

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

In the Matter of the Exception to the Jurisdiction of the Centre
and the Competence of the Tribunal
In the Arbitration between

COMPAÑIA DE AGUAS DEL ACONQUIJA S.A.
and
VIVENDI UNIVERSAL S.A.
Claimants

v.

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/97/3

DECISION ON JURISDICTION

Date: November 14, 2005

Members of the Tribunal

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

Secretary of the Tribunal

Dr. Claudia Frutos-Peterson

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Representing Respondent

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THE TRIBUNAL

After Deliberation,

Makes the following decision:

A. INTRODUCTION

1. The case now before this Tribunal is a resubmitted case. The dispute here involved has been the subject of prior proceedings before the Centre, as ICSID Case No. ARB/97/3. Pursuant to a Request for Arbitration filed on 26 December 1996 and registered on 17 February 1997 (“First Request” or “Original Request”), a duly appointed Tribunal (“First Tribunal” or “Original Tribunal”) rendered an Award on 21 November 2000. Two Claimants were named in the Original Request, Compañía de Aguas del Aconquija, S.A. (“CAA”) and Compagnie Générale des Eaux (“CGE”);
2. By a Request for Partial Annulment of the Award, (“Request for Annulment”) filed pursuant to Article 52 of the ICSID Convention, Claimants, on 20 March 2001, sought an annulment of the merits portion of the Award. The Applicants named in the Request for Annulment were CAA and Vivendi Universal S.A. (formerly CGE). Vivendi Universal S.A. attached to the Request for Annulment a letter dated 20 March 2001 from Gilbert Klajnman, its Senior Vice-President Legal Affairs, informing the Secretary General of ICSID that *“The party of the arbitration proceeding, Compagnie Générale des Eaux (“CGE”) has changed its corporate name to Vivendi and has been merged to form Vivendi Universal.”* A duly constituted *ad hoc* Committee (“Committee” or “*ad hoc* Committee”) rendered a Decision on Annulment on 3 July 2002.
3. The *ad hoc* Committee decided, *inter alia*, that the Original Tribunal rightly held that it had jurisdiction over the claims before it, but that it had exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT. Accordingly, the Committee annulled the First Tribunal’s Decision with regard to those claims.
4. On 26th August 2002, Respondent submitted to the Secretary-General of ICSID a Request for Supplementation and Rectification of some aspects of the *ad hoc* Committee’s Decision. By Decision dated 26 May 2003, the *ad hoc* Committee denied Respondent’s Request for a Supplementary Decision and, with one minor exception (having to do with a typographical error), denied Respondent’s Request for Rectification.
5. By a Request for Arbitration dated 29 August 2003 (“Second Request”), Claimants resubmitted the dispute to ICSID pursuant to Article 55(1) of the ICSID Arbitration Rules. Claimants sought adjudication by a new Tribunal of the issues as to which the Award was annulled, namely the merits of their BIT claims arising out of the alleged acts and omissions of the Tucumán authorities. The Claimants named in the Second Request are CAA and Vivendi Universal S.A. (“Vivendi Universal”). The resubmitted case continues to bear the same Case No. ARB/97/3 assigned to the original case.

6. The present Tribunal was constituted on 14 April 2004.

B. AGREED PROCEDURAL TIMETABLE OF RESUBMITTED DISPUTE

7. The Tribunal held its First Session with the parties on 7 July 2004 pursuant to Rule 13 of the Arbitration Rules. At that Session, following the expression of the parties' views, a timetable for production of documents, written submissions and a substantive hearing was established.

8. In accordance with that timetable, as subsequently amended by agreement of the Parties, the Memorial of Claimants was filed on 24 November 2004. Respondent's Counter-Memorial was due to be filed by 7 April 2005.

9. On 23 March 2005, two weeks before the 7 April 2005 deadline for the submission of its Counter-Memorial, the Argentine Republic filed an Exception to the Jurisdiction of the Centre and the Competence of the Tribunal in which it raised comprehensive objections to the jurisdiction of the Centre and this Tribunal.

C. ARGENTINE REPUBLIC'S OBJECTIONS TO THE JURISDICTION OF TRIBUNAL

10. In its 23 March 2005 Memorial on Jurisdiction, as developed in its 21 June 2005 Reply on Jurisdiction (entitled "Rejoinder Brief about Objections Raised..."), and as further developed during the course of the hearing on jurisdiction held on 16-17 August 2005, the Argentine Republic raises five objections to the jurisdiction of this Tribunal. These may shortly be summarised as follows:

- (i) Vivendi Universal has not proved itself to be the successor-in-interest to CGE. Rather, through a series of complicated corporate changes that occurred after the filing of the First Request but before the filing of the Second Request, Veolia Environment succeeded to CGE's majority shareholding in CAA and Vivendi Universal currently owns only 5.3% of Veolia Environment's issued and outstanding shares (on the date of the Second Request it held only 20.4% of such shares);
- (ii) Being presently only an indirect minority shareholder of CAA, Vivendi Universal's current claims are derivative and derivative claims are forbidden under both Argentine and international law;
- (iii) As regards CAA's claims, CAA did not obtain its French nationality for protection pursuant to the terms of Argentina-France BIT and to the extent that it acquired protection under the treaty it did so illegitimately;
- (iv) CAA and Vivendi Universal have failed to comply with Article 36(2) of the ICSID Convention and Rule 2(1)(f) of the Institution Rules; and
- (v) The *ad hoc* Committee's Decision precludes consideration of purely contractual claims (*ie*, for breach of the Concession Contract). To the extent that the present

Tribunal has jurisdiction, it is limited to claims for breach of the Argentina-France BIT which are grounded in allegations of conspiracy or based on facts which constitute a concerted effort by the Tucumán authorities to frustrate the Concession Contract.

D. PROCEDURAL TIMETABLE ADOPTED FOR JURISDICTIONAL DETERMINATION

11. On 12 April 2005, having considered Respondent's objections and the parties' submissions of 1 and 7 April 2005, the Tribunal decided that Respondent's objections required to be dealt with as a preliminary question in accordance with the following schedule:
 - (i) Claimants to file a Counter-Memorial on Jurisdiction on or before 31 May 2005;
 - (ii) Respondent to file a Reply on Jurisdiction on or before 21 July 2005;
 - (iii) Claimants to file a Rejoinder on Jurisdiction on or before 12 July 2005;
 - (iv) A two-day oral hearing on Jurisdiction to be held on 16-17 August 2005 in Washington, D.C.
12. On the same date, the parties were informed by the Secretariat that, given their potential relevance to Respondent's objections, the Tribunal had requested the Secretariat to provide it with their submissions on jurisdiction previously made before the First Tribunal and before the *ad hoc* Committee.

E. RESPONDENT'S JURISDICTIONAL CASE

13. It is here convenient to summarise briefly the elements and scope of Respondent's case on jurisdiction as advanced in its written submissions and during the course of the oral hearing.
 - (1) **Vivendi Universal lacks *ius standi* to sue, not having established itself as the successor to CGE**
14. The Argentine Republic contends that Vivendi Universal bears the burden to, but has failed to establish itself as the successor-in-interest to CGE. It has both failed to document appropriately changes in its corporate name so as to show itself as successor-in-interest to CGE or to explain adequately those corporate changes which justify its claim to be the successor-in-interest to CGE. It has also failed to prove its shareholding in the company that is the successor to CGE.
15. Argentina asserts that Vivendi Universal's claim to be successor-in-interest to CGE requires to be "... *proved formally and irrefutably at this stage, and not at any other*

stage of these proceedings".¹ Argentina also says that control of CAA by a French national is essential to *ius standi* pursuant to Article 25(2)(b).

