

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

—
CONCURRING OPINION OF ARBITRATOR
GEORGES ABI-SAAB
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1. My purpose in writing this separate opinion is two-fold. In the first place, on the first jurisdictional objection raised by Argentina, I reach the same conclusion as the Award, but on different grounds, as I explain below. Secondly, while totally subscribing to the reasoning and conclusions of the Award in its treatment of the third jurisdictional objection raised by Argentina, I would like to add certain other grounds in support of the same conclusions.

I. FIRST JURISDICTIONAL OBJECTION

2. I first note that the Parties have made a clear choice of forum in the concession contract, which should be followed for all claims arising from this contract.
3. This choice of forum clause does not imply any kind of relinquishment of diplomatic or international protection (*i.e.* a species of the Calvo clause), because it includes international commercial arbitration, but under the ICC rather than within ICSID. Nor does it imply any relinquishment of any protection under the BIT where what is at issue is an alleged violation of the BIT and not merely and exclusively an alleged violation of the contract, be it clothed in terms of a violation of the BIT.
4. In distinguishing “contract claims” from “treaty claims”, I consider that the same set of facts can give rise to both kind of claims, but on condition that the treaty claim be “self-standing”, or, in other words, that it does not necessarily pass by or posit a contract violation as a fundamental element or premise of its cause of action.
5. Thus, where what is contended in the treaty claim is mainly that the contract has been violated and that this violation constitutes in turn and by another name (figuring in the treaty) a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim. To use the terminology of *Vivendi II*, “where ‘the fundamental basis of the claim’” is the contract, however, many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract.

6. A different solution would run roughshod over the clear text of the contract reflecting the will of the parties, in total disregard of the principles of party autonomy and *pacta sunt servanda*. It would render “inutile” or without effect the contractual stipulation on the choice of forum, giving to a jurisdictional clause in a BIT the effect of superseding all choice of forum contractual stipulations between parties to a dispute, once one of them invokes the jurisdictional clause of the BIT. But the reverse is not true, *i.e.* applying the contractual clause of choice of forum does not neutralize the BIT jurisdictional clause. For, once the “contract claim” is verified in the proper forum chosen by the contracting parties, there is room, in case of a finding of a violation, to apply the jurisdictional clause in the BIT, in order to determine whether the contract violation amounts to a treaty violation (and which one).
7. In the present case, I find that TSA’s claims as formulated in Claimant’s Memorial on the Merits, are all fundamentally rooted in, or based on allegations of violations of the concession contract. In other words, they turned on who violated the contract and whether its termination and consequent action by Argentina were justifiable (as contended by Argentina) or not (as maintained by TSA) according (*i.e.* by reference) to the terms of the contract. Then TSA recharacterises the same as expropriation or another violation in terms of the BIT. But such recharacterisation would not stand by itself if the termination of the contract was found by an adjudicative body to have been legally justified as a result of grave breaches of the contract by TSA. In other words, if these were all the arguments that TSA could offer, the latter claims would not be “self-standing” and should not be admissible as “treaty claims”.
8. However, TSA adduced as evidence some statements of high official spokesmen of the Argentinian government, at the time of the termination of the concession contract and the recovery of the service into the public sector, to the effect that “it is a service that definitely cannot be delegated by the national State”, that “it is one of the services of the State that cannot be delegated”, and that “it is not possible for a private company to have a control through the radio-electric spectrum of the activities carried out by the Argentinian armed forces” (Claimant’s Memorial on the Merits, para. 222). Such statements seem to imply that the activity which is the subject-matter of the concession

contract, by its very nature, is public or governmental and cannot be, or should not have been outsourced to a private company in the first place.

9. I consider that these declarations of Argentinian officials provide *prima facie* evidence that the termination of the concession contract and consequent action by the Argentinian government may have been motivated, not only by TSA's alleged grave breaches of the concession contract, but also by other considerations which seem to fall within the purview of the BIT guarantees. These considerations, independent of the alleged violations of the contract, are, in my view, sufficient *prima facie* to constitute the subject-matter of a treaty claim, and consequently to bring the jurisdictional clause of the BIT into play.
10. I therefore agree, but for the above reasons with the conclusion of the Award that Argentina's first jurisdictional objection should be rejected.

II. THIRD JURISDICTIONAL OBJECTION

11. As is abundantly demonstrated in the Award, Article 25(2)(b) defines the ambit, and thus traces the objective outer limits of ICSID's jurisdiction. These are institutional limits that cannot be waived, changed or extended by *inter se* agreements between parties to the ICSID Convention, but only by a revision of the ICSID Convention itself.
12. It is true that the second clause of Article 25(2)(b) does not define the "foreign control", "because" of which a juristic person holding the nationality of the host State can be "treated as a national of another Contracting State", and that States have some latitude in defining "foreign control" by agreement, in their BITs or elsewhere. But as the Award points out, foreign control is an objective condition of jurisdiction, whose existence has to be established objectively by the Tribunal. The Parties cannot by agreement waive it away or reduce it to a mere semblance or formality.
13. It is against this background and in this context that BIT stipulations expressing the agreement of the parties, as required by Article 25(2)(b) of the ICSID Convention, and reflecting their understanding of how "foreign control" has to be interpreted.

14. The interpretation of paragraph B of the Protocol to the BIT between Argentina and the Netherlands lends to controversy. Claimant contends that the text is clear; that the *shall* in the clause “The following facts, inter alia, *shall* be accepted as evidence of the control” (emphasis added), makes it imperative for the Tribunal to decide exclusively on the basis of the facts cited thereafter, particularly in the provision which is applicable in the present case: “ii-having direct or indirect participation in the capital of a company higher than 49%...”, and to ignore all other available evidence of real control.
15. It is to be noted, however, that the official Spanish version of the text of the Protocol does not use the Spanish equivalent of the imperative “shall”, but the rather discretionary “*pueden*”, the equivalent of “*can*” or the French “*peuvent*”. If we go by the Spanish text, the above interpretation becomes untenable. But even if we go by the English version, on careful reading, the text does not appear as clear or exempt of ambiguities as that interpretation makes it to be. This is illustrated by the two following queries:
 - a) the term “*inter alia*”, coming before the verb (in the English version of the Protocol), indicates that other facts are also covered by the phrase “*shall* be accepted as evidence of control”. No problem arises if those other facts go in the same direction as the ones enumerated in the text. But what would be the situation if the other facts contradict those enumerated in the text, particularly if they outweigh them as evidence?
 - b) the text refers to “direct or *indirect*” participation in capital (or possession of votes). The establishment of “indirect” participation or possession necessarily implies the piercing of the second corporate layer (beyond the nationality of the host State). But if the text allows piercing the corporate veil to establish “indirect” foreign control at a third or fourth remove, could it prohibit doing the same in order to infirm this foreign control, by establishing that real control is in the hands of nationals of the host State?
16. If a text raises such interrogations as to its import and significance, it cannot be considered “clear” in the sense of the rule of interpretation according to the clear and ordinary meaning. This makes it even more imperative to resort to context and object and purpose in its interpretation.

17. Another possible and more logical interpretation of the provision of the Protocol is that the facts enumerated therein “can” or even “have to” be accepted, as a minimum, in the absence of any other evidence of foreign control; but not that they would prevail over other more ample and probative evidence or prohibit the Tribunal from admitting such evidence if it results from piercing the second corporate layer.
18. This interpretation, while sitting well with the language of the Protocol, particularly its Spanish official version, is more congruent with its context, which is Article 25(2)(b) of the ICSID Convention that it cannot waive, but is supposed to implement, as well as with the object and purpose of this Convention as a whole; which is to settle disputes between States and nationals of other States parties to the Convention, and not between States and their own nationals.
19. However, even if the text of the Protocol were clear, in the sense of the interpretation proposed by Claimant which in my view it is not, as already shown - the rule of interpretation according to the clear and ordinary meaning is subject to the *provisio* that such interpretation does not lead to “absurd or unreasonable results”. And what can be more absurd, in the face of stark reality, than to opt for its shadow, obfuscating by the same token the sense of the law.
20. These are my additional reasons for admitting the third jurisdictional objection of Respondent, and in consequence dismissing the case for lack of jurisdiction.

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

[*signed*]

Professor Georges Abi-Saab
Arbitrator
Date: