INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

TSA SPECTRUM DE ARGENTINA S.A.
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/05/5

DISSENTING OPINION OF ARBITRATOR GRANT D. ALDONAS

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1. I dissent from the Tribunal's decision with respect to the Government of Argentina's third objection to jurisdiction for the following reasons.

2. In accepting the Government of Argentina's third objection to jurisdiction, my colleagues rely heavily on what they term an "objective" reading of Article 25 of the ICSID Convention. They suggest that the crucial issue is the interpretation of the phrase "because of foreign control" contained in Article 25(2)(b). They assert that the provisions of the Bilateral Investment Treaty between Argentina and the Netherlands (the "BIT") have no bearing whatsoever on ICSID jurisdiction as a consequence.

3. In that, my colleagues erred in three fundamental respects. They erred in:

   (1) construing Article 25 of the Convention to limit the ability of the Dutch and Argentine governments to determine by subsequent agreement which juridical persons incorporated under their respective laws would have the right to pursue the arbitration of their claims under the Convention;

   (2) disregarding an international agreement between the Dutch and Argentine governments that was intended to determine the precise issue we are obliged to decide, and

   (3) misreading the precedents and commentaries cited in support of their decision.

4. The majority erred in construing Article 25 to imply a duty to look beyond the ownership of TSA Argentina by a company incorporated under Dutch law. Article 25 neither compels nor, ultimately, supports that conclusion in this case.

5. Article 25(1) of the ICSID Convention provides that 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 . . .."[1] Under Article 25(2)(b), the phrase "national of another Contracting State" includes two categories of juridical persons:

[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 25(1) ("Convention").

a. 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

b. 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 purpose of the Convention.[2]

6. In this instance, it is the latter clause that matters. The claimant is TSA Spectrum de Argentina, S.A., a juridical person lawfully incorporated under the laws of Argentina. The operative question is whether TSA Spectrum de Argentina is a person "which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of [the] Convention."

7. It is axiomatic that a treaty is to "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty . . . ."[3] Read in that light, the language of Article 25 flatly contradicts the majority's claim that the Convention imposes an "objective" limit on the Centre's jurisdiction.

8. Far from supporting the majority's decision, a good faith interpretation of Article 25 in accordance with the ordinary meaning of its terms compels the opposite result. Article 25(2)(b) makes the determination of which juridical persons may gain access to ICSID jurisdiction by virtue of their "foreign control" expressly dependent on an agreement between "the parties," not some putative "objective" test.

9. The negotiating history of Article 25 reinforces that conclusion. It underscores the fact that Article 25 does not define the term "foreign national" for purposes of the Convention. Indeed, the drafters of the Convention expressly rejected attempts to provide a more formalistic reading of the term like that suggested by the majority in favor of giving the parties to any investment agreement "the widest possible latitude to agree on the meaning

[2] Id., Art. 25(2)(b).
[3] Vienna Convention on the Interpretation of Treaties and other International Agreements, Art. 31.

of 'nationality.'"[4] The Contracting States, instead, left it to the parties to determine the limits of "nationality" as it applied between them, emphasizing that "any stipulation of the nationality made in connection with a conciliation or arbitration clause which is based on reasonable criteria should be accepted."[5]

10. Thus, rather than requiring an interpretation of the Tribunal's jurisdiction based on the hypothetical "objective test" the majority reads into Article 25, the "ordinary meaning" of the language used in Article 25(2)(b) points directly toward the provisions of the BIT between the Netherlands and Argentina as the appropriate point of reference for determining which Argentine companies the two Contracting States agreed to treat as potential claimants under the Convention "by virtue of their foreign control."

11. This is why the majority's disregard of the BIT is so disabling to a proper construction of Article 25 in this instance. The BIT between the Netherlands and Argentina represents precisely the "stipulation of nationality" called for by Article 25 and its negotiating history. It is, moreover, unquestionably "based on reasonable criteria" – one that respects the legal personality of a corporation lawfully established under the domestic law of either party. The key provisions of the BIT should, therefore, be "accepted" by this Tribunal if we are to follow both the "ordinary meaning" of Article 25 and the guidance offered by its negotiating history.

12. The rules governing the interpretation of international agreements reinforce that conclusion. The International Court of Justice ("ICJ") has consistently affirmed that the "ordinary meaning of a term is determined not in the abstract but in its context and in the light of the object and purpose of the treaty."[6] For this purpose, the "context of a treaty includes not only its text, preamble and annexes, but also any agreement relating to the treaty" and its interpretation.[7]

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[4] A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331, 360-61 (1972) ("Broches").
[5] Id.
[6] See R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman, 1992) 1272.
[7] Id.

13. In other words, even if the language of Article 25 did not expressly direct the Tribunal to the BIT, the general rules of treaty interpretation would impel that inquiry. The fact that the BIT not only falls within the general scope of the rule laid down by the Vienna Convention, but is, by its terms, directed at the precise phrase in Article 25 that the Tribunal is called upon to interpret makes the majority's error that much more glaring.

14. The majority goes to great lengths to avoid the unavoidable conclusion that the parties did, in the context of the BIT, expressly defined "foreign nationality" for purposes of their investment relations and for purposes of interpreting Article 25 of the Convention.

15. One of the most telling example of that effort lies in the majority's misplaced reliance on the *Barcelona Traction Case* to justify its decision to ignore the plain language of both Article 25 and the BIT and, instead, "pierce the corporate veil" of the Dutch company that owns TSA Spectrum de Argentina in order to define who shall qualify as a "foreign national" for purposes of the Convention. The majority cites the ICJ's decision in *Barcelona Traction* for the proposition that:

> in international law, it is allowed to pierce the corporate veil . . . to prevent the misuse of the privileges of legal personality or to prevent the evasion of legal requirements or obligations. [8]

16. What that ignores, of course, is that the ICJ reached the opposite conclusion in *Barcelona Traction*. There, the ICJ confronted the challenge of defining nationality for purposes of determining when diplomatic protection might be invoked.[9] The case involved an attempt by Belgian shareholders of Barcelona Traction, a Canadian company, to invoke the diplomatic protection of the Belgian government in pursuing an action against Spain for damages done to Barcelona Traction's interests in Spain.

17. In the event, the ICJ refused jurisdiction on the ground that the Belgian shareholders were not entitled to invoke the diplomatic protection of the Belgian government because whatever damage the Spanish government may have done caused injury to a juridical

[8] Award, para. 117.
[9] Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain), ICJ 1970, 3, 5 February 1970.

person established under the laws of Canada (i.e., a Canadian citizen). In other words, rather than standing for the proposition that this Tribunal should pierce the corporate veil and look to the shareholders to determine whether they are also Dutch, the ICJ's reasoning in *Barcelona Traction* strongly suggests that the Tribunal here should respect the legal personality of the corporation established under Dutch law that owns TSA Spectrum de Argentina.

18. The ICJ emphatically did not purport to set down any particular rule for determining under what circumstances a tribunal should pierce the corporate veil, as the majority implies. Given its decision to respect the legal personality of the Canadian corporation, it did not have to. The language the majority cites in defense of its piercing of the corporate veil was an *obiter dictum* irrelevant to the court's decision.[10]

19. Yet, more importantly, even if the ICJ's decision in *Barcelona Traction* stood for the proposition that the majority claims, there is no factual basis to justify its piercing of the corporate veil in this instance even by the standard it suggests the ICJ set. There has been no "misuse of the privileges of legal personality" or attempted "evasion of legal requirements or obligations" that would justify piercing the corporate veil.[11]

20. Tellingly, the majority never does actually articulate the "misuse" or "evasion" on which its decision to pierce the corporate veil relies. Based on the record before us, there is none. The facts are these – an Argentine national succeeded to ownership of a controlling stake in the Dutch company that owns TSA Spectrum de Argentina after all other shareholders gave up their interest due to the Argentine government's interference with

