

**Date of dispatch to the parties: 20 August 2007**

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
Washington, D.C.

**In the Arbitration between**

**COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A.**  
**and**  
**VIVENDI UNIVERSAL S.A.**  
**Claimants**

v.

**ARGENTINE REPUBLIC**  
**Respondent**

**Case No. ARB/97/3**

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**AWARD**

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**The Tribunal**

Professor Gabrielle Kaufmann-Kohler  
Professor Carlos Bernal Vera  
J. William Rowley QC (President)

**Secretary of the Tribunal**

Dr. Claudia Frutos-Peterson

**Assistant to the Tribunal**

Ms. Lisa Parliament

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## TABLE OF DEFINED TERMS IN THE AWARD

<b>“AA Consortium”</b>	Aguas del Aconquija (later to become Compañía de Aguas del Aconquija S.A.) (also referred to as “Consortium”)
<b>“Argentina”</b>	Argentine Republic (also referred to as the “Argentine Republic”)
<b>“Argentine Republic”</b>	Argentine Republic (also referred to as “Argentina”)
<b>“Award”</b>	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Final Award of 20 August 2007
<b>“BIT”</b>	Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (also referred to as the “Treaty”)
<b>“CAA”</b>	Compañía de Aguas del Aconquija S.A.
<b>“CETI”</b>	Centro de Estudio de Transporte e Infraestructura S.A.
<b>“CGE”</b>	Compagnie Générale des Eaux (now Vivendi Universal S.A.)
<b>“Claimants”</b>	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.
<b>“Consortium”</b>	Aguas del Aconquija (later to become Compañía de Aguas del Aconquija S.A.) (also referred to as “AA Consortium”)
<b>“Decision on Annulment”</b>	Decision on Annulment of the <i>ad hoc</i> Committee, constituted on 3 July 2002, comprised of Mr. Yves Fortier, President, Professor James Crawford and Professor José Carlos Fernández Rozas, in <i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.</i>

*(formerly Compagnie Générale des Eaux) v. Argentine Republic,*  
ICSID Case No. ARB/97/3.

**“Defender of the People”** Head of the office created 15 August 1995, by Tucumán Law No. 6644, for the protection and defence of the legal rights and interests of persons and community, as contained in the National and Provincial Constitutions and in the laws passed as a consequence thereof before the acts, events and omissions of the Provincial Public Administration, with the provisional scope of this law (also known as “Defender of the Public”, or the “Ombudsman”)

**“Defender of the Public”** Head of the office created 15 August 1995, by Tucumán Law No. 6644, for the protection and defence of the legal rights and interests of persons and community, as contained in the National and Provincial Constitutions and in the laws passed as a consequence thereof before the acts, events and omissions of the Provincial Public Administration, with the provisional scope of this law (also known as “Defender of the People”, or the “Ombudsman”)

**“DiPOS”** Direccion Provincial de Obras Sanitarias

**“DYCASA”** Dragados y Construcciones Argentina S.A.

**“ERSACT”** Tucumán Provincial water regulator created by Tucumán Provincial Law No. 6529, 18 January 1994 (formerly “ERAT”) (also referred to as the “Regulator”)

<b>“Executive Orders”</b>	Resolutions or regulations issued pursuant to the Provincial Constitution of the Province of Tucumán by the Governor of the Province of Tucumán on matters referred to in laws enacted by the Tucumán Provincial Legislature
<b>“Executive”</b>	The executive branch of the Tucumán provincial government, composed of the Governor and the Lieutenant or Vice Governor and Ministers appointed by the Governor
<b>“First Award”</b>	<i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Award of 21 November 2000 (also referred to as the “Original Award”)
<b>“First Tribunal”</b>	A duly appointed Tribunal, comprised of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff, constituted in <i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic</i> , ICSID Case No. ARB/97/3, pursuant to a Request for Arbitration filed by <i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale</i> on 26 December 1996 (also referred to as the “Original Tribunal”)
<b>“ICSID Convention”</b>	Convention on the Settlement of Investment Disputes between States and other Nationals of Other States
<b>“ILC Articles”</b>	The International Law Commission’s Articles on State Responsibility (2002)
<b>“Legislature”</b>	Tucumán provincial legislature

<b>“Ombudsman”</b>	Head of the office created 15 August 1995, by Tucumán Law No. 6644, for the protection and defence of the legal rights and interests of persons and community, as contained in the National and Provincial Constitutions and in the laws passed as a consequence thereof before the acts, events and omissions of the Provincial Public Administration, with the provisional scope of this law (also known as “Defender of the Public”, or the “Defender of the People”)
<b>“Original Award”</b>	<i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic</i> Award of 21 November 2000 (also referred to as the “First Award”)
<b>“Original Tribunal”</b>	A duly appointed Tribunal, comprised of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff, constituted in <i>Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic</i> , ICSID Case No. ARB/97/3, pursuant to a Request for Arbitration filed by Compañía de Aguas del Aconquija S.A. and Compagnie Générale on 26 December 1996 (also referred to as the “First Tribunal”)
<b>“Province”</b>	Province of Tucumán, Argentine Republic (also referred to as “Tucumán”)
<b>“Rais Report”</b>	Case Study, Concession for the Potable Water and Sewerage Services in Tucumán, by Jorge Carlos Rais, Maria Esther Esquivel, Sergio Sour, Consultants, April 2001.

<b>“Regulator”</b>	Tucumán Provincial water regulator created by Tucumán Provincial Law No. 6529, 18 January 1994 (formerly “ERAT”) (also referred to as “ERSACT”)
<b>“Roggio”</b>	Benito Roggio e Hijos S.A.
<b>“San Miguel”</b>	San Miguel de Tucumán, the provincial capital of the Province of Tucumán
<b>“Second Request”</b>	Claimants’ Request for Arbitration dated 29 August 2003
<b>“Supercemento”</b>	Supercemento S.A.
<b>“Treaty”</b>	Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (also referred to as the “BIT”)
<b>“Tucumán”</b>	Province of Tucumán, Argentine Republic (also referred to as the “Province”)
<b>“Vienna Convention”</b>	1969 Vienna Convention on the law of Treaties
<b>“Vivendi”</b>	Vivendi Universal S.A. (formerly Compagnie Générale des Eaux)

## **1. INTRODUCTION AND SUMMARY**

### **1.1. Overview**

1.1.1. This case arises out of the troubled relationship which developed between the parties to a 1995 “Concession Agreement” which privatised (as it turned out, unsuccessfully) the water and sewage services of the Province of Tucumán (“Tucumán” or the “Province”) in the Argentine Republic (“Argentine Republic” or “Argentina”). The original signatories to the Concession Agreement were a French company, Compagnie Générale des Eaux (“CGE” now Vivendi Universal S.A., “Vivendi”), its Argentine affiliate, Compañía de Aguas del Aconquija S.A. (“CAA”) Benito Roggio e Hijos S.A. (“Roggio”), Dragados y Construcciones (“DYCASA”), and the Province.

1.1.2. The Argentine Republic was not a party to the Concession Agreement but is party to a bilateral investment treaty signed on 3 July 1991 with the French Republic – Agreement between the Argentine Republic and the French Republic for the Promotion and Reciprocal Protection of Investments (“BIT” or “Treaty”).<sup>1</sup> Both Argentina and France are also parties to the Convention on the Settlement of Investment Disputes between States and other Nationals of Other States (“ICSID Convention”) which entered into force for both states prior to signature of the Concession Agreement.<sup>2</sup>

1.1.3. The case has a protracted history, the current dispute having been the subject of prior ICSID proceedings before the Centre. In those proceedings, pursuant to a

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<sup>1</sup> The BIT was published as Argentine Law No. 24.100, Boletín Oficial 14 July 1992; Acuerdo Entre el Gobierno de la Republica Francesa Para la Promoción y la Protección Reciproca de Las Inversiones, 3 July 1991 (Exhibit 310).

Request for Arbitration filed by CGE and CAA on 26 December 1996, a duly appointed tribunal comprised of Judge Francisco Rezek - President, Judge Thomas Buergenthal and Mr. Peter Trooboff (“First Tribunal” or “Original Tribunal”), rendered an award on 21 November 2000 (“First Award” or “Original Award”).<sup>3</sup>

1.1.4. On 20 March 2001, a Request for Partial Annulment was filed by CAA and CGE’s successor, Vivendi, and on 3 July 2002, a duly constituted “*ad hoc* Committee”, comprised of Mr. Yves Fortier - President, Professor James Crawford and Professor José Carlos Fernández Rozas, rendered a Decision on Annulment (“Decision on Annulment”).<sup>4</sup>

1.1.5. The *ad hoc* Committee decided, *inter alia*, that the First Tribunal rightly held that it had jurisdiction over the claims before it, but that it had exceeded its powers by not examining the merits of the claims based on actions of the Tucumán authorities under the BIT. Accordingly, the Committee annulled the First Tribunal’s decision with regard to those claims. The *ad hoc* Committee did not annul the First Tribunal’s findings with respect to the claims “based directly on

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<sup>2</sup> Entered into force for Argentina on 18 November 1984; entered into force for France on 20 September 1967.

<sup>3</sup> The Original Award is published at 16 ICSID Rev.—FILJ 641 (2001); 40 ILM 426 (2001); 125 I.L.R. 1 (2004); 26 Y.B. Com. Arb. 61 (2001) (excerpts); Spanish translation of English original in La Ley (Buenos Aires) Año LXV No. 25, February 5, 2001, p. 1. The text of the Original Award is also available online through <http://www.worldbank.org/icsid>.

<sup>4</sup> The Decision on Annulment is published at 19 ICSID Rev.—FILJ 89 (2004); 41 ILM 1135 (2002); 6 ICSID Rep. 340 (2004); 125 I.L.R. 58 (2004); French translation of English and Spanish originals in 130 Journal du droit international 195 (2003). The text of the Decision on Annulment is also available online through <http://www.worldbank.org/icsid>.

alleged actions or failures to act of the Argentine Republic” (the “Federal Claims”).<sup>5</sup>

- 1.1.6. On 26 August 2002, Respondent submitted to the Secretary-General of ICSID a Request for Supplementation and Rectification of some aspects of the *ad hoc* Committee’s Decision. By Decision dated 26 May 2003, the *ad hoc* Committee denied Respondent’s Request for a Supplementary Decision and, with one minor exception (having to do with a typographical error), denied Respondent’s Request for Rectification.<sup>6</sup>
- 1.1.7. By a Request for Arbitration dated 29 August 2003 (“Second Request”), Vivendi and CAA (“Claimants” in these proceedings) resubmitted the dispute to ICSID pursuant to Article 55(1) of the ICSID Arbitration Rules. Claimants sought adjudication by a new tribunal of the issues as to which the First Award had been annulled, namely the merits of their BIT Claim arising out of the alleged acts and omissions of the Tucumán authorities. As to the merits, Claimants assert that the Tucumán authorities denied Claimants fair and equitable treatment in connection with the Concession Agreement and expropriated their investment without compensation.
- 1.1.8. Claimants say that the Argentine Republic is internationally responsible for the impugned acts and omissions of the Tucumán authorities and that Respondent has therefore violated Claimants’ rights under Articles 3 and 5 of the BIT.

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<sup>5</sup> Decision on Annulment at ¶16.

<sup>6</sup> The Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award (3 May 2003) is published at 19 ICSID Rev.—FILJ 139 (2004 ); 8 ICSID Rep. 490 (2005). The text is also available online through <http://www.worldbank.org/icsid>.

- 1.1.9. Claimants seek to recover damages in the sum of US\$316,923,000.00 plus interest compounded at 9.70% from 27 November 1997.<sup>7</sup>
- 1.1.10. Claimants' investments having been made in US dollars and/or French francs, Claimants request that any award be made in US dollars.
- 1.1.11. As will be evident from this award ("Award") and our previous Decision on Jurisdiction, the "Tribunal" has been greatly assisted by the submissions of counsel, who, in turn, were helped by many others whose names do not appear in the transcription of the hearings. It is therefore appropriate, at the beginning of this Award to record our appreciation of the scholarship and industry which counsel for the disputing parties have brought to bear during these complicated and lengthy proceedings, together with their respective experts, assistants and other advisors.

## **1.2. The Parties**

### **Claimants**

- 1.2.1. CAA is a company established and organised under the laws of Argentina with its principal place of business at the following address:

Compañía de Aguas del Aconquija S.A.

Catamarca 444

C4000ITJ – San Miguel de Tucumán

Provincia de Tucumán

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<sup>7</sup> Memorial at ¶¶404-409.

Argentina

1.2.2. Vivendi is a company established and organised under the laws of France with its principal place of business at the following address:

Vivendi Universal S.A.

42 Avenue de Friedland

75008 Paris

France

1.2.3. In its Decision on Jurisdiction,<sup>8</sup> the Tribunal found Vivendi to be the successor-in-interest to CGE, a company also established and organised under the laws of France.<sup>9</sup>

## **Respondent**

1.2.4. Respondent is the Argentine Republic.

## **1.3. The Parties' Representatives**

1.3.1. Claimants were represented in this proceeding by:

Mr. Daniel Price

Judge Stephen M. Schwebel

Mr. Stanimir A. Alexandrov

1501 K Street, NWCP 112

Mr. Samuel Boxerman

Washington, DC 20004

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<sup>8</sup> As defined below under the heading "Decision on Jurisdiction".

<sup>9</sup> Decision on Jurisdiction at ¶82.

Ms. Marinn F. Carlson	United States of America
Ms. Patricio Grané	
Mr. Michael J. Smart	Mr. Ignacio Colombres Garmendia
Sidley Austin Brown & Wood LLP	Ms. Inés García González
1501 K Street, NWCP 112	Ignacio Colombres Garmendia y Asociados
Washington, DC 20004	San Martín 666 - 6° Piso
United States of America	San Miguel de Tucumán
	Argentina
Luis A. Erize	
Abeledo Gottheil Abogados SC	
Ave. E. Madero 1020 – Piso 5	
1106 Buenos Aires	
Argentina	

1.3.2. Respondent was represented in this proceeding by:

Mr. Osvaldo César Guglielmino	Prof. Philippe Sands
Procurador del Tesoro de la Nación	Ms. Alison Macdonald
Ms. Leticia Sierra Lobos	Matrix Chambers
Mr. Ignacio Torterola	Griffin Building, Gray's Inn
Mr. Fabián Rosales Markaida	London WC1R
Mr. Jorge Barraguirre	
Mr. Diego Gosis	Mr. Bruce Heyman
Ms. Adriana Busto	London

Mr. Luciano Lombardi

Mr. Juan Acosta

Mr. Antonio Estofan

Mr. Geofredo Rush

Ms. Carolina Mordini

Ms. María Guadalupe Iglesias

Procuración del Tesoro de la Nación

Posadas 1641

CP 1112 Buenos Aires

Argentina

#### **1.4. The Arbitral Tribunal and Secretaries**

1.4.1. The present tribunal was constituted on 14 April 2004, as follows:

Mr. J. William Rowley QC (President)

McMillan Binch Mendelsohn

20 Essex Street Chambers

181 Bay Street

20 Essex Street

Suite 4400

London WC2R 3AL

Toronto, Ontario

England

M5J 2T3

Prof. Gabrielle Kaufmann-Kohler

Schellenberg Wittmer

15bis, Rue des Alpes

P.O. Box 2088

CH-1211 Geneva 1

Prof. Carlos Bernal Vereza

Noriega y Escobedo

Sierra Mojada 626

Lomas de Barrilaco

11010 Mexico DF

1.4.2. The Tribunal's administrative secretary was Dr. Claudia Frutos-Peterson, Counsel, ICSID, World Bank, Washington DC. The Tribunal also acknowledges the considerable support received from ICSID generally and particularly from Mrs. Mercedes Kurowski, Ms. Ashley Grubor, Ms. Michelle Salomon and Mr. Malkiat Singh.

1.4.3. Ms. Lisa Parliament of McMillan Binch Mendelsohn, Toronto, Canada acted as Assistant to the Tribunal. Ms. Parliament's appointment was made with the agreement of the disputing parties. As Assistant to the Tribunal she assumed the same obligations of impartiality, independence and confidentiality as the members of the Tribunal.

## **2. PROCEDURAL HISTORY**

### **2.1. Original Award**

2.1.1. As stated above, the First Award was annulled in part. Given that a number of the parties arguments before us turn on both the First Tribunal's holdings, and the analysis made by the *ad hoc* Committee of the First Tribunal's reasoning, it is

useful to highlight here aspects of the First Award and the Decision on Annulment of the *ad hoc* Committee.

- 2.1.2. Because of its importance to an understanding of the First Award and the Decision on Annulment it is helpful to record the terms of Article 16.4 of the Concession Agreement – the exclusive jurisdiction clause – which provides:

*“For purposes of interpretation and application of this Contract, the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.”*<sup>10</sup>

- 2.1.3. Having joined to the merits all issues which had been raised as to jurisdiction, the First Tribunal, in the Original Award, rejected each of Respondent’s objections to jurisdiction. It also dismissed each of Claimants’ so-called federal claims (*ie*, claims arising from alleged acts or omissions on the part of the federal authorities). The First Tribunal’s overall conclusion as to those claims was as follows:

*“In conclusion, the Tribunal finds that the record of these proceedings does not provide a basis for holding that the Argentine Republic failed to respond to the situation in Tucumán and the requests of the Claimants in accordance with the obligations of the Argentine Government under the BIT”*.<sup>11</sup>

- 2.1.4. As to the provincial claims, the First Tribunal found that:

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<sup>10</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127), at Article 16.4.

<sup>11</sup> First Award at ¶92.

*“...the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement... Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract”.*<sup>12</sup>

## **2.2. Annulment Decision**

2.2.1. As previously noted, the *ad hoc* Committee decided that the First Tribunal rightly held it had jurisdiction over the Claims before it, but that it had exceeded its powers when it failed to examine the merits of the claims for acts of the Tucumán authorities under the BIT.

2.2.2. In reaching its decision on this latter point, the *ad hoc* Committee observed:

*“...where the “fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.”*<sup>13</sup>

*“In the Committee’s view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to*

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<sup>12</sup> First Award, Part A, p. 3.

<sup>13</sup> Decision on Annulment at ¶101. The *ad hoc* Committee noted that it may be that “mere” breaches of contract, accompanied by bad faith or other aggravating circumstances, will rarely amount to a breach of the fair and equitable treatment standards set out in Article 3. However, the First Tribunal failed to offer any interpretation of that Article, nor did it seek to base its rationale on this consideration.

*dismiss the claim on the ground that it could or should have been dealt with by a national court.”*<sup>14</sup>

*“A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”*<sup>15</sup>

*“...it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT.”*<sup>16</sup>

*“...whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.”*<sup>17</sup>

2.2.3. After noting that it was not its function to form even a provisional view as to whether or not the Tucumán conduct involved a breach of the BIT, and stating clearly that it had not done so, the *ad hoc* Committee nonetheless concluded that the conduct alleged by claimants, if established, *could* breach the BIT. Accordingly, it annulled the decision of the First Tribunal so far as it concerned the *entirety* of the Tucumán claims.

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<sup>14</sup> Decision on Annulment at ¶102.

<sup>15</sup> *Ibid.*, at ¶103.

<sup>16</sup> *Ibid.*, at ¶105.

<sup>17</sup> *Ibid.*, at ¶110. In connection with this statement, the *ad hoc* Committee cited the ILC Articles, commentary to Article 4, para. (6); commentary to Article 12, paras. (9) – (10), and also C. Amerasinghe, “State Breaches of Contract with Aliens and International Law,” *American Journal of International Law*, vol. 58 (1964), p. 881 at pp. 910-912: “The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties”; R. Jennings & A. Watts, *Oppenheim’s International Law* (9<sup>th</sup> edn.) (Harlow Longman, 1992) p. 927: “It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state’s international responsibility.”

### **2.3. The Resubmitted Dispute**

2.3.1. Following the Decision on Annulment, on 29 August 2003, Claimants resubmitted the dispute to ICSID, seeking a determination of the merits of the claims with respect to which the Original Award was annulled. The resubmitted case continues to bear the same case number, assigned to the original case.

### **2.4. Pleadings and Agreed Procedural Timetable for the Resubmitted Dispute**

2.4.1. The present Tribunal was constituted on 14 April 2004 and held its first session with the parties on 7 July 2004 at the offices of the World Bank in Washington D.C.

2.4.2. At the first session, the parties confirmed that they had no objection to the constitution of the Tribunal. Following the expression of the parties' views and in consideration of the agreements reached between the parties, a timetable for production of documents, written submissions and a substantive hearing was established.

2.4.3. At this time, the parties also agreed, *inter alia*, that statements from witnesses who were not available for cross-examination at the oral hearing were not to be taken into evidence by the Tribunal. The parties further agreed to include with their written submissions not only their legal argument, but also all of the evidence on which they intended to reply for the legal arguments advanced therein. The parties agreed that the Tribunal was not to receive any testimony or other evidence that had not been introduced in writing, unless the Tribunal determined that exceptional circumstances existed. The agreement of the parties

with respect to the submission of evidence and the attendance of witnesses proved significant during the course of the hearing, as discussed further below at 2.7.6 *et seq.*

2.4.4. Prior to the hearing on the merits, and in accordance with the procedure and timetable established by the Tribunal (with subsequent amendments as to timetabling thereafter), the disputing parties made written submissions to the Tribunal as set out below:

- (i) Memorial of Claimants, 24 November 2004;
- (ii) Respondent's Exception to the Jurisdiction of the Centre and the Jurisdiction of the Tribunal, 7 April 2005;
- (iii) Claimants' Counter-Memorial on Jurisdiction, 31 May 2005;
- (iv) Respondent's Reply on Jurisdiction (entitled Rejoinder Brief About Objections Raised), 21 June 2005;
- (v) Claimants' Rejoinder on Jurisdiction, 12 July 2005;
- (vi) Counter-Memorial of Respondent, 29 November 2005;
- (vii) Reply of Claimants, 15 February 2006;
- (viii) Rejoinder Memorial of Respondent, 19 May 2006.

## **2.5. Argentina's Objections to the Jurisdiction of the Tribunal**

2.5.1. In accordance with the agreed timetable, Claimants filed their Memorial on 24 November 2004.

2.5.2. On 23 March 2005, approximately two weeks before the due date for the submission of its Counter-Memorial, Respondent filed an Exception to the Jurisdiction of the Centre and the Jurisdiction of the Tribunal, in which it raised

objections to the jurisdiction of the Centre and this Tribunal. Those objections can be summarised as follows:

- (i) Vivendi had not established itself as the successor-in-interest to CGE. Rather, through a series of complicated corporate changes that occurred after the filing of the first Request but before the filing of the Second Request, Veolia Environment succeeded to CGE's majority shareholding in CAA and Vivendi currently owns only 5.3% of Veolia Environment's issued and outstanding shares (on the date of the Second Request it held only 20.4% of such shares);
- (ii) being presently only an indirect minority shareholder of CAA, Vivendi's current claims are derivative and derivative claims are forbidden under both Argentine and international law;
- (iii) with respect to CAA's claims, CAA had not obtained its French nationality for protection pursuant to the terms of Argentina-France BIT and to the extent that it had acquired any protection under the treaty it had done so illegitimately through transfers and transactions in violation of the Concession Agreement;
- (iv) CAA and Vivendi had failed to comply with Rule 36(2) of the ICSID Convention and Rule 2(1)(f) of the Institution Rules; and
- (v) the *ad hoc* Committee's Decision on Annulment precludes consideration of purely contractual claims (*ie*, for breach of the Concession Agreement). To the extent that the present Tribunal has jurisdiction, it is limited to claims for breach of the BIT which are grounded in allegations of conspiracy or based on facts which constitute a concerted effort by the Tucumán authorities to frustrate the Concession Agreement.

2.5.3. On 12 April 2005, having considered Respondent's objections to jurisdiction and the parties submissions of 1 and 7 April 2005, the Tribunal decided that Respondent's objections required to be dealt with as a preliminary question. The parties thereupon exchanged a series of submissions on jurisdiction (as described in the next preceding section).

## 2.6. Decision on Jurisdiction

- 2.6.1. After a two-day oral hearing on jurisdiction, held on 16-17 August 2005 in Washington, D.C., the Tribunal issued its Decision on Jurisdiction on 14 November 2005, rejecting each of Respondent's objections.<sup>18</sup>
- 2.6.2. Because Respondent continues to assert defences based on CAA not being a proper claimant under the Treaty,<sup>19</sup> it is helpful to set out here a number of the findings made by the First Tribunal, the *ad hoc* Committee and this Tribunal in respect of Respondent's successive jurisdictional arguments concerning CAA's standing.
- 2.6.3. In rejecting Argentina's initial objections to jurisdiction, the First Tribunal found that:

*"This case concerns a claim against the Argentine Republic submitted to ICSID by CGE, a French corporation that operates water and sewage systems in France and other countries, and also by CGE's Argentine affiliate, CAA."*<sup>20</sup>

- 2.6.4. The First Tribunal explained this finding in footnote 6 of the First Award in the following language:

*"Respondent argued that CAA should not be treated as a French investor because this acquisition occurred after disputes had arisen between CGE and Tucumán (Resp. Mem. at App. B, Note relating to CGE's Acquisition). CGE responded that the critical date for purposes of determining control under Article 25(2)(b) and under precedent*

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<sup>18</sup> A copy of the Decision on Jurisdiction has been published online at [http://www.iisd.org/pdf/2006/itn\\_vivendi\\_decision.pdf](http://www.iisd.org/pdf/2006/itn_vivendi_decision.pdf).

<sup>19</sup> Memorial at ¶¶407-415.

<sup>20</sup> First Award at ¶24.

*interpreting the ICSID Convention is the date for consent to arbitration and that is the date in late 1996 when CGE submitted the dispute to arbitration. All parties agree that by late 1996 CGE had acquired the Dycasa shares.... For purposes of resolving the issues addressed by this Award, the Tribunal has determined that CGE controlled CAA and that CAA should be considered a French investor from the effective date of the Concession Contract.”*

2.6.5. The *ad hoc* Committee did not annul this positive finding; it expressly endorsed it.

*“Moreover it cannot be argued that CGE did not have an “investment” in CAA from the date of the conclusion of the Concession Contract, or that it was not an “investor” in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5. It is also clear that CGE controlled CAA at the time the proceedings were commenced, so that there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration. In the circumstances, and for the purposes of the present proceedings, the Committee does not need to reach any conclusion on the precise extent of CAA’s and CGE’s treaty rights at different times.”<sup>21</sup>*

2.6.6. Ultimately, the *ad hoc* Committee concluded that “the Tribunal rightly held that it had jurisdiction over the claims.”<sup>22</sup>

2.6.7. Amongst the various objections raised as to the Tribunal’s jurisdiction, Respondent sought to rely on events subsequent to the date CGE submitted its claim to arbitration to show that Vivendi had not established itself as the successor to CGE.

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<sup>21</sup> Decision on Annulment at ¶50.

<sup>22</sup> Decision on Annulment at ¶119.

2.6.8. As to this aspect of Respondent’s objections, this Tribunal rejected Respondent’s allegation that there had been a change in the CAA’s corporate ownership subsequent to the Decision on Annulment of the *ad hoc* Committee. In doing so, we held that:

*“The evidence before this Tribunal demonstrates that, in May 1998, CGE changed its name to Vivendi S.A., which then merged with several other companies to form the company Vivendi Universal. Vivendi Universal continues to this date to hold the majority stake in CAA that was acquired at the time by CGE.”*<sup>23</sup>

*“In these circumstances, the Tribunal has no difficulty whatever in concluding that the parties to the resubmitted case are the same as the parties below.”*<sup>24</sup>

## **2.7. Hearing on the Merits and Evidentiary Matters**

2.7.1. A hearing on the merits was held from 24 July to 4 August 2006, (over 11 working days) at the seat of the Centre at the offices of the World Bank in Washington, D.C. The hearing was recorded by transcript.

2.7.2. At the hearing, the Tribunal heard oral testimony from the following witnesses presented by Claimants:

Mr. Daniel Benquis

Mr. Christian Lefaix

Mr. Charles-Louis de Maud’huy

Mr. José Alvaro Padilla

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<sup>23</sup> Decision on Jurisdiction at ¶82.

<sup>24</sup> Decision on Jurisdiction at ¶86. However, we also concluded that, as a consequence of the well-established rule of international law, as expressed by the ICJ in the *Lockerbie Case*, that: “The consequence of this rule is that, once established, jurisdiction cannot be diverted. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an *ad hoc* Committee’s Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal’s jurisdiction over the dispute.” See, Decision on Jurisdiction at ¶63.

Mr. José Manuel García González	Ms. Dominique Perrier
Dr. Herman J. Gibb	Mr. J. Alan Roberson
Mr. Gérald Guérin	Mr. François de Rochambeau
Mr. Régis Hahn	Mr. Walter Velarde

2.7.3. The Tribunal also heard oral testimony from the following witnesses presented by Respondent:

Mr. Daniel Esteban Arancibia	Mr. Ángel María García Pinto
Mr. Próspero Barrionuevo	Mr. Raúl Gil Romero
Ms. Silvia Estela Courel	Mr. Emilio Lentini
Mr. Franco Davolio	Mr. Raúl Roque Topa
Mr. Fortunato Carlos Duguech	Mr. Daniel Arturo Vaca

2.7.4. In addition to the evidence received at the oral hearing, Claimants filed witness statements and/or expert reports from:

Daniel Benquis	Régis Hahn
Alberto B. Bianchi	Herve Jauffret
Carmen Broudeur	Christian Lefaix
Juan Walter Velarde Carrión	Álvaro José Padilla
Charles-Louis de Maud'huy	Daniel José Paz
François de Rochambeau	Dominique Perrier

Herman J. Gibb

J. Alan Roberson

Gérald Guérin

Christoph Schrueur

José Manuel García González

José W. Vanetta

2.7.5. Similarly, Respondent filed witness statements and/or expert reports from:

Daniel Esteban Arancibia

Ismael Mata (replaces report of  
Francisco Sassi Colombres)

Próspero Barrionuevo

Jorge A. García Mena

Maria Silvina Bosio

Alejo J. Molinari

Gabriel Bouzat

María Gilda Pedicone de Valls

Daniel Chudnovsky

Jorge Carlos Rais

Francisco Sassi Colombres (report  
replaced by that of Ismael Mata)

Raúl Gil Romero

Sylvia Estela Courel

Carlos F. Rosenkrantz

Franco Davolio

Raúl Roque Topa

Fortunato Carlos Duguech

Héctor Osvaldo Turk

Ángel María Manuel García Pinto

Daniel Arturo Vaca

Juan Carlos Jiménez

Daniel Enrique Yáñez

Michael C. Kavanaugh

Emilio Juan Lentini

2.7.6. On 10 July 2006, Claimants advised Respondent and the Tribunal that one of its witnesses, Dr. Paz, would be unable to attend the hearing on the merits having become severely ill. At the Tribunal's request, on 17 July 2006, Claimants

provided a medical certificate describing Dr. Paz's condition and his inability to participate in the schedule hearing.

2.7.7. During the course of the hearing, Respondent advised Claimants and the Tribunal that Mr. Jorge Rais had also become ill and would not be able to attend the hearing as had originally been anticipated. At the Tribunal's request, Respondent provided Claimants and Tribunal with a medical certificate describing Mr. Rais's medical condition and his inability to participate in the scheduled hearing.

2.7.8. The parties agreed that, having regard to the acceptable medical certificates that had been provided, the evidence of both Mr. Rais and Mr. Paz, as provided in their witness statements, was to be admitted in evidence before the Tribunal, despite their inability to attend the oral hearing.<sup>25</sup>

2.7.9. Prior to the commencement of the oral hearing, by letters dated 14 and 19 July 2006, Respondent applied to the Tribunal, *inter alia*, for an order permitting one of its expert witnesses, Mr. Michael Kavanaugh, to testify by video conference, instead of attending in-person at the oral hearing. Claimants made their position known on Respondent's application in their letters of 18 and 20 April 2006.

2.7.10. On 21 July 2006, having considered the parties' respective positions, the Tribunal denied Respondent's application, noting that no reason had been provided for the proposed non-attendance at the oral hearing of Mr. Kavanaugh. The Tribunal indicated its willingness to reconsider Respondent's application if Respondent

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<sup>25</sup> Transcript of the hearing on the merits, Day 8, p. 1915 (31 July 2006).

substantiated, for good reason, why Mr. Kavanaugh could not make himself available to attend.

2.7.11. At the commencement of the oral hearing, Respondent advised the Tribunal it had been unable to reach Mr. Kavanaugh and sought an order either to allow Mr. Kavanaugh's evidence to remain on the record despite his absence from the hearing, or to permit Mr. Kavanaugh to testify by video conference.

2.7.12. Claimants counter-applied, seeking an order from the Tribunal striking Mr. Kavanaugh's evidence from the record in accordance with the prior agreement of the parties and having regard to the fact that no explanation had been provided as to Mr. Kavanaugh's inability to attend.

2.7.13. Initially, the Tribunal advised the parties that it would defer a ruling on the parties' competing applications, preferring to give Respondent a further opportunity to contact Mr. Kavanaugh and to provide an explanation as to his reasons for non-attendance.

2.7.14. On day eight of the hearing, Respondent advised the Tribunal that one of its former legal advisers had been aware at the time Mr. Kavanaugh's witness statement was given that he would be unable to attend the hearing on the merits due to a prior commitment. The Tribunal was further advised that, although he had not yet been contacted, Mr. Kavanaugh was expected to arrive in Paris that night or the following day.

2.7.15. Respondent thereupon renewed its application to have Mr. Kavanaugh's witness statement received in evidence and for his cross-examination to take place by video conference. Claimants renewed their application to have Mr. Kavanaugh's evidence stricken from the record.<sup>26</sup>

2.7.16. After considering of the Parties' respective position, the Tribunal denied Respondent's application to present Mr. Kavanaugh for cross-examination by video conference and granted Claimants' application to have Mr. Kavanaugh's witness statements stricken from the record. The Tribunal was influenced, *inter alia*, by the number of opportunities Respondent had been given to explain the whereabouts of Mr. Kavanaugh and his reasons for being unable to attend the oral hearing and the unwillingness of Claimants to depart from the prior agreement of the parties that statements from witnesses who were not available for cross-examination at the oral hearing were not to be taken into evidence by the Tribunal. The Tribunal's reasons are set out fully in the transcript.<sup>27</sup>

2.7.17. Following the hearing on the merits, and in accordance with the directions of the Tribunal, the Tribunal received further written submissions as follows:

- (i) on 23 August 2006, after the conclusion of the hearing on the merits, Claimants sought to file additional evidence not in the record to support alternative approaches to the calculation of damages. By letter dated 1 September 2006, Claimants explained that although "[t]o be sure, there are facts on the existing record that the Tribunal can use for that purpose", Claimants wished the Tribunal to exercise its discretion to accept further evidence offered by Claimants to give the Tribunal the "full picture" relevant to alternative calculation methods. In its letter dated 31 August 2006, Respondent objected to Claimants' attempt to introduce such

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<sup>26</sup> Transcript of the hearing on the merits, Day 8, pp. 1917-1919, 2047-2048 (31 July 2006).

<sup>27</sup> Transcript of the hearing on the merits, Day 8, pp. 2080-2083 (31 July 2006).

evidence. In Respondent's view, even if the Tribunal sought further discussion from the parties as to the effects of the various methods of calculation on Claimants' damages claim, the record was clear that no new evidence was to be introduced. The Tribunal communicated its decision to the parties by letter dated 15 September 2006, attached hereto as Schedule A. The Tribunal advised that it declined to exercise its discretion to accept Claimants' new evidence;

- (ii) on 25 August 2006 each of the disputing parties submitted a post-hearing submission;
- (iii) on Days 10 and 11 of the hearing on the merits, to assist the parties in developing their closing arguments and post-closing submissions, the Tribunal noted various topics with respect to which the Tribunal thought it would be helpful if the parties provided summaries of the evidence. On 12 September 2006, Respondent submitted to the Tribunal various compilations and descriptions with respect to various of the governmental agencies that were relevant to the proceedings. On 13 September 2006, Claimants objected to Respondent's submission on the basis that the submission was untimely. After carefully considering the positions of the parties, as expressed by Claimants in its letters of 13 September 2006 and 19 September 2006, the Tribunal has concluded that it will accept the summaries and compilations of existing evidence provided by Respondent. Although it might have been contemplated that the parties would submit all compilations and descriptions with their post-hearing briefs, this was not explicitly required by the Tribunal. The Tribunal notes that Claimants do not suggest that any of the materials provided by Respondent include evidence not already part of the record. In any event, the Tribunal has concluded that there is no actual prejudice to Claimants in permitting Respondent to present this material to the Tribunal;
- (iv) on 29 September 2006 each of the parties made their respective initial submissions on costs;
- (v) on 6 October 2006, each of the parties made submission commenting on the costs of the other party.

2.7.18. On 25 May 2007, the Tribunal notified the parties that it had that day declared the proceeding closed in accordance with ICSID Arbitration Rule 38.

### **3. OVERVIEW OF THE DISPUTE**

#### **3.1. Tribunal's Approach**

3.1.1. It is useful here to set out a summary overview of the disputing parties respective cases so as to provide the contextual backdrop for the next section of the Award – the Tribunal's review of and findings regarding the facts relevant to the dispute.

#### **3.2. Overview of Claimants' Case**

3.2.1. To Claimants, this case is all about the mistreatment of a French investor by the authorities in the Argentinian province of Tucumán. Almost immediately upon taking over the water and sewage services concessions for Tucumán, Claimants say that CGE / Vivendi and CAA were attacked by the provincial authorities and systematically deprived of their rights under the Argentine/France BIT. The provincial authorities are said to have used their regulatory powers to impose unilaterally modified tariffs, contrary to the terms of the Concession Agreement and at great cost to Claimants. They are said to have used their oversight powers to pepper the concessionaire with numerous, unjustified accusations while themselves acting in flagrant violation of the agreement. It is claimed that they used the media and the public stage to generate hostility in the citizenry towards the foreign Claimants and that they interfered directly with CAA's customer relationships, inciting its customers not to pay their bills and abetting customer efforts to avoid their payment obligations. After forcing Claimants to renegotiate the Concession Agreement, they are said to have used their law making powers to reject or secretly to undermine the proposals that could have ended the crisis and saved the concession from disaster.

3.2.2. Claimants argue that these alleged attacks destroyed the economic value of the Concession Agreement and that by mid-1997 CGE/Vivendi and CAA had no choice but to terminate the concession – the first time in CGE / Vivendi’s 150-year history in water concessions that it had been driven to terminate a concession for the fault of the grantor. After the agreement’s termination, Claimants say that they were held “hostage” by the Province and obliged to continue to provide services for a further ten months and, even after they were released from that obligation in October 1998, the provincial authorities continued their harassment, culminating in a series of targeted enactments to prevent CAA from pursuing lawsuits to collect outstanding invoices and, eventually from enforcing any judgments.

3.2.3. These acts and omissions of the Province, which Claimants say are legally attributable to the Argentine Republic, constituted:

- (i) a violation of the fair and equitable treatment standard, as expressed in Articles 3 and 5 (1) and (3) of the BIT,<sup>28</sup> and
- (ii) an expropriation of Claimants’ investment in its entirety, contrary to Article 5(2) of the BIT<sup>29</sup>.

3.2.4. Having thus been deprived of their rights under Articles 3 and 5 of BIT, Claimants seek damages for the harms inflicted upon them, assessed on the basis of CAA’s losses, totalling US\$ 316,923,000,<sup>30</sup> plus interest, compounded from 27 November 1997 (the date as of which Claimants have calculated and stated their

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<sup>28</sup> Memorial at ¶¶286-322.

<sup>29</sup> Memorial at ¶¶324-376.

<sup>30</sup> Memorial at ¶404, and Statement of Amounts Claimed, with verification report of Ernst & Young, 19 November 2004 (Exhibit 7).

amounts claimed),<sup>31</sup> plus their costs and expenses associated with the arbitration proceedings.

### **3.3. Overview of Respondent's Defences**

3.3.1. To Respondent, this case exclusively involves contractual matters (*ie* disputes arising under the Concession Agreement) over which the Tribunal does not have jurisdiction.<sup>32</sup> Respondent also says that CGE's purchase of its controlling interest in CAA in June 1996 conflicted with the express terms of the Concession Agreement (under which the consent of Tucumán's executive was required prior to the transfer). Such consent having never been granted, Claimants should not be allowed to pursue a claim for violation of Treaty rights which were acquired unlawfully.<sup>33</sup>

3.3.2. Respondent asserts that, shortly after assuming the concession, without warning to an impoverished population and without noticeably improving service, CAA doubled the water bills in the first round of invoices sent to consumers. CAA then proceeded to destroy the confidence of the population by negligently delivering black, undrinkable and potentially unhealthy water over a period of many weeks. Respondent contends that this situation understandably caused consumers to revolt and, in some cases, to refuse to pay vastly inflated bills. CAA then made matters worse by responding to its customers' grievances in a confrontational and aggressive manner.

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<sup>31</sup> Memorial at ¶405, and Statement of Amounts Claimed, with verification report of Ernst & Young, 19 November 2004 at Note 8 (Exhibit 7).

<sup>32</sup> Counter-Memorial at ¶2; Rejoinder at ¶8.

<sup>33</sup> Counter-Memorial at ¶15.

- 3.3.3. To the extent Claimants' cite speeches made and actions taken by individual legislative representatives in response to their constituents' grievances (improperly characterising their comments as arbitrary acts of the state), Respondent contends that that position is untenable. Bilateral investment treaties have never been deemed to protect investors from the consequences of their own mistakes, nor provide them with an insurance policy against the due exercise of the State's regulatory activity. This is even more so the case when the service provided is as vital as the provision of water and sewage services.<sup>34</sup>
- 3.3.4. When the Province wanted, and was within its rights, to rescind the Concession Agreement, CAA's owners improperly exerted their wealth and influence to force the Province to re-negotiate the Concession Agreement on terms more favourable to CAA. Notwithstanding their success in imposing new contractual conditions on the Province, CAA then unilaterally abandoned and unlawfully terminated the Concession Agreement, once it realised it had lost the trust and goodwill of the people of Tucumán.<sup>35</sup>
- 3.3.5. Faced with Claimants' material breaches of the Concession Agreement, the Province had the right and the responsibility to take the requisite steps to ensure the availability of safe drinking water for its population on an affordable and accessible basis. Far from constituting an expropriation or unfair and inequitable treatment, Tucumán's conduct merely discharged its responsibilities, both as a

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<sup>34</sup> Counter-Memorial at ¶¶4-6.

<sup>35</sup> Counter-Memorial at ¶7.

contracting party and as a government.<sup>36</sup> On this basis, Respondent argues that Claimants' case must be dismissed.

3.3.6. Finally, in the event that the Tribunal should find that the Claimants are entitled to damages, Respondent says that these should be limited to *damnum emergens* and that Claimants have failed to provide appropriate and reliable evidence of such loss. Under no circumstances are Claimants entitled to recover any *lucrum cessans*.

3.3.7. Like Claimants, Respondent seeks its costs and expenses associated with these proceedings.

#### **4. FACTS**

4.1.1. A review of disputing party's submissions, witness statements and the oral testimony given at the oral hearing indicates that, with few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed. Put another way, most of the differences between the parties have to do with the implications arising from or the interpretation to be given to the events which unfolded. Real differences as to what, in fact, occurred or led to certain events exist in relation to four main areas. These involve:

- (i) the causes and foreseeability of episodes of turbidity which appeared in the water in San Miguel de Tucumán in late 1995 and January 1996;
- (ii) which of the disputing parties initiated (and what motivated) the parties' attempts to re-negotiate the Concession Agreement, which commenced in early 1996, shortly after the manganese turbidity phenomenon;

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<sup>36</sup> Counter-Memorial at ¶11; Rejoinder at ¶19.

- (iii) whether the provincial water regulator, ERSACT, took regulatory action against CAA because of the latter's failure to meet its contractual obligations and in order to ensure adequate supplies of clean and potable water, or as part of a campaign to harass CAA until it agreed to re-negotiate the terms of the Concession Agreement; and
- (iv) whether CAA had previously agreed to changes that were made to the 6 June 1997 legislative bill (which set out the terms of the proposed, re-negotiated Concession Agreement) when the bill was amended in the course of being enacted as law No. 6826 on 13 June 1997.

4.1.2. We set out in some detail below a summary of the facts most relevant to the dispute – either as agreed, not disputed or determined by the Tribunal. We then turn in Sections 5 and 6 to the party's competing positions as to their respective rights and obligations arising out of what occurred.

## **4.2. Privatisation of Water and Sewage Services in Tucumán**

4.2.1. The privatisation of the water and sewage services in Tucumán coincided with a broader investment liberalisation effort across Tucumán and Argentina as a whole. Prior to the Menem presidency, which began in 1989, nearly all public services in Argentina were state-owned and operated. President Menem introduced an ambitious set of economic reforms, including the privatisation of many traditionally-government owned services. Most provinces, including Tucumán, adopted similar measures to assist with the national liberalisation efforts.<sup>37</sup>

4.2.2. Before privatisation, Tucumán residents received water and sewage services in one of two ways. Most residents received services from the provincial entity (Dirección Provincial de Obras Sanitarias, "DiPOS"). Some residents, in areas

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<sup>37</sup> See *eg* Law No. 6071, 15 January 1991 (Exhibit 102).

not served by DiPOS, received services from municipalities, local communities, or private entities. Some residents did not receive any water and sewage services.

4.2.3. Over the years, DiPOS experienced a number of challenges. By the beginning of the 1990s, DiPOS revenues covered only 30% of its expenses, with the remainder of its operating funds coming from state subsidies. Moreover, despite a cumulative inflation rate of approximately 60% between 1991 and late 1994, DiPOS did not raise its tariffs. DiPOS's physical infrastructure was also deteriorating, and major investments were needed.

4.2.4. On 17 January 1993, the Governor of the Province (then Ramón Ortega) issued Decree No. 7/1, declaring that the Province's water and sewage services were to be privatised.<sup>38</sup> About three weeks later, Tucumán invited national and international companies to submit bids for the water and sewage concession services in Tucumán.<sup>39</sup>

4.2.5. On 15 April 1993, the provincial legislature of Tucumán ("Legislature") passed Law No. 6445, establishing the basic guidelines for the privatisation process. Law 6445 also provided that the Court of Accounts (of which more later) would oversee the privatisation process.<sup>40</sup>

4.2.6. On 11 May 1993, Governor Ortega invited consulting firms to bid to advise the provincial authorities on the process of privatisation.<sup>41</sup> A consulting contract was

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<sup>38</sup> Decree No. 7/1, 17 January 1993 (Exhibit 103).

<sup>39</sup> Decree No. 288/93, 10 February 1993 (Exhibit 104).

<sup>40</sup> Decree No. Law No. 6445, 15 April 1993 (Exhibit 105); Provincial Law No. 6445 (Exhibit 750).

<sup>41</sup> Decree No. 949/3, 11 May 1993 (Exhibit 112).

granted to Centro de Estudio de Transporte e Infraestructura S.A. (“CETI”) in July 1993 and CETI issued its report in 1994. In its report, CETI, citing international health standards, said, *inter alia*, that fees for potable water services should not exceed 3% of a family’s income.<sup>42</sup>

4.2.7. In response to the invitation to bid for the concession, representatives of five interested groups visited the Province at the beginning of 1993. One of the five groups was the consortium known as “Aguas del Aconquija” – later to become CAA (“AA Consortium” or “Consortium”).

4.2.8. On 18 January 1994, the provincial Legislature passed Law No. 6529, which established the minimum requirements for the concession and the mandate, powers and duties of the new provincial water regulator (the “Regulator” or “ERSACT”, formerly “ERAT”) which had been created by Law No. 6445 the previous year).<sup>43</sup>

4.2.9. On 20 January 1994, all five interested consortia successfully pre-qualified to tender for the concession.<sup>44</sup> A copy of the “Bid Conditions” (a draft Concession Agreement was attached to the Bid Conditions as Annex XIII) was delivered to each of the five pre-qualified bidders on 10 May 1994.<sup>45</sup>

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<sup>42</sup> DiPOS Resolution No. 1189/3, 8 July 1993 (Exhibit 113); CETI, *Capacidad de Pago de los Usuarios e Incidencia de la Facturación de los Servicios de Agua y Cloacas en el Ingreso Familiar para el Área de Prestación de DiPOS (Payment Capacity of Customers)*, undated, circa 1994 (the “CETI Report”) (Exhibit 8).

<sup>43</sup> Provincial Law No. 6529, 18 January 1994 (Exhibit 82).

<sup>44</sup> Minutes of the Opening of Bids for Prequalification of Offerors, 20 January 1994 (Exhibit 398).

<sup>45</sup> *Concesion del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions)*, with Annexes, 10 May 1994 (Exhibit 115).

- 4.2.10. Given DiPOS's heavy reliance on provincial subsidies and its poor physical infrastructure, the provincial authorities understood that the decision to privatise necessitated a complete overhaul of the economics of the system. This meant that the Province's Bid Conditions would need to be financially viable from a bidders perspective, while still accommodating the Province's objectives. In short, given the Province's political decision to shift the cost of services from the public treasury (through subsidies) to customers making use of the service, a significant tariff increase was inevitable.
- 4.2.11. In presenting their proposed tariffs, the Bid Conditions required bidders to calculate an adjustment coefficient showing the projected increase in tariff rates for each category of user (Article 3.8.1). Article 15.3 of the Bid Conditions and Article 9.2 of the draft Concession Agreement provided that "[w]ith the exception of the Earnings Tax and Value-Added Tax (VAT) or those they replace, all other taxes, whether national, provincial, or municipal, affecting the concession-holder *will be considered as costs* for purposes of tariff calculation."<sup>46</sup> (emphasis added)
- 4.2.12. On 20 July 1994, in a step which later took on considerable importance, the Ministry of Economy issued Circular No. 2, which revised the Bid Conditions' earlier requirements relating to the treatment of taxes as costs for the purposes of tariff calculation. Article 3.8.1 of Circular No. 2 provided that "[p]ursuant to Article 51 of Law No. 6529 and for selection purposes, the Offeror shall propose adjustment factors based on representative values for the quantity and effective

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<sup>46</sup> Concesion del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions), with Annexes, 10 May 1994 (Exhibit 115).

rate for each category of user. In calculating said factors, *municipal taxes and/or levies on the use of public property or the stamp tax payable on the concession agreement shall not be counted as costs of the concession.*<sup>47</sup> (emphasis added)

### **4.3. CAA's Initial Bid, Improved Bid, and Bid Approval**

4.3.1. Despite five bidders having prequalified, only one bid was received on the 1 August 1994 tender submission date - that being the bid of the AA Consortium. At that time the AA Consortium comprised CGE, DYCASA, Roggio and Supercemento S.A. ("Supercemento").<sup>48</sup>

4.3.2. It is not disputed that CGE and its partners analysed market conditions in Tucumán before preparing a bid for the concession.<sup>49</sup> Indeed, before the submission of its final bid in mid-1994, CGE conducted extensive additional analyses onsite in Tucumán (see para 4.3.7 below).

4.3.3. The Consortium's initial bid proposed a tariff adjustment coefficient of 1.941. Stated somewhat differently, a coefficient of 1.941 would have led to a 94% higher tariff than that being charged at that time by DiPOS.<sup>50</sup> As required by

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<sup>47</sup> Ministry of Economy, Circular No. 2, 20 July 1994 (with English translation) (Exhibit 116).

<sup>48</sup> Legislature of the Province of Tucumán Resolution No. 10, 28 September 1995 (with English translation) (Exhibit 143) and Legislature of the Province of Tucumán Resolution No. 2, 12 December 1995 (Exhibit 149).

<sup>49</sup> Memorial at ¶¶36 and 37; Counter-Memorial at ¶48. Technicians from the Consortium's three-partner companies began arriving in Tucumán as early as 1993 to analyse financial, technical and socio-economic conditions that the Concessionaire would face. CGE officials studied the conclusions of the CETI Report, and the Consortium prepared its own internal analyses of appropriate tariff levels based on the study of reports by the World Health Organization and the World Bank regarding appropriate tariff levels in the region.

<sup>50</sup> CAA Oferta Económico-Fianciera (Economic Offer), with Annexes, 1 August 1994 (Exhibit 306).

Circular No. 2, the Consortium's initial bid *excluded* taxes from the service tariff.<sup>51</sup>

- 4.3.4. The Bid Conditions upon which the initial bid was based required bidders to assume a final 85% collection rate from customers. Specifically, Article 3.8.4 provided that “in accordance with the provisions of Article 77 of Law N° 6529, Concessionaire shall be responsible for the degree of efficiency of its commercial system, and may not include in its plans or forecasts a non-payment rate higher than FIFTEEN PER CENT (15%) of its total billing.”<sup>52</sup>
- 4.3.5. On 22 August 1994, three weeks after the receipt of the Consortium's bid, the Province's “Pre-Award Commission” (made up of members of the Provincial legislature and the executive), established to review bids for the concession, recommended acceptance of the technical portion of the bid, after having received, presumably, satisfactory answers to several questions it had posed to CGE.<sup>53</sup>
- 4.3.6. The Ministry of the Economy thereupon approved the technical portion of the initial bid,<sup>54</sup> but requested the Consortium to consider revisions to the economic

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<sup>51</sup> CAA Oferta Económico-Fianciera (Economic Offer), with Annexes, 1 August 1994 (Exhibit 306).

<sup>52</sup> Concesion del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions), with Annexes, 10 May 1994 (Exhibit 115).

<sup>53</sup> Comisión de Preadjudicación, Solicitud de Aclaraciones en Relación a la Oferta - su Respuesta, 22 August 1994, (Exhibit 120); Letter from CAA to Comisión de Preadjudicación, 31 August 1994 (Exhibit 121); Ministry of Economy Resolution No. 261/MIN, 16 September 1994 (Exhibit 122).

<sup>54</sup> Resolution 261/MIN, 16 September 1994 (Exhibit 122).

offer to provide a reduced tariff adjustment coefficient and an increased projected recovery rate.<sup>55</sup>

4.3.7. At this point the Consortium seemed likely to be awarded the concession and officials from CGE and its partners began to conduct extensive analyses and preparations for the takeover and operation of the concession. Mr. Gérald Guérin, then director of CGE's regional center in Orléans, France, was asked to coordinate these preparations and to serve as the Consortium's general manager when it began operations.<sup>56</sup> Technicians from the Consortium's three-partner companies visited Tucumán as early as 1993 to analyse financial, technical and socio-economic conditions that the concessionaire would face. Subsequently, in October 1994, Mr. Guérin visited Tucumán as a representative of the Consortium to investigate, *inter alia*, DiPOS's offices, the water and sewage treatment systems, and DiPOS's laboratory and organisation structure.<sup>57</sup>

4.3.8. As requested by the Ministry of Economy, the Consortium submitted an improved economic offer on 7 October 1994. The improved economic offer proposed a reduced tariff adjustment coefficient of 1.679. This was based on the Consortium increasing its projected recovery rates from 85% to 89 % in the first year, 90% in the second year and 91% in the third year.<sup>58</sup>

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<sup>55</sup> Letter from Ministry of Economy to CAA, 30 September 1994 (Exhibit 123).

<sup>56</sup> Guérin Affidavit, 9 February 2006, at ¶¶2-3 (Exhibit 793).

<sup>57</sup> Mr. Guérin again visited Tucumán in February 1995 at which time he had met with the head of DiPOS and other DiPOS officials to discuss the Consortium's plan for takeover and operation of the Concession.

<sup>58</sup> Letter from CAA to Comisión de Preadjudicación (Improved Economic Offer), 7 October 1994 (Exhibit 124).

4.3.9. All relevant government entities in Tucumán reviewed and approved the Consortium's improved offer. The first approval came from the Pre-Award Commission. In a detailed report issued on 14 October 1994, the Pre-Award Commission concluded that the proposed tariff adjustment coefficient in the improved economic offer was reasonable from a commercial and economic perspective.<sup>59</sup>

4.3.10. With respect to the increase to the projected collection rate, the Pre-Award Commission noted that:

*“Despite progressive improvements in its commercial management, the DiPOS currently has not achieved a collection rate higher than 55%. In any event, the collection rate provided by the Bidder for billings on services is felt to be insufficient, given that it sets a figure of 85% at the start of the concession term, which gradually increases to 90% by the 15th year ... Our own projections start from a collection index of 85% and attain 90% by the third year, and 95% after the eight year and through the end of the concession. These returns are considered to be reasonable taking into account the results achieved by the DiPOS and the improvements that can be achieved by effective private management as demonstrated in international experiences”.*<sup>60</sup>

4.3.11. The Pre-Award Commission concluded that “the values ultimately adopted (in the Consortium's bid) are reasonable, taking into consideration the collectability

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<sup>59</sup> Comisión de Preadjudicación, Informe de Evaluación de la Oferta (Report of Pre-Award Commission), 14 October 1994 (Exhibit 11).

<sup>60</sup> Comisión de Preadjudicación, Informe de Evaluación de la Oferta (Report of Pre-Award Commission), 14 October 1994 (Exhibit 11).

indicators achieved by DiPOS and the improved efficiency expected from a private operator.”<sup>61</sup>

- 4.3.12. Subsequently, on 18 November 1994, the Tucumán legislature ratified the Pre-Award Commission’s recommendation to award the Concession to the AA Consortium.<sup>62</sup>
- 4.3.13. Thereafter, on 26 December 1994, the Governor formally awarded the concession to the AA Consortium by Decree No. 3512/3.<sup>63</sup> In awarding the concession, the Governor cited, *inter alia*, the Pre-Award Commission’s opinion that the tariff contemplated by the amended bid was “just and reasonable”. Approximately three months later, on 10 March 1995, Governor Ortega approved the draft Concession Agreement, pursuant to Decree No. 459/3,<sup>64</sup> which was then submitted to the Court of Accounts for its review.
- 4.3.14. In a 28 April 1995 report, a consultant to the Province, Dr. Ismael Mata, supported the tariff that had been proposed in the Consortium’s improved offer, stating his belief that the lower tariff adjustment coefficient of 1.679, combined with the two 10% increases provided for in the draft Concession Agreement, essentially implemented his earlier advice to the Province that tariff increases should be introduced progressively.<sup>65</sup>

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<sup>61</sup> Comisión de Preadjudicación, Informe de Evaluación de la Oferta (Report of Pre-Award Commission), 14 October 1994 (Exhibit 11).

<sup>62</sup> Legislature of the Province of Tucumán, Resolution Approving CAA’s Offer, 18 November 1994 (Exhibit 125).

<sup>63</sup> Decree No. 3512/3, 26 December 1994, Article 1 (Exhibit 128).

<sup>64</sup> Decree No. 459/3, 10 March 1995 (Exhibit 129).

<sup>65</sup> Copy of fax sent by Dr. Ismael Mata to Eng. García Posse (DiPOS) re: improved offer submitted by CAA on 7 October 1994 in file 757/300-ME-94, incorporated in file 56-110-M-93, 28 April 1995 (Exhibit 416).

4.3.15. On 17 March 1995, the Court of Accounts, having completed its review of the draft Concession Agreement, issued Resolution No. 398/95, approving the draft, provided that the executive power made certain amendments. Specifically, the Court of Accounts stated that, until the executive branch corrects or modifies "...the contractual text in compliance with the hereinabove indications, neither Executive Order N° 459/3 nor the acts resulting as a consequence shall be executed ...".<sup>66</sup>

#### **4.4. Execution of the Concession Agreement and Delays in Takeover**

4.4.1. Prior to the execution of the Concession Agreement, a take-over date of 1 May 1995 had been projected. This date was subsequently delayed, along with the signing of the Concession Agreement, due to the intervention by the Court of Accounts and the Legislature's Commission on the Oversight of the DiPOS Privatisation.<sup>67</sup> The signing of the Concession Agreement was rescheduled for 5 May 1995, and the take-over for 11 May 1995. In light of further interventions by the Court of Accounts, the signing and take-over of services were delayed twice more.

4.4.2. Pursuant to the Bid Conditions, the concessionaire was required to be a locally incorporated company.<sup>68</sup> CAA was thus incorporated as an Argentine company on 17 May 1995, by the then members of the AA Consortium, CGE and the

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<sup>66</sup> Court of Accounts Resolution No. 398, 17 May 1995 (Exhibit 130); Court of Accounts Resolution No. 398/95, 17 May 1995 (Exhibit 421).

<sup>67</sup> Guérin Affidavit, 9 February 2006, at ¶27 (Exhibit 793).

<sup>68</sup> Concesión del Servicio de Agua y Desagues Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions), with Annexes, 10 May 1994 (Exhibit 115) at Art. 5.1.

Argentine companies DYCASA and Roggio; Supercemento having left the Consortium in March of that year.<sup>69</sup>

- 4.4.3. The next day, 18 May 1995, Governor Ortega approved the final text of the Concession Agreement by Decree No. 852/3, and CAA and the Province executed the Concession Agreement.<sup>70</sup> The takeover of the service was scheduled for 1 June 1995.<sup>71</sup>
- 4.4.4. With the Concession Agreement now signed and in the belief that the transfer of the service would take place on 1 June 1995, CAA purchased supplies, leased buildings, transferred personnel and arranged for a caravan of trucks from Buenos Aires for the delivery of the supplies. However, a few hours before the transfer was to take place, a messenger delivered a copy of Decree No. 68/3-95 which again postponed the takeover until 14 June 1995.<sup>72</sup>
- 4.4.5. On 20 June 1995, following the execution of the Concession Agreement, the executive branch issued executive order No. 1142/3, implementing the changes previously required by the Court of Accounts.<sup>73</sup> CAA unsuccessfully challenged this Order by way of administrative appeal dated 11 July 1995.<sup>74</sup>

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<sup>69</sup> Letter dated 9 March 1995, Consortium to Governor Ortega, notifying the withdrawal of Supercemento (Exhibit 417).

<sup>70</sup> Decree No. 852/3, 18 May 1995 (Exhibit 131).

<sup>71</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127).

<sup>72</sup> Guérin Affidavit, 9 February 2006 (Exhibit 793), at ¶28. Decree No. 68/3-95 was issued at the request of the Legislative Commission on the Oversight of the DiPOS privatization, ostensibly in order to provide the Commission with the opportunity to review documents relating to several amendments to the Concession Agreement required by the Court of Accounts.

<sup>73</sup> Executive Order No. 1142/3, 20 June 1995 (Exhibit 423).

<sup>74</sup> Administrative appeal of CAA against Executive Order No. 1142/3, 11 July 1995 (Exhibit 546).

- 4.4.6. On 18 July 1995, the Province responded to CAA's administrative appeal of Executive Order 1142/3 with Executive Order No. 1371/3-1995. The latter confirmed the validity of the clarifications to the text of the Concession Agreement and set 22 July 1995 as the date for the takeover of the services by CAA. This was the date that CAA assumed the Concession.<sup>75</sup>
- 4.4.7. The disputing parties differ on the reasons for the delay to the takeover of services, each blaming the other. The Province attributes the delay to CAA's inadequate processes for hiring former DiPOS employees and to its failure to obtain insurance as required by the Concession Agreement.
- 4.4.8. Although not much turns on this question, the Tribunal is satisfied that the CAA was not responsible for the delay.<sup>76</sup> In the period before the takeover of the service, the Consortium partners, and, subsequently, CAA, operated with a staff of approximately 50 persons. Amongst the tasks of this core team was the hiring of permanent employees to operate the concession after the takeover. Article 8.1 of the Concession Agreement required CAA to employ a minimum of 1000 employees for at least the first three years of the concession and that the concessionaire hire 90% of its permanent employees from personal of the outgoing provider, DiPOS.<sup>77</sup>
- 4.4.9. To comply with the Article 8.1 staffing requirements, Mr. Guérin and his staff instituted a hiring process initially based on the review of résumés of DiPOS

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<sup>75</sup> Executive Order No. 1371/3, 18 July 1995 (Exhibit 483).

<sup>76</sup> See Letter from CAA to Minister of Economy, 7 June 1995 (Exhibit 819); Letter from CAA to Minister of Economy, 15 June 1995 (Exhibit 897) and Guérin Affidavit, 9 February 2006 (Exhibit 793), at ¶32.

employees. After an initial cut, the more promising candidates were interviewed by members of Mr. Guérin’s team, assisted by two psychologists recommended by Roggio. According to the minutes of the meeting of the “Joint DiPOS/CAA Commission” (which had been established in preparation for and to facilitate the takeover), CAA had conducted approximately 1,500 interviews by 17 April 1995. Further, CAA had successfully completed the process of interviewing and selecting more than 900 former DiPOS employees before the 1 June 1995 date initially scheduled for the takeover.<sup>78</sup>

4.4.10. As regards the procedural requirements under Article 3.9 of the Concession Agreement, relating to the verification of CAA’s insurance policies, the Ministry of the Economy granted CAA approval with respect to its proposed insurance policies on 18 May 1995.<sup>79</sup> The Court of Accounts subsequently certified that it had reviewed and was satisfied with the evidence that CAA had obtained insurance policies as required by the Concession Agreement.<sup>80</sup>

4.4.11. Before turning to what occurred when CAA took over the concession it is useful to review briefly some of the more important provisions of the Concession Agreement, and to describe the branches of the provincial government and the provincial agencies which interacted with CAA during its stewardship of the concession.

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<sup>77</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127).

<sup>78</sup> Comisión Mixta DiPOS – Compañía de Aguas del Aconquija – Minutes of Meeting No. 19, 22 May 1995 (Exhibit 895) and Comisión Mixta DiPOS – Compañía de Aguas del Aconquija – Minutes of Meeting No. 20, 23 May 1995 (Exhibit 811).

<sup>79</sup> Ministry of Economy Resolution No. 118 Expte. No. 238/300-C-1995, 18 May 1995 (Exhibit 892).

## 4.5. Key Provisions of the Concession Agreement

### Legal Framework

- 4.5.1. Article 1.6 of the Concession Agreement sets out rules for and the instruments to be considered (including their priority) in construing its provisions:

#### *1.6 APPLICABLE LAW*

*"The rules applicable to this Agreement according to Section 1.5 of the Bid Terms and Conditions, shall be Law 6529 as amended by Law 6537, Law No. 6445, Law No. 5995, Law No. 6071, Executive Order Agreement 7/1, Executive Order N° 288/93, and, where applicable, Law No. 5241.*

*In the event of any doubt or gap, the following documents shall be relied upon in the order indicated:*

*1.6.1. This Concession Agreement and the Executive Order granting approval thereof.*

*1.6.2. The awardee's Bid and any improvement thereof as qualified by Memoranda 7 and 16 of the Pre-Award Commission.*

*1.6.3. The Bid Terms and Conditions for Di.P.O.S. Privatisation, approved by Executive Order 1053/3/94 and explanatory circulars thereof.*

*1.6.4. The Prequalification Terms and Conditions and explanatory circulars thereof.*

*This Concession Agreement shall be interpreted within the framework of the obligations described in the Bid Terms and Conditions and explanatory circulars thereof and in the hereinabove mentioned legislation. In the event of any discrepancies or contradictions between this documentation and the Concession Agreement, which do not allow for any interpretation maintaining in effect all of*

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<sup>80</sup> Court of Accounts Resolution 508/95 (with English translation), 22 June 1995 (Exhibit 898); see also Hahn Supplemental Affidavit, 14 February 2006 (Exhibit 788), at ¶23.

*the sections in question, the provisions of this Agreement shall prevail.”*

## **Tariffs**

4.5.2. The permissible tariff to be charged by CAA is provided in Article 12.1

### *“12.1. APPLICABLE TARIFF SYSTEM*

*...the Concession Tariff System shall be the following: The methods for calculating tariffs shall be the one currently used by Di.P.O.S. based on the provisions set forth in Executive Orders 9022/63 and 1333/74 issued by the Federal Executive Power and Provincial Executive Orders 2611/82 and 1277/85. The rules and elements necessary to do the above-mentioned calculation are included in ANNEX XX. During the first year of the Concession, the tariffs pertaining to each category and class of Users arise from applying the offered adjustment coefficient ( $K=1.679$ ) to the tariff framework in force. The resulting values are included in ANNEX XXI. During the second year of the Concession, the tariffs pertaining to each category and class of Users arise from applying a multiplying coefficient equal to ONE AND TEN HUNDREDTHS (1.10) to the tariff framework in force during the first year (the values of which are included in ANNEX XXI). The resulting values are included in ANNEX XXII. During the third and subsequent years of the Concession, the tariffs to be applied to each category and class of Users arise from applying a multiplying coefficient equal to ONE AND TEN HUNDREDTHS (1.10) to the tariff framework in force during the second year (the values of which are included in ANNEX XXII). The resulting values are included in ANNEX XXIII.”*

4.5.3. Article 12.3 stipulated that these tariff values were the maximum amounts to be charged by the concessionaire.

## **Treatment of Taxes**

4.5.4. Article 9.2 addressed the question of taxes, levies and contributions as follows:

*“9.2 INCLUSION IN TARIFF  
Taxes, duties and/or local contributions shall not be considered Concession costs. The same will apply to stamp taxes to be paid on the Concession Agreement. Any modification to a higher or lower figure, the introduction of new taxes and the abolition of existing taxes that may arise as from the date of presentation of the Bid, shall allow the renegotiation of tariffs and prices so as to properly reflect such modifications in costs.”*

## **Investment Obligations**

4.5.5. Under the Concession Agreement, CAA agreed to invest USD 386 million over its 30-year-life (see in particular Annex XIV to the Concession Agreement). Of this investment, 54% (US\$209 million) was allocated to the expansion of the network, 10% (US\$37 million) was earmarked for new sewage treatment facilities and 36% (US\$140 million) was for renovating the existing sewage treatment system.

## **Concessionaire’s Rights of Enforcement**

4.5.6. To enforce payment by customers for the services provided, CAA was granted the right to cut off service to non-paying customers, subject to certain conditions specified in Article 12.9.<sup>81</sup> CAA could not cut service where customers had made an agreement regarding payment of their debts or where ERSACT had

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<sup>81</sup> Comisión de Preadjudicación, Informe de Evaluación de la Oferta (Report of the Prequalification Committee), 14 October 1994 (Exhibit 11).

issued an order temporarily preventing disconnection (such orders could only be issued in unforeseen or extraordinary circumstances and according to a “well-founded” decision).<sup>82</sup>

## **Termination and Damages for Breach**

4.5.7. Article 15.3 of the Concession Agreement permitted the Governor unilaterally to rescind the agreement under certain specific conditions, for example, in case of grave, unjustified violations by CAA of applicable laws, ERSACT regulations or contractual provisions.

4.5.8. Similarly, under Article 15.4, CAA had the right to rescind in the event of acts or omission either by ERSACT or the Province that resulted in grave, unjustified violations of obligations under the Concession Agreement. Before terminating under this provision, CAA was required to provide the Province with 15 days prior notification and the opportunity to rectify its breaches.

4.5.9. Article 15.8.3 of the Concession Agreement provided that if CAA’s rescission was due to material breach by the Province, then CAA could obtain an award of damages.

## **4.6. Provincial Authorities of Tucumán**

4.6.1. The province of Tucumán has three main branches: executive, legislative, and judicial.<sup>83</sup>

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<sup>82</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127), at Article 12.9.7.

## **Legislative Branch**

- 4.6.2. The legislative branch comprises the “Legislature” which, by majority vote, has the power to enact laws and issue proclamations through resolutions.<sup>84</sup> Such laws, proclamations and resolutions issued by the Legislature have binding effect throughout the Province.<sup>85</sup>
- 4.6.3. Up to 40 individual legislators may be elected and the provincial constitution grants legislators immunity (fuero) for any opinions they express while discharging their legislative duties.<sup>86</sup>

## **Executive Branch**

- 4.6.4. The executive branch (“Executive”) is made up of the Governor and the Lieutenant or Vice Governor.<sup>87</sup> The Governor, in whom the powers of government and the provincial administration are vested, heads the Executive. Under the constitution, the Vice Governor is the president of the Legislature. During the pertinent period (late 1995 – 1999) this role was fulfilled by Vice Governor Raul Roque Topa.
- 4.6.5. The Governor has the right to regulate / issue resolutions (“Executive Orders”) on matters referred to in laws enacted by the Legislature, as provided by the

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<sup>83</sup> Provincial Constitution (Exhibit 397), Article 87.4.

<sup>84</sup> Counter-Memorial at ¶23; Provincial Constitution (Exhibit 397), Articles 1 and 63.

<sup>85</sup> Provincial Constitution (Exhibit 397), Article 1.

<sup>86</sup> Provincial Constitution (Exhibit 397), Articles 58 and 59.

<sup>87</sup> Testimony of Raúl Roque Topa, Transcript of the hearing on the merits, Day 7, page 1886 (30 July 2006).

provincial constitution.<sup>88</sup> The Governor may also rule on general matters where there is “need and urgency”, *ie* whenever exceptional circumstances prevent the completion of ordinary processes under the constitution. Such Executive Orders are provisional and must be ratified by the Legislature.<sup>89</sup>

4.6.6. Ministers, the so-called “hands of the Governor”, are non-elected officials, appointed by the Governor and are part of the Executive. During the Bussi government, there were five ministers: the Minister of Government and Justice, the Social Affairs or Health Minister, the Minister of Production, the Minister of the Economy, and the Minister of Education.<sup>90</sup>

4.6.7. The Attorney General is the chief legal advisor to the Executive and the legal comptroller of the administration. The Attorney General is the non-elected head of the Attorney-General’s Department and ranks as a minister. He or she reports directly to the Governor. The Attorney General is empowered, by Provincial Law No. 3623, *inter alia*, to:<sup>91</sup>

- (i) advise the Governor and his ministers on any legal matter, for which purpose the provincial Attorney General may request from the Province’s various administration offices such reports, records and files as may be necessary;
- (ii) undertake such studies as may be necessary for the purpose of updating laws and regulations;
- (iii) intervene in legislative acts and duties of the Executive; and
- (iv) intervene in administrative matters in which the interpretation of the rules in force is at issue.

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<sup>88</sup> Provincial Constitution (Exhibit 397), Article 87 at sub-para. 3.

<sup>89</sup> Law No. 6686 (Exhibit 999); see also Counter-Memorial at ¶26.

<sup>90</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, pages 1887-1888 (30 July 2006).

<sup>91</sup> Law No. 6823 (Exhibit 749).

## **Judicial Branch**

4.6.8. The judicial branch is comprised of the Supreme Court of Justice, the Court of Appeals, the trial courts in the various forums such as the administrative courts, the labour courts, the criminal courts, the commercial and civil courts.<sup>92</sup>

## **Other Entities**

4.6.9. Three of the Province's administrative entities played an important role in the events which unfolded and it is useful to provide a summary description of each. These are: the Province's water regulator, ERSACT, the Defender of the People (also known as Defender of the Public, or the provincial Ombudsman - collectively, "Ombudsman") and the Court of Accounts.

## **ERSACT**

4.6.10. ERSACT was created on 15 April 1993 as an independent provincial agency by the initial privatisation bill, Provincial Law No. 6445. At all relevant times it was responsible for exercising enforcement powers related to the regulation and control of drinking water and sewage service in the province of Tucumán.

4.6.11. ERSACT's numerous powers and obligations included:

- (i) enforcement of the provisions of Laws No. 6445 and Law No. 6529;
- (ii) oversight of the concession and the services provided by the concessionaire to users;

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<sup>92</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, page 1888-1889 (30 July 2006).

- (iii) monitoring of the concession holder’s compliance with its investment obligations, expansion plans, and its timely and proper compliance with the price and rate schedules;
- (iv) addressing users’ complaints regarding deficient service or over-billing; and
- (v) taking any necessary steps to meet these objectives, subject to the prevailing law and the applicable provisions of the Concession Agreement.<sup>93</sup>

4.6.12. Under the applicable law, ERSACT’s finances depended on fees paid by the concessionaire.<sup>94</sup>

### **Ombudsman’s Office**

4.6.13. The office of the Ombudsman was created on 15 August 1995, by Law No. 6644. Articles 1 and 2 of the law explain the purpose and the scope of the office:

*“Art. 1 - Create the Office of the Defender of the People for the protection and defence of the legal rights and interests of persons and community, as contained in the National and Provincial Constitutions and in the laws passed as a consequence thereof before the acts, events and omissions of the Provincial Public Administration, with the provisional scope of this law, the head of which shall be an official called “Defender of the People”. ”*

*“Art. 2 - JURISDICTION – For the purposes of this law, the concept of provincial public administration, includes the centralised and decentralised administration; self-governed entities; State enterprises; State companies; State-partially-owned Companies; State-majority-owned Companies; and any other agency of the Provincial State whatever is its legal nature, name, special regulatory law, or place where its service is provided. This Office of the Defender of the People shall have jurisdiction over public non-state legal entities that exercise public powers, as well as over private suppliers of public utilities. In this case,*

<sup>93</sup> Counter-Memorial, at ¶33; Law 6529 (Exhibit 751).

<sup>94</sup> Law 6529 (Exhibit 751), Article 13.

*and without prejudice to the remaining powers granted by this law, the Defender of the People may demand the competent administrative authorities in pursuance of the powers granted by law. The Office of the Defender of the People shall not have jurisdiction over the Judicial Power and the Legislative Power.”<sup>95</sup> (emphasis added)*

4.6.14. The Ombudsman has the power to issue non-legally-binding recommendations only. The Ombudsman is an “independent agency” that must act fairly and equitably and according to law.<sup>96</sup> The Ombudsman is obliged to examine all non-frivolous complaints or those made in bad faith and those holding public office are required to assist the Ombudsman’s Office in the pursuit of its duties.<sup>97</sup>

### **Court of Accounts**

4.6.15. The Court of Accounts, an administrative body created by provincial Executive Order N° 960/3 is responsible for reviewing the expenditure of public funds by any provincial governmental entity. It also has *ex post facto* control over all administrative actions, including actions taken by public officials, involving public funds.<sup>98</sup> At the relevant time, the Court of Accounts was made up of a number of the directors, nominated by the Governor and whose appointment was then ratified by the Legislature. Between 1995 and 1999 directors served a fixed term and could only be removed following a special political proceeding known as “juicio politico”. The directors are not part of the judiciary.<sup>99</sup> Though

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<sup>95</sup> Law No. 6644 (Exhibit 450), Articles 1 and 2.

<sup>96</sup> Law No. 6644 (Exhibit 450), Articles 4, 5 and 13.

<sup>97</sup> Law No. 6644 (Exhibit 450), Article 12.

<sup>98</sup> Decree No. 960/3, 24 April 1986 (Exhibit 471), Article 131.

<sup>99</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, page 1890 (30 July 2006).

technically not part of the judicial branch, the decisions of the Court of Accounts are binding and are subject to appeal before the Contentious Administrative Court of Appeals (Cámara Contencioso-Administrativo) which is part of the Judiciary.<sup>100</sup>

#### **4.7. System Condition on Takeover**

4.7.1. The condition of the water and sewage facilities in Tucumán at that time they were transferred to CAA in late July 1995 was very bad and had declined rapidly in the months immediately preceding the transfer. This rapid degeneration appears to have been caused by a variety of factors including neglect (this set in following the April 1993 provincial approval of the privatisation - the Province generally withdrew its financial support while DiPOS was still the official system operator),<sup>101</sup> abuse and looting.

4.7.2. The general deterioration of the system which occurred at this time was not controverted in its essentials and is reflected in the minutes of the Joint DiPOS/CAA Commission:

*“[Regarding the state of the facilities at the time of their transfer,] CAA... agrees with what was expressed by DiPOS, since it has also noticed a significant deterioration in the organization and in the state of the equipment, plant, etc., making it very onerous and difficult to place it in a normal working order.”<sup>102</sup>*

4.7.3. Messrs. Guérin and Lefaix gave uncontradicted evidence that, at the time of takeover, many pipes in the network were broken, leaking or permanently backed

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<sup>100</sup> Decree No. 960/3, 24 April 1986 (Exhibit 471), Article 120.

<sup>101</sup> Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶10.

up. Sewer pipes were overflowing, vehicles, equipment and tools were broken down, missing or stolen. Client files were scattered across the floors of DiPOS offices by the hundreds, and hundreds more files were discarded in heaps outdoors, near trucks and trash bins. DiPOS's central laboratory similarly appear to have been looted and lacked nearly all supplies.<sup>103</sup>

4.7.4. The Minutes of a Joint CAA/ERSACT meeting held on 27 July 1995 (five days after the take-over) characterised the condition of the laboratory as “a pitiful situation of total abandonment”.<sup>104</sup>

4.7.5. Indeed, in the period immediately prior to the takeover, the system had deteriorated to such an extent that many chlorination facilities were not in service and, in many cases, makeshift systems had been substituted for necessary chlorine injection pumps. In the result, CAA began voluntarily to provide DiPOS with basic supplies and equipment prior to the takeover, including chlorine and trucks needed to clear obstructed sewage lines.<sup>105</sup>

4.7.6. In summary, the rapid deterioration experienced by the water and sewage system in the 10 months between the submission of CAA's economic offer in October 1994 and the transfer of service in late July 1995 left CAA with a system in considerably worse condition than that it had analysed at the time it was preparing its bid.

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<sup>102</sup> Minutes Nos. 12 and 13 Joint DiPOS/CAA Commission, April 1995 (Exhibit 319).

<sup>103</sup> See photographs of DiPOS vehicles, strewn and discarded DiPOS files; Guérin Affidavit (Exhibit 793), at ¶40, and Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶11.

<sup>104</sup> Minutes of CAA/ERSACT Meeting No. 2, 27 July 1994 (Exhibit 318).

<sup>105</sup> See de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶33; Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶9.

#### **4.8. Politics of Privatisation Change**

- 4.8.1. The pro-privatisation views of the Ortega government were not shared by the various provincial opposition parties of the day and, by the time of its execution in late 1994, the Concession Agreement had become something of a political flashpoint in the provincial election campaign that had begun earlier the year. The longstanding opposition of the *Fuerza Republicana* party, led by General Bussi, which in late 1995 was to succeed the Ortega led *Justicialista* party government is key to an understanding of the events that occurred in the six to nine months after CAA took control of the concession in late July 1995.
- 4.8.2. In December 1994, during the provincial election campaign, General Bussi and his party had proclaimed their “most solid opposition to transferring the patrimonies of the Province”.<sup>106</sup> Vice Governor Topa explained in his written evidence “our party had announced that one of its government actions – if it was elected – would be to consider examining the details of the concession agreement ... taking into account the interests of the users,” and that the agreement had been “born defective”.<sup>107</sup>
- 4.8.3. At the municipal level, a number of municipalities publicly rejected the Concession Agreement, asserting legal invalidity. The Municipality of Aguilares “municipalised the former DiPOS” and established the Municipal Directorate for

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<sup>106</sup> “*FR sostiene una posición coherente*”, *Siglo XXI*, 4 December 1994 (Exhibit 1081).

<sup>107</sup> Topa Affidavit, 10 November 2005 (Exhibit 386,) at ¶8 and ¶72.

Sanitation Works, whilst municipal officials in Monteros formally sought suspension of the concession.<sup>108</sup>

4.8.4. In his 2001 report to the World Bank (A Case Study on the Tucumán Water Privatisation – “Rais Report”), Dr. Jorge Rais, the then Undersecretary of Water Resources of the Federal Ministry of the Economy (and a witness for Respondent) explained the political dynamic of the times, “In order to avoid confrontation with the anti-privatisation propaganda of the political opposition, the Tucumán Government chose not to explain the objectives and procedures involved in the transformation of DiPOS, foregoing any kind of public relations strategy.” He continued “[t]he decision to privatize DiPOS was generally rejected by the local political forces (one of which took over the government shortly thereafter)...”.<sup>109</sup>

4.8.5. General Bussi won the election on 2 July 1995 and took office on 30 October, shortly after CAA had issued its first invoices. By then, as detailed more fully below, political opposition was growing within the Legislature more generally and this set the political stage for the intense scrutiny to which the concession and the concessionaire were to become subject.

#### **4.9. Initial Operation of the Concession**

4.9.1. It is Respondent’s case that Claimants precipitated a crisis of confidence in the concession by immediately increasing tariffs to the contractual maximum (doubling the amount of any water bill that customers had ever received before)

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<sup>108</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibits 134-136), at ¶92.

<sup>109</sup> Case Study, Concession for the potable Water and Sewerage Services in Tucumán, Argentine Republic, by Jorge Carlos Rais, María Esther Esquivel, Sergio Sour, Consultants, April 2001 (Exhibit 858), at ¶16-17.

and by failing to comply with its investment and water quality testing obligations (thus allowing manganese to permeate the domestic water supply, leading to weeks of turbid – at times completely black – water in customer’s taps).<sup>110</sup> What actually occurred, however, points to a different explanation of the events of turbidity which occurred December 1995 / January 1996 and, to the extent it existed, any crisis of confidence in the Province’s water service.

4.9.2. Upon the transfer of service, it is clear that CAA took emergency measures to reduce serious bacteriological risk, to improve water quality more generally and to upgrade the water and sewage infrastructure. In the first five months of the concession (August – December 1995) CAA refurbished the chlorination systems in drinking water facilities (replacing approximately 45% of the chlorination systems in Tucumán wells), arranged for the cleaning of the drinking water distribution system and spent almost US\$140,000 to rebuild the former DiPOS laboratory and purchase supplies and new equipment.<sup>111</sup>

4.9.3. Christian Lefaix, who served as CAA’s Manager of Operations from 22 July 1994 until mid February 1998, testified as to the poor state of the water and sewer services in Tucumán and the considerable deterioration of the system that had occurred in the six-month period before CAA’s takeover. He also described the water quality, testing, technical operations and improvements made by CAA to the water and sewer services between 1995 – 1998. The chart below summarises Mr. Lefaix’s evidence as to the improvements made during the last five months of

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<sup>110</sup> Counter-Memorial at ¶¶115-118.

<sup>111</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶¶40, 42 and 46.

1995. His evidence was unchallenged and the Tribunal accepts it as an accurate record of CAA's initial activity.

**CAA's Initial System Improvement**<sup>112</sup>

	1995 Last Five Months
Water network repairs	5,018
Change and renewed valves	188
New interconnections (m)	5,070
Purging and removing encrustations from pipes (m)	18,150
New and renewed connections (m)	118
New chlorinators	115
Removing electrical panels	51
Change of well pumps	42
Repairs of sewer leaks	405
Repairs of manhole covers	166
Clearing sewer network obstructions	2,596
Renovating sewage pumping stations	2
Cleaning sewage pipes (m)	295,800
Water analysis (number of tests)	3,044
Water analysis (parameters of tests)	15,220

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<sup>112</sup> Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶26.

#### **4.10. CAA's First Bills to its Customers**

- 4.10.1. On 1 August 1995, CAA's General Manager, Gérald Guérin, wrote to each of Tucumán's municipalities explaining that, under the terms of the Concession Agreement, taxes were to be charged separately from the service tariff on CAA's invoices and requested that each municipality inform CAA of the applicable taxes and contributions to be added to CAA's invoices for its residents.<sup>113</sup>
- 4.10.2. Shortly thereafter, on 4 August 1995, CAA wrote to ERSACT advising that CAA would soon start issuing bills to its customers and enclosing a copy of Mr Guérin's letter to the municipalities. (A model invoice was also enclosed).
- 4.10.3. In mid-September 1995, CAA started to invoice its customers for its first billing period (July – August 1995).<sup>114</sup> CAA's rates reflected an approximate 67.9% average tariff increase from the rates previously charged by DiPOS. The invoices corresponded precisely to the model previously submitted to ERSACT and, as with the model, also contained an additional charge for taxes, which included provincial taxes, municipal levies and federal taxes. In total, CAA's first invoices reflected on average, an approximate 110% increase over the rates previously charged by DiPOS. However, this rate increase was not uniform, due to the reclassification of numerous customers. This led to higher increased in the

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<sup>113</sup> Letter from CAA to Municipalities of Province of Tucumán, 1 August 1995 (Exhibit 831).

<sup>114</sup> Respondent argues that the initial billing period was only 41 days, and thus customers would not initially have appreciated the impact of the increase in tariffs and the billing of taxes: Respondent's Rejoinder at ¶¶205-209.

middle and higher range, with the lower income population experiencing little or no change.<sup>115</sup>

4.10.4. On 17 September 1995, ERSACT published an advertisement in *La Gaceta* and *Siglo XXI* stating that the 67.9% tariff increase, the separate charges for municipal, provincial and federal taxes, and the separate 6% contribution to ERSACT were all mandated under the Concession Agreement.<sup>116</sup>

4.10.5. Despite the substantial increase in charges to customers, CAA's collection rate for its first invoices, for the July – August 1995 billing period, was 64.5%, although, as Mr. de Rochambeau testified under cross-examination, the actual collection rate was closer to 74%, given the fact that CAA had no addresses for 15,000 of its 170,000 customers when it sent its first bills.<sup>117</sup>

#### **4.11. Post-Election Manifestations of Political Concern**

4.11.1. As noted in 4.8 above, by the time Governor Bassi took office, the political views about water services privatisation in general, and about the Concession Agreement in particular had shifted. As Vice Governor Topa confirmed during his cross-examination, both he and the Legislature held the view that the Concession Agreement had been “born defective”:

*“Not from a legal point of view, but with everything that was going on, evidently it was out of line in terms of equations, possibility of providing the service, and particularly the possibility of a community to pay.”*

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<sup>115</sup> CAA Invoice, 1 March 1996 (Exhibit 139). See also the Rais Report, ¶46.

<sup>116</sup> ERSACT advertisement, *La Gaceta*, 17 September 1995 (Exhibit 140).

<sup>117</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1) at ¶78, Testimony of de Rochambeau, Transcript of the hearing on the merits, Day 2, p. 360 (25 July 2006).

*However much, legally it might have been perfectly well adjusted.”<sup>118</sup>*

4.11.2. An example of the early concern of one legislator is Gumersindo Parajón’s proclamation on 6 September 1995, before CAA issued its first invoices, that “[t]he people must join the civil resistance and refuse to pay the bloated invoices they will receive for potable water and sewage services”.<sup>119</sup>

4.11.3. And Legislator Parajón’s concern was not the expression of a voice in the wilderness. Despite ERSACT’s prior vetting of CAA’s first invoices, the publication of its 17 September 1995 advertisements, and an ERSACT representatives’ confirmation on 28 September 1995 that

*“We have not detected any error in the first invoice that CAA has sent to its customers: the invoicing coincides with what is set forth in the Concession Agreement and Annex XIII which the executive power signed for the concession of the sanitation service”<sup>120</sup>*

the Legislature passed a resolution that same day ordering ERSACT to provide information on the tariff increase and inviting members of the public to provide input on tariff rates. The resolution also instructed the Court of Accounts to investigate the legality of each item that appeared on CAA’s invoices. And this occurred before the new government took office on 30 October 1995.<sup>121</sup>

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<sup>118</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, p. 1756 (30 July 2006).

<sup>119</sup> “Parajón insta a resistir y no pagar el agua”, *La Gaceta*, 6 September 1995 (Exhibit 137).

<sup>120</sup> “Revisaron Facturas de agua”, *La Gaceta*, 28 September 1995 (Exhibit 142).

<sup>121</sup> Legislature of the Province of Tucumán Resolution No. 10, 28 September 1995 (Exhibit 143), at ¶¶1, 2 and 4. As Dr. Rais put it, the government blamed the previous government and the legislators, – even those from the party which had approved the privatisation – denied any part in the matter and felt free to join the opposition.

4.11.4. After 30 October 1995, opposition to the Concession Agreement increased steadily. On 31 October 1995, legislators argued for a re-evaluation of the privatisation process.<sup>122</sup> About two weeks later, on 17 November 1995, the Attorney General suggested that CAA's tariffs were unrealistic and advocated for "tariff levels that are adjusted to the economic reality which the province is facing."<sup>123</sup> In this same time frame a number of individual legislators began to call for the outright suspension of CAA's tariff structure and the outright repeal of the privatisation.<sup>124</sup>

4.11.5. Despite CAA's protestations to Governor Bussi that what was happening in the Legislature was harming its standing, impairing its ability to collect on its invoices and inconsistent with the Province's obligations under the Concession Agreement to cooperate with the concessionaire, on 12 December 2005, the Legislature adopted Resolution No. 2 which recommended that the Governor unilaterally impose a temporary tariff reduction to a rate no more than 35% greater than the old DiPOS tariff. The tariff change sought by the Legislature was to be retroactive to 22 July 1995 (the date CAA assumed the concession) and would continue with "the establishment of a just and reasonable new tariff system."<sup>125</sup>

4.11.6. The year ended with a legislative debate in which legislator Virgilio Nuñez argued in favour of the departure of CAA, the "feudal lord" rather than to require

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<sup>122</sup> "Los motores a toda marcha", *Siglo XXI*, 31 October 1995 (Exhibit 144).

<sup>123</sup> "La Legislatura quiere suspender el aumento de la traifa del agua" *Siglo XXI*, 17 November 1995 (Exhibit 145).

<sup>124</sup> "DiPOS: objetan privatización", *Le Gaceta*, 29 November 1995 (Exhibit 147).

<sup>125</sup> Legislature of the Province of Tucumán Resolution No. 2, 12 December 1995 (Exhibit 149).

the people to pay the “abusive” tariffs. Mr. Nuñez concluded by comparing CAA officials to “pirates” taking the “treasures” that belong to the people of Tucumán”.<sup>126</sup>

4.11.7. Against this backdrop of political criticism and uncertainty, CAA’s initial collection rate for its first bills fell from 64.5% (for the July – August billing period) to 57.6% (for the September – October billing period) to 52.6% (for November – December billing period).<sup>127</sup>

#### **4.12. Episodes of Turbidity**

4.12.1. Between December 1995 and February 1996, there were episodes of turbidity in the drinking water in areas of Tucumán. The disputing parties disagreed on the cause, extent and impact of these episodes. Extensive evidence was tendered and much time was spent during the oral hearing on this subject.

4.12.2. For their part, Claimants contended that it was necessary to distinguish between localised “reddish turbidity” which occurred in certain areas in Tucumán in December 1995 and January 1996 (said to be caused by the iron and copper oxides which were an unavoidable by-product of the cleaning and system improvements made by CAA at this time, and which posed no risk to human health) and the “manganese turbidity” that occurred in late January and early February 1996 (caused by the unforeseeable entry of manganese from the bottom of the El Cadillal reservoir into the water system in San Miguel de Tucumán). The manganese turbidity was also said not to pose any risk to human health.

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<sup>126</sup> Legislature of the Province of Tucumán, Legislative Debate, 28 December 1995 (Exhibit 151), at p. 3971.

- 4.12.3. According to Respondent, all turbidity was one and the same, having started in mid-December and lasting through February 1996. Respondent argued that CAA should have foreseen the risk of the possible appearance of manganese and that the “Blackwater” was eminently foreseeable and avoidable.<sup>128</sup>
- 4.12.4. On these questions, the Tribunal concludes that there were two distinct and isolated incidents of water turbidity in the Tucumán water system, that neither incident posed any health risk to the people of Tucumán and that both incidents were resolved promptly in a manner which demonstrated CAA’s efficiency and professionalism.

#### **Appearance of Reddish Turbidity**

- 4.12.5. In late 1995 and early 1996, turbid water of a reddish colour appeared intermittently in localised portions of the water system of the provincial capital, San Miguel de Tucumán (“San Miguel”). As was pointed out by Mr. de Rochambeau, reddish turbidity had appeared periodically when the system was under DiPOS management and was unlikely to have been startling to San Miguel consumers. This turbidity almost certainly resulted, as was the case in late 1995, from the harmless break-away and release into the water supply of by-products of internal corrosion such as iron and copper oxides.<sup>129</sup>

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<sup>127</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶¶73 and 77.

<sup>128</sup> Counter-Memorial at ¶¶165-168.

<sup>129</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶100. Customers in Tucumán had been experiencing red turbidity on a recurring basis for many years – see ERSACT / CAA Sub-Committee on Water Quality, Final Report (with partial English translation), May 1996 (Exhibit 870). Importantly, the red turbidity posed no risk to human health.

4.12.6. Ironically, the reddish turbidity episode which occurred in December 1995 was a side effect of CAA's initial system improvements. Corroded elements broke away from the pipes, in part due to increases in water pressure, and in part due to reversals of the water flow following installation of new interconnections in the network. When reddish turbidity occurred, CAA responded by purging the system and injecting caustic soda at water treatment facilities, which effectively resolved the problem.

4.12.7. The Tribunal accepts Claimants' witnesses evidence (that of Messrs. de Rochambeau, Lefaix, Roberson and Dr. Gibb) that the effects of the appearances of reddish turbidity were minimal. According to data maintained by CAA, the reddish turbidity appeared only in water that passed through or in that part of the system that was interconnected with cast-iron pipes, and affected, intermittently, only about 5-10% of CAA's customers. Importantly, as was recognised by ERSACT itself, these episodes never posed any health risk and periodic repetition of the treatment process described above prevented any repeat occurrences.<sup>130</sup>

### **Appearance of Manganese Turbidity**

4.12.8. In late January 1996, the water system in parts of San Miguel de Tucumán also experienced the appearance of a dark, blackish turbidity due to the presence in the water supply of manganese from the El Cadillal reservoir. The manganese

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<sup>130</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶¶100-102; Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶¶31 and 36; Roberson Affidavit, 11 February 2006 (Exhibit 798), at ¶¶6-17 and Gibb Report, 10 February 2006 (Exhibit 797), at ¶¶8-11, 26-28 and 36-37. In its Resolution No. 21/96 of 19 January 1996, ERSACT said that the analyses its laboratory carried out showed that the water was suitable for human consumption and posed no risk to human health (Exhibit 832).

turbidity was far more widespread than the previous episodes of reddish turbidity and, given the unattractive appearance of the water, it had the potential to be, and no doubt was very upsetting to consumers.

4.12.9. The manganese turbidity episode occurred as the result of a complex chemical reaction, the seeds for which had been sown over many years. In simple terms, manganese exists in the mud at the bottom of lakes (generally old lakes) and under certain circumstances dissolves in the lake water. Such water will turn dark in colour when it comes into contact with chlorine or oxygen.

4.12.10. In order to understand why the manganese problem occurred, it is necessary to understand the characteristics of the water in the El Cadillal basin. During the summer, the water stratifies into two layers. The temperature in the top layer of water rises, which causes it to circulate and become highly oxygenated. The bottom lawyer is relatively cold, does not circulate freely and contains very little oxygen. The two layers do not mix well.

4.12.11. Although El Cadillal is a fairly young lake, it turns out the silt at the bottom of the basin contained crystallised manganese. Manganese is soluble in unoxxygenated water and in January 1996 the crystalline manganese in the silt in the bottom of El Cadillal dissolved in the unoxxygenated bottom layer of water. Manganese crystals do not dissolve easily and will do so only under certain conditions. These occurred that January.

4.12.12. As Mr. Lefaix explained in his testimony, the water in the El Cadillal basin had not been renewed for sometime (it having not rained for months in Tucumán and

because the deep water outlets from the basin had been closed in an effort to prevent mud slides in the bottom of the reservoir comparable to those that had occurred in 1983). These factors, together with the presence of algae, further reduced the oxygen level at the bottom of the lake and increased the volume of the unoxygenated bottom layer of water. This confluence of events caused the manganese crystals to dissolve in the unoxygenated water at the bottom of the lake.

- 4.12.13. During December 1995 and until mid-January 1996 CAA had been pumping water from the reservoir to the treatment plant through the raw water intake. CAA tested for manganese at the entrance of the treatment plant in December 1995 and January 1996 and no manganese was detected.
- 4.12.14. At the time CAA took over the water service, a second water intake, located at the floating pumping station, was not working. During November and December 1995, CAA had renovated the surface pumping station to restore it to good working order. On 17 January 1996 it tested the floating pumping station. No manganese turbidity occurred at this time.
- 4.12.15. However, by 22 January 1996, the lower layer of unoxygenated water had risen above the level of the raw water intake, which meant that the water then being pumped to the treatment station through the raw water intake contained dissolved manganese. Thus water containing manganese in solution was pumped throughout the network. However, since that water was not oxygenated, the manganese remained in solution and the water remained clear. Nevertheless, the

manganese in the solution began to collect on the sides of the pipes throughout the system through the process of absorption.

4.12.16. At about this time, the treatment of water taken from the reservoir through the raw water intake was becoming difficult and CAA decided to start pumping water from the renovated surface pumping station. Within hours of beginning to do so, turbidity started to appear in the water and at dawn on 26 January 1996 a generalised turbidity appeared in the San Miguel network. As a result of highly oxygenated water being pumped into the system from the surface layer of water from the floating pumping station, the manganese that had been dissolved in the water that was already in the system (or deposited on the walls of the pipes) precipitated and turned the water turbid.

4.12.17. The disputing parties differed sharply as to the foreseeability of a potential manganese turbidity problem at the time CAA took over the concession. Respondent contended that the potential problem was entirely foreseeable and could and should have been averted. Claimants argued that nothing in the history of the service suggested the possibility of such an occurrence and that its causes were unique and not reasonably to have been anticipated.

4.12.18. On this point, the Tribunal accepts as accurate the evidence of Mr. Lefaix, that neither DiPOS nor CAA knew of the presence of manganese prior to the problem in January 1996 and that no historical records indicated that the silt at the bottom of the El Cadillal reservoir contained manganese.

4.12.19. Mr. Lefaix's evidence was confirmed by Respondent's witness, Dr. Courel, who testified under cross-examination that DiPOS did not conduct sampling to detect manganese. As Dr. Courel was in charge of the water quality control service at ERSACT in January 1996, having worked at DiPOS since 1984, we are satisfied by this evidence, and the fact that there were no facilities in place to treat manganese at any of the treatment plants in Tucumán, that the episode of manganese turbidity which occurred in January 1996 was not foreseeable.<sup>131</sup>

4.12.20. We are also satisfied that CAA's response to the manganese episode was swift, professional and effective. CAA diagnosed the cause of the turbidity within hours after it appeared and adopted corrective measures in the early morning of 26 January 1996. The same day, CAA notified ERSACT that it believed it knew the cause of the turbidity.<sup>132</sup> Within 72 hours of the peak in turbidity, CAA had in place a standard treatment programme to separate the manganese dioxide from the water, by injecting potassium permanganate and then using filters and decanters. It had also put in place an intensive sampling and analysis programme to prevent such future incidents. By the beginning of February, a few days after the dark turbidity appeared, water distributed through the network already had manganese concentrations below the level specified in the Concession Agreement.<sup>133</sup> The Joint ERSACT / CAA Sub-Committee on Water Quality reached the same conclusion, noting as well that CAA's monitoring of the water quality in the days

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<sup>131</sup> Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶41, and Testimony of Courel, Transcript of the hearing on merits, Day 9, pp. 2153-2154 (2 August 2006).

<sup>132</sup> Letter from CAA to ERSACT, 26 January 1996 (Exhibit 853).

<sup>133</sup> Lefaix Supplemental Affidavit, 8 February 2006 (Exhibit 789), at ¶83.

following the incident which included more than 500 turbidity analyses per week, was “exceptional”.<sup>134</sup>

4.12.21. Although it is generally well understood that the presence of manganese in water poses no health risk, CAA nonetheless retained an Argentine doctor, an expert in water-borne infectious diseases, who conducted a detailed study and confirmed that no health risk existed. Throughout, the population was informed about the absence of health risks and CAA held a press conference shortly after the incident to explain the phenomenon to its customers. All in all, the manganese episode was resolved in about two weeks and the phenomenon gradually disappeared over that time.<sup>135</sup>

#### **4.13. Regulatory and Political Responses to “Water Quality” and Turbidity Episodes**

4.13.1. Despite the measures taken at the outset by CAA to improve the Tucumán water service, despite having confirmed that CAA’s first billings were mandated by the Concession Agreement and despite a six-month contractual grace period (against regulatory fines relating to quality controls),<sup>136</sup> in early December, and over the next several months, ERSACT initiated a series of “regulatory” proceedings against CAA for alleged problems with water quality and its invoices. During this

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<sup>134</sup> ERSACT / CAA Subcommittee on Water Quality, Final Report (with partial English translation), May 1996 (Exhibit 870).

<sup>135</sup> Lefaix Affidavit, 3 November 2004 (Exhibit 2), at ¶¶64-67, de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶¶113 – 115 and Dr. Pedro Cahn evaluación microbiológica del sistema de aguas de San Miguel de Tucumán, February 1996 (Exhibit 54), Testimony of Roberson, Transcript of the hearing on the merits, Day 5, pp. 1219-1221 (28 July 2006) and Testimony of Gibb, Transcript of the hearing on the merits, Day 5, pp. 1273-1277, 1293-1296 (28 July 2006).

<sup>136</sup> Concesión del Servicio de Agua y Desagües (locales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXII, 18 May 1995 (Exhibit 127), at Article 14.8.2.

same period, members of the Executive and a number of provincial entities also became publicly engaged on these issues.

- 4.13.2. An understanding of what motivated these regulatory and political responses to CAA's initial operation of the concession, its billings and the episodes of turbidity described above is key to determining whether or not Claimants' Treaty rights were contravened in this case.

### **101 Charges of Water Quality Control Breaches**

- 4.13.3. On 6 December 1995, ERSACT accused CAA of breaching its water quality control obligations under the Concession Agreement by not taking samples and testing in 78 different localities in the interior in August and September 1995.
- 4.13.4. By letter dated 8 January 1996 (misdated 1995), CAA denied liability, requested that the 78 separate claims be consolidated into a single proceeding, and invoked its rights under the grace period.
- 4.13.5. On 7 February 1996, ERSACT rejected CAA's challenge and levied 78 fines on CAA for a total of US\$78,000. On the same date, it accused CAA of 23 further breaches of its water quality control obligations under the Concession Agreement by not taking samples and testing in 23 locations in the interior in October 1995. (These regulatory charges did not result in fines at this time, but were dealt with 20 months later – ERSACT's behaviour in late 1997 is dealt with later in this Award).

4.13.6. Dr. Daniel Paz (CAA's then Director of Legal Affairs) testified that, shortly after these first fines were imposed, he requested (and was granted) a meeting with Engineer Franco Davolio, the Sub-Interventor (the "Intervention" of ERSACT by the Executive on 26 January 1996 is described below), the second highest official at ERSACT. Given CAA's increasingly difficult relationship with ERSACT, Dr. Paz had become more cautious in his dealings with the Regulator, and had sought an in-person meeting to confirm (against the originals) the completeness of the annexes to an ERSACT Resolution of which CAA had recently been notified. A meeting was fixed for late in the day of Friday, 16 February 1996 and Dr. Paz asked Mr. José Padilla, a notary public, to accompany him to make an official notarial record (*Acta*) of what transpired. (Under Argentine law, the events verified by a notary public in his or her presence and transcribed in the form of an *Acta* over his or her signature are to be considered as totally authentic, not only between the parties, but also with respect to third parties).<sup>137</sup>

4.13.7. Although Engineer Davolio testified that the 16 February 1996 meeting never took place, the Tribunal is satisfied that the meeting occurred on the date and as described by Messrs. Paz and Padilla. (This on the basis of (i) the contemporaneous letter, prepared in the ordinary course of business, sent by CAA to Mr. Fogliata (Mr. Davolio's superior) on 19 February 1996 (the Monday following the Friday meeting) that refers specifically to the meeting, its purpose, the discussion that took place and the fact that notarial records had been made,<sup>138</sup> (ii) the testimony of Messrs. Paz and Padilla, and (iii) the contents of Mr.

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<sup>137</sup> Padilla Affidavit, 6 January 2006 (Exhibit 794) at ¶3. Mr. Padilla's evidence on this point was not challenged.

Padilla's *Acta* No. 60.<sup>139</sup> Under cross-examination, Mr. Davolio testified that he saw CAA's confirmatory letter at the time but, rather than respond, he and Mr. Fogliata decided simply to "set it aside".<sup>140</sup>

4.13.8. Because of its importance, that part of Notary Padilla's record of the Paz / Davolio exchange on the subject of the 78 fines that had just been imposed by ERSACT, is set out fully below:

*"Dr. Paz then told Mr. Davolio: "Don't you think we're getting buried in paper from all these cases being filed lately? Take the case of the 78 fines: don't you think a single case could have been filed, instead of 78?" Mr. Davolio replied, "[t]hat's how I see it. If it were up to me, I would resolve most of these matters with a telephone call. As far as the 78 fines, I agree, but my superiors are asking me to put pressure on Aguas del Aconquiya to renegotiate the rates."*

*"Dr. Paz then told Mr. Davolio, "Lately our engineers are spending more time on inspections in response to resolutions than on technical work. Do you think a relationship can be kept up under those conditions for 30 years?"*

*"Mr. Davolio replied; "Look, this whole problem came about because of the high rates and, what is worse, you had the misfortune that the manganese thing happened, which it never had before in Tucumán. So until the rates are renegotiated like the government wants, the order from*

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<sup>138</sup> Letter from CAA to ERSACT, 19 February 1996 (Exhibit 860).

<sup>139</sup> Acta No. 60, Notary Public Álvaro Padilla, 16 February 1996 (Exhibit 859).

<sup>140</sup> Transcript of the hearing on the merits, Day 8, pp. 1937-1938 (31 July 2006).

higher up is to keep applying pressure with whatever we've got."

*Mr. Davolio then said "you have no idea how much I want to get out of here. I am sure that right now someone is on the phone saying, "What is Davolio doing meeting with CCA's [sic] people for over half an hour? But I don't care. You two leave and I will deny everything".<sup>141</sup> (emphasis added)*

- 4.13.9. After the completion of his re-examination Mr. Davolio was invited by the Chairman of the Tribunal to reconsider his testimony – that the 16 February 1996 meeting never occurred – on the basis of his memory possibly being refreshed by reference to CAA's 19 February 1996 letter to Mr. Fogliata. Mr. Davolio declined to do so, and stated "I'm absolutely certain it did not happen."<sup>142</sup>
- 4.13.10. For the reasons noted at 4.13.7 above, the Tribunal accepts as accurate the testimony of Messrs. Paz and Padilla as to what happened on 16 February 1996.

### **Regulatory and Political Responses to the Episodes of Turbidity**

- 4.13.11. As noted above, episodes of red turbidity had been experienced on a recurring basis in San Miguel for many years and were known to be harmless. Indeed, on 19 January 1996, about a week before the occurrence of manganese turbidity, ERSACT confirmed that its own laboratory's analyses showed that the water in San Miguel posed no risk to human health and was suitable for human consumption.<sup>143</sup>

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<sup>141</sup> Padilla Affidavit, 6 January 2006, Annex B (Exhibit 794).

<sup>142</sup> Transcript of the hearing on merits, Day 8, pp. 1979-1980 (31 July 2006).

<sup>143</sup> ERSACT Resolution No. 21/96, 19 January 1996 (Exhibit 832).

- 4.13.12. Similarly, the evidence is clear that the manganese turbidity, while disagreeable in the words of Gérald Guérin, even “repugnant”<sup>144</sup>, never posed a risk to human health. Claimants’ experts testimony to this effect, echoed ERSACT’s announcement, published in Tucumán’s two leading newspapers on 26 January 1996 that the manganese related turbidity did not pose a threat to human health.<sup>145</sup>
- 4.13.13. However, instead of seeking to calm consumers during this difficult period, as might have been expected, government ministers and the executive behaved in a manner which undermined both the water services operator and the Regulator. On 24 January 1996, under the headline “Guraiib says that the water damages our health”, *La Gaceta* reported Tucumán’s Health Minister telling the Legislature that the water in San Miguel could cause cholera, typhoid and hepatitis.<sup>146</sup> Thereafter, on 31 January 1996, the Minister of Health, during a legislative debate, stated that CAA was supplying “bacteriologically contaminated water”.<sup>147</sup>
- 4.13.14. Vice Governor Topa testified at the oral hearing that the Health Minister had come to see him before making the former statement. His evidence was that, when told that the Minister believed the water could be a risk to public health, he presumed that a health specialist, such as the Minister, would have “conducted a number of analyses and tests with his technicians to say that the water was not

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<sup>144</sup> Letter from Gérald Guérin (CAA) to ERSACT re file 128/300 (“Just as repugnant as harmless”), 28 February 1996 (Exhibit 661).

<sup>145</sup> Gibb Report, 10 February 2006 (Exhibit 797), at ¶40; ERSACT advertisement in *Siglo XXI* and *La Gaceta*, 26 January 1996 (Exhibit 152).

<sup>146</sup> *La Gaceta*, 24 January 1996 (Exhibit 548).

<sup>147</sup> Legislature of the Province of Tucumán, Legislative Debate, 31 January 1996 (Exhibit 160).

drinkable” before making such public statements.<sup>148</sup> However, no evidence of any such analyses was submitted by the Respondent.

4.13.15. Two days after the Health Minister’s first statement, and on the day ERSACT published its advertisements reassuring the public that the manganese turbidity posed no health threat, Vice Governor Topa, acting on behalf of Governor Bussi, “took the decision to intervene in the agency”, replaced its board of directors and appointed Mr. Franco Fogliata to serve as “Interventor”, heading ERSACT as its “chief government inspector”. (Prior to his appointment as Interventor, Mr. Fogliata had served – and continued to do so – as Tucumán’s Minister of Production.) Three days later, Mr. Franco Davolio, was appointed as Sub-Interventor of ERSACT, becoming Interventor on 7 March 1996, “upon the delegation of that office by the Minister of Production”.<sup>149</sup>

4.13.16. Under Argentine law, the intervention into an agency such as ERSACT is permissible only in an emergency. When an Interventor is installed, his or her job is not to take over the agency permanently, but to reorganise it and resolve the emergency.<sup>150</sup>

4.13.17. Vice Governor Topa explained the Province’s decision to intervene ERSACT was based on “a public alert situation”, “a public situation with extreme pressure on the government” which resulted from “a sudden increase in the tariff of over a

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<sup>148</sup> Transcript of the hearing on the merits, Day 7, p. 1709 (30 July 2006).

<sup>149</sup> Transcript of the hearing on the merits, Day 7, pp. 1906-1907 (30 July 2006); Davolio Affidavit, 29 September 2005 (Exhibit 383), at ¶2.

<sup>150</sup> Bianchi Report, 13 February 2006 (Exhibit 801), at ¶¶192-196.

hundred percent in the first bill”, “the episode of water turbidity” and with the regulatory agency not responding with clarity, but with ambiguities.<sup>151</sup>

4.13.18. That the decisions of ERSACT were “politicised” and directed by the Executive from that point forward is not in doubt. Mr. Davolio testified under cross-examination as to the decision / resolution making process when Mr. Fogliata was Interventor, and after:

*“A. The regulatory body, its function was to oversee compliance with the contract in every respect, and when there was what is called a breach or non-performance, then a resolution was issued when that non-performance was well-founded and duly proven. That is what you call resolution against CAA.*

*Q. Thank you for that clarification. When such a resolution was issued, was the ultimate decision whether or not such a resolution should be issued a decision of Minister Fogliata?*

*A. Exactly. Until the day that I took over as Interventor, but despite that, even after that, I always consulted with him” ... “Well, while he was the Interventor, its not that he would issue it. It would be drawn up by ERSACT. It would be taken to Minister Fogliata for him to it define or decide whether it was appropriate because he would have a political view or policy view beyond the resolution and in light of how the relationship with the company stood”.*<sup>152</sup>

4.13.19. On the same day it was intervened, ERSACT issued Resolution 51/96 declaring CAA to be *at fault* for the manganese incident and imposing, *as a penalty*, 35 days free service for affected customers.

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<sup>151</sup> Transcript of the hearing on the merits, Day 7, pp. 1629-1632 (30 July 2006).

<sup>152</sup> Transcript of the hearing on the merits, Day 8, pp. 1941-1943 (31 July 2006).

#### **4.14. Regulatory and Political Responses to CAA's Invoices**

4.14.1. As noted at 4.11.3 above, the legality of CAA's first invoices (specifically, the addition of certain federal, provincial and municipal taxes to CAA's service tariff) was put in issue initially by the Legislature's 28 September 1996 Resolution calling for their examination by the Court of Accounts. This was followed shortly by the establishment of the Legislature's Special Commission and the Attorney General's call for the CAA's "unrealistic" tariffs to be adjusted to reflect the economic reality the Province was facing.

4.14.2. Given the importance that the tax component of CAA's bills assumed in this dispute, it is useful to summarise briefly the taxes that were involved.

4.14.3. When the decision was taken to privatise, the Province elected to impose six new taxes (or charges) on users of the water service. These were:

- (i) "*Ingresos Brutos*" ("IB"), a provincial tax on CAA's gross income equal to 2.5% of the service tariff;
- (ii) *PACIS*, a municipal tax equal to 1.2% of the service tariff;
- (iii) *Contribución de Ocupación de Suelos* ("OS"), a municipal tax that varied between the municipalities but was equal to 6.0% of the service tariff in San Miguel Tucumán;
- (iv) a municipal retention levy ("RM"), collected on behalf of the municipalities, and equal to 2.0% of the service tariff;
- (v) a federal value-added tax ("IVA"), being 21% of the sum of the service tariff and the IB, PACIS and OS taxes; and
- (vi) "ENTE, a charge paid to ERSACT, being 6% of the sum of the service tariff and the IB, PACIS, OS, RM and IVA taxes and levies.

4.14.4. The total value of the six taxes was approximately 38.7% of CAA's service tariff (slightly higher when grossed-up as required), and it is Respondent's present

position that the parties dispute over taxes concerned only the addition to CAA's tariff changes of IB (2.5%), PACIS (1.21%) and a municipal tax (assessment) on the supply of network water and sewage service (4.52%).<sup>153</sup> Put another way, whatever may have appeared to be in issue at the time, disputing parties now agree that amounts totalling approximately 30% of CAA's service tariff were properly to be charged on top of the 67.9% increase over the former DiPOS rates which was permitted in the first year (*ie* for an undisputed total increase of 98% over the DiPOS rate).

4.14.5. Although ERSACT's early position on the propriety of CAA adding the taxes in question to its service tariff is clear – its 17 September 1995 advertisement in *La Gaceta* stated:

*“2. The billings by “AGUAS DEL ACONQUIJA S.A.” include a 67.9% increase over the rate schedule amounts for the last billing by DiPOS, plus the cost to the Concessionaire of provincial taxes and municipal taxes (on the rate for service net of VAT) and the 6% contribution to the Regulatory Agency”.*<sup>154</sup>

Carlos Barrionuevo, ERSACT's then head, told his board on 20 September 1995, that “the Concession Agreement contains absurd provisions” and asked the board to “issue an administrative act ordering a halt to the attempt to collect all these charges”.<sup>155</sup> The board minutes record a discussion about the scope of the Regulator's power to interpret the contractual provisions, but a complete copy of

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<sup>153</sup> Claimants' Post-Hearing Brief at ¶9. Respondent's Post-Hearing Closing argument (¶¶11, 14 and 16) notes that the Province never questioned CAA's interpretation regarding the tax for the municipal assessment of the public space (¶14), but it seems clear the charge for this tax was in issue, given Respondent's position that it had been repealed when CAA charged for it in its invoices (at ¶16).

<sup>154</sup> ERSACT advertisement, *La Gaceta*, 17 September 1995 (Exhibit 140).

the minutes not having been produced, it is not possible to say what then transpired.

- 4.14.6. On 25 September 1996, five days after Mr. Barrionuevo's presentation to the board, ERSACT requested the Attorney General to issue a report on the difference between the signed Concession Agreement and the Bid Conditions. Three days later, on 28 September 1996, the Legislature ordered ERSACT to provide information on the tariff increase, invited public comment on tariff rates and instructed the Court of Accounts to investigate the legality of each item on CAA's invoices.
- 4.14.7. On 16 November 1996, legislators from the governing party filed a bill to form a commission to investigate the tariff structure of the concession. At the same time, opposition legislators brought forward another bill to create a commission to investigate the privatisation process. The next day, both bills were merged and an Investigative Commission was formed for both purposes. Mr. Próspero Barrionuevo (a member of the legislature and the opposition *Justicialista* party - not to be confused with Carlos Barrionuevo, Head of ERSACT) was appointed to the Commission.
- 4.14.8. Less than a month later, on 12 December 1996, and *before* receiving reports from the Attorney General, the Court of Accounts or the Investigative Commission, the Legislature adopted a resolution calling for CAA's tariffs to be reduced – retroactive to 22 July 1995.

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<sup>155</sup> Minutes No. 9 of the Board of Directors of ERSACT, 20 September 1995 (Exhibit 434).

4.14.9. A month after that, on 15 January 1996, the Attorney General issued his opinion, concluding that the Circular No. 2 (described above at 4.2.12) did not justify Article 9.2 of the Concession Agreement – this on the basis that such ministry circulars should be limited to the modification of non-essential provisions. However, no suggestion was made by the Attorney General that CAA had acted improperly, or that its invoicing procedures breached the Concession Agreement. Nor did he recommend that CAA be sanctioned, or that the Province act, on its own, to amend the Concession Agreement. Rather, he stated, “it is necessary to convene the board of directors of Aguas del Aconquija, through its chairman or representative, with the purpose of *reaching an agreement* that would make it possible to restructure the rate charge ... in accordance with our findings.”<sup>156</sup> (emphasis added)

4.14.10. About three weeks later (two weeks after it had been intervened), on 9 February 1996, ERSACT issued Resolution 170/96 in which it found CAA’s invoicing procedures to be “*invalid acts*” and “order[ed] that they be revoked or replaced *for reasons of illegitimacy* ... in order to avoid [ERSACT] issuing an administrative decision that forces CAA to reduce the current rate charged”.<sup>157</sup> (emphasis added) The resolution also directed CAA, within 48 hours, to submit a corrected rate schedule based on the Attorney General’s opinion and subject to ERSACT’s approval. Until such approval was received, CAA was enjoined from issuing new invoices or collecting on outstanding invoices. The resolution also

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<sup>156</sup> Opinion of the Attorney General, 15 January 1996 (Exhibit 159) at pp. 3-4.

<sup>157</sup> ERSACT Resolution No. 170/96, 9 February 1996 (Exhibit 154).

directed that it be distributed broadly to associations of users and consumers as well as to the Attorney General's office.

- 4.14.11. The next day, in a statement to the press, the Ministry of the Interior, Alberto Germanó, stated that CAA's Concession Agreement should be rescinded, because CAA provides "a very bad service with a high tariff". The Minister went on to say that the Province was prepared to take over the concession.<sup>158</sup>
- 4.14.12. On 13 February 1996, ERSACT issued Resolution No. 173/96, directing that CAA grant affected customers a 35-days billing holiday (from 2 January to 6 February 1996). ERSACT subsequently affirmed the billings holiday order by Resolution 213/96 on 19 March 1996.
- 4.14.13. CAA appealed Resolution 170/96 on 14 February 1996. In doing so, it disagreed with the Attorney General's opinion, but noted that, even if the opinion were accepted, the resolution was inconsistent with it.
- 4.14.14. On 15 February 1996, in a statement to the press, Governor Bussi announced the intention of his government to rescind the Concession Agreement:

*"Journalist – is the agreement going to be rescinded? Is the Executive Branch continuing to pursue this issue?"*

*Mr. Bussi – that is the intention. Unless there is a miracle, and I do believe in miracles, but ...*

*Journalist – do you believe that such a miracle is close?"*

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<sup>158</sup> Statement to the press, 10 February 1996 (Exhibit 436).

*Mr. Bussi – No, no. I have said this before and I will say it again: I don't see any possibility of a miracle any time soon*".<sup>159</sup>

4.14.15. The next day, 16 February 1996, the Court of Accounts rendered its opinion. It endorsed the Attorney General's interpretation and found that CAA should not be invoicing for IB (2.5%) and PACIS (1.21%) taxes. It concluded that the RM (2%) tax was the only *municipal* tax that could be charged on top of the service tariff (emphasis added). The Court of Accounts endorsed the Attorney General's recommendation that ERSACT negotiate with CAA to resolve the issue.<sup>160</sup>

4.14.16. That same day an advertisement appeared in *AMBITO Financiero* which was titled "The Water Problem in Tucumán, Governor Bussi's report to the Tucumán Legislature on "Aguas del Aconquija" ". The advertisement appeared over Governor Bussi's name and title. The advertisement contained, *inter alia*, the following relevant statements:

*"the company ... has not given much thought to the consequences of trying to convert its breach of contract into a political issue ..."*

*"the concessionaire company has been systematically ignoring and evading performance of the agreement."*

*"neither ... the Ambassadors of France and Spain have had to suffer what the 700,000 Tucumán residents had to suffer for a good part of the month of January, during which substance which was anything but water was distributed through the pipes. That substance was neither potable nor usable"*.

*"the possible application to Aguas del Aconquija of the maximum sanction set forth in the Concession Agreement –*

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<sup>159</sup> Statement to the press by Governor Bussi, 15 February 1996 (Exhibit 141).

<sup>160</sup> Court of Accounts Resolution No. 015, 16 February 1996 at Article 3 (Exhibits 170 and 170A).

*Rescission – is not a capricious action by Governor Bussi. It is the response to a unanimous request by the entire social, political, guild and business spectrum of the province, duly represented by the Honourable Legislature, which has been supporting without hesitation the actions undertaken by the Executive Branch.”*

*“I will not hesitate to personally move forward with the administrative measures, as well as to also drive the legislative and legal actions that may be necessary to resolve the problem affecting the people of Tucumán”.*<sup>161</sup>

4.14.17. On 19 March 1996, ERSACT issued Resolution 212/96 by which it (i) rejected CAA’s appeal, (ii) maintained that CAA had breached the Concession Agreement, (iii) stated that ERSACT had not approved CAA’s invoice, (iv) ordered CAA to correct its future invoices and credit users for the items improperly included on past invoices, and (v) informed the Executive Branch of CAA’s “serious and unjustified failure” to comply with ERSACT’s previous order, Resolution 170/96<sup>162</sup>. The Resolution stated that Resolution 170/96 had immediate effect, despite the pendency of CAA’s appeal, and declared CAA to be in violation of its terms and required notification, amongst others, of the existing users and consumer associations. In support of its decision, ERSACT stated that the Attorney General’s opinion, with which it agreed, “leads to the need and obligation to take *urgent measures* in view of the *serious losses* that may be caused, or to attenuate those that have already been caused due to the incorrect billing, in addition to the *great social repercussions*”. It went on to note that “the user is the first victim of this situation because of the undue funds charged, and

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<sup>161</sup> Advertisement by Governor Bussi, *AMBITO Financiero*, 16 February 1996 (Exhibit 167).

<sup>162</sup> ERSACT Resolution No. 22/96, 19 March 1996 (Exhibit 157).

*the disobedience is serious ... because of the high amounts involved ...*”.

(emphasis added)

4.14.18. As regards the amounts involved, the three taxes at issue (IB, PACIS and OS – or, as now argued, “the municipal taxes on the supply of network water and sewerage services”), total approximately between 8.2 - 9.7% of the service charge. Having regard to Mr. de Rochambeau’s uncontradicted evidence, that the average monthly invoice for water and sewage services in Tucumán during CAA’s operation of the concession was US\$25.92. The Tribunal finds that the amount involved in the party’s dispute concerning “improper” charges was approximately US\$2.10 - US\$2.50 per month – even in Tucumán, a relatively small amount for the average customer. However, from CAA’s perspective, a 3.7% reduction in revenue was substantial when looked at against the 11.7% rate of return it projected when it made its improved economic offer.<sup>163</sup>

4.14.19. On 21 March 1996 the Attorney General advised customers “not to pay the last invoice (January – February) until the company responds to the order issued by ERSACT instructing it to refrain from charging for the service provided from January 6 through February 6”.<sup>164</sup>

#### **4.15. First Attempted Renegotiation**

4.15.1. On 20 February 1996, Governor Bussi wrote to CGE’s President, inviting him to a meeting to discuss “the grave situation” facing the Province and CAA.

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<sup>163</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶27.

<sup>164</sup> “*El fiscal Frías Silva instó a no pagar el agua*”, *Siglo XXI*, 21 March 1996 (Exhibit 171).

4.15.2. The requested meeting by the Governor took place on 26 February 1996. CAA and CGE / Vivendi were represented by Mr. de Maud'huy (CAA's Vice Chairman and a representative of CGE) and Mr. Erize (a director of CAA and counsel to CAA/CGE). They were accompanied by a representative of the French Embassy. Mr. de Maud'huy testified as to what occurred at the meeting. His testimony was not contradicted and the Tribunal accepts his evidence in this regard.

4.15.3. Mr. de Maud'huy recalled that Governor Bussi began by saying that there had been a "misunderstanding" between himself and CAA. He went on to say that taxes were part of CAA's tariff, that CAA must not charge customers the taxes in addition to its tariffs and that this was sufficient cause for the Province to repudiate the Concession Agreement. Nevertheless, in the light of President Menem's upcoming trip to France, he (Governor Bussi) was willing to negotiate a solution. He requested CAA's investors to bring forward a proposal for lower tariffs and corresponding adjustments to related contractual provisions that would correspond to the Tucumán population's ability to pay. Mr. de Maud'huy replied that the tariffs in the Concession Agreement were consistent with the terms set by the Province at the time of privatisation and had been calibrated to the population's ability to pay. However, Mr. de Maud'huy indicated that, if necessary, CAA/ CGE would negotiate to resolve the crisis. The Governor responded that the investors in CAA had not answered his earlier invitation to renegotiate and that CAA did not seem fully to understand the risk it faced that the Concession Agreement might be declared null and void. He indicated that he

was not prepared to continue to debate, that he intended to turn the matter over to the provincial Attorney General, and that if CAA wished to resolve matters by negotiation it should submit a firm proposal on new tariffs. He concluded the meeting by saying that he would wait only eight more days before rescinding the Concession Agreement.<sup>165</sup>

- 4.15.4. On 6 March 1996, CAA submitted a proposal to Governor Bussi for a renegotiation of the Concession Agreement. The proposal contemplated, *inter alia*, a reduction in the concession area, a reduction in the investment obligations, a change in the tariff system to one based on actual consumption, and a reduction in tariffs.
- 4.15.5. On 11 March 1996, Minister Germanó, the Head of the Ministry of Government, rejected CAA's proposal. He noted that the company did not appear to have "welcomed the suggestions" of Governor Bussi.<sup>166</sup>
- 4.15.6. On 18 March 1996, Minister Germanó advised CAA of the government's preconditions for negotiation, which included an immediate tariff cut of 30%.
- 4.15.7. On 27 March 1996, CAA and representatives of the Province convened as the "Commission for the Renegotiation of the Concession Agreement" under the chairmanship of Minister Germanó. In the course of the meeting, the parties agreed they would work on an analysis of a proposal submitted on the same date by CAA (in essence similar to the proposal submitted on 6 March 1996). The

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<sup>165</sup> de Maud'huy Affidavit, 5 November 2004 (Exhibit 4), at ¶¶15-22.

parties also agreed on terms to govern the period during the negotiations in March and April. Specifically, the parties agreed to a temporary 25% tariff reduction and a suspension of CAA's investment commitments. They also agreed, in principle, on a future reduction in the size of the concession area and on CAA's proposal to transition to a new usage-based rate structure.<sup>167</sup>

4.15.8. As a result of the agreement in principle reached at this meeting, the Province agreed to suspend enforcement of ERSACT Resolutions 212/96 and 213/96 for the duration of the renegotiation. This decision was duly implemented on 14 April 1996, by ERSACT Resolution No. 289/96.<sup>168</sup>

4.15.9. The effect of the suspension of these resolutions 212/96 and 213/96 was to permit CAA to recommence invoicing its customers for its services (based on a 25% reduction) as well as for the disputed taxes and fees. ERSACT's 35-day billing holiday was also suspended (but not the 10-day billing holiday which CAA had offered at the time of the manganese turbidity incident). The Province also agreed to encourage the payment of all outstanding bills, by instalments over 90 days.

### **Failure of First Renegotiation**

4.15.10. Although the first renegotiation initially seemed to promise an end to the crisis, it foundered as a result of concerns arising from the publication, on 10 May 1996, of

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<sup>166</sup> Letter from Minister Germanó to CAA, CGE and DYCASA, 11 March 1996 (with English translation) (Exhibit 174).

<sup>167</sup> Comisión de Renegociación del Contrato, Minutes of Meeting No. 1, 27 March 1996 (with English translation) (Exhibit 16).

<sup>168</sup> ERSACT Resolution No. 289/96, 30 April 1996 (with English translation) (Exhibit 175)

the Legislature's "Final Report of the Special Investigative Commission on the Privatization of DiPOS".<sup>169</sup>

- 4.15.11. The report criticised the privatisation process and expressed concerns of corruption. According to the report, the Attorney General was expected to initiate criminal investigations as to the alleged irregularities. The Governor was also expected to take appropriate action, including nullification of the Concession Agreement if necessary.<sup>170</sup>
- 4.15.12. Although the Attorney General later concluded that the report's charges were unfounded, it intensified criticism of CAA. Minister Germanó stated that the "Government could not continue to deal with criminals" if the Legislature concluded that the Concession Agreement "was riddled with 'irregularities' that would be felonies" and on 14 May 1996, the renegotiations were suspended pending instructions from the Legislature.<sup>171</sup>
- 4.15.13. A few days later, a decision by ERSACT brought to an end the provisional arrangements that had been agreed to govern the first negotiations. On 16 May 1996, ERSACT issued Resolution No. 322/96, reactivating Resolutions No. 212/96 (prohibiting CAA from charging for the municipal taxes separately from

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<sup>169</sup> Legislature of the Province of Tucumán, Informe de la Comisión Especial Investigadora del Proceso de Privatización de la EX Di.P.O.S., 10 May 1996 (Exhibit 176).

<sup>170</sup> Legislature of the Province of Tucumán, Informe de la Comisión Especial Investigadora del Proceso de Privatización de la EX Di.P.O.S., 10 May 1996 (Exhibit 176).

<sup>171</sup> "El Gobierno decidió suspender la negociación con la concesionara", *Siglo XXI*, 8 May 1996 (Exhibit 179).

its service tariff) and No. 213/96 (prohibiting CAA from invoicing for services from 2 January through 6 February 1996).<sup>172</sup>

4.15.14. Although the Governor ordered the Interventor to repeal Resolution No. 322/96 (ERSACT complied with this direction on 29 May 1996, by issuing Resolution No. 333/96), the Court of Accounts moved to condemn the legality of ERSACT's latter resolution.

4.15.15. Also, on 30 May 1996, the Ombudsman issued his own resolution expressing his approval of ERSACT's Resolution No. 212/96 and, on the next day, established a claims procedure to permit CAA's customers to refuse to pay their water and sewage bills.<sup>173</sup>

#### **4.16. Second Attempted Renegotiation**

4.16.1. Despite the unsettled environment and the failure of the first attempted renegotiation, a second round of renegotiations commenced in mid-1996. This was conducted with the assistance of representatives of the federal government (in particular Under-Secretary for Water Resources, Dr. Jorge Rais) and the World Bank. For the duration of these negotiations, CAA agreed not to exercise its right under Article 12.1 of the Concession Agreement to increase tariffs by 10% in the concession's second year.

4.16.2. The second attempted re-negotiation continued through the Argentine winter and reached its tentative conclusion on 30 August 1996, when the parties executed a

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<sup>172</sup> ERSACT Resolution No. 322/96, 16 May 1996 (Exhibit 180).

<sup>173</sup> Ombudsman's Resolutions Nos. 66/96 and 67/96, 30-31 May 1996 (Exhibits 184 and 185).

“Framework Agreement for the Reformulation of the Concession Agreement for the Water and Sewage Services” (“Framework Agreement”).<sup>174</sup> On the same day, the Province, the national government and the World Bank signed a letter of intent to provide assistance in implementing any agreement between the parties modifying the Concession Agreement.<sup>175</sup>

- 4.16.3. The Framework Agreement provided, *inter alia*, for the reduction of the concession area, changes in CAA’s personnel structure, reductions in billings to customers and compensation to the concessionaire for reduced billings, *inter alia*, through decreased investment obligations. Under clause four of the Framework Agreement, customers would receive an average reduction in billings of 28% over a set period. In contrast to the terms of the 1995 Concession Agreement regarding separate charges for service and tax, the reduction in the Framework Agreement applied to “total billings” – in other words, to the sum of the service tariff and the taxes and other charges on the bill.
- 4.16.4. The Framework Agreement was then sent to the Legislature for ratification. The parties had agreed that, if the Legislature rejected the Framework Agreement, the Concession Agreement would remain in force as originally negotiated.
- 4.16.5. Despite the Province’s participation in this second round of renegotiations, the Concession Agreement, CAA’s billings and its attempt to collect on its invoices remained subject to attack whilst the second renegotiation was in process.

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<sup>174</sup> Acuerdo Marco para la Reformulación del Contrato de Concesión del Servicio de Agua y Cloacas (Framework Agreement), 30 August 1996 (Exhibit 187).

<sup>175</sup> Letter of Intent signed by Province of Tucumán, ENOHSA and World Bank, 30 August 1996 (Exhibit 188).

- 4.16.6. On 28 June 1996, Carlos Barrionuevo – the former head of ERSACT and now adviser to the Court of Accounts – issued a report commissioned by the Court of Accounts questioning CAA’s invoicing practices.<sup>176</sup>
- 4.16.7. Further to this report, the Court of Accounts reiterated its opposition to ERSACT’s Resolution 333/96 and took the position that CAA should not bill its customers separately for municipal taxes and that ERSACT Resolutions 212/96 and 213/96 should be reinstated.<sup>177</sup>
- 4.16.8. On 15 August 1996, CAA put ERSACT on notice that, while it would comply with any official order not to invoice customers separately for municipal taxes, it would hold the Province responsible for the significant losses that would result.<sup>178</sup>
- 4.16.9. On 22 August 1996, ERACT officially accepted the opinions of Mr. Barrionuevo and the Court of Accounts, and issued a Resolution 484/96 which, once again, resurrected Resolutions No. 212/96 and 213/96.<sup>179</sup> Thus, CAA was again prohibited from charging customers for municipal taxes in addition to its service tariff and the 35-day billing holiday was again re-imposed.
- 4.16.10. In mid-October 1996, CAA announced publicly that it would cut-off or reduce water to those who were in arrears in the district of Yerba Buena, a residential area near the capital.

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<sup>176</sup> Opinion of Carlos Barrionuevo to Court of Accounts, 28 June 1996 (Exhibit 189).

<sup>177</sup> Court of Accounts Resolution No. 470, 2 August 1996 (Exhibit 190).

<sup>178</sup> Letter from CAA to ERSACT, 15 August 1996 (Exhibit 191).

<sup>179</sup> ERSACT Resolution No. 484/96, 22 August 1996 (Exhibit 192).

- 4.16.11. On 4 November 1996, the Court of Accounts, which had been sent a copy of the Framework Agreement for its review, issued a highly critical opinion of the agreement, concluding that it would violate laws No. 6445 and No. 6529 (the original privatisation statutes).<sup>180</sup>
- 4.16.12. At about the same time, Legislator Próspero Barrionuevo published a form letter, advising members of the public of their rights, setting out procedures to be followed if they felt that had a grievance against CAA regarding its invoices for the quality of that service. He included a model letter which customers might use to make such claims. He also explained that CAA was not entitled to cut them off from water if they had a valid claim against the company.<sup>181</sup> Legislators Barrionuevo, Seguí and Sangenis also set up a table in the downtown area of San Miguel to advise customers on how to use the legal system to avoid losing service if they chose not to pay their bills.
- 4.16.13. On 22 November 1996, the Ombudsman also volunteered his office to advise customers on how to file claims against CAA.
- 4.16.14. On 2 December 1996, against this backdrop, the Framework Agreement came before the Legislature for debate and ratification. It was rejected on 3 December 1996, with the Legislature declaring that it “did not conform to the legal framework derived from laws Nos. 6445 and 6529, the Bid Conditions, and the Company’s Economic Proposals”.<sup>182</sup> At the same time, the Legislature refused to

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<sup>180</sup> Court of Accounts Resolution No. 709, 4 November 1996 (Exhibit 193).

<sup>181</sup> Form letter from Legislator Próspero Barrionuevo, November 1996 (Exhibit 88).

<sup>182</sup> Legislature of the Province of Tucumán Resolution No. 6, 3 December 1996 (Exhibit 196).

reaffirm the original Concession Agreement, stating that it “must be readjusted”. The Legislature also concluded that the separate billing of certain taxes under the Concession Agreement, and the 10% increases provided in the second and third year of the concession were without legal basis.

4.16.15. On 10 December 1996, following the political collapse of the Framework Agreement, the Ombudsman issued Resolution 504 indicating that the Province would provide a legal defence (including the possibility of seeking an injunction) if CAA sought to challenge non-payment or sought to cut off the service of non-paying customers.<sup>183</sup>

4.16.16. On 26 December 1996, after the failure of the second attempted renegotiation, CAA and CGE initiated ICSID arbitration proceedings. The Province and ERSACT were notified on the same day.

#### **4.17. Third Attempted Renegotiation**

4.17.1. A third and final attempt to renegotiate the Concession Agreement began in early 1997.

4.17.2. On 8 January 1997, Vice Governor Topa informed officials of CAA/CGE that the Province would engage in further renegotiations if the ICSID proceedings were suspended. This was followed by a series of meetings between CAA and CGE officials and officials of the federal and provincial authorities to discuss possible renegotiations. Federal officials significantly increased their involvement in negotiations following the initiation of the ICSID proceedings.

- 4.17.3. Despite these meetings, on 17 January 1997, Vice Governor Topa publicly stated that the original Concession Agreement was “inapplicable” and “unenforceable”<sup>184</sup> and on 20 January 1997, the provincial Ombudsman issued a further resolution concluding that CAA had breached Article 12.7.3 of the Concession Agreement and requiring CAA to reimburse its customers for legal fees incurred in the course of legal actions brought against them by CAA for non-payment of bills.<sup>185</sup>
- 4.17.4. On 7 February 1997, Governor Bussi delivered a note to CAA and CGE inviting them to renegotiate the Concession Agreement under the auspices of an “*Ad Hoc* Negotiating Commission” consisting of a variety of stakeholders from across the political spectrum in Tucumán.<sup>186</sup> The invitation was accepted and, on 27 February 1997, CAA and CGE agreed to suspend the pending ICSID proceedings as of the commencement of the negotiations on 3 March 1997.<sup>187</sup> CAA submitted a new proposal for renegotiation of the Concession Agreement to the *Ad Hoc* Negotiation Commission on 3 March 1997.
- 4.17.5. A week later, Vice Governor Topa gave a television interview, during which he discussed the potential imposition of a two to three year moratorium on payment

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<sup>183</sup> Ombudsman Resolution No. 504/96, 10 December 1996 (with English translation) (Exhibit 48).

