

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

Compañía de Aguas del Aconquija, S.A.
&
Compagnie Générale des Eaux, Claimants,

v.

Argentine Republic, Respondent.

(Case No. ARB/97/3)

AWARD

1. Members of the Tribunal

Judge Francisco Rezek, President
Judge Thomas Buergenthal
Mr. Peter D. Trooboff

2. Secretary of the Tribunal

Alejandro A. Escobar

Representing the Claimants

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A. *Introduction and Summary*

This case arises from a complex and often bitter dispute associated with a 1995 Concession Contract that a French company, Compagnie Générale des Eaux, and its Argentine affiliate, Compañía de Aguas del Aconquija, S.A. (collectively referred to as “Claimants” or “CGE”), made with Tucumán, a province of Argentina, and with the investment in Tucumán resulting from that agreement. The Republic of Argentina (“Argentine Republic”) was not a party to the Concession Contract or to the negotiations that led to its conclusion.

The Argentine Republic is a party to a bilateral investment treaty of July 1991 with the Republic of France, the Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (hereinafter, “the Argentine-French BIT” or “BIT”)¹. Both the Argentine Republic and France are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), which entered into force for both states prior to signature of the Concession Contract by CGE and Tucumán.²

The Concession Contract itself makes no reference to either the BIT or ICSID Convention or to the remedies that are available to a French foreign investor in Argentina under these treaties. Articles 3 and 5 of the BIT provide that each of the Contracting Parties shall grant “fair and equitable treatment according to the principles of international law to investments made by investors of the other Party,” that investments shall enjoy “protection and full security in accordance with the principle of fair and equitable treatment,” and that Contracting Parties shall not adopt expropriatory or nationalizing measures except for a public purpose, without discrimination and upon payment of “prompt and adequate compensation.”³ Article 8 of the Argentine-French BIT provides that, if an investment dispute arises between one Contracting Party and an investor from another Contracting Party and that dispute cannot be resolved within six months through amicable consultations, then the investor may submit the dispute either to the national jurisdictions of the Contracting Party involved in the dispute or, at the investor’s option, to arbitration under the ICSID Convention or to an ad hoc tribunal pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.⁴

¹ Signed on July 3, 1991, approved Argentine Law No. 24.100, Boletín Oficial, July 14, 1992.

² Opened for signature on March 18, 1965, entered into force on October 14, 1966, *reprinted in* ICSID Basic Documents, Doc. ICSID/15 (available at <<http://www.worldbank.org/icsid/basicdoc>>); entered into force for Argentina, November 18, 1994; entered into force for France, September 20, 1967.

³ The English translation of the text of Articles 3 and 5 is set forth in Appendix 1 to this Award.

⁴ The English translation of the text of Article 8 is set forth in Appendix 1 to this Award.

Article 16.4 of the Concession Contract between CGE and Tucumán provided for the resolution of contract disputes, concerning both its interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán.⁵ While this case presents many preliminary and other related questions, the core issue before this Tribunal concerns the legal significance that is to be attributed to this forum-selection provision of the Concession Contract in light of the remedial provisions in the BIT and the ICSID Convention. This question bears both on the jurisdiction of the Centre and the competence of this Tribunal under the ICSID Convention and on the legal analysis of the merits of the dispute between CGE and the Argentine Republic.

When CGE invoked the jurisdiction of ICSID in reliance on the terms of the BIT and the ICSID Convention and sought damages of over U.S. \$300 million, the Argentine Republic responded that it had not consented to submission of the dispute for resolution under the ICSID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided that it would not be able to resolve the jurisdictional question without a full presentation of the factual issues relating to the merits. Accordingly, the Tribunal, after receiving memorials from the parties and hearing oral argument, joined the jurisdictional issue to the merits.

For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.

With respect to the merits, CGE has not alleged that the Republic itself affirmatively interfered with its investment in Tucumán. Rather, CGE alleges that the Argentine Republic failed to prevent the Province of Tucumán from taking certain action with respect to the Concession Contract that, Claimants allege, consequently infringed their rights under the BIT. CGE also alleges that the Argentine Republic failed to cause the Province to take certain action with respect to the Concession Contract, thereby also infringing Claimants' rights under the BIT. In addition, CGE maintains that international law attributes to the Argentine Republic actions of the Province and its officials and alleges that those actions constitute breaches of the Argentine Republic's obligations under the BIT.

While CGE challenged actions of Tucumán in administrative agencies of the Province, CGE concedes that it never sought, pursuant to Article 16.4, to challenge any of Tucumán's actions in the contentious administrative courts of Tucumán as violations of the terms of the Concession Contract. CGE maintains that any such challenge would have

⁵ The text of Article 16.4 of the Concession Contract in Spanish and as translated by the parties into English is set forth in Appendix 1 to this Award.

constituted a waiver of its rights to recourse to ICSID under the BIT and the ICSID Convention.

The Tribunal does not accept CGE's position that claims by CGE in the contentious administrative courts of Tucumán for breach of the terms of the Concession Contract, as Article 16.4 requires, would have constituted a waiver of Claimants' rights under the BIT and the ICSID Convention. Further, as the Tribunal demonstrates below, 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. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. 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.

CGE presented certain additional claims regarding allegedly sovereign actions of Tucumán that Claimants maintained were unrelated to the Concession Contract. CGE asserted that these actions of the Province gave rise to international responsibility attributable to the Argentine Republic under the BIT as interpreted by applicable international law. Furthermore, CGE alleged that the Argentine Republic was also liable for its failures to perform certain obligations under the BIT that Claimants submitted gave rise to international responsibility independent of the performance of Tucumán under the Concession Contract. The Tribunal finds that many of these other claims arose, in fact, from actions of the Province relating to the merits of disputes under the Concession Contract and, for that reason, were subject to initial resolution in the contentious administrative tribunals of Tucumán under Article 16.4. To the extent such claims are the result of actions of the Argentine Republic or of the Province that are arguably independent of the Concession Contract, the Tribunal holds that the evidence presented in these proceedings did not establish the grounds for finding violation by the Argentine Republic of its legal obligations under the BIT either through its own acts or omission or through attribution to it of acts of the Tucumán authorities.

B. *Procedural History*

1. On December 26, 1996, the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" or "the Centre") received a request for the institution of arbitration proceedings (hereinafter "the request") under the ICSID Convention against the Argentine Republic, submitted on behalf of Compagnie Générale des Eaux, a company established under the laws of France, and Compañía de Aguas del Aconquija, S.A., a company established under the laws of Tucumán, Argentina.

2. The request invoked the provisions of the Argentine-French BIT.
3. By letter of January 3, 1997, the Centre acknowledged receipt of the request and asked the Claimants to furnish information concerning authorization to submit the request on behalf of Compañía de Aguas del Aconquija, S.A. The Claimants supplied such information by letter of January 14, 1997. On January 15, 1997, the Centre accordingly transmitted copies of the request and of its accompanying documentation to the Argentine Republic. By letter of January 21, 1997, the Centre transmitted to the Argentine Republic additional documentation received from the Claimants concerning such authorization.
4. By letters of January 29 and February 3, 1997, the Centre asked the Claimants to provide specific information concerning certain administrative steps that were mentioned in the request and that were said to have been taken in Argentina by Compañía de Aguas del Aconquija, S.A. The Claimants responded by letters of February 3 and 14, 1997, respectively, which were transmitted to the Argentine Republic by the Centre. In such letters the Claimants provided an explanation of the meaning of the terms “administrative recourse” and “administrative action” used in the request, and of their relationship to the conditions for submitting a dispute to arbitration under the Argentine-French Agreement.
5. On February 19, 1997, the Acting Secretary-General of ICSID registered the request and, on the same day, notified the parties of the registration, inviting them to proceed to constitute an arbitral tribunal under the ICSID Convention as soon as possible. In accordance with Article 36 of the ICSID Convention, such registration was required because, on the basis of the information contained in the request, as supplemented, the dispute was not manifestly outside the jurisdiction of the Centre.
6. By letter of March 3, 1997, the Claimants informed the Centre that the parties had agreed to suspend for 30 days all time limits applicable to the proceeding. By letters of April 8 and May 7, 1997, the Claimants informed the Centre that the parties had agreed to suspend such time limits for a further 20 days, and then a further 60 days, respectively.
7. By a letter of September 16, 1997, the Claimants informed the Secretary-General of ICSID that they were choosing the formula set forth in Article 37(2)(b) of the ICSID Convention regarding the number of arbitrators and the method of their appointment. On that same date, the Centre accordingly informed the parties that the Arbitral Tribunal was to consist of three members, one appointed by each party and the third arbitrator, who was to be the President of the Tribunal, to be appointed by agreement of the parties.
8. On October 1, 1997, the Claimants appointed as arbitrator Mr. Peter D. Trooboff, a United States national. On October 17, 1997, the Argentine

Republic not having named an arbitrator, the Claimants requested the Chairman of ICSID's Administrative Council to appoint, under Article 38 of the ICSID Convention, the arbitrators not yet appointed. By a letter of that same date, the Centre explained to the parties its normal consultation procedures for making such appointments. The Centre accordingly wrote to the parties on October 20, November 6 and November 14, 1997, in regard to the recommendations that the Secretary-General intended to make to the Chairman of its Administrative Council concerning such appointments. Having received no objection from either party, the Chairman of the Administrative Council designated Judge Francisco Rezek, a national of Brazil, and Judge Thomas Buergenthal, a United States national, as arbitrators in this proceeding, and designated Judge Rezek as the President of the Arbitral Tribunal. The Centre informed the parties of this designation by letter of November 14, 1997.