16. In substance, Argentina contends that Vivendi Universal (or its predecessor) has divested all of its water operations, which after a number of corporate changes are presently within Veolia Environment, a company in which Vivendi Universal now holds only a minority interest. More specifically, Argentina submits that public filings -in particular financial reports and filings before the U.S. Securities and Exchange Commission ("SEC") - by Vivendi Universal and its affiliates indicate that:
- (i) On 23 December 1999, Vivendi S.A. transferred 100% of its shares in CGE to Vivendi Environment and later (by the end of 2002) to Vivendi Water²;
 - (ii) In April 2003, Vivendi Environment changed its name to Veolia Environment and Vivendi Water changed its name to Veolia Water³;
 - (iii) Over this same period, Vivendi Universal's holding in Veolia Environment (previously Vivendi Environment) decreased from 100% to 72% in 2000, to 63% in 2001, to 20.4% in December 2002⁴, and to 5.3% in 2005.
17. Argentina further contends that after CGE's alleged change of name to Vivendi S.A. in May 1998 and until the middle of 2003, CGE remained registered (and Vivendi S.A. was not registered) in CAA's register of shares. Argentina submits that the reason why Vivendi S.A. was not registered in CAA's register of shares at the time is that Vivendi S.A. transferred in 1999 all its water operations to one of its subsidiaries called CGE-Sahide S.C.A., which had been created on 26 June 1998 and which later changed its name to CGE.⁵ Argentina also argues that maintaining CGE's name in CAA's register of shares at ordinary shareholders meeting after CGE's name was changed to Vivendi S.A. validated the "notation" of the shares in favour of the party that was in fact the "new CGE". In Argentina's submission, this shows that CGE and Vivendi S.A. coexisted before December 1999 and that Vivendi S.A. was not the universal successor of CGE, as alleged by Claimants.⁶ Given that there was no universal succession, the only way Vivendi S.A. could become a shareholder of CAA is by way of a specific transaction,

¹ Respondent's Memorial on Jurisdiction, ¶19.

² Argentina relies in particular upon the 2002 and 2003 Veolia Water Financial Reports (Annex 15 and 14, respectively). For example, the 2003 Veolia Water (previously known as Vivendi Water) Financial Report indicates that "*The Vivendi Water group was created in December 1999 through (...) The contribution at book value on December 23, 1999 by Vivendi Universal to Vivendi Environment of its shareholdings in the capital of Compagnie Générale des Eaux (100%; holding company for water and wastewater services (...)).*"

³ Argentina relies in particular upon the 2002 and 2003 Veolia Water Financial Reports (Annex 15 and 14, respectively).

⁴ Argentina relies in particular upon Vivendi Universal's filing before the SEC of 30 June 2003 (Annex 17) and upon Veolia Environment's filing before the SEC of 30 May 2003 (Annex 12).

⁵ Respondent's Reply on Jurisdiction, ¶¶25-28 and 31-33. In support of its argument that all of Vivendi S.A.'s water operations were transferred to CGE in 1999, Argentina relies in particular on the 2002 and 2003 Veolia Water Financial Reports, which both indicate that "Compagnie Générale des Eaux" became the recipient of all of (as opposed to some of) the water-related activities of Vivendi Universal (Annex 14 at 1; Annex 15 at 1; see also Transcript at 161-163).

⁶ Respondent's Reply on Jurisdiction, ¶¶28-33.

which Claimants failed to prove. The Argentine Republic also argues that Claimants' argument that Vivendi S.A. was not entered into CAA's register of shares between May 1998 and the middle of 2003 because of an "administrative delay of 5 years" is not believable.⁷

18. As regards Claimants' reliance upon jurisdictional findings of the First Tribunal or the *ad hoc* Committee (to support its arguments of *res judicata*), Respondent argues that the existence of a controlling interest by a French national at the beginning of the arbitration (*ie*, on 26 December 1996) is insufficient. This is because such control must persist over time. Thus, it is required also to be established as at 29 August 2003, the date of the filing of the Second Request and throughout the proceedings. For this reason, Argentina contends that Vivendi Universal's minority interest in (hence lack of control of) Veolia Environment – the controlling shareholder of Veolia Water which owned CAA – critically undermines Claimants' BIT claims and the jurisdiction of this Tribunal.

(2) Vivendi Universal's claim is a derivative claim forbidden by Argentine and international law

19. Vivendi Universal claims as an indirect minority investor in Veolia Water (holding a 20.4% interest at the date of filing of the Second Request, and a 5.3% interest today). This minority indirect shareholding in a protected investor converts Vivendi Universal's claim into a derivative action prohibited under both Argentine and international law.
20. Under Argentine law shareholders of corporations may not assert claims in respect of corporate rights but only on their own behalf. Absent special legislative provisions, such derivative claims for rights belonging to the Corporation are improper. Such claims are also impermissible under international law. Reliance is placed on the conclusions of the International Court of Justice ("ICJ") in the *Barcelona Traction case*.⁸ In sum, it is CAA, not Vivendi Universal or even Veolia Environment which can assert claims on its behalf.

(3) CAA did not acquire French "nationality" under the protection of the Argentine/French BIT

21. Argentina says that at the time issues arose under the Concession Contract, CAA was an Argentine company established under Argentine Law. It contends further that CGE's acquisition of a majority stake in CAA, occurring as it did after grievances had arisen, was made only to ensure CGE obtained the controlling interest required by Article 25(2)(b) of the ICSID Convention. Further, CAA's acquisition of a French nationality under the French/Argentine BIT in these circumstances constitutes a fraud on the treaty and cannot be used to satisfy the nationality conditions of Article 25(2)(b) of the Convention.

⁷ Transcript at 171.

⁸ *Barcelona Traction, Light and Power Company Limited*, judgment of 5 February 1970, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.

(4) CAA and Vivendi Universal failed to comply with essential preconditions to instituting ICSID arbitration proceedings

22. It is Argentina's case in this regard that Article 36(2) of the Convention and Rule 2(1)(f) of the Institution Rules require that all necessary internal actions have been taken to authorize the registration of the case and that the necessary powers to institute proceedings have been granted, both of these preconditions requiring documentary proof.
23. Argentina contends that the documents evidencing powers of attorney granted by Vivendi Universal and CAA to Messrs. Price and Erize are ineffective. Moreover, CAA has never conferred such a power to Mr. Colombres, nor has Vivendi Universal ever empowered Mr. Erize. Such failures are said to constitute insurmountable obstacles to the admissibility of Claimants' claims.

(5) Claimants' claims are prohibited under the terms of the ad hoc Committee's Decision

24. Argentina argues that the *ad hoc* Committee distinguished between purely contractual claims and treaty claims and annulled the Award only in so far as the First Tribunal had declined to decide Claimants' treaty claims.⁹ Argentina identified 13 claims, issues or questions which the First Tribunal had clearly delineated as being contractual in nature which, having not been revised by the Committee, must be considered as being barred from consideration by this Tribunal on the grounds of *res judicata*.¹⁰
25. Argentina further contends that the *ad hoc* Committee's analysis of the First Tribunal's errors in this regard makes it clear that Claimants' only proper "treaty claims" are those based on "a conspiracy of the authorities of Tucumán to frustrate the Concession Contract."¹¹ Accordingly, this Tribunal's jurisdiction must be limited to a consideration of such claims.
26. Finally, Argentina says that, to the extent that the evidence at this stage does not readily enable a determination as to which claims sound only in contractual breach and which are based on concerted action or conspiracy to frustrate the Concession Contract, such a determination should be reserved to and joined with the merits stage of these proceedings, should such a stage be reached.

F. CLAIMANTS' JURISDICTIONAL CASE

27. It is here convenient to summarise briefly the elements and scope of Claimants' case on jurisdiction as it was developed in their written submissions and during the course of the oral hearing.

(1) Argentina's claim that Vivendi Universal lacks standing is precluded by *res judicata* and is based on a fundamental misstatement of fact

⁹ Respondent's Memorial on Jurisdiction, ¶¶172 – 176.

¹⁰ Respondent's Memorial on Jurisdiction, ¶178.

¹¹ Respondent's Memorial on Jurisdiction, ¶193 and Transcript, pages 63-65.

