

[Date of dispatch to the parties: May 28, 2003]

International Centre for
Settlement of Investment Disputes
(ICSID)

In the Matter of the Annulment Proceeding
in the Arbitration between

COMPAÑIA DE AGUAS DEL ACONQUIJA S.A.

and

VIVENDI UNIVERSAL
(formerly COMPAGNIE GÉNÉRALE DES EAUX)
Claimants

and

ARGENTINE REPUBLIC
Respondent

Case No. ARB/97/3

DECISION OF THE *AD HOC* COMMITTEE
ON THE
REQUEST FOR SUPPLEMENTATION
AND RECTIFICATION OF ITS DECISION
CONCERNING ANNULMENT
OF THE AWARD

TABLE OF CONTENTS

| | <i>page</i> |
|--|-------------|
| A. BACKGROUND AND PROCEDURAL HISTORY | 3 |
| B. THE POSITION OF THE PARTIES | 3 |
| 1) Argentina's Position | 3 |
| 2) Claimants' Position | 4 |
| C. THE COMMITTEE'S ANALYSIS | 4 |
| 1) Limits on the Scope of a Request for Supplementation/Rectification | 4 |
| 2) On the Request for Supplementary Decision | 5 |
| 3) On the Requests for Rectification | 8 |
| D. COSTS | 13 |
| E. DECISION | 13 |

President: L. Yves FORTIER, C.C., Q.C.

*Members of the
ad hoc Committee:* Professor James R. CRAWFORD, S.C., F.B.A.
Professor José Carlos FERNANDEZ ROZAS

*Secretary of the
ad hoc Committee:* Claudia Frutos-Peterson

In Case No. ARB/97/3

BETWEEN: Compañía de Aguas del Aconquija S.A. and
Vivendi Universal (formerly Compagnie Générale des Eaux)
("Claimants")

Represented by:

Judge Stephen M. Schwebel,
as counsel
Mr. Bernardo M. Cremades
of the law firm *B. Cremades y Asociados*, as counsel
Mr. Daniel M. Price and Mr. Stanimir A. Alexandrov
of the law firm *Sidley Austin Brown & Wood LLP*, as counsel
Mr. Luis A. Erize
of the law firm *Abeledo Gottheil Abogados*, as counsel
Mr. Ignacio Colombres Garmendia
of the law firm *Ignacio Colombres Garmendia & Asociados*, as
counsel

And

Argentine Republic ("*Respondent*" or "*Argentina*")

Represented by:

Dr. Rubén Miguel Citara, Mr. Hernán M. Cruchagan and
Mr. Carlos Ignacio Suárez Anzorena
of the *Procuración del Tesoro de la Nación*, as counsel

A. BACKGROUND AND PROCEDURAL HISTORY

1. On July 3, 2002, the *ad hoc* Committee (the “Committee”) rendered a Decision on Annulment with respect to the Award issued by the Tribunal in the present arbitration (the “Decision”).¹

2. On August 16, 2002, the Argentine Republic submitted to the Secretary-General of ICSID a Request for Supplementation and Rectification of some aspects of the Decision (the “Request”). The Request was made on the basis of Article 49(2) of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the “ICSID Convention”) and Rule 49 of the ICSID Arbitration Rules. Article 49(2) of the ICSID Convention reads as follows:

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

3. The Argentine Republic having complied with the deadline set in Article 49(2) and having made the payments required under the ICSID Convention and the Arbitration Rules, the Request was registered by the Secretariat and transmitted to the Claimants and the members of the Committee on August 23, 2002.

4. After deliberation, the Committee decided, in accordance with the provisions of Arbitration Rule 49(3), to grant the Claimants until November 4, 2002 to file their observations on the Request. Argentina submitted a Reply to Claimants’ observations on December 6, 2002.

¹ The English version of the Decision is reported in 41 ILM 1135 (2002).

B. THE POSITION OF THE PARTIES

1) Argentina's Position

5. In support of its Request, the Argentine Republic makes the following fundamental arguments:

(a) *Request for a supplementary decision under the provisions of Arbitration Rule 49(1)(c)(i):*

6. Respondent asserts that, in its Decision, the Committee incorrectly omitted to decide whether, as argued by Argentina, the Arbitral Tribunal's failure to account for the fact that the transfer of CAA's shares from DyCASA to CGE was not previously authorised by the Government of Tucumán undermined its decision on jurisdiction.

7. This omission, contends Respondent, requires that the Committee render a supplementary decision which specifically addresses the issue.

(b) *Request for rectification of seven specific matters pursuant to the provisions of Arbitration Rule 49(1)(c)(ii):*

8. The Argentine Republic submits that, in its Decision, the Committee committed seven material errors in its description of the arguments and legal position advanced by Argentina in the annulment proceedings. These errors, each of which is the object of a specific request for rectification, are:

(i) The Committee erred in affirming that there was no dispute between the parties concerning CGE's control of CAA at the time the arbitration proceedings were commenced (paragraphs 48 and 49 of the Decision);

(ii) The Committee erred in stating that the Respondent acknowledged that there exists no presumption either in favor of or against annulment of an arbitral award (paragraph 62 of the Decision);

(iii) The Committee erred in describing the Respondent's position in relation to the possibility of a partial annulment and its consequences (paragraph 67 of the Decision);

- (iv) The Committee erred in stating that the Respondent was not making a late annulment application by way of a counterclaim (paragraph 70 of the Decision);
- (v) The Committee erred in stating that the Respondent argued that there was a contradiction between the Tribunal's reasons concerning jurisdiction and its reasons concerning the merits of the dispute (paragraph 72 of the Decision);
- (vi) The Committee erred in stating that neither party disputes that a tribunal commits an excess of powers if it fails to exercise its jurisdiction (paragraph 86 of the Decision);
- (vii) The Committee erred in summarizing the arguments of the Respondent in relation to the treatment by the Tribunal of the Tucumán claims (paragraph 93 of the Decision).

2) Claimants' Position

9. The Claimants object to the Respondent's Request. They maintain that the request for supplementary decision and each of the seven requests for rectification should be rejected as disclosing no omission or error on the part of the Committee.

C. THE COMMITTEE'S ANALYSIS

1) Limits on the Scope of a Request for Supplementation/ Rectification

10. Before addressing the issues raised by Argentina's Request, the Committee considers it appropriate to comment on the nature and purpose of the procedure by which ICSID awards and decisions may be supplemented or rectified.

11. In this regard, it is important to state that that procedure, and any supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification.² Those sorts of proceedings are simply not

² C. H. Schreuer, *Commentary*, Art. 49, para. 47.

provided for in the ICSID system. Still less may a request for supplementation or rectification of a *decision on annulment* be employed as vehicle by which to examine the correctness, not of the decision of the *ad hoc* committee, but of the underlying arbitral award.

12. With these comments firmly in mind, the Committee turns to the various aspects of Respondent's Request.

2) On the Request for Supplementary Decision

13. As mentioned, the Respondent's written submissions of August 16 and December 6, 2002, set out the legal grounds on which the Argentine Republic relies in support of its Request.

14. As regards its request for a supplementary decision, the Respondent argues that the Committee omitted to rule on Argentina's claim that the Tribunal's decision upholding its jurisdiction in the arbitration was undermined by its failure to account for the manner in which CAA's shares, and thus control of the company, was transferred from DyCASA to CGE. Argentina contends that, in accordance with the provisions of the Concession Contract, this transfer required the express authorization of the Government of Tucumán. The existence or non-existence of such authorization and the consequences thereof for the jurisdiction of the Tribunal must, in the Respondent's view, be examined by the Committee.

15. For their part, the Claimants argue: that the Committee is not obliged to opine on every single matter raised by the parties; that the Request exceeds the scope of Article 49(2) of the ICSID Convention; and that in any event the Decision reveals no omission, but, rather, a decision by the Committee contrary to the position advocated by the Respondent.

16. In the Committee's view, and contrary to what is argued by the Respondent, neither the Committee nor indeed the Arbitral Tribunal omitted to consider Argentina's position concerning the circumstances surrounding the transfer of CAA's shares from DyCASA to CGE or the consequences of that transfer as regards the Tribunal's competence. As the Argentine Republic acknowledges in its written submissions, the Committee stated in its Decision that CGE had always been an investor, whether or not it had overall control of CAA; and in any case CGE controlled CAA at the time that arbitration proceedings were commenced, such that there was no question but that the

Tribunal enjoyed jurisdiction over CAA.³ Specifically, in paragraph 50 of its Decision, the Committee declared:

[W]hile it is arguable that the Tribunal failed to state any reasons for its finding that “CAA should be considered a French investor from the effective date of the Concession Contract,” that finding played no part in the subsequent reasoning of the Tribunal, or in its dismissal of the claim. (...) It is also clear the CGE controlled CAA at the time the proceedings were commenced, so that there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration.⁴

17. These constitute material and substantive findings by the Committee that belie the contentions underlying Respondent’s Request, although they admittedly do not expressly refute its entire legal argument.⁵ Indeed, the Decision itself demonstrates that, as asserted by Claimants in their written submissions, the Committee in fact considered – and denied – the relevance of Argentina’s arguments with respect to jurisdiction.⁶

18. In these circumstances, only a highly subjective perspective makes it possible to affirm, as does Respondent, that, but for the Committee’s alleged “omission,” the content of the Decision would have been different. This subjective perspective has led the Respondent to refer matters to this Committee that have already been addressed and decided in the Decision.

19. In no way can it be said that the Committee omitted to address Argentina’s arguments. Rather, it appears that Respondent is seeking to reopen a substantive debate that occurred and was resolved during the earlier, merits

³ Paragraph 16 of the Request of the Argentine Republic, quoting from paragraph 50 of the Decision on Annulment.

⁴ See also paragraph 48 of the Decision.

⁵ In the sense expressed by the decisions on supplementation and rectification made in *AMCO v. Indonesia*, October 10, 1990, *ICSID Reports*, vol. 1, 1993, at 638-640, and *Genin v. Estonia*, April 4, 2002, <http://www.worldbank.org/icsid/cases/genin-sp.pdf>.

⁶ The argument that the Committee could alter substantive decisions in the award has been studied and rejected. See Respondent’s Submission of December 6, 2002, para. 20, citing the specifications presented by C. Schreuer (footnote 4) and the decisions in *Mine v. Guinea and Klöckner v. Cameroon* (footnote 5). In both of those cases, the transfer of shares at issue was considered relevant. This is not true in the present case, and the argument of irrelevance or indifference is simply intended to weaken any allegation of substance. Cf. C. Schreuer, *Commentary*, Art. 49, para. 37.

phase of the annulment proceeding, with a view to having the Committee reconsider its findings concerning CAA's status as an investor subject to the jurisdiction of the Tribunal and the manner in which the issue was addressed by the Tribunal. This is something that, in this exceptional phase of the annulment proceeding, the Committee cannot and will not do.

20. With the collapse of Respondent's case concerning the Committee's alleged omission – the only case open to Respondent under Article 49 of the ICSID Convention – Argentina's entire argument in support of its request for a supplementary decision falls.

21. The Committee wishes to stress that it was not necessary, in order to decide that CGE controlled CAA at the time of the commencement of the arbitration, to decide whether relevant contractual requirements had been met. The question was exclusively whether CAA was a "body corporate effectively controlled, directly or indirectly, by" CGE (see 1991 Agreement, Article 1(2)(c)), and the dossier indicated clearly that it was. In the Committee's view (as, evidently, in the Tribunal's view also), para. (c) looks to the factual situation and is concerned with jurisdiction, not with the implications of any failure to comply with contractual or other requirements, even if these might be relevant to the merits. Even assuming that CGE should have obtained Tucuman's agreement to its acquisition of DyCasa's shares and did not, it remained the case that at the time of commencement of the arbitration CGE directly or indirectly controlled CAA, and for the purposes of ICSID jurisdiction that is enough. The Committee made it quite clear that in partially annulling the Tribunal's decision, including its finding that CAA was controlled by CGE from the effective date of the Concession Contract, it made no decision for itself on any aspect of the merits of the Tucuman claim.

22. For the foregoing reasons, the Committee rejects that aspect of Respondent's Request that consist of a request that the Committee issue a supplementary decision.

3) On the Requests for Rectification

23. The Argentine Republic also requests the rectification of what it considers to be seven material errors in the Decision. It submits that the scope of the remedy of rectification provided for in Article 49(2) of the ICSID Convention is well established, as illustrated by recent precedents, and argues that the particular errors affecting the Decision in the present case are so seri-

ous that, unless rectified, they could “nullify the Decision on Annulment” and prejudice Argentina’s position in future ICSID arbitrations. The implication is that, in its deliberations and preparation of the Decision, the Committee disregarded many of the arguments put forward by the Respondent, to its significant detriment.

24. The Claimant, for its part, argues that the seven requests for rectification should be rejected, on the grounds that they exceed the scope of Article 49(2) and, in effect, represent further attempts by the Respondent to reopen debate on issues already decided by the Committee.

25. A review of pertinent arbitral awards⁷ illustrates that the availability of the rectification remedy afforded by Article 49(2) depends upon the existence of two factual conditions. First, a clerical, arithmetical or similar error in an award or decision must be found to exist. Second, the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. Simply stated (and contrary to Respondent’s assertion at paragraph 26 of its Request), Article 49(2) does not permit the “rectification” of substantive findings⁸ made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties. The sole purpose of a rectification is to correct clerical, arithmetical or similar errors, not to reconsider the merits of issues already decided. As will be seen, below, many of the Respondent’s requests derive from a misunderstanding of this fundamental principle.

