

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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In the Matter of the Arbitration between

**TSA SPECTRUM DE ARGENTINA S.A.**  
Claimant

v.

**ARGENTINE REPUBLIC**  
Respondent

**ICSID Case No. ARB/05/5**

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**AWARD**

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*Members of the Tribunal:*

Judge Hans Danelius, President  
Professor Georges Abi-Saab, Arbitrator  
Mr. Grant D. Aldonas, Arbitrator

*Secretary of the Tribunal:* Ms. Natalí Sequeira

<i>Representing the Claimant:</i>	<i>Representing the Respondent:</i>
Mr. R. Doak Bishop, Mr. Craig S. Miles Mr. Roberto Aguirre Luzi Ms. Silvia Marchili Mr. Ben Love <i>King &amp; Spalding L.L.P.</i> 1100 Louisiana St., Suite 4000, Houston, Texas 77002, USA	Mr. Osvaldo César Guglielmino <i>Procurador del Tesoro de la Nación Argentina</i> Procuración del Tesoro de la Nación Posadas 1641 (1121), Buenos Aires Argentina

**Date of Dispatch to the Parties:** December 19, 2008

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## **I. SUMMARY OF THE FACTS**

### **A. THE CONCESSION**

1. Thales Spectrum de Argentina S.A. (formerly known as “Thomson Spectrum de Argentina S.A.” and hereinafter called “TSA”) is a company incorporated in Argentina. TSA is a wholly owned subsidiary of TSI Spectrum International N.V, (hereinafter called “TSI”), a company registered in the Netherlands.
2. According to Decree 1073/1992, dated 30 June 1992, the Undersecretary of Communications and the National Commission of Telecommunications of the Argentine Republic (hereinafter called “CNC”) were instructed to commence a tender for the privatisation of the administration, management and control of the radio spectrum and to prepare bidding conditions for such a tender.
3. On 5 November 1995, the Argentine Government published bidding conditions which were finally approved on 25 January 1996 by Resolution No. 144/1996 of the Ministry of Economy, Services and Public Works.
4. On 30 December 1996, the Government published an updated version of the bidding conditions. Pursuant to this version, bidders had to submit three envelopes, consisting of the following:
  - (a) *First envelope*: information on the bidder, including documentation proving the bidder’s or its controlling company’s capital.
  - (b) *Second envelope*: the proposal of technical improvement.
  - (c) *Third envelope*: the economic offer.
5. By 14 March 1997, TSA and one other bidder had submitted their bids.
6. In May 1997, the Evaluation and Pre-Awarding Commission pre-awarded the Concession to TSA.

7. On 11 June 1997, CNC, by Resolution No. 716/97, approved the decision of the Evaluation and Pre-Awarding Commission and awarded the Concession to TSA.
8. A Concession Contract setting out the conditions for the Concession and the obligations of the parties was signed on 11 June 1997 by TSA and CNC. The Contract was to be in force for a period of fifteen years, but the term could be prolonged for a further period of five years if the Concessionaire complied with its obligations under the contract and met certain criteria of the Contract Follow-Up Commission. Under the Contract, TSA was to provide radio spectrum administration, monitoring and control services to CNC which, in turn, was obliged to create a unified database. The objectives were to carry out spectrum management and planning and attribution policy, to assign frequencies and grant licenses and concessions, to approve equipment standards, specifications and authorisations, as well as to extend debt certificates for the judicial enforcement of matured debts. TSA and CNC were entitled to receive a specific percentage of the monthly tariffs collected as payment for services and use of spectrum. The Contract contained in Article 29 the following clause about settlement of disputes (original text):

**“ARTICULO 29.- JURISDICCIÓN**

Toda cuestión a que dé lugar la aplicación o interpretación de las normas que rigen el CONCURSO o sobre cualquier cuestión vinculada directa o indirectamente con el objeto y efectos del CONCURSO, será sometida a la jurisdicción de los Tribunales Nacionales de Primera Instancia en lo Contencioso Administrativo de la Capital Federal, renunciando a cualquier otro fuero o jurisdicción que pudiera corresponder. También en el caso de que el oferente o uno de sus integrantes sea una sociedad extranjera.

Sin perjuicio de ello, las partes podrán someter las desavenencias que deriven de este contrato para que sean resueltas definitivamente en la ciudad de Buenos Aires de acuerdo con el Reglamento de Conciliación y Arbitraje de la Cámara de Comercio Internacional por uno o mas árbitros

nombrados conforme a este Reglamento.”<sup>1</sup>

9. By Resolution No. 242/04 of 26 January 2004, CNC declared the Concession Contract terminated and decided that CNC would operate the installations and assets that were the object of the Contract. The reasons given were in brief that TSA had breached the Contract in regard to the provision of an integrated information system and had unduly enriched itself.
10. In a letter of 25 March 2004 to CNC, TSA, with reference to the bilateral investment treaties with the Netherlands, France and Germany, requested amicable negotiations under the terms of these treaties. TSA also requested the reversal of Resolution No. 242/04.
11. On 14 May 2004, CNC adopted Resolution No. 1231/04 by which these requests were rejected.
12. In a letter, dated 4 June 2004 but filed on 17 June 2004, TSA, with reference to the bilateral investment treaties with the Netherlands, France and Germany, requested the Secretary of Communications to overturn Resolution No. 1231/04.
13. In a letter of 10 December 2004 to the President of the Argentine Republic, TSA stated that, since more than 30 days had passed without an express reply from the Secretary of Communications, TSA’s request should be considered rejected according to Argentine law. TSA therefore notified the Argentine Republic of TSA’s consent to the exclusive jurisdiction of ICSID in order that the investment dispute be resolved through binding arbitration. TSA also notified its decision to interrupt, in compliance with Article 10(4) of

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<sup>1</sup> Claimant’s Memorial on the Merits (Exhibit 4) and Respondent’s Memorial on Jurisdiction (Exhibit A RA-2). English Translation of Exhibit 4: provided by the Claimant: “All issues arising out of the application or the interpretation of the rules governing the BIDDING PROCESS or any other issue directly or indirectly related to the object and the purpose of the BIDDING PROCESS, will be subject to the jurisdiction of the National Courts on Administrative Law Matters of the City of Buenos Aires, thus relinquishing any other forum or jurisdiction that might be applicable. This also applies in case the offeror or one of its members is a foreign company. Notwithstanding, the parties will also be entitled to submit the disputes resulting from this contract before one or more arbitrators appointed in accordance with the Rules of Arbitration and Conciliation of the International Chamber of Commerce in the city of Buenos Aires, so that they are definitely settled”. English Translation of Article 29 provided by the Respondent (Respondent’s Memorial on Jurisdiction, para. 12): “All the issues arising from the application or interpretation of the standards governing the BIDDING PROCESS or any other issue directly or indirectly related to the object and effects of the BIDDING PROCESS, will be subject to the jurisdiction of the National Federal Lower Court on Administrative Law Matters, thus relinquishing any other forum or jurisdiction that might be applicable. If the bidder or one of its members is a foreign company, all discrepancies deriving from this contract will be definitely settled in the City of Buenos Aires in compliance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators in compliance with these Rules”.

the bilateral investment treaty between the Netherlands and the Argentine Republic, the administrative procedures instituted before CNC and the Secretary of Communications.

14. On 23 May 2005, the Ministry of Federal Planning, Public Investment and Services rejected TSA's appeal against Resolution No. 242/04.

## **B. CRIMINAL INVESTIGATIONS**

15. Following an anonymous report on alleged irregularities in the bidding process which resulted in the Concession being granted to TSA, a criminal accusation was filed on 16 July 2001 by the Anticorruption Office against persons belonging to the public administration or connected with TSA.
16. On 1 October 2004, the Federal Court in Criminal and Correctional Affairs for the City of Buenos Aires No. 7 partially acquitted some of the persons charged, given that the investigated events had not taken place.
17. On 15 November 2005, the Federal Court of Appeals in Criminal and Correctional Affairs, Court II, reversed the partial acquittal and ordered further investigations.
18. On 26 February 2008, a federal judge ordered the prosecution without detention of a number of persons on charges of fraud by unfaithful administration aggravated by the infliction of damage to the state. The judge also decided to prosecute two persons connected to TSA – Mr. Jorge Justo Neuss and Mr. Jean Nicolas d'Ancezune – for complicity in such acts. The judge ordered the attachment of assets of the indicted persons, in the case of Mr. Neuss and Mr. d'Ancezune up to the amount of 200 million pesos each. As regards bribery, the judge noted that the investigation was incomplete and deferred the decision to be taken in this regard.

## **II. THE ICSID CONVENTION AND THE BIT**

19. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter called the "ICSID Convention"), under which the International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID") was set up, provides in Article 25(1) and (2) and Article 26 as follows:

“Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. (...)

(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 (...); 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.

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

20. The Argentine Republic and the Netherlands are parties to the ICSID Convention.
21. The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (hereinafter called the “BIT”) was signed on 20 October 1992 and entered into force on 1 October 1994. It contains, *inter alia*, the following provisions:

## “Article 1

For the purposes of the present Agreement:

(a) The term ‘investments’ shall comprise every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the laws and regulations of the latter Contracting Party, and shall include (...)

(b) the term ‘investor’ 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 paragraph (iii) hereafter, legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party in which a place of effective management is situated; and

iii. legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.

(...)

## Article 3

1) Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

2) More particularly, each Contracting Party shall accord to such investments the same security and protection as it accords either to those of its own investors or to those of investors of any third State, whichever is more favourable to the investor concerned.



3) If a Contracting Party has accorded special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, integration areas or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

4) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Party in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that is more favourable prevail over the present Agreement.

#### Article 4

1) Investments which are subject to a special agreement between one of the Contracting Parties and an investor of the other Contracting Party shall be ruled by the provisions of this Agreement and by those of such special agreement.

2) Each Contracting Party shall observe any obligation it may have entered into with regard to investment of investors of the other Contracting Party.

#### Article 5

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State, whichever is more favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party under an agreement for the avoidance of double taxation, by virtue of its

participation in a customs union, economic union, integration area or similar institution, or on the basis of reciprocity with a third State.

(...)

#### Article 7

Neither of the Contracting Parties shall take any direct or indirect measure of nationalization or expropriation or any other measure having a similar nature or similar effect against investments made in its territory by investors of the other Contracting Party, unless the following conditions are complied with:

(...)

#### Article 10

1) Disputes between one Contracting Party and an investor of the other Contracting Party regarding issues covered by this agreement shall, if possible, be settled amicably.