28. Claimants argue that this Tribunal’s jurisdiction was established by the First Tribunal five years ago when it found it had jurisdiction to rule on the merits of the dispute having rejected the many objections to jurisdiction then raised by Argentina. Because this positive finding was not annulled by the *ad hoc* Committee, it is *res judicata* and binds both the parties and this Tribunal.
29. In concluding that it had jurisdiction, the First Tribunal necessarily made final determinations on the various elements of jurisdiction under the ICSID Convention and the BIT, finding, *inter alia*, that CGE and CAA were proper Claimants and that the dispute arose out of the investment made by Claimants in Argentina. In endorsing the First Tribunal’s jurisdictional analysis the *ad hoc* Committee agreed that CAA should be treated as a French company for the purpose of the arbitral proceedings, finding that “...there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration.”¹² The *ad hoc* Committee also confirmed the First Tribunal’s findings that this dispute is one “...relating to investments...” under Article 8 of the BIT.¹³ Thus, the *ad hoc* Committee decided that “...the Tribunal rightly held that it had jurisdiction over the Claims.”¹⁴
30. Further, Rule 55(3) expressly precludes resubmission to a new tribunal constituted under Article 52(6) of any claims or issues adjudicated by an earlier Tribunal and not subsequently annulled.
31. The practice of ICSID Tribunals also confirms that a new tribunal constituted under Article 52(6) of the Convention may not reconsider non-annulled findings of the First Tribunal. Reliance is placed on the *Amco Asia case*.¹⁵
32. Whilst it is possible, on very rare occasions, that a new fact may arise subsequent to the annulment proceedings that may require consideration of a jurisdictional question in a resubmitted case, there are no new “facts” here, merely demonstrably false speculations.
33. Also, even where a new fact may give rise to a jurisdictional-enquiry, that enquiry is limited to determining whether, in fact and in law, the conditions of *res judicata* apply (*ie*, whether the parties and the causes of action are the same as in the previous proceeding). Critically, here, Argentina makes no allegation that there is a different party or that Claimant has maintained different causes of action.
34. In any event, Argentina’s allegations that there was a change in CAA’s corporate ownership is simply false. Vivendi Universal was formerly known as Vivendi S.A., which in turn was formerly known as CGE. Vivendi Universal continues to this day to hold the majority stake in CAA that was acquired at the time that it was known as CGE.

¹² See Decision on Annulment at ¶50.

¹³ See Decision on Annulment at ¶74.

¹⁴ See Decision on Annulment at ¶119.

¹⁵ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (resubmitted case), 10 May 1998, 1 ICSID Rep. 543 (1993).

35. Argentina's suggestion that Vivendi Universal no longer holds the majority of CAA's shares rests on the assumption that its stake in CAA may have been transferred in 1999 along with most of Vivendi S.A.'s water related assets to what today are the Veolia companies. However, the alleged transfer of shares never occurred. CAA's board of directors in June 2003 explicitly confirmed that Vivendi Universal was CGE's successor-in-interest and holds title to all the shares formerly held in the name of CGE.¹⁶ CAA's shareholder register shows, explicitly, that Vivendi Universal is CGE's successor-in-interest and that Vivendi Universal owns the CAA shares previously acquired and held by Vivendi Universal's predecessor, CGE.¹⁷ Finally, Vivendi Universal's status as the majority owner of CAA is demonstrated conclusively by the CAA share certificates currently held by Vivendi Universal.¹⁸

(2) A shareholder may bring a claim under the BIT for injury to the company in which it is invested

36. Claimants contend that Argentina's objection, that Vivendi Universal is improperly advancing a claim based on harm to CAA which is prohibited under Argentine law as well as international law, fails because:

- (i) The standing of CAA's controlling shareholder has already been established by the First Tribunal and, thus, is *res judicata*; and
- (ii) It is well established that shareholders (whether minority or majority) may bring investor-state claims based on breaches of an investment treaty that have injured the company in which they have invested.

37. As regard *res judicata*, the *ad hoc* Committee stated:

Moreover, it cannot be argued that CGE did not have an "investment" in CAA from the date of the conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5.¹⁹

38. The *ad hoc* Committee thus upheld the First Tribunal's finding that CGE had standing as CAA's shareholder to pursue arbitration under the BIT. This finding remains in force and is *res judicata*. The Committee's Decision was also issued after CGE's name had been changed to Vivendi S.A. and after Vivendi was succeeded by Vivendi Universal S.A. The Annulment Decision's caption reads "*Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (ICSID Case No. ARB/97/3, Decision on Annulment 3 July 2002)*."

¹⁶ CAA Board of Directors, Act no. 80, 17 Jun 2003; Claimants' Memorial, ¶35.

¹⁷ CAA register of shares at 3 (Exhibit 348) (05558); Claimants' Counter-Memorial ¶36.

¹⁸ See CAA share certificates nos. 1, 2, 4-9, 17 June 2003 (349)(05561-05568).

¹⁹ Decision on Annulment at ¶50.

39. As regards existing precedent, Claimants say that Argentina’s contention that corporate shareholders may not bring claims for investment treaty breaches that harm the company in which they invest so clearly contradicts a settled point of law as to border on bad faith.
40. First, the Argentina-France BIT (the instrument through which Argentina consents to arbitration under Article 25(1) of the ICSID Convention) explicitly includes shares in its definition of “*investments*”, making it clear that a foreigner who holds shares of a domestically incorporated company has an “*investment*”.²⁰ The BIT further entitles foreign investors to bring claims for Argentina’s breach of the Treaty’s protections with respect to those investments.²¹
41. Second, reliance on the *Barcelona Traction case* is misplaced and international tribunals have consistently upheld independent shareholder standing under investment treaties. Reliance was placed on eighteen cases, all of which upheld the ability of shareholders to pursue such claims. In eleven of the eighteen cases, the Argentine Republic, as Respondent, made the same argument it now advances and in each of those eleven cases that argument was rejected.²²

(3) CAA is a French company with standing under Article 25(2)(b) of the ICSID Convention and Article 8 of the BIT

42. Claimants say that CAA’s status as a French company under the Convention and the BIT may not be challenged here because the First Tribunal’s jurisdictional finding is *res judicata*. In the first proceedings, Argentina raised exactly the same objection that it raises here, arguing that CAA “*should not be treated as a French investor*” because a majority of its voting stock was not owned by French companies at the time the dispute arose.²³
43. In this regard, the First Tribunal held that “...*the Tribunal has determined that CGE controlled CAA and that CAA should be considered a French investor from the effective date of the Concession Contract*”.²⁴ It went on to conclude, *inter alia*, that “...*it is...clear that CGE controlled CAA at the time the proceedings were commenced so that there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration.*”²⁵
44. Moreover, even if this issue was not *res judicata*, Argentina is undeniably wrong on the facts.²⁶ CAA meets all the criteria to be deemed a French company under the ICSID

²⁰ BIT Art. 1(1).

²¹ BIT Art. 8.

²² Appendix 1 contains a list of the 18 cases in question.

²³ Award at ¶24 and n.6.

²⁴ Decision on Annulment at ¶48; Award at n. 6. This conclusion was not annulled by the *ad hoc* Committee. Rather it noted that CGE “...had effective control of CAA within the meaning of Article 1(2)(c) of the Argentine/French BIT [at least as of June 1996].

²⁵ Decision on Annulment ¶50 (emphasis added).

²⁶ Claimants contend that the history of CAA’s equity ownership was set out in the First Tribunal Award at Note 6 and was summarized again by the *ad hoc* Committee in its Decision on Annulment at ¶48. None of the facts have changed since that time.

Convention and the BIT, being both controlled and majority owned by a French investor at all times relevant under the Treaty.²⁷

(4) Argentina’s complaints regarding authorisation of Claimants are misguided and not relevant to jurisdiction

45. Claimants argue that the Argentine Republic’s complaints regarding authorisation of Claimants to pursue arbitration and the powers granted to Claimants’ attorneys fail for three reasons.
46. First, these procedural complaints do not constitute a jurisdictional objection. Article 36(2) of the ICSID Convention and Rule 2(1)(f) of the ICSID Institution Rules on company authorisation are procedural in nature and do not provide a basis for an objection to jurisdiction. Failure to comply with these provisions can readily be cured and compliance becomes moot after registration of the Request for Arbitration.
47. For a tribunal to find that it lacks jurisdiction, it must identify a missing element under Article 25 of the Convention or Article 8 of the BIT and no such jurisdictional deficiency is involved in the requirements of Article 36(2) of the ICSID Convention and Rule 2(1)(f) of the ICSID Institution Rules.
48. Second, Argentina must be held to have waived such objections because it failed to raise them during the preceding eight and half years of these proceedings involving the same companies and the same attorneys. Indeed, a claimant’s compliance with Article 36(2) of the ICSID Convention and ICSID Institution Rule 2 is relevant only until the Secretary-General has registered a Request for Arbitration under Article 36(3) of the Convention.²⁸
49. Third, even if Argentina’s complaints provided a basis for jurisdictional objection and even if Argentina had not waived its rights to object, its objection would still fail because Claimants have met the requirements under Article 36(2) of the ICSID Convention, Rule 2(1)(f) of the Institution Rules and Arbitration Rule 18(1) in both the original proceeding and in this resubmitted case.²⁹

(5) Argentina’s suggestion that jurisdiction over treaty claims must be limited to those based on conspiracy/concerted action are unfounded

50. Claimants argue that Argentina may not challenge this Tribunal’s jurisdiction over treaty claims based on the action of the Tucumán Authorities relating to the Concession Agreement, because the First Tribunal’s finding – that it had jurisdiction over all claims arising under the BIT, including BIT claims relating to rights and obligations under the

²⁷ See Article 25(2)(b) of the ICSID Convention, Article 1(2)(c) of the Argentine/French BIT concerning evidence which is sufficient to demonstrate “effective control”.

²⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001) (“Schreuer ICSID Convention”) at 456.

²⁹ Reliance is placed on Delegation of Authority, 11 July 2002 (Claimants’ Request for Arbitration, 29 August 2003) (Exhibit 9); Letters from Gilbert Klajnman, 4 and 29 July 2003 (Claimants’ Request for Arbitration, 29 August 2003) (Exhibits 7 and 8); Resolution of the Board of Directors of CAA, 29 July 2003 (Claimants’ Request for Arbitration, 29 August 2003) (Exhibit 5) and Letter from José Manuel García González, CAA’s Vice-President, 12 August 2003 (Claimants’ Request for Arbitration, 29 August 2003) (Exhibit 6).

Concession Agreement – is *res judicata*. The *ad hoc* Committee did not annul (and indeed endorsed) this finding. Argentina is thus barred from seeking to re-litigate this Tribunal’s jurisdiction, and cannot be heard when it argues that some BIT claims should be sent to the local jurisdiction because they are contractual in nature.

51. Argentina is said to misconstrue the *ad hoc* Committee’s Decision on Annulment. In fact, the Committee rejected the First Tribunal’s conclusion that it could not consider the contract-related BIT claims, finding that the standards set forth in Articles 3 and 5 of the BIT are “*independent*” from the Argentine law standard for breach of contract.³⁰ Argentina thus may breach the treaty without breaching the contract and *vice versa*. It therefore follows that “*whether there has been a breach of the BIT and whether there has been a breach of the contract are different questions*” to “*be determined by reference to its own proper or applicable law*”.³¹
52. Claimants submit that, properly analysed, the findings of the First Tribunal, as modified by the Decision on Annulment, lead to conclusions exactly opposite from those now advocated by Argentina. First, the Original Tribunal’s description of certain of the claims at issue as “*contractual*”, and its resulting decision that they ought not to be reviewed under the BIT, have been annulled and thus have no legal force and are not *res judicata*. In the result, this Tribunal is now obliged to review such claims. Second, neither the holdings nor the reasoning of the Committee’s Decision on Annulment support Argentina’s position that contract-related BIT claims should be referred to the local courts. On the contrary, the Committee’s explicit rejection of this proposition formed the basis for its partial annulment of the First Tribunal’s Award. Under the pretext of its claim that certain issues are *res judicata*, Argentina is, in reality, asking the Tribunal to ignore this case’s history and to repeat the First Tribunal’s error, namely to refuse to undertake the legal analysis of Articles 3 and 5 of the BIT for the contract-related BIT claims that have been determined to be within its jurisdiction.

G. PREVIOUS SUBMISSIONS ON JURISDICTION

53. Given the central importance of the doctrine of *res judicata* to the parties’ positions regarding Respondent’s current objections to the jurisdiction of this Tribunal, it is useful to restate the procedural history concerning the timing, number, nature and scope of the objections to jurisdiction that have been raised by the Argentine Republic over the course of these proceedings.
54. As previously noted, the First Request was received by the Centre on 26 December 1996, with the request being registered on 19 February 1997.
55. Following a letter of 11 December 1997, from the Secretary of the First Tribunal notifying the parties of the latter’s wish to hold its First Session, the Argentine Republic, by letter of 8 January 1998, raised its first objections to jurisdiction. A week later, on 14 January 1998, counsel for Argentina submitted a memorandum to the Secretary-General setting forth grounds for finding that the dispute was manifestly not within the

³⁰ Decision on Annulment at ¶95.

³¹ Decision on Annulment at ¶96.

jurisdiction of the Centre.³² On 23 January 1998, Counsel for 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, not for the Secretary-General.³³

56. On 18 February 1998, at a meeting of the parties with the Tribunal, it was then agreed that the parties would file simultaneous observations on the objections of the Argentine Republic to jurisdiction, to be followed by filing of simultaneous Further Observations and a hearing, after which the proceedings before the First Tribunal unfolded as follows.³⁴
- (i) On 20 April 1998, the parties filed their Observations on Argentina's Objections to Jurisdiction;³⁵
 - (ii) On 11 May 1998, the parties filed their Further Observations on such Objections;³⁶
 - (iii) On 2 July 1998, the First Tribunal ordered that Argentina's Objections to Jurisdiction be joined to the consideration of the merits of the dispute;³⁷
 - (iv) On 2 November 1998, Claimants filed their Memorial which included their argumentation on Jurisdiction;³⁸
 - (v) On 1 February 1999, Respondent filed its Counter-Memorial on the merits and jurisdiction;³⁹
 - (vi) On 4 March 1999, Claimants filed their Reply on the Merits and Jurisdiction;
 - (vii) Following the Respondent's Rejoinder, filed on 5 April 1999, which dealt only with the merits, the hearing on jurisdiction and the merits was held on 11-13 August 1999;⁴⁰
 - (viii) On 30 September 1999, the parties simultaneously filed Post-Hearing Memorials. Post-Hearing Rejoinders were filed simultaneously on 12 October 1999.⁴¹
57. In the course of the Annulment Proceedings there were five further written submissions, each of which dealt further with the jurisdictional issues:
- (i) On 20 August 2001, Claimants filed their Memorial;⁴²

³² See Award at ¶¶10-12.

³³ See Award at ¶12.

³⁴ See Award at ¶16.

³⁵ See Award at ¶16.

³⁶ See Award at ¶16.

³⁷ See Award at ¶17.

³⁸ See Award at ¶18.

³⁹ See Award at ¶18.

⁴⁰ See Award at ¶21.

⁴¹ See Award at ¶22.

- (ii) On 12 November 2001, Argentina filed its Counter-Memorial;⁴³
- (iii) On 10 December 2001, Claimants filed their Reply;⁴⁴
- (iv) On 8 January 2002, the Argentine Republic filed its Rejoinder.⁴⁵

H. TRIBUNAL'S ANALYSIS

58. Many of the relevant factual issues and legal arguments pertaining to each of Argentina's five current objections to jurisdiction are the same or overlap. Nonetheless, it is convenient to consider each objection separately.

(1) Vivendi Universal lacks *ius standi* to sue, not having established itself as the successor to CGE

59. Respondent's objections to Claimants' standing in this resubmitted case turn on five principal questions:

- (i) At what stage of the proceedings is the jurisdiction of an ICSID Tribunal to be assessed;
- (ii) Did the First Tribunal assess its jurisdiction as at the correct stage of these proceedings;
- (iii) If so, is the jurisdictional decision of the First Tribunal binding on this Tribunal;
- (iv) May the jurisdictional determination made by the First Tribunal be reopened because of, so-called, new facts; and
- (v) If so, are there new facts to support the arguments of the Argentine Republic on this point.

60. As to question (i) above, it is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted.⁴⁶ ICSID Tribunals have consistently applied this Rule.⁴⁷ More specifically, in ICSID arbitration, the critical date for purposes of determining the nationality of the foreign investor under Article 25(2) of the ICSID Convention is the

⁴² See Decision on Annulment at ¶6.

⁴³ See Decision on Annulment at ¶6.

⁴⁴ See Decision on Annulment at ¶6.

⁴⁵ See Decision on Annulment at ¶6.

⁴⁶ *Československá Obchodní Banka, A.S. v. The Slovak Republic* ICSID Case No. ARB/97/4 Decision of the Tribunal on objections to Jurisdiction, 24 May 1999, 14 ICSID Rev. – Foreign Inv. L.J. 251, 262 at ¶31 (1999).

⁴⁷ See Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, 1 ICSID Reports 645, 644-668 (1993); *Liberian Eastern Timber Corp. (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 ICSID Reports 346, 351 (1994); and, *Antoine Goetz et Consorts c. République du Burundi*, ICSID Case No. ARB/95/3, Award, at 10 February 1999, 15 ICSID Rev. – Foreign Inv. L.J. 457, 490 at ¶72 (2000).

date of consent⁴⁸, *ie* generally the date when the arbitration is instituted in case of a dispute arising out of a BIT⁴⁹.

61. This is not only a principle of ICSID proceedings, it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not. The ICJ developed cogent case law to this effect in the *Lockerbie case*. There, in a preliminary objection, Libya relied on the Montreal Convention to establish the Court's jurisdiction. The United States and the United Kingdom contended that Security Council Resolutions adopted after the initiation of the proceedings deprived the Court of jurisdiction. The Court rejected categorically the arguments of the United States and the United Kingdom, deciding that:

The Court cannot uphold this line of argument. Security Council Resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so. The subsequent coming into existence of the above-mentioned Resolutions cannot affect its jurisdiction once established... ”⁵⁰

62. The Court confirmed this rule in the *Arrest Warrant case*, where it stated:

The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction ... ”⁵¹

63. The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an *ad hoc* Committee's Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal's jurisdiction over the dispute.
64. This principle applies in particular to the nationality requirement under Article 25 of the ICSID Convention. As Professor Schreuer notes:

⁴⁸ See Schreuer, ICSID Convention at 226 ¶325, 288 ¶490 and 289 ¶493.

⁴⁹ Indeed, ICSID clauses in modern BITs express an offer by the two Contracting States to submit to ICSID jurisdiction; the investor can accept such an offer by instituting ICSID proceedings (*see* Schreuer, ICSID Convention at 210-281 ¶¶285-308).

⁵⁰ See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriva v. United States of America) Preliminary Objection*, Judgment, 27 February 1998, 37 I.L.M. 590, 604 at ¶38 (1998).

⁵¹ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002 at ¶26, available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

*Any change in the juridical person's nationality after the date of consent is immaterial for jurisdiction. Subsequent to consent, a juridical person may lose the nationality of the original Contracting State and may acquire the nationality of a non-Contracting State or that of the host State without losing access to ICSID.*⁵²

65. It should be noted that the situation is less clear when nationality depends on foreign control. Indeed, ICSID Tribunals dealing with the relevant date to assess foreign control have generally favoured the date of consent. At the same time, they have not wholly disregarded subsequent developments, stressing in particular that the foreign control requirement was still met at a later date.⁵³ Be that as it may, the question of the relevance of new facts in connection with foreign control can be left open here. Indeed, as will be seen when discussing question (v) below, the Tribunal has found that control did not change, *ie* that no new facts occurred in this case.
66. As regards question (ii) above, it is beyond doubt that jurisdiction under the ICSID Convention and the Argentine-French BIT was established by the First Tribunal in this case five years ago. As is also evident from a review of Chapter G above, the parties briefed and argued jurisdiction extensively before each of the First Tribunal and *ad hoc* Committee.
67. In the result, the First Tribunal rejected each of Argentina's objections to jurisdiction, finding that:

*This case concerns a claim against the Argentine Republic submitted to ICSID by CGE, a French corporation that operates water and sewage systems in France and other countries, and also by CGE's Argentine affiliate, CAA.*⁵⁴

68. In footnote 6, which explained this finding, the First Tribunal noted, *inter alia*:

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....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.

69. The *ad hoc* Committee on Annulment did not annul this positive finding; it expressly endorsed it:

⁵² Schreuer, ICSID Convention at 289, ¶493

⁵³ Schreuer, ICSID Convention at 324-325, ¶¶579-581 and at 326ff, ¶¶581ff with references to cases (Professor Schreuer notes that ICSID Tribunals dealing with the critical date for foreign control have generally favoured the date of consent but have also expressed some concern for subsequent development).

⁵⁴ See Award at ¶24.

Moreover it cannot be argued that CGE did not have an “investment” in CAA from the date of the conclusion of the Concession Contract or that it was not an “investor” in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5. It is also clear that CGE controlled CAA at the time the proceedings were commenced, so that there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration. In the circumstances, and for the purposes of the present proceedings, the Committee does not need to reach any conclusion on the precise extent of CAA’s and CGE’s treaty rights at different times.⁵⁵

70. Ultimately, the *ad hoc* Committee concluded that “[t]he Tribunal rightly held that it had jurisdiction over the claims.”⁵⁶
71. Question (iii) above, *ie*, whether the First Tribunal’s decisions on jurisdiction, as endorsed by the *ad hoc* Committee, are binding on this Tribunal is governed by the doctrine of *res judicata*, which is recognized as a general principle of law.⁵⁷
72. It is common ground between the parties that a later tribunal is bound by the decision of an earlier one if the two actions involve the same parties and the same cause of action⁵⁸, *ie* if the claims asserted in both proceedings are the same.⁵⁹ This is in line with the general notion of *res judicata*. Indeed, it is generally recognized that the *res judicata* doctrine only applies where there is identity of the parties and of the “question at issue” -

⁵⁵ See Decision on Annulment at ¶50

⁵⁶ See Decision on Annulment at ¶119.

⁵⁷ See eg B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Sweet & Maxwell, 1953, reprinted Cambridge, Grotius, 1987, at 336, with references (“Cheng, *General Principles of Law*”); B. Hanotiau, *The res judicata effect of arbitral awards*, ICC International Court of Arbitration Bulletin, special supplement 2003, Complex arbitrations, at 43, ¶ 1 (“Hanotiau, *The res judicata effect of arbitral awards*”); and, Schwarzenberger, Georg, *International Law*, Vol. 1, Stevens & Sons, London, 1945, at 407-422.

⁵⁸ At the hearing, Counsel for Respondent stated that “*when we speak of res judicata, we speak of a decision that has been – that is a firm decision because of the impossibility of any review or reconsideration, and such impossibility of review or reconsideration is based on the notion that one would be rediscussing the same issue with the same parties under the condition that there be no new facts (...). In other words, there must be identity of object, identity of cause or case, and identity of subject or parties*” (Transcript at 146). Counsel for Claimants explained that the conditions of *res judicata* are “*first, that the parties are the same, and second, that the causes of action are the same*” (Transcript at 187). Thus, the parties agree that there must be identity of parties and identity of cause. The parties disagree however on whether the determination made by a first Tribunal can be reopened because of so-called new facts (modifying the “object of the case” to use Respondent’s wording). This question will be addressed below under question (iv).

⁵⁹ Relying on the *Amco Asia* resubmitted case, Counsel for Claimants defined the cause of action as the claims formally brought before a Tribunal: “*(...) the dispute must have the same causes of action. The Tribunal, in the resubmitted Amco Asia case stated “A dispute is defined by claims formally asserted and responded to in claim and defense or in counterclaim and reply to counterclaim; in other words, the causes of action”* (Transcript at 189-190). Counsel for Respondent did not give such a precise definition, but said that in the present resubmitted case there were “*new parties, new claims, new facts*” (Transcript at 152).

this second identity requirement being sometimes divided into the object (*persona petitem*) and the grounds (*causa petendi*)”.⁶⁰

73. The Argentine Republic argues that these identity requirements are not met, while the Claimants submit that they are satisfied. The identity of the parties depends on whether Vivendi Universal is the successor-in-interest of CGE. As will be seen below, the Tribunal has come to the conclusion that Vivendi Universal is indeed the successor of CGE and shareholder of CAA. Hence, the requirement of identical parties is met.
74. The same conclusion holds true with respect to the identity of the “questions at issue”. Depending on the definition given to this second requirement, the requirements for the identity which it implies may be more or less stringent. In the present case, there is no need to further define the applicable requirements, as the dispute before this Tribunal meets the identity requirement by any standard. A review of the pleadings before this and the First Tribunal demonstrates that the claims are based on the same facts, *ie*, on certain conduct of the authorities of *Tucumán* and on the same legal grounds, *ie*, on breaches of Articles 3 and 5 of the Treaty. It further demonstrates that in both cases Claimants seek reparation in the form of an award of damages. It is true that in the resubmitted case, Claimants have made allegations about certain conduct which occurred later than the acts submitted to the First Tribunal, and produced related evidence.⁶¹ This fact does not change the conclusion on the identity of the “questions at issue” as the later occurrences are merely the continuation in time of the breaches initially complained of.⁶²
75. ICSID Arbitration Rule 55(3) adopts the doctrine of *res judicata* and precludes resubmission to a new tribunal constituted under Article 52(6) of the Convention of any claims or issues adjudicated by the First Tribunal and not subsequently annulled:
- (3) *If the original award had only been annulled in part, the new tribunal shall not reconsider any portion of the award not so annulled...*
76. Professor Schreuer cites Rule 55(3) for the proposition that:
- ...*if the original award had only been annulled in part, the unannulled portion of the original award remains res judicata and is binding on the new tribunal.*⁶³
77. Note D to Arbitration Rule 55 of 1968 in turn confirms that submission of unannulled portions of an award to a new tribunal constituted under Article 52(6) of the ICSID

⁶⁰ Cheng, *General Principles of Law*, at 339-340 and 343-345 (who notes, however, that in his opinion an examination of international decisions throws some doubts upon the accuracy of the subdivision of the second requirement into *petitum* and *causa petendi*); Hanotiau, *The res judicata effect of arbitral awards*, at 48 ¶ 32.

⁶¹ Request for Arbitration, ¶¶ 25 – 27, and Claimant’s Memorial ¶¶ 259 ff.

⁶² This is in line with “continuing character” of breaches referred to in Article 14 of the International Law Commission Draft on the Responsibility of States for internationally wrongful acts, which provides as follows: “*The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation*”.

⁶³ See United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement, International Centre for Settlement of Investment Disputes*, 2.8 Post Award Remedies and Procedures at 31.

Convention would deprive Article 53(1) of its intended effect. Note D provides in pertinent part:

[ICSID Arbitration Rule 55(3)] provides that if the original award had only been annulled in part, then the new tribunal shall not reconsider any portion of the award not so annulled. This is in accordance with the first sentence of Article 53(1) of the Convention, which indicates that awards shall not be subject to appeal except as provided in the Convention. If an ad hoc Committee empowered to annul all of an award has decided to annul only part thereof (as it is entitled to do under Article 52(3) of the Convention), then the only possible remedy with respect to the unannulled portion is a request for revision made pursuant to Article 51 of the Convention.⁶⁴

78. When it concluded, in its Award, that it had jurisdiction, the First Tribunal made determinations on the various elements of the jurisdiction under the ICSID Convention and the BIT, finding, *inter alia* that the CGE and CAA were proper Claimants and that the dispute arose out of the investments made by Claimants in Argentina. Given these findings this Tribunal is precluded under the doctrine of *res judicata* from reconsidering the First Tribunal's jurisdictional conclusions.
79. Turning now to question (iv) above, *ie*, whether new facts permit prior jurisdictional findings to be reopened, Claimants, in their Counter-Memorial on Jurisdiction of 31 May 2005, agreed, citing *Amco Asia*, that, on very rare occasions, it is possible that a new fact will arise subsequent to the annulment proceeding requiring the consideration of a jurisdictional question in a resubmitted case, even where the First Tribunal's jurisdictional finding was not annulled.⁶⁵
80. However, when questioned on this point at the Jurisdictional Hearing, counsel for Claimants explained that, properly understood, *Amco Asia* means only that, in a resubmitted case, where jurisdiction has already been found, any new facts must bear on the applicability of *res judicata* if they are to have any jurisdictional significance. According to Claimants, there is no room for any other jurisdictional enquiry. The Arbitral Tribunal has doubts that this is the meaning of *Amco Asia*. The Tribunal in *Amco Asia* did not say so, at least explicitly, and the structure of the decision tends to indicate otherwise. Whether new facts must bear on the applicability of *res judicata* to be considered at all, can, however, be left open here given that the Tribunal's conclusion below that there are no new facts.
81. These assertions lead directly to question (v) above - are there new facts such as to justify not applying the doctrine of *res judicata*. The answer to this question is no.
82. Argentina's allegation that there has been a change in CAA's corporate ownership is inaccurate. The evidence before this Tribunal demonstrates that, in May 1998, CGE changed its name to Vivendi S.A., which then merged with several other companies to

⁶⁴ See Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968 1 ICSID Rep. 117 at D (1993).

⁶⁵ See *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (resubmitted case), 10 May 1998, 1 ICSID Rep. 543(1993) at ¶99.

form the company Vivendi Universal. Vivendi Universal continues to this date to hold the majority stake in CAA that was acquired at the time by CGE.

83. The Tribunal accepts as dispositive proof of this conclusion:
- (i) The affidavit of CAA Chairman, Charles-Louis de Maud'huy, indicating that "Vivendi Universal is CGE's successor in interest with respect to CAA";⁶⁶
 - (ii) CAA Board of Directors' confirmation that Vivendi S.A. and later, Vivendi Universal, succeeded to and holds title to all of the shares formerly held in the name of CGE;⁶⁷
 - (iii) CAA's shareholders register, which indicates that Vivendi Universal owns the CAA shares previously acquired and held by CGE and in which the change of name from CGE to Vivendi S.A. is explicitly inscribed;⁶⁸ and
 - (iv) The CAA share certificates which are currently held by Vivendi Universal and which list Vivendi Universal as holder of title to the various classes of CAA shares.⁶⁹
84. Based upon the foregoing evidence, the Tribunal also rejects Argentina's allegation that the majority stake in CAA must have been transferred from Vivendi S.A. to what today are the Veolia companies, along with all of Vivendi S.A.'s water operations. Although most of Vivendi S.A.'s water-related assets were transferred to the Veolia companies, the above evidence shows that CAA was not included in such transfer. In this respect, the fact that the 2002 and 2003 Veolia Water Financial Reports⁷⁰ mention that all water-related activities were transferred to the Veolia companies is not decisive, as any deduction one may draw from it is contradicted by the clear and better evidence listed at para. 83 above.
85. Argentina's argument that Vivendi S.A. cannot be the universal successor of CGE, in particular since Vivendi S.A. and CGE co-existed, is also dismissed. Indeed, the evidence on record mentioned at para. 83 above undoubtedly shows that CGE was renamed Vivendi S.A. in May 1998 and then merged into Vivendi Universal (keeping with it the shares of CAA), so that Vivendi Universal is the successor of CGE. The company named CGE, which coexisted with Vivendi S.A. and which is mentioned in some of the public filings produced by the Argentine Republic,⁷¹ is in fact another company created in June 1998, first known as SAHIDE, then renamed CGE-Sahide and finally renamed CGE. The existence of another company named CGE has no bearing on the fact that CGE became, by change of name, Vivendi S.A., which then, by way of merger, became Vivendi Universal. As for the delay in registering Vivendi S.A.'s name change in CAA's records,

⁶⁶ Affidavit of Charles-Louis de Maud'huy, 5 November 2004, at ¶2 (Exhibit 4) (00070) attached to Claimants' Memorial of 24 November 2004.

⁶⁷ CAA's Board of Directors, Act No. 80, 17 June 2003 (Exhibit 347) (05553).

⁶⁸ CAA Register of Shares at 3 (Exhibit 348) (05558).

⁶⁹ See CAA Share Certificates Nos. 1,2,4-9, 17 June 2003 (Exhibit 349) (05561-68).

⁷⁰ Annexes 14 and 15, at 1.

⁷¹ See e.g. Annex 14 at 1 and Annex 15 at 1.

in particular in CAA's register of shares, the Arbitral Tribunal is of the opinion that it does not change any of the foregoing conclusions in light of the clear evidence enumerated in para. 83.

86. In conclusion, the Tribunal finds that Vivendi Universal S.A. continues to this date to hold the majority stake in CAA. In these circumstances, the Tribunal has no difficulty whatever in concluding that the parties to the resubmitted case are the same as the parties below.
87. Thus, the requirements for the application of the doctrine of *res judicata* are satisfied – an earlier decision involving the same claims between the same parties as those pending before this Tribunal. In these circumstances, this Tribunal is precluded from reconsidering the jurisdictional determination of the First Tribunal pursuant to which the requirements for jurisdiction were fulfilled. The First Tribunal having (in the words of the *ad hoc* Committee) rightly concluded that it had jurisdiction on that date, this Tribunal also has jurisdiction. Accordingly, Respondent's first jurisdictional objection is thus dismissed.

(2) Vivendi Universal's claim constitutes a derivative claim forbidden by Argentine and international law

88. The objection of the Argentine Republic that Vivendi Universal cannot proceed as a claimant because it is only a shareholder in CAA (a minority shareholding was asserted) must also fail and is hereby dismissed.
89. As noted above, the First Tribunal held that CAA's majority shareholder – then CGE – could pursue the treaty claims it asserted. For the reasons already noted, that holding, not having been annulled (and indeed having been endorsed by the *ad hoc* Committee) is *res judicata*.
90. Even if this were not case, there is really no question that the ICSID Convention and the France-Argentina BIT give corporate shareholders, whether majority or minority, the status of investors.
91. Under Article 25 of the ICSID Convention, the Centre's jurisdiction extends to any legal dispute “...*arising directly out of an investment*” between an investor of one Contracting State and another Contracting State. Each Contracting State thus may define the “*investments*” as to which it will accept the Centre's jurisdiction through its consent under Article 25(1) of the Convention.⁷²
92. As the instrument of Argentina's consent, the Argentina-France BIT thus provides the applicable definition of “*investment*”, and this definition explicitly includes shares. Article 1 of the BIT provides, in pertinent part:

For purposes of this Agreement: 1. The term “investments” means assets such as property, rights and interests of any kind and in particular... shares, stock and

⁷² Schreuer, ICSID Convention at 124.

*other forms of participation, even minor or indirect, in companies incorporated within the territory of the Contracting Parties ...*⁷³

93. Thus, under the BIT, it is evident that a foreign shareholder's investment in shares of a domestically incorporated company constitutes an "investment". The BIT, in turn, entitles investors who make such shareholding investments to bring claims for Argentina's alleged breaches of the Treaty's protections with respect to those investments.
94. Finally, numerous arbitral tribunals have rejected this very same jurisdictional objection as shown by the 18 cases referred to in Appendix 1 to this Decision. In each of those eighteen cases the tribunals upheld the right of shareholders to pursue such claims. In 11 cases, the Argentine Republic was respondent and asserted, and lost, this same objection. In the last one of these cases, the Tribunal observed that the very objection which Argentina raises in this case "has been made numerous times, never, so far as the Tribunal has been aware, with success".⁷⁴

(3) CAA did not acquire French "nationality" under the protection of the Argentine/French BIT

95. Argentina's third objection to jurisdiction, that CAA lacks standing as a claimant, having not properly acquired French nationality under the Convention and the BIT, was explicitly advanced before and considered by the First Tribunal.
96. The First Tribunal's summary of the history of CAA's equity ownership discloses that a majority of CAA equity was under French ownership well before the parties consented to submit this dispute to arbitration on 26 December, 1996.⁷⁵ As previously noted, the *ad hoc* Committee endorsed the First Tribunal's finding that CAA was a French company under the ICSID Convention and the BIT.⁷⁶
97. Because the First Tribunal found that CAA was a French company under the ICSID Convention and the BIT and the *ad hoc* Committee did not annul this finding, the finding remains in force and is *res judicata*. Accordingly, Argentina's third jurisdictional objection is dismissed.

(4) CAA and Vivendi Universal failed to comply with essential preconditions to instituting an ICSID arbitration proceeding

98. The fundamental problem with this objection is Respondent's failure to identify a jurisdictional requirement that the documentation submitted by Claimants fails to satisfy.

⁷³ BIT at Art. 1(1) ("*El término "inversiones" designa los activos tales como los bienes, derechos e intereses de cualquier naturaleza y, en particular, aunque no exclusivamente: ...b) las acciones, primas de emisión y otras formas de participación, aún minoritarias o indirectas, en las sociedades constituidas en el territorio de una de las Partes Contratantes...*").

⁷⁴ *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Question on Jurisdiction, 17 June 2005.

⁷⁵ See Award at n. 6.

⁷⁶ Decision on Annulment at ¶48 and 50.

Objections to jurisdiction must be premised on a failure to satisfy an element of Article 25 of the ICSID Convention or the jurisdictional limitations of the France-Argentina BIT. The Respondent's documentary complaints bear on neither of these.

99. According to Professor Schreuer, the corporate authorization requirement is not a jurisdictional requirement. As he explains in his Commentary, "*it is merely a rule of procedure*". Indeed, designation of legal representatives is not even required in a Claimant's Request for Arbitration.⁷⁷
100. When faced with shortcomings under Article 36(2) of the ICSID Convention and ICSID Institution Rule 2, the ICSID Secretary-General need not decline to register the Request. Rather, the Secretary-General may consult with the claimant and provide it with "*an opportunity to supplement or correct their request before he takes a decision on its registration*".⁷⁸
101. The Secretary-General employed exactly this procedure when Claimants filed their Original Request on 26 December 1996. On 3 January 1997, ICSID advised Claimants of its satisfaction with the information it had received on CGE's behalf, attesting to CGE's authorization of the Request.⁷⁹ However, in the same letter, it requested that CAA, as a condition for the registration of the Request, submit evidence demonstrating that the filing of the Request was authorized under CAA's internal procedures. On 15 January 1997, ICSID sent another letter to Claimants, acknowledging receipt of the requested additional evidence that CAA had been properly authorized to file the Request.⁸⁰
102. No request for supplementation of the information and materials provided by the Claimants in support of their Second Request for Arbitration was made and the Second Request was duly registered.
103. In any event, as Professor Schreuer explains,

*...once a request has been registered, the tribunal must ascertain the existence of all jurisdictional requirements on the basis of Art. 25 in the light of all available evidence. Omissions, errors and other deficiencies in their request for arbitration are not an independent basis for the tribunal to decline jurisdiction.*⁸¹
104. Because Claimants' Second Request was registered on 23 October 2003, any possible deficiencies in that Request cannot now be raised and, even if they could, would not operate as a bar to the Tribunal's jurisdiction. For each of these reasons, Respondent's fourth objection is dismissed.

⁷⁷ See Schreuer, *The ICSID Convention*, 456 at ¶36.

⁷⁸ Schreuer, *The ICSID Convention*, 458 at ¶42.

⁷⁹ See letter from ICSID to Claimants 3 January 1997 (Exhibit 364) (05689).

⁸⁰ See letter from ICSID to Claimants 15 January 1997 (Exhibit 365) (05790).

⁸¹ Schreuer, *The ICSID Convention*, 456 at ¶36.

(5) Claimants' claims are prohibited under the terms of the *ad hoc* Committee's Decision

105. Respondent's argument on this objection evolved in the course of the jurisdictional phase. Taking into account the written memorials and the oral submissions, the Tribunal summarises Respondent's argument as follows: in light of the *ad hoc* Committee's Decision (i) the majority of Claimants' claims, which are essentially contractual in nature, must be considered as being barred from consideration by this Tribunal; and (ii) this Tribunal's jurisdiction should be limited to a consideration of the claims based on a conspiracy of the authorities of Tucumán to frustrate the Concession contract. As will be explained below, the Tribunal agrees with Claimants that Respondent's argument misconstrues the *ad hoc* Committee's Decision.
106. In the jurisdictional portion of its award, the First Tribunal held that:

In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT through...the 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.⁸²

Thus, in the earlier jurisdictional phase, the First Tribunal found it had jurisdiction over all claims arising under the BIT, including BIT claims relating to rights and obligations under the Concession Contract.

107. The *ad hoc* Committee did not annul this finding but instead confirmed it.⁸³ Hence, like all other non-annulled findings of the First Tribunal, this one is *res judicata* and the only issue that arises here is a question of interpretation of the *ad hoc* Committee's Decision.
108. According to the Committee, the standards set forth in Articles 3 and 5 of the BIT are "*independent*" from Argentine law standards for breach of contract.⁸⁴ Argentina thus "*...may breach [the] treaty without breaching [the] contract and vice versa*".⁸⁵ It logically follows that "*...whether there has been a breach of the BIT and whether that has been a breach of contract are different questions*" to "*be determined by reference to its own proper or applicable law*".⁸⁶
109. In fact, Respondent asks this Tribunal to adopt precisely the approach, which led to the annulment of the First Award. According to the *ad hoc* Committee:

⁸² Award at ¶53.

⁸³ Decision on Annulment at ¶119.

⁸⁴ Decision on Annulment at ¶95.

⁸⁵ Decision on Annulment at ¶95.

⁸⁶ Decision on Annulment at ¶96.

... the inquiry which the ICSID Tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.⁸⁷

110. The Committee further stated:

*The Claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it.*⁸⁸

111. In other words, the claims presented in the First Arbitration, which are identical to those in these proceedings, are Treaty claims. The fact that they are related to the Concession Contract does not change their nature. Whether the conduct complained of constitutes a Treaty breach (as opposed to, or as well as a contract violation) is another issue, which remains to be considered at the merits stage of this arbitration.

112. Because the First Tribunal failed to consider and rule on these Treaty claims, the Committee found that it had “*manifestly exceeded its powers*” under Article 52(1)(b) of the ICSID Convention. Accordingly, it annulled this portion of the Award.⁸⁹

113. Respondent also argues that this Tribunal is limited to reviewing a claim of conspiracy or concerted action under the BIT. It bases this argument on a passage in the Annulment Decision, which states that the Claimants asserted that the conduct of the Tucumán authorities “*amounted on the whole to concerted action [...] to frustrate the concession*”.⁹⁰ It is obvious, however, that this passage contains no restriction on the ICSID Tribunal’s jurisdiction over the Treaty claims. Other passages in the Annulment Decision make it abundantly clear that the First Tribunal had the duty to rule on Treaty claims without a limitation to conspiracy, and so does this Tribunal.

114. Because the *ad hoc* Committee affirmed the jurisdiction of the First Tribunal and annulled the portion of the First Tribunal’s Award where it declined to deal with those claims on the merits, this Tribunal is now charged with resolving all claims for Treaty breach, including contract-related Treaty claims. It follows that we must also dismiss Respondent’s fifth jurisdictional objection. Hence, Respondent’s alternative requests⁹¹ that the issue of jurisdiction be joined to the merits or that jurisdiction be affirmed but limited to Treaty claims of conspiracy or concerted actions must also be dismissed.

⁸⁷ Decision on Annulment at ¶102.

⁸⁸ Decision on Annulment at ¶112.

⁸⁹ Decision on Annulment at ¶115.

⁹⁰ Decision on Annulment, at ¶106.

⁹¹ Transcript, at pp. 59-60.

I. THE COSTS OF THIS JURISDICTIONAL PHASE

115. Each of the parties in their written submissions sought an award of costs and attorneys fees in connection with these proceedings.⁹²
116. During the course of the oral hearing, the Tribunal asked the parties whether they sought an award of costs and legal fees to be made now and payable now in the event of a finding in its/their favour.⁹³
117. Counsel for Claimants confirmed that this was the case and that their application for costs persisted.⁹⁴
118. Counsel for the Argentine Republic requested the ability to take instructions overnight and, at the conclusion of its Reply arguments, withdrew its claim for Claimants to pay costs and legal fees if the Argentine Republic was successful on its objections. Instead, it advised the Tribunal that it now felt it would be inappropriate for the Tribunal to assess costs to either party, given that

*We are faced with a case that is being looked at during a historic stage in ICSID's history. It's a new submission of a case that was annulled, which has brought to the floor very delicate, very sensitive topics and issues on which there is no precedent or practical guidance as to how the parties should perform and how the Tribunal should perform or act.*⁹⁵

119. At the conclusion of the hearing, the Tribunal requested a report to be filed on 31 August 2005 in support of Claimants' request for an award of costs, including attorneys' fees, associated with these jurisdictional proceedings, with Respondent being given the opportunity to comment thereon one week later.
120. In its comments on Claimants' Memorandum on Costs, Respondent made the points, *inter alia*, that Arbitration Rule 47(1) limits:
- (i) A tribunal's ability to make a decision regarding the costs of a proceeding to an award and that an interim decision upholding jurisdiction under Article 41 is not an award and consequently cannot properly contain a decision on costs, and
 - (ii) Although Arbitration Rule 28 allows a tribunal to decide that related costs shall be borne entirely or in a particular share by one of the parties, this rule deals with prospective costs yet to be incurred and is solely concerned with the fees of the tribunal and the charges of the Centre. It does not include attorneys' fees or other costs incurred by a party.

⁹² See Respondent's Exception to the Jurisdiction of the Centre and the Competence of the Tribunal at IV. PETITION ¶43 and Claimants' Counter-Memorial on Jurisdiction at ¶¶123-126.

⁹³ Transcript at 116.

⁹⁴ Transcript at 117.

⁹⁵ Transcript at 176.

121. The First Tribunal, when it came to consider the question of costs and fees, noted that neither the BIT nor the provisions of the ICSID Convention include a provision directing how a Tribunal should regulate the costs and fees of the parties. It noted that ICSID Tribunals, and international arbitration tribunals generally, have not followed a uniform practice with respect to the award of costs. After drawing attention to a number of facts the tribunal in the *Robert Azinian* case had relied on in declining to award costs or fees to either party, it noted that:

*The instant case raised a set of novel and complex issue 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 impression. Finally, the position of both parties evolved in the course of the proceeding as their respective arguments and the enquiries of the Tribunal caused them to clarify their positions.*⁹⁶

122. In the circumstances, the First Tribunal decided that each side should bear its own expenses for the proceedings and that the two sides bear equally the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre.⁹⁷

123. During the annulment phase, the *ad hoc* Committee decided that:

*In light of the importance of the arguments advanced by the parties in connection with this case, the Committee considers it appropriate that each party bear its own expenses incurred with respect to these annulment proceeding...*⁹⁸

124. However, with respect to Argentina's Subsequent Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, the *ad hoc* Committee concluded that:

*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 Requests are not only unfounded but inappropriate, consisting essentially of attempts to re-argue substantive elements of the Committee's Decision.*⁹⁹

125. In the circumstances, the Committee ordered Argentina to pay the entirety of the fees and expenses incurred by the Committee in connection with that Request. It concluded that each party should bear its own costs in connection with the Request.

⁹⁶ Award at ¶95.

⁹⁷ Award at ¶96.

⁹⁸ Decision on Annulment, at ¶118.

⁹⁹ Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning the Annulment of the Award, at ¶43.

126. In the present instance, we have concluded not only that each of Argentina's objections is without merit, but that each of objections one, two, three and five has previously been taken before the First Tribunal and the *ad hoc* Committee. Indeed, objection three has previously been made before numerous other tribunals before which Argentina has appeared. As regards objection four, it is advanced for the first time, eight and a half years into these proceedings, a year and a half after registration of the Second Request and eight months after the first meeting of this Tribunal with the Parties.
127. In these circumstances, the Tribunal concludes not only that Respondent's five objections are unfounded but that they have been raised inappropriately at this stage of these proceedings, in an attempt, for the most part, to reargue elements of the First Tribunal's jurisdictional decision, as endorsed by the *ad hoc* Committee.
128. Nevertheless, we conclude that it is appropriate to reserve all questions concerning costs and expenses of the Tribunal and the parties for subsequent determination. In so doing, the Tribunal takes due note of Claimants' request that Respondent bears all of the costs of this jurisdictional phase, including legal fees.

J. THE TRIBUNAL'S OPERATIVE ORDER

129. For the foregoing reasons, the Tribunal DECIDES:
- (a) Each of Respondent's objections to the jurisdiction of the Centre and the competence of this Tribunal is rejected;
 - (b) Respondent's Counter-Memorial shall be filed on or before the later of 17 October 2005, or fifteen (15) days after this Decision.
 - (c) Claimants' Reply shall be filed on or before a date sixty (60) days following the date established for the filing of Respondent's Counter-Memorial.
 - (d) Respondent's Rejoinder shall be filed on or before a date sixty (60) days following the date established for the filing of Claimants' Reply.
 - (e) All questions concerning costs and expenses of the Tribunal and the parties in connection with this jurisdictional phase of these proceedings are reserved for subsequent determination by the Tribunal.

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

**Professor Gabrielle
Kaufmann-Kohler**

**Professor Carlos Bernal
Verea**

**J. William Rowley QC
President**

K. APPENDIX 1

1. Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, June 21, 1990.
2. American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, February 21, 1997.
3. ***Lanco International Inc. v. The Argentine Republic***, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, December 8, 1998.
4. Antoine Goetz et consorts c. République du Burundi, ICSID Case No. ARB/95/3, Award, February 10, 1999.
5. ***Emilio Agustín Maffezini v. The Kingdom of Spain***, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000.
6. **Alex Genin et al. v. The Republic of Estonia**, ICSID Case No. ARB/99/2, Award, June 25, 2001.
7. ***CME Czech Republic B.V. v. The Czech Republic***, UNCITRAL Proceeding, Partial Award, September 13, 2001.
8. ***CMS Gas Transmission Co. v. The Republic of Argentina***, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003.
9. ***Azurix Corp. v. The Argentine Republic***, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003.
10. ***Enron Corp. & Ponderosa Assets, L.P. v. The Argentine Republic***, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004.
11. ***Siemens A.G. v. The Argentine Republic***, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004.
12. GAMI Investments, Inc. v. the Government of the United Mexican States, NAFTA UNCITRAL Proceeding, Final Award, November 15, 2004.
13. ***AES Corp. v. The Argentine Republic***, ICSID Case No. ARB/02/17, Decision on Jurisdiction, April 26, 2005.
14. ***Sempra Energy International v. The Argentine Republic***, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, May 11, 2005.
15. ***Camuzzi International S.A. (CGS/CGP) v. The Argentine Republic***, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, May 11, 2005.
16. CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, May 12, 2005.

17. *Camuzzi International S.A. (TRANSPA) c. República Argentina*, ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción, June 10, 2005.
18. *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005.