(a) *Whether the Committee erred in affirming that there was no dispute between the parties concerning CGE’s control of CAA at the time the arbitration proceedings were commenced (paragraphs 48 and 49 of the Decision)*

26. The Committee reaffirms the statements (actually, the summary of the facts) contained in paragraphs 49 and 50 of its Decision. Those passages are not concerned with whether or not the parties are in agreement as to CGE’s control of CAA or as to the consequences of a determination one way or another; they merely describe the factual circumstances relating to the alleged

⁷ *AMCO v. Indonesia*, *op. cit.*, at 638, *Emilio Agustín Maffezini v. Kingdom of Spain*, Rectification of the Award of January 31, 2001, *ICSID Rev.*, vol. 16, 2001, at 279 and *CDSE v. Republic of Costa Rica*, decision of June 8, 2000, *ICSID Rev.*, vol. 15, 2000, at 169.

⁸ See *Genin v. Estonia*, *op. cit.*, para. 16.

transfer of control of CAA prior to the commencement of the arbitration proceedings. It is solely in relation to these facts, that is, concerning the manner in which the shares of CAA changed hands, that the Decision states that there is no disagreement between the parties. This does not imply that the Committee considers that there was agreement between the parties with respect to the validity or juridical consequences of that transfer, for example as regards CAA's status as a foreign investor under the ICSID Convention.

27. No error having been found, the Committee denies the rectification requested by Respondent, which appears as yet another attempt to revisit the same issue as in its request for a supplementary decision.

(b) *Whether the Committee erred in stating that the Respondent acknowledged that there exists no presumption either in favour of or against annulment of an arbitral award (paragraph 62 of the Decision)*

28. Paragraph 62 of the Decision comprises, *inter alia*, a summary of complex legal arguments raised by the parties during the annulment proceeding. It focuses on what the Committee considered to be the central aspects of the parties' positions for the purpose of its Decision. In summarising their positions thus, the Committee is by no means obliged to restate the parties' submissions in their entirety. In this case, the Respondent certainly did make submissions regarding the existence of a presumption in favor of the validity of the awards, but not in specific terms, as can be seen by a reading of paragraph 3 of its written submission of December 6, 2002. Rather, it limited itself to suggesting the possibility of support for the presumption of the validity of awards without, however, making an issue of it, or in any way questioning the legitimacy of the annulment proceeding, which was accepted by all parties.

29. At the end of paragraph 62 of its Decision, the Committee merely observes that there is no definitive presumption one way or the other. And the two parties appear independently to have arrived at the same conclusion, as illustrated by the fact that they both accept that annulment proceedings are restricted to certain very concrete cases and that the competence of an *ad hoc* committee extends only to annulment justified on one or other of the specific grounds enumerated in Article 52 of the ICSID Convention, rather than on any general presumption.

30. There being no error that is susceptible of rectification, Argentina's request for rectification is rejected.

(c) *Whether the Committee erred in describing the Respondent's position in relation to the possibility of a partial annulment and its consequences (paragraph 67 of the Decision)*

31. Once again, the Respondent's request comprises an inappropriate attempt to revise the wording of the Decision as it concerns the Committee's summary of the parties' allegations, rather to "rectify" any error within the meaning of Article 49(2). Indeed, the Committee is unable to identify any specific error in paragraph 67 of the Decision, notwithstanding Argentina's view to the contrary. As stated above, in summarising the parties' positions in relation to a particular issue, the Committee is by no means obliged to restate the parties' submissions in their entirety.

32. For these reasons, and on the same basis as for Respondent's request for rectification "(b)," above, Argentina's request is rejected.

(d) *Whether the Committee erred in stating that the Respondent was not making a late annulment application by way of a counterclaim (paragraph 70 of the Decision)*

33. The foregoing reasons could apply as well to the Respondent's fourth request for rectification. That said, there are additional compelling reasons on the basis of which the Committee also denies this request.

34. The Respondent itself admits, in paragraph 53 of its Request, that it had pointed out "in a subsidiary and conditional manner" the absence of consideration of the jurisdictional issue arising from the transfer of CAA's shares from DyCASA to CGE. In any event, in paragraph 70 of the Decision, the Committee clearly states that Respondent's position to the effect that, if any part of the Tribunal's award is annulled its jurisdictional decision must also fall, is *not* to be considered as a "late annulment application by way of a counterclaim" or "an inadmissible counterclaim for annulment on new grounds." It should be stressed that the Committee did consider Argentina's subsidiary argument relating to jurisdiction, and did so in full.

35. The Committee need not and will not re-visit the parties' respective positions as to whether or not Argentina's submissions were in fact "late."

Suffice it to state that the Respondent has identified no error whatsoever that requires rectification, and that its request for rectification is therefore rejected.

- (e) *Whether the Committee erred in stating that the Respondent argued that there was a contradiction between the Tribunal's reasons concerning jurisdiction and its reasons concerning the merits of the dispute (paragraph 72 of the Decision)*

36. Paragraph 72 of the Decision similarly refers to the parties' positions concerning the Tribunal's jurisdictional finding and the annulment of that aspect of its Award. And in this instance, the Decision does reveal an error: the word "Respondent" in the third sentence should read "Claimants," since it was in fact the Claimants which "...argued, in the alternative, that there was a contradiction between those reasons and the reasons given by the Tribunal concerning the merits." This clerical error can easily and accurately be remedied by changing one word, without the need to delete the entire sentence, as requested by Argentina.

37. Accordingly, this element of Argentina's Request is granted, in part. The third sentence of paragraph 72 of the Decision shall be rectified by the substitution of the word "Claimants" for the word "Respondent."

- (f) *Whether the Committee erred in stating that neither party disputes that a tribunal commits an excess of powers if it fails to exercise its jurisdiction (paragraph 86 of the Decision)*

38. In paragraph 86 of its Decision, the Committee described what it considered to be the settled and uncontroversial principle that a tribunal may commit an excess of powers not only by purporting to exercise a jurisdiction that it does not possess, but also by failing to exercise a jurisdiction that it in fact does possess. In so doing, the Committee stated that "neither party disputes" this proposition.

39. It is true, however, that the Respondent – although only in its Memorial, and not in its subsequent written submissions on annulment or during the hearing – made the arguments relating to the issue that are enumerated in paragraph 59 of its Request. The Committee interpreted the Respondent during the oral hearing as – at least – not stressing this argument any longer, but accepts that it was not formally abandoned. As such, the phrase

“neither party disputes” could be seen as a clerical or similar error, which in no way affects the merits of the Decision.

40. Accordingly, and for the sake of accuracy, the first sentence of paragraph 86 of the Decision shall be rectified by the deletion of the words “, and neither party disputes.” Respondent’s Request is thus granted in this respect.

(g) *Whether the Committee erred in summarizing the arguments of the Respondent in relation to the treatment by the Tribunal of the Tucumán claims (paragraph 93 of the Decision)*

41. As with the majority of its specific requests for rectification, the Respondent has failed to identify, in this particular request, any clerical, arithmetical or similar error susceptible of rectification. Once again, its objective appears to be to have the Committee substantially alter the summary, in paragraph 93 of the Decision, of what it appreciated as the most relevant aspects of the parties’ positions concerning the issue under consideration. It goes without saying that such a summary could obviously be approached in a number of different ways. The important point, however, is that paragraph 93 contains no identifiable error. On the contrary, the Committee is of the opinion that it captures the essence of the Respondent’s submissions, in particular as they were developed in the oral hearings.

42. For these reasons, this element of Argentina’s Request is denied.

D. COSTS

43. In its Decision, the Committee determined that “in the light of the importance of the arguments advanced by the parties in connection with this case, [it] considers it appropriate that each party bear its own expenses incurred with respect to this annulment proceeding...” The same cannot, however, be said of the present phase of the proceeding. Indeed, in all but two instances, the Committee has found that the various requests that comprise Respondent’s Request are not only unfounded but inappropriate, consisting essentially of attempts to re-argue substantive elements of the Committee’s Decision.

44. In the circumstances, the Committee finds that each party shall bear all of its own costs incurred in connection with the Request for Supplementation and Rectification of the Committee’s Decision, but that

Argentina shall pay the entirety of the fees and expenses incurred by the Committee in connection with the above-mentioned request of Argentina.

E. DECISION

45. For the foregoing reasons, the Committee DECIDES:

- (a) Respondent's Request for a supplementary decision is denied;
- (b) Respondent's Requests for rectification are denied, with the exception of the following:
 - (i) The third sentence of paragraph 72 of the Decision is rectified by the substitution of the word "*Claimants*" for the word "*Respondent*";
 - (ii) The first sentence of paragraph 86 of the Decision is rectified by the deletion of the words "*, and neither party disputes.*"
- (c) Each party shall bear all of its own costs incurred in connection with the Request for Supplementation and Rectification of the Committee's Decision, and Respondent shall pay the entirety of the fees and expenses of the Committee in connection with the above-mentioned request of Argentina.

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

L. YVES FORTIER, C.C., Q.C.
President of the Committee

Professor JAMES R. CRAWFORD
Member

Professor JOSÉ CARLOS FERNANDEZ ROZAS
Member