9. By letter to the parties of December 1, 1997, the Secretary-General of ICSID informed the parties that, having received from each arbitrator the acceptance of his appointment, the Arbitral Tribunal (hereinafter "the Tribunal") was deemed to have been constituted, and the proceeding to have begun, on that date, in accordance with Arbitration Rule 6. Mr. Alejandro A. Escobar, Senior Counsel, ICSID, was designated to serve as Secretary of the Tribunal.
10. On December 11, 1997, the Secretary of the Tribunal first wrote to the parties to inform them of the Tribunal's wish to hold its first session with them in Paris on January 15, 1998. By letter of January 8, 1998, the Argentine Republic communicated with ICSID for the first time in this proceeding and raised objections to jurisdiction, besides requesting the postponement of the first session of the Tribunal. The Argentine Republic also urged that all sessions of the Tribunal should be held at the seat of the Centre in Washington, D.C. After receiving the Claimants' views, the Tribunal decided to postpone, exceptionally, its first session, and proposed to hold such session with the parties in Washington, D.C. on February 6, 1998. Under Arbitration Rule 13(1), the Tribunal was to hold its first session within 60 days after its constitution, that is, by January 30, 1998, or such other period as the parties may agree. There was no agreement between the parties, however, for holding the session on February 6, 1998.
11. In these circumstances, and upon notice to the parties, the Tribunal held its first session by telephone conference call through the Secretariat on January 20, 1998. Among the matters considered at its first session, the Tribunal noted that it had been duly established under the provisions of the ICSID Convention. In addition, the Tribunal determined dates for holding a session with the parties. Copies of the minutes of such session, prepared by the Secretary and approved by the Tribunal, were distributed to the parties

together with copies of each of the Tribunal members' declaration made under Arbitration Rule 6.

12. On January 14, 1998, counsel for the Argentine Republic submitted a memorandum to the Secretary-General setting forth the grounds for finding that the dispute was manifestly not within the jurisdiction of the Centre. Copies of that memorandum were distributed to the members of the Tribunal and to the Claimants under cover of the Secretariat's letter of January 15, 1998. On January 23, 1998, counsel for the Claimants submitted a letter to the Secretary-General setting forth their arguments for finding that the request for arbitration was properly registered and contending that any objection to jurisdiction was for the Tribunal, and not the Secretary-General, to decide.
13. At the request of counsel for the Argentine Republic, the Secretary-General of the Centre met at his offices on January 27, 1998, with counsel for the Argentine Republic and with counsel for the Claimants. At that meeting, the Secretary-General informed the parties that he had carefully considered the arguments raised in the Argentine Republic's memorandum of January 14, 1998, and in the Claimants' letter of January 23, 1998, before registering the request for arbitration. On that basis, and in view of the provisions of the ICSID Convention, the Secretary-General reiterated to the parties that the request for arbitration was properly registered. The Secretary-General added that the registration of a request for arbitration does not prejudice in any manner the question of whether the dispute is or is not within the jurisdiction of the Centre or otherwise within the competence of the Tribunal established for the case. The foregoing points were confirmed in the Secretary-General's letter to the parties of January 27, 1998.
14. On February 18, 1998, the Tribunal met with the parties at the seat of the Centre to discuss procedural matters not addressed during the Tribunal's first session, in particular procedural matters concerning the Argentine Republic's objections to jurisdiction. It was agreed at that session that the parties would file simultaneous observations on the objections of the Argentine Republic to jurisdiction, to be followed by filing simultaneously of further observations and a hearing. The parties also agreed that their memorials would be in English with exhibits presented in their original language, if in English, French or Spanish. The proceedings on the merits were in the interim to remain suspended, in accordance with Arbitration Rule 41(3).

15. The Claimants were represented in the proceeding by the following counsel:

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The Respondent was represented in the proceeding by the following counsel:

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Ms. Nancy L. Perkins and
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16. On April 20, 1998, the parties filed their observations on the Argentine Republic's objections to jurisdiction. On May 11, 1998, the parties filed their further observations on such objections. On May 26 and 27, 1998, the Tribunal held a hearing at the seat of the Centre to receive the parties' oral arguments on the issue of jurisdiction.
17. On July 2, 1998, the Tribunal issued an order joining the Argentine Republic's objections to jurisdiction to the consideration of the merits of the dispute. The Tribunal issued on July 23, 1998, an order fixing the schedule for the filing of the parties' memorials and evidence in the next phase of the proceeding.

18. On November 2, 1998, the Claimants filed their memorial on jurisdiction and on the merits with supporting witness affidavits. On February 1, 1999, the Respondent filed its counter-memorial on the merits and jurisdiction with supporting witness affidavits.
19. On February 4, 1999, the Tribunal issued an order proposing to the parties three sets of dates for holding a hearing on jurisdiction and on the merits, and a date for holding a pre-hearing session to discuss procedures for the hearing, including those for the presentation of evidence. In addition, the Tribunal requested each party to submit, by April 19, 1999, a pre-hearing memorandum on certain issues identified in the order.
20. On April 25, 1999, as agreed, the Tribunal held a pre-hearing session with the parties at the seat of the Centre. On April 27, 1999, the Tribunal issued its fourth order, concerning the presentation of evidence at the hearing and, in particular, the allocation of time for each party to sponsor the written testimony of its witnesses and for the opposing party to cross-examine the witnesses. Based upon the parties' agreement set forth in their joint pre-hearing memorandum of April 22, 1999, the fourth order of the Tribunal confirmed that, apart from the witness testimony to be presented at the hearing, the evidentiary record was closed; that the parties had reported that they could not provide a stipulation of facts that would meaningfully assist the Tribunal; and that each party was to submit a post-hearing memorial within 30 days from the close of the August 1999 hearing. In addition, the Tribunal in its fourth order permitted the Claimants to present at the hearing the testimony of an expert on water quality even though his affidavit had not been presented with the memorial and reply of Claimants. The Tribunal also determined the time allocation for sponsoring the testimony of this expert and for his cross-examination.
21. The hearing on jurisdiction and the merits was held at the seat of the Centre from August 11 through August 13, 1999. At the hearing, the Tribunal received the testimony of the following witnesses presented by the Claimants: Mr. Francois de Rochambeau, Mr. Christian Lefaix, Mr. Charles-Louis de Maud'Huy, Mr. José Manuel García González and Mr. Oldrich Fischmeister. Also at the hearing, the Tribunal received the testimony of the following witnesses presented by the Respondent: Ms. María Gilda Pedicone de Valls, Mr. Daniel Esteban Arancibia and Mr. Jorge Rais. Copies of the audio recordings and of the verbatim transcripts made of the hearing were distributed by the Secretariat. The parties subsequently agreed on some adjustments to those transcripts, particularly to the English transcription of testimony given orally in Spanish.
22. On August 25, 1999, the Tribunal directed the parties simultaneously to file post-hearing memorials by September 30, 1999. The Tribunal also prepared a

list of questions on jurisdiction and liability that it asked each party to address in its post-hearing memorial. At the same time, the Tribunal announced that it would entertain a request by either party to permit the parties simultaneously to submit brief rejoinders to the post-hearing memorials. By a joint letter of September 22, 1999, the parties requested to be permitted to submit such rejoinders by October 12, 1999. The Tribunal granted that permission and the parties' respective post-hearing memorials and rejoinders thereto were filed on the dates agreed upon.

23. In its order of April 27, 1999, the Tribunal decided that the hearing in August 1999 would be devoted only to the issues of jurisdiction and liability, and that it would, if necessary, address questions relating to damages at a later stage of the proceeding. With its holding in this award, under which no further hearing on damages is necessary, the Tribunal hereby determines that the presentation of the case by the parties is completed and declares that, pursuant to ICSID Arbitration Rule 38, the proceeding is closed.

C. *Facts and Legal Positions of the Parties*

24. 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.⁶
25. The dispute from which the claims in this proceeding arise relates to a Concession Contract that CAA entered into on May 18, 1995 (the "Concession Contract"), with the Province of Tucumán ("Tucumán"), one of the 23

⁶ At the time of the Concession Contract, CGE held 36 percent of the equity capital of CAA; a Spanish company, Dragados y Construcciones Argentina S.A. (Dycasa), and an Argentine company, Benito Roggio e Hijos S.A. (Roggio), each held 27 percent of the equity capital of CAA. In June 1996, CGE acquired ownership of a total of 68.33 percent of the total equity capital of CAA and acquired beneficial ownership of an additional 16.67 percent of the equity capital of CAA. (Cls. Obs. Jur. at 22-23.) 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 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 (Cls. Reply at 90-91.) Further, Claimants argue that the French company CGE controlled CAA from the time of the takeover of the Tucumán water and sewage concession under the Concession Contract and maintain that it is sufficient for satisfying the test under Article 25(2)(b). 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. Accordingly, the Award uses the terms "CGE" and "Claimants" when referring to CGE and CAA collectively in their capacity as operators of the water and sewage concession.

provinces of the Argentine Republic. The Concession Contract grew out of a 1993 decision by the government of Tucumán to privatize its water and sewage facilities that were being operated by a provincial authority. The signature of the Concession Contract was the culmination of a two-year pre-qualification and lengthy negotiation process with CGE that the provincial authorities of Tucumán conducted with the assistance of its professional advisers. (Cls. Mem. at 15-24.) The record in these proceedings does not indicate that the Argentine Republic played any role with respect to the negotiation and conclusion of the Concession Contract or with respect to anticipated performance by CGE and Tucumán of their respective obligations under the Concession Contract.