2) If such disputes cannot be settled according to the provisions of paragraph (1) of this Article within a period of three months from the date on which either party to the dispute requested amicable settlement, either party may submit the dispute to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made.

3) If within a period of eighteen months from submission of the dispute to the competent organs mentioned in paragraph (2) above, these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation. Each Contracting Party hereby consents to the submission of a dispute as referred to in paragraph (1) of this Article to international arbitration.

4) At the moment the dispute is submitted to arbitration each party to the

dispute shall adopt all necessary measures to interrupt the procedures instituted at the organs as mentioned in paragraph (2) of this Article.

5) Where the dispute is referred to international arbitration or conciliation, the investor concerned may submit the dispute either to:

(a) The International Centre for Settlement of Investment Disputes (hereinafter referred to as I.C.S.I.D.) created by the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” opened for signature at Washington on 18th March 1965 (hereinafter referred to as the Convention), once both Contracting Parties have become a party to the Convention; until such time as the latter condition shall be fulfilled, the Additional Facility for the administration of proceedings by the secretariat of the I.C.S.I.D. shall be used;

(b) An ad hoc arbitration tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law.

6) A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and which, before a dispute arises, is controlled by nationals of the other Contracting Party shall, in accordance with article 25(2)(b) of the Convention be treated for the purposes of the Convention as a national of the other Contracting Party.

7) The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.

(...)”

22. A Protocol to the BIT provides as follows:

“On the signing of the Agreement between the Kingdom of the Netherlands and the Argentine Republic on the encouragement and reciprocal protection of investments, the undersigned representatives have agreed on the following provisions which constitute an integral part of the Agreement:

(...)

B. 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.”

### **III. PROCEDURAL HISTORY**

- 23. On 20 December 2004, TSA filed a request for arbitration with ICSID. The request was registered on 8 April 2005 under ICSID Case No. ARB/05/05.
- 24. On 19 July 2005, the parties requested that the Arbitral Tribunal in this case be constituted in accordance with Article 37(2)(b) of the ICSID Convention. Accordingly, the Tribunal was to consist of three arbitrators, one arbitrator appointed by each party and the third, who should be the President of the Tribunal, appointed by agreement of the parties.
- 25. The Claimant appointed Mr. Grant D. Aldonas, a national of the United States of America and the Respondent appointed Professor Georges Abi-Saab, a national of the Arab Republic of Egypt. The Acting Chairman of the Administrative Council appointed Justice Hans Danelius, a national of Sweden, as President of the Tribunal. By letter of 12 June

2006, the Centre informed the parties that the Arbitral Tribunal was deemed to be constituted and the proceedings to have begun. On the same date Ms. Gabriela Alvarez Ávila was appointed Secretary of the Arbitral Tribunal. She was subsequently succeeded in this capacity by Ms. Natalí Sequeira.

26. The Arbitral Tribunal held a first session with the parties on 31 August 2006 in Washington D.C.
27. On 29 January 2007, TSA filed its Memorial on the Merits.
28. On 17 May 2007, the Argentine Republic submitted a Memorial on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal. On 6 August 2007, TSA submitted a Counter-Memorial on Jurisdiction.
29. Further briefs on the issue of jurisdiction were submitted on 26 December 2007 by the Argentine Republic and on 30 January 2008 by TSA.
30. On 15 October 2007, the Arbitral Tribunal issued Procedural Order No. 1 in which it requested TSA to submit, no later than 20 November 2007, information asked for by the Argentine Republic as to the chain of ownership and control of TSA Spectrum de Argentina S.A., including specifications of the legal or physical persons having the effective control of the company. TSA's request for an order to exclude certain documents from consideration was rejected.
31. By letter of 20 November 2007, TSA, in response to Procedural Order No.1, submitted a Witness Statement. On 29 November 2007, the Argentine Republic objected that this was not sufficient compliance with the Procedural Order and requested further documents.
32. On 6 December 2007, the Arbitral Tribunal issued Procedural Order No. 2, in which it requested TSA to submit, no later than 8 January 2008, copies or extracts of shares registries, or equivalent official documents, covering the period from 1997 until the present time, regarding certain companies, as well as further information about the character and contents of a fiduciary encumbrance upon the shares of TSA Spectrum de Argentina S.A. which had been referred to by TSA.

33. On 31 January 2008, after an extension of the time-limit, TSA submitted further documentation about its ownership chain.
34. On 5-7 May 2008, the Arbitral Tribunal held a hearing on the issue of jurisdiction in Washington D.C. at which TSA was represented by Mr. Doak R. Bishop, Mr. Craig S. Miles, Mr. Roberto Aguirre Luzi and Ms. Silvia Marchili (King & Spalding LLP) and Mr. Juan Pablo Martini (Cassagne Abogados). The Argentine Republic was represented by Mr. Adolfo Gustavo Scrinzi, Mr. Gabriel Bottini, Ms. Silvina González Napolitano, Ms. Mariana Lozza, Ms. Verónica Lavista, Mr. Nicolás Duhalde (*Procuración del Tesoro de la Nación Argentina*) and Mr. Ignacio Torterola (Embassy of the Argentine Republic). The Arbitral Tribunal also heard testimonies by Mr. Horacio R. Della Rocca, Mr. Javier M. Guerrico, Mr. Jean Nicolas d'Ancezune and Professor Eduardo Aguirre Obarrio.
35. In a letter of 26 June 2008, TSA referred to a recent decision in an ICSID case which in TSA's opinion had some resemblance with the present case. The Argentine Republic commented on the letter on 14 July 2008. There was some further correspondence in August and September 2008.

#### **IV. CLAIMS AND JURISDICTIONAL ISSUES**

36. TSA claims that the Argentine Republic, in violation of the BIT, international law and Argentine law, has:
  - (a) expropriated TSA's investment;
  - (b) failed to treat TSA's investment fairly and equitably;
  - (c) impaired by unreasonable measures the management, operation, maintenance, use, enjoyment, expansion or disposal of TSA's investment; and
  - (d) failed to protect TSA's investment.
37. The Argentine Republic contests TSA's claims and raises four separate objections to the Arbitral Tribunal's jurisdiction. Argentina requests the Arbitral Tribunal to declare, in accordance with Rule 41(4) of the Arbitration Rules, the lack of jurisdiction of the Centre and determine in conformity with Rule 41(5) of the Arbitration Rules the lack of

competence of the Tribunal to hear this case and thus to reject the Request for Arbitration with costs against TSA according to Rule 47(1)(j) of the Arbitration Rules.

38. TSA requests:

- (a) a declaration that the dispute is within the jurisdiction of the ICSID Convention and within the competence of the Arbitral Tribunal;
- (b) an order dismissing all of Argentina's objections to the admissibility of the dispute and dismissing all of Argentina's objections to the jurisdiction of the ICSID Convention and the competence of the Arbitral Tribunal;
- (c) an order that Argentina pay the costs for the proceedings, including the Tribunal's fees and expenses, and the costs of TSA's representation, subject to interest until the day of payment.

39. The Argentine Republic's objections are, in brief:

- (a) that TSA relinquished in the Concession Contract any international arbitration based on the BIT;
- (b) that TSA initiated ICSID arbitration without respecting the pre-conditions for such arbitration in the BIT;
- (c) that TSA is not a legal person enjoying protection as an investor under the BIT;  
and
- (d) that TSA's Concession was not obtained in accordance with Argentine law and is therefore not protected under the BIT.

40. TSA finds the Argentine Republic's four objections ill-founded and makes the general remark that the Arbitral Tribunal's inquiry at the jurisdictional stage is rather limited under Article 25 of the ICSID Convention. In TSA's opinion, the Arbitral Tribunal may look to the BIT in order to determine if its jurisdictional requirements are satisfied and to TSA's pleadings in order to determine if the alleged facts, assumed for jurisdictional purposes to be true, could constitute a violation of the BIT.

41. The Arbitral Tribunal has examined the parties' written and oral submissions in their entirety as well as the written and oral evidence on which they have relied. In the following sections of this Award, the Arbitral Tribunal will deal with each of the Argentine Republic's four objections separately and will, in respect of each objection, make a short summary of the parties' main arguments and then set out the reasons on which the Tribunal bases its decision regarding the jurisdictional objection concerned.

## **V. FIRST ISSUE OF JURISDICTION**

### **A. THE PARTIES' ARGUMENTS**

#### **1. The Argentine Republic**

42. The Concession Contract which is the object of TSA's claim contains a clause in Article 29 which provides that the competent forum for settling disputes regarding the application or interpretation of the Contract is either the National Federal Court on Administrative Law Matters or an arbitral forum in Buenos Aires which shall apply the Rules of Conciliation and Arbitration of the International Chamber of Commerce (hereinafter called "ICC"). The clause is particularly comprehensive, since it refers to all discrepancies deriving from the Contract. The impact of Article 29 is that TSA has relinquished any other forum and jurisdiction.
43. TSA's claim is manifestly contractual, although TSA tries to conceal the true nature of the dispute by framing it under the provisions of the BIT. But it cannot be ignored that the parties agreed on a jurisdictional clause which provided for arbitration under international rules, but not under ICSID rules. This distinguishes the present case from other cases in which the jurisdiction agreed upon in a contract was that of the courts and tribunals of the host state, and not international arbitration. It is also worth noting that in some other cases the person filing for international arbitration was not a party to the contract, as a consequence of which the tribunals considered that it could be found that the claimant was not bound by the jurisdictional clause contained in the contract.



44. TSA cannot intend to have the Concession Contract regulations applied partially. This is not a choice process in which TSA can choose those parts of the Concession Contract that best suit it (cf. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*<sup>2</sup>).
45. The relinquishment of ICSID jurisdiction is consistent with Article 4(1) of the BIT which acknowledges that investments subject to a special agreement – such as the Concession Contract – shall be ruled not only by the provisions of the BIT but also by those of the special agreement. Thus, even accepting, *arguendo*, that the BIT is the essential basis of all TSA’s claims, the contractual jurisdictional clause shall apply to the exclusion of any other jurisdiction, as Article 4(1) of the BIT contains a *renvoi* clause referring us thereto.
46. Neither can it be argued that the jurisdictional clause in the Concession Contract was executed by a person other than the one filing for arbitration under the BIT. Indeed TSA is the same person that signed the Contract, and the Contract provides for the exclusive jurisdiction of an arbitration tribunal set up under the ICC Rules, which TSA later ignores by invoking the jurisdiction of an ICSID arbitral tribunal.
47. The jurisdiction agreed by TSA and Argentina in the Concession Contract must prevail as: (i) it derives from a special agreement that has priority over the general rule; (ii) the special agreement was entered into after the BIT had become effective; (iii) the special agreement was entered into with a specific and, at the same time, broad, scope for dispute resolution purposes; (iv) it was connected with all such matters as are related to the Concession Contract; (v) the jurisdiction in the special agreement was expressly consented to by TSA; and (vi) the BIT expressly refers to the special agreement.
48. Consequently, TSA should have resorted to Argentine tribunals or to arbitration under the ICC Rules, and since it did not do so, the Arbitral Tribunal should declare its lack of jurisdiction on the basis of Article 29 of the Concession Contract and Article 4(1) of the BIT.