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[10] I am mindful here of Aaron Broches' injunction against relying too heavily on *Barcelona Traction* for the contrary proposition as well – i.e., that the ICJ's heavy reliance on the nationality of the Canadian corporation in reaching its decision should somehow compel the same result here. It does not. As Broches pointed out, the ICJ's decision was made in the context of defining the prerequisites "for the exercise of diplomatic protection," and should therefore "be carefully constricted to the context in which it was given." Broches at 360-361. Broches' point in stating that ICJ's decision in *Barcelona Traction* was "without relevance to the meaning of the term 'nationality' in Article 25 (2) (b)" was that the legal and public policy reasons that called for such a strict construction in the context of determining the availability of diplomatic protection had little bearing on a determination that had been expressly left to the parties to determine under Article 25. Id.

[11] Award, para. 117.

the contract between TSA Spectrum de Argentina and the Argentine government that was the sole purpose for which the Argentine company was made.

21. Not even the Government of Argentina suggests, for example, that the Argentine national involved incorporated in the Netherlands to subvert the purposes of the treaty (i.e., for the express purpose of obtaining ICSID jurisdiction). Quite the opposite, even Argentina concedes that the company was owned and controlled throughout the period relevant to the conclusion of the contract, its performance, and, in fact, even following the alleged breach, by Thales, the French parent of the Dutch company that owned TSA Spectrum de Argentina. Indeed, Thales' participation in the contract was absolutely essential to its performance from the Argentine perspective.

22. In short, even by the standard the majority erroneously invokes on the basis of the ICJ's decision in *Barcelona Traction Case*, there is no basis for piercing the corporate veil in this instance.

23. The majority has similarly misread the views of Aaron Broches, former General Counsel of the World Bank and the acknowledged principal author and authority on the Convention. The majority quotes Broches in support of their hypothetical "objective test" of jurisdiction, highlighting Broches' statement that Article 25 sets the "outer limits" of ICSID jurisdiction. But, the quoted language ignores the thrust of what Broches actually said**.**

24. It is worth recording here in full simply to illustrate the extent to which the majority's citation of Broches is inconsistent with his intent. Broches said:

> The purpose of that provision [Article 25 (2) (b)], as well as of Article 25 (1), is to indicate 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. Therefore the parties should be given the widest possible latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be

> accepted. In order to avoid uncertainty or unpleasant surprises in case of a challenge to the jurisdiction of the Centre, it is clearly desirable that whenever a company is not incorporated under the laws of a Contracting State to stipulate the nationality which that company is to have for the purposes of the Convention.

25. Reading Broches' statement in full helps illustrate the extent to which the majority mischaracterizes his views. Broches made the statement regarding Article 25 representing the "outer limits" of the Centre's jurisdiction in the context of explaining why the parties to the Convention expressly rejected a more formalistic definition of nationality and their agreement to give "wide latitude to the parties" to determine under what circumstances they would agree to permit claimants to invoke the Convention by virtue of foreign control."[12] He did not use the phrase "outer limits" to refer to any particular arrangement between the parties. Nor did he opine as to what those outer limits were or whether the facts we face here might violate those outer limits.

26. Instead, what Broches said was that the agreement between the parties with respect to the meaning of "nationality" under Article 25(2)(b) should be respected where it is based on a reasonable criterion. The certainty that observing the legal personality of corporations duly organized under the parties respective domestic corporate law creates in determining nationality for purposes of Article 25 is just one such "reasonable criterion."