26. The 111-page, single-spaced Concession Contract, consisting of 16 articles plus 25 lengthy appendices, included detailed provisions regarding the service that CGE would provide in operating the water and sewage system of Tucumán (Chapter 4), the tariffs that CGE would charge (Chapter 12), and the investments that CGE would make in the system for its improvement and expansion (Chapter 11). The Concession Contract makes no reference to the remedies available to CGE under the BIT, which had entered into force nearly three years before the Concession Contract was signed in May 1995. Nor did the Concession Contract refer to potential remedies under the ICSID Convention which had become effective for the Argentine Republic on the same day (Nov. 18, 1994) that the Tucumán Legislature approved the actions of the Pre-Award Commission and the Commission recommended that the concession be awarded to the CGE Consortium. (Cls. Mem. at 22.)
27. Article 16.4 of the Concession Contract provides as follows:

For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.⁷
28. Pursuant to the Concession Contract, CGE assumed responsibility for the operation of the water and sewage system of Tucumán on July 22, 1995. It is undisputed that there were serious technical and commercial deficiencies in the structure and operation of the Tucumán water and sewer system at the time of the CGE takeover. The principal problems included severe operational

⁷ The original reads as follows in Spanish:

A los efectos de la interpretación y aplicación de este Contrato las partes se someten a la jurisdicción exclusiva de los Tribunales en lo Contencioso Administrativo de la Provincia de Tucumán.

difficulties resulting from the inadequate and antiquated infrastructure, deferred maintenance, tariffs that inadequately reflected the cost of operations and the required provision for capital expenditures, and failures in collection from Tucumán users, both private and commercial, of a significant part of the tariffs actually imposed.

29. From an early point in the CGE's performance under the Concession Contract, disputes arose between CGE and the authorities of Tucumán. These disputes became the subject of extensive publicity and controversy involving the parties to the Concession Contract and ultimately led to active involvement of the governments of France and Argentina in attempts to resolve the issues that had arisen.
30. As for the facts and circumstances giving rise to these disputes, CGE contended that "from the very beginnings of the Concession, it became apparent that instead of supporting the Concession, various branches of the Provincial Government sought to destroy the Concession." (Cls. Prop. Findings at 34.) Claimants maintain that commencing shortly after the takeover of the project in July 1995 and continuing to the end of its concession performance, CGE was subjected to a "steady stream of decrees, resolutions, laws, and legal opinions which were designed to undermine the operation of the concession and either drive CAA from the Province or force it to renegotiate the Agreement." (Cls. Mem. at 106.) Further, these acts of the Tucumán authorities were, Claimants submit, part of a "concerted public attack against CAA and the Concession Agreement by [Tucumán] government authorities, which included a series of inflammatory statements and other acts encouraging customers not to pay their bills." (*Id.*) Claimants allege that the government of Tucumán was generally seeking to interfere with CGE's performance and exercise of its rights under the Concession Contract.
31. Claimants further allege that from the inception of the Concession Contract, CGE was "attacked and vilified" by officials in all branches of the government of Tucumán. (Cls. Prop. Findings at 30-33.) Claimants also allege that such actions continued throughout the effectiveness of the Concession Contract and were intended to and did undermine CGE's performance of the Concession Contract. Further, Claimants allege that these asserted attacks and this vilification occurred because "the Concession threatened to disrupt vested economic and political interests in the Province and it represented an opportunity for elements of the Provincial Government to curry favor with the public." (*Id.* at 44.)
32. The Argentine Republic contests these allegations regarding the substance and reasons for actions of officials of Tucumán and submits that the actions of the Tucumán authorities were the result of alleged deficiencies by CGE in its performance under the Concession Contract. These failures, according to the

Argentine Republic, affected the delivery of water and sewage services to the areas of Tucumán that were covered by the Concession Contract. The specifics of the disputes concerned such issues under the Concession Contract as the method for measuring water consumption, the level of tariffs to customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of CGE to pass-through to customers certain taxes and the quality of the water delivered. Further, the Argentine Republic contends, the actions of the provincial authorities in response to these alleged failures in performance were not directed, encouraged or condoned by the Argentine Republic.

33. In the record of these proceedings, the earliest reference to officials of the Argentine Republic taking any action with respect to the Concession Contract between CGE and Tucumán occurred in February 1996, when the Argentine government acted through the Ministries of Economy and Interior and the Chief of Cabinet to prevent rescission of the Concession Contract by Tucumán (Cls. Mem. at 39.) See also Statement of President Menem in Paris on February 26, 1996, concerning the assistance by the Argentine government “to find a solution to these problems” that had arisen between CGE and the Province (Cls. Ex. #26.)
34. On March 5, 1996, CGE notified the Argentine Republic of the pending negotiations with Tucumán regarding the terms of the Concession Contract and, in particular, of the threat of the Governor of the province to rescind the agreement and his demand for redefinition of the tariff schedule. (Cls. Ex. #27)(letter from CGE and Dycasa to the Argentine Minister of Foreign Affairs.) In that letter CGE stated that its purpose was “keeping . . . [the Argentine Republic] informed regarding the evolution of the negotiations that are designed to overcome the inconveniences that have arisen regarding the Concession Contract.” The letter also stated that “in the event that a satisfactory result is not achieved” in the negotiations with Tucumán, CGE would “proceed to present the eventual controversy” under the BIT.⁸ (*Id.*)
35. On or about May 2, 1996, several months after negotiations between CGE and Tucumán had been under way, the Argentine Republic and Tucumán entered into “an agreement pursuant to which the National Government would provide assistance and expertise for the successful renegotiation of the Concession Agreement.” (Cls. Prop. Findings at 51 (citing Cl. Ex. #29)). It is undisputed that officials of the Argentine Republic were involved with varying degrees of

⁸ The letter of March 5, 1996, also referred to the bilateral investment treaty between Spain and the Argentine Republic in view of the involvement, as noted above, of a Spanish company in the original CGE Consortium.

intensity from these initial initiatives in early 1996 until the turnover in 1998 of the water and sewage concession to an agency of the Argentine Republic. This Argentine governmental involvement concerned the efforts by CGE and Tucumán to renegotiate the Concession Contract. It related to a broad range of technical, political and legal aspects of that renegotiation.

36. In the end, the Claimants and Tucumán did not succeed in concluding a renegotiated Concession Contract that was acceptable to both parties. In particular, lengthy negotiations between CGE and Tucumán culminated in a Framework Agreement in 1997 that was rejected by the Tucumán legislature. Further, CGE and Tucumán negotiated revisions in the Concession Contract that culminated in a text approved by the Governor of Tucumán in April 1997. However, before submitting the implementing legislation to the Tucumán legislature, the Governor, Claimants argue, altered in significant respects the business terms of the text without consultation with CGE. CGE refused to sign the revised Concession Agreement, as passed by the Tucumán legislature. Further negotiations ensued, including further involvement in these exchanges by officials of the Argentine Republic. The parties vigorously disagree over the economic significance of any changes by the Governor or the Tucumán legislature to the revisions in the Concession Contract that were negotiated in April 1997. They also dispute whether, by virtue of subsequent negotiations, the Tucumán legislature was ready by August 1997, as alleged by Respondent, to approve a revised Concession Contract that would have been acceptable to all concerned parties.
37. On August 27, 1997, CGE notified the Provincial Governor of Tucumán that CGE was rescinding the Concession Contract pursuant to Section 15.9.5. because of the alleged default of Tucumán.
38. On September 27, 1997, Tucumán rejected the CGE notice of rescission and terminated the Concession Contract, alleging a default in performance by CGE. In addition, relying on Section 15.11 of the Concession Contract, Tucumán required CGE to continue providing water and sewage services for a period not to exceed 18 months or until a successor operator could be found. Although CGE strongly contested this Tucumán position, it continued for ten months to operate the water and sewage system.
39. On October 17, 1998, an agency of the Republic of Argentina assumed responsibility for the operation of the water and sewage system of Tucumán. (Cls. Prop. Findings at 89 and 94.)

D. *Jurisdiction*

40. The Claimants submit that this Tribunal has jurisdiction on the basis of Article 25 of the ICSID Convention and Article 8 of the Argentine-French BIT. The latter provides that in the event that a dispute between an investor of one

Contracting Party and the other Contracting Party is not resolved within six months, then the investor may at its discretion seek relief either in the courts of the Contracting State with which the dispute exists or in an international arbitral tribunal established either under the ICSID Convention, if each State Party has adhered to that Convention, or *ad hoc* pursuant to the Rules of the United Nations Commission on International Trade Law.⁹

41. The Argentine Republic responds that the Tribunal lacks jurisdiction because these provisions upon which Claimants rely provide for consent to jurisdiction only if there is a dispute between the Claimants and the Argentine Republic. Respondent argues that the only dispute presented by the Claimants arises under and relates exclusively to a Concession Contract to which the Argentine Republic was not a party. The Argentine Republic also takes the position that, absent its consent and designation of Tucumán, paragraphs (1) and (3) of Article 25 of the ICSID Convention preclude Claimants from asserting against the Argentine Republic a claim that is based on actions of Tucumán. Finally, Respondent submits that the only claims presented by Claimants relate to rights and obligations of the parties under Concession Contract and that, accordingly, Article 16.4 of the Concession Contract requires that Claimants submit those claims to the contentious administrative tribunals of Tucumán. The Argentine Republic denies that its national governmental authorities engaged in any conduct that may serve as the basis for a claim under the BIT. It also denies that, for jurisdictional purposes, the actions of the Province may be attributed to the national government.
42. Claimants answer that, notwithstanding the terms of Article 16.4 of the Concession Contract, they are not obligated by the BIT to pursue a domestic judicial remedy prior to bringing a treaty claim against the Argentine Republic. Claimants argue that had if they had pursued any domestic legal remedy in the Argentine courts, whether against the Argentine Republic or the Province of Tucumán, they would have been held to have made the choice presented under Article 8 of the BIT and now be faced with the argument by the Respondent that Claimants had waived their right to seek arbitration under the ICSID Convention. (The parties referred to such a waiver as taking the “fork in the road” under Article 8 of the BIT.)
43. Under the terms of the BIT and as the Tribunal emphasized in its order of July 2, 1998, the Argentine Republic is liable to Claimants only if the Argentine government violated a legal duty that is owed to Claimants and that duty was violated by acts or omissions of the Argentine Republic. In these proceedings,

⁹ The ICSID Convention had entered into force for France during 1967; the Argentine Republic became a party to the ICSID Convention after its signature of the BIT, *i.e.*, in November 1994.

Claimants have contended that the Argentine Republic violated its legal duty under Articles 3 (fair and equitable treatment) and 5 (expropriation) of the BIT. In this regard, Claimants make two distinct types of submissions. First, Claimants assert that the actions of the officials of Tucumán are legally attributable to the Argentine Republic and serve as the basis for finding that the Argentine government expropriated the rights of Claimants in the Concession Contract and denied “fair and equitable” treatment to Claimants. Claimants next assert that on the facts presented the inaction of the Argentine Republic itself constitutes a violation of a legal duty that the Argentine Republic owes to investors under terms of the BIT and international law. In this connection Claimants rely particularly on the failure of Argentine government officials to prevent Tucumán officials from taking certain actions and the failure of the Argentine Republic to require Tucumán to honor its obligations under the Concession Contract and to enter into and approve a renegotiated Concession Agreement.

44. The Argentine Republic submits that as a non-party to the Concession Contract it owed no legal duty to Claimants and that there is no basis in international law to attribute in this case to the Argentine Republic the actions of the provincial authorities of Tucumán. Further, the Argentine Republic responds that the scope of its duty to the Claimants is affected not only by the terms of the Concession Contract, including Article 16.4, but also by the provisions of the Argentine Constitution that govern its relationship to the provinces under the Argentine federal system. As a result, the Argentine Republic submits that in this case it owes to CGE only an obligation to exercise good faith or show due diligence in seeking to promote agreement between CGE and the Tucumán authorities in order to fulfill its duty to provide the investor with fair and equitable treatment under the BIT and to prevent expropriatory action in violation of the BIT. The Argentine Republic submits that the actions of its officials fully satisfied this legal duty.
45. Article 25(1) of the ICSID Convention provides that the jurisdiction of ICSID extends to “any legal dispute arising directly out of an investment” provided that the parties consent to submit their dispute to the Centre. Under Article 8 of the BIT, an investor in the Republic of Argentina is entitled to submit to ICSID a “dispute relating to investments, within the meaning of this [the BIT] agreement.” Article 1(1) of the BIT defines “investments” to include “[c]oncessions granted by law or by virtue of an agreement.” It is not disputed by the Argentine Republic that this definition includes concession agreements of the kind entered with CGE.

46. The Argentine Republic contends nevertheless that it is not subject to the jurisdiction of this Tribunal. In advancing this proposition, Respondent points to the following three provisions:

- Article 25(1) of the ICSID Convention, as referred to by Article 8 of the BIT, which limits the jurisdictional consent of states to investment disputes “between a contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State;”
- Article 25(3) of the ICSID Convention which provides with respect to the jurisdiction of the Centre that “[c]onsent by a constituent subdivision . . . of a Contracting Party shall require the approval of that State unless that State notifies the Centre that no such approval is required;” and
- Article 16.4 of the Concession Contract which provides for submission of issues of interpretation or application to the exclusive jurisdiction of the contentious administrative tribunals of Tucumán.¹⁰

47. In reliance on these provisions, the Respondent argues that CGE’s claims may be heard by this Tribunal only upon designation by the Argentine Republic of Tucumán under subsection (1) of Article 25 of the ICSID Convention and upon grant of the consent by the Argentine Republic called for under subsection (3) of Article 25. The parties agree that the Argentine Republic has not made any such designation or filed any such consent pursuant to these subsections. They disagree regarding the import of the absence of such action. In addition, the Respondent also argues that CGE waived its right to resort to the ICSID Convention to assert those claims that Claimants have raised under the BIT because with respect to such claims CGE accepted the exclusive jurisdiction of the contentious administrative courts of Tucumán under Article 16.4 of the Concession Contract.¹¹

¹⁰ See Appendix 1 for the full text of each of these provisions.

¹¹ Respondent also contended that Claimants had submitted to the national jurisdictions of Argentina under Article 8 of the BIT by pursuing their *administrative* remedies before the *administrative* authorities of Tucumán (*see, e.g.*, Res. Rep. Jur. at 7 (“They referred the matter to the administrative fora [*i.e.*, Tucumán administrative agencies] specified in the Contract. . . . They cannot change course now. . . . they are committed [under Article 8 of the BIT]. . . . Claimants have promised they would have recourse to the local agencies and tribunals. They had recourse to those local agencies.”) The (continued. . .)

48. The Argentine Republic relies on its federal system under its 1994 Constitution in arguing that the acts of officials of the Province of Tucumán cannot be attributed to the federal government and, accordingly, the Tribunal has no jurisdiction for the claims of CGE in this case. (Resp. Obs. Jur. at 7 and Resp. Mem. at 70 and 94.) The Argentine Republic concedes, however, that even though the Concession Contract is between the Province of Tucumán and CGE, it could incur liability for actions or failure to act on the part of federal officials in relation to the CGE investment in Tucumán. (*See, e.g.*, Trans. Jur./Merits at p. 474.) The Argentine Republic thus denies as a matter of international law the attribution of liability for actions of Tucumán but at the same time acknowledges that the BIT places independent duties on the Argentine government vis-à-vis the Concession Contract. Specifically, the Argentine Republic concedes that it could be liable under Articles 3 or 5 of the BIT relating to the treatment to which foreign investors are entitled and the prohibition against expropriatory governmental action. Respondent contends, however, that since it was not a party to the Concession Contract, these obligations are in this case limited to maintaining an open environment for investment, avoiding discrimination, ensuring security and affording a forum for adjudication of disputes. Further, the Argentine Republic takes the position that the facts presented do not support any finding of inaccessibility for investment, discrimination or absence of security and, accordingly, this Tribunal should ask only whether Respondent has engaged in a denial of justice to the investor. The Argentine Republic maintains that since there is no evidence of a denial of justice on its part in this case, nor even an allegation to that effect, the Tribunal lacks jurisdiction.
49. Under international law, and for purposes of jurisdiction of this Tribunal, it is well established that actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government.¹² It is equally clear that the internal

Argentine Republic abandoned this argument in subsequent phases of the proceedings, presumably because Article 8 of the BIT refers to “national jurisdictions,” meaning courts, including contentious administrative tribunals of the type mentioned in Article 16.4, and not administrative agencies. (*See*, Mem. Resp. at 126-27 (referring only to Tucumán tribunals) and Resp. Post-Hrg. Mem. at 30 (Concession Contract “committed the parties to remit all disputes relating to the interpretation or application of the Concession Agreement to the local administrative *courts* in the first instance.”)(emphasis added).

¹² *See, e.g.*, Luigi Condorelli, *L'imputazione à l'état d'un fait internationalement illicite: solutions classiques et nouvelles tendances*, 189 Recueil des Cours 66 (1984) (“sont attribués à l'Etat, d'après le droit international, tous les comportements de tous ceux qui, dans l'ordre interne de l'Etat concerné, exercent effectivement les prérogatives de la puissance publique”); *see also* Antonio Brotons et al., *Derecho Internacional* 418 (1997) and Manual Diez de Velasco Vallejo, *La Responsabilidad Internacional*, Instituciones de Derecho Internacional Público 688 (11th ed. 1997) (continued...)

constitutional structure of a country can not alter these obligations.¹³ Finally, the Special Rapporteur of the International Law Commission, in discussing the proposed Commentary that confirms the attribution of conduct of political subdivisions to the federal State, has referred to the “established principle” that a federal state “cannot rely on the federal or decentralized character of its constitution to limit the scope of its international responsibilities.”¹⁴

50. In this case CGE contends that the Argentine Republic itself violated its obligations under the BIT by virtue of the attribution to that central government of the acts of the Province of Tucumán. Claimants’ request for relief is thus not based on a breach of the terms of the Concession Contract. For this reason, the Tribunal finds that its jurisdiction under the ICSID Convention is not, as the Argentine Republic argues, precluded by the requirement of Article 8 of the BIT that the dispute be between the French investor and the Argentine Republic. The Tribunal also concludes that it has jurisdiction over those claims of CGE that are based directly on alleged actions or failures to act of the Argentine Republic itself and that do not rely in any respect upon the principle of attribution.
51. Moreover, the Tribunal cannot accept the position of Respondent that its failure to designate or consent to the application of the ICSID Convention to the Province of Tucumán under Article 25 of that treaty deprives the Tribunal of jurisdiction to hear the claims of CGE against the Argentine Republic. The designation and consent provisions of paragraphs (1) and (3) of Article 25 stipulate that a subdivision or agency of a Contracting State may, with the permission of that State, submit itself to the jurisdiction of ICSID for purposes of resolving a legal dispute arising out of an investment dispute between that subdivision or agency and a national of another Contracting State. Those optional provisions do not apply to disputes between the Contracting State itself (in this instance the Argentine Republic) and a national of another Contracting State that may be related to an investment contract between a

(discussing the consensus regarding the responsibility in international law of the central government for actions of states in a federal state).

¹³ Max Sørensen, *Manual of Public International Law* 557 (1968)(referring to the “obvious principle” and “generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations.”). See also Nguyen Quoc Dinh, *Droit International Public* 752 (eds. Dailler and Pellet, 6th ed. 1999)(referring to the well-established international jurisprudence that “[I]’État fédéral ne peut s’abriter derrière une constitution qui organise l’autonomie de ses éléments composants pour dégager sa responsabilité internationale.”)