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<sup>2</sup> ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 154.

49. Pursuant to Article 26 of the ICSID Convention, the Arbitral Tribunal also lacks jurisdiction to hear this arbitration proceeding, since that Article provides that consent of the parties to arbitration shall, “unless otherwise stated”, be deemed consent to such arbitration to the exclusion of any other remedy. The meaning of the phrase “unless otherwise stated” supports the criterion explained by Argentina as far as the existence of a special agreement recognised by Article 4(1) of the BIT is concerned.

## 2. TSA

50. The forum selection clause in the Concession Contract does not operate to divest the Arbitral Tribunal of ICSID jurisdiction. TSA is not asserting a breach of contract claims but violations of the BIT. The forum selection clause in the Concession Contract does not preclude TSA’s right to bring treaty claims, and Article 4(1) of the BIT does not effectively displace the forum selection clause in the BIT with that of the Concession Contract.

51. Although Argentina breached the Concession Contract in many respects, this is not the dispute that TSA has put before the Arbitral Tribunal. Instead, TSA claims that Argentina violated the BIT when it expropriated TSA’s investment, when it failed to treat TSA’s investment fairly and equitably, when it impaired by unreasonable measures TSA’s management, operation, maintenance, use, enjoyment, expansion, or disposal of its investment, when it failed to protect TSA’s investment, and when it failed to observe obligations entered into with regard to TSA and its investments. There is case-law showing that the mere fact that certain elements of an investment dispute also involve breaches of contract does not suffice to transform a dispute into a non-international contract claim or to divest ICSID jurisdiction (*e.g. Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, called *Vivendi II*<sup>3</sup>, *Azurix Corp. v. Argentine Republic*<sup>4</sup>, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*<sup>5</sup>, *Total S.A. v. Argentine Republic*<sup>6</sup>, *SGS Société Générale de*

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<sup>3</sup> ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 112-113.

<sup>4</sup> ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 76.

<sup>5</sup> ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004, para. 66.

<sup>6</sup> ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, 25 August 2006, para. 85.

*Surveillance S.A. v. Islamic Republic of Pakistan*<sup>7</sup>, *Lanco International, Inc. v. Argentine Republic*<sup>8</sup>, *Wena Hotels Ltd. v. Arab Republic of Egypt*<sup>9</sup>, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*<sup>10</sup>, *Eureka B.V. v. Republic of Poland*<sup>11</sup>, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*<sup>12</sup>).

52. TSA has presented to the Arbitral Tribunal facts that, on their face, could constitute a violation of the BIT, and this is the proper test for jurisdiction. Moreover, TSA argues that these facts constitute violations of the BIT, and Argentina contests these conclusions. Thus, TSA has fulfilled the jurisdictional requirement under Article 25(1) of the ICSID Convention to bring a “legal dispute” based on the BIT, and it will be for the Arbitral Tribunal to decide, on the merits, whether the facts indeed result in violations of the BIT.
53. Article 29 of the Concession Contract, in its first paragraph, refers foreign companies to the same dispute resolution procedures as local companies, *i.e.* the National Lower Courts on Administrative Law Matters of the City of Buenos Aires. Under the clause in the second paragraph of the same Article, the parties have the option of submitting disputes relating to the bidding process to either the Federal Lower Courts on Administrative Law Matters of the City of Buenos Aires or arbitration under the ICC Rules. Article 29 refers to issues relating to the bidding process, not issues arising under the BIT. Thus, Article 29 refers a very limited class of disputes to the local courts, not to arbitration. Under Article 29, arbitration is simply an option, not a requirement.
54. Even if ICC arbitration were a requirement, it would make no difference. When tribunals have held that a forum selection clause in an underlying contract does not divest a tribunal of jurisdiction to hear treaty claims, they have done so on the following bases: (i) the forum selection clause could not constitute a waiver of ICSID jurisdiction over BIT

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<sup>7</sup> ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, paras 43, 44, 48-74.

<sup>8</sup> ICSID Case No. ARB 97/6, Decision on Jurisdiction, 8 December 1998, 40 ILM (2001) at 463, 466, 469 and 470.

<sup>9</sup> ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, para. 31.

<sup>10</sup> ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 62.

<sup>11</sup> UNCITRAL Arbitration, Partial Award, 19 August 2005, para. 112.

<sup>12</sup> ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, paras.43-45.

claims; and, more importantly, (ii) the claims in question were based on the BIT, not the underlying contract.

55. Even if the Concession Contract had provided for mandatory arbitration, this would not exclude Argentina's consent to ICSID arbitration under the BIT without explicit language to that effect. Thus the fact that arbitration was an option under Article 29 of the Concession Contract is of no significance. Nor is it relevant that the parties concluded the forum selection clause in the Concession Contract after the entry into force of the BIT. Moreover, TSA and Argentina technically consented to ICSID arbitration after they signed the Concession Contract.

#### **B. THE ARBITRAL TRIBUNAL'S FINDINGS**

56. According to Article 10(3) of the BIT, an investor from one of the Contracting States may, on certain conditions, resort to international arbitration in order to settle a dispute with the other Contracting State regarding issues covered by the BIT. TSA alleges that its rights under the BIT have been breached in several respects, and this is disputed by the Argentine Republic.
57. The question the Arbitral Tribunal has to consider is whether TSA, according to the terms of the Concession Contract, has undertaken not to avail itself of the right to dispute settlement it might otherwise have according to the BIT.
58. Similar questions of the relations between contractual obligations and obligations under bilateral investment treaties have arisen in a number of previous ICSID arbitrations. As pointed out in *Vivendi II*, it is clear that a particular investment dispute may at the same time involve both issues of the interpretation and application of a treaty and questions of contract. In such cases, the questions as to whether there has been a breach of the treaty and whether there has been a breach of the contract are different questions, and each of them is to be examined separately. As stated in the *Vivendi II* case, "where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state (...) cannot operate as a bar to

the application of the treaty standard”<sup>13</sup>. Thus, if the contract contains a specific clause on dispute settlement, this does not exclude recourse to the settlement procedure in the treaty, unless there is a clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty (see also *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*<sup>14</sup>, *Eureko B.V. v. Republic of Poland*<sup>15</sup>). The Arbitral Tribunal notes that in the case of *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, referred to by the Argentine Republic, the main question was whether the claimant had presented an independent treaty claim different from a claim that could be based on the contract, and that the approach taken in that case does not exclude that contractual claims and treaty claims can in some circumstances be based on the same or similar facts.

59. The Concession Contract contains the following provision in Article 29:

**“ARTICULO 29.- JURISDICCIÓN**

Toda cuestión a que dé lugar la aplicación o interpretación de las normas que rigen el CONCURSO o sobre cualquier cuestión vinculada directa o indirectamente con el objeto y efectos del CONCURSO, será sometida a la jurisdicción de los Tribunales Nacionales de Primera Instancia en lo Contencioso Administrativo de la Capital Federal, renunciando a cualquier otro fuero o jurisdicción que pudiera corresponder. También en el caso de que el oferente o uno de sus integrantes sea una sociedad extranjera.

Sin perjuicio de ello, las partes podrán someter las desavenencias que deriven de este contrato para que sean resueltas definitivamente en la ciudad de Buenos Aires de acuerdo con el Reglamento de Conciliación y Arbitraje de la Cámara de Comercio Internacional por uno o mas árbitros

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<sup>13</sup> See supra note 3, at para. 101.

<sup>14</sup> See supra note 7, at paras. 146 and 147.

<sup>15</sup> See supra note 11, at paras. 112 and 113.

nombrados conforme a este Reglamento.”<sup>16</sup>

60. The Arbitral Tribunal considers that, while the Concession Contract deals with specific contractual rights and obligations, the BIT concerns rights and obligations of a different and more fundamental nature. Consequently, not all breaches of CNC’s obligations in the Concession Contract would qualify as breaches of the BIT. On the other hand, some acts or failures by CNC or other State agencies may involve questions of the implementation of the Concession Contract as well as the observance of Argentina’s obligations under the BIT.
61. In the present case, it is clear that, while some of the acts or failures referred to by TSA may also have concerned CNC’s obligations under the Concession Contract, a tribunal acting on the basis of Article 29 second paragraph of that Contract would not have been competent to examine the observance by Argentina of its more fundamental obligations under the BIT. In respect of alleged violations of such obligations, TSA’s only remedies were those provided for in the BIT.
62. The Arbitral Tribunal considers that the wording of Article 29 of the Concession Contract is not such as to exclude recourse to a remedy under the BIT in cases where a dispute arises about acts which might constitute breaches of both the Concession Contract and the BIT. Nor can it be assumed without convincing evidence that TSA, by concluding the Concession Contract, intended to relinquish any right to a remedy under the BIT, in particular for serious acts such as the alleged expropriation of TSA’s contractual rights. No evidence of relinquishment has been presented in the present proceedings. Moreover, if Argentina had intended that the Concession Contract should have the far-reaching

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<sup>16</sup> Claimant’s Memorial on the Merits (Exhibit 4) and Respondent’s Memorial on Jurisdiction (Exhibit A RA-2). English Translation of Exhibit 4 provided by the Claimant: “All issues arising out of the application or the interpretation of the rules governing the BIDDING PROCESS or any other issue directly or indirectly related to the object and the purpose of the BIDDING PROCESS, will be subject to the jurisdiction of the National Courts on Administrative Law Matters of the City of Buenos Aires, thus relinquishing any other forum or jurisdiction that might be applicable. This also applies in case the offeror or one of its members is a foreign company. Notwithstanding, the parties will also be entitled to submit the disputes resulting from this contract before one or more arbitrators appointed in accordance with the Rules of Arbitration and Conciliation of the International Chamber of Commerce in the city of Buenos Aires, so that they are definitely settled”. English Translation of Article 29 provided by the Respondent (Respondent’s Memorial on Jurisdiction, para. 12): “All the issues arising from the application or interpretation of the standards governing the BIDDING PROCESS or any other issue directly or indirectly related to the object and effects of the BIDDING PROCESS, will be subject to the jurisdiction of the National Federal Lower Court on Administrative Law Matters, thus relinquishing any other forum or jurisdiction that might be applicable. If the bidder or one of its members is a foreign company, all discrepancies deriving from this contract will be definitely settled in the City of Buenos Aires in compliance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators in compliance with these Rules”.

effect of excluding application of the remedies under the BIT, it must have been incumbent on Argentina to indicate this in a clear manner in the Contract or in connection with the conclusion of the Contract. There is no evidence that Argentina did so or informed TSA that such was Argentina's understanding of Article 29 of the Contract.