27. Having misapplied *Barcelona Traction* and misread the commentary of Aaron Broches, the majority commits a similar error in its reading of the prior decisions of ICSID tribunals. Again, the most telling example turns out to be the case on which the majority relies most heavily, *Vacuum Salt Products Limited v. the Republic of Ghana* ("*Vacuum Salt*").[13]

28. In *Vacuum Salt*, the tribunal confronted a situation in which a company incorporated under Ghanian law sought to avail itself of the jurisdiction of the Centre. The Ghanian

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[12] Broches at 360-361.
[13] *Vacuum Salt Products Limited v. the Republic of Ghana* (ICSID Case No. ARB/92/1) Award, 16 February 1994.

government objected, *inter alia*, on the ground that the claimant corporation was a national of Ghana. The tribunal found no evidence of any agreement between the parties to the dispute to treat the company as a foreign national for purposes of ICSID jurisdiction under Article 25 of the Convention.

29. The tribunal's decision in *Vacuum Salt* is distinguishable from the facts presented here on two grounds, both of which entirely undermine the reliance the majority places on the *Vacuum Salt* decision. First, whereas the tribunal in *Vacuum Salt* found no evidence of an agreement between the parties with respect to Article 25, here there is ample evidence, as noted above, that there was an agreement between the parties with respect to the interpretation of Article 25 – indeed, with respect to Article 25(2)(b) itself.

30. Second, and more importantly, in *Vacuum Salt* there was no foreign corporation, as there is here, that owned the Ghanian company attempting to invoke the Centre's jurisdiction. One can readily understand and agree with the Tribunal's ruling in *Vacuum Salt*, where there was no diversity in fact between the nationality of the corporation bringing the claim and the host state and no evidence of "foreign control" exercised by a corporation lawfully established under the corporate law of another Contracting State. But, those are <u>not</u> the facts presented here.

31. In other words, the majority's reading of *Vacuum Salt* is entire misplaced and cannot possibly provide the justification for the majority's decision to withhold jurisdiction here.

32. Having illustrated the errors in the specific reasons the majority offers in support of its decision to refuse jurisdiction, I would close on a broader point. Under international law, there is no more fundamental principle than that which emanates from a state's sovereignty. No state is bound by international obligation unless it expressly agrees to bind itself by treaty or other international agreement or behaves in a way that suggests its acceptance of common practice by all states as creating a common legal norm.

33. All of the specifics of international law, such as the injunction contained in the rules of treaty interpretation to look to the "ordinary meaning" of the words used in an agreement,

flow from that basic principle of sovereignty. That same principle should inform our decision as arbitrators as well.

34. The limit sovereignty imposes on how international law is made, enjoins us to vindicate, rather than ignore, the agreements reached by two states. We are to apply as they were negotiated, not as we might prefer that they were understood or applied. Regardless of whether we think the rule the two governments, the Netherlands and Argentina, adopted in the BIT is appropriate, it is not our role to substitute our judgment for theirs.

35. Thinking of the BIT in those terms helps explain why I must dissent from the majority's opinion. Our responsibility is to intuit the intent of the parties as reflected in the actual language of the agreements between them and vindicate the bargain they reached. In this instance, as between Argentina and the Netherlands, Argentina has already received the benefit of its bargain. It received a multi-million investment in its communications infrastructure by a Dutch company based, in part, on the strength of the bilateral investment agreement with the Netherlands.

36. The Netherlands, on the other hand, will forfeit the right it bargained for in the context of the BIT if the majority's opinion stands. Based on the language of the BIT, it would appear that the Dutch government plainly foresaw the problem with which we are now confronted and provided a decisional rule to guide this Tribunal in vindicating the Netherlands' interest in ensuring that its companies, regardless of their ownership, would not be prejudiced by the actions of the Argentine government, which, over time, has established a considerable record of expropriation.

37. We cannot ignore what the Dutch government sought to do to protect its interests. Nor can we ignore the fact that the Argentine government expressly agreed to the decisional rule that would offer the Dutch the protection they sought. To do so would substitute our judgment for that of the two sovereign states that formed an agreement that is controlling for purposes of the question before us. That, I am afraid, is precisely what the majority has done.

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

[*signed*]

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Mr. Grant D. Aldonas
Arbitrator
Date: