedures, January 17, 2003
AdT's Response	AdT's Response to Bolivia's Objection to Jurisdiction and Requests for the Production of Evidence and for Clarification of Procedures, January 29, 2003
Bolivia's Reply	Reply of Republic of Bolivia to Claimant's Response to Bolivia's Objection to Jurisdiction and Requests for the Production of Evidence and for Clarification of Procedures and Motion for Immediate Dismissal, February 5, 2003
AdT's Rej.	AdT's Rejoinder to Bolivia's Reply, February 13, 2003.
Cl. Mem.	AdT's Memorial on Jurisdiction, June 4, 2003
Resp. Counter Mem.	The Republic of Bolivia's Counter-Memorial in Opposition to Jurisdiction and in Support of the Production of Evidence, August 4, 2003
Cl. Reply	Claimant's Reply to Bolivia's Counter-Memorial in Opposition to Jurisdiction and in Support of the Production of Evidence, September 4, 2003
Resp. Rej.	The Republic of Bolivia's Rejoinder in Opposition to Jurisdiction and in Support of the Production of Evidence, October 6, 2003

ICSID Cases Discussed & Cited

Aucoven	*Autopista Concesionada de Venezuela CA [Aucoven] v. Bolivarian Republic of Venezuela, Decision on Jurisdiction of September 27, 2001, reprinted at* 16 ICSID Rev.—FILJ 469 (2001), 6 ICSID 419 (2004).
Azurix	*Azurix Corp. v. The Argentine Republic,* "Decision on Jurisdiction" dated December 8, 2003, *available at* http://www.asil.org/ilib/azurix.pdf.
Cable TV	*Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings Ltd. v. Federation of St Kitts and Nevis,* Award of January 13, 1997, *reprinted at* 13 ICSID Rev.—FILJ 328 (1998), 5 ICSID Rep. 108 (2002).
Lanco	*LANCO International, Inc. v. The Argentine Republic,* "Preliminary Decision: Jurisdiction of the Arbitral Tribunal" dated December 8, 1998, *reprinted at* 40 ILM 457 (2001), 5 ICSID Rep. 367 (2002).
Vacuum Salt	*Vacuum Salt Products Ltd. v. Republic of Ghana, Award of February 16, 1994, 9 ICSID Rev.—FILJ (1994),* 4 ICSID 329 (1997).
Vivendi	*Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic,* Award of November 21, 2000, *reprinted at* 16 ICSID Rev.—FILJ __ (2001), 5 ICSID Rep. 299 (2002), Decision on Annulment, July 3, 2002, *reprinted at* 17 ICSID Rev.—FILJ __ (2002), 5 ICSID Rev. 240 (2002).

Appendix II

Text of Cited Treaty and Contract Provisions

The Netherlands-Bolivia BIT

Article 1(b) the term "nationals" shall comprise with regard to either Contracting Party:

i. natural persons having the nationality of that Contracting Party in accordance with its law;

ii. without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party;

iii. legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.

Article 9

1) For the purpose of resolving disputes that may arise from investments between one Contracting Party and a national of the other Party to the present Agreement, consultation will be held with a view to settling, amicably the conflict between the parties to the dispute.

2) If a dispute cannot be settled within a period of six months from the date on which the interested national shall have formally notified it, the dispute shall, at the request of the interested national, be submitted to an arbitral tribunal.

3) The arbitral tribunal shall be constituted ad hoc, in such a way that each party shall nominate an arbitrator, and the arbitrators shall agree on the choice of a national of a third State as chairman of the tribunal. The arbitrators shall be nominated within a period of two months, and the chairman within a period of three months, from the time the interested national shall have communicated his wish to submit the dispute to an arbitral tribunal.

4) If the time limits provided for in paragraph 3 are not observed, either of the parties to the dispute shall, if no other provisions apply between the parties to the dispute, be empowered to request the President of the Court of Arbitration of the Paris International Chamber of Commerce to proceed to make the necessary appointments.

5) Paragraphs 4 to 7 of article 13 of the present Agreement shall apply mutatis mutandis.

6) If both Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the international Centre for Settlement of Investment Disputes.

The Bolivian Constitution

Artículo 24 Las empresas y súbditos extranjeros están sometidos a las leyes bolivianas, sin que en ningún caso puedan invocar situación excepcional ni apelar a reclamaciones diplomáticas.

[**Article 24** Foreign subjects and enterprises are subject to Bolivian laws, and in no case may they invoke exceptional position or have recourse to diplomatic claims.]

Artículo 136 Son de dominio originario del Estado, además de los bienes a los que la Ley les da esa calidad, el suelo y el subsuelo con todas sus riquezas naturales, las aguas lacustres, fluviales y medicinales, así como los elementos y fuerzas físicas susceptibles de aprovechamiento. La ley establecerá las condiciones de este dominio, así como las de su concesión y adjudicación a los particulares.

[**Article 136** Within the regional original domain of the State, in addition to property to which the law gives that character, are the soil and the subsoil with all their natural resources: lake, river and thermal waters; and all physical elements and forces susceptible of utilization. Laws shall establish the conditions of such ownership, and those for their concession and allotment to private individuals.]

The Concession

Artículo 37.1 Cada Accionista Fundador deberá mantener más del 50% de su porcentaje original de participación en el capital con derecho a voto del Concesionario por lo menos durante los primeros siete (7) años de las Concesiones. No obstante lo anterior, nada en este Contrato impide a los Accionistas gravar sus acciones como garantía ante las Entidades Financieras

[**Article 37.1** Every Founding Stockholder keep more than 50% of the original equity percentage in voting shares of the Concessionaire at least over the first seven (7) years of the Concessions.]

Artículo 41.2 El Concesionario reconoce la jurisdicción y competencia de las autoridades que componen e Sistema de Regulación Sectorial (SIRESE) y tribunales de la República de Bolivia, de conformidad con la Ley SIRESE y otras leyes bolivianas aplicables.

[**Article 41.2** [The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.]

Artículo 41.3 Las estipulaciones del presente Contrato no podrán interpretarse como renuncia por parte de los Accionistas, los Accionistas Fundadores, incluyendo los Accionistas Útlimos, a mecanismos de Resolución de controversias establecidos en tratados internacionales reconocidos por la República de Bolivia.

[**Article 41.3** The provisions of the present Contract are not to be interpreted as a renunciation on the part of the Shareholders, the Founding Shareholders, including the Ultimate Shareholders, of methods of dispute resolution established in International Treaties recognized by the Republic of Bolivia.]

Artículo 41.5 Las Partes reconocen que dichos Accionistas y Accionistas Últimos del Concesionario incluyendo los Accionistas Fundadores, son libres para ampararse en aquellos

métodos de resolución de disputas que puedan serles legalmente disponibles de acuerdo a la Ley Boliviana (como por ejemplo arbitraje bajo las reglas de CCI, ICSID, o UNCITRAL y otros organismos internacionales similares). Las Partes acuerdan cooperar en el proceso arriba mencionado, en la medida que les sea permitido por Ley.

> [**Article 41.5** The Parties [the Regulator of Water and AdT] recognize that the Shareholders and Ultimate Shareholders including the Founding Shareholders are free to have recourse to those methods of dispute resolution which are legally available to them in accordance with Bolivian Law (such as example arbitration under the rules of the ICC, ICSID or UNITRAL or other similar international organizations). The Parties agree to cooperate in the above-mentioned process, to the extent permitted by Law.]

The ICSID Convention

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 43
Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

The ICSID Arbitration Rules

Article 34 Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts; and

(b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Article 41 Objections to Jurisdiction

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with

its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.

Appendix III

Text of January 29, 2003 Letter from the Tribunal to Earthjustice, Counsel for Petitioners

Professor David D. Caron
C/o Ms. Margrete Stevens
Senior Counsel
International Centre for the Settlement of Investment Disputes, MC6-611
The World Bank Group
Washington, D.C. 20433 U.S.A.

January 29, 2003

J. Martin Wagner
Director, International Program, Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612

Dear Mr. Wagner:

I write in response to your letter of August 28th 2002 to the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) requesting that he forward to the Tribunal a petition for intervention in ICSID Case No. Arb/02/03, *Aguas del Tunari v. The Republic of Bolivia.* The Secretary-General promptly forwarded your request to me and the other members of the Tribunal, José Alberro and Henri Alvarez. You were entirely correct in directing your request to the Tribunal, rather than ICSID itself, as ICSID plays only an administrative and support function in any tribunal's handling of cases.

The Tribunal has given extended consideration to your request. Moreover, the Tribunal requested, and subsequently received, the views of the parties to the dispute. As indicated on the ICSID public register for this case, the Tribunal was constituted under the Rules, without objection from the parties, on July 5, 2002, and held the First Session in this matter on December 9, 2002. Your letter and the request in it were discussed at that meeting and considered by the Tribunal. I write to you and your co-petitioners on behalf of the Tribunal with our response to the particular requests specified in your petition (copy attached hereto).

First, it is the Tribunal's unanimous opinion that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to

join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori,* to the public generally; or to make the documents of the proceedings public.

Second, the consent required of the Parties to grant the requests is not present. Although the Tribunal did not receive any indication that such consent may be forthcoming, the Tribunal remains open to any initiative from the parties in this regard.

Third, the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work. We hold this view without in anyway prejudging the question of the extent of the Tribunal's authority to call witnesses or receive information from non-parties on its own initiative.

The Tribunal wishes to emphasize that it has given serious consideration to your request. The briefness of our reply should not be taken as an indication that your request was viewed in other than a serious manner. Rather, the Tribunal has endeavored to answer the request in a manner that is both responsive and efficient. In addition, given your status as a non-party to this dispute, we necessarily have been careful in our response not to breach the undertakings in our declarations as arbitrators, signed under Arbitration Rule 6(2), to maintain the confidentiality of the proceedings.

The Tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute. The duties of the Tribunal, however, derive from the treaties which govern this particular dispute. It has been reported that the new bilateral investment treaty between Singapore and the United States contains provisions for the *amicus* participation of non-governmental organizations. The duty of a tribunal in any case that arises under that instrument will be to follow its dictates. It is no less our duty to follow the structure and requirements of the instruments that control this case.

The Tribunal thanks you for your letter and the attached petition. Your letter and petition will remain on file with the Secretariat. The ICSID Secretariat and the Parties have been informed of our views.

On behalf of myself and the other members of the Tribunal, I am

Respectfully yours,

David D. Caron
President of the Tribunal in the matter of
Aguas del Tunari vs. The Republic of Bolivia

Appendix IV

Text of October 1, 2004 Letter from the Tribunal to the Government of the Netherlands

Professor David D. Caron
C/o Ms. Margrete Stevens
Senior Counsel
International Centre for Settlement of Investment Disputes,
1818 H St., N.W.
Washington, D.C. 20433, U.S.A.

October 1, 2004

Mr. J.G. Lammers
Legal Adviser
Ministerie van Buitenlandse Zaken
PO Box 20061
2500 EB The Hague, The Netherlands

Dear Mr. Lammers:

I write regarding three parliamentary questions and replies made between 21 February and 5 June 2002 that have been introduced as evidence relevant to the matter of *Aguas del Tunari v. Republic of Bolivia*, an arbitration before the International Centre for Settlement of Investment Disputes (ICSID), Case No. Arb/02/03.

I write on behalf of the Tribunal constituted to address the above-referenced matter, that Tribunal consisting of José Luis Alberro-Semerena, Henri Alvarez, and myself as President. Claimant in this case bases the jurisdiction of the Tribunal on the Bilateral Investment Treaty (BIT) between the Netherlands and Bolivia, signed 10 March 1992 and entered into force on 1 November 1994. The Tribunal has heard arguments as to its jurisdiction and is currently deliberating on the matter. The Tribunal recognizes the obligation of the Netherlands under the ICSID Convention to not provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention.[1] In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal's jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions.

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[1] See Articles 25-27 of the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, especially Article 27:

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Specifically, the parties in this case have presented evidence and made arguments addressing the interpretation held by the Government of the Netherlands regarding provisions of its BIT with Bolivia. The parties do so in part by referencing three sets of responses to parliamentary questions. It is in regard of these responses to parliamentary questions that the Tribunal writes. We attach the Dutch originals of the responses to parliamentary questions, as well as the unofficial English translations of them, as they were provided to the Tribunal.[2]

The three sets of responses to parliamentary questions in outline are as follows.

First, on 21 February 2002, MP Van Bommel submitted written questions to the State Secretary for Economic Affairs and the Minister for Development Cooperation concerning, *inter alia*, whether certain corporations could invoke the Dutch-Bolivian BIT in the dispute addressed by this Tribunal.[3] On behalf of the Minister for Development Cooperation and his Ministry, the State Secretary for Economic Affairs (Minister Ybema) replied on 6 March 2002. He declined to state whether the current dispute fell under the BIT, stating instead, *inter alia,* that the answer is up to the "discretion of the arbitration tribunal to which a dispute has been submitted."[4]

Second, on 25 March 2002, MP Van Bommel submitted further written questions, requesting that the State Secretary and Minister "state clearly and unambiguously whether these multinationals can invoke the Dutch-Bolivian investment treaty in this case."[5] The State Secretary replied on 5 April 2002, referred the MP to his 6 March 2002 reply, and made further comments of a general nature which may be found at attachments three and four.

Third, on 18 April 2002, a five member group of MPs, including MP Van Bommel, submitted further questions to the Minister of Housing, Spatial Planning and Environment, the Minister for Development Cooperation and the State Secretary for Economic Affairs.[6] The MPs asked: "Are you familiar with the publication 'Water, Human Right or Merchandise' of the association Milieudefensie ('Friends of the Earth')? What is your general opinion on this publication?"[7] On behalf of himself and the State Secretary, the Minister for Housing, Spatial Planning, and Development (Minister Pronk) replied on 5 June 2002:

> Yes. Access to safe and clean water is important. The publication brings a number of aspects of the complicated water issue to the attention of a larger public. The topic deserves this attention. However, the formulation in this pamphlet is sometimes factually incorrect or suggestive. One particular point I would like to mention with emphasis. On p. 16 (Water war in Bolivia) it is stated that Aguas del Tunari can resort to the dispute settlement commission of the World Bank under the Dutch-Bolivian Investment Treaty. This is incorrect. As recently stated in response to questions of MP Van Bommel

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[2] See attachments 1-6.

[3] See Parliamentary questions ("Kamervragen"), Parliamentary year 2001-2002, no. 765; see attachment 1, Unofficial English translation; and attachment 2, Dutch original.

[4] See *Id.,* answer 6.

[5] Parliamentary questions, no. 959; see attachment 3, unofficial English translation; and attachment 4, Dutch original.

[6] Parliamentary questions, no. 1229; see attachment 5, unofficial English Translation; and attachment 6, Dutch original. See also attachment 7, unofficial English translation of an excerpt of the publication; and attachment 8, Dutch Original.

[7] *Id.,* question 1.

> [citing to the previous replies to Van Bommel], the Government is of the view that the investment treaty is not applicable to this particular case.[8]

The ICSID Convention entrusts the Tribunal with deciding upon its jurisdiction in this matter. The parties to this arbitration have put in issue provisions of the BIT between the Netherlands and Bolivia. Given that the Government of the Netherlands is not a party or otherwise present in this arbitration, the Tribunal concludes that information from the Government of the Netherlands would assist the work of the Tribunal. Given further the above quoted Article 27 of the ICSID Convention and the fact that the Netherlands is not a party to this arbitration, the Tribunal is also of the view that such questions must be specific and narrowly tailored, aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case. It is the opinion of the Tribunal that it possesses the authority to seek this information under Rule 34 of the ICSID Arbitration Rules.

With all of these considerations in mind, the Tribunal notes that the written responses to parliamentary questions, summarized above and attached in full, do not in and of themselves provide reasons of general application. If the Government's statement replying to the Parliamentary questions of 18 April 2002 reflects an interpretative position of general application held by the Government of the Netherlands, the Tribunal requests that the Government provide the Tribunal with information (of the type suggested by Articles 31 and 32 of the Vienna Convention on the Law of Treaties as being possibly relevant) upon which that general interpretative position is based. The Tribunal advises that it already has before it the text of the BIT and the Explanatory Note set forth at Staten-Generaal, Parliamentary Year 1992-1993, 22870 (R 1452), nos. 37 and 1.

The Tribunal is proceeding with its deliberations on this matter. To be effective your response will need to be received by the Tribunal before 15 November 2004.

The Tribunal thanks you for your attention to this matter. On behalf of myself and the other members of the Tribunal, I am

Respectfully yours,

David D. Caron
President of the Tribunal in the matter of
Aguas del Tunari v. Republic of Bolivia

[List of Attachments not reprinted]

[8] See *Id.*, answer 1. See also attachment 5, Unofficial English translation; and attachment 6, Dutch original.