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After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, S.A. v. Republic of Bolivia by A. de Gramont

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AFTER THE WATER WAR: THE BATTLE FOR JURISDICTION IN
AGUAS DEL TUNARI, S.A. v. REPUBLIC OF BOLIVIA
by Alexandre de Gramont¹

I. Introduction

In a 2-1 decision dated October 21, 2005, a Tribunal at the International Centre for Settlement of Investment Disputes (“ICSID”) held that it had jurisdiction to hear the merits in the highly publicized case of Aguas del Tunari, S.A. v. Republic of Bolivia.² Shortly after the decision on jurisdiction was announced by the Tribunal, the international consortium that owned Aguas del Tunari, S.A. (“Aguas del Tunari” or “AdT”) – led by the Bechtel Corporation – settled the case on a no-pay basis, ending an arbitration that had been commenced nearly four years earlier.³

Few ICSID cases have received as much attention outside the international arbitration bar as Aguas del Tunari. The tragic facts giving rise to la guerra del agua (the Water War, as the affair is still known throughout Bolivia), and the ill-fated effort to privatize the water system in Bolivia’s third largest city, Cochabamba, were the subject of numerous articles in the popular press extending far beyond Latin America. The *New Yorker* magazine, for example, featured an

¹ Alexandre de Gramont is a partner in the Washington, D.C. office of Crowell & Moring LLP, where he specializes in international arbitration and litigation. He was co-lead counsel for the Republic of Bolivia in the Aguas del Tunari case. The opinions expressed herein are his own and do not necessarily reflect those of the Republic of Bolivia or Crowell & Moring LLP.

² ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, October 21, 2005 (hereafter, “AdT Decision on Jurisdiction”).

³ See, e.g., Damon Vis-Dunbar and Luke Eric Peterson, “Bolivian Water Dispute Settled; Bechtel Forgoes Compensation,” *Investment Treaty News* (Jan. 20, 2006). To be more precise, the settlement was effectuated by Bolivia’s buying the controlling interest in AdT from Bechtel-

article on the Water War in Cochabamba entitled, “Leasing the Rain: The World Is Running Out of Fresh Water, and the Fight To Control It Has Begun.”⁴ *Le Monde* in Paris reported that increased water rates in Cochabamba had led to “a grave social crisis in Bolivia.”⁵ The *Frankfurter Rundschau* featured several articles about “der ‘Krieg um das Wasser’ in Cochabamba.”⁶ In London, *The Observer* ran a piece entitled “New British Empire of the Dammed: Bolivia’s Water Supply Is the Latest Acquisition of Thirsty British Firms in the Service of Uncle Sam” (referring to the involvement of International Waters Ltd. of London – then a wholly-owned subsidiary of Bechtel – in operating AdT).⁷ A headline in *The New York Times* asked, “Who Will Bring Water to the Poor of Bolivia?”⁸ And the *San Francisco Chronicle* – located in Bechtel’s hometown – wrote of “Bechtel’s Bolivia Debacle.”⁹

The Water War also became a cause célèbre for the anti-globalist movement. Many anti-globalist websites provided extensive commentary on the events underlying the Water War as well as on the case at ICSID.¹⁰ Several non-

controlled and other non-Bolivian shareholders for the grand sum of two Bolivianos – roughly \$ 0.25 U.S.

⁴ William Finnegan, “Leasing the Rain: The World Is Running Out of Fresh Water, and the Fight to Control It Has Begun,” *The New Yorker* 43 (April 8, 2002).

⁵ Nicole Bonnet, “L’augmentation des tarifs de l’eau à Cochabamba provoque une grave crise sociale en Bolivie,” *Le Monde* (April 17, 2000).

⁶ See, e.g., Ulrich Goedecking, “Wichtig ist ein Dach über dem Kopf,” *Frankfurter Rundschau* (Oct. 18, 2003).

⁷ Gregory Palast, “New British Empire of the Dammed: Bolivia’s Water Supply Is the Latest Acquisition of Thirsty British Firms in the Service of Uncle Sam,” *The Observer*, 4 (April 23, 2000).

⁸ Juan Forero, “Who Will Bring Water to the Poor of Bolivia? Multinational Is Ousted, but Local Ills Persist,” *The New York Times*, Business Section 1 (Dec. 15, 2005).

⁹ Editorial, “Bechtel’s Bolivian Debacle,” *The San Francisco Chronicle* B6 (April 29, 2002).

¹⁰ See, e.g., “Bolivia’s War over Water,” available at www.democracycctr.org/waterwar/#war; Jim Schultz and Tom Kruse, “Globalization and the War for Water in Bolivia,” Resource Center of the Americas, available at www.americas.org/item_130.

governmental organizations represented by Earthjustice also sought unsuccessfully to intervene in the case at ICSID on behalf of Bolivia.¹¹

Indeed, there are some who would argue that the Water War was the seminal event in galvanizing support for Evo Morales, a coca-farmer and populist leader of Bolivia's Movimiento al Socialismo party, who was elected President of Bolivia at the end of 2005.¹² In the several years following the Water War, Bolivia was often in a state of crisis and public discord, with high turnover in government, leading to the election of President Morales, whose term began in January 2006.

The difficult facts of the case – including the insertion of Dutch holding companies into AdT's intermediate ownership structure (which provided the basis for ICSID jurisdiction) after widespread opposition to AdT was evident – contributed to what is apparently the longest jurisdiction battle in ICSID's history. It took 1439 days (i.e., almost four years) from the filing of AdT's request for arbitration for the Tribunal to render its decision on jurisdiction. The amount of time taken to decide the jurisdiction issue in Aguas del Tunari also arose in significant part (1) from civil unrest in Bolivia, which required postponing the originally scheduled hearing dates for Bolivia's objections to jurisdiction¹³ and (2) the parties' request to the Tribunal not to issue a decision on jurisdiction while

¹¹ See "Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit Over Access to Water," Press Release by proposed amicus curiae dated Feb. 12, 2003, available at www.ciel.org/lfi/Bechtel_Lawsuit_12feb03.html. See also AdT Decision on Jurisdiction ¶¶ 15-17.

¹² See, e.g., Roger Burbach, "Evo Morales and the Roots of Revolution," Pacific News Service (Jan. 23, 2006).

¹³ See AdT Decision on Jurisdiction ¶¶ 29-38.

settlement was being discussed. (Ultimately, the parties withdrew that request, only to reach settlement after the decision was issued.)

Not surprisingly, the decision on jurisdiction at ICSID has captured considerably less attention in the popular press than the events surrounding the Water War itself. Nonetheless, the majority opinion addresses a range of significant and developing issues in international investment arbitration that should be of interest to any practitioner in the field, including: (1) whether an investor's right to arbitration under a bilateral investment treaty ("BIT") can be waived by an investor when entering an investment agreement with a host State; (2) whether ICSID jurisdiction can be based on the nationality of a holding company that was inserted into the investment's ownership structure after problems with the investment arose; (3) what it means to be "controlled, directly or indirectly," by a national of a Contracting Party to a BIT, for the purpose of allowing the "controlled" party to establish ICSID jurisdiction; and (4) the circumstances under which an arbitral tribunal will order the production of evidence to support a party's effort to pierce the "corporate veil."

As a caveat offered at the outset, my partner Dana Contratto and I served as lead counsel for Bolivia in the Aguas del Tunari case at ICSID. As the first anniversary of the decision on jurisdiction approaches, I have written this article neither to reargue the jurisdiction issues nor to provide a comprehensive summary of all the facts and issues addressed in the majority's 79-page (single-spaced) decision. Rather, my purpose is to give an overview of the most significant facts and

rulings from the perspective of someone who was privy to the proceedings – with the goal of presenting them as objectively as possible by someone who spent several years representing one of the parties. As discussed below, the case offers important lessons for investors, host states, and the practitioners who represent them.

II. Overview of Relevant Facts

A. The Cochabamba Water Concession

Typically described as a “beautiful old Andean city,”¹⁴ Cochabamba sits in a fertile valley in the foothills of the Andes mountains. Like many cities in the region, Cochabamba has long lacked an adequate water system. The city has a population of about half a million people. Even today, roughly half are without running water. Those with running water typically have service for only part of the day.

In 1998, after a failed tender process for private companies to bid for the Cochabamba water and sanitary sewer concession, Bolivia entered direct negotiations with a consortium (the “Consortium”) led by International Water Ltd. (“International Water”), a British company headquartered in London, which was wholly owned by Bechtel at the time. The Consortium sought, and was ultimately awarded, a forty-year agreement for the exclusive provision of water services for the city of Cochabamba. In August 1999, the Consortium formed AdT, a Bolivian corporation established for the sole purpose of operating the concession. The

Concession Agreement was signed on September 3, 1999, with an official commencement date of November 1, 1999.

B. The Protests Begin

It is fair to say that no one expected the intensely hostile reaction by the people and press in Cochabamba that greeted AdT immediately upon the signing of the Concession Agreement. While many of the protests and press reports focused on reported rate increases, the rate increases by themselves cannot explain the vehemence – and, ultimately, the violence – of the opposition that AdT faced.¹⁵ Organized protests began in Cochabamba on the very day that the Agreement was signed, as did the negative reports in Cochabamba’s press (the accuracy of which was hotly disputed by AdT). A headline on September 14, 1999, for example, announced that water tariffs would increase by as much as 110%.¹⁶ The press also reported that AdT intended to charge for water drawn from cooperative community wells and private wells established long before AdT’s arrival in Cochabamba. One headline in October 1999 read: “In six months, no one will be able to drill a well for his own house.”¹⁷ Still other press reports asserted that AdT was so thinly capitalized that it would be making no real investment in the Concession; rather, it

¹⁴ See, e.g., Finnegan, *supra* note 4, at 43.

¹⁵ For reasons that remain difficult to explain, AdT became a lightning rod for Bolivians’ growing frustration and anger with a stagnant economy and persistent poverty that have been increasingly blamed (fairly or not) on so-called “neoliberal” policies favoring foreign investment. In his inaugural address in January 2006, Bolivia’s new president, Evo Morales, said: “We cannot privatize public needs like water. We are fighting for our water rights, for our right to plant coca, for control over our natural resources. . . . [W]e need to end the radicalism of neoliberalism, not the radicalism of our unions and our movements.” Quoted by Burbach, *supra*, note 12.

¹⁶ “Incremento de tarifas de agua va de 58% a 110%,” *Opinión* (Sept. 14, 1999).

was asserted, AdT would operate solely on the rate increases it expected to make.¹⁸ In early November 1999, it was reported that an organization known as the Committee for the Defense of Water (later called the Committee for the Defense of Water and Life, also known as the Coordinadora)¹⁹ had called for a strike, including blockades, on November 4.²⁰ A headline on November 17 read: “Within 45 days of rate increases, calls are made for the annulment of the contract.”²¹

On November 28, 1999, less than a month into the term of the Concession, AdT attempted to respond to the charges by taking out a newspaper advertisement in *Opinión*, one of the Cochabamba newspapers in which many of the critical reports had occurred. The advertisement stated that “[i]n light of the declarations and publications broadcast by various citizens, institutions and media,” AdT believed “it necessary to address the present Open Letter to the public opinion and especially to the Town (or “People”) of Cochabamba, since many of the assertions that have been made are incorrect and ill-intentioned.”²² AdT offered a number of points designed to assuage the public criticism against it. Among other things, AdT stated that it did not intend “to appropriate for itself the systems of potable water developed by neighborhood associations, water cooperatives or other private systems”; that its “subscribed capital” was “\$25 million (U.S.)”; and that it was

¹⁷ “En seis meses, nadie podrá perforar un pozo en su casa,” *Opinión* (Oct. 10, 1999).

¹⁸ See, e.g., “Con inversión menor a \$us 10,000 negociará 311 millones de dólares,” *Opinión* (Nov. 25, 1999).

¹⁹ The Coordinadora was one of the several non-governmental organizations that sought unsuccessfully to intervene in the ICSID proceedings. See *supra* note 11 and accompanying text.

²⁰ “Aguas del Tunari invertirá \$us 200 millones en 5 años,” *Los Tiempos* (Nov. 2, 1999).

²¹ “A 45 días del tarifazo, piden anular el contrato,” *Opinión* (Nov. 17, 1999).

²² Aguas del Tunari, S.A., *A La Opinión Pública*, printed in *Opinión* (Nov. 28, 1999).

subject “to what is established in the Political Constitution of the Bolivian State and to all the laws that regulate its activity.”²³

Unfortunately, AdT’s advertisement seemed to have little or no effect on an increasingly restive public. In January 2000, the residents of Cochabamba received their first water bills, which had significant rate increases for many customers. Although AdT rolled back rates to their previous levels, the public demonstrations against AdT that had begun in September grew larger and more violent through February and March 2000 – underscoring that the public hostility against the water privatization project was not simply about rate increases. In March, the Coordinadora held an unofficial referendum and claimed that ninety-six percent of the nearly fifty thousand votes collected wanted the Concession Agreement with AdT to be terminated.

C. The Water War Erupts

In early April 2000, protesters occupied Cochabamba’s central plaza and built barricades in the street. They also blocked all highways in and out of Cochabamba. In the meantime, protests had spread to other parts of the country, including the administrative capital, La Paz. Highways and roads were blockaded in other parts of the country as well.

On April 8, major violence erupted in Cochabamba. The Army fired tear gas into the crowds and gunfire was exchanged. At least one civilian was killed in

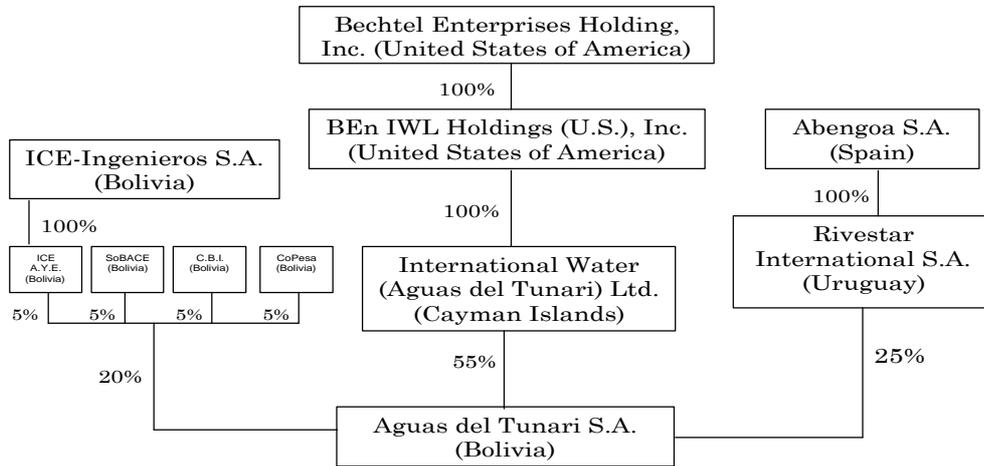
²³ Id.

Cochabamba. Other deaths were reported in the violence that spread throughout the country. The President of Bolivia at the time, Hugo Banzer, declared a “state of siege,” a condition tantamount to martial law, which, under the Bolivian Constitution, could be invoked for a period of up to 90 days. In the midst of the violence, AdT’s executives left Cochabamba. By letters dated April 9 and 10, the Bolivian Waters Superintendent wrote AdT’s executives that he had no choice but to rescind the Concession, based on AdT’s abandonment of the Concession. On April 11, barely seven months after the signing of the Concession Agreement – and barely five months after its official commencement date – the Waters Superintendent issued an Administrative Resolution rescinding the Concession.

D. AdT’s Basis for ICSID Jurisdiction: the December 1999 Changes in AdT’s Upstream Ownership

It is of particular significance to the subsequent battle on jurisdiction that, at the time AdT signed the Concession Agreement on September 3, 1999, its upstream ownership did not afford AdT with a basis on which to assert a claim to ICSID jurisdiction. AdT’s original ownership structure was set forth in detail in the Concession Agreement. According to the Agreement, AdT was 20% owned by Bolivian companies; 25% owned by Rivestar International S.A. of Uruguay (which was in turn owned by Abengoa S.A. of Spain); and 55% owned by International Water (Aguas del Tunari) Ltd., a company incorporated in the Cayman Islands (“IWL/ Cayman Islands”). IWL/Cayman Islands was wholly owned by Ben IWL Holdings (U.S.), Inc., which in turned was owned by Bechtel Enterprises Holding,

Inc. (the latter two companies both being incorporated in the United States of America).²⁴ Thus, AdT’s original ownership structure was:



Not only did the Concession Agreement set forth this upstream ownership structure in detail; it also prohibited AdT from making certain changes to the ownership structure during the first seven years of the Concession. Specifically, the Agreement identified IWL/Cayman Islands, Rivestar International, and the four Bolivian companies that directly held shares in AdT as the “Founding Shareholders” (“Accionistas Fundadores”). It identified Bechtel Enterprises Holding, Inc., Abengoa, S.A., and ICE – Ingenieros S.A. as the “Ultimate Shareholders” (“Accionistas Ultimos”).²⁵ The Agreement specifically provided that “[e]very

²⁴ Bolivia does not have a BIT with Uruguay. While it has signed a BIT with Spain, that BIT has never gone into force. Bolivia’s BIT with the United States of America went into force only on June 6, 2001; even if AdT could have overcome the retroactivity issue, the Bolivia-U.S. BIT has other provisions that would likely have barred AdT from seeking international arbitration based on that BIT. The BIT between the United Kingdom and Bolivia does not appear to extend to the Cayman Islands.

²⁵ Interestingly, an independent translating agency hired by Bolivia for the arbitration – without any input from Bolivia or its counsel – translated the phrase “Accionistas Ultimos” as “Controlling Shareholders.” That translation happened to fit Bolivia’s argument rather nicely as

Founding Shareholder shall keep more than 50% of the original percentage in voting shares of [AdT] at least over the first seven (7) years of the [Agreement].”

In a letter dated November 24, 1999 (i.e., after the street protests and negative press reports had begun, after calls for annulment of the Concession Agreement had been made, and just a few days before AdT published its “Open Letter” to Cochabamba), Bechtel asked the Waters Superintendent for permission to change AdT’s upstream ownership to effectuate a joint venture between Bechtel and Edison S.p.A. of Italy. According to Bechtel, the changes were part of a long-planned corporate reorganization being effectuated for tax reasons. As part of the changes in upstream ownership, the 55% ownership stake in AdT then held by IWL/Cayman Islands would be transferred to a company incorporated in the Netherlands (the “New IWL Shareholder”). Bechtel appeared to recognize that the transfer of shares from IWL/Cayman Islands, one of the Founding Shareholders, to the New IWL Shareholder, would violate the provision in the Concession Agreement requiring that each Founding Shareholder keep more than 50% of its original shares over the first seven years of the Concession. Accordingly, Bechtel asked the Waters Superintendent for a waiver of that provision. When the Water Superintendent did not provide the waiver, a Bolivian law firm representing Bechtel wrote a second letter, dated December 3, 1999. This letter stated:

Bolivia maintained that the Accionistas Ultimos – in particular, Bechtel – were the true controllers of AdT. See Discussion *infra* at § III(C). Throughout Bolivia’s submissions at ICSID, we translated “Accionistas Ultimos” as “Controlling Shareholders.” However, since the Tribunal in its Decision on Jurisdiction chose to translate the phrase as “Ultimate Shareholders,” I will use that translation here.

We have examined the changes detailed in Bechtel Corporation's letter to you dated 24 November 1999, from the perspective of Bolivian law, as well as the Project Documents.

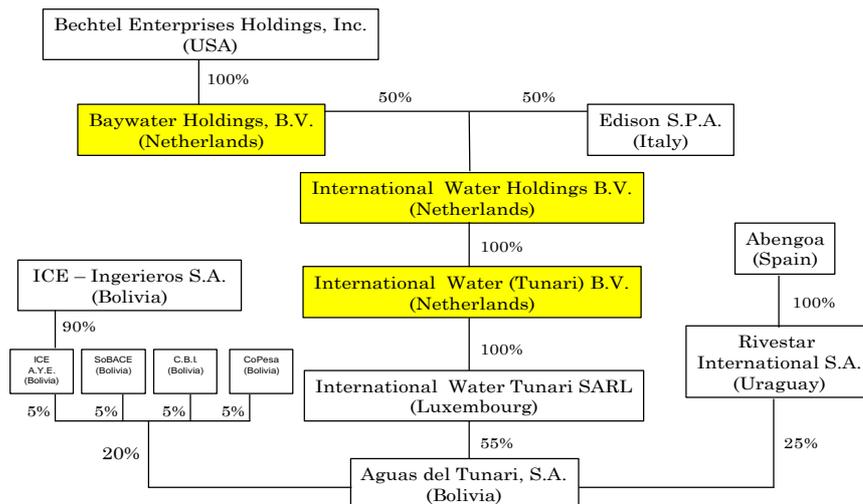
Given that such change has to do with the tax requirements outside of Bolivia, we consider that transferring the Founding Shareholder status from [IWL – Cayman Islands] to a Dutch firm that will remain under the same control, will have no adverse effect or impact for the Bolivian government, for Bolivian entities or for the town of Cochabamba and we see no reason why such approval should not be granted.

The letter added: “The change will not affect the 55% control of the shares of Aguas del Tunari, S.A., nor the administration of the business.”²⁶

However, neither the Bolivian Waters Superintendent nor anyone else in the Bolivian government provided the approval for the transaction that Bechtel had requested. On December 22, 1999, changes to AdT's ownership were made, although in a different manner than that outlined in Bechtel's November 24, 1999 letter. As described by AdT during the arbitration, the 55% ownership stake held in AdT was not “transferred” to a different company in the Netherlands. Rather, IWL/Cayman Islands as a company moved – or “migrated” – to Luxembourg, where it changed its name to International Water (Tunari) SARL (“SARL”), and became a corporation of Luxembourg rather than of the Cayman Islands. (A number of jurisdictions have statutes permitting “corporate migration,” which essentially allow a change of nationality without requiring a dissolution in the state of

²⁶ Bolivia's Counter-Memorial in Opposition to Jurisdiction and in Support of the Production of Evidence, Exh. 2; see also AdT Decision on Jurisdiction ¶ 68.

departure and an incorporation of an entirely new entity in the state of arrival.²⁷ Luxembourg and the Cayman Islands both have such statutes.) According to AdT, this corporate migration did not implicate the Concession Agreement’s requirement that each Founding Stockholder retain at least 50% shares over the first seven years of the Concession, because SARL was one of the Founding Stockholders (i.e., IWL – Cayman Islands), albeit with a new name and place of incorporation. Among the other corporate changes, IWL/Cayman (now SARL) was now owned by a Netherlands company, International Water (Tunari) B.V., which was in turned owned by another Netherlands company, International Water Holdings B.V., which was 50% owned by Edison, S.p.A., and 50% owned by still another Netherlands company, Baywater Holdings, B.V. Baywater Holdings, B.V. was wholly owned by Bechtel Enterprises Holdings, Inc. AdT’s new ownership structure (with the Dutch holding companies highlighted) was now as follows:



²⁷ See generally Karsten Sorensen and Mette Neville, Corporate Migration in the European Union, 6 Colum. J. Eur. L. 181 (2000).

The Bolivia-Netherlands BIT defines “nationals” of each Contracting Party to include “legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the Contracting Party”²⁸ In other words, the BIT allows a company incorporated under the laws of one State party (here, Bolivia), which is “controlled directly or indirectly” by a company in the other State party (The Netherlands), to initiate arbitration against the State party in which the first company is incorporated (Bolivia). On November 12, 2001, AdT filed its Request for Arbitration at ICSID, asserting jurisdiction based on the Bolivia-Netherlands BIT.

III. The Key Jurisdictional Issues and the Majority’s Rulings

The Tribunal was officially constituted on July 5, 2002. It consisted of Henri C. Alvarez of Canada (appointed by AdT); José Luis Alberro-Semerena of Mexico (appointed by Bolivia); and Professor David D. Caron of the United States (appointed as the Tribunal’s President by the Chairman of the ICSID Administrative Council after the parties were unable to agree among themselves on a President).

The hearing on jurisdiction took place in Washington, D.C. on February 9, 10, and 11, 2004,²⁹ and consisted primarily of expert testimony and presentations by

²⁸ Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia, 10 March 1992 (hereafter, “Bolivia-Netherlands BIT”), Art. 1(b)(iii). The text is available online at <http://www.unctad.org/sections/dite/jia/docs/bits/netherlands~bolivia.pdf>.

²⁹ As noted above, the hearing had been postponed from its originally scheduled dates of November 17-19, 2003, due to civil unrest in Bolivia. Bolivia’s attorneys had requested the

counsel.³⁰ Bolivia’s principal arguments against jurisdiction were that (1) AdT had waived any right that it had (or might later acquire) to seek international arbitration when it entered the Concession Agreement; (2) ICSID jurisdiction could not be established under the Bolivia-Netherlands BIT by the insertion of Dutch holding companies into AdT’s intermediate ownership structure after problems with the investment had already arisen; (3) AdT could not demonstrate that it was “controlled, directly or indirectly,” by the Dutch holding companies solely on the basis of majority shareholding; and (4) in the event that AdT did not bear the burden of proving it was controlled by Dutch companies, then the Tribunal should order the production of evidence to allow Bolivia to prove that AdT was controlled not by the Dutch holding companies, but by other upstream entities that were not nationals of The Netherlands. These arguments, and the majority’s disposition of them, are discussed in turn.

A. Waiver

There is little doubt that the Bolivian government officials who negotiated the Concession Agreement on Bolivia’s behalf at least tried to draft the Agreement so that AdT (as opposed to its shareholders) would have no recourse to international

postponement, which the Tribunal granted over AdT’s objection, because they were unable to adequately prepare for the hearing with their client given the turmoil in Bolivia in September and October 2003. See AdT Decision on Jurisdiction ¶¶ 30-37.

³⁰ Bolivia presented Professor Rudolf Dolzer of the University of Bonn and Professor Merritt B. Fox of Columbia University. AdT presented Professor Nico J. Schrijver of Vrije Uniersiteit in Amsterdam. AdT also submitted statements by lawyers in The Cayman Islands and Luxembourg on the issue of corporate migration. AdT was represented by the formidable team of Robert Volterra (then at Herbert Smith, now at Latham & Watkins) and Matthew Weiniger (then and now at Herbert Smith).

arbitration.³¹ During the negotiations, the Consortium specifically proposed to Bolivia's negotiating committee that the Concession Agreement include a general reference to ICSID for disputes arising out of the Concession. The written report of the Bolivian negotiating committee stated that the committee had rejected this proposal, because "arbitration is not permitted under the norms of the [Bolivian] regulatory system and the laws covering the subject matter."³² Bolivia's negotiating committee believed that under Bolivian law and the Bolivian Constitution, a concessionaire for a critically important natural resource such as water had to be a Bolivian company, subject to Bolivian law and the courts and tribunals of Bolivia.³³ The notion that a Bolivian company holding such a concession could seek recourse to an international tribunal for a dispute arising solely in Bolivia was unacceptable to the Bolivian negotiating committee.

At the same time, however, the negotiating committee did not see any problems under Bolivian law if AdT's foreign shareholders had recourse to international arbitration. As a result, the Concession Agreement ended up with two separate dispute resolution provisions – one for AdT and one for the shareholders. Article 41.2 of the Concession Agreement contained the dispute resolution provision for AdT:

³¹ Bolivia does not appear to have been assisted or advised by outside counsel in negotiating the Concession Agreement. My law firm was retained for this matter only after the Request for Arbitration was filed.

³² See AdT Decision on Jurisdiction ¶ 99.

³³ See id. ¶ 100.

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

Article 41.3 made clear that the provisions of the Agreement were not to be interpreted as a renunciation of international arbitration on the part of AdT’s shareholders (thus indicating that they were meant to be a renunciation of international arbitration by AdT itself):

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

And Article 41.5 set forth the dispute resolution provision for the shareholders:

Article 41.5 The Parties recognize that the Shareholders and the Ultimate Shareholders including the Founding Shareholders are free to have recourse to those methods of dispute resolution which are legally available to them in accordance with Bolivian law (such as, for example, arbitration under the rules of the ICC, ICSID or UNCITRAL or other similar international organizations). The Parties agree to cooperate in the above-mentioned process, to the extent permitted by Law.³⁴

Based in part on these provisions (as well as on the Bolivian Constitution and other applicable Bolivian law), Bolivia argued at ICSID that the law of Bolivia required that any company responsible for operating a concession involving one of the nation’s key natural resources had to be a Bolivian corporation, subject only to

³⁴ Concession Agreement, Art. 41. See AdT Decision on Jurisdiction ¶ 58.

Bolivian law and to the courts and tribunals of Bolivia. Bolivia observed that Article 2 of the Bolivia-Netherlands BIT specifically provided that each Contracting Party would promote economic cooperation “within the framework of its law and regulations.” Bolivia argued further that in awarding such a concession to AdT, Bolivia was entitled to insist that AdT waive any right it might claim to international arbitration and that AdT had done so by agreeing to the dispute resolution provisions set forth in the Concession Agreement. As Bolivia noted, the dispute resolution provisions allowing for international arbitration were specifically limited to the shareholders of AdT; they did not cover AdT itself.

AdT responded that Bolivia was attempting to resurrect the Calvo Doctrine.³⁵ Named for the nineteenth-century Argentinean diplomat and lawyer, Carlos Calvo, the Calvo Doctrine posited that foreigners have no recourse to international dispute resolution, so long as the national courts of the host state are accessible to them.³⁶ But of course, Bolivia was not attempting to exclude foreigners from international arbitration: AdT’s foreign shareholders were explicitly granted recourse to international arbitration under the Concession Agreement. Only AdT, the Bolivian corporation that held the Cochabamba water concession, was meant to be limited to the courts and tribunals of Bolivia.

³⁵ See Transcript of Hearing on Jurisdiction, February 9, 2004, at 248.

³⁶ For an excellent short discussion of the Calvo Doctrine and its history, see Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 20-37 (Cambridge Univ. Press 2005). The Tribunal did not discuss AdT’s argument concerning the Calvo Doctrine in its decision.

AdT also argued that its claim was brought not under the Concession Agreement, but rather under the BIT, and that in any event, the Concession Agreement did not explicitly limit AdT to the courts and tribunals of Bolivia, but merely “recognized” their “jurisdiction and competence.” AdT argued further that even an unambiguous, exclusive jurisdiction provision could not waive a right to international arbitration under a BIT. The Tribunal essentially agreed with AdT on these points. But in its decision, the majority offered extremely interesting dicta on the issue of waiver.

As the majority observed, other ICSID tribunals have concluded that exclusive jurisdiction clauses in contracts between the parties (including clauses more explicit than in AdT’s Concession Agreement) do not bar access to international arbitration, where the dispute is primarily based on an alleged violation of treaty rights. For example, in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (“Vivendi”),³⁷ the forum selection clause at issue provided:

For purposes of interpretation and application of this Contract, the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.³⁸

³⁷ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of November 21, 2000, reprinted at 40 ILM 426 (2001), 5 ICSID Rep. 299 (2002); Decision on Annulment, July 3, 2002, reprinted at 41 ILM 933 (2002), 5 ICSID Rep. 240 (2002).

³⁸ *Vivendi*, Award of November 21, 2000, ¶ 27, quoted in AdT Decision on Jurisdiction, ¶ 112.

Both the original tribunal in Vivendi, as well as the Ad Hoc Committee appointed for the Annulment Proceeding in Vivendi, held that even such an explicitly exclusive jurisdiction clause does not affect the jurisdiction of an ICSID tribunal with respect to a claim made under the BIT.³⁹ Similarly, in *Azurix Corp. v. The Argentine Republic* (“Azurix”),⁴⁰ the jurisdiction clauses contained within a set of Bidding Terms, a Concession Agreement, and Commitment Letters did not constitute a waiver of international arbitration, when one such clause (typical of the others) provided for the exclusive jurisdiction of the courts for contentious-administrative matters of the city of La Plata “for all disputes that may arise out of the Bidding, waiving any other forum, jurisdiction or immunity that may correspond.”⁴¹ The tribunal in *Azurix* held that the jurisdiction clauses (including the waiver language) applied only to claims under the contract and not to claims made under a BIT.⁴² And in *Lanco International, Inc. v. The Argentine Republic* (“Lanco”)⁴³, the tribunal held that a forum clause in which the parties “agree[d] to

³⁹ Vivendi, Award of November 21, 2000, ¶ 53; Vivendi, Decision on Annulment Proceedings (“Annulment Decision”), ¶¶ 73, 76, 80, and 95-97. Vivendi as well as other decisions emphasize, however, that contractual claims and treaty claims can be distinct. “A state may breach a treaty without breaching a contract, and vice versa” Annulment Decision, ¶ 95. If a dispute is truly a contractual dispute, rather than a dispute arising out of treaty rights and obligations, then the contractual dispute resolution provisions should be applied. See also AdT Decision on Jurisdiction, ¶ 114.

⁴⁰ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, Dec. 8, 2003, available at <http://www.asil.org/ilib/azurix.pdf>.

⁴¹ Id. ¶ 26.

⁴² Id. at ¶¶ 80-81. In addition, the tribunal in *Azurix* concluded that the waiver clause was part of a contract to which the respondent was not a party. Therefore, the respondent could not invoke the clause in its favor. Id. ¶ 85. See also AdT Decision on Jurisdiction, ¶ 117.

⁴³ *Lanco International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal,” December 9, 1998, reprinted at 40 ILM 457 (2001), 5 ICSID REP 370 (2002). As the majority in AdT noted, at least one ICSID tribunal, in a 2-1 decision, has held that a forum selection clause providing for the jurisdiction of local courts barred ICSID jurisdiction. See AdT Decision on Jurisdiction, ¶ 117 n.99 (discussing *Société Générale de Surveillance v. Republic of the Philippines* (January 29, 2004), available at

the jurisdiction of the Federal Contentious-Administrative Tribunals of the Federal Capital of the ARGENTINE REPUBLIC” – but did not provide for such jurisdiction to be exclusive – did not operate as a waiver of ICSID’s jurisdiction to hear treaty claims.⁴⁴

The majority in AdT could have safely stopped its analysis at its conclusion that the forum selection provisions in AdT’s Concession Agreement did not plainly provide for the exclusive jurisdiction of the courts and tribunals of Bolivia. However, the AdT majority went further in explicitly stating (albeit in dicta) that ICSID jurisdiction can be waived – so long as the waiver is clear and explicit.⁴⁵ Put differently, an exclusive jurisdiction clause, by itself, will not waive ICSID jurisdiction. But a clear and unambiguous waiver clause will serve to waive such jurisdiction. According to the majority:

Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the

www.worldbank.org/icsid/cases/SGSv.Phil-final.pdf (“SGS”). In SGS, the clause at issue provided for “actions concerning disputes in connection with obligations of either party to this Agreement . . . [to] be filed at the Regional Trial Courts of Makati or Manila.” The majority in AdT suggested that the SGS decision is arguably distinguishable, in part because the SGS tribunal found the claims at issue to be contractual in nature. The majority acknowledged, however, that “its reasoning differs from that of the SGS tribunal,” and was closer to that of the dissenting opinion of Arbitrator Antonio Crivellara in that case. *Id.*

⁴⁴ *Id.* ¶ 6, 26.

⁴⁵ The tribunal in Azurix, by contrast, had explicitly declined to reach this issue, stating that “[s]ince the Tribunal has found that the waiver does not cover the claim of Azurix in the dispute before it, the Tribunal does not need to comment further on the issue of renunciation by individuals of rights conferred upon them by treaty.” Azurix, ¶ 85.

jurisdiction of ICSID. However, the Tribunal need not decide this question in this case.⁴⁶

Scholarly opinion has been generally divided on whether an investor can waive treaty rights negotiated by the investor's home state – or whether only the state can do so.⁴⁷ After all, it is one thing for parties to agree to modify the manner in which the international dispute resolution is conducted; it is another thing to agree to do away entirely with international dispute resolution or other substantive rights provided by a treaty between the parties' respective sovereigns. It remains to be seen whether future ICSID tribunals will adopt the dicta of the AdT Tribunal, but if so, intriguing possibilities are raised. Under this dicta, parties could presumably waive or modify a host of substantive and procedural rights ordinarily afforded under a BIT, ranging from which arbitral fora are available, to the types of claims that can be asserted, to the categories and amounts of damages that can be awarded. In light of this dicta, parties and their counsel will want to give careful consideration and pay close attention to forum and waiver provisions in international investment agreements. If other tribunals adopt the AdT dicta, then a government that does not want to engage in international arbitration with a concessionaire, for example, would be well advised to try to include a clear and unambiguous waiver clause in its concession agreements; an investor who wants recourse to international arbitration would be well advised to resist such a clause. Some have argued that the enormous leverage that host states have in awarding

⁴⁶ AdT Decision on Jurisdiction, ¶ 118 (footnote omitted) (citing Ole Spiermann, Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties, 20 *ARBITRATION INTERNATIONAL* 179, 191 (2004) (“Spiermann”).

concessions to investors is by itself reason not to allow an investor to waive arbitration rights that have been negotiated by the investor's state. The AdT dicta obviously rejects that notion.

B. Reorganization of AdT's Intermediate Ownership Structure

One of the most interesting aspects of the battle for jurisdiction in AdT was the insertion of Dutch holding companies into AdT's intermediate ownership structure – which formed the basis for AdT's claim to ICSID jurisdiction under the Bolivia-Netherlands BIT – after problems with the investment arose.

Other tribunals have held that ICSID jurisdiction can be premised on the nationality of an intermediate holding company. Indeed, in *Tokios Tokeles v. Ukraine* (“Tokios”),⁴⁸ the tribunal held in a 2-1 decision that the claimant, a Lithuanian holding company that was owned and controlled predominantly by Ukrainian nationals, could assert claims at ICSID against Ukraine. Although Ukraine argued that allowing ICSID to hear the claim “would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government,” the tribunal in *Tokios* concluded that, for purposes of establishing jurisdiction under the Ukraine-Lithuania BIT, “the only relevant consideration is whether the Claimant is established under the laws of Lithuania.”⁴⁹

⁴⁷ See generally Spiermann, *supra*, note 46.

⁴⁸ *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004.

⁴⁹ *Id.* ¶¶ 22 and 38.

Similarly, in *Saluka Investments BV v. The Czech Republic* (“Saluka”),⁵⁰ a Dutch holding company initiated an arbitration against the Czech Republic based on the BIT between The Netherlands and the Czech Republic. The respondent argued that Saluka was a “mere surrogate” for its parent company, the Nomura Group of Japan, a country that has no investment treaty with the Czech Republic. It was undisputed that Nomura had originally held the controlling shares in the Czech company at issue and had later transferred them to Saluka prior to the alleged expropriation. As in *Tokios*, the tribunal in *Saluka* concluded that the only relevant consideration was whether Saluka was a bona fide company established under the laws of The Netherlands.⁵¹

What arguably made AdT a different case is that the Dutch holding companies on which AdT based ICSID jurisdiction were inserted into AdT’s intermediate ownership structure after problems arose with the investment – and when it was arguably foreseeable that AdT might want to pursue a claim against Bolivia in a forum other than the courts or tribunals of Bolivia. As described above, the Dutch holding companies were inserted into AdT’s intermediate ownership structure after the street protests and negative press reports had begun, and after public calls to cancel the Concession Agreement had been made. Even AdT’s Request for Arbitration alleged that the Government of Bolivia had begun to “engage[] in a course of action . . . culminating in the expulsion of AdT and the

⁵⁰ *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award dated March 17, 2006, available at: <http://www.pca.cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf>.

expropriation of the Concession” as early as December 1999.⁵² The ownership changes were not effectuated until December 22, 1999.

AdT argued vigorously that the changes to its intermediate ownership structure were for tax reasons and had been planned (though not implemented) long before any problems with the investment were apparent. However, AdT did not present any evidence to support that assertion and the majority decision rejected Bolivia’s request for the production of any such evidence. Nor did the majority seriously question AdT’s assertion, opining that the planning of the corporate reorganization “likely predated the transfer by at least several months.”⁵³

More fundamentally, the majority saw nothing wrong with a corporate reorganization designed to take advantage of a particular BIT at any time (or at least any time prior to the alleged treaty violation at issue.) Bolivia had argued that a corporate reorganization designed solely to take advantage of a particular BIT – especially when a dispute was reasonably foreseeable at the time – was an

⁵¹ Id. ¶ 180.

⁵² AdT’s Request for Arbitration ¶ 12. Following public complaints and protests in Cochabamba that AdT was laying claim to water sources outside the area of its Concession, the Bolivian Superintendent of Waters took action that, according to AdT, “purported to limit the effective area of the Concession.” Id. According to AdT, that was one of several events that marked the beginning of Bolivia’s allegedly expropriatory conduct.

⁵³ AdT Decision on Jurisdiction at ¶ 329 (emphasis added). The majority offered no explanation why the planning of the reorganization “likely” predated the reorganization itself by several months. The reality is that large, sophisticated law firms can turn around transactions like the one at issue in a matter of days. Nor was there any explanation as to why – if the planning predated the actual reorganization by several months – AdT entered a Concession Agreement that prohibited that transaction in September in 1999 and informed Bolivia of its plans only in November 1999. Moreover, the decision to “migrate” IWL from the Cayman Islands to Luxembourg – which, according to AdT, avoided any violation of the requirement that each Founding Shareholder keep more than 50% of the original percentage in voting shares of AdT over the first seven years of the Concession – was obviously made after Bechtel’s December 3, 1999 letter repeating the request for permission to transfer IWL-Cayman Island’s shares to a Netherlands entity.

abuse of the corporate form. In addition, Bolivia again invoked the BIT's provision that each Contracting Party is to admit foreign investments "within the framework of its law and regulations." Bolivia argued that the reorganization was designed to circumvent the provisions in the Concession Agreement that were meant to preclude AdT from seeking recourse to international arbitration, which, again, was prohibited under Bolivian law as well as under the Concession Agreement. The majority rejected these arguments:

[I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.⁵⁴

Bolivia had argued that allowing a claimant's upstream ownership to be reorganized when a crisis is foreseeable would turn Bolivia's investment treaty with The Netherlands into a treaty "between Bolivia and the world."⁵⁵ Apparently in response to this argument, the majority decision stated that Bolivia's BIT with The Netherlands should not necessarily be seen as purely "bilateral":

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

⁵⁴ Id. ¶ 330(d) (emphasis added).

⁵⁵ Bolivia's Rejoinder in Opposition to Jurisdiction and in Support of the Production of Evidence, ¶ 137 (quoting Expert Opinion of Prof. Merritt B. Fox at 13).

which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum. The language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties.⁵⁶

Regardless of whether one agrees with the Tribunal's conclusion under the unique circumstances of this particular case, the passage quoted above is generally consistent with the decisions of Tokios, Saluka, and other cases holding that corporate entities – so long as they fall within the definition of “national” of a Contracting Party under the BIT at issue – are entitled to the protections of those treaties. Absent clear indicia that the corporate entity at issue was established to perpetrate a fraud (and, in the view of the AdT majority, a corporate reorganization designed to afford access to BIT arbitration does not rise to that level), the AdT majority was unwilling to look behind the corporate veil or otherwise examine the reasons for or timing of the entity's establishment.

The majority may also have been reluctant to try to define a precise point in time when a treaty claim might be deemed sufficiently “foreseeable” to bar ICSID jurisdiction based on a corporate reorganization that took place after that point (but prior to the alleged treaty violation). The majority observed that the record in AdT “indicate[d] that in November-December 1999 . . . civil society organizations expressed strong concerns about the proposed tariff structure and, in a few

⁵⁶ AdT Decision on Jurisdiction ¶ 332 (footnote omitted).

instances, called for the annulment of the concession.”⁵⁷ However, the majority concluded, the record did not establish that “the severity of the particular events that would erupt in the Spring of 2000 were foreseeable in November-December 1999.”⁵⁸ But whether the “severity” of the events was foreseeable was not the issue that Bolivia had raised. Rather, the question was whether it was sufficiently foreseeable that AdT might want to assert any claims under a BIT based on events that were already in progress, and, based on such foresight, undertook a corporate reorganization to be able to do so. Given the majority’s stated rationale for its ultimate holding, it would appear that even an affirmative answer to that question would not have barred ICSID jurisdiction in this case.

C. The Meaning of “Controlled” under the BIT

Article 25(2)(b) of the ICSID Convention explicitly defines a “National of another Contracting State” (who can seek ICSID arbitration against the host Contracting State) as including “any juridical person which had the nationality of the Contracting State party to the dispute . . . 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.” The Bolivia-Netherlands BIT specifically defines “nationals . . . with regard to either Contracting Party” as including “legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other

⁵⁷ AdT Decision on Jurisdiction ¶ 329.

⁵⁸ Id.

Contracting Party.”⁵⁹ Accordingly, under the ICSID Convention and the Bolivia-Netherlands BIT, a Bolivian company can assert claims at ICSID if it is “controlled” by a Netherlands company, which AdT asserted. What the BIT does not define, however, is the meaning of the term “controlled.”

AdT argued that majority shareholding (with majority voting rights) by the Dutch holding companies was sufficient in itself to establish control under the Treaty. To be “controlled” by another entity, AdT argued, means to be capable of being controlled by that entity – regardless of whether such control is in fact exercised. There was no dispute that, following the reorganization of AdT’s upstream ownership in December 1999, Dutch entities owned fifty-five percent of AdT’s stock (albeit indirectly, through SARL of Luxembourg). Because all shares in AdT carried equal voting rights, the Dutch companies indirectly maintained the ability to control AdT (again, through SARL). Therefore, AdT argued, it was “controlled” by the Dutch entities.

Bolivia countered that the plain meaning of the word “controlled” requires the actual exercise of control. Bolivia’s argument was quoted by the majority decision as follows:

The word used in the Treaty, “controlled,” is a participle, i.e., a verb used in adjective form. To say that an object is “controlled” is different from saying that an object is capable of being controlled; an object that is “controlled” is actually controlled. “Controlled” is not a complex or unusual word. To apply the word in this case means that

⁵⁹ Bolivia-Netherlands BIT, Art. 1(b)(iii).

AdT must have been controlled, i.e., commanded, regulated, restrained, or directed, by a Dutch company or companies.⁶⁰

Bolivia observed that other BITs (including other BITs entered by The Netherlands) defined “nationals” of one Contracting Party as including “legal persons owned or controlled, directly or indirectly” by nationals of the other Contracting Party.⁶¹ Bolivia argued that the parties to the Bolivia-Netherlands could have chosen such language, but did not, thus indicating that the parties had rejected a test based solely on ownership. Moreover, Bolivia asserted, the use of the “owned or controlled” language in other BITs underscored its argument that the two terms were not synonymous.⁶²

Bolivia also pointed to the travaux préparatoires of the ICSID Convention, as well as to the decisions of other tribunals and to secondary sources, as authority for the proposition that majority shareholding does not by itself establish “control” (and, conversely, that minority shareholding does not by itself establish the lack of control). For example, the tribunal in *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, stated:

⁶⁰ Bolivia’s Rejoinder in Opposition to Jurisdiction and in Support of the Production of Evidence, ¶ 92 (citing various dictionaries), quoted in AdT Decision on Jurisdiction ¶ 228.

⁶¹ See AdT Decision on Jurisdiction ¶ 299 (discussing Bolivia’s argument and the language of the Netherlands-Romania BIT)(emphasis added).

⁶² On the other hand, some treaties specifically define “control” as “control in fact” – whereas the Bolivia-Netherlands BIT did not. Thus, for example, the Protocol to the Agreement on Encouragement and Reciprocal Protection of Investment Between Bosnia and Herzegovina and the Kingdom of the Netherlands (signed on May 13, 1998) provides that “[i]ndirect control of an investment means control in fact, determined after an examination of the actual circumstances in each situation.” AdT argued that the parties could have included such a protocol to the Bolivia-Netherlands BIT, had they wanted “controlled” to be defined in that fashion.

[I]n the course of the drafting of the Convention, it was said variously that “interests sufficiently important to be able to block major changes in the company” could amount to a “controlling interest” (Convention History, Vol. II, 447); that “control could in fact be acquired by persons holding only 25 percent” of a company’s capital (id., 447-48); and even that “51% of the shares might not be controlling” while for some purposes “15% was sufficient (id., 538).⁶³

Similarly, Professor Schreuer has observed:

On the basis of the Convention’s preparatory works as well as the published cases, it can be said that the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone.⁶⁴

Bolivia argued further that there was no evidence that AdT was actually controlled (directly or indirectly) by the Dutch holding companies that had been inserted into AdT’s ownership structure at the end of 1999. To the contrary, all of the available evidence indicated that AdT was not actually controlled by the Dutch holding companies (which did not appear to have any real operations in The Netherlands in any event), but rather remained under the control of its ultimate parent, Bechtel.⁶⁵ Indeed, throughout the tender and negotiation process leading to

⁶³ Vacuum Salt Products Limited v. Government of the Republic of Ghana, ICSID Case No. ARB/92/1, Award of Feb. 16, 1994, 9 ICSID Review – Foreign Investment Law Journal 72, 94 ¶ 43 (1994).

⁶⁴ Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY 321 (Cambridge Univ. Press 2001) (emphasis added).

⁶⁵ AdT strongly disputed Bolivia’s description of the Dutch companies as mere “shells.” See AdT Decision on Jurisdiction ¶ 212. However, because the Tribunal declined to order the production of evidence on this point, the extent to which the Dutch companies maintained actual operations in The Netherlands was never resolved.

the Concession Agreement, Bechtel had emphasized its expertise in the provision of water services and had promised in documents submitted to the Bolivian government that it would be the “controlling company” of the International Water entity that owned fifty-five percent of AdT’s shares (which was at first IWL/Cayman Islands and later became SARL of Luxembourg, see discussion supra § II(D)).⁶⁶ In requesting permission to transfer the fifty-five percent stake held by IWL/Cayman Islands (before deciding to “migrate” that company to Luxembourg, where it became SARL), Bechtel had, through its Bolivian counsel, told the Bolivian Waters Superintendent that the change would “not affect the 55% control of the shares of Aguas del Tunari, S.A., nor the administration of the business.”⁶⁷ Although arguing that the burden rested on AdT to establish that it was “controlled” by Dutch entities – and that AdT could not meet that burden merely by pointing to majority shareholding – Bolivia also sought the production of evidence on whether the Dutch companies exercised any control over AdT. Bolivia requested, for example, copies of the by-laws and the board-of-director minutes for the Dutch companies, which, Bolivia argued, might show if AdT had the ability to exercise control over AdT and whether it had ever done so. Bolivia also requested the Tribunal to direct AdT to identify any instances in which it (AdT) maintained that the Dutch companies had exercised any direct or indirect control over it.

⁶⁶ Exhibits 3-4 to Bolivia’s Counter-Memorial in Opposition to Jurisdiction and in Support of the Production of Evidence.

⁶⁷ Exhibit 2 to Bolivia’s Counter-Memorial in Opposition to Jurisdiction and in Support of the Production of Evidence. See also Discussion supra at § II(D)).

Invoking the Vienna Convention, the Tribunal undertook an extensive and lengthy analysis of the meaning of the term “controlled” as used in the BIT. The majority rejected Bolivia’s argument that the term “controlled” as used in the BIT requires the actual exercise of control.⁶⁸ The majority began with a review of both the general and legal meaning of the term “controlled,” citing various general dictionaries and legal sources.⁶⁹ The majority concluded that the various definitions were too conflicting to be determinative of the issue.⁷⁰

The majority also considered at length: the negotiating history of the BIT; the jurisprudence regarding Article 25(2) of the ICSID Convention; the holdings of other arbitral awards concerning “control”; the “BIT practice” of both Bolivia and The Netherlands; and statements made by certain members of the Dutch government concerning the AdT case. The majority concluded that none of these factors were instructive (and that certainly none were conclusive) on the precise issue before the Tribunal.⁷¹

The majority ultimately concluded that majority shareholding by the Dutch entities established that AdT was “controlled” by those entities by considering the phrase “controlled” in its “context . . . and in light of the object and purpose of the BIT.”⁷² Based on the language of the BIT’s preamble, the Tribunal concluded:

⁶⁸ AdT Decision on Jurisdiction ¶ 223.

⁶⁹ Id. ¶¶ 226-238

⁷⁰ Id.

⁷¹ Id. ¶ 249-314.

⁷² Id. ¶ 240.

the object and purpose of the treaty is to “stimulate the flow of capital and technology” and the Contracting Parties explicitly recognize that such stimulation will result from “agreement upon the treatment to be accorded to . . . investments” by “the national of one Contracting Party in the territory of the other Contracting Party.”⁷³

With respect to the context in which the phrase was used in the BIT, the Tribunal observed that the BIT provision

in defining the concept of “national” not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word “controlled” is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, “controlled” indicates a quality of the ownership interest.⁷⁴

In other words, the majority concluded that to assert a claim under the BIT, some degree of ownership in the investment was required, and that “[t]he question, therefore, is how the term ‘controlled’ . . . is meant to qualify ‘ownership.’”⁷⁵ It concluded that majority shareholding (with majority voting rights) constituted an ownership interest pursuant to which AdT could be “controlled, directly or indirectly,” by any upstream entity holding such an ownership.⁷⁶

⁷³ Id. ¶ 241 (quoting Preamble to Bolivia-Netherlands BIT).

⁷⁴ Id. at ¶ 242 (quoting Bolivia-Netherlands BIT, Art. 1).

⁷⁵ Id. at ¶ 243.

⁷⁶ In a recent award issued in a NAFTA case, the tribunal distinguished between “legal control” – meaning the legal ability to control an entity by virtue of owning more than 50% of the voting shares – and “effective” or “de facto” control. *International Thunderbird Gaming Corp. v. The United*

Ultimately, the majority’s conclusion on the meaning of “controlled” appears to have been driven by (1) a search for a “bright-line” test and (2) a reluctance to order the production of evidence designed to pierce the corporate veil. Bolivia had argued that the determination of whether AdT was “controlled” had to be determined by examining the actual facts and that shareholding, without more, could not establish that AdT was “controlled” by the Dutch entities. Although there is certainly support for Bolivia’s view,⁷⁷ the majority rejected the argument that “control” can be established by only a certain level of actual control.” The majority found that view to be “sufficiently vague as to be unmanageable.”⁷⁸ Moreover, without evidence that the Dutch entities were inserted into AdT’s ownership structure to perpetrate a fraud, the majority was unwilling to look behind the various corporate forms – an examination that would have been necessary to determine which entity or entities exercised actual control over AdT.

D. The Production of Evidence To Pierce the Corporate Veil

Mexican States, UNCITRAL, Arbitral Award dated January 26, 2006, ¶ 106. The tribunal concluded that for the purpose of Article 1117 of NAFTA (“[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit [certain specified claims] to arbitration under this Section”), effective or de facto control is sufficient in the absence of legal control. *Id.* ¶¶ 106-108. In other words, in the view of the Thunderbird tribunal, majority shareholding (with voting rights) is sufficient to constitute “control.” But where the investor holds less than 50% of the shares, effective or de facto control will suffice. As the Tribunal in AdT pointed out, other tribunals have typically looked at the issue of actual control only when the facts involved a minority shareholder. AdT Decision on Jurisdiction ¶ 288.

⁷⁷ See, e.g., Schreuer, *supra* note 64 (“[T]he existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone.”).

⁷⁸ AdT Decision on Jurisdiction ¶ 246.

Bolivia had submitted its request for the production of evidence (in the form of ten document requests and eight interrogatories) on January 17, 2003 – well over a year in advance of the hearing on jurisdiction. The request was designed and targeted narrowly and primarily to adduce evidence of whether AdT was actually controlled, directly or indirectly, by any of the Dutch holding companies that had been inserted into its upstream ownership structure in December 1999. The request also sought to elicit information concerning when the decision to undertake the reorganization of AdT’s mid-stream ownership structure was made. The document requests sought, for example, the articles of incorporation and by-laws of the several entities that were newly inserted into AdT’s mid-stream ownership in December 1999; any documents reflecting communications between AdT and those entities; minutes of board-of-director meetings for those entities; and any documents supporting AdT’s contention that it was controlled directly or indirectly by any national of The Netherlands. The interrogatories sought information such as the identity and nationality of the officers and board members for those entities.

In its Procedural Order No. 1, issued on April 8, 2003, the Tribunal decided to wait for the hearing on jurisdiction to decide if the production of evidence was necessary.⁷⁹ As discussed above, following the hearing on jurisdiction, the majority concluded that majority shareholding was by itself sufficient to establish that AdT

⁷⁹ Order No. 1, ¶ 30, quoted in AdT Decision on Jurisdiction ¶ 325.

was “controlled” by Dutch entities. Therefore, according to the majority, evidence on “actual” control (or the lack thereof) was “without object.”⁸⁰

Again, regardless of whether one agrees with the majority’s conclusion in this particular case, its reasoning is generally consistent with the decision of other international arbitral tribunals, which have been historically reluctant to pierce the corporate veil absent clear indicia of fraud. As discussed supra at § III(B), a majority of the tribunal in Tokios declined to look beyond the corporate form, even when the respondent – the government of Ukraine – alleged that the Lithuanian claimant was “owned and controlled” predominantly by Ukrainian nationals.⁸¹ The Tokios tribunal first quoted the seminal case of Barcelona Traction, which held that

“[t]he wealth of practice . . . indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.”

The tribunal in Tokios concluded that

Respondent has not made a prima facie case, much less demonstrated, that the Claimant has engaged in any of the types of conduct described in Barcelona Traction that might support a piercing of the Claimant’s corporate veil. The Respondent has not shown or even suggested that the Claimant has used its status as a juridical entity of Lithuania to perpetrate fraud or engage in malfeasance. The Respondent has made no claim that the Claimant’s veil must be pierced and jurisdiction denied in order to protect third persons, nor has the Respondent shown that the Claimant used its corporate nationality to evade applicable legal requirements or obligations.

⁸⁰ AdT Decision on Jurisdiction ¶ 327.

⁸¹ Tokios Decision on Jurisdiction ¶ 23.

Similarly, in *Saluka* (also discussed *supra* at § III(B)), the tribunal rejected respondent’s request that it “pierce the corporate veil” between *Saluka* and its parent company, *Nomura*, even though respondent argued that *Saluka* was “a mere surrogate for *Nomura*, and a claim under an investment treaty could not be brought by an entity which was a surrogate for another entity, which, like *Nomura*, was not covered by the Treaty.”⁸² The tribunal began by observing that it “accepts – and the parties have made no attempt to conceal, either from the Tribunal or, in the Claimant’s case, from the Czech authorities – the closeness of the relationship between *Nomura* and *Saluka*. In that respect, the companies concerned have simply acted in a manner which is commonplace in the world of commerce.”⁸³ The tribunal stated further that there was insufficient evidence of fraud or other malfeasance in the case before it to justify piercing the corporate veil:

While it might in some circumstances be permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before it, the Tribunal is of the view that the circumstances of the present case are not such as to allow it to act in that way. The Respondent acknowledges that this possibility presents itself as an equitable remedy where corporate structures had been utilized to perpetrate fraud or other malfeasance, but, in the present case, the Tribunal finds that the alleged fraud and malfeasance have been insufficiently made out to justify recourse to a remedy which, being equitable, is discretionary.⁸⁴

⁸² *Saluka Partial Award*, 227.

⁸³ *id.* ¶ 228.

⁸⁴ *Saluka Partial Award*, ¶ 230.

In AdT, the majority rested its decision not to order the production of evidence concerning which upstream entity or entities actually controlled AdT primarily on its conclusion that actual control was not necessary to resolve the issue. But the majority also concluded that there was not “a sufficient basis in the present record to support an allegation of abuse of corporate form or fraud” so as to warrant piercing the corporate veil between the various entities in AdT’s upstream ownership chain.⁸⁵ The conclusion on the one hand that the corporate veil should not be pierced absent sufficient indicia of fraud – and the conclusion on the other that majority shareholding is enough to establish control, and that the reasons and timing for a corporate reorganization are irrelevant to the issue of jurisdiction – were thus mutually supportive of the majority’s decision.

IV. Conclusion

The Water War and its aftermath presented a nightmare scenario both for the foreign investor and host State. There is no doubt that both AdT and the Bolivian government had good intentions: i.e., to bring a long-needed and critically important sanitary water and sewer system to Cochabamba. Had the project succeeded, the people of Cochabamba would finally have had access to running water on a widespread, regular basis, and AdT might have made a respectable return on its investment over the forty-year term of the Concession Agreement. Instead, AdT held the concession for less than a year and no longer exists. Violence overtook large parts of the country and lives were lost. The people of Cochabamba

⁸⁵ Id. ¶ 331.

still lack an adequate water system. And Bolivia – ranking among the poorest countries in the hemisphere, with terrible infrastructure and in desperate need of foreign investment – is viewed in many quarters as a hostile and dangerous place for foreign investors. As stated above, no one seems to have anticipated the intensely hostile reaction that greeted AdT immediately upon the signing of the Concession Agreement. With the benefit of hindsight, one still can only wonder if a greater effort by the Bolivian government and AdT to convince the people of Cochabamba of the project’s benefits (combined with less dramatic rate increases) might have made the project viable – or whether Cochabamba was simply a tinderbox waiting to be ignited by the slightest spark.

As for the decision on jurisdiction, regardless of whether one agrees with every aspect of the majority’s analysis, or with the conclusions reached under the unique facts of AdT, the majority opinion is best seen as an attempt to draw bright-line rules. Thus, the majority either held or stated in dicta that: (1) parties to an investment contract can waive the right to international arbitration provided by a BIT, so long as the waiver is unambiguous; (2) a party can reorganize its corporate structure to obtain the benefits of a BIT (at least as long as it does so before treaty rights are violated); (3) the presence of majority shareholding (with majority voting rights) is by itself enough to establish that a downstream entity is “controlled” by any upstream entity with such an ownership interest (at least under the BIT at issue); and (4), in the absence of fraud, the corporate veil will not be pierced in an effort to defeat jurisdiction.

The majority's views (and in particular the dicta concerning waiver) appear to leave both the investor and state parties to an investment agreement with considerable discretion to try to depart from the provisions of an otherwise applicable BIT. At the same time, the majority's decision leaves investors with considerable discretion in structuring their investments through a holding company to take advantage of BIT protections. Whether the dicta is adopted by other tribunals in particular remains to be seen, but few investors or host States can afford to ignore it. Toward the end of its decision, the majority described BITs as "portals" through which investments are "structured" and "organized."⁸⁶ Parties entering investment agreements in situations where a BIT may be applicable are well advised to study the AdT decision – and then to examine both the language of the investment agreement and the structure of the investment – to determine whether the portal remains open, and to whom.

⁸⁶ AdT Decision on Jurisdiction ¶ 332.