This case summary was prepared in the course of research for
S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)

Case summary

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.
v
Argentine Republic

Year of the award: 2007
Forum: ICSID (Case No. ARB/97/3)
Applicable investment treaty: Argentina-France BIT (1991)

Arbitrators	**Timeline of the dispute**
J. William Rowley QC (President) Professor Gabrielle Kaufmann-Kohler Professor Carlos Bernal Verea	26 December 1996 – Original Request for Arbitration 21 November 2000 – Original Award 3 July 2002 – Decision on Annulment 29 August 2003 – Second Request for Arbitration 14 November 2005 – Decision on Jurisdiction 20 August 2007 –Award

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I. Executive Summary

The dispute concerned the claims of Vivendi Universal, a French investor, and Compañía de Aguas del Aconquija S.A. (CAA), an Argentinean company, where Vivendi was the principal shareholder. In the course of the Argentinean privatisation campaign in the early 1990s, the Claimants entered into a 30-year Concession Agreement in May 1995 with the Argentine Province of Tucumán for the provision of water and sewage services. In accordance with the Concession Agreement, CAA made substantial investments to improve the quality of the service.

The Claimants encountered increasing opposition from the new Government of Tucumán elected soon after the Concession had been granted. The new Governor and his party opposed the privatisation and proclaimed that the Concession Agreement had been "born defective". The legislature of the Province adopted a resolution which recommended the Governor to unilaterally impose a temporary tariff reduction. Furthermore, following two episodes of turbidity in the drinking water, government officials called for non-payment of invoices for the services provided by CAA, which led to a steady decline in CAA's recovery on its invoices. Various governmental agencies continuously exerted pressure on the concessionaire to reduce tariffs, agreed in the Concession Agreement. Finally, the Government tried to force the Claimants to re-negotiate the agreement in order to lower the tariffs. After three failed attempts of re-negotiation, CAA terminated the Concession Agreement in August 1997 but was forced by the Provincial authorities to provide services until October 1998.

In 1996, the Claimants initiated the first ICSID proceedings, alleging several violations of the 1991 Argentina-France BIT and requesting damages. After the first decision, rendered in 2000 and annulled in 2003, the Claimants re-submitted the case. The Claimants contended that the acts and omissions of the province of Tucumán contravened Argentina's obligation to provide fair and equitable treatment to French investors and constituted an uncompensated expropriation of their investment. The Tribunal accepted both claims finding that the measures attributable to Argentina had radically deprived the Claimants of the right of use and enjoyment of their investment under the Concession Agreement and left them no choice but to terminate the Concession.

When dealing with compensation, the Tribunal held that the Treaty governed compensation for lawful (rather than wrongful) expropriation. The Tribunal relied on the *Chorzów Factory* case and to Article 36 of the ILC Articles on State Responsibility to hold that the fair market value was the most appropriate method to compensate the affected party fully and eliminate all the consequences of the State's action. The Tribunal rejected the DCF method of valuatuion because the Claimants failed to produce convincing evidence of their ability to make profit and considered the "actual investment" method as the "closest proxy" for valuing their investment. Due to the incomplete evidence of the amounts invested by the Claimants, the Tribunal resorted to approximation of damages. The Tribunal awarded a compensation of US$105 million and interest at the rate of 6%, compounded annually.

II. Factual Background and Claims[1]

In May 1995, the French Compagnie Général des Eaux (now Vivendi Universal) and Compañía de Aguas del Aconquija S.A. (CAA), an Argentinean company where Vivendi held 94.4 % of shares, entered – following a bidding process – into a 30-year Concession Agreement with the Argentine Province of Tucumán for the provision of water and sewage services. The Concession Agreement was part of the broader privatisation campaign of state-owned public services in Argentina.

CAA (the concessionnaire) took control of the Concession in late July 1995, in considerably worse condition than at the time CAA's bid had been prepared. In accordance with the Concession Agreement, CAA made substantial investments in order to improve the quality of the service. Specifically, CAA refurbished the chlorination system, arranged the cleaning of the drinking water system, leased buildings, purchased supplies and new equipment.

However, the Claimants encountered increasing opposition from the new Government of Tucumán elected soon after the Concession had been taken over. The new Governor and his party were discontent with the increased tariffs (even though they were provided for in the Agreement) and proclaimed that the Concession Agreement had been "born defective". The legislature of the Province recommended the Governor to unilaterally impose a temporary tariff reduction. Furthermore, following two unfortunate episodes of turbidity in the drinking water, government officials called for non-payment of invoices for the services provided by CAA, which lead to a steady decline in CAA's recovery on its invoices. The Health Minister stated that the water could cause cholera, typhoid and hepatitis despite no evidence of any such health risk. Various governmental agencies continuously exerted pressure on the concessionaire to reduce tariffs, agreed in the Concession Agreement. Finally, the Government attempted a forced re-negotiation of the agreement. After three failed attempts of re-negotiation, CAA gave notice of termination of the Agreement in August 1997 but was forced by the Provincial authorities to provide services until October 1998 ("hostage period").

In 1996, the Claimants initiated ICSID proceedings under the Argentina-France BIT. An original award was rendered in 2000. The Original Tribunal concluded that it had jurisdiction over the claims but had no power to examine the merits of the dispute. An ad hoc Annulment Committee annulled the Original Tribunal's finding on the absence of jurisdiction to examine the merits of the dispute.

In 2003, the Claimants re-submitted their application with the same claims, contending that the Provincial Government breached Argentina's obligation to treat French investors fairly and equitably and expropriated their investment without compensation. The Claimants sought approximately US$ 317 million in damages plus interest.

[1] The facts of the case are discussed by the Tribunal in great detail at pages 38-115 of the Award. For the purpose of this summary, the facts are presented in a very condensed manner.

III. Findings on Merits[2]

A. Fair and Equitable Treatment (FET)

Interpreting the Treaty FET provision, the Tribunal decided that the relevant standard:

- was not limited to the minimum standard of treatment under international law (paras.7.4.5-9);
- was not limited to a prohibition on denial of justice (paras.7.4.10-11);
- did not limit the "protection and full security" obligation to "physical interferences" only, because an investor or its property "could be subject to harassment without being physically harmed or seized" (paras.7.4.13-17);
- Did not require bad faith on the part of the Respondent (para.7.4.12).

Having analyzed a number of specific episodes of interference with the Claimants' rights, the Tribunal concluded that the illegitimate campaign mounted by the Provincial Government against the Concession, aimed either at reversing the Concession or forcing the concessionaire to renegotiate, constituted numerous breaches of the FET obligation. According to the Tribunal, "[u]nder the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a 'do no harm' standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. And that is exactly what happened in Tucumán." (para.7.4.19-46)

B. Expropriation

The Tribunal confirmed that contractual rights were capable of being expropriated. It found that the case involved "illegitimate sovereign acts, taken by the province in its official capacity, backed by the force of law and with all the authoritative powers of public office". The Tribunal further held that even though the Claimants remained in physical and managerial control of the concession, this did not mean that an expropriation had not taken place. Finally, the Tribunal refused Respondent's proposition that an act of State must be presumed regulatory in the absence of proof of bad faith. It asserted that the effect of the measure, not the State's intent, was the critical factor. (paras.7.5.1-20)

The Tribunal then analyzed whether the conduct in question had had an expropriatory effect. The Tribunal found that the provincial measures, taken cumulatively, had a "devastating effect on the economic viability of the concession" and rendered it

[2] Before dealing with the substantive treaty claims, the Tribunal examined Argentina's preliminary objections. The Respondent advanced two arguments. First, it asserted that CAA ought not to be permitted to pursue a claim for treaty rights, which had allegedly acquired in violation of the Concession Agreement. Secondly, the Respondent argued that the scope of the Tribunal's jurisdiction in applying and interpreting the Concession Agreement was limited because the Concession Agreement gave the right of such application and interpretation to local courts. The Tribunal rejected both arguments. (sections 7.2-7.3)

valueless; "by leaving the Claimants with no other choice, the province expropriated Claimant's right of use and enjoyment of their investment under the concession". The Tribunal also found that the expropriation was unlawful because no compensation had been paid (paras.7.5.21-34)

C. Causation

Before proceeding to the quantum of damages, the Tribunal briefly analyzed whether the damages alleged were caused by the measures found to violate the Treaty. The Tribunal considered that the episodes of turbidity in the drinking water cannot be alleged to have led to the steady decline in CAA's recovery on its invoices (as argued by the Respondent). On the contrary, the Tribunal held that the persistent steps taken by the Province to prevent the collection of payments from the CAA's customers ("perhaps the most important of the Province's breaches") led to the decline in recovery rates and the consequent destruction of the Concession. The Tribunal concluded that this destruction was "directly attributable to (and was proximately caused by) the government authorities in Tucumán". (paras.7.6.1-7.6.2)

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

The Tribunal examined the Treaty and, having found that the Treaty did not contain rules on the award of compensation for unlawful expropriation, resorted to general international law. (paras.8.2.2-6)

B. Claims

The Claimants requested four elements of damages:

(1) Lost profits suffered during the life of the Concession period (the difference between actual cash flows received and cash flows projected under the terms of the Concession Agreement) (US$ 59,173, 000);
(2) Lost profits suffered as a result of the expropriation of the remaining 27.5 years of the concession (net present value of future cash flows) (US$ 241,359,000);
(3) Damages for the forced provision of services after the termination of the Concession Agreement (US$ 14,989,000);
(4) Contingency related to a potential tax liability based on CAA's control of the Concession's assets (US$ 1,402,000).

In the award, the Tribunal did not expressly deal with the third and fourth claims.

C. Approach to Compensation

The Tribunal established that the Treaty contained rules on compensation only for lawful *(*as opposed to wrongful) expropriation and, therefore, relied on customary international law, as elucidated in the *Chorzów Factory* case and in Article 36 of the ILC Articles on State Responsibility. The Tribunal did not, however, explain the difference between customary law and the BIT rules simply stating that customary law permits "a higher rate of recovery" than the BIT. The Tribunal concluded that "the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action." (paras.8.2.2-7)

The Tribunal considered that the "fair market value" (which the Tribunal equated with the "actual value" standard prescribed by the Treaty) of the Concession was an appropriate basis to assess compensation for damages incurred as of the date of expropriation, 27 August 1997 (the Tribunal noted that such compensation would be partial because the Claimants had incurred costs/losses after that date). (para.8.2.11).

The Tribunal also noted that in this case compensation for a breach of the FET standard and compensation for expropriation should be the same because the breaches "caused more or less equivalent harm" (para.8.2.8).

D. Valuation

1. DCF Method – Rejected

The Tribunal stated that under international law, there were "a number of ways of approximating fair market value" and accepted that, in principle, it may be determined with reference to future lost profits, which would be particularly appropriate in "cases involving the appropriation of or fundamental impairment of going concerns". However, the DCF method became less appropriate "as the assumptions and projections [became] increasingly speculative". The Tribunal referred to previous arbitral awards that had stated that "an award based on future profits [was] not appropriate unless the relevant enterprise [was] profitable and [had] operated for a sufficient period to establish its performance record"[3] and held that "compensation for lost profits is generally awarded only where *future profitability* can be established (*the fact of profitability* as opposed to the *amount*) with some level of certainty" (para.8.3.3)

Standard of proof and evidence

The Tribunal said that "the likelihood of lost profits must be sufficiently established by Claimants in order to be the basis of compensable damages". The Tribunal suggested that "a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern", for example, "by presenting *sufficient* evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances" (para.8.3.4)

[3] Citing *Levitt v Iran*; *Metalclad v Mexico*; *Southern Pacific Properties (Middle East) Ltd. v Egypt*; *Asian Agricultural Products Ltd v Republic of Sri Lanka* and *Wena Hotels Ltd. v Egypt*.

The Tribunal continued:

> [T]he absence of a history of demonstrated profitability does not absolutely preclude the use of DCF valuation methodology. But to overcome the hurdle of its absence, a claimant must lead convincing evidence of its ability to produce profits in the particular circumstances it faced. […] A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation. (paras.8.3.8 and 8.3.10)

On the facts of the case, the Tribunal found that the Claimants had failed to establish with a "sufficient degree of certainty" that the concession would have been profitable. In view of the fact that neither the state entity providing water services before the privatisation nor CAA itself had ever been profitable, the Tribunal rejected Claimant's assertion that the concession was a "going concern" (the Tribunal defined going concern as "a business enterprise with demonstrable future earning power"). The Claimants had not presented any other evidence supporting the profitability of the Concession. In the absence of such evidence, the Tribunal rejected the DCF method as inappropriate and turned to alternative methods of valuing the concession.

2. Actual Investment Method – Adopted

The Tribunal referred to "generally accepted means of calculating fair market value", specifically:

- "book value" – the net value of an enterprise's assets;
- "investment value" – the amount actually invested prior to the injurious acts;
- "replacement value" – the amount necessary to replace the investment prior to the injurious acts; and
- "liquidation value" – the amount a willing buyer would pay a willing seller for the investment in a liquidation process. (para.8.3.12)

The Tribunal decided that the "investment value of the concession" (amounts actually invested) appeared "to offer the closest proxy, if only partial, for compensation sufficient to eliminate the consequences of the Province's actions". (8.3.13)

3. Evidence and Approximation

Prior to the oral hearings, the Claimants provided evidence supporting only the DCF method. Subsequently, the Claimants sought to introduce new evidence to support alternative methods of valuation. The Tribunal did not accept this new evidence. Despite the incompleteness of the evidence, the Tribunal affirmed that "it was well settled that the fact that damages cannot be fixed with certainty was not a reason not to award damages when a loss had been occurred" and proceeded to approximate the

amount of actual investment on the basis of the evidence available. (paras.8.1.3-9, 8.3.16)

4. Date of Valuation

The Tribunal fixed 27 August 1997, the date of expropriation, as the date of valuation. In calculating the investment's value, the Tribunal took into account the amounts invested both before and after the valuation date.

5. Calculation of the Invested Amount

On the basis of the evidence in the record (witness testimony), found to be "both credible and sufficient", the Tribunal established:

- CGE/Vivendi initially contributed US$ 30 million to the equity capital of CAA;
- Vivendi contributed another US$ 75 million (by way of loans provided in order to underwrite CAA's ongoing losses) by the end of 2005 (21.5 million by the end of November 1997 and the rest after that date).

Thus, at the date of expropriation (27 August 1997), the value of the concession was fixed at US$51 million (US$ 30 million capital plus US$ 21 million further debt investments) and the post-expropriation expenses were found to be US$ 54 million. The Tribunal further found that the Concession was "no or nominal" current residual value. The total amount of damages was thus fixed at US$ 105 million (US$51 million plus US$54 million). (paras.8.3.17-19)

6. The Impact of Argentina's Economic Crisis

With reference to the doctrine of "abuse of rights", the Respondent argued that full compensation was not appropriate, given the "economic condition" of Argentina, namely its economic crisis of the early 2000s. According to the Respondent, the events that occurred in Argentina such as the devaluation of the peso, the inflation and the rise in unemployment would have inevitably affected the cash flows under the Concession. (para.6.9.13) The Tribunal refused to reduce the award on this basis "having regard to the nature and time frame of Tucumán's breaches", without providing more specific reasons. (para.8.4.1)

E. Currency

The Respondent also sought the award to be expressed in Argentine pesos arguing that all payments to be made under the Concession Agreement were to be in pesos. However, the Tribunal dismissed this argument for two reasons. First, The Tribunal referred to the *Lighthouses Arbitration* where it was held that "an injured party had the right to receive the equivalent at the date of the award of the loss suffered as the

result of the illegal act and ought not to be prejudiced by the effects of a devaluation that took place between the date of the wrongful act and the determination of the amount of compensation". Secondly, the Tribunal stated that it was "frequently the practice of international tribunals to provide for payment in a convertible currency". It thus concluded that all sums awarded should be expressed in US dollars. (para.8.4.5)

F. Interest

The Tribunal held that "the liability to pay interest [was] now an accepted legal principle" and that the "object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive." (paras.9.2.1-3)

On the question of **simple v compound** interest, the Tribunal determined – upon its review of earlier case law – that the tendency of international tribunals to award only simple interest was changing and that "the award of compound interest [was] no longer the exception to the rule". The Tribunal observed that compound interest was "*not punitive* in nature"; rather, as a matter of economic reality, compound interest would "place the claimant in the position it would have been in had it never been injured (i.e. had the wrongful act not taken place)." Therefore, the Tribunal ordered compound interest "in order adequately to compensate Claimants for the loss of use of their investment over most of the last decade". (paras.9.2.4-6, 9.2.8)

On the question of the **rate of interest**, the Tribunal was not persuaded that the Claimants would have earned 9.7% compounded interest (as they requested) on the amount of compensation had it been timely paid at the date of expropriation. Having regard to Claimants' business of investing in and operating water concessions, the anticipated 11.7% rate of return on investment reflected in the Concession Agreement and the generally prevailing rate of interest since September 1997, the Tribunal concluded that a 6% interest rate represented "a reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the Tucumán concession." (para.9.2.8)

On the amount of US$ 51 million, the interest was awarded as from 28 August 1997 (date of the expropriation) and on the further amount of US$ 54 million as from 5 September 2002 (the Tribunal did not explain its choice of the second date), until the date of the payment. (Operative part, para.(vi))

G. Costs

The Tribunal ordered the Respondent to bear Claimants' reasonable legal and other costs relating to the jurisdictional phase of the proceedings. With respect to the substantive phase of the proceedings, the Tribunal decided that the parties should bear their own costs and counsel fees and bear equally the costs of the arbitration.

V. Implications / Initial Analysis

- The case involved **unlawful expropriation** and the Tribunal therefore relied on customary international law (*Chorzów Factory* case and to ILC Article 36) rather than on the BIT provision on expropriation. This is continuation of the trend reflected in *ADC* and *Siemens*.
- The Tribunal adopted the **FMV approach** (with FMV determined on the basis of actual investments); the reliance on customary law allowed the Tribunal to include the post-expropriation expenses in the amount of compensation (roughly half of the total award). Had the Tribunal adopted the BIT standard, it would have had to award the FMV at the date of expropriation.
- The Tribunal is in line with previous case-law that the likelihood of lost profits must be "sufficiently established" for the **DCF method** to be applied as a measure of the FMV. However, by contrast to previous awards, the Tribunal was willing to recognize as proper evidence not only the past record of profitability of the business in question but also the record of profitability of other businesses operated by the claimant (or even by other investors) in similar circumstances.
- On the **standard of proof**, the Tribunal said that the likelihood of lost profits must be established "with sufficient certainty" on the "balance of probabilities".
- The Tribunal did not accept the **evidence** submitted after the hearing on the merits. Incompleteness of evidence did not prevent the Tribunal from awarding damages on the basis of the approximated amount.
- The Tribunal refused to reduce compensation on account of the Argentinean **economic crisis**. Even though the Tribunal did not explain this decision, it appears that the crisis circumstances could only be taken into account if the award was made on the basis of future cash flows (which would have been adversely affected by the crisis – see *CMS*, *Enron* and *Sempra Energy*). Since the award was based on the actual investment made, the impact of the crisis became much less pronounced, if at all.
- On the question of the **currency of the award**, the Tribunal held that a party ought not to be prejudiced by the effects of a devaluation that took place between the date when the compensation was due and when it was awarded. There is also an indication in the Award that international tribunals generally tend to award damages in a convertible currency.
- The Award contains a helpful discussion on the **compounding of interest**.