63. Furthermore, in a more general manner, the Arbitral Tribunal observes that Argentina's interpretation, if generally applied, would make it possible for governments to avoid their treaty obligations as regards important matters such as expropriation by the simple expedient of inserting clauses in their contracts that vitiated the right to international arbitration, thereby effectively rendering the arbitration provisions of a bilateral investment treaty a nullity. This would seem inconsistent with a state's basic obligation under international law to implement its treaty obligations in good faith.
64. The Argentine Republic has also referred to the phrase "unless otherwise stated" in Article 26 of the ICSID Convention. However, since the rights and obligations under the Concession Contract are different from those derived from the BIT, the exception from consent in Article 26 has no application in the present case.
65. Thus, it remained open for TSA – provided that all other formal conditions were satisfied – to seek a remedy in the BIT for expropriation of its investment or for any alleged failure by Argentina to give adequate security and protection to the investment in accordance with the BIT.
66. The Arbitral Tribunal therefore concludes that, notwithstanding Article 29 of the Concession Contract and Article 26 of the ICSID Convention, the dispute settlement rules in the BIT remained at the disposal of TSA, provided that the BIT was not for other reasons inapplicable to TSA.

## **VI. SECOND ISSUE OF JURISDICTION**

### **A. THE PARTIES' ARGUMENTS**

#### **1. The Argentine Republic**

67. Argentina and the Netherlands agreed in Article 10 of the BIT that, should it not be possible to resolve amicably a dispute between an investor and a Contracting Party, it should first be subject to the administrative or judicial agencies of the country of investment. Only if eighteen months later no final decision had been made, or if the decision had been given but the dispute prevailed, could the claim be filed with an international tribunal. TSA did not comply with these requirements.
68. CNC's Resolution No. 1231/04 of 14 May 2004 was not a final decision for the purpose of Article 10(3) of the BIT, since such decision was likely to be appealed. Indeed TSA filed an appeal which made the proceedings be referred to the Secretariat of Communications on 18 May 2004. Although there was no final decision, TSA submitted the case to ICSID on 20 December 2004 when only nine months had elapsed from 29 March 2004, the date when the petition for reconsideration of Resolution No. 242/04 was filed.
69. Article 10(3) of the BIT expressly provides for two cumulative requirements necessary for investors protected under the BIT to be authorised to resort to arbitration: (a) an eighteen-month term as from the submission of the dispute to the competent administrative or judicial bodies of the host state; and (b) absence of a final decision, or if a final decision has been issued, a remaining dispute between the parties. TSA has failed to meet such requirements.
70. It cannot be concluded that at any time in this case there was a sign of the obvious futility of the local remedies available. TSA had the guarantees provided by the local remedies, and still decided to skip them in order to resort to ICSID's jurisdiction. The parties to the BIT agreed upon a clear and precise procedure to be followed in order to file international arbitration proceedings. Such procedure does not allow investors arbitrarily and at their own discretion to decide not to comply with it. If investors choose not to comply with the



provisions agreed upon by the states, tribunals cannot grant them the protection afforded by said rules, since that would be against the common intention of the States Parties. The fact that a new submission of an arbitration claim would cause the investor to incur additional, maybe unnecessary, costs is not something which a decision on jurisdiction should depend on. This has been the decision of, and the risk taken by, the investor.

71. The most favoured nation clauses (hereinafter called “*MFN clauses*”) in the BIT are not applicable. The MFN clause in Article 5 of the BIT relates exclusively to taxes, fees, charges and fiscal deductions and exemptions. The MFN clause in Article 3(2) relates to the protection and security standard and does not include dispute resolution. The intention of Argentina and the Netherlands was to add such protection to substantive issues and not to dispute resolution issues. This also appears from the wording of Article 3(2) which differs from the wording of MFN clauses in some other bilateral investment treaties which extend the protection to all matters governed by the treaty. Had it been the intention of the Argentine Republic and the Netherlands to include stipulations applicable to dispute resolution within the scope of the MFN clause, they would have included a phrase that allowed for such construction, or a general phrase referring to the whole BIT. Not only did they refrain from doing so, but they also limited the scope of application of the MFN clause to some particular events expressly stipulated, one of them being protection and security in Article 3(2). Argentina thus took a deliberate decision when negotiating the BIT with the Netherlands, which was executed by both Governments on 20 October 1992. By that time, Argentina had already executed other bilateral investment treaties in which there was no requirement to previously resort to the domestic jurisdiction within a specific period before opting for arbitration.
72. Article 3(4) of the BIT is of no relevance for solving the issue, given that it only refers to two events which are not related to the MFN clause: (a) where there are national laws of one of the parties granting investments of the other Contracting Party a more favourable treatment than that set out in the BIT, and (b) where there are existing or subsequently established international law obligations between the Contracting Parties and in addition to the BIT granting a more favourable treatment to investments made by investors from the other Contracting Party.

73. The bilateral investment treaty between Argentina and the USA is also of no relevance in this context. It was not concluded in connection with the conclusion of the BIT with the Netherlands. The Argentina-US treaty was executed on 14 November 1991 and the Argentina-Netherlands BIT almost a year later, on 20 October 1992. Therefore, it could not be considered an instrument concluded in connection with the conclusion of the Argentina-Netherlands BIT. Neither does the Argentina-US bilateral treaty qualify as a relevant rule of international law applicable in the relations between the parties in the terms of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, as it was not entered into by and between the same parties as the ones in the treaty to be interpreted, *i.e.* the Argentina-Netherlands BIT.
74. The integration principle can under no circumstances back up the inclusion of procedural rules included in other international treaties with third states to the Argentina-Netherlands BIT, for instance in the case of the Argentina-US treaty. The distinction between conditional and unconditional clauses is not useful either, since the MFN clause in Article 3(2) is limited by its own wording.
75. TSA has not submitted any evidence that nullifies the authentic interpretation of the BIT made by the Argentine Republic. TSA is not a party to the BIT. Therefore only Argentina and the Netherlands can make an authentic interpretation of the BIT. TSA's position cannot prevail over the express wording of the BIT, the Argentine Republic's official position or the case-law in regard to other bilateral investment treaties. Moreover, if Article 3(2) comprised any issue included in the BIT, it would be difficult to understand the *raison d'être* of other clauses providing for MFN treatment in specific matters. The only possible explanation is that Article 3(2) is limited to certain issues and does not comprise all articles of the BIT, thus the need to include other comprehensive clauses regarding other particular situations.
76. An extension of the MFN clause to dispute settlement would also be inconsistent with previous ICSID case-law (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite*

*Kingdom of Jordan*<sup>17</sup>, *Plama Consortium Limited v. Republic of Bulgaria*<sup>18</sup>) and with the *ejusdem generis* principle. Article 3(2) makes reference to the protection and security standard which does not include the chapter on solution of disputes or the requirements for access to an international tribunal provided for in the chapter of the BIT on dispute resolution.

77. The Arbitral Tribunal should therefore decline its jurisdiction based on the failure to comply with the requirement set forth in Article 10 of the BIT.

## 2. TSA

78. TSA duly notified the treaty dispute to the Argentine Government which refused to comply with the BIT. Furthermore, Article 10 of the BIT does not bar the Arbitral Tribunal's jurisdiction over TSA's claim, and even if it did, TSA may invoke the MFN clause in Article 3(2) of the BIT to displace the requirements of Article 10 with more favourable provisions from other bilateral investment treaties.
79. First, TSA complied with Article 10 by submitting this treaty dispute to the competent "administrative organs" of Argentina, requesting them to undo the measures taken by the Argentine Government in violation of the BIT. This request was rejected.
80. Second, Article 10 is a procedural rule that does not bar the Arbitral Tribunal's jurisdiction over the substance of TSA's claim.
81. Third, the MFN clause in Article 3(2) of the BIT may be invoked to displace the requirements of Article 10.
82. On 29 March 2004, TSA notified Argentina, through a communication to CNC, of an investment dispute under the BIT. In the same communication, TSA also requested that CNC resolve this dispute by undoing the termination of the Concession Contract, among

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<sup>17</sup> ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, paras. 114, 116 and 117.

<sup>18</sup> ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 193, 198, 199, 207, 219, 223 and 226.

- other measures, and expressed its willingness to consult and negotiate with the Argentine Government to resolve the dispute amicably.
83. On 14 May 2004, CNC rejected TSA's request to settle the dispute amicably and undo the measures taken by the Government in violation of the BIT. Furthermore, CNC denied the existence of any dispute under the BIT.
  84. Although this decision was final under Argentine administrative procedure, TSA had an option to seek a revision of that final act by either the judiciary or CNC's superior, the Secretary of Communications. TSA opted to submit its request for revision to the Secretary of Communications, on 17 June 2004, to overturn CNC's decision and undo the measures taken by the Government in violation of the BIT.
  85. On 23 May 2005, the Ministry of Federal Planning, Public Investment and Services rejected TSA's request to revise CNC's decision. However, long before the Ministry rejected the request, TSA was entitled to proceed as if its administrative appeal had been rejected under the Argentine law doctrine of *silencio denegatorio*.
  86. Even assuming that the administrative law decisions were not final, there were no further effective local remedies available to TSA.
  87. The Ministry of Federal Planning, Public Investment and Services notified TSA of its negative decision on 27 June 2005. At that stage, the time required to receive a court decision would have well exceeded the three months left until September 2005 when the eighteen-month period provided for in the BIT expired. In addition, TSA's investment had then already been expropriated and TSA's directors were the subject of unfounded criminal accusations.
  88. Thus, (i) TSA had already received a final decision under Argentine administrative law; (ii) the Argentine judiciary lacks independence and is vulnerable to political pressure; (iii) in this particular case, the Argentine judiciary and executive targeted TSA and its employees as objects for harassment; (iv) even if there was a chance for a favourable and unbiased solution, it would have been technically impossible because of the length of time a review of CNC's decision terminating the Concession Contract would have required.

89. It should be noted that according to Article 10(2) a party may submit a dispute to the administrative *or* judicial organs of the host state. The party thus has a choice between administrative and judicial organs but does not have to submit the dispute to both. In this case, TSA submitted its appeal to the relevant administrative organ, not once but twice.
90. Under Argentine law an appeal is considered denied if not decided within 30 days by the administrative authority. The final appeal, submitted to the Secretary of Communications, did not prompt a decision for nearly a year, but should be considered to have been rejected well before that time. The decision eventually issued was thus superfluous, even when it also rejected TSA's request, because under Argentine law it had already been implicitly rejected. The administrative remedies were thus exhausted. TSA observed the requirements of the waiting period in Article 10(3), since it had effectively received a final decision within the eighteen-month period and the parties were still in dispute.
91. TSA also asks the Arbitral Tribunal to follow the case-law (*Nicaragua v. United States of America*<sup>19</sup>, *Consorzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*<sup>20</sup>, *Ethyl Corporation v. Canada*<sup>21</sup>, *Ronald S. Lauder v. Czech Republic*<sup>22</sup>, *Wena Hotels v. Arab Republic of Egypt*<sup>23</sup>, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*<sup>24</sup>) in categorizing the waiting period in Article 10(3) as a procedural stipulation rather than a jurisdictional requirement. Such a procedural stipulation cannot render TSA's claim inadmissible. To dismiss TSA's claim over a matter of form would be inimical to the structure and goals of the ICSID system.
92. Given the finality of the decisions of CNC and the Secretary of Communications, TSA had no obligation under Article 10 to pursue further domestic remedies. In any case, such further remedies would not have given TSA relief. To suggest that TSA had further legal

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<sup>19</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), ICJ Judgment (Jurisdiction and Admissibility), 26 November 1984, ICJ Reports 427-429.

<sup>20</sup> ICSID Case No. ARB/03/08, 10 January 2005, Award, Questions of Law, para. 32.

<sup>21</sup> UNCITRAL, NAFTA, Award on Jurisdiction, 24 June 1998, para. 77.

<sup>22</sup> UNCITRAL, Final Award, 3 September 2001, para. 187-191.

<sup>23</sup> See supra note 9, at para. 101-103.

<sup>24</sup> See supra note 7, at para. 184.

recourse in an environment of judicial harassment through criminal proceedings against TSA would be a flight of fancy.

93. TSA also invokes, if necessary, the MFN clause in Article 3(2) of the BIT to import the more favourable dispute resolution provision found in Article VII of the Argentina-US bilateral investment treaty, which provides for a six-month notice period.
94. *First*, ICSID case-law emphatically affirms the application of the MFN standard to import shorter waiting periods. *Second*, there is no evidence that the parties intended to limit the MFN coverage in the BIT to substantive issues. *Third*, the difference in wording between Article 3(2) and other MFN clauses is without consequence in this case. Because the BIT expresses the parties' intention to promote economic co-operation through the protection in its territory of investment, a construction of the BIT that furthers these goals should prevail over one that defeats or detracts from them. *Fourth*, TSA's interpretation of the MFN clause does not violate the *ejusdem generis* principle. There is no language in Article 3(2) that would limit MFN treatment to substantive issues. Article 3(2) refers to "protection" of which dispute resolution is one of the most important aspects.
95. In fact, leading ICSID cases have extended MFN coverage to import shorter waiting periods and bypass local courts (*Emilio Agustín Maffezini v. Kingdom of Spain*<sup>25</sup>, *Siemens A.G. v. Argentine Republic*<sup>26</sup>, *Camuzzi International S.A. v. Argentine Republic*<sup>27</sup>, *Gas Natural SDG, S.A. v. Argentine Republic*<sup>28</sup>, *Suez, Sociedad General de Aguas de Barcelona and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*<sup>29</sup>, *National Grid plc v. Argentine Republic*<sup>30</sup>). All the claimants in these cases were faced with stipulated waiting periods, and some were faced with the obligation to pursue domestic remedies within that stipulated time. However, none of the tribunals denied the claimants' requests to bypass the stipulated waiting periods and proceed directly to arbitration without first pursuing domestic remedies.

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<sup>25</sup> ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 54.

<sup>26</sup> ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, paras. 102-103.

<sup>27</sup> ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction, 10 June 2005, para. 34.

<sup>28</sup> ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, paras. 29-31 and 49.

<sup>29</sup> See *supra* note 12, at paras. 63, 65 and 224.

<sup>30</sup> UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 88.

96. The Vienna Convention on the Law of Treaties requires that interpretation should take account of “any relevant rules of international law applicable in the relations between the parties”. The BIT expresses an acknowledgement by its parties of the relevance of general international law. The following two “relevant rules of international law” can be relied on in this case: (i) the principle of integration, *i.e.* that provisions of a treaty must be interpreted, not in isolation, but as a whole; and (ii) the principle of interpretation, which requires a construction that gives effect to each provision of a treaty, disfavouring interpretations that would render ineffective or lessen the effectiveness of, any specific provision. Together, these principles make it clear that the BIT, by its express terms and by the construction most consistent with customary international law, incorporates any standards of procedure or substance concerning the protection of investments that are more favourable to the foreign investor. The only limitations on the MFN coverage of the BIT are in Article 3(3). Those limitations are express, and thus comprehensive. Most importantly, procedural issues are not included in the list of exceptions in Article 3(3) and should therefore be covered by the MFN protection.
97. In any case, the burden falls on Argentina to show that the parties intended otherwise. Even in the case of ambiguity, there can be no presumption that MFN coverage does not extend to dispute settlement provisions. In light of the object and purpose of the BIT, the Arbitral Tribunal is obligated to resolve such ambiguities in favour of the investor.

#### **B. THE ARBITRAL TRIBUNAL’S FINDINGS**

98. The Arbitral Tribunal notes that, according to Article 10(2) of the BIT, a party may submit a dispute to the administrative or judicial organs of the investment state. According to Article 10(3) of the BIT, a party may proceed to international arbitration, once there is a final decision or eighteen months have elapsed since the dispute was submitted to the said administrative or judicial organs.
99. Article 10(3) of the BIT gives rise to various questions of interpretation, and the Arbitral Tribunal cannot find that the written or oral evidence in this case provides any answers to those questions and will therefore base its conclusions on an examination of the text of this provision as read in the context of the BIT in its entirety.

100. The Arbitral Tribunal first has to examine whether there was in the present case a final decision within the meaning of Article 10(3) of the BIT.
101. There is no information in the case which clarifies how the Netherlands and the Argentine Republic intended the term “final decision” in Article 10(3) to be interpreted. However, since the term appears in an international treaty and not in a purely national context, it is appropriate to give it an autonomous meaning and thus interpret it independently of any meaning the same term may have in the national laws of the two Contracting States. It may be assumed that the purpose of the requirement of a final decision was to limit as far as possible the number of disputes that should be the subject of international settlement. The provision thus imposes a requirement of exhaustion of domestic remedies, but with a time limitation. If a final decision has not been obtained after eighteen months, no further use of domestic remedies is required.
102. Against this background, the Arbitral Tribunal considers that in this context a decision should be considered final when there is no legal remedy which would give a party a reasonable chance of having the decision changed.
103. It follows that it is not decisive whether, as alleged by TSA, CNC’s Resolution No. 1231/04 of 14 May 2004 was a final decision according to Argentinian administrative law. Instead it is significant that TSA itself sought a remedy against that Resolution by submitting a request to the Secretary of Communications. It may be assumed that TSA, when resorting to this remedy, believed that there was a reasonable chance that Resolution No. 242/04 terminating the Concession Contract would be repealed or amended, or that some other relief might be obtained. The Arbitral Tribunal therefore considers that Resolution No. 1231/04 was not a final decision within the meaning of Article 10(3) of the BIT.
104. However, TSA did not wait for a reply to his appeal. Such a reply did not reach TSA until June 2005, when the decision of the Ministry for Federal Planning, Public Investment and Services was communicated to TSA. Long before that, on 20 December 2004, TSA instituted ICSID proceedings. This gives rise to the following questions:



- (a) whether TSA, before proceeding to ICSID arbitration, should have waited for a reply to his appeal to the Secretary of Communications, and
  - (b) whether TSA, either before or after June 2005, should have lodged an appeal with an Argentinian court before instituting ICSID proceedings.
105. TSA attaches weight to the fact that, according to Argentinian administrative law, the appeal to the Secretary of Communications could be considered rejected if there was no reply to it within 30 days, *i.e.* in July 2004. This was the rule relied on by TSA when it announced, in its letter of 10 December 2004 to the President of the Argentine Republic, that it had given its consent to the jurisdiction of ICSID in order to have the dispute resolved by arbitration.
106. The Arbitral Tribunal is not convinced that the Argentinian rule that a request may be considered rejected by silence is decisive in the present case. As stated above, the concept of “final decision” in Article 10(3) of the BIT should be given an autonomous interpretation, the relevant criterion being whether there is a reasonable chance of having a decision changed within the domestic legal system. In this respect, it should be noted that the Secretary of Communications and/or the Ministry of Planning, Public Investment and Services continued the examination of TSA’s appeal after the 30-day period had elapsed, which means that, despite the 30-day rule in domestic administrative law, TSA continued to stand a reasonable chance of having its appeal granted during the whole period up to 23 May 2005 when the Ministry rendered its decision.
107. It follows that, on 20 December 2004, when TSA requested ICSID arbitration, there was not yet a “final decision” within the meaning of Article 10(3) of the BIT. Nor had the eighteen-month period provided for in that Article elapsed. TSA’s institution of arbitration proceedings was therefore premature. The question arises what consequences this should have in the light of subsequent developments, in particular the rejection of the appeal on 23 May 2005.
108. When TSA’s appeal was rejected on 23 May 2005, fourteen months of the eighteen-month period had elapsed. The decision was notified to TSA about one month later, on 27 June 2005, when fifteen months had elapsed and only three months remained until the

expiry of the eighteen-month period. The question arises whether TSA, after receiving the Ministry's negative decision, should have used further remedies before lodging its request with ICSID.

109. The Argentine Republic has argued that it would have been possible for TSA to ask the Argentinian courts for judicial review. TSA has denied that it was obliged to do so and argued that Article 10(2) requires recourse to either administrative or judicial remedies and does not oblige an investor to use both categories of remedies. TSA has also argued that recourse to the Argentinian courts would have been meaningless and that in any case a court decision could not have been obtained before the end of the eighteen-month period.
110. The Arbitral Tribunal has some doubts as to whether Article 10(2) should be understood to give an investor a choice between administrative and judicial remedies. The provision has some resemblance with Article 26 of the ICSID Convention which provides that a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention. However, the purpose of Article 10(2) would seem to be that domestic remedies should be exhausted to the extent that this might produce results within an eighteen-month period, and this purpose is best served if the investor is required successively to avail himself of all remedies, whether administrative or judicial, which give him a fair chance of obtaining satisfaction at the national level within the said time frame.
111. In the present case, however, since only three months out of the eighteen months remained after the decision of the Ministry for Federal Planning, Public Investment and Services had been notified to TSA, it is most unlikely that a decision by a court giving TSA satisfaction could have been obtained before the expiry of the eighteen months. The eighteen-month period would thus have elapsed without any resolution of the dispute, after which ICSID arbitration could have been instituted in full conformity with Article 10(3) of the BIT.
112. In these circumstances, and despite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to

reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter.

113. The Arbitral Tribunal therefore concludes that the case should not be rejected for lack of jurisdiction on the basis of the Argentine Republic's second objection and, having regard to this finding, does not find it necessary, to examine whether the MFN clauses in the BIT could also be a valid defence to Argentina's objection.

## **VII. THIRD ISSUE OF JURISDICTION**

### **A. THE PARTIES' ARGUMENTS**

#### **1. The Argentine Republic**

114. The ICSID Convention is the outer limit of ICSID's jurisdiction. Article 25(2)(b) of the Convention permits the extension of the jurisdiction to local companies which, because of foreign control, the parties have agreed should be treated as nationals of another Contracting State for the purposes of the ICSID Convention. The "control" required is an objective requirement that shall not be replaced by an agreement.
115. According to Article 25(2)(b) of the ICSID Convention, the critical date for analysing who controls a local company is the date on which the parties agree to ICSID's jurisdiction. TSA consented to submit the dispute to ICSID on 13 December 2004, and this date shall be considered the moment to evaluate who the parent corporation of the local corporation is. Reference is made in this respect to the case of *Vacuum Salt Products Ltd v. Republic of Ghana*<sup>31</sup>.
116. Article 10(6) of the BIT accepts ICSID jurisdiction in those cases where the Argentine companies were controlled by nationals of the other Contracting Party. "Controlled" means being actually under the control of the other company. In this case there is no local company actually controlled by a Dutch company. Given the circumstances of the present

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<sup>31</sup> ICSID Case No. ARB/92/1, Award, 16 February 1994, para. 29.

case, the corporate veil must be pierced as the Dutch company that claims to have control over the local company is not controlling but is a mere vehicle to control the Argentine company through other companies. Reference is made in this respect to the case *Aguas del Tunari S.A. v. Bolivia*<sup>32</sup>.

117. In the *Barcelona Traction* case, the International Court of Justice stated that, in international law, it is allowed to pierce the corporate veil, for instance to prevent the misuse of the privileges of legal personality or to prevent the evasion of legal requirements or obligations<sup>33</sup>.
118. In the *Tokios Tokelés* case<sup>34</sup>, the possibility of piercing the corporate veil of a Dutch company was analysed, but the tribunal did not allow this to be done, since it found none of the grounds indicated in the *Barcelona Traction* case to be present. This case differs from the present one, since there was no ostensible attempt to conceal the true controller of the company, taking advantage of the rights that a Dutch controlling shareholder could have in an Argentine company. Alternatively, the comments made by Professor Weil in his dissent should be applied. According to these comments, only a genuinely foreign investment should be protected by the ICSID mechanism.
119. The Protocol to the BIT provides that certain facts, *inter alia*, shall be accepted as evidence of the control but does not state that those facts “prove” the control, only that they can be accepted as evidence of the control. In a case such as the present one, the facts relied on by TSA are not sufficient to prove the existence of such control by investors of the other Contracting Party. Plainly, TSI is a corporate vehicle without any real control over TSA. In this respect, Argentina attaches weight to the following circumstances: (i) the lack of Dutch citizens in the establishment of TSA and in its board of directors; the presence of French citizens until 2002 and of Argentine citizens from 2002; (ii) the difference between the corporate capital of the “controlling” and the “controlled”

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<sup>32</sup> ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction, 21 October 2005, para. 255.

<sup>33</sup> *Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)*, ICJ 1970, 3, 5 February 1970, para. 58.

<sup>34</sup> *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction, 29 April 2004, paras. 54-56, and Dissenting Opinion of President Prosper Weil, para. 23.

- corporation; (iii) the corporate seat registered for TSI at the same address as 225 other corporations; (iv) doubts about TSI's corporate activities.
120. The fact that there are some 225 companies registered at the same head office as TSI means that the head office does not actually exist. TSI was created on 15 August 1996 with the purpose to invest in a concession for the Argentine radio-electric spectrum which was granted on 11 June 1997. On 20 August 1996, *i.e.* five days after the establishment of TSI, TSA was created. TSI is a vehicle company used by the true controllers of TSA to carry out their investment.
121. TSA has not furnished any proof that TSI actually controls TSA. According to the ICSID Convention and the BIT there must be effective control in order to extend ICSID jurisdiction through Article 25(2)(b) of the ICSID Convention. Company stockholding is not enough but must be accompanied by effective control.
122. Control over TSA was exercised until July 2002 by Thales, a French company. Then Thales sold its majority stockholding. There are two possibilities. Either the controlling company is another foreign company from another jurisdiction, in which case it cannot invoke the Argentina-Netherlands BIT. Or even more serious, the controlling company is an Argentine company or natural person. If so, the company is not under foreign control.
123. The Argentine Republic thus requests that the Arbitral Tribunal declare that no foreign investor exists in light of Article 25(2)(b) of the ICSID Convention and Articles 1 b) (iii) and 10(6) of the BIT, since TSA is not controlled by TSI.

## **2. TSA**

124. Contrary to Argentina's assertions, TSA is controlled by TSI in the terms of Article 25(2)(b) of the ICSID Convention and Articles 1 b) (iii) and 10(6) of the BIT. TSI owns 100% of TSA's shares and therefore meets the "control" criterion in the Protocol to the BIT.
125. TSA's case falls squarely within Article 25(2)(b) of the ICSID Convention. TSA meets all the requirements of that provision for the following reasons:

- (a) TSA has the nationality of “the Contracting State party to the dispute”, *i.e.* Argentina, given that it is incorporated in Argentina and has been so since 1996.
  - (b) TSA had that nationality on the date on which the parties consented to submit such dispute to arbitration, Indeed, TSA has been an Argentinian corporation since the beginning of the Concession up to the present.
  - (c) Argentina and the Netherlands have agreed that TSA should be treated as a national of another Contracting State for the purposes of Article 25(2)(b) of the ICSID Convention, through both Article 1 b) (iii) and Article 10(6) of the BIT.
  - (d) Argentina and the Netherlands have agreed to treat TSA as a national of the Netherlands because of “foreign control”, as stated in Articles 1 b) (iii) and 10(6) of the BIT.
126. Undoubtedly, Articles 1 b) (iii) and 10(6) of the BIT are an agreement as to “foreign control”. In the light of Article 1 b) (iii), TSA need only fulfil one basic requirement: it should be controlled, directly or indirectly, by a national of the Netherlands, regardless of where it is located. The meaning of the term “controlled” was clarified in the Protocol to the BIT, and TSA satisfies the requirements indicated there, since TSA is an affiliate of TSI and the latter has a participation in the capital of TSA higher than 49% with direct possession of the necessary votes to obtain a predominant position in company organs. TSA also meets the requirements in Article 10(6), given that it was incorporated in Argentina before the dispute arose, and it has been controlled by a Dutch company since the date of its incorporation.
127. There is no necessity to look for the nationality of the “ultimate controller”, since there is no such requirement in the BIT.
128. Although not necessary for the ruling on this issue, TSA provides information on the chain of ownership of TSA and TSI at different points in time. In brief, this information indicates the following:

- (a) *Time of signature of Concession Contract (11 June 1997)*: At that time the ultimate owner of TSA and TSI was the French company Thomson CSF S.A.
- (b) *Date before the dispute arose (5 January 2002)*: On that date the ultimate owners of TSA and TSI were the German-Argentinian citizen Jorge Justo Neuss, the French Thales Group and the French citizen Jean Nicolas d’Ancezune.
- (c) *Time of termination of the Concession (26 January 2004)*: At that time Jorge Justo Neuss and the Thales Group were ultimate owners with certain rights accorded to Jean Nicolas d’Ancezune.
- (d) *Time of notice of the dispute (16 December 2004)*: At that time Jorge Justo Neuss was the ultimate owner with certain rights accorded to Jean Nicolas d’Ancezune.
129. According to Article 25(2)(b) of the ICSID Convention, the relevant date as regards the nationality of the juridical person is the date on which the parties consented to submit the dispute to arbitration. According to Article 10(6) of the BIT, the critical date for the purposes of “foreign control” is the date before the dispute arose. In the present case, TSA has always been incorporated in Argentina, and before the date on which the dispute arose, *i.e.* on 5 January 2002, TSA was under foreign control, since TSI owned 100% of its shares.
130. Consequently, TSA’s case falls within the provisions of Article 25(2)(b) of the ICSID Convention and Articles 1 b)(iii) and 10(6) of the BIT and the Protocol regarding foreign control.
131. Argentina’s arguments with respect to the existence of “control” not only disregard the literal meaning of the BIT but are also not applicable to the present case, as evidenced by ICSID precedents (*Aguas del Tunari S.A. v. Republic of Bolivia*<sup>35</sup>, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*<sup>36</sup>, *AMCO Asia Corporation, Pan American Development Limited, PT Amco Indonesia v. Republic of*

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<sup>35</sup> See *supra* note 32, at paras. 296 and 301.

<sup>36</sup> ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, paras. 67, 79, 86 and 112.

*Indonesia*<sup>37</sup>, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*<sup>38</sup>, *Tokios Tokelés v. Ukraine*<sup>39</sup>). In a recent case – *Rompetrol Group N.V. v. Romania*<sup>40</sup> – the fact that there was a Romanian majority shareholding in a Dutch company was not considered an obstacle to bringing proceedings against Romania under the rules of the ICSID Convention and the Dutch-Romanian bilateral investment treaty.

132. Alternatively, even if the Tribunal (i) decides to analyse the nationality of all of the companies that directly or indirectly own TSA’s shares, and (ii) interprets the terms “foreign control” on the date before the dispute arose as meaning “effective foreign control” or as requiring the last controlling company in the ownership chain to be foreign, TSA would still fulfil the “foreign control” requirement.

## **B. THE ARBITRAL TRIBUNAL’S FINDINGS**

133. The Arbitral Tribunal will start its examination on this point by analyzing Article 25(2)(b) of the ICSID Convention and then proceed to a consideration of its application in the circumstances of the present case and taking into account the contents of the BIT between Argentina and the Netherlands.

### ***I. Article 25(2)(b) of the ICSID Convention***

134. Article 25 of the ICSID Convention defines the ambit of ICSID’s jurisdiction. In other words, it defines the extent, hence also the objective limits, of this jurisdiction (including the jurisdiction of tribunals established therein) which cannot be extended or derogated from even by agreement of the Parties.
135. In respect of Article 25(2)(b) of the ICSID Convention, which is the provision of particular interest in the present case, Aron Broches has stated as follows:

“The purpose of that provision, as well as of Article 25(1), is to indicate

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<sup>37</sup> ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 14.

<sup>38</sup> ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 335, 337, 342, 343 and 357.

<sup>39</sup> See supra note 34, at paras 22, 36 and 46.

<sup>40</sup> ICSID Case No. ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 81-85, 93 and 110.



the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto.”<sup>41</sup>

136. The objective character of these limits has been noted by several ICSID Tribunals (*Vacuum Salt Products Ltd v. Republic of Ghana*<sup>42</sup>, and *Rompetrol Group N.V. v. Romania*: “reflects objective ‘outer limits’ beyond which party consent would be ineffective”<sup>43</sup>).
137. ICSID and the Convention establishing it have for sole purpose and function, as their very title indicates, “the settlement of investment disputes between States and nationals of other States”.
138. Article 25(2)(b) defines the juridical persons that can have access to ICSID as “nationals of another Contracting State”, classifying them in two categories :
- (i) “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
  - (ii) “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”.
139. The second clause of Article 25(2)(b) introduces a significant exception to one of the major premises of the Convention (which also reflects a general principle of international law), *i.e.* that it deals exclusively with disputes between parties of diverse nationalities, to the exclusion of those between a State and its own national investors. The *ratio legis* of this exception is the wording “because of foreign control”. Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension

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<sup>41</sup> Broches, Academy of International Law, *Recueil des cours*, vol. 136 [1973 II].

<sup>42</sup> See *supra* note 31, at paras. 36-38.

<sup>43</sup> See *supra* note 40, at para. 80.

of the ambit of ICSID, but sets the objective limits of the exception at the same time. As was stated in *Vacuum Salt Products Ltd v. Republic of Ghana*, “[t]he reference in Article 25(2)(b) to ‘foreign control’ necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist”.

140. A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of “foreign control” in order to pierce the corporate veil and reach for the reality behind the cover of nationality.
141. Once the Parties have agreed to the use of the latter criterion for juridical persons having the nationality of the host State, they are bound by this criterion as a condition for ICSID jurisdiction and cannot extend that jurisdiction by other agreements.
142. In this respect, Professor Schreuer, after surveying the case-law, states:
- “These cases, especially *Vacuum Salt*, make it abundantly clear that foreign control at the time of consent is an objective requirement which must be examined by the tribunal in order to establish jurisdiction”.<sup>44</sup>
143. The question as to whether, or to what extent, the corporate veil should be pierced or lifted in the application of Article 25(2)(b) of the ICSID Convention presents itself in a different light and can lead to different solutions, depending on whether the case falls under the first or the second clause of this provision.
144. The first clause of Article 25(2)(b) mentions only the “nationality” of a Contracting State other than the State party to the dispute. In other words, it uses as a criterion the formal legal concept of nationality, which for legal persons is determined by one of the two generally accepted criteria of the place of incorporation or the seat (*siège social*) of the corporation. There is no reference here to “control”, whether foreign or other, nor any mention of “piercing” or looking beyond this nationality.

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<sup>44</sup> Schreuer, *The ICSID Convention: A Commentary*, p. 312, para. 548.

145. This text may be interpreted in a strict constructionist manner to mean that a tribunal has to go always by the formal nationality. On the other hand, such a strict literal interpretation may appear to go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State.
146. In the two cases of *Tokios Tokelés v. Ukraine* and *Rompetrol Group N.V. v. Romania*, the Tribunals adopted the strict constructionist interpretation in spite of the control of the foreign companies by nationals of the host States. However, this interpretation has not been generally accepted and was also criticised by the dissenting President of the *Tokios Tokelés* Tribunal.
147. The situation is different, however, when it comes to the second clause of Article 25(2)(b) of the Convention. Here, the text itself allows the parties to agree to lift the corporate veil, but only “because of foreign control”, which justifies, but at the same time conditions, this exception. Although the text refers to juridical persons holding the nationality of the host State that the parties have agreed should be treated as nationals of another contracting State “because of foreign control”, the existence and materiality of this foreign control have to be objectively proven in order for them to establish ICSID jurisdiction by their agreement. It would not be consistent with the text, if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source, using the same criterion with which it started.
148. However, in cases falling within the second clause of Article 25(2)(b), ICSID tribunals have not been constant in dealing with this issue of whether or not to pierce the second corporate layer after the one bearing the nationality of the host State, in identifying foreign control. In *AMCO and others v. Republic of Indonesia*, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* and *Aguas del Tunari v. Republic of Bolivia*, the Tribunals refused to lift the veil beyond the first layer or rung of the

corporate ladder (bearing the nationality of the host State). On the other hand, the Tribunals in *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*<sup>45</sup> and, most recently, *African Holding Company of America and Société Africaine de Construction au Congo S.A.R.L. v. Republic of Congo*<sup>46</sup> did not hesitate to pierce the successive corporate layers in identifying foreign control and the nationality of those holding it.

149. It is to be noted that in all these cases what was at issue was not the objective existence of foreign control, which was not contested by the host State, but the nationality of this foreign control.
150. In only one other case, *Vacuum Salt Products Ltd v. Republic of Ghana*, was the question of the existence and reality of “foreign control” raised, *i.e.* the question whether the company, formally national of the host State, was indeed under “foreign control” or whether it remained, directly or indirectly, in the hands of nationals of the host State and thus fell outside the objective bounds of ICSID’s jurisdiction under Article 25(2)(b).
151. Indeed, in that case, the Claimant deduced from a jurisdictional clause referring to ICSID in the contract that the parties – *Vacuum Salt Products Ltd.*, which was incorporated under Ghanaian law, and the Government of Ghana – had agreed to treat the Company “as a foreign national”, *i.e.* that they had recognised the existence of “foreign control” under the second clause of Article 25(2)(b). The Tribunal considered that such an agreement only “raises a rebuttable presumption that the ‘foreign control’ criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent”<sup>47</sup>. Thereupon, the Tribunal proceeded to a thorough examination of the facts of the case, to reach the conclusion that the presumption was rebutted, *i.e.* that the criterion of foreign control was not satisfied, and dismissed the case for lack of jurisdiction.

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<sup>45</sup> ICSID Case No. ARB/82/1, Decision on Jurisdiction, 19 July 1984.

<sup>46</sup> ICSID Case No. ARB/05/21, Award, 29 July 2008.

<sup>47</sup> See *supra* note 31, at para. 38.

152. Writers and commentators are also divided on the issue of piercing the corporate veil under Article 25(2)(b) in general. But a majority appear to favour piercing the veil and going for the real control and nationality of controllers<sup>48</sup>.
153. The reasons for piercing of the corporate veil up to the real source of control is *a fortiori* more compelling under the second clause of Article 25(2)(b) when ultimate control is alleged to be in the hands of nationals of the host State, whose formal nationality is also that of the Claimant corporation. Thus, Professor Schreuer concludes his analysis with the following rhetorical question: “Is it sufficient for nationals of non-Contracting States or even of the host State to set up a company of convenience in a Contracting State to create the semblance of appropriate foreign control?” And his answer is that “the better approach would appear to be a realistic look at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State”<sup>49</sup>.
154. This is also why in the one case under the second clause of Article 25(2)(b) where national control was alleged (*Vacuum Salt Products Ltd. v. Republic of Ghana*), the Tribunal found the presumption of jurisdiction rebutted and declined jurisdiction. And in no other such case up to date has an ICSID Tribunal, after setting aside the nationality of the host State, stopped short at the second corporate layer or rung, refusing to pursue control to its real source.

## ***II. The Circumstances of the Case***

155. TSA bases “foreign control” mainly on the interpretation of Article 1(b)(iii) of the BIT between the Netherlands and Argentina, and its Protocol which provides under B:

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<sup>48</sup> E.g. G.R. Delaune, “How to Draft an ICSID Arbitration Clause” (*ICSID Rev -FILJ* vol. 7 (1992)), p. 168 at 178; A. Broches, “Denying ICSID’s Jurisdiction : The ICSID Award in Vacuum Salt Products Ltd”, *Journal of International Arbitration*, vol. 13 (1996), p. 21 (Broches also presided the SOABI Tribunal); M. Hirsch, *The Arbitration Mechanism of the ICSID* (1993), p. 104; Ch. Schreuer, “Access to ICSID Disputes Settlement for Locally Incorporated Companies”, in Friedleweiss, Deuters & de Waart (eds.) *International Economic Law with a Human Face* (1998), p. 497; Ch. Schreuer, *The ICSID Convention : A Commentary*, (*Commentary, op.cit.*, pp. 317-318, paras. 562-563); M. Burgstaller, “Nationality of Corporate Investors and International Claims against the Investor’s own State”, *Journal of World Investment and Trade*, vol. 7, no 2 (Dec. 2006), p. 857.

<sup>49</sup> Schreuer, *Commentary, op.cit.*, p. 318 [para. 563].

“B. 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.”

156. However, the provisions of the BIT cannot provide ICSID jurisdiction unless the conditions of Article 25(2)(b) of the ICSID Convention are satisfied. In this sense, the *Vacuum Salt Products Ltd v. Republic of Ghana* Tribunal stated:

“(…) the parties’ agreement to treat Claimant as a foreign national ‘because of foreign control’ does not *ipso jure* confer jurisdiction. The 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.”<sup>50</sup>

157. What is decisive is therefore whether the circumstances are such that TSA, although it is an Argentinian juridical person, can base jurisdiction on the second clause of Article 25(2)(b) of the ICSID Convention.

158. TSA argues in this respect that the shares of TSA are wholly held by TSI, which is incorporated under the law of the Netherlands and is domiciled there. It thus satisfies the criterion of the Protocol and also Article 25(2)(b) of the Convention since the parties have agreed in the BIT that TSA, because of TSI’s incorporation in the Netherlands and its 100% participation in TSA’s capital, should be treated as a national of the Netherlands.