¹⁴ First Report on State Responsibility 14-15, UNDOC A/CN.4/490 and Add. 5 (1998).

subdivision or agency of that State and the national. In other words, Article 25(3) does not restrict the subject matter jurisdiction of the Tribunal; rather, it creates potential efficiencies in operations of ICSID by establishing, with approval of the central government, the right of such agencies or subdivisions to be parties in their own right to an ICSID proceeding.

52. The foregoing reading of Articles 25(1) and (3) is confirmed by the negotiating history of the ICSID Convention. It shows that these provisions were designed to permit the expansion of the scope of ICSID arbitration *ratione personae* to include subdivisions and agencies of a Contracting State. This enlargement of the Centre's jurisdiction occurred without in any respect restricting ICSID jurisdiction *ratione materiae* over claims against a Contracting State arising from actions of such subdivisions or agencies that are alleged to be attributable to the Contracting State. Article 25(1) and (3) responded to the concerns that many states carried out their investment functions through distinct legal entities, including state-owned agencies and subdivisions.¹⁵ Article 25 consequently provided a method for giving these entities standing for purposes of ICSID arbitration as long as their Contracting State had given its consent thereto.¹⁶ The Tribunal also notes that the Argentine Republic did not notify its intention under Article 25(4) of the ICSID Convention to exclude *ratione materiae* claims based generally on actions of political subdivisions, or, more specifically, on actions of political subdivisions in relation to concession contracts. Nor has the Argentine Republic argued in these proceedings that any such express *ratione materiae* restriction appears in its consent to jurisdiction under the BIT or the ICSID Convention.

¹⁵ For statements of delegations from developing countries to the negotiation of the ICSID Convention pointing out the significant role of their state agencies and other sub-federal institutions in entering into investment agreements and, therefore, the importance to these states in attracting foreign investment of *expanding* the jurisdiction of the Centre to hear disputes involving foreign investor claims against state agencies and political subdivisions, provided that the government of the relevant Contracting Party approved, *see, e.g.*, II History ICSID Convention at 297 and 366; *see also* Christoph Schreuer, "Commentary on the ICSID Convention," 11 ICSID Rev. 318, 380 (Fall 1996)(explaining that the provision "open[s] the possibility, in principle, that such entities may become parties in ICSID proceedings instead of or in addition to the host State itself;" and referring to the designation under the parenthetical in Article 25(1) as relating to "jurisdiction *ratione personae*" to give "the entities described *locus standi*, if the Convention's requirements have been met" and to Article 25(3) as relating to "the modalities of consent.")

¹⁶ The BIT refers as well to the Arbitration Rules of the United Nations Commission on International Trade Law which include no provision comparable to Articles 25(1) and (3). Since the two sets of arbitral rules are alternatives under the BIT, there is a strong inference that no limitation of the type asserted by Respondent was intended on the subject matter for arbitration if the ICSID Convention is invoked.

53. Finally, the Tribunal holds that Article 16.4 of the Concession Contract does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic. On this issue, the parties have presented extensive argument on the potential pertinence of the preliminary decision on jurisdiction of the ICSID tribunal in *Lanco International Inc. v. Argentine Republic*.¹⁷ The *Lanco* tribunal addressed the distinct argument that a contract provision by which the parties submitted their disputes to federal contentious administrative tribunals of the City of Buenos Aires constituted a pre-existing agreement that precluded ICSID arbitration under the distinct terms of the bilateral investment agreement at issue in that case. Having rejected that position, the *Lanco* tribunal also upheld the investor's option to choose ICSID arbitration when the investor could not and did not submit to such tribunals its claims based on the bilateral agreement.¹⁸ In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.¹⁹

¹⁷ *Lanco Int'l, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6)(Prelim. Decision on Jurisdiction)(Dec. 8, 1998).

¹⁸ *Id.* at Paras. 28-30. It is true that the forum-selection clause in *Lanco* was agreed to *before* entry into force of the relevant Argentine-U.S. BIT referring to ICSID while Article 16.4 of the CGE Concession Contract with the Province of Tucumán was signed three years *after* the Argentine-French BIT entered into force and after the Argentine Republic had become a party to the ICSID Convention. It is also true, that, unlike the Concession Agreement in this case, the forum-selection clause in the *Lanco* investment contract did not use the term “exclusive” in referring to the domestic courts of Argentina as did the Concession Agreement in the instant case. Neither of these distinctions alters the key point that for jurisdictional purposes *Lanco*, in addition to resolving the pre-existing agreement issue, also upholds the investor's option for ICSID arbitration despite the presence of a forum-selection clause in the investor-state contract at issue.

¹⁹ *See, also*, Cls. Post-Hrg. Answers at 1-3. The Tribunal does not accept the position of Respondent that Tucumán courts would have had jurisdiction over a claim against the Argentine Republic based on the BIT because “an allegation of breach of the BIT by Argentina depends on a prior determination that the Concession Contract was breached by Tucumán” and that CGE did not violate the Contract. (Resp. Post-Hrg. Answers at 4.) It is clear that the Argentine Republic could have engaged in conduct or failed to act in violation of its obligations under the BIT even if Tucumán were not in violation of the Concession Contract. Moreover, the suit that the Respondent hypothesizes would not be against the Argentine Republic *ratione personae* because, as the (continued...)

54. Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.
55. By this same analysis, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention. That is, submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not, contrary to Claimants' position, have been the kind of choice by Claimants of legal action in national jurisdictions (*i.e.*, courts) against the Argentine Republic that constitutes the "fork in the road" under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention.

E. *Merits*

E.1 *Overview of the Positions of the Parties*

56. It is undisputed that the Argentine Republic was not a party to the Concession Contract, nor did that agreement refer in any respect to the role that the Argentine Republic, which was not a party to its negotiation, might be called upon to play in ensuring performance of the contract by Tucumán.
57. Claimants contend, however, that every action of the Province of Tucumán, taken in the exercise of sovereign power and not as a party to a contract, is directly attributable to the Argentine Republic. Thus, Claimants submit, if the Province of Tucumán exercised governmental authority in abrogating the rights of Claimants under the Concession, then the Argentine Republic is liable to Claimants under the BIT. (Cls. Mem. at 97-101.)
58. Claimants have not alleged that any action of the Argentine Republic directly or indirectly interfered with their performance of the Concession Contract. Rather, they base their claim against the Argentine government on its failure to

responses of both parties to the Tribunal's questions indicate, the Tucumán courts do not have jurisdiction over such a suit absent consent by Respondent. Nor does the Tribunal agree with Respondent that the choice of the law of Tucumán by the parties to the Concession Contract, "raises a presumption" against finding ICSID jurisdiction and in favor of deference to the Tucumán courts. (Resp. Mem. at 127.) That argument is not apposite when the parties to the Concession Contract and their governments have entered into agreements expressly addressing the jurisdiction of the Tucumán courts and ICSID.

have acted and, in particular, its failure to have caused Tucumán (i) to refrain from exercising governmental powers that abrogated the rights of Claimants, or (ii) to comply with the terms of the Concession Contract.

59. Claimants argue that the Argentine Republic is subject to a strict liability standard under the BIT and that any action of the Province that violates the BIT creates liability on the part of Respondent. (Cls. Post-Hrg. Mem. at 20 and Cls. Post-Hrg. Answers at 28.) Claimants submit that the record is replete with examples of such action.
60. The Argentine Republic maintains that the standard of its liability is limited to what the parties and the Tribunal have sometimes termed “due diligence” but which may be more appropriately termed “good offices,” *i.e.*, a duty to undertake a good faith effort through actions of its federal officials to help resolve the controversy between the Province and Claimants. (Res. Post-Hrg. Mem. at 35-38 and Res. Post-Hrg. Answers at 14.)
61. Claimants respond that this lesser standard of obligation does not apply to the alleged BIT violations at issue in this case (*i.e.*, expropriation and denial of fair and equitable treatment resulting from actions of officials of a political subdivision of a Contracting Party) (Cls. Post-Hrg. Answers at 30). Further, Claimants submit that even in the case of other violations, the lesser “due diligence” or “good offices” standard applies only if the actions of private parties are involved -- not actions of a political subdivision such as a Province. (*Id.* at 29-30.) In any event, Claimants contend that the Argentine Republic violated its obligation under the BIT and applicable international law even under this lesser standard because the Argentine Republic “failed . . . to take reasonable measures to solve the conflict and protect or redress damage to Claimants.” (*Id.* at 48.)

E.2 *Analysis of the Relationship of the Alleged Violations of BIT by the Argentine Republic to Issues of Alleged Non-Performance under the Concession Contract*

62. To resolve these issues in this case, the Tribunal need not determine generally whether bilateral investment treaties with provisions forbidding expropriation in the absence of full compensation and requiring fair and equitable treatment under international law impose a strict liability standard on a central government for actions of a political subdivision. Instead, the Tribunal resolves this case on the basis of the specific allegations on which the Claimants base their claims and their legal significance in light of the terms of the Concession Contract and the BIT.
63. In its post-hearing submissions, Claimants, in response to the request by the Tribunal for “specific acts or omissions” taken by or attributable to the Argentine Republic under a strict liability standard of attribution, identified four categories of “acts of the Province attributable to [Respondent] that

violated Claimants' rights under the BIT." (Cls. Post-Hrg. Answers at 51-53.) Claimants described these categories as follows: (1) "Acts that resulted in a fall in the recovery rate;" (2) "Acts that unilaterally reduced the tariff rate;" (3) "Abuses of regulatory authority;" and (4) "Dealings in bad faith."

64. None of these four categories include any act or omission by officials of the Argentine Republic. Therefore, liability of the Respondent may arise in this case on any of these grounds only through attribution of actions of the Tucumán authorities to the Argentine Republic. Because these acts are an essential element of the Claimants' case, the Tribunal will consider each of the acts under their respective categories. The Tribunal will seek to determine not only the basis for establishing liability of the Argentine Republic under the BIT in reliance upon these provincial acts; it will also consider the relationship of these acts to the promised performance of the parties under the Concession Contract.

E.2.1 Acts that Resulted in a Fall in the Recovery Rate under the Concession Contract

65. Of the four alleged acts of the Province of Tucumán that Claimants include in this category, two relate directly to actions of the administrative authorities of Tucumán -- the Ombudsman of Tucumán and the Ente Regulador de los Servicios de Agua y Cloacas de Tucumán ("ERSACT"). In the case of the Ombudsman, the action identified by Claimants concerned a decision of the Ombudsman in December 1996 that Claimants allege to have deprived CGE of "their right to cut off service to non-paying customers." In the case of ERSACT, which served as the regulatory body supervising the services rendered by CGE, Claimants point to two resolutions, Nos. 170 and 212, that "forced a reduction in the tariff and thereby created uncertainty as to what invoices had to be paid." (Cls. Post-Hrg. Answers at 52.) Claimants never challenged in the courts of Tucumán any of these actions of the administrative agencies of Tucumán relating to implementation of the Concession Contract.
66. The other two actions that Claimants place in the category of "Acts that resulted in a fall in the recovery rate," are "public statements made by various branches of the Tucumán government to encourage customers not to pay their bills" and "modification by the Governor and the Legislature to the second renegotiated agreement that deprived Claimants of their right to cut off the service to non-paying customers." (Cls. Post-Hrg. Answers at 52.) The first of these alleged grounds concerns a highly disputed issue of fact, *i.e.*, whether Tucumán authorities organized a campaign for non-payment of invoices issued by Claimants. In any event, this non-payment issue relates to the grounds for non-payment under the Concession Contract and to whether under that agreement termination of service was an authorized remedy for non-payment. (*see, e.g.*, Cls. Reply at 18-21.) The other cited action relates directly to the action of the Ombudsman, as noted in the previous paragraph. Again, all of

these issues concerned the rights of Claimants under the Concession Contract and the performance by Tucumán of its obligations under that agreement. Claimants failed to challenge any of these acts in the Tucumán courts.

E.2.2 *Acts that Unilaterally Reduced the Tariff Rate*

67. Two of the acts that Claimants specify as being in this second category of allegedly attributable actions are the same as those under the prior category, *i.e.*, Resolutions 170 and 212 of ERSACT and, as noted, were never challenged in the Tucumán courts. The third act also harkens back to the first category and refers also to the fourth category (discussed below) because it concerns the changes by the Tucumán legislature in Law 6826 to the tariff schedule in the second renegotiated agreement.

E.2.3 *Abuses of Regulatory Authority*

68. Claimants categorize under this heading two types of alleged action by Provincial authorities-- (1) actions that encouraged non-payment of bills or reduced the recovery rate, and (2) the intervention of ERSACT by the Governor and subsequent actions of that agency. As to the first, these repeat from another perspective points already reviewed above relating to payment of invoices by water and sewage customers in Tucumán and the remedy for their non-payment of invoices. CGE never challenged in the Tucumán courts the interpretation that the Tucumán agencies gave to the provisions of the Concession Contract bearing on this issue.
69. As to the ERSACT intervention, Claimants concede that they sought no “special provision in the Concession Agreement that would prevent the Governor from overriding the normal appointment process and appoint an intervenor.” (Cls. Post-Hrg. Answers at 84.) Claimants contend, nonetheless, that the intervention of ERSACT in January 1996 was “not an exercise of legitimate regulatory authority” but rather was “politically motivated” to affect the terms of the Concession Contract. (*Id.* at 85.) Respondent submits that intervention of ERSACT was authorized under established Argentine administrative law principles. (Resp. Post-Hrg. Answers at 93-96.) Claimants never brought any legal challenge in the courts of Tucumán of the ERSACT intervention on the ground that such action violated the rights of CGE under the Concession Contract.

E.2.4 *Dealings in Bad Faith*

70. Finally, Claimants argue that the Argentine Republic is liable by attribution for the bad faith of Tucumán officials as exemplified most clearly by the alleged changes that the Governor of the Province made in the terms of the second renegotiated agreement that was submitted to the Tucumán legislature. Three other examples are also given: (i) imposing penalties for failure to conduct

water tests even though the laboratory was stripped of equipment at the time of the takeover; (ii) refusing to permit CGE to invoice for municipal and provincial taxes; and (iii) exploiting the manganese so-called “black water” problem for public relations purposes even though CGE was not responsible for its occurrence and promptly remedied the circumstances.

71. Perhaps no issue has been more disputed in this proceeding than the occurrence, significance and consequences of the alleged 70 changes in the second renegotiated agreement. These events took place in period March through August 1997. (See Cls. Post-Hrg. Mem. at 62-70 and Cls. Post-Hrg. Answers at 59 - 67; Resp. Post-Hrg. Answers at Annex I (Chronology) and Annex II (Explanation of Changes).) In summary and with due acknowledgement that the factual complexity of the differences handicaps any effort to simplify the issues, the disagreement relates to whether the Governor would submit to the Tucumán Legislature and the Legislature would approve implementing legislation that incorporated the version of the second renegotiated agreement that the Governor and the Claimants had initially agreed upon on or about April 22, 1997. Further, the Claimants, having refused to sign the revised Concession Contract with the disputed changes to the April 22 version, terminated the Concession Contract at the very moment (Aug. 15, 1997) when, according to Respondent, the Tucumán legislature and its authorized committee were apparently ready to approve the second renegotiated agreement without the 70 changes.
72. Claimants argue that the modifications by the Provincial Governor of the April 22 text of the legislation “signaled the end of any basis of trust and persuaded Claimants that the Provincial Government was determined to destroy the concession and that the Federal Government lacked the determination to redress the wrong.” (Cls. Post-Hrg. Answers at 80.) It is these actions of the Governor and the Legislature on which Claimants rely in support of their contention of “bad faith dealing” attributable to the Argentine Republic.
73. It is essential to recall that this dispute regarding the second renegotiated agreement relates entirely to the *negotiations* of Tucumán and Claimants, and not to whether or how either was performing its legal obligations under the Concession Contract. Claimants do not assert that Tucumán was legally obligated to modify the Concession Contract. It is also undisputed that the Argentine Republic, fully supported by the Claimants, sought in a variety of ways to bring about agreement of the parties, including the so-called Rottenberg mission and political pressure on certain of the key political parties in Tucumán. In these circumstances and on the evidence presented, the Tribunal does not find the basis for holding the Argentine Republic liable for actions of the Tucumán authorities that may be attributed to Respondent. (See Section E.3, *infra*, regarding the claims based on failure of the Argentine

Republic to respond to the alleged bad-faith dealings of the Tucumán authorities.)

74. As to the three other actions of the Argentine Republic that Claimants identify as supporting their bad-faith allegations, the first relates to water testing. The Argentine Republic submits that the citations by ERSACT against CGE were justified by the facts and permitted under Article 14.8 of the Concession Contract. Specifically, Respondent argues that this provision permitted Tucumán authorities to deliver a notice of deficiency and to take punitive action if the deficiency was not cured. Further, the Argentine Republic maintains that the fines for failure to test were never collected. (Res. Post-Hrg. Answers at 102-05.) For their part, Claimants submit that the notices of deficiency specified no deadline, that by December, 1995 CGE had installed the necessary test equipment, that the failures resulted from the seriously inadequate state of the facilities that CGE received at the time of the takeover, and that additional fines imposed upon confirmation of the first fines demonstrate the political motivation of the procedure. Further, Claimants maintain that the political motivation was also shown by statements from officials whose superiors were seeking to pressure CGE to renegotiate its rates. (Cls. Post-Hrg. Answers at 90-92.) Since none of the fines were ever enforced against Claimants, the Tribunal cannot base a finding of bad faith dealings on this alleged action, particularly when the dispute concerning its justification appears to depend in significant part on an interpretation of the Concession Contract that the parties thereto agreed would be decided by the Tucumán courts.
75. Claimants also assert bad faith dealings by Tucumán authorities due to their refusal to permit CGE to invoice for municipal and provincial taxes; and exploiting the manganese or so-called “black water” problem for public relations purposes even though CGE was not responsible for its occurrence and promptly remedied the circumstances. In both instances, the parties disagree over the meaning and applicability of the pertinent provisions of the Concession Contract, as well as over the underlying facts. (*See, e.g.*, Cls. Mem. at 12 and 25 n. 80; Resp. Rej. at 91.)
76. Finally, Claimants allege that CGE was improperly required to continue to provide water and sewage service to Tucumán for 18 months pursuant to the holdover provisions of the Concession Contract. (Cls. Mem. at 72 and 116-17.) According to Respondent, Tucumán officials were acting in reliance upon Section 15.11 of the Concession Contract. (Resp. Post-Hrg. Answers at 106-10.) Claimants respond that the actions of Tucumán “effectively repudiated the concession and destroyed its value” and that, therefore, the “Province was not entitled . . . as a matter of law or equity”, to invoke this provision of the Concession Agreement. (Cls. Post-Hrg. Answers at 95.) Further, CGE maintains that during this 10-month holdover period Provincial

authorities refused to determine the applicable tariffs and continued to urge customers not to pay their bills for services (*Id.* at 96.)

E.2.5 Relationship of Alleged Acts of Tucumán Authorities to Performance under Concession Contract and Legal Consequences

77. From the foregoing, it is apparent that all of the above-mentioned actions of the Province of Tucumán on which the Claimants rely for their position attributing liability to the Argentine Republic are closely linked to the performance or non-performance of the parties under the Concession Contract. The Tribunal concludes, accordingly, that all of the issues relevant to the legal basis for these claims against Respondent arose from disputes between Claimants and Tucumán concerning their performance and non-performance under the Concession Contract. These included the issues summarized in the preceding sections based on Claimants' response to the Tribunal, as well as such questions as the reasonableness of the rates and the timing of increases in rates that the Claimants contended were authorized by the Concession Contract, whether individual metering was required or permitted, whether CGE was entitled to charge certain local taxes to its customers in addition to its service tariff, whether CGE was permitted to terminate service to users who failed to pay their water and sewage invoices, whether CGE failed to submit an investment plan, maintain adequate insurance, or submit an emergency plan in a timely manner and, finally, whether CGE was required to continue operating the system for 10 months after it terminated the Concession Contract.
78. The Tribunal addresses, therefore, the relationship between the terms of the Concession Contract, and, in particular, the forum selection provision in Article 16.4, and the alleged international legal responsibility of the Argentine Republic under the BIT with respect to the previously outlined actions of officials and agencies of Tucumán. In this regard, the Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.²⁰ Alternatively, as the Tribunal

²⁰ The Tribunal does not accept Claimants' argument that Article 16.4 of the Concession Contract is without effect in this matter because Article 10 of the BIT, which refers to rights under a special agreement between a Contracting Party and an investor, "supercedes the forum selection clause in the Concession Agreement." (Cls. Mem. at 86.) Article 10 protects rights granted to an investor under a special agreement if such rights are more favorable to the investor than those granted under the BIT. The question here is not whether one or the other is more favorable, but whether the Tribunal is in a (continued...)

discusses below (Paras. 83-92, *infra*), the Argentine Republic could be held liable if it were shown that it failed to satisfy its obligation to pursue in good faith and with reasonable efforts the resolution of disputes between Tucumán and Claimants.

79. Here it is clear that, given the nature of the dispute between Claimants and the Province of Tucumán, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract considering, in particular, that much of the evidence presented in this case has involved detailed issues of performance and rates under the Concession Contract. To make such determinations, the Tribunal would have to undertake a detailed interpretation and application of the Concession Contract, a task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán. The contentious administrative courts of Tucumán were open to Claimants to pursue contract remedies against the Province of Tucumán under the Concession Contract. Claimants bargained under Article 16.4 for seeking such remedies in those courts and conferred exclusive jurisdiction upon them for disputes relating to issues arising under the Concession Contract. There is no allegation before the Tribunal that the courts of Tucumán were unavailable to hear such claims or that they lacked independence or fairness in adjudicating them.
80. Because the Tribunal has determined that on the facts presented Claimants should first have challenged the actions of the Tucumán authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic. However, since Claimants failed to seek relief from the Tucumán administrative courts and since there is no evidence before this Tribunal that these courts would have denied Claimants procedural or substantive justice, there is no basis on this ground to hold the Argentine Republic liable under the BIT.

position, on the facts of this case, to separate the breach of contract issues from violations of the BIT, considering that the parties to the Concession Contract have agreed to an exclusive remedy in the Tucumán courts for the determination of the disputed contractual issues which are not governed by the BIT.

81. The Tribunal emphasizes that this decision does not impose an exhaustion of remedies requirement under the BIT because such requirement would be incompatible with Article 8 of the BIT and Article 26 of the ICSID Convention. In this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the private contract between Claimants and the Province of Tucumán and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts. That is why the Tribunal rejects Claimants' position that they had no obligation to pursue such local remedies against the Province or that, in the event of a denial of justice of rights under the BIT, that any such legal action in the Tucumán courts would have waived their right to resort to arbitration against the Argentine Republic before ICSID under the BIT.
82. Finally, the Tribunal notes that despite the considerable importance Claimants attached during these proceedings to the failure in negotiation of the revised Concession Contract and, in particular, to the changes by the Tucumán Governor and the Legislature in the April 22 draft, the Tribunal considers that these circumstances do not amount to a breach by the Argentine Republic of the BIT based on actions of the Province. Specifically, the Claimants have never argued that the Province violated a legal duty to revise the Concession Contract. Further, as noted below in discussing actions of the Argentine Republic, there is ample evidence in the record that federal officials of the Argentine Republic played a constructive role in the renegotiation process involving Tucumán officials and representatives of CGE.

E.3 *Failure of the Argentine Republic to Respond to Actions of Tucumán Officials*

83. It remains for the Tribunal to address the allegations of the Claimants that the Argentine Republic is liable under the BIT by failing to respond appropriately to the actions of officials of the Province of Tucumán. In this connection and despite the several years of acrimony in the relations between Tucumán and Claimants, the Tribunal notes that Claimants produced only a single document, a letter dated March 5, 1996 (Cls. Ex. #27), that served as the basis for notifying the Argentine Republic that, absent resolution of the ongoing disputes between Claimants and the Province, the Claimants would pursue before ICSID their remedy against the Argentine Republic under the BIT. That letter concerns principally a report on the status of the renegotiations between Claimants and Tucumán over a tariff reduction and does not ask Argentine officials to take any particular action relating to the Concession Contract or the pending differences between Claimants and the authorities of Tucumán.

84. The record contains no evidence that Argentine officials ever failed to take any specific action that the Claimants requested. During the hearing, witnesses for the Claimants, including Mr. Charles-Louis de Maud'Huy, who served as a member, vice chairman and then chairman of the CAA board (Trans. Jur./Merits at 244), and Mr. García González, a leading Tucumán industrialist and a member of the CAA board, were unable to identify specifically any action that Claimants asked the Argentine Republic to take and that was not taken. Indeed, Mr. García González, when testifying about a critical meeting with a senior Argentine official, stated "No, we did not request absolutely any specific steps to be taken . . ." (Trans. Jur./Merits at 341.) Moreover, Claimants did not present as evidence any document in which they put Respondent on notice regarding what action the Argentine governmental authorities had taken that constituted a violation of the BIT or what action, if not taken by the Argentine Republic, would have constituted a breach of the BIT.
85. In the hearing, Respondent stated that Article 5 of the BIT could be read to require that, for purposes of the present arbitration, the Argentine Republic had an obligation "to do everything in its power to avoid illegal expropriation by other political subdivisions." (Trans. Jur./Merits at 476.) The Respondent argued that this obligation was fulfilled by providing a forum for adjudication of the contract claims. (Trans. Jur./Merits at 477-78.) Claimants maintain that Respondent also had an obligation "to take reasonable measures to solve the conflict and protect or redress damage to Claimants." (Cls. Post-Hrg. Answers at 48.)
86. Claimants argue that the Argentine Republic failed to meet this good-offices obligation because the Argentine Republic did not "exhaust the legal and political means at its disposal to protect Claimants' rights and did not even try to use them." (Cls. Post-Hrg. Answers at 48.) The Tribunal considers in turn each of the grounds upon which Claimants base this position.
87. Claimants argue that the Argentine Republic "failed to institute a legal action against Tucumán to compel Tucumán to comply with the BIT" by instituting legal proceeding in the Argentine Supreme Court to "declare that acts of a province . . . are not in conformity with federal laws, treaties, or the Constitution itself." (Cls. Post-Hearing Answers at 48-49.) The parties dispute whether the Argentine Republic could have initiated any such legal action without either a predicate court decision by a Tucumán court, or a Tucumán public law that on its face conflicted with Argentine federal law in an area of exclusive federal jurisdiction. (Res. Rej. at 33 and 37-39.) The Tribunal need not resolve this contested issue of Argentine law. It is clear that Claimants never urged that the Argentine Republic initiate such legal action at the time of the effectiveness of the Concession Contract (Res. Post-Hrg. Answers at 61-65.)("The fact is, Claimants never asked the Republic to start a

legal action against Tucumán.”) Further, the basis for any such federal action would depend on whether Tucumán had, in fact, failed to fulfill its obligations under the Concession Contract or had taken measures clearly outside the scope of the Concession Contract. Under Article 16.4 of the Concession Contract, Claimants agreed to pursue in the courts of Tucumán any such alleged violation of the terms of that agreement. On the facts presented, the Tribunal finds that there was no action of the Province of Tucumán that, absent such a local court proceeding, so obviously violated the BIT as to require the Argentine government to seek a legal remedy against the Province in the Argentine courts nor, for that matter, did the Claimants ever specify any such action to the Argentine Republic.

88. Claimants argue that the Argentine Republic also failed to “exercise its financial leverage over the province to persuade Tucumán to comply with the BIT.” (Cls. Post-Hrg. Answers at 49.) Only one of the asserted Argentine precedents for such action appears to have involved the Argentine Republic entering into a dispute involving a private contract and, in that instance, a clear breach of an obligation to privatize was apparently involved (Trans. Jur./Merits at 822-24.) Again, the parties dispute the availability of the remedy in this case. However, they appear to agree that Claimants never urged such action during the period of the effectiveness of the Concession Contract. (Res. Rej. at 36; Cls. Post-Hrg. Answers at 49 (stating without citation to any request by Claimants to the Argentine Republic that the “Federal Government refused to exercise its financial leverage over the province to persuade Tucumán to comply with the BIT” by furnishing additional funds to assist the Province or by withholding funds to pressure the Province.)) Even if the Tribunal were prepared to adopt the proposition that the Argentine Republic could be found legally required under the BIT to take such action, and the Tribunal does not resolve that point in this instance, that duty could not arise in this case absent proceedings in the courts of Tucumán demonstrating either a clear breach of an obligation of Tucumán to the investor or proceedings in those courts that otherwise failed to satisfy the international standard for procedural or substantive justice.
89. Claimants also find a basis for liability in the failure of the Argentine Republic to take action showing the “political commitment necessary to resolve the problem.” (Cls. Post-Hearing Answers at 50.) Claimants concede that the Argentine Republic offered “technical assistance” and “even helped prepare a new agreement” between the Province and Claimants. However, they contend that Respondent had a duty to resolve the political problem resulting from the fact that, in their judgment, the “Province simply had no interest in a new agreement that would allow CAA to operate as a viable commercial entity.” (*Id.*) This position was strongly disputed by the Argentine Republic whose witnesses presented evidence in support of the conclusion that the disaffection of the Province with Claimants could reasonably be attributed to non-

performance under the Concession Contract. Without resolving this contentious point, the Tribunal sees no basis for finding on the facts presented an international legal duty under the BIT for the Argentine Republic to cause Tucumán to enter into a new agreement. Such a proposition would require this Tribunal to adopt the Claimants' assertions about the purposes and motives of the Province which are not justified by the evidence presented in these proceedings. (*See, e.g.*, Res. Post-Hearing Answers at 98-100 (disputing Claimants' interpretation of the actions of Tucumán officials).)

90. Claimants also submit that the Argentine Republic failed in its obligation to notify the Province of Tucumán that "its actions are causing a breach of the Republic's obligations under the BIT." (Cls. Post-Hrg. Answers at 51.) Given the denial of Respondent that it is liable under the BIT and Claimants' failure to specify to the Argentine Republic which actions of the Province violated the BIT, the Tribunal finds no basis for finding liability of Respondent based on the absence of such notification to the Province.

91. Claimants also allege that the "attacks on CAA revealed an interlocking web of [Tucumán] officials that together were able to drive CAA from the Province." (Cls. Post-Hrg. Answers at 86.) Further, Claimants argue that under the BIT, as interpreted by international law, the Argentine Republic is liable for these actions of the Tucumán officials. The Tribunal specifically asked the parties to address whether there was evidence in the record that actions of the legislators of Tucumán that adversely affected the operations of Claimants (*e.g.*, demonstrations and encouragement of non-payment of invoices) were, in fact, directed or coordinated by the Governor of Tucumán or his cabinet. Claimants characterized the coordination between the various political branches as "generally informal," but pointed to specific examples of actions of officials, executive and legislative, that were said to demonstrate that "both individually and collectively, the public authorities in Tucumán worked to undermine the concession." (*Id.* at 89.) These actions related to disagreements over the tariffs being charged by CGE, charges by an Investigative Commission of the Legislature regarding the performance of the government officials who had negotiated the Concession Contract and the previously noted alleged 70 changes in the second renegotiated agreement. Respondent vigorously disputes this interpretation of the actions of the Tucumán executive and legislative officials. (Resp. Post-Hrg. Answers at 98.) In addition to pointing out that the legislators on whose actions the Claimants rely were opponents of the governing party in Tucumán at the time that the disputes arose under the Concession Contract, Respondent presented a point by point refutation of the other evidence upon which Claimants rely for these allegations. After carefully reviewing the extensive memorials and testimony, the Tribunal finds that the record in these proceedings regarding these allegations does not establish a factual basis for attributing liability to the

Argentine Republic under the BIT for the alleged actions of officials of Tucumán.

92. 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.

F. *Costs and Fees*

93. Neither the BIT nor the provisions of the ICSID Convention include a provision directing how this Tribunal should regulate the costs and fees of the parties. Nor does the Concession Contract include any provision on this subject.
94. ICSID tribunals, and international arbitral tribunals generally, have not followed a uniform practice with respect to the award of costs and fees.²¹ In a recent ICSID decision, the tribunal decided not to follow the common practice that the party not prevailing bear the costs of arbitration and contribute to the prevailing party's reasonable costs of representation. *Robert Azinian et al. v. The United Mexican States*, Case No. ARB(AF)/97/2 (Nov. 1, 1999). In that case, which was initiated under the Chapter 11 investment provisions of the North American Free Trade Agreement, the tribunal relied upon a number of factors in declining to award costs or fees to either party. Those factors included the “new and novel mechanism for the resolution of international investment disputes” under NAFTA and that the Claimants, who did not prevail on the merits, had “presented their case in an efficient and professional manner.”
95. In this case, the Claimants have prevailed on the jurisdictional issue while the Respondent has prevailed on the merits. The instant case 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. Counsel for both parties have presented their arguments, written and oral, in an efficient and professional manner and have extensively briefed these issues of first

²¹ For a recent comprehensive survey of the practice of ICSID and other international arbitral tribunals see J. Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitrations*, 21 Mich. J. Int'l L. 1, 25 (1999) (discussing the varied practice of ICSID tribunals in several cases and concluding that “there is no consensus on the amount of costs and fees that should be paid to the prevailing party”); see also A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* 407 (2d ed. 1991) (“It is impossible to identify any general practice as to the treatment of costs in international commercial arbitrations.”).

impression. Finally, the positions of both parties evolved in the course of the proceeding as their respective arguments and the inquiries of the Tribunal caused them to clarify their positions.

96. In these circumstances and in the exercise of its discretion after taking account of all pertinent factors, the Tribunal decides that each side shall bear its own expenses for the proceedings, and that the two sides shall bear equally the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre. Since the parties have each made equal advance payments to ICSID, the Tribunal need not award the payment of any amount on account of such fees, expenses or charges.

G. Award

The Tribunal herewith dismisses the claims filed by the Claimants against the Republic of Argentina.

Judge Francisco Rezek
President
Date:

Judge Thomas Buergenthal
Arbitrator
Date:

Peter D. Trooboff
Arbitrator
Date:

Appendix 1

Text of Cited Treaty and Contract Provisions

A. Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, July 3, 1991 (unofficial translation)

Article 3

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.

Article 5 (excerpt)

1. Investments made by investors of any of the Contracting Parties shall enjoy, within the territory and maritime area of the other Contracting Party, protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this agreement.
2. 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.

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. . . .

Article 8

1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.

2. If such dispute could not be resolved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:

- either to the national jurisdictions of the Contracting Party involved in the dispute;
- or to international arbitration in accordance with the terms of paragraph 3 below.

Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.

3. In the event of recourse to international arbitration, the dispute shall be submitted to any of the following arbitration bodies at the choice of the investor:

- The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on March 18, 1965, when each State Party to this agreement has adhered to it. . . .
- An 'ad hoc' arbitration tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Article 10

Investments regulated by a special agreement between one of the Contracting Parties and the investors of the other Contracting Party shall be governed, without prejudice to the provisions of the present agreement, by the terms of that special agreement to the extent that such agreement includes provisions which are more favorable than the ones set forth in the present agreement.

B. Concession Contract for Water and Sewage Service in the Province of Tucumán, May 18, 1995

Article 16.4

Original Spanish:

A los efectos de la interpretación y aplicación de este Contrato las partes se someten a la jurisdicción exclusiva de los Tribunales en lo Contencioso Administrativo de la Provincia de Tucumán.

Translation of the Parties:

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

C. Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

...

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Appendix 2

Abbreviations

A. Parties and Terms

Argentine-French BIT, Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, July 3, 1991

BIT, Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, July 3, 1991

Centre, International Centre for Settlement of Investment Disputes

CGE, Compagnie Générale des Eaux and Compañía de Aguas del Aconquija, S.A.

Claimants, Compagnie Générale des Eaux and Compañía de Aguas del Aconquija, S.A.

ERSACT, Ente Regulador de los Servicios de Agua y Cloacas de Tucumán

ICSID, International Centre for Settlement of Investment Disputes

ICSID Convention, Convention on the Settlement of Investment Disputes between States and Nationals of Other States

ICSID Arbitration Rules, ICSID Rules of Procedure for Arbitration Proceedings

Province, the Province of Tucumán

Respondent, Republic of Argentina or Argentine Republic

B. Memorials of the Parties and Transcripts of Hearings

(1) Jurisdictional Phase:

Cls. Obs. Jur., Observations of Claimants on Jurisdiction (Apr. 20, 1998)

Resp. Obs. Jur., Respondent's Observations Pursuant to Rule 41(3) on Its Objection to Jurisdiction (Apr. 20, 1998)

Cls. Reply Jur., Reply of Claimants to Respondent's Observations on Jurisdiction (May 11, 1998)

Res. Reply Jur., Respondent's Further Observations Pursuant to Rule 41(3) on Its Objections to Jurisdiction (May 11, 1998)

Trans. Jur., Transcript of Oral Arguments on Jurisdiction (Nov. 2, 1998)

(2) *Jurisdictional and Merits Phase*

Cls. Mem., Memorial of Claimants (Nov. 2, 1998)

Resp. Mem., Memorial of Respondent (Feb. 1, 1999)

Cls. Reply, Reply of Claimants (Mar. 4, 1999)

Resp. Rej., Rejoinder of Respondent (Apr. 5, 1999)

Cls. Ex. #__, Claimants' Exhibit Number __

Resp. Ex. #__, Respondent's Exhibit Number __

Trans. Jur./Merits, Transcript of Hearing on Jurisdiction and the Merits (Aug. 11-13, 1999)

(3) *Post-Hearing Memorials*

Cls. Post-Hrg. Mem., Claimants' Post-Hearing Memorial (Sept. 30, 1999)

Cls. Prop. Findings, Claimants' Proposed Findings of Fact (Sept. 30, 1999) (Ex. #1 to Cls. Post-Hrg. Mem.)

Cls. Post-Hrg. Answers, Claimants' Answers to Post-Hearing Questions of the Tribunal (Sept. 30, 1999) (Ex. #2 to Cls. Post-Hrg. Mem.)

Resp. Post-Hrg. Mem., Post-Hearing Memorial of Respondent (Sept. 30, 1999)

Resp. Post-Hrg. Answers., Respondent's Answers to Post-Hearing Questions of the Tribunal (Sept. 30, 1999)

Cls. Post-Hrg. Rej., Claimants' Rejoinder to Respondent's Post-Hearing Memorial (Oct. 12, 1999)

Res. Post-Hrg. Rej., Post-Hearing Rejoinder of the Republic (Oct. 12, 1999)