<sup>184</sup> “Es inaplicable el contrato con Aguas del Aconquija,” 17 January 1997 (Exhibit 210).

<sup>185</sup> ERSACT Resolution No. 33/97, 20 January 1997 (Exhibit 209).

<sup>186</sup> Letter from Governor Bussi to CGE, 7 February 1997 (Exhibit 203).

<sup>187</sup> The parties extended the suspension several times, ultimately for a period of 110 days: Letter from CAA and CGE to Governor Bussi, 27 February 1997 (Exhibit 207).

of all outstanding customer invoices - because the invoices exceeded customer's economic means and were issued "under great uncertainty".<sup>188</sup>

4.17.6. During a meeting of the *Ad Hoc* Negotiating Commission on 15 March 1997, the parties discussed revised terms for the concession which were incorporated into a signed "*Acta*".<sup>189</sup>

4.17.7. On 18 March 1997, on the same day that Governor Bussi was later to appear on television expressing his approval of the revised Concession Agreement – provincial legislator Pedicone led a public rally against CAA in San Miguel. During the course of the rally legislator Pedicone attacked CAA's intentions in Tucumán, and described CAA and its investors as "French sons of bitches:" as regards the proposed revisions to the Concession Agreement he said:

*"the Province has put things in their place ... the French have had to take one step back in their excessive ambitions which aimed at getting the people, and above all the poorest people, to have a really hard time as a result of the subjugation of the previous government resulting from the privatization."*<sup>190</sup>

4.17.8. On 8 April 1997, the parties formally endorsed the *Acta* and the "8 April Agreement" was signed by Governor Bussi, the President of Legislature, CAA, a representative of Tucumán's union of sanitary workers, as well as the federal Undersecretary of Water Resources.<sup>191</sup>

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<sup>188</sup> Transcripts of news reports (Exhibit 141).

<sup>189</sup> *Ad Hoc* Negotiating Commission, Agreement, 15 March 1997 (Exhibit 212).

<sup>190</sup> Transcripts of news reports, 18 March 1997 (Exhibit 141).

<sup>191</sup> Authentication of Agreement of April 8, 1997 (Exhibit 213); Acta Acuerdo Sobre Modificaciones al Marco Regulatorio del Contrato de Prestación de los Servicios de Abastecimiento de Agua Potable y Desagües Cloacales

- 4.17.9. On 22 April 1997, Governor Bussi submitted a draft law to the Legislature to implement the 8 April Agreement.<sup>192</sup> He explained that the draft law, which contained a few minor agreed modifications to the 8 April Agreement, was based on the 15 March Report and the 8 April Agreement (the draft law included several exhibits, amongst which was a detailed draft of the proposed new Concession Agreement).<sup>193</sup>
- 4.17.10. On 6 June 1997, Governor Bussi withdrew the original legislative bill from the Legislature and submitted in its place a modified legislative bill (“Second Version of the Revised Concession Agreement”).<sup>194</sup>
- 4.17.11. Between 6 June 1997 and 13 June 1997, the Tucumán Legislature made changes to the Second Version of the Revised Concession Agreement, which it approved on 13 June 1997 as part of Law No. 6826.
- 4.17.12. Ultimately, on 13 June 1997, the Legislature enacted a version of the renegotiated agreement which contained approximately 70 changes to the draft law submitted to it on 22 April 1997. The parties were in substantial disagreement as to whether the changes were minor in nature, made known to CAA in advance or negotiated with CAA in advance. Although the Tribunal has concluded that nothing turns on this disagreement for the purposes of this Award, we summarise briefly below what occurred.

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(April 8, 1997 Agreement and Notarial Protocol, with attached March 15, 1997 Acta, Draft Law, Annexes to Draft Law, “Reformas Finales” Document, and Letter from Union) 8 April 1997 (Exhibit 900).

<sup>192</sup> Draft Law, with Annexes, 22 April 1997 (Exhibit 901).

<sup>193</sup> Letter from Governor Bussi to Legislature, 22 April 1997 (Exhibit 218).

<sup>194</sup> Second Version of Revised Concession Agreement sent by Governor Bussi to Legislature, 6 June 1997 (Exhibit 219).

- 4.17.13. Law No. 6826 was first published without its annexes (*ie* without the accompanying draft text of the contract) on 23 June 1997, such annexes being published only 11 July 1997. Because most of the changes that had been made appeared in the contract text, they were not evident when the bill was passed.
- 4.17.14. The fact that the draft law, submitted by Governor Bussi to the Legislature on 22 April, had been substantially modified was discovered by CAA only in late June. At that time, Vice Governor Topa and Mr. de Maud'huy, amongst others, were part of a Tucumán delegation visiting the World Bank in Washington. Mr. de Maud'huy was advised by telephone of the fact that approximately 70 changes had been made to the negotiated new agreement. He immediately brought his concerns to the attention of Vice Governor Topa whose reaction was to understate the importance of the changes and to suggest that they could be corrected by regulation.<sup>195</sup>
- 4.17.15. After protesting to Governor Bussi, CAA wrote to the Attorney General on 30 June 1997, seeking an official copy of the Annexes to Law No. 6826.<sup>196</sup> The Attorney General responded on 4 July 1997, stating that the Annexes would be published on 7 July 1997.<sup>197</sup>
- 4.17.16. Governor Bussi initially ignored CAA's protests and on 17 July 1997 asked it to sign the modified agreement, but CAA refused. In its response of 23 July 1997, CAA stated that the text of the modified agreement, as found in Law No. 6826,

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<sup>195</sup> Transcript of the hearing on the merits, Day 4, pp. 848-849 (27 July 2006).

<sup>196</sup> Letter from CAA to Attorney General, 30 June 1997 Ref.: PB/FR/97014 (Exhibit 903).

<sup>197</sup> Letter from Attorney General to CAA, 4 July 1997 (Exhibit 904).

was unacceptable because of its significant adverse effect on the economic value of the renegotiated agreement.<sup>198</sup>

4.17.17. Based on unequivocal testimony from CAA, that the changes made to the proposed new concession agreement between the 22 April 1997 version and that found in Law 6826 were not agreed in advance, and based on the equivocal testimony on this point from Respondent,<sup>199</sup> the Tribunal concludes that the changes were made unilaterally by the Legislature. The Tribunal also accepts that the unilateral changes modified, in some cases materially, the terms of the renegotiated agreement.

4.17.18. On 25 July 1997, CAA met with Governor Bussi and a representative of the Federal Ministry of the Economy and reiterated that the modified agreement was not acceptable. Governor Bussi replied that it was not possible to change the law.<sup>200</sup>

#### **4.18. CAA's Rescission of the Concession Agreement**

4.18.1. By mid-July 1996, CAA officials had begun to deliberate on the deteriorating situation in Tucumán and authorised Mr. de Maud'huy to take all necessary steps to resolve the situation. Thus, on 27 July 1997, Mr. de Maud'huy advised Federal Secretary Guibert that CAA planned to terminate the Concession Agreement imminently.

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<sup>198</sup> Letter from CAA to Governor Bussi, 23 July 1997 (Exhibit 225).

<sup>199</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, pp.1621-1631 (30 July 2006).

<sup>200</sup> García González Affidavit, 22 November 2004 (Exhibit 5), at ¶39.

- 4.18.2. In the hope of somehow resolving the crisis, federal officials requested CAA to postpone the termination.
- 4.18.3. After a series of day-to-day postponements, on 4 August 1997, CAA decided to terminate and informed both the French Embassy in Argentina and the Argentine Embassy in Paris of its decision.
- 4.18.4. Following further interventions from high ranking officials in the French and Argentine Governments, the decision to terminate was again postponed to allow Mr. Jorge Rottenberg, Chief of Staff to President Menem's Chief of Cabinet, to seek to save the concession.
- 4.18.5. Following a number of fruitless meetings, the Rottenberg mission failed and, on 18 August 1997, CAA concluded that there was no hope of solution to the crisis. However, because of an official visit to Argentina by a member of the French Government, CAA delayed sending notice of its termination until 27 August 1997, when it notified Governor Bussi that it had rescinded the Concession Agreement due to its breach by the Province.
- 4.18.6. On the same day, the Provincial Legislature passed Law No. 6837, which revoked Law No. 6826 and reinstated the terms of the original Concession Agreement.

#### **CAA's Recovery Rate on Bi-Monthly Billings – 22 July 1995 to 27 August 1997**

- 4.18.7. Over the period from the date CAA took over the concession (22 July 1995) until the date it rescinded the Concession Agreement, CAA's recovery rates on its billings dropped steadily. From a high of 64.50% for the first bi-monthly period,

the rates dropped consecutively to 57.60%, 52.60%, 46.60%, 48.60%, 44.50%, 41%, 39.20%, 36.50%, 33.90%, 34.30%, 24.70% and 20.10%.<sup>201</sup>

#### **4.19. Tucumán Rejects CAA’s Rescission and Terminates Agreement**

4.19.1. The Province’s initial reaction to CAA’s notice of rescission was a series of regulatory responses, the first occurring on 3 September 1997 in the form of ERSACT Resolution 558/97. This resolution, which was dated three weeks earlier, on 13 August 1997, alleged that CAA had not complied with the investment plan under the Concession Agreement.

4.19.2. The next day, ERSACT notified CAA of Resolution No. 616/97, which alleged non-compliance with Concession Agreement obligations regarding creation of prevention and emergency plans.<sup>202</sup>

4.19.3. Between 2 and 4 September 1997, CAA received notification from ERSACT of 19 resolutions (some of which dated back months), according to which CAA had allegedly not complied with the Concession Agreement.<sup>203</sup> Simultaneously, ERSACT began to prosecute all pending resolutions – some dating to 1995.

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<sup>201</sup> de Rochembeau Affidavit, 5 November 2004, (Exhibit 1), at ¶¶77-78.

<sup>202</sup> ERSACT Resolution No. 616/97, 2 September 1997 (Exhibit 31).

<sup>203</sup> ERSACT Resolution No. 495/97, 22 July 1997 (Exhibit 17); ERSACT Resolution No. 514/97, 29 July 1997 (Exhibit 18); ERSACT Resolution No. 515/97, 29 July 1997 (Exhibit 19); ERSACT Resolution No. 558/97, 13 August 1997 (Exhibit 20); ERSACT Resolution No. 595/97, 4 September 1997 (Exhibit 21); ERSACT Resolution No. 607/97, 1 September 1997 (Exhibit 22); ERSACT Resolution No. 608/97, 1 September 1997 (Exhibit 23); ERSACT Resolution No. 609/97, 1 September 1997 (Exhibit 24); ERSACT Resolution No. 610/97, 1 September 1997 (Exhibit 25); ERSACT Resolution No. 611/97, 1 September 1997 (Exhibit 26); ERSACT Resolution No. 612/97, 1 September 1997 (Exhibit 27); ERSACT Resolution No. 613/97, 1 September 1997 (Exhibit 28); ERSACT Resolution No. 614/97, 1 September 1997 (Exhibit 29); ERSACT Resolution No. 616/97, 2 September 1997 (Exhibit 31); ERSACT Resolution No. 617/97, 2 September 1997 (Exhibit 32); ERSACT Resolution No. 620/97, 2 September 1997 (Exhibit 33); ERSACT Resolution No. 138/97, 10 March 1997 (Exhibit 51); and ERSACT Resolution No. 576/97, 20 August 1997 (Exhibit 232).

4.19.4. On 10 September 1997, Governor Bussi issued Decree No. 2270/1, informing CAA that the Concession Agreement was terminated by reason of CAA's repeated violations of the agreement and its unacceptable and unlawful attempt to terminate the agreement by itself.

4.19.5. Decree No. 2270/1 also formally rejected CAA's rescission and purported to extend the duration of CAA's service for an additional 18 months or until the Province could find a replacement, based upon Article 15.11 of the Concession Agreement.<sup>204</sup>

4.19.6. On 25 and 30 September 1997, CAA challenged Decree No. 2270/1.<sup>205</sup> Almost a year later, on 11 August 1998, Governor Bussi responded to CAA's objections, rejecting Decree No. 2270/1.<sup>206</sup>

#### **4.20. CAA's Operation of the Services After Termination – the alleged "Hostage Period"**

4.20.1. On 21 October 1997, the Executive filed an action in the Province's contentious administrative courts, seeking a declaratory judgement to the effect that the Province had the legal authority to compel CAA to continue to provide services for 18 months. The Executive also unsuccessfully sought an injunction while the lawsuit was pending.

4.20.2. The 90-day notice period given by Claimants for termination of the Concession Agreement passed without transfer of the services on 27 November 1997.

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<sup>204</sup> Decree No. 2270/1, 10 September 1997 (Exhibit 172).

<sup>205</sup> Letter from CAA to Governor Bussi, Answer to Decree 2270/1, 25 September 1997 (Exhibit 234); Letter from CAA to Governor Bussi, Supplemental Answer to Decree 2270/1, 30 September 1997 (Exhibit 235).

<sup>206</sup> Decree No. 1332/1, 11 August 1998 (Exhibit 236).

- 4.20.3. By letter from CAA to Governor Bussi, dated 2 December 1997, CAA explained that, as of 27 November 1997, CAA's legal responsibility as concessionaire had ended and the economic risk of the concession had thus been transferred to the Province. CAA added that the Province was liable for all damages due to the Province's default.<sup>207</sup>
- 4.20.4. At the same time, CAA sought direction as to the tariff rate to be applied with respect to the continued provision of services. On 2 January 1998, Governor Bussi informed CAA it should apply a tariff rate consistent with the original 1995 Concession Agreement and Law No. 6529, but Governor Bussi made reference to the legitimate expectation of the both the Government and the population that CAA would significantly reduce its tariffs below the rates set forth in the 1995 Concession Agreement because, after rescission, CAA was not longer subject to investment obligations.<sup>208</sup>
- 4.20.5. On 28 January 1998, Governor Bussi approved bid terms for a tender for a new concessionaire. However, the government announced the failure of the tender for a transitional service provider on 5 June 1998.<sup>209</sup>
- 4.20.6. On 6 July 1998, Vivendi President Messier wrote to President Menem expressing his concern that CAA was being forced to provide a service notwithstanding the rescission of the Concession Agreement and on 10 July 1998, the federal

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<sup>207</sup> Letter from CAA to Governor Bussi, 2 December 1997 (Exhibit 229).

<sup>208</sup> Letter from Governor Bussi to CAA, 2 January 1998 (Exhibit 238).

<sup>209</sup> Decree No. 1058/3 (MP), 5 June 1998 (Exhibit 249).

government offered to serve as Tucumán’s transitory water and sewage service provider through ENHOSA.<sup>210</sup>

4.20.7. On 5 August 1998, the federal government and the Province signed an agreement whereby ENOHSA would supply the service under a power granted by the Province. This agreement was approved by the Legislature on 7 September 1998 and provided that ENHOSA would take over the service within 30 days.<sup>211</sup>

4.20.8. Finally, on 7 October 1998, the service was taken over by ENOHSA, which provided the service through an Argentine public entity designated as Obras Sanitarias de Tucumán (“OST”). CAA’s role as operator of Tucumán’s water and sewage services effectively terminated on that date.

#### **4.21. CAA’s Post-Termination Collection Efforts**

4.21.1. From 8 October 1998, after termination of the service, CAA retained a small staff, as well as local counsel in Tucumán, to continue the company’s efforts to collect payment for the services that it had provided to customers.

4.21.2. In 2000, CAA decided to undertake a fresh effort at collections by preparing formal legal notices containing a detailed breakdown of each customer’s overdue payments. Between July and October 2000, CAA dispatched 146,559 notices to its delinquent customers via registered mail. Initially this effort met with some success and, immediately after the mailing of the first of these notices, customers began remitting payments at a rate of approximately 3,000 pesos per day.

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<sup>210</sup> Letter from Vivendi to Argentine President Menem, 6 July 1998 (Exhibit 250).

<sup>211</sup> Law No. 6894, 7 September 1998 (Exhibit 252).

- 4.21.3. However, CAA's collections slowed significantly when the Ombudsman and a number of Legislators advised customers, whom they met as they came to CAA's offices, that it was not necessary to pay their bills. In this period, CAA received over 17,000 form letters that had been distributed by the Ombudsman, over 5,000 distributed by Legislators Próspero Barrionuevo and Guido Luis García and over 1,700 distributed by DUDAS, a consumer defence association.
- 4.21.4. When it became clear that its renewed collection efforts would not work, CAA decided to initiate summary proceedings (executory judicial proceedings known as *juicios ejecutivos*) against 2000 of its most significant debtors. Having over 150,000 delinquent accounts at this time, CAA hoped that if judgements could be obtained in short order against a significant number of its customers, its other debtors would elect to pay, rather than face suit.<sup>212</sup>
- 4.21.5. At this stage, the Ombudsman and the Legislature intervened. On 20 November 2001, the Ombudsman brought a summary proceeding seeking the suspension of proceedings in all of CAA's collection lawsuits filed against non-paying customers, as well as a bar against CAA filing any new collection suits.<sup>213</sup>
- 4.21.6. On 20 December 2001, after these proceedings were rejected, primarily on procedural grounds, the Legislature enacted Law No. 7196, prohibiting CAA from pursuing any collection lawsuits for a period of 180 days.<sup>214</sup> This law was

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<sup>212</sup> Hahn Affidavit, 5 November 2004 (Exhibit 3), at ¶¶26-30.

<sup>213</sup> *Defensor del Pueblo de Tucumán vs. Compañía Aguas del Aconquija S.A. s/ Amparos Colectivos*, Demanda—Inicio Acción de Amparo Colectivo, 20 November 2001 (Exhibit 263).

<sup>214</sup> Law No. 7196, 14 February 2002 (Exhibit 265).

subsequently held unconstitutional by a civil court in Tucumán on 20 August 2002.<sup>215</sup>

4.21.7. Undeterred, on 5 September 2002, the Legislature took a different approach and enacted Law No. 7234, this time barring CAA from *enforcing*, for a period of 180 days, judgments already rendered or to be rendered in proceedings against debtors. The temporary nature of this enactment was illusory, since the Legislature re-enacted a new version of the same law every 180 days, with the fourth version being in effect at the time Claimants' case was pleaded.<sup>216</sup>

4.21.8. In a statement made during the Legislative debate over Law No. 7322, Legislator Terán Nogues (the former Vice Governor, Mr. Topa's successor, who had left the Executive one month earlier) explained the need for the enactment of this third version of the law:

*"In order to place it on the historical record, I want to specifically state the citizens of Tucumán are the victims of a situation of defencelessness into which they were placed by two state powers: the Executive Power first and, thereafter, the Judicial Power. The only exception is the protection granted by the Honourable Legislature in successive sessions, in defence of their rights.*

*The Executive Power told the citizens of Tucumán, at a given time not to pay their water bills; it said it in all the tones and in all the forms; additionally it told the citizens the invoicing system did not correspond to the terms of the contract. And for that reason, the people did not pay for the water, in addition to the lack of a culture of payment of*

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<sup>215</sup> *Compañía de Aguas del Aconquija S.A. v. Omodeo, Pedro César s/ Cobra Ejecutivo*, Sentencia, 20 August 2002 (Exhibit 267). The Ombudsman acted again three years later, by asking the court to declare that CAA cannot collect through executory judicial proceedings seeking interim measures to prevent CAA from initiating any new actions of this type. CAA filed a defence on October 2004.

<sup>216</sup> Law No. 7234, 5 September 2002 (Exhibit 268); Law No. 7274, 2 May 2003 (Exhibit 269); Law No. 7322, 20 November 2003 (Exhibit 270); and, Law No. 7402, 15 July 2004 (Exhibit 271).

*utilities, etc., but there was an explicit appeal made by the Executive Power about not paying for the water.... But in the certain fact is that, in spite of my natural demeanour which leads me not to sanction regulations obstructing judicial processes between private citizens, the certain fact is that currently the citizens were urged not to pay by the Executive Power.”*<sup>217</sup> (emphasis added)

#### **4.22. Respondent’s Post-Termination Tax Claim Against CAA**

4.22.1. On 30 July 2004, the Administración Federal de Ingresos Públicos (AFIP) made an administrative demand on CAA for the payment of approximately 4.5 million pesos in tax liability for the tax years 1998-2002. The AFIP claim asserts that CAA should have paid a minimum presumed income tax in 1998 through 2002 on its customer’s unpaid invoices as well as on assets CAA transferred to the Province at the end of the alleged “hostage period”.

4.22.2. CAA replied to and contested AFIP’s tax assessment on 21 September 2004.<sup>218</sup>

4.22.3. On 20 October 2004, AFIP agents obtained a court judgment attaching all of CAA’s assets held in Tucumán bank accounts.<sup>219</sup>

### **5. CLAIMANTS’ CASE**

#### **5.1. Tribunal’s Approach**

5.1.1. In this section we summarise the elements and scope of the claims made by Claimants, as advanced in their pleadings, written submissions and during the course of the oral hearing.

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<sup>217</sup> Legislature of the Province of Tucumán, Legislative Debate, 20 November 2003 (Exhibit 69).

<sup>218</sup> Administración Federal de Ingresos Públicos, Tax Assessment against CAA for fiscal years 1998-2002, 30 July 2004 (Exhibit 276); *Fisco Nacional (AFIP-DGI) v. Compañía Aguas del Aconquija S.A. s / Ejecución Fiscal*, Attachment Order, 20 October 2004 (Exhibit 277).

<sup>219</sup> CAA Reply to AFIP Tax Assessment, 21 September 2004 (Exhibit 280).

5.1.2. Claimants advance two principal arguments. First, the acts and omissions of the Province of Tucumán cannot be reconciled with Argentina's obligation under the Treaty to provide fair and equitable treatment to French investors and their investments. Second, the Province's actions constitute an expropriation of Claimants' investment, for which Claimants have never been compensated.

### **CAA is a Proper Claimant**

5.1.3. Claimants also say that Respondent's argument, that CAA is not a proper claimant, must be rejected because that issue was decided in the first proceeding and is now *res judicata*. Claimants point to the Decision on Jurisdiction in which this Tribunal held "[b]ecause the First Tribunal found that CAA was a French company under the ICSID Convention and the BIT and the *ad hoc* Committee did not annul this finding, the finding remains in force and is *res judicata*".<sup>220</sup> In any event, Claimants submit that Respondent's argument rests on two erroneous premises. First, CAA did not become a French company until CGE acquired more than 50% of CAA's shares, and second, CGE acquired its majority shareholding in violation of the Concession Agreement because the Province did not consent to the share transfer.<sup>221</sup>

5.1.4. As to Respondent's first assertion, Claimants point to the fact that CAA has been deemed a "French" national since its incorporation. Claimants rely on the Article 1(2)(c) of the BIT, which provision contains France's and Argentina's agreement

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<sup>220</sup> Decision on Jurisdiction, at ¶97; Reply at ¶221.

that certain companies having the nationality of one party are treated as a national of another party if they are effectively controlled, directly or indirectly, by nationals of that other party. Accordingly, an Argentine company will qualify as a French national where more than half its equity is owned by a French company, or, where a French company exerts “decisive influence”.<sup>222</sup>

5.1.5. Based on factual findings by the First Tribunal, Claimants claim that CGE clearly exerted “decisive influence” over CAA’s decision-making processes at all times since CAA’s incorporation. Accordingly, CAA is a proper claimant that acquired its Treaty rights on the day it was formed.

5.1.6. With respect to Respondent's complaints about the process by which CGE/Vivendi acquired its current 85% stake in CAA, Claimants argue that all share acquisitions were either approved by the Province or did not require its approval.<sup>223</sup>

5.1.7. Claimants also rely on the conclusion of the Original Tribunal, which finding was not annulled and is *res judicata*, that “the Tribunal has determined that CGE controlled CAA and that CAA should be considered a French investor from the effective date of the Concession Contract”.<sup>224</sup>

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<sup>221</sup> Reply at pp. 112-119.

<sup>222</sup> Reply at ¶¶223-225.

<sup>223</sup> Reply at ¶¶228-235.

<sup>224</sup> Decision on Annulment at ¶9, Note 6; Reply at ¶236.

## **5.2. Claimants were Denied Fair and Equitable Treatment by the Tucumán Authorities**

- 5.2.1. Claimants contend that the object and purpose of the Treaty is to guarantee the reciprocal protection and promotion of investments. Based in part on the objectives, as stated in the preamble and, in part, on the holdings of the *MTD v Chile Tribunal*, Claimants say that the signatory states' obligations under the Treaty are to be read as proactive, rather than as prescriptions for passive behaviour, such as the avoidance of impermissible behaviour or conduct toward the investor.<sup>225</sup>
- 5.2.2. Claimants reject Respondent's contention that the fair and equitable treatment obligation is synonymous with the international minimum standard of treatment.<sup>226</sup> They claim that Respondent's restrictive interpretation is not supported by the text of Article 3 of the Treaty, and is based on an inapposite reliance on the fair and equitable treatment provision of the North American Free Trade Agreement ("NAFTA").<sup>227</sup> Claimants argue that Respondent's reliance on the minimum standard of treatment lacks support outside the NAFTA context.<sup>228</sup>
- 5.2.3. Claimants assert that the fair and equitable treatment standard has evolved from the minimum standard of treatment long required under international law and that the relevant authorities have found content in the fair and equitable treatment obligation that includes (i) refraining from arbitrary or discriminatory conduct; (ii) providing transparency and due process; (iii) acting in good faith; and (iv)

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<sup>225</sup> Memorial at ¶291.

<sup>226</sup> Counter-Memorial at ¶550.

<sup>227</sup> North American Free Trade Agreement ("NAFTA") at Art. 1105.

providing security for reasonable, investment-backed expectations.<sup>229</sup> Claimants' position on each of these four propositions is summarised below.

### **Tucumán Authorities' Attacks on Claimants and Their Investment were Arbitrary and Discriminatory**

5.2.4. According to Claimants, the Tucumán authorities – from the Legislature, to the Governor, to the Province's regulatory authorities – relentlessly “attacked” CAA and the Concession Agreement almost from its inception, with a view to pressuring CAA and its investors to renegotiate the terms (in particular, the tariff) of the concession.<sup>230</sup> As a result of this regulatory harassment, as well as direct unilateral modifications of the Concession Agreement's terms, and the Province vitiated the principal asset of a concessionaire – the stream of expected payments from customers – by encouraging customers not to pay their bills and devising means by which customers could withhold payment without fear of adverse consequences.

5.2.5. The Province's “relentless attacks” on Claimants, taken singly or collectively, are said to be inconsistent with Argentina's Treaty obligation to provide fair and equitable treatment to investors and their investments and are the direct opposite of Argentina's affirmative duty to protect and promote investments.

5.2.6. Claimants say that the Provincial authorities acted arbitrarily when:

- (i) Through a misuse of its regulatory power, the Province adopted an excessively and systematically adversarial posture toward CAA - perhaps

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<sup>228</sup> Reply at ¶¶289-293.

<sup>229</sup> Memorial at ¶288; Reply at ¶295.

<sup>230</sup> Memorial at pp. 135-141.

the best example being ERSACT's simultaneous issuance of dozens of resolutions and fines, not for regulatory purposes but rather in a deliberate effort to "pressure" CAA to agree to lower tariffs.

- (ii) governmental actors inflamed popular sentiments, incited and led protests against CAA, and actively encouraged and facilitated non-payment of CAA invoices.
- (iii) ERSACT and the Legislature deprived CAA of all of its legal recourses against delinquent customers, first by preventing CAA from cutting service to non-paying customers, then by attempting to prevent CAA from using expeditious judicial processes, and ultimately by directly blocking CAA's access to the judicial system to enforce its right to payment.<sup>231</sup>

5.2.7. Claimants also point to the Province's treatment of CAA's successor, OST, which was demonstrably more favourable than its treatment of CAA – even in the face of service problems and OST's express admission that it was unable to maintain or properly provide the service.<sup>232</sup> In contrast to the treatment of CAA, the Province publicly supported OST, subsidized it, exempted it from significant tax and investment obligations, protected its ability to collect from customers and even its ability to restrict service to defaulting customers.<sup>233</sup> The Province also downplayed important service problems. Claimants' argue unjustified discriminatory treatment is by definition unfair and inequitable.<sup>234</sup>

5.2.8. Claimants also argue that the actions of the office of the federal tax authorities, in seizing CAA's bank accounts and threatening to impose tax liabilities premised

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<sup>231</sup> Memorial at ¶294.

<sup>232</sup> Memorial at ¶298.

<sup>233</sup> Memorial at ¶¶297-298.

<sup>234</sup> Memorial at ¶298.

on the CAA's unpaid invoices – whose value the Province has destroyed, have further violated the fair and equitable treatment obligation.<sup>235</sup>

5.2.9. In so acting, Claimants say that the Province and, through it, Argentina exhibited arbitrary and capricious hostility toward Claimants and the Concession Agreement under which Claimants invested, thereby violating Respondent's obligation of fair and equitable treatment under Article 3 of the Treaty.<sup>236</sup>

### **Lack of Transparency and Due Process in the Treatment of Claimants**

5.2.10. Claimants define transparency as requiring the legal framework for an investor's operations to be readily apparent and that any decision affecting the investor to be traceable to that legal framework. Due process or "fair procedure" is said to be an essential complement to transparency and includes, *inter alia*, proper notice of legal action and the opportunity to appear and be heard. Due process may be violated not only by the courts, but also through legislative and administrative actions.<sup>237</sup>

5.2.11. Claimants contend that the Province violated the principles of transparency by failing to provide Claimants with due process on multiple occasions, and that, individually and collectively, these violations constitute a breach of the obligation to provide fair and equitable treatment under Article 3 of the BIT.<sup>238</sup>

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<sup>235</sup> Memorial at ¶297.

<sup>236</sup> Memorial at ¶295.

<sup>237</sup> Memorial at ¶300.

<sup>238</sup> Memorial at ¶301.

5.2.12. To illustrate, Claimants provide six examples of the Province's deficient treatment of CAA:

- (i) ERSACT unilaterally overrode the terms of the Concession Agreement by arbitrarily and without legal foundation issuing Resolution 212/96 (which implemented Resolution 170/96). Further, Resolution 212/96 was repeatedly imposed, suspended and then re-imposed again and again, in a manner that Claimants' allege tracked the Province's need for leverage in different phases of its renegotiations with CAA.
- (ii) the Province created an environment of legal uncertainty, in violation of its obligations to provide a transparent and predictable legal environment.
- (iii) ERSACT issued 78 resolutions and fines on a single day, not for legitimate regulatory purposes, but, in an admitted attempt to pressure Claimants to renegotiate the terms of the Concession Agreement. That action was also in direct violation of the express terms of the Concession Agreement, which restricted ERSACT's ability to sanction CAA for a six-month period.
- (iv) the Tucumán authorities' actions in the face of concededly harmless manganese-related turbidity – a situation that CAA did not create, could not foresee, and acted professionally and promptly to correct – were illegitimate and unfair to CAA.
- (v) ERSACT's and the Governor's actions after CAA's notification that it was terminating the Concession Agreement, based on the Province's defaults, further confirm the lack of transparency and due process in Tucumán's treatment of CAA. Following CAA's notice, ERSACT proceeded to issue a number of Resolutions, which were not received by CAA on a timely basis, violating the transparency and due process obligations of proper notice. The Governor later relied on ERSACT's Resolutions in Decree 2270/1 as a basis for (purportedly) terminating the Concession Agreement for fault of CAA.
- (vi) the Governor and the Legislature – unilaterally and secretly – introduced some seventy changes into the text of the 8 April Agreement regarding amendments to the Concession Agreement, and presented it to Claimants as a “fait accompli”.<sup>239</sup>

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<sup>239</sup> Memorial at ¶¶301-307.

## **Province's Bad Faith During Contract Renegotiations**

5.2.13. Claimants say that it is not necessary to prove bad faith to establish a violation of a fair and equitable treatment standard. Nevertheless, Claimants note actual bad faith dealings with an investor by a government is necessarily inconsistent with Article 3 of the Treaty.<sup>240</sup>

5.2.14. Relying on, *inter alia*, the principle of good faith articulated in *Aminoil*,<sup>241</sup> Claimants say that, having been invited by the Province and the National Government to engage in a third round of renegotiations in early 1997, they were entitled to expect that the Province would act in good faith in those negotiations. However, they say that the submission of the unilaterally amended version of the agreement to the Legislature, and further unilateral amendments made by the Legislature, violated not only transparency, stability and the Claimants' legitimate expectations, but also the elemental requirement of good faith dealings. In particular, the manner in which the amendments were made – unilaterally and without any attempt at notification or consultation with Claimants - is impossible to reconcile with any notion of good faith.<sup>242</sup>

## **Tucumán's Actions Deprived Claimants of Their Legitimate Expectations With Respect to the Concession**

5.2.15. Claimants further assert that the fair and equitable treatment standard imposes an affirmative obligation on government to treat investors in good faith in a

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<sup>240</sup> Memorial at ¶308.

<sup>241</sup> *Government of the State of Kuwait v. American Independent Oil Co.*, 21 ILM 976 (1978) (“*Aminoil*”).

<sup>242</sup> Memorial at ¶¶313-314.

reasonable and measured manner that respects the contractual provisions that embody the expectation of the parties and to promote the realisation of their expectations – including a fair profit for the investor.

5.2.16. In Claimants’ submission, the Province not only failed to protect, but itself directly undermined, Claimants’ legitimate, investment-backed, expectations with respect to the Tucumán concession when the Province:

- (i) directly and unilaterally modified the terms of the Concession Agreement. This occurred when ERSACT issued Resolution 212/96 which reversed the Province’s own pre-contract specifications and contradicted the terms of the Concession Agreement, by requiring CAA to include certain taxes within its tariff caps; when CAA was prevented from cutting service to non-paying customers; and when the Legislature put into force reduced tariffs and other economically harmful contractual terms under Law 6826;
- (ii) incited the population of Tucumán to refuse to pay CAA’s bills and shielded customers from the legal consequences of such refusals; and
- (iii) forced CAA to continue providing services in Tucumán for over ten months in violation of the termination provisions of the Concession Agreement.<sup>243</sup>

### **Tucumán Authorities Deprived Claimants of Fair and Equitable Treatment in the Form of Protection and Full Security**

5.2.17. Claimants contend that the text of the provisions of Article 5(1) of the Treaty intimately links the protections there granted with Article 3, such that protection and full security is an application of the principle of fair and equitable treatment.

5.2.18. Claimants argue that the protection and full security required extends beyond physical security, to encompass security against harassment that impairs the normal functioning of an investors business. They say that the Tucumán

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<sup>243</sup> Memorial at ¶¶318-319.

authorities not only failed to guarantee Claimants protection and full security, but went further and themselves participated in and encouraged acts that affirmatively undermined any such security. They engaged in illegitimate regulatory harassment of CAA, and they deliberately incited the population to inflict harm on Claimants' investment.

### **5.3. Tucumán Authorities Expropriated Claimants' Investment**

5.3.1. Claimants rely on six principal arguments in support of their case that the Province expropriated their investment without compensation in breach of Treaty Article 5(2):

- (i) the Treaty's guarantee against uncompensated expropriation is broad;
- (ii) Article 5 bars the expropriation of concession and contract rights;
- (iii) the Tucumán authorities' deprivation of Claimants' reasonably expected economic benefit constitutes expropriation;
- (iv) whether taken singly or cumulatively, the Province's acts and omissions constitute expropriation;
- (v) the forced provision of services during the alleged "hostage period" constitutes expropriation; and
- (vi) the effects of the Tucumán authorities' actions are determinative.<sup>244</sup>

#### **Treaty's Guarantee against Uncompensated Expropriation is Broad**

5.3.2. Claimants say that the concept of "expropriation" has been broadly defined in ICSID jurisprudence to include any unjustified interference with an investor's property that deprives the investor of the use or value of that property. For example, a state is responsible for an unlawful expropriation when it subjects

alien property to regulatory or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of that property. Further, Treaty Article 5(2) has been drafted with particular care to be inclusive, as it refers not only to indirect measures of expropriation, but also to equivalent measures that have a similar effect to dispossession.

### **Article 5 Bars the Tucumán Authorities from Expropriating Concession and Contract Rights**

5.3.3. Claimants point out that Article 1 of the Treaty specifically defines the term “investment” to include “concessions granted by law or by virtue of an agreement”. The Treaty’s provisions are thus consistent with the well-established principle of international law that the taking of contract rights constitutes an expropriation or a measure having an equivalent effect. Accordingly, the Province’s taking or denial of valuable contract rights under the concession, and the destruction of the economic value of the concession itself, constitute expropriation affecting Claimants’ “investment” as defined under Article 1, for which compensation is required under Article 5(2) of the Treaty.

5.3.4. In cases such as this one, involving an investor’s rights under a contract with the government itself, international law distinguishes between a mere commercial breach and an expropriation of a contractual right. Claimants say that expropriation occurs when the government does not act in its role as a commercial party to the contract, but instead exercises its sovereign powers to defeat the expectations of the parties by undercutting or destroying the value of the contract.

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<sup>244</sup> Memorial at pp. 154-185.

5.3.5. Here, the Province's actions cannot under any circumstances be characterised as mere commercial breaches of contract terms, and are precisely the type of sovereign actions that constitute expropriation by a government authority. Three non-exhaustive examples of the Province's unilateral alterations of contract rights are said to be particularly significant in terms of their effects on the economic balance of the concession.

- (i) First, the Provincial Government used its regulatory authority to compel CAA to stop invoicing customers for certain taxes, contrary to the Province's own prior instructions and to the express terms of the Concession Agreement. Specifically, Claimants argue that ERSACT Resolution 170/96, Court of Accounts Resolution No. 015, and ERSACT Resolution 212/96 forced CAA to reduce its tariffs by almost 10%, with severe adverse consequences for the economic balance of the concession.
- (ii) Second, the Province used its authority over CAA effectively to deny CAA the 10% tariff increases to which it was entitled in each of the second and third years of the concession. In the hostile atmosphere that government officials in Tucumán had created, CAA had no choice but to agree to try to renegotiate the Agreement, not once, not twice, but three times during the two-and-a-half year effective life of the concession.
- (iii) Third, the Legislature unilaterally changed the legal framework that governed CAA in June 1997, drastically altering the economic balance of the concession. Law 6826 purported to approve a new contract to govern the concession, but the version enacted contained approximately 70 economically significant changes to the terms agreed upon by Claimants and the Governor in the 8 April Agreement. Nevertheless, Law 6826 was legally effective in its own right and remained in force from 1 May 1997 (the third bi-monthly invoicing period for 1997) until its repeal on 27 August 1997.

5.3.6. Claimants further contend that as a party to the Concession Agreement, the Province had an obligation not actively to undermine the Agreement's viability. The provincial regulator was also expressly obliged to "cooperate with the Concessionaire in a manner such as to facilitate the fulfillment of the Concession

Agreement, exercising the powers to police, regulate, and control in a reasonable manner...”.

5.3.7. Claimants assert that the Tucumán authorities breached those obligations with vigorous and sustained attacks on CAA that substantially destroyed the value of the concession by driving down the company's collection rates.

5.3.8. These actions of the Province destroyed the value of Claimants’ investment in the Tucumán concession and the prospect of continued such losses forced the termination of the Concession Agreement, completing the Province’s expropriation of Claimants’ investment.

#### **The Tucumán Authorities' Deprivation of Claimants’ Reasonably Expected Economic Benefits Constitutes Expropriation**

5.3.9. According to Claimants, it is well-established in international arbitration decisions that expropriation may arise, not only from the deprivation of valuable contractual rights through sovereign acts, as discussed above, but also from government interference with an investor's ability to obtain reasonably expected economic benefits from their investment.

5.3.10. In this case, based on the Province’s own undertakings in the Concession Agreement, Claimants legitimately expected that their investment would operate and be governed consistent with those terms. The Province’s actions thus worked an expropriation, not only as a direct deprivation of valuable rights, but also as an interference with Claimants’ reasonably expected economic benefits of their investment in the concession. The Tucumán authorities also crippled the asset

that is at the heart of a concession investment – the revenue stream of payments from users of the service. Claimants legitimately expected that they would be paid for the services they rendered, but the Tucumán authorities actively and relentlessly undermined that expectation.

5.3.11. In support of this proposition, Claimants point out that the government attacks against the concession began in July and August 1995, when the municipalities demanded that they be given control over the water and sewerage services. These actions were followed quickly by public statements from the Governor, legislators, and the Attorney General condemning the concession. By the end of 1995, the Legislature had introduced a series of bills and other proposals demanding the nullification or renegotiation of the Concession Agreement. The Legislature also appointed an Investigative Commission to review the privatisation and analyse the options for renegotiating the tariff. The intent of these actions was made clear by Franco Davolio, the Deputy Engineering Supervisor of ERSACT, who, when asked why ERSACT was harassing CAA in violation of the language and spirit of the Agreement, stated that “my superiors are asking to put pressure on [CAA] to renegotiate the rates ... So until the rates are renegotiated like the government wants, the order from higher up is to keep applying pressure with whatever we have at hand.”

5.3.12. Claimants assert that the attacks continued in 1996, when the Attorney General issued an opinion impugning the validity of the Concession Agreement. ERSACT then adopted Resolution 170/96, which prohibited CAA from issuing invoices, and Resolution 212/96, which affirmed Resolution 170/96 and forced CAA to

reduce its tariffs below the levels permitted under the Concession Agreement. Resolution 212/96 was alternately suspended and reactivated on several occasions, contributing further to the confusion over the applicable tariff rates which had been precipitated by the government's arbitrary actions.

- 5.3.13. Legislators handed out 3,000 applications in the public square to encourage people to submit claims against CAA and to block CAA's collection efforts. Similarly, the Ombudsman established a claims procedure that would allow users to refuse to pay for CAA's services. It also issued a formal resolution which effectively prevented CAA from cutting the service to customers who refused to pay their bills and to provide a legal defence to customers if CAA challenged their refusal to pay.
- 5.3.14. Claimants contend that in 1996 and 1997, the Province and the Argentine government left Claimants no choice but to engage in multiple rounds of attempted renegotiations. However, the provincial authorities continued to backtrack and undercut the proceedings, demanding the nullification or renegotiation of the Concession Agreement. And though the parties were twice able to reach preliminary agreements on a renegotiated Concession Agreement in 1996, the provincial government quickly backed away from those settlements. The final blow to the concession came when the Governor unilaterally and secretly rewrote the 8 April Agreement and then submitted it to the Legislature for approval.

5.3.15. Against this relentless assault, CAA's recovery rate declined steadily throughout the life of the concession, even after the tariffs had been lowered. By the time CAA notified the authorities that the Concession Agreement was rescinded, CAA's recovery rate hovered around 20 percent, in stark contrast to the rate of 89-90% upon which the Concession Agreement was premised. This interference with Claimants' legitimate expectations constituted a clear deprivation of their property. And when government officials incite the population to take action against a specific foreign party, as happened here, the government under international law is responsible for the actions taken by the population.

**Province's Acts and Omissions Constitute Expropriation Whether Taken Singly or Cumulatively**

5.3.16. Claimants emphasise that it is well established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts, taken together, can warrant a finding that such obligation has been breached. This concept is reflected in Article 15(1) of the International Law Commissions' *Articles on Responsibility of States for Internationally Wrongful Acts* (2002) ("ILC Articles"). Article 15(1) also defines the time at which a composite act 'occurs' to be the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act without it necessarily having to be the last of the series.

5.3.17. Here, Claimants contend that the Province's actions, beginning in the opening months of the concession and culminating in the secret and unilateral changes to

the 8 April Agreement in 1997, had the necessary consequence of forcing the CAA to terminate the Concession Agreement. The accumulation of the Province's failures to live up to its obligations, including those of the Concession Agreement and of good faith commercial dealing, resulted in the termination, and thus expropriation of Claimants' investment.

### **Tucumán Authorities' Actions relating to the Alleged "Hostage Period" Constituted an Expropriation**

- 5.3.18. Claimants say that even after the expropriation of Claimants' investment in the concession was complete (*ie* upon termination of the Concession Agreement), the Tucumán authorities effected a further taking, by compelling CAA to continue to provide services to the Province outside the terms of any contractual arrangement. In effect, the Province appropriated for itself and its citizens the value of CAA's services for a period of over ten months, and yet paid no compensation to CAA for the services received.
- 5.3.19. Having notified the Province of the termination of the Concession Agreement for fault of the grantor on 27 August 1997, Claimants submit that the concession should have terminated 90 days later, on 27 November 1997. The actions by government authorities that forced CAA to provide services beyond that date constituted a separate and independent act of expropriation.
- 5.3.20. Claimants emphasise that the provisions of Article 15.11 of the Concession Agreement, which provide for the 18-month extension of the concessionaire's term following termination, is not applicable here for two reasons.

- 5.3.21. The first is because the applicable rule in the Concession Agreement is not Article 15.11 but Article 15.9.5, which provides the special rules and procedures governing termination based on the breach of the Province.
- 5.3.22. The second is that the eighteen-month extension period provided for under Article 15.11 of the Concession Agreement is expressly conditioned on the Province's inability to find another operator to take over the service. Thus, even if the Province could impose the eighteen-month extension on a provider that has rescinded based on the fault of the Province, the exercise of this prerogative must be accompanied by effective confirmation of non-existence of an operator (public or private) capable of taking charge of the service. Here, however, the Province had operated the service for years and was fully capable of taking charge of the service. In these circumstances the Province abused its power when it forced CAA to remain the service provider pursuant to Article 15.11.
- 5.3.23. By requiring CAA to provide services during this time, the Province forced CAA to continue to absorb all of the costs associated with operating the concession. At no point did the Province offer to compensate CAA for these costs, which amounted to over US\$10.5 million. Claimants argue that there simply is no principle of international law that could justify the actions of the government authorities in this case. Claimants are therefore entitled to all of their costs incurred in operating the service during the more than 10-month alleged "hostage period".

## **Effects of the Tucumán Authorities' Actions are Determinative**

5.3.24. Claimants argue that in determining whether a taking constitutes an expropriation it is particularly important to examine the effect that such taking may have had on the investors' rights. Effects are determinative, and it is well established that the government's intent to expropriate, or lack thereof, is not a principal concern.

5.3.25. This means, whatever the motivations for the Province's actions against the concessionaire, it is the destructive economic effects of those action that are determinative to the expropriation analysis under Treaty Article 5. Claimants therefore contend that, even if the motivations of the Tucumán authorities were unclear, the Tribunal need only find that – regardless of whether they intended to do so – the Tucumán authorities in fact deprived Claimants of the value of their investment.

### **5.4. Respondent is Responsible under the Treaty for the Actions Complained of by Claimants**

5.4.1. As regards Respondent's defence, that the actions of individual provincial legislators and the Ombudsman are not attributable to Argentina, Claimants first observe that Respondent does not deny responsibility for actions (which may found to constitute treaty breaches) of the Legislature (as a body), the Executive and provincial organs such as ERSACT, the Attorney General or the Court of Accounts.

5.4.2. Then, citing Articles 4 and 5 of the ILC Articles, Claimants contend that:

- (i) the provincial legislators of Tucumán, exercising as they do “legislative” functions at “a territorial unit of the State”, individually and collectively

are “State organs” whose conduct shall be considered an act of the state under international law, and

- (ii) the Ombudsman, having regard to his governmental functions, relationship with the Legislature and sweeping authority, also has the status of a “State organ” for whose conduct the state is responsible. And even if the Tribunal were to conclude that the Ombudsman is not a state organ, it is certainly an entity “empowered by the law” of Argentina “to exercise elements of governmental authority” within the meaning of Article 5 for which the state must take responsibility.

5.4.3. For these reasons, Claimants say that Respondent is incorrect when it argues that the conduct of the provincial legislators of Tucumán and the Ombudsman is not attributable to Respondent. Their conduct, which Claimants assert to be in breach of the Treaty, is attributable to Respondent and thus Respondent is liable to compensate Claimants in accordance with the Treaty.

## **5.5. Respondent Must Answer All Treaty Claims, Including Those Related to Matters of Contract**

5.5.1. Claimants reject Respondent’s arguments that they have advanced only contract claims, that the existence of a forum selection clause prevents the Tribunal from deciding the meaning of the contract and that they must demonstrate conduct of the Tucumán authorities that amounts to more than mere breach of contract – a showing of “breach plus” – to establish breach of the Treaty under international law.

5.5.2. Claimants contend that the *ad hoc* Committee concluded that a new tribunal could (even must) consider and decide such contractual issues as might be necessary to adjudicate Claimants’ Treaty claims.

5.5.3. Claimants note that the *ad hoc* Committee described the Treaty standard as “independent”, that is, distinct from, but not necessarily additive to, issues of contract performance or breach. Thus, a breach of Articles 3 or 5 does not depend on showing “more” than a contractual breach and, in the right circumstances, a showing of contractual breach(es) may lay the foundation for demonstrating – or may itself constitute – a Treaty breach. However, even if “more” were required, “more” is present here, where the government acted not in a commercial capacity, but instead used its sovereign authority to defeat the parties’ expectations and destroy the value of the contract. Claimants point to the *Shufeldt*,<sup>245</sup> *Phillips Petroleum*,<sup>246</sup> *Seaco*,<sup>247</sup> and *SPP*<sup>248</sup> decisions to illustrate that tribunals consistently award compensation where sovereign authority is used to destroy or unilaterally modify contract rights.<sup>249</sup>

5.5.4. In sum, Claimants argue that Respondent must answer to each and every Treaty claim advanced by Claimants. This includes Treaty claims based on the impact of the Province’s actions with respect to Claimants’ rights under the concession. And to the extent that adjudicating Claimants’ Treaty claims requires the Tribunal to evaluate the parties’ contentions with respect to their contractual rights, that is its responsibility. According to Claimants, Respondent cannot be heard to contend, in disregard of the jurisdictional decisions reached in this case, that all claims

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<sup>245</sup> *Shufeldt Claim (U.S.A. v. Guatemala)*, Decision of the Arbitrator of 24 July 1930, 2 INT’L ARB AWARDS 1083, 1095-96.

<sup>246</sup> *Phillips Petroleum Company Iran v. the Islamic Republic of Iran and NIOC*, Award No. 425-39-2, Award of 29 June 1989, 21 Iran – U.S. C.T.R. 79 at ¶¶765-76.

<sup>247</sup> *Searco, Inc. v. Islamic Republic of Iran*, Award No. 531-260-2, Award of 25 June 1992, 12 Iran – U.S. C.T.R. 335 at ¶45.

<sup>248</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of 20 May 1992, 32 I.L.M. 937 (1993) at 164-65.

resting on contractual issues are excluded from the Tribunal’s purview or that contractual breaches as such cannot also support Treaty claims without “more”.

**5.6. Respondent’s Allegations that CAA Breached the Concession Agreement are Misleading and did not Justify Termination**

5.6.1. Claimants submit that Respondent’s allegations that CAA breached the Concession Agreement are misleading and did not justify termination by the Province.

5.6.2. Claimants say that immediately after receiving CAA’s notice of rescission, ERSACT issued a flurry of new and old resolutions accusing CAA of all manner of breaches of the Concession Agreement. Two weeks later, the Province issued Decree 2270, which cited all of the defaults just claimed by ERSACT and purported to terminate the Concession Agreement.

5.6.3. Claimants describe Decree 2270 and the flurry of ERSACT resolutions that preceded it as a naked exercise of politics—a perfect example of the politically driven “parody of regulation” that governed CAA during the concession. Claimants rely on the simple factual falsity of so many of those allegations of breach as evidence of their “sham” nature.

**CAA’s Alleged Failure to Make Investments**

5.6.4. As regards Respondent’s claim that CAA failed to meet its annual contractual capital investment obligations, Claimants rely on Barbier Frinault & Associés’ (Arthur Andersen) April 1998 report (Exhibit 882) which demonstrates that, at the

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<sup>249</sup> Memorial at ¶¶329-34; and Reply at ¶269.

end of the concession's second year, CAA was within US\$75,000 of the required investment targets set in the contract, after having invested nearly four times more than the investments required in the first year of the concession.

5.6.5. Claimants say that Respondent's witnesses fail to take into account the contractual structure of the company's investment obligations. Within each year's total investments, there was a portion designated for "extensions". However such extensions were conditioned on CAA receiving requests from customers to carry them out, and on certain levels of commitments from the customers partially to finance the works. CAA did not perform the extensions because it received no requests through this procedure, and therefore it was not obligated to make the "extensions" investments. This is not to say that the network was unchanged during that time—to the contrary, over 10,300 extensions were performed. However, these were self-contracted by the customers and so did not use the procedure set out in Article 12.2 of the Concession Agreement.

### **Alleged Shortcomings of CAA's Water Sampling and Testing Program**

5.6.6. Concerning Respondent's assertion that CAA failed to comply with the required contractual water quality control program, Claimants say that, to the extent that a limited number of tests were not performed, CAA observed at all times the necessary water testing and sampling requirements to ensure that the water it provided to its customers was of the highest possible quality, and this testing was later recognised by the Province as a more appropriate and effective regime. Indeed, the Province ultimately adopted the water testing and quality regime

proposed by CAA, with slight modification, and planned to subject any future concessionaire to that programme.

- 5.6.7. Claimants submit that CAA's regimen improved on the testing requirements of the Concession Agreement in important ways that were recognised and agreed to by ERSACT's technical professionals. The logical conclusion is that it was only for political reasons that ERSACT continued to use Annex XIII-related allegations to harass CAA.

#### **Alleged Shortfall in CAA's Paid-in Capital**

- 5.6.8. As to Respondent's position that CAA was under-capitalised, Claimants submit that this was flatly wrong. As certified by CAA's independent auditors and recorded in CAA's shareholders' register (exhibit 880), CAA was fully capitalised with US\$30 million in May 1997, ahead of the contractual deadline of the end of the second year of the concession.

#### **CAA's Alleged Failure to Maintain Performance Bonds**

- 5.6.9. Claimants counter Respondent's allegation of default for lack of contractually required performance bonds (guarantees) by pointing out that CAA had the required US\$30 million and US\$4.15 million guarantees in place before the takeover of the concession, and maintained the necessary insurance policies in effect at all times throughout the life of the Concession Agreement.

### **Alleged Defects in CAA's Emergency Plan**

5.6.10. As regards Respondent's claim that CAA did not submit, or submitted an inadequate emergency plan, Claimants contend that the emergency plan submitted by CAA was perfectly adequate and was based on an emergency plan that was already in force and functioning in Poitiers, France. Its summary rejection by ERSACT provides another example of the arbitrary and intransigent attitude that the Regulator adopted towards CAA.

### **CAA's Alleged Poor Service**

5.6.11. Claimants say that Respondent misrepresents the events concerning the turbidity episodes when it offers them as evidence of CAA's allegedly poor service. Claimants submit that these events demonstrate the exact opposite of what Respondent claims. The brief and innocuous red turbidity that occurred in December 1995 was the unavoidable result of the necessary repairs carried out by CAA in the water network and the darkish and equally innocuous turbidity in late January 1996 that was caused by the presence of manganese in the reservoir—a circumstance beyond the control of CAA—demonstrated the professionalism with which CAA dealt with an unforeseeable *force majeure* event and how efficiently it diagnosed and redressed the problem.

5.6.12. As regards these separate events of turbidity, Claimants note five points of commonality. First, neither incident posed any health risk to the population of Tucumán. Second, neither incident was caused by negligence on the part of

CAA. Third, both incidents were detected, diagnosed, and corrected by CAA in a prompt and professional manner. Fourth, CAA was transparent and precise in the information it provided to the authorities and its customers throughout the turbidity episodes. Fifth, the actions of CAA ensured that similar problems of turbidity could either be prevented or mitigated in the future.

## **5.7. Claimants Claim Compensation for Deprivation of Treaty Rights**

5.7.1. Claimants submit that they have been deprived of their rights under Articles 3 and 5 of the Treaty: they have suffered multiple forms of unfair and inequitable treatment in violation of international law; they have also seen their investment expropriated, without compensation. Claimants seek damages for these harms inflicted upon them.

5.7.2. Claimants say, for the most part, that harm arises out of the same acts and omissions of the Province, whether it results from breaches of Article 3 or Article 5 of the Treaty, but that it is most readily measured in terms of the full value of their property rights that were expropriated by government authorities in Argentina.

5.7.3. Therefore, Claimants first seek damages arising from the forced reduction of the tariff and the depression of the recovery rate during the two and a half year life of the Concession Agreement. Second, Claimants seek damages arising from the premature termination of the Concession Agreement, including CAA's lost profits, the value of its investments, the amount of its redundancy costs, and costs associated with the breaching of subcontracts as a result of the termination of the

concession. Finally, Claimants seek damages for the period in which CAA was forced to provide additional services after the termination of the Concession Agreement, as well as damages incurred up to the present.

5.7.4. Claimants emphasise that international decisions have consistently required that governments pay compensation for the full value of expropriated property. Article 5(2) of the Treaty provides the specific framework for this case. It directly incorporates these principles, stating that, if Argentina “directly or indirectly, [adopts] measures of expropriation or nationalization or any other equivalent measure having an effect similar to dispossession,” then it shall allow the payment of a prompt and adequate compensation, the amount of which, computed on the basis of the actual value of the investments affected, shall be evaluated in relation to the normal economic situation, and prior to any threat of dispossession.

5.7.5. In Claimants’ submission, in this case, the Concession Agreement itself provides the best guidance for assessing the value of what was taken and the parties’ understanding of the normal economic conditions under which the concession would operate. Thus, the value of Claimants’ investment is essentially the value of the concession, and that valuation is best made using the agreed upon economic terms and financial assumptions of the Concession Agreement itself. Claimants argue that Tucumán authorities destroyed, or otherwise diminished Claimants’ valuable economic rights under the Concession Agreement whilst that agreement was in effect. Claimants also submit the Provincial authorities deprived them of the value of their contractual rights under the remaining 27-plus years of the Concession Agreement, which CAA was forced to terminate as a result of the

Province's unlawful conduct. Claimants have calculated the damages owed on these two components of its claims as of the date of the termination of the Concession Agreement on 27 November 1997. Claimants also request damages for the post-termination period during which CAA was forced to provide water and sewage treatment services in Tucumán, and for net losses incurred after that time in connection with Claimants' mitigation efforts.

5.7.6. Claimants seek damages in the amount of US\$316,923,000, plus compound interest and litigation costs and expenses.<sup>250</sup> In support of their calculations of the damages incurred, Claimants provided a Statement of Amounts Claimed, with a corresponding verification report of Ernst & Young.<sup>251</sup>

#### **Damages for Losses During the Life of the Concession Agreement**

5.7.7. Claimants argue that the Province is responsible for the damages resulting from at least three key modifications of essential economic terms of the Concession Agreement.

5.7.8. First, Resolution 212/96 prevented CAA from invoicing customers for local taxes (IB, PACIS, and OS). During the periods when CAA was prohibited from invoicing customers for these taxes, it was forced to bear the cost of the taxes itself within its capped service tariffs, resulting in losses of more than US\$3,578,000. Second, CAA suffered losses because of its inability to apply the 10% increases permitted to the tariff in the second and third years of the

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<sup>250</sup> Reply at ¶438.

concession – losses that totalled over US\$5,846,400. Third, Provincial Law 6826 passed, in connection with the third renegotiation, imposed tariff reductions in line with the unilaterally modified text that. Law 6826 was retroactively effective to 1 May 1997, and remained in effect until 27 August 1998, notwithstanding the failure of the renegotiation as a result of the Province’s bad faith acts. Losses for this period are claimed in the amount of US\$5,718,600.

5.7.9. Claimants contend that the acts of government officials during the effective life of the Concession Agreement, *ie*, for the period 22 July 1995 to 27 November 1997, reduced CAA’s actual recovery rate significantly below the levels established with the Concession Agreement. Here Claimants seek to recover US\$47,658,000, made up of:

- (i) US\$41,686,000 in losses as a result of diminished revenues (calculated by multiplying the difference between the recovery rate assumed in the Concession Agreement and the actual recovery rate, by the actual tariff);
- (ii) US\$2,108,000 in losses associated with the 6% CENTE fee payable to ERSACT. CAA was forced to pay the CENTE fee as soon as an invoice was issued and regardless of whether the customer actually paid the invoice; and
- (iii) US\$3,864,000 losses from financing costs arising from the cash flow deficit for CAA created by the drop in the recovery rate.

### **Damages for Losses Resulting from the Termination of the Concession Agreement**

5.7.10. Claimants request full compensation for the value of the concession at the time of the taking. They rely, *inter alia*, on Article 15.8.3 of the Concession Agreement

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<sup>251</sup> Statement of Amounts Claimed, with verification report of Ernst & Young, 19 November 2004 (Exhibit 7).

which is said to be entirely consistent with international law standards. In pertinent part, it provides that:

*“in the case of return or of termination of the Concession due to misconduct by the Authority, the procedure set out in Art. 15.9.5 herein shall be followed. The Authority will return the Guaranty for the due completion of the Contract, the non-depreciated value of the assets acquired or built by the Concessionaire, the concession investments which have not been totally depreciated at the date of return, in conformity with the depreciation plan and will indemnify the Concessionaire for the damages generated by the termination, which will be duly confirmed and will, furthermore, take responsibility for the subcontracts then in progress.”*

5.7.11. On this basis, Claimants seek:

- (i) US\$12,117,000 for the value of CAA’s depreciated investments in the concession (corresponding to the net value of the investments made by the Concessionaire as defined in Article 15.8.3 of the Concession Agreement);
- (ii) US\$642,000 of incidental losses related to the termination of the Concession Agreement (under international law as well as Articles 8.15 and 15.8.3 of the Concession Agreement); and
- (iii) US\$228,600,000 being the net present value of CAA’s lost profits for the “going concern” of the concession (calculated with reference to the fair market value prior to expropriation and the future cash flows set out in the cash flow projections in the Concession Agreement as provided for in Article 15.8.3 of the Concession Agreement).

### **Damages Incurred During and After the Alleged “Hostage Period”**

5.7.12. Claimants contend that the Province forced CAA to provide services for a period of over 10 months after the termination of the Concession Agreement. Thus, the damages claimed for this period arise not from the expropriation of CAA’s rights under the Concession Agreement, but for the expropriation of CAA’s services after that first taking was effectively completed. Claimants seek payment for all of

their costs incurred in providing over 10 months of extra-contractual services, as well as costs incurred thereafter, when CAA was engaged in continued mitigation efforts to collect unpaid invoices.

- 5.7.13. Claimants submit that CAA's damages during the period of forced provision of services amounted to US\$10,580,000. Additional damages in the amount of US\$4,409,000 were incurred after that alleged "hostage period" for CAA's costs as it worked to collect unpaid invoices, resulting in a total claim for restitution for these periods of US\$14,989,000.

#### **Tax Liability Contingency**

- 5.7.14. Regarding AFIP's tax claim against CAA, described at 4.22 above, Claimants say that if AFIP's claim is upheld, CAA's damages arising out of the expropriation will be increased by this additional tax liability. Accordingly, Claimants include in their damages a contingent claim of at least US\$1,402,000 – the claimed tax liability, exclusive of penalties or interest (which Claimants reserve the right to add when any final liability becomes known).

#### **Interest**

- 5.7.15. Claimants argue that they are entitled to an award of interest on the damage amounts claimed, in order to place them in the position they would have occupied had Respondent paid adequate compensation promptly upon the date of its expropriation. Interest should date from 27 November 1997, the date as of which Claimants have calculated and stated their amounts claimed.

5.7.16. Claimants further submit that it is appropriate under international law to apply compound, rather than simple, interest in expropriation cases, and seek compound interest at the rate of 9.70%. This rate corresponds to the “discount rate” applied in Claimants’ DCF analysis to calculate the net present value (as of 27 November 1997) of the remaining term of the expropriated Concession Agreement. That discount rate was based on the quoted rate on the Argentine Treasury bond “Argentina Rep 17” on that same date. Claimants argue that it represents a reasonable proxy for the interest rate Claimants could have earned on the compensation that was due to them upon expropriation, had that compensation been paid promptly on 27 November 1997. According to Claimants, this rate thus would properly compensate Claimants for the opportunity costs of Respondent's failure to pay prompt and adequate compensation for the Province’s expropriatory, unfair and inequitable acts.

### **Litigation Costs and Expenses**

5.7.17. Claimants sought reimbursement of their litigation costs and expenses.<sup>252</sup> As specified in the parties’ procedural agreement of 6 June 2006, confirmed by the Tribunal’s order of 16 June 2006, Claimants filed their submission on costs on 29 September 2006. Claimants sought over US\$6.3 million in costs, including attorney’s fees, in respect of the merits stage of the proceedings. In addition, Claimants reasserted their request for US\$706,273.23 in respect of costs incurred

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<sup>252</sup> Memorial at ¶409.

in the jurisdictional proceedings, as detailed in Claimants' costs report of 31 August 2005.

## **Mode of Payment**

5.7.18. Claimants' investments were made in Argentina in US dollars and/or French francs. Claimants' damages are calculated in US dollars, and Claimants request payment of any award in the same currency. Claimants made their investments with funds transferred into Argentina by CGE/Vivendi. Accordingly, Claimants jointly request that the Tribunal order that payment be made to Claimants in France, to the account of Vivendi.

## **6. RESPONDENT'S CASE**

### **6.1. Tribunal's Approach**

6.1.1. In this section we summarise the elements and scope of the defences and arguments raised by Respondent, as advanced in its pleadings, written submissions and during the course of the oral hearing.

6.1.2. Respondent defends on the basis of six main propositions, which in summary may be stated as follows:

- (i) neither CAA nor CGE / Vivendi are proper Treaty claimants on the facts;<sup>253</sup>
- (ii) Claimants' case exclusively involves contractual matters, over which this Tribunal has no jurisdiction, and discloses no treaty violations;<sup>254</sup>

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<sup>253</sup> Counter-Memorial at ¶¶14-15.

<sup>254</sup> Counter-Memorial at ¶2.

- (iii) CAA frustrated the Concession Agreement, causing its Tucumán operations to fail, as a result of its own mismanagement, contractual breaches and public relations blunders;<sup>255</sup>
- (iv) the Province responded reasonably, properly and proportionately to CAA's failure to meet its contractual obligations – both as a contracting party and a government. Claimants were always treated fairly and equitably and provided with security and full protection. None of the actions of the provincial authorities constituted expropriation;<sup>256</sup>
- (v) Respondent had cause to terminate, and properly terminated the Concession Agreement.<sup>257</sup> Requiring CAA to provide service thereafter was lawful and did not amount to expropriation, and
- (vi) Claimants' case should also be dismissed on the basis that its claim for damages is groundless, as well as unsubstantiated and unjustified. In the event the Tribunal finds Claimants entitled to damages, these should be limited to *damnum emergens*, based on reliable evidence of loss. Under no circumstances are Claimants entitled to recovery any *lucrum cessans*.<sup>258</sup>

## **6.2. CAA is not a Proper Claimant**

- 6.2.1. Respondent argues that CAA is not entitled to recover any losses because it acquired its rights in violation of the Concession Agreement.<sup>259</sup> Because CGE did not become a majority shareholder of CAA until June 1996, CAA was not a "French" company within the meaning of Article 1(2) of the BIT when the Concession Agreement was signed, because CAA was not controlled directly or indirectly by CGE.<sup>260</sup>
- 6.2.2. Respondent further argues CGE's acquisition of its controlling stake in CAA was contrary to Article 2.3.2 of the Concession Agreement, because the Executive did not consent to the transfer of the ownership of CAA's shares which led to CGE's

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<sup>255</sup> Counter-Memorial at ¶¶3-4.

<sup>256</sup> Counter-Memorial at ¶3.

<sup>257</sup> Counter-Memorial at ¶11.

<sup>258</sup> Counter-Memorial at ¶17.

<sup>259</sup> Rejoinder at pp. 140-142.

stake of 85%. Accordingly, CAA became entitled to pursue a claim under the BIT only through an express violation of the terms of the Concession Agreement.

Respondent says that CAA's claim should be dismissed because it has been brought in bad faith, and that for policy reasons, CAA should not be permitted to pursue a claim for violation of treaty rights that it acquired illegitimately.

6.2.3. Respondent accepts that the Tribunal has jurisdiction to determine CAA's claim, but contends that, in the proper exercise of that jurisdiction, CAA's claim must be dismissed for these reasons.

### **6.3. Claimants' Case Exclusively Involves Contractual Matters**

6.3.1. Respondent claims that the Tribunal does not have jurisdiction over any dispute arising under the Concession Agreement. Insofar, as the concession is concerned, the Tribunal's task is limited to "taking into account the terms of the contract" for the purposes of determining – principally – whether there has been a breach of Argentina's obligation to provide fair and equitable treatment in accordance with the principles of international law. If the Tribunal concludes that Tucumán's actions are plausibly justified on the basis of the terms of the Concession Agreement, and if there has been no denial of justice in relation to the forum for the resolution of contractual disputes, it is difficult to see on what basis Argentina could be internationally responsible for the alleged acts of the Province.

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<sup>260</sup> Rejoinder at ¶¶408-410.

- 6.3.2. In the course of Respondent’s closing submissions during the hearing on the merits, Respondent attempted to clarify its position on the extent to which the Concession Agreement could and should be considered by the Tribunal.<sup>261</sup>
- 6.3.3. According to Respondent, the Decision on Annulment did not suggest that the First Tribunal could or should have ruled on the Concession Agreement, but that it “should have tried harder to see whether any of the facts of the case could be disentangled from the contractual dispute, and whether those facts fell into the category of sovereign power, and whether the sovereign power had been used in such a way as to breach a pertinent Treaty standard.”<sup>262</sup>
- 6.3.4. Respondent argued that Article 16.4 of the Concession Agreement prevents the Tribunal from interpreting or applying the contract, but does not require the Tribunal to ignore factual matters related to the contract.<sup>263</sup> In response to an inquiry from the Tribunal with respect to the apparent contradiction between Respondent’s position and its reliance on its allegations that Claimants were in breach of the Concession Agreement, Respondent argued that exploring the “reasonableness of the model which was embodied in the contract” was not interpreting or applying the contract.<sup>264</sup> Respondent further submitted that the Tribunal could and must take into account Respondent’s case and consider

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<sup>261</sup> Transcript of the hearing on the merits, Day 11, pp. 2921-2929 (4 August 2006).

<sup>262</sup> Transcript of the hearing on the merits, Day 11, pp. 2924-2925 (4 August 2006).

<sup>263</sup> Transcript of the hearing on the merits, Day 11, p. 2926 (4 August 2006).

<sup>264</sup> Transcript of the hearing on the merits, Day 11, p. 2927 (4 August 2006).

whether it is plausible that Respondent's actions were justified under the Concession Agreement.<sup>265</sup>

**6.4. CAA Frustrated its Own Agreement and Failed to Discharge its Obligations in Good Faith**

6.4.1. Respondent argues that Claimants frustrated the Concession Agreement when CAA failed to comply with its contractual obligations in good faith.<sup>266</sup>

6.4.2. In Respondent's view, CAA implemented an erroneous commercial policy by increasing the tariffs by 110% in its first billing, when under the "price cap" principle provided for in the Concession Agreement, they would have been able to do so on a gradual or progressive basis.<sup>267</sup> Respondent submits that this effectively destroyed CAA's credibility in the eyes of its customers.

6.4.3. According to Respondent, CAA failed to invest in accordance with its obligations. Respondent argued that when CAA took over the concession, one of the most urgent priorities was the upgrading of the laboratory, including the acquisition of equipment necessary to undertake the water quality tests mandated by the Concession Agreement. However, CAA neglected the test laboratory's equipment and operations, failing to improve the laboratory building for over three months, until November 1995. Even then, according to Respondent, CAA expended only minimal amounts that were insufficient to allow CAA to have the necessary

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<sup>265</sup> Transcript of the hearing on the merits, Day 11, pp. 2919-2929 (4 August 2006).

<sup>266</sup> Counter-Memorial at ¶¶423-430.

<sup>267</sup> Counter-Memorial at ¶424.

equipment to test the water supply properly and maintain the water delivery infrastructure.<sup>268</sup>

6.4.4. Whilst Claimants say that CAA spent nearly ARS 140,000 in the first six months of the Concession to rebuild the laboratory and purchase new equipment and supplies, Respondent notes that CAA's "Annual Report of Advancement of the Five-Yearly Plan," indicates that CAA invested only ARS 62,414.90 in the laboratory during the entire first year of the Concession which represents only 0.4% of CAA's overall required investment during the first year of the Concession.<sup>269</sup>

6.4.5. According to Respondent, the fact that it took as long as six months "to get the laboratory up and running"<sup>270</sup> demonstrates CAA's lack of commitment to what should have been a high priority. Thus, CAA failed during this period to establish proper water quality control and to meet its obligations under the Concession Agreement. In this respect, Respondent says that most laboratory equipment that had to be purchased and installed at the central lab and at the labs in the main water treatment facilities in order to comply with the Bid Conditions was never purchased by CAA.<sup>271</sup>

6.4.6. From the beginning of the Concession, Respondent asserts that the Regulator demanded that CAA comply with its contractual obligation to execute a sampling program to ensure water quality. Nevertheless, Respondent argues that CAA

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<sup>268</sup> Counter-Memorial at ¶118, citing ERSACT report about investment in laboratory (Exhibit 592).

<sup>269</sup> Counter-Memorial at ¶¶118-119.

<sup>270</sup> de Rochambeau Affidavit, 5 November 2004 (Exhibit 1), at ¶42.

failed to equip the laboratory properly or expeditiously. By way of example, Respondent notes that CAA waited more than two months from the takeover of the concession and more than four months from execution of the agreement to purchase a necessary instrument (a spectrophotometer), the price of which was less than the salary of one of its managers.<sup>272</sup>

6.4.7. CAA's failures in relation to the laboratory and water quality testing are said by Respondent to be indicative of its general failure to comply with its investment obligations throughout its tenure in Tucumán.<sup>273</sup> CAA also failed to make the necessary investments to comply with its obligations to expand the area of service.<sup>274</sup> This was a key requirement of the Concession Agreement and in fact one of the principal reasons why the Province decided to privatise water service in the first place. The resulting inadequate supply of potable water posed a severe risk of disease to people in the more remote areas of the Province.<sup>275</sup>

6.4.8. More generally, Respondent asserts that CAA rendered a deficient service, characterised by a constant lack of water pressure, lack of service in the poorest towns, and their own negligence in allowing the network to be contaminated with manganese. This situation led to the distribution of water of a "repugnant" quality, exhibiting a black appearance that had never been seen before and that shocked

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<sup>271</sup> Counter-Memorial at ¶122.

<sup>272</sup> Counter-Memorial at ¶123, citing Invoice for purchase of a spectrophotometer for the amount of ARS 7,022 + VAT = 8,496.62 (Exhibit 56), and Copy of list of demanded wages by CAA to the Province, in File No. 849/300-C, 12 September 1995 (Exhibit 424).

<sup>273</sup> Counter-Memorial at ¶127.

<sup>274</sup> Counter-Memorial at ¶128.

<sup>275</sup> Counter-Memorial at ¶128, citing United National Development Programme, Human Poverty Profile and Index (28 January 1999), Pan American Health Organization, Health in the Americas, 1998 Edition, Volume I (attached

customers. Respondent claims that the blackwater began to flow into people's homes in December 1995 and continued for approximately six weeks, until mid February 1996. In this respect, Respondent submits that:

- (i) CAA made varied, contradictory and erroneous announcements about the cause of the contamination and whether or not it constituted a danger to health.<sup>276</sup> In the beginning of January 1996, CAA publicly explained that the discolouration, what it called “red turbidity”, was due to the disembedding of rust particles from the inside of cast iron pipe networks after certain cleansing operations undertaken by CAA in some areas of San Miguel de Tucumán.<sup>277</sup> Respondent rejects CAA’s explanations for the early turbidity and submits that CAA’s failure properly to diagnose the true cause of the problem actually made the situation even worse.<sup>278</sup> Based on its incorrect diagnosis of bacterial contamination, CAA treated the problem with the addition of chlorine, when in fact, the turbidity was caused by the presence of manganese in the water supply. The chlorine injected by CAA into the system reacted with the manganese to create an even darker appearance.
- (ii) CAA failed to undertake tests mandated by the Concessions Agreement that would have prevented the water quality problems, refused to respond to the Regulator's repeated requests to see the test results, complained that the tests were too costly and said it would not perform any quality control tests unless tariffs were increased to cover the performance costs.<sup>279</sup> Respondent submits that periodic tests required by the Concession Agreement would have prevented the blackwater problem.<sup>280</sup>
- (iii) Having found that CAA had violated the Concession Agreement by failing to comply with the frequency of quality control tests in August and September 1995, ERSACT therefore formally declared the existence of 78

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as Exhibit 27 to Respondent’s Counter-Memorial from the first arbitration proceeding) (“Inadequate water supply and excreta disposal generate high-risk conditions that especially endanger the country’s poorer areas”).

<sup>276</sup> Counter-Memorial at ¶147.

<sup>277</sup> Counter-Memorial at ¶¶147-149.

<sup>278</sup> Counter-Memorial at ¶¶150-151.

<sup>279</sup> Counter-Memorial at ¶157.

<sup>280</sup> Counter-Memorial at ¶158. Respondent relies on the four scientific publications it submitted as Exhibit 18 in the first arbitration, which according to Respondent explain “the means to prevent and control, by quality testing and other measures, the processes that occur in lakes and dams like El Cadillal that may lead to manganese contamination of the public water supply”.

violations to the Concession Agreement, issuing Resolutions No. 38/95 to 115/95 on 6 December 1995.<sup>281</sup>

- (iv) Apart from the contractual testing regime, Respondent claims that CAA should have anticipated the potential for the blackwater problem.<sup>282</sup> Having performed extensive due diligence on the water infrastructure in Tucumán for more than 12 months, CAA knew or should have known the correct procedures to extract water from the El Cadillal reservoir without creating the risk of manganese contamination.<sup>283</sup> Moreover, in Respondent's submission the blackwater was eminently foreseeable and avoidable and CAA's failure to foresee and consequently avoid it was due to CAA's own failure to perform the contractually mandated water quality tests, to carry out the emergency works promptly, and to undertake proper investigations into the chemical and geological characteristics of one of its largest reservoirs.<sup>284</sup>

6.4.9. Respondent asserts that CAA materially breached the Concession Agreement on dozens of occasions and the dozens of resolutions issued by ERSACT at the time conclusively establish those breaches. This is because CAA never appealed or otherwise sought judicial review of the relevant resolutions and Claimants have presented no evidence that would allow the Tribunal to review the merits of any of these ERSACT resolutions.<sup>285</sup>

6.4.10. In sum, Respondent submits that to allow Claimants to rely on alleged breaches of the Concession Agreement, they must first demonstrate they fulfilled their own obligations under the agreement in good faith.<sup>286</sup>

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<sup>281</sup> Counter-Memorial at ¶¶159-160. Respondent identifies ERSACT Resolutions No. 38 to 115/95 (filed in the proceedings before the Original Tribunal).

<sup>282</sup> Counter-Memorial at ¶¶163-168; Courel Affidavit, 30 September 2005 (Exhibit 389).

<sup>283</sup> Counter-Memorial at ¶163. Romero Affidavit, 11 November 2005 (Exhibit 380), at ¶22.

<sup>284</sup> Counter-Memorial at ¶¶165-168.

<sup>285</sup> Counter-Memorial at ¶159, Note 237.

<sup>286</sup> Counter-Memorial at ¶¶423-430.

**6.5. Actions of the Tucumán Authorities Were Responsible, Proportionate, and did not Constitute Expropriation**

6.5.1. Respondent submits that Claimants' property was not expropriated within the meaning of the BIT for the following reasons:

- (i) the submissions made by Claimants as to the nature and content of indirect expropriation are not recognized as a matter of international law, and Claimants' assertions that the BIT must be broadly construed do not find support in the relevant case-law;
- (ii) Claimants assert that two types of property have been expropriated: contractual rights and "reasonably expected economic benefits" which were expected to flow from the concession. As to the first, Respondent submits the Tucumán authorities did not destroy Claimants' rights under the contract. Rather, it was Claimants' refusal to comply with their contractual obligations that led to termination of the Agreement, which remained in effect until Claimants themselves initiated its termination. As to the second, Respondent argues the BIT does not insure against investments that are not profitable or guarantee that an investment will be profitable, especially where Claimants' own mismanagement and contractual breaches were the source of any failure to realise their initial expectations.
- (iii) with respect to legislative acts, Claimants bear the significant burden of rebutting the strong presumption that state regulatory legislation is legitimate. The challenged acts were legitimate and proportionate measures directed to protecting public health and the well-being of the population in response to Claimants' failure to provide a reliable supply of quality water, a fundamental human need which the state has a responsibility to safeguard and maintain.
- (iv) some of the acts about which Claimants complain were not performed or acquiesced in by any governmental authority. Such private acts cannot serve as the basis of an expropriation claim.
- (v) the Tucumán authorities were entitled under the Contract to require a period of service after termination of the Contract and did so for entirely legitimate reasons directed to public health and well-being. Furthermore, the federal government took appropriate steps to intervene and shorten the post-contract service period.<sup>287</sup>

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<sup>287</sup> Counter-Memorial at ¶460.

- 6.5.2. Respondent notes that Claimants appear to suggest that any act or measure by the Tucumán authorities which diminished the profitability of the contract in some way can and should be deemed a measure “tantamount to expropriation” and thus a violation of Article 5(2) of the BIT. In Respondent’s submission, this argument is erroneous and groundless.<sup>288</sup>
- 6.5.3. Respondent submits that the BIT was intended to incorporate a standard of conduct grounded in customary international law.<sup>289</sup> According to Respondent the BIT drafters did not intend to expand the concept of “expropriation” beyond the established international law standard. In Respondent’s submission, Claimants have provided no evidence to support the proposition that it was the intention of the drafters of the BIT to protect the investors’ “reasonably expected economic benefits”, but have instead proceeded on the basis of a manifest misunderstanding as to the scope of the BIT, and the extent to which the BIT is intended to provide comfort and protection to investors.<sup>290</sup>
- 6.5.4. Furthermore, Respondent stresses that, having regard to the findings of the *ad hoc* Committee, the Tribunal, when considering Claimants’ expropriation case, ought to bear in mind the distinction which must be drawn between breaches (if any) of the Concession Agreement by the Tucumán authorities, and expropriation within the meaning of international law and the BIT as set out above. The *ad hoc* Committee noted that “Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A State may

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<sup>288</sup> Counter-Memorial at ¶461.

<sup>289</sup> Counter-Memorial at ¶462.

breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT”.

- 6.5.5. Respondent submits that any breach of contract on the part of the Tucumán authorities accordingly would be insufficient to provide grounds for a claim for breach of the BIT. Claimants therefore have the burden of demonstrating conduct on the part of the Tucumán authorities that amounts to more than mere breach of contract and instead rises to the level of expropriation under international law.
- 6.5.6. Respondent contends that the specific matters about which Claimants’ complains arise out of the application of provisions of the Concession Agreement (the recoverability of taxes, the increase in tariffs in years two and three and the renegotiation of its terms). Therefore, it is important for the Tribunal to have regard to the distinctions which have been drawn by respected jurists and tribunals between conduct which amounts to expropriation and conduct which does not warrant a remedy under international law.
- 6.5.7. It is Respondent’s position that the case law has specifically addressed whether an expropriation can be established from alleged breaches of contract, where Claimants had an opportunity to seek redress through a contractually chosen forum. In that context, expropriation can only be established if a claimant proves a denial of justice, or a repudiation of a right, that could not be redressed by the contractually chosen forum, thereby denying the exercise of that right entirely or substantially.

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<sup>290</sup> Counter-Memorial at ¶462.

- 6.5.8. Respondent submits that nothing in the facts of this case discloses conduct by the Tucumán authorities which comes within the narrowly-defined scope of expropriation as recognized by international law. Accordingly, there has been no conduct amounting to an expropriation which gives rise to liability under the BIT.
- 6.5.9. In Respondent's submission, the challenged actions of the Tucumán authorities represented a proper exercise of governmental authority and a reasonable, proportionate and necessary response to the dire emergency caused by CAA's failure to provide potable water, its serious and persistent breaches of its obligations under the Concession Agreement (described above) and to the public outcry over its supply of undrinkable water at inflated prices. These facts show incontrovertibly that CAA's own actions — and not the actions of the Tucumán authorities — led to Claimants' failure to realise their anticipated profits under the Concession Agreement.

### **The Regulator's Response**

- 6.5.10. Respondent asserts the propriety of ERSACT's resolutions concerning the frequency and quality control testing for the reasons described above, at 6.4.
- 6.5.11. As regards the steps taken by the Regulator to ensure that CAA did not overcharge customers by imposing taxes on them which were properly for CAA's account and should already have been comprised in the tariff, Respondent points out that ERSACT's response:
- (i) followed public complaints that had prompted the Ombudsman to ask CAA to clarify its position by holding a meeting on 26 December 1995;

- (ii) was based on advice received from the Attorney General as to the legality and validity of the charging structure which CAA had adopted;
- (iii) was intended to clarify an issue which had been specifically and expressly addressed in the Bid Conditions but which was left unclear in the Concession Agreement and subject to contradictory construction; and
- (iv) was ultimately upheld by the Court of Accounts in a ruling, that bound both ERSACT and the Executive, that Claimants' did not challenge in the local courts.

6.5.12. Respondent contends that these facts disclose no act by a state organ which had the effect of expropriating Claimants' investment. Claimants may not have been happy with the Regulator, but unhappiness with legitimate regulation is not a valid basis for an expropriation claim under the BIT.

**Claimants have Failed to Rebut the Presumption that State Regulation was Legitimate**

6.5.13. Respondent rejects Claimants' contention that the Tucumán authorities' regulation of CAA's activities under the Concession Agreement was merely a guise to force a renegotiation. Respondent says that governmental regulation is bound to affect the value of an investment and the fact that the value of an investment may have been affected by one or more acts of regulation does not make such regulation expropriatory in character.

6.5.14. Respondent argues that there is a necessary presumption that states are regulating when they say they are regulating and, in this context, non-responsibility of the state must be presumed for non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment. In addition to the strong presumption

of legitimacy when states regulate property rights, it is a well established principle that valid regulation does not constitute expropriation.

- 6.5.15. Respondent submits that the regulatory actions adopted by the Tucumán authorities were intended to give effect to the Concession Agreement and to “protect legitimate public welfare objectives” in the province of Tucumán, namely the provision of accessible drinking water supplies to the population as a whole. It is plain that this process discloses no bad faith or *ultra vires* conduct on the part of the Tucumán authorities.
- 6.5.16. As regards Claimants’ suggestion that the parties various attempts to renegotiate the Concession Agreement provide a foundation for their Article 3 and 5 claims, Respondent says that these negotiations were anything but forced upon Claimants. Rather, the renegotiation of the Concession Agreement was an attractive option for Claimants. The alternatives were rescission of the agreement by the Province, on account of CAA’s many breaches, or continued operation of the agreement, potentially for 30 years. CAA and its investors wanted neither.<sup>291</sup>
- 6.5.17. Respondent answers Claimants’ criticisms of speeches made and action taken by legislators and the government by pointing out that they were the natural by-product of CAA’s own conduct. A provider of an essential necessity of life, such as water, must expect that its performance will be closely scrutinised by the public, including legislators and the news media.

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<sup>291</sup> Counter-Memorial at ¶¶200-205.

- 6.5.18. As to Claimants' complaints, which are based on the suspension of the provisions of the Concession Agreement that purportedly entitled CAA to increase tariffs by 10% in years two and three, Respondent describes this position as unfathomable.
- 6.5.19. Indeed, from March 1996, CAA put forward renegotiation proposals which incorporated tariff reductions. Thus, CAA plainly deemed appropriate tariff rates to be a proper matter for negotiation. For example, at the meeting between CAA and the Renegotiation Commission on 27 March 1996, CAA proposed a temporary tariff reduction pending the outcome of those negotiations. Later, in August 1996, CAA and the Province signed the Framework Agreement which provided for CAA to reduce tariffs by 28% from the rates which applied under the Concession Agreement. Finally, in a proposal made by CAA on 3 March 1997, CAA stated that it would be prepared to agree to a tariff reduction if it achieved its three primary goals: geographical limitation of the concession area; reduction of the required level of investment; and consumption-based charges. By this time, CAA knew and accepted that it could not raise tariffs given its inability to meet acceptable service standards
- 6.5.20. In sum, Respondent says that a deferral of tariff increases to which CAA was not entitled and to which it voluntarily agreed, cannot be deemed state action intended to deprive Claimants of their protected rights.
- 6.5.21. Respondent further submits that Claimants' assertions that the Legislature secretly and unilaterally made material changes to the 8 April Agreement are baseless.

6.5.22. The evidence shows that, after a lengthy period of negotiation, CAA obtained from the Tucumán authorities a new concession agreement which, in essence, provided to CAA the three elements it had been seeking, and the legislative bill presented to the Legislature on 22 April 1997 was the product of negotiation and drafting between the parties. Following adverse reaction to the legislative bill in the Legislature, the Executive and CAA carried out a general analysis of the bill in the Legislature's Public Services and Works Committee in May 1997.

6.5.23. Starting in June 1997, Respondent argues that pro-Executive legislators and the Regulator's technicians discussed with CAA changes to a new bill which was then submitted to the Legislature by Governor Bussi on 6 June 1997. CAA approved the revised legislative bill, as demonstrated by the fact that CAA itself placed an advertisement promoting its advantages on 10 June 1997, and further by the fact that CAA calculated its invoices for the bi-monthly period of May-June 1997 on the basis of the tariff provisions in the draft concession agreement attached to the revised legislative bill.

6.5.24. Respondent further argues that Claimants have submitted no evidence that alterations made to the new concession agreement between the execution of the April Memorandum and the version presented to the Legislature in July 1997 were "unilateral". Rather, the evidence discloses the parties' negotiated to find a mutually acceptable solution to the key problems that had plagued the performance of the concession from its beginning in 1995. Thus, when CAA repudiated the terms of the revised concession agreement as set forth in Law

No. 6826, it had no justification for alleging that there had been “substantial” and “unilateral” alterations to the text of the renegotiated agreement.

6.5.25. Against this factual backdrop, Respondent concludes that Claimants’ expropriation case must fail. The Tucumán authorities were prepared to continue to deal with CAA as the appointed concessionaire had CAA not repudiated the concession. The Tucumán authorities never attempted to nationalise the concession or to divest CAA of its assets. Nor were the measures complained of disproportionate or unreasonable. Respondent stresses that even if regulation by the Tucumán authorities had the effect of making the concession less profitable than Claimants hoped, such an effect was an incidental and appropriate consequence of public regulation in relation to public welfare. It was not, as Claimants argue, an attempt to “destroy the concession”, and no evidence has been put before the Tribunal to establish that it was. To the contrary, the evidence is clear that CAA’s lack of profitability was due to CAA’s own gross mismanagement of the enterprise. In any event, the Tucumán authorities were plainly exercising their regulatory authority to ensure the delivery of clean water at reasonable prices. There can be no doubt that this is a legitimate purpose and a fundamental responsibility of local government.

## **6.6. No Unfair or Inequitable Treatment in Violation of Article 3 of the BIT**

6.6.1. Respondent says that the content and scope of the obligations reflected in Article 3 of the BIT are significantly narrower than those advanced by Claimants and that, in any event, the facts of this case do not permit a finding of any violation of

Article 3, on either a “broad” or “narrow” interpretation of the “fair and equitable” standard.

6.6.2. Respondent suggests that the fair and equitable standard has always been intended to provide a minimum international law yardstick to measure a state's treatment of foreign investors. Despite attempts to suggest, principally by academics, that "fair and equitable treatment" should now be viewed more broadly than under the international law minimum standard, the adoption of a broader standard has not been accepted in practice.

6.6.3. Respondent relies on what is said to have become a classic formulation of the international minimum standard, expressed by the US-Mexico Claims Commission in the *Neer Claim* as follows:

*“The propriety of governmental acts should be put to the test of international standards ... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.”*<sup>292</sup>

6.6.4. Based on cases such as *Mondev*, *Loewen Group*, *Alex Genin* and *CME*, Respondent argues that a review of more recent decisions by tribunals both under NAFTA and under BITs shows that a broader interpretation of the minimum standard has not been accepted.<sup>293</sup>

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<sup>292</sup> *Neer Claim*, Mexico-U.S. General Claims Commission, Reports of International Arbitral Awards, Vol. IV, p. 60 (1926).

<sup>293</sup> Counter-Memorial at ¶¶552-562, citing *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, 42 I.L.M. 85 (2003), 6 ICSID Reports 192; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/5), Award of 26 June 2003, at

6.6.5. Respondent submits that Claimants’ attempts to re-characterise the obligation by reference to particular “components” of the standard is novel, unsupported by authority, and misconceived. Rather, as a matter of principle and of practice, international bodies and tribunals have recognised and applied a context-specific standard of conduct for fair and equitable treatment, that, consistent with the minimum international law standard, requires conduct that amounts “to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”

6.6.6. According to Respondent, Claimants cannot succeed on their claim of unfair and inequitable treatment because the Tucumán authorities acted only in response to serious and persistent contractual breaches by Claimants, and to genuine anger and outrage on the part of Claimants’ customers, who were persistently supplied with poor water, poor service and huge bills, and thus had every reason to be dissatisfied with the services supplied by Claimants. The challenged actions of the Tucumán authorities were simply necessary responses to the inadequate implementation of Claimants’ contractual obligations in light of the need to secure accessible supplies of water to the population of Tucumán.

6.6.7. Even if Claimants’ four “component principles” were relevant factors, Claimants cannot prove that their investment received unfair and inequitable treatment. There was nothing arbitrary about the Tucumán authorities' insistence that

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¶128; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia* (ICSID Case No. ARB/99/2 Award of 25 June 2001 (rectification denied)); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 13 September 2001 (UNCITRAL).

Claimants comply with their contractual obligations to provide potable water to its customers. There is no evidence of any “discriminatory” conduct, *ie*, of similarly situated concessionaires being treated better than Claimants. In Respondent’s view, the Tucumán authorities certainly acted transparently, at all times making the need for water quality testing, infrastructure improvements, adequate provisioning of potable water, etc. known to the CAA and to the public. The many warnings given to Claimants certainly comported with due process. To give one example, the Regulator's resolution in respect of the unlawful additional charges for tax levied by Claimants on their customers was based upon an investigation and report by the Attorney General and did not simply emerge from the Regulator without warning.

#### **No Failure to Provide Protection and Full Security in Violation of Article 5(1) of the BIT**

6.6.8. Respondent also contends that the content and scope of the obligation reflected in Article 5(1) are significantly narrower than that Claimants seek and reject Claimants’ view that “the protection and security required extends beyond physical security, to encompass security against harassment that impairs the normal functioning of the investor's business.” In any event, the facts of this case do not support a finding of any violation of Article 5(1), on either a “broad” or “narrow” interpretation of that provision.

6.6.9. According to Respondent, Claimants seek to portray the situation as one in which they were driven to terminate the contract after a concerted campaign against them by the Tucumán authorities. In fact, Respondent argues, the Tucumán

authorities acted in response to Claimants' serious and persistent contract breaches and to the actions of Claimants' customers, who revolted against Claimants for their supply of poor water, poor service and unjustifiable tariff increases.

**6.7. Termination of the Concession was Lawful and the Provision of Services Following Termination does not Amount to Expropriation**

6.7.1. Respondent contends that CAA's purported termination of the Concession Agreement was ineffective both under the terms of the agreement itself and the law. Respondent further contends, however, that CAA's abandonment of its obligations to provide water service created a grave crisis within the Province, by posing a serious risk to public health, and the Province had to act.

6.7.2. Accordingly, on 10 September 1997, the Province issued Executive Order No. 2270/1, which terminated the concession based on CAA's repeated violations of the Concession Agreement and its unlawful attempt to rescind the Concession Agreement.

6.7.3. Claimants say that, pursuant to Article 15.11 of the Concession Agreement, CAA agreed that it could be required to operate the concession for up to 18 months after termination of the concession for any reason, in the event the Province did not have a replacement. On this basis, Respondent says that the requirement in Order No. 2270/1, which required CAA to continue to provide water and sewage service for 18 months, or until the Province could find a replacement, was lawful.

- 6.7.4. Respondent says that the Province acted in accordance with its legitimate governmental responsibility to preserve the provision of water to the population of the Province. Also, by requiring CAA to continue to provide service until a replacement company could be found, Tucumán avoided a public health disaster.
- 6.7.5. Tucumán is said to have sought to minimise any burden on CAA, by diligently searching, and organising a bidding process for the appointment of a temporary provider.
- 6.7.6. Respondent also contends that the federal government went beyond what was statutorily required when it assumed temporary management of the system, on 7 October 1998, pending identification of a suitable replacement operator, and relieved Claimants of any further operating responsibilities.
- 6.7.7. In these circumstances, Respondent argues that Claimants offer no plausible explanation as to how a decision to enforce a contractual post-termination period of service, coupled with federal assistance designed to release Claimants earlier than contractually required, amounts to expropriation.

**6.8. Most of the Acts Alleged by Claimants do not Involve Actionable State Conduct Under the BIT**

- 6.8.1. Respondent notes that the dispute between the parties as to Argentina's responsibility for the actions complained of by Claimants centres largely on the alleged actions of provincial legislators and the Ombudsman. It says that neither of these classes of individuals raises any issue of state responsibility.

6.8.2. Argentina does not dispute that the ILC Articles represent, in part, an authoritative summary of international law on the issue of attribution of responsibility to a state. However, the general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *ie*, as agent of the state.

6.8.3. Thus, Respondent points out that, for each person or body for whose actions it is said to be responsible, two questions must be answered:

- (i) is it an organ of government?
- (ii) alternatively, does it act under the direction, instigation or control of an organ of government, *ie*, as an agent of the state?

6.8.4. As regards the acts of individual, mostly opposition, legislators, Respondent points out that the missing link is the notion of “governmental authority”. Respondent says that individual legislators are not in a position themselves to exercise any authority. They can only channel their electors’ views in hope that those who do exercise authority will take them into account. As the tribunal in the *Salvador Commercial Company* case stated, “... a state is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the government, so far as the acts are done in their official capacity”.<sup>294</sup> However, in Respondent’s submission, an individual legislator, particularly one from an opposition party, is not “ruling” in any sense of the word when he or she expresses the views of constituents. The Respondent points to

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<sup>294</sup> UNRIAA, Vol. XV, p. 455 (1902) at ¶477.

*Tradex v. Albania*, where the tribunal emphasised the speech of a politician “was neither a legislative or an executive act” and accordingly could not contribute to any finding of expropriation.<sup>295</sup>

- 6.8.5. Respondent further says that Claimants improperly ignore the context in which legislators’ speeches were made or actions taken. According to Respondent, the vast majority of the legislators to whom Claimants have referred were members of opposition parties and none of the acts described by Claimants were undertaken on behalf of the Executive. Even those who were members of the ruling party were not members of the Executive itself.
- 6.8.6. Respondent also argues that these legislators, regardless of their political affiliation, would not be doing their duty to the people who elected them if they ignored their complaints over matters of public service and health. There was no co-ordinated assault on CAA. The speeches given about CAA were in fact no more than the natural outcome of its conduct relating to the concession and its treatment of its customers and the examples cited by Claimants of the comments and actions of legislators constitute nothing more than evidence of CAA’s own failures in the Province and the unrest and upheaval it caused by its abysmal service and mismanagement of the concession.
- 6.8.7. Respondent also says that Claimants cannot attribute statements or actions of the Ombudsman or his office to Argentina because the Ombudsman is neither a state organ nor an agent of the state.

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<sup>295</sup> *Tradex Hellas SA v. Republic of Albania* (ICSID Case No. ARB/94/2), Final Award of 29 April 1999 at ¶¶156-7.

- 6.8.8. In this connection, Respondent relies on the domestic characterisation of the functions of the Ombudsman (considered to be of prime importance in the ILC Articles) as a body opposed to government: it has the role of asserting the rights of the individual. And, although the Ombudsman is organised by and reports to the Legislature, he and his office are fully independent and the Legislature and the Executive cannot exert control over his/its substantive actions.
- 6.8.9. Respondent contends that the Ombudsman's advocacy and scrutiny functions are of a type commonly exercised by non-governmental organisations and, the fact that it is funded by and reports to the Legislature cannot convert its intrinsically non-governmental functions into functions of the state.
- 6.8.10. Respondent submits that Claimants have the burden of proving that CAA customers did not pay their bills due to the incitement of Tucumán officials acting in their official capacity. Claimants cannot meet that burden. The evidence demonstrates, however, that the public unrest in Tucumán, including the failure to pay invoices from CAA, resulted from the failure of CAA to meet even minimally acceptable levels of service while immediately doubling tariffs, only to be further compounded by a long string of commercial blunders. In any event, the statements on which Claimants rely were not made by state officials in their official capacity but rather by individual representatives in response to the outrage of their constituents.

## **6.9. Claimants' Request for Damages is Groundless as well as Unsubstantiated and Unjustified**

6.9.1. Respondent advances five key arguments for the rejection of Claimants' claim for damages:

- (i) the bulk of Claimants' claim is for lost future profits, but such a claim is not available in the present case because the compensation quantum cannot be established with certainty, and in any event, the doctrine of abuse of rights and the protection of the public interest must also be considered in any determination of lost profits;
- (ii) Claimants may not rely on the provisions of the Concession Agreement to calculate their damages. For claims alleging breach of a BIT, damages must be calculated in accordance with the prevailing standards of international law;
- (iii) even if it were possible to rely on the provisions of the Concession Agreement to assess damages, the assumptions of profitability, and of a 30-year duration are erroneous and misleading. A 30-year term was not guaranteed, nor was there a guarantee of a certain level of profitability throughout the 30-year period;
- (iv) Claimants failed to take into account the economic crisis Argentina endured after the execution of the Concession Agreement. The crisis would have had a huge impact on the profitability of Claimants' enterprise in Argentina over the period of the concession; and
- (v) Claimants wrongly calculate damages using a discounted cash flow ("DCF") methodology, but DCF valuation is only proper for a genuine going concern with a proven track record of profitability. Absent these conditions, compensation should be calculated on the basis of the so-called liquidation value method or, if that is not workable, based on "replacement value" or "book value".

### **Claimants Not Entitled to Compensation for Lost Profits**

6.9.2. Respondent says that under general public international law, loss of profits is only exceptionally recoverable and, relying on Article 36 of the ILC Draft on State Responsibility, contends that this is limited to circumstances in which such loss of profits can be "established".

6.9.3. The availability of lost profits in this type of proceedings is thus limited to cases in which,

- (i) the loss is certain (which is not the case here), *ie* there must be no uncertainty or speculation about both the fact that a loss has been suffered and that the quantification is already established. “Established” meaning in this context that the amount of damages is certain, unchallengeable and does not the result from speculative calculations; and
- (ii) the loss has already been suffered and has already been established at the time of adjudication of the dispute. In other words, there are no remedies available under international law for the loss of profits that the Claimants expected to earn in the period of time after the judgment is rendered, let alone over a 30-year period.

6.9.4. Based on case law established, *inter alia*, in *Levitt*, and ICSID cases, *Metalclad*, *S.P.P.*, *AAPL* and *Wena*, Respondent also argues that where, as here, the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be compensated, or used to determine a going concern or fair market value.<sup>296</sup>

6.9.5. Respondent further contends that under the public international law doctrine of abuse of rights, a tribunal may not uphold claims for lost profits where the investment from which they should yield has not yet been made, or has been made only in part, and/or where the award would have a disproportionate impact on a state due to its economic condition. Parties are expected to act in good faith in exercising their rights and where they do not do so, that conduct may be classed as an abuse of rights which limits their ability to recover losses.

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<sup>296</sup> Counter-Memorial at ¶¶602-611, citing *Levitt v. Iran*, 14 Iran-US. CI. Trib. Rep. 191, 209-10 (1987); *Metalclad Corp v. United Mexican States* (ICSID Case No. ARB (AF)/97/1), Award of 30 August 2000; *S.P.P. v. Egypt* (ICSID Case No. ARB/84/3), 20 May 1992 32 I.L.M. 933 (1993); *Asian Agricultural Products Ltd v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Final Award of 27 June 1990 (4 ICSID Reports 246 (1990)); *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Final Award of 8 December 2000.

6.9.6. Although it is not disputed that some funds were invested by CAA in the concession, Respondent argues that the limited nature of the investment points to an abuse of rights where Claimants' claim for loss of profit is based upon the level of investment they claim would have been made over the life of the Concession Agreement.

6.9.7. Respondent points out that claims for lost profits have also failed where the amount of damages for *lucrum cessans* could be disproportionate to the nature, the extent and the circumstances of the breach. Respondent argues claims for lost profits are normally doomed to fail where the injured party's lost profits do not correspond to the benefits that the breaching party gained by failing to perform. In such cases, justice may be served by requiring the breaching party to pay the claimant reliance expenses but not his expected profits.

#### **No Proper Basis for Claiming Damages on the Assumptions set out in the Concession Agreement**

6.9.8. Respondent contends that the terms of the Concession Agreement cannot supply the relevant measure of damages because Claimants are not entitled to pursue such a claim for breach of contract in these proceedings, thus the relevant measure of damages is provided by reference to international law.

6.9.9. Respondent describes Claimants' argument, that the assumptions in the Concession Agreement reveal the "value of the investment", as misconceived, for a number of reasons:

- (i) whilst the "agreed upon economic terms and financial assumptions" of the Concession Agreement may provide some background as to a hypothetical

best-case, they are a wholly unrealistic measure by which to ascertain the actual losses which Claimants may have incurred in light of CAA's failure to perform its obligations under the Concession Agreement and the prior recovery experience of DiPOS.

- (ii) there are many factors which would adversely affect the value of the investment (both before and after the date on which the acts alleged to have amounted to expropriation occurred) which are not reflected in the optimum economic terms and financial assumptions underlying the Concession Agreement and upon which Claimants' lost profits case is based.
- (iii) Claimants were fully aware, at the time they undertook the concession, that DiPOS had been unable to achieve a recovery rate in excess of 55%. Claimants were well aware of the difficulties inherent in attempting to privatise the provision of water services in Latin American countries and had, indeed, considered the advisability of introducing tariff increases on a staged basis. This they failed to do in the instant case. Claimants also knew of the risks inherent in operating the concession and these were expressly accepted by Claimants in the terms of the Concession Agreement. These risks necessarily have to be reflected in any award of damages.
- (iv) insofar as Claimants' claim concerns lost profits, events which would have occurred had CAA continued to operate the concession in Tucumán, would plainly have had a significant impact on CAA's profits, and those events must be taken into account in calculating any award of damages on this basis.
- (v) in the absence of information demonstrating a consistent history of such investments producing income, it is inappropriate to apply a projection of future performance based on unproven assumptions to try to establish the appropriate measure of damage. The likelihood of profit being made in respect of such investments must be sufficiently certain in order for an award to be made in respect of such profits. In short, for Claimants to rely, without more, on the assumptions underlying the Concession Agreement, is hopelessly to mislead the Tribunal as to the actual value of the assets in question.

### **No Profit Guarantee in the Concession Agreement**

6.9.10. Respondent submits that CAA was not only aware prior to entry into the Concession Agreement of the rate of recovery under the DiPOS regime but it also knew that the minimum recovery rates required for the bid of 85% was and only

ever could be an assumption rather than a reflection of what might happen in practice. Indeed, the Concession Agreement expressly provided that the concession was to be operated by reference to the usual principles of business risk. This constitutes a de facto recognition by both parties that profit for the concessionaire was in no way guaranteed.

- 6.9.11. In Respondent's submission, it is entirely inappropriate for Claimants to make a claim based on a measure of damages which ignores the risks which they willingly entertained by entering into the Agreement.

**Claimants' Claim Fails to Take into Account Argentina's Economic Crisis**

- 6.9.12. Respondent points out that the report of Ernst & Young calculates the future cash flow of the Concession as from 1997 without regard of events which have taken place since 1997 in Argentina. These events affected the economy of Argentina to a profound degree, and would inevitably have had a major impact on the cash-flow achievable by Claimants in the region in that period and subsequently. In Respondent's view, no attempt has been made by Claimants to explain the basis for their projections, save for their continuing reliance on the terms of the improved economic offer.

- 6.9.13. Respondent says that the projections made by Claimants in the improved economic offer could not in practice have been achieved in the longer term, in the light of the events affecting Argentina's economy in the course of, in particular, 2001 and early 2002. During that period the economy of the whole country was

subject to considerable change and adjustment. By way of example only, the peso was devalued in January 2002 and quickly depreciated to a quarter of its previous value, inflation rose to 41% in 2002, unemployment rose from 12.4% in 1998 to 38.3% in 2001 and 23.6% in 2002, the poverty rate reached 57.5% in 2002, inflation-adjusted wages fell 23.7% in 2002, and supermarket sales fell by 5% in 2001 and 26% in 2002.

6.9.14. Respondent submits that Claimants cannot pursue their claim in damages without reference to these matters, which demonstrate that the DCF analysis advanced by Claimants is fatally flawed, as it fails to take into account events which would have affected the performance of the concession in any event.

#### **CAA's Concession was not a Going Concern and Was Never Profitable**

6.9.15. As noted above, Respondent asserts that, in order to recover lost profits damages Claimants must prove that CAA was "sufficiently certain" to receive the incomes necessary to achieve the profits they now seek. Respondent says that the evidence on that issue squarely refutes Claimants' damage claim.

6.9.16. First, it is not disputed that the concession never realised any profit. Respondent argues that, for example, while the bid assumed a collection rate of 85%, CAA never achieved more than 64%.

6.9.17. As regards Claimants' pretence that CAA's business in Tucumán was a long-standing going concern, Respondent submits this is simply wrong. Sewage and water services before and after CAA's tenure were provided not by a private

concessionaire but by the government on a completely different commercial basis and Claimants failed to account for the far-lower collection rates and financial performance that marked those other periods.

6.9.18. Respondent says that Claimants never established a proven track record that could possibly sustain their lost profits calculations and this fatally precludes recovery of lost profits. As the Tribunal in *Metalclad* explained, where the enterprise has not operated for “a sufficiently long time to establish a performance record or where it has failed to make a profit” future profits cannot be ascertained or recovered. Likewise, in the absence of a demonstrated history of profitability, “future profits cannot be used to determine going concern or fair market value”.<sup>297</sup>

### **No Evidence to Support Claim Argentina’s Conduct Caused the Losses**

6.9.19. Respondent also submits that Claimants have to prove a causal link between the events they complain of and their alleged losses. On the question of causation, Claimants have failed to take account of the factors which adversely affected their business as a result of their own repeated breaches of the Concession Agreement.

6.9.20. As to Claimants’ first class of damages (*ie* losses caused by the allegedly forced reduction of tariffs and the depression of the recovery rate), Respondent points to the fact that the tariffs imposed by CAA immediately upon its assumption of the concession were hugely unpopular with the population. There was also

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<sup>297</sup> *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 40 I.L.M. 36 (2001), 16 ICSID Rev. – Foreign Inv. L.J.

considerable confusion and suspicion as a result of the inclusion in its invoices of amounts for taxes which ought not to have been charged. This doubtless contributed to CAA's poor recovery rates and was entirely attributable to CAA's own management of the concession, its failings in the provision of services, and not to any actions taken by or on behalf of the Argentine Republic. Respondent also says that the reduction in tariff was effected by Law N° 6826 on and from 1 May 1997, following a lengthy renegotiation process which granted Claimants three main strategic objectives: a reduction in the service area, a reduction in the concessionaire's investment requirements and a rate structure based on measurement of actual consumption. Accordingly, there were considerable benefits afforded to CAA by the new law, to which Claimants do not advert and in respect of which no credit has been allowed in their calculation of loss.

6.9.21. With respect to Claimants' claim for the difference in income between that which CAA obtained under the reduced tariff structure and that which it would have obtained under the original Concession Agreement, Respondent says that Claimants' projected 90% recovery rate was not a contractually-guaranteed minimum backed by some form of indemnity from the Argentine Republic. It was for CAA to effect recoveries on its invoices and non-payment by its customers is not a matter which can or should properly be laid at the door of Argentina.

6.9.22. As regards Claimants' claim for the recovery of the value of the investments CAA made during the operation of the concession, Respondent argues that those investments have not been shown to have been lost by the actions of Argentina.

Rather, the evidence demonstrates that CAA invested whilst voluntarily participating in the renegotiation of the Concession Agreement and before it abandoned the concession and its investments.

6.9.23. As to the sums claimed relating to CAA's exposure to third parties, as a result of the termination of the Concession Agreement, these costs arise as a result of CAA having opted, improperly, to terminate the Concession Agreement. Respondent also argues that, pursuant to Article 15.11 of the Concession Agreement, the Province was entitled, in the event of termination, to require Claimants to continue to provide service for a further period of 18 months. Furthermore, CAA was entitled to charge, throughout the period of continued service, as it would have done in the ordinary course. Thus there is no basis on which Claimants can seek damages, in circumstances where the only "losses" which CAA may have incurred would have arisen as a result of its failure to secure payment from the customers for its continuing service pending the appointment of a replacement supplier.

6.9.24. As to Claimants' case for lost profits, and quite apart from the significant obstacles to their recovery as a matter of international legal principle, Respondent contends that it is impossible, as a matter of causation, for Claimants to demonstrate, first, that the concession would have been profitable but for the activities the Argentine Republic and, second, had it been profitable, that the profits would have been of the order asserted in the claim.

6.9.25. On this point, it is not in disputed that Claimants' recovery rate, at best, was of the order of 64%, which is in no way comparable to the 89%+ recovery rate which Claimants claim was intended to be realised pursuant to the Concession Agreement. Respondent also emphasises, as previously noted, that Claimants have failed to take into account the economic conditions applicable throughout Argentina, particularly during the crisis in late 2001 and early 2002, which would have affected the profitability of the concession irrespective of any involvement by the Argentine Republic.

6.9.26. Respondent also says that the DCF model upon which Claimants rely is unsupported by evidence other than the report of Ernst & Young. Respondent argues that the assumptions on which that report is premised are not properly explained or supported on any independently verifiable basis and cannot properly stand as the measure of damage in these circumstances. Respondent further submits that Claimants' selected discount rate is wholly inappropriate, bearing in mind the events in Argentina since the termination of the Concession Agreement. In particular, Claimants' reliance on the DCF model set out in a dictum in *Phillips Petroleum* is said to be flawed, because this dictum can be distinguished, on its face, from the situation in the present case. According to Respondent, there is no evidence to suggest that CAA's participation in the concession at any stage produced, or was likely to produce, revenues of the order prescribed in the discounted cash flow model which has been prepared. In order to make a "careful and realistic appraisal of the revenue-producing potential" of the concession, the Tribunal would have to take into account CAA's performance pre-dating the

matters complained of in these proceedings. In Respondent's submission, this would have to be discounted further to take account of Claimants' own breaches of contract and errors and omissions in performance.

### **“Double Counting” by Claimants**

6.9.27. Respondent contends that Claimants seek to recover damages based in part on the calculation of the financial position in which they would have been had the concession been performed over its full term (via their claims for alleged losses actually suffered in the period of the Concession Agreement and the DCF analysis of future profits), and in part on restitution of the level of investment made by them in the concession prior to its termination (via their claim for restoration of the value of their investment in the Concession).

6.9.28. Respondent says this is obvious double-counting. Either Claimants seek restitution, or they seek a contractual measure of damages to put them in the position they would have been in had the contract been performed. In Respondent's submission, Claimants cannot recover on both bases since, had the concession been performed, Claimants' level of investment in it should have been taken into account in the calculation of its likely profits, and should have been deducted from those profits to produce a true picture of Claimants' position had the 30-year term been fulfilled.

### **Alternative Method of Calculating Damages**

6.9.29. Finally, and in the alternative, Respondent submits that if Claimants succeed in establishing any liability in these proceedings, the Tribunal should, after taking into account the points made above as to the likelihood that Claimants' investment would ever in reality have yielded a profit, take as its starting point for any award of damages, the book value of CAA's assets, or the value of Claimants' actual investment.

### **Damages must be Calculated in Pesos**

6.9.30. In the event the Tribunal decides an award of damages should be made, Respondent argues that would be inappropriate for such damages to be calculated or awarded in US dollars. According to Respondent, there is no basis on which Claimants can assert a right to be reimbursed in US dollars under the Concession Agreement (on which they rely for all other purposes where the terms of the Concession Agreement are favourable to Claimants' position) which was expressed to be in Argentine pesos. Respondent further argues that any profits in respect of the performance of the Concession Agreement would have been paid to Claimants in Argentine pesos.

### **Failure to Mitigate**

6.9.31. Respondent also argues that Claimants failed to mitigate the losses which they claim flowed from the Argentine Republic's alleged Treaty breaches. Respondent says that the most obvious way Claimants might have mitigated their losses would

have been for CAA to remain as concessionaire and to charge consumers on the basis of the provisions of Law No. 6826. Although the rates recoverable under Law No. 6826 were below those allowed under the Concession Agreement, they would have served to offset Claimants' claims for loss of future earnings pending a determination by the appropriate tribunal of Claimants' entitlements. Having chosen not to proceed in that way, Claimants' failure to mitigate ought to be taken into account by the Tribunal in any calculation of an appropriate award of damages.

6.9.32. Respondent emphasises CAA also waited until 2001 to bring proceedings against customers who failed to pay its 1995, 1996 and 1997 invoices. Such delay obviously increased the risk that recovery would not be realised from those users. CAA's delay in taking such steps should also be taken into account in calculating any award of damages which the Tribunal may make.

#### **Deduction for Amounts Attributable to Tax**

6.9.33. As regards Claimants' claims based on taxes to be paid to the Argentine Republic, if the Tribunal finds that such amounts are recoverable by Claimants pursuant to the Treaty, Respondent submits that these sums must be offset against any other damages payable to Claimants.

## **Deduction for Status of Ownership as at Date of Loss**

6.9.34. Finally, Respondent points out that the claim as formulated by Claimants in their pleadings is premised entirely upon CAA's alleged losses. No attempt has been made to identify the losses of CGE as shareholder.

6.9.35. Moreover, as to CGE's claim as an investor, Respondent argues that CGE cannot recover any losses other than those which it has suffered as a shareholder of CAA and that any such claim should be restricted to its original 36% shareholding in CAA.

### **6.10. Provincial and Municipal Taxes in CAA's Invoices**

6.10.1. Respondent notes that Claimants argue that Tucumán "used its regulatory authority to compel CAA to stop invoicing customers for certain taxes." This complaint arises out of the Regulator's Resolution N° 170, passed on 9 February 1996, which required CAA not to invoice customers for amounts relating to certain provincial and municipal taxes.

### **6.11. Tariff Increases in Years Two and Three of the Concession Agreement**

6.11.1. Respondent notes that Claimants also base their expropriation claim on their own agreement with the Tucumán authorities during the renegotiation process to suspend provisions of the Concession Agreement that purportedly entitled CAA to increase tariffs by 10% in years two and three of Concession. It is Respondent's position that this contention is frankly unfathomable.

6.11.2. Respondent submits that the agreement was entered into voluntarily by CAA with full knowledge that the ongoing renegotiation was considering an entirely

different tariff structure, including a proposal based rates on actual customer consumption.

6.11.3. Respondent contends that on the other hand, the Concession Agreement did not provide Claimants with any right to increase tariffs by 10% in years two and three. The Concession Agreement expressly provided that the tariffs set out in Article 12.1 were maximum and that Claimants would not be permitted to increase tariffs during the first ten years. Provisions addressing tariff review concerned tariff reductions where Claimants were not making the required level of investment. Thus, Claimants had no right to the 10% tariff increase, reference of which is made in their written submissions, which could have been expropriated.

6.11.4. In this respect, Respondent argues that the Tucumán authorities' regulation of Claimants' user charges and other aspects of its business did not constitute expropriation since this regulation was a legitimate – indeed, mandatory – exercise of the Province's valid power to regulate in the public interest. The state has the responsibility to legislate and regulate to protect public health, including the provision of adequate and accessible potable water. A measure which is regarded as essential to the efficient functioning of the state cannot be expropriatory in character. And it should not be the function of international law to insulate the foreign investor from the regulatory regime of the host state's laws.

6.11.5. Thus, it is Respondent's position that regulatory measures that are for a public purpose, are non-discriminatory and are enacted in accordance with due process do not amount, under international law, to expropriation.

6.11.6. With respect to Claimants' argument that the Tucumán authorities bear responsibility for events not attributable to any regulatory or administrative or public act on the part of those authorities but which Claimants contend resulted in their loss of "reasonably expected economic benefits", Respondent contends that it is without foundation in law or fact.

**6.12. Tucumán Authorities Cannot be Liable for any Losses not Resulting from Administrative or Regulatory Acts**

6.12.1. Respondent observes that Claimants contend that their "reasonably expected economic benefits" were expropriated.

6.12.2. Respondent also argues that Claimants have completely failed to demonstrate that the consequences which they allege flow from the conduct of the Argentine Republic in this regard are causative of the losses which they claim. According to Respondent, it is apparent from the foregoing that Claimants' losses arising from the initial period during which they held the Concession were as a result of their failure to fulfill their obligations pursuant to the Concession in respect of the provision of satisfactory services to the people of Tucumán, and not as a result of any step taken by the Argentine Republic.

**6.13. Litigation Costs and Expenses**

6.13.1. Respondent sought reimbursement of its litigation costs and expenses. Respondent filed its submission on costs on 29 September 2006. Respondent

sought US\$1,151,119.35, including US\$355,000 on account of its payments to IC SID, but included no claim for the jurisdictional phase of the proceedings.

## **7. THE TRIBUNAL'S ANALYSIS OF AND CONCLUSIONS ON THE ISSUES**

### **7.1. Introduction**

7.1.1. Many of the relevant factual issues and legal arguments pertaining to the parties' claims and defences are the same or overlap. Nonetheless, it is convenient to consider the principal claims and defences separately in light of the factual findings already made by the Tribunal in this Award. It is appropriate to start with the Argentine Republic's contention that, in the proper exercise of its jurisdiction, the Tribunal must dismiss CAA's claim by reason of it having acquired its treaty rights in violation of the terms of the Concession Agreement. We then turn to the overarching issue put in play by Respondent – the Tribunal's jurisdictional scope, in assessing a possible Treaty breach, to consider whether disputing parties breached the Concession Agreement - before dealing with the substantive case advanced by Claimants under Articles 3 and 5 of the Treaty. Questions of causation and damages are dealt with thereafter.

### **7.2. Whether CAA is a Proper Claimant?**

7.2.1. Relying on the Decision on Annulment, Respondent points out that CGE only became a controlling shareholder of CAA in June 1996, when CGE increased its stake in CAA to 85%. In these circumstances, the Argentine Republic asserts that CGE acquired its controlling stake contrary to the expressed terms of the Concession Agreement which, at Article 2.3.2 provides that:

*“... at least FIFTY-ONE PERCENT (51%) of the voting corporate capital, excluding the TEN PERCENT (10%) set forth in Section 2.3.3 hereof, shall be composed of registered stock and ownership thereto shall not be transferred during the term of this concession without prior express consent given by the Executive Branch” (emphasis added).*

7.2.2. Because the Executive did not consent to the transfer of the ownership of CAA’s shares which led to CGE’s 85% stake, CAA acquired the right to pursue its BIT claim only through an express violation of the terms of the Concession Agreement. In these circumstances, Respondent says that CAA’s claim should be dismissed, having been brought in bad faith. Respondent concludes that, for fundamental policy reasons, CAA ought not to be permitted to pursue a claim for treaty rights which it acquired illegitimately.

7.2.3. The Argentine Republic seeks to distinguish this, its first argument, from its earlier, unsuccessful assertion that the Tribunal lacked jurisdiction. Thus, for the avoidance of doubt, it accepts that the Tribunal has jurisdiction to determine CAA’s claim, but contends that, in the proper exercise of that jurisdiction, CAA’s claim must be dismissed because it has been brought in bad faith.

7.2.4. To the Tribunal’s mind, Respondent’s current argument seeks to re-litigate issues of jurisdiction, on this occasion in the guise of an objection to admissibility, that have been heard and rejected in the course of the determination of its jurisdictional objections.

7.2.5. To the extent that this is so, our Decision on Jurisdiction disposes of the question. There we found that the First Tribunal’s summary of the history of CAA’s equity

ownership disclosed that a majority of CAA's equity was under French ownership well before the parties consented to submit this dispute to arbitration, originally, on 26 December 1996 and that the *ad hoc* Committee endorsed the First Tribunal's finding that CAA was a French company under the ICSID Convention and the BIT.<sup>298</sup> In these circumstances, we concluded that,

*“because the first Tribunal found that CAA was a French company under the ICSID Convention and the BIT and the ad hoc Committee did not annul this finding, the finding remains in force and is res judicata.”*<sup>299</sup>

7.2.6. In any event, Respondent's proposition that CGE required its majority shareholding in violation of the Concession Agreement, because the Province did not consent to this share transfer, is wrong. The Concession Agreement required the Province's prior consent only to share transfers involving 51% of CAA's shares. As was explained in Claimants' Counter-Memorial on Jurisdiction, the share increases acquired by CAA were either approved by the Province, were outside the 51% over which the Province had authority, or were acquired after the termination of the Concession Agreement and its authorisation requirement.

7.2.7. CAA was established as an Argentine company on 17 May 1995 with 30 million equity shares divided amongst four shareholders. CGE initially held 36% of the shares. CGE consortium partners DYCASA, a Spanish company, Roggio, an

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<sup>298</sup> Decision on Jurisdiction at ¶ 96.

<sup>299</sup> Decision on Jurisdiction at ¶ 97.

Argentine company, each initially held 27% of the shares. The remaining 10% was set aside for former DiPOS employees who worked for CAA.<sup>300</sup>

7.2.8. The transfer of CAA's shares was limited in several ways while the Concession Agreement was in effect. Most importantly, 51% of the voting shares could only be divested with prior approval of the Tucumán Executive.<sup>301</sup> Also, the operator (CGE) had to maintain an ownership interest of 25% of the voting shares and could not divest those shares without prior approval of the Tucumán Executive,<sup>302</sup> and DYCASA and Roggio each had to maintain a 13% interest.<sup>303</sup>

7.2.9. In January 1996, Roggio transferred all of its shares to its partners. Because Roggio thus transferred some shares (13%) that were subject to the restrictions on transferability, Executive approval was sought for the restricted part of the transaction. The Tucumán Executive authorised that transfer under Decree 270/3.<sup>304</sup> Following this transaction CGE and DYCASA each held 45% of CAA's equity (13.5 million shares each).

7.2.10. On 26 March 1996, DYCASA entered into an agreement with CGE to sell to CGE 12 million shares, representing 40% of all CAA's shares.<sup>305</sup> While the

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<sup>300</sup> First Award at N.6.

<sup>301</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions), with Annexes, 10 May 1994 (Exhibit 115) at Articles 5.2.3, 5.2.4.

<sup>302</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán: Pliego de Bases y Condiciones Generales para la Licitación (Bid Conditions), with Annexes, 10 May 1994 (Exhibit 115) at Article 5.2.3; and Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión (Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127), at Articles 2.3.1, 2.3.2.

<sup>303</sup> See CAA Acta Constitutiva y Estatutos Sociales (Exhibit 356) at Clause 12.

<sup>304</sup> See Decree No. 270/3, 5 December 1995 (Exhibit 357).

<sup>305</sup> See Agreement between DYCASA and CGE, 26 March 1996 (Exhibit 258) at Clause C1.

transfer of title for the shares was to occur later, in two stages, the sale agreement provided that CGE would immediately enjoy the share's voting rights thus making CGE their beneficial owner.

7.2.11. On 19 June 1996, pursuant to this agreement, DYCASA transferred to CGE seven million *unrestricted* shares representing 23.33% of CAA stock. Although no Executive authorisation was required for the transfer of such shares, DYCASA and CGE notified Tucumán's Governor Bussi of the transaction on the same date. The Executive never registered any objection. As a result of this transfer of *unrestricted* shares, CGE held a 68.33% stake in CAA. Thus, as of 19 June 1996 CGE held the majority of CAA stock.

7.2.12. In addition, also on 19 June 1996, the parties sought Executive approval for the transfer to CGE of title to five million *restricted* shares, representing 16.67% of CAA's stock.<sup>306</sup> The Executive never responded to the request; thus authorisation was never granted. Nevertheless, under the terms of the March 1996 agreement, CGE became and remained the beneficial owner of those five million shares.<sup>307</sup>

7.2.13. On 8 October 1998, the parties completed the transfer of the five million shares.<sup>308</sup> Executive authorisation was not required at this point as the restrictions on transfer were removed with the termination of the Concession Agreement in late 1997. CGE thus became the *de jure* owner of 85% of CAA's equity. Also, as

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<sup>306</sup> See letter from DYCASA and CGE to Governor Bussi, Request for Authorization, 19 June 1996 (Exhibit 360).

<sup>307</sup> See First Award at N.6 (stating that, by June 1966, CAA had "acquired beneficial ownership of additional 16.67% of the equity capital of CAA").

<sup>308</sup> See CAA Register of Shares (Exhibit 348).

held in our Decision on Jurisdiction, CGE's successor, Vivendi, now holds the title to these shares.<sup>309</sup>

7.2.14. In these circumstances, the Tribunal finds there to be no basis for Respondent's contention that CAA's claim should be dismissed because it has been brought in bad faith.

### **7.3. Tribunal's Scope to Consider Alleged Breaches of Contract**

7.3.1. In various ways and at various times over the course of these proceedings the Argentine Republic has sought to limit the Tribunal's consideration of the Concession Agreement (*ie* the interpretation of the Concession Agreement and any assessment of whether the provincial authorities have acted in breach of its provisions). In its Counter-Memorial, Respondent notes that:

*“ ... in order to determine if Argentina breached the standards contained in the BIT, the Tribunal must apply Argentine law in general, and the law regulating the Concession Agreement in particular, taking into account that this Tribunal cannot grant any relief arising from alleged violations to the Concession Agreement.”<sup>310</sup>  
(emphasis added)*

7.3.2. Respondent further asserts that:

*“ ... the existence of a forum selection clause prevents the Tribunal from deciding the meaning of the contract, not only because of the express provisions in the contract, but because doing so would otherwise violate the principle of mutuality, ...”<sup>311</sup> (emphasis added)*

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<sup>309</sup> Decision on Jurisdiction at ¶83.

<sup>310</sup> Counter-Memorial at ¶ 421.

<sup>311</sup> Counter-Memorial at ¶ 436.

7.3.3. This thesis was developed further during the course of the oral hearing and in Respondent's post-hearing submissions. There, counsel for the Argentine Republic construed the provisions of Article 16.4 of the Concession Agreement as preventing the Tribunal from interpreting or applying the contract.<sup>312</sup> Further, it was said to be impermissible in law for this Tribunal to determine whether:

*“ ... there have or have not been breaches of the contract because we say such a finding is expressly reserved by the parties to the Courts of Tucumán themselves.”*<sup>313</sup>

*“ ... on our analysis you do not have jurisdiction to decide whether CAA or Argentina did, in fact, breach the contract.”*<sup>314</sup>

7.3.4. Against these assertions, Respondent accepted that the Concession Agreement could not be considered irrelevant to the Tribunal's determination of the case. And while Article 16.4 is said to prevent the Tribunal from interpreting or applying the contract, Respondent accepts that it does not require the Tribunal to ignore factual matters related to the contract. For the Tribunal to explore the case in any meaningful way it was conceded that the contractual background is required to be taken into account. Thus, Argentina's case, that the Tucumán authorities acted as they did in response to what they responsibly and in good faith considered to be CAA's contractual breaches, is a proper matter for assessment in determining whether the acts of the Tucumán authorities were reasonable in light of their views that breaches of the contract had occurred.

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<sup>312</sup> Transcript of the hearing on the merits, Day 11, at pages 2921-2933 (4 August 2006).

<sup>313</sup> Transcript of the hearing on the merits, Day 11, at page 2929, lines 3-11 (4 August 2006).

<sup>314</sup> Transcript of the hearing on the merits, Day 11, at page 2928, lines 6-8 (4 August 2006).

7.3.5. From Claimants’ perspective, in seeking to limit the Tribunal’s consideration of the Concession Agreement in this way, Respondent sought to revive its earlier arguments - rejected by the Original Tribunal in the first proceedings, by the *ad hoc* Committee and by this Tribunal – that characterised Claimants’ case as comprised of claims for contractual breaches thus allowing it to escape scrutiny under the Treaty. They contend that any suggestion that the forum selection clause prevents the Tribunal from deciding the meaning of the contract and whether a violation or series of violations of the contract amounted to an expropriation, or to unfair and inequitable treatment, flies in the face of the prior decision in this case which confirm that the Tribunal may - indeed, even must, or risk annulment – consider and decide such contractual issues as are necessary to adjudicate Claimants’ Treaty claims.

7.3.6. In its award, the First Tribunal reasoned that in order to determine whether the Argentine government was liable under the Treaty, it would have to “... undertake a detailed interpretation and application of the concession contract”.<sup>315</sup> The First Tribunal also concluded that it was impossible to separate potential breaches of contract claims from BIT violations without interpreting and applying the concession contract.<sup>316</sup> But this – that is, interpreting and applying the concession contract – the First Tribunal decided it could not do, because that task was assigned expressly to the local courts. It therefore concluded that it was “... not possible to determine which actions of the Province were taken in exercise of

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<sup>315</sup> First Award at ¶ 79.

<sup>316</sup> First Award at ¶ 81.

its sovereign authority and which in the exercise of its rights as a party to the concession contract.”<sup>317</sup>

- 7.3.7. The *ad hoc* Committee came to the opposite conclusion. It disagreed with the First Tribunal’s finding that it was impossible to decide the Treaty claims because to do so would require the Tribunal to interpret and apply the concession contract. It went on to hold that “the Tribunal had jurisdiction to base its decision upon the Concession Contract”, at least “so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT”.<sup>318</sup>
- 7.3.8. Without, at this stage considering whether or not acts or omissions of the provincial authorities may have constituted a breach of the Concession Agreement, the Tribunal does not accept the limitation proposed by Respondent on its ability to ascertain whether a Treaty breach may have occurred as a result of or having regard, *inter alia*, to breaches (by either of the parties) of the Concession Agreement.
- 7.3.9. This is because, in the forum selection clause of the Concession Agreement, the parties submit themselves to the exclusive jurisdiction of the Administrative Courts of Tucumán *only* “for purposes of *interpretation and application* of this contract”.<sup>319</sup> (emphasis added) The use of the conjunctive in this clause leaves it open to the Tribunal, should it feel it necessary for its analysis of Treaty breach, to interpret the Concession Agreement and come to a view as to whether either of

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<sup>317</sup> First Award at ¶ 79.

<sup>318</sup> Decision on Annulment at ¶110.

<sup>319</sup> Concesión del Servicio de Agua y Desagües Cloacales en la Provincia de Tucumán, Contrato de Concesión

the parties failed to live up to its terms. In doing so, the Tribunal would not be *applying* the contract by deciding a contractual issue, determining the parties' respective rights and obligations or granting relief under the agreement. It would be doing no more than the Respondent concedes is its right – *ie*, taking the contractual background into account in determining whether or not a breach of the Treaty has occurred.

7.3.10. Whether there is a breach of contract or a breach of the Treaty involves two different inquiries. Articles 3 and 5 of the BIT do not relate to breach of a municipal contract. Rather, they set an independent standard. A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty. In doing so, the Tribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties behaviour under and in relation to the terms of the contract in determining whether there has been a breach of a distinct standard of international law, as reflected in Articles 3 and 5 of the BIT.

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(Concession Agreement), with Annexes XIV, XX-XXIII, 18 May 1995 (Exhibit 127), Article 16.4.

7.3.11. All of this being said, in reaching our conclusions below, we do not consider it necessary to come to a definitive view as to whether either party has or has not breached the Concession Agreement.<sup>320</sup>

#### **7.4. Fair and Equitable Treatment – Article 3**

7.4.1. As noted above, the disputing parties differ as to the content and scope of the fair and equitable treatment obligation expressed in Article 3 of the Treaty. Article 3 provides:

*“Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law to investments made by investors of the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed de jure or de facto.”*

7.4.2. It was undisputed that the BIT is a treaty. It is thus to be interpreted in accordance with the international law rules of interpretation reflected in Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”) *ie* “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.

7.4.3. As was noted by the tribunal in *Methanex*,<sup>321</sup> Article 31(1) of the Vienna Convention is comprised of three separate principles. The first, good faith, requires no further explanation. As to the second, interpretation in accordance with the ordinary meaning of a term, scholars have noted that this is not merely a

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<sup>320</sup> Claimants accept that, in the early days of its operations and prior to the joint ERSACT/CAA Sub Committee on Water Quality recommended variations to the water quality control programme set out in the contract, CAA did not perform every test required under the Concession Agreement.

semantic exercise in uncovering the literal meaning of a term.<sup>322</sup> As to the third, the term is not to be examined in isolation or *in abstracto*, but in the context of the treaty and in the light of its object and purpose. One result of this third general principle is that, as noted by the International Tribunal for the Law of the Sea in *The MOX Plant Case* (as also applied in the *OSPAR Case*): “the application of international rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in their respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*”.<sup>323</sup>

7.4.4. As to the object and purpose of the BIT, the Tribunal notes the parties’ wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and *vice versa*, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives. The provisions of Article 2 also provides context for the interpretation of Articles 3 and 5. Article 2 provides:

*“each of the Contracting Parties shall admit and promote within the framework of its laws and the provisions of this agreement, all investments made by investors of the other Party in its territory and its maritime area”.* (emphasis

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<sup>321</sup> *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (UNCITRAL).

<sup>322</sup> See eg Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed., 1984, p. 121. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 114.

<sup>323</sup> *The MOX Plant Case (Ireland v. United Kingdom)*, Order on Provisional Measures, 3 December 2001, 51, 41 ILM 405 at 413 quoted in *Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, 41, 42 ILM 1118 at 1144.

added)

- 7.4.5. Dealing first with Respondent’s argument that the fair and equitable treatment is limited to and to be weighed against the so-called minimum standard of treatment under international law, the Tribunal concludes that there is no basis for such a limitation and that such an interpretation runs counter to the ordinary meaning of the text of Article 3.
- 7.4.6. Article 3 refers to fair and equitable treatment *in conformity* with the principles of international law, and not to the minimum standard of treatment. The French and Spanish text of the Treaty support this proposition. The French text reads “un traitement juste et équitable, conformément aux principes du Droit International”. The Spanish text refers to “un tratamiento justo y equitativo, conforme a los principios de derecho internacional”.
- 7.4.7. The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment *conform* to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard.<sup>324</sup> Third, the language of the provision suggests that one should also

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<sup>324</sup> *American Manufacturing & Trading, Inc. (AMT) v. Democratic Republic of Congo* (ICSID Case No. ARB/93/1), Award of 21 February 1997, reprinted in 36 ILM 1531 (1997); and *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, at ¶367. The floor-not-a-ceiling principle was also recently accepted by the *Azurix* Tribunal: *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, at ¶361.

look to contemporary principles of international law, not only to principles from almost a century ago.<sup>325</sup>

7.4.8. As Dr. F.A. Mann, one of the twentieth century's leading authorities on the interaction between municipal law and public international law wrote in 1981:

*“the terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and implied independently and autonomously”*.<sup>326</sup>

7.4.9. Dr. Mann's conclusions have been echoed by others.<sup>327</sup> Like Dr. Mann, an UNCTAD Report on Fair and Equitable Treatment concluded that “where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and

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<sup>325</sup> Any suggestion that the minimum standard remains effectively unchanged since the 1926 *Neer Claim* (Mexico-U.S. General Claims Commission, Reports of International Arbitral Awards, Vol. IV, p. 60 (1926)) is not supportable. Indeed, NAFTA cases that preceded the Free Trade Commission's interpretation of the Chapter Eleven F&ET provision, (eg *S.D. Myers, Inc. v. Government of Canada*, NAFTA Arbitration under the UNCITRAL Arbitration Rules, Award of 13 November 2000, and *Pope & Talbot Inc. v. The Government of Canada*, Arbitration under Chapter 11 of the North American Free Trade Agreement (UNCITRAL (NAFTA)), affirm that the minimum standard has evolved significantly beyond *Neer*. Also, the *ADF Group* Tribunal held that the minimum standard is not a static photograph dated 1927 (*ADF Group, Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), (2003), 6 ICSID Reports 470 at ¶179), and the Tribunal in *Mondev* held that the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920's. It added that, to the modern eye, what is unfair or inequitable need not equate with outrageous or egregious: *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, 42 I.L.M. 85 (2003), 6 ICSID Reports 192, at ¶116.

<sup>326</sup> F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. YB Int'l L. 241, 244 (1981).

<sup>327</sup> See *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, ¶284; *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, at ¶361; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2),

inequitable”.<sup>328</sup> Stephen Vascianne reached the same conclusion in his extensive study of the concept of fair and equitable treatment.<sup>329</sup>

- 7.4.10. To the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state’s courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other.
- 7.4.11. But if this Tribunal were to restrict the claims of unfair and equitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard. Although the standard is commonly understood to include a prohibition on denial of justice, it would be significantly diminished if it were limited to claims for denial of justice.
- 7.4.12. As regards Respondent’s argument that Claimants’ so-called component principles (described at 5.2.3 above, and following) are misconceived, being unsupported by authority, the difference between the parties may be more one of labelling rather than of substance. Significantly the parties find common ground in acceptance of the proposition that, in assessing whether the standard has been transgressed, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and

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Award of 29 May 2003 (Spain/Mexico BIT). See also UNCTAD, *Fair and Equitable Treatment* 40 (UNCTAD Series on Issues in Int’l Investment Agreements) (1999).

<sup>328</sup> UNCTAD, *Fair and Equitable Treatment* 40 (UNCTAD Series on Issues in Int’l Investment Agreements) (1999).

<sup>329</sup> Stephen Vascianne, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. Int’l L 99, 144 (1999). (“Following Mann, where the fair and equitable treatment standard is invoked, the central question remains simply whether the actions in question are in all of the circumstances fair and equitable or unfair and inequitable.”)

equitable, or unfair and inequitable. That this is an objective standard was recognised recently by the *CMS* tribunal which noted that it was “unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.”<sup>330</sup> However, before turning to the assessment of Respondents’ conduct against this standard, we deal with Respondent’s arguments concerning the interpretation of Article 5(1)’s provision concerning protection and full security.

### **Protection and Full Security – Article 5(1)**

7.4.13. In their Memorial, Claimants assert that the Tucumán authorities’ actions deprived Vivendi / CAA of fair and equitable treatment in the form of protection and full security, as the last component of fair and equitable treatment arguments.<sup>331</sup> Article 5(1) of the Treaty – guarantees that “... investments ... shall enjoy ... protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement.” In brief, Claimants say that this treaty provision extends beyond physical security, and encompasses what may be described as a general obligation of a host state proactively to provide security against harassment that impairs the normal functioning of an investor’s business.

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<sup>330</sup> *CMS Gas Transportation Company v. Argentine Republic* (ICISD Case No. ARB/01/8), Award of 12 May 2005, ¶ 280.

<sup>331</sup> Memorial, IV ARGUMENTS ON THE MERITS, A. Section 6 at ¶ 320 et seq.

7.4.14. For its part, the Argentine Republic argues that Claimants have no viable authority to support the proposition that the principle of protection and full security imposes a general duty to ensure a stable and predictable business or fiscal environment. Rather the case law on this standard has consistently limited its applicability to “physical interferences”.

7.4.15. As to these competing positions, the Tribunal notes that the text of Article 5(1) does not limit the obligation to providing reasonable protection and security from “physical interferences”, as Respondent argues. If the parties to the BIT had intended to limit the obligation to “physical interferences”, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.

7.4.16. This interpretation is consistent with the decisions of recent international tribunals. The *CME* tribunal interpreted the “full security and protection” clause in the Czech Republic – Netherlands BIT as obligating the host state “to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s

investment withdrawn or devalued”.<sup>332</sup> In *Československá Obchodní Banka A.S. v. The Slovak Republic*, the tribunal found that respondent’s denial of CSOB’s right to receive payment on a loan effectively guaranteed by the Slovak Republic “would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic’s commitment to let CSOB enjoy ‘full protection and security’ ...”<sup>333</sup> And the *Azurix* tribunal found that the inter-relationship of the two standards (fair and equitable treatment and full protection and security) “indicates that full protection and security may be breached even if no physical violence or damage occurs as it (sic) was the case in *Occidental v. Ecuador*.”<sup>334</sup>

7.4.17. By contrast, the cases cited by Respondent do not limit the protection and full security standard to protection from violence or outright seizure of property. In the *Case Concerning Elettronica Sicula S.p.A (“ELSI”)*,<sup>335</sup> although the US claim was based principally on a physical occupation, nowhere in the judgement, contrary to Respondent’s contention, does the Court interpret the full protection and security obligation as limited to such circumstances. The United States also argued that a 16-month delay in obtaining a ruling on its appeal violated Italy’s duty to provide full protection and security. If the protection and full security standard applied only to circumstances of physical occupation, the Court can be expected to have said so explicitly and dismissed the US claim on that basis.

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<sup>332</sup> *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 13 September 2001 (UNCITRAL), at ¶613.

<sup>333</sup> *Československá Obchodní Banka A.S. v. The Slovak Republic* (ICSID Case No. ARB/97/4), Award of 29 December 2004, at ¶170.

<sup>334</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, at ¶406.

<sup>335</sup> *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy) (ELSI)*, Judgment 20 July 1989, 1989 WL 139016 (I.C.J. 1989).

Instead, after examining the factual basis for the US position, it concluded that “... [I]t must be doubted whether *in all the circumstances*, the delay in the Prefect’s ruling in this case can be regarded as falling below [the] standard.” (emphasis added)<sup>336</sup> In *Wena Hotels*, the Tribunal found a breach of the full protection and security obligation where the respondent permitted the physical occupation of the claimants’ property, but, as in *ELSI*, the tribunal did not interpret the obligation as limited to those circumstances.<sup>337</sup> In *Rankin*, the tribunal held that statements of the Iranian revolutionary leaders were “inconsistent with the requirements of the Treaty of Amity and customary international law to accord protection and security” because they could have reasonably been expected to initiate “harassment”, *as well as*, “violence” against foreigners and their property.<sup>338</sup> Similarly, in *Eureko v. Poland*, although the tribunal had concluded that the respondent had not breached its obligation, it indicated that it might have reached a different conclusion if there had been “clear evidence” that the respondent “was the author or instigator of the actions in question”. It added that if the actions of harassment “were to be repeated and sustained, it may well be that the responsibility of the [respondent] would be incurred by failure to prevent them”.<sup>339</sup> Thus protection and full security (sometimes full protection and security) can apply to more than physical security

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<sup>336</sup> *Ibid.*, at ¶111.

<sup>337</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 I.L.M. 896 at 911 (2002) at ¶¶84-95.

<sup>338</sup> *Rankin v. Islamic Republic of Iran*, Award No. 326-10913-2, Award of 3 November 1987, 17 Iran-U.S. C.T.R. 135 at ¶30 (c).

<sup>339</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, at ¶¶236-237.

of an investor or its property, because either could be subject to harassment without being physically harmed or seized.

## Conclusions

7.4.18. In reaching our conclusion, that the provincial authorities of Tucumán (for which the Argentine Republic is responsible) violated the fair and equitable treatment standard of the BIT, we have considered carefully (and reject) Respondent's assertions that (a) CAA frustrated the Concession Agreement by failing fully to discharge its obligations and, faced with its breaches, (b) Tucumán's regulatory and other responses were responsible, proportionate and appropriate.

7.4.19. On the facts before us, it is only possible to conclude that the Bussi government, improperly and without justification, mounted an illegitimate "campaign" against the concession, the Concession Agreement, and the "foreign" concessionaire from the moment it took office, aimed either at reversing the privatisation or forcing the concessionaire to renegotiate (and lower) CAA's tariffs.

7.4.20. As Respondents' own witness, Dr. Jorge Rais, described the situation in his subsequent case study prepared for the World Bank:

*"Instead of coming out and explaining the reasons for the changes, the Tucumán Government added its voice to the protests. In truth, a veritable chorus was formed, where legislators, journalists, politicians and leaders from civil society competed to be perceived as the most virulent."*<sup>340</sup>

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<sup>340</sup> Case Study, April 2001 – Concession for the Potable Water and Sewerage Services in Tucumán, Argentine Republic, by Jorge Carlos Rais, María Esther Esquivel, Sergio Sour, Consultants (Exhibit 858), at ¶47.

7.4.21. That this campaign had nothing to do with CAA’s initial operation of the concession (or its alleged, or minor admitted, breaches of the Concession Agreement) is clear. Before taking office, the new Governor stated repeatedly he would not respect appointments made by the outgoing Governor and that he doubted the need for the new water regulator, ERSACT, because he rejected the privatisation of DiPOS.<sup>341</sup> Recall also General Bussi’s declaration in December 1994, during the provincial election campaign, of his party’s “most solid opposition to transferring the patrimonies of the Province”, and Vice Governor Topa’s evidence that “our party had announced that one of its government action – if it was elected – would be to consider examining the details of the concession agreement ... taking into account the interest of the users,” and that the Concession Agreement had been “born defective”.

7.4.22. ERSACT’s 25 September 1995 decision to refer the Concession Agreement’s “*absurd*” tariff provisions to the Attorney General, not 10 days after having published its own full page advertisement endorsing CAA’s addition of taxes to its service tariff, and the Legislature’s 17 November 1995 formation of an investigative commission to investigate both CAA’s tariff and the privatisation as a whole are best understood in this context. Respondent led no cogent evidence to explain the apparent about-face in ERSACT’s thinking on the legitimacy of the addition of taxes to CAA’s tariff. In these circumstances we are entitled to infer that ERSACT’s reference of the Concession Agreement to the Attorney General was politically motivated.

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<sup>341</sup> *Ibid.*, at ¶45.

7.4.23. Dr. Rais described these measures – which he labelled (correctly in our view) as the Province’s “first attack” – as “... depriving the concessionaire’s billing of formal legitimacy ... which led to a series of official decisions that voided the billing in question. And in December, the Legislature itself issued a kind of censure of the billing.” As to their effect on the concession, he observed that CAA’s “... customers immediately picked up on the message that was being sent to them from all around, intimating that CAA’s efforts, including all its official acts, were provisional, and so they gradually stopped paying their invoices.”<sup>342</sup>

7.4.24. Despite a six-month contractual grace period (against regulatory fines relating to quality controls) Argentina sought to describe ERSACT’s levelling of 101 separate charges for water quality control breaches in early December 1995 as normal “regulatory” proceedings. They were anything but. We accept Dr. Paz’s testimony that Mr. Davolio (then ERSACT’s Sub-Interventor) told him he would have resolved these early water testing questions with a telephone call, but that ERSACT instead laid 101 separate charges and imposed 78 fines of US\$1,000.00 (23 of the charges were not dealt with at this time) because his superiors had asked him “... to put pressure on Aguas del Aconquija to negotiate the rates.” Mr. Davolio added “... until the rates are renegotiated like the government wants, the order from higher up is to keep applying pressure with whatever we’ve got.” These early charges and the subsequent fines are evidence of what Dr. Rais described as early efforts by the members of ERSACT “... to ingratiate

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<sup>342</sup> *Ibid.*, at ¶48.

themselves with the political “views” of the new Governor.”<sup>343</sup> Having been laid and imposed “to put pressure” on CAA “to negotiate the rates”, these charges and fines constitute a blatant misuse of the Province’s regulatory powers for illegitimate purposes.

7.4.25. The Legislature’s Resolution No. 2, issued on 12 December 1995, which recommended that the Governor *unilaterally impose a temporary tariff reduction* to no more than 35% greater than the old DiPOS tariff also illuminates the new government’s immediate imperative; “... the establishment of a *just and reasonable new tariff system.*” (emphasis added)

7.4.26. And as Dr. Rais observed, “... the turbid water episode did nothing but heighten the campaign to discredit CAA.”<sup>344</sup> While provincial officials knew that there was never a health risk, the manganese episode led to “an open call for non-payment by all the political leadership,” to the Province “threatening to terminate the contract,” and to the appointment of an ERSACT Interventor, “who quickly declared war on the concession.”<sup>345</sup> We conclude that the Province’s reaction to the episodes of turbidity was irresponsible, unreasonable and disproportionate. Having regard to the motivation for this response, it clearly breached the Article 3 standard.

7.4.27. The disagreeable appearance of manganese turbidity in the water system in parts of San Miguel in late January 1996 was most unfortunate; it was also unforeseen

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<sup>343</sup> *Ibid.*, at ¶45.

<sup>344</sup> *Ibid.*, at ¶51.

<sup>345</sup> *Ibid.*, at ¶51.

and unforeseeable. Despite this, as Respondent's witness Mr. Arancibia stated, "Within 72 hours, treatment was implemented for oxydising the colorless, soluble manganese that was detectable only by chemical analysis, after precipitation, filtration and as a result of its removal."<sup>346</sup> In addition, CAA took appropriate steps to inform the public about what had occurred and what steps the company was taking to address the problem.

7.4.28. By contrast, instead of working with CAA to understand the problem and alleviate consumers' concerns, the Province's most senior officials acted irresponsibly. The Minister of Health, for example, made the inflammatory announcement that CAA was supplying "bacteriologically contaminated" water. Indeed, even before manganese turbidity appeared, he said publicly that the water could cause cholera, typhoid, and hepatitis. When asked in cross-examination about the effect of that statement, Vice Governor Topa acknowledged that it "has an impact on the community".<sup>347</sup> When asked if he was aware whether the Minister of Health had any evidence to support his latter statement, he replied, "we presume that he was a man with the technical background and necessary responsibility to say what he said."<sup>348</sup> Mr. Topa added "I imagine, or I assume that a health specialist, who is also the Minister of Health, well, when he publicly makes these statements, I am assuming that he conducted a number of analyses ...".<sup>349</sup> No evidence of any such analyses was ever submitted by Respondent. This is perhaps not surprising as it is generally well understood that the presence

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<sup>346</sup> Arancibia Supplementary Affidavit, 26 March 1999, at Section IX, ¶13 (Exhibit 377).

<sup>347</sup> Transcript of the hearing on the merits, Day 7, p. 1674, lines 1-2 (30 July 2006).

<sup>348</sup> Transcript of the hearing on the merits, Day 7, p. 1706, lines 1-9 (30 July 2006).

of manganese in water poses no health risk and that, as noted earlier, CAA retained an Argentine doctor, an expert in water-borne infectious diseases, who conducted a detailed study and confirmed that no health risk existed.

7.4.29. Two days after the Health Minister's 24 January 1996 statement warning of cholera and typhoid, and on the day ERSACT published advertisements reassuring the public that the manganese turbidity posed no health threat, Vice Governor Topa, acting on behalf of Governor Bussi, placed the agency under government supervision, dismissed its directors and appointed Mr. Franco Fogliata to serve as Interventor. Prior to his appointment Mr. Fogliata had served, and he continued to do so, as the Province's Minister of Production. That the decisions of ERSACT were politically directed by the Executive from that point forward is not in doubt. As from this date, Dr. Rais considered that it was now ERSACT's role "... to execute the political directives that it was given". He put it plainly in his report: the Interventor "... quickly declared war on the concessionaire."<sup>350</sup> We accept Dr. Rais's rather fierce description as reflecting reality.

7.4.30. Given Mr. Paz's testimony and the non-partisan opinion expressed by Dr. Rais in his report to the World Bank in 2001,<sup>351</sup> the measures adopted by ERSACT after its intervention must be regarded as infected, and, thus robbed of legitimacy, by

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<sup>349</sup> Transcript of the hearing on the merits, Day 7, p. 1709, lines 14-20 (30 July 2006).

<sup>350</sup> Case Study, April 2001 – Concession for the Potable Water and Sewerage Services in Tucumán, Argentine Republic, by Jorge Carlos Rais, María Esther Esquivel, Sergio Sour, Consultants (Exhibit 858), at ¶¶ 51 and 52.

<sup>351</sup> Although Dr. Rais provided evidence on behalf of Respondent, his opinions expressed in the Rais Report may be considered non-partisan, in the sense that the Report was prepared in 2001 as a case study for the World Bank to identify causes of failure of private sector participation in the area of potable water and sewerage public utilities.

the Province's determination to rescind or force a renegotiation of the Concession Agreement.

7.4.31. Similarly, while it would have been entirely proper for a new government with a different policy perspective on privatisation to seek to renegotiate a concession agreement in a transparent non-coercive manner, it is clearly wrong (and unfair and inequitable in terms of the BIT) to seek to bring a concessionaire to the renegotiation table through threats of rescission based on colourable allegations after having wrongly deprived the concessionaire's billings of formal legitimacy. But this is exactly what happened here.

7.4.32. On 9 February 1996, two weeks after it had been intervened, ERSACT issued Resolution No. 170/96 in which it found CAA's invoicing procedures to be "invalid acts" and ordered "... that they be revoked or replaced for reasons of illegitimacy ... in order to avoid [ERSACT] issuing an administrative decision that forces CAA to reduce the current rate charged". A week later it directed CAA to grant its customers a 35-day billing holiday, affirming its early "penalty" for CAA's fault as found in Resolution 51/96.

7.4.33. The next day, the Ministry of the Interior, Alberto Germanó, joined in, announcing that the Concession Agreement should be rescinded because of "very bad service with a high tariff". On cross-examination, Vice Governor Topa was asked to respond to the Minister's statement that the Province was "prepared to take immediate charge of the water and sewage services". He responded that, "... that is not serious at all". Adding that "... the government understood that it was

not in a position, and it did not have the capabilities to take over the service, and we had no plans in this regard ...”<sup>352</sup> The Tribunal accepts Mr. Topa’s testimony that the government did not have a plan at this time to take back the concession, but merely to threaten to do so. And that is exactly what Governor Bussi did when he announced to the press on 15 February 1996 that only a miracle could save the Concession Agreement from being rescinded by the Executive. This threat and all that preceded it brought Claimants to the table to renegotiate.

7.4.34. As we have found above, CAA’s initial proposal for a renegotiated agreement was immediately rejected. Then, on 19 March 1996, a day after Minister Germanó advised CAA of the government’s preconditions for the negotiations, ERSACT issued Resolution 212/96 dealing with CAA’s initial billings and its tariff. Despite the fact that both the Attorney General and the Court of Accounts had recommended only that ERSACT *negotiate* with CAA over the addition to its tariff of certain of the municipal taxes, Resolution 212/96 hit hard. Resolution 212/96 rejected CAA’s appeal against Resolution 170 and found CAA to be in breach of the Concession Agreement. It also held that Resolution 170 had taken effect on 9 February 1996 and informed the Executive of CAA’s “serious and unjustified failure” to comply with it, despite the pendency of CAA’s appeal.

7.4.35. It is to be recalled that Resolution 170 had enjoined CAA from issuing new invoices or collecting on outstanding invoices until ERSACT had approved a new rate schedule for CAA based on the Attorney General’s opinion.

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<sup>352</sup> Testimony of Topa, Transcript of the hearings on the merits, Day 7, pp. 1846 (lines 8-19), 1847 (lines 12-21), and 1848 (lines 1-2) (30 July 2006).

7.4.36. For the reasons noted above, Resolution 212/96 provides a particularly good example of an unfair and inequitable measure by the governmental authorities of Tucumán. To the extent that plausible questions may have been raised as to exactly what taxes CAA was entitled to add to its service charges in its invoices, ERSACT's references to the need for "*urgent measures*", "*serious losses*", "*great social repercussions*", "*serious disobedience*" and the "*high amounts involved*" points unmistakably to the fact that the Regulator was improperly being used as an instrument of political re-engineering. It is to be remembered that the disputed taxes totalled only about US\$2.50 per month and that it was not disputed that CAA had the right to increase its service charge by approximately 30% to cover taxes on top of the 67.9% increase over the former DiPOS rates.

7.4.37. As to the on-again, off-again, renegotiations which were carried on from the end of February 1996 through mid-May 1997, it is not necessary to address each of the matters Claimants advance as examples of unfair and inequitable treatment over this period. It is sufficient to observe that Claimants had been brought to the negotiation table by Governor Bussi's repeated threats of recession and the Province's impermissible campaign to reverse the privatisation or force CAA to renegotiate, and were kept there (they continued to negotiate as long as they felt it was possible to salvage the concession on renegotiated terms) by the Regulator's repeated suspension and reactivation of its Resolutions Nos 212/96 and 213/96. This so-called regulatory activity constituted ongoing, unfair and inequitable behaviour because it was no more than politically driven arm-twisting aimed at

compelling Claimants to agree to new terms to the Concession Agreement which were acceptable to the new government.

7.4.38. We also find that the effect of the Regulator's conduct over this period, taken against a background of the highly critical Report of the Special Investigative Commission, Minister Germanó's observations about continuing to deal with criminals, the Court of Accounts' attack on the Framework Agreement and the efforts by legislators and the Ombudsman to assist CAA's customers in resisting payment of invoices, had a devastating effect on the economic viability of the concession.

7.4.39. Under the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a "do no harm" standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. And that is exactly what happened in Tucumán.

7.4.40. The record conclusively demonstrates the accuracy of Legislator Nogués' description of what CAA's customers were told by the Bussi Government. As he said, the provincial authorities:

*“told the citizens of Tucumán, at a given moment, not to pay their water bills; it said it in all tones and in all the forms; additionally, it told the citizens the invoicing system did not correspond to the terms of the contract .... there was an explicit appeal made by the Executive Power about not paying for the water .... the certain fact is that currently*

*the citizens were urged not to pay by the Executive Power.*<sup>353</sup>

- 7.4.41. In his cross-examination, Vice Governor Topa testified that the Province would never have discouraged payment because that would be “inconsistent with the letter of the contract”. He claimed that he constantly encouraged customers to pay their bills. However, although he also testified that “members of the media were on top of us, and they were publishing every single comma and period of the statements made”,<sup>354</sup> there is no evidence before the Tribunal that any such statements, encouraging customers to pay, were ever made by Vice Governor Topa or any other provincial official.
- 7.4.42. By contrast, contrary statements and conduct were well documented. In the 1995 election campaign, General Bussi’s party told the people that the tariff was too high and that, if elected, it would fix it. Subsequently the Legislature adopted its own resolution challenging CAA’s invoices and calling for a tariff no more than 35% higher than the old DiPOS rate. In January 1996, the Minister of Health cautioned about typhoid and cholera when ERSACT knew no such risks existed. General Bussi and others threatened to terminate the concession and its shareholders were branded as possible criminals. On this record, it is hardly surprising that CAA’s recovery rate on its invoices was driven further and further down. Thus, measured by a “do no harm” standard, Respondent directly

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<sup>353</sup> Legislature of the Province of Tucumán, Legislative Debate, 20 November 2003 (Exhibit 69).

<sup>354</sup> Testimony of Topa, Transcript of the hearing on the merits, Day 7, pp. 1670 (lines 10-12) and 1672 (lines 3-11) (30 July 2006).

undermined Claimants' legitimate expectations of their investment<sup>355</sup> and breached its Treaty commitments under Article 3.

7.4.43. As noted above, after learning that the Executive had failed to support the 8 April Agreement (when, in mid-June 1997, it accepted some 70 unilateral amendments to the agreed bill that had been placed before the Legislature), CAA formally gave 90 day notice of rescission of the Concession Agreement on 27 August 1997.

Having regard to our mandate to adjudicate on Treaty breach, we do not need to offer a view, nor do we, on whether CAA had contractual grounds to rescind the Concession Agreement at this time. We do say, however, that when it did so the Tucumán authorities (the Governor, the Vice-Governor, the Ministers, the Executive, the Legislative, the Attorney-General and the Regulator), whose actions are unquestionably attributable to the Argentine Republic, had committed numerous breaches of the Article 3 fair and equitable treatment standard.

7.4.44. Disputing parties spent much time on the responsibility, or lack thereof, of the Argentine Republic for the acts of individual opposition party legislators and of the Ombudsman. The Tribunal notes that Respondent did not contest its responsibility for the acts of the Legislature in the exercise of its governmental authority, the Executive, the Attorney-General or the Regulator. Respondent only denies responsibility for the acts of individual legislators, particularly opposition politicians and the Ombudsman. We do not need to decide these questions given

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<sup>355</sup> According to the Tribunal, it was not reasonable for the Claimants to expect that they would achieve the recovery rates or internal rates of return upon which they modeled their investment. Investments always carry risk and returns are seldom guaranteed. However, they had every reason to expect that their privatisation partner, the Province, would not mount an illegitimate campaign to force them, on threat of rescission, to renegotiate a lower tariff.

our conclusion that multiple acts of members of the Executive, government ministers, the Regulator (which was politically guided by the Executive) and the Legislature violated the Article 3 standard. Had it been necessary, we would have been inclined to find that many of the acts of the Ombudsman that were complained of involved the exercise of governmental authority and would thus have been attributable to Argentina in the event they too constituted a breach of Article 3.

7.4.45. As to Tucumán’s post-termination behaviour, we also leave aside contractual questions associated with whether or not the Province had the right to require CAA to continue to provide service during the alleged “hostage period”. The answers to this question would have no material bearing on the outcome. However, the Legislature’s enactment in 2001 of Law No. 7196, prohibiting CAA from pursuing its collection lawsuits, and in 2002 of Law No.7234, barring CAA from enforcing judgments rendered or to be rendered in proceedings against debtors, cannot plausibly be justified. These measures were, and can only be seen as a vindictive exercise of sovereign power aimed at punishing CAA and its shareholders for seeking to terminate the Concession Agreement and for exercising their rights to arbitrate under the BIT. As such, these measures, and the repeated re-enactment of successor versions of Law No. 7234, also infringe BIT Article 3.

7.4.46. Finally, even if we had accepted Respondent’s interpretation of the scope of the Article 3 standard (which this Tribunal has concluded is obsolete), we are in no doubt that Respondent’s many acts and omissions cumulatively constituted an

“international delinquency” as defined in the *Neer Claim*,<sup>356</sup> and thus infringed the “minimum standard of treatment” it relies upon.

## **7.5. Expropriation Without Compensation - Article 5**

7.5.1. As with Article 3, disputing parties differ as to the scope of the protection against expropriation expressed in Article 5 of the Treaty. In relevant part, Article 5(2) provides:

*“The Contracting Parties shall not adopt, directly or indirectly, measures of expropriation or nationalization or any other equivalent measure having an effect similar to dispossession, except for public purpose and provided that such measures are not discriminatory or contrary to a specific commitment.”*

*“Such measures referred to above which could be adopted, shall allow the payment of a prompt and adequate compensation, the amount of which, computed on the basis of the actual value of the investments affected, shall be evaluated in relation to the normal economic situation, and prior to any threat of dispossession.”*

7.5.2. It is evident that the contractual rights at issue in the present dispute (*ie* those provided by the Concession Agreement) are covered under Article 1’s definition of rights protected by the Treaty. Article 1 provides, in pertinent part:

*“1. The term “investments” means assets such as property, rights and interests of any kind, and in particular, but without limitation;*

...

*e) Concessions granted by law or by virtue of an agreement, particularly those concessions related to ... exploitation of natural resources ... ”*

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<sup>356</sup> *Neer Claim*, Mexico-U.S. General Claims Commission, Reports of International Arbitral Awards, Vol. IV, p. 60 (1926).

- 7.5.3. Respondent appears to contend that an act or measure that breaches a contract cannot give rise to an expropriation because contract breaches could be addressed and must in law be addressed in other fora, without recourse to the Treaty.
- 7.5.4. This proposition is incorrect. There can be no doubt that contractual rights are capable of being expropriated, and a number of treaty cases have arisen out of contractual disputes. The same act that may violate a treaty may also violate a contract, or both the treaty and the contract. The fact that there is overlap does not prevent a tribunal from considering the act as a possible treaty breach. Further, whether a given act was in breach, or was thought by one of the parties to be in breach of the contract, may well inform the tribunal’s assessment of that act for purposes of a treaty claim.
- 7.5.5. In *Phillips Petroleum*, the Iran-US Claims Tribunal considered whether a claim that the termination of an oil concession agreement constituted an “expropriation of contract rights” and, “alternatively, ... [a] breach and repudiation” of the contract.<sup>357</sup> The termination of the contract followed a series of actions by the Iranian Government that slowly eroded claimant’s rights under the contract. The Claims Tribunal held that “ ... expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible ... or intangible, such as the contract rights

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<sup>357</sup> *Phillips Petroleum Company Iran v. the Islamic Republic of Iran and NIOC*, Award No. 425-39-2, Award of 29 June 1989, 21 Iran – U.S. C.T.R. 79, at ¶75.

involved in the present case.”<sup>358</sup> The Tribunal considered “that the acts complained of appear more closely suited to assessment of liability for the taking of foreign-owned property under international law than to assessment of the contractual aspects of the relationship, and so decided to consider the claim in this light.”<sup>359</sup>

7.5.6. Similarly, the tribunal in *SPP v. Egypt* noted that contract rights are entitled to the protection of international law and the taking of such rights involves an obligation to make compensation, and that it has long been recognised that contractual rights may be indirectly expropriated.<sup>360</sup>

7.5.7. Respondent cites *Waste Management II* and *Azinian* for the proposition that a state’s contractual non-performance, without more, will not constitute an expropriation within the meaning of an investment treaty.<sup>361</sup>

7.5.8. However, the measures identified at 7.4 herein, which constituted the Province’s destructive campaign against CAA and CGE / Vivendi cannot in any circumstance be cast as simple commercial acts of or relating to non-performance by a contracting counter-party. Here we have illegitimate sovereign acts, taken by the Province in its official capacity, backed by the force of law and with all the authoritative powers of public office.

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<sup>358</sup> *Ibid.*, at ¶76.

<sup>359</sup> *Ibid.*, at ¶75.

<sup>360</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of May 20, 1992, 321.L.M. 937 (1993).

<sup>361</sup> See Counter-Memorial at ¶¶10, 474-489.

- 7.5.9. The 1948 *Jalapa Railroad Case* held that international responsibility was triggered when the government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under the contract by exercising its superior governmental power.<sup>362</sup>
- 7.5.10. Thus, even if one were to accept Respondent's arguments requiring some extra element in order to find a Treaty violation in acts of a contractual nature, an abundance of such elements are present in this case. In any event, the Article 5(2) requirement, that state measures not be contrary to a particular commitment, suggests that the breach of a commitment by a state is an appropriate factor for consideration in determining whether the state action is expropriatory in nature.
- 7.5.11. As to Respondent's position that it is novel and far-reaching for Claimants to suggest that the *value* of their investment has been expropriated, it is not infrequent in cases of indirect expropriation that the investor suffers a substantial deprivation of value of its investment. Numerous tribunals have looked at the diminution of the value of the investment to determine whether the contested measure is expropriatory. The weight of authority (further discussed below) appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation).

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<sup>362</sup> *Jalapa R.R. & Power Co. Claim* (1948), Whitesman's Digest of International Law, Volume 8 at pp. 908-909 (1976) (American Mexican Claims Commission under the Act of Congress Approved December 18, 1942, Report to the Secretary of State with Decisions Showing the Reasons for the Allowance or Disallowance of the Claims (Dept. of State Pub. No. 2859, Arbitration Series No. 9) (1948)).

7.5.12. In *Tecmed*, the tribunal held that a measure is equivalent to expropriation if:

*“the Claimant, due to[ the actions of the Respondent] was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist. In other words, if due to the actions of Respondent, the assets involved have lost their value or economic use for their holder ... ”*<sup>363</sup>

7.5.13. The *Tecmed* tribunal also recognised that, although terms such as “equivalent to expropriation” or “tantamount to expropriation” (so called indirect or creeping expropriation), do not have a clear or unequivocal definition “... it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.”<sup>364</sup>

7.5.14. The tribunal in *CME* similarly recognised that destruction of the value or the benefit of property can constitute expropriation:

*“De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law ... ”*<sup>365</sup>

7.5.15. The ICSID Tribunal in *Santa Elena* also stressed that “there is ample authority for the proposition that a property has been expropriated when the effect of the

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<sup>363</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (Spain/Mexico BIT), at ¶115.

<sup>364</sup> *Ibid.*, at ¶114.

<sup>365</sup> *CME Czech Republic B.V. (the Netherlands) v. The Czech Republic*, Partial Award of September 13, 2001 (UNCITRAL), at ¶604.

measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property...”<sup>366</sup> (emphasis added)

7.5.16. The jurisprudence of the Iran-US Claims Tribunal provides further support. In *Tippetts*, the tribunal found that a deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefit, even where legal title to the property is not affected.<sup>367</sup> Similarly, the tribunal in *Starrett Housing* stated that “it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner”.<sup>368</sup>

7.5.17. UNCTAD’S 2000 study on taking of property, which summarises existing jurisprudence, confirms this view. It observes that measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value of the asset of a foreign investor;<sup>369</sup> that takings tantamount to expropriation are those that

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<sup>366</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000), at ¶77.

<sup>367</sup> *Tippetts, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran* (Award No. 141-7-2), Award of 29 June 29 1984, (Iran-U.S. C.T.R. 219).

<sup>368</sup> *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat* (Interlocutory Award No. ITL 32-24-1), Interlocutory Award of 19 December 1983, reprinted in 4 Iran-U.S. C.T.R. 122, 154.

<sup>369</sup> UNCTAD, TAKING OF PROPERTY 36, (UNCTAD Series on International Investment Agreements 2000), at p. 4.

result in a substantial loss of control or value of a foreign investment,<sup>370</sup> that creeping expropriation may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. This is so even though the legal title to the property remains vested in the foreign investors but the investors' rights of use of the property are diminished as a result of the interference by the state.<sup>371</sup>

7.5.18. At several points in its submission, Respondent appears to press for a return to a regime in which liability for expropriation is limited to physical or formal expropriations. Put another way, so long as Claimants remain in physical and managerial control of the water and sewage treatment assets of the concession, including during the alleged "hostage period", they were not deprived of their ownership rights in the concession. However, it has been clear since at least 1903, in the *Rudolff case*, that the taking away or destruction of rights acquired, transmitted and defined by contract is as much a wrong entitling the sufferer to redress as the taking away or destruction of a tangible property.<sup>372</sup>

7.5.19. Respondent fails to appreciate that in the context of Claimants' case for expropriation of the Concession Agreement, the ownership rights which are subject to deprivation are Claimants' contractual rights themselves, *ie* the right to the use, enjoyment and benefit of those rights. And here, CAA's principal contractual right was to invoice its customers and pursue payment for the water

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<sup>370</sup> *Ibid.*, at p. 41.

<sup>371</sup> *Ibid.*, at pp. 11-12.

<sup>372</sup> *Rudloff Case* (1903), U.S.-Venezuelan Claims Commission, Interlocutory Decision 9 RIAA 2144, Reports of International Arbitral Awards, Volume 9, p. 250.

and sewage services it provided in accordance with the tariff and terms provided for in the Concession Agreement. The fact that CAA remained, and during the alleged “hostage period” may have been “forced” to remain in control of the physical operation of the water treatment plants and the water and sewage network has no bearing whatever on whether CAA was effectively deprived of the right to operate the concession and to be compensated in accordance with the Concession Agreement, as originally negotiated.

7.5.20. Turning to Respondent’s proposition that an act of state must be presumed to be regulatory, absent proof of bad faith, this is incorrect. There is extensive authority for the proposition that the state’s intent, or its subjective motives are at most a secondary consideration.<sup>373</sup> While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state’s intent, is the critical factor. As Professor Christie explained in his famous article in the British Yearbook of International Law more than 40 years ago,<sup>374</sup> a state may expropriate property where it interferes with it even though the state expressly disclaims such intention. Indeed international tribunals, jurists and scholars have consistently appreciated that states may accomplish expropriations in ways other than by formal decree; often

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<sup>373</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, The Government of the Islamic Republic of Iran, Civil Aviation Organization, Plan & Budget Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank of Iran and Holland, Award of 29 June 1984, Iran U.S. C.T.R. 219, Award No. 141-7-2, at ¶¶225-26; *Phillips Petroleum Company Iran v. the Islamic Republic of Iran and NIOC*, Award No. 425-39-2, Award of 29 June 1989, 21 Iran – U.S. C.T.R. 79, at ¶¶97-98; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003, (Spain/Mexico BIT); *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467 (US/Ecuador BIT), at ¶186; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 40 I.L.M. 36 (2001), at ¶111; and *Pope & Talbot Inc. v. The Government of Canada*, Arbitration under Chapter 11 of the North American Free Trade Agreement, Interim Award of 26 June 2000, UNCITRAL (NAFTA), at ¶181.

in ways that may seek to cloak expropriative conduct with a veneer of legitimacy.<sup>375</sup>

7.5.21. Also, the structure of Article 5(2) of the Treaty directs the Tribunal first to consider whether the challenged measures are expropriatory, and only then to ask whether they can comply with certain conditions, *ie* public purpose, non-discriminatory, specific commitments, et cetera. If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid. Respondent's public purpose arguments suggest that state acts causing loss of property cannot be classified as expropriatory. If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose. As the tribunal in *Santa Elena* correctly pointed out, the purpose for which the property was taken "does not alter the legal character of the taking for which adequate compensation must be paid."<sup>376</sup> The legal element in question is whether the act is expropriatory or not. If Respondent's invocation of public purpose were correct, Costa Rica would have prevailed in the *Santa Elena* case and thus would not have faced the prospect of having to compensate.

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<sup>374</sup> G. Christie, "What Constitutes a Taking Under International Law?", 33 BYIL 307 (1962).

<sup>375</sup> W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BYIL 115 (2004), at p. 121.

<sup>376</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000), at ¶71.

## Conclusions

7.5.22. In any event, the record and our findings are clear; the measures constituting the campaign identified above were not legitimate regulatory responses to CAA's failings, but were sovereign acts designed illegitimately to end the concession or to force its renegotiation.

7.5.23. As noted above, we have found that the only possible conclusion to be reached on the facts before us is that the provincial authorities mounted an illegitimate campaign against the concession, the Concession Agreement and the "foreign" concessionaire. Having also come to the view that the measures which made up that campaign violated the Treaty's fair and equitable standard we turn now to our assessment of whether they may also be seen as expropriatory.

7.5.24. Where, as here, there has been no taking or dispossession, as such, and the question turns on whether there have been measures equivalent to expropriation which have had an effect similar to the dispossession of Claimants' rights and expectations, it is necessary to consider whether the challenged measures have or will (i) radically deprive Claimants of the economic use and enjoyment of its investment – *Tecmed*,<sup>377</sup> (ii) effectively neutralise the benefit of Claimants' property – *CME*,<sup>378</sup> (iii) deprive the owner of the benefit and economic use of its

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<sup>377</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (Spain/Mexico BIT).

<sup>378</sup> *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 13 September 2001 (UNCITRAL).

contractual rights – *Santa Elena*,<sup>379</sup> (iv) render Claimants’ property rights useless – *Starrett Housing*,<sup>380</sup> or have a similar dispossessory effect.

7.5.25. As to this, we find that the Province’s unfair and inequitable measures, identified at 7.4 above, which ultimately led to CAA’s notice of rescission of the Concession Agreement on 27 August 1997, struck at the economic heart of, and crippled, Claimants’ investment.

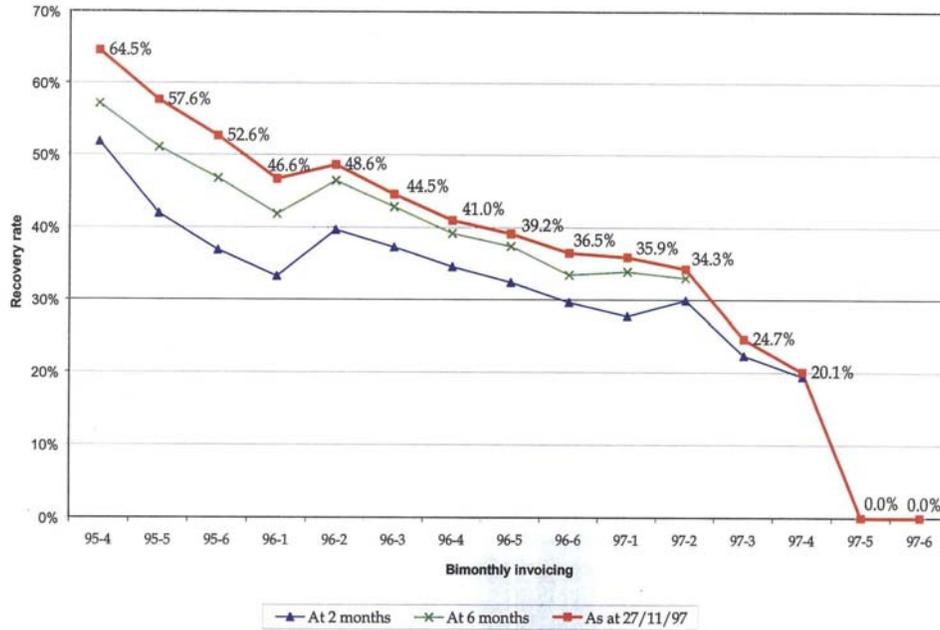
7.5.26. The actions taken by the provincial authorities against the concession and its “foreign” investors had a devastating effect on the economic viability of the concession. CAA’s recovery rate declined dramatically over the life of the concession, as illustrated in the graph below.<sup>381</sup> The recovery rate continued to fall even after the tariffs were lowered as part of the interim agreement reached during the attempted renegotiations and, by the time CAA notified the authorities that the Concession Agreement was rescinded, it hovered around 20%; a stark contrast with the rate of 89-90% upon which the Concession Agreement was premised.

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<sup>379</sup> *Compañía del Desarrollo de Santa Elena, S.A. v The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000).

<sup>380</sup> *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat* (Interlocutory Award No. ITL 32-24-1), Interlocutory Award of 19 December 1983, reprinted in 4 Iran-U.S. C.T.R. 122, 154.

<sup>381</sup> The graph represents the recovery rate observed as of 27 November 1997 on the invoicing for each bimonthly period, as well as the recovery rate at 2 months and 6 months after the invoicing for these bimonthly periods. The invoices due for the bimonthly periods 97-5 and 97-6 (which accounts for 27 days) were due as of November 27, 1997 but had not been sent yet. Statement of Amounts Claimed, with verification report of Ernst & Young, 19 November 2004 (Exhibit 7).



7.5.27. We have already indicated that it would not have been reasonable for Claimants to expect they would achieve the recovery rates or internal rates of return upon which they had modelled their investment (see fn. 355 above). However, they had every right to expect their privatisation partner, the Province, would not mount a wrongful and damaging campaign to force them, on threat of rescission, to abandon their contractual rights and renegotiate the concession based on lower tariffs.

7.5.28. The provincial measures earlier identified, taken cumulatively, rendered the concession valueless and forced CAA and Vivendi to incur unsustainable losses. As former Legislator Nougés said, the provincial authorities, including the Executive, told the citizens of Tucumán not to pay and they did not.<sup>382</sup> By August 1997, they had also so undermined CAA and the legitimacy of the

<sup>382</sup> Legislature of the Province of Tucumán, Legislative Debate, 20 November 2003 (Statement of Legislator Nougés) (Exhibit 69).

Concession Agreement that it is utterly unrealistic to suggest that CAA (and its investors) should simply have stayed put, continuing to provide services for which it was not being paid and accepting ever increasing losses.

7.5.29. This is not a case where the value of a claimant's investment had simply been diminished. Here, as in *Tecmed*,<sup>383</sup> Claimants were radically deprived of the economic use and enjoyment of their concessionary rights. The *ad hoc* Committee well understood the potential for such a finding when it stressed that:

*“... the conduct complained of here was not more or less peripheral to a continuing successful enterprise. The Tucumán conduct (in conjunction with the acts and decisions of Claimants) had the effect of putting an end to the investment.”*<sup>384</sup>

7.5.30. Respondent's reliance on recent findings against expropriation in cases such as *CMS v. Argentina*, and *Azurix v. Argentina* is unavailing. In *CMS*,<sup>385</sup> the tribunal approached the question of expropriation using the same standards as we, *ie* substantial deprivation, or whether the enjoyment of property had been effectively neutralised. It simply concluded that the measures in question had not had such an effect, given that CMS's export sales had been unaffected and CMS was able to continue operations.<sup>386</sup> In *Azurix*,<sup>387</sup> the tribunal disagreed with the claimant as to whether Argentina had behaved wrongfully concerning Azurix's attempt to recover its Canon payment or had interfered inappropriately in its requested

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<sup>383</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (Spain/Mexico BIT).

<sup>384</sup> Decision on Annulment at ¶114.

<sup>385</sup> *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), 12 May 2005.

<sup>386</sup> *Ibid.*, at ¶¶260-264.

<sup>387</sup> *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006.

revision to the Retail Price Index. The tribunal made it clear that if it had found in favour of Azurix's contentions on these points, it "... would agree that the breaches of the Concession Agreement would have had a devastating effect on the financial viability of the Concession ..."<sup>388</sup> It also considered that the management of the concession company had been affected, but not sufficiently for a finding of expropriation. In the result, it found that the provinces' actions did not impact Azurix's investment *to the extent required*.<sup>389</sup> More recently in *LG&E Energy v. Argentina*, which was decided after receipt of disputing parties final submissions to us, the tribunal also concluded that the measures at issue did not, on the facts, constitute indirect expropriation. However, the tribunal made it clear that its conclusion would have been different had the evidence indicated an "... almost complete deprivation of the value of LG&E's investment".<sup>390</sup>

7.5.31. It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached. The *ad hoc* Committee recognised this when it noted that "[i]t was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT."<sup>391</sup> Similarly, the tribunal in *Santa Elena* stated "[i]t is clear ... that a measure or series of measures can still eventually amount to a taking, though the individual

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<sup>388</sup> *Ibid.*, at ¶321.

<sup>389</sup> *Ibid.*, at ¶¶321-322.

<sup>390</sup> *LG&E Energy Corp. et al. v. The Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006, at ¶200. As the Decision on Liability in this case was issued after disputing parties' Post-Hearing Briefs, it was not cited to us and we do not rely on it here.

steps in the process do not formally purport to amount to a taking or to a transfer of title”.<sup>392</sup>

- 7.5.32. Article 15(1) of the ILC Articles is to like effect where it defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series.<sup>393</sup>
- 7.5.33. Here, the Province’s actions – from the very opening months of the concession, continuing through its wrongful regulatory action and culminating in the unilateral amendments to the 8 April Agreement – had the necessary consequence of forcing CAA to terminate the Concession Agreement. The provincial government was simply not prepared to countenance and support CAA’s operation of the concession on the terms of the Concession Agreement as originally agreed. Ultimately, the Province simply left CAA with no choice. It could not continue in the face of mounting losses, under significantly reduced tariffs and with no reasonable prospect of improved collection rates. CAA’s contractual rights under the Concession Agreement were rendered worthless by the Province’s actions while its losses would only continue to mount. Vivendi suffered direct harm in its capacity as CAA’s principal shareholder, with the value of its shareholding being eradicated.

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<sup>391</sup> Decision on Annulment at ¶112.

<sup>392</sup> *Compañía del Desarrollo de Santa Elena, S.A. v The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000), at ¶76.

<sup>393</sup> See The International Law Commission, *Articles on State Responsibility* (2001), reprinted in James Crawford, ed., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge Univ. Press, 2002). See also UN GAOR, 56th Sess, Supp No. 10, p 43, UN Doc A/56/10 (2001).

7.5.34. Paraphrasing the words of the *Tecmed*,<sup>394</sup> *CME*,<sup>395</sup> *Santa Elena*,<sup>396</sup> and *Starrett Housing*<sup>397</sup> tribunals, Claimants were radically deprived of the economic use and enjoyment of their investment, the benefits of which (*ie* the right to be paid for services provided) had been effectively neutralised and rendered useless. Under these circumstances, rescission of the Concession Agreement represented the only rational alternative for Claimants. By leaving Claimants with no other rational choice, we conclude that the Province thus expropriated Claimants' right of use and enjoyment of their investment under the Concession Agreement.

## **7.6. Causation**

7.6.1. Before turning to damages we deal briefly with Claimants' obligation to show that the damages alleged were caused by the measures we have found to infringe the BIT, and were not, for example, simply the result of general dissatisfaction with the privatisation and CAA's services.

7.6.2. On this issue, there can be no serious dispute. Upon the transfer of service, CAA immediately took emergency measures to reduce serious bacteriological risk, to improve water quality more generally, and to upgrade the water and sewage infrastructure. We have already found its initial operation of the concession to have been satisfactory. Nor can it seriously be alleged that the episodes of

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<sup>394</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (Spain/Mexico BIT).

<sup>395</sup> *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 13 September 2001 (UNCITRAL).

<sup>396</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000).

<sup>397</sup> *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat* (Interlocutory Award No. ITL 32-24-1), Interlocutory Award of 19 December 1983, reprinted in 4 Iran-U.S. C.T.R. 122, 154.

turbidity by themselves led to the steady decline in CAA's recovery on its invoices. The incidents of red turbidity were intermittent, non-harmful and in no way out of the ordinary. They affected only a relatively small part of the population (5-10%) for short periods and occurred over only one or two months. As to the manganese turbidity, it was unquestionably unpleasant but it only lasted about two weeks, posed no health risks and CAA's response to an unforeseeable event was highly professional. By contrast, the actions taken by government officials in Tucumán had the effect of pressuring, and were meant to pressure CAA by destroying its base of paying customers. The persistent steps taken by the Province to prevent the collection of payments due for services from the investors' customers are perhaps the most important of the Province's breaches of the fair and equitable standard and the prohibition against expropriation without compensation. We find that the destruction of the concession brought about by the decline in recovery rates is directly attributable to (and was proximately caused by) the government authorities in Tucumán and thus, is the responsibility of the Argentine Republic.

## **8. DAMAGES**

### **8.1. Introduction**

8.1.1. Claimants' case for damages is not without complications. Relying on the principle established in the *Chorzów Factory Case*,<sup>398</sup> over US\$317 million is claimed as the amount necessary to eliminate the adverse financial consequences of the Province's illegal acts. This amount is made up of four components: (i)

US\$59,173,000 for damages suffered during the life of the concession period, *ie* before 27 November 1997; (ii) US\$241,359,000 for damages suffered as a result of the expropriation of the remainder of the concession; (iii) US\$14,989,000 for damages for the forced provision of services during the alleged hostage period; and (iv) US\$1,402,000 as a contingency related to a potential tax liability based on CAA's control of the concession's assets.<sup>399</sup> Claimants also seek interest on the amounts claimed, and costs and expenses.

8.1.2. It is evident that the lion's share of the amount claimed - *ie* US\$300,532,000, being the sum of (i) and (ii) - is for lost profits. This part of the claim rests on a comparison of what Claimants contend the concession would have earned, but for the Province's actions. For the period 22 July 1995 to 27 November 1997, a comparison was made of actual cash flows versus cash flows projected based on the terms of the Concession Agreement. For the 27.5 years remaining, lost profits were estimated using a DCF analysis which discounted anticipated future net cash flow to a 27 November 1997 present value.

8.1.3. In its comprehensive challenge to Claimants' damages, Respondent put squarely in issue the appropriateness and availability, on the facts of this case, of a damages claim that includes future lost profits calculated using the DCF methodology. Claimants' methodology and underlying assumptions were also contested. Respondent also noted that Claimants' damage claim was formulated

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<sup>398</sup> Claimants' Memorial at ¶379, citing *Case Concerning the Factory at Chorzów* (Germany v. Poland), Judgement of 13 September 1928 P.C.I.J., Ser. A, No. 17, at ¶47 reprinted in Manley O. Hudson, I World Court Reports 677-78 (1934).

<sup>399</sup> Statement of Amounts Claimed (Exhibit 7); Memorial at ¶¶377-410; Claimants' Post-Hearing Brief at ¶93.

entirely upon CAA's alleged losses and that no attempt had been made to identify or claim for any alleged losses of CGE/Vivendi as shareholder.

8.1.4. Despite these challenges, Claimants elected not to offer the Tribunal in their further pre-hearing pleadings any alternative approaches to their claim for or calculation of damages.

8.1.5. During the course of the oral hearing, the Tribunal noted the absence in Claimants' submission of an alternative to the lost profits claim and the apparent reliance on only CAA's alleged losses. It also invited Claimants to direct it to the portions of the existing record that were relevant to possible alternative approaches to calculating damages (eg liquidation value, book value, replacement value or amounts invested) that had been noted by Respondent. Towards the end of Day 11, in response to a request from Claimants for clarification as to its queries, the Tribunal's President responded as follows:

*“PRESIDENT ROWLEY: ... if a claim is asserted by Vivendi for its wasted investment, it can only be asserted based on the evidence in these proceedings, and so we would need to have brought to our attention the evidence that is in these proceedings. That's what I mean. It was not an invitation to seek to introduce new evidence at this stage of the matter.  
MR. PRICE: Thank you. You have clarified it.”<sup>400</sup>*

8.1.6. Despite this clarification, on 23 August 2006, after the conclusion of the hearing on the merits, Claimants sought to introduce new evidence to support alternative approaches to the calculation of damages.

- 8.1.7. Respondent objected to the introduction of such evidence by Claimants at this stage of the proceeding. In Respondent's view, even if the Tribunal had sought further discussion from the parties as to the *effects* of the various methods of calculation on Claimants' damages claim, the record was clear that no new evidence was to be introduced.
- 8.1.8. Claimants responded by letter dated 1 September 2006: "to be sure", they conceded, "there are facts on the existing record that the Tribunal can use for that purpose". Nevertheless, Claimants requested that Tribunal exercise its discretion to accept further evidence to give the Tribunal the "full picture" relevant to alternative calculation methods.
- 8.1.9. For reasons elaborated in its letter to the parties dated 15 September 2006, attached hereto as Schedule A, the Tribunal declined to exercise its discretion to accept Claimants' new evidence. Accordingly, we have disregarded the fresh evidence Claimants provided in their 25 August 2006 Post-Hearing Brief as well as argumentation therein contained based on that fresh evidence. Claimants' arguments regarding compensation which were not based on fresh evidence were admitted.
- 8.1.10. As regards the queries concerning possible claims for CGE/Vivendi's losses, in their Post-Hearing Brief, Claimants jointly requested an award totalling 100% of

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<sup>400</sup> Transcript of the hearing on the merits, Day 11, pp. 2959-2960 (3 August 2006).

CAA's damages. And for the avoidance of doubt, Vivendi made an express claim for 94.4% of CAA's damages as its 94.4% *de facto* shareholder.<sup>401</sup>

## 8.2. Principles Relevant to an Award of Compensation

- 8.2.1. Having concluded that Respondent has violated the provisions of both Articles 3 and 5 of the BIT, the Tribunal must now determine the appropriate compensation to be awarded.
- 8.2.2. Article 42(1) of the ICSID Convention requires the Tribunal to decide a dispute in accordance with such rules of law as may be agreed by the parties. In the present case, Article 8(4) of the Treaty sets out a basic framework for the Tribunal's determinations, including those relating to the appropriate measure of damages:

*“The arbitration body shall decide on the basis of the provisions of this agreement, the law of the Contracting Party which is a party to the dispute – including its conflict of law rules – and the terms of possible specific agreements concluded in relation to the investment, as well as the principles of international law on the subject-matter.”*

The BIT also expressly addresses compensation for expropriation. Article 5(2), in relevant part, provides:

*“Such measures referred to above [ie of expropriation] which could be adopted, shall allow the payment of a prompt and adequate compensation, the amount of which, computed on the basis of the actual value of the investments affected, shall be evaluated in relation to the normal economic situation, and prior to any threat of dispossession”.*

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<sup>401</sup> Claimants' Post-Hearing Brief at ¶68. See also Claimants' Counter-Memorial on Jurisdiction, ¶75, Note 118.

*“Such compensation, its amount and payment method shall be established, at the latest, on the date of dispossession. Such compensation shall be effectively realizable, paid without delay and freely transferable. It shall bear interests, computed at an appropriate rate, until the date of payment.”* (emphasis added)

8.2.3. The Treaty thus *mandates* that compensation for *lawful* expropriation be based on the *actual value* of the investment, and that interest *shall* be paid from the date of dispossession. However, it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations.<sup>402</sup> As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent.

8.2.4. In the *Chorzów Factory Case*, the Permanent Court of International Justice (PCIJ) set out the following principles of compensation for *unlawful* acts by states:

*“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”*

*“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss*

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<sup>402</sup> The distinction established by the Permanent Court of International Justice in *Chorzów* between *lawful* and *unlawful* taking, was explored by Chamber Two of the Iran-US Claims Tribunal in *Phillips Petroleum Company Iran v. the Islamic Republic of Iran and NIOC*, Award No. 425-39-2, Award of 29 June 1989, 21 Iran – U.S. C.T.R. 79. For a lucid analysis of possible different standards of damages assessment under customary international law and a *lex specialis* established in a BIT, see *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/10), Award of 2 October 2006, at pp. 89 *et seq.* However, as the Award in this case was issued after disputing parties’ Post-Hearing Briefs, it was not cited to us and we do not rely on it here.

*sustained which would not be covered by restitution in kind or payment in place of it...*”<sup>403</sup>

- 8.2.5. There can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice.<sup>404</sup> It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations.
- 8.2.6. Disputing parties also cite to the ILC Articles on State Responsibility.<sup>405</sup> Article 36 requires that a “state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution” and that such compensation “shall cover any financially assessable damage, including loss of profits insofar as it is established”.<sup>406</sup>
- 8.2.7. Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless

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<sup>403</sup> *Case Concerning the Factory at Chorzów*, Judgment No. 13, 13 September 1928, Merits, 1928, P.C.I.J., Series A, No. 17, at p. 47.

<sup>404</sup> *S.D. Myers, Inc. v. Government of Canada*, NAFTA Arbitration under the UNCITRAL Arbitration Rules, Award of 13 November 2000, at ¶311; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 40 I.L.M. 36 (2001), at ¶122; *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, at ¶400; *Petrobart Limited v. The Kyrgyz Republic* (Arbitration No. 126/2003), Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty), Award of 29 March 2005, at pp. 77 and 78; *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment 25 September 1997, 1997 I.C.J. 7.

<sup>405</sup> Reply at ¶394; Counter-Memorial at ¶593, citing Article 36 of the ILC Draft on State Responsibility, Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly*, Fifty-sixth session, Supplement N° 10 (A/56/10), at chapter IV.E.2.

of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.

8.2.8. Of course, the level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless. Put differently, the breaches of Articles 3 and 5 caused more or less equivalent harm.

8.2.9. Claimants' principal claim for compensation is based on the "fair market value" of the concession established by a lost profit analysis. Respondent did not seriously contest that fair market value could be an appropriate basis upon which to award damages for breach of the Treaty, but challenged Claimants' methodology and calculations.

8.2.10. "Fair market value" can be considered the equivalent of "actual value" as those words are used in Article 5. This standard has also generally been accepted as appropriate compensation for expropriation. However, as pointed out by the

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<sup>406</sup> Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement N° 10 (A/56/10)*, at chapter IV.E.2.

tribunal in *CMS Gas Transmission Co. v. Argentine Republic*,<sup>407</sup> a “fair market value” standard might also be appropriate for other breaches which result in long-term losses. The *Azurix* tribunal also concluded that it could properly resort to fair market value to compensate breaches other than expropriation – in particular the fair and equitable standard.<sup>408</sup> In its award, it noted the particular relevance of the government having taken over the concession.

8.2.11. On the facts before us, and having regard to the parties’ approaches to damages, the Tribunal is of the view that it is appropriate to assess compensation, *at least in part*,<sup>409</sup> based on the fair market value of the concession.

### **8.3. Damages Calculation**

8.3.1. Claimants contend that a DCF analysis is recognised as the preferred approach to valuation in modern practice where projected cash flows are reasonably capable of determination and are not speculative. They say there was nothing speculative about the concession’s ability to operate, to provide services, or to attract customers; this was not a start-up enterprise or a project yet to be constructed. The provision of water and sewage services in Tucumán was, and is today, a revenue-generating going concern. They point to CAA’s achievement of a 65% recovery rate on its first invoices as demonstrative of the reasonableness of the Concession Agreement’s projected 89-90% collection rate. Other utilities in Tucumán were shown to have collection rates about 90% and Ms. Perrier testified

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<sup>407</sup> *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, at ¶410.

<sup>408</sup> *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 23 June 2006, at ¶424.

<sup>409</sup> We say “at least in part” because of Claimants’ need to fund CAA’s ongoing costs/losses after 27 August 1997, the date of expropriation, through the end of the alleged “hostage period”.

as to the low economic risk of water services concessions. CGE's long and diverse global experience was cited as evidence that the 11.52% projected rate of return was conservative and likely to be achieved; why otherwise would CGE have agreed the terms of the concession.

8.3.2. Respondent argued strongly against the appropriateness of a DCF valuation for the Tucumán concession, contending, *inter alia*, that DiPOS was never a genuine going concern, there was no proven record of profitability and that Claimants' approach entirely ignores the substantial risk associated with the privatisation by wrongly assuming the Concession Agreement's income stream to be a minimum, rather than a maximum.

8.3.3. At international law, depending on the circumstances arising in a particular case, there are a number of ways of approximating fair market value. The Tribunal accepts, in principle, that fair market value may be determined with reference to future lost profits in an appropriate case. Indeed, theoretically, it may even be the preferred method of calculating damages in cases involving the appropriation of or fundamental impairment of going concerns. However, the net present value provided by a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative. And, as Respondent points out, many international tribunals have stated that an award based on future profits is not appropriate unless the relevant enterprise is profitable and has operated for a sufficient period to establish its performance

record.<sup>410</sup> The Tribunal notes that even in the authorities relied on by Claimants, compensation for lost profits is generally awarded only where *future profitability* can be established (*the fact of profitability* as opposed to the *amount*) with some level of certainty.

- 8.3.4. In the Tribunal’s view, the likelihood of lost profits must be sufficiently established by Claimants in order to be the basis of compensable damages. The Tribunal also recognises that in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting *sufficient* evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.
- 8.3.5. In the present case, as noted below, Claimants faced significant challenges and we conclude that they have failed to establish with a sufficient degree of certainty that the Tucumán concession would have been profitable.
- 8.3.6. Claimants’ assertions that the concession operated as going concern before, during and after CAA’s tenure border on the fanciful. A “going concern” is generally understood to be a business enterprise with demonstrable future earning power. However, the Tucumán water concession was anything but, DiPOS was

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<sup>410</sup> *Levitt v. Iran*, 14 Iran-US. CI. Trib. Rep. 191, 209-10 (1987); *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 40 I.L.M. 36 (2001); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of 20 May 1992, ICSID Rev. – FILJ 1993, at 328 et seq; ICSID Rep. 1995, at 189 et seq.; 32 I.L.M. 933 (1993), at 933 et seq.; *Asian Agricultural Products Ltd v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Final Award of 27 June

never self-sufficient – in the early ‘90’s its revenues covered only 30% of its expenses. As Dr. Rais pointed out, before privatisation, it had routinely been looted by successive provincial governments, its operations had been deteriorating steadily, it could not provide services to cover the growth rate of the population, it operated with an average deficit of US\$17 million. In 1991, it owed US\$45 million to one contractor alone. DiPOS was financed with direct contributions from the provincial treasury. DiPOS had been unable to achieve a recovery rate of more than 55% on its invoices,<sup>411</sup> and at the time of privatisation its accounts receivable totalled 19 months of billing.<sup>412</sup> In Claimants’ own words, “the water and sewage system operated by DiPOS was not financially viable ...”<sup>413</sup>

8.3.7. It is also common ground (and it is hardly surprising in the circumstances) that CAA never made a profit whilst it had operational control of the concession. Indeed, although CAA had a positive book value of US\$22.5 million at the end of 1997, CAA’s book value at this time distorts the economic reality due to the fact that CAA was required to carry a US\$55 million asset of unpaid (and largely uncollectible) customer invoices.<sup>414</sup>

8.3.8. As previously noted, the absence of a history of demonstrated profitability does not absolutely preclude the use of DCF valuation methodology. But to overcome the hurdle of its absence, a claimant must lead convincing evidence of its ability

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1990, 4 ICSID Reports 246 (1990); *Wena Hotels Ltd. v. Arab Republic of Egypt* (Award) (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 I.L.M. 896 (2002).

<sup>411</sup> Rejoinder at ¶52; Lentini Supplemental Expert Report, 8 May 2006 (Exhibit 918).

<sup>412</sup> Case Study, Concession for the Potable Water and Sewerage Services in Tucumán, Argentine Republic, by Jorge Carlos Rais, María Ester Esquivel, Sergio Sour, Consultants (Exhibit 858).

<sup>413</sup> Claimants’ Memorial at ¶22.

<sup>414</sup> Claimants’ Post-Hearing Brief at ¶82 and Note 211.

to produce profits in the particular circumstances it faced. And here, we find Claimants' evidence deficient.<sup>415</sup>

8.3.9. In the present circumstances, more was required than Ms. Perrier's statement that the water concession business is considered to have a very low risk, given her forthright admission that she had no personal experience as to their rates of return or recovery.<sup>416</sup> The brief testimonial references made by Messrs. de Maud'huy and de Rochambeau to CGE's success with concessions in Chile, Mexico and Morocco are similarly insufficient.

8.3.10. A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation. This approach was not taken here.

8.3.11. In these circumstances, we conclude that Claimants' evidence of the value of the concession – in the sum of US\$300,532,000 – based on its lost profits analysis cannot be relied upon and need not be further analysed. We therefore turn to alternative methods of evaluating the concession.

8.3.12. As already noted, Claimants initially elected to rest their valuation case on lost profits. Until their closing argument and Post-Hearing Brief, Claimants did not

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<sup>415</sup> This deficiency relates not to CGE/Vivendi's expertise, which is evident, but to the evidentiary record required as described at 8.3.4.

advance or rely upon generally accepted alternative means of calculating fair market value, such as “book value” – the net value of an enterprise’s assets, “investment value” – the amount actually invested prior to the injurious acts, “replacement value” – the amount necessary to replace the investment prior to the injurious acts, or “liquidation value” – the amount a willing buyer would pay a willing seller for the investment in a liquidation process. These alternative approaches were addressed at Days 10 and 11 of the hearing on the merits.<sup>417</sup> In their Post-Hearing Brief, Claimants examined the alternative methods and pointed to the parts of the evidentiary record relevant to the determination of amounts invested.<sup>418</sup>

8.3.13. Of these alternatives, the “investment value” of the concession appears to offer the closest proxy, if only partial, for compensation sufficient to eliminate the consequences of the Province’s actions.

8.3.14. Respondent’s arguments in favour of “book” value are unacceptable for reasons explained at 8.3.7 above, and neither of the parties provided any evidence on “liquidation” or “replacement” value.

8.3.15. As to “investment value”, Respondent conceded in the event of finding of liability, that:

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<sup>416</sup> Transcript of the hearing on the merits, Day 10, pp. 2609-2610 (3 August 2006).

<sup>417</sup> Transcript of the hearing on the merits, Day 10, pp. 2623-2673 (3 August 2006); Transcript of the hearing on the merits, Day 11 (4 August 2006).

<sup>418</sup> In their Post-Hearing Brief, Claimants pointed to the unsuitability of the alternative methods, and, at the Tribunal’s request, pointed to the portions of the evidentiary record relevant to the calculation of amounts invested: Claimants’ Post-Hearing Brief at pp. 47-51.

*“Alternatively, the Claimants may seek to be put in the position in which they would have been had they never agreed to enter into the Concession Agreement: the return to them of their investment in the Concession.”*<sup>419</sup>

8.3.16. As foreshadowed above, the evidence of what Claimants invested in the concession is incomplete – it not having been put forward initially by Claimants as an alternative to its lost profits analysis. Nevertheless, there is useful evidence on the record and it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred.<sup>420</sup> In such cases, approximations are inevitable; the settling of damages is not an exact science.<sup>421</sup>

8.3.17. In ascertaining the amount of Claimants’ investments the Tribunal accepts that CAA was initially capitalised in the amount of US\$30 million.<sup>422</sup> We also accept that subsequently, CGE/Vivendi were required to invest in the concession to cover its operational deficits. Vivendi had paid in, by way of loan to CAA, an additional US\$21.5 million at the end of November 1997.<sup>423</sup> Vivendi continued to underwrite CAA’s ongoing losses thereafter and Mr. Hahn, CAA’s Administrative and Financial Director since September 1997 and Vice Chairman at the time of the hearing, testified that CAA’s accounts at the end of 2005 showed a debt owing from CAA to Vivendi of approximately US\$75 million. He

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<sup>419</sup> Counter-Memorial at ¶671.

<sup>420</sup> *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of 20 May 1992, ICSID Rev. – FILJ 1993, at 328 et seq.; ICSID Rep. 1995, at 189 et seq.; 32 I.L.M. 933 (1993), at 933 et seq.

<sup>421</sup> As to the tendency and appropriateness of international tribunals to approximate damages, see *American International Group, Inc. et al. v. The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran) (Case No. 2)* (Award No. 93-2-3), Award of 19 December 1983, at 109; and *Payne v. Iran (Case No. 335)* (Award No. 245-335-2), Award of 8 August 1986, 12 Iran-U.S. C.T.R. 3, at ¶¶35-37.

<sup>422</sup> Hahn Supplementary Affidavit, 14 February 2006 (Exhibit 788), at ¶¶20-21.

noted that Vivendi was continuing to finance CAA as of the date of the hearing, which indicated to us that CAA's debt to Vivendi at the date of the oral hearing almost certainly exceeded US\$75 million.<sup>424</sup> Neither Ms. Perrier's nor Mr. Hahn's testimony was contested or contradicted on these points.

8.3.18. Thus, based on the evidence in the record, which we find to be both credible and sufficient, we find that CGE/Vivendi and CAA's other shareholders contributed US\$30 million in equity capital to CAA and that CGE/Vivendi invested further sums of US\$75 million (by way of loans) to finance the operation of the concession until its management was taken over by ENHOSA on 7 October 1998, and thereafter in its efforts to mitigate its damages through its various attempts to collect on outstanding receivables.<sup>425</sup>

8.3.19. Having regard to the Province's violation of Articles 3 and 5 of the BIT, we fix the investment value of the concession at the date of expropriation, 27 August 1997, in the amount of US\$51 million (US\$30 million capital plus US\$21 million further debt investments). We also find that CGE/Vivendi invested by way of debt an additional US\$54 million in CAA after that date (US\$75 million less US\$21 million). Further, and absent evidence to the contrary, we find CAA currently to be of no or nominal value.

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<sup>423</sup> Perrier Report, 10 February 2006 (Exhibit 803), at p. 10.

<sup>424</sup> Testimony of Hahn, Transcript of the hearing on the merits, Day 5, p. 1322 (28 July 2006). Mr. Hahn's testimony is supported by Ms. Perrier's Expert Report in which she advised that Vivendi's shareholders account in CAA's books, reflecting its investment in CAA, had increased to US\$69 million at the end of August 1998, as a result of related losses from 30 November 1997 forward.

<sup>425</sup> Absent evidence of the amount of CGE shareholders account at 27 August 1997, we fix by estimation the amount of further investment at the date of expropriation at US\$21 million, based on the evidence that US\$21.5 million had been invested as at 27 November 1997.

8.3.20. In these circumstances, we calculate CAA’s investment damages to be US\$105 million (US\$51 million plus US\$54 million). As its 94.4% *de facto* shareholder, Vivendi is entitled to a 94.4% share of CAA’s damages. However, in order “to wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed” (the *Chorzów* principle),<sup>426</sup> it is necessary for any award of damages in this case to bear interest. This question is dealt with below in Section 9.

8.3.21. Claimants having jointly requested an Award for 100% of CAA’s damages. Payment of the damages awarded may be made either:

- (i) in totality to CAA, Vivendi being made whole through its participation in CAA, or
- (ii) in the proportion of 5.6% to CAA and 94.4% to Vivendi.

In any event, each dollar paid to either Claimant shall satisfy one dollar owed to the other Claimant.

#### **8.4. Additional Considerations**

8.4.1. While Claimants submit that the principle of full compensation of fair market value is applicable, Respondent contends that full compensation is not appropriate. In this regard, Respondent relied on the doctrine of abuse of rights, Respondent’s economic condition, and the fact that Respondent acted in the public interest.<sup>427</sup>

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<sup>426</sup> See the discussion above at 8.2.4.

<sup>427</sup> Counter-Memorial at ¶¶612-617.

8.4.2. In particular, in its challenge to Claimants' damages claim, Respondent points to the economic and social crisis that occurred in Argentina and to the events affecting Argentina's economy in the course of, in particular, 2001 and early 2002. During that period the economy of the whole country was subject to considerable change and adjustment. For example: (i) the peso was devalued in January 2002 and quickly depreciated to a quarter of its previous value, with an exchange rate of nearly four pesos to the US dollar; (ii) inflation rose to 41% in 2002; (iii) unemployment rose from 12.4% in 1998 to 38.3% in 2001 and 23.6% in 2002; (iv) the poverty rate reached 57.5% in 2002; (v) inflation-adjusted wages fell by 23.7% in 2002; and (vi) supermarket sales fell by 5% in 2001 and 26% in 2002.<sup>428</sup>

8.4.3. Having regard to the nature and time frame of Tucumán's breaches, the Tribunal does not consider it appropriate to reduce the award of full compensation to Claimants on any of these bases.

8.4.4. Respondent says that any award of damage should be expressed in pesos, arguing that all payments to be made under the Concession Agreement were to be in pesos. This contention in the pre-hearing pleadings was addressed particularly to Claimants' case for damages, based as it was on a lost profits analysis. However, it is not disputed that CGE/Vivendi's investments were made in US dollars and/or French francs, and that the peso has since 2002 been devalued and depreciated very significantly against the US dollar.

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<sup>428</sup> Counter-Memorial at ¶656.

8.4.5. In the *Lighthouses Arbitration*, the Permanent Court of Arbitration held that an injured party has the right to receive the equivalent at the date of the award of the loss suffered as the result of the illegal act and ought not to be prejudiced by the effects of a devaluation that takes place between the date of the wrongful act and the determination of the amount of compensation.<sup>429</sup> We agree with this principle and also note that it is frequently the practice of international tribunals to provide for payment in a convertible currency.<sup>430</sup> Accordingly, all sums awarded in and to be paid by reason of this Award are expressed in US dollars.

## **9. INTEREST**

### **9.1. Compound Interest Claimed**

9.1.1. Claimants seek compound interest at the rate of 9.7% on the damage amounts claimed in order to place them in the position they would have been had Respondent paid adequate compensation promptly upon the date of its expropriation of the Concession Agreement.

### **9.2. Tribunal's Conclusions on Interest**

9.2.1. Absent treaty terms or provisions in the governing law to the contrary, it is generally accepted that international tribunals may award interest to an injured claimant; indeed the liability to pay interest is now an accepted legal principle.

9.2.2. The provisions of Article 5(2) of the BIT reflect this, requiring as they do that the compensation to be paid by a state party for lawful expropriation "... bear

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<sup>429</sup> *The Lighthouses Arbitration (France v. Greece)* (1956), 12 R.I.A.A. 155; 23 I.L.R. 659.

<sup>430</sup> See the discussion in *McCullough & Company, Inc. v. Ministry of Post, Telegraph and Telephone, National Iranian Oil Company, Bank Markazi*, Award No. 225-89-3, Award of 22 April 1986, Iran-U.S. Cl. Trib., Yearbook Commercial Arbitration Volume XII (1987), pp. 316-331, 11 Iran-U.S. Cl. Trib. 3 (1986) at ¶107.

interest, computed at an appropriate rate, until the date of payment.” Other things being equal, it is just as, if not more appropriate for interest to be paid on compensation for a wrongful expropriation.

- 9.2.3. The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.<sup>431</sup>
- 9.2.4. To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule.<sup>432</sup>
- 9.2.5. This development is not surprising once it is recognised that compound interest is *not punitive* in nature. As the tribunal in *Santa Elena Case* pointed out, “It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to

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<sup>431</sup> *Evaluation of Damages in International Arbitrations*, Derains & Kreindler, Dossiers, ICC Publication No. 668 (2006) at 167.

<sup>432</sup> The Tribunal made a non-exhaustive review of previous investment arbitration cases and found seven awards granting compound interest and three granting simple interest. The awards granting compound interest include *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 40 I.L.M. 36 (2001); *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000); *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award of 13 November 2000; *Wena Hotels Ltd. v. Arab Republic of Egypt* (Award) (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 I.L.M. 896 (2002); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004; *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006; and *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (“The ADC Case”) (ICSID Case No. ARB/03/16), Award of 2 October 2006. The awards granting simple interest include *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award of 13 September 2001 (UNCITRAL); *Marvin Feldman v. The United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002; and *Occidental Exploration & Production Co. v. Republic of Ecuador* (LCIA Administered Case No. UN3467) (US/Ecuador BIT), Award of 1 July 2004. In a recent article published on the TDM (Transnational Dispute Management) website in 2006, Wilson, Cain and Gray, surveying ICSID arbitrator awards and costs, found that of the 14 decisions they reviewed, eight granted compound interest, two did not disclose the calculation method used and one did not grant interest: James Gray, Jason Cain, Wayne Wilson, (Alvarez & Marsal), “ICSID Arbitration Awards and Cost”,

ensure that the compensation awarded the Claimant is appropriate in the circumstances”.<sup>433</sup> The tribunal had noted that where the owner of property has lost the value of his asset but not been timely compensated, the amount of compensation that is later awarded “... should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”<sup>434</sup>

- 9.2.6. Reflecting this rationale, a number of international tribunals have recently expressed the view that compound interest should be available as a matter of course if economic reality requires such an award to place the claimant in the position it would have been in had it never been injured (*ie* had the wrongful act not taken place).<sup>435</sup>
- 9.2.7. Claimants contend that compound interest should be awarded at the rate of 9.7%, corresponding to the discount rate applied in Claimants’ DCF analysis and the quoted rate on the Argentine Treasury bond “Argentina Rep 17” on 27 November 1997. The Tribunal is not persuaded that Claimants would have earned 9.7%,

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*Transnational Dispute Management*, Vol. III (5) (December 2006), at <http://www.transnational-dispute-management.com>.

<sup>433</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000), at ¶104.

<sup>434</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 15 ICISD REV – FILJ 169 (2000), at ¶104.

<sup>435</sup> See *Pope & Talbot Inc. v. The Government of Canada*, Arbitration under Chapter 11 of the North American Free Trade Agreement, Award in Respect of Damages by Arbitral Tribunal of 31 May 2002, UNCITRAL (NAFTA), at ¶89; *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 I.L.M. 896 (2002), at ¶129; and *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004, at ¶251.

compounded, on their respective shares of damages awarded, had such sums been timely paid at the date of Argentina's expropriation of the concession.

9.2.8. Having regard to Claimants' business of investing in and operating water concessions, to the anticipated 11.7 % rate of return on investment reflected in the Concession Agreement (which the parties had agreed to be appropriate having regard to the nature of the business, the term and the risk involved) and the generally prevailing rates of interest since September 1997, the Tribunal concludes that a 6% interest rate represents a reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the Tucumán concession. The Tribunal is also satisfied on the factual record that it is appropriate in this case to provide for compounding of such interest in order adequately to compensate Claimants for the loss of use of their investment over most of the last decade.

## **10. COSTS**

### **10.1. Disputing Parties Claims for Costs**

10.1.1. Each of the parties sought an award of costs and legal fees with respect to these proceedings,<sup>436</sup> although, towards the end of the jurisdictional phase, Respondent's counsel withdrew its costs claim for that phase of the proceedings. Having done so, Respondent then argued that it would be inappropriate for the Tribunal to assess such costs to either party, given the "very delicate, very sensitive topics and issues on which there is no precedent or practical guidance as

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<sup>436</sup> Memorial at ¶409, Reply at ¶438, Counter-Memorial at ¶686, Rejoinder at ¶453.

to how the parties should perform and how the Tribunal should perform or act.<sup>437</sup>

- 10.1.2. In response to the Tribunal's request, Claimants submitted its costs claim for the jurisdictional phase on 31 August 2005 in the amount of US\$701,961.08, covering attorney's fees and other costs but excluding payments to ICSID. Claimants also sought the appropriate portion of payments it had made to ICSID and the US\$4,312.15 in transportation costs involved for the hearing on jurisdiction.
- 10.1.3. On 29 September 2006, following the oral hearing on substantive issues, disputing parties each submitted detailed claims for their costs of the substantive phase of the proceedings. Thereafter, on 6 October 2006, each commented on each other's claims.
- 10.1.4. For this phase, Claimants sought reimbursement of US\$6,343,585.78, including US\$364,973.00 on account of its payments to ICSID, and Respondent sought US\$1,151,119.35, including US\$355,000.00 on account of its payments to ICSID.
- 10.1.5. Thus, excluding payments made to ICSID, disputing parties total claims for costs in these proceedings are
- (i) Claimants - US\$6,680,533.86 (US\$701,961.08 + US\$6,343,585.78 - US\$364,973.00)
  - (ii) Respondents - US\$786,119.35 (US\$1,151,119.35 - US\$365,000.00)

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<sup>437</sup> Transcript from the Jurisdictional Proceedings, Vol. 2, at p.176 (17 August 2006).

## 10.2. Tribunal's Conclusion on Costs

- 10.2.1. When the Original Tribunal came to consider an award of costs for the prior proceedings it examined a number of the factors considered by the tribunal in *Robert Azinian et al. v. The United Mexican States*.<sup>438</sup> These included the “new and novel mechanism for the resolution of international investment disputes” under NAFTA and that the unsuccessful party had “presented their case in an efficient and professional manner”. It noted that: the prior proceedings “raised a set of novel and complex issues not previously addressed in international arbitral precedent relating to the interplay of a bilateral investment treaty, a Concession Contract with a forum-selection clause and the ICSID Convention”; the parties’ counsel had presented their arguments in an efficient and professional manner; and, the position of the parties had evolved in the course of the proceeding. Accordingly, it determined that each side should bear its own expenses for the proceedings, and should share equally the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre.<sup>439</sup>
- 10.2.2. After the first phase of the annulment proceedings, the *ad hoc* Committee also concluded that, due to the importance of the arguments raised by the parties, each party should bear its own expenses.<sup>440</sup> However, as regards Respondent’s subsequent Request for Supplementation and Rectification of its Decision Concerning the Annulment of the Award, the *ad hoc* Committee ordered Argentina to pay the Committee’s fees and expenses, as Respondent’s Requests

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<sup>438</sup> *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award of 1 November 1999.

<sup>439</sup> First Award, at ¶¶94-95.

were unfounded and inappropriate. In particular, the *ad hoc* Committee took issue with Respondent's attempts to re-argue substantive elements of the Committee's decision.<sup>441</sup>

10.2.3. In our earlier Decision on Jurisdiction, we noted that Respondent's objections were not only without merit, but four of the five had also been taken before both the Original Tribunal and the *ad hoc* Committee and that one of these objections had been raised, each time unsuccessfully, before numerous other tribunals before which Argentina had appeared. In addition, we noted that Respondent's fifth jurisdictional objection had been raised for the first time eight and a half years into the proceedings. We concluded that all of Respondent's objections were unfounded, and had been raised inappropriately and, in the case of four of the five, in an attempt to reargue elements of the earlier decisions. Nevertheless, we determined that all questions concerning costs and expenses of the Tribunal and the parties would be left for the present proceeding for determination.<sup>442</sup>

10.2.4. The Tribunal accepts that, at the time the prior proceedings were initiated, the arguments and issues then in the dispute were important, complex and relatively novel. They remained so in this second phase of the proceedings.

10.2.5. As regards disputing parties comparative success in their claims and defences, Claimants have succeeded substantially in both the jurisdictional and substantive phases of these proceedings. Moreover, Respondent has on a number of

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<sup>440</sup> Decision on Annulment, at ¶118.

<sup>441</sup> Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning the Annulment of the Award of 28 May 2003, at ¶43.

occasions sought to reargue jurisdictional issues that had previously been determined by the Tribunal, the Original Tribunal and the *ad hoc* Committee. In so doing, it unnecessarily extended and added considerably to the cost of these proceedings.

10.2.6. Given the background and history of the dispute, as well as all of the other circumstances of the case, the Tribunal concludes that it is appropriate that Claimants should receive reimbursement for the whole of their reasonable costs and counsel fees from Respondent, covering the jurisdictional phase of these proceedings which are hereby assessed at US\$701,961.08. As regards the substantive phase, the Tribunal decides that disputing parties shall bear their own costs and counsel fees. The Tribunal further decides that disputing parties shall bear equally the arbitrators' fees and expenses and the cost of the ICSID Secretariat, together with any related costs or charges regarding the use of the ICSID facilities.

## **11. THE TRIBUNAL'S OPERATIVE DECISION**

11.1. For the foregoing reasons the Tribunal unanimously **DECIDES**:

- (i) Vivendi and CAA are proper claimants in these proceedings.
- (ii) Respondent, the Argentine Republic, has acted in breach of Article 3 of the Treaty by failing to grant to Claimants fair and equitable treatment of their investments according to the principles of international law.
- (iii) Respondent, the Argentine Republic, has acted in breach of Article 5(1) of the Treaty by failing to provide protection and full security for Claimants' investments in accordance with the principles of fair and equitable treatment referred to in Article 3.

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<sup>442</sup> Decision on Jurisdiction, at ¶128.

- (iv) Respondent, the Argentine Republic, has acted in breach of Article 5(2) of the Treaty by adopting unlawful measures of expropriation of Claimants' investments.
- (v) Respondent, the Argentine Republic, shall pay compensation of US\$105,000,000.00 to Claimants as follows,
  - (a) to CAA, the sum of US\$105,000,000.00, or
  - (b) to Vivendi, the sum of US\$99,120,000.00, being 94.4% of US\$105,000,000.00 and to CAA, the sum of US\$5,880,000.00, being 5.6% of US\$105,000,000.00.
- (vi) Respondent, the Argentine Republic, shall also pay interest, compounded annually, at the rate of 6.00%,
  - (a) on the amount of US\$51,000,000.00 as from 28 August 1997 until the date of payment, and
  - (b) on the further amount of US\$54,000,000 as from 5 September 2002 until the date of payment.
- (vii) Respondent, the Argentine Republic, shall pay to Claimants the sum of US\$701,961.08, being their reasonable legal and other costs of the jurisdictional phase of these proceedings, such costs to bear simple interest at 6% from this date until payment.
- (viii) Claimants and Respondent shall bear equally the fees and expenses of the arbitrators and the costs of the Centre.
- (ix) All other claims shall be and are hereby dismissed.



Schedule A

**International Centre for Settlement of Investment Disputes**

1818 H Street, N.W., Washington, D.C. 20433 U.S.A.  
Telephone: (202) 458-1534 Faxes: (202) 522-2615 / (202) 522-2027  
Website: [www.worldbank.org/icsid](http://www.worldbank.org/icsid)

By Fax

15 September 2006

Compañía de Aguas del Aconquija S.A.  
and Vivendi Universal S.A.  
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and  
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Argentine Republic  
c/o Dr. Osvaldo César Guglielmino  
Procurador del Tesoro de la Nación Argentina  
Posadas 1641  
Buenos Aires,  
Argentina

Re: Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic  
(ICSID Case No. ARB/97/3)

Dear Sirs,

The President of the Tribunal has asked me to respond on behalf of the Tribunal to Claimants' letter of 23 August 2006 (producing for the first time certain financial records of Claimants) Respondent's letter of 31 August 2006 (setting out its position on the admission of new evidence at this time) and Claimant's letter of 1 September 2006 (replying to Respondents' position).

The Tribunal has carefully considered the positions of the parties with respect to Claimants' proposed introduction of new evidence – *i.e.* certain existing financial records of CAA and Vivendi that are not presently before the Tribunal. The Tribunal has reached the following conclusions:

1. The Tribunal has determined it will not accept the proffered evidence at this stage in the proceedings.
2. In the 1 July 2004 Agreement of the Parties on Certain Procedural Matters (the "Agreement of the Parties" – attached to the Minutes of the 7 July 2004 First Session of the Arbitral Tribunal), the parties agreed to include with their written submissions all evidence to be relied upon for their legal arguments, and to include with their second written submissions all evidence relied upon in response to or in rebuttal to the matters raised by the other party's first written submission. The Agreement of the Parties specifically requires that "[t]he Tribunal shall not receive any [testimony] or any other evidence that has not been introduced in writing, unless the Tribunal determines that exceptional circumstances exist." (emphasis added)
3. Respondent objects to the introduction of the proffered new evidence and the Tribunal has determined, for the reasons noted below, that no such exceptional circumstances exist in the present case.

4. During the hearing on the merits, the Tribunal denied a similar application by Respondent to introduce new evidence to which Claimants objected – *i.e.* public filings by CGE / Vivendi with the Securities and Exchange Commission of the United States (Day 1, Transcript, pages 174-5).
5. Also during the hearing on the merits, Claimants refused to accede to a request by Respondent to vary the Agreement of the Parties with respect to the admission of evidence. The Agreement of the Parties requires the Tribunal to disregard the testimony of any witness who did not appear at the hearing for examination and cross-examination. Argentina sought to vary or depart from this portion of the Agreement of the Parties. Claimants refused to consent to Argentina's request to vary the agreement and insisted upon its enforcement by the Tribunal. Claimants' counsel stated (Day 8, Transcript, page 2048):

*"So, it's been very clear in the agreement of parties that if a witness doesn't show up, his statement is to be stricken. That was modified by agreement of parties this morning in respect to Messrs. Paz and Rais. No good cause, no good explanation having been advanced, we think the witness statement should be stricken, and we do not believe a belated offer of videotaping substitutes in any adequate way to having the witness present here."*

6. In their 23 August 2006 letter, Claimants appear to suggest that, because of what Claimants describe as "... the Tribunal's methodological queries expressed for the first time at the hearing," they were somehow unable fully and fairly to present their case. In Claimants' 1 September 2006 letter, Claimants say that alternative damages calculations were never put "into play" by Respondent, but only became relevant because of the Tribunal's inquiries at the hearing.
7. A review of the submissions of the parties contradicts Claimants' suggestion. The Tribunal notes that Claimants' approach to damages was specifically put in issue by Respondent. Claimants rested their damages claims primarily on CAA's lost profits. In its Counter-Memorial, Respondent disputed the availability of a claim for lost profits and challenged the methodology upon which Claimants relied for its calculations and the basis and assumptions upon which Claimants based their claim.
8. The Tribunal notes the following examples, which are by no means exhaustive, of Respondent's challenges in its Counter-Memorial to Claimants' damages calculations and calculation methods:
  - Para. 17: *The Claimants' case should also be dismissed because the Claimants failed to prove recoverable damages. As a preliminary matter, in the event that the Tribunal finds that Claimants are entitled to damages, these should be limited to the damnum emergens, and only then on the condition that appropriate and reliable evidence of such loss is provided by the Claimants (which they have failed to present). Under no circumstances whatsoever are Claimants entitled to recover any lucrum cessans.* [emphasis added]
  - Para. 615: *Claims for lost profits have also failed where the amount of damages for lucrum cessans could be disproportionate to the nature, the extent, and the circumstances of the breach. Moreover,*

*they are normally doomed to fail where the injured party's lost profits do not correspond to the benefits that the breaching party gained by failing to perform. In such cases, justice may be served by requiring the respondent to pay the claimant reliance expenses but not his expected profits. [emphasis added]*

- Paras. 639-640: *The Claimants contend that they are entitled to recover damages for the value of the investments they have made, on an allegedly compensatory basis, in order that they might be restored to the position in which they would have been had they never participated in the Agreement. That approach is wholly at odds with the basis upon which the claim for loss of profit is advanced (that they should be put in the position in which they would have been had the Concession Agreement been fully performed.)*

*If the Claimants do not [typo in original] succeed in establishing any liability in these proceedings (which for all the reasons given above is denied), the Tribunal may, taking into account the points made above as to the likelihood that this investment would ever in reality have yielded a profit, conclude that it is appropriate to award the Claimants only the book value of the assets involved or the value of the investment made by the Claimants in the Concession. However, it cannot both award the costs of investment and the future profits lost. This is a blatant attempt at double recovery by the Claimants which must be dismissed. [emphasis added]*

- Paras. 669-671: *As is apparent from the foregoing, the Claimants seek to recover damages based in part on the calculation of the financial position in which they would have been had the Concession been performed over its full term (via the claims for alleged losses actually suffered in the period of the Concession Agreement and the DCF analysis of future profits), and in part on restitution of the level of investment made by them in the Concession prior to its termination (via their claim for restoration of the value of their investment in the Concession.*

*This is obvious double counting by the Claimants. Either they seek restitution, or they seek a contractual measure of damages to put them in the position they would have been in had the Contract been performed. They cannot recover on both bases since, had the Concession been performed, the Claimants' level of investment in it should have been taken into account in the calculation of its likely profits, and should have been be [typo in original] deducted from the profits to produce a true picture of the Claimants' position had the 30-year term been fulfilled.*

*Alternatively, the Claimants may seek to be put in the position in which they would have been had they never agreed to enter the Concession Agreement: the return to them of their investment in the Concession. Particularly in circumstances where Claimants' estimation of future profits is based on a series of premises and projections which cannot sensibly be applied across the 30-year term of the Agreement, in the Argentine Republics' [typo in original]*

submission, any award of damages by this Tribunal should take as its starting point the book value of the assets or the value of Claimants' actual investment, as the future earnings of the Claimants cannot be established with any reasonable certainty. [emphasis added]

9. In the Tribunal's view, a significant area of focus of Respondent's arguments on damages was Respondent's position that Claimants' approach to damages relied on inappropriate methodology. A few additional examples of Respondent's relevant arguments may be found in Respondent's Counter-Memorial at paras. 587, 592-611, 667-668 and sub-paras. 675(a) and (b).
10. Respondent also argued Claimants had failed to substantiate CGE/Vivendi's damages claims. At paragraph 684 of the Counter-Memorial, Respondent expressly states as follows:

*"The claim formulated by the Claimants is premised entirely upon the assumption that the losses are those of CAA. No attempt has been made by the Claimants to identify the losses of CGE as a shareholder."*

11. Claimants were never prevented from a full and fair presentation of their case. It was always open to Claimants to assert alternative bases for their damages, e.g. claims based on book value of the assets or the value of the investments actually made by Claimants. Claimants had the opportunity in their Reply to introduce evidence in support of alternative approaches to damages, including those noted by Respondent. Claimants declined to do so, preferring to rely on their claims based on lost profits.
12. The record of the proceedings does not support Claimants' contention that due process requires that they be afforded adequate opportunity to respond to the Tribunal's requests, or that the evidence now offered is required to respond to the Tribunal's inquiries. The introduction of new evidence is not necessary to respond to the Tribunal's inquiries. The Tribunal asked Claimants to direct it to the portions of the *existing record* that were relevant to the alternative approaches to damages which had been noted by Respondent. On Day 11 of the hearing on the merits, in response to a request by Claimants' counsel, the Tribunal clarified its queries as follows (beginning at page 2960):

*PRESIDENT ROWLEY: Yes, in the sense that I can help you understand what I was saying, if a claim is asserted by Vivendi for its wasted investment, it can only be asserted based on the evidence in these proceedings, and so we would need to have brought to our attention the evidence that is in these proceedings. That's what I mean. It was not an invitation to seek to introduce new evidence at this stage of the matter.*

*MR. PRICE: Thank you. You have clarified it.*

13. The proffered evidence is not necessary to respond to these inquiries, nor is it even responsive to these inquiries. According to Claimants' description, the offered evidence is clearly new evidence in the sense that although the evidence was available to Claimants, Claimants elected not to make it part of the record at the appropriate stage of these proceedings.

14. The Tribunal also notes that on Day 11 of the hearing on the merits, Claimants' counsel confirmed Claimants' understanding that no new evidentiary submissions would be accepted. Apparently further to Claimants' concern that Respondent might try to submit new evidence to respond to the Tribunal's questions with regard to certain Tucumán entities, the following exchange occurred:

*MR. PRICE: Thank you, Mr. President. I just wanted to clarify and confirm and make sure that both parties shared the understanding that the Tribunal will not entertain new evidence at this stage about what any of these Tucuman governmental or nongovernmental bodies did in the relevant period or subsequently.*

*PRESIDENT ROWLEY: That is correct. That would be new evidence of fact, and the fact-finding stage is complete.*

15. Claimants clearly understood that no new evidentiary submissions would be entertained by the Tribunal at this stage, and sought reassurance from the Tribunal that this understanding would be confirmed and enforced by the Tribunal against Respondent.
16. For all of these reasons, the Tribunal is not prepared to depart at this stage of the proceedings, from the Agreement of the Parties and the understanding of the parties to permit Claimants now to introduce and rely upon evidence that was not properly made part of the record in accordance with the agreed procedures.
17. The Tribunal's ruling is made without prejudice to the Tribunal's jurisdiction under Article 43(a) of the ICSID Convention, should the Tribunal later determine the exercise of its discretion under that provision to be appropriate.

Yours sincerely



Claudia Frutos-Peterson  
Secretary of the Tribunal

cc:  
Members of the Tribunal

H.E. Ambassador José Octavio Bordón  
Embassy of Argentina,  
Washington, DC.