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<sup>50</sup> See supra note 31, at para. 36.

159. The Argentine Republic argues that TSA does not fulfil the conditions in Article 25(2)(b) of the ICSID Convention for being treated as a national of the Netherlands, since it appears from the information provided by TSA that at all possible critical dates (the request of arbitration, the consent to jurisdiction, the origin of the dispute), TSI was controlled by an Argentinian national, Mr. Jorge Justo Neuss, who held, directly or indirectly, a majority of its shares, starting with 51%, increasing over time to near totality. Therefore, TSA was not under foreign control and cannot be “treated as a national of another Contracting State”. The case must therefore be dismissed for lack of jurisdiction.
160. The Tribunal has found above that in the application of the second part of Article 25(2)(b) it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control. It also appears from the text of Article 25(2)(b) that the relevant date is the date on which the parties consented to submit the dispute to arbitration. In a letter of 10 December 2004 to the President of the Argentine Republic, TSA consented to ICSID arbitration on the basis of the BIT which means that on that date both parties had consented to arbitration.
161. TSA has submitted a chart showing that at the time of the notice of the dispute, on 16 December 2004, thus close to the date of consent, TSA, via other companies, was wholly owned by TH Operations International NV (THOP) and that the owner of THOP’s shares was Mr. Jorge Justo Neuss, a German-Argentinian citizen. TSA contends, however, that Mr. Jean-Nicolas d’Ancezune, a French citizen, has rights to 75% of THOP’s shares through a “fiduciary encumbrance” agreed to by Mr. Neuss, who continues all the same to hold the shares on his behalf. In spite of questions put to TSA (and to Mr. d’Ancezune during his witness statement) about the arrangements made with Mr. d’Ancezune and the nature of the “fiduciary encumbrance”, only scant information – and no corroborating evidence – was provided. TSA’s contention in this regard thus remains vague and unproven, and there is no evidence that TSA was, at the time of consent, under the real control of Mr. d’Ancezune who, moreover, is not a Dutch but a French citizen.
162. The only conclusion that can be drawn from the information and evidence available to the Tribunal is thus that the ultimate owner of TSA on and around the date of consent was the Argentinian citizen Mr. Jorge Justo Neuss. It therefore follows that, whatever

interpretation is given to the BIT between Argentina and the Netherlands, including the Protocol to the BIT, TSA cannot be treated, for the purposes of Article 25(2)(b) of the ICSID Convention, as a national of the Netherlands because of absence of “foreign control” and that the Arbitral Tribunal therefore lacks jurisdiction to examine TSA’s claims.

## **VIII. FOURTH ISSUE OF JURISDICTION**

### **A. THE PARTIES’ ARGUMENTS**

#### **1. The Argentine Republic**

163. The Arbitral Tribunal’s competence is outlined by Article 25(1) of the ICSID Convention in which the term “investment” is not defined. The BIT is the instrument in which the parties gave their consent and determined what kind of investment could be submitted to the ICSID jurisdiction. Article 1(a) of the BIT requires that an asset, in order to be protected, must have been invested in accordance with the laws and regulations of the relevant Contracting Party. An investment made in violation of such laws and regulations shall not be considered an investment for the purposes of the BIT.
164. An investment made by illegal means such as corruption cannot be considered to have been made in accordance with the laws and regulations of the host state. TSA is being investigated in Argentina for corruption in regard to the awarding of the Concession Contract in June 1997. A criminal accusation was filed on 16 July 2001 by the Anticorruption Office. There was a partial acquittal but it was annulled by the Court of Appeals on 15 November 2005. On 26 February 2008, several public officials as well as Mr. Jorge Justo Neuss and Mr. Jean Nicolas d’Ancezune were charged with criminal offences in connection with the awarding of the Concession to TSA.
165. There have been extensive press reports on corruption in connection with the Concession, and a certain Mr. Lionel Queudot has made accusations against TSA. It is possible to note the existence of bribery and/or corruption involving company officials and Argentine public officers. Argentina considers the existence of events proven which confirm the



corruption in which TSI and TSA have been involved. Consequently, they have breached the obligation for the investment to be executed according to the laws and regulations of the Argentine Republic. There is convincing and clear evidence of irregularities, not only at the time of granting the Concession in favour of TSA, but also during its subsequent operation. These irregularities are not merely based on news articles but they mostly find their support in the evidence that has been filed during the proceedings in which TSA is accused of the criminal offences.

166. The payment of bribes to local public officials guaranteed TSA tailor-made bidding terms and conditions for the privatisation of the management, control and administration of the radio-electric spectrum and, then, the irregular performance thereof. Once the Concession Contract had been concluded, TSA continued enjoying the impunity that bribery ensured. In the face of its inability to honour the commitments it had undertaken, TSA had to trigger a process for the modification of the conditions of the Concession which, since the very beginning, it knew it would not be able to fulfil. A written testimony by Mr. Lionel Queudot to the Argentine Embassy in Berne bears evidence of the corruption that occurred.
167. Although the criminal investigation started in July 2001, the complexity of the facts, the large amount of evidence, the diversity of agents and players involved, and the existence of some factors alien to domestic courts have prevented the issuance of a final decision to date. Nevertheless, the Arbitral Tribunal is not unable to determine that TSA's investment was not made in accordance with Argentine law.
168. TSA made its investment in violation of the general principles of law, since the investment resulted from the commission of crimes such as fraud and bribery. Consequently, the Arbitral Tribunal has competence and also an obligation to prevent TSA from benefiting from the rights granted by the BIT. Reference is made in this respect

to the ICSID cases of *World Duty Free Company Limited v. Republic of Kenya*<sup>51</sup>, *Tokios Tokelés v. Ukraine*<sup>52</sup> and *Inceysa Vallisoletana, SL v. Republic of El Salvador*<sup>53</sup>.

## 2. TSA

169. TSA denies the accusation of bribery. In any case, it is the Arbitral Tribunal, and not the Argentine courts, that must decide Argentina's accusation of bribery. Argentina bears the burden of proving bribery and has failed to meet the burden of proof.
170. Based on an anonymous accusation against members of TSA's management, a criminal investigation was initiated. There was a partial acquittal which was reversed upon appeal. There is now a new unfounded accusation against Mr. Neuss and Mr. d'Ancezune. The charges have been analysed and criticised by Professor Aguirre Obarrio. Reference is made to his expert opinion.
171. TSA neither bribed an Argentine official nor received tailor-made bidding conditions or performance advantages, and Argentina has not presented any evidence showing that they did so. The evidence used against TSA consists of reports by auditing agencies which are part of the Argentine Government and highly politicised. There is also a regrettable lack of independence of the Argentine judicial branch. TSA and its management have been harassed for many years by Argentina despite the absence of any evidence of bribery.
172. An accusation of bribery requires the most rigorous level of proof, and no such proof has been adduced by Argentina. There have been media articles based on unreliable uncorroborated statements by Mr. Lionel Queudot who had been acting as a fiduciary of TSA and who had a strong motive to take revenge on TSA and its shareholders. Moreover, the allegation that Mr. Queudot had twice effected transfers of about USD 10 million was not supported by any record. If Mr. Queudot was involved in bribing the Argentine Government, he would have been subject to prosecution or investigation. In any case, his allegations do not meet accepted standards of evidence in arbitration.

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<sup>51</sup> ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 157.

<sup>52</sup> See supra note 34, at para. 84.

<sup>53</sup> ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 236, 240, 243, 246.

173. Argentina does not deny that the Arbitral Tribunal is the sole organ competent to rule on Argentina's bribery allegations in this arbitration. Rather, Argentina focuses its argument on the proposition that the Arbitral Tribunal must decline jurisdiction in this case if it finds that TSA's investment was made in violation of Argentine law. TSA, on the other hand, submits that the legality of an investment is a question for the merits. Moreover, TSA notes the extreme reticence that arbitral tribunals display in granting jurisdictional objections on grounds of claimed illegality or corruption. Indeed, even tribunals that have declined jurisdiction on account of corruption or illegality have done so only after receiving clear and convincing proof. No such evidence has been presented in the present case.

**B. THE ARBITRAL TRIBUNAL'S FINDINGS**

174. The Arbitral Tribunal notes that investigations about criminal offences in connection with the Concession granted to TSA have been initiated in Argentina. These proceedings are being pursued but have not been terminated. There is an indictment against two persons connected with TSA – Mr. Neuss and Mr. d'Ancezune – for complicity in misuse of public office, but no judgment has been rendered, and the issue of bribery is still being investigated.

175. The Arbitral Tribunal cannot find it established, on the basis of available materials, that the Concession was illegally obtained and that, for this reason, it is not protected under the BIT. On the other hand, investigations and proceedings in Argentina are still going on.

176. If there had been no other jurisdictional obstacle in the present case, the Tribunal would have decided to join the fourth jurisdictional objection to the merits of the case. However, since the Tribunal has already found that the case should be dismissed on another jurisdictional ground, the questions raised under the fourth jurisdictional objection are not decisive for the outcome of the case.

## **IX. COSTS**

177. Article 61(2) of the ICSID Convention provides:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

178. Arbitration Rule 47(1)(j) requires that the Award contain “any decision of the Tribunal regarding the cost of the proceeding”.

179. It does not appear that “the parties otherwise agree” within the meaning of Article 61(2) of the ICSID Convention.

180. Each party has claimed that all costs should be borne by the other party. However, the Tribunal finds the circumstances to be such that each party shall bear its own expenses in connection with the proceedings and that the fees and expenses of the members of the Tribunal shall be shared equally by them.

**X. AWARD**

For the reasons set forth above, a majority of the Arbitral Tribunal decides:

- A. To accept the third objection to the jurisdiction of the International Centre for Settlement of Investment Disputes raised by the Respondent;
- B. To declare that the Centre does not have jurisdiction over the dispute and that this Arbitral Tribunal is not competent to resolve it;
- C. To dismiss the Claimant's claims; and
- D. To order that each party shall bear in full its own costs and expenses and pay one half of the fees and expenses of the members of the Tribunal and the charges of the Centre.

Done in English and Spanish, both versions being equally authentic.

*[signed]*

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Mr. Grant D. Aldonas  
Arbitrator  
Date:

**Subject to the attached dissenting opinion**

*[signed]*

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Professor Georges Abi-Saab  
Arbitrator  
Date:

**Subject to the attached concurring opinion**

*[signed]*

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Judge Hans Danelius  
President of the Tribunal  